IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 20

Suit No 1285 of 2014

Between

(1) MSP4GE Asia Pte Ltd
(2) Tony Antonius Lie

… *Plaintiffs*

And

(1) MSP Global Pte Ltd
(2) Vasile Avram
(3) Yong Patricia Lay Lee

… *Defendants*

JUDGMENT

[Trusts] — [Constructive trust] — [Breach of trust]

[Restitution] — [Unjust enrichment]

[Contract] — [Misrepresentation]

TABLE OF CONTENTS

MSP4GE Asia Pte Ltd and another
v
MSP Global Pte Ltd and others

[2019] SGHC 20

High Court — Suit No 1285 of 2014
Andrew Ang SJ
14, 15, 19, 20, 21 September 2017, 12 October 2017, 10, 23 November 2017

31 January 2019 Judgment reserved.

Andrew Ang SJ:

Introduction

1 The principal dispute in this case is whether a sum of USD 1 million paid by MSP4GE Asia Pte Ltd ("1st Plaintiff") to MSP Global Pte Ltd ("1st Defendant") was wholly spent in payment for the 1st Defendant's goods ("MSP Products") or only partly so spent in the amount of USD 520,766.40 with the balance thereof (USD 479,233.60) remaining a deposit refundable on demand.

2 While the Plaintiffs assert that the balance is due or owing, demand having been made for the refund, the Defendants maintain that the 1st Plaintiff had placed an order for USD 1 million worth of MSP Products and that, after earlier payment of USD 520,766.40 for the first shipment, the balance had been applied in payment for a second shipment of MSP Products. The Defendants further say that the 1st Plaintiff failed to take delivery of this second shipment

of MSP Products thus causing the 1st Defendant to incur storage charges for which they seek reimbursement under the Counterclaim.

The Background

Facts

3 The 1st Plaintiff is a company incorporated in Singapore and is in the business of wholesale trade and provision of business and management consultancy. The 2nd Plaintiff ("Tony Lie") is a shareholder and was a director of the 1st Plaintiff from 15 March 2010 to 3 October 2011.

4 The 1st Defendant is also a company incorporated in Singapore and is in the business inter alia of the manufacture and sale of MSP Products. The 2nd Defendant ("Avram") and the 3rd Defendant ("Patricia Yong") are the sole shareholders and directors of the 1st Defendant.

5 The 1st Plaintiff entered into an Asia Marketing Agreement ("AMA") with the 1st Defendant on 22 December 2009 under which the 1st Plaintiff was to have the right to market and distribute the 1st Defendant's MSP Products in various territories more particularly set out in Annex B to the AMA.[1] For that right to be exclusive with respect to any country ("Exclusive Distributorship Right"), the 1st Plaintiff had to achieve a certain "Targeted Minimum Business Level" prescribed in Annex B for that country. For the purposes of this case, we are concerned only with Indonesia with respect to which the applicable Targeted Minimum Business Level was USD 1 million.[2]

---

1 Agreed Bundle Vol 1 at p 339-361 ("1AB339 – 361).

2 1AB372.

6 The President of the 1st Plaintiff was one Andrew Emmanuel Tani ("Andrew Tani"). At the time that the AMA was executed, the 1st Defendant and Andrew Tani also signed a letter agreement (the "Commission Agreement") for an "overriding commission" of 8% to be paid to Andrew Tani for all purchases of the 1st Defendant's range of MSP Products arranged by Andrew Tani through the 1st Plaintiff.[3]

7 Despite the 1st Plaintiff having signed the AMA, it was unable to put up any funds to achieve exclusive distributorship in Indonesia. The 1st Plaintiff failed to remit USD 1 million to place an order for an initial inventory of the MSP Products by 31 January 2010 as required under Clause 3.6 of the AMA.[4] This was not for want of effort on Andrew Tani's part. One potential investor, Hermanto Setyabudi ("Hermanto") failed to put up the funds despite earlier indications otherwise.[5] Orders which were placed were not followed through with payment. The 1st Defendant's President, Patricia Yong informed Andrew Tani on 8 February 2010 that her Vice-President, Avram would not discuss product mix and packing until payment had been made.[6] Andrew Tani was embarrassed.[7]

8 On 18 February 2010, Andrew Tani sent an email to Avram naming four potential investors, of whom Tony Lie was one.[8]

---

3 1AB386.

4 1AB343.

5 Affidavit of Evidence-in-Chief of Andrew Emmanuel Tani ("Andrew Tani's AEIC") at paras 36 to 44.

6 Plaintiff's Core Bundle ("PCB") at page 113.

7 PCB at page 115.

8 1AB973.

9 On 21 February 2010, Patricia Yong reminded Andrew Tani via email that it [was] crucial that exclusivity [was] "secured" and expressed her concern as to the 1st Plaintiff's non-exclusive status given that USD 1 million had not been raised.[9]

10 Avram's evidence was that he had been "angry" with Andrew Tani for "dragging too long". He wanted Andrew Tani personally to find the money to pay the USD 1 million.[10]

11 In the period between late February and early March 2010, Andrew Tani approached Tony Lie, with a proposal for the latter to invest in the venture to acquire the Exclusive Distributorship Right. Andrew Tani told Tony Lie that he was looking for an investor to provide USD 1 million which would go towards an initial order of the MSP Products in order to gain exclusive distributorship. Tony Lie agreed in principle to invest the USD 1 million but later had second thoughts. The MSP Products consisted of a range of lubricants and in order to place an order, it was necessary to specify the particular MSP Products and the quantity of the same. As the Plaintiffs had no knowledge which of the MSP Products would sell well, there was a risk that demand for the MSP Products in Indonesia might not match the Plaintiffs' order composition for an initial USD 1 million order. He was therefore prepared to invest only USD 500,000 to determine if the MSP Products could sell well in Indonesia and, if so, which of them.[11]

---

9 1AB981.

10 Transcripts, 20 September, page 41 lines 18 to 24.

11 Andrew Tani's AEIC at paras 47 to 50. See also Affidavit of Evidence-in-Chief of Tony Antoonius Lie ("Tony Lie's AEIC") at paras 5 to 12.

12 It was against this background that the 10 March 2010 meeting between Andrew Tani, Tony Lie and Avram took place ("10 March 2010 Meeting"). Avram thought the meeting was for him to demonstrate the efficacy of the MSP Products. This was, of course, to impress Tony Lie so that the latter would invest the USD 1 million Andrew Tani needed to find for the 1st Plaintiff.[12]

13 According to the Plaintiffs, at the meeting, after Avram had demonstrated the MSP Products, Tony Lie then informed Avram of his decision to invest only USD 500,000 as he wanted to make sure that the mix of the MSP Products was saleable before investing more.[13]

14 The Plaintiffs aver that, in response, Avram assured Tony Lie of the quality of the MSP Products and that they would sell well. According to Tony Lie, in order to persuade him to invest the full USD 1 million, Avram made the following representations ("the Representations")[14]:

> (a) that the MSP Products were of good quality and would prove to be highly popular in Indonesia; (Note: In Tony Lie's and Andrew Tani's respective Affidavits of Evidence-in-Chief they deposed that Avram also stated that slower moving stock could be replaced with faster moving items. But this was omitted in the Plaintiff's pleading)[15].
>
> (b) that if Tony Lie would provide funds in the amount of USD 1 million to the 1st Plaintiff, the latter would obtain the Exclusive Distributorship Right for Indonesia without having to make a firm order for USD 1 million worth of MSP Products. Instead, the 1st Plaintiff

12 Andrew Tani's AEIC at paras 50 to 54 and Tony Lie's AEIC at paras 10 to 20.

13 Tony Lie's AEIC at para 18.

14 Bundle of Pleadings, p 127 paras 9 to 11A.

15 Tony Lie's affidavit para 18(a) and Andrew Tani's affidavit para 54.

would only have to place an initial order for USD 500,000 worth of the MSP Products and the 1st Defendant would hold the balance of the USD 1 million as a deposit for and on behalf of the 1st Plaintiff until it was prepared and ready to place the next order; and

(c) that if the next order was not proceeded with, the balance amount would be returned to the 1st Plaintiff.

15 The Defendants maintain that no such discussion happened.

16 The Plaintiffs' Statement of Claim further pleaded that further and/or pursuant to the Representations, the 1st Defendant[16]:

(a) Issued one (1) tax invoice dated the same day i.e. 10 March 2010 to PT MSP4GE Indonesia for the amount of USD 500,000 (the "Tax Invoice"). The Tax Invoice stated that it was for "Payment of MSP Products. DO will be issued upon confirmation of goods at later date". The Tax Invoice indicated the terms of the payment as "TT (Prepayment)"; and

(b) Issued one (1) Proforma invoice dated 10 March 2010 (the "Proforma Invoice") to the 1st Plaintiff with a detailed list of MSP Products to be acquired by the 1st Plaintiff for the total aggregate value of USD 494,050.68 for the initial order.[17]

17 The Plaintiffs aver that in reliance on the Representations of the 1st Defendant and/or Avram as pleaded[18], Tony Lie injected funds into the 1st

---

16 Statement of Claim (Amendment No 1) at para 10.

17 Andrew Tani's AEIC at para 57. See also Andrew Tani's AEIC at Tab 14.

18 Bundle of Pleadings, p 127 paras 9 to 10.

Plaintiff, and through the 1st Plaintiff, paid USD 1 million to the 1st Defendant for the specific purpose of obtaining the Exclusive Distributorship Right and/or to acquire the MSP Products.[19]

18 The Proforma Invoice was subsequently amended to vary the composition of the MSP Products comprising the initial order. As a result, a revised invoice dated 8 April 2010 ("8 April 2010 Invoice") was issued for the revised initial order in the amount of USD 520,766.40.[20]

19 The Plaintiffs aver that after deducting the amount of USD 520,766.40 from the USD 1 million that was paid, the balance of USD 479,233.60 (the "Balance Sum") was held by the 1st Defendant on trust for the Plaintiffs. This was on the basis of the understanding upon which the USD 1 million was paid as mentioned above.[21]

20 It is the Plaintiffs' case that after the revised initial order, no subsequent order was placed owing to the lack of marketability of the MSP Products.[22] Whether or not there was a second order of the MSP Products is the subject of dispute between the parties.

Events leading to the present suit

21 After delivery of the MSP Products as reflected in the 8th April 2010 Invoice, the 1st Plaintiff through Andrew Tani marketed the MSP Products in Indonesia. However, by September 2010, none of the potential customers whom Andrew Tani approached entered into any long term contract for the supply of

19 Statement of Claim (Amendment No 1) at paras 9 and 10.

20 Andrew Tani's AEIC at para 72. See also Andrew Tani's AEIC at Tab 21.

21 Statement of Claim (Amendment No 1) at para 14.

22 Bundle of Pleadings, p 128 para 13.

the MSP Products. As a result, Tony Lie started to lose confidence in the entire venture.[23]

22 On or around 30 March 2011, Tony Lie decided to withdraw his investment in the 1st Plaintiff and asked for his USD 1 million to be refunded.[24]

23 After Andrew Tani successfully recruited another investor to replace Tony Lie, the latter was refunded the amount stated in the 8th April 2010 Invoice (USD 520,766.40). As for the Balance Sum, Andrew Tani proposed that the 1st Plaintiff place a second order for the MSP Products and thereafter repay the Balance Sum to Tony Lie after the MSP Products so ordered were sold.[25]

24 However, according to the Plaintiffs, no such order was ever placed. Tony Lie also instructed the 1st Plaintiff to demand from the 1st Defendant the return of the Balance Sum.[26]

25 By way of a letter dated 23 August 2013, the Plaintiffs demanded the repayment of USD 505,949.02 from the 1st Defendant. This was mistakenly thought to be the balance of the USD 1 million after deducting the amount stated on the Proforma Invoice but was understated by 30 cents.[27] In any case, it was incorrect since the Proforma Invoice was superseded by a revised invoice referred to at [18] above as the "8 April 2010 Invoice".

26 A further letter of demand for the same amount dated 15 October 2014 was addressed to all three Defendants.[28]

23 Andrew Tani's AEIC at paras 88 to 91.

24 Andrew Tani's AEIC at para 93.

25 Andrew Tani's AEIC at paras 93 to 97.

26 Andrew Tani's AEIC at para 104.

27 Statement of Claim (Amendment No 1) at para 16.

27 The Plaintiffs thereafter commenced the present suit against the Defendants, claiming breach of trust by the 1st Defendant for its refusal and/or neglect to repay the Balance Sum, and dishonest assistance in the breach by Avram and Patricia Yong. In the alternative, the 1st Plaintiff claims against the 1st and 2nd Defendants for fraudulent misrepresentation. Further, and in the alternative, the Plaintiffs claim against the 1st Defendant for unjust enrichment in the amount of the Balance Sum.

Issues to be determined

28 The principal issues of fact to be determined in this case are as follows:

(a) whether Avram made the Representations at the 10 March 2010 Meeting; and

(b) whether USD 1 million worth of MSP Products had been ordered (either in one order or in aggregate with a second order).

29 Following my findings on the above, I will then determine whether, as pleaded:

(a) the 1st Defendant holds the Balance Sum on trust for the 1st Plaintiff and/or Tony Lie;

(b) Avram and Patricia Yong are liable for dishonestly assisting the 1st Defendant in breach of the said trust;

(c) the Plaintiffs have made out a case of unjust enrichment against the Defendants;

---

[28] Statement of Claim (Amendment No 1) at para 18.

(d) the Defendants are liable for fraudulent misrepresentation; and

(e) the 1st Defendant is entitled to succeed in its counterclaim against the 1st Plaintiff for storage costs in the sum of S$97,295.00, which it avers to have incurred in storing a second shipment of MSP Products exhausting the Balance Sum.[29]

30 I will consider these issues seriatim.

Issue 1: Whether the Representations were made at the 10 March 2010 Meeting

31 On this issue, I accept Tony Lie's evidence that he had concerns about investing the whole USD 1 million to purchase MSP Products because it posed a financial risk to him. As he is an experienced businessman, it is perfectly reasonable that he would first want to test the market to see if the MSP Products could sell in Indonesia.[30] Tony Lie's testimony in court on his concern was also consistent with his affidavit.[31] The Defendants' counsel did not challenge Tony Lie's evidence. Despite his concern, Tony Lie nevertheless transferred USD 1 million to the 1st Plaintiff who then transferred it to the 1st Defendant. From this, I accept that Tony Lie's concern was somehow addressed when he met Avram at the 10 March 2010 Meeting. As such, it is important to determine whether the Representations were indeed made at the 10 March 2010 Meeting.

---

29 Bundle of Pleadings p 149 – 151, at [36] – [39].

30 Tony Antonius Lie Affidavit of Evidence in Chief dated 22 May 2017 ("Tony Lie's AEIC") at para 3.

31 Tony Antonius Lie Affidavit of Evidence in Chief dated 22 May 2017 ("Tony Lie's AEIC") at para 11 to 12 and paras 16 to 18. Transcript, 14 September, page 78 lines 1 to 9.

The objective evidence

The Invoices

32 The Plaintiffs' counsel submitted that the Tax Invoice and the Proforma Invoice were issued *pursuant to the Representations* made at the 10 March 2010 Meeting.[32] They were issued contrary to the 1st Defendant's standard pay-to-produce policy that invoices would only be issued after payment had been received and the MSP Products had been specified. Explaining the policy, Avram said that the 1st Defendant would only place an order (for the MSP Products) with its supplier, MSP INC USA (the parent company of the 1st Defendant and also the manufacturer of MSP Products) when the 1st Defendant had received payment for the specific products ordered by the buyer.[33] An invoice issued in compliance with this pay-to-produce policy would reflect the specified and paid orders of the buyer.[34] Consistent with this policy, an invoice was not issued to an initial potential investor, Hermanto, or to the 1st Plaintiff even after Hermanto had indicated that he would transfer USD 500,000 to the 1st Plaintiff in February 2010 for that to be applied towards compliance with clause 3.6 of the AMA.[35]

33 However, in this case, the Tax Invoice was issued before payment and without any MSP Products having been specified. The Proforma Invoice was also prematurely issued because, although MSP Products had been specified, no payment had yet been made.

---

32 Plaintiff's closing submissions at [89] to [97].

33 Affidavit of Evidence in Chief of Vasile Avram ("Avram's AEIC") at [8] – [17].

34 Transcripts, 19 September 2017, p 86 lines 9 to 19 and p 88 lines 17 to 23.

35 Transcripts, 20 September, page 66 line 12 to page 67 line 13.

34 As such, I accept the Plaintiffs' contention that the only reason these two invoices were issued against the 1st Defendant's pay-to-produce policy was that Avram was confident that Tony Lie would invest USD 1 million in the 1st Plaintiff for the latter to obtain the Exclusive Distributorship Right for Indonesia.[36] Avram was confident because he had made the Representations to address Tony Lie's concerns.[37] In fact, Patricia Yong also testified that "[the transfer of the USD 1 million was] a foregone conclusion and that [Avram] was "very excited".[38] According to Avram, Andrew Tani asked Patricia Yong for the invoices and when they were prepared, he signed them.

35 The Defendants' counsel argued that the issuance of the Proforma Invoice and Tax Invoice were at the request of Andrew Tani and that this court should not place too much weight on it.[39] However, more importantly, one should ask why Andrew Tani requested for these two invoices and why the 1st Defendant agreed to issue them despite the 1st Defendant's pay to produce policy? The Defendants have not offered any explanation to counter Plaintiffs' contention that Andrew Tani made the request for these two invoices to be issued, and especially the Tax Invoice, to reflect the terms of the Representations Avram made at the 10 March 2010 Meeting.

The 26 March 2010 Letter

36 Next, the Plaintiffs' counsel submitted that the exchange of emails between Andrew Tani and Patricia Yong after the transfer of USD 1 million and

---

36 Plaintiff's closing submissions at [94] and [95].

37 Transcripts, 20 September, page 64 lines 14 to 23.

38 Transcripts, 21 September, page 82 lines 4 to 21.

39 Defendants' Closing Submissions at [87].

their conduct then show that the Representations had indeed been made. A brief chronology of the relevant emails between the parties are as follows:

37 In an email dated 26 March 2010, the day when the USD 1 million was transferred to the 1st Defendant, Andrew Tani sent an email to Patricia Yong attaching a draft addendum[40] and a draft letter[41] dated 26 March 2010 ("26 March 2010 Letter") to be signed by her.[42] The draft addendum sought to confirm that clause 3.6 of the AMA had been complied with by the 1st Plaintiff's transfer of USD 1 million to the 1st Defendant. As for the 26 March 2010 Letter, according to Andrew Tani, this was prepared to reflect a few points which Patricia Yong had earlier raised with Andrew Tani after she learnt about the Representations, particularly the representation to Tony Lie that he could obtain a refund of the Balance Sum if a second order was not placed and the (unpleaded) representation that he could replace slow moving stock with faster moving items.[43] In that earlier discussion with Andrew Tani, Patricia Yong was upset that the aforesaid Representations and the unpleaded representation had been made and requested that Andrew Tani draft the said letter.[44]

38 In a separate email chain on the same day, Andrew Tani emailed Patricia Yong the bank details for crediting the overriding commission he would earn from the MSP Products ordered by the 1st Plaintiff.[45] Patricia Yong replied to Andrew Tani on 27 March 2010 congratulating him and informing him that she would "personally attend to the commissions on a totally confidential basis".[46]

---

40 PCB page 133.

41 PCB page 134.

42 PCB pages 132 to 134.

43 PCB pages 132 to 134 and Andrew Tani's AEIC at para 63.

44 Andrew Tani's AEIC at para 64.

45 PCB at page 1334.

On the same day, Andrew Tani replied to Patricia Yong asking her to "review the draft Addendum [and] sign it to give peace of mind to [Tony Lie]".[47] In an email dated 30 March 2010, Patricia Yong wrote that she wanted to talk to Andrew Tani when she was back in Singapore.[48]

39 The draft addendum was never signed by the Defendants. However, sometime in April 2010, Patricia Yong did eventually sign the 26 March 2010 Letter.[49]

40 The parties dispute the reason behind the 26 March 2010 Letter and interpretation of the above chain of correspondence. The Plaintiffs' counsel submitted, on the basis of Andrew Tani's evidence, that after the 10 March 2010 Meeting, Andrew Tani had spoken to Patricia Yong about the Representations and that she was upset because they were against the 1st Defendant's policy of no replacement and no refund. Andrew Tani drafted the 26 March 2010 Letter to accommodate Patricia Yong's concerns. As such, the 26 March 2010 Letter is evidence that the Representations must have been made at the 10 March 2010 meeting.[50] The Plaintiffs' counsel also submitted that if Patricia Yong did not know about the Representations, there would have been no need for her to want to speak to Andrew Tani as she requested in her 30 March 2010 email referred to above.[51]

---

46 PCB at page 1333.

47 PCB pages 141 to 142.

48 PCB pages 141.

49 PCB page 135.

50 Plaintiffs' Closing Submissions at paras 101 to 106.

51 Plaintiffs' Closing Submissions at para 100.

41 The Defendants' counsel on the other hand argued that Andrew Tani's evidence on the 26 March 2010 Letter was inconsistent; he first testified that the 26 March 2010 Letter was drafted to reflect the Representations but later changed his evidence to allege that the 26 March 2010 Letter was drafted to reflect a middle ground, accommodating Patricia Yong's objection to a refund policy and yet addressing Tony Lie's interest. He therefore urged the court not to give weight to Andrew Tani's explanation for the 26 March 2010 Letter.[52]

42 I accept Andrew Tani's evidence that Patricia Yong was unhappy when she learned about the Representations (including the unpleaded Representations of allowing replacement of slow moving stock).[53] I accept the evidence because it explains the letter dated 26 March 2010 Letter which Andrew Tani drafted which was eventually signed by Patricia Yong in April 2010.[54] No cogent alternative explanation was given by Patricia Yong. The letter stated:

> Referring to *your visit to our office*, we note the following issues that came up and need clarification:
>
> 1. Your initial investment of USD 1,000,000. - is best seen as your proof of intention in exchange for exclusivity in Indonesia, on your way to exclusivity in the 40 other country markets of the Territory. You do accept that it is a small price to pay for the geographic scope that you are interested in and we have obliged to develop with you.
>
> a. *Replacement of unsold products* will never occur because of our pay-to-produce policy, and therefore *need not be mentioned in our documentation invoices*. You will only order and TT payment for products that already have a destined application for a Client.
>
> b. In the same context, *there will be no need to stipulate a refund policy* since you will only place

---

52 Defendants' Closing Submissions at [16] – [18].

53 Andrew Tani's AEIC at para 64. Transcripts, 15 September, page 31 lines 17 to page 33 line 11.

54 PCB page 135.

> orders for products that already have a Client ready to be served.
>
> …
>
> [emphasis added in italics]

43 I agree with the Plaintiffs that the "visit to our office" mentioned in the 26 March 2010 Letter referred to the 10 March 2010 Meeting between Andrew Tani, Tony Lie and Avram because there is no evidence of any other meeting between the parties between 10 March 2010 and 26 March 2010.

44 Prior to the 26 March 2010 Letter, there were no documents which referred to any replacement or refund policy. As can be seen in the letter, Patricia Yong addressed the question of replacement and refund in an ambiguous and non-committal way. She gave assurances that "[r]eplacement of products [would] never occur" because of the way orders for MSP Products were made and similarly, "there [would] be no need to stipulate a refund policy". I find that the fact that Patricia Yong agreed to sign the 26 March 2010 Letter supports a finding that there had been discussions about replacement and refund at the 10 March 2010 Meeting. That in turn tends to support a finding that Representations in that regard had been made. The non-committal language of the 26 March 2010 Letter is explained by Andrew Tani's evidence that when Patricia Yong learnt about the Representations, she was upset and requested Andrew Tani to draft the 26 March 2010 Letter.[55] It is possible to construe the ambiguous and non-committal phrasing of the 26 March 2010 Letter on replacement and refund as an attempt by Patricia Yong to assure the Plaintiffs that they would not arise, in the hope that Tony Lie would thereby be given some comfort and reassurance.[56]

---

55 Transcripts, 15 September, page 47 line 19 to page 48 line 19 and page 105 line 12 to page 107 line 7.

56 Transcript, 15 September, page 105 line 12 to page 107 line 7. See also Transcripts, 21

45 Patricia Yong tried to diminish the importance of the 26 March 2010 Letter by testifying that the above letter was unsolicited.[57] If such was the case, she could have just ignored the letter and not sign it.

46 The Defendants' counsel submitted that Andrew Tani's evidence on the purpose of the 26 March 2010 Letter and the Addendum should not be given much weight because he was inconsistent. In my view, Andrew Tani's evidence and the motivation behind the 26 March 2010 Letter must be read in the light of Andrew Tani's role in the transaction.

47 As noted earlier, Andrew Tani stood to earn commission from any order for MSP Products which the 1st Plaintiff made. As such, it is understandable that he would have wanted to ensure that Tony Lie (who was effectively funding the entire venture) proceeded with the investment. In that light, I find that Andrew Tani's evidence on the reason why the 26 March 2010 Letter was drafted the way it was and the motivation behind the 26 March 2010 Letter is credible. He was trying to satisfy Tony Lie who only invested in the 1st Plaintiff because of the Representations and at the same time accommodate Patricia Yong who was unhappy that Avram had made those Representations. He admitted as much in his testimony.[58]

48 As such, I do not find any material inconsistency in Andrew Tani's evidence as alleged by the Defendants' counsel. He needed Patricia Yong to sign the 26 March 2010 Letter to give comfort to Tony Lie that the USD 1 million was transferred pursuant to the Representations. At the same time, he had to ensure that Patricia Yong's unhappiness about the Representations was

---

September, page 94 line 16 to page 95 line 21.

57 Transcripts, 21 September, page 84 lines 4 to 18.

58 Transcripts, 15 September 2017, p 103 line 13 to p 104 to 19.

addressed. Andrew Tani therefore drafted the 26 March 2010 Letter the way he did. It might be said, figuratively, that he was walking a tightrope.

Avram's evidence

49 I now turn to Avram's evidence on whether the Representations were made at the 10 March 2010 Meeting. The Plaintiffs submitted that Avram had reason to make the Representations to Tony Lie because the 1st Defendant was not performing well and was in a poor financial state as admitted by Avram.[59] In particular,

(a) the 1st Defendant had been in a loss position since its incorporation in 2003,[60]

(b) up to 2009, its sales in Indonesia amounted to only USD 30,000 annually,[61] and

(c) until then, the 1st Defendant had only been able to find exclusive distributors for the Myanmar and Malaysian markets. It had not been able to find an exclusive distributor for the Indonesian market despite Avram's efforts.[62]

Avram therefore was understandably keen to secure Tony Lie's investment.

50 The evidence also shows that Avram was growing impatient with Andrew Tani's inability to raise the USD 1 million required under clause 3.6 of

59 Transcript, 19 September 2017, page 52 lines 13 to 19. See also PCB pages 250 to 255. See also Transcripts, 20 September 2017, page 51 lines 5 to 13 and page 49 lines 13 to 22.

60 Transcript, 19 September, page 52 lines 13 to 19. See also PCB pages 250 to 255.

61 Transcripts, 20 September, page 49 lines 13 to 22, p 52 lines 21 - 23

62 Transcripts, 19 September, page 60 line 13 to page 62 line 14.

the AMA which the 1st Defendant had signed on 22 December 2009. This is supported by the following chronology of events:

(a) by February 2010, Andrew Tani had not been able to raise the USD 1 million required under clause 3.6 of the AMA. Under this clause, the 1st Plaintiff was under an obligation to place an order for USD 1 million with the 1st Defendant and to make payment in respect thereof by 31 January 2010 (see above at [5] to [7]);

(b) on 8 February 2010, Andrew Tani wrote an email to Patricia Yong to inform her that the remittance of USD 500,000 towards compliance with clause 3.6 of the AMA would be delayed because the potential investor at that time, Hermanto, was unable to sign the necessary agreements with his bankers[63];

(c) replying on the same day, Patricia Yong wrote in her email to Andrew Tani as follows: "I really hope that TT can b in asap as [Avram] had not even called you to discuss product mix n packaging he would recommend …" [64]

(d) later that day on 8 February 2010, Andrew Tani wrote in reply to Patricia Yong to inform her that he would call Avram when the money from Hermanto was in and that he was "embarrassed [and] hope[d] to recover his face [at the] soonest" [65];

(e) Patricia Yong replied later that day to Andrew Tani as follows: "I fully understand. [Avram] will b fine once TT is in. Do not worry

---

63 PCB at page 113. See also Andrew Tani's AEIC at para 40.

64 PCB at page 113.

65 PCB at page 115.

…".[66] This email indicates that Avram had expressed some anxiety or impatience at the delay in the transfer of the USD 500,000. If not, why else would Patricia Yong intimate this in her email? Avram also admitted in cross-examination that by this stage, he was angry with Andrew Tani because the process of obtaining the USD 1 million was "dragging too long"[67];

(f) in an email dated 9 February 2010, Danny Anthonius, one of Andrew Tani's assistants, wrote to Hermanto to request Hermanto to transfer the amount of USD 500,000 directly to the 1st Defendant's bank account in Singapore "tomorrow";[68]

(g) some time on or around 16 February 2010, Hermanto asked to be allowed to drop out of the Indonesian distributorship for MSP Products;[69]

(h) on 18 February 2010, Andrew Tani emailed Avram and Patricia Yong[70] to inform them that he was in the process of getting four potential investors on board to raise the USD 1 million. By this stage, as Avram admitted in cross-examination, both he and Patricia Yong were becoming really anxious and impatient with Andrew Tani.[71] In relation to Andrew Tani working to get other investors in after Hermanto, Avram testified in cross-examination: "[s]o what happened, so many months we talk, talk, talk but nobody is coming"[72]; and

---

66 PCB at page 117.

67 Transcripts, 20 September 2017, page 41 lines 18 to 24.

68 PCB at page 120.

69 Andrew Tani's AEIC at para 44.

70 PCB at page 121.

71 Transcript, 20 September 2017, page 41 line 25 to page 42 line 4.

(i) finally, on 21 February 2010, Patricia Yong emailed Andrew Tani informing him that she was informed by Avram that Andrew Tani would "personally get the funds and will take up exclusive distributorship for Indonesia".[73]

51 The above chronology of events shows that Avram was getting quite impatient with Andrew Tani's inability to raise the USD 1 million. Avram himself admitted this in cross-examination.[74] This, coupled with the fact that Avram was all too aware of the poor financial state of the 1st Defendant reinforces my belief that Avram had reason to make the Representations to secure Tony Lie's commitment to invest USD 1 million in the venture.

52 I pause here to address two of the submissions of the Defendants' counsel. First, the Defendants' counsel submitted that it was unlikely that the 1st Defendant's loss position was operating on Avram's mind at the 10 March 2010 Meeting given his lack of knowledge and interest in the finances of the 1st Defendant.[75] There is scant evidentiary support for this submission.

53 While it is true that in his testimony[76] Avram had said that he was a technical director and not much involved in accounting matters, he did not say that he lacked knowledge of or interest in the finances of the 1st Defendant.

54 More importantly, while he was cross-examined on the meeting of 10 March 2010, he admitted that by 2009, after six years of trying to break into the

---

72 Transcript, 20 September 2017, page 42 lines 9 to 14.

73 PCB at page 122.

74 Transcript, 20 September 2017, page 42 line 23 to page 44 line 4.

75 Defendants' Closing Submissions at [28].

76 19 September 2017 at p 60 lines 22 to 25.

Indonesian market, the 1st Defendant's sales in Indonesia was only USD 30,000 per year.[77] He also admitted that since 2003, the 1st Defendant had been suffering losses.

55 Avram also agreed with Plaintiffs' counsel that "Tony Lie was the last and only bet after Andrew Tani's efforts for the nine months" prior to the 10 March 2010 meeting.[78] In a similar vein he also agreed with the Plaintiffs' counsel's suggestion that Andrew Tani might never find any other investor who was willing to put up USD 1 million to be transferred to the 1st Defendant.[79]

56 Second, the Defendants' counsel submitted that what was actually said at the 10 March 2010 Meeting was uncertain. It was also unlikely that Avram could have made the Representations to Tony Lie because Andrew Tani had done most of the talking to Tony Lie in Bahasa Indonesia and Avram could not speak Bahasa Indonesia. I set out the Defendants' counsel's submission below:

> Furthermore, the contents of what was actually said at the meeting is also disputed. Vass Avram maintained that Andrew Tani had done most of the talking to Tony Lie in Bahasa Indonesia, while Andrew Tani testified that Vass Avram spoken directly to Tony Lie. *The Defendants submit that this is unlikely to be the case given that Vass Avram is unable to speak Bahasa Indonesia.*[80] [emphasis added in italics]

57 A short answer to this is that by Avram's own evidence at paragraphs 100 to 102 of his Affidavit of Evidence-in-Chief, Tony Lie and he did converse with each other.

---

77 Transcripts, 20 September p 51 lines 10 – 13.

78 Transcripts, 20 September p 50 lines 22 – 25.

79 Transcripts, 20 September p 54 lines 4 – 10.

80 Defendants' Closing Submissions at [35].

58 Finally, I find Avram's denial that he had made the Representations not credible. He admitted under cross-examination (albeit possibly under some misapprehension as to the question Plaintiffs' counsel asked him) that he had made the Representations but later disavowed the admission.[81] He also testified that he only "present[ed] the product" to Tony Lie but this is inconsistent with his affidavit in which he described discussions with Tony Lie concerning distributorship not only in Indonesia but elsewhere.[82]

59 To conclude, I did not find persuasive the Defendants' arguments why Avram could not have made the Representations. Based on the totality of the evidence before me, on the balance of probabilities, I conclude that Avram did make the Representations.

Issue 2: Whether the 1st Plaintiff placed only one order for the MSP Products amounting to USD 520,766.40 as reflected in the 8 April 2010 Tax Invoice.

There is no evidence to show that a single order for USD 1 million was made or that a second order of MSP Products was placed by the 1st Plaintiff after that reflected in the Proforma Invoice.

60 The Defendants' pleaded case is that there had been one single order for USD 1 million worth of MSP Products, as evidenced by a 2 February 2010 email from Esmond, one of the 1st Plaintiff's employees.[83] The Defendants contend that in keeping with their 'pay-to-produce' policy, MSP Products had been produced and that the second shipment of the same had been stored for the Plaintiffs since June 2010. Hence, the Defendants posit that the 1st Defendant

---

81 Transcripts, 20 September 2017, p 54 line 11 to p 56 line 29.

82 Affidavit of Evidence-in-Chief of Vasile Avram paras 100-101.

83 Defence (Amendment No 4) at para 10. See also PCB112.

is entitled to retain the Balance Sum and to its counterclaim for storage charges in relation to the second shipment.[84]

61 The Plaintiffs on the other hand submit that, from the evidence established under cross-examination, it is clear that there was only one order for MSP Products made for the value of USD 520,766.40, as per the 8 April 2010 Tax Invoice; there was no other order and no other invoice. As such, the 1st Defendant does not have any right to retain the Balance Sum. [85]

62 With regard to the 2nd February 2010 email sent by Esmond, the Plaintiffs argue that it was a preliminary order made up to reflect approximately USD 1 million worth of MSP Products.[86] I accept the evidence of Andrew Tani that the 2nd February 2010 email was sent in anticipation of funds to be injected by the potential investor Hermanto which eventually did not materialise.[87] Accordingly, the preliminary order was not regarded as a final order and was never acted upon.

63 The Plaintiffs contend that from contemporaneous evidence, the 2nd February 2010 email was understood by all parties not to be an order for USD 1 million worth of MSP Products. By Patricia Yong's email dated 8 February 2010, she informed Andrew Tani as follows[88]:

> "Certainly Andrew. I know you r doing your best.
>
> Vass [Avram] feels the product mix n packaging needs to b[e] amended for obvious reasons.

---

84 Defendants' Closing Submissions at para 59 to 62. See also Defence (Amendment No 4) at para 16 and 35 to 39.

85 Plaintiffs' Closing Submissions paras 30 to 38.

86 Plaintiffs' Closing Submissions paras 59 to 67.

87 Andrew Tani's AEIC, at para 42.

88 Plaintiff's closing submissions at paras 60.

> Let us take example of treating a vessel's engine at 10%. Let's say it requires 47 litres. Then you will need 2 x 19L, 2 x 4L & 2 x 473ml. Therefore all packaging needs to be stocked.
>
> As we do not use stabilisers, we do not recommend stirring the pails to measure our percentage of treatments.
>
> I really **hope the TT can be in asap as Vass had not even called you to discuss product mix n packaging he would recommend. He will only do so when TT is in**.
>
> Vass will have to do last minute recalculation for me to include Indonesian vol as I will be on flight.
>
> Once TT is in pls call him to work vol in for me. This one of those unforeseen but very tight schedule as production dates have been confirmed."
>
> [emphasis added in bold]

64 The Plaintiffs also point out that Patricia Yong confirmed under cross-examination that the 2 February 2010 email could not have been the final order because the product combination had not been finalised. The transcript shows as follows[89]:

> Q: Ms Yong, you are telling us today that this email on February 2010 at page 174 of Andrew Tani's affidavit is the order?
>
> A: No I--I said that is the route of the order. The order keeps moving. It is an order. But order based on the money coming in and the money was delayed coming in. So, yes, there is an order, but the final order was revisited when the money went in.

65 The Plaintiffs also point out that according to Avram, any order placed before any payment is received by the 1st Defendant would not be entered into the system and thus would not be treated as an order[90].

66 It is common ground that as at 2 February 2010, no payment had been received by the 1st Defendant. Hence, based on the Defendants' pay-to-produce

89 Transcript, 21 September, p 37 lines 4 to 12.

90 Transcript, 19 September, p 85 line 1 to p 86 line 19.

policy, the 2 February 2010 email could not have been a confirmed order for USD 1 million worth of MSP Products.

67 Further, according to the pay-to-produce policy, an invoice will be issued only when an order has been confirmed and payment is received by the 1st Defendant (see above at [312]). This was confirmed by both Avram and Patricia Yong.[91] The latter also conceded that the only invoice which was issued according to the pay-to-produce policy was the 8 April 2010 Invoice.[92] (Although Patricia Yong testified that there should be another invoice reflecting the 1st Plaintiff's paid order for the Balance Sum worth of MSP Products, she was not able to produce any documentary evidence of such an invoice.)[93]

68 If the 2 February 2010 email was an order for USD 1 million worth of MSP Products, there would have been a single invoice issued by the 1st Defendant for the full amount that reflected the combination set out in the 2 February 2010 Email. However, there was none.

69 In support of their pleaded case, the Defendants also sought to rely on 2 other emails from Andrew Tani dated 31 March and 2 April 2010.

70 Read in context and in the light of Andrew Tani's evidence,[94] these two emails of 31 March and 2 April 2010 do not show that the 1st Plaintiff had placed and paid for an order of USD 1 million worth of MSP Products from the 1st Defendant. In these two emails, Andrew Tani was informing the defendants that they should be expecting a huge order from the 1st Plaintiff in the event

91 Patricia Yong's AEIC at para 44. See also Transcripts, 21 September, page 38 line 8 to page 40 line 5.

92 Patricia Yong's AEIC at para 44.

93 Transcripts, 21 September, page 38 line 8 to page 40 line 25.

94 Andrew Tani's AEIC at paras 65 to 68.

that both Krakatau Steel and PAMA, two potential clients, signed up for the 1st Plaintiff's pilot program to use MSP Products. As such, I find that these two emails did not in any way evidence any confirmed order of USD 1 million worth of MSP Products by the 1st Plaintiff. Subsequent to these two emails, only the 8 April 2010 Invoice was issued.

71 In contrast, the following evidence in favour of the Plaintiffs' contention that the Balance Sum had not been applied in payment for any order is much more convincing.

The 1st Defendant's financial records show that the Balance Sum was not utilised for the purchase or production of MSP Products

72 The 1st Defendant's financial records show that the Balance Sum was not treated as part of the 1st Defendant's revenue but rather was treated as a liability by the 1st Defendant.

73 First, the 1st Defendant's Ledger Listing Report ("the Ledger") shows that:[95]

(a) the Balance Sum remained in the 1st Defendant's accounts as at 28 February 2011 (approximately one year after the USD 1 million had been received by the 1st Defendant); and

(b) an amount of USD 476,923.13 remained in the 1st Defendant's accounts as at 28 February 2012. (This is the Balance Sum less USD 2,304.47 which is the 2nd Defendant's purported travel expenses to Indonesia[96]). This was approximately two years after the sum of USD 1 million had been received by the 1st Defendant.

---

95 Andrew Tani AEIC, pp 228 – 230.

74 Patricia Yong also admitted that the Ledger showed that the 1st Defendant had not utilised the Balance Sum as at 28 February 2011. Neither had it utilised the Balance Sum (less the 2nd Defendant's travel expenses to Indonesia) as at 28 February 2012.[97]

75 To similar affect, the 1st Defendant's Detailed Profit and Loss Account as at 28 February 2011 and 29 February 2012 showed that the Balance Sum was not treated as the 1st Defendant's revenue but as a liability.[98] In both these records, the Balance Sum was reflected as part of the 1st Defendant's "Collections in Advance" under the heading "Current Liabilities".[99]

76 As such, the 1st Defendant's financial records incontrovertibly show that the 1st Defendant had not used the Balance Sum towards payment for the production of MSP Products for the 1st Plaintiff. They clearly support the Plaintiffs' case that only one order for MSP Products was placed, *viz,* that reflected in the 8 April 2010 Invoice.

The 2nd Defendant fabricated the list of MSP Products which the defendants averred were ordered by the 1st Plaintiff

77 Pursuant to the Plaintiffs' application for discovery of documents evidencing the MSP Products allegedly stored by the 1st Defendant (that being the basis for its counterclaim for storage charges), the Defendants disclosed an Inventory List in March 2016.[100]

---

96 Transcripts, 21 September, page 65 line 6 to page 66 line 4.

97 Transcript, 21 September, page 64 lines 21 to 25 and page 65 lines 5 to 13.

98 DOBB at Tab C and D.

99 Transcripts, 21 September, page 67 line 5 to page 69 line 22.

100 Defendants' Bundle of Documents (DBD) at p 13.

78 However, under cross-examination, Avram admitted that he had prepared the Inventory List by working backwards from the Balance Sum.[101] He also admitted that the Inventory List had never been confirmed by the 1st Plaintiffs as a potential second order of MSP Products.[102] It was also quite damning on the Defendants' case when Avram admitted further in cross-examination that he created the Inventory List to justify the counterclaim[103]:

> Q: Right. Mr Avram, it was only in 2015 that after the plaintiffs took out the application for discovery to ask the defendants for the inventory records, that you decided to come up with this list, correct?
>
> A: Correct.
>
> Q: So that you could justify what products purportedly the defendants had stored for the plaintiffs, right?
>
> A: Correct.

79 In view of the above, I find that the Inventory List was a fabrication.

The overriding commission paid to Andrew Tani

80 Further evidence in support of Plaintiffs' contention that there was only one order for the MSP Products (*viz*, that evidenced by the 8 April 2010 Invoice) is found in the amount of commission paid to Andrew Tani.

81 As mentioned above at [6], Andrew Tani was entitled to be paid an 8% "overriding" commission for all purchases of MSP Products that he arranged pursuant to the Commission Agreement agreed with 1st Defendant.

82 The only commission Andrew Tani received was USD 38,575.29 on 20 April 2010. This figure works out to be exactly 8% of USD 482,191.11, which

101 Transcripts, 20 September, page 87 line 8 to page 88 line 19.

102 Transcripts, 20 September, page 88 line 20 to page 90 line 22.

103 Transcripts, 20 September, page 90 line 23 to page 91 line 5.

is the amount payable in respect of the 8 April 2010 Invoice (USD 520,766.40) minus the USD 38,575.29 commission which Andrew Tani received.[104] This was consistent with the arrangement whereby the amount invoiced to the 1st Plaintiff was inclusive of the commission payable to Andrew Tani. In other words, the commission was borne by the 1st Plaintiff.[105]

83 The fact that no other commission was paid to Andrew Tani supports the Plaintiffs' contention that there was no second order. Therefore, the Balance Sum had not been used to pay for any further MSP Products.

84 Patricia Yong tried to explain away the fact that Andrew Tani had not been paid any other commission for the alleged USD 1 million order by testifying that she had given instructions to her accountants to pay Andrew Tani the 8% overriding commission for the first shipment under the 8 April 2010 Invoice and to withhold the payment to Andrew Tani for the alleged second shipment.[106] According to her, the reason for this was that there was a confidential verbal agreement between Andrew Tani and the defendants that expenses incurred by Avram in travelling to Indonesia would be deducted from the overall commission due to Andrew Tani.[107] As this agreement was confidential, it was not reflected in the Commission Agreement.[108] As such, Andrew Tani's commission for the second shipment was withheld by the 1st Defendant so that all the said travelling expenses incurred by Avram could be calculated and then deducted from Andrew Tani's balance commission.

---

104 Transcript, 21 September, page 13 line 22 – page 14 line 15.

105 Transcript, 21 September, page 14 lines 21 – 24.

106 Transcript, 21 September, page 27 line 11 to page 28 line 8.

107 Transcript, 21 September, page 6 line 1 to page 8 line 3.

108 Transcript, 21 September, page 8 lines 12 to 21.

85 As was pointed out by the Plaintiffs, Patricia Yong's evidence on the alleged verbal agreement was inherently contradictory:

(a) If the alleged verbal agreement for deduction of travelling expenses was confidential, the agreement to pay overriding commission was equally confidential, if not more so. Nevertheless, that did not prevent the parties from having the Commission Agreement in written form. So why was there a need to leave out the former?

(b) Moreover, there was never any mention of the alleged verbal agreement in any of the AEICs filed by the Defendants or in the Defendants' pleadings.

(c) It is also difficult to understand why Avram's travel expenses of USD 2,304.47 (as mentioned in [73(b)]) were deducted from the Balance Sum if there was a verbal agreement that they were to be deducted from Andrew Tani's commission.

86 Finally, the terms of the Commission Agreement are unambiguous.[109] Under the Commission Agreement, it was stated as follows:

> [t]his is to confirm that 8% (eight per cent) over-riding commission is payable to Mr Andrew Tani for all purchases of MSP range of products arranged by him through our Asia Marketing Agent, msp4GE Pte Ltd.
>
> Such commission will be calculated from any amount received for orders made and transferred to his bank account, and will be ***payable upon receipt of payment in our bank***.
>
> [emphasis added in bold italics]

---

109 Andrew Tani's AEIC at Tab 8.

87 The irresistible conclusion is that Patricia Yong's explanation why Andrew Tani was paid commission only in respect of the 8 April 2010 Invoice was made up by her on the witness stand.

The Exclusive Distributorship Right was not granted

88 In an email dated 8 April 2010 *(ie,* after the USD 1 million had been received by the 1st Defendant) Patricia Yong informed Andrew Tani that she was "pleased that Indonesia [was] finally exclusively represented; except for a few industries" (the "8 April 2010 email").[110] The Plaintiffs argue that if, amongst the Representations, Avram had not represented that the 1st Plaintiff would obtain exclusive distributorship without having to make a firm order for USD 1 million worth of MSP Products, there would have been no reason for her to declare that "Indonesia is finally exclusively represented", since according to the Defendants' themselves, in order to satisfy clause 3.6 of the AMA, there had to be a single order for USD 1 million worth of the MSP Products.[111]

89 While the Defendants might argue that Patricia Yong's 8 April 2010 email was equally proof that USD 1 million worth of MSP Products had been ordered, such an argument would not get the Defendants very far for two reasons. First, there was never any other invoice after the 8 April 2010 Invoice (see above at [60] to [710]). Second, despite Patricia Yong's declaration in the said email, the Exclusive Distributorship Right was in fact never granted to the 1st Plaintiff.

90 The Defendants argue that the Exclusive Distributorship Right was not

---

110 3 Agreed Bundles 1348, Core Bundle 151.

111 Defendants' Closing Submissions at para 59.

granted because the 1st Plaintiff did not meet the criteria for exclusive distributorship under the AMA.[112] However, the Defendants' witnesses were inconsistent on the criteria for obtaining exclusivity. According to Avram, the 1st Plaintiff needed to transfer to the 1st Defendant USD 1 million and place an order for USD 1 million worth of MSP Products before the 1st Plaintiff would have the Exclusive Distributorship Right.[113] Patricia Yong also confirmed this on affidavit.[114] In court, however, to explain why the Exclusive Distributorship Right was not granted to the 1st Plaintiff, Patricia Yong testified that there were *additional* preconditions which the 1st Plaintiff had to satisfy.[115] These conditions, however, were not mentioned in her Affidavit of Evidence-in-Chief and it contradicted her email to Andrew Tani dated 16 March 2010 in which she informed Andrew Tani that as soon as the 1st Defendant received the USD 1 million, the 1st Defendant would announce to all distributors about the 1st Plaintiff's exclusive distributorship status in Indonesia.[116]

91 It seems to me that the more persuasive reason why the Exclusive Distributorship Right was not granted is that the 1st Plaintiff had not placed a second order for the MSP Products to bring the total value ordered up to USD 1 million.

92 In conclusion, weighing all the evidence, I am satisfied that there was only one order for MSP Products in the sum of USD 520,766.40 as reflected in the 8 April 2010 Invoice and that the Balance Sum was unutilised.

---

112 Defendants' Closing Submissions at [76] – [77].

113 Avram's AEIC at para 78.

114 Patricia Yong's AEIC at paras 24 and 25.

115 Transcripts, 21 September, page 45 line 9 to page 48 line 23.

116 PCB at page 131.

93 I move on to consider the legal issues outlined in [29].

Legal Issues

Legal Issue 1: Whether the Balance Sum is held on trust

94 The Plaintiffs submit that the Balance Sum is held by the 1st Defendant on trust for the 1st Plaintiff. They rely on *Re Kayford Ltd (in liquidation)* [1975] 1 WLR 279 ("*Re Kayford*")[117] and *Twinsectra Ltd v Yardley* [2002] AC 164 ("*Twinsectra v Yardley*").

95 In *Re Kayford*, the company, Kayford Ltd, carried on a mail order business in bedding quilts, stretch covers for chairs and the like. The customers either paid the full price in advance or paid a deposit. After an advertising campaign by the company in August 1972, similar to previous campaigns, money came in for goods, but the company found itself unable to obtain supplies to meet all the orders. Mr Kay, the managing director of the company, was becoming concerned for the customers of the company who had sent and were sending money for goods. He met his accountants and was advised that a separate bank account should be opened by the company and all further moneys paid by customers for goods not yet delivered should be paid into this account and withdrawn only when the goods had been delivered. The object of doing this was so that if the company had to go into liquidation, these sums of money could and would be refunded to those who paid them. Mr Kay did as advised.

96 When the company went into liquidation, the question for the court was whether the money in the bank account was held on trust for those who paid it, or formed part of the assets of the company available to creditors in the insolvency. Megarry J held that the money in the bank account was held on trust

[117] Plaintiffs' Closing Submissions at para 116, 120 and 121.

for the customers; by paying the money into a separate account, the company had set up a trust account so that the customers were not mere creditors but were beneficiaries of the trust.

97 Commenting on *Re Kayford* and cases following it, the author of *Parker and Mellows*: *The Modern Law of Trusts* (A. J. Oakley) (Sweet & Maxwell, 9th Ed, 2008) ("*Parker & Mellows*") observed at [9 – 065]:

> It has to be admitted that it is not easy to justify the existence of a *Quistclose* trust in cases of this kind. Those paying money in question never had any intention of becoming anything other than general creditors of the recipient. Consequently, it is not easy to see why the unilateral creation of proprietary rights in their favour does not amount to an undue preference if the only reason why they did become beneficiaries of a trust rather than general creditors of the recipient is that unilateral act."

98 It is curious why counsel for the Plaintiffs sought to rely on this case. From the Plaintiffs' closing submissions, it appears the case was cited for 2 propositions:

> (a) that, to constitute an express trust, there is no need to use the words "trust" or ["confidence"] or the like. The question is whether or not in substance an intention to create a trust has been manifested; and
>
> (b) "that the sender of the money may create a trust by using appropriate words when he sends the money or the [recipient] may do it by taking suitable steps on or before receiving the money. If either is done, the obligations in respect of the money are transferred from contract to property, from debt to trust…".

99 To begin with, the material facts of *Re Kayford* are quite different from the case at hand. In the former, the trust was created by the unilateral act of the recipient company setting up a separate bank account into which the moneys

paid by customers were deposited. The customers did not contemplate any trust when they paid the money.

100 In contrast, the Plaintiffs assert that when the sum of USD 1 million was paid to the 1st Defendant, it was with the understanding and/or on the basis of Representations made by Avram that the Balance Sum was to be a deposit for the second order if it was made and that it would be refunded in the event no such order was made.

101 Clearly, *Twinsectra v Yardley* is more to the point. As I explain below, on the basis of that case, it is open to the Plaintiffs to submit that by reason of the pleaded facts as outlined above, a *Quistclose* trust of the Balance Sum came into being at the time the deposit was made.

102 But before I go further, it is instructive to briefly recount the eponymous House of Lords decision in *Barclays Bank v Quistclose Investments* [1970] AC 567 (*Barclays Bank v Quistclose*). There, a company needed money to pay a dividend upon its ordinary shares. It obtained a loan from *Quistclose* Investments on the basis that the money was only to be used for the purpose of paying the dividend. The money loaned by *Quistclose* Investments was paid into a separate account with the company's bankers, and it was agreed that the account would 'only be used to meet the dividend' (*Barclays Bank v Quistclose* at 579). However, before the dividend was paid, the company went into liquidation. The question whether the money in the separate account was trust money became critical. If *Quistclose* Investments was a mere unsecured creditor of the company, it would enjoy no priority over other creditors in the liquidation. The bank which held the money could in exercise of its right of set off apply the money in payment of the larger debt owed to it by the company. Per contra, if the money in the account was held on trust for *Quistclose* Investments, it would

be entitled to the money in the separate bank account in priority over all others including the bank.

103 The House of Lords held that the common intention of the company and *Quistclose* Investments was such that the money was held on trust unless and until it was applied for the intended purpose of payment of the dividend, in which event *Quistclose* Investments would become merely an unsecured creditor. However, since the purpose was never accomplished the money remained trust property beyond the reach of the bank.

104 In the later decision of *Twinsectra v Yardley*, the House of Lords made a finding of a trust in somewhat different circumstances. In that case, the claimant loaned a sum of money to the borrower by paying the same to the borrower's solicitor. The solicitor gave an undertaking to the claimant to utilise the money solely for the purchase of property on behalf of the borrower. The House of Lords held that the solicitor's undertaking had given rise to a trust which Lord Millett called a *Quistclose* trust. Unlike in *Barclays Bank v Quistclose*, where the payer and the recipient company were held to have intended that the money should be held on trust, in *Twinsectra v Yardley*, the lender and the recipient solicitor merely agreed on the restriction that the money advanced could only be used for the purchase of property on behalf of the borrower; the claimant had not actually intended that the sum advanced should be held by the borrower's solicitors on trust for the claimants. The House of Lords held that the restriction on the purpose for which the money could be utilised meant that the money was not at the free disposal of the solicitor who had received it; consequently, independent of the subjective intention of the claimant, the effect of the undertaking was that they had been holding the sum advanced on trust for the claimant with power to apply it in the acquisition of property by the borrower.

105 As Lord Millett said at [74]:

> The question in every case is whether the parties intended the money to be at the free disposal of the recipient: in re Goldcorp Exchange Ltd [1995] I AC 74, 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used exclusively for the stated purpose, for as Lord Wilberforce observed in the *Quistclose* case [1970] AC 567, 580:
>
> "A necessary consequence from this, by a process simply of interpretation, must be that if, for any reason, [the purpose could not be carried out,] the money was to be returned to [the lender]: the word 'only' or 'exclusively' can have no other meaning or effect."

106 In *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 ("*AHPETC*"), Quentin Loh J ("Loh J") analysed Lord Millett's decision in *Twinsectra v Yardley*, and summarised the propositions of law thus (*AHPETC* at [114]):

> (a) Whenever a donor transfers money to a recipient for a specified purpose, a *Quistclose* trust may arise. In a *Quistclose* trust, the donor possesses the beneficial interest in the money, but this is subject to a power or duty on the recipient's part to use the money for the specified purpose. If the recipient is unwilling or unable to use the money for the specified purpose, the money is to be returned to the donor. ***Such a trust may be either express or resulting***.
>
> (b) For a *Quistclose* trust to arise, the twin certainties of subject matter and objects must be present. In particular, the purpose must be stated with sufficient clarity for a court to determine if it is still capable of being carried out or if the money has been misapplied.
>
> (c) For an **express *Quistclose* trust**, the settlor-donor must intend to constitute the recipient as a trustee, and confer a power or duty on the recipient-trustee to apply the money exclusively in accordance with the stated purpose.
>
> (d) For a **resulting *Quistclose* trust** to arise, the donor must have a lack of intention to part with the entire beneficial interest in the transferred money. The recipient must not have free disposal of the money (*Twinsectra* at [73]) and must be under a power or duty to apply the money exclusively in accordance with the stated purpose (*Twinsectra* at [74]).

> [emphasis added in bold and italics]

107 It is therefore apparent that Loh J viewed that there are *two* types of *Quistclose* trusts, *viz*, an express *Quistclose* trust and a resulting *Quistclose* trust.

108 However, in *Twinsectra v Yardley,* after examining several alternative analyses for a *Quistclose* trust, Lord Millett opined that a *Quistclose* trust is a resulting trust (*Twinsectra v Yardley* at [100]):

> "I would reject all the alternative analyses, which I find unconvincing for the reasons I have endeavoured to explain, and hold the *Quistclose* trust to be an entirely orthodox example of *the kind of default trust known as a resulting trust.*"
>
> [emphasis added in italics]

109 The learned author of *Parker & Mellows* describes resulting trusts as follows at [9-001]:

> The vast majority of commentators regard the terms "implied trust" and "resulting trust" as synonymous; this is also the view adopted in this edition of this work. Such trusts arise where a settlor or testator carries out some intentional act other than the creation of a relationship of trustee and beneficiary from which the court infers a relationship of trustee and beneficiary. They consequently arise from the unexpressed but presumed intention of the settlor or testator. The two alternative names appear to stem from the fact that such a trust is not only implied by the court but also often causes the beneficial interest arising thereunder to "result" to the settlor or his estate, or to the testator's residuary beneficiaries or intestate successors.

110 It is therefore somewhat curious that Loh J referred to an "express" *Quistclose* trust in [114] of his judgment where he helpfully summarised the propositions of law on the creation of a *Quistclose* trust. (Perhaps what he meant to refer to was an express "*Quistclose*-type" trust).

111 The learned judge is in distinguished company, however, for Lord Millett himself in *Latimer v Commissioner of Inland Revenue* [2004] 1 WLR 1466 glossed over the distinction between an express trust and a resulting trust where he held at [41]:

> The only difference is that in the present case a resulting trust in favour of the settlor is express; whereas it is more usually implied".

112 In any event, the prescient remarks made in *Twinsectra* at [99], by his Lordship are apropos:

> I do not think that subtle distinctions should be made between "true" *Quistclose* trusts and trusts which are merely analogous to them. It depends on how widely or narrowly you choose to define the *Quistclose* trust. There is clearly a wide range of situations in which the parties enter into a commercial arrangement which permits one party to have a limited use of the other's money for a stated purpose, is not free to apply it for any other purpose, and must return it if for any reason the purpose cannot be carried out".

113 Returning to our case, regardless of whether the *Quistclose* trust here is a resulting or express one (on the assumption that there is an express *Quistclose* trust, as Loh J posited), the Plaintiffs' submission that a trust of the Balance Sum had been constituted in favour of the 1st Plaintiff is clearly made out. There is no doubt as regards the twin certainties of subject matter of the trust nor as to the intended beneficiary of the trust (*ie,* certainty of object) (see *AHPETC* at [114(b)]). The Balance Sum was paid to the 1st Defendant on deposit until the 1st Plaintiff decided to place a second order. If a second order was not proceeded with, the Balance Sum was to be returned to the 1st Plaintiff. It was never intended to be at the free disposal of the 1st Defendant. In my opinion, the Balance Sum was thus held by the 1st Defendant on a *Quistclose* trust. Accordingly, the 1st Defendant's refusal to refund the Balance Sum was a breach of trust.

Legal Issue 2: Whether Avram and Patricia Yong are liable for dishonest assistance in the 1st Defendant's breach of trust.

114 Although the heading of section E of the Defendant's closing submissions asserts that both Avram and Patricia Yong are not liable for dishonest assistance, the body of section E is devoted exclusively to submissions in Patricia Yong's behalf.

115 Counsel for the Defendants submit that "the threshold of dishonesty which has to affect the conscience of the director is a high one",[118] and that Plaintiffs have not proved that she knew of the Representations.

116 With regard to the factual question raised as to her knowledge, the evidence earlier reviewed shows that she knew of the Representations. The two invoices of 10 March 2010 (the same day that the Representations were made) were issued with her knowledge if not on her instructions. The 26 March 2010 Letter which she signed in April of that year showed that she was upset with the Representations and sought, with Andrew Tani's help, to downplay their significance. However, she stopped short of disavowing the Representations.

117 As regards the law, the locus classicus is the Privy Council decision in *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 ("*Royal Brunei Airlines*") where Lord Nicholls delivered their Lordships' judgment in what was described as a "magisterial opinion" by Lord Millett in *Twinsectra v Yardley*.

118 In dealing with the question as to what constitutes dishonesty in the context of dishonest assistance in the breach of trust, Lord Nicholls opined, (*Royal Brunei Airlines* at 389):

---

118 Defendant's Closing Submissions at [93].

> Whatever may be the position in some criminal or other contexts … in the context of the accessory liability principle acting dishonestly … *means simply not acting as an honest person would in the circumstances. This is an objective standard.* At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of *conduct assessed in the light of what a person actually knew at the time*, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct…. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. *The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual.* If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> [emphasis added in italics]

119 This yardstick for dishonesty was followed by the Court of Appeal ("CA") in *Bansal Hermant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33 ("*Bansal*"). However, *in George Raymond Zage III and another v Ho Chi Kwong and another* [2010] SGCA 4 ("*George Raymond Zage III*") the test for dishonesty was revisited as the court in *Bansal* had not considered two relevant cases decided not long after *Royal Brunei Airlines*, namely *Twinsectra v Yardley* and our High Court's decision in *Malaysian International Trading Corporation Sdn Bhd v Interamerica Asia Pte Ltd* [2002] 2 SLR (R) 896 which followed *Twinsectra v Yardley*.

120 In *Twinsectra v Yardley*, a solicitor (the "1st solicitor") was acting for a client in connection with the purchase of land. The client needed to borrow £1 million in order to complete the purchase. A lender was found who was willing to lend that money but only if repayment was secured by a solicitor's personal undertaking. The 1st solicitor was unwilling to give such an undertaking. The

client then approached another solicitor (the "2nd solicitor") who held himself out as acting for the client and received the money after his firm gave an undertaking that "(1) The loan moneys will be retained by us until such time as they are applied in the acquisition of property on behalf of our client. (2) The loan moneys will be utilised solely for the acquisition of property on behalf of our client and for no other purposes. (3) We will repay to you the said sum of £1 million together with interest". On the client's instructions, the 2nd solicitor released the money to the 1st solicitor after having received assurances from the client through the 1st solicitor that the money would be used in the acquisition of property. The 1st solicitor regarded the money as held on account for the client. On the client's instructions, he then paid it out. The 1st solicitor took no steps to ensure that the money was only applied in the acquisition of property; a substantial part of it was used by the client for other purposes. The 2nd solicitor then went bankrupt and the loan was not repaid. The lender sued the 1st solicitor alleging that he had dishonestly assisted in the 2nd solicitor's breach of trust. The trial judge found that the 1st solicitor had not been dishonest. However, he also found that he was clearly aware of the terms of the undertaking that the money would be applied in the acquisition of property and that he had received them on the footing that they would be so applied. Nevertheless, he had regarded the money as held simply to the order of the client.

121 The CA reversed the judge's finding that the 1st solicitor had not been dishonest as it conflicted with the factual finding that he was aware of the terms of the undertaking and that he had received the funds on that footing. On appeal, the majority in the House of Lords reversed the CA's finding of dishonesty, holding that it should not have substituted its own finding of dishonesty for that of the trial judge.

122 Lord Hutton sought to elaborate on what *Royal Brunei Airlines* had established as the requisite standard of dishonesty.

123 In his statement, with which a majority of their Lordships agreed, he opined (at [35] and [36]):

> There is, in my opinion, a further consideration which supports the view that *for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men.* A finding by a judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law and not in a criminal context, I think that it would be less than just for the law to permit a finding that a defendant had been "dishonest" in assisting in a breach of trust where he knew of the facts which created the trust and its breach but had not been aware that what he was doing would be regarded by honest men as being dishonest.
>
> It would be open to your Lordships to depart from the principle stated by Lord Nicholls that dishonesty is a necessary ingredient of accessory liability and to hold that knowledge is a sufficient ingredient. But the statement of that principle by Lord Nicholls has been widely regarded as clarifying this area of the law and, as he observed, the tide of authority in England has flowed strongly in favour of the test of dishonesty. Therefore I consider that the courts should continue to apply that test and that your Lordships should state that *dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people*, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.
>
> [emphasis added in italics]

124 This contrasted with the dissenting view of Lord Millett who opined (at [118]):

> There is no trace in Lord Nicholls' opinion that the defendant should have been aware that he was acting contrary to objective standards of dishonesty."

125 Further elaborating, Lord Millett continued (at [121]):

> In my opinion Lord Nicholls was adopting an objective standard of dishonesty by which the defendant is expected to attain the standard which would be observed by an honest person placed in similar circumstances. Account must be taken of subjective considerations such as the defendant's experience and intelligence and his actual state of knowledge at the relevant time. But it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was.

126 The result in *Twinsectra v Yardley* was that the 1st solicitor who was aware (i) that the 2nd solicitor (from whom he received the funds) had given his undertaking that the loan moneys would be held until such time as they were applied in the acquisition of property on behalf of the borrower; and (ii) that he (the 1st solicitor) had received the money on the footing that they would be so applied, was nevertheless not liable for dishonest assistance when he released the money to the client.

127 Lord Hoffmann in agreeing with Lord Hutton said (at [20]):

> For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles [i.e. the principles laid down by the Privy Council in Royal Brunei Airlines require more than knowledge of the facts which make the conduct wrongful. *They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour.*
>
> [emphasis added in italics]

128 The subjectivity in the requirement apparently introduced by Lord Hutton that the defendant had to know "that what he was doing was dishonest by the standards of honest and reasonable men" enabled the House of Lords to uphold the High Court finding that the 1st solicitor was not dishonest.

129 A later Privy Council decision in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2006] 1 WLR 1476 ("*Barrow Clowes*") has since clarified that the majority decision in *Twinsectra v Yardley* did not depart from the objective test for honesty set out in *Royal Brunei Airlines*. Lord Hoffmann explained (at [15] and [16]):

> Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that the *Twinsectra* case had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to "what he knows would offend normally accepted standards of honest conduct" meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.
>
> Similarly in the speech of Lord of Hoffmann, the statement (in para 20) that a dishonest state of mid meant "consciousness that one is transgressing ordinary standards of honest behaviour" was in their Lordships' view intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about what those standards were.

130 The CA in *George Raymond Zage III* therefore concluded at [22] "that for a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them."

131 The conclusion was framed in that way ("if he failed to adequately query them") to accommodate the particular circumstances of the case. For our

purposes, it would not be inconsistent with that conclusion to frame the requirements for dishonest assistance in breach of trust as follows:

> (a) The defendant must be aware of the facts which enable the court to make a finding of a trust whether or not the defendant appreciated that a trust was constituted, and
>
> (b) With knowledge of the facts, he acts in relation to the trust in a manner which is contrary to normally acceptable standards of honest conduct.

132 Avram and Patricia Yong were in complete charge of the 1st Defendant. In the absence of evidence to the contrary, it is reasonable to infer that as the directors of 1st Defendant, they were behind the actions of the 1st Defendant and were accessories to the breach of trust committed by the 1st Defendant.

133 Avram was the maker of the Representations and Patricia Yong, as I have found, was aware of the Representations. Both of them knew that when the sum of USD 1 million was paid by the 1st Plaintiff to the 1st Defendant, it was with the understanding and/or on the basis of the Representations made by Avram that the Balance Sum was to be a deposit for a second order if it was made and that it would be refunded if no such order was made.

134 By refusing to return the Balance Sum despite demands for the same and putting up untrue allegations that there was an order for USD 1 million worth of MSP Products, Avram and Patricia Yong acted in a manner contrary to normally acceptable standards of honest conduct.

135 I therefore find them liable for dishonest assistance in the 1st Defendant's breach of trust.

Plaintiffs claim in unjust enrichment

136 A third ground of the Plaintiffs' claim is unjust enrichment. At para 22 of the Statement of Claim (Amendment No. 1) the pleading reads:

> Further and/or alternatively, by reason of the aforementioned, the Plaintiffs aver that the 1st Defendant has been unjustly enriched at their expense, and the 1st Defendant is liable to repay the said amount of US$479,233.60 to the Plaintiffs.

137 Nothing more was pleaded in that regard. In para 133 of the Plaintiffs' closing submissions, they argue as follows:

> Since no order apart from that under the 8 April 2010 Tax Invoice had been placed, the 1st Defendant had no basis to retain the Balance Sum. To allow the 1st Defendants to retain the Balance Sum would be to enable the 1st Defendant to be unjustly enriched at the expense of the Plaintiffs.

138 Then followed references to passages of *Goff & Jones*, The Law of Unjust Enrichment (9th edition) ("*Goff & Jones*") (in 12-24 to 12-27): dealing with the doctrine of severability.

139 There are three requirements for a claim in unjust enrichment, namely,

(a) enrichment of the defendant;

(b) at the expense of the plaintiff; and

(c) circumstances which make the enrichment unjust (i.e. the presence of an "unjust factor"): see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another* [2011] 2 SLR 540 at [110].

140 What is noticeably absent is any attempt by the Plaintiffs to explain how they satisfy the three requirements. In particular, there is no attempt to show

how the 1st Defendant's retention of the Balance Sum is within any of the categories which the law recognises as sufficient to render their retention unjust.

141 The Defendants contend that this failure on the part of the Plaintiffs to found the claim in unjust enrichment on any "unjust factor" is fatal to the Plaintiffs' case.[119]

142 In this regard, the Defendants cite *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased and another* [2013] SGCA 36 ("*Anna*"), where the CA observed at [134]:

> "It is important to reiterate that there is no freestanding claim in unjust enrichment on the abstract basis that it is "unjust" for the defendant to retain the benefit – there must be a particular recognised unjust factor or event which gives rise to a claim. The following observations by Prof Birks in a seminal article are, in this regard, apposite (see Peter Birks, "The English recognition of unjust enrichment" [199] LMCLQ 473 (at 482)):
>
> > 'Unjust' is the generalization of all the factors which the law recognizes as calling for restitution. Hence, at the lower level of generality the plaintiff must put his finger on a specific ground for restitution, a circumstance recognized as rendering the defendant's enrichment 'unjust' and therefore reversible.

143 The CA then referred to the list of "unjust factors" summarised in 2 academic treatises, *viz*:

(a) *The Law of Restitution* (Andrew Burrows) (Oxford University Press, 3rd Ed, 2011) ("*Burrows*"); and

(b) *Goff & Jones*: *The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell, and Stephen Watterson) (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones*").

---

119 Defendant's Closing Submissions at [96].

144 *Burrows* (at p 86) stated as follows (*Anna* at [132]):

> As regards the cause of action of unjust enrichment, the main unjust factors can be as follows: mistake, duress, undue influence, exploitation of weakness, human incapacity, failure of consideration, ignorance, legal compulsion, necessity, illegality and public authority ultra vires exaction and payment.

145 Meanwhile, *Goff & Jones* (at [1-22]) sets out the list of unjust factors as follows (*Anna* at [133]):

> Lack of consent and want of authority; mistake; duress; undue influence; failure of basis; necessity; secondary liability; ultra vires receipts and payments by public bodies; legal incapacity; illegality; and money paid pursuant to a judgment that is later reversed.

146 The Plaintiffs' claim is a bare assertion that the 1st Defendant was unjustly enriched at their expense. This is clearly deficient. Pointing to a similar deficiency in *Anna*, the CA borrowed the words of Mann J in *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [18], where the latter held,

> "the claim fails because it does not plead facts which are capable of bringing the case within one of the established restitutionary claims or some justifiable extension of them."

147 The authors of *Goff & Jones*: *The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell, and Stephen Watterson) (Sweet & Maxwell, 9th Ed, 2016) explain at [1-26]:

> A claimant must be able to point a *ground of recovery* that is established by past authority, or at least is justifiable by a process of principled analogical reasoning from past authority. 'There is in English law *no general rule* giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense', and the court's jurisdiction to order restitution on the ground of unjust enrichment is subject 'to the binding authority of previous decisions': they *do not have 'a discretionary power to order repayment whenever it seems... just and equitable to do so'*. Claims in unjust enrichment must be

> pleaded by bringing them 'within or close to some *established category or factual recovery situation'*.
>
> [emphasis added in italics]

148 Accordingly, the Plaintiffs' claim in unjust enrichment fails.

149 I should perhaps add that the Plaintiffs might have made out their case if greater pains had been taken in the pleadings. The Plaintiff's closing submissions did deal with the doctrine of severability but this was done in vacuo. Although one could possibly infer that what the Plaintiffs were trying to do was to found their claim upon the unjust factor of failure of consideration (or basis), given that this was not fleshed out in their pleadings, it was not open to me to make a finding in favour of the 1st Plaintiff.

Legal Issue 3: Fraudulent Misrepresentation

150 The Plaintiffs argue that the 1st Defendant and/or Avram are liable for fraudulent misrepresentation.[120]

151 The Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 laid down the law as regards fraudulent misrepresentation (at [13] - [14]):

> The law as regards fraudulent representation is clear. Since the case of *Pasley v Freeman* (1789) 3 TR 51, it has been settled that *a person can be held liable in tort to another, if he knowingly or recklessly makes a false statement to that other with the intent that it would be acted upon, and that other does act upon it and suffers damage*. This came to be known as the tort of deceit. In *Derry v Peek* (1889) 14 App Cas 337, the tort was further developed. It was held that in an action of deceit the Plaintiff must prove actual fraud. This fraud is proved only when it is shown that a false representation has been made knowingly, or

120 Plaintiffs' closing submissions at paras [138] to [149].

> without belief in its truth, or recklessly without caring whether it be true or false.
>
> The essentials of this tort have been set out by Lord Maughan in *Bradford Building Society v Borders* [1941] 2 All ER 205. Basically there are the following essential elements. ***First**, there must be a representation of fact made by words or conduct. **Second**, the representation must be made with the intention that it should be acted upon by the Plaintiff, or by a class of persons which includes the Plaintiff. **Third**, it must be proved that the Plaintiff had acted upon the false statement. **Fourth**, it must be proved that the Plaintiff suffered damage by so doing. **Fifth**, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.*
>
> [emphasis added in italics and bold italics]

152 With respect to the first element, although the representation with regard to the refund of the Balance Sum was a representation as to a future intention, it may qualify as a representation as to an existing fact, namely the state of Avram's mind at the time. Nevertheless, I disagree with the Plaintiffs that the 1st Defendant and/or Avram are liable for fraudulent misrepresentation. In particular, considering the fifth element, there is no evidence that when Avram made the Representation as to the refund on 10 March 2010, he did so with knowledge that it was false in that he or the 1st Defendant had no intention of honouring it. There is also no evidence that the Representations were made in the absence of any genuine belief that they were true. Indeed, the subsequent conduct of Avram and Patricia Yong served to show that there was genuine belief on their part that they were bound by the Representations (see above at [36] to [48] on the issuance of the 26 March 2010 Letter and [72] to [76] on the 1st Defendant's financial records). The evidence suggests that it was only after the 1st Plaintiff failed to make a second order that the Defendants had a change of heart and decided not to honour the Representations.

153 Accordingly, the Plaintiffs fail in their claim in fraudulent misrepresentation.

The 1st Defendant's counterclaim

154 Finally, having found that there was no order apart from that under the 8 April 2010 Tax Invoice, the Defendants' counterclaim must fail. What is telling is that the Defendants' counsel did not advance any argument in the closing submissions in support of the counterclaim. Accordingly, I dismiss the 1st Defendant's counterclaim.

Conclusion

155 In the result:

(a) I declare that the Balance Sum in the amount of USD 479,233.60 is held by the 1st Defendant on trust for the 1st Plaintiff and order that the Balance Sum together with interest thereon at the rate of 5.33% per annum from the date of the Writ be paid by the 1st Defendant to the 1st Plaintiff.

(b) I declare that the 2nd and 3rd Defendants are accessories to the 1st Defendant's breach of trust by reason of their dishonest assistance in the said breach and they are thus liable jointly and severally with the 1st Defendant for payment of the Balance Sum (together with the interest aforesaid).

(c) I also order that an account be taken before the Registrar and that all enquiries be made in that connection as to the use of the Balance Sum and all properties, assets, or benefits obtained or acquired from the use thereof ("Additional Sums"). I order the 1st Defendant to pay to the 1st

Plaintiff all Additional Sums found by the Registrar to be due to the 1st Plaintiffs over and above the Balance Sum.

(d) That interest on the Additional Sums be fixed by the Registrar at his discretion.

(e) The Counterclaim is dismissed with costs.

(f) Finally, I order that the Defendants jointly and severally bear the Plaintiffs' costs, such costs to be taxed unless agreed.

Andrew Ang
Senior Judge

Foo Maw Shen, Chu Hua Yi and Liong Wei Kiat, Alvin (Dentons Rodyk & Davidson LLP for first and second plaintiff;
Cai Enhuai Amos and Wan Zahrah (Tito Isaac & Co LLP) for the first, second and third defendant.