

Heap Huat Rubber Company Sdn Bhd and Others v Kong Choot Sian and Others
[2003] SGHC 133

Case Number : Suit 1378/2001
Decision Date : 27 June 2003
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Philip Jeyaretnam SC (Rodyk & Davidson) for the Plaintiffs; Jean Lim (Rodyk & Davidson) for the Plaintiffs; Defendant in person
Parties : Heap Huat Rubber Company Sdn Bhd; HHR Properties Sdn Bhd; HHR Trading Sdn Bhd; HHR Construction and Supply Sdn Bhd — Kong Choot Sian; Ng Phuay Tiong David; Tan Chong Puat; Kong Siew Seng; Ng Phuay Khoon; Tan Teck Seng; Low Toh Pwee; Chan Kim Hong Agnes; Ng Keng Eng

Companies – Directors – De facto director – Shadow director – Defendant not held out as a director of the company – Whether defendant considered a de facto or shadow director.

Companies – Directors – Duties – Company's assets allegedly sold at undervalue – Subsidiary companies allegedly formed to benefit defendants, and not the parent company – Companies achieved little or no return on investments made – Whether defendants in breach of fiduciary duty as directors.

1 As there are four plaintiffs and nine defendants in this action, it is useful to start by identifying them.

2 All the plaintiff companies are incorporated in Malaysia. The first plaintiff is Heap Huat Rubber Co Sdn Bhd ("HHR"). The second, third and fourth plaintiffs are wholly-owned subsidiaries of HHR. All the plaintiffs were represented by Mr Philip Jeyaretnam SC and Ms Jean Lim in this action.

3 The first, second, third, sixth, seventh and eighth defendants are alleged by the plaintiffs to have been de facto or shadow directors of the companies. The fourth, fifth, sixth and seventh defendants were directors of the plaintiff companies at the material time. The ninth defendant was an employee of the second plaintiff. The defendants were not represented by counsel, and appeared in person.

The plaintiffs' claims

4 The actions against the first to eighth defendants are founded on the allegation when they were in control of HHR they incorporated and ran the second to fourth plaintiffs for their own benefit.

5 They are also accused of selling HHR's land at undervalue, making improper payments in connection with the sales, overpaying themselves for their services, using the companies' funds to purchase vehicles for their own use, and causing the companies to make improper investments.

6 When the hearing of the action started the sixth and seventh defendants became witnesses for the plaintiffs, and the claims against them were withdrawn.

The background

7 HHR was incorporated in 1960 by the late Ng Quee Lam, his brothers and their families, who also controlled several other companies. In the 1980s the companies ran into financial difficulties. Some of the companies were wound-up and Ng Quee Lam and others were declared bankrupt.

8 However Ng Quee Lam's family retained control of HHR through his daughters. In 1999 the Official Receiver and Official Assignee of the estates of some shareholders gained majority control of HHR, and new directors for the company and the subsidiaries were appointed in 2001.

9 The present action is instituted on the initiative of the new directors.

The defendants

10 The first defendant Kong Choot Sian is the son-in-law of Ng Quee Lam. He was a director of HHR from 1987 to 1988, when he resigned after being adjudicated a bankrupt. Thereafter he was engaged as a senior administration officer of HHR and a consultant of the subsidiary companies. The plaintiffs allege that he continued to act as a de facto director and/or shadow director of the plaintiffs.

11 The second defendant is a nephew of Ng Quee Lam. He is an undischarged bankrupt and was an employee of the first, third and fourth plaintiffs as an administration officer and assistant manager. The plaintiffs allege that he was a de facto director and/or shadow director of the plaintiffs.

12 The third defendant is not related to the Ng family and is a friend of the first defendant from their undergraduate days at Nanyang University. He became the general manager of the second, third and fourth plaintiffs on the recommendation of the first defendant and is alleged to have been a de facto director and/or shadow director of these companies.

13 The fourth defendant is the brother of the first defendant. He was an executive director of all the plaintiff companies.

14 The fifth defendant is also related to Ng Quee Lam. He was an executive director of HHR and the second, third, fourth plaintiffs.

15 The sixth and seventh defendants were directors of all the plaintiffs. They are not related to the Ng family. The former worked in a coffee shop and the latter sold durians. They were appointed because they were Malaysian citizens. They took no active part in the management of the companies.

16 The eighth defendant is a practising lawyer in Malaysia. She was the company secretary, legal adviser and consultant of the second, third and fourth plaintiffs. She is alleged to have been a de facto director of those three companies.

17 The ninth defendant is the wife of the second defendant and was an employee of the second plaintiff.

18 The principal witness for the plaintiffs, Mr Robert Yam Mow Lam is a practising accountant and is one of the new directors who are in control of the plaintiffs. He investigated the affairs of the companies and found that

- (i) the first defendant was a de facto director and the directing mind behind HHR and the three subsidiaries and was a key figure in the schemes of HHR and the three subsidiaries to siphon their assets,
- (ii) the second defendant "carried out the functions of a director",

(iii) it can be inferred that the third defendant was in fact a de facto director of the second, third and fourth plaintiffs, and

(iv) it can be reasonably inferred that the eighth defendant was a de facto director.

19 He did not identify the functions of a director that the second defendant had undertaken, or explain the circumstances on which the inferences against the third and eighth defendants were made.

20 The sixth and seventh defendants who gave evidence on behalf of the plaintiffs did not say anything about the second, third and eighth defendants being de facto directors or shadow directors. Each deposed that he regarded the first defendant as the "Big Boss" and he believed that the first defendant decided on the payments to be made to the directors, consultants and employees. In his evidence the sixth defendant added that the first defendant told him what to do as a director, and was the one who made the decisions, and the first defendant told him of his appointment as a director of the second, third and fourth plaintiffs. The seventh defendant likewise stated in evidence that the first defendant made the decisions for the companies and told him that he was to be a director of the three subsidiary companies.

21 The onus is on the plaintiffs to prove that the first, second, third or eighth defendants were de facto directors or shadow directors. On the evidence adduced, they had not discharged the onus in respect of the last three.

22 In respect of the first defendant, there was the evidence from the sixth and seventh defendants that he was the decision maker. He was a director of the first plaintiff until his bankruptcy forced him to relinquish the office. He regarded HHR as the family business of his father-in-law and his wife.^[1] He is a graduate of Nanyang University and believed that he has the capacity to be a director. He would not have resigned as director if he was not made a bankrupt^[2] and he continued to be involved with the companies after resigning.

23 The terms "de facto director" and "shadow director" are not found in the Malaysian Companies Act, which only refers to "director" and defines it to include

(A)ny person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

The words in italics are in the definition of "shadow director" in the UK Insolvency Act 1986.

24 Both terms were discussed in the context of that act in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 where Millet J explained at page 183 that

A shadow director ... does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act.

whereas a de facto director is

(A) person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.

25 In *Secretary of State for Trade & Industry v Deverell* [2000] 2 WLR 907, the Court of Appeal also dealt with shadow directors. The statutory provision applicable there was s 22(5) of the Company Directors Disqualification Act 1986 which defines "shadow director" as a person in accordance with whose directions or instructions the directors of a company are accustomed to act. The Court considered what "accustomed to act" entails. Morritt LJ explained at para 36

What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. ... such directions and instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them.

It is useful to remember this so that one would not argue as the first defendant did that he cannot be a shadow director because his views are not always accepted by the directors.

26 The first defendant was not a de facto director because he did not hold himself out as a director, and the companies did not hold him out as a director. However, he had a long connection with HHR as a member of the Ng family. He never severed his connections with the company, but only changed his designation from director to senior administration officer and consultant. From the evidence of the sixth and seventh defendants who have no reason to incriminate or prejudice him falsely, he was the decision maker. The directors were less qualified and assertive than him. The fourth defendant only had three years primary school education and was hesitant to be a director, [3] and signed documents when he was requested to sign. The fifth defendant rose from the rank of a clerical assistant. He acknowledged that he received instructions from the first defendant even after the latter ceased to be a director.[4]

27 On the evidence before me, I found that the first defendant was a shadow director of the plaintiff companies.

The claims

28 The plaintiffs' made many claims against the defendants, some overlapping, others pleaded in the alternative. Instead of listing each of them individually, they can be put under larger heads without any loss of clarity.

29 The plaintiffs' primary complaint was that the defendants (except the ninth defendant) were in breach of their fiduciary duties as directors, de facto directors or shadow directors in connection with

- (i) the formation of the three subsidiaries,
- (ii) the sale of HHR's land in Johore at an undervalue,
- (iii) the payments made by HHR in connection with the sale of the land,

- (iv) the excessive remuneration to the defendants, and
- (v) the purchase of two properties in Johore Bahru.

30 There were other complaints pleaded in the statement of claim, such as the purchase of six cars for the use of the defendants, investment in a quarry and conspiracy to injure the plaintiffs, but these were clarified and resolved at the hearing, or not followed up on.

31 In their closing submissions the plaintiffs complained of

- (i) the sale of the Johore land at an undervalue and the related payment and deduction made,
- (ii) the formation of the three subsidiaries companies,
- (iii) the subsidiaries companies paying excessive remuneration to the defendants,
- (iv) the subsidiary companies lending money to the first plaintiff without commercial justification. (This was not pleaded in the statement of claim and not referred to in the opening statement and shall not be dealt with),
- (v) unauthorised payments by HHR to the defendants, and
- (vi) unauthorised payments by the subsidiary companies to the defendants.

Sale of the Johore land and payment and reduction made

32 HHR sold one lot of land in Pulai to Panfield Sdn Bhd for RM13.2m and seven lots in Tebrau to Timepac Industries Sdn Bhd for RM6.8m. The Pulai land was sold subject to a caveat lodged by United Overseas Bank Ltd. It was also sold on the condition that the purchaser would be at liberty to apply in the name of the vendor to convert the land from agriculture use to building and/or industrial use, with the expenses for the application to be borne by the purchaser.

33 The Tebrau land was also sold subject to the caveat of United Overseas Bank. There was also a provision for Timepac to apply for the conversion of the land use to industrial use in the name of HHR at Timepac's expense.

34 By a supplementary agreement HHR agreed to reimburse Panfield RM3.2m for payments made by Panfield for the management preservation and protection of the land and for fees paid on behalf of HHR in legal proceedings involving HHR in connection with the land.

35 The supplementary agreement also provided for the payment of RM400,000 from the sale proceeds to a broker, R Sinniah, for the services rendered by him in the sale.

36 There were no valuation of the Pulai or Tebrau land prior to the sale to Panfield and Timepac.

37 After the new directors gained control of HHR valuers were instructed to undertake valuation of the land. Consequently reports were put up placing the value of the Pulai land at RM91,886,000 and the Tebrau land at RM50,052,000, both on an unencumbered basis.

38 The valuations did not conform with the term of sale that the land were sold subject to the

existing UOB caveats. No effort was taken to bring the valuations in line to the terms of sale. This was unfortunate because the exercise fell short of providing a professional assessment of the proper sale prices for the Pulai and Tebrau land on the terms they were sold.

39 There was no evidence on the basis for the caveats lodged by UOB on the Pulai and Tebrau land. The plaintiffs referred to a statement in the audited accounts of Panfield for the year ending 31 May 1996 appearing in Panfield's annual report dated 25 April 1997 that

On 28th December, 1995 the Company entered into a sale and purchase agreement with Heap Huat Rubber Co. Sdn. Bhd. for the purchase of a piece of land of approximately 302.741 acres in the Mukim of Pulai, District of Johor Bahru for a consideration of RM13,200,000 conditional upon :

- (i) United Overseas Bank Ltd, Singapore agreeing with the Company a settlement sum (which was *agreed at S\$34,000,000* or approximately RM60,095,000 on 14th January, 1997) to waive and discharge Heap Huat Rubber Co. Sdn. Bhd. from all liabilities due to the said Bank; and
- (ii) the approval of the Foreign Investment Committee.[\[5\]](#)

(Emphasis added)

40 It is not evident from this statement whether or how the settlement sum is connected to the caveats lodged by UOB. Counsel did not take a firm position when he asked the valuer

Q: *If there is an encumbrance in a mortgage for \$34m what effect does that have on the value of the land?*

A: The net proceeds to the vendor will be reduced by \$34m.[\[6\]](#)

(Emphasis added)

41 That could have been clarified with the bank, but it was not. As matters stand, there is no evidence of the interest the bank claimed over the land, or the sum the bank wanted on 28 December 1995 (when the agreements of sale were signed) to withdraw the caveats. The fact that it agreed to \$34 m on 14 January 1997 does not mean that it would have accepted the same figure on 28 December 1995. The debt (if the caveats arose from debts) may be reduced over the period, or the bank may have lowered its demand in 1997.

42 Without knowing the sum required to remove the encumbrances at the time of sales it is not possible to derive the proper sale prices from the valuation reports. That being the case, the plaintiffs have not proved that the land was sold at an undervalue, and that part of their claim must fail.

43 With regard to the reimbursement to Panfield and to the payment to Sinniah, the plaintiffs' case is that the agreement to pay Panfield was not supported by consideration and the agreement to pay Sinniah was for past or no consideration.

44 The plaintiffs are not disputing that Panfield had rendered services or expended monies on behalf of HHR or that Sinniah had rendered services in the sale. It is also not the plaintiffs' position that the services and expenditure were voluntary or gratuitous. The fifth defendant testified that there was an oral agreement to pay the broker. In the circumstances when the plaintiffs agreed to the sums to be paid to those two parties, the agreements cannot be said to be without

consideration, or for past consideration.

The formation of the three subsidiary companies

45 The plaintiffs' case is that the three subsidiary companies were incorporated to benefit the defendants, and not to benefit HHR.[\[7\]](#)

46 The fifth defendant explained that after the sale of the Johore land, RM12.8m was released to HHR. The directors wanted to diversify and expand HHR's activities and to protect it against the suits it was facing. After taking advice, the directors incorporated the three subsidiary companies with a total amount of RM12m as paid-up capital.[\[8\]](#) Counsel did not challenge this part of his evidence.

47 The plaintiffs' allegations were not consistent with the evidence. The evidence was that all the shares of the three companies were held in trust for HHR with proper trust documents executed. It is also clear that the three companies were not dummy companies. The second plaintiff purchased two residential properties in Johore Bahru for investment which it is still holding. The third plaintiff traded on the stock market and the fourth plaintiff invested in a company operating a quarry in Trengganu which has turned out to be a sound investment. Genuine efforts were made to run these companies - the third defendant and eighth defendant were engaged to give of their knowledge and experience, and business proposals were made, discussed, and in some cases, rejected. If the directors of HHR only intended to use the three subsidiary companies to divert funds to themselves they would not engage the third and eighth defendants and pay them for their services as they did.

Excessive remuneration paid to the defendants by the subsidiary companies

48 The plaintiffs' case on this claim ran into difficulties during the hearing. It transpired that the computations of the remuneration paid were not done correctly. For example, reimbursements were taken as remuneration, disbursement costs regarded as fees and payment to the eighth defendant's legal firm and secretariat company regarded as payment to her.

49 This led to repeated clarifications and modifications of the figures. When the plaintiffs made their closing submissions, the figures were reduced from those pleaded in the statement of claim. They argued that during the period 1998-2000, the plaintiffs' income was RM2,815,857.43 against total remuneration to the defendants (other than the sixth and seventh defendants) of RM5,924,944.14.

50 The plaintiffs complained that the subsidiary companies achieved little or no return on the investments made[\[9\]](#) and alleged that it was plain that the companies were incorporated as a scheme to hide the surplus funds from the land sale and distribute it amongst the defendants.[\[10\]](#)

51 The plaintiffs did not justify the basis of their complaints. The rate of returns is not a proven and accepted basis for determining whether directors and employees remuneration paid are excessive. I am not prepared to accept that without proper explanation. A proper determination should take into account the work and services done and rendered by the defendants. Directors may render sterling services without achieving good returns for their companies.

52 Furthermore, the plaintiffs have not, beyond stating that the RM5,924,944.14 was excessive, said what the reasonable amount was, and this was a material omission. What is reasonable and proper remuneration is a matter of opinion and judgment. While it may be argued that it is a breach of duty to authorise payments which are excessive by 100%, that would be more difficult to assert if

they are 10% in excess. The omission to state the extent of the overpayment undermined this complaint of breach of directors' duties.

HHR's payments of salary and other fees

53 The plaintiffs submitted that directors are not entitled to remuneration except in accordance with the article of association of the company.[\[11\]](#) They asserted that HHR did not hold board meetings during the relevant time, and that there were no valid resolutions authorising payments of salary or other fees to the directors or the employees.[\[12\]](#)

54 The submission was misconceived. It failed to take into account article 73 of HHR's articles of association which provide that the remuneration of the directors shall be determined by the company in a general meeting. There is no requirement for board meetings or board resolutions for such payments.

Payments made by the subsidiary companies

55 The plaintiffs' case is that the payment of directors' remuneration by the three companies was in breach of the company's articles of association. The articles required that such payments be approved by the companies in general meeting.[\[13\]](#) The plaintiffs pleaded that no approval was obtained and this was specifically denied by the defendants.[\[14\]](#)

56 Inexplicably the plaintiffs led no evidence to support this allegation. All Robert Yam said in his affidavit of evidence-in-chief in respect of the directors' remuneration and benefits was

I can see no commercial purpose for the incorporation of HHR Trading, HHR Properties and HHR Construction. With a paid-up capital of a total of RM12 million, one would expect the 3 subsidiaries to have detailed business plans and to carry out substantial business activities. On the contrary, I have not seen any business plans at all. The 3 subsidiaries carried out little or no business activities[\[15\]](#) ...

Nothing was said about the lack of approval or authorisation.

57 A party making an allegation has to prove it. This can be done by adducing evidence on the matter alleged, but it cannot be done by making allegation in pleadings and submissions without evidence. The evidence may be the records of the resolutions passed by the companies, or the evidence of someone familiar with the records, or someone who has gone through the available records, but the plaintiffs did not produce any evidence.

The third and eighth defendants dishonestly assisted in the misapplication of funds of the subsidiary companies

58 This claim is pleaded in alternative to the claim of breach of directors' fiduciary duties. The basis of the complaint against the third defendant was that he attended an extraordinary general meeting of HHR on 17 April 1998 as a proxy of a shareholder and voted in support of a resolution which retrospectively approved and ratified the incorporation of the three subsidiary companies. (The second and third plaintiffs were incorporated on 23 December 1997 and the fourth plaintiff was incorporated on 7 March 1998). His vote enabled the resolution to be passed against the objection of some other shareholders. The plaintiffs allege that he was there instrumental in the scheme to form the subsidiary companies to shield the surplus funds from the creditors and shareholders of HHR.[\[16\]](#)

59 Against the eighth defendant the plaintiffs noted that she did little work for the payments

she received from the subsidiary companies. Nevertheless they complained without elaboration that she was instrumental in the use of the three subsidiary companies as a shield against creditors and shareholders.[\[17\]](#)

60 Counsel referred to the decision of the Court of Appeal in *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241 and submitted that for the plaintiffs to prove dishonest assistance by the third and eighth defendants, they need to establish that

- (1) the assets of the plaintiffs had been disposed of in breach of fiduciary duties,
- (2) the third and eighth defendants assisted in the disposal of the assets,
- (3) the third and eighth defendants had acted dishonestly, and
- (4) the disposal of the assets resulted in loss to the plaintiffs.

61 He has set out the law correctly, but his clients the plaintiffs failed to satisfy the conditions. They had not substantiated their complaint that the assets had been disposed of in breach of fiduciary duties. They had not shown that the third and eighth defendants acted dishonestly when they rendered their assistance in the disposal of the assets. There was no evidence that the disposal of the assets was at a loss.

Conclusion

62 The plaintiffs have not proved any of their claims against the defendants. Their action is dismissed with costs to the defendants except the sixth and seventh defendants.

[\[1\]](#)Notes of Evidence page 164

[\[2\]](#)Notes of Evidence page 186

[\[3\]](#)Notes of Evidence pages 365, 369

[\[4\]](#)Notes of Evidence page 398

[\[5\]](#)1PB 57

[\[6\]](#)Notes of Evidence page 146

[\[7\]](#)Statement of Claim para 28

[\[8\]](#)Affidavit of evidence-in-chief of Fifth Defendant paras 39-41

[\[9\]](#)Plaintiffs' Closing Submissions para 33

[\[10\]](#)Plaintiffs' Closing Submissions para 34

[\[11\]](#)Plaintiffs' Closing Submissions para 43

[\[12\]](#)Plaintiffs' Closing Submissions paras 44 and 46

[\[13\]](#)Statement of Claim paras 34-5

[\[14\]](#)Defence of First, Second, Third, Fourth, Fifth and Ninth Defendants, para 67

[\[15\]](#)Affidavit of evidence-in-chief of Robert Yam Mow Lam para 66

[\[16\]](#)Plaintiffs' Closing Submissions para 75

[\[17\]](#)Plaintiffs' Closing Submissions paras 77-8

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