IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 58

Suit 224/1991

Between

Canadian Pacific (Bermuda) Ltd

… *Plaintiff*

And

Nederkoorn Pte Ltd
Another

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Mareva injunctions; Companies; Contract — Mistake; Trusts — Breach of trust

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Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd and Another

[1998] SGHC 58

Suit 224/1991
G P Selvam J
28 February 1998

Judgment:

1.**GP SELVAM J**

The parties

The plaintiffs, Canadian Pacific (Bermuda) Ltd, carried on the business of operating a fleet of specialist tanker vessels either as registered or disponent owners. The operation hub of their business was in London. For this purpose they had a management company in London called Canadian Pacific Ships Ltd Their corporate affairs were handled in Bermuda.

2.The first defendants, Nederkoorn Pte Ltd, carried on the business as brokers for vegetable oils. Their business operation hub was in Singapore. The second defendant, Robin Nederkoorn, was the chief executive officer of the first defendants. There were other companies related to the first defendants which were peripherally involved in the business.

3.Where the context permits I will refer to the plaintiffs and their associates as the `Canadian Pacific side` and the first defendants and their associates as the `Nederkoorn side`.

4. **Initial joint-ventures**

The business operations of the plaintiffs and the first defendants led to overlap and competition for the carriage of Far East cargoes. In order to avoid the conflict and with the view to joining forces the parties collaborated in an unincorporated joint-venture. This first unincorporated joint-venture lasted from June 1988 till September 1988. It was on a 50:50 basis. The vessels involved in the collaboration were two in number. The parties were well satisfied with the performance for the joint-venture. So they expanded and formalized the collaboration in September 1998. The second joint-venture lasted from September till November 1988. This time there were five vessels all of which had been chartered on period time charters by the plaintiffs. Thus the plaintiffs secured the ships. The first defendants secured the cargo. The parties to this joint-venture agreement were the plaintiffs and the amorphous `Nederkoorn group of companies`. It was signed by the second defendant `for Nederkoorn Pte Ltd`. Profit or loss was shared on a 40:60 basis between the two parties: 40 for the Canadian Pacific and 60 for Nederkoorn Pte Ltd. Fairfield Ship Management Pte Ltd, of the Nederkoorn side in Singapore was used for the commercial management of the vessels (including accounting). The plaintiffs paid the charter hire, bunker bills, canal tolls and fees to all agents. They received all the freights. The securing of cargo was undertaken by the Nederkoorn side in consultation with the Canadian Pacific side. The cargo was mostly from the Far East to the West.

5. **The third joint-venture**

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Both sides were once again pleased with the joint-venture business and its success prompted the parties to continue their collaboration on a more rational and organized basis. To this end the parties signed a memorandum of agreement (the MOU) on 4 November 1988. The heading of the MOU was `Memorandum of Understanding between Canadian Pacific (Bermuda) Ltd and The Nederkoorn Group of Companies`. Again the amorphous `Group of Nederkoorn Companies` constituted the Nederkoorn side.

6.The second defendant signed the MOU `for Nederkoorn (Singapore) Pte Ltd`. One George Bateman signed the MOU for `Canadian Pacific (Bermuda) Ltd`.

7.Clauses 1 to 6 of the MOU provided as follows:

> 1 Canadian Pacific (Bermuda) Ltd and Nederkoorn`s Principal, Aquaspan Ltd of Liberia will form a 50/50 nominally capitalised joint-venture company, domiciled in Bermuda, to be called CPN Tankers (Bermuda) Ltd. At the same time a nominally capitalised 50/50 joint-venture management company will be formed in Singapore, to be named CPN Tankers (Singapore) Pte Ltd which will be owned 50% by a Canadian Pacific Co and 50% by Nederkoorn (Singapore) Pte Ltd.
>
> 2 The Board of CPN (Bermuda) will consist of local nominees and the Board of CPN (Singapore) will be:
>
> Harvey Romoff
>
> Matthys Nederkoorn
>
> Brian Williams
>
> Robin Nederkoorn
>
> Arthur Robinson
>
> Jerome Williams
>
> 3 CPN (Singapore) will receive a management fee from CPN (Bermuda) to cover their overheads plus a nominal profit. CPN (Singapore) will be located in the offices of Nederkoorn (Singapore) in a separate partitioned section. CPN (Singapore) will pay Nederkoorn (Singapore) rent on the space occupied on

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> a back-to-back basis with Nederkoorn`s existing office lease. CPN (Singapore) will have its own switchboard, telex, telefax, etc., for which it will be responsible and will operate as a completely independent unit except such services as may be requested from Nederkoorn (Singapore) Pte Ltd.
>
> 4 Robin Nederkoorn is to be appointed managing director of CPN (Singapore) with no salary but he will be reimbursed actual expenses incurred in his capacity as managing director. Roger Newnham is to be seconded as manager of CPN (Singapore), who will be responsible for his salary and expenses. Other CPN (Singapore) staff will be seconded from the existing personnel of Fairfield Ship Management Singapore and Nederkoorn (Singapore). CPN (Singapore) will be responsible for all its staff`s salaries and expenses, etc.
>
> 5 CPN (Bermuda) is not to enter into any commitments in excess of six months without the approval of its shareholders. The company is to submit monthly profit and loss statements to its shareholders and is to hold semi-annual Board meetings to review performance. Price Waterhouse are to be appointed auditors of both the Bermuda and Singapore companies. CPN (Singapore) will open a bank account in Singapore which will receive all freights and pay hires, etc. Under Singapore law there is no tax liability for the Bermuda company and, therefore, the Singapore bank can hold funds indefinitely until such time as CPN (Bermuda) decides to pay a dividend.
>
> 6 A termination clause will be incorporated in the CPN (Bermuda) shareholders` agreement whereby either party can be given 12 months` notice of terminating the agreement, although the party will still be responsible for all contractual obligations and liabilities entered into by CPN (Bermuda).

8. **Formation of joint-venture companies and their business**

Following that on 18 November 1988 CPN Tankers Pte Ltd (CPN Singapore) was incorporated in Singapore and began to transact business. CPN Tankers (Bermuda) Ltd (CPN Bermuda) was incorporated only on 8 February 1989. The corporate affairs of CPN Bermuda including the issue of shares were handled by the Canadian Pacific side in Bermuda. On the day of incorporation (8 February 1989) a number of events occurred. First there was a meeting of the

provisional directors of CPN Bermuda. Items 6 and 7 of the minutes of the meeting read as follows:

> *It was reported to the meeting that the minimum share capital of the company had been fully subscribed and it was resolved that the minimum share capital of US$12,000 divided into 12,000 shares of par value US$1 each, be and is hereby allotted at a price of US$1 per share as follows:*
>
> Canadian Pacific (Bermuda) Ltd 5,997 shares
>
> Aquaspan Ltd 5,997 shares
>
> Robin H Nederkoorn 1 share
>
> Matthys A Nederkoorn 1 share
>
> Harvey Romoff 1 share
>
> Roger C Shutter 1 share
>
> David J Doyle 1 share
>
> Michael J Spurling 1 share
>
> *The chairman noted that the shares so allotted had been subscribed for upon terms that no payment would be due upon allotment and that there was no proposal to make a call on the shares at this time.*

9.It is to be observed that the minutes confirmed that there was no intention or requirement that the shareholders should immediately pay for the shares and collect the share certificates. Aquaspan Ltd was intended as the nominee shareholder of the first defendants.

10.Next Roger Shutter and David J Doyle were appointed proxies of the shareholders and there was a statutory meeting of members being the first annual general meeting. At that meeting six persons including Roger Shutter, Robin H Nederkoorn and his father Matthys A Nederkoorn, were appointed directors.

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11.On the same day there was a meeting of the board of directors. The Nederkoorns were represented by their proxy David J Doyle. Roger Shutter and Robin Nederkoorn were appointed president and vice-president of CPN Bermuda respectively. The board further appointed Swiss Bank Corp, Singapore and Bank of American Singapore as bankers. The authorized signatories to the accounts were Robin Nederkoorn together with Jerome Williams and Vincent Wong signing jointly.

12.It deserves to be mentioned at this juncture that it was only after a lapse of eight months (25 October 1989 to be specific) and after very many momentous events that Roger Shutter and MJ Spurling held a meeting of directors of CPN Bermuda and resolved that:

> *a 100% call be made on all the allotted shares of the company and, having been advised that the moneys so called had been received, the chairman instructed the secretary to issue corresponding certificates for fully-paid shares.*

13.In a letter dated 25 October 1989 and addressed to `HM Romoff, Chairman and Chief Executive Officer, Canadian Pacific Ships`, Roger Shutter confirmed that `Nederkoorn paid their US$6,000 being 50% of the US$12,000 call up capital on 3 October`.

14.The shareholders` agreement contemplated by the parties and mentioned in cl 6 of the MOU never materialized. It remained an agreement to agree. Drafts of the shareholders` agreement had been produced by lawyers but it was not signed because the Canadian Pacific side for their own convenience directed their lawyers to put it `on hold`. In the meantime, CPN (Bermuda) and CPN (Singapore) carried on the joint-venture business. Bank accounts were established and operated by both joint-venture companies. Cheques were signed by officers appointed by both sides. Both sides had deployed their personnel

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and resources to ensure the success of CPN Tankers business. The personnel of CPN Singapore came from the Canadian Pacific side as well as Nederkoorn side. All the time the personnel including the second defendant remained the employees of CPN (Singapore). Thus the two CPN companies operated as independent entities. The plaintiffs ensured that neither defendant had the power or opportunity to lay their hands on moneys belonging to the joint-venture business while it remained as such.

15.Meanwhile the CPN Tankers business by February 1989 had six ships under its operation. Subsequently four vessels, `OT Sonja`, `Nand Vishnu`, `Eulota`, `Cosmos A` were chartered. The plaintiffs had no financial exposure in respect of these four vessels which were later nicknamed `the Ugly Four`.

16.In essence, the substratum of the CPN Tankers business strategy was for Canadian Pacific side to provide the tonnage and secure cargo other than vegetable oil. The Singapore side was to provide the vegetable oil cargo. Things appeared to be running smoothly for a few months.

17. **Plaintiffs withdraw**

Within six months of the start-up of the business the Canadian Pacific side sprang a major surprise. Unbeknown to the defendants, the plaintiffs had decided to relinquish their entire shipping business by selling it to certain Greek interests called Ceres Hellenic Shipping Enterprise Ltd (Ceres Hellenic). This included the plaintiffs` shares in CPN Bermuda and CPN Singapore.

18.On or about 30 May 1989, the plaintiffs represented by one Brian Williams who was in control of the Canadian Pacific side of the CPN Tankers business informed the second defendant that the plaintiffs had sold their 50% interest in

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the CPN joint-venture to Ceres Hellenic. He stated the sale as an accomplished fact when in fact it was not. The first defendants without examining the legalities of the matter resigned to the new configuration. The first defendants in any event had no legal right to restrain the sale or refuse to accept Ceres Hellenic. Unlike a partnership, no shareholder of a company can hinder another shareholder from selling his share unless the articles of the company or a shareholders` agreement precludes him from doing so. There was no written agreement between the plaintiffs and the first defendants evidencing the terms of severance of the plaintiffs from the CPN Tankers business.

19.The proposed sale of the plaintiffs` shipping business to Ceres Hellenic was for a total price of US$100,000,000 and the terms and conditions of the sale were evidenced by a master agreement dated 23 May 1989 made between the plaintiffs and Ceres Hellenic (the Ceres Agreement).

20.The Ceres Agreement contained a term that 50% of the CPN joint-venture together with other businesses, including goodwill, was sold by the plaintiffs to Ceres Hellenic for US$800. Another agreement called the Asset Sale Agreement, executed on 30 June 1989 by the plaintiffs and Elcommerce Inc further included an agreement for sale of, inter alia, `the CPN Bermuda Interest` to Elcommerce Inc and the sale was to be effective on 1 July 1989. It would be salutary now to state here that the master agreement defined `the CPN Bermuda Interest` in the following terms:

> *An interest (the CPN Bermuda Interest) in incompleted arrangements which are already in part operational for the establishment of a joint-venture company (to be known as CPN Bermuda Ltd) now incorporated in Bermuda for the purposes of trading in the carriage by sea of vegetable oil in the Far East together with Nederkoorn Pte Ltd (Nederkoorn) of Singapore and Aquaspan Ltd (Aquaspan) of Monrovia as envisaged and set forth in a Memorandum of Understanding made between the vendor and Nederkoorn and Aquaspan and dated 4 November*

> *1988 and certain draft documentation currently in negotiation between the parties thereto.*

21.It must be observed that the definition speaks of a joint-venture company and not partnership.

22. **Notional novation**

The plaintiffs by these agreements were to withdraw from CPN Tankers business and induct Ceres Hellenic or Elcommerce Inc into it. The intended sale by the plaintiffs to Ceres Hellenic of the CPN Tankers business was lock, stock and barrel in that not only the shares were to be transferred to Ceres Hellenic but also most of, if not all, the operation staff appointed by the Canadian side were to remain with CPN Singapore.

23.Even before the documentation of the transfer could be done the CPN Tankers business continued with Ceres Hellenic notionally substituting the plaintiffs. What is the same thing there was a notional novation which never materialised. But alas it soon ran into stormy weather causing further difficulties to the Nederkoorn side.

24.The plaintiffs` agenda did not work out well because Ceres Hellenic refused to abide by certain parts of their agreement with the plaintiffs. In the result in October 1989 Ceres Hellenic wanted to wean themselves from their agreement with the plaintiffs as regards the CPN Tankers business. Once again the defendants found themselves compelled to agree as it would be a commercial disaster to be hobbled by an unwilling party namely Ceres Hellenic. Since there was a de facto withdrawal by the plaintiffs the first defendants had no hold on them. So the Nederkoorn side agreed to dissolve whatever relationship there was between the first defendants and Ceres Hellenic pertaining to CPN Tankers

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business and the vessels and business were taken over by (Tamar Shipping Bermuda Ltd), a company belonging to the Nederkoorn side.

25. **Ceres Hellenic`s withdrawal**

A memorandum of understanding dated 18 October 1989 (the Ceres Hellenic MOU) was made between Ceres Hellenic and the first defendants. The signatories were Nederkoorn Pte Ltd and Ceres Hellenic Shipping Enterprise Ltd. The plaintiffs were not a party to it but they were fully aware of its terms and the events which led to it. The essential parts of it were the first and the last clauses. They read as follows:

> 1 Under the terms of the sale of the Canadian Pacific Tanker business to the Ceres Hellenic Group the Canadian Pacific 50% shareholding in CPN is to be transferred to Ceres. When Ceres acquires this 50% shareholding, the shares will immediately be transferred to Nederkoorn so that CPN becomes fully owned by the Nederkoorn Group. All profits/losses incurred by CPN from 1 July 1989 will be for the account of the Nederkoorn Group. However, there is a disagreement between Canadian Pacific and Ceres as to the financial responsibility for the OT Sonja, Nand Vishnu, Eulota and Cosmos A from 1 July 1989. If Canadian Pacific are unwilling to accept their 50% share of the losses from 1 July 1989 then this 50% share of the losses will be borne by Ceres.
>
> 5 After the transfer of the shares in CPN (Bermuda) Ltd from Ceres to Nederkoorn, then CPN (Singapore) will hold a board meeting at which time Harvey Romoff, Brian Williams and Arthur Robinson will resign from the board. The company will cease to operate.

26.It should be recalled that it was one week after this fiasco that Roger Shutter and MJ Spurling for some mysterious motive held the directors meeting of CPN Bermuda on 25 October 1989 and resolved to issue the share certificates to themselves and the first defendants. The plaintiffs ironically continue to remain

the shareholders of CPN Bermuda because the transfer of their interest to Ceres Hellenic turned out to be notional and fictional and never materialised.

27.If the withdrawal of the plaintiffs from the CPN Tankers business sounded the deathknell to the joint-venture business, the Ceres Hellenic MOU drove the last nail into the coffin. CPN Tankers business as a joint-venture company business was all but buried. It should be noted that this was due to the capricious and incompetent conduct of the plaintiffs. The plaintiffs had withdrawn from the joint-venture business leaving the first defendants in limbo.

28.The consequence of all these happenings was that the plaintiffs who had chartered a good number of vessels operated by the CPN Tankers business were out of pocket on a large scale. It would appear that they were in a predicament because they were not clear as to how to recover the huge commitments they had made. The plaintiffs fortunately had no exposure in respect of the Ugly Four. They were not liable to the owners of the four vessels. They of course had to bear the losses up to 30 June 1989 but not beyond that date.

29. **Action against Ceres Hellenic**

As a first major step to recoup their advances and outgoings the plaintiffs commenced proceedings in the Commercial Court, London on 13 March 1990 against Elcommerce Inc as first defendants and Ceres Hellenic Shipping Enterprise Ltd as second defendants. The principal remedies the plaintiffs sought in so far as it concerns this case were as follows:

> 1 Such orders as may be necessary specifically to enforce and to carry into effect the undertaking given by the first defendant in the written Asset Sale Agreement (the Asset Sale Agreement) made between the plaintiff and the first defendant and dated 30 June 1989 that the first defendant would with effect from 30

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June 1989 assume and perform the obligations of the plaintiff under certain arrangements for the establishment and operation together with Nederkoorn (Private) Ltd of Singapore and Aquaspan Limited of Monrovia of a joint-venture (the joint-venture) for the purposes of trading in the carriage by sea of vegetable oil in the Far East: and, in particular, an order that the first defendant does forthwith apply to the Bermuda Monetary Authority for permission to take over and does all such other things as may be necessary to take over and does take over from the plaintiff the plaintiff`s allotment of 6,000 shares in the joint-venture company known as CPN Tankers (Bermuda) Ltd (CPN), incorporated in Bermuda.

2 Such orders as may be necessary specifically to enforce and to carry into effect the undertaking given by the first defendant in the Asset Sale Agreement that the first defendant would as agent for the plaintiff use all reasonable endeavours to collect the debts owed immediately prior to 30 June 1989 to the plaintiff in connection (inter alia) with the joint-venture: and, in particular, an order that the first Defendant use all reasonable endeavours to collect on behalf of the plaintiff the sums of US$787,313 (being US$1,227,313 certified by Price Waterhouse less payments of US$250,000 and US$190,000) and US$200,000 certified by Price Waterhouse as due to the plaintiff from the joint-venture and/or from Nederkoorn (Private) Ltd. Alternatively, an order that the first defendant do pay those sums to the plaintiff pursuant to the provisions of the Asset Sale Agreement.

3 Orders for payment by the first defendant of the sums of:

3.1 US$2,868.30 corporate administration charges paid by the plaintiff on behalf of CPN referable to the period from 30 June 1989 to 31 December 1989;

3.2 US$41,218 insurance premiums paid by the plaintiff on vessels employed in the joint-venture referable to the period from 30 June 1989;

3.3 US$317,192.50, being the part apportioned by Nederkoorn (Private) Ltd to the period after 30 June 1989 which Nederkoorn (Private) Ltd has claimed from the plaintiff in default of payment (or agreement to pay) by the first defendant;

pursuant to the first defendant`s undertaking in the Asset Sale Agreement to indemnify the plaintiff against such costs, proceedings, claims, demands and expenses.

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30.In the statement of claim in the London action the CPN Tanker business was described as follows:

> *An interest in arrangements which were incomplete but already partly operational for the establishment with Nederkoorn Pte Ltd and Aquaspan Ltd of a* ***joint-venture, to be carried on through a company called CPN Bermuda Ltd*** *incorporated in Bermuda on 8 February 1989. [Emphasis added.]*

31.The second objective of the London action was to compel Ceres Hellenic and its associate, Elcommerce to substitute the plaintiffs in the CPN Tankers business when in fact the plaintiffs were aware that Ceres Hellenic and the first defendants, by the Ceres Hellenic MOU, had agreed to end the uncertain relationship between them.

32.Ceres Hellenic filed a defence denying that they were under an obligation to take up the plaintiffs` interest in the CPN Tankers business. It is unnecessary to state the reasons Ceres Hellenic stated in their defence. The defence of Ceres Hellenic was filed on 30 April 1990 and it was amended on 25 January 1992. In March 1992 the London suit was terminated by way of an out of court settlement approved by the court. The settlement term that directly concerns this case was as follows:

> *The parties agree that the defendants (ie Elcommerce and Ceres Hellenic) have no claim, right or interest in or to the shares in CPN Tankers (Bermuda) Ltd, presently registered in the name of CPB (ie Canadian Pacific Bermuda Ltd).*

33.By early 1991 the plaintiffs must have realized that they had lost their way by proceeding against Ceres Hellenic as they decided to file the present action on 6 March 1991. It was one year after the London action against Ceres Hellenic had been filed and some one year before it was settled out of court. It is to be inferred that the plaintiffs did so because they were convinced that they did not

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stand a chance against Ceres Hellenic in respect of the CPN Tankers business. With that backdrop I come to the present action.

34. **Present action**

To recapitulate the present claim of the plaintiffs arose out of their withdrawal from CPN Tankers business and the notional take over of the plaintiffs` interest by Ceres Hellenic. The cut-off date of the withdrawal was 30 June 1989. The plaintiffs filed this action to recover their advances and outlays to the CPN Tankers business. The plaintiffs had contributed hugely to the CPN Tankers business by providing chartered tonnage and working capital. There was a notional assignment of the charters to the CPN Tankers business. In effect, therefore, the main part of the plaintiffs` claim was for the reimbursement of charterhire which had been paid by them to the shipowners or for which they had become liable. In other words the plaintiffs were creditors of the joint-venture business `carried on through CPN Bermuda`. They wanted the defendants to pay them what was owing to them. The amounts of the plaintiffs` claim was represented in two statements of accounts prepared by the Singapore office of Price Waterhouse. One reflected the position as at 30 June 1989. The other reflected the position taking into account events up to 9 October 1990 but still maintaining the cut-off date of 30 June 1989. These accounts were not accepted in their entirety by the first defendants and nor were they signed by the first defendants.

35.When this action was filed the total amount of the plaintiffs` claims was stated as US$667,805. When the action came up for trial it had more than doubled exceeding US$1.5m.

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36.The details of the claims were as follows : 1. US$947,846 being the plaintiffs` entitlement as a result of account taking.

2. US$312,849 being an amount in the bank.

3. US$305,247.50 being 50% of the loss arising from the voyages commencing before 30 June 1989 and after that date.

4. There was a claim for US$111,900 later reduced to US$43,755 being a claim for return of working capital. There was a sum of US$92,329 being an amount in the hands of the plaintiffs being amounts they had collected but never handed over to CPN Bermuda.

. There was also a dispute relating to the losses arising from the Ugly Four, that is whether the plaintiffs were responsible for the losses after 30 June 1989 in respect of those four vessels.

37.Another matter that was before me was a Mareva order against both defendants which the plaintiffs had obtained on 18 June 1991. The defendants asked the court to set aside the order with an inquiry as to damages.

38. **Plaintiffs` primary case**

The plaintiffs founded their case on the contention that by the MOU of 4 November 1988 a joint-venture partnership business was set up and that the plaintiffs and first defendants carried on a joint-venture partnership from that day until 30 June 1989. The plaintiffs denied that defendants` contention that the joint-venture business was manifested or carried on by the corporate body CPN Bermuda. They said that CPN Bermuda was an agent for the partnership. The defendants` contention was what was contemplated by the MOU of 4

November 1988 was not a partnership business but corporate business and that as a matter of fact the business was manifested and carried by CPN Bermuda and further that the joint-venture business was managed by CPN Singapore as managers and agents of CPN Bermuda. The true construction of the MOU of 4 November 1988 is critical to the resolution of this main issue.

39. **A case of misnomer**

Before I examine the main issue it is necessary to decide an ancillary matter relating to the MOU of 4 November 1988: with whom did the plaintiffs make the MOU of 4 November 1988? The caption of this document has been reproduced earlier in this judgment. It was also noted that RH Nederkoorn signed for `Nederkoorn (Singapore) Pte Ltd`. The plaintiffs said correctly that there was no company registered under the name of Nederkoorn (Singapore) Pte Ltd. They further said that Robin Nederkoorn by signing for a non-existing company made himself personally liable on the agreements. In the same breath, however, the plaintiffs announced that there was a misnomer for Nederkoorn Pte Ltd. Upon that recognition they made Nederkoorn Pte Ltd, a Singapore registered company, as the principal defendant, that is first defendants, in this action.

40.In my judgment `Nederkoorn (Singapore) Pte Ltd` was unquestionably a misnomer for `Nederkoorn Pte Ltd`. Accordingly I shall construe the MOU by omitting the word `Singapore` and reading it as Nederkoorn Pte Ltd. There is ample legal justification for this course of action. The concept of mistake in name, known in legal parlance as `misnomer` or `falsa demonstratier` is very ancient. The full statement of this concept is: ***Nil facit error nomis cum de corpore vel persona constat*** . A mistake in the name does not matter when the body or person is manifest. Applying the concept of misnomer courts from time

out of mind have rectified incorrect names in court proceedings and private documents. See **Colgate-Palmolive (Asia) Ltd v Swedish East Asia Co Ltd** [1965] 2 MLJ 177 , **Re Taylor; Cloak v Hammond** [1887] 34 Ch D 255 and generally ***The Construction of Deeds and Statutes*** (Fifth Ed) ch 9.

41.In this case there was abundant evidence that the contracting party was Nederkoorn Pte Ltd and that it was always in the mind of the persons concerned including Robin Nederkoorn and Brian Williams that Nederkoorn Pte Ltd was the contracting party as that was the only company in existence in Singapore bearing the name "Nederkoorn". On numerous occasions the plaintiffs themselves used the correct name: Nederkoorn (P) Ltd. For instance in the definition of the CPN Bermuda interest they wrote the correct name. So did Holman Fenwick & Willan in the writ against Ceres Hellenic. Ceres Hellenic MOU used the correct name. The theory that the second defendant warranted the authority of a non-existent company is therefore a disingenuous case. It is clear that the introduction of the word "Singapore" was to distinguish the Singapore company from other foreign "Nederkoorn corporations". Accordingly it was illogical to proceeded against Robin Nederkoorn on the basis that he contracted for a non-existing company.

42.The plaintiffs later advanced other grounds for contending that Robin Nederkoorn was personally liable as an officer of the first defendants. Robin Nederkoorn has challenged this. I will consider this issue later.

43. **The law**

Before considering the plaintiffs` arguments I shall state the applicable law. A `partnership` is the relation which subsists between two or more persons, both natural and corporate, carrying on a business in common with a view of profit.

See s 1 of the Partnership Act 1890. Those who are engaged in the business constitute a `a firm`. See s 4 of the Partnership Act a partnership therefore by definition is a business owned by two or more persons that is not organized as a corporation. On the other hand when any two or more persons associate and incorporate a body to do business a corporation or company is created. The implications go beyond the formalities because they are governed by fundamentally different legal regimes. The liabilities of those who form a firm or a company are not the same. A partnership firm or business being an unincorporated body, is registrable under the Business Registration Act (Cap 32) and subject to the terms of a partnership agreement and the provisions of the Partnership Act 1890. A company on the other hand is incorporated and registered under and governed by the Companies Act. A partnership firm is treated as a conduit for its partners and as such is not subject to taxation. Each partner is taxed on the share of the firm`s profits. However, each partner is liable when any partner incurs a debt on behalf of the firm. In the case of a company, the company itself and to the shareholders are liable on its taxable income. Creditors have a right of recovery of each partner. Each partner is a fiduciary of other partners. The directors are fiduciaries of the company only. The company is not a fiduciary of its shareholders.

44.The concept of a `joint-venture` was first created by American jurists to overcome the disability of American corporations to form a partnership and carry on business as such. The words `carry on business` imply doing business on a continual basis. This disability was not part of English law since the Partnership Act permitted the formation of a partnership by corporations. If therefore two corporations in Singapore combined for the purpose of an one-off business venture without intending to ***carry on business*** in general or of a particular kind the joint-venture would not be treated as a partnership for the

simple reason that it does not entail a continuing relationship among the participants which is an essential element of a partnership. If an unincorporated joint-venture is intended to carry on business, that is on a continual basis, it would be partnership. `The principal difference between a partnership and a joint adventure` says ***Rowley On Partnership*** (2nd Ed) at p 482 `is said to be that "while a co-partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint-venture is usually, but not necessarily, limited to a single transaction." Stated otherwise, a single or isolated and non-continuing undertaking usually constitutes a distinguishing feature between a "joint-venture" and a "partnership."` Another American authority, ***A Treatise on the Law of Contracts by Williston*** (3rd Ed) at p 553 says that a joint adventure is usually limited to a single transaction. He proceeds to state that `a joint-venture is a special combination of two or more persons, whether corporate, individual or otherwise, where in some specific venture a profit is jointly sought ***without the necessity of any actual partnership or corporate designation*** .` A true joint-venture therefore need not be registered under the Business Registration Act because it is not a partnership formed to carry on business on a continual basis. On the other hand an unincorporated joint-venture formed by two or more persons to carry on business on a continual basis making transaction after transaction will be a partnership and if it is formed in Singapore must be registered under the Business Registration Act.

45.In order to determine the true structure of a business venture the courts will not merely look at the description label parties choose to attach but the nature of the business. A business set-up does not become a partnership simply because some one for some self serving motive chooses to describe it so. The substance of the organization rather than its outward form must be looked at. See ***Lindley & Banks On Partnership*** (17th Ed) p 74, para 5.07.

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46. **Keith Spicer Ltd v Mansell**

Keith Spicer Ltd v Mansell [1970] 1 WLR 333 is a good case in point. Two individuals, Mansell and Bishop, agreed to go into business together and form a limited company which would carry on business in Mansell`s restaurant. They performed certain preparatory acts during the three weeks prior to the formation of the company to enable it, when formed, to start business at once. Bishop ordered goods from the plaintiffs intending to be used by the company when formed. The goods were delivered to Mansell`s address. They both visited a bank and opened an account in the name of the proposed `company` omitting the word `ltd`. Subsequently Bishop became insolvent and the plaintiffs sued Mansell for the price of the goods on the ground that Mansell was carrying on business in partnership with Bishop at the time when Bishop ordered the goods and that Mansell was accordingly liable. At the trial there was no evidence that the bank account was ever used. The county court judge decided that there was never a partnership between Mansell and Bishop before the company was formed. There was `a loose agreement` to start ordering for the company but there was no partnership between them at the date when the goods were ordered by Bishop. Additionally it was found as a fact that the plaintiffs did not intend to supply goods to a partnership. He dismissed the claim. The plaintiffs appealed. The court of appeal affirmed the decision below. In the leading judgment Harman LJ said at pp 335-336:

> *In that model piece of legislation, the Partnership Act 1890 s 1(1), one finds: `Partnership is the relation which subsists between persons carry on a business in common with a view to profit.` Now were Bishop and Mansell carrying on a business? I do not think there is any evidence of that. There is evidence of the buying of these goods by Bishop There is evidence of the opening of a banking account and the banker saying `You cannot put the word "Ltd" after the name because the company is not formed, but you can use the same title without "Ltd."` But what happened about that banking account is left in the shadow, the bank being*

> *in liquidation; and I do not think there is enough in the act of going to the bank and opening an account in the name of the proposed company without the word `Ltd` to show that the defendant and Bishop were then carrying on business in partnership. They were preparing to carry on business as a company as soon as they could. I think the county court judge was justified in saying that they never intended to be partners and that therefore they were not partners because they never carried on business as such.*
>
> *There was a lot of learning evinced in the argument, one of the points taken by Mr Reid being that in the old days under the Companies (Winding-up) Acts you could have an abortive company wound up although it had never been incorporated; and there are a number of cases which say that promoters involved in such an abortive business were not partners. I think that is because they did not intend to be partners: everything they did was a preparation for the company which they were trying to promote. But I do not think those cases have anything but a very indirect bearing on anything we have to decide. The last of them* ***Hamilton v Smith*** *[1859] 5 Jur NS 32, came before Kindersley VC, who deplored the fact that the law was that promoters in that position were not partners.*

47.Two points about the case come out bright and clear. First if the company had in fact been formed and bank account had been established in the name of the company there would have been no basis for the plaintiffs raise the assertion that there was a partnership at any time. Secondly, as between Mansell and Bishop there would have been no basis invoke the Partnership Act when in fact the agreement was merely to incorporate the company and take some preparations to launch its business. More so if the company had in fact been formed.

48.What then is the legal position between two or more persons, natural or corporate, who combine to form a company? The answer is succinctly stated in the following proposition by ***Lindley & Banks On Partnership*** (17th Ed) at p 17, para 2-19:

> *Where two or more persons are preparing to set up a company and intend to become members of the company after its*

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> *formation, they will not be regarded as partners if this is their only business association. Admittedly, they may share a common object which is, ultimately, the acquisition of profit, but their immediate object is the formation of the company. On the other hand, persons who together carry on the* ***business*** *of promoting companies with a view to making profits therefrom will unquestionably be partners.*

49. **The meaning and effect of the MOU**

It is trite law once a contract has been performed or its objects accomplished that contract no longer remains executory and no rights and obligations can flow from it. Accordingly once the two companies were set up and business commenced the primary terms ceased to be executory and the parties acquired fresh rights as shareholders. Once the bridge is crossed by the incorporation the rules of the new regime of company law applied. Furthermore the doctrine of separate legal entity must also be respected and applied. If the shareholders as separate legal entities had business dealings with or lent moneys to the company in which they are shareholders those dealings must be governed by principles of contract.

50.I shall now examine the MOU of 4 November 1988 and weld the law into the relevant facts of the case. It is settled law that in order to determine the true intention of the contracting parties of the MOU of 4 November 1988, one must search within the four corners of the document. The opening part of the MOU started in crystal clear terms: they `will form a ***joint-venture company*** ` and not a partnership. It then identified the shareholders - namely the plaintiffs and Aquaspan Limited of Liberia. It went on to say that a `nominally capitalised 50/50 ***joint-venture management company*** ` would be formed in Singapore. It then named those who were to be the shareholders and that each would hold 50% of the shares. It named persons who were to be the directors. Three were from the Canadian Pacific side and three from the Nederkoorn side. Two clauses

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spelt out the operation details of the ***management company*** . Another clause said, inter alia that, `the management of CPN (Singapore) is to decide as to who and through whom business is to be worked and whenever possible is to utilise the offices of Nederkoorn and Canadian Pacific`. In short the business was to be carried on by the management company in Singapore for the joint-venture company in Bermuda but nowhere a partnership business was contemplated or mentioned. The final paragraph of the MOU declared : `CPN (Singapore) is to keep it shareholders fully informed of its business activities and the management is to ensure that the interest of CPN remain paramount at all times.` There was no mention of two partners keeping each other informed of the business affairs.

51.Parties went on to prepare a shareholders agreement but it was not finalised and signed. No doubt the parties intended to sign a shareholders` agreement. Unfortunately for the plaintiffs that remained merely an agreement to agree and it was due to the plaintiffs` own default when they decided to put it on hold. The anticipation of a shareholders agreement ruled out any thought of a partnership arrangement.

52.In any event no partnership was registered under the Business Registration Act, no doubt because what was contemplated was the incorporation of a corporation and not a partnership.

53.In this case it was abundantly supported by evidence that as a matter of fact no joint-venture partnership business was carried on by the plaintiffs and the first defendants. That is borne out by the existence of the CPN companies and the fact that all the joint-venture business were transacted by them. All evidence point to the fact that the two CPN companies and not the plaintiffs or first defendants carried on the business. The plaintiffs and the first defendants gave

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financial and business support to the CPN companies and not to a partnership business.

54. **Pre-litigation - Position of plaintiffs**

Now, let us note how the plaintiffs themselves characterised their interest in the joint-venture. Roger Shutter who was the president of the plaintiffs, in a message dated 22 February 1989 to Brian Williams of Canadian Pacific Tankers said unequivocally that `CPN Tankers (Bermuda) Ltd is the principal company of the joint-venture and CPN Tankers (Singapore) Ltd only acts as it agent in Singapore. CPN Bermuda will be the charterparty and all hire payments, freight receipts and other transactions of this joint-venture will go through CPN Bermuda Bank Accounts in either Singapore (in most cases) or Bermuda.` There was no mention of a partnership.

55.In a memorandum dated 22 February 1989 commenting on the draft of the proposed shareholders agreement (he called it joint-venture agreement) Roger Shutter said:

> *CPN Tankers (Bermuda) Ltd is the principal company of the joint-venture and CPN Tankers (Singapore) Ltd only acts as its` agent in Singapore. CPN Bermuda will be the charterparty and all hire payments, freight receipts and other transactions of this joint-venture will go through CPN Bermuda Bank accounts in either Singapore (in most cases) or Bermuda.*
>
> *I would think it important for the mind and management of the joint-venture to be seen to be outside of Singapore for local tax reasons etc.*
>
> *I hope these comments will be helpful and I look forward to seeing a draft of the agreement between CPN (Bermuda) and CPN (Singapore) being produced in Singapore.*

56.I have already stated earlier how the plaintiffs in the master agreement with Ceres Hellenic Shipping Enterprises Ltd described their interest in CPN joint-

venture and it is unnecessary to repeat it here. Again there was no mention of a partnership.

57.Similar description was found in another document prepared by the plaintiffs namely a company prospectus. It was stated as follows:

> *It was therefore decided to form a joint-venture* ***company*** *and take on time charter suitable vegetable oil tankers and to utilize the marketing expertise of both companies to mutual benefit.*
>
> *The holding joint-venture* ***company*** *is CPN (Bermuda) Ltd with the management being undertaken by the joint-venture* ***company*** *CPN Tankers (Singapore) Pte Ltd. [Emphasis added.]*

Once again the idea of a partnership was not in the mind of the plaintiffs. The joint-venture was manifested by a company that is CPN (Bermuda) Ltd.

58.Further in a memorandum dated 13 July 1989 by Roger Shutter it was stated that shareholders of CPN Tankers (Bermuda) Ltd were Canadian Pacific (Bermuda) Ltd (6,000 shares) and Aquaspan Ltd (6,000 shares). Both had been approved by Bermuda Monetary Authorities but shares were issued only to Canadian Pacific (Bermuda) Ltd. Ceres/Elcommerce required same Bermuda Monetary Authority approval. What the plaintiffs intended to sell were shares in a limited company and not a share in a partnership.

59.The above descriptions by the plaintiffs make it clear that what the plaintiffs intended to form and did form was a joint-venture company not a joint-venture partnership. No partnership was mentioned because it was not intended. There was no hint that the companies would conduct the business as agents of an unincorporated joint-venture first. CPN Bermuda was the principal company and CPN Singapore was its agent. A limited company is not the agent of its shareholders.

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60. **Accountants` views**

Next in sequence was the preparation of accounts by Price Waterhouse, accountants, to finalize the financial position between the plaintiffs and the CPN Bermuda as at 30 June 1989, the cut-off date for Ceres Hellenic takeover.

61.The London office of Price Waterhouse by a letter of 17 August 1989 on behalf of Price Waterhouse Bermuda asked Price Waterhouse Singapore `to outline the audit work required on CPN Tankers (Bermuda) Ltd, (CPN) a joint-venture established by Canadian Pacific Bermuda Ltd (CPB) and Nederkoorn to manage vessel voyages. On 30 June 1989 CPB sold its interest in CPN as part of the sale of its bulkshipping interests to Ceres, a Greek shipping operation, hence the need for completion accounts. The letter went on to say that `CPN is incorporated in Bermuda, but operates in Singapore, from the following address: CPN Tankers Pte Ltd, 19 Keppel Road, Singapore`.

62.In September 1989 Price Waterhouse Singapore prepared a preliminary draft balance sheet and profit and loss account of CPN Tankers (Bermuda) Ltd. What they prepared certainly were not partnership accounts but corporate accounts showing what was due to the plaintiffs. A letter of 18 September 1989 was sent by Price Waterhouse Singapore to RC Shutter, president of the plaintiffs together with the draft accounts. The letter was captioned: `CPN Tankers (Bermuda) Ltd audit for the period February 8 1989 to June 30 1989`. RC Shutter did not raise any protest to the caption. Instead he sent a fax to Price Waterhouse. Its opening words were: `Thank you for your fax of 18 September and I appreciate your diligence in getting off on time for our meeting in Bermuda on the same day.` On 22 September 1989 Price Waterhouse inserted the same heading in their letter and accounts which they sent to Roger Shutter.

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63. **A self serving volte face after legal advice**

The following month Roger Shutter sent a fax to Price Waterhouse Singapore in which he said inter alia the following:

> *Whilst I am broadly happy with the figures, there is one material aspect which causes me particular concern, in the context of our disposal, with effect from 30 June, of our interest in this business.*
>
> *The fact is that whilst CPN Tankers (Bermuda) Ltd was formed with the intention of running and owning the vegetable oil and transport business, the company never in fact legally adopted the business because the Nederkoorn interests never took up their shares in the company, nor did they ever assent to the terms of the joint-venture agreement.*
>
> *As advised by our solicitors, the position is simply that there was a business carried on by the two parties, in partnership, on account of which partnership business each partner (CPB or Nederkoorn as the case might be) made various payments to get the business going.*
>
> *We would therefore prefer the accounts to be a true reflection of this position and therefore to show a balance sheet and profit and loss account for `CP Bermuda and Nederkoorn Trading as CPN Joint-Venture` for the relevant period.*
>
> *Therefore all the financial statements should be headed up with this title - `Canadian Pacific (Bermuda) Ltd And Nederkoorn Pte Trading as CPN Joint-Venture.`*

64.What is stated in para 3 by Roger Shutter was blatantly disingenuous and he knew it. No business was carried on by the two parties on partnership basis. The companies carried on a corporate business as the plaintiffs themselves had described. The reference to the fact that `the Nederkoorn interests never took up the share in the company nor did they ever assent to the terms of the joint-venture agreement` was patently dishonest because Roger Shutter was party to the board resolution that neither party was required to take up the shares and no call would be made Further the plaintiffs deliberately decided not to conclude the shareholders` agreement.

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65.Price Waterhouse Singapore, unwittingly complied with the directions of their employers and deleted the previous caption and inserted the new caption as instructed by Roger Shutter.

66.What did Roger Shutter have to say about what has been stated above? Nothing, because he failed to attend the trial and give evidence. No explanation was offered as to why he and Brian Williams were not called by the plaintiffs. It was, however, not difficult to see that the mischaracterisation was conceived as a litigation strategy. As the plaintiffs had entered into an agreement for the transfer of their shares in CPN Bermuda to Ceres Hellenic it would be unwise and certainly not in the plaintiffs` interest to lodge a huge claim against CPN Bermuda without causing alarm to Ceres Hellenic. It was to avoid this difficulty that the partnership strategy of mischaracterisation was employed. Further, the strategy of partnership would give the plaintiffs a launching pad to wage a war against the first defendants and Nederkoorn because they were worth powder and shot.. It was only after this that the plaintiffs and Roger Shutter began harping on the `joint-venture partnership` theme. Robin Nederkoorn , who was the Chief Executive Officer of the first defendants and who struck me as an artless and straightforward businessman without knowing the private communication between Price Waterhouse and Roger Shutter also at times used the terms `partner` and `partnership`. Nevertheless the evidence and the context made it manifest that the defendants and those in their camp were not using these expressions as terms of art but in a colloquial sense. It is common for a director-shareholder of a private company to call his co-director-shareholder a `partner`. See **Babanaft International Co SA v Bassatne** (Unreported) .

67.Medora, an auditor, unlike Price Waterhouse Singapore who unsuspectingly complied with Roger Shutter`s direction to change the charterisation of the joint-venture from company to partnership, was a man with a robust and

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independent mind. To him the nature of the joint-venture business was undoubtedly a corporate body. He said in evidence: `The parties to the joint-venture were Can Pac (B) Ltd and Aquaspan and/or Nederkoorn Pte Ltd and not Nederkoorn in his personal capacity. This is backed by documents. Nederkoorn`s name is not mentioned in any of the documents. What I did was to compile the detailed accounts for the company. This was in early 1992. See p 7627 which is on the bill to CPN (T)(B) Ltd. This was well before the court ordered appointing me as auditor. I took the view that it (the joint-venture) was a limited company. The manager from Price Waterhouse took the view that it was a partnership.` Price Waterhouse, of course, did not reveal the reasons why they called it a partnership.

68.Evidence placed before me revealed that Medora consistently and correctly treated CPN Bermuda as manifestation of the joint-venture. The accounts prepared by him gave evidence of his thinking. An attempt was made to persuade him to change his mind. He would not be gulled as he said in evidence:

> *Price Waterhouse were told to interpret the accounts in the way they were described. I remember this from a conversation. I got into a slanging match with the manager of Price Waterhouse and counsel (Asokan). They first drew the accounts in the name of the company. Then they changed it. Every document was in the name of the company.*

69. **Plaintiffs` authorities**

I shall now consider two authorities heavily relied on by the plaintiffs. The plaintiffs referred to **Haw Par Brothers International Ltd v Jack Chiarapurk** [1991] 2 MLJ 428 [1991] SLR 626 . In that case the first plaintiffs Haw Par Brothers International Ltd and two others entered into a joint-venture agreement on 22 October 1971 which was expressed to last until 31 December 1991. Jack Chia (the first defendant) and his company, Chia Holdings (HK) Ltd, which was

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not a party in the proceedings were the other two parties to the joint-venture agreement. Two limited companies (the joint-venture companies) were formed to manufacture and make `Tiger Balm` products. Jack Chia was the chief executive of the joint-venture companies. Shares in the joint-venture companies were held by Tiger Balm Ltd, the second plaintiff for the first plaintiffs, and Jack Chia-MPH Ltd, the second defendants and Tri-Shine Ltd, the third defendants Jack Chia. The three shareholders agreed to be bound by the joint-venture agreement. In effect therefore there were six parties to the joint-venture agreement and the joint-venture agreement served as a shareholders` agreement. Subsequently, the joint-venture companies found that Jack Chia and four companies in which he had an interest (including the second and third defendants) were about to manufacture and market a rival product called `Golden Lion Balm`. When the joint-venture companies learnt this, the two plaintiffs brought the action and sought an injunction and damages to restrain Jack Chia and his four other companies from manufacturing the `Golden Lion Balm`. The plaintiffs relied on breach of contract, passing-off and breach of fiduciary or contractual obligations under the joint-venture agreement. They also alleged breach of the Singapore Companies Act (Cap 50, 1990 Ed) by the first defendant. The joint-venture companies were not parties to the proceedings but their shareholders, namely the second plaintiffs were parties to the proceedings. The second plaintiffs asserted their locus standi on s 490A of the Companies Act which provided that:

> (1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of this Act, the Court may, on the application of -
>
> (a) the Registrar; or

> (b) any person whose interests have been, are or would be affected by the conduct,
>
> grant an injunction restraining the first-mentioned person from engaging in the conduct.

70.The court held there were breaches of the Companies Act, the joint-venture agreement and fiduciary duties. The parties to the joint-venture agreement were fiduciaries. Under s 409A of the Companies Act the second plaintiffs was entitled to seek an injunction against Jack Chia for breach of s 157 of the Companies Act which provided as follows:

> (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> (2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

71.The ***Haw Par Brothers*** case went on appeal. See [1993] 3 SLR 285 and the decision was reversed but the principles outlined above remained intact.

72.It can be readily observed that in the ***Haw Par Brothers*** case the remedy sought was injunction and damages based on subsisting obligations under a contract. The present case is fundamentally different in that the plaintiffs` claim is for recovery of outlays and advances to the joint-venture company. The question, therefore, was: to whom or on whose behalf the moneys were advanced as that would decide who was liable to repay them. The only answer was that the moneys were advanced to or on behalf of the joint-venture companies - CPN (Bermuda) and CPN Singapore and accordingly the action ought to have been brought against them. If there was any wrong doing by the

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either defendant, CPN (Bermuda) or its liquidator should proceed against them. The provisions of the Singapore Companies Act do not govern a Bermudan corporation.

73.The plaintiffs might not have been in this difficulty had they not put `on hold` the shareholders agreement and accomplished the intended sale to Ceres Hellenic. The court cannot make the agreement for them. On both scores the fault was in their camp.

74.II shall now consider the second case: **Babanaft International Co SA v Bassatne** (Unreported) . In that case the receiver of the plaintiffs, a Panamanian corporation (Babanaft) brought an action against two brothers who were directors of Babanaft. The substance of Babanaft`s allegation against the defendants as summarised by Kerr LJ in a sequel to the decision of Vinelott J and reported as in **Babanaft International Co SA v Bassante** [1990] 1 Ch 13 at p 22. Although the two directors and another person

> *had nominally been merely shareholders and directors of the plaintiffs, in truth they carried on a joint-venture as partners which used the plaintiffs (Babanaft) as a vehicle and as a screen to protect them from personal liability, with the result that they were jointly and severally liable to indemnify the plaintiffs (Babanaft) in respect of, inter alia, the judgment debt owed to Beeston.*

In other words Babanaft`s name and its corporate facade were used to produce income which was misappropriated by the shareholders to the detriment of the company and its creditors. The liquidator therefore wanted the defendants to pay to the company what belonged to the company. This was the allegation which Vinelott J found to be established and which resulted in the judgment for over US$15m against the defendants, directors and shareholders of the plaintiffs (Babanaft). In effect the defendants had formed partnerships and joint-venture

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companies using them as agents and sub-agents to defraud the creditors of the company. Vinelott J accepted the contention of the plaintiffs (Babanaft) and concluded on the peculiar facts of the case that the joint-venture company (Babanaft) was the agent of the true joint-venture partners. The company as an agent was entitled to be reimbursed by its principals. It is clear to me that the decision of Vinelott J turned on the special facts of the case and does not offer a novel principle of law. In the course of his judgment Vinelott J said `It is not uncommon for businessmen or even lawyers to use the word "partnership" to describe a joint-venture entered into through a corporate structure, the partners being nevertheless shareholders in the company.` In cases where a business set-up is used as a sham front for unjust enrichment the function of the court is to look at the substance of the transaction and not what the parties choose to call it.

75.The conclusion is that there was no joint-venture partnership and the claim against the first defendants not made out. CPN Bermuda was not a sham front set up for unjust enrichment.

76. **Findings on quantum**

I shall now state my findings on the quantum. The defendants did not raise any major objections to the quantification. I shall state my comments on these claims now. As the plaintiffs collected and rightfully retained the sum of US$92,329 (item 4) the first item ought to be reduced by that amount. Secondly, if there was a partnership as alleged by the plaintiffs, the first defendants would be liable to pay to the plaintiffs only half that amount unless the defendants collected any part of it from third parties. It was not alleged that they did. Since the plaintiffs claim the whole amount it implies that there was no partnership and that claim could be made only against CPN Bermuda. The second item (amount in bank)

was a phantom vision created by Roger Shutter. I shall say more about this later. As I understand it, the amount of US$305,247.50 was in respect of voyages commenced before 30 June 1989 but completed after that day. On that basis this amount had been reckoned into the final accounts. Accordingly it is a duplication. In any event this is not recoverable from the first defendants but CPN Bermuda. For the same reason the return of capital is not recoverable from the first defendants but CPN Bermuda. As regards the losses of the Ugly Four after 30 June 1989 I have already stated that the plaintiffs are not responsible for them.

77. **The claim against second defendant**

The bases of the claim against the second defendant apart from the case of misnomer which was the original claim were stated in the further re-amended statement of claim in a somewhat unintelligible fashion In their `further opening statement` they expounded them under three limbs as follows:

> *The plaintiffs` case against the second defendant personally is put in three main ways.*
>
> (i) Liability arising out of the signature of the MOU in the erroneous name of Nederkoorn (Singapore) Pte Limited.
>
> (ii) Liability as the principal and chief executive officer of the first defendant, as a consequence of the second defendant`s failure to procure that the first defendant made the necessary contributions to the post 30 June losses in accordance with the MOU of the 18 October 1989 thereby diminishing the joint-venture company assets and preventing the discharge of the sums due to the plaintiffs; and
>
> (iii) If, as the defendants plead is the case, the plaintiffs` only remedy is against the joint-venture company, CPN Tankers (Bermuda) Ltd, the plaintiffs` claim as creditors of that company against the second defendant personally for breaches of his duties imposed on a director of an insolvent company, in particular circumstances where the business of that company is transferred to a connected company of that director, namely Tamar.

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78.It appears that the main object of the inclusion of the second defendant was to envelop him because the first defendants might not be worth powder and shot. I have already rejected the first limb based on misnomer and given my reasons for doing so. The second and third grounds were shaped and added essentially in order to rely on the Privy Council decision **Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip** [1995] 2 AC 378 delivered on 24 May 1995. When articulating this case on the two grounds counsel for the plaintiffs emphatically relied on that case.

79.I shall now consider the second and third limbs. The second limb of their case against the second defendant assumes that there was a legal duty under the MOU of 18 October 1989 or otherwise to ensure that the assets of CPN (Bermuda) were kept intact to pay the plaintiffs what was due to them from CPN (Bermuda). This was a major departure from their basic position by abandoning the partnership theory and accepting the defendants` contention that the joint-venture was represented by a joint-venture company - CPN Tankers (Bermuda) Ltd. Even so this contention is utterly misconceived. First, the plaintiffs not being a party to the MOU of 18 October 1989 could derive no benefit from it nor incur any liability. It spelt out the position between Ceres Hellenic and the first defendants. Furthermore it was in relation to the CPN Tankers` business after 30 June 1989 that is after the plaintiffs withdrew from it with the consent of the first defendants and thereby terminating the fiduciary relationship if there was one. Secondly Ceres Hellenic never acquired the plaintiffs` 50% share holding in CPN Tankers (Bermuda) Ltd and accordingly never passed on those shares to the first defendants. Oddly enough the plaintiffs at all times remained the 50% shareholders of CPN Bermuda.

80.Finally, there is no legal basis for the contention that the second defendant was obligated to the plaintiffs to ensure that `the first defendants made the

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necessary contributions to the post 30 July 1989 losses` or any other losses. I could not see any sense in the plaintiffs` contention.

81.The third limb was that the defendant was personally liable for `breaches of his duties imposed on a director of an insolvent company, in particular circumstances where the business of that company is transferred to a connected company of that director, namely Tamar.` This again was not the plaintiffs` pleaded case. If there was any impropriety in the transfer CPN Bermuda or its liquidator must investigate and proceed against the first defendant. This court had no power to probe into a speculative allegation by a stranger. Even then a director as such owes duties to his company not a third party. If the second defendant was in breach of his duties as a director the right to proceed against him rests with the company or its liquidator and not the plaintiffs.

82.Additionally there was no evidence before me that CPN Bermuda had assets as at 30 June 1989 and there was foul play in respect of that corporation on the part of either defendant. The little evidence before me revealed that CPN Tankers` business suffered because the plaintiffs withdrew from it without effectively transferring their interest in it to Ceres Hellenic. Ceres Hellenic rejected the interest and failed to fairly and faithfully assist or co-operated with the first defendants. The first defendants suffered as a result of it. The plaintiffs held on to the shares in CPN Bermuda and behaved as though they had nothing to do with the company leaving the first defendants in limbo. The plaintiffs by their irresponsible act of withdrawing from the venture without ensuring that Ceres Hellenic effectively and properly stepped in caused more damage to the CPN Tankers business and the first defendants. Ironically, the first defendants were the victims of the inefficient and incompetent handling of the sale of their assets to Ceres Hellenic. There was no evidence before me to show that the first defendants or the second defendant was a wrong-doer in any case.

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83.I shall now consider the plaintiffs` case to make the second defendant personally liable on the basis of **Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip** [1995] 2 AC 378. This case decided that where a third party (eg the defendant director Philip Tan) dishonestly assists a trustee (the company which is an agent receiving funds of the beneficiary) to commit a breach of trust or procured him to do so, the third party would be liable to the beneficiary for the loss occasioned by breach of trust, even though the third party had received no trust property and irrespective of whether the trustee had been dishonest or fraudulent. In equity it is called the assessory liability principle. In the context of such assessory liability dishonesty of the third party is to be judged objectively. Acting dishonestly, or a lack of probity, which is synonymous, means not acting as a person would act in the circumstances and less usually be equated with conscious impropriety as distinct from inadvertent or negligent conduct or carelessness.

84.This cause of action was not pleaded setting out its elements. It was not stated who the trustee was and what was the property in respect of which there was a trust. It appeared that the plaintiffs based the case on the assumption that the first defendants were fiduciaries of the plaintiffs because there was a `joint-venture partnership`. I have held that there was no partnership. It was a joint-venture business evidenced by a corporate body - CPN Tankers (Bermuda) Ltd and their business was largely handled by CPN Tankers Pte Ltd. Neither of these companies was a trustee of the plaintiffs in the proper sense of the term. The relationship between the plaintiffs and CPN Bermuda was one of creditor and debtor.

85.In any event, even assuming that there was a joint-venture partnership the plaintiffs and the first defendants ceased to be so on 30 June 1989. On the following day Ceres Hellenic had taken on the mantle. The alleged `partnership`

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was not dissolved but continued with Ceres Hellenic as the alleged new partner. Accordingly the alleged fiduciary relationship between the plaintiffs and the first defendants ended on 30 June 1989.

86.Next, the first defendants were never the trustees of the plaintiffs. No property belonging to the plaintiffs was held by the first defendants as trustees. All the property of the joint-venture business at all times were with CPN Tankers (Bermuda) Ltd or CPN Tankers (Singapore) Pte Ltd. They were controlled by its employees who had been appointed by both sides. There was no question of any breach of trust.

87.The plaintiffs simply were creditors and not beneficiaries of any trust. There being no trustee beneficiary relationship or property held by the first defendant as trustee of the plaintiffs there can be no breach of trust. Finally the second defendant at all times acted with utmost probity. If anything he was naive and gullible as far as the plaintiffs were concerned. To use an informal expression it was the plaintiffs who took him for a ride and left him in limbo.

88. **The Mareva order**

I now come to the Mareva order. Six months after the issue of the writ and three months after close of pleadings the plaintiffs applied for a worldwide Mareva injunction against both defendants up to an aggregate amount of US$750,000. The application for the injunction was supported by affidavits made by the plaintiffs` Singapore and London solicitors. The injunction was subject to the usual limitations, exception and liabilities.

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89.SJ Paull offered no explanation as to why he and not someone from the plaintiffs` organisation chose to make the leading affidavits. In his affidavit SJ Paull stated the basis of the application for the Mareva injunction as follows:

> *The plaintiffs make this application for a Mareva injunction on the basis of their belief and concern that faced with the application for summary judgment, account and a receiver, the defendants will take steps to put such assets as remain in the jurisdiction of this court outside of the reach of the plaintiffs. This may be either by way of transfer or dissipation of those assets out of the jurisdiction of this court, or by way of the dissipation or transfer of those assets within the jurisdiction to other companies controlled or owned by the defendants and against whom the plaintiffs have no claim. Indeed, the plaintiffs have a very real concern that this may already have been happening to a significant degree.*

90.SJ Paull gave substance to the plaintiffs` belief stated above by the inferential accusation that the defendants used a sum of US$312,847 to `defray other debts incurred by the defendants.` That amount was a phantom created by Roger Shutter. SJ Paull said in his affidavit: `This is, the plaintiffs would submit, a clear indication of the willingness of the defendants to use the fund which they should be accounting to the others, for their own purposes.` Further, to underpin his application for a universal injunction SJ Paull said that `The plaintiffs believe that there is a real risk that the assets within the jurisdiction of the courts of Singapore may not be sufficient to meet the plaintiffs` claim. The worldwide nature of the defendants` business provides ample opportunity for funds to be transferred or dissipated outside of the jurisdiction, and the plaintiffs further submit that until they are in a position, through their impending application for an account and a receiver or otherwise, to identify the whereabouts of the funds `lost` to the pre-30 June 1989 joint-venture, it is appropriate that any injunction restraining the defendants is capable of enforcement on a worldwide basis.` What he was saying was that the defendants were clearly in blatant breach of

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trust. It was eventually on the basis of SJ Paull`s affidavit that the universal injunction was granted ex parte on 17 June 1991 and amended on 18 June 1991.

91.The defendants made an application before me to discharge the Mareva order but were not successful. There were also interlocutory applications to vary the Mareva order which I need not delve into.

92.The defendants have taken out an application to set aside the worldwide Mareva order. They further have asked for an inquiry as to damages on the basis of the undertaking as to damages given by the plaintiffs. As I decided against the plaintiffs I must set aside the Mareva order. Then came the question of inquiry as to damages. The law was settled over a century ago that where an interlocutory injunction has been granted on the usual undertaking as to damages and the plaintiff loses at the trial, excepting exceptions, an inquiry as to damages will be ordered as a matter of course even though the plaintiff has not acted improperly by way of misrepresentation, suppression or other default in obtaining the interlocutory injunction. See **Griffith v Blake** [1884] 27 Ch D 474. Otherwise there would be no necessity to demand that an undertaking be given.

93.In this case, however, the evidence established that the interlocutory injunction was obtained without any basis and with a hidden motive. This finding is very different from what I said in an earlier decision placing much faith in what was said by SJ Paull as a solicitor of the Supreme Court of England. This was what I wrote: `The nature of the plaintiffs` claim was that the moneys they claimed were actually their share in a joint-venture for which they were accountable as fiduciaries. The plaintiffs had a strong arguable case that what was frozen was their money.` Indeed that was how the plaintiffs` claim was presented by SJ Paull. I was given the distinct impression that the plaintiffs`

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moneys were deposited with the first defendants and that they fritted away the moneys and applied them for their own use. In other words the first defendants held joint-venture funds and both defendants committed breach of trust. They made the false allegation that the first defendants misappropriated moneys belonging to the plaintiffs. In August 1991 when I heard and disposed of the application I was not apprised of the true nature of the joint-venture business and accounts. What I had before me was the Price Waterhouse position which had been dictated by the plaintiffs and not Medora`s independent position which was the true position. It was only at the trial that I was able to see the true and accurate picture.

94.Central to the plaintiffs` application for the injunction was the plaintiffs` allegation that the defendants had misappropriated the sum of US$312,849 described as `cash at bank` which was otherwise due to the plaintiffs. Further, the plaintiffs contended that because the defendants had offices in UK and USA and because they had misappropriated this sum of US$312,849 the first defendants also had the propensity to dissipate further sums that were otherwise due to them. Further I was misled to infer that Price Waterhouse had identified that a sum of US$312,849 which was supposed to be in the bank was missing and had been misused by the first defendants. At one point SJ Paull pointed to what might be the true position. He said: `The plaintiffs` understandable concern is that this is merely a book keeping figure and that this credit balance simply does not exist.` He did not elaborate. Instead in the following paragraph he denounced the defendants as misappropriators of the plaintiffs` funds in the following words:

> *Not only is this significant sum not actually held for the account of the pre 30 June 1989 joint-venture, but the defendants` meetings with the plaintiffs subsequent to the preparation of these accounts have given no indication as to the use to which the funds have been put. The irresistible inference from this*

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> *position is that these funds have been used to defray other debts incurred by the defendants, whether through the vehicle of CPN Tankers Bermuda Ltd or some other corporate entity within the Nederkoorn Group.*

The truth of the matter was that moneys belonging to the CPN joint-venture were kept and maintained in the bank account of the joint-venture company, CPN Tankers (Bermuda) Ltd. At no time the first defendants had access to the funds of CPN Bermuda and never laid their hands them. This truth was revealed at the trial when Michael Lim of Price Waterhouse gave evidence that this figure of US$312,849 was given to him by Roger Shutter and he merely complied with his instructions. Lim admitted that he did not verify the correctness of this figure but he added that he did not appreciate that this figure would be the basis to support an application for injunction against the defendants. The figure was later investigated by Jamshid Medora. He testified that this figure of US$312,849 stated as `cash at bank` never existed at all and that it was a contrived figure. His evidence stood undemolished in examination. All these emerged only during the deconstruction of the plaintiffs` case and it showed up the plaintiffs and Roger Shutter as less than honest and there was no one from the plaintiffs` side to defend them or Roger Shutter.

95.Finally there was this further disclosure during the trial. On 2 June 1991, the second defendant had arranged to meet the plaintiffs in London. The meeting was fixed on 18 June 1991. He was in London on that day. The second defendant said that his intention was to advise the plaintiffs at the meeting that the first defendants would be prepared to pay 50% of the losses up to and including 30 June 1989 regardless of the legalities of the matter. However on the morning of 18 June 1991, the second defendant received a call from the first defendants` financial controller, Tony Mallek, informing him that they had been served with the injunction against the first defendants and himself. The second defendant

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cancelled the meeting. It was clear that the purpose of the Mareva order was planned and obtained in a rush to emaciate the defendants before the meeting by effectively paralysing both defendants and bringing the second defendant down to his knees at the meeting. The affidavits of SJ Paull were sworn in London on 6 June 1991. They were filed on 17 June 1991 and an amended injunction was obtained on 18 June 1991. It does not take 11 days for the affidavits to be sent to Singapore.

96.In support of the application by the defendants to set aside the Mareva order Brian Williams, who was directly responsible for the commercial affairs of the plaintiffs and as such brought about the three joint-ventures, filed an affidavit on 22 July 1991. He was the representative of the plaintiffs directly in contact with Robin Nederkoorn until 30 June 1989. In his affidavit he said:

> *I was involved with the business of CPN Joint-Venture from inception. During this period I had no reason to suspect and/or believe that the first and/or the second defendants had dissipated the assets belonging to CPN Joint-Venture and/or assets belonging to themselves. I have known Robin Nederkoorn for about 12 years and do not believe that it would be in character for him to dissipate or cause to dissipate funds or assets belonging to himself, CPN Joint-Venture or other companies of which he has an interest, including the first defendants. Indeed during the course of my time as vice-president of Canadian Pacific Bulkships and in my capacity as the plaintiffs` representative handling the affairs of CPN Joint-Venture, I had occasion to receive frequent reports and statements of accounts on the activities of the new venture. During all that time there was absolutely no evidence to suggest a dissipation of any assets of any kind as suggested by the plaintiffs.*

97.At the hearing of the application I took what Brian Williams said in his affidavit with a grain of salt. One of the reasons I preferred to accept SJ Paull`s assertions, albeit only for the interlocutory decision was that he was a solicitor of the Supreme Court of England and Wales. After I heard all the evidence and

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considered the document I was convinced that Brian Williams represented the truth.

98.The case of the plaintiffs that there was a joint-venture partnership was a contrivance by Roger Shutter. The assertion that there was cash at bank in the sum of US$312,849 was also a contrivance by Roger Shutter. I therefore dismissed the plaintiffs` claim with costs and set aside the Mareva order.

99.By obtaining the Mareva order the plaintiffs by their capricious and callous conduct inflicted a grievous and unjust harm on the defendants. For this reason and the reason that they failed in their claim there should therefore be an inquiry as to damages.

100.The first defendants conceded that they could not prosecute the counterclaim in view of the decision I made on the main issue. Accordingly I dismissed the counterclaim with costs.

G P Selvam J

Govindarajalu Asokan (Rodyk & Davidson) for the plaintiffs
Thomas Tan (Haridass Ho & Partners) for the defendants

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