Soh Chee Gee v Syn Tai Hung Trading Sdn Bhd [2019] 2 MLJ 379

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COURT OF APPEAL (PUTRAJAYA)

TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA

CIVIL APPEAL NO W-02(NCVC)(W)-196-01 OF 2017

25 October 2018

Case Summary

Damages — Quantum — Whether sum claimed for as loss not proven — High Court awarded amount company claimed as loss caused by its employee's breach of fiduciary duties — Whether loss unproven as trial court disallowed documentary evidence which could have proven amount of loss — Whether even if such documentary evidence had been allowed the evidence did not show the losses solely attributable to the defendant — Whether evidence showed that benefits derived by third parties dealing with the company caused loss amount and that the defendant himself had not personally gained from his actions or misappropriated company's funds

The appellant, a chartered accountant, was employed by the respondent as its chief executive officer ('CEO'). About four years after his appointment to that post, an internal audit carried out by the respondent showed that the appellant had been responsible for several irregularities in the respondent's business dealings with two other companies ('Cosmo' and 'Lotus') which had caused the respondent to suffer significant losses. The investigation resulted in a domestic inquiry which found the appellant guilty of various wrongdoings. The appellant was dismissed from employment. Inter alia, the respondent found that the appellant had: (a) unilaterally allowed Cosmo to raise its credit limit and extend its credit term twice in its trading transactions with the respondent which resulted in the respondent suffering serious cash-flow problems; (b) permitted Lotus to by-pass the respondent in delivering goods to Cosmo; and (c) become a cheque signatory for both Cosmo and Lotus. Both Cosmo and Lotus were eventually wound up on the ground of insolvency and their guarantors were declared bankrupts. The respondent sued the appellant for breach of his fiduciary duties as CEO which caused it to suffer a loss of RM16,389,788.71 which was the amount allegedly owed to it by Cosmo. The High Court allowed the claim and gave judgment for the said sum. The instant appeal was against that decision.

Held, affirming the High Court's finding that the appellant had breached his express and/or implied duties and/or fiduciary duties to the respondent but setting aside the award of RM16,389,788.71 to the respondent:

(1) While the trial judge was not plainly wrong in finding that the appellant as CEO had breached his fiduciary duties to the respondent as his employer, there was no legal basis to hold him liable for the totality of the losses suffered by the respondent. The claim for the damages was not established (see paras 65 & 67).

(2) This case was unlike those where an employee acting in breach of his fiduciary duties had appropriated the company's funds for himself. Several factors went into assessing the cause for the respondent's losses, particularly the role played by Cosmo and the benefit received by it. The respondent did not adduce any evidence to show that the appellant had profited or personally gained from the transactions with Cosmo and Lotus or that he had siphoned off monies paid by the respondent to Lotus or that he was in possession of monies belonging to the respondent which warranted the imposition of a 'constructive trust' against him requiring him to disgorge such profit in his possession. The party that directly benefitted from

the transactions was not the appellant but Cosmo and Lotus. Also, since the trial judge had disallowed the admission of source documents (invoices) to prove the respondent's claimed losses, the respondent could not have proven the said loss. The evidence showed that the respondent's revenue had increased between the years 2011 and 2012 after the appellant had approved the increase in credit term and credit limit to Cosmo. Therefore, the trial judge erred in directly attributing the losses claimed solely to the appellant (see paras 66-67, 69 & 71-72).

(3) The actions taken by the appellant clearly showed that he had made decisions which had benefitted Cosmo and Lotus but had exposed the respondent to a real risk of loss, which materialised when Cosmo and Lotus were wound up and the respondent was unable to recover the debt owed to it by Cosmo. Regardless of whether the appellant actually signed any cheques on behalf of Lotus and/or Cosmo, his position as their cheque signatory showed he had a close relationship with those two companies and the fact that he did not disclose that relationship to the respondent led to the inference that he was not impartial in carrying out his duties as CEO of the respondent (see paras 55-56).

Perayu, serorang akauntan bertauliah, telah diambil bekerja oleh responden sebagai ketua pegawai eksekutifnya ('CEO'). Kira-kira empat tahun selepas pelantikannya atas jawatan itu, audit dalaman yang dijalankan oleh responden menunjukkan bahawa perayu telah bertanggungjawab atas beberapa penyelewengan dalam urusan perniagaan responden dengan dua syarikat lain ('Cosmo' dan 'Lotus') yang menyebabkan responden mengalami kerugian besar. Siasatan itu mengakibatkan siasatan dalam negeri yang mendapati perayu bersalah atas berbagai kesalahan. Perayu diberhentikan daripada tugas. Antara lain, responden mendapati bahawa perayu telah: (a) secara *unilateral* membenarkan Cosmo untuk menaikkan had kreditnya dan melanjutkan tempoh kreditnya sebanyak dua kali dalam urus niaga dagangannya dengan responden yang mengakibatkan responden mengalami masalah aliran tunai yang serius; (b) membenarkan Lotus untuk mengelak responden dalam menyampaikan barang kepada Cosmo; dan (c) menjadi tandatangan penandatangan untuk kedua-dua Cosmo dan Lotus. Kedua-dua Cosmo dan Lotus akhirnya digulung disebabkan insolvensi dan penjamin mereka diisytiharkan bankrap. Responden menyaman perayu kerana melanggar duti fidusiarinya sebagai CEO yang menyebabkannya mengalami kerugian sebanyak RM16,389,788.71 yang merupakan jumlah yang didakwa oleh Cosmo. Mahkamah Tinggi membenarkan tuntutan itu dan memberikan penghakiman bagi jumlah tersebut. Rayuan ini adalah terhadap keputusan itu.

Diputuskan, mengesahkan keputusan Mahkamah Tinggi bahawa perayu telah melanggar duti tegas dan/atau tersirat dan/atau duti fidusiari kepada responden tetapi mengetepikan award RM16,389,788.71 kepada responden:

(1) Walaupun hakim perbicaraan tidak salah dalam mendapati bahawa perayu sebagai CEO telah melanggar duti fidusiarinya kepada responden sebagai majikannya, tiada asas undang-undang untuk memutuskan beliau bersalah untuk keseluruhan kerugian yang dialami oleh responden. Tuntutan bagi ganti rugi tidak dibuktikan (lihat perenggan 65 & 67).

(2) Kes ini tidak seperti yang berlaku di mana seseorang pekerja yang bertindak melanggar duti fidusiarinya telah memperuntukkan dana syarikat untuk diri sendiri. Beberapa faktor telah dinilai bagi punca kerugian responden, terutamanya peranan yang dimainkan oleh Cosmo dan faedah yang diterima olehnya. Responden tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa perayu telah mendapat keuntungan atau secara peribadi memperoleh dari transaksi dengan Cosmo dan Lotus atau bahawa beliau telah mengeluarkan wang yang dibayar oleh responden kepada Lotus atau bahawa beliau mempunyai wang yang dimiliki oleh responden yang menjamin pembebanan 'kepercayaan konstruktif' terhadapnya yang memerlukan beliau untuk menafikan keuntungan sedemikian dalam miliknya. Pihak yang mendapat faedah secara langsung daripada transaksi bukan perayu tetapi Cosmo dan Lotus. Selain itu, oleh kerana hakim perbicaraan tidak membenarkan penerimaan sumber dokumen (invois) untuk membuktikan kerugian yang dituntut oleh responden, responden tidak dapat membuktikan kerugian tersebut. Keterangan menunjukkan bahawa hasil responden telah meningkat antara tahun 2011 dan 2012 selepas perayu telah meluluskan kenaikan tempoh kredit dan had kredit kepada Cosmo. Oleh itu, hakim perbicaraan terkhilaf dengan secara langsung mengaitkan kerugian yang dituntut semata-mata kepada perayu (lihat perenggan 66-67, 69 & 71-72).

(3) Tindakan yang diambil oleh perayu jelas menunjukkan bahawa beliau telah membuat keputusan yang telah memberi faedah kepada Cosmo dan Lotus tetapi telah mendedahkan responden kepada risiko kerugian sebenar, yang berlaku ketika Cosmo dan Lotus digulung dan responden tidak dapat memulihkan

hutang yang terhutang oleh Cosmo. Tanpa menghiraukan sama ada perayu sebenarnya menandatangani sebarang cek bagi pihak Lotus dan/atau Cosmo, kedudukannya sebagai tandatangan penandatangan menunjukkan beliau mempunyai hubungan erat dengan dua syarikat itu dan hakikat bahawa beliau tidak mendedahkan hubungan kepada dengan responden membawa kepada kesimpulan bahawa beliau tidak berlaku adil dalam menjalankan tugasnya sebagai CEO responden (lihat perenggan 55-56).]

Notes

For cases on quantum, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 408-418.

Cases referred to

Bristol and West Building Society v Mothew [1988] Ch 1, CA (refd)

The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469; [2008] 1 LNS 100, FC (refd)

University of Nottingham v Fishel and Another [2000] ICR 1462, QBD (refd)

Legislation referred to

Companies Act 1965 s 132

Appeal from: Civil Suit No 22NCVC-483-09 of 2015 (High Court, Kuala Lumpur)

VK Raj (Sri Devi Nair and SP Devi with him) (P Kuppusamy & Co) for the appellant.
Jack Yow (Kwong Chiew Ee with him) (Rahmat Lim & Partners) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1]This is an appeal by Soh Chee Gee ('the defendant') against the decision of the High Court in allowing the claim against him filed by his former employer, Syn Tai Hung Trading Sdn Bhd ('the plaintiff') premised on the tort of breach of fiduciary duty in the course of the defendant's employment as the plaintiff's Chief Executive Officer ('CEO'). The plaintiff contended that the defendant's failure to adhere to the plaintiff's credit policy had caused loss to the plaintiff company. The High Court agreed with the plaintiff's submissions and awarded damages to the plaintiff.

[2]We dismissed the defendant's appeal and affirmed the finding of the High Court that the defendant had breached the fiduciary duty which he owed to the plaintiff company in his capacity as the CEO. However, we varied the decision of the High Court in that we disallowed the loss claimed in the sum of RM16m odd because we found that the plaintiff had not succeeded in proving the same. The defendant sought leave to appeal to the Federal Court. We therefore set out the reasons for our decision below.

[3]The salient facts as set out below are largely adopted from the statement of agreed facts and the submissions of both parties.

THE SALIENT FACTS

[4]The plaintiff is a company in the business of trading and distributing construction materials.

[5]The plaintiff is a wholly owned subsidiary of Petro-Pipe Industrial Corporation Sdn Bhd ('PPIC') which in turn is a subsidiary of Wah Seong Corporation Bhd ('WSC').

[6]The defendant was employed by the plaintiff on 16 November 2000. Eight years later, from 1 January 2008, the defendant was appointed an executive director in the plaintiff company. The use of the term executive director refers to his position as an employee and not as a member of the board of directors. This is evident from the letter entitled 'Promotion and Salary Adjustment' dated 15 December 2007.

[7]As of 1 January 2009, he was promoted and appointed to the post of CEO. On 3 March 2010 the defendant's post was rebranded 'Senior Vice President' but for all intents and purposes he functioned as the plaintiff's CEO. In his capacity as the CEO, he occupied a fiduciary position vis a vis the plaintiff throughout the course of his employment.

[8]As the CEO, the defendant's main responsibilities were to manage the plaintiff's daily operations and to ensure the continuous development of the plaintiff's business. The defendant also checked, supervised and approved the financial reports which were prepared by the Head of the plaintiff's Finance Department which would monitor, study and make recommendations pertaining to the plaintiff's financial status. In addition, the defendant would conduct a credit evaluation of the plaintiff's customers after the plaintiff's Credit Control Department had checked, studied and commented on customer applications for credit facilities.

[9]In or around April 2013, the plaintiff's internal audit exercise raised several issues including issues relating to transactions with Cosmo Painters Sdn Bhd ('Cosmo'). An independent investigative review was commenced which turned up information which suggested that the defendant may have acted against the plaintiff's interest. As a consequence, the plaintiff commenced disciplinary proceedings against, inter alia, the defendant. After a domestic inquiry into the defendant's alleged wrongdoings, the plaintiff dismissed the defendant from employment on 27 September 2013 (the sequence of events is set out in full in paras 23-28 below.) The plaintiff's case against the defendant is based on transactions with Lotus Paints Sdn Bhd ('Lotus') and Cosmo.

[10]Lotus is a company which supplies a product known as Lota Paints ('the product'). Cosmo is a customer of the plaintiff and it purchases the said product.

[11]Lotus and Cosmo are related entities. Their common shareholders are So Hwee Cheng (Rosalind) and So Chai Chueh. The former is a director of both Lotus and Cosmo while the latter is a director of Cosmo.

[12]The plaintiff company obtained the said product from Lotus and, acting as Lotus' agent, marketed and distributed the said product to Cosmo and other customers at a certain profit margin.

[13]Initially, Lotus granted the plaintiff a credit term of 30 days and the plaintiff granted the same term to Cosmo. In addition, the plaintiff imposed a credit limit of RM250,000 on Cosmo.

[14]On 14 January 2010, Cosmo submitted an application to the plaintiff to extend its credit term to 120 days.

[15]The defendant approved the extension of credit term for Cosmo to 120 days while the credit term granted by Lotus to the plaintiff remained at 30 days. This resulted in a 90 day time gap between the respective credit terms.

[16]In March or April 2010, Cosmo submitted an application to the plaintiff to raise its credit limit to RM1m.

[17]The defendant also approved Cosmo's application to increase its credit limit and the plaintiff contended this was done without any proper documentation or due diligence. This enabled Cosmo to place larger orders with the plaintiff. This also resulted in the reactivation of Cosmo's accounts which had previously been suspended pending settlement of its debts to the plaintiff.

[18]Subsequently, even when Cosmo exceeded the credit limit of RM1m, the defendant continued to approve sales to Cosmo.

[19]The said product was delivered directly from Lotus to Cosmo without going through the plaintiff. The plaintiff contended that it is unknown whether the said product was ever delivered from Lotus to Cosmo. This is because the defendant did not implement any system to verify the transactions.

[20]The payments which Cosmo were supposed to make to the plaintiff were set off against payments which the plaintiff was supposed to pay Lotus for the said product. The plaintiff contended that the time gap between the respective credit terms led to a Ponzi-like scheme whereby the plaintiff's monies were siphoned out to Lotus on the pretext of the commercial transactions between the plaintiff and Cosmo.

[21]Around October 2012, the plaintiff deposited four cheques from Cosmo amounting to the sum of RM1,784,250. All the cheques were dishonoured due to an insufficient balance in Cosmo's account. Since then, the plaintiff ceased all business transactions with Cosmo.

[22]From 2010-2013, the plaintiff had paid a total of RM10,536,040 to Lotus. When the transactions with Cosmo ceased in October 2012, there were no longer any invoices from Lotus to the plaintiff which could be used to offset the invoices from the plaintiff to Cosmo.

[23]In or around August 2013, the plaintiff's holding company's internal audit team discovered the irregularities in the transactions with Lotus and Cosmo. The plaintiff engaged PKF Covenants Sdn Bhd ('PKF Covenants') to conduct an independent investigative audit.

[24]On 20 August 2013, PKF Covenants searched the plaintiff's safes located in the Finance Department and the defendant's office. It discovered documents namely undated Board of Directors' resolutions from Lotus and Cosmo,

which named the defendant and one Chin Yoong Ngok (the plaintiff's managing director at the material time) as cheque signatories of those companies.

[25]In the meantime, the plaintiff issued a letter dated 2 September 2013 to the defendant to restrain the defendant from approving credit terms and executing contracts without prior consultation and written sanction from the Acting Chief Financial Officer and CEO of the Industrial Service Division for WSC (which is the ultimate parent company of the plaintiff, see para 5 above).

[26]On 13 September 2013, the plaintiff issued a notice of inquiry to the defendant informing him that a Board of Inquiry would be convened to consider the following allegations (reproduced below):

> 1. That you have acted negligently and/or in breach of your fiduciary duty in your handling of the transactions concerning Lotus Paints Sdn Bhd ('Lotus') and Cosmo Painters Sdn Bhd ('Cosmo'). Your acts and/or omissions in that regard have caused and/or contributed to the following:
>
> …
>
> 2. By acting as you had done above, you had failed to act in a forthright manner towards your immediate superiors and/or the Board of Directors in your disclosures to them. In that you had failed to render due and candid disclosures of the matters set out in para 1 above and material developments arising therefrom.
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> 3. You have failed at all material times to disclose that you had become a cheque signatory for Cosmo and Lotus. This undisclosed role that you had assumed raises serious questions against your independence and judgment and given the extent of your dealings with these parties and their principals which were likewise not disclosed to your superiors or the Board of Directors.

[27]The plaintiff carried out a domestic inquiry against the defendant on 19 and 20 September 2013. The domestic inquiry panel found the defendant guilty of all the above charges against him.

[28]The plaintiff sent the defendant a notice of dismissal on 27 September 2013 to dismiss him from employment with immediate effect.

[29]As at 29 October 2013, the amount owed by Cosmo to the plaintiff was RM16,389,788.71. Cosmo and Lotus were wound up in 2015 and their guarantors, So Hwee Cheng and So Chai Chueh, were made bankrupt in 2016. Therefore the plaintiff suffered that amount as irrecoverable losses.

[30]The plaintiff in a letter from the plaintiff's solicitors, namely The Chambers of R Sivagnanam dated 1 November 2013, requested the defendant to make a proposal to compensate the plaintiff for the losses caused by the

defendant's failings, to be submitted on or by 8 November 2013.

[31]In a letter dated 14 November 2013, the defendant replied through his solicitors Messrs P Kuppusamy & Co. He maintained that he was dismissed without just cause or excuse. He further asserted that before his dismissal, he was negotiating with Cosmo to recover the monies owing to the plaintiff and this was within the knowledge of the plaintiff. Therefore the defendant refused to make any proposal for compensation.

[32]The plaintiff filed this claim against the defendant to reclaim the losses it suffered as a result of the defendant's breach of fiduciary duties.

[33]The defendant counterclaimed for the losses he suffered when his employment was terminated by the plaintiff. However, the High Court struck out the defendant's counterclaim on 17 February 2016.

[34]The plaintiff submitted that the defendant had 13 years of experience in the plaintiff's group of companies before he was dismissed. In addition, the defendant was a qualified chartered accountant. The plaintiff relied on the defendant's vast knowledge and experience to assert that the court should hold the defendant to a high standard as the plaintiff's CEO.

[35]In his defence, the defendant asserted that he had complied with the plaintiff's credit policy in his dealings with Cosmo as at the material time, there was no limit on what he could approve (subsequently, the plaintiff imposed a limit upon him). Further, the defendant claimed to have relied on the work done by his subordinates, ie the sales personnel, the credit manager and the general manager, to check the documents submitted by Cosmo before he approved Cosmo's applications.

[36]The defendant attempted to deflect blame by submitting that both Cosmo and Lotus were recommended to the plaintiff by the plaintiff's General Manager, Marvis Yeoh, while the admission of Cosmo and Lotus as customer and supplier respectively was approved by the plaintiff's former CEO, one Chin Yung Ngok. Further, he claimed that it was the general manager supported by the credit manager, Hue Teck (PW3), who recommended that the credit term and credit limit could be increased. They did so based on the fact that Cosmo had secured big contracts and two of Cosmo's directors provided personal guarantees.

[37]The plaintiff raised the fact that although Lotus and Cosmo were introduced to the plaintiff in 2006 which was prior to the defendant's tenure as CEO, the defendant was the plaintiff's financial controller at that time. The plaintiff asserted that the defendant was instrumental in the admission of Lotus and Cosmo as supplier and customer respectively because since 2004, the defendant had the task of vetting all applications for the admission of new customers.

[38]Besides that, the plaintiff's credit policy stipulated certain documents which are a prerequisite for the defendant to vet such applications. The internal audit found that many of the requisite documents were not submitted together with Cosmo's 'New Customer Details' form. The defendant did not challenge the non-existence of such documents but instead contended that there were instances where other customers could not provide all the documents listed in the credit policy. This raised a doubt as to whether the defendant had sufficient supporting documents for the

purposes of evaluating Cosmo's application for admission as a new customer.

[39]The plaintiff's credit policy included guidelines to evaluate a potential customer's creditworthiness, called the '5C's credit evaluation tools' as set out below:

(a) character;

(b) capacity;

(c) conditions;

(d) capital; and

(e) collateral.

[40]The defendant argued that the plaintiff also had approved credit terms for other customers without sufficient supporting documentation. Therefore it was not only Cosmo that secured an extension of credit limit.

[41]The plaintiff raised the issue that the defendant had created new customer codes for Cosmo. The defendant contended that first of all, the plaintiff's credit policy did not prohibit such creation of codes, secondly that such codes were created for other customers, and that finally, the fault lies with the general manager who instructed the credit manager's subordinate staff to create such codes without copying to the plaintiff.

[42]The High Court found the defendant was in breach of his fiduciary duties and the plaintiff had proved that it suffered the sum of RM16,389,788 as losses. Therefore the High Court allowed the plaintiff's claim. The defendant appealed to the Court of Appeal.

OUR DECISION

[43]We have perused the appeal records and considered the submissions of learned counsel. The plaintiff's claim is essentially premised on breach of fiduciary duty by the CEO of the company. The position in law of CEO is one of a fiduciary. *Section 132* of the *Companies Act 1965* prior to the recent amendments sets out in statutory form the duties of a director. The defendant in the instant case is not a director of the Board of Directors of the plaintiff. The designation of 'Executive Director' denotes in the instant case, the name given to the position to which the defendant was appointed. The defendant however remained an employee at all material times. It appears that learned counsel for both the plaintiff and the defendant failed to appreciate the distinction between an employee who is appointed to a position called 'Executive Director' and a director on the Board of Directors. In the circumstances therefore, *s 132* which is specifically for directors is not applicable for an employee such as the defendant. However, as the defendant in his capacity as the CEO assumes a fiduciary position, the common law in relation to the duties and obligation of a fiduciary remains wholly relevant. As such the authorities relied upon by the parties are inapplicable, strictly speaking.

[44]In *Concise Principles of Company Law in Malaysia* (2nd Ed, 2010, LexisNexis) the learned authors stated as follows:

> Fiduciary duties are imposed on persons who are involved in the management of a company. This obviously includes directors. The definition of a 'director' also includes persons other than directors, to whom the board has delegated managerial duties and other persons who act as a director even though they have not been validly appointed … It is

therefore necessary to distinguish between persons involved in management and mere employees.

Persons taking part in the management of a company have authority to act in an independent and significant manner and are not subject to the close supervision and control of others more senior in the company hierarchy. At common law, only persons holding a senior management position, owe duties similar to directors: *Green v Bestobell Industries Ltd* [1982] WAR 1.

[45]In *Labour Law* by Simon Deakin and Gillian S Morris (5th Ed, 2009, Hart Publishing) the learned authors stated as follows:

(ii) Employees as Fiduciaries

4.110 The implied duty of fidelity operates as a term of the contract of employment, which arises as an incident of the employment relationship; it must therefore be distinguished from the separate notion of a fiduciary obligation which may [added: be] incurred by an employee to his or her employer. Only employees who undertake particular duties and responsibilities, normally associated with a senior position, will become fiduciaries and thereby assume the wide-ranging legal duties which are attached to that status. In particular, fiduciaries come under an open-ended duty of disclosure which is not part of the employee's general duty of fidelity under the contract of employment.

[46]In the Queen's Bench Division case of *University of Nottingham v Fishel and Another [2000] ICR 1462* ('Fishel'), Elias J considered the position of employees and in what situations they owed fiduciary duties. His Lordship cautioned against conflating and confusing the regular duties owed by employees to the company with the fiduciary duties owed by certain employees. His Lordship stated as follows:

The employment relationship is obviously not a fiduciary relationship in the classic sense. It is to be contrasted with a number of other relationships which can readily and universally be recognised as 'fiduciary relationships' because the very essence of the relationship is that one party must exercise his powers for the benefit of another. Trustees, company directors and liquidators classically fall into this category which Dr PD Finn, in his seminal work on fiduciaries *Fiduciary Obligations* (1977), has termed 'fiduciary offices'. As he has pointed out, typically there are two characteristics of these relationships, apart from duty on the office holder to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act, and the second is that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries.

By contrast, the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers. This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary

obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken. The position was succinctly expressed by Mason J in the High Court of *Australia in Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 as follows:

> 'That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

…

Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations. Very often in such cases the court has simply been concerned with the question whether the employee's conduct has been such as to justify summary dismissal, and there has been no need to decide whether the duties infringed, properly analysed, are contractual or fiduciary obligations. As a consequence, the two are sometimes wrongly treated as identical: see *Neary v Dean of Westminster* *[1999] IRLR 288*, 290 where the mutual duty of trust and confidence was described as constituting a 'fiduciary relationship'. *Accordingly, in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached,* as Lord Upjohn commented in *Phipps v Boardman* *[1967] 2 AC 46*, 127:

> Having defined the scope of [the] duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises … (Emphasis added.)

[47]The learned authors of the texbook *Labour Law* considered the case of *Fishel* (above) and commented as follows:

> If this analysis is correct, it would be inappropriate to attach fiduciary duties of a general kind to an employee solely on the grounds that he or she owes duties of trust and confidence to the employer. The issue becomes instead one of determining when 'within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes [on him] these rigorous [fiduciary] duties' (per Elias J in *Fishel*). The introduction of a fiduciary element into the relationship is not dependent on the seniority of the employee concerned, since the most junior of employees can be entrusted with the employer's property in such a way as to give rise to a specific obligation to restore it (together with any secret profits that may have been made through its use). *Nevertheless, very senior employees who are in a position of special trust and responsibility with regard to the management of the employer's organisation and assets will almost necessarily incur extensive fiduciary duties to the employer.* (Emphasis added.)

[48]The defendant, as the plaintiff's CEO, would certainly fall into the category of very senior employees who are in a position of special trust and responsibility with regard to the management of the organisation and assets. The defendant thus owes fiduciary duties to the plaintiff, which we found that he had breached.

[49]From the circumstances in this case, we were in agreement with the finding of the learned judge that the defendant had breached his fiduciary duties. We were of the view that the relationship between the defendant and the two companies, Lotus and Cosmo, indicates a conflict of interest. When the actions of the defendant are scrutinised, he is found to have made decisions which were not impartial and not in the best interest of the company.

[50]The plaintiff contended that the defendant did not exercise good business judgment in approving the applications of Cosmo for an increase of credit term and credit limit because in Cosmo's application form, Cosmo declared that it had assets of only RM40,000 in 2010. When the plaintiff cross-examined the defendant on the approvals, the defendant could not conclusively state that he viewed Cosmo's applications. We agree with the plaintiff's submissions that this appears to be negligence on the defendant's part, as this exposed the plaintiff to a risk of Cosmo defaulting on its debt to the plaintiff. And this became a reality.

[51]In addition, the defendant approved the credit term extension on 6 January 2010, a week before Cosmo submitted its formal application for extension on 14 January 2010. There was a handwritten note on the credit extension approval form 'will ask him to fill up app form', which supports the conclusion that at the time the defendant increased the credit term for Cosmo, he did so without referring to any supporting documentation. Nor was there any attempt made to obtain or review whether there was sufficient basis for an extension of such credit, subsequently.

[52]In cross-examination, the defendant initially insisted that he would have looked at the financial statements of Cosmo when making the credit evaluation. The plaintiff adduced the Companies Commission of Malaysia search of Cosmo to show that Cosmo had not filed any audited accounts since 2006. The defendant then claimed that he looked at the audited accounts of 2006. However, we agree with the plaintiff's submission that the 2006 audited accounts would not be of much relevance to a credit evaluation of the financial strength of Cosmo at the time of the application in 2010.

[53]The plaintiff submitted that if Cosmo did not file audited accounts from 2006 onwards, the defendant should have drawn the inference that Cosmo was a dormant company or at least had financial irregularities. At the time Cosmo was introduced to the plaintiff in 2006, the defendant could not have known that Cosmo would not file its audited accounts for future years. However, this is a relevant consideration when determining whether the defendant made a sound business judgment to raise Cosmo's credit limit and credit term, because the plaintiff's credit policy stipulates that the defendant must consider the applicant's audited accounts for the two years preceding the time the application was made as well as bank statements for the preceding three months. This was clearly not done.

[54]The defendant has many years of experience and knowledge in the relevant field, so this begs the question why he would overlook the guidelines laid out in the plaintiff's credit policy in approving Cosmo's application. The fact that the defendant at some point in time became a cheque signatory for Cosmo and Lotus, at the very least indicates a conflict of interest with his employment at the plaintiff. The date the defendant became a cheque signatory is unknown because the Cosmo and Lotus Board of Directors' resolutions which named the defendant as

their cheque signatory were undated.

[55]During submissions, the defendant did not reply to the issue of his being a cheque signatory for Lotus and Cosmo. In his statement of defence, the defendant merely denied that there was a conflict of interest and asserted that there was no necessity for him to disclose this fact. He also claimed that the accounts for which he was a cheque signatory had been dormant since 2006/2007. We are of the view that this explanation is insufficient to dispel the inference that there was a conflict of interest, especially since the actions taken by the defendant clearly show that the defendant made decisions which benefitted Cosmo and Lotus but exposed the plaintiff to a real risk of loss, which materialised when Cosmo and Lotus were wound up and the plaintiff was unable to recover the debt owed by Cosmo to it.

[56]We agree with the plaintiff's submissions that regardless of whether the defendant actually signed any cheques on behalf of Lotus and/or Cosmo, the defendant's position as a cheque signatory shows that he had a close relationship with these two companies. The fact that the defendant neglected to disclose this relationship to the plaintiff leads to the inference that the defendant was not impartial in carrying out his duties as CEO of the plaintiff.

[57]On fiduciary obligations, the Federal Court in the case of *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469; [2008] 1 LNS 100 cited the following passage by Millet LJ in the English case of *Bristol and West Building Society v Mothew* [1988] Ch 1 ('Bristol and West Building Society'):

> 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. They are the defining characteristics of the fiduciary.
>
> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty. (Emphasis added.)

[58]The fact of the defendant holding the post as cheque signatory is in contravention of his common law duty as an employee and gives rise to the presumption that the decisions of the defendant in relation to Cosmo and Lotus were not good business judgments. In attempting to disprove this presumption against him, the defendant asserted that the accounts for which he was a signatory were dormant and that there was no proof of any pecuniary advantage gained by him.

[59]However, the defendant had an interest in Cosmo and Lotus as he was their cheque signatory. It is clear that in this scheme, Cosmo and Lotus benefitted while the plaintiff suffered losses. Cosmo and Lotus are third parties and as stated in *Bristol and West Building Society*, the defendant should not have acted to benefit a third party without

the plaintiff's knowledge.

[60]The defendant attempted to blame his subordinates for not checking the supporting documents properly before passing the forms to him for approval and in addition, requested the court to draw an adverse inference against the plaintiff for not calling his subordinates, the then managing director and the credit manager, to give evidence. However, a director is not entitled to put the blame on his subordinates for his bad business judgment as he is the one who owes the company a fiduciary duty to act in the best interests of the company. He may and did delegate the checking of supporting documents to his subordinates but ultimately, as the person who granted approval, the blame for extending the credit term and credit limit Cosmo lies at his feet because it was a decision which he alone had the authority to make.

[61]There should not be an adverse inference drawn against the plaintiff for not calling the then managing director and credit manager as witnesses because, as submitted by the plaintiff, the case against the defendant does not rest on any conspiracy between the defendant and those persons to gain personal benefit at the expense of the plaintiff. The plaintiff's case against the defendant is for breach of his fiduciary duties and this can be determined by the court by considering whether the defendant had breached his duty to act in good faith and in the best interests of the company.

[62]The plaintiff contended that the defendant deliberately did not provide Cosmo's debts as doubtful debts for a selfish reason, merely in order to give the impression that the plaintiff company was performing well during the defendant's tenure as the plaintiff's CEO. PW3 testified that the defendant specifically told him to conceal Cosmo's debts. On the other hand, the defendant blamed PW3 as well as his other subordinates for misleading him into granting approval to Cosmo. So the court had to weigh the evidence of two witnesses, both of whom had interests in conflict with each other.

[63]It is appropriate to note at this juncture that PW3 was also investigated by the plaintiff for negligence and/or breach of fiduciary duties in relation to the Lotus and Cosmo transactions but punished with a warning letter. Subsequently PW3 resigned from the plaintiff on 31 May 2015. Therefore, PW3 has no reason to give evidence favourable to the plaintiff as he is no longer in the plaintiff's employment. As accepted by the plaintiff and stated in the notice of warning dated 14 October 2013 to PW3, PW3's 'position was subordinate to that of the Chief Executive Officer and others who may be involved in such transactions'. We have no reason to disagree with the learned trial judge that, on the balance of probabilities, it was the defendant who instructed PW3 to conceal Cosmo's debts from the plaintiff. By doing so, the defendant exacerbated the situation and the plaintiff only realised the irregularities in August 2013, when Cosmo's debt had ballooned to RM16,238,280 (being the principal amount plus late payment interest, as stated in the Cosmo ageing list as at 31 August 2013).

[64]In mitigation, the defendant claimed that he had secured not only personal guarantees but also a corporate guarantee from Lotus, and that he had managed to recover some of the debt owed. As to the corporate guarantee and partial debt recovery, there was no evidence of the same before the court. To make matters worse, one of the personal guarantors, Winson Chang, was already bankrupt at the time of signing the guarantee in 2013, and had been bankrupt since 1996.

[65]Therefore, we do not think that the learned Judge was plainly wrong in concluding on the totality of the evidence that the defendant had breached his duties as CEO and a fiduciary of the plaintiff company. There was clear loss occasioned to the company by his allowing, what was in effect a financing scheme, for the benefit of Cosmo and to the detriment of the plaintiff company, to be implemented over a considerable period of time. We therefore uphold the trial judge's finding that the defendant as CEO was in breach of his fiduciary duties owed to the plaintiff

company as his employer.

[66]However, we are not convinced that the defendant can be said to be solely responsible for the losses of the company stated to be RM16m plus. This case is unlike other cases where the employee acted in breach of his fiduciary duties and appropriated the company's funds for himself. In such an event, the losses are clearly attributable directly to the acts of the employee and should be ordered to be disgorged. That is not the case here. Several factors go into assessing the cause for the losses stated to be suffered by the plaintiff company, particularly the role played by Cosmo and the benefit received by it.

[67]As an employee, unless it can be established that he acted dishonestly and enjoyed pecuniary gains as a result of his misconduct, there is no legal basis to hold him liable for the totality of the losses that was not the thrust of the charges preferred against him; neither were such clear findings of fact made against him by the domestic inquiry panel. In the absence of such evidence, the defendant's liability for the entirety of the losses is not made out. On liability alone, this aspect of the claim for damages is not established.

[68]The plaintiff also has not produced evidence as to whether the defendant had allegedly made as profit or personal gains from the transactions with Cosmo and Lotus. The defendant pointed to the fact that during the cross-examination of the internal auditor (PW1), PW1 admitted that the plaintiff's revenue for the financial year 2012 was almost RM600m and about RM550m for the year before that. This meant that there was an increase in profitability between 2011 and 2012, after the defendant approved the increase in credit term and credit limit to Cosmo. Therefore we were of the view that the learned judge erred in directly attributing the losses claimed solely to the defendant.

[69]Further, as we have stated above, on the face of the matter, the party that directly benefitted from the transactions here was not the defendant but Cosmo and Lotus. There is no evidence of the defendant obtaining any pecuniary advantage by assisting Cosmo and Lotus to perpetuate this 'scheme'. There is also no suggestion of the defendant siphoning any of the money paid by the plaintiff to Lotus.

[70]The learned judge based his finding that the plaintiff suffered losses amounting to RM16,389,788 on the defendant's purported admission that this amount was suffered as loss due to his action of approving Cosmo's orders even though Cosmo had exceeded the credit limit.

[71]As submitted by the counsel for the defendant, during the trial the learned judge had allowed the defendant's objection to the admission of source documents ie invoices which could prove that the plaintiff suffered the said amount as losses caused by the defendant's breach of fiduciary duties. Since the source documents were not allowed to be introduced in evidence, then the plaintiff could not have proved that it suffered that sum as losses. The learned judge merely stated in the grounds of judgment that the plaintiff had proved this sum as losses but did not refer to any documents in support of this finding. The only document before the court was the debtor's statement which stated the principal amount owing from Cosmo at the material time, but since the invoices which purportedly supported this figure were not allowed to be admitted as evidence before the court, the principal sum remained a mere statement.

[72]Further, even if such invoices had been admitted in evidence, it does not follow that the defendant alone is solely liable for the losses suffered for the reasons set out above in paras 69-70. The plaintiff did not prove that as a fiduciary, the defendant was in possession of monies belonging to the company which warranted the imposition of a

'constructive trust' against him such that he was impelled to disgorge such profit in his possession.

[73]We therefore set aside that part of the judgment awarding RM16,389,788.71 by way of damages to the plaintiff. In other words, we grant a declaration that defendant has breached his express and/or implied duties and/or fiduciary duties to the plaintiff, but we find that the plaintiff has not established the losses claimed in the sum of RM16,389,788.71.

NOTE

[74]For completion, we note that the defendant has filed a claim for wrongful dismissal and that complaint was pending in the Industrial Court at the time of our decision.

CONCLUSION

[75]The appeal was therefore dismissed, save that the order of the High Court was varied to the extent that the losses claimed were not allowed. No order was made as to costs. The deposit was refunded.

Order accordingly.

Reported by Ashok Kumar