

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 274

Suit No 4885 of 1986

Between

McPherson's Holdings
(Singapore) Pte Ltd

... Plaintiff

And

Koo Kwan Yuen
Koo Kok Kee
Koo Kok Kum
Koo Kok Wing
Koo Kok Leong
Koo Woon Lien
Koo Woon Chan
Koo Holdings Pte Ltd

... Defendant

GROUND OF DECISION

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**McPherson's Holdings (Singapore) Pte Ltd v Koo Kwan Yuen
and Others**

[1992] SGHC 274

Suit No 4885 of 1986
Lai Siu Chiu JC
28 October 1992

1 **Judgment:**

2 Coram : Lai Siu Chiu JC

3 **Cur Adv Vult**

4 JUDGMENT

5 The facts

6 Kok Wah Press Private Limited (KWP) was incorporated in 1969 with the first to the seventh defendants as shareholders; the first defendant (now deceased) was the father of the second to seventh defendants. The first defendant was the sole- proprietor and founder of KWP's predecessor, namely Kok Wah Press which commenced business at Victoria Street in 1947 printing stationery. The second defendant Koo Kok Kee (KKK) who is the eldest son of the first defendant joined KWP as managing director in 1970 upon his return from further studies from England. KWP shifted from Lower Delta Road to

No.3 Gul Crescent, Jurong and expanded its activities. From printing office stationery and business cards, KWP progressed to printing books, magazines and bingo tickets (for an Australian company). By 1984-85 KWP was among the top twenty printers in Singapore in terms of size and turnover.

7 The third defendant joined KWP in 1966 fresh from secondary school and at the time of his resignation from the company in May 1985, he held the position of production manager. The fourth defendant joined KWP at KKK's request in 1980 as administrative and finance manager and he assumed some marketing functions before he left the company at end 1983 due to differences with the second defendant. The fifth defendant was the sales manager in charge of local marketing whilst the sixth defendant, a sister, worked as a clerk in KWP. Prior to the trial she was made a bankrupt.

8 The parent company of the plaintiff McPherson's Limited (McPherson's) is an Australian public company with diversified interests including printing, which came under its consumer products division.

9 Between 1984-1988, Alan John Sherratt (Sherratt) was the general manager of The Dominion Press -- Hedges & Bell an operation which came under the printing division of McPherson's. According to Sherratt (PW1) McPherson's in the early eighties decided that printing in Australia was no longer competitive and that it was desirable to invest in or establish, a manufacturing concern overseas either in Singapore, Taiwan or Hong Kong, for the purpose. At that time McPherson's carried on print broking in Singapore through Hedges & Bell (Singapore) and in the process came into contact with KWP which was one of its suppliers, as well as other Singapore printers. Based on the recommendations in a 1982 report (3AB1-22) prepared by J.S.Ray an

employee of McPherson's then based in Singapore, an approach was made to KWP and discussions held with KKK on a possible joint venture. Nothing came out of those discussions as according to KKK (DW1) the ball park figure suggested by McPherson's was not acceptable to his family.

10 Following upon a second report (2AB5-8) by the then general manager of McPherson's Graham Volk (Volk) in October 1984, there were renewed discussions with KKK for a joint venture. After several meetings in November 1984, it was agreed (see 2AB9-10) between KKK and McPherson's that the structure of the joint venture would be as follows:- a) a joint venture company (the company) would be formed to acquire the business of KWP but not the company; b) 50% shares in the company would be held by the existing shareholders of KWP and the balance 50% by McPherson's through its Singapore company; c) McPherson's consideration in the company would be a cash injection whereas for the other party it would be the assets of KWP; d) McPherson's cash injection would equal 50% of the net assets (including goodwill) of KWP to be transferred, which assets would be valued; e) the existing markets of KWP would be developed for the company and new markets in Australia and New Zealand would be generated by McPherson's.

11 At the November meetings KWP's past performance was discussed in particular its sales and profit records based on KWP's accounts as presented by KKK. Sherratt testified that the representations made by KKK of KWP's sales and profitability played an important part in McPherson's decision to go into the joint venture.

12 Upon his return to Singapore, KKK ascertained that KWP had significant tax loss benefits and unabsorbed capital allowances which would be

forfeited if a new company was formed to take over KWP's business. It was then decided that instead of forming the company a) McPherson's would acquire 50% of the existing shares in KWP; b) inject fresh capital into KWP to fund its expansion; c) the consideration received by the shareholders for McPherson's 50% equity would immediately be paid into KWP as new share capital and a corresponding amount of new share capital would be paid for in cash by McPherson's; d) the purchase price would comprise of three elements namely (i) equity as evidenced by audited accounts as at 28 February 1985 and management accounts as at 31 March 1985 excepting certain assets and liabilities, (ii) certified value of future income tax benefits and (iii) goodwill which was agreed at \$700,000.

13 The formula for the calculation of the purchase price was eventually incorporated as cl 2 of the agreement for sale and purchase (the agreement).

14 It was part of the agreement that KKK would continue as the managing director of KWP. It was further agreed that Coopers & Lybrand (C&L) would be appointed KWP's auditors in place of its existing auditor and that McPherson's solicitors would prepare the agreement and a draft would be forwarded to KKK on behalf of his family.

15 With Sherratt's and KKK's participation, Les Morrow (Morrow) the financial controller of McPherson's consumer products division, worked out the estimated purchase price (2AB50) to be in the region of S\$2.15m based on KWP's 1983 audited accounts and on KKK's estimated figures for 1984 (as there were then no accounts for 1984).

16 The proposal (2AB53-72) to invest S\$2.15m in KWP was placed before a board meeting of McPherson's in December 1984 (2AB73) by its managing director Ralph Ward-Ambler (Ward-Ambler) and was approved. Accordingly Sherratt instructed McPherson's solicitors to prepare the agreement. On his part, KKK had to furnish more updated information to McPherson's on KWP's accounts and discuss the proposal with his family.

17 Sherratt came to Singapore in February 1985. He held further discussions with KKK, visited KWP's plant, briefed C&L on the proposed joint venture and requested that C&L act for McPherson's in the matter of certifying the equity element of the purchase price as well as the tax benefits.

18 Two drafts of the agreement (2AB383-390 and 2AB394- 402) prepared in February 1985 were rejected by the Koo family. After delaying the completion originally scheduled for 1 March 1985, the agreement was finally signed on 29 March 1985. The clauses (see 2AB106-115) relevant to the plaintiff's claim are as follows:- cl 6(a). The vendors warrant to and agree with the purchaser that the audited accounts of the Company for the period ended 28 February 1985 as hereinbefore provided will be true and correct in every particular and that without prejudice to the generality of this warranty such accounts will disclose or provide for all liabilities of the Company of every description (both actual and contingent) as at the said date; (the warranty clause) cl 7. The vendors agree for themselves and their successors that they will not for the period of three years commencing on the date on which the Holding Company referred to in cl 12 ceases to hold shares in the Company (KWP) be engaged interested or concerned in any business of printing or print broking within the Republic of Singapore except with the written permission of the purchaser or except as officers of the Company; (the non-competition clause) cl

12. The vendors are desirous of transferring shares in the Company held by them to a company to hold the same for and on behalf of all the vendors (the Holding Company). Any reference to the vendors in this agreement shall be deemed to be a reference to the Holding Company. The Holding Company shall assume all the rights and liabilities of the vendors under this agreement upon the transfer to it of all shares held by the vendors for the time being.

19 Sherratt's evidence on the above three clauses was as follows:- 1. The warranty clause was inserted because it is a normal requirement in a purchase and sale agreement for such a warranty to be given as a matter of commercial prudence. The purpose is to ensure that no liabilities or inaccuracies in the accounts used as the basis for calculating consideration may impact to the detriment of the joint venture or the purchaser. 2. Similarly the non-competition clause was a normal requirement. 3. Clause 12 was inserted at the request of KKK who also provided the wording for the clause (see KKK's telex to Sherratt dated 6 March 1985 at 2AB404-407). It was to simplify the family members' relationship with each other in that if they wished to change the balance of the shares held by them, they could do so easily without affecting the joint venture; it was also easier for McPherson's to deal with a single company that represented the entire Koo family's interests rather than with individuals. As at the date of the agreement the Holding Company was not yet incorporated. McPherson's would not have completed the agreement if this clause meant that the personal liability of the first to seventh defendants was transferred to the Holding Company as this was never the intention -- it would also have negated the warranty clause. McPherson's understood this clause to refer to the ongoing holding of shares by the Koo family that is, the remaining 50% shares after the sale to McPherson's.

20 In September 1985 Hedges & Bell Printing (S.E.Asia) Pte Ltd (Hedges & Bell) received 50% of the issued shares that is, 2,100 shares in KWP, transferred from the Koo family and McPherson's part payment of \$1m was used to ease KWP's cash flow problem. At the same time the Koo family members transferred their remaining 50% shares (2,100) in KWP to Koo Holdings Pte Ltd (Koo Holdings) which company was incorporated on 9 May 1985. The share capital of KWP was increased from \$500,000 to \$1,500,000 by the creation of 10,000 new shares of \$100 each, KKK was appointed managing-director whilst Ward-Ambler, Sherratt and Clive McCleery (the managing-director of McPherson's consumer products division) were appointed directors of KWP. On 10 September 1985 (2AB195) the fourth defendant tendered his resignation as a director and requested to be released as guarantor for KWP; his resignation was accepted and his release as a guarantor subsequently effected. In December 1985 pursuant to a resolution passed in September, Koo Holdings and Hedges & Bell were each allotted 2,100 new shares in KWP. Hedges & Bell changed to the plaintiff's present name on 21 May 1986.

21 Sherratt testified that the audited accounts of KWP as at 28 February 1985 were received by McPherson's in September 1985 (see 1AB60-71) certified by C&L on 17 July 1985. Acting in their other capacity, that is, to certify on McPherson's behalf the income tax benefits due to KWP for previous years' losses, C&L reported that it could not do so because it could not determine the unabsorbed capital allowances. In the event, McPherson's agreed with KKK that the purchase price would be based on equity as shown in the audited accounts as at 28 February 1985 plus the agreed goodwill plus McPherson's own valuation (\$800,000) of the future income tax benefits. Prior to receiving the audited accounts in September, Sherratt received in June 1985 two draft sets of the accounts from KWP's accountant Lim Huay Boon (Lim) and a telex (see

2AB154) which he understood to mean that the second set of draft accounts would be unchanged in the final audited accounts. Relying on the second set of draft accounts, Morrow worked out the actual purchase price to be paid by McPherson's as \$1,658,788 which figure and computation he telexed to KKK (2AB168-171) on 30 August 1985 and which KKK accepted (see his telex at 2AB173). The breakdown for the \$1,658,788 is as follows:- (i) Goodwill \$700,000 (ii) Tax benefits \$532,288 (iii) Net assets \$426,500 Total \$1,658,788

22 A more detailed computation for the \$1,658,788 done by Morrow appears at 2AB161. In August 1985 McPherson's paid another \$120,000 towards the purchase price and the balance of \$538,788 was paid in early September. Together with \$50,000 contribution towards KWP's increased share capital, McPherson's investment totalled \$1,708,788. Sometime towards the end of January 1986 Sherratt was informed by Dorothy Lee (Lee) who had succeeded Lim as KWP's financial controller (in October 1985) that she was unable to reconcile the stock with work-in-progress (WIP) figures and there was a difference in excess of \$500,000. Sherratt in turn informed Ward-Ambler who instructed Michael Woodruff (Woodruff) McPherson's internal auditor to visit Singapore to check the stock discrepancy.

23 Woodruff (PW2) visited Singapore in late February 1986. His investigations confirmed the shortfall in stock to the extent of \$1,126,000. Woodruff prepared a report (3AB23-41) after his investigations which copies were extended to McPherson's as well as to KWP's, directors. Upon receipt of Woodruff's report, McPherson's commissioned C&L to do a full investigation. The investigation concurred with Woodruff's conclusion and C&L's report (2AB235-241) confirmed that there had been an overstatement of assets and an overstatement of the purchase price, based on the February 1985 accounts

updated to 31 March 1985. This was due in part to KWP's practice of pre-billing. The result was that instead of assets being a positive figure of \$426,500 it was a negative figure of \$197,043 as at 31 March 1986 (see 2AB239); KWP was technically insolvent.

24 Upon discovering the errors, McPherson's called for a board meeting of KWP in Singapore. It was held on 8 April 1986 and it was attended by Sherratt and Ward-Ambler on McPherson's behalf (see minutes at 2AB242) and by the first defendant, KKK, the fifth defendant (as alternate to his mother Madam Leong Poh Yeok) and by the third and fourth defendants as observers. Ward-Ambler who chaired the meeting informed the attendees of KWP's financial situation and that the company may be in breach of its loan agreement with Citibank as the same contained a condition that the net tangible worth of the company should not fall below \$1.4m. It was agreed that Arthur Andersen (AA) Singapore be appointed financial advisers to investigate KWP's financial position and that Ward-Ambler together with Sherratt would visit Citibank to inform the bank of the situation. It was also noted that McPherson's had made it known that the balance sheet of 28 February 1985 differed from the original and that McPherson's would be seeking advice and if appropriate, relief from resulting losses. The meeting was preceded by an extraordinary general meeting (2AB246) at which the shareholders were informed by Ward-Ambler that according to C&L, KWP's balance sheet as at 28 February 1985 had overstated stocks by \$712,510 and consequently its profits in earlier years had also been overstated by the same amount. McPherson's at the time of purchase believed the company to be profitable which information was evidently incorrect. McPherson's had to determine its loss and what action had to be taken to rectify the situation.

25 Pursuant to the measures agreed at the board meeting, AA were appointed to review the financial position of KWP as at 31 March 1986, another stocktaking was done on 30 April 1986 and C&L audited the accounts as at 30 April 1986 (see 1AB78-90). AA's report (2AB253-313) concluded that KWP was substantially insolvent both as a going concern and on a break-up basis.

26 After receiving AA's report, McPherson's called for another board meeting of KWP; the same was held on 10 June 1986, chaired by Clive McCleery and attended by Sherratt, KKK and the fifth defendant. A draft of AA's report was presented to the meeting and it was resolved arising therefrom that (i) a copy of the report would be sent to Citibank; (ii) Citibank would be invited to appoint a receiver, and (iii) KWP would cease trading immediately.

27 Sherratt testified that prior to the board's decision to put KWP into receivership, there was some discussion (with a view to saving the company) concerning injecting additional funds into KWP. The discussion came to nought as McPherson's stand was that it was willing to put more funds into the company provided the other shareholders did the same; the Koo family were unable or unwilling to do so.

28 On 11 June 1986 KWP was placed under receivership by Citibank. The first to fifth defendants then received letters of demand dated 11 or 12 July 1986 (2AB318-349) from the plaintiff's solicitors for losses totalling S\$7,350,560 allegedly arising out of errors in KWP's accounts as at 28 February 1985; none of the five defendants responded to the demand. Citibank then called upon McPherson's to repay the sums owing on the facilities granted to KWP (see 2AB176) pursuant to the letter of comfort dated 20 September 1985 (2AB204) which McPherson's had given to the bank's Melbourne branch.

29 The claim In September 1986 the plaintiff commenced these proceedings joining as the eighth defendant Koo Holdings. In its statement of claim against the seven individual defendants, the plaintiff alleged that through their agent KKK they represented that KWP was both solvent and profitable in reliance upon which the plaintiff entered into the agreement. The plaintiff alleged that the representations were incorrect in material respects as which result the plaintiff suffered loss and damage particularised as follows:- (i) the plaintiff paid S\$1,658,788 as the price for the shares; (ii) KWP was in receivership with an expected shortfall to its secured creditor of S\$1.5m; (iii) the shares purchased and subscribed for were of no value; (iv) the plaintiff had been put to further expense and had incurred obligations to third parties.

30 Alternatively the plaintiff alleged that under the warranty clause the individual defendants had warranted that the audited accounts of KWP for the period ended 28 February 1985 would be true and correct in every particular. The audited accounts for the period ended 28 February 1985 were not true and correct in every particular in that there was an understatement in losses of \$712,510 as a result of a) overstatement of revenue; b) losses in WIP not provided for; c) the value of WIP not being reduced to net realisable value; d) under-accrual of expenses; e) omission of charging for hire-purchase interest; f) stock in transit being included in purchases in the profit and loss accounts as well as in the balance sheet. In consequence KWP was shown to have a net asset surplus of \$248,716 when the calculation should have been a deficiency of net assets \$463,794. The effect of the errors was that the plaintiff paid for the purchase and subscription price of the shares \$1,658,788 when it should have paid \$1,150,210; it overpaid by S\$508,578.

31 The plaintiff alleged that Koo Holdings was liable for breach of the warranty clause by virtue of cl 12 as the individual defendants had transferred their shares in KWP to the eighth defendant on date(s) unknown to the plaintiff.

32 The defence of the first, second and fifth defendants denied the agency alleged against KKK, the representations and the plaintiff's reliance thereon. It was contended that at meetings between KKK, Sherratt, McCleery and Morrow at Melbourne in February 1986, KKK informed the plaintiff that KWP had made a loss for the period ended 31 December 1984. If KKK made any statement to the plaintiff before the signing of the agreement on KWP's financial state and if such statement was inaccurate, KKK made the statement thinking it was true. Apart from admitting the purchase price paid by the plaintiff for the shares, the defence denied the other allegations and the loss of the plaintiff. The three defendants further contended that by reason of cl 12 of the agreement, their liability to the plaintiff was transferred to the eighth defendant by novation; the breach of warranty was also denied.

33 In his defence and counterclaim, the third defendant contended that (i) he was never involved in the negotiations for the sale of the shares; (ii) the sale was concluded between KKK and McPherson's; (iii) the plaintiff was nothing more than a nominee for McPherson's and prior to the execution of the agreement, McPherson's representatives had spent time on KWP's premises and had looked at its operations; (iv) McPherson's well knew that KWP was not making money despite which it wanted to buy and it pumped into the company over \$1m before the agreement was signed; the third defendant was then still a director and a member, of KWP's management team; (v) McPherson's had also engaged C&L to prepare the accounts and were satisfied that the same were in order; (vi) he was forced to resign as a director after the agreement was signed

and he had no dealings with KWP thereafter; however McPherson's managed and ran KWP for about a year before it complained about the discrepancies; (vii) McPherson's spent 18 months assessing the performance of KWP before deciding to purchase the shares; (viii) the sale was made between a willing buyer and a willing seller and there was no representations made as alleged; if the same were made by the second defendant, he was unaware; (ix) the plaintiff was negligent in mismanaging KWP thereby forcing it into liquidation without regard for the investment of its shareholders in particular the third defendant's who still held 395 shares in KWP held in trust for him by Koo Holdings; (x) the plaintiff's rash act in liquidating KWP resulted in loss to the third defendant who counterclaimed for damages and other consequential relief.

34 The fourth, sixth and seventh defendants filed a common defence which denied the plaintiff's allegations and also contended that by novation their liability to the plaintiff had been transferred to the eighth defendant.

35 Koo Holdings' defence repeated the defence of the first, second and fifth defendants.

36 Pursuant to the letter of comfort it gave to Citibank, the plaintiff paid to the bank S\$1,300,022.79 being S\$749,990 in July 1987 and the balance of S\$550,032.79 in June 1988 (see 3AB62 and 2AB367).

37 Before hearing commenced, counsel for the plaintiff informed the court that the plaintiff would not be pursuing its claim based on misrepresentation but only that for breach of warranty under para 7 of the statement of claim. Counsel further applied to amend the figure for the plaintiff's overpayment for the shares

(under para 14 of the statement of claim) from \$508,578 to \$515,374; the amendment was allowed.

38 The evidence I have already dealt with Sherratt's evidence. With regard to the overpayment for the shares in KWP, the plaintiff called Woodruff (PW2) to substantiate the computation. Woodruff, a chartered accountant by training, had supervised a stocktaking in KWP after his arrival in Singapore which exercise confirmed a shortfall of \$1,126,000. He identified the main cause to be due to double accounting for stock, namely, certain goods were included in the stock of KWP as at 28 February 1985 (for which McPherson's paid) when they had already been invoiced to and paid for, by customers. KWP practised pre-billing because it enabled the company to obtain cash upfront from a customer for the total contract value before the goods or the entire goods were delivered to the customer. The contract value of the goods paid by the customer would be included in KWP's sales and also in the stock of the company. When the goods were actually completed and delivered to the customer, the customer made no further payment as it had already paid and so had McPherson's thinking the same comprised part of the inventory, but it was no longer the stock of KWP. The impact on KWP's financial statements was that its losses for the period ending 1985 were understated by \$712,510 and conversely its equity for the same period was overstated by the same amount. The second error detected by Woodruff was that KWP valued stock at cost instead of at its net realizable value when it was sold at a price lower than its cost. It made no provision for losses on such contracts.

39 Woodruff testified that after he had reported his findings (3AB23-41) to McPherson's board of directors, it was decided to do another stocktaking at end April 1986 to determine KWP's commercial viability. He was involved in the

April stocktaking after which he produced a second report dated 21 May 1986 (3AB42-57) confirming his previous findings. He prepared the computation of McPherson's overpayment of the purchase price as reflected in Schedule IV of the amended statement of claim. He explained the workings done by Ross Herron (exh P1) of C&L Melbourne of the loss adjustment (\$712,510) that had to be made to KWP's sales as at 28 February 1985 for the items particularised in para 11 of the statement of claim and in C&L's report (2AB235). The effect of the loss adjustment was that the equity of KWP went from a positive \$515,467 to a negative \$197,043 (see Appendix III at 2AB239) which, had it been known at the material time, meant that McPherson's would not have bought the company. Based on the negative equity KWP would not have achieved the goodwill of \$700,000 paid by McPherson's.

40 Woodruff presented his workings (exh P2) for his computation of McPherson's overpayment of \$515,374 (\$1,708,788 paid less the correct purchase price \$1,193,414) and also his workings (exh P3) on how the pre-billings affected KWP's profitability as at 31 March 1985 and in turn its equity. Under cross-examination by counsel for the first, second and fifth defendants, Woodruff agreed he could have made certain errors in his computation in exh P3 in that he may have omitted certain items of profit pro rated to 31 March 1985 as shown in his first report (see column I at 3AB34). However he had also not made adjustments for the estimated cost of work to be done to earn those profits (column F in 3AB34) nor for losses on contracts (such as STPB's) and therefore the figures would still balance up. Nonetheless, taking into account counsel's comments, he had revised his calculations and arrived at a figure of \$447,880 (exh P3) as the overpayment figure instead of \$515,374.

41 Whilst Woodruff was under cross-examination, counsel for the first, second and fifth defendants informed the court that the defence accepted there was some overstatement in the accounts but the plaintiff's figures were disputed.

42 It is noteworthy that KWP had a history of loss making (save for 1979 and 1983) from its printing operations (see 2AB240) and in three out of six consecutive years it managed to make profits not from trading but essentially from postage revenue. In fact from 1979 to 1985, it had a negative working capital situation. Against such a background it was not unreasonable for Woodruff to question the profit attributable to March 1985 of \$67,495. In the profit making years of 1979 and 1983, KWP earned \$14,058 and \$49,881 respectively. Therefore it is highly unlikely that for the month of March 1985 alone the estimated profit of \$67,495 could have been achieved. Equally, it is unlikely that the work in progress amounting to \$103,293 had been included in and deducted from, the March 1985 profits. Woodruff had said that the lack of adjustment for the March 1985 accounts would not in any event have any material impact on his calculations as it was only one month's figures.

43 According to KKK, KWP charged its customers postage at the published rates and earned substantial income from the rebates given by the postal authority for its bulk mailing done through a third party (Caxton). Woodruff had testified that because of KWP's past record of trading losses, the adjusted profits for one month that is March 1985 (\$52,848) which he calculated based on the March management accounts should, on hindsight, have been questioned. KWP was insolvent due to its inability to make profits and pre-billing also affected its profitability.

44 It was part of the defendants' case that the plaintiff had received from Lim the management accounts for KWP for the period ended 31 March 1985 (in lieu of audited accounts for the period) and the same had been accepted by C&L. In turn the March accounts were based on the first audit done by C&L. KWP's practice of pre-billing however was not made known to C&L. Another oblique criticism of the plaintiff was that Lim had been selected as KWP's financial controller in consultation with Sherratt. There was no clear evidence as to when the practice of pre-billing commenced although KKK in his evidence hazarded it would have been before 1983. What was obvious was that KWP had poor stock control. It should be emphasised at this stage that pre-billing ipso facto is not wrong provided that it is properly accounted for.

45 Counsel for the first, second, fifth and eighth defendants at the close of the plaintiff's case informed the court that based on the evidence presented by the plaintiff Koo Holdings accepted liability for breach of warranty, under cl 12 of the agreement.

46 KKK explained the rationale for cl 12:- 1. He had disagreements with the fourth and then the third defendants resulting in both of them leaving KWP. All the shareholders were unhappy with the warranty clause and he and his brothers were concerned about the personal guarantees and the mortgages on their properties which they had given to KWP's bankers. 2. The third and fourth defendants would not sign the agreement if the guarantees and mortgages were continued. 3. It was agreed that if the family's shares in KWP were held through a holding company which then gave the warranty, the third and fourth defendants would sign the agreement. That was why he telephoned Sherratt to suggest that the family's shares be held by a holding company and also for the guarantees and mortgages to be released; Sherratt agreed. 4. The holding

company could not be formed in time before the agreement was signed because the loans which the third and fourth defendants borrowed from financial institutions to purchase their properties had been transferred to KWP when they left the company and they were not in a position to repay those loans. He therefore spoke to Sherratt and volunteered to get the appropriate clause drafted to take care of the interim period before the holding company was incorporated, hence his telex to Sherratt on 6 March 1985 (2AB404) with the draft clause which was accepted and subsequently incorporated as cl 12 in the agreement. The effect was that the family members would sign the agreement but as soon as the holding company was formed they would transfer their shares to the latter and the family members would then be free of all existing rights and liabilities as spelt out under the agreement. 5. The family members signed a shareholders' agreement on 1 April 1985 (exh D1). Koo Holdings was incorporated on 9 May 1985 with a paid-up capital of \$210,000 (see 2AB371) and on 9 September 1985 it resolved to purchase (see 4AB14) from the family members 2,100 shares in KWP at \$100 per share. Transfer of the shares was effected in October 1985.

47 KKK did not disagree with Sherratt's evidence on the reasons why KWP and McPherson's decided to team up. Essentially the joint venture would benefit KWP as:- a. with the exception of bingo tickets, KWP was not active in Australia, b. KWP was undercapitalised and c. McPherson's would bring capital as well as management expertise into KWP. He recognised that KWP was weak in financial control. That was why Lim a qualified accountant, was hired in early February 1985.

48 KKK testified that before February 1985 he had not seen the projections (2AB13-26) done by Volk of KWP's Singapore and Australian sales after the joint venture although he may have contributed to the input for the Singapore

sales by his handing to Volk the accounts of KWP in their discussions in September/October 1984.

49 On the pre-billing practice, KKK testified that it was done usually for monthly magazines after the advance copies had been airmailed to their publishers; it enabled KWP to obtain payment earlier as most of these magazines were posted out of Singapore by surface mail and sometimes they took up to three months to arrive at the readers' destination; the practice also enabled publishers to invoice their advertisers earlier.

50 He explained that the projected increase in sales for KWP did not materialise after the joint venture with McPherson's because of these factors:-
a. The 1985-86 recession in Singapore when local customers forced KWP to lower prices; b. The Australian dollar was devalued quite drastically against the Singapore dollar resulting in the projected sales from Australia not being realised; c. The Hong Kong dollar was also falling in tandem with the American dollar and Hong Kong printers undercut KWP; d. Costs increased because of the then state of the local economy and KWP's expanded capacity;

51 e. KWP's traditional markets were also eroded by competitors.

52 He believed McPherson's valuation of KWP's equity at \$1.2m was based on the 1983 audited accounts projected to 1984 figures and also based on the management accounts as at 31 March 1985 done by Lim. In turn Lim relied on C&L's audited accounts as at 28 February 1985. When he was informed by Lee about the discrepancy in the stocktaking done for 31 December 1985, he instructed her to inform McPherson's immediately and he rendered to Woodruff his full co-operation in the subsequent investigations that followed.

53 Under cross-examination by counsel for the plaintiff, KKK opined that if the overstatement of assets had been discovered before completion of the sale, he would still have continued with the joint venture but the purchase consideration would have been computed based on correct figures. He agreed that as a starting point he would accept the loss understatement figure (\$712,500) of C&L. What clearly emerged from his evidence is the following:-

- a. he did not suppress any information from McPherson's nor did he intentionally mislead McPherson's with wrong figures;
- b. he was aware of KWP's practice of pre-billing but did not realise that it was wrongly treated in KWP's accounts resulting in its stocks and assets being inflated; he did not inform C&L about the practice;
- c. his family intended that upon the incorporation of the holding company, all of them would be relieved from their obligations under the warranty clause by cl 12 although the non-competition clause would continue to bind them personally;
- d. he did not make his family's intentions/objective clear to McPherson's in his negotiations in particular with Sherratt, before the agreement was signed;
- e. he provided the wording for cl 12 of the agreement and it was accepted without question by McPherson's;
- f. no details were given to Sherratt on the structure of the holding company; after the family transferred their remaining shares in KWP to Koo Holdings, KKK did not inform Sherratt of the transfer nor did he say that Koo Holdings would assume the individuals' rights and liabilities under cl 12;
- g. no family member benefitted from McPherson's purchase of his/her shares as the purchase price was injected into KWP as working capital.

54 The evidence of the third and the fourth defendants on the genesis of cl 12 corroborated KKK's evidence. The two brothers were very close and the third defendant relied on his better educated younger sibling, a university graduate, for advice. The fourth defendant who worked in a bank before he joined KWP,

testified that because of his experiences in that bank and knowing the nature and consequences of warranties, he told KKK that he would not sign the agreement if he had to give the warranty in cl 6 and if cl 12 was not included. Both brothers wanted the mortgages on their properties to be discharged and their personal guarantees cancelled once McPherson's bought their shares. They thought their requirements were met by the inclusion of cl 12 in the agreement and by the family's signing exh D1.

55 The findings It is noteworthy that the defence of the third defendant made no reference to cl 12. Neither did he adduce any evidence to support the allegations he had pleaded. Having left KWP by then one wonders how he could know as he asserted, that McPherson's had managed the company for about a year let alone that the plaintiff mismanaged KWP and forced it into liquidation, which in any event was not true. Indeed all his allegations were denied by Sherratt. Similarly no evidence was presented in support of the third defendant's counterclaim. I find both his defence and his counterclaim to be totally devoid of merit. I would therefore at this juncture award judgment to the plaintiff on its claim against the third defendant and dismiss his counterclaim with costs.

56 As the plaintiff has abandoned its claim based on misrepresentation, the fact that the seven individual defendants did not intend to deceive the plaintiff by KWP's practice of pre- billing is no answer to the plaintiff's claim for breach of the warranty clause. The plaintiff's loss for its investment in KWP was more than the purchase price as it had paid to Citibank \$1,300,022.79. Therefore the submission by counsel for the first, second, fifth and eighth defendants that settlement by the plaintiff of its suit against C&L in Suit No.4769 of 1986 should be disclosed as it has a bearing on this claim is untenable. Counsel in his submissions agreed that the claim against C&L was 'obviously different' being

based on negligence. It is the outcome of this case which has a bearing on the other suit since the measure of damages in the latter is wider than this claim based on breach of warranty.

57 Having disposed of the third defendant's case, I next turn to the submissions of the other defendants. Their respective counsel contended: a) cl 12 read with cl 13 applied to all the clauses of the agreement including the warranty clause save for the non-competition clause which was expressly stated to be an exception as it involved personal undertakings; b) cl 12 was not intended to create a trustee- beneficiary relationship between Koo Holdings and the other defendants vis-a-vis the latter's remaining shares in KWP after the sale to McPherson's; c) with effect from 9 September 1985 when the defendants' remaining shares in KWP were transferred to Koo Holdings, the former's rights and liabilities were assumed by Koo Holdings. Such transfer was the condition precedent upon which the novation took effect. Koo Holdings having stepped into the shoes of the defendants, there was no liability left and the defendants were thereby released. The plaintiff recognised this fact in paras 16 and 17 of the amended statement of claim; d) the plaintiff knew or ought to have known by 10 September 1985 that all the defendants' shares had been transferred to Koo Holdings since it dealt with and recognised Koo Holdings as the only other shareholder of KWP at the annual general meeting (AGM) and extraordinary general meeting (EOGM) held on that date which were attended by both companies' proxies; e) whilst it was conceded there was some overpayment of the purchase price on McPherson's part, the defendants did not accept Woodruff's figures which were calculated to give the plaintiff the best advantage. In regard to exh P3 it was impossible for the defendants to verify the figures. Counsel questioned Woodruff's (i) figure of \$50,264 for bad debts, (ii) inclusion of \$50,000 in the overpayment as that was additional capital

contribution which was not part of the formula in cl 2(b) for calculation of the purchase price, (iii) refusal/failure to requantify the real loss taking into account the adjustments and allowances as well as the management accounts for 31 March 1985; this had been pointed out during his cross-examination and adverse inferences should be drawn against the plaintiff. f) since the plaintiff's claim is for specific damages and it has failed to prove the quantum of its loss with any degree of certainty, its claim must fail or at most the plaintiff should be awarded nominal damages; g) as the plaintiff chose not to pursue its claim for misrepresentation just before the hearing and its claim for consequential loss under para 18 of the amended statement of claim was not proven, the defendants should be awarded costs thrown away. Counsel for the fourth, sixth and seventh defendants added that: h) if cl 12 intended the individual defendants to remain liable after the transfer of their shares to Koo Holdings, then the last sentence of cl 12 ought to have been worded differently by deleting the words 'all' 'of the vendors' and 'for the time being' so that the sentence then reads The Holding Company shall assume the rights and liabilities under this agreement upon the transfer to it of shares held by the vendors.

58 i) further, if that was the intention, then cl 12 ought to have provided that the 'vendors agree for themselves and their successors' as was stated in cl 7; j) it was stated in the non-competition clause that the 3 year period would commence from the date Koo Holdings ceased to hold shares in KWP instead of after the first to seventh defendants ceased to hold shares -- that shows Koo Holdings was the intended warrantor. This is to be contrasted with cl 13 where the expression 'the Vendors' means the holders for the time being of the shares in KWP; k) Sherratt's understanding that cl 12 would apply only to the 50% shares of the first to seventh defendants was negated by the words in the last sentence which provided for the transfer of 'all shares held by the vendors for

the time being'. All the shares of the seven defendants were transferred to Koo Holdings on 9 September 1985. The audited accounts of KWP for the period ended 28 February 1985 only came into existence when the audit certificate was signed in September 1985 by which date Koo Holdings had assumed all the rights and liabilities of the seven defendants who were consequently released under cl 12; l) by joining Koo Holdings as the eighth defendant in this suit the plaintiff had elected to accept it as the new contracting party in place of the other defendants. But for the novation Koo Holdings would be wrongly sued as it was not 'a party privy to this contract'.

59 Counsel for the plaintiff inter alia submitted: a) The first to seven defendants cannot rely on extrinsic evidence in aid of their construction of cl 12 as it would infringe the parol evidence rule under ss 93 and 94 of the Evidence Act. b) A strict literal interpretation of cl 12 militates against any release of the defendants from their liabilities for breach of warranty. Based on such interpretation (i) the last sentence of cl 12 does not expressly state that upon the assumption of liabilities by Koo Holdings the defendants would be released from their personal liabilities. Therefore in the absence of any express wording providing for such a release, the defendants' contention must fail; (ii) the word 'assume' is not a legal term or a term of art. The court should construe it to mean 'take on' alongside the defendants. It was never within the plaintiff's contemplation according to Sherratt that 'take on' would be 'in place of' or 'in substitution for' the defendants' personal liabilities. The first time Sherratt was made aware of the release argument was after proceedings had commenced. Even if it can be said that cl 12 allowed Koo Holdings to assume liability, such assumption cannot operate with retrospective effect and only took place when the defendants' remaining shares were transferred to Koo Holdings on 25 October 1985. The breach of warranty occurred between 3 June and 3

September 1985 when the balance purchase price was paid. The breach having crystallised prior to the transfer of the defendants' shares, the defendants' liabilities remained with them. (iii) alternatively, the word 'assume' can equally be construed to mean 'in addition to' and if there is ambiguity it should be resolved against the defendants who drafted the clause. c) The non-competition clause cannot be used out of its context to give to cl 12 an interpretation slanted for the defendants' sole benefit. Clause 7 deals with the situation when Koo Holdings ceased to be a shareholder of KWP, a future event. In that situation, it would not have made much commercial sense to bind only the defendants to their non-competition undertaking, their successors must necessarily be included. The same situation is not found under the warranty clause which deals with a warranty for a specific purpose and within a specific time frame; the warranty has a limited life span and there is no need to bind the defendants' successors. d) Neither cl 7 nor cl 12 specified that one would operate as an exception to the other; the defendants had no basis for such an argument. e) For the court to imply a term that the defendants were to be released from their obligations they must show that it was the obvious and common intention of both parties that the defendants were to be released from their liabilities when Koo Holdings took over their remaining shares; the evidence was heavily weighted against such a finding.

60 I next deal with the common defence raised of novation. The imprecise wording of clause 12 renders it open to two possible interpretations summarised as follows: a) According to counsel for the plaintiff, it meant Koo Holdings would assume future rights and liabilities for the balance 50% shares which were transferred to it by the shareholders of KWP. Alternatively, Koo Holdings would assume the rights and liabilities concurrently with the individual shareholders after it had been incorporated, hence Koo Holdings was joined as

the eighth defendant to the suit. b) According to the defendants, it meant that once Koo Holdings was incorporated, all of them were discharged from their personal liability in particular under the warranty clause save that the non-competition clause would continue to bind them. In determining which interpretation is correct, one must consider the meaning of the words used, not what one may guess to be the intention of the parties (per Jessel MR in *Smith v Lucas* (1881) 18 Ch.D 531 at p.542). However as no contract is made in a vacuum, in order to resolve an ambiguity as in this case, the court may look at the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction (per Lord Wilberforce in *Prenn v Simmonds* (1971) 1 WLR 1381). Adopting the words of Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen* (1976) 1 WLR 989 (at pp.995 and 997) in a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating... When one speaks of the intention of the parties to the contract, one is speaking objectively -- the parties cannot themselves give direct evidence of what their intention was -- and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties... What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

61 What then was the commercial purpose of the agreement? To find the answer, the following observations are pertinent:- a) the defendants admitted

that the non-competition clause was personal to all the individual shareholders of KWP; b) subsequent to its incorporation there was no reference by Koo Holdings to its role in cl 12 nor was any resolution passed to show its acceptance of liability as envisaged under s.41(1) of the Companies Act (Ch 50). Indeed, in its defence, Koo Holdings apart from admitting the existence of cl 12 under para 7 thereof, denied liability for the warranty. Taking into account that Koo Holdings, KKK, the first and the fifth defendants are all represented by the same solicitors, I am inclined to accept the submission of the plaintiff that Koo Holdings' acceptance of liability in the midst of the trial can only be viewed as an attempt by the aforesaid other defendants to escape from their personal liability at the eleventh hour; c) the defendants' interpretation of cl 12 is clearly inconsistent with cl 13 which states:- the expression "the Vendors" means the holders for the time being of the shares in the Company other than the Purchaser or any related corporation of the Purchaser; d) cl 12 was drafted by KKK and or his advisers; e) there was very little to choose between the plaintiff and Koo Holdings in terms of net worth as each was incorporated with a paid up capital of \$2 but would eventually have its capital increased to \$210,000 due to the shares each party held in KWP. Therefore Sherratt's statement that cl 12 was not meant to include Koo Holdings as its worth was unknown to McPherson's is incorrect. Similarly KKK's statement on re-examination that the plaintiff had \$2 as its paid up capital is also incorrect since, as pointed out by the fourth defendant, its intrinsic value was half KWP's value; f) the preamble to the shareholders' agreement dated 1 April 1985 made no mention that Koo Holdings would assume the shareholders' liability once the former transferred their shares.

62 At law novation requires:- i) the consent of both contracting parties, and ii) consideration to be provided for the new contract.

63 On the evidence, I am not satisfied that the defendants have discharged the burden of proving that Koo Holdings had by novation taken over the personal liability of the first to seventh defendants. Whether or not there was a novation as contended by the defence depends on the answers to these two questions:- i) Did all parties in particular McPherson's agree to the substitution of Koo Holdings for the other defendants, in the agreement? ii) Did Koo Holdings agree to the terms of the agreement? On the facts the answer to both questions is in the negative.

64 As pointed out earlier, to give cl 12 the defendants' interpretation would contradict cl 13 which wording is explicit. Further it would be straining the language of the entire agreement to say that the non-competition clause was the only obligation which the individual defendants retained, after Koo Holdings' incorporation. The commercial purpose of the agreement militates against giving cl 12 the meaning the defendants contends for the following reasons:- a) the warranty clause pertained to the state of KWP's accounts which was known or ought to have been known to its individual shareholders, not to Koo Holdings which was not even in existence at the date the agreement was signed; b) it was Sherratt's evidence that the purpose of the warranty was to give comfort to McPherson's that its purchase of shares was what it purported to be and the warranty coming from the Koo family who were the sellers of those shares gave credit to the comfort McPherson's sought -- his evidence was not challenged by the defendants. Neither did they challenge his evidence that had he been told that the intent of cl 12 was to release the first to seventh defendants from their liability under the warranty clause, McPherson's would not have completed; c) it would be incredible naivete on the part of McPherson's as an Australian public company to invest over S\$1m in an overseas enterprise and be contented with a warranty from a limited company which would give little if any comfort in the

event the accounts turned out to be inaccurate as proved to be the case; d) in accordance with the contra proferentum rule any ambiguity in cl 12 is to be construed against the maker namely the defendants. Therefore if the word 'assume' in the third last line can be said to mean either 'take on' or 'in addition to' I accept the plaintiff's submission that the latter construction should be preferred. Further the clause clearly states that Koo Holdings would assume the rights and liabilities upon transfer of the remaining 50% shares which the defendants then had, not when it was incorporated -- the clause does not operate with retrospective effect; e) KKK had agreed under cross-examination that when he wrote his letter dated 25 January 1985 (2AB379-382) he assumed that the warranty would be given by Koo Holdings as a natural follow-up to his discussion with Sherratt that the vendor would be Koo Holdings but he did not convey his thoughts to McPherson's who he thought would operate under the same assumption. His assumption, according to Sherratt, was not shared by McPherson's. In the event as Sherratt said, the agreement was not signed by Koo Holdings but by the first to seventh defendants; f) Koo Holdings could not have consented to the novation as it was not in existence at the time of the agreement. It would be too simplistic a view to accept the defendants' argument that Koo Holdings' consent was evidenced in its acceptance of the transfer of shares from the defendants. There must be some overt act on the part of Koo Holdings to evidence such consent (see *Panachand & Co (Pte) Ltd v Riko International Pte Ltd* < 1986 > 1 MLJ 294). Similarly I do not accept the defendants' contention that mere attendance at the AGM/EOGM by KKK as Koo Holdings' proxy was sufficient dealing with the plaintiff to constitute acceptance by the plaintiff of Koo Holdings as the party liable in place of the defendants. In any case the fact that each of the defendants was asked by the plaintiff to attend the April 1986 EOGM would seem to rebut that presumption, if any.

65 I therefore hold that all the defendants including Koo Holdings (by admission) are liable to the plaintiff for breach of warranty.

66 As for the sum claimed by the plaintiff for its overpayment of the shares, the defendants did not in challenging Woodruff's computation, put forward alternative figures. Their stand was to put the plaintiff to strict proof of the sum claimed and there was no obligation on their part to assert other figures. They may well be justified in adopting such a stand but in so doing they have not successfully challenged the plaintiff's figures save for three items. I therefore accept Woodruff's computation save for the following adjustments:- a) based on Woodruff's evidence reflected in exh P3 that he had unintentionally omitted from the March 1985 accounts profits before tax (\$44,997) of \$112,492 (stock of \$335,338 as at 28 February 1985 less work in progress of \$103,293 shown in 3AB34), the overpayment figure of \$515,374 should be reduced by the pro rated profits of \$67,495 (although the figure itself was questionable) (\$112,492 less \$44,997) for March 1985; the overpayment figure is therefore \$447,880 as shown in exh P3; b) Woodruff had also added onto the overpayment figure the sum of \$50,000 paid by McPherson's as capital contribution to KWP. As was rightly pointed out by counsel for KKK, the plaintiff is not entitled to recover this sum as it did not form part of the equity formula set out in cl 2 of the agreement and covered by the warranty clause; the \$50,000 should therefore be deducted from the \$447,880 to reduce it to \$397,880; c) Woodruff had further added \$50,264 as a bad debt (see note 4 in exh P2) to the overpayment figure. He said that since McPherson's had paid as part of the equity the receivables due to the company, the plaintiff is entitled to recover back what (on hindsight) appears to be irrecoverable. Again, there is no justification for such a deduction to be made under the equity formula in cl 2. Accordingly this sum should also be deducted from the overpayment figure which is thereby reduced to \$347,616

(\$397,880 less \$50,264); d) the three other sums (\$17,000, \$16,847 and \$41,000) added by Woodruff to the overpayment figure are justified as the equity formula excluded debts owed by the Koo family (\$17,000), a cruiser owned/ purchased by KKK (net value \$16,847) and income tax written off (\$41,000 as seen in 3AB32).

67 I therefore award judgment to the plaintiff in the sum of \$347,616 against all the defendants together with interest at 6% per annum on the sum from the date of the writ (5 September 1986) until judgment.

68 As for costs and the defendants' request for costs thrown away, to some extent I agree with the plaintiff's submission that although the plaintiff did not proceed with its claim for misrepresentation, the facts and materials collated for the trial were not wasted as evidence of those matters pleaded were adduced from the various witnesses for both the plaintiff and the defendants on the plaintiff's claim for breach of warranty. In the event that any element of getting-up by the defendants was wasted as a result of the plaintiff's abandoning the claim based on misrepresentation, I award to the plaintiff 4/5 of the taxed costs of this action. As to the apportionment of costs between the defendants I am mindful of these factors:

69 a) KKK contrary to the denial in his defence, did not in his evidence rebut the plaintiff's allegation that he acted at all times as the Koo family's agent in negotiating with McPherson's; indeed he was the prime mover as substantiated by his own testimony; b) according to the fourth defendant, his sisters the sixth and seventh defendants played no part in the negotiations with and sale to McPherson's; their involvement was solely because they were

shareholders due to the first defendant's generosity when he first incorporated KWP.

70 It is my view based on the facts and the evidence adduced that an equitable apportionment would be for the second defendant to bear 40% of the costs awarded to the plaintiff, the first, third, fourth, fifth and eighth defendants shall each bear 10% of the costs and the balance 10% shall be borne by the sixth and seventh defendants. The plaintiff is also awarded costs on the third defendant's counterclaim.

Lai Siu Chiu JC

Molly Lim & Chia Foon Yeow (Wong Yoong Tan & Molly Lim) for
the plaintiff
Gan Choon Beng & Leo Cheng Suan (Chu Chan Gan & Ooi) for the
First, Second, Fifth, and Eighth defendants
Wee Soon Keng (Wee Soon Keng & Co) for the Third defendant
Peter Chua (Peter Chua, Sobaran & Partners) for the Fourth, Sixth,
and Seventh defendants
