THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 104

Suit No 334 of 2021

Between

2253 Apparel Inc

… *Plaintiff*

And

Medico Titan Pte Ltd

… *Defendant*

JUDGMENT

[Contract — Formation]
[Contract — Misrepresentation]
[Restitution — Unjust enrichment]
[Tort — Conspiracy]

TABLE OF CONTENTS

INTRODUCTION **1**

THE FACTS **2**

THE DEFENDANT'S VERSION OF EVENTS 2

THE PLAINTIFF'S VERSION OF EVENTS 8

THIS SUIT **13**

THE TRIAL **19**

(I) THE PLAINTIFF'S CASE 19

(II) THE DEFENDANT'S CASE 23

THE ISSUE **25**

THE FINDINGS **26**

DID THE DEFENDANT CONTRACT WITH THE PLAINTIFF? 29

(I) THE CLAIM BASED ON MISREPRESENTATION 33

(II) THE REMAINING CLAIMS OF THE PLAINTIFF 35

COSTS **40**

CONCLUSION **42**

Version No 1: 20 Apr 2023 (15:04 hrs)

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2253 Apparel Inc
v
Medico Titan Pte Ltd

[2023] SGHC 104

General Division of the High Court — Suit No 334 of 2021
Lai Siu Chiu SJ
5–8 July, 18 August 2022

19 April 2023 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 The claim in this suit arose directly out of the worldwide demand for, coupled with the shortage of, gloves after the onset of the Covid-19 pandemic ("the pandemic") in early 2020.

2 2253 Apparel Inc ("the plaintiff") is an American company situated in Montebello, Los Angeles County, California state and its business is in wholesale clothing. The plaintiff's chief executive officer is Doron Kadosh ("Kadosh").[1]

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[1] See paras 1 and 3 of the affidavit evidence-in-chief ("AEIC") of Kadosh dated 1 June 2022 ("AEIC of Kadosh").

3 Medico Titan Pte Ltd ("the defendant") is a Singapore company incorporated in April 2020. The defendant operates as a middleman for buyers and manufacturers of personal protection equipment ("PPE") including SKYMED nitrile gloves ("the Gloves"). In or about November 2020, the defendant progressed to manufacturing and distributing its own "Medico Titan" brand of PPE products to meet demands resulting from the worldwide shortage caused by the pandemic. The defendant's sole director and shareholder is Njoto Danastri Sahita @ Njoo Soen Hwa ("Dan").[2]

The facts

4 The facts set out below are extracted from the written testimony of the witnesses called by the parties for the trial, in particular from the affidavits of evidence-in-chief ("the AEICs") of Kadosh and Dan.

The defendant's version of events

5 According to Dan, the defendant was appointed by the Gloves' Thai manufacturer Sufficiency Economy City Co Ltd ("Sufficiency Economy") as its official representative on 13 June 2020[3] and later as an official reseller on 25 June 2020[4] of the Gloves, for one year until June 2024. The defendant would in turn then seek buyers for the Gloves. Both agreements will henceforth be referred to collectively as the "Sufficiency Economy-Defendant Agreements".

6 One such buyer of the Gloves was a Malaysian public company called Faylez Berhad ("Faylez") which was incorporated in July 2006. Faylez was/is

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2 See paras 1, 6 and 7 of the AEIC of Njoto Danastri Sahita @ Njoo Soen Hwa dated 17 May 2022 ("AEIC of Dan").

3 See the defendant's bundle of documents (DB) at DB33.

4 Ibid DB49.

Version No 1: 20 Apr 2023 (15:04 hrs)

in the business of trading and/or supplying medical products.[5] The President of Faylez is one Dr Hasliza Ozcan ("Dr O").[6]

7 Dan was introduced to Dr O in June 2020 as a potential wholesale customer. The defendant officially appointed Faylez as an authorised reseller of the Gloves by a letter of appointment dated 23 June 2020[7] ("Faylez's letter of appointment") which appointment would expire in June 2021.

8 On 9 July 2020, the defendant and Faylez signed an agreement whereby the defendant sold 900 million boxes of the Gloves to Faylez ("Faylez Agreement")[8] at a price of US$6.20 per box for a total consideration of US$5,580,000,000 ("Faylez's purchase price"). Upon signing, Faylez was required under clause 3 of the Faylez Agreement to pay a deposit to the defendant of 30% of Faylez's purchase price amounting to US$1,674,000,000 ("Faylez's deposit").

9 Faylez's deposit was to be paid into the defendant's Singapore bank account with Standard Chartered Bank under account no. xxxxxx198 ("the Defendant's SCB account").

10 On or about 13 July 2020, Dr O informed Dan that Faylez had a possible buyer for the Gloves whose details she did not provide. She inquired as to the length of time required for the Gloves to be delivered to Faylez's buyer.

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5 See Exhibit NDS-32, p 31 of the AEIC of Dan.

6 See Exhibit NDS-33, p 38 of the AEIC of Dan.

7 See DB45.

8 See DB53–55.

Version No 1: 20 Apr 2023 (15:04 hrs)

11 It was only on or about 15 July 2020 that Dan found out that Faylez's buyer was a Malaysian company based in Kuala Lumpur called Ikarl Global Sdn Bhd ("Ikarl"). Dan obtained this information from documents that Dr O sent to him which included:[9]

(a) an offer letter dated 14 July 2020 (expiring on 17 July 2020) from Faylez to Ikarl ("Faylez's offer letter") to sell to the latter 30 million of boxes of the Gloves at US$6.65 per box for a total consideration of US$199,500,000 ("Ikarl's purchase price");

(b) an irrevocable confirmed purchase order dated 14 July 2020 ("Ikarl's PO") issued by Ikarl to Faylez confirming the purchase of 30 million boxes of the Gloves to be manufactured in Thailand, at Ikarl's purchase price; and

(c) a purchase order which Faylez in turn issued to Ikarl ("Faylez's PO") on 15 July 2020, confirming Ikarl's PO.

12 Under the terms of Faylez's offer letter referred to in [11(a)], Ikarl had to pay a commitment fee of RM1,000,000 to Faylez immediately after counter-signing Faylez's offer letter. Payment of the balance of Ikarl's purchase price to Faylez was to be by three instalments staggered over July and August 2020. Further, Faylez required Ikarl to pay 30% of Ikarl's purchase price amounting to US$59,850,000 by wire transfer to the defendant, followed by wire transfer of 20% amounting to US$39,665,368.30 to Faylez.

13 As the defendant's sale price to Faylez for the Gloves was US$6.20 per box, Faylez's sub-sale to Ikarl at US$6.65 per box would have reaped Faylez a

[9] See para 16 of the AEIC of Dan.

Version No 1: 20 Apr 2023 (15:04 hrs)

profit of US$0.45 per box or US$13,500,000 for 30 million boxes, a handsome profit indeed for a party acting purely as a middleman.

14 On his part, Dan affirmed in his AEIC[10] that he knew nothing about Ikarl, and has never dealt with the company or spoken to the company's shareholders and/or directors. Neither did Dan suggest to Faylez that Dr O should instruct Ikarl to make payment of the 30% deposit under the Faylez offer letter to the defendant. Dan surmised that Faylez imposed this condition on Ikarl to reduce its own burden of having to make the 30% down payment to the Defendant pursuant to clause 3 of the Faylez Agreement.[11]

15 Shortly after the Faylez Agreement was signed, Dan was informed by Dr O that she had a downstream buyer for the Gloves which was an American entity. Dan knew nothing of this American buyer as he was not told by Dr O, nor did Dan know how the American buyer was related Faylez's offer letter, Ikarl's PO or Faylez's PO.

16 It was only in Kadosh's affidavit filed on 2 April 2022 in support of the plaintiff's injunction application that Dan subsequently saw a copy of Ikarl's own pro-forma invoice no. IGSB/2253INC/007/2020 dated 14 July 2020 issued to the plaintiff ("Ikarl's invoice").[12] It was noted therefrom that Ikarl had on-sold to the plaintiff 500,000 boxes of the Gloves ("the plaintiff's order") at US$6.65 per box ("the plaintiff's purchase price") FOB Thailand. In his AEIC,[13] Dan affirmed he knew nothing about Ikarl's invoice nor was he involved in the

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10 See paras 20–21 of the AEIC of Dan.

11 See para 8 of the AEIC of Dan.

12 See DB79.

13 See para 26 of the AEIC of Dan.

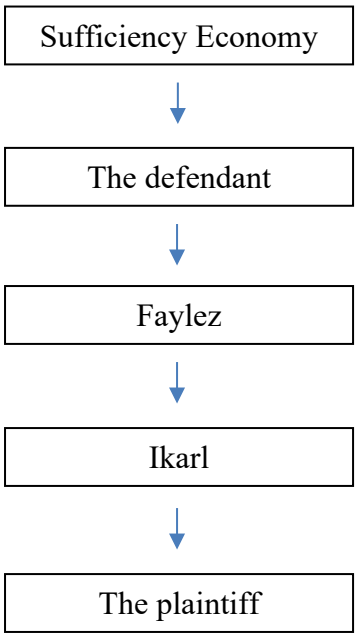
Version No 1: 20 Apr 2023 (15:04 hrs)

negotiations, and he did not know how the terms therein came about. The defendant had never dealt with the plaintiff before this dispute. Dan stated he did not suggest to Faylez or Ikarl (or to their respective directors and/or shareholders) to incorporate the 30% deposit term under clause 3 of the Faylez Agreement into Ikarl's invoice.

17 Dan noted that the 30% deposit in Ikarl's invoice matched Faylez's terms of sale in Faylez's offer letter and in Ikarl's PO. In his AEIC,[14] Dan described the defendant as an upstream supplier, with the plaintiff as a downstream buyer (which the plaintiff disputed), of the Gloves with Faylez and Ikarl as the parties in between in the chain of contracts. The various parties' standing in the chain can be seen in the following diagram that Dan produced in his AEIC:

[14] See para 30 of the AEIC of Dan.

Version No 1: 20 Apr 2023 (15:04 hrs)



Agreements	**Dates**	**No. of Gloves**	**Total Price US$**	**Unit Price per box (US$)**
Faylez's Agreement	9 July 2020	900 million	$5.58 billion	$6.20
Ikarl's PO	14 July 2020	30 million	$199.5 million	$6.65
Ikarl's Invoice	14 July 2020	500,000	$3.325 million	$6.65

It is noted from the above diagram that there is no direct contractual linkage between the plaintiff and the defendant.

Version No 1: 20 Apr 2023 (15:04 hrs)

The plaintiff's version of events

18 The plaintiff's version of the facts involved as set out below are extracted from the AEIC of Kadosh and the plaintiff's second witness, Robert Allen Mckelvey ("Mckelvey").

19 Kadosh confirmed[15] that he had agreed with Ikarl's representative Kamarul Hisham Bin Kamarudin ("Hisham") and Dr O that a sum of US$997,500 ("the 30% deposit") would be remitted to the defendant's SCB account. The 30% deposit was remitted by the plaintiff on 19 July 2020. Kadosh added that after the remittance was made, Dan had informed Dr O that the funds had been received.

20 Under the terms of Ikarl's invoice,[16] the plaintiff's order was scheduled to leave Thailand on 5 August 2020. However, there was a delay and the plaintiff was advised that delivery to the freight forwarder of the plaintiff's order would take place on 31 August 2020 instead and shipment would follow on 11 September 2020.

21 The plaintiff received an invoice from Ikarl to prepay US$10,154 for freight ("the freight payment"). According to Kadosh's statement in his AEIC, he had made the freight payment on behalf of the plaintiff on 30 August 2020.[17] However, Kadosh's statement in his AEIC is incorrect. The payment document he exhibited in his AEIC reflected that a credit transfer to NCL International

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15 See paras 4-5 of the AEIC of Kadosh.

16 See DB79 and para 9 of the AEIC of Kadosh.

17 See para 10 of the AEIC of Kadosh.

Version No 1: 20 Apr 2023 (15:04 hrs)

Logistics PCL of the freight payment on 31 August 2020 was effected by Mckelvey through a Hong Kong company called JMG H.K. Limited ("JMG").[18]

22 Kadosh's AEIC exhibited a copy of the bill of lading dated 12 September 2020 ("the Bill of Lading")[19] for the vessel MSC Mirja V.QLO37N ("the vessel") that the plaintiff subsequently received from Ikarl. It showed the plaintiff as the consignee of one container of 30,000 boxes of the Gloves. The Bill of Lading showed the exporter/shipper to be Paddy The Room Trading Co Ltd and the notify party to be Walsh C.H.B. Inc, RDBA Walsh International. 189, Sunrise. Highway, Suite 202, Rockville Centre, NY 11570 USA. Kadosh deposed that the plaintiff contacted Mediterranean Shipping Company ("MSC") to seek confirmation that the plaintiff's container was on board the vessel; MSC confirmed it was.

23 There was another bill of lading issued for the plaintiff's cargo. Strangely, this second bill of lading dated 11 September 2020 showed the consignee as well as notify party of the container of 30,000 boxes of the Gloves to be another company called Zev Supplies USA ("Zev Supplies") of 3020 NW 27th ST, Fort Lauderdale, Florida 33319, USA.

24 Kadosh deposed that the plaintiff attempted to contact the defendant several times without success. The plaintiff made inquiries of SCB and was informed that it had similarly received no response. Kadosh believed that the 30% deposit remained with the bank.

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18 See DB-91.

19 See Exhibit DK-1, Tab 4, p 29 of the AEIC of Kadosh.

Version No 1: 20 Apr 2023 (15:04 hrs)

25 Earlier (at [21] above), the court had alluded to JMG and Mckelvey. Mckelvey is a resident of Bangladesh and is the vice-president of JMG which is in the business of manufacturing jeans and other garments. Mckelvey deposed that JMG has acted as the plaintiff's sourcing agent since 7 December 2019 by a memorandum of understanding made between the parties.

26 In April 2020, Kadosh informed Mckelvey that the plaintiff needed 130,000 boxes of nitrile gloves for the US market and requested him to source for them. Mckelvey could not find the product in Bangladesh. He looked elsewhere and was informed by an associate that Ikarl was a possible source for the product. Mckelvey spoke to Hisham who confirmed he could supply the gloves.

27 At the plaintiff's request, Mckelvey ordered 130,000 boxes of gloves for the plaintiff from Paddy The Room Trading Co Ltd ("Paddy") at a cost of US$826,800. The invoice for this order dated 30 June 2020 came from Ikarl. Mckelvey forwarded the invoice to the plaintiff who paid a 50% deposit for the order. Mckelvey deposed that this contract was never honoured and the plaintiff did not receive the gloves it purchased.[20]

28 In July 2020, Kadosh informed Mckelvey that the plaintiff needed another 500,000 boxes of gloves. On checking, Mckelvey was informed by Hisham that the defendant could supply the Gloves as it held the licence from the manufacturer and that Dr O of Faylez was the defendant's sales representative. Mckelvey conveyed the information to Kadosh who requested

[20] See para 57 of the AEIC of Robert Allen Mckelvey dated 27 May 2022 ("AEIC of Mckelvey").

Version No 1: 20 Apr 2023 (15:04 hrs)

that he verify the information first before proceeding to make the purchase on the plaintiff's behalf.

29 On 16 July 2020, Mckelvey emailed Dan via his LinkedIn account with the following message:[21]

> Dear Mr. Danas Njoto,
>
> I am looking at purchasing SkyMed nitrile gloves through a Malaysia company, can you verify they are the approved license holder and they deliver product as required;
>
> 14TH July 2020
>
> FAYLEZ BERHAD (741523-P)
>
> NO. 46-1, JLN WANGSA SETIA 3,
>
> W MELAWATI 53300 KUALA LUMPUR MALAYSIA
>
> There is so much fraud in the market it is very difficult to get validation.

30 Mckelvey received Dan's following reply to his email:

> Dear Robert.
>
> Thank you for the query. We will like to confirm that
>
> Faylez Berhad is an authorised representative for our SkyMed gloves to assist us to reach out more efficiently to meet the demands of our customers.
>
> …

31 A second message followed from Dan where he wrote:

> Thank you for the message and for the due diligence.
>
> Faylez Berhad is indeed our representative for SkyMed Nitrile Gloves.
>
> Here is the direct contact detail to the party in Faylez Berhad whom we are dealing with.
>
> Dr HasLiza

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[21] See Exhibit RAM-3 of the AEIC of Mckelvey.

Version No 1: 20 Apr 2023 (15:04 hrs)

Mobile: [redacted]

Email: [redacted]

…

32 Thereafter, Mckelvey contacted Dr O in regard to the plaintiff's intended purchase of 500,000 boxes of the Gloves. Dr O confirmed she was the defendant's representative and was authorised to discuss and finalise the terms of the purchase and sale. She recommended that the plaintiff appoint Ikarl as its agent to formalise the purchase agreements for the Gloves. Dr O added that the plaintiff had to make an advance payment of 30% to the defendant's SCB account.

33 Mckelvey conveyed the defendant's emails (in [30]–[31] above) to Kadosh. Kadosh gave him the consent and McKelvey proceeded to discuss and finalise the plaintiff's order (in [16] above) with Ikarl. Hisham informed Mckelvey that he (Hisham) had discussed the plaintiff's order with Dr O and he repeated the requirement of a 30% deposit being remitted to the defendant's SCB account. Mckelvey conveyed the requirement to Kadosh who agreed.

34 After he was informed by Kadosh that the plaintiff had paid the 30% deposit to the defendant's SCB account, Mckelvey clarified with Dr O who informed him that Dan had confirmed receipt of the sum.

35 Thereafter however, according to the plaintiff, there was complete silence from the defendant, Faylez and Ikarl and no delivery of the plaintiff's order was made.

Version No 1: 20 Apr 2023 (15:04 hrs)

36 Prior to remittance of the 30% deposit to the defendant's SCB account, Mckelvey deposed[22] that the defendant at no time asserted that Faylez was/is the defendant's reseller.

37 Mckelvey alleged it was only after the plaintiff had commenced HC/S 334/2021 ("this Suit") that the defendant asserted that Faylez is not its representative. Mckelvey was not aware of, nor had he seen, Faylez's letter of appointment (in [7] above) prior to the plaintiff's invoice. He claimed Faylez's letter of appointment only surfaced after this Suit commenced.

38 It should be noted at this stage that during his cross-examination,[23] Mckelvey was challenged on his alleged late knowledge (in [37] above) of Faylez's letter of appointment on two bases. First, in Mckelvey's own email to Dan on 1 November 2020[24] prior to commencement of this Suit, he had attached a copy of Faylez's letter of appointment. Second, in Kadosh's affidavit filed on 2 April 2021 in support of the plaintiff's injunction application, Kadosh himself had exhibited[25] a copy of the document.

This Suit

39 On 9 April 2021, the plaintiff commenced this Suit against the defendant and immediately applied in HC/SUM 1636/2021 for, *inter alia*, (i) an injunction to restrain the defendant from withdrawing or otherwise dealing with the 30% deposit and the freight payment held in the defendant's SCB account and (ii) an

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22 See para 38 of the AEIC of Mckelvey.

23 See Certified Transcripts on 5 July 2022 at pp 102–103.

24 See Certified Transcripts on 5 July 2022 at pp 104–106; DB171-173.

25 See Tab 6, p 31 of the Affidavit of Doron Kadosh dated 2 April 2021.

Version No 1: 20 Apr 2023 (15:04 hrs)

order that the defendant authorise SCB to return both sums to the plaintiff ("the plaintiff's injunction application").

40 On 13 April 2021, this court heard and granted the plaintiff's application on an *ex parte* basis, only to the extent of restraining the defendant from withdrawing or otherwise dealing with the moneys ("the injunction order"), with the remaining prayers adjourned to an *inter partes* hearing. Subsequently, by way of HC/SUM 2150/2021, the defendant applied to set aside the injunction order ("the defendant's setting-aside application") at the same time that the plaintiff's injunction application was to be heard on an *inter partes* basis.

41 On 27 May 2021, this court heard both applications. The court dismissed the plaintiff's injunction application and granted (with costs) the defendant's setting-aside application. No appeals have been filed against either order of court. As the court informed parties at the close of the hearing, the court's decision was premised on the fact that the plaintiff had sued the wrong party.

42 In its (amended) statement of claim ("SOC"), the plaintiff *inter alia* alleged that there had been a total failure of consideration for the 30% deposit as the plaintiff did not receive the plaintiff's order.[26] In the alternative, the plaintiff based its claim on money had and received. In the further alternative, the plaintiff averred that it had paid the 30% deposit and the freight payment as a result of a mistake of fact.[27]

43 Additionally, the plaintiff alleged that the defendant, Faylez and Ikarl had conspired to commit fraud on and cause loss to the plaintiff by unlawful

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26 See para 18 of the Statement of Claim (Amendment No 1) ("SOC").

27 See paras 22–28 of the SOC.

Version No 1: 20 Apr 2023 (15:04 hrs)

means by making use of Ikarl's invoice.[28] In this regard, the plaintiff alleged that the defendant caused and procured Dr O of Faylez and Hisham of Ikarl to use Ikarl's invoice to induce the plaintiff to remit the 30% deposit to the defendant's SCB account.[29]

44 In furtherance of the conspiracy, the plaintiff alleged that the defendant, Faylez and Ikarl carried out the following unlawful acts and more:[30]

(a) Ikarl's invoice was issued with Ikarl representing to the Plaintiff that it was market practice to issue an invoice in its own name.

(b) The defendant, Faylez and Ikarl caused the plaintiff to remit the 30% deposit to the defendant when in fact there was no sale and purchase or actual intention to sell the Gloves to the plaintiff.

(c) Dan falsely informed the plaintiff that Dr O of Faylez was the defendant's representative.

(d) Dan falsely informed the plaintiff that it could deal with Dr O in relation to purchase of the Gloves.

(e) Dr O recommended that the plaintiff appoint Ikarl as the plaintiff's representative for the purchase of the Gloves.

(f) Ikarl's invoice was a result of the agreement between the defendant, Faylez and Ikarl.

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28 See para 29 of the SOC; paras 64–103 of the Plaintiff's Closing Submissions ("PCS").

29 See para 29(a) of the SOC.

30 See Particulars of Unlawful Acts under para 29 of the SOC, at particulars (a), (c), and (f)–(k).

Version No 1: 20 Apr 2023 (15:04 hrs)

(g) The defendant's SCB account was furnished by the defendant.

(h) The requirement of the 30% deposit included in Ikarl's invoice was a result of communication between the defendant, Faylez and Ikarl.

45 The plaintiff also alleged that the defendant had made false representations to the plaintiff in Dan's two messages of 16 July 2020 to the Plaintiff at [30]–[31] wherein Dan stated that Faylez was the defendant's representative. The representation was untrue as the defendant now contends that Faylez is not the defendant's representative but a buyer. The plaintiff relied on s 2 of the Misrepresentation Act 1967 (2020 Rev Ed) ("Misrepresentation Act").[31]

46 The plaintiff's last cause of action was based on unjust enrichment. It wanted the defendant to refund the 30% deposit and the freight payment as well as loss of sales/profits amounting to US$650,000. No particulars and/or breakdown was furnished for this claim. The court will return to this item of claim later in the judgment (see paras [54]–[55] below).

47 The plaintiff mounted no less than 6 causes of action against the defendant. However, in the course of his cross-examination,[32] Kadosh confirmed that the plaintiff was withdrawing its claim for the freight payment.

48 On its part, the defendant put up a robust defence and denied the plaintiff's numerous allegations. In its (amended) defence, the defendant:

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31 See para 32 of the SOC; paras 47–63 of the PCS.

32 See Certified Transcripts on 5 July 2022 at p 28.

Version No 1: 20 Apr 2023 (15:04 hrs)

(a) denied there was a contract between the plaintiff and the defendant;[33]

(b) averred that Faylez was/is the defendant's authorised reseller of the Gloves and that Dr O is the representative of Faylez;[34]

(c) averred it has no contract with Ikarl for the sale of the Gloves, adding that the defendant was an upstream supplier while the plaintiff was a downstream buyer of the Gloves in the chain of contracts between the parties which included the defendant, Faylez, Ikarl and the plaintiff;[35]

(d) pointed out that before the material dispute, the defendant was unaware of Ikarl, its directors and shareholders and/or of the plaintiff. At all material times, the defendant was unaware of the details and/or terms of the agreements between Faylez and Ikarl and between Ikarl and the plaintiff;[36]

(e) averred that Dr O was not the defendant's representative;[37]

(f) denied that Ikarl was the plaintiff's agent;[38]

(g) averred that it knew Mckelvey was from JMG, not from the plaintiff;[39]

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33 See para 5 of the Defence (Amendment No. 1) ("Defence").

34 Ibid para 7.

35 Ibid para 8.

36 Ibid para 9.

37 Ibid para 12.

38 Ibid.

39 Ibid para 15.

Version No 1: 20 Apr 2023 (15:04 hrs)

(h) averred it was unaware of MSC and Zev Supplies;[40] and

(i) averred it did not receive any correspondence from the plaintiff as alleged.[41]

49 The defendant generally denied all the causes of action pleaded by the plaintiff, putting the plaintiff to strict proof of each and every allegation the plaintiff had pleaded.

50 It would not be necessary to address the plaintiff's (amended) Reply as the averments made therein were largely a repeat of the allegations in the SOC. As for the 30% deposit, the plaintiff pleaded:[42]

> 3. The said sum was paid under a contract between the Plaintiff and Defendant as the said contract was negotiated and concluded for the Defendant's representative Faylez Berhad with the Plaintiff.

51 The plaintiff had further pleaded:[43]

> 9. As the Defendant's CEO, Mr [Dan] had confirmed that Faylez Berhad is in fact the Defendant's representative, the Plaintiff relied on that representation and acted on it and entered into the contract with the Defendant.

The court will return to these pleadings later in the judgment.

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40 Ibid para 23.

41 Ibid para 24.

42 See para 3 of the Reply (Amendment No. 1).

43 Ibid para 9.

Version No 1: 20 Apr 2023 (15:04 hrs)

The trial

(i) The plaintiff's case

52 Kadosh's testimony in his AEIC has already been set out earlier (see [19]–[24] above). It was in his cross-examination that Kadosh admitted that the plaintiff had sued Ikarl in the US (specifically, in the Superior Court of California). Documents relating to the plaintiff's US proceedings were included in the defendant's documents.[44] In those proceedings filed in Los Angeles County, California, the Plaintiff sued not only Ikarl but also Zev Supplies (see [23] above), Topocean Consolidation Service (Los Angles) Inc ("Topocean"), NCL International Logistics Public Company Limited ("NCL"), Aerolink International Sdn Bhd ("Aerolink") and DOES 1-10.

53 It was only disclosed by Kadosh during his cross-examination[45] that the plaintiff was not the end-buyer in the chain of contracts set out in the diagram at [17]. Apparently, the plaintiff had its own downstream contracts with third parties.

54 In eight purchase orders[46] which identified the plaintiff as the vendor, it was noted that the plaintiff had entered into contracts with Hotel Emporium Inc ("Hotel Emporium") of California to supply cartons of nitrile gloves to the latter. In turn, Hotel Emporium had entered into eight purchase orders with the Home Depot Inc ("Home Depot") to supply nitrile gloves.[47] Home Depot's purchase orders to Hotel Emporium mirrored the eight purchase orders that

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44 See DB 179-202.

45 See Certified Transcripts on 5 July 2022 at p 58.

46 See Plaintiff's 3rd Supplementary Bundle of Documents at pp 16–23.

47 Ibid at pp 24–31.

Version No 1: 20 Apr 2023 (15:04 hrs)

Hotel Emporium had issued to the plaintiff. The two sets of purchase orders were on a back-to-back basis. Home Depot is the US's largest home improvement retailer.

55 Home Depot's purchase orders showed it paid to Hotel Emporium US$9.70 per box of gloves. The plaintiff's invoice (at [16] above) stated that its purchase price from Ikarl was US$6.65 per box. The difference was therefore US$3.05 per box. In Hotel Emporium's purchase orders to the plaintiff, no price was stated for the Gloves but under the column **TERMS,** the words **50/50 profit** appeared. That was the basis for the plaintiff's claim for loss of profits (see [46] above) which Kadosh said during cross-examination was US$1.25 per box. Even based on US$1.25 per box, the plaintiff's computation of US$650,000 is incorrect. At US$1.25 per box for the plaintiff's order, the gross loss of profits should only be US$625,000 not US$650,000 (taking 500,000 boxes x US$1.25).

56 During his cross-examination of Kadosh, counsel for the defendant had pointed out that the plaintiff's claim for loss of profits of US$650,000 lacked supporting evidence.[48] It was only then that Kadosh informed the court that the plaintiff's loss was US$1.25 per box of the Gloves and that the plaintiff had purchase orders as proof.

57 Just before the plaintiff's witness from SCB testified, the plaintiff e-filed late on 7 July 2022 its third supplementary bundle of documents containing the purchase orders of both Emporium Hotels and Home Depot. Its counsel then applied on 8 July 2022[49] for Kadosh to be recalled to the witness stand and for

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48 See Certified Transcripts on 5 July 2022 at p 58.

49 See Certified Transcripts on 8 July 2022 at p 238.

Version No 1: 20 Apr 2023 (15:04 hrs)

those documents to be admitted.[50] This application met with strong objections from counsel for the defendant which the court eventually upheld after hearing the parties.

58 Counsel for the defendant as well as the court noted that the purchase orders of Hotel Emporium to the plaintiff were all dated 18 August 2020 whilst those from Home Depot to Hotel Emporium were either dated 1 or 23 July 2020. The writ of summons was filed on 9 April 2021 followed by the (amended) SOC on 22 September 2021 while the AEICs of Kadosh and Mckelvey were both filed on 3 June 2022. The 16 purchase orders came into existence *well before* the plaintiff's pleadings and AEICS. The plaintiff had every opportunity to adduce evidence of its loss of profits before the trial but chose not to do so.

59 The court had questioned counsel for the plaintiff on the rule in *Ladd v Marshall* [1954] 1 WLR 1489.[51] She could not respond. The three criteria as enunciated by Denning LJ in the English Court of Appeal in *Ladd v Marshall* (at 1491) to justify the reception of fresh evidence or a new trial are as follows:

> (a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> (b) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

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50 See Certified Transcripts on 8 July 2022 at pp 226-229.

51 See Certified Transcripts on 8 July 2022 at pp 238-239.

Version No 1: 20 Apr 2023 (15:04 hrs)

(c) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

The plaintiff's eleventh-hour application to adduce evidence of its alleged loss did not pass the requisite tests in *Ladd v Marshall*, particularly the third criterion of credibility when the defendant challenged the authenticity of the 16 purchase orders. Consequently, the court rejected the plaintiff's application (see [57] above).

60 As with Kadosh's testimony, Mckelvey's evidence was not particularly helpful. It appeared from his cross-examination[52] that it was his Bangladeshi contact, one Mr Jewel, who introduced Mckelvey to Dr O who in turn recommended Hisham of Ikarl to him.

61 Although it was not stated in his AEIC or pleaded by the plaintiff, Mckelvey claimed in the midst of cross-examination that he was present during the telephone conversation[53] between Hisham and Dr O when it was agreed that the 30% deposit would be paid for the plaintiff's order.[54]

62 Mckelvey referred to Kadosh's testimony and said the US proceedings had nothing to do with this suit. That is incorrect. The two sets of proceedings did overlap. The plaintiff sued *inter alia* Ikarl in the US and the defendant in Singapore over Ikarl's invoice and in both sets of proceedings referred to its payment of the 30% deposit.

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52 See Certified Transcripts on 5 July 2022 at p 73.

53 See para 5 of the SOC.

54 See Certified Transcripts on 5 July 2022 at pp 74–75.

Version No 1: 20 Apr 2023 (15:04 hrs)

63 After going into the US proceedings for a considerable amount of time during his cross-examination, Mckelvey disclosed that the US proceedings had been discontinued by Kadosh on the basis that the costs were not commensurate with the sum claimed.[55] His testimony was again incorrect.

64 The court allowed Kadosh to be recalled as a witness to address the issue of the US proceedings. Kadosh clarified[56] that the US proceedings (see [52] above) had not been discontinued against Ikarl, Aerolink, NCL and DOES 1-10. However, he had decided to and claimed he had instructed the plaintiff's US lawyers overnight to discontinue those proceedings because it made no commercial sense to do so – it was just too expensive.[57] However, in the defendant's closing submissions,[58] the defendant pointed out that its searches showed that as at 18 August 2022, the US proceedings had not been discontinued and were still "pending".

65 The plaintiff had applied for and obtained, dispensation for the filing of an AEIC by SCB's representative Alice Lee Peck Hoon ("Ms Lee"). Nothing turns on Ms Lee's evidence. She disclosed that the defendant's SCB account was closed on 31 May 2022 by SCB for reasons she did not reveal.[59]

(ii) The defendant's case

66 Dan was the defendant's sole witness. Despite repeated cross-examination by the plaintiff, Dan held fast to his AEIC and the defence of the

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55 See Certified Transcripts on 5 July 2022 at p 118.

56 See Certified Transcripts on 6 July 2022 at p 207.

57 See Certified Transcripts on 6 July 2022 at p 200.

58 See para 229 of the Defendant's Closing Submissions ("DCS").

59 See Certified Transcripts on 6 July 2022 at pp 214, 219.

Version No 1: 20 Apr 2023 (15:04 hrs)

defendant that he had no knowledge of Ikarl, the plaintiff and the dealings between them and Faylez in relation to Ikarl's invoice.

67 There was no agreed bundle prepared for the trial. Neither side accepted the authenticity of the other party's documents. On its part, the plaintiff disputed the authenticity of the Sufficiency Economy-Defendant Agreements (in [5] above) and the Faylez Agreement (in [8] above), as well as an unsigned sale and purchase agreement dated 23 June 2020 ("the defendant's SPA")[60] between the defendant and Sufficiency Economy for the sale of 1.5 billion boxes of the Gloves.

68 Cross-examined[61] on why the defendant's SPA was unsigned, Dan explained that the moment he signed the document, the defendant would be committed to the order (for 1.5 billion boxes of the Gloves). Signing the document meant that the defendant would be responsible for payment to Sufficiency Economy. Dan added that the defendant's SPA related to the Faylez Agreement and he would not sign the same and commit the defendant until Faylez had fully paid the 30% deposit. For the same reason, he did not countersign the quotation[62] relating to the defendant's SPA. He explained he did not have the original documents because the transaction took place during the pandemic at which time he concluded a lot of deals via Zoom or WhatsApp. In any case, he had a representative stationed in Thailand who could go to the office of Sufficiency Economy to negotiate and collect the agreements.

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60 See DB37.

61 See Certified Transcripts on 8 July 2022 at pp 247-248.

62 See DB39.

Version No 1: 20 Apr 2023 (15:04 hrs)

69 Due to the pandemic, Dan testified[63] the Faylez Agreement[64] was also concluded online. He identified his and Dr O's signatures on the copy before the court but said he did not have the original document. The court takes judicial notice of the fact that the document is dated 9 July 2020, at the height of the pandemic when nationwide movement control orders were in effect in Malaysia.

70 As for the documents between Ikarl and Faylez referred to in [11] above, Dan testified[65] in answer to the court's question, that they came into his possession via a WhatsApp chat group when Faylez sent them. The chat group comprised of Dan, Dr O and Dan's Canada-based business partner, Kevin Tambuweun.

71 The court would point out that there were exchanges from another chat group that were disclosed in these proceedings. The extracts therefrom at exhibit D2 show that the parties to this chat group between 27 and 29 July 2020 were Ikarl, Dr O, Mr Jewel and Mckelvey. In these exhibited exchanges, Dr O had sent Mckelvey the Faylez Agreement as well as the Ikarl PO. When confronted with this in cross-examination, Mckelvey's only response was to deny the exchanges as being fake.[66]

The issue

72 The only issue the court has to decide is whether the plaintiff through Ikarl contracted with the defendant through Faylez.

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63 See Certified Transcripts on 8 July 2022 at p 249.

64 See DB53–55.

65 See Certified Transcripts on 8 July 2022 at p 249.

66 See Certified Transcripts on 6 July 2022 at p 174.

Version No 1: 20 Apr 2023 (15:04 hrs)

The findings

73 The court will make some general observations before going into the specifics of this case.

74 First, in relation to the US proceedings, it is telling that the plaintiff made no mention of those proceedings (see [52] above). It was the defendant who discovered those proceedings prior to the exchange of AEICs and produced documents therefrom in this Suit. Kadosh did not mention the US proceedings in his AEIC while Mckelvey in his AEIC[67] claimed it had nothing to do with the defendant or Ikarl's invoice but pertained to the contract signed with Paddy (in [27] above) and which bills of lading (in [22] and [23] above) turned out to be red herrings.

75 It took considerable probing by counsel for the defendant during cross-examination to extract information from Kadosh and Mckelvey on the US proceedings to prove that the plaintiff was indeed suing on Ikarl's invoice and the plaintiff had not been forthright in that regard.

76 The documents in the US proceedings[68] state that the second claim against Ikarl[69] related to an agreement entered into on or about 16 July 2020, memorialised by an invoice issued by Ikarl to the plaintiff's Chinese agent Jiangsu Guotai Litian Enterprise Co Ltd ("Jiangsu"). For this second claim, the plaintiff stated it had paid US$997,500 to Ikarl. During cross-examination, Kadosh disclosed that the Jiangsu agreement was not proceeded[70] with, and

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67 See paras 56–67 of the AEIC of Mckelvey.

68 See DB181–201.

69 See DB196–197.

70 See Certified Transcripts on 5 July 2022 at p 13.

Version No 1: 20 Apr 2023 (15:04 hrs)

confirmed that only one deposit of US$997,500 was paid and that was not to Ikarl but to the defendant.[71]

77 The defendant argued in its closing submissions[72] that the plaintiff's claims in the US proceedings and in this Suit are for the same sum of US$997,500 and it has[73] sued different parties (namely Ikarl and the defendant) for breach of the same contract in different lawsuits. The court agrees.

78 It would not be necessary to address the defendant's lengthy submissions[74] on the plaintiff's inconsistent stand and the principles of approbation and reprobation. Suffice it to say there is no doubt in the court's mind that the plaintiff's stand in the US proceedings that it contracted with Ikarl based on Ikarl's invoice is inconsistent with the stand it takes in this Suit, that it contracted with the defendant. The law frowns on such conduct (see *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 at [62] cited by the defendant).

79 As far as the testimony adduced is concerned, the court prefers the evidence that was given by Dan to that of Kadosh and Mckelvey. Kadosh would not give straight answers when he realised the answers would be unfavourable to him (see [96] below) while Mckelvey was criticised in the defendant's submissions as being evasive.[75] Dan, on the other hand, came across as candid

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71 See Certified Transcripts on 5 July 2022 at p 32.

72 See paras 73–80 of DCS.

73 See para 81 of DCS.

74 See paras 55–89 of DCS.

75 See para 80 of DCS.

Version No 1: 20 Apr 2023 (15:04 hrs)

and forthright and gave reasoned explanations for his conduct (such as not signing the defendant's SPA) (see [68] above).

80 On the issue of admissibility of the parties' documents, while Dan was able to testify on the Sufficiency Economy-Defendant Agreements and the defendant's documents that he signed, the plaintiff's witnesses could not as the makers (Ikarl and Faylez) were not before the court.

81 The defendant had submitted[76] that the court should admit the defendant's documents under ss 67(1)(*a*)(ii) and 67(2) read with s 68(2)(*f*) of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act").

82 Section 67 reads:

> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> > (*a*) when the original is shown or appears to be in the possession or power of —
> >
> > > …
> >
> > > (ii) any person out of reach of or not subject to the process of the court;
> >
> > > …
>
> (2) In cases (*a*), (*c*) and (*d*) in subsection (1), any secondary evidence of the contents of the document is admissible

Section 68 states:

> (1) Secondary evidence of the contents of the documents referred to in section 67(1)(*a*) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to that party's solicitor, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then

[76] See paras 125–127 of DCS.

Version No 1: 20 Apr 2023 (15:04 hrs)

> such notice as the court considers reasonable under the circumstances of the case.
>
> (2) The notice mentioned in subsection (1) is not required in order to render secondary evidence admissible in any of the following cases or in any other case in which the court thinks fit to dispense with it:
>
> …
>
> (*f*) when the person in possession of the document is out of reach of or not subject to the process of the court.

83 In the light of the evidence given by Dan at [68]–[69] above, the court admits into evidence the Sufficiency Economy-Defendant Agreements, Faylez's letter of appointment and the Faylez Agreement under the above provisions of the Evidence Act relied on by the defendant.

Did the defendant contract with the plaintiff?

84 The defendant's submissions pointed out that the plaintiff's case (and its submissions) is premised on the existence of an oral agreement as reflected in Ikarl's invoice. However as the defendant submitted, Ikarl's invoice is problematic as it was issued by the plaintiff's agent to the plaintiff. Hence at best, it evidences an agreement between the plaintiff's agent and the plaintiff and has nothing to do with the defendant.[77]

85 Bearing in mind the defendant's denials in the defence, the burden is on the plaintiff to prove (under s 103 of the Evidence Act) that there was indeed an oral agreement, for which Hisham of Ikarl and Dr O of Faylez were required to

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77 See para 1 of DCS.

Version No 1: 20 Apr 2023 (15:04 hrs)

testify. However, neither witness came to court. When he was cross-examined[78] on whether he had attempted to call them, Kadosh said:[79]

> A: …they stole money from me, why would they show up? How --- what kind of power do I have to bring these people from Malaysia here?

86 In his cross-examination, it was pointed out to Mckelvey that the plaintiffs had not called Dr O as a witness.[80] His response and further exchanges with counsel are as follows:[81]

> A: She's a complete fraud. Why would I call her?
>
> Q: Because she's the only party---
>
> A: She colluded with your defendant on all this stuff.
>
> …
>
> Q: Mr Mckelvey, the plaintiff has asserted the existence of an oral agreement between Dr Ozcan and Hisham of Ikarl. I brought you to that in the statement of claim, you recall that?
>
> A: Mm-hm. Yes.
>
> Q: It's a legal argument but the burden of proving the existence of the oral agreement rest upon the plaintiff. The plaintiff has not produced Dr Ozcan or Mr Hisham as witnesses in these proceedings, agree or disagree?
>
> A: Agree, because they're frauds.

87 However, in the midst of his cross-examination,[82] Mckelvey suddenly claimed that he was present during the teleconference between Dr O and Hisham when the oral agreement was concluded (see [61] above). This

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78 See Certified Transcripts on 5 July 2022 at pp 22–23.

79 See Certified Transcripts on 5 July 2022 at p 23.

80 See Certified Transcripts on 6 July 2022 at p 179.

81 See Certified Transcripts on 6 July 2022 at pp 179–180.

82 See Certified Transcripts on 5 July 2022 at p 75.

Version No 1: 20 Apr 2023 (15:04 hrs)

testimony was against the entire tenor of his AEIC (in particular paras 16–18) that gave the impression that he was not present. He was either *informed* by Hisham or he *informed* Hisham – his usage of these two words strongly suggested the two of them were never together even in a teleconference. Mckelvey's answers in cross-examination in this regard[83] were highly unsatisfactory and the court rejects without more, his desperate attempt to assist the plaintiff on its lack of evidence *vis-a-vis* the oral agreement.

88 It bears noting too that Kadosh at no time in his AEIC or in court said McKelvey had met Hisham or Dr O virtually, in regard to the oral agreement. Neither was the fact pleaded in the SOC.

89 Even if Hisham and or Dr O were "frauds" to use Mckelvey's language, the point to note (as the defendant raised in its closing submissions)[84] is that unless the plaintiff had made some attempts to procure their attendance for this trial which attempts were rejected, the court cannot exercise its discretion under s 32 of the Evidence Act to allow the admission of hearsay evidence. In this regard, Mckelvey's AEIC was replete with hearsay evidence as to what was told to him by Dr O and/or Hisham. This hearsay evidence is inadmissible.

90 With no evidence let alone independent evidence to corroborate the plaintiff's claim of an oral agreement that was purportedly concluded between Faylez, Ikral and the plaintiff, its claim must fail. There is no document or other evidence to link Ikarl's invoice to the defendant.

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83 See Certified Transcripts on 6 July 2022 at pp 132–135.

84 See para 108 of DCS.

Version No 1: 20 Apr 2023 (15:04 hrs)

91 In the plaintiff's closing submissions, it submitted[85] that Ikarl's invoice in [16] was not an agreement as such because it was not signed by the parties. This argument was obviously to circumvent the problem highlighted by the defendant during the cross-examination of Kadosh.[86] Kadosh had agreed[87] that Ikarl's invoice dated 14 July 2020 would be the date of the agreement between the plaintiff and Ikarl. The plaintiff's late disavowal of Ikarl's invoice as an agreement also flies in the face of Kadosh's own AEIC where at para 4 he affirmed:[88]

> On or about 14 July 2020, there was an agreement made for 500,000 boxes of hand gloves to be supplied to the Plaintiff by the Defendant for a total price of US$3,325,000.00 (US Dollars Three Million, Three Hundred and Twenty-Five Thousand only). The said agreement was reached through our representative Ikarl Global Sdn Bhd ('Ikarl') for the Plaintiff and Faylez Berhad ('Faylez') for the Defendant. A Proforma Invoice IGSB/2253INC/007/2020 dated 14 July 2020 ('Proforma Invoice') for a total price of US$3,325,000.00 for the hand gloves was sent to us, as Plaintiff. [emphasis in original omitted]

92 In para 7 of his AEIC, Kadosh stated:[89]

> Pursuant to the said Proforma Invoice, I sent the advance amount of US$997,500.00 to the Defendant's bank account with Standard Chartered Bank (Singapore) Account Number [xxxxxxxxx] on 19 July 2020.

Notwithstanding the plaintiff's contention[90] that Ikarl's invoice merely set down the terms of payment to the plaintiff, the plaintiff performed the terms in Ikarl's invoice by taking steps to remit the 30% deposit to the defendant's SCB

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85 See para 44 of PCS.

86 See Certified Transcripts on 5 July 2022 at p 50.

87 See Certified Transcripts on 5 July 2022 at p 48.

88 See para 4 of the AEIC of Kadosh.

89 See para 7 of the AEIC of Kadosh.

90 See para 44 of PCS.

Version No 1: 20 Apr 2023 (15:04 hrs)

account. It did not wait to sign Ikarl's invoice. Indeed, there is no term/condition in that document that the plaintiff must countersign Ikarl's invoice to confirm acceptance.

93 Apart from Ikarl's invoice, the plaintiff has not produced one iota of evidence or a document or anything else signed by the defendant that pertains to the plaintiff's order.

94 Although it is not strictly necessary, given the court's above finding that there is no contract between the plaintiff and the defendant, the court will nonetheless, for completeness, go on to consider the various heads of claim pleaded in the SOC.

95 The court notes the irony -– although the plaintiff refuses to recognise the diagram set out at [17] showing the defendant as the upstream seller with the plaintiff as a downstream buyer, the plaintiff itself expects the defendant/the court to accept its own downstream contracts with Hotel Emporium and Home Depot.

(i) The claim based on misrepresentation

96 In cross-examination, counsel for the defendant had pointed out to Kadosh that the alleged representations made by Dan in his emails to Mckelvey took place on 16 July 2020. Counsel then said to Kadosh:[91]

> Q: If the agreement was reached on 14th July, how could the agreement be procured by a misrepresentation made after 14th of July?
>
> A: I don't understand the question.

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[91] See Certified Transcripts on 5 July 2022 at p 50, lines 12–14.

Version No 1: 20 Apr 2023 (15:04 hrs)

97 Subsequently, the following exchange took place between Kadosh and counsel for the defendant:[92]

> Q: This misrepresentation that you have referred to in paragraph 32(a) [of the SOC] took place on 16th of July, correct?
>
> A: Yes.
>
> Q: Therefore these representations could not have procured an agreement which took place 2 days earlier, correct?
>
> A 'This representation was made in two social media', I disagree.

Kadosh may feign ignorance or disagree with counsel in his answers in cross-examination, but it does not detract from the fact that even if the defendant's emails in [30]–[31] were representations, these were *post* the agreement reached between Ikarl and the plaintiff on 14 July 2020. The representations have no legal effect.

98 This is made very clear by s 2(1) of the Misrepresentation Act that the plaintiff relies on; it states:

> (1) Where a person has entered into a contract *after a misrepresentation has been made to him* by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. [emphasis added]

Consequently, the plaintiff's *volte-face* in its submission set out at [91] does not help the plaintiff to advance its case based on misrepresentation. The claim fails *in limine*.

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92 See Certified Transcripts on 5 July 2022 at p 51.

Version No 1: 20 Apr 2023 (15:04 hrs)

99 If *arguendo*, the representations made on 16 July 2020 were *before* the conclusion of the agreement between the plaintiff and Ikarl, what did the defendant represent to Mckelvey? As seen from Dan's messages set out at [30]–[31], at no time did Dan state that Faylez was the defendant's agent. On both occasions, Dan informed Mckelvey that Faylez Berhad was the defendant's representative for SkyMed Nitrile Gloves. That was a correct description of Faylez's role. As Dan said in his AEIC,[93] he used the word "representative" in the context of general commercial practice. In the court's view, this also accords with a reasonable and objective reading of the statement. If Kadosh and/or Mckelvey chose to read more into the statement than what Dan stated, Dan and/or the defendant should not be blamed for it.

100 At law, an actionable representation or misrepresentation must come from the principal, not the representative or agent. If the plaintiff chose to believe/accept whatever representations Faylez or Ikarl made about the defendant, the latter cannot be held liable. The same legal principle would apply if Faylez held itself out to the plaintiff as the defendant's agent – the representation that Faylez had ostensible/apparent authority must have come from the defendant to make the defendant liable.

(ii) The remaining claims of the Plaintiff

101 Besides misrepresentation, the plaintiff's other claims were founded on (i) money had and received; (ii) total failure of consideration; (iii) mistake of fact; (iv) unjust enrichment; (v) conspiracy.

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[93] See para 39 of the AEIC of Dan.

Version No 1: 20 Apr 2023 (15:04 hrs)

102 As the defendant pointed out in its submissions,[94] "money had and received" and "total failure of consideration" are not separate causes of action as the former is subsumed under the rubric of "unjust enrichment" (see *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie Handoyo*") at [125]). Similarly, total failure of consideration would come under the cause of action of unjust enrichment.

103 According to *Esben Finance Ltd and others v Wong Hou-Liang Neil* [2022] 1 SLR 136 ("*Esben Finance*"), the requisite elements the plaintiff must prove for a cause of action in unjust enrichment are (at [125]):

(a) that the defendant has benefited or been enriched;

(b) the enrichment was at the expense of the plaintiff; and

(c) the enrichment was unjust.

104 According to Dan's evidence (which he repeated more than once),[95] the 30% deposit was paid into the defendant's SCB account by Faylez pursuant to the terms of the Faylez Agreement which required Faylez to pay US$1,674,000,000 after the agreement was signed. The US$997,500 was only a small fraction of the requisite 30% amount. The court accepts Dan's testimony as it was corroborated by the terms of the Faylez Agreement. The law does not allow the plaintiff to recover the US$997,500 because it was paid on behalf of Faylez pursuant to the Fayez Agreement with the defendant (see *Alwie Handoyo* at [104]). It is of no concern to Dan that a third party namely the plaintiff made the payment rather than Faylez.

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94 See paras 179–180 of DCS.

95 See Certified Transcripts on 8 July 2022 at pp 287, 294, 297, 299.

Version No 1: 20 Apr 2023 (15:04 hrs)

105 As the Court of Appeal said in *Esben Finance* (at [250]):

> 250 … Permitting a claim in unjust enrichment would 'undermine the contract and the contractual allocation of risk between the plaintiff and the third party' … – the existence of an existing *legal* basis for the transfer to the third party … *precludes* a claim in *unjust enrichment* to reverse the transfer. This must be correct in principle; it is obvious that if a transfer is *legally valid* there can be *no question* of it having been unjust so as to justify a reversal of said transfer by way of a claim in unjust enrichment. This principle applies with equal force to situations where the defendant has a *legal right* to *retain* the property sought to be recovered … It logically follows that if the defendant is, pursuant to those areas of law, *legally entitled* to the property or value … there is nothing unjust in the defendant's retention of said property or value. [emphasis in original]

106 The plaintiff cannot therefore (as the defendant submitted) sidestep its contract with Ikarl and claim against the defendant in unjust enrichment. It was absurd of the plaintiff's counsel to complain[96] that the defendant cannot usurp the 30% deposit as the defendant provided no benefit to the plaintiff. The law does not require the defendant, having obtained the money pursuant to a contract with a third party, to then disgorge it to the plaintiff on the basis that the defendant provided no benefit to the plaintiff (see [105] above).

107 Although it would not be necessary for the court to make a finding on the issue, the defendant pointed out[97] that the plaintiff was itself in breach of Ikarl's invoice. Besides the 30% deposit to be paid to the defendant's SCB account, the plaintiff was obliged to pay 100% of the plaintiff's purchase price to other third parties (including 20% to Faylez) before any of the Gloves would be delivered.

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96 See Certified Transcripts on 8 July 2022 at p 294.

97 See para 198 of DCS.

Version No 1: 20 Apr 2023 (15:04 hrs)

108 The plaintiff's recourse is to sue Ikarl for breach of contract on Ikarl's invoice; it does not have a claim in unjust enrichment against the defendant.

109 As for its remaining claims, the facts do not support the plaintiff's claims for mistake of fact and conspiracy.

110 There cannot have been any mistake of fact in any case since the plaintiff was obliged under Ikarl's invoice to pay and did pay, the 30% deposit into the SCB account of the defendant.

111 As for the claim in conspiracy, the requisite elements are set out in the case of *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 (at [112]) cited by the defendant, namely that:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

112 On the facts, none of the five elements are made out in this Suit. The plaintiff has not produced any evidence to rebut Dan's testimony that he was unaware of Ikarl and that he did not know about the company until after the dispute arose.

Version No 1: 20 Apr 2023 (15:04 hrs)

113 It is all very well for Kadosh and Mckelvey to criticise Ikarl and/or Faylez after the event and label the people therein as frauds (see [85]–[86] above). The plaintiff had conducted company searches (known as SSM searches) on or about 22 April 2021 on Faylez in Malaysia. Mckelvey said those searches[98] showed that for its financial year ended 31 December 2016, Faylez had retained earnings of RM61,386.00 or S$20,462.00 (at an exchange rate of RM3.00 to S$1.00). He opined[99] that a company with this type of earnings could not have entered into the Faylez Agreement worth $986 million with the defendant and alleged the contract must be fake and made up by the defendant.

114 The court wonders why the plaintiff would ascertain Faylez's financial health well *after* the claim arose when it was too late. Why did the plaintiff not conduct the SSM searches at the material time (July 2020)?

115 It is the court's view that the plaintiff could or should have been more circumspect, before it made the remittance to the defendant's SCB account. Had the plaintiff been more vigilant, it would have or should have noticed that Ikarl's invoice was not even an acceptable commercial document. It is surprising that an experienced sourcing agent like Mckelvey or for that matter a businessman like Kadosh could accept an invoice in the manner prepared by Ikarl. The document contained the figure "5,00,000" as the quantity instead of 500,000 boxes and the total price was stated as 33,25,000 without even a currency denominated. Furthermore, the invoice contained clear and obvious spelling and grammatical mistakes, most egregiously of Ikarl's own name. The court sets out a few examples below:

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98 See DB101–106.

99 See Certified Transcripts on 6 July 2022 at pp 176–177.

Version No 1: 20 Apr 2023 (15:04 hrs)

> … OUT OF THIS 20% AMOUNT US$413,392.00, WILL BE PAIED BY IKRAL GLOBAL SDN BHD. ON SINGING OF (ICPO) DT …
>
> …
>
> for IKRAL GLOBAL SDN BHD., Malaysia

Such an amateurish or badly drafted document should have put the plaintiff on guard.

116 Instead, the plaintiff threw discretion to the winds in its eagerness to secure a supply of the Gloves to fulfil the eight purchase orders it secured from Hotel Emporium and for Hotel Emporium in turn to perform the eight back-to-back purchase orders of Home Depot. It seems to the court that the plaintiff was the author of its own misfortune and loss.

Costs

117 In regard to costs, the defendant had written a *Calderbank* letter (see *Calderbank v Calderbank* [1975] 3 All ER 333) to the plaintiff on 16 June 2021 offering to accept a sum of $60,000 from the plaintiff in exchange for discontinuance of this Suit with each party bearing its own costs. According to the exchange of correspondence between the parties that the court has seen, the *Calderbank* offer was rejected by the plaintiff on 6 July 2021; it counter-proposed mediation instead. The plaintiff's counter-proposal was rejected by the defendant on 14 June 2021 (the date is an obvious mistake and should be 14 July 2021 instead). On 28 July 2021, the plaintiff's solicitors *inter alia* wrote to the defendant's solicitors as follows:

> Our client is willing to explore settlement on condition that your client accepts liability of US$997,500.00 and their payment of freight charges of US$10,154.09. Further, parties negotiate the payment of damages to our client for the losses they suffered in this matter and for the legal costs they have incurred.

Version No 1: 20 Apr 2023 (15:04 hrs)

118 The above proposal was most absurd – it meant that the defendant was being asked to admit liability for the plaintiff's claim and to consent to judgment on the same on top of which the defendant had to pay damages and legal costs. What room was there for the defendant to negotiate? It was an unreasonable and unacceptable proposal.

119 It was a most unreasonable proposal because the defendant had in the *Calderbank* letter referred to this court's decision on 27 May 2021 when, in dismissing the plaintiff's injunction application, the court informed parties that the plaintiff had sued the wrong party (see [41] above). This is also the basis for the dismissal of the plaintiff's claim here. Further. in Dan's AEIC,[100] he affirmed that the plaintiff had sued the wrong party.

120 Consequently, in the defendant's closing submissions,[101] it submitted that this Suit ought to be dismissed with costs on an indemnity basis to the defendant.

121 In the light of the reasons for dismissing the plaintiff's injunction application and this Suit as well as the plaintiff's totally unreasonable conduct in [117], the court is of the view that the defendant is entitled to its costs on an indemnity basis from 28 July 2021 onwards. Its entitlement to costs prior to 28 July 2021 would be on a standard basis.

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100 See para 60 of the AEIC of Dan.

101 See para 234 of DCS.

Version No 1: 20 Apr 2023 (15:04 hrs)

Conclusion

122 Consequently, the plaintiff's claim is dismissed with costs to the defendant to be taxed on a standard basis before 28 July 2021 and on an indemnity basis thereafter, unless otherwise agreed.

Lai Siu Chiu
Senior Judge

Bhargavan Sujatha, Chidambaram Chandrasegar and R Dilip Kumar (Gavan Law Practice LLC) for the plaintiff;
Muralli Rajaram (K&L Gates Straits Law LLP) (instructed), Lim Tianjun, Lucas Tjia and Teng Hin Weng, Mark (That.Legal LLC) for the defendant.

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