

HONG KONG / JUDGMENT

CHAN CHUN HOO THOMAS v. WADDINGTON LTD

COURT

Court of Final Appeal

DECIDED

22 February 2017

CASE / FILE NUMBER

FAMV49/2016

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bjbj FAMV No. 49 of 2016 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 49 OF 2016 (CIVIL) (On APPLICATION FOR LEAVE TO appeal from CACV No. 10 of 2014)

BETWEEN WADDINGTON LIMITED (Suing on behalf of itself and all other shareholders in PLAYMATES HOLDINGS LIMITED (except the 1st and 2nd Defendants), PLAYMATES INTERNATIONAL LIMITED and PROFIT POINT LIMITED) Plaintiff (Respondent)

- and - CHAN CHUN HOO THOMAS (W gP ATIONAL LIMITED 4th Defendant PROFIT POINT LIMITED 5th Defendant

Appeal Committee : Chief Justice Ma, Mr Justice Fok PJ and Mr Justice Bokhary NPJ Date of Hearing and Determination : 14 February 2017 Date of Reasons for Determination : 22 February 2017 REASONS FOR DETERMINATION Chief Justice Ma (for the Court) :

1. The present proceedings involve a multiple derivative action (MDA) arising essentially from the following relationships during the times material to the action :- The Plaintiff (Waddington) was an 18.08% minority shareholder of the 3rd Defendant (Playmates). The 2nd Defendant (Chansam) was the majority shareholder (46.4%). Playmates directly owned 100% of the 5th Defendant (Profit Point). Prior to the events which formed the background to the action, Profit Point owned 4.28% of a company called Prestige Properties Holdings Limited (Prestige). Chansam held a 39.2% stake in Prestige. Prestige was a property holding company, having as its asset a commercial building in Canton Road, Tsim Sha Tsui. Chansam was essentially controlled by the 1st Defendant. His brother controlled Waddington. The 1st Defendant was a director of Playmates and Profit Point and, by reason of the shareholdings in those companies, was in control of the board of directors of those companies.

2. The background to the dispute leading to the proceedings involved the sale in July 2000 by Chansam of 34.25% of its holding in Prestige to a listed company, Yugang International Limited (Yugang). The Yugang transaction had been preceded in May 2000 by a sale of the whole of Profit Point's 4.28% holding in Prestige on the open market. While the Yugang transaction resulted in the sale of Chansam's Prestige shares at the price of \$2.20 a share, by contrast the price obtained for the Sale Shares in the open market amounted only to between \$0.60 and \$0.70 a share. This was the complaint made by Waddington in the proceedings. It claimed on the basis that the disposal of the Sale Shares was for a price which was much less than could and should have been obtained. As a result, loss was occasioned to Profit Point and this filtered down to an indirect loss suffered by Waddington.
3. The claim was principally directed at the 1st Defendant, the allegation being that he (being a director of Profit Point) was in breach of fiduciary duty owed to Profit Point in being instrumental in the disposal of the Sale Shares in May 2000 at a time when he (on behalf of Chansam) was in negotiations with Yugang to sell Chansam's shares in Prestige for a much higher price than that obtained by Profit Point.
4. As Waddington was a minority shareholder in Playmates and therefore unable to procure the necessary approval to enable Profit Point to claim against the 1st Defendant, Waddington had to bring an MDA to enforce Profit Point's claim. Despite attempts to strike out the claim, the action was permitted to proceed as an MDA.
5. Waddington succeeded at trial against the 1st Defendant. The following were findings made by the learned Recorder :- At the time of the disposal of the Sale Shares in May 2000, the 1st Defendant was already well into negotiations with Yugang or had even arrived at an agreement in principle to sell to Yugang Chansam's shares in Prestige. This was contrary to his position at trial that the negotiations with Yugang only commenced at the end of June, after the disposal of the Sale Shares. On the contrary, the disposal of the Sale Shares was made with the intention to facilitate the implementation of the Yugang transaction. The 1st Defendant was instrumental in causing Profit Point to dispose of the Sale Shares. At all material times he was the person in control of Chansam, Playmates and Profit Point. The sale of the Sale Shares disadvantaged Profit Point and benefitted instead Chansam and the 1st Defendant. The 1st Defendant ought to have included Profit Point in getting the benefit of a sale of the Sale Shares at \$2.20 a share, even if this meant Chansam could not sell as many shares in Prestige as it did.
6. Accordingly, the Recorder found the 1st Defendant to have been in breach of the fiduciary duty owed to Profit Point. As for compensation, the Recorder held that Profit Point was entitled to \$33,511,220.32 as reflecting the loss caused to Profit Point by not having been included in a sale of its shares in Prestige as part of the Yugang transaction.
7. The 1st Defendant appealed to the Court of Appeal which unanimously dismissed the appeal. In its judgment, the Court of Appeal upheld the findings of the learned Recorder as set out above. The Court of Appeal said this :-

74. We are satisfied that on the factual basis here, a reasonable man would have thought there was a real sensible possibility of conflict in this situation and D1 had breached the no conflict duty. We uphold the judge's finding that D1 was in breach of his fiduciary duty to Profit Point in causing the Sale Shares to be sold in the market to facilitate the Yugang transaction and thereby not including Profit Point in the Yugang transaction to get the benefit of the sale of Prestige shares at a much higher price.
8. In arriving at this conclusion, the Court of Appeal considered a submission made on behalf of the 1st Defendant to the effect that when determining whether or not a fiduciary duty existed and had been breached, the court had to take into account the fact that he owed fiduciary duties not only to Profit Point but also to Chansam. It was argued that there was no requirement on the 1st Defendant's part to subordinate Chansam's interest to Profit Point in the Yugang transaction. The Court of Appeal held the fact that the 1st Defendant was in a fiduciary relationship with more than one principal did not prevent a duty imposed on the 1st Defendant not to place himself in a conflict of interest situation. It was further held that as far as liability for breach of fiduciary duty was concerned, even where a relevant opportunity could or would not have been available to the principal (such as the opportunity to take part in the Yugang transaction on Profit Point's part), this did not prevent a fiduciary duty from arising. In circumstances such as the present case, a duty arose on the 1st Defendant's part to have informed Profit Point of the Yugang negotiations : it was certainly relevant information for Profit Point to be informed about. In addition, the Court of Appeal said this :-
73. Mr Jat also made the point that the question put to D1 in cross-examination was someone making an offer to buy up to 35% of the shares and it was not made clear in the question whether the offer was to buy up to 35% from any source or from just one source. We do not think this is a matter of any moment. Commercial impossibility or the unwillingness of the third party to deal with the beneficiary is not a defence. Even if the beneficiary lacks the resources to exploit the opportunity, the duty is on the fiduciary to seek to overcome the beneficiary's commercial inability. And if the third party is unwilling to deal with the beneficiary, the duty is on the fiduciary to persuade the third party to deal. See the article *The Corporate Opportunity Doctrine* by D D Prentice and Jenny Payne in (2004) 120 LQR 198 at 201, citing in support the cases of *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 and *IDC v Cooley*. Alternatively, the fiduciary should declare the conflict to the board of the beneficiary and refrain from taking part in any decision of the beneficiary which may affect the course of event.
9. In any event, on the facts the Court of Appeal did not accept the factual premise advanced by the 1st Defendant that Yugang would not have dealt with Profit Point. It was said in the judgment : There is no credible evidence that Yugang would not have purchased part of the Prestige shares from Profit Point.

10. The 1st Defendant sought leave to appeal on the basis that points of great general or public importance arose and also on the or otherwise ground. Two questions were framed as follows in the Notice of Motion :-
8. The intended appeal gives rise to the following questions of great general public importance which ought to be submitted to the Court of Final Appeal for decision: 8.1 Where F is a fiduciary of B and C, and an opportunity comes to F in his capacity as fiduciary of C, but the opportunity could not have been utilised by B because the relevant third party would not deal with B, is F required to refrain from taking up the opportunity for C? Or is F required to persuade the third party to deal with B? (Question 1) 8.2 Where a beneficiary claims compensation for breach of fiduciary duty in the form of lost profits that he says he would have made on a lost transaction, for the beneficiary to succeed, would it be sufficient for him to show that he has lost an opportunity (and then the burden would be on the fiduciary to show that the opportunity would not materialise in favour of the beneficiary)? Or would it be the burden on the beneficiary to show that the lost opportunity would have materialised to his benefit? (Question 2
11. After hearing counsel for the 1st Defendant, we dismissed the application with costs. These are our reasons.
12. Notwithstanding the way in which the questions were framed, Mr Girolami made submissions along the following lines :- The present case was not one in which the relevant fiduciary (the 1st Defendant) owed duties only to one principal. He had other principals. In ascertaining the extent of the fiduciary duties owed to Profit Point, the court had to take into account the position of other principals to whom the 1st Defendant owed fiduciary duties as well. In the present case, it could not be a part of the fiduciary duties owed to Profit Point to subordinate Chansam s interest to those of Profit Point. It was submitted by Mr Girolami that this was an important principle and the lower courts had paid insufficient or no regard to this aspect. Connected with the above was the submission that the court had to take into account the possibility that as far as transactions with outside parties were concerned (in the present case the sale of Prestige shares to Yugang), the outside party may not want to deal with the relevant principal at all (that is, Profit Point), instead wishing to deal only with another principal (in this case the 1st Defendant s other principal, Chansam). If the relevant transaction was therefore unavailable to Profit Point, this was important when analysing both the extent of the fiduciary duty owed by the fiduciary and also as to any compensation that may be claimed. The point of law was articulated in the following way : to what extent does the principle in Keech v Sandford apply in situations where the non conflict duty of a fiduciary comes to be examined?
13. In our view, these arguments were insufficient for the Appeal Committee to grant leave :- Both courts below were fully aware of the fact that the 1st Defendant acted for more than one principal. This was afterall the basis for the conclusion reached by the lower courts that the 1st Defendant found himself in a position of conflict of interest. Accordingly, while it is right that in identifying the extent of fiduciary duties owed to a principal, one must also take

into account duties owed to other principals, this was not a point of criticism which arose in the present case. The facts as found at trial (undisturbed on appeal) simply did not support the legal question advanced before us. As far as the second argument was concerned, this was again not a point that arose in the present case. First, there is no factual basis for it. As the Court of Appeal stated, there was no evidence to suggest that Yugang would not have dealt with Profit Point. We would add this : that if it were to have been suggested that Yugang would not have dealt with Profit Point, the evidential burden would have been on the 1st Defendant to adduce evidence of this. Secondly, in any event, in terms of ascertaining the ambit of a fiduciary duty, the Court of Appeal did deal with this factual premise. There is no error in principle in the approach adopted. We would not see this as involving the principle in *Keech v Sandford* at all : that principle is mainly concerned with remedies following a situation in which the fiduciary has profited. Nor did the Court of Appeal so regard the position (contrary to what Mr Girolami submitted). All that the court was saying was that even where it might be said that an opportunity would not have been available to the principal, this did not mean that it was not relevant for the principal to know about it. The authorities referred to by the Court of Appeal in its judgment made this clear.

14. It is unnecessary to deal with the or otherwise ground. Although a large part of the 1st Defendant's skeleton submissions were devoted to this aspect, this was not pursued at the hearing.
15. For the above reasons, the application for leave was dismissed.
16. Lastly, we would just make the observation that the way in which the application was argued by the 1st Defendant differed substantially from the way in which the questions said to be of great general or public importance were framed in the Notice of Motion. The proper identification of the questions in respect of which a party seeks leave to appeal to the Court of Final Appeal is important. It is not some pleading formality just to enable an application to be brought. It would have been better in the present case if proper questions had been reformulated to reflect the arguments before us. This is not just for the court's convenience in order to enable it to determine whether or not points of great general or public importance properly arise; it is also a matter of basic fairness to the party responding to the application for leave. (Geoffrey Ma) (Joseph Fok) (Kemal Bokhary) Chief Justice Permanent Judge Non-Permanent Judge Mr Paul Girolami QC, Mr Bernard Man SC and Mr Keith Lam, instructed by K & L Gates, for the applicant Mr Benjamin Yu SC and Mr Justin Lam, instructed by Kao, Lee & Yip, for the respondent The majority shareholder of Chansam was a company controlled by the 1st Defendant and his family. For the purposes of the action, it was assumed that the 1st Defendant controlled Chansam. This sale has been referred to throughout the proceedings as the Yugang transaction. These shares have been referred to throughout the proceedings as the Sale Shares. See *Waddington Limited v Chan Chun Hoo* (2008) 11 HKCFAR 370. Before Mr Recorder Patrick Fung SC. Although Chansam held a 39.2% stake in Prestige, only 34.25% of its shareholding was to be sold to Yugang so as to avoid the 35% trigger point prescribed by the Stock Exchange's Code on Takeovers and

Mergers for a general offer to shareholders to buy shares of a listed company. Waddington claimed equitable compensation rather than any other equitable remedy. This also reflected a pro rata apportionment based on the respective shareholdings of Profit Point and Chansam in Prestige. The judgment was a joint judgment of Lam VP, Kwan and Barma JJA (the CA Judgment). Para 68 of the CA Judgment. Para 89 of the CA Judgment. Section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance, Cap 484. Mr Paul Girolami QC together with Mr Bernard Man SC and Mr Keith Lam. The Respondent to the application (Waddington) was represented by Mr Benjamin Yu SC and Mr Justin Lam. The so called principle of Keech v Sandford (1726) Sel. Cas. Chancery 61; 25 ER 223 is this : that where a person has profited from his position as a fiduciary, he or she will be liable to the principal notwithstanding that the principal could not have obtained the benefit anyway. It has essentially to do with remedies. This is the duty on a fiduciary not to place himself in a position where his or anyone else's interests would or may conflict with duties owed to the principal. See para 9 above. See para 8 above. See para 70 of the CA Judgment. (continued)

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