# Michael de Kretser Consultants Pte Ltd v De Kretser Michael Earnleigh and Another [2008] SGHC 66

**Case Number** : Suit 119/2006

**Decision Date** : 08 May 2008

**Tribunal/Court** : High Court

**Coram** : Choo Han Teck J

**Counsel Name(s)** : Lee Eng Beng, Low Poh Ling and Chin Wei Lin (Rajah & Tann LLP) for the plaintiff; David Liew Tuck Yin (DSH Law Corporation) for the first defendant; Ling Tien Wah and Joseph Lee (Rodyk & Davidson LLP) for the second defendant

**Parties** : Michael de Kretser Consultants Pte Ltd — De Kretser Michael Earnleigh; Michael William Rose

*Companies*

8May 2008 Judgment reserved.

Choo Han Teck J:

1 The plaintiff was a company that provided business management consultancy services including advice and services relating to public relations and advertising. The first defendant was the founder of the plaintiff company in which he was at all material time a director and shareholder. He retained 33.8% of the shareholding in the plaintiff after selling the majority stake to Batey Pte Ltd ("Batey"), a member of a larger consultancy group known by its acronym WPP. The plaintiff is part of a group of companies known as the "Michael De Kretser Consultants" group ("the MDK Group") which comprises the plaintiff; a company in Malaysia known as MDK Consultants (Malaysia) Sdn Bhd; and a company in Thailand known as MDK Consultants (Thailand) Ltd. The first defendant was at all material time a director of all three companies in the MDK Group and was also the Group Chief Executive Officer. The second defendant was the Chief Executive Officer of the plaintiff.

2 This action was brought by the plaintiff against the defendants for breach of fiduciary duties as Chief Executive Officers, and, further, in respect of the second defendant, for breach of a contract of employment dated 1 November 2004. The alleged breaches of the contract concerned the obligations not to take on other employment without prior written approval of the plaintiff and not carrying on any employment in competition with the plaintiff for six months after leaving the plaintiff's employ. The thrust of the plaintiff's action was that the defendants conspired and conducted activities in conflict with their duties to the plaintiff. The focal point of the alleged breaches of duty was the company known as DPR Consultants Pte Ltd ("DPR") on 15 December 2005. DPR was a company created to compete with the plaintiff for its staff and business.

3 The plaintiff's case was as follows. In September 2005, Batey proposed a merger with a company known as Burston-Marstellar. In subsequent developments Batey began discussions with the first defendant with the view of buying over the latter's shares in the plaintiff. The plaintiff claimed that the first defendant was in fact secretly taking steps between November 2005 and early 2006 to set up a rival group of companies to compete with the plaintiff. It alleged that the plans were discussed between the defendants and various executives of the plaintiff and the MDK Group in Kuala Lumpur on 22 November 2005. This was the meeting referred to in evidence as the "Hilton Hotel Meeting". It was envisaged that one Danai Chan Chao Chai, the former Chief Executive Officer of MDK Thailand would be in charge of the new company in Thailand, and the first defendant would be in

charge of the company in Malaysia. The second defendant was to continue in Singapore and be in charge of DPR.

4 The plaintiff claimed that a Christmas lunch on 22 December 2005 at the Flutes restaurant was used as an occasion by the defendants to persuade the plaintiff's staff to join DPR. It was not disputed that some did. Adrian Heng and Louis Lew were two who did. Prem Kallat Baj, the financial controller and company secretary of the plaintiff did not. Adrian Heng and Louis Lew testified as defence witnesses. Goh Sue Lynn and Prem Kallat testified as the plaintiff's witnesses; they testified that the second defendant promised rewards and advantages should the staff join the new company. The plaintiff claimed that the second defendant was in breach even as he was acting as the Chief Executive Officer of the plaintiff because his last day of work with the plaintiff was announced by the first defendant as 9 February 2006 only the day before. It transpired that the second defendant had resigned on 8 November 2005 but this fact was not disclosed to the company and was known only by the first defendant. The plaintiff's counsel, Mr Lee Eng Beng, submitted that the defendants' assertion that the second defendant had served his notice of resignation on 8 November 2005 could not be true.

5 A private investigator employed by the plaintiff found an unsigned letter of resignation from the second defendant in the waste basket of the first defendant's MDK office in Kuala Lumpur, Malaysia on 10 February 2006. On 15 February the second defendant attended a seminar in London organised by Vertu, one of the plaintiff's clients. Vertu subsequently engaged DPR as its business consultant. Mr Lee thus submitted that it was crucial to the second defendant to leave the plaintiff before he could justify his trip to London to get the Vertu account for DPR. The evidence showed that between November 2005 and February 2006 the defendants had intimated to staff and clients of the plaintiff that they were leaving the plaintiff to start their own company. The evidence showed that the defendants took steps to recruit staff for their new company, DPR, while they were still employed by and were holding executive positions in the plaintiff company.

6 There appeared to be a pattern in the incorporation of companies in Singapore, Malaysia, and Thailand with the name and logo of "DPR". DPR in Singapore was incorporated on 15 December 2005 by Wendy Smith, a friend of the second defendant; DPR Communications Sdn Bhd ("DPR Malaysia") in Malaysia was incorporated by Peter De Kretser, the first defendant's son; and DPR Corporate & Marketing Communications Ltd in Thailand ("DPR Thailand") was registered on 15 December 2005 and having the same address as MDK Thailand, where Danai Chan worked. All the companies bearing the DPR initials were in the same or similar business, namely, in business and public relations consultancy and services. Evidence of an email circulating among Danai Chan, Adrian Heng, and the first defendant concerning the pantone colours that were used in the standardized DPR corporate logo emerged about 7 February 2006. It seemed that the planning of the corporate logo probably started shortly before that date.

7 A close personal and professional relationship between the first and second defendant was apparent from the evidence, and it was the first defendant who identified and recruited the second defendant as the person to succeed him in the plaintiff company. The evidence against the second defendant in his involvement in the setting up of DPR in competition with the plaintiff was exemplified in an email dated 9 December 2005 from him to one Christine Howard. The second defendant wrote:

> Things have been mad, trying to see all the clients to woo them to the new company, setting up the new company, applying for PR, meeting the team, finding staff for the new biz.

The date of the email was significant if the evidence that the second defendant resigned only in February 2006 was to be accepted. It meant that even before notice was given to the plaintiff, the

second defendant had been actively acting against the plaintiff's commercial interests. Further, in January 2006 the second defendant told his secretary at the plaintiff office to write to various magazines instructing them to forward the magazines to the DPR address. This was another piece of evidence that fitted into the overall plan of the plaintiff employees of setting up a rival company. Mr Lee, counsel for the plaintiff, contended that by not giving notice of the second defendant's resignation to the plaintiff the plaintiff lost time and opportunity in recruiting a replacement.

8 The defendants denied the plaintiff's claim. Both defendants denied that they had plotted to start the rival DPR (or any other) group of companies while they were still under the employ of the plaintiff. They further denied that they had taken any steps towards the establishment of the rival companies. Finally, they denied that they had caused the plaintiff any damage as claimed or at all. Mr Ling, counsel for the second defendant also denied that the second defendant owed any fiduciary duty to the plaintiff. Mr David Liew, counsel for the first defendant, submitted that the plaintiff's case was a "systematic pattern of schemes devised by the controlling mind behind the plaintiff" and that "the first defendant was being made a scapegoat by the politics within Batey and WPP and [the] action was started and continued against the first defendant". In summing up, counsel stated that "The first defendant's case is therefore that the plaintiff is merely a tool used by the controlling mind behind the company, who has acted oppressively and in complete disregard of the first defendant's interests in the MDK Group and in Batey." In my view, in this action based on breach of fiduciary duty and contract, the motives of the plaintiff in commencing the action are of little relevance. The defence of the first defendant as pleaded was a denial of the plaintiff's allegations of breach of duty and contract. Apart from that denial, it contained various assertions of wrongful conduct on the part of the plaintiff in its negotiations with the first defendant over the latter's severance package. Consequently, much of the first defendant's evidence concerned these matters which I found to be irrelevant to his defence. The first defendant was further distracted by personal circumstances in the history of the company – his wife not only left him but also joined Batey to set up a separate public relations branch for it.

9 The disagreement between the plaintiff's owners and the first defendant were only relevant insofar that they appeared to have been some of the reasons why the first defendant decided to set up a rival group. He repeatedly stated in evidence that he started the MDK Group, and was proud of this fact — the door to the office bore his name, as he reminded counsel in cross-examination. I think that there was no doubt that the first defendant was an able and capable public relations consultant who had a great deal of experience and many contacts. It was not surprising that the rival group of companies involved his son, the second defendant, and former employees of the plaintiff. These were people who knew, respected and trusted the first defendant, who I supposed, earned that respect and trust. The main question before me therefore, was whether the first and second defendants were in breach of their duties as alleged. Mr Liew questioned whether as Group CEO of the MDK Group and a director of the plaintiff the first defendant had breached any fiduciary duty as claimed by the plaintiff.

10 Mr Liew made several points in refutation of the breach of duty allegations. One of these concerned his client's conduct in regard to the merger rumours. That story concerned a rumour that the plaintiff was going to merge with another Batey company and consequently, many of the plaintiff employees would lose their jobs. The defendants claimed that they did their best to quell the rumour and tried to get the staff to concentrate on their jobs in the plaintiff. I am of the view that the rumour episode in itself was not very material. However, I think that the defendants' evidence were probably only partly true. It may be that in the incipient stage of the rumour, and perhaps, later to some but not all employees, the defendants denied the rumour. The evidence showed that in planning their exit from the plaintiff, both defendants had talked to many employees and many of the plaintiff's clients, and further, took steps to form the vehicles for competition, namely, the companies in

Malaysia, Thailand, and Singapore bearing the DPR logo. I am of the view that the evidence showed that the first defendant was in breach of both his contractual and fiduciary duties to the plaintiff. In my view, as the person between the second defendant, who was the Chief Executive Officer, and the board of directors of the plaintiff, the first defendant owed a contractual and fiduciary duty to notify the board that the plaintiff's Chief Executive Officer had resigned and steps had to be taken to find a replacement. He was the person who was responsible for accepting the second defendant's resignation, and being the most senior person in management, was obliged to notify the board so that a replacement Chief Executive can be employed.

11 Mr Ling submitted that there was no agreement between the defendants to set up a rival business in competition with the plaintiff, nor was there any intention to injure the plaintiff. He also submitted that the second defendant owed no fiduciary duty to the plaintiff. Finally, Mr Ling submitted that there was no evidence of damage to the plaintiff. Counsel commented on the value to be attached to evidence such as the Hilton Hotel meeting. He submitted that that was an innocuous meeting and that Danai Chan Chao Chai's evidence that it was a senior management retreat should be preferred to that of Prem Kallat's. On the whole of the evidence, that is, comparing not just the evidence of these two, but that of every witness called by all parties, I am of the view that Prem Kallat's evidence is to be preferred. The evidence indicated to me that from December 2005, if not earlier, to February 2006, the second defendant was in breach of his contractual obligations as the Chief Executive Officer of the plaintiff. As the head of the company he was obliged, at the least, not to conduct activities that he ought to have known was or would be detrimental to his employer. In this regard, he was in breach in having actively enticed his junior colleagues to leave the plaintiff's employ. He was also in breach in setting up DPR and soliciting business for that company. I have reviewed the second defendant's private email to his friend Christine Howard against the other evidence and his own explanation in court, and am of the view that the evidence showed that he had acted in breach of his duties. The relevant text of that email has been set out in [7] above. Mr Lee argued that the second defendant was the most senior officer in the plaintiff company since the chairman of the board's resignation shortly after the second defendant was employed. Counsel argued that by virtue of this and his role in the employment of all other staff, this court should find that his duties to the plaintiff were fiduciary in nature. I agree with counsel. Fiduciary duties arise from positions of trust and are couched in acts of good faith.

12 In my opinion, the freedom to choose one's work naturally allows free movement from one employ to another. The restrictions on changes of employment are governed by the employee's contractual obligations. Even so, not every breach will constitute an actionable breach of contract. A manifest loss of interest, motivation or industry on the part of the employee may be grounds for a termination of the employment by his employer, but might not be sufficient for a suit for breach of contract. Similarly, I think that an employee who has decided to leave his employment is entitled to tell his colleagues and his clients or customers that he is leaving. He is also entitled to inform them of his plans. Courtesy and etiquette in this regard should deflect an accusation of breach of contractual obligations. When that conduct becomes an actionable breach of duty depends on the individual circumstances, after the court has taken into account the nature and degree of the breach of duty. In the present case, I am of the view that the conduct of the first and second defendants had crossed the line from acceptable preparation for departure to a breach of their contractual as well as fiduciary obligations. They were so preoccupied with their new venture that their duties to the plaintiff were grossly neglected, and the action they took while ostensibly working for the plaintiff, in fact, undermined it. Further, their active recruitment of the plaintiff's staff and clients during the period from December 2005 to February 2006 was planned and deliberate and would have, in my view, very likely resulted in damage to the plaintiff. Even assuming that none of the staff members left the plaintiff, though this was not the case, the defendants' conduct led to uncertainty and anxiety and this had a deleterious effect on morale, sufficient to constitute damage in breach of contract. The

short period of time in which the breach occurred may mean that not much pecuniary damage was occasioned. Some of the damage may be more easily quantified than others. Loss of wages would be one of the simpler exercises. Furthermore, it may be that the staff members and clients who joined DPR might testify that they would not have elected to remain with the plaintiff once the defendants leave. Thus, the true and full extent of damage will have to be assessed.

13 I therefore hold that there be judgment for the plaintiff against the first and second defendants, and further order that damages be assessed. Costs will follow the event.