

SM Trading Services (a firm) v Intersanctuary Ltd (Kek Kim Hok, Third Party)
[2006] SGHC 102

Case Number : Suit 14/2005
Decision Date : 15 June 2006
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Jimmy Yap (Ngaw Tan & Yap) for the plaintiff; Ismail bin Atan (Gabriel Law Corporation) for the defendant; Sean Lim Thian Siong and Tan Aik How (Hin Tat Augustine & Partners) for the third party
Parties : SM Trading Services (a firm) — Intersanctuary Ltd — Kek Kim Hok

Equity – Fiduciary relationships – When arising – Third party actively involved in running defendant's columbarium business and advising defendant on management of such business – Third party not employed by or having formal position in relation to defendant – Whether third party owing defendant fiduciary duties

Tort – Conspiracy – Plaintiff suing defendant for breach of contract – Defendant alleging that contract resulting from conspiracy between plaintiff and third party to supply goods to defendant at vastly inflated prices – Whether conspiracy between plaintiff and third party to injure defendant existing

15 June 2006

Judgment reserved.

Judith Prakash J:

1 On the face of the statement of claim, this is a simple action for breach of a contract of sale of goods. The plaintiff is claiming the cost of the goods sold to the defendant as well as damages for the defendant's refusal to take further goods ordered from the plaintiff. When the defence is looked at, however, the situation becomes much more complicated. This is because apart from a few allegations relating to the quality of the goods supplied, the main line adopted by the defendant in its attempt to resist the suit, is that the sale transactions resulted from a conspiracy between the plaintiff and the third party, Mr Kek Kim Hok ("Mr Kek"). The defendant also brought a third party action against Mr Kek to be indemnified against any amount it may be found liable to pay the plaintiff.

Background

2 Before I go into the background, I should identify the main parties. The plaintiff, SM Trading Services, is a sole proprietorship owned and operated by Mr Tan Swee Mong, Alvin ("Mr Tan"). Mr Tan set up this business in late July 2004 after meeting Mr Kek who asked him to source and supply ancestral tablets and niche covers for a columbarium owned by the defendant, a British Virgin Islands company. The main shareholders of the defendant are Mr Francis Chua Seng Kiat ("Mr Chua") and Colonel (Retired) Tan Hong Huat ("Col Tan"). Mr Chua says that he became a shareholder of the defendant when he was persuaded by Mr Kek to buy over the columbarium from a company in which Mr Kek had an interest.

3 Mr Kek is the majority shareholder and director of a Singapore company called Hok Mee Property Pte Ltd ("Hok Mee"). In 1999, Hok Mee entered into a joint venture with the trustees of the Leong Hwa Chan Si Temple ("the temple") to develop a site at Chua Chu Kang Road into a columbarium, to be called the Ji Le Memorial Park. Subsequently, Hok Mee entered into a further

agreement with another company called Poh Lian Development Pte Ltd ("Poh Lian") under which Poh Lian was to participate in the development and construction of the columbarium. Thereafter, the temple, Hok Mee and Poh Lian were partners. Loans were taken to finance the project and Mr Kek gave some personal guarantees as part of the security for these loans.

4 The columbarium was completed in 2001 and commenced operation. Thereafter, differences arose amongst the partners. As a result of these differences, M/s Deloitte & Touche were appointed special accountants to market and sell the niches in the columbarium and also to look for a purchaser for the columbarium itself.

5 In November 1993, a company incorporated in the British Virgin Islands called Best International Network Corporation ("Best Corp") offered to buy the columbarium. The sale to Best Corp was still pending in May 2004 when Mr Kek was first introduced to Mr Chua. In due course, Mr Chua agreed to purchase the columbarium and he then acquired an interest in Best Corp which was renamed Intersanctuary Limited. The purchase of the columbarium by the defendant was completed at the beginning of September 2004 and the columbarium was then renamed An Le Memorial Park.

6 Both prior to and after the completion of the takeover of the columbarium by the defendant, various contracts were concluded between the plaintiff and the defendant for the supply of funerary equipment. The specific goods involved were niche covers, ancestral tablets and urns. The plaintiff also supplied the defendant with a wooden model of the columbarium to be used by the defendant in its marketing efforts. In addition, the plaintiff said he supplied engraving services at the request of the defendant.

7 The defendant made some payments to the plaintiff but subsequently refused to accept delivery of the ancestral tablets, niche covers and urns. This action was brought to recover the price of those goods plus damages for repudiation of the contracts. As the plaintiff quantifies it, his claim amounts to more than \$1.9m. As I have said above, the defendant's main defence is that there was a conspiracy between Mr Kek and Mr Tan to supply goods to the defendant at vastly inflated prices. Additionally, the defendant claims that Mr Kek was its agent and adviser and was active in the day-to-day running of the columbarium and as such owed it fiduciary duties that he has breached. These allegations are, naturally, denied by the plaintiff and Mr Kek. The issues therefore that arise in this case are mainly factual issues relating to the relationship between the various parties. I must therefore go into the facts in some detail.

The stories told by the parties

The plaintiff

8 Mr Tan himself was the only witness for the plaintiff. In his affidavit, he first referred to what he called the "two (2) written contracts dated 4 August 2004 and 28 September 2004" whereby the defendant had agreed to purchase ancestral tablets from the plaintiff. He said that Mr Kek had approached him to quote for the supply of these tablets. When the quotations were ready, Mr Tan had handed them to Mr Kek who subsequently brought back these quotations with the signatures of Mr Chua endorsed on them. Mr Tan said that the terms of the contracts were that the minimum order was for 10,000 pieces and that the first batch of 3,000 pieces would be delivered by end November 2004.

9 On several occasions in August and September 2004, Mr Tan handed to Mr Kek various samples of the ancestral tablets. These were coloured blue and gold and were of different sizes.

Mr Kek in turn showed them to and had them approved by the defendant. In October 2004, the defendant paid the plaintiff a deposit of \$20,000 for the 28 September 2004 contract and also paid a deposit of \$90,000 for the 4 August 2004 contract.

10 Mr Kek then informed Mr Tan of the quantities of the various types of ancestral tablets that the defendant wanted. As at 1 November 2004, Mr Tan was ready and able to deliver 2,900 pieces of various ancestral tablets (2,390 gold tablets and 510 blue tablets) to the defendant. In breach of the contract, the defendant refused to accept delivery, wrongfully alleging that it had not ordered the blue tablets and asking for samples to be approved when samples had already been shown and approved by the defendant.

11 On 3 December 2004, the plaintiff gave the defendant five days' notice to accept delivery failing which he would make a claim in respect of his loss. A lawyer's letter of demand was sent on 14 December 2004 by which the plaintiff accepted the defendant's repudiation of the contract and warned it that if delivery was not taken within the next three days, the plaintiff would resell the goods in the open market. The plaintiff then made attempts to sell the tablets to other columbaria but there were no takers. Presently, the plaintiff is saddled with 2,900 tablets. Mr Tan said that he claimed \$319,640 as the price of these tablets plus damages for the repudiation of the contract in relation to the remaining 7,100 tablets ordered. Mr Tan asserted that he had obtained the tablets from a Taiwanese company, Kuan Show International Corporation ("Kuan Show"), which had charged him as follows:

Ancestral tables 11" (one photo)	US\$10.38
Ancestral tables 14" (1/2/3 photos)	US\$10.68
2 dragons (4 photos)	US\$11.38
2 dragons (1/2/3 photos)	<u>US\$11.18</u>
Average price	<u>US\$10.90</u> (S\$18.53)

Mr Tan asserted that the loss suffered by him was \$676,062 (\$113.75 less \$18.53 x 7,100 pieces).

12 He then went on to deal with his claim in respect of niche covers ordered by the defendant. He stated that by written contracts dated 4 and 5 August 2004, the defendant agreed to purchase and he agreed to supply normal and granite niche covers to the defendant. Again, it was Mr Kek who asked for quotations for the supply of the goods. Again, Mr Tan prepared the quotations, handed them over to Mr Kek and the latter returned the quotations approved with the signatures of Mr Chua.

13 The contracts provided for minimum orders of 10,000 covers with normal finish and 2,000 covers with granite finish. A deposit of \$90,000 was paid to Mr Tan on or about 18 August 2004 when the defendant approved the samples. A further deposit of \$20,000 was placed with him on 20 August 2004 for the contract dated 5 August 2004. On 10 November 2004, however, the defendant instructed Mr Tan to stop the production and shipment of niche covers. Mr Tan's claim in respect of

these contracts was included in his letter of 3 December 2004 and his solicitors' letter of 14 December 2004.

14 According to Mr Tan, he had ordered the niche covers from two suppliers (Kuan Show and Hoe Ann Granite Industrial Corporation ("Hoe Ann")) and his cost prices for the same were as follows:

Normal finish

Single : US\$18.98 or S\$32.26

Double : US\$19.78 or S\$33.62

Average price : S\$32.94

Granite finish

Single : S\$48

Double : S\$58

He calculated his loss in respect of these contracts as follows:

Normal finish : Average sale price \$100 less \$32.94 x 10,000 pieces = \$676,600

Granite finish : Average sale price \$165 less \$53 x 2,000 pieces = \$224,000

15 Moving on to the urns, Mr Tan stated that in early September 2004, Mr Kek asked for a quotation for these items. Mr Tan then obtained sample marble urns and gave them to Mr Kek quoting the latter \$100 for each. Mr Kek showed the marble samples to Mr Chua and Col Tan and then went back to Mr Tan and informed him that marble urns were too brittle and broke too easily. Mr Tan then obtained samples of urns made from polyglass and gave them to Mr Kek for approval. Subsequently, the defendant agreed to purchase 250 polyglass jade urns at \$90 each and 250 polyglass white marble urns at \$80 each. An invoice dated 2 September 2004, describing the goods in the above terms, was sent to the defendant as evidence of the above agreement and as a request for a deposit of 30%. The defendant paid the plaintiff \$12,750 as deposit on 22 September 2004.

16 On 26 October 2004, when the first 40 urns were ready, Mr Tan had them delivered to the defendant. Two days later, he issued an invoice for \$3,400 in respect of those urns. On 13 November 2004, the defendant rejected the urns alleging that they were not made out of marble. On 16 November 2004, Mr Tan wrote to the defendant reminding it that the samples had been approved and said in his letter:

Please keep Miss Chung [the person who had signed the rejection letter] informed that Mr. Kek had a meeting with both of you at Raffles Town Country [*sic*] Club where he showed both samples of the cultured marble urn in white and jade color. The samples were approved by yourselves during the meeting. Perhaps Miss Chung is not aware of the arrangement. Please enlighten her on this.

The defendant did not return the 40 urns to the plaintiff. Mr Tan therefore said that he was claiming \$3,400 for them plus damages for the remaining 460 urns in the sum of \$18,400 on the basis that his cost price for the urns was \$45 per piece.

17 In respect of the engraving costs, Mr Kek told Mr Tan that the defendant required engraving services for its urns and niches. As Mr Tan did not have any contact for engravers, Mr Kek suggested that he approach Hoe Ann, a Singapore firm. Mr Tan then told Hoe Ann that it should take instructions from one James Aw, an employee of the defendant, on the services required. Thereafter, the particulars of the deceased persons that had to be engraved on each niche were provided by the defendant directly to Hoe Ann. When the work was completed, the defendant accepted it without any complaints. The plaintiff sent the defendant two invoices in respect of this work, one for \$514, on 15 October 2004 and the other for \$1,636 on 26 October 2004. The defendant had the benefit of the work done and services rendered but has not made payment since.

18 The final item for which the plaintiff claimed was the architectural model. Mr Tan said that sometime in August 2004, Mr Kek asked him to give a quotation for this. The plaintiff quoted \$12,800 and gave the quotation to Mr Kek who, as usual, returned it to the plaintiff with Mr Chua's signature. The quotation provided that the roof of each complex of the model should be removable. It did not provide that the model be constructed with layers that could be removed floor by floor. A deposit of \$5,120 was paid by the defendant and the model was delivered to it at the end of October 2004. In November 2004, the defendant asked for certain rectifications to be made. These were done. The defendant did not complain that the model did not have removable floors. The model was used by the defendant for marketing the columbarium. Mr Tan saw it at a road show on 7 May 2005 at People's Park Centre. He claimed \$7,680 being the balance amount due for the model.

19 Having dealt with the plaintiff's claim, Mr Tan went on to reply to the various allegations that had been made in connection with his relationship with Mr Kek. He said that he had not conspired with Mr Kek to injure the defendant by selling, at higher prices, goods allegedly obtained from Hok Mee. He asserted that he was a businessman who traded in all sorts of goods and services. Throughout the years, he had gone into partnership with several persons and invested in several companies. He became acquainted with Mr Kek sometime in 2002 and had kept in touch with him thereafter.

20 It was in July 2004 that Mr Kek first approached Mr Tan and asked him to quote and supply goods and services at competitive prices to the columbarium. Mr Tan was keen and decided to set up another firm, which he called SM Trading Services, for this venture. Mr Kek had told him in vague terms that he was helping the defendant to source for suppliers of various goods and services. Mr Tan did not bother to find out the exact relationship between Mr Kek and the defendant as he would be contracting directly with the defendant. After all, he said, he knew Mr Kek to be a reputable businessman and had no reason to doubt him.

21 When Mr Tan registered his new firm, he used Block 212 Hougang Street 21, #07-333, Singapore 530212, a unit belonging to Mr Kek, as the registered place of business of the new firm. For convenience and whilst Mr Tan was waiting for his new fax number, Mr Kek was kind enough to allow him to use Mr Kek's company's fax number and to provide minor administrative assistance to Mr Tan. Since then, Mr Tan said, he had obtained his own fax number and changed the firm's registered address.

22 Mr Tan went on to say that after he found out the kind of goods and services that the defendant required, he started to look for quotations from suppliers in Singapore and in Taiwan. When he obtained the necessary details, he prepared the written quotations for the various items and passed them to Mr Kek who then obtained the signature and approval of the defendant. He asserted that the allegations that he was "financed" by Mr Kek or "set up SM Trading with the assistance of Kek" were baseless and utter rubbish. Mr Kek did not own any interest in his firm at all and Mr Tan was its sole proprietor.

23 Referring to the defendant's claim that Mr Tan had made an oral admission to the effect that Mr Kek had financed him and helped him set up his firm, Mr Tan stated firmly that the allegation was untrue and baseless. He said that he had merely told the defendant that he was asked by Mr Kek to quote for the goods and services for the defendant. The contracts were all arm's-length transactions. As far as the engraving services were concerned, the defendant was making an unnecessary fuss about a few invoices from Hoe Ann in respect of the services supplied by the plaintiff to the defendant because these invoices had been mistakenly addressed to Hok Mee instead of to the plaintiff. Mr Tan said this had happened because it was Hok Mee who had suggested that he approach Hoe Ann when he was unable to find an engraver. After they realised that mistake, Hoe Ann had rectified the invoices and addressed them to the plaintiff instead. In any case, the invoices had been paid by the plaintiff.

24 During cross-examination, Mr Tan agreed that the dealings involving the defendant were his first dealings in the columbarium business. He said that he had been approached by Mr Kek before he set up the plaintiff firm and this firm had been set up specifically for the purpose of doing business with the columbarium. He also stated that he had used Mr Kek's office at Block 212 Hougang Street 21, #07-333, as his registered address for almost five months from the start of the business at the end of July 2004 up till 17 December 2004. He admitted that he had not paid any money for the use of this office. It also came out that towards the end of November 2004, he had procured the incorporation of a company called WTK Private Limited and that for its business that company had rented Block 212 Hougang Street 21, #07-327, another office unit belonging to Mr Kek. Another business set up by Mr Tan was Da Tang Trading (S) Pte Ltd ("Da Tang Trading") and this company shared the premises at #07-327. It was also interesting that WTK Private Limited was a business started by Mr Tan with one Ms Wong Peck Lim who was an associate of Mr Kek in another of Mr Kek's companies.

25 Another fact that was emphasised during cross-examination was the lack of any evidence produced by the plaintiff to show that Mr Tan had in fact obtained the ancestral tablets and niche covers he was selling to the plaintiff from the purported Taiwanese supplier, Kuan Show. Mr Tan had admitted that he had no ready suppliers for the goods he was asked to sell to the defendant and therefore he said he had sourced suppliers through the local market and through the Internet. He then said that he had been given Kuan Show's name by one Mr Brian Sim, his associate in Da Tang Trading, in late July 2004.

26 Mr Tan also stated that he had set up a letter of credit to pay for Kuan Show's goods. This was a bare assertion. No copy of the letter of credit was produced nor were any banking or shipping documents. In fact, not even an invoice from Kuan Show was shown to the court. When Mr Tan was asked where the letter of credit was, he said it was not in the bundle of documents. Then when asked when he had established the letter of credit, he said that this had been done by one Mr Sim whom he emphasised was not Mr Brian Sim. He gave few details about the second Mr Sim. When asked which company Mr Sim had used to procure the letter of credit, his reply was, "He is just a friend of mine, they have got no company." He did not know what bank facility Mr Sim had used to obtain the letter of credit and admitted that he had not even seen the letter of credit. When it was suggested to him that Mr Sim must have been a good friend of his, he agreed, but he had earlier admitted that he had only met Mr Sim in July 2004. He also stated that he could not remember who had introduced Mr Sim to him. He was unable to give me Mr Sim's full name and said that was because he always called the latter Mr Sim. Mr Tan stated that Mr Sim lived in Pasir Ris and that he was in the construction business. However, he was not able to state the name of Mr Sim's company.

27 All the cross-examination that I have referred to above took place before lunch on the first day of the hearing. After lunch, however, and during re-examination, Mr Tan remembered more details

about Mr Sim. He produced a business card stating that Mr Sim's full name was Sim Eng Kiang and that he worked for a company called Kaiden Materials Pte Ltd. Mr Tan was also able at that stage to give an explanation as to why, without having first received any payment from Mr Tan, Mr Sim would have paid \$100,000 to obtain the issue of the letter of credit in favour of Kuan Show. He said that at that time Mr Sim had recommended that Mr Tan should obtain the ancestral tablets from Kuan Show and that Kuan Show and Mr Sim were very close. So, therefore, of course Mr Sim would have helped him with the letter of credit. He also said that he believed that Mr Sim would be paid a commission by Kuan Show. It is notable that in giving this explanation he forgot that in the earlier part of the day he had said that Kuan Show had been recommended to him by Mr Brian Sim of Da Tang Trading.

28 The only document that Mr Tan was able to produce to show a connection between the plaintiff and Kuan Show in respect of the goods supplied to the defendant was a quotation from Kuan Show for ancestral tablets and niche covers addressed to the plaintiff. The most interesting thing about this quotation was that it was dated 8 September 2005 which was more than one year after the first contract between the plaintiff and the defendant and about a year from the date of the last contract between the plaintiff and the defendant in respect of such items. This document did not show that Kuan Show had supplied the plaintiff with any goods in 2004. It did not show either that there had even been an enquiry by the plaintiff to Kuan Show about the supply of such goods in August and September 2004. I find it most suspicious that the plaintiff could have ordered and obtained 2,900 ancestral tablets from Kuan Show in Taiwan and not have a single document that evidences the supply of those goods to him. It is also suspicious that the plaintiff did not mention the Mr Sim who helped him finance the purchase or procure either his attendance in court or the production by Mr Sim of documents that could help support the plaintiff's case. The lack of such supporting documents is especially telling in the light of the fact that the plaintiff knew from the beginning that it was the defendant's case that he had in fact been financed by Mr Kek. If the plaintiff had sources of money that were independent of Mr Kek, he should have been forthright and forthcoming from the beginning.

29 One of the points in dispute was Mr Tan's knowledge of Mr Kek's position *vis-à-vis* the defendant. It would be recalled that Mr Tan said that Mr Kek had been vague about that connection. During cross-examination, however, Mr Tan admitted that he knew that Mr Kek was someone who was working for, employed by or acting as an agent for the columbarium. When he was asked the same question for the second time, Mr Tan then said that he did not know what Mr Kek's position in the columbarium was. When I asked whether Mr Kek was a representative of the columbarium, Mr Tan replied that Mr Kek had said that he was helping the columbarium. When he was asked to explain what was meant by "helping" and whether it was "like for example to purchase things" the answer was, "No, no. He said he's just giving advice – advisor to them, only that." It is also significant that during his evidence in relation to the supply of urns, Mr Tan agreed that he had confirmed the order for the urns when Mr Kek orally informed him that the defendant had agreed to order certain types of urns. It would appear therefore that Mr Tan considered that Mr Kek was able to make contracts or confirm orders on behalf of the defendant. He must have thought that Mr Kek had authority from the defendant to do so and that he was really an adviser of the defendant.

The defendant

30 The defendant called three witnesses. The first of these was Ms Chung Mei Leng also known as Phyllis Chung ("Ms Chung"). Ms Chung testified that she was the office-administrator-cum secretary of An Le Management Private Limited ("ALPL"), which was considered to be the managing arm of the defendant.

31 Ms Chung was called in order to authenticate the minutes taken during a directors' meeting of

ALPL held on 9 October 2004. She stated that present at the meeting were Mr Chua, Col Tan, one Mr Lim Keng Nang, one Mr Thomas Chua (the younger brother of Mr Chua) and herself. She said that the relationship between the defendant and ALPL was that the defendant was an investment company and ALPL managed it. She confirmed that she had recorded the minutes and that the document produced in court represented what took place at the meeting.

32 As the defendant placed a great deal of emphasis on the minutes, I should briefly state their contents. The title of the document is "Directors Meeting held on Oct 9, 2004 at 2.30pm at An Le Memorial Park". There are various headings relating to the matters discussed. The first heading is "Organisation Structure". This is followed by a sub-heading "Exco Members" and the persons named as "Exco Members" are Mr Chua, Col Tan and Mr Kek. Then the responsibilities of these persons are enumerated next to their names. Next to Mr Kek's name, the following appears, "Responsible for renovation and running of CCK through Mr Lim Keng Nang, building network and support among temples and clan associations". Next come the responsibilities of the Marketing Administration/ Sales Department. After that, the names "Tan Hong Huat and Kek Kim Hock" appear in bold and it is stated that these persons will "decide and approve" the budgets and redevelopment plans of the columbarium, the services and the new designs of tablets and plaques. The final section of the minutes is entitled "Other Issues". Under it, the following is written:

1. Mr Kek's suggestion regarding immediate payment of sales commission was accepted. Effectively immediately, all sales commission will be paid upon clearance of customers' cheques or as soon as practically possible.
2. Mr Kek informed that newly designed tablets will be available by Nov 14, 2004.
3. As an incentive for An Le's staff, all directors (Francis, Kek, Tan HH) agreed that 6% commission of all walk-in deals be set aside for An Le staff's distribution at year end.
4. Francis Chua will gradually withdraw from involvement and decision making once the admin systems and staffing are in place. He wants to concentrate on new biz projects elsewhere.

33 Ms Chung was cross-examined by counsel for Mr Kek. She was asked whether she was saying that Mr Kek was a director of ALPL. Her reply was that he was in the management team of the defendant but she was not sure whether he was a director of ALPL. She said that she knew that he was one of the management team members because of the relationship between the defendant and ALPL. She did not know whether Mr Chua was paid any salary by the defendant. She said, however, that she believed that Mr Kek had been paid a salary by the defendant because she thought she saw some payment vouchers for him. On further reflection, she added that she was not sure whether those payment vouchers were for his salary or not. She confirmed that she had written letters on ALPL's letterhead to the plaintiff in respect of its complaints regarding certain goods and asserted that these letters had been written on the instructions of Mr Thomas Chua. She had not checked the instructions with the other directors nor with Mr Kek. She also gave evidence that Mr Chua or his brother, Mr Thomas Chua, had been responsible for ordering ancestral tablets from the plaintiff and that both of them had the authority to order these goods. As far as she knew, no one else had such authority.

34 Counsel asked Ms Chung whether, apart from the meeting of 9 October 2004, she had ever had any discussions with Mr Kek. Her recollection on this point was not very clear. She said she thought she went to his office once. He had asked her down to the office to hand over some of the files. As far as the meeting of 9 October 2004 was concerned, she was asked whether Mr Thomas Chua had attended it. Her reply was he had and she explained his name was not on the minutes

because only the Exco members' names had been put there. She did point out that Mr Chua's name was put at the bottom of the document in relation to the note that he was in charge of supervision of marketing and sales administration. No other questions about the contents of the minutes were put to her. It was not suggested that they were inaccurate. Whilst parties had agreed that formal put questions were not necessary in this case, I think it significant that the witness was not challenged over the accuracy of her records.

35 The next witness for the defendant was Mr Horison. In his affidavit of evidence-in-chief, he stated that he was the marketing director of the defendant. The purpose of his affidavit was to tell the court about the meeting that took place on 4 November 2004 between Mr Tan and himself, Mr Thomas Chua and one Mr David Chong.

36 Mr Horison said that present at the defendant's premises was a badly constructed model of the columbarium. On 4 November 2004, some workers had turned up at the columbarium to repair the model. Mr Horison had wanted to clarify why the model was so badly made so he asked a staff member to contact the builder to arrange for a meeting. Later that day, Mr Tan turned up for the meeting in place of the builder of the model. The meeting proceeded cordially and during the course of the meeting, Mr Tan admitted the following:

- (a) that Mr Kek was financing the plaintiff in the dealing with the defendant;
- (b) that Mr Kek was responsible for determining what items were needed to be purchased and on-sold to the defendant;
- (c) that Mr Kek himself placed the orders for the goods which were on-sold to the defendant by the plaintiff; and
- (d) that Mr Kek was responsible to ensure that the defendant made the purchases.

37 Mr Horison went on to say that this meeting was the very first time when any one from the defendant, apart from Mr Kek, had met with Mr Tan. It was because of what Mr Tan said during the meeting that steps were taken to dismiss Mr Kek.

38 Under cross-examination, it appeared that Mr Horison was not a marketing director of the defendant as stated in his affidavit but only an adviser on the formation of a sales team for marketing the columbarium. He had given advice to Col Tan and Mr Chua from September 2004 onwards because Col Tan was his partner in some business that he was doing in Beijing. He also produced a letter dated 1 November 2005 stating he was marketing director of the defendant.

39 Mr Horison was asked about the meeting of 4 November 2004. He clarified that this was not a meeting that had been prearranged but that Mr Tan had turned up unexpectedly. Present in the defendant's office at that time were Ms Chung, Mr Thomas Chua and Mr Horison's driver, Mr David Chong. Also at the meeting was a polytechnic student who was repairing the model. It was put to Mr Horison that it was very strange that in this meeting, out of the blue, Mr Tan made statements regarding the financing of the defendant when the purpose of the meeting was to discuss the model. Mr Horison replied that he, Mr Chua and Col Tan had wanted to meet Mr Tan and when the latter turned up, they took the opportunity to ask him certain questions. Mr Tan then told Mr Horison that the plaintiff was financed by Mr Kek. This statement was made in the presence of the driver, Thomas Chua and Ms Chung as well.

40 The last witness was Mr Chua himself. In his affidavit of evidence-in-chief, he said that

Mr Kek had approached him to take over the columbarium sometime in June 2004. Mr Kek claimed that he had devised a corporate structure through a Singapore law firm for the takeover of the columbarium without any hassle or hindrances. Mr Kek also told Mr Chua that he was the only signatory remaining on the sale and purchase agreement in respect of the columbarium ("the S&P agreement") as both Poh Lian and the temple had already executed it. In return for his co-operation, Mr Kek demanded a 30% shareholding in the defendant (*ie*, the eventual vehicle used to acquire the columbarium) and also payment of the sum of \$6m which he claimed was the loss he had suffered in respect of the columbarium.

41 Since Mr Chua had no experience in running a columbarium, he said that it was orally agreed between Mr Kek and himself (for and on behalf of the defendant) that Mr Kek would assist the defendant in the day-to-day running of the columbarium. As such, he was in charge of purchasing supplies and materials for the defendant to ensure the smooth operation of the columbarium. By reason of Mr Kek's situation, however, which to the best of Mr Chua's knowledge was a result of certain undertakings that Mr Kek had given to Poh Lian and the temple in respect of a columbarium, Mr Kek was to be appointed as an "adviser".

42 Thus, Mr Chua said, from mid-July 2004 (when the decision was taken to proceed with the purchase of the columbarium), until the completion of that purchase by the defendant, Mr Kek was acting both as a free agent, ensuring that the S&P agreement went through, and the person assisting the defendant in the day-to-day running of the columbarium. On or about 1 September 2004, Mr Kek was formally appointed as an adviser of the defendant. On 9 October 2004, the defendant held a directors' meeting that confirmed Mr Kek's role in the defendant. At this juncture, Mr Chua referred to the minutes of meeting prepared by Ms Chung.

43 The next part of Mr Chua's affidavit set out the evidence that the defendant had regarding the relationship between Mr Tan and Mr Kek. These details included Mr Horison's evidence on Mr Tan's admission of being financed by Mr Kek, the plaintiff's letter that showed his fax number as being that belonging to a company in which Mr Kek was a director and shareholder, the various business associates that Mr Kek and Mr Tan had in common, and the documents showing (to Mr Chua's mind) that Hok Mee had purchased services from Hoe Ann which services had later been on-sold by Mr Tan to the defendant at higher prices. He also stated that at the time when the contracts with Mr Tan were entered into, Mr Kek was the defendant's agent and/or employee. As Mr Tan had at all times dealt with the defendant exclusively through Mr Kek, Mr Tan must have been aware of the faith and trust which the defendant placed in Mr Kek. He also considered that the date when Mr Tan registered SM Trading Services (27 July 2004) was significant as the decision to purchase the columbarium was made in mid-July 2004 and the defendant obtained banking facilities for the purposes of the columbarium on 23 July 2004. Mr Kek was privy to both pieces of information by reason of his involvement in the S&P agreement and with the defendant. Furthermore, the only business carried out in the name of SM Trading Services, to the best of Mr Chua's knowledge, was with the defendant. To Mr Chua it was clear that Mr Kek and Mr Tan were in collusion to injure the defendant.

44 Mr Chua was subjected to a great deal of cross-examination by counsel for the plaintiff and Mr Kek. Most of this was aimed at showing that Mr Kek was never an adviser or employee or fiduciary of any sort of the defendant. It was also intended to establish that Mr Chua was fully aware of all the contracts made with the plaintiff and did not rely on Mr Kek.

45 In response, Mr Chua said that although he was a substantial shareholder in the defendant and attended most of the shareholders' meetings, from day one his position was clear. He is a Christian and when he went into the purchase of the columbarium, a facility run for Buddhists and Taoists, he told Mr Kek and Col Tan that he had no intention of being involved in the management of

the business. He wanted to be a passive investor, but for the initial set-up, he had to come in to organise the corporate structure and sign various documents. On the other hand, Mr Kek had wanted to come in from day one as a partner. It was because Mr Kek said that he was going to be actively helping in the running of the business, albeit from behind the scenes, that Mr Chua had had the confidence to go into the columbarium business. Mr Kek was not able to co-operate openly because of an arrangement with his previous partners which prevented him from being involved with the new purchaser of the columbarium.

46 Mr Chua confirmed that he had signed all the contracts on which the plaintiff was suing the defendant. He admitted that he had read the documents before signing them and had agreed to the terms in them. He then explained that he had accepted all the quotations on the understanding that Mr Kek was acting as an employee and an agent of the defendant, and in good faith that Mr Kek would do whatever was necessary for the running of the defendant because Mr Chua himself had no understanding of how to run the columbarium business. Whilst he saw himself basically as an investor, since there were only two directors of the defendant, himself and Col Tan, one of them had to sign on behalf of the defendant and Mr Chua had signed most of the documents because he had been around more often than Col Tan.

47 Mr Chua was asked to confirm that he had not given Mr Kek authority to make purchases. Mr Chua replied that Mr Kek had come along and recommended that the defendant do a certain thing or make a certain purchase and Mr Chua had generally gone along with Mr Kek's recommendations. Whilst Mr Kek had no written authority to sign any contract, effectively he was running the show. When pressed, Mr Chua confirmed that Mr Kek could not commit the defendant to any purchase but stated that he had made decisions on representations by Mr Kek as to what was best for the defendant in terms of prices, product selection and recruiting people. He formally endorsed Mr Kek's recommendations because he had faith and trusted Mr Kek. Mr Chua added that on top of that, Mr Kek was a paid employee of the defendant. It should be noted, however, that Mr Chua did not produce any documents that showed that Mr Kek had been paid a salary by the defendant and there was no assertion in the defendant's pleadings to this effect.

48 When Mr Chua was cross-examined by counsel for Mr Kek, he informed the court that the purchase price for the columbarium was approximately \$34m. The defendant had paid \$26m to settle a loan that the previous owners owed the bank and had spent a further \$8m or so on renovation and repairs of the columbarium. The defendant had bought it on the basis that during the first year of operation, the columbarium had had sales of about \$10m and Mr Chua thought that that was a good business. Mr Chua confirmed that he had first met Mr Kek in 2004 in a business context. Sometime after their first meeting, Mr Kek told him about the columbarium and the partnership and offered to run the business if Mr Chua and Col Tan bought it. Mr Chua himself was not very keen but went along because of Col Tan's interest. Col Tan was Mr Chua's long-time business partner.

49 Mr Kek told Mr Chua that he had been working with another party who had appointed a lawyer to set up a structure to buy over the business. Everything was in place – the company, the structure, how to transfer the columbarium from the temple to the purchaser – but that Mr Kek was the only person who could hold back the business because his was the only signature missing from the S&P agreement whereas the other two partners had already signed it. Therefore, Mr Kek said that he held the key to a successful transfer of the business. For some reason, Mr Kek said, the original deal had not gone through but since the structure was in place, once Mr Chua agreed, Mr Kek had only to sign the document (on behalf of Hok Mee) and the deal would be done. I should note at this stage that Mr Chua was able to produce a photocopy of the original S&P agreement (dated 19 November 2003 and contained in a letter written by a firm of solicitors) which photocopy had been made at the stage when the S&P agreement had been signed by the temple and Poh Lian but had not

been signed by Hok Mee. Mr Chua knew at that time that Mr Kek was anxious to sell the columbarium because the bank was pushing for its sale and Mr Kek had guaranteed the indebtedness to the bank. Mr Kek also said that if Mr Chua bought over the columbarium, Mr Kek himself wanted to retain a share in it and wanted compensation of \$6m for the investment he had made in the columbarium.

50 Regarding the discussion about Mr Kek's share in the columbarium, Mr Chua was shown drafts of four unsigned documents, each dated 28 May 2004. The parties to the first two documents were Mr Kek and Mr Chua while the parties to the third and fourth documents were Mr Kek and a company called Pacific Dragon Ltd ("PDL"), a British Virgin Islands company owned by Mr Chua. The contents of all four drafts were roughly the same. They referred to Mr Kek's desire to find someone to take over the ownership and management of the columbarium and Mr Chua's (or PDL's) desire to invest in the columbarium. All the documents provided for Mr Chua or PDL to pay Mr Kek \$10m to compensate him for his investment losses in the columbarium, for Mr Chua or PDL to own the entity that would take over the columbarium and for Mr Kek to in some way have a 30% interest in such entity. There was also a provision that Mr Kek would be adviser to the purchaser of the columbarium once the transfer had been successfully completed.

51 Mr Chua confirmed that he had prepared these various drafts sometime in May 2004 soon after he met Mr Kek. He said that the \$10m to be paid to Mr Kek was part of the total investment required for the takeover of the columbarium. However, the terms with Mr Kek changed from day to day and at the end of the day, nothing was signed because Mr Kek was operating under many constraints: he was unable to put his name to any agreement and could not be seen to have an interest in the entity purchasing the columbarium. Mr Chua also explained that the documents had been prepared at the stage when Mr Kek had asked for \$10m and was going to pay for his share in the new owner of the columbarium. Subsequently, Mr Kek was willing to take \$6m in cash but wanted a 30% share in the new owner free from payment. Mr Chua prepared one draft agreement after another at Mr Kek's request and finally Mr Kek suggested that since he could not be seen to have an interest in the columbarium, the agreement should be made with a company owned by his son. It was put to Mr Chua that he was lying about Mr Kek being unable to be open about the investment since Mr Kek's name appeared consistently in Mr Chua's draft. Mr Chua disagreed. He said that Mr Kek made it very clear that he had to be invisible and that was why when Mr Chua wanted to appoint Mr Kek as the chief operating officer of the defendant, the latter refused and said he could only be an adviser.

52 Mr Chua also maintained that the \$6m was to be paid to Mr Kek in return for his co-operating by signing the S&P agreement in favour of the defendant. For that signature, Mr Chua and Col Tan were willing to also give Mr Kek a 30% share in the columbarium. Mr Chua clarified, however, that the 30% share would only be free if none of the investors had to put up the equity from their own funds (ie, they could borrow the money needed) and that the \$6m was only to be paid to Mr Kek after the defendant had made profits and had repaid its bank loans. Subsequently, the 30% shareholding was reduced to 20%. Although it was put to Mr Chua that such demands would not have been made by Mr Kek because the latter was anxious to sell the columbarium, Mr Chua maintained that Mr Kek had told him that there were other persons interested in the columbarium and therefore Mr Kek had some bargaining power. To substantiate his evidence, Mr Chua then produced (for the first time as this document was not disclosed during discovery) an agreement dated 23 July 2004 and made between Mr Chua and Col Tan on the one part and a company called HM Development (International) Pte Ltd ("HMD") on the other. HMD is a Singapore company in which Mr Kek's son, Kek Sin Hwa, is a major shareholder and a director.

53 The agreement is a 21-page document containing some 21 clauses and was obviously drafted by a lawyer. It is quite unlike the simple two-page draft agreements that Mr Chua prepared for Mr Kek's review. The cover page of the agreement states that it is a shareholders' agreement

between the parties. The recitals of the agreement refer to the temple and the columbarium and the partnership that run the columbarium. They also state that the parties (*ie*, Mr Chua and Col Tan and HMD) intended to participate in the defendant for the purpose of acquiring the columbarium and its business. The final recital stated that the parties had entered into the agreement for the purpose of regulating their relationship as shareholders of the defendant and for establishing rights and obligations as between themselves. The terms of the agreement provide that the issued share capital of the defendant shall be held in the following proportions: Mr Chua and Col Tan 80% and HMD 20%. Clause 12 of the agreement entitled "Application of Revenue" provides that the gross revenue generated by the defendant must first be applied to meet the costs and expenses of running the columbarium and half of the balance of the revenue shall be paid into an escrow account and applied in repayment of the banking facilities. Upon complete discharge of the banking facilities and directors' loans of \$1.5m, at least 60% of the balance of the revenue is to be paid to HMD within 21 days of the end of each financial year of the defendant until HMD is in receipt of an aggregate sum of \$6m.

The third party's story

54 There were two witnesses for the third party. One was a Mr Phang Poh Chui, an insurance broker, who gave evidence on the circumstances in which he had given a quotation for fire insurance coverage of the columbarium. I do not think it is necessary to go into this evidence in any detail. The third party also procured an affidavit of evidence-in-chief from one Mr Neo Koon Boo. During the hearing I was informed that Mr Neo would not be testifying as he was away. Therefore his affidavit has to be disregarded.

55 The only other witness was Mr Kek himself. In his affidavit, he first set out a detailed account of the development of the columbarium and the partnership between Hok Mee, the temple and Poh Lian. He then went on to say that after the columbarium was put up for sale, an offer made by Best Corp on 19 November 2003 was accepted by the temple on 8 December 2003 and by Poh Lian and Hok Mee on 9 December 2003. The sale was, however, still pending completion when he first met Mr Chua in May 2004.

56 According to Mr Kek, it was Mr Chua who enquired whether Mr Kek knew of any worthwhile investment opportunities. In response, Mr Kek told Mr Chua about the columbarium and asked him to introduce potential purchasers as Mr Kek was concerned about the progress of the sale to Best Corp. Mr Kek did not specifically ask Mr Chua to purchase the columbarium himself because Mr Chua is a Christian. Subsequently, at a meeting that took place in June 2004, Mr Chua informed Mr Kek that he would be interested in buying over the columbarium. A site visit took place some days later at which Mr Chua, Col Tan and Mr Horison were also present. After the visit, Mr Chua reaffirmed his interest in the columbarium but Mr Kek did not follow up on this interest. Instead, he left it to Mr Chua to liaise directly with the special accountants on the purchase. In July 2004, Mr Chua informed Mr Kek that he had become a shareholder of the defendant and that the defendant was proceeding with the purchase.

57 Mr Kek said that after Mr Chua had indicated his interest in the columbarium, he arranged to meet Mr Kek at the Raffles Town Club on 22 June 2004. At this meeting, Mr Chua offered to let Mr Kek take shares in the entity that would be acquiring the columbarium and showed him a copy of a draft agreement dated 28 May 2004. This agreement provided for a partnership between Mr Chua and Mr Kek to own and manage the columbarium through a corporate entity in which Mr Chua would have a 70% share and Mr Kek a 30% share. The agreement also provided for Mr Chua to pay Mr Kek \$10m as consideration.

58 A revised draft of the proposed partnership agreement was sent to Mr Kek three days later.

One of the key changes was that the payment of the \$10m to Mr Kek was described as compensation for Mr Kek's investment loss in relation to the columbarium and that instead of having a 30% stake in the purported partnership, Mr Kek would only be given an option to purchase the 30% stake at a price to be agreed. On 26 June 2004, a third draft of the agreement was produced. In this document, PDL took Mr Chua's place and the amount of \$10m to Mr Kek as compensation was to be paid outside Singapore. A fourth draft was dated 28 June 2004. Mr Kek asked Mr Chua why he wanted such an agreement to be executed. Mr Chua explained that he and Col Tan were trying to secure a \$34m loan and that it was a condition for the disbursement of the loan that the entity acquiring the columbarium had a paid-up capital of \$10m. If Mr Kek had signed the agreement, that agreement would have been presented to the bank by Mr Chua to show that the defendant had paid Mr Kek \$10m and that sum would in turn be "booked" as the defendant's paid-up capital. Mr Chua also clarified that he did not intend to, and would not, pay Mr Kek \$10m or any amount for that matter or appoint him as the defendant's adviser. Mr Kek told Mr Chua that he had no wish to be a part of such a dubious arrangement.

59 Mr Kek explained that as he was a personal guarantor of the loans granted for the development of the columbarium, he was keen to ensure that the sale took place without any hitch. Further, his company, Hok Mee, had also guaranteed those loans and he did not want it to be bankrupted. It was the immense pressure from the bank that propelled Mr Kek into assisting Mr Chua in understanding the various aspects of running the columbarium. For this purpose, Mr Kek gave Mr Chua pointers and passed the latter his contacts for contractors and suppliers. Paragraphs 38 to 50 of Mr Kek's affidavit detailed his dealings with Mr Chua in relation to the columbarium prior to its handover to the defendant. He stated that despite his role in actively answering Mr Chua's various enquiries concerning the running of the columbarium, he was never formally appointed as the defendant's adviser or introduced to the various other third party contractors as such adviser. Mr Chua would contact Mr Kek whenever Mr Chua was unsure about certain aspects relating to the business and Mr Kek would then either provide Mr Chua with contacts or obtain quotations from third parties which he then forwarded to Mr Chua. More importantly, Mr Kek had never concluded any contract for and on behalf of the defendant nor was he given any authority to do so.

60 From paras 54 to 60, Mr Kek set out an account of his dealings with Mr Chua after the handover of the columbarium. He said that even after 1 September 2004, Mr Chua had continued to approach him whenever Mr Chua needed assistance in running the columbarium. Often, Mr Chua asked for the names of contractors to undertake renovation works at the columbarium. As it did not take much effort on Mr Kek's part to simply provide Mr Chua with the references, he would often lend a helping hand in that respect. One such reference was to Ms Alice Huang Yuling ("Ms Huang") whom Mr Kek recommended as being a person who could install the wall mural in the hall of the main shrine. Attached to Mr Kek's affidavit were copies of correspondence between Mr Chua and Ms Huang and Mr Kek stated that it was obvious from this correspondence that Mr Chua had been the decision maker and had conducted all the negotiations directly with Ms Huang. Mr Kek also stated that the defendant had a practice of comparing quotations obtained from various contractors and did not simply accept the quotation submitted by the persons recommended by him.

61 Mr Kek gave reasons as to why he continued to be involved in the columbarium after the handover. He said that these included the following:

- (a) He had made advance payments on behalf of the defendant and had asked for reimbursement of those expenses from the defendant. Among the expenses incurred were those relating to a tour of the temple that had been given to some monks from China.
- (b) His company, Hok Mee, was then the main contractor for the upgrading and renovation

works done in respect of the columbarium.

(c) Since several of his referrals had resulted in contracts between his contacts and the defendant for various types of work and goods, he felt obliged to assist when needed in order to preserve the integrity of his contacts. Further, if the columbarium failed to take off, his referrals would have difficulties in recovering their fees.

(d) Since the defendant had come to know of the columbarium through him, he wanted to ensure that it would be a rewarding investment for the defendant.

62 Mr Kek went on in the next section of his affidavit to deal with what he called "the facts surrounding the plaintiff's various contracts with the defendant". He said that he and Mr Tan were friends and that he had known Mr Tan since 2002. Sometime in July 2004, Mr Chua approached him to enquire about the supply of niche covers for the columbarium. Mr Kek informed Mr Chua that Yew Hock Trading Pte Ltd ("Yew Hock"), a company related to Poh Lian, had sent a letter dated 12 August 2003 to Hok Mee in which it set out its prices for niche covers. He gave a copy of the letter to Mr Chua and told him that the defendant could approach Yew Hock directly for the supply of niche covers. Mr Chua, however, found the prices offered by Yew Hock too high and asked Mr Kek for other referrals. In addition, he asked Mr Kek to source blue ancestral tablets for the defendant.

63 Mr Kek then told Mr Tan about these items. Mr Tan was in the business of import and export trading. From Mr Kek's understanding of Mr Tan's business model, the latter would form and trade under different business entities for different types of goods. When Mr Kek told Mr Tan that the defendant was inviting suppliers to quote for the supply of niche covers, blue ancestral tablets and granite niche covers, Mr Tan set about looking for those products and prepared his quotation. Prior to submitting the quotation, Mr Tan handed Mr Kek several samples of the goods for the defendant's consideration. Mr Kek then passed the samples to Mr Chua and Col Tan. As they were satisfied with the samples, they invited the plaintiff to give his quotation. Mr Kek was the one who passed this message on to Mr Tan. As with the other suppliers whom Mr Kek approached for quotations, Mr Tan found it convenient to request that Mr Kek transmit the quotation to Mr Chua. To that extent, Mr Kek became the "postman" for both Mr Tan and the defendant. He did not participate in the negotiations on price (if any) between the plaintiff and the defendant that followed.

64 The defendant found the plaintiff's first quotation for niche covers and tablets to be reasonable and accepted it. The plaintiff, however, required the defendant to pay a deposit. At that time (August 2004), the defendant was not able to draw down on the loan facility that had been arranged for the purchase of the columbarium as the purchase had not yet been completed. So Mr Chua asked Mr Kek to pay the plaintiff the deposit on behalf of the defendant on the basis that the defendant would reimburse him when the loan had been disbursed. Mr Kek then paid the plaintiff \$110,000 as deposit. Mr Kek said he had no choice but to agree to assist as he was afraid that the defendant would resile from the purchase of the columbarium if he refused to help. He was reimbursed by the defendant in September 2004.

65 In August 2004, Mr Chua asked Mr Kek to obtain quotations for an architectural model of the columbarium. Mr Kek then asked Mr Tan to quote for this work. Mr Tan handed the quotation to Mr Kek and he forwarded it to Mr Chua and Col Tan for their consideration. The defendant accepted the quotation and asked Mr Kek to pay the deposit of \$5,120 to the plaintiff. Mr Kek did so. He has since been repaid.

66 At the end of August 2004, Mr Chua asked Mr Kek to find someone to supply urns. Since Mr Tan had successfully quoted for other goods, Mr Kek told him to quote for the supply of urns.

Mr Tan gave him samples of marble urns which he then showed to Mr Chua and Col Tan. They rejected the samples because they thought those urns were easily breakable. Mr Tan then provided a sample of a polyglass urn. This time, the sample was accepted. In September 2004, Mr Kek handed the plaintiff's quotation for polyglass urns to Mr Chua and Col Tan. Both men accepted the quotation and gave him a cheque for \$12,750 in favour of the plaintiff as payment of the deposit for the urns. Mr Kek duly passed this on to the plaintiff.

67 In September 2004, having been requested by Mr Chua to find a supplier for gold ancestral tablets, Mr Kek approached the plaintiff again for samples. As before, the plaintiff was asked to quote. After the defendant approved the samples, the plaintiff submitted his quotation which was accepted and the defendant then paid the plaintiff a deposit of \$20,000.

68 When he came to court, Mr Kek said that he was not involved in the running of the columbarium because he had had no experience himself in this. Hok Mee's responsibility had been limited to the construction of the building. The operation of the columbarium had been handled by the temple. This was in accordance with the agreement between the three partners. In fact, he repeatedly stated that his responsibility "was to construct and complete the building". He was, however, shown a People Profile Information Search and then admitted that he was a manager of the partnership between Hok Mee, the temple and Poh Lian. Thereafter, when he was referred to the deed of partnership between these parties and it was put to him that he was involved in the management and administrative matters of the columbarium from day to day, his response was in the affirmative. He had maintained that he had never seen any purchase orders or invoices relating to the supply of tablets and other equipment for the columbarium while it was being managed by the partnership. It also turned out, however, that Mr Kek's son had been the person in charge of the accounts of the columbarium at the time it was managed by the partnership.

69 Mr Kek was asked about the purported offer by Mr Chua to give him \$10m and his refusal to sign any document showing such an arrangement because of his assertion that the signed document would be used to deceive the bank into thinking that the defendant had paid-up capital of \$10m. His answers during cross-examination did not support his original contentions. On the one hand, he said that there would be no actual payment of \$10m to him even if he signed the document, but on the other hand, he had stated that Mr Chua had offered him \$10m. He then explained that there was no discrepancy between the two statements because the first impression given to him was that Mr Chua was giving him \$10m but later, when he asked Mr Chua about the money, Mr Chua gave him further details and as a result Mr Kek did not dare sign the document. It would appear therefore that when the first of the drafts was given to Mr Kek, he had no idea of what the document was to be used for. If he had agreed to the first of the documents and signed it, he would have been in a position to obtain the \$10m or, at the least, to be able to sue Mr Chua for that money. It would appear that Mr Kek had rejected a windfall of \$10m even though he was in a difficult financial position because the bank was pressing him for payment of the loan to the partnership.

70 Mr Kek was also asked about the shareholders' agreement between Mr Chua and Col Tan and HMD. He stated that he had only found out about this agreement after it was disclosed in court by Mr Chua. He had been told about it by his lawyer during the luncheon break and had been very upset. When his lawyer explained the contents of the agreement to him, he stated that he was very surprised. After that, he had scolded his son. I asked him how his son had dared to enter into that agreement without having told Mr Kek about it. His reply to that question was that "I wouldn't know. I don't know whether Mr Chua had used any means to persuade him" and later he said that because his son was young, Mr Chua might have misled him. When asked how he could say that Mr Chua had misled his son if Mr Kek himself knew nothing about the shareholders' agreement, his reply was that if one made a comparison between the two proposals, the earlier offer was for Mr Kek to be paid \$10m

but in the later offer that had been embodied in the shareholders' agreement, Mr Kek would have to pay US\$1.2m in order to obtain the promised shareholding in the defendant. He also said that his son did not have US\$1.2m and therefore he did not know how his son had dared to enter into the shareholders' agreement.

71 Mr Kek was asked about his statement in his affidavit that Mr Chua had found the prices offered by Yew Hock for the niche covers too high and had then approached him for referrals to other suppliers. The question was how Mr Chua knew that those prices were too high. His answer was that he did not know. It was then put to Mr Kek that if Mr Chua had told him that the Yew Hock prices were too high, Mr Chua must have had knowledge of the prices. Mr Kek then said that he believed that Mr Chua knew what the prices should be. It was then put to him that if Mr Chua had such knowledge he must know of alternative suppliers and there was no reason for him to approach Mr Kek for other referrals. Mr Kek's response was "Well, if he wants to ask me for help, there is nothing I can do". It was suggested to him that Mr Chua had asked him to recommend suppliers because Mr Chua trusted him. Mr Kek gave an evasive answer by stating "Well, if he trusted me, then he wouldn't have asked me for samples".

72 In another part of the cross-examination, Mr Kek was shown the letter from Yew Hock dated 12 August 2003 and asked whether he agreed that that letter was not a quotation for the supply of goods. His response was "But there are prices listed there". In fact, the letter from Yew Hock was a letter to Hok Mee stating the cost of niche covers that had been delivered to the columbarium prior to 13 May 2003 and that such niche covers had not been paid for. The letter suggested that when Hok Mee negotiated with potential purchasers of the columbarium, it should try to sell the niche covers supplied by Yew Hock as well. It was suggested by counsel for Mr Chua that the letter from Yew Hock was shown to Mr Chua as an indication of the market price of niche covers so that the prices quoted by the plaintiff would appear reasonable. Mr Kek denied this suggestion.

73 Mr Kek was questioned as to why he did not try to persuade Mr Chua to purchase the niche covers that Yew Hock had supplied even though Yew Hock had asked him to try to sell those covers to the new buyer. He replied that he had shown Mr Chua the letter and Mr Chua had commented that the prices were expensive. When asked why he had not tried to persuade Yew Hock to reduce its prices, Mr Kek's response was that Mr Chua and Yew Hock should speak to each other. The matter had nothing to do with him and that there was a telephone number on Yew Hock's letter. He also said that he knew nothing about the pricing of such items. Asked why he had recommended the plaintiff when Mr Chua wanted a supplier of niche covers, urns and tablets, Mr Kek replied that this was because he knew Mr Tan and when he asked Mr Tan to source the items for him, Mr Tan managed to do so. I asked why he did not go to somebody who was already in the business. His reply was he did not know anyone other than Yew Hock. He had not gone to Yew Hock because Yew Hock had already given its cost price so how could he approach Yew Hock to lower that price? He said he was only an introducer. There was no reason for him to talk to Yew Hock about prices. The buyer was Mr Chua so he could approach Yew Hock directly.

My decision

74 The first point to consider is whether Mr Kek had a fiduciary relationship with the defendant. Mr Kek was not a director of the defendant nor its lawyer. It was not proved either that he was employed by the defendant. This lack of a formal position in relation to the defendant does not, however, mean that Mr Kek could not have owed it fiduciary duties. In *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, Millett LJ said:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular

matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.

75 The defendant's position is that Mr Kek had agreed to act as adviser to the management of the columbarium and to help in its running. As the officers of the defendant had no experience in that business, they relied on Mr Kek to give them proper advice and guidance and to act in the best interests of the columbarium. Mr Chua said repeatedly that he had relied on Mr Kek's recommendations when concluding contracts with the plaintiff.

76 I am satisfied on the evidence that the defendant went into the acquisition of the columbarium on the basis that Mr Kek would be an integral part of the management team even though for his own reasons he was not able to publicly declare his position and his interest. Mr Chua testified that Mr Kek had assisted the defendant in the day-to-day running of the columbarium. This testimony was supported by a great deal of evidence adduced before me. This included the minutes of the meeting of 9 October 2004 which set out the various responsibilities of the persons who were running the columbarium. I accept Ms Chung's evidence that the minutes correctly recorded what was decided at the meeting.

77 From the rather detailed account that I have given above of the contents of Mr Kek's affidavit of evidence-in-chief, it can be seen that it too supported the contention that he was in a position of trust and confidence *vis-à-vis* the defendant. Additionally, the affidavit contained various exhibits that indicated the close relationship between the parties. There was, for example, an e-mail from Mr Chua relating to the draft of a letter that contained detailed terms and conditions for the appointment of marketing agents for the columbarium. There was also a letter from a firm of architects to the defendant. Mr Kek admitted that he had received a copy of that letter from the architect before it was even sent to the defendant. Mr Kek was also sent a copy of an e-mail that Mr Chua sent to a Peter Low, who worked for Hok Mee, asking the latter, in respect of the employment letter to be sent out to the staff of the columbarium, to please use the sample attached which had been used for the employment of Ms Chung. Mr Kek testified that he was aware of the contents of the e-mail, having been told about it by Peter Low whom he said was his accountant.

78 In addition to Mr Kek having admitted, whilst he was being cross-examined, that he was involved in the management and administrative matters of the columbarium, there was also the evidence that showed his connection with the columbarium to be more than that of a disinterested helper. In fact, I accept the submission that it was all along intended that Mr Kek have an interest in the defendant company after it purchased the columbarium. I find that he did make the investment proposal to Mr Chua on the basis that he would continue to be involved in the business after the defendant acquired it. I also accept that he did not sign any of the draft agreements prepared by Mr Chua because he did not want there to be written evidence of his involvement due to other commitments that he had made. In this connection, I accept that the shareholders' agreement between Mr Kek's son's company and Mr Chua and Col Tan was the way in which Mr Kek himself acquired his interest in the defendant. I do not believe that Mr Kek had no knowledge of this agreement until it was produced in court. I do not think that his son, whom he himself admitted had no money, would have signed that document without his father's permission. Mr Kek's son was sitting in court during the trial and taking notes of the evidence. He continued to do so despite my warning and only left the court when I noticed that my direction had been disregarded. The relationship

between Mr Kek and his son was obviously close.

79 In the circumstances, I find that Mr Kek had a vested interest in the business of the columbarium and that he was also actively involved in running it and advising the defendant on the proper management of the business. The defendant was therefore entitled to Mr Kek's loyalty and to expect that he would act in good faith and would not make a profit out of his position or act for his own benefit without the consent of the defendant.

80 Moving on to the relationship between Mr Kek and the plaintiff, I note that the law on conspiracy is well established. From the principles set out by the Court of Appeal in *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390, in order to succeed in the defence of conspiracy via unlawful means, the defendant must prove:

- (a) that there was an agreement between the plaintiff and Mr Kek;
- (b) that this agreement was for the purpose of injuring the defendant; and
- (c) that the acts done in execution of the agreement were unlawful.

In this case, if the acts done in execution of the agreement were acts that breached the fiduciary duties that Mr Kek owed to the defendant, those acts would be unlawful.

81 The defendant submitted that it had proved that there was in existence an agreement between the plaintiff and Mr Kek to defraud the defendant. It relied on the evidence adduced by Mr Chua and also the evidence elicited during the cross-examination of Mr Kek and Mr Tan to discharge the high degree of proof required to establish conspiracy. Having considered the evidence, I find that the allegation has been proved.

82 There are a number of reasons for my holding. First, Mr Tan had no experience at all in dealing in ancestral tablets, niches, urns or other goods necessary for the columbarium business before July 2004. It was quite a coincidence that he set up the plaintiff to do this business just after the agreement by the defendant to purchase the columbarium had been finalised. I also find it odd that Mr Kek, who not only knew Yew Hock but also must have had other contacts for such goods through his involvement in the running of the columbarium prior to May 2004, should have gone to a complete novice to ask him to supply the goods. Thirdly, for the first five months after the plaintiff was established, Mr Tan used Mr Kek's fax numbers and his office free of rent. As a businessman with other ongoing businesses, surely Mr Tan would have had other facilities which he could have used instead of those belonging to Mr Kek. In fact, Mr Tan had testified that he was operating from home before he obtained a suitable office with the right facilities. No reason was given as to why, in respect of the plaintiff's business, he could not have operated this from home as well.

83 Mr Tan had no ready suppliers for the items he was asked to quote for. His evidence as to how he sourced the items from Kuan Show and how he financed these purchases was unbelievable. As I have already pointed out, he had no contemporaneous documents to show that he had bought any goods from Kuan Show or any documents to show how he had paid Kuan Show for those goods. He did not call Mr Sim, his purported financier, as a witness despite knowing that one of the main allegations that the defendant had made was that the plaintiff's business was financed by Mr Kek. I do not believe that Mr Tan obtained any goods from Kuan Show or that Mr Sim was his financier. I think he was most probably financed by Mr Kek and that he did make an admission to this effect at the meeting at the defendant's premises in November 2004.

84 The situation relating to the issue of invoices by Hoe Ann to Hok Mee for engraving services supplied to the columbarium was also suspicious. These invoices were issued in respect of services that the plaintiff had billed the columbarium for. Mr Tan explained that Hoe Ann had wrongly addressed the invoices to Hok Mee but he did not call any representative from Hoe Ann to clarify the circumstances in which the invoices had been issued. No questions were asked of Mr Kek in relation to these invoices either. In his affidavit, Mr Kek had said that he had told Mr Tan to contact Hoe Ann when Mr Tan could not locate an engraver and had left it to Mr Tan to deal directly with Hoe Ann. Mr Tan in his affidavit had also asserted that he had dealt with Hoe Ann by telling the latter to take instructions directly from an employee of the defendant. If this was so, then it is very odd that Hoe Ann billed Hok Mee initially. If Hoe Ann was to make any mistake in addressing the bill, that mistake would very likely have been to address the bill to the defendant directly from whom instructions had been taken rather than the plaintiff who was the ostensible procurer of the services.

85 I accept, also, the defendant's submission that the agreement between Mr Kek and Mr Tan was for the purpose of injuring the defendant. This must have been so because Mr Tan, assisted by Mr Kek, had set up the plaintiff business for the purpose of carrying on business with the defendant and no one else. They must have intended that they would make a big profit from the defendant and that the defendant would pay more for the goods and services supplied than it would have if it had dealt with a genuine third party supplier on an arm's-length basis. I also find that Mr Tan knew all along that Mr Kek was someone who was involved in the business of the columbarium and was a representative for the defendant.

86 The *modus operandi* of the parties was instructive. The plaintiff did not meet any one from the defendant company apart from Mr Kek until the meeting of 4 November 2004. Instead, what happened in relation to each contract was that first, Mr Tan would receive instructions from Mr Kek to obtain samples for the defendant. Next, Mr Tan would give Mr Kek the samples and the latter would in turn transmit the same to Mr Chua and/or Col Tan. Thirdly, upon approval by the defendant, Mr Kek would tell Mr Tan to prepare the necessary quotations and Mr Tan would then hand over the quotations to Mr Kek to obtain Mr Chua's signature. This way of going about things would surely have indicated to Mr Tan, if he did not already know this, that Mr Kek was acting on behalf of the defendant. The one occasion when the usual procedure was not followed in full provides even stronger evidence of Mr Tan's knowledge of the position. This was in respect of the supply of the urns. Here, after the samples were approved, Mr Tan had taken the order after receiving oral confirmation from Mr Kek that the defendant wished to purchase the urns. Since Mr Tan acted on that oral confirmation, he must have considered that Mr Kek was authorised to represent the defendant.

87 As far as damage to the defendant is concerned, this was established by the fact that Mr Tan testified that the 30% down payment made by the defendant for the goods was more than enough to cover the plaintiff's costs. The mark-up was therefore substantial.

88 I therefore find that the defendant has established its defence of conspiracy and the counterclaim.

Conclusion

89 The plaintiff's claim is dismissed.

90 In the counterclaim, the defendant claimed the repayment of various amounts from the plaintiff. In my judgment, the defendant is entitled to the repayment of the following sums:

- (a) \$20,000 paid as deposit for the standard ancestral tablets;
- (b) \$90,000 paid as deposit for niche covers;
- (c) \$12,750 paid as deposit for marble urns; and
- (d) \$20,000 paid as deposit for VVIP ancestral tablets.

The defendant also reclaimed the sum of \$7,680 that it paid as deposit for the architectural model. The defendant did take delivery of this model and has used it. Accordingly, I do not think it can reclaim the deposit although the plaintiff cannot claim the balance of the price which has not been paid. Therefore, the defendant is entitled to judgment on the counterclaim for a total amount \$142,750 plus interest at 6% per annum from the date of the writ.

91 As against the third party, the defendant sought an order for damages to be assessed and such order shall be made in favour of the defendant as Mr Kek was in breach of his fiduciary duty in that he conspired with Mr Tan to supply the defendant with goods. Even if the goods supplied were not excessively expensive, Mr Kek had a duty to disclose his dealings with Mr Tan to the defendant and he was in breach of his duty of loyalty when he secretly financed Mr Tan and promoted the sale of items by the plaintiff to the defendant.

92 I will hear the parties on the appropriate costs order to be made in view of my findings above.

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