United States Trading Co Pte Ltd *v* Philips Electronics Singapore Pte Ltd [2010] SGHC 194

Case Number	: Suit No 141 of 2009
Decision Date	: 07 July 2010
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Ragbir Singh s/o Ram Singh Bajwa and Malathi Raju (Bajwa & Co) for the plaintiff; Ong Boon Hwee William, Sathiaseelan s/o Jagateesan and Ramesh Kumar (Allen & Gledhill LLP) for the defendant.
Parties	: United States Trading Co Pte Ltd — Philips Electronics Singapore Pte Ltd

Agency

7 July 2010 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 This suit involves a victim, the plaintiff, of a fraud perpetrated by Jason Ting ("Ting") who was an employee of the defendant at the material time. As a result of that fraud, the plaintiff lost the sum of US$360,000 which, along with interest, it claims against the defendant in contract on the ground of ostensible or implied authority, vicarious liability and in negligence.

2 The plaintiff is a company incorporated in Singapore and is engaged in the supply of aluminium ingots. It has about seven employees in all, who operate out of a small office. Its managing director is Leonard Bruce Ross ("Ross"). The defendant is the Singapore subsidiary of the global electrical and electronics giant based in the Netherlands. The defendant is engaged in the design, development, manufacturing and supply of products ranging from highly sophisticated medical systems to business and consumer electronics and has more than 3000 employees. From documents tendered in evidence, the defendant has a paid up capital of $100m with another US$74m in preference shares. In 2005, it made a profit of almost $39m.

3 Aluminium is an important raw material in the defendant's manufacturing activities and it consumes some 3,000 to 4,000MT of the metal annually. The defendant has two main suppliers of aluminium, Lucky Alloys Limited ("Lucky Alloys"), an aluminium smelter in Dubai, UAE and the second is a smelter in Malaysia. The defendant's purchasing function came under the purview of its purchasing department. At the material time, Ting was the purchasing manager responsible for the purchasing of aluminium. The plaintiff was a commission agent representing Lucky Alloys and had carried on a business relationship with the defendant for some 15 years. The transactions were carried out in the following manner. The plaintiff would provide quotes from Lucky Alloys to Ting who, if the decision was taken to accept the price or any reduced price, would give a confirmation to the plaintiff over the telephone. This would be followed up by an email confirmation and the defendant would eventually issue a PO ("PO") to Lucky Alloys for the quantity, price and delivery schedule orally agreed upon. Such POs were signed by the defendant's general manager and chief financial officer. Ting had been carrying out this function since August 2002.

4 The events that gave rise to this suit began in August 2006, a period during which the prices of aluminium were rapidly rising; from a price of $1,800/MT in September 2005, it had increased to $2,500/MT by August 2006. There was significant volatility, with prices going up by as much as 10% in a day. On 22 August 2006, Ting sent an email to the plaintiff requesting quotes for the supply of 1,000 to 2,000MT of aluminium for delivery in the second half of 2007. The plaintiff responded on the same day with a quote of US$2,600/MT. After an exchange of email and telephone calls, Ting agreed by telephone to purchase 1,500MT at US$2,580/MT, and this oral agreement was noted in the plaintiff's email dated 23 August 2006. Later that day, Ting sent an email to Ross requesting him to call because Ting wanted to discuss "other matters". This conversation took place on 28 August 2006. According to Ross, Ting said that he was planning to purchase an additional 1,500MT in the next two or three months for delivery in 2007. However he wanted to protect the defendant against any price increase at the time he executed the purchase and proposed to purchase a call option. Ross explained that a call option is a hedging contract in which the buyer of the option pays a fee for the right, but not the obligation, to buy a specific quantity of commodity at a particular price on a future date. Ting asked Ross to procure Lucky Alloys to pay for the option fee first, and the defendant would reimburse Lucky Alloys by way of an inflated price in a subsequent PO. Ross broached this with Lucky Alloys but this was declined for reasons of practicality as well as on religious grounds, as there was an interest payment involved. Ross conveyed this decision to Ting, at the same time mentioning that a call option was an expensive way to achieve what he wanted. Ross said that Ting was disappointed with the news, and he sent Ross an email with a veiled threat to reduce the volume of business to Lucky Alloys. That email stated:

> Regret to hear that the upside risk of the LME prices cannot be protected and I have to explore other options. Anyway, thanks for your effort and [i]n any way Lucky share could be diluted in future. Thank you.

5 According to Ross, a few days after this, Ting asked Ross to help him to partially fund the purchase of an additional 400MT of aluminium for the defendant for urgent delivery for the fourth quarter of 2006 and which was urgently required for production. Ting explained that he needed such assistance because the defendant's budget for 2006 had been exhausted due to the sharp metal price increase and, because of its bureaucracy, it would take too long to get approval for any increase. Ting proposed that repayment would be by way of inflating the price of the 1,500MT contract concluded by email on 23 August 2006, wherein the price had been initially agreed at US$2,564/MT. The price would be increased by US$286/MT to take on board the repayment of the loan principal plus interest. Ross said that Ting was very persistent in his request. He also told Ross that this advance to the defendant would be secured by collateral agreements to be entered into by the defendant by way of an acknowledgement as well as an indemnity for the advance. Ting also said that, in return for the plaintiff's cooperation, he would place an order for another 1,500MT for 2007 within a few weeks, making a total of 1,900MT (comprising the 400MT needed urgently plus the further 1,500MT). They negotiated on the interest to be paid, and Ross said that Ting drove a hard bargain in bringing it down. At the end of it, the defendant issued PO no 3200166552-59 dated 21 September 2006 in which the price was inflated from the contracted amount of US$2,564/MT to US$2,850/MT ("the Inflated PO"). The original contract was made with Lucky Alloys and the plaintiff took over as the supplier, having entered into a back-to-back contract with Lucky Alloys for this amount. In this manner, the defendant could repay the plaintiff by way of the inflated pricing. Ross said that after this, Ting "pressured me for payment of the advance, including by email dated 13th September 2006, representing that he could not commit to the order for 400 metric tonnes in the 4th quarter of 2006 until he received the Plaintiffs' cheque for the advance". Ross was only able to procure the funds on 18 September 2006. That morning Ting sent an email to Ross to request that the cheque be made payable to "Philips CoC Singapore" ("PCS"). When Ross asked Ting why it was not to be made to the defendant, Ting replied that "Philips CoC Singapore is one of [the defendant's]

subsidiaries and that although [the defendant] was the contracting party with [the plaintiff], the cheque could be issued to [its] subsidiary". Ross said that he accepted this explanation as he had seen "Philips CoC Singapore" written on various documents from the defendant such as its letterheads, email and name cards. Later that day, Ross handed to Ting a cheque made payable to PCS in the sum of US$360,000. It was drawn down on 21 September 2006. It was later discovered that Ting had, days earlier, registered a business partnership under the name of "Philips CoC Singapore" and opened a bank account in that name into which the cheque was deposited.

6 Ting had sent to Ross a "Letter of Acceptance of Loan" ("the Letter of Acceptance") on 18 September 2006, which Ting had signed on behalf of the defendant, accepting the offer of the US$360,000 loan and which detailed the manner in which it would be repaid. Further, on 28 October 2006, Ross received from Ting a document entitled "Letter of Indemnity" on the defendant's letterhead ("the Letter of Indemnity"), pursuant to Ross' request made in his email to Ting of 14 September 2006. The Letter of Indemnity was signed by Ting and purported to be signed by Paul Officier ("Officier"), the general manager, and David Lim ("Lim"), the vice president and chief financial officer. The Letter of Indemnity described the arrangement between the parties for the US$360,000 loan and the manner of repayment thereof. It also stated that the defendant guaranteed the repayment of the entire sum plus interest no later than 31 January 2007. It turned out that neither Officier nor Lim had signed the Letter of Indemnity nor had even seen it at the time; the only conclusion is that Ting had forged their signatures.

7 Ross said that after this, Ting did not place the further order of 400MT with Lucky Alloys through the plaintiff. He said that Ting explained that this was because the latter had managed to get the 400MT by bringing forward the delivery from another supplier. However on 28 November 2006, Ting placed three further orders totalling 1,880MT for delivery in the first half of 2007.

8 The fraud by Ting was unearthed in June 2007 in the following manner. On 7 June 2007, Ross received an email from Tan Eng Huat ("Tan"), the defendant's strategic manager (purchasing), advising that Ting was leaving the defendant's employment. Ross decided to check on PCS, the payee of the US$360,000 cheque. That was when he discovered that PCS was a partnership registered by Ting and his brother. Ross immediately sought a meeting with the defendant's representatives about the matter. He went to the defendant's office on 7 June 2007 and met first with Tan, then with Karl Tilkorn ("Tilkorn"), the defendant's vice-president. They told Ross that they were unaware of what Ting had done. According to Ross, Tilkorn requested him to alter the purchase prices in the Inflated PO back to the original price of $2,564/MT. Ross said that he was induced to do so by Tilkorn's assurance that, in consideration for doing so, the defendant would ensure that the plaintiff suffered no loss arising from Ting's acts. This part of the evidence was disputed by Tilkorn, who claimed that all he had said was that if the investigations and legal advice showed that the defendant was liable at law to compensate the plaintiff, this would be done.

9 At the time of the trial, Ting was serving a 5-year imprisonment sentence for cheating in connection with this matter and an unrelated immigration offence. Neither party called him to give evidence. However, although the court did not have the benefit of his evidence, it was clear on the evidence before me that the defendant's employees were as much taken in by Ting's actions as the plaintiff, and I so find. Whether Ting had fully planned the scam and executed it in accordance with that plan, or he had seized opportunities as events unfolded serendipitously for him, the fact remained that it worked, and rather well. Ting had established a good reputation for himself *vis-à-vis* the plaintiff. Ross said that Ting was a diligent employee of the defendant who always appeared to act in the best interests of the defendant. For example, he consistently drove a hard bargain. Ting often made quick decisions, but always delivered on what he promised. Above all, Ting had never asked for personal favours, presumably in contrast to other purchasing managers in Ross' experience. So when

Ting told Ross that his budget for 2006 had been exceeded due to the sharp increase in aluminium price and that he wanted to look into ways and means to protect the defendant from further increases, this only enhanced his standing in the eyes of Ross. Therefore, when Ting explored the possibility of purchasing call options to shield the defendant from further price rises on the ground that getting an increase in his budget would be too slow and he wanted to explore the possibility of getting a loan from Lucky Alloys to do this, Ross must have been impressed with Ting. Here was an innovative person who was constantly looking after the defendant's interest. Ting's idea, to repay the advances for the call options by increasing the price on the POs for delivery (and payment) in 2007, was out of the box, but the circumstances were exceptional as prices were fast rising and decisive action needed to be taken. So Ross had no inkling of the plot that Ting was hatching. Ross actively pursued this with Lucky Alloys but the Dubai outfit lived up to its name and did not take the bait. Ting then spun the story that he was short of 400 MT for the year, but he had busted his budget and required an advance of US$360,000 to make up the shortfall in his budget. Ting laced it with a threat to take the business elsewhere if the plaintiff could not help him out. Although the plaintiff was not a large company, Ross felt that he ought to do his best to accommodate Ting's request in order to maintain the business or, better still, improve it. Furthermore, the terms of the loan was not at all bad, with the effective annual rate of interest a little above 15%.

10 There is no doubt in my mind that Ting had all along conducted himself *vis-à-vis* Ross on the basis that he had full authority to enter into the purchase contracts for the loan on behalf of the defendant. The evidence showed that Ting made commitments with the expectation on the part of the supplier that this would be honoured, and the paperwork that came in due course was only a formality. The course of dealings was such that Ting could enter into binding contracts with Lucky Alloys in relation to the purchase of aluminium by the defendant. Indeed, Lee Lui Sen, the defendant's purchasing director, confirmed in re-examination that in relation to an email from Ting that a PO would be issued, the supplier would have the expectation that this would be done. This must mean that even if that PO was not issued, the email would bind the defendant.

Claim in contract

11 However, whether Ting had authority to enter into a contract to borrow money from the plaintiff, as opposed to a contract to purchase raw materials, is quite another matter. The defendant's position was that he did not have such authority, whether actual or apparent. In *Hely-Hutchinson v Brayhead Ltd and another* [1968] 1 QB 549 ("*Hely-Hutchinson*"), Lord Denning MR described the distinction in the following manner (at 583):

> … actual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office ...
>
> Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case

his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out." Thus, if he orders goods worth £1,000 and signs himself "Managing Director for and on behalf of the company," the company is bound to the other party who does not know of the £500 limitation, see British Thomson-Houston Co. Ltd. v. Federated European Bank Ltd [[1932] 2 KB 176] ...

[emphasis in original]

12 In *Hely-Hutchinson*, the chairman of a company had acted as *de facto* managing director and chief executive of the company. He entered into significant transactions on its behalf, which he would sometimes merely report to the board without seeking prior authorisation or subsequent ratification. The Board acquiesced in this course of dealing. In these circumstances, the chairman was held to have had actual authority to bind the company to certain transactions, although he was acting beyond the normal powers of a chairman. The Court's decision in *Hely-Hutchinson* was premised on an appraisal of the relationship between the principal and the agent.

13 In the present case, there was no assertion by the plaintiff that Ting had express authority and neither was there any evidence of it. As for implied authority, the question is whether it may be inferred that Ting had authority, as purchasing manager, to borrow money from suppliers or their agents on behalf of his employer. I am unable to see how this conclusion can arise. The function of a purchasing manager is to purchase material and it is difficult to see how a power to borrow money can form part of his usual function.

14 With regard to apparent authority, the law distinguishes between two categories of apparent authority, which arises out of:

(a) a genuine representation by the principal of the agent's authority, whether oral, in writing, by course of dealing or by allowing the agent to act in certain ways ("genuine apparent authority"); and

(b) an "implied" representation by the principal in putting the agent in a specific position which carries with it a usual authority to undertake the acts in question ("artificial apparent authority").

See *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [77], citing *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at para 8-018.

15 There was no evidence that Ting had genuine apparent authority. Whatever representation to Ross that Ting had authority emanated from Ting and not from any other person representing the defendant. The course of dealings between Ting and the plaintiff pertained only to purchase of raw material, and there had never been any contract for loan prior to the one in question.

16 As for artificial apparent authority, this overlaps with the issue of implied authority, discussed in [13] above. I cannot see how, by appointing Ting as purchasing manager, there can be said to have been a representation by the defendant that this carries with it authority to enter into a loan contract with the plaintiff.

17 The plaintiff submitted that its course of dealing with Ting over the years, "where the nature and extent of his authority is fully displayed including entering into transactions in a conventional as well as [unconventional] manner", had clothed him with the necessary authority. In para 6 of the

statement of claim, the following particulars were given:

i) The Plaintiffs consistently dealt solely with the Defendants' Purchasing Managers in relation to matters related to purchasing;

ii) Throughout Jason Ting's tenure as the Purchasing Manager, the Plaintiffs dealt with the Defendants solely through Jason Ting and the Defendants consistently honoured such commitments as Jason Ting entered into on their behalf with the Plaintiffs;

iii) The normal course of business dealings the Plaintiffs adopted in relation to clients were inter-alia Inquiry, Response and Negotiation, Order Confirmation, Purchase Order, Sales Contract from Suppliers or Agents, Shipments and Payments. However the Defendants apparently allowed a relatively informal procedure and honoured agreements concluded by the Purchasing Manager whereby inquiries, quotations, negotiations and conclusion of multi-million dollar contracts were conducted by telephone without written confirmation.

iv) Requests for delay or change in shipments were also usually conveyed by telephone.

v) Purchase Orders were issued late or even issued after shipments were effected.

vi) Purchase Orders were on occasion not signed by the General Manager / Vice-President or Chief Financial Officer (CFO).

vii) Despite such informal procedures, the Defendants consistently honoured agreements entered into on their behalf by Jason Ting whether transacted on his company or mobile telephone lines or otherwise and made payment thereupon.

viii) Under these circumstances, the Plaintiffs continued to deal with the Defendants on such informal terms.

18 While the course of dealings particularised could have led the plaintiff to the conclusion that Ting's authority to enter into purchase contracts was deep and wide, I cannot see how this can reasonably lead to the conclusion that he could borrow money on the defendant's behalf, even though the loan was purportedly for the purpose of financing the purchase of raw materials. The plaintiff's case is even weaker when seen in the context of the defendant who was part of a large multinational group, with annual profits in the tens of millions. Quite how Ross could be persuaded that the defendant would require a loan of US$360,000 and was prepared to pay interest at a rate of 15% is a testament to the skill of Ting.

19 I would add that the evidence before me in fact showed that Ross had suspected that Ting was not authorised to enter into the loan agreement and that was why he insisted on the Letter of Indemnity. This is clear from Ross' email to Ting on 14 September 2006, in which he sent a draft of the Letter of Indemnity for comments. Ross said that the Letter of Indemnity "is to be signed by at least two senior officials from Philips" and he believed that "it provides sufficient protection" for the plaintiff. I therefore find that Ross did not operate under the belief that Ting was authorised by the defendant to enter into the loan contract with the plaintiff.

20 In the premises, the plaintiff's claim in contract fails.

Vicarious liability

21 Ting is of course liable to the plaintiff for the tort of deceit. The plaintiff submitted that, as his employer, the defendant is vicariously liable to the plaintiff. However, the plaintiff had rightly submitted that whether it had to prove that Ting was acting in the course of his employment depended on "whether the matter complained of was within his actual/implied/ostensible authority". Consistent with my findings above on the scope of Ting's authority, it would follow that the defendant is not vicariously liable for Ting's fraudulent scheme on the plaintiff.

Claim in negligence

22 The plaintiff also submitted that the defendant was negligent in failing to properly supervise Ting. I do not think that the exquisite skills displayed by Ting is capably of any effort to supervise him that does not freeze the operations of any organisation.

Estoppel

23 Finally, the plaintiff claimed that the defendant had represented that the former would suffer no loss and, relying on such representations, the plaintiff had given up its rights under the Inflated PO, to its detriment. Therefore the defendant should be estopped from denying that there was an agreement that the plaintiff would not suffer any losses. This submission is based on the following facts asserted by the plaintiff.

24 Following discovery of the fraud, a meeting was held in the defendant's office at which Tilkorn promised Ross that the plaintiff will suffer no loss as a result of Ting's fraud. Ross said in his affidavit evidence-in-chief that Tilkorn "gave verbal assurance that in consideration for amending the [Inflated PO], they would ensure that [the plaintiff] would suffer no loss as a consequence of the actions of [Ting]". Ross said that in reliance on this assurance and promise, he agreed to alter the prices on the Inflated PO and eventually accepted the reduced sum in payment.

25 Tilkorn gave a more detailed account of the events he was involved in. He said that his first encounter with the matter was when Tan told him on 7 June 2007 that Ross had just told him that Ting had arranged a US$360,000 loan on behalf of the defendant, which was paid to an entity called "Philips CoC Singapore". Tilkorn said that he was puzzled that the defendant would take a loan from an agent of one of its suppliers and that Ting, a purchasing manager, would be doing this on behalf of the defendant. He also did not know who PCS was. Tilkorn arranged to meet Ross on the same day, during which Ross showed him a copy of the cheque for US$360,000 paid to PCS, the Letter of Acceptance and the Letter of Indemnity. Tilkorn said that he had to consider the matter and arranged to meet with Ross again the following day. After some internal checks on the authenticity of the Letter of Acceptance and Letter of Indemnity, he made a police report. Tilkorn said that at the second meeting with Ross on 8 June 2007, Tan and Israel Louis Ismail, the defendant's general counsel were present, along with Irfan Shaban ("Irfan"), the general manager of Lucky Alloys. Tilkorn said that one of the issues discussed was the Inflated PO. He told Irfan that the inflated purchase price had to be corrected to reflect the agreed price as this was the correct and appropriate way to conduct business. Tilkorn said that Irfan agreed. On the issue of Ting's malfeasance, Tilkorn said in his affidavit evidence-in-chief at para 17:

> … I informed [Ross] that [the defendant] was in the process of reviewing the documents that [the plaintiff] had provided and will be conducting an investigation into the matter. I told [Ross] that [the defendant] will also be seeking legal advice. Once these processes had been completed, [the defendant] will revert to [the plaintiff] on its position on the matter. I also mentioned to [Ross] that if the investigations and the legal advice show that [the defendant] is liable at law to compensate [the plaintiff], [the defendant] will do so. [Ross] did not disagree or

object to this.

26 The plaintiff submitted that Tilkorn was not speaking the truth and that Ross' version should be believed. From his demeanour in the witness box, Ross appeared to me to be a totally decent and honest businessman. I have no doubt as to his sincerity and indeed am sympathetic to his plight, as US$360,000 was a huge sum for him. Nevertheless, I have also no reason to disbelieve Tilkorn as well, both from his demeanour in the witness box as well as inferentially, from the fact that it would have been rather reckless of him, given his state of knowledge at that time, to commit the defendant as Ross had claimed. In my view, Ross, who was dealing with the shock of the loss, had misapprehended the meaning of Tilkorn's words and sincerely believed that when Tilkorn assured him that if his lawyers advise that the defendant is liable to compensate the plaintiff then the defendant would do so, this meant that the plaintiff would be compensated for whatever losses it had suffered.

27 I should add that the plaintiff had to prove that it had altered its position to its detriment. There was no evidence of this. The plaintiff had, by no means, proven that it could have recovered from the defendant the full sum of the Inflated PO.

28 In the premises, this aspect of the plaintiff's claims also fails.

Conclusion

29 The plaintiff's claims are accordingly dismissed. Unless there is any reason to order differently, the defendant would be entitled to costs on the standard scale which is to be taxed unless agreed.