

W&P Piling Pte Ltd (in liquidation) v Chew Yin What and Others
[2007] SGHC 124

Case Number : Suit No 162/2006
Decision Date : 31 July 2007
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Jeya Putra and Magdalene Chew (AsiaLegal LLC) for the plaintiff; Leslie Phua and Louis Lim (William Poh & Louis Lim) for the first and second defendants; Tan Cheow Hin (CH & Partners) for the third defendant
Parties : W&P Piling Pte Ltd (in liquidation) — Chew Yin What; Lee Kok Swee; Yeung Chun Keung

Companies – Directors – Duties – Breach of statutory duties and fiduciary duties – Transferring of assets to parent company – Failure to account to company for sale proceeds arising from transferring of assets – Whether directors' actions amounting to breaches of duty to act honestly as well as duty to act bona fide – Section 157(1) Companies Act (Cap 50, 1994 Rev Ed)

Companies – Directors – Duties – Whether fiduciary duties owed by nominee director different from that of other directors – Whether fact that company is under scheme of arrangement has any relevance vis-a-vis directors' duties – Defence of acting reasonably and honestly – Sections 157(1), 391(1) Companies Act (Cap 50, 1994 Rev Ed)

31 July 2007

Lai Siu Chiu J

1 At the conclusion of the trial, I awarded interlocutory judgment on the claim of the plaintiff W&P Piling Pte Ltd, against Chew Yin What, Lee Kok Swee and Yeung Chun Keung, who are the first, second and third defendants respectively. I further directed the Registrar to assess damages due to the plaintiff with the costs of such assessment to be reserved to the Registrar. Finally, I directed that in the event the third defendant paid the plaintiff's claim and costs when the amounts were assessed, the third defendant was at liberty to look to the other two defendants for 75% contribution of both sums, pursuant to the third defendant's notice claiming contribution from them.

2 As the third and first defendants have filed notices of appeal in Civil Appeals No. 44 of 2007 and No. 45 of 2007 respectively against my judgment, I shall now set out my grounds.

The facts

3 The plaintiff was incorporated on 9 May 1996 and was in the business of mixed construction activities and roofing as well as piling works. The company was ordered to be wound-up by an order of court dated 16 May 2003 in Companies Winding Up No. 30 of 2003 ("the Winding-up Petition") and Don Ho Mun-Tuke ("Don Ho") was appointed the liquidator. This suit was commenced by Don Ho on the plaintiff's behalf.

4 The first defendant was a director from 9 May 1996 to 12 April 2003, the second defendant was a director from 2 August 1996 to 12 April 2003, while the third defendant was a director from 27 May 1996 to 12 April 2003, of the plaintiff. At the material time the first and second defendants were also directors of the plaintiff's immediate holding company viz Wee Poh Construction Co. Pte Ltd

("Wee Poh"). I should add that the second defendant is the first defendant's brother-in-law by reason of being married to the first defendant's younger sister. The parent company of Wee Poh is Wee Poh Holdings Ltd ("the holding company") which is listed on the Stock Exchange of Singapore. The first defendant was also the executive or managing-director of the holding company at the material time. In his written testimony, the first defendant deposed that he was a representative of Wee Poh on the plaintiff's board of directors.

5 The plaintiff had two other directors besides the defendants at the time of its incorporation viz Chow Soong Cheng ("Chow") and Wong Tuck Wai ("Wong"). Chow and Wong managed the company until their resignations. Chow left the plaintiff's services on 28 February 2002. The first defendant deposed (in his affidavit of evidence-in-chief) that he took over the management of the plaintiff with the assistance of the second and third defendants after Chow and Wong left.

6 The plaintiff required various types of machinery for its activities in the construction industry. It therefore purchased *inter alia* the following five pieces of equipment at various times:

Date	Seller	Particulars of machine	Cost excluding GST
27.11.97	THL Foundation	IMT AF 18 hydraulic Equipment Pte Ltd (the first machine)	\$740,000
31.03.97	ditto	AF22 IMT hydraulic drilling rig (the second machine)	\$860,000
07.04.00	ditto	IMT AF-180 hydraulic drilling rig (the third machine)	\$774,000
11.04.00	ditto	AF 220 hydraulic drilling rig (the fourth machine)	\$955,000
07.07.00	Attas Machinery	R518 hydraulic rig with Kelly bar (the fifth machine)	\$750,000

(Hereinafter, all the machines will be referred to collectively as "the five machines").

7 The first machine was leased back from HSBC Capital (Asia) Pte Ltd ("HSBC") under a hire-purchase agreement dated 5 December 1997. The third, fourth and fifth machines were leased back from Caterpillar Credit Services Asia Pte Ltd ("Caterpillar") under hire-purchase agreements dated 30 June 2000, 25 October 2000 and 7 July 2000 respectively. The third, fourth and fifth machines were purchased for use by the plaintiff for the Changi Terminal 3 project which commenced sometime in 2000 but which the plaintiff did not complete.

8 In January 2002, the plaintiff was placed under a scheme of arrangement ("the Scheme") pursuant to s 227 of the Companies Act Cap 50 ("the Act") in Originating Summons No. 7 of 2001 wherein it agreed to pay its creditors in cash by four instalments an aggregate of 0.40¢ for every \$1.00. The plaintiff defaulted in payment of the second instalment due on 26 October 2002 with the result that the creditors' claims became repayable in full. The Scheme was terminated and was followed by the filing of the Winding-up Petition against the plaintiff on 27 January 2003 by a judgment creditor Will Marketing Pte Ltd (for an outstanding judgment debt of \$15,906.51). I should

add that in Originating Summons no. 1759 of 2003, Wee Poh was itself placed under a scheme of arrangement by an order of court dated 16 April 2004, pursuant to s 210 of the Companies Act Cap 50. One Yin Kum Choy ("Yin") was appointed the scheme administrator.

9 The first defendant claimed that the plaintiff was unable to meet the monthly instalment of \$15,636 due to HSBC for the first machine resulting in the termination of the hire-purchase agreement dated 5 December 1997. The plaintiff's board of directors then decided to sell the first machine to Wee Poh at \$380,000 (excluding 3% GST of \$11,400) on or about 2 May 2002, who thereafter on-sold it to a company called Lip Seng at the same price. The net book value of the first machine was then \$405,467. No valuation was obtained at the time of the sale to Wee Poh. The sale proceeds were paid to HSBC and to Wee Poh, not the plaintiff.

10 Similarly, the first defendant claimed that the plaintiff was unable to meet the instalments due to Caterpillar under the hire-purchase agreements dated 30 June and 25 October 2000 for the third and fourth machines respectively, in April/May 2002; it resulted in the machines being repossessed by Caterpillar. He added that the plaintiff's board of directors agreed with Caterpillar and Wee Poh that Wee Poh would take over hire of the two machines from Caterpillar thus releasing the plaintiff from its hire-purchase liabilities to Caterpillar. The two machines were then deployed and used by the plaintiff to complete its outstanding projects. He claimed that Wee Poh's actions helped to ease the plaintiff's cash flow. The net book values of the third and fourth machines were then \$625,650 and \$811,750.06 while Caterpillar was owed \$449,887.81 and \$626,995.90 respectively. The defendants did not account to the plaintiff for the difference between the net book values and the outstanding hire purchase sums. Subsequently, Wee Poh was unable to pay Caterpillar's hire-purchase instalments and Caterpillar terminated the hire-purchase agreement with Wee Poh on 27 June 2003. The two machines were on-sold to Zap Piling Pte Ltd ("Zap Piling") but Wee Poh did not account to the plaintiff for the sale proceeds.

11 As for the fifth machine, the first defendant stated the plaintiff was unable, in or about September or October 2002, to pay the monthly hire-purchase instalments due to Caterpillar under the hire purchase agreement dated 7 July 2000. The plaintiff's board of directors then agreed with Wee Poh and Caterpillar that Wee Poh would take over hire of the fifth machine from Caterpillar and relieve the plaintiff of its obligations to the latter. The fifth machine was sold in September 2002 by Wee Poh to Lim Sing Piling Pte Ltd ("Lim Sing") for \$494,400 (inclusive of 3% GST) and the proceeds were used to settle Caterpillar's outstanding claim owed by Wee Poh; Caterpillar refunded to Wee Poh the surplus of \$33,374.12. In addition, the defendants caused the plaintiff to issue a credit note dated 31 March 2003 to Wee Poh for \$494,400 cancelling the amount owed by Wee Poh to the plaintiff. At the material time, the net book value of the fifth machine was \$600,000. No valuation was conducted before the fifth machine was transferred to Wee Poh and on-sold to Lim Sing.

12 Although Chow testified that the second machine was never the subject of any hire-purchase agreement, the first defendant claimed that the plaintiff could not meet its hire-purchase instalments and the plaintiff's board of directors agreed to sell the second machine to Wee Poh for \$432,600, which sold it in turn to J Lim Piling Pte Ltd at the same consideration. The first defendant claimed that the sale proceeds were used to set-off the payments made by Wee Poh on the plaintiff's behalf. Such payments consisted of salaries, CPF payments, bank interest and expenses necessary to continue the operations of the plaintiff. Otherwise, the plaintiff could not have continued as a going concern and meet its financial obligations. Suffice it to say, the plaintiff never received any of the sale proceeds of the second machine.

13 On 22 September 2004, the first and second defendants were examined in court on the plaintiff's affairs and on their duties as directors in Originating Summons No. 115 of 2004 ("the OS"),

pursuant to an application taken out under s 285 of the Act against all three defendants by Don Ho (see *Liquidator of W&P Piling Pte Ltd v Chew Yin What & Others* [2004] 3 SLR 164). The application against the third defendant was dismissed. The first and second defendants were ordered to and did file, affidavits on 8 October 2004 to answer on oath the questions put to them by the liquidator.

The pleadings

14 Relying on the evidence and/or admissions adduced from the first defendant in the OS, Don Ho initiated this suit on the plaintiff's behalf against the three defendants. The statement of claim pleaded that the three defendants were the directing minds of the plaintiff and were in control and management of the plaintiff. As directors of the plaintiff, they each owed fiduciary duties at law and under s 157 of the Companies Act Cap 50 revised 2006 edition ("the Act") including *inter alia*, the following:

- (a) a duty to act *bona fide* in the interests of the plaintiff;
- (b) a duty to act for the proper purposes of the plaintiff in relation to the plaintiff's affairs.

15 The statement of claim alleged that the defendants breached their fiduciary duties to the plaintiff and placed themselves in a position where their interests conflicted with the interests of the plaintiff, when the defendants sold the five machines in [6] and failed to account to the plaintiff for the sale proceeds.

16 The plaintiff alleged that the auditors of the company had qualified the accounts of the plaintiff for the financial year ending 30 June 2002, which accounts clearly showed that the plaintiff's then current liabilities exceeded its assets by \$15,735,685. While the plaintiff was owed \$3,966,001 in trade receivables, it owed \$12,978,911 in trade payables. When the purported transfers of the five machines took place, the plaintiff was already insolvent in law as the plaintiff's net liabilities exceeded its net assets and it had entered into the Scheme with its creditors in January 2002.

17 Despite knowing of the plaintiff's insolvency, the plaintiff alleged that the defendants caused and/or allowed the plaintiff to continue to trade and/or to incur losses by cancelling debts owed to the plaintiff by Wee Poh and transferring the five machines to Wee Poh without consideration.

18 Arising from the various breaches of the defendants set out in the statement of claim, the plaintiff claimed five sums totalling \$1,678,916.35 from the defendants.

19 The first and second defendants filed a joint defence which essentially repeated what has been set out earlier in [9] to [12]. They disputed the plaintiff's allegation that the company was insolvent at the time the five machines were transferred to Wee Poh, and contended that the scheme administrator of the scheme of arrangement had knowledge and/or ought to have knowledge of the transactions as payment was made by Wee Poh on the plaintiff's behalf to complete projects which enabled the plaintiff to recover more than \$1m subsequently. The two defendants denied they had breached their fiduciary duties to the plaintiff and denied the sums claimed against them by the company. They further claimed that Wee Poh was the guarantor of the first, third, fourth and fifth machines under the hire-purchase agreement with Caterpillar.

20 The third defendant filed a separate defence. On the same day, he instituted third party proceedings against the first and second defendants pursuant to O 16 of the Rules of Court revised 2006 edition. He followed up by filing a statement of claim against the two defendants.

21 In the defence which he filed, the third defendant disputed the plaintiff's allegation that he was one of the directing minds, was in control and management of the plaintiff and that he had breached his fiduciary duties as a director. He averred that that he was only an employee of the plaintiff and he was by training a professional engineer in civil engineering and became a nominee director of the plaintiff at the request of the first defendant. The third defendant contended that he had no personal interest in the plaintiff and/or Wee Poh and took no part in any executive or management decisions of the plaintiff as he attended to day-to-day technical matters and issues (if any) of the holding company and its subsidiaries including the plaintiff and Wee Poh. He averred that he had never been notified nor was he invited to attend any directors' meetings of the plaintiff. The plaintiff had five directors and the third defendant together with the first and second defendants were nominees of the holding company who was the third defendant's employer. The third defendant averred he had sued the holding company (in Suit No. 1206 of 2003) for wrongfully repudiating his service contract (dated 14 November 1996) on 3 November 2003.

22 The third defendant averred he had no knowledge of the sale of any of the five machines. He pointed out that the plaintiff's application against him in the OS was dismissed with costs. The third defendant did not admit that the plaintiff had suffered the loss and damage alleged and if it did, he contended that it was not caused by him. He asserted that the plaintiff's action against him was an abuse of process. The third defendant pleaded that VK Rajah JC (as he then was) had dismissed the OS against him.

23 In the statement of claim he filed against the first and second defendants, the third defendant claimed an indemnity or contribution to the extent claimed by the plaintiff against the third defendant.

24 In their defence to the third defendant's third party claim, the first and second defendants alleged that his claim ought to be against the plaintiff, the holding company and/or Wee Poh and they reserved their rights to strike out his action against them. The first and second defendants put the third defendant to strict proof of his contention that they had caused loss and damage to the plaintiff without the third defendant's knowledge and consent.

The evidence

25 The trial before me was confined to liability as I directed that damages (should the plaintiff succeed) would be assessed by the Registrar at a later date. Hence, I only awarded interlocutory judgment to the plaintiff at the conclusion of the trial.

(a) the plaintiff's case

26 Apart from Don Ho (PW1), the plaintiff's only other witness was Chow. Don Ho's testimony was essentially related to his difficulties in recovering documents of the plaintiff from its previous accounting staff subsequent to his appointment as liquidator and to the evidence he obtained pursuant to proceedings in the OS. Don Ho was not a witness of fact as he came into the picture post the relevant events. It would not therefore be necessary to consider Don Ho's evidence in any detail as it was his inspection of the plaintiff's documents that prompted him to institute proceedings against the defendants, first in the OS and then in this suit. Don Ho testified he had also attempted (albeit unsuccessfully) to elicit more information from Yin (Wee Poh's scheme administrator) on the status of the running account between the plaintiff and Wee Poh alleged by the first defendant.

27 Chow (PW2) was a witness of fact. He did not testify voluntarily for the plaintiff but was subpoenaed (at his request) to do so. Chow explained that he resigned as a director of the plaintiff in February 2002 as he was a minority shareholder and when the Scheme came into effect earlier, he

could no longer make decisions for the plaintiff. Chow clarified that the letter of termination dated 1 March 2003 from the plaintiff which seemingly contradicted his evidence that he resigned was issued at his request.

28 Chow disputed the defence of the first and second defendants where they alleged that Wee Poh was the guarantor of the plaintiff for the hire-purchase agreement. He pointed out that corporate guarantees for machines bought by the plaintiff on hire-purchase financing were always given by the holding company, not by Wee Poh. His evidence was subsequently corroborated by Caterpillar's representative Tan Teck Soon.

29 Chow's written testimony alleged that the defendants caused Wee Poh to tender for the Singapore Sports School complex which it secured. Although the project was not subcontracted out to the plaintiff, Chow alleged (because he saw) that Wee Poh used the plaintiff's third and fourth machines to carry out the work on site but without paying rent to the plaintiff. Chow also alleged that the defendants caused Wee Poh to take over the plaintiff's other machines to complete the Sengkang flyover, the Braddell flyover and the Bukit Timah flyover projects without paying rent to the plaintiff. Cross-examined by counsel for the first/second defendants, he acknowledged he would not know if the two parties had any subcontract arrangements.

30 Besides the defendants, Chow revealed that he and Wong were also instrumental in initiating the Scheme for the plaintiff, due to the company's then cash flow problems.

31 Chow revealed there were management agreements between the plaintiff and Wee Poh, which required the plaintiff to pay management fees to Wee Poh. In the course of the first defendant's cross-examination, it was drawn to the court's attention that the management fees of \$8,000 in 1996 had ballooned to \$45,750 per month in 2002, an increase of more than 571%, of which the explanation from the first defendant was wholly unsatisfactory and even less convincing. The first defendant claimed that the increase in management fees went to pay salaries, wages, hire-purchase instalments, bank interest, raw materials and related expenses on the plaintiff's behalf. However, this testimony directly contradicted the first defendant's own affidavit evidence (see para 6) where he deposed that at the time of the Scheme (January 2002), the plaintiff lost a large number of employees with the result that the plaintiff was unable to complete its outstanding projects. Moreover (see N/E248) the court pointed out that the first defendant had not produced any evidence that supported his claim that Wee Poh advanced or made miscellaneous payments on the plaintiff's behalf.

32 Chow testified that the plaintiff was required to report regularly to Wee Poh (to the first defendant in particular) on the plaintiff's projects, progress and projected profits at monthly meetings which he and Wong attended. In the course of Chow's testimony, it was revealed that because of the termination of three subcontracts of the plaintiff by Wee Poh, the plaintiff's claims were adjudicated and the plaintiff was awarded \$1,102,000 ("the adjudicated sum") in January 2002. Although the first defendant claimed Wee Poh paid the adjudicated sum, there was no evidence to substantiate his statement. Indeed, his testimony contradicted a letter he had written to Don Ho on Wee Poh's behalf on 27 June 2003 in response to Don Ho's demand for payment of the adjudicated sum. I shall revert to the first defendant's letter later at [44].

(b) the defendants' case

33 I start by reviewing the evidence of the first defendant (DW1). It was obvious from the first defendant's testimony adduced during cross-examination that he paid scant regard to his fiduciary duties, both at common law and under statute, as a director of the plaintiff. From his conduct, it was apparent that the first defendant thought he had a *carte blanche* as a director to do as he pleased

because he controlled the holding company, Wee Poh and the plaintiff. After the third defendant's resignation as a director, the first defendant appointed his brother Chew Aik Khoon and one Phang Chu Mau ("Phang") to take over as operations director.

34 In the course of cross-examination, the first defendant admitted that even though the board of directors purportedly authorised/approved the sales of the five machines, no resolutions were passed for the sales, no valuations were carried out nor was the relevant hire-purchase documentation shown to the board.

35 I should add that the sale of the first machine was approved by the first and second defendants only as no other directors of the plaintiff attended the board meeting in May 2002 when the sale was approved. As for the third and fourth machines, Zap Piling's payments to Wee Poh were never received by the plaintiff.

36 Questioned on the reasons for Wee Poh's failure to account to the plaintiff for the sale proceeds of the five machines, the first defendant either prevaricated or gave evasive and/or patently untrue answers or answers which contradicted documents produced in the court.

37 I will now highlight certain aspects of the first defendant's testimony that prompted me to arrive at my poor assessment of his evidence. In the course of cross-examination, counsel for the plaintiff had referred the first defendant to the Scheme (see [8]) (of which the first defendant admitted he was the chief architect). In recommending the Scheme to its creditors as the plaintiff's director, the first defendant gave the following explanatory statement (see 1DB42) in the proposal form dated 31 January 2002 ("the proposal"):

4.1.2 The business of W&P is viable. However, the Company is presently facing cash flow difficulties because of a slow down in the construction industry in Singapore. Consequently, the Company has suffered, in tandem with other businesses in the construction industry, a decline in business. The decline in the volume of construction projects and work in Singapore amidst the global and regional economic slowdown has led to financial difficulties for W&P:

(a) Unrealistically low tender prices have been prevalent in the building and construction industries since the regional economic crisis of 1997/8...This has resulted in very low profit margins for building contractors.

(b) Notwithstanding a reduced volume of works, fixed overheads could not be cut within a short period, giving rise to under-recovery of costs and operating losses.

(c) Without a high volume of work, W&P is not utilising its resources as efficiently as it could. It has a high capital usage in terms of equipment, which leads to high financing costs, primarily through the hire purchase of equipment.

(d) Certifications for work done in respect of progress and penultimate payments, variation orders and retention for various projects have also been low compared to the claims submitted by W&P. In addition, receivables/collections from trade debtors and/or monies due and payable to W&P has slowed down. This affects the Company's ability to pay its creditors.

38 Under para 7.3 of the proposal it was stated that Wee Poh owed the plaintiff \$807,825 whilst under para 7.4, it was said that the plaintiff owed the holding company \$389,773.29.

39 Under para 5.4 of the proposal, it was stated that the proposed payments to the plaintiff's

creditors would be financed by the Wee Poh group and it was envisaged that the holding company would inject funds into the plaintiff for the purpose of meeting the company's obligations under the Scheme. However, as things turned out, Wee Poh and the holding company failed to keep the promise to bail out the plaintiff. Neither did Wee Poh pay its debt of \$807,825 to the plaintiff which receipt would have greatly assisted to ease the plaintiff's cash flow. Instead, the actions of the defendants as the plaintiff's directors (particularly on the part of the first defendant) caused the plaintiff to be bled dry financially, by Wee Poh's conduct of taking over and selling off the five machines without accounting to the plaintiff for either the gross or the net sale proceeds.

40 In the case of the second machine, as it was never the subject of hire-purchase financing, the pleaded defence and closing submissions of the first and second defendants (see [12]) were clearly untenable. The first defendant was obviously lying, both in his written and in his oral testimony when he contended that the transfer and subsequent sale of the second machine to J Lim Piling Pte Ltd for the sum of \$432,600 was done because the plaintiff could not service its hire purchase instalments. How could it be said (as their counsel submitted) that the first and second defendant's action was done in good faith and they had acted honestly in the best interests of the plaintiff?

41 It bears mentioning at this juncture that when he was questioned by the court (see [31]) on his lack of documentation to support various aspects of his testimony, the first defendant's equally unconvincing explanation was that as he had resigned from the plaintiff's directorship (on 12 April 2003), he had no access to the company's documents. The first defendant even called a director, one Aw Keng Seng ("Aw") from Wee Poh to support this contention.

42 However, counsel for the plaintiff drew the court's attention to some exchange of correspondence between the first defendant and Don Ho subsequent to 12 April 2003 (see 2AB93-106) which rebutted the first defendant's excuse that he did not have the documentation to support his testimony.

43 To elaborate, in a letter dated 26 May 2003 to Wee Poh, Don Ho had stated that the plaintiff's records showed that Wee Poh owed the plaintiff \$964,457.69 and he requested payment of the amount. In his reply dated 5 June 2003 on behalf of Wee Poh, the first defendant pointed out that the sum of \$964,457.69 was incorrect, asserting that according to Wee Poh's records, the sum owed to the plaintiff was only \$36,970.95; the first defendant attached a schedule to his reply showing sums which Wee Poh had purportedly set off against an original sum owed to the plaintiff of \$1,519,044.00.

44 Don Ho had similarly written to Wee Poh on 11 June 2003 demanding the adjudicated sum on the plaintiff's behalf (see [32]). The demand drew a response dated 27 June 2003 from Wee Poh again signed by the first defendant, referring to Wee Poh's earlier letter dated 5 June 2003 and the schedule enclosed therewith. The first defendant asserted that the adjudicated sum had already been included in the original sum owed to the plaintiff of \$1,519,044.00 before set-offs.

45 Don Ho responded to Wee Poh's letter dated 27 June 2003 on 8 July 2003 with a request for invoices to substantiate the net balance of \$36,970.95 supposedly owed to the plaintiff. He also requested payment of the said balance on a without prejudice basis. No payment or response was received from Wee Poh. In fact, Don Ho's further letter to Wee Poh dated 29 September 2003 pointed out that the adjudicated sum had not been taken into account and/or reflected in the books of the plaintiff; Don Ho enclosed accounting documents as of 30 June 2002 to support his statement. Don Ho repeated his request for payment of the sum of \$36,970.95 admitted by Wee Poh as being owed to the plaintiff. There was no reply or payment received from Wee Poh.

46 I would add that relying on the plaintiff's statement of accounts as of 30 June 2002, Don Ho had submitted proofs of debt for \$36,970.95 and \$494,400 to Yin (the scheme administrator of Wee Poh) but the same were rejected. It was pursuant to an order of court obtained in Originating Summons No. 1759 of 2003 by Don Ho (on 21 March 2005) that Yin was ordered to admit the plaintiff's proof of debt of \$36,970.95 plus another sum of \$128,374.12 and that the plaintiff was to be allowed to participate in Wee Poh's scheme for such sums. The plaintiff was given leave to file a further proof of debt for a sum not exceeding \$1,102,000 (presumably the adjudicated sum) less the sum of \$36,970.95 provided the proof of debt was filed on or before 4 April 2005.

47 Paragraphs [42] to [43] showed that the first defendant was able to respond to Don Ho's letters comprehensively despite having resigned his directorship from the plaintiff earlier while it was clear from [44] that the first defendant was untruthful in claiming that Wee Poh had paid the plaintiff the adjudicated sum whether directly or by way of set-off. It was also obvious that the first defendant had fabricated the purported credit note of \$494,400 as Don Ho found out that Yin did not know of such a credit note when Don Ho lodged a proof of debt for the amount with Yin. I noted (from Aw's written testimony) that the first defendant only approached Aw (DW3) in September/October 2006 to locate documents relating to transactions between Wee Poh and the plaintiff. Although Aw was only appointed a director of Wee Poh on 3 January 2005, he deposed in para 7 of his affidavit that the statement of accounts as of 30 June 2003 between the two companies was true and correct. Not surprisingly, this assertion was challenged by the plaintiff's counsel during Aw's cross-examination and resulted in Aw's admission that he neither did nor checked, the collation of documents for preparation of the running account between the plaintiff and Wee Poh. Aw eventually retracted para 7 of his affidavit. Aw was obviously clueless about the documents exhibited in his affidavit as he did not even realise that irrelevant documents (relating to equipment insurance by China Insurance Company Limited) had been included.

48 As for the testimony of the second defendant, I paid scant regard to either his written or oral testimony. In his affidavit of evidence-in-chief, the second defendant was content to rely on the first defendant's evidence, deposing in his para 5 that he confirmed paras 4 to 29 of the first defendant's affidavit of evidence-in-chief. Despite reservations by the court and by counsel for the plaintiff, the second defendant chose to maintain the stand taken in para 5 of his affidavit, even after he was given a short adjournment to confer with his counsel and to reconsider his position.

49 During cross-examination by counsel for the plaintiff and the third defendant, it was obvious that the second defendant had little knowledge of happenings in the plaintiff and what transpired at meetings he attended of the plaintiff; he apparently left all decision-making to his brother-in-law the first defendant.

50 My view of the second defendant's evidence would equally apply to the testimony of Phang Chu Mau (see [33]) ("Phang") who similarly deposed in his affidavit of evidence-in-chief that he confirmed paras 4 to 28 of the first defendant's affidavit evidence. Phang (DW5) confirmed he was involved in some negotiations with the hire-purchase companies (which he did not identify) for the machines.

51 Phang revealed he procured Zap Piling as the buyer for the third and fourth machines and Lim Sing Piling as the buyer for the fifth machine before Caterpillar took steps to repossess the machines. The sales were done with Caterpillar's approval. Despite having been actively involved in the sale of the machines, Phang claimed (under cross-examination) that he could not remember the details as selling the machines was outside the scope of his duties as the plaintiff's operations manager. In para 8 of his affidavit, Phang had deposed that Wee Poh allowed the plaintiff to use some of the machines (the rigs) to complete the plaintiff's projects without charge. Questioned by the court on his para 8 which assumed that Wee Poh owned the machines whereas the second machine (which he

admitted) was not the subject of any hire-purchase agreement, Phang's memory failed him altogether; he could not remember any discussion *vis a vis* the sale to Wee Poh. It was clear that Phang took his instructions not from the board of directors as he claimed but from the first defendant. It was plain too that he did not know who actually owned the five machines. I found Phang to be an unreliable witness.

52 Another witness called by the first defendant to bolster his defence was Tan Teck Soon ("Tan") who has been the credit manager of Caterpillar since January 2001. Tan (DW4) was involved in the sale of the third, fourth and fifth machines.

53 Tan's affidavit evidence was singularly lacking in particulars. All that he said of the third and fourth machines was: "On or about April/May 2002, W& P Piling was unable to meet the monthly instalment payments and the 2 rigs were repossessed by Caterpillar Credit Services Asia Pte Ltd". Similarly, in regard to the fifth machine, Tan deposed: "Sometime on or about September/October 2002, W& P Piling was unable to meet the monthly instalment payments and the Rig was repossessed by Caterpillar Credit Services Asia Pte Ltd". Tan concluded his affidavit with the sentence "Subsequently, Wee Poh Construction Co (Pte) Ltd was unable to pay the monthly instalments and the 3 Rigs were sold off".

54 Figures were also conspicuously absent from Tan's affidavit. Yet throughout his testimony, Tan repeatedly asserted that the plaintiff owed more to Caterpillar than the value of the machines. Questioned by the court and when cross-examined on this assertion, Tan admitted he had no numbers and/or valuations to corroborate his statement. Neither could he produce any evidence that proved Caterpillar had indeed obtained the plaintiff's consent before the sale of the third, fourth and fifth machines. His lame excuse was that he relied on his customer service representative's confirmation. Tan could also offer no explanation for Caterpillar's omission either to afford the plaintiff an opportunity to sell the fifth machine itself or to have Caterpillar dispose of the same instead of Wee Poh doing so. Tan's testimony revealed that Caterpillar failed to account to the plaintiff for the balance sale proceeds of the fifth machine, after Caterpillar had been paid the outstanding hire instalments therefrom. He admitted that Caterpillar used the balance sale proceeds to set-off arrears owed to Caterpillar by Wee Poh on other hire-purchase agreements.

55 I said as much to Tan (at N/E 351) in court and repeat here my observation that Tan was a defensive witness whose primary motive was to justify his company's actions. It was obvious that he paid lip service to the terms of the hire-purchase agreements between the plaintiff and Caterpillar as he did not adhere to the procedures stipulated therein for forced sale of machines on which the hirer had defaulted on hire-purchase instalments. He chose to deal with Phang mainly if not exclusively, on the disposal of the plaintiff's three machines and treated the plaintiff and Wee Poh as one and the same entity. In the process, Caterpillar breached its duties as owner of the machines to the plaintiff as its hirer. I say this because cl 2.4 of the Master Hire Purchase Agreement dated 30 June 2000 ("MHPA") made between the plaintiff and Caterpillar and which applied to all hire-purchase arrangements between them states:

Save as otherwise provided in this MHPA each Hire Purchase Contract shall with the terms of this MHPA be a separate contract for the hiring of the equipment therein described, without prejudice to the generality of the foregoing, sums payable pursuant to or in respect of any Hire Purchase Contract shall be calculated assessed and paid independently of and without prejudice to the generality of the foregoing, sums payable pursuant to or in respect of any Hire Purchase Contract shall be calculated assessed and paid independently of and without regard to any other Hire Purchase Contracts.

Consequently, in relation to the third, fourth and fifth machines, Caterpillar could not take into consideration other hire-purchase contracts made with the plaintiff let alone hire-purchase agreements made between *Caterpillar* and *Wee Poh*.

56 I turn next to the testimony of the third defendant (DW6). In terms of education and qualifications, the third defendant was far superior to either of the other two defendants. The third defendant holds a Bachelor of Science degree in civil engineering from Aberdeen University and has been registered as a professional engineer with the Singapore Board of Engineers since 1988.

57 The third defendant's written and oral testimony was consistent throughout – he did not participate in nor was he privy to the decision of the plaintiff's board of directors to sell the five machines; he was only a nominee director of the plaintiff. However, he did not deny attending meetings of the board of directors where such decisions were taken. The third defendant explained that his role was to provide technical support for the company. He claimed there were no *discussions* on the five machines at the "routine" weekly meetings he attended at Wee Poh's office when projects under his charge were discussed. The third defendant testified that he became aware of the sale of the five machines when Don Ho came into the picture and questioned him on the plaintiff's missing assets.

58 The *gravamen* of the third defendant's case (which he pleaded in his defence at para 5) was that Don Ho's application against him in the OS had been dismissed. The third defendant relied on VK Rajah JC's judgment in that respect in both his pleadings and in his affidavit of evidence in chief. In particular, he cited the following extract from that judgment where (after allowing Don Ho's application against the first and second defendants) the judge said (at [42]):

The third [defendant] was in an altogether different position. It was abundantly clear to me that he had fully cooperated with the liquidator to the best of his ability from the outset. His contract with the holding company was terminated on grounds that were entirely unconnected with the company's insolvency. Indeed, he had himself commenced proceedings against the holding company. The applicant had adduced no evidence of complicity tarnishing his position *qua* director.. The application, in so far as it relates to the third [defendant], is wholly misconceived and axiomatically oppressive. The applicant was plainly overzealous in initiating the application against the third [defendant], making this a case of "overkill".

59 The third defendant's quotation from the above judgment had conveniently omitted the last sentence of [42] where the judge stated:

The issue of his general responsibilities *qua* director was a separate issue that did not arise in the application.

60 Phang however had testified that the third defendant was involved in the management of both the plaintiff and Wee Poh and the third defendant was present at meetings which Phang attended. The third defendant also did not deny he signed the annual financial statements/accounts of the plaintiff as well as the board resolutions. However, he said that the documents were passed to him by the financial controller and he considered resolutions "standard" documents. In the course of cross-examination by counsel for the plaintiff however, the third defendant conceded that his signing of board resolutions would amount to participation in the management of the plaintiff.

61 The third defendant said he was aware that the plaintiff was in financial difficulties towards the end of 2001. He further agreed that after the resignations of Wong and Chow as directors in February 2002, he should have been more vigilant in the performance of his duties as a director. The third

defendant repeated that he did not assume a more proactive role in the plaintiff because his role was to provide technical support for Wee Poh's on-going projects. He was neither in charge of nor was he the site engineer for, any of the plaintiff's projects. Neither did the plaintiff's engineers report to him in his capacity as the project director. The first defendant had also told the third defendant that the plaintiff may be wound up and the first defendant would arrange to transfer out the third defendant's directorship in the plaintiff. He had also relied on other professionals including the Scheme administrator, to resolve the company's financial problems.

62 The third defendant explained that his service contract with the holding company precluded him from resigning as a director for ten years. This explanation was inaccurate. The third defendant's (undated) appointment agreement as a director was with Wee Poh and not the plaintiff. Clause 6 therein stated that in consideration of his purchase of 5% of the shares in Wee Poh, the third defendant would not be allowed to resign from his position for ten years. I noted from the document that payment of the third defendant's monthly salary of \$16,000 was apportioned between Wee Poh (\$6,000), W& P Management Services Pte Ltd (\$4,000) and the plaintiff (\$6,000).

63 Counsel for the plaintiff had drawn the third defendant's attention to a board resolution of the plaintiff dated 5 September 1996 (at AB253-254) which showed that the third defendant received \$9,000 director's fees for the year ended 30 June 1996. The third defendant explained that the payment was only for 1996. He was unsure whether he received director's fees for other years.

The findings

64 On the evidence adduced in court, I had no hesitation in finding that all three defendants had breached their fiduciary duties as directors of the plaintiff at law. Further, they had also breached their statutory duties under s 157 of the Act. That section states:

(1) A director shall at all times act honestly and with reasonable diligence in the discharge of the duties of his office.

65 As stated earlier at [32], I found that the first defendant paid little heed to his duties and responsibilities as a director even though he was a director of a public listed company (the holding company).

66 The latest pronouncement on the fiduciary and statutory duties of directors is to be found in the Court of Appeal decision in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR 597 ("*Townsing's case*"). The decision of the appellate court was released shortly before the commencement of this trial and consequently was not referred to by the parties. In that case, Chan Sek Keong CJ, held at [59] that the duty of honesty of a director and his duty to act bona fide was a composite obligation. The duty to act honestly under s 157 of the Act was the statutory equivalent of the duty to act bona fide which exists at common law (see the plaintiff's authorities *Kea Holdings Pte Ltd v Gan Boon Hock* [2003] 3 SLR129 and *Golden Village Multiplex Pte Ltd v Phoon Chiong Kit* [2006] 2 SLR307).

67 *Townsing's case* is particularly relevant to this suit because the appellant there was similarly a director of a holding company and its wholly owned subsidiary. Chan Sek Keong CJ held that the appellant fell foul of the "no conflict rule" *vis a vis* his status as a director of the parent and subsidiary companies, citing passages from some English cases to one of which I now turn my attention.

68 In *Re Dominion International Group plc (No 2)* [1996] 1 BCLC 572, Knox J had to decide whether

the acts of an individual (L) *qua* a director of a subsidiary (DIFE) were relevant to an application to disqualify him (by the Secretary of State) based on his conduct as a director of the parent company (DIG). It was alleged that L had caused DIG to pay an excessive price for certain shares it acquired and that he had received consultancy fees from DIG which were not properly disclosed or authorised.

69 Knox J held (at p 634):

....In practical terms, this means the court has to consider L's conduct as a director of DIG to determine whether it makes him unfit to be concerned in the management of a company. The question is whether that justifies the process of identifying in what capacity L did the acts complained of, and if it is found that they were done primarily as a director of DIFE, ignoring them altogether in assessing whether L has been shown to be unfit to be concerned in the management of a company.... But that presupposes that acts of L can be put into watertight compartments as acts by a director of a particular company even though the human being in question was at the material time a director both of the subsidiary whose assets are being dealt with and of the holding company of that particular subsidiary.

I do not accept that it is right to categorise activities as necessarily belonging exclusively to the directorship of the company whose asset is being dealt with. I do accept that there may very well be many cases where that will be the correct analysis of the activities of a director of a subsidiary company even if he is also a director of the subsidiary company's holding company. But equally where an individual who is a director of both takes steps which seriously affect the interests of both companies, it strikes me as artificial to ignore his duties as a director of one of the two companies and attribute his actions solely to the directorship of the company whose asset is dealt with. Put baldly, the question is whether a director of a subsidiary company, who is also a director of its holding company, is in breach of his fiduciary duty to the holding company, if he improperly gets rid of an asset of significant value to the subsidiary. It is clear that that conduct inflicts harm on the holding company because it reduces the value of its investment in the subsidiary. In my view a director in such a position is in breach of his duty to both the holding company and the subsidiary company.

70 In our case, it was the reverse – it was not a question of the immediate holding company of the plaintiff *viz* Wee Poh suffering loss as a result of the defendants' conduct. The defendants' act of transferring the plaintiff's five machines to Wee Poh and the subsequent sales directly and adversely affected, the plaintiff's financial position, and this was made worse by the issuance of a false credit note (*supra* [11]).

71 In summary, the undisputed evidence adduced at the trial showed that the defendants:

- (a) transferred the five machines to Wee Poh who sold off the machines;
- (b) no valuation of any of the machines was done before their disposal;
- (c) no tenders were called to ascertain whether higher sale prices could have been achieved than those paid by the buyers concerned; and
- (d) the plaintiff did not receive payment from any of the sales.

72 It was to be noted that when the transfers and sales took place, the plaintiff was insolvent, and this was exemplified by the fact that the Scheme was in place in December 2001. Based on Wee Poh's own documents, the plaintiff was owed \$1,519,044 by Wee Poh as of 30 June 2002. Instead of

making Wee Poh repay the debt, the first defendant with the concurrence of the second defendant, caused the plaintiff's financial position/cashflow to worsen further by transferring the five machines to Wee Poh which then sold off the machines and pocketed the proceeds.

73 I was of the view that the plaintiff was insolvent by virtue of the Scheme. Counsel for the plaintiff had submitted to which I agreed, that as the company was insolvent, the interests of the plaintiff's creditors became the dominant factor, see *Tong Tien See Construction Pte Ltd v Tong Tien See* [2002] 3 SLR 76 which relied in turn on *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. Put another way, when a company is insolvent or on the verge of insolvency but not otherwise, it is the creditors' interests that are paramount (*Gore-Brown on Companies* 45th edition at 15-13 Part IV).

74 Even if I am wrong in my view that the plaintiff was deemed to be insolvent by reason of the Scheme, it was an undisputed fact that the plaintiff's audited accounts as of 30 June 2002 (at AB162) showed that its accumulated losses were \$15,118.819, a figure which wiped out its entire issued capital of \$2,500,000. With a net shareholders' deficit of \$12,618.819, the plaintiff was undoubtedly insolvent. It is arguable (but not crucial to my findings) that the defendants directors had acted fraudulently under s 340(1) of the Act in disposing of the five machines when the plaintiff was insolvent.

75 Earlier at [31], I had observed that the first defendant could not substantiate his claim/defence that Wee Poh had advanced various and numerous sums to the plaintiff and that the set-off resulted in a much smaller sum (\$36,970.95) being owed than \$1,519,044. There was little doubt in my mind that Wee Poh's alleged schedule referred to by the 1st defendant at [43] showing the breakdown for the net sum owed of \$36,970.95 was a sham document, without basis or corroboration. In any case, Wee Poh did not even pay the admitted sum of \$36,970.95, necessitating the filing of a proof debt by Don Ho with Wee Poh's scheme administrator (see [46]).

76 In their closing submissions, the first and second defendants contended that what they did was in the best interests of the plaintiff and they asked to be excused under s 391(1) of the Act which reads:

If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

77 I was of the view that neither the first nor the second defendant could take advantage of the above section. Apart from citing s 391(1) of the Act, counsel for the first and second defendants made no reference to case-law on the ambit and scope of the section. Consequently, counsel overlooked the prerequisite for the section to operate. According to *Walter Woon on Company Law* (3rd edition at 333):

In order for relief under s 391 to be obtained three things must be shown:

(a) that the director acted honestly; (b) that he acted reasonably; and (c) that it is fair to excuse him having regard to all the circumstances of the case. *All three elements must be shown*. It is only after it has been shown that the director acted honestly and reasonably that the question of whether it is fair to excuse him arises. *It may not be fair in the circumstances to*

excuse the director even if he did act honestly and reasonably...(emphasis mine)

78 By no stretch of the imagination could it be said that what the two defendants did was honest and/or reasonable under s 157 of the Act. How could it be said that transferring out and/or disposing of, the five machines and paying the sale proceeds to the plaintiff's holding company was acting honestly and reasonably in the interests of the plaintiff? I found it galling that the first and second defendants had the audacity to ask for statutory relief when, together with the third defendant (albeit to a lesser degree), they deliberately ran the plaintiff into the ground against the plaintiff's own interests. This was not a case where it could be said that the first and second directors made *bona fide* commercial decisions (per VK Rajah JC in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162) but which decisions turned out to be against the company's interests.

79 As for the third defendant, I was mindful of his more limited role in the wrongful disposal of the plaintiff's machines. First, he took no part in the decision to sell the first machine [35]. Second, he was the technical/operations director of the plaintiff. However, those two factors could not exonerate the third defendant altogether as his counsel sought to do in his closing submissions.

80 The law makes no distinction between fiduciary duties owed by different categories of directors – a nominee director (as the third defendant described himself) owes the same duties to a company as any other director (per Stanley Burton J at [2] in *Globalink Telecommunications Limited v Wilmbury Limited* [2003] 1 BCLC 145).

81 It would also be apt to refer to *Kwee Seng Chio Peter v Biogenics Sdn Bhd* [2003] 2 SLR 482 where Belinda Ang JC (as she then was) observed at [14]:

...If a person allows himself to be a mere nominee of, and acts for, another person, without the exercise of his own discretion or volition, in utter disregard for his duties as a director of the company, that nominee director must be bound by the notice which the other person, for whom he acts, has of the nature of the transaction...

Contrary to his defence (see [21]), the third defendant admitted in the course of cross-examination (confirmed by Phang) that he did attend board meetings when the sales of the second to fifth machines were discussed (although he claimed he could not recall the discussions). It was also not the third defendant's pleaded case that he had delegated his functions as a director to his co-directors. Certainly, he did not inform Don Ho in the course of the OS that he had so delegated his responsibilities. The fact that the third defendant had made no personal gain arising out of the sale of the four machines transacted with his knowledge is no answer to a claim under s 157 of the Act.

82 Although it was not specifically pleaded, it was implicit in the third defendant's defence (para 6) that *res judicata* was the reason for his contention that this action was an abuse of process against him. My short answer to this defence is that earlier at [59], I had already noted that VK Rajah JC recognised that his dismissal of the OS against the third defendant was not a pronouncement on the third defendant's duties *qua* director.

83 I therefore found that the third defendant like the other defendants, had similarly breached his fiduciary duties to the plaintiff. He should and could have been more vigilant in how his co-directors dealt with the plaintiff's assets when he knew that the company was in financial difficulties. Alternatively, the third defendant should have refrained from participating in board decisions to sell four of the five machines. It is also no defence to a claim under s 157 of the Act for the third defendant to say that he left it to the Scheme's administrator or other professionals to resolve the plaintiff's financial problems. The Scheme had no relevance to his fiduciary duties. The third defendant

chose to turn a blind eye to what his co-directors did and he must accept the consequences of his actions.

84 However, recognising the fact that he was less blameworthy as compared with the first and second defendants, I held that the third defendant was entitled to 75% contribution from the other two defendants pursuant to his third party notice, once the third defendant had paid the plaintiff's claim and costs when the amounts were assessed.

Copyright © Government of Singapore.