

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)**

SUIT NO: D5 (IP)-22-761-2008

BETWEEN

1. OGAWA WORLD BERHAD
(COMPANY NO: 712499-V) ... 1st PLAINTIFF

2. HEALTHY WORLD LIFESTYLE SDN BHD
(COMPANY NO: 550497-K) ... 2nd PLAINTIFF

AND

CH'NG WAI LOONG
(I/C NO: 760527-14-5751) ... DEFENDANT

JUDGMENT

This is an action brought by the Plaintiffs against the Defendant for declaratory order, injunction and damages. The Plaintiffs' claim is based on conversion, trespass and breach of fiduciary duty in respect of the domain name www.ogawaworld.com.

A domain name is an identification label that defines an administrative authority and control in the internet. It serves as hostname such as web site. An important purpose of domain name is to provide easily recognizable name to addressed internet resources.

The 1st Plaintiff is a company listed on the Kuala Lumpur Stock Exchange. The 1st Plaintiff is the shareholder of the Ogawa World corporate group. The 2nd Plaintiff is a subsidiary of the 1st Plaintiff and is in the business of designing, producing, marketing and selling health equipment.

The 1st Plaintiff, 2nd Plaintiff and the Ogawa World corporate group are sellers of health products under the brand name of "Ogawa". The brand name is a well-known brand of such products in Malaysia. The 2nd Plaintiff is actively engaged in promoting and selling the Ogawa health products through various road shows at shopping centers in Malaysia, and owns chain of stores in East Malaysia, West Malaysia, Singapore, Thailand China, Hong Kong, Australia, Vietnam, Indonesia and others.

The Plaintiffs' case

A summary of the Plaintiffs' case is given here. Through a letter dated 7.11.2005, the Defendant was hired by the 2nd Plaintiff as a

Customer Relations Manager wherein the terms of the appointment letter was accepted by the Defendant. Amongst the terms agreed by the Defendant is that the 2nd Plaintiff has the right to assign the Defendant to work in other sections within the company and within Ogawa World group.

At the end of 2006, the Defendant's duties within the Ogawa World corporate group involve matters pertaining to information technology and the group's computers system. The 1st Plaintiff then decided to create a website for the Ogawa corporate group under the domain name www.ogawaworld.com in order to promote its products and to manage the email account for all its staffs. The Defendant was then assigned to register the domain name www.ogawaworld.com under the 1st Plaintiff's name. The Defendant then informed the 1st Plaintiff that the domain name www.ogawaworld.com has been registered under the 1st Plaintiff's name. However, unknown to the Plaintiffs, the Defendant had registered the domain name www.ogawaworld.com under his own name and not under the 1st Plaintiff's name as instructed. The Plaintiffs' case is that the aforesaid action of the Defendant in hijacking the control of the domain name

www.ogawaworld.com constitute, inter alia, conversion of and trespass to the Plaintiffs' property in the same.

The Defendant resigned on 16.7.2007 and left the employment of the 2nd Plaintiff on 31.7.2007.

Findings of court

I have read and considered in detail the testimonies of all the witnesses, the pleadings and the documentary exhibits. Based on all these, the following facts have been established. Chew Eng Loke (PW3) is the Chief Financial Officer of the 2nd Plaintiff. According to PW3 on 17.12.2007, he made a search in www.dnsvine and found out that the domain name www.ogawaworld.com was not registered under the 1st Plaintiff's name. He then informed Chong Swee Main (PW1), the Executive Director of the 2nd Defendant. PW3 also discovered that the domain name www.ogawaworld.com was registered under one C Ian, Cheras, Kuala Lumpur, telephone No: 019-6617782, Email: ian_cwl@hotmail.co. Now, the telephone number is the same number written by the Defendant in his resignation letter. Furthermore, it is not disputed that the name C, Ian also corresponds with the name that the Defendant is known during his employment with the 2nd Plaintiff. Subsequently, PW3 called the

Defendant through the telephone number 019-6617782 to demand that the Defendant return the control of the domain name to the 1st Plaintiff. The Defendant answered the call but denied knowledge of what PW3 was referring to. The next day (18.12.2007), PW3 conducted another search and found out that that the administrative contact, technical contact and billing contact of the domain name has been changed to "Doc, K", Jalan Sultan Sulaiman Kuala Lumpur. PW3 then found out that the telephone number displayed, 016-61728421, is incorrect when he tried to call the said number. On 28.12.2007, Tan Say Keat (PW5), an Information Technology Assistant of the 2nd Plaintiff known to the Defendant, contacted the Defendant to demand for the return of the domain name to the 1st Plaintiff, however the Defendant again denied knowledge of what PW5 was referring to. On 29.1.2007, the administrative contact, technical contact and billing contact of the domain name was again changed to "Saleha, Siti". On 7.1.2008, PW3 contacted Siti Saleha through the telephone number 012-2622122 and the person who answered the call instructed PW3 to correspond through email. An email was sent on 8.1.2008 but no response was ever received. On 8.1.2008, Cheah Yew Kong (PW2), an Executive Director of the 1st

Plaintiff, contacted the Defendant and the Defendant admitted to PW2 that he was the one controlling the domain name www.ogawaworld.com and the Defendant had promised to return the domain name to the 1st Plaintiff. On 4.3.2008, the Plaintiffs discovered that the DNS server for www.ogawaworld.com, which is the original server hosting the Plaintiffs' website from "ns1.dnsvinecom" and "ns2.dnsvine.com" had been changed to "dom1.omnis.com" and "dom2.omnis.com". As a result of the unlawful changed of servers, the Plaintiffs' website and the all emails belonging to the Plaintiffs were closed down with immediate effect. Therefore the entire Plaintiffs' staffs were not able to communicate, send or receive email and their operations were severely disrupted. Following the disruptions, PW3 sent a Short Message System (SMS) to 019-6617782 and 012-2622122 on 6.3.2008; informing the Defendant that legal action will be filed against the Defendant should the Defendant fail to transfer the domain name back to the 1st Plaintiff by 5 pm on the same day. No reply was ever received by the Plaintiffs following the SMS sent on 6.3.2008. After another search, PW3 discovered that the administrative contact, technical contact and billing contact of the domain name was again changed to "Anthony,

Ron". PW3 found out that the email address of Doc K, Saleha Siti and Ron Anthony displayed in the searches all displayed the same email address, which is kdoc83@yahoo.com. On 6.3.2008 approximately at 5.48 pm, PW3 then received an SMS from 019-6617782, informing him to forward his messages to kdoc83@yahoo.com. PW1 then telephoned the Defendant, demanding that the Defendant return the control of the domain name back to the 1st Plaintiff. The Defendant informed PW1 that he is no longer in control of the domain name as it is presently controlled by his 'friend'. The 'friend' had demanded USD\$10,000.00 to transfer the domain name back to the Plaintiffs. PW1 rejected the Defendant's request and demanded that the Defendant return the domain name to the Plaintiffs or the Plaintiffs will proceed with legal action against the Defendant. On 12.3.2008, the Plaintiffs' solicitors, Messrs Iza Ng Yeoh & Kit served a Letter of Demand upon the Defendant, demanding for the return of the domain to the Plaintiffs. On 17.3.2008, the 1st Plaintiff received a reply from the Defendant which is a total reversal from his previous position. In the said reply, not only had the Defendant failed to deny allegations that he was in control of the domain name www.ogawaworld.com, he also demanded for

USD\$10,000.00 for his effort and expenses incurred in renewing and maintaining the domain. The Plaintiffs' solicitors then replied the Defendant via letter dated 28.03.2008 and stressed that the Defendant's claim was baseless and untrue on grounds that the Defendant was never given permission to register the domain name under his own name. The Plaintiffs' solicitor further stated that the 1st Plaintiff is willing to reimburse the Defendant for the registration and renewing of the domain name, which ultimately costs USD\$15.90, i.e. USD\$7.95 each and not USD\$10,000.00.

In my view, based on the above evidence, there can be no doubt that the Defendant is always in control of the domain name www.ogawaworld.com. Evidently, in his letter dated 17.3.2008, the Defendant wrote *"As a registered owner, I also reserve the rights to transfer or make any modifications to the domain name"*. Indeed, the Defendant had admitted that he is the registered owner of the domain by which, in my view, he had unlawfully registered under his own name. In cross-examination, the Defendant also admitted that he was supposed to create and register the domain name www.ogawaworld.com for the 1st Plaintiff,

It is important to note that PW3 had testified that the change of servers from dnsvine to OMNIS was done by the Defendant to disrupt the Plaintiffs' communication system and shut down their email system. This allegation was never denied by the Defendant, nor had the Defendant cross-examined PW3 on this issue.

It is my findings that the Plaintiffs have shown that the Defendant had unlawfully registered the domain under his own name and is currently the controller of the domain. The Defendant has also admitted that he is still in control of the domain and had failed, refused and/or neglected to return the domain to the Plaintiffs. I reject the Defendant's written submission to the effect that he had all along registered the domain name www.ogawaworld.com under the Plaintiffs and that the Plaintiffs had full control of the said domain. Furthermore, it is my findings that the Defendant is not telling the truth when he said that all the domain login information including username and password were given to the Plaintiffs before he resigned. It had been established that the Defendant had been assigned to register the domain name www.ogawaworld.com by the Plaintiffs during his employment. The Defendant had then during trial

admitted that he has received instructions from the Plaintiffs to register the domain under the Plaintiffs name.

The Defendant had clearly disregarded and in breach of clear instructions from the Plaintiffs registered the domain under his own name and had done so without informing the Plaintiffs. The Defendant is in breach of his contractual and fiduciary duty owed towards the Plaintiffs.

The Defendant had refused to return the control of the domain to the Plaintiffs and the Plaintiffs suffered losses in term or marketing and printed materials as all marketing materials bear the domain name of www.ogawaworld.com. The Plaintiff had also suffered huge losses when the Defendant changes the server from dnsvine to OMNIS without prior warning to the Plaintiffs, thus causing the Plaintiff to lose its entire communications and email capabilities. These have caused losses to the Plaintiffs due to the wrongful act of the Defendant.

Therefore, to sum it up, based on all the previously mentioned reasons, the Plaintiffs have proved on the balance of probability that the actions of the Defendant in unlawfully registered and control the domain name www.ogawaworld.com under his own name constituted

conversion of and trespass to the Plaintiffs' property in the domain name and also constituted breach of fiduciary duty. Hence, I allow the Plaintiffs claims and I make an order in terms of the Plaintiffs' Statement of Claim, paragraphs 42 (a) (b) (c) (e) (f) and costs.

(DATO' AZAHAR BIN MOHAMED)
Judge of High Court
Kuala Lumpur.

5 March 2011

Counsel for the Plaintiff: Hasmaliza and Siew Thia En

Solicitors for the Plaintiff: Messrs. Iza Ng Yeoh & Kit

Defendant: Ch'ng Wai Loong (Defendant in-person)