IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 195

S993/1990

Between

Trudina Investments Pte Ltd

… Plaintiff

And

Virginia Industries Pte Ltd

… Defendant

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Trudina Investments Pte Ltd v Virginia Industries Pte Ltd

[1994] SGHC 195

S993/1990
Lai Siu Chiu J
29 July 1994

1 **Judgment:**

2 Coram: Lai Siu Chiu J

3 **Cur Adv Vult**

4 JUDGMENT

5 The facts

6 The plaintiffs and the defendants are Singapore registered companies whose shareholders and managing directors are Japanese.

7 Sometime in 1987 the managing director of the plaintiffs Tetsuhiko Fujinaga (T Fuji) who is an aquaculture consultant, met the defendants' managing director Hideo Sekine (Sekine) through Japanese friends. A year or so after their introduction Sekine (DW1) raised the subject of doing business in prawn culture with T Fuji (PW1). T Fuji advised Sekine to go into feed manufacturing rather than prawn farming as prawn farming was more difficult

requiring a very large area. At that time T Fuji was a consultant to a feed manufacturer in Hong Kong and in Jakarta and to various prawn farms one of which was in Johor. Sekine expressed an interest in feed manufacturing and subsequently informed T Fuji that he had found a Japanese company Ihara Chikuro Co Ltd (Ihara) who was prepared to invest in such a business. T Fuji was introduced to a director of Ihara and Ihara as well as Sekine indicated they would appoint the plaintiffs as consultant for feed manufacturing technology.

8 To that intent and purpose the parties signed an agreement dated 29 August 1989 (the agreement) (see AB37-41) wherein the plaintiffs were appointed consultants for five (5) years in the set-up and operation of a feed manufacturing plant by the defendants. Prior thereto, on 22 August 1989, the parties had entered into a memorandum of understanding in the Japanese language (exh P4). The salient clauses of the agreement for our purpose are the following:

9 (1) Trudina shall assist Virginia in all aspects of the set-up of the said plant, including rendering advice to Virginia on the appropriate equipment to be purchased and to assist Virginia in the supervision of the installation and commission of the said equipment. (2) Trudina shall disclose to and provide Virginia with the complete formula setting out the ingredients used in the manufacture of the feed. (4) Trudina shall carry out regular analysis work on the feed and the ingredients to ensure a regular and high standard of production. (7) Trudina shall assist Virginia in all aspects of sales and marketing of the feed and in particular Trudina shall endeavour to achieve high sales volume of the feed to prawn farms with which Trudina is connected in any manner. (8) Trudina shall train and educate Virginia's staff in all aspects of production of the feed and also provide guidance to the marketing and sales staff of Virginia in the marketing of the feed. (13) Trudina shall provide sufficient staff and

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trained personnel to carry out its training obligations under this contract. (15) Virginia shall also nominate and invite one staff of Trudina to become a nominee director of Virginia. The director's fees for this director shall be paid from the S$10,000 management fee referred to in cl 11 hereof. (16) All formulas for the preparation of the said prawn feed or any improved formulas thereof shall be the sole property of Virginia. During the contract period of five (5) years, Trudina shall not enter into any consultancy agreements with any other companies or persons producing similar feed, including their own related companies in Singapore.

10 Pursuant to cl 9(i) of the agreement the defendants paid to the plaintiffs S$100,000 upon its execution. Further the defendants had to pay a monthly management fee of S$10,000 (cl 11) to the plaintiffs for the first three (3) years of the agreement which fee would include the salaries of all necessary personnel of the plaintiffs working on the project. Pursuant to cl 15 of the agreement the defendants appointed T Fuji's brother Koichi Fujinaga (K Fuji) as the plaintiffs' nominee director. At Sekine's request, the plaintiffs provided the defendants with six (6) formulas prepared by K Fuji (PW2) together with hundred (100) other formulas extracted from their database.

11 The first requirement being factory space, T Fuji after consultation with Sekine, applied to the Jurong Town Corporation (JTC) for a factory space at Woodlands and at Jurong. T Fuji selected a detached C6 type of factory as being the most suitable as it had adequate space, there would be no immediate neighbours, preparation of feed can be smelly and the machinery can also be noisy. The JTC processed and subsequently rejected T Fuji's application for a Woodlands factory. He then instructed his staff to scout for a suitable factory and they found two (2) possibilities. However before he could discuss the sites with Sekine he was told by Sekine that the latter had commenced negotiations

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to purchase a Tuas factory. The defendants eventually bought the Tuas factory (the factory) for S$1.03ml (see the option at DB1-7) and Sekine decided on the installation of a pelletizing instead of an extrusion system for feed manufacture, it being cheaper and easier to operate.

12 In the first quarter of 1990 installation of machinery in the factory was still incomplete and production of the feed had not yet begun. According to T Fuji he could not supervise commissioning of the equipment either as most of the machines had not yet arrived. For the same reason he could not train or educate the defendants' staff let alone provide them with guidance on marketing and sales of the feed. He had requested the defendants to hire ten (10) staff for production but they did not. He did not send the plaintiffs' staff to the factory either as he did not want them to waste their time while waiting for the machines to arrive. The defendants also failed to comply with his request made in April 1990 (AB62A) to buy a list of raw materials and to send him samples thereof for analysis.

13 The Fuji brothers then discovered that the professional engineer appointed to supervise the installation of the plant had resigned and that the defendants were carrying on with installation in the factory without approval from the Building Control Division (BCD); they expressed their concern to Sekine in May 1990 (see AB100A and 165A). By then Sekine had contacted Hitachi Zosen Singapore (Pte) Ltd (Hitachi) on the 100 formulas K Fuji had handed to the defendants previously. T Fuji had previously acted as an aquaculture consultant to Hitachi. By letter dated 14 May 1990 (AB167A) Hitachi confirmed to the defendants that they had compared the 100 formulas of the plaintiffs with their own and had found out some formulae are just identical or very close to < theirs > .

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14 Sekine then wrote to the plaintiffs (see AB168) requesting confirmation that the formulas given to the defendants solely belonged to the plaintiffs, there was no substantive response. Instead the plaintiffs' solicitors wrote to the defendants on 17 May 1990 (AB169) demanding payment of the outstanding April management fee and giving notice that they viewed such failure to pay as well as the defendants' intimation not to continue with future payments as breaches of substantive conditions of the agreement. The defendants meanwhile through their solicitors (AB172) had written to the plaintiffs on 21 May 1990 stating that the plaintiffs were in breach of cl 16 of the agreement as the formulas the plaintiffs supplied to the defendants were discovered to be the sole property of a third party. The defendants gave notice that they treated the agreement as having been terminated by such breach and intended to recover all monies they had previously paid to the plaintiffs.

15 In a separate letter to the plaintiffs' solicitors (AB173) in reply to their letter of demand the defendants' solicitors whilst admitting that payment of the April management fee had been withheld, repeated their contention that it was the plaintiffs who were in breach of the agreement in particular cll 1, 8 and 16. They demanded refund of the $100,000 as well as the management fees totalling $70,000 paid by the defendants to date. Needless to say the defendants' allegations were disputed by the plaintiffs' solicitors who inter alia

16 a. contended that the plaintiffs had provided the defendants with two (2) formulations which were composed by the plaintiffs' employees and which were meant for the defendants' prawn feed manufacture; b. denied that the formulas referred to by Hitachi belonged to Hitachi. In any case the formulas were provided purely for the purposes of reference to enable the defendants to make comparisons.

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17 The claim

18 Shortly thereafter the plaintiffs commenced this suit. In the statement of claim the plaintiffs alleged that the defendants were in breach of cl 11 of the agreement in failing to pay the April and May 1990 management fees totalling $20,000. Further they alleged it was an implied term of the agreement that the defendants would take all necessary steps to ensure that the plant would be set up in order that the plaintiffs may carry out their obligations under the agreement. The defendants in breach of such implied term failed or neglected to take all necessary steps to

19 a. install the relevant machinery and equipment required for the operation of the plant, and to b. procure the relevant government approvals for the installation of the machinery and equipment

20 as which result the operation of the plant to date had not yet commenced. The plaintiffs had therefore lost the benefit of the agreement and the revenue they would otherwise have received namely

21 (i) monthly management fees for the residue of the term from 29 June 1990 to 28 August 1992 S$270,000 (ii) fees on commencement of production $ 50,000 (iii)royalty of 3% on the estimated production profits for 5 years to be assessed.

22 The plaintiffs prayed for

23 a. a declaration that they are relieved of all liability for the further performance of their obligations under the agreement; b. payment of the $20,000; c. damages for repudiation of the agreement; d. interest and costs.

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24 In the defence the defendants

25 1. referred to cll 1, 2, 3, 7, 8 and 16 of the agreement and alleged that the plaintiffs were in breach of the same; 2. contended that they had rescinded the agreement by their solicitors' letter dated 21 May 1990 and that it was due to the plaintiffs' aforesaid breaches that operation of the plant could not commence by the targeted date; 3. alleged they only managed to commence feed production in June 1990 and incurred considerable expense and suffered loss as a result for which the plaintiffs are liable; 4. denied that the works done and or materials purportedly supplied by the plaintiffs were in accordance with the agreement. Indeed they were worthless or worth less than the defendants' payment of $170,000.

26 The defendants counterclaimed from the plaintiffs

27 a. the said $170,000; b. loss and damage relating to (i) the delay in setting up the plant; (ii) loss of profits; (iii)rescission of the agreement; (iv) loss of opportunities in other investments.

28 The plaintiffs' case

29 The plaintiffs' only witnesses were the two Fuji brothers whilst the defendants called besides Sekine, four (4) other witnesses including a representative from Hitachi. I shall first review the evidence of T Fuji. In support of the plaintiffs' claim that they had performed their obligations under the agreement, he testified to the following:

30 1. his father was a scientist who was the first person in the world to breed prawns in captivity. He joined his father's laboratory after graduating from the

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University of Tokyo in 1969 in nuclear engineering; 2. after Sekine had expressed an interest in feed manufacturing he met Mr Yano a director of Ihara and took both Sekine and Yano to Jakarta to see the operations of a feedmill manufacturer of which he was consultant; 3. he arranged a meeting between Yano, Sekine and himself with the Economic Development Board (EDB) to find out whether their investment in feed manufacturing would qualify for pioneer status in Singapore; 4. he obtained a quotation from Star Union Engineering Pte Ltd (Star Union) for installation of the plant and machinery on a turnkey basis. After obtaining the quotation (which was for an extrusion system) he discussed the technical matters involved with Mr Ow of Star Union. He also requested Ow to use reputable international machinery. He received a second quotation from Star Union, this time for a pelletizing system; 5. he explained to Sekine the difference between an extrusion and a pellet mill system which essentially was the price and the operations involved. He pointed out the good and bad aspects of each system and left it to Sekine to choose. The defendants signed a sale agreement with Star Union for installation and commissioning of the plant on 21 August 1989 (AB26); 6. after Sekine had chosen the pelletizing system he prepared a flow chart (AB185) to guide Star Union in the construction of the superstructure and in the installation of the machinery; 7. Star Union had agreed that the plant would be ready by December 1989 but completion was delayed due to the defendants' late purchase of the factory. He visited the Tuas site a few times before Sekine negotiated its purchase. He found the backyard space quite narrow if a boiler had to be installed there but the factory space itself was adequate so he informed Sekine that technically he had no objections, it was a brand new factory; 8. there are two kinds of prawns for purposes of production -- (i) Japanese tiger prawns and (ii) brown tiger prawns. Both require high protein content in the feed. In compliance with cl 2 of the agreement he supplied to the defendants three (3) high protein and three (3) low protein feeds prepared

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by his brother; 9. no research and development (R & D) to make better formulas can be done unless and until the existing formulas are used and tested. Further R & D is only possible after the machines have been commissioned, feed in pellet form produced and tested on prawns in tank trials; 10. to market the plaintiffs' feed under cl 7 of the agreement, he intended to sell to existing prawn farms of which he acted as consultant in particular those in India. To do so, he advised Sekine that brochures must be produced which contain samples of the defendants' feed. Without such samples (see exh P1) it would not be possible to recommend the defendants' product to customers. He specified the quality of the feed to be manufactured, even the particle size to be ground -- he wanted the size to be equivalent to 300 microns which is as fine as talcum powder; 11. he had to supervise Star Union's installation of the machinery to make sure the configuration was in accordance with the flow chart. After commissioning, he would have to adjust the machinery's workings until it produced high quality feed. During commissioning he would have to work closely with Star Union; 12. he had asked his brother to go to the defendants' office to educate their staff on how to develop the feed. He further gave the defendants all the available brochures from established companies and he explained how existing feedmills sold prawn feed. He prepared a feasibility study on prawn farming for the defendants as they wanted to know the concept; 13. he introduced overseas suppliers to the defendants; 14. as he was not certain what was meant by 'scheduled premises' under the Clean Air Act Cap 45 after a meeting with the Ministry of the Environment, he consulted the plaintiffs' solicitors and gave a copy of their opinion to the defendants; 15. in February 1990 it was discovered that the factory did not have enough power supply so at the request of the defendants' director Yamanishi he recommended certain generators as a temporary source of power supply. For the plant itself he obtained for the defendants brochures on the type of generator set (Perkins) which he thought

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was suitable; 16. despite his/his brother's warnings, the defendants proceeded with installation without BCD approval after the resignation of the professional engineer T S Lee.

31 Under cross-examination, T Fuji explained that the reason the application to JTC was in his and not in the defendants' name was because initially all applications and quotations were in the plaintiffs' name but subsequently they were switched to the defendants. In any case he did not know which name the defendants would use to operate the factory. He denied that the reason he took Sekine and Yano to see the extrusion system mill in Jakarta was because it was intended originally that the defendants would use an extrusion system. Around Singapore at that time, the only feedmill of which he was consultant was the one in Jakarta. It was not true that he intended to have Ihara put him in charge of an extrusion system mill in Singapore. His brother last visited the factory in early May 1990 at which time only welding of the superstructure had been done. He was unaware until February-end March 1990 that alterations had to be made to the factory. He did not know the building had insufficient height necessitating the digging of the concrete floor to accommodate the superstructure. He only found out after his brother's last visit that the floor had been dug.

32 On Sekine's request for bio-data as explained in Sekine's letter dated 6 May 1990 (AB99) to him, T Fuji said he could not understand why the defendants would want the results of experiments on the 100 formulas the plaintiffs had given them. As it can take up to half a year to train operators to become familiar with the different machines in the factory it had been his intention to have the plaintiffs' staff to run operations until the defendants' staff were fully trained and could take over. After installation and commissioning, it was the plaintiffs' duty to make sure the plant worked smoothly to produce high

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quality feed. The plaintiffs were never afforded an opportunity by the defendants to discharge their obligations as the agreement was terminated.

33 I move next to the evidence of K Fuji. Like his elder brother, K Fuji was also a graduate in engineering who studied prawn culture under their father. He came to Singapore in 1982 and became a technical consultant as well as manager to prawn farms, firstly in Johor and then in Indonesia. He joined Ebikken Aquaculture (S) Pte Ltd (Ebikken) in June-July 1986 as a director. Ebikken entered into an agreement with Hitachi and the Primary Production Department (PPD) on 23 February 1987 (AB112) to do a three (3) year study on prawn culture (the project) and he was put in charge of technical matters.

34 At the time Hitachi imported prawn feed from Japan at $10 per kilo which was very expensive so together with the PPD, Hitachi and Ebikken decided to develop a cheaper but good quality feed. To that intent and purpose he studied close to two hundred (200) formulas. This was necessary because slight changes in the feed formulation can make a significant difference to the growth rate of prawns. Even if the components are the same but they come from different places (squid meal from India as against local squid meal for instance) the results can be different.

35 K Fuji said he understood cl 2 of the agreement to mean that the plaintiffs must provide one formula for prawn feed to the defendants and he had more than fulfilled the requirement by providing 6 formulas to them in addition to which he had also given them the hundred (100) formulas selected from the thousands he had developed. He disagreed with Hitachi's contention that the 100 formulas were identical to theirs although he agreed that they may be very close. He assumed that Hitachi was referring to the formulas set out in the project report (the report) (see AB102-111) issued by the PPD. He had studied the

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comparisons made by Hitachi between the 100 formulas and those set out in the report and he had noted differences (see exhs P2 and P3) in the percentages of ingredients used in the formulas which differences can give rise to different results. Even where the same ingredient is used, an example being Vitamin C, the survival rate for prawns differed and was lower where crystalline instead of silicone coated Vitamin C was used. Some of his formulas were not in the report and he had prepared his own table (exh P5) to show the differences between the 100 formulas handed to the defendants and those set out in the report.

36 K Fuji contended that he was unable to assist the defendants 'in the set-up of the said plant... and to assist Virginia in the supervision of the installation and commission of the said equipment' as stipulated under cl 1 of the agreement because during his last visit to the factory in early May 1990, he found that the superstructure was not ready; it would not be possible to complete installation that month. All in he had visited the factory 5-7 times, including 2-3 visits before it was purchased to make sure it was suitable. He recalled that at that time he noted that the entrance was low and that a container would not be able to go inside. He asked and was told that it would not be possible to break down the upper part of the entrance because BCD approval was required. Neither was it possible to raise the height of the entrance. So he suggested that a roof be installed outside the entrance to facilitate loading of the finished product.

37 Under cross-examination K Fuji clarified that not all ingredients in prawn feed manufacture contribute towards the growth of prawns. Some ingredients are binders (basfin, Aquabind and CMC) or anti-fungus agents (calcium propionate) or anti-oxidants (BHT) and have no nutrient value. The 6 formulas he had given to them were the defendants' for their use but not the 100 formulas which were only shown to the defendants at their request -- those belonged to him and were not meant to be used by the defendants. He thought

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in any case that the 6 formulas which he developed were better than the 100 he had. Furthermore, if a formula is good, only one formula is required for one kind of prawn. He agreed that a shrimp in the hatchery and after it has been transferred to the pond has different nutrient requirements but once in the pond the prawn requires only one kind of feed. He wanted to conduct experiments with the defendants' machinery and to conduct tests on feeds produced by the machinery using the 6 formulas he had given to the defendants.

38 Under re-examination, K Fuji explained that the usage of the 6 formulas would depend on the markets for which the prawns were intended. If the market was Japan, then grade A feed should be used as the price of the best quality prawn in Japan is very high and therefore the feed that produces the best quality prawns should be used. Pursuant to cl 3 of the agreement, he would have done R & D after taking charge of production at the defendants' factory and would have developed new and better formulas for them. K Fuji confirmed that in the course of the project, tank trials were conducted by PPD at Jurong and Changi and that more than 200 formulas were tested. The feed for the tests was produced by PPD at a feedmill at Sembawang.

39 The defendants' case

40 I shall now review the defendants' evidence. Their first witness was Sekine who testified that before going into prawn feed manufacture, the defendants' business was in construction and trading. Before he set up the defendants in 1986, he was with Asahi Glass until it closed down during the recession in Singapore. The defendants being a new company, it was a struggle for him to survive in its early days. He met T Fuji in late 1987 or early 1988 and formed the impression that the latter was well versed in prawn culture which was a new field to him. He was also informed of K Fuji's involvement in the

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project. He became interested when T Fuji told him that the project would end shortly and it would be wonderful if there were investors who could continue the project and use the plaintiffs' know-how by setting up a feedmill plant. Sekine was confident he could bring in investors and he succeeded with Ihara.

41 Sekine opined that the reason the plaintiffs submitted the application to JTC for a factory in their own name was because they wanted to set up a factory themselves with Ihara as the investor. He was only told about the application in May or June 1989. He relied on T Fuji for technical matters and left it to T Fuji and his fellow director Yamanishi to negotiate with Star Union on the system to be installed and the price although ultimately he made the decision to use a pellet mill system after consulting a director of Ihara.

42 As for the agreement, in Sekine's view:

43 1. the plaintiffs were obliged under cl 1 to impart to the defendants knowledge of all aspects before and after the set-up, of the plant and machinery as neither the defendants nor their investor were familiar with it. It was the plaintiffs' duty to advise on the location and selection of the factory site, the application to the government and problems relating to the environment prior to the set-up of the plant. After the machinery had been installed they had to advise on its operations and run trial tests until the system was perfect. When he decided on the factory, he recalled that he took T Fuji with him to the Tuas site. T Fuji had recommended a C6 JTC factory at Woodlands which has a roof lower than the one at Tuas but the latter has less backyard space than a C6 factory. Yet T Fuji had agreed that the Tuas site was suitable because it had enough height. He was unaware of the two alternative sites that T Fuji claimed to have obtained after JTC rejected the application for a C6 factory. Had he been told it was possible he would have accepted one of them instead of the Tuas site. He was

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committed to purchase the factory in October 1989 as by then he had signed the option; he consulted JTC after they rejected the defendants' application and JTC suggested Tuas as an alternative. The feedmill was scheduled to start operations at end December 1989 or early 1990 but after the agreement was signed neither of the two brothers continued to advise the defendants on government regulations; 2. under cl 2, he expected the plaintiffs to give at least 300 formulas to the defendants since they told him they had that many. Hence his request to the plaintiffs for the balance 200 formulas after receiving the 100 formulas -- he did not receive them. It was also his understanding that the 300 formulas belonged to the defendants and also whatever formulas that the plaintiffs developed. As for cl 3 he understood from T Fuji that tested formulas cannot be used indefinitely as the situation and circumstances of prawn farms such as water quality, ingredients and clients change, therefore formulas had to be improved; 3. As for the 6 formulas, although the plaintiffs told him that they had tested them, they did not forward to him the test results nor those for the 100 formulas. It was important to have the test results as explained in his letter to T Fuji dated 6 May 1990 (DB27-30) because unless the feed upon which a formula is based is given to the prawns, it is impossible to judge whether a formula is right. This is particularly true as the defendants mixed as many as 45 ingredients for the feed. The plaintiffs' response to his letter that he should continue to have confidence in them was strange and caused his trust in them to deteriorate. By then the defendants had paid the plaintiffs monthly management fees totalling $70,000 as well as the $100,000 upfront and the plaintiffs had not provided much assistance for such payments; 4. for cl 13 the plaintiffs had promised from the beginning that they would provide talented people who would take charge of formulations and R & D. The $10,000 payment under cl 10 was meant for not only the plaintiffs' nominee director but 2 other staff members who were to be stationed at the factory. The defendants wanted the

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right to reject staff they thought were not suitable hence the inclusion of cl 14. He requested the plaintiffs in April 1990 to send their staff to be stationed at the factory but they refused saying the factory was not yet completed. He explained to the plaintiffs in another letter (DB27-30) that their stand was incorrect as the defendants had paid them according to the agreement and such payment included a portion for the staff. It was important for the defendants to learn from the plaintiffs' staff as the defendants were not familiar with the business. Despite his explanation the plaintiffs did not send any staff nor did they reply to his letter.

44 Sekine said he understood that the plaintiffs had many clients in various countries in which prawn farming was going on. He therefore thought that if the defendants could produce good feed they would be able to sell to these farms, hence cl 7 of the agreement. Indeed this was a factor which prompted Ihara to invest because they had a consultant, tested formulas, a good builder and ready customers to sell to.

45 After he had received the 100 formulas from the plaintiffs, Sekine went to Hitachi and asked their manager Kawachi who he knew very well, to review the formulas. He was aware that T Fuji had been involved in the project and that the project had conducted tests on 300 formulas. Kawachi was very angry and told Sekine that the 100 formulas came from the project, Hitachi had lost $6-$8m on the project and this was due to poor performance on the part of T Fuji. Thereafter Hitachi wrote their letter dated 14 May 1990 to confirm what Kawachi had said. Sekine then wrote to the plaintiffs on 15 May 1990 (AB168) requesting confirmation that 'the formulation given to us ... solely belong to your company' -- he received no reply.

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46 As for the factory, Sekine said the superstructure was up by March 1990 as evidenced in photographs produced in court taken that month by Yamanishi and Star Union. Installation of the machinery commenced in April 1990 and he understood from the professional engineer and Star Union that digging of a hole in the ground did not require permission. What required BCD approval was sawing a beam whilst the hole was being dug. The professional engineer did not advise the defendants to stop work pending approval. As the defendants could not wait they continued with the work since once the new drawing was submitted to the JTC and was endorsed it meant JTC had given approval. He was told that with JTC's endorsement construction could proceed. He did not know why the engineer resigned in the midst of the work but he was told that someone from the plaintiffs' staff had reported to BCD. In any case he procured the services of a replacement engineer (who did not advise the defendants to stop work pending approval) and installation was finally completed on 12 or 13 May 1990; the opening ceremony was held on 15 May 1990. Neither Fuji brother rendered any assistance and he did not consult them either. He doubted that they knew that the installation was about to be completed until he wrote to tell them on 12 April 1990 (AB54-55). Neither of them visited the factory after receiving his letter. In March 1990 he had already commenced purchasing raw materials to produce feed notwithstanding the lack of assistance from the plaintiffs.

47 Due to the lack of advice from the plaintiffs the defendants only managed to secure orders in October 1990 for the feed they produced. The defendants recruited staff in May 1990 to operate the machinery; the plaintiffs did not provide guidelines or assistance for the recruitment despite his request. They did not inform him for instance that the boiler man had to have a licence. Neither did the plaintiffs furnish a list of their customers or information on those

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customers as regards their financial position and requirements. The couple of names which the plaintiffs did furnish were worthless as those people had ceased prawn farming. Further K Fuji admitted that some of the plaintiffs' customers' projects were not sound. When he asked the plaintiffs for a new list of clients they refused. It was difficult for the defendants to start production not knowing the potential market. As a result the defendants only started actual production in August 1990 and to market their feed they relied on friends, trading companies and on banks for introduction to prawn farms. Indeed the defendants at the time of the trial were not selling feed to any customers provided by the plaintiffs as they were no longer the plaintiffs' clients. He had even received unfavourable feedback about the plaintiffs from one customer. The defendants also did not use any formula provided by the plaintiffs.

48 Under cross-examination, it was pointed out to Sekine that the plaintiffs' expertise was in prawn culture and not in setting up feedmills. He conceded that the agreement did not mention the 300 formulas he expected the plaintiffs to provide, nor that they should provide the research data for the formulas given to the defendants nor that they should apply for government approvals. Counsel pointed out to Sekine that the plaintiffs' alleged failure to apply for government approvals was only raised after the plaintiffs had commenced proceedings. Sekine further conceded that item 32 in the defendants' contract with Star Union provided $17,000 for professional engineer's fees. Even so Sekine pointed out that whilst the submission of plans is done by professional engineers, the design idea came from the plaintiffs and the defendants needed their guidance and support regarding submission of plans and obtaining approvals. Neither could he agree that the plaintiffs' obligations under cl 3 and to carry out R & D can only take effect after production had commenced nor that cll 8 and 13 are to be read together - cl 8 referred to training of the defendants' staff whereas cl 13

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referred to secondment of the plaintiffs' staff to the factory. It was Sekine's view that it was the plaintiffs' duty to provide the defendants with formulas that were tried and tested for purposes of comparison even before the defendants started production. He installed tanks at the factory in September 1990 to conduct experiments on feed samples of other producers and also on that produced by the factory.

49 Sekine also conceded under cross-examination that if installation of the machinery had proceeded according to schedule he would only have had to pay management fees up to November/December 1989 namely four (4) instead of seven (7) months, after commissioning. He denied that the defendants' purchase of the factory at Tuas delayed the setting up of the plant but conceded that there was no letter wherein the delay was blamed on the plaintiffs. He denied counsel's suggestion that the superstructure was completed later than March 1990 (referring to photograph C in DB67 to support his contention) but he agreed that he proceeded with installation of the machinery before the superstructure was completed. It was pointed out to Sekine that it was only in April 1990 that he commenced writing to the plaintiffs complaining about their performance in which month he also stopped paying the plaintiffs' management fees. Sekine denied that he terminated the agreement because a staff member from Hitachi one SK Lim (on Kawachi's recommendation) joined the defendants and he no longer needed the plaintiffs as consultants; he said he employed SK Lim in May 1990, after the plaintiffs' services had been terminated and SK Lim provided the formula for the defendants' feed production. Sekine also denied that Hitachi's letter dated 14 May 1990 (AB167A) was written at his instigation, that he failed to give the plaintiffs the samples of the ingredients the defendants purchased and to inform the plaintiffs

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of the factory's soft opening on 15 May 1990 because he did not intend to continue with the agreement.

50 When re-examined Sekine clarified

51 a. that he expected 300 formulas from the plaintiffs because T Fuji had told him that in order to produce good quality feed it was necessary to have more than 300 formulas; b. it was the plaintiffs who told him that the required factory had to have a high ceiling and the ceiling of a C6 factory of about 6m was not high enough unlike the (Tuas) factory. The delay in construction could have been avoided or reduced if the plaintiffs had discharged their obligations under the agreement bearing in mind they had past dealings with Star Union and they had an overview of the entire project and would be in a position to advise on problems even before the same arose. As the plaintiffs failed to supervise Star Union in the fabrication of the superstructure the defendants did it themselves; c. SK Lim could not have replaced the plaintiffs as he is not an expert.

52 Another witness called by the plaintiffs was Nancy Wong (DW2) holder of a Master's degree in fisheries and aquaculture from Michigan University who testified to the following:

53 1. she was invited by T Fuji to work for Ebikken (in 1987) which she did and she then worked for the plaintiffs between April 1988-June 1991. While she was with Ebikken she was assigned to work on the project. She was in charge of feed formulation for production of prawn feed while working for the plaintiffs; 2. she was the defendants' consultant between September 1991 and March 1992, thereafter she became their technical manager and later their general manager. Her duties as general manager included overseeing some

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aspects of production, marketing and administration as well doing R & D and preparing feed formulas. Since she joined them, the defendants had produced 278 formulas; 3. a high quality feed is one which is proven by tests to be attractive to prawns, consumable in 1-2 hours, stable in water, gives a growth rate of 2-3 gms per week, gives a survival rate of over 70% and yield a harvest size of 30 gms in the case of black tiger prawns; 4. throughout the growth of a prawn from shrimp to adult prawn, 3-6 types of feed of different protein level and formulations are required and most commercial feed manufacturers have 6 types; 5. minor changes in the percentages of some ingredients can affect prawn growth but it depends on what the ingredients are -- small differences in bioactive ingredients such as Vitamin C will make crucial difference to the survival rate but not items like flour; 6. it is not sufficient for the defendants nor is it efficient to have only one feed formula for the production of prawn feed because feed formulations depend on ingredients which can come from different sources which sources may be seasonal in supply; 7. the defendants produce 15 types of feed using 10 formulas. In any one month the defendants could be using 10-30 formulations depending on the availability of different materials; 8. she was familiar with the 6 formulas given by the plaintiffs to the defendants as one of them came from the project and the 6 had been prepared by K Fuji with her assistance. The formulas however had not been tested and without tank trials it is difficult to tell which formula is better. Without test results the defendants were not in a position to start producing competitive prawn feed; 9. she was familiar with the report of the project as she was involved in feed formulation with advice from K Fuji, PPD and sometimes SK Lim as well as assisting K Fuji in the tank trials; 10. the reason there were some differences between the 100 formulas given to the defendants by the plaintiffs and those set out in the report was because of inadvertent omissions, typographical errors due to incomplete proof-reading after parties became apathetic towards the end of the

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project, and sometimes keying-in errors on the part of the computer operator. This could be clearly seen by comparing the report with the worksheets (exh D1) she prepared during the project. She had given a set of her worksheets to Kawachi at his request; 11. when she first joined the defendants' services, they were not able to produce high quality feed because they were not familiar with all the specifications of ingredients, neither were they familiar with processing conditions; hence sales were bad; 12. for competitiveness the defendants produce 3 different types of feed of different price range and for different cultivating conditions. The defendants conduct R & D with the use of 12 tanks using seawater.

54 When cross-examined it was suggested to but denied by Nancy Wong that she gained her knowledge of prawn feed formulation from K Fuji as his assistant as, prior to her attachment with Ebikken and PPD, she had no such experience. Nancy Wong pointed out to counsel that she had previously worked for a prawn research centre in Guam with a consultant for the Food & Agricultural Organisation who had written several United Nations publications on prawn/fish feeds; she learnt prawn feed cultivation from him. At the same time she was a consultant to a prawn farm/hatchery at Pulau Ubin and prior thereto to a Sabah prawn farming project. She was told by the plaintiffs to prepare 6 formulas different from PPD's but she was not told for what purpose. The plaintiffs did not show her what they had given to the defendants, had they done so, she would have informed them that the information given was incomplete, in particular the biodata which would be requested by the defendants' customers; she thought such biodata came within cl 2 of the agreement under the words 'complete formula' which she understood to mean specifications of the ingredient materials clearly spelt out, the processing

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conditions and the product quality parameters specified and test results obtained.

55 Under re-examination Nancy Wong said that her experience as a consultant to prawn farms taught her that it was important to have prawn feeds that are water stable and pellets which are attractive to reduce the production costs for prawns since feed comprises 40-70% of the operational costs of a prawn farm. She explained that in order to produce competitive feeds, the defendants needed test results for purposes of marketing. She pointed out that the formulas handed to the defendants by the plaintiffs did not specify the source and quantity of many of the ingredients, there was no breakdown of the nutrient composition nor were the processing conditions given. Although the defendants had increased their feed production from 700 tons in 1991 to 1300 tons in 1992 and had sold 1500 tons in 1993 to date, they were still trying to recover their losses.

56 I move next to the evidence of M Yamanishi, who was a director of the defendants between August 1989 and March 1992. Yamanishi (DW3) confirmed that he took the photographs produced in court (DB67-71) at the official opening ceremony of the factory on 15 or 16 May 1990. He had met the Fuji brothers while he was working for the defendants but he could not recall obtaining the 100 formulas from either of them.

57 The defendants also called their factory manager to give evidence. Tan Tek Bu (Tan) who was employed in June 1992 testified as follows:

58 1. he is in charge of all aspects of production. He encountered various problems with the machinery. In the pre-mix room there was no expiration system and the hammermill was installed in a dumping pit which gave off a

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stench because there was insufficient fresh air. When doing periodic maintenance the workers had to put on oxygen masks. The machine occupied so much space in the pit that the workers had no room to dismantle and move the parts for preventive maintenance purposes. The pulveriser required considerable maintenance and there was also high wear and tear. Further it took about 20 minutes to mix the product homogenously in the horizontal mixer and despite having a cooler the pellets produced were still hot. The shifter which is supposed to separate the sliced pellets was not efficient and failed to deliver the capacity specified; 2. the problems with the machinery were due to the fact that in the course of their installation a lot of factors were not taken into consideration namely health of the staff, the measurements of the whole configuration of the machines, the set-up time was not taken into consideration, there were no training manuals to tell the operators the importance of each process and there was a mismatch on the capacity of the various machines -- the pulverizer takes about 30 minutes to pulverize 450 kilos whereas the pellet mill takes only 15-20 minutes to complete the product and the cooler is thereby rendered ineffective. There were cheaper yet better pulverizers in the market which were also easier to maintain. It is impossible to produce 1 ton of prawn feed per hour as specified for the machine. The defendants engaged a company (Life Engineering) to act as consultant on improving the current set-up and the latter confirmed that the existing machinery configuration could not produce one ton per hour; 3. when he first joined the defendants he found that the workers were a problem as some were illiterate or could not understand English and did not know how to set the weighing scale -- they were not health or quality conscious. He trained the existing staff, recruited better quality staff and made improvements on the machines to better their performance and cut down time wastage.

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59 Under cross-examination, Tan said the speed of the machines could not be adjusted to improve the performance unless some parts were changed which can be a costly exercise; neither would changing the temperature in the controller help. When re-examined he said the mismatch between the pulverizer and the pellet mill could have been avoided by choosing the right type for both machines; adjusting the machines may also affect the production capacity. Tan informed the court that the current capacity of the factory was + ton per 8 hours or 60 odd kilos per hour for the smallest size of feed.

60 The last witness for the defendants was Kawachi (DW5) who said:

61 1. he was posted from Malaysia to join Hitachi in the first quarter of 1989 and he was in charge of the project as well as the manufacture of prawn feed through subcontractors; 2. the purpose of the project was to do actual tests of the prawn feed and to sell the feed to prawn farms. Hitachi had a prawn farm at the time and K Fuji was its consultant to take charge of the 24 ponds it had. Sometimes he could not find K Fuji when he needed his help. As for T Fuji he recalled that he sold feed only once to the plaintiffs and he had to resort to legal process to recover the balance of the sale price; he did not have a good impression of T Fuji; 3. initially Hitachi used feed obtained from Japan but it was expensive and not suited to tropical conditions so Hitachi decided to produce the feed itself; 4. the project was not profitable as the prawns cultivated did not achieve the projected high growth rate; Hitachi lost $5-6m on the investment and its contribution to the project was about $180,000; 5. he was familiar with the formulas in exh D1 as he received a set of the worksheets from Nancy Wong; 6. he wrote to the defendants on 14 May 1990 after Sekine approached him to check the defendants' formulas with those of Hitachi and he found that there were a lot of similarities between the two. He found out that the defendants' formulas came from the plaintiffs; 7. he recalled that in 1987 all

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three parties involved in the project had agreed that they could not disclose the formulas to other parties. However at the final meeting held on 12 May 1990 (see minutes at AB166-167) the other parties despite his objections, agreed to disclose; 8. Hitachi's main business was ship repair but because of the recession in Singapore it decided to diversify into, inter alia, prawn farming in mid-1986 and later it ventured into the feed business. Hitachi exported prawns from its farm to Japan and also sold the feed which it produced using formulas prepared during the project. As the venture was unprofitable Hitachi closed it down and returned to ship repairing; 9. being a chemical engineer and not a shipyard man, he returned to Japan in June 1990 after the prawn business was terminated. He visited the factory 3-4 times and in mid-May 1990 he found that it was completed and ready for commencement of production.

62 The Submissions

63 Before making my findings I would first refer to the submissions of the parties. Amongst the arguments put forward by counsel for the defendants were the following:

64 1. the evidence of the Fuji brothers should not be accepted although one purportedly corroborated the other's testimony. In particular the evidence of T Fuji was inconsistent with the evidence before the court on the following aspects:

65 a. that the factory was not completed in early May 1990 when the defendants' photographs showed otherwise; b. the 100 formulas were the plaintiffs' solely when Kawachi's and Nancy Wong's evidence proved they did not belong to the plaintiffs at all; c. that he visited the factory many times after its purchase as, if that was true, he would have known that construction was

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underway and would have been briefed by Sekine and or Yamanishi about the work in progress; 2. the scope of cl 1 of the agreement was not limited to the plaintiffs' giving advice on the appropriate equipment to be purchased and the installation and commissioning of the equipment. The plaintiffs were obliged to assist the defendants in all aspects of the set-up of the 'plant' which word refers to the factory and not just the equipment. This followed from Sekine's understanding from the Fuji brothers that the plaintiffs acted as consultants to prawn farms and feed manufacturers in the region. The plaintiffs did not supervise the commissioning of the equipment as other wise they would have known that installation was completed in May 1990 which evidence of Sekine and Yamanishi was confirmed by Kawachi who attended the opening ceremony on 15 May 1990. With or without BCD approval, the construction of the superstructure commenced in March 1990 after completion of the purchase of the factory in February 1990 followed by installation of the equipment in April 1990; 3. the plaintiffs failed to advise the defendants on the appropriate equipment to be purchased as confirmed by Tan's testimony that there were fundamental flaws in the equipment; the expected production capacity of 1 ton was also not met; 4. the word 'formula' in cl 2 of the agreement cannot mean 'one' as it will be contrary to the plural sense in which it was used in the Japanese memorandum of understanding (exh P4) which preceded the agreement and the latter was meant to formalize the former; 5. the 6 formulas handed to the defendants had not been tested by the plaintiffs and yet the latter expected them to be used for production. As a prawn feed producer it is crucial for the defendants to produce high quality feed which is competitive but they cannot do so unless they had formulas which were tried and tested. The very reason the plaintiffs were appointed consultants was to ensure that the defendants would be in a position to market and sell the feeds immediately upon commencement of production; 6. as regards the 100 formulas, the parties to the project had

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agreed not to reveal its findings until 3 years after it was terminated. That aside, the irresistible inference to be drawn from a comparison between Nancy Wong's worksheets and the 100 formulas is, that the latter were taken from the project to which the plaintiffs were not a party; 7. training of the defendants' staff under cl 8 of the agreement was not done due to the plaintiffs' neglect or incompetence and not because of the defendants' default; 8. as for cl 7, contrary to T Fuji's assurance to Sekine that there would be a ready market for the defendants' feed from the plaintiffs' customers, it became apparent subsequently that the prawn farms under the plaintiffs' consultancy no longer existed - - this was confirmed by K Fuji and not denied by T Fuji; 9. T Fuji's efforts in arranging meetings between the defendants and the EDB were before the agreement was signed and before Ihara decided to invest in the defendants' project; 10. it was possible that the plaintiffs made the application to JTC in their own name because they intended initially to go into the venture with Ihara as at that time (June 1989) Sekine's intention was to matchmake an investor with the plaintiffs, the defendants not having made up their mind to run and manage a factory.

66 Counsel for the plaintiffs countered her opponent's arguments as follows:-

67 1. the plaintiffs had fully performed their obligations under the agreement which are to be construed in accordance with the scope and nature of their expertise as set out in the recitals (West London Railway v London & N W Railway (1853) 11 CB 327). They were ready and willing to perform their remaining obligations had the defendants not repudiated the agreement by failing to pay the management fee for April 1990 and suspending further payment. The plaintiffs are therefore discharged from further performance of the agreement and are entitled to contractual payments due prior to the termination and damages for breach of contract; 2. the defendants through

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Sekine well knew the scope and nature of the plaintiffs' expertise namely that of the Fuji brothers and that they possess the knowhow to manufacture high quality prawn feed and the ability and experience to market the feed; 3. Sekine knew that the plaintiffs/the Fuji brothers had never set up a feedmill in Singapore or were consultants to one. Therefore the assistance required from the plaintiffs under cl 1 of the agreement must be limited to technical matters concerning the appropriate equipment to be purchased and the installation and commissioning of the equipment; 4. in its ordinary and natural meaning the word 'plant' must be construed to refer only to the feedmill and not to the whole factory. The plaintiffs were not bound to apply for government approvals as this is not a technical matter relating to the setting up of a feedmill; 5. the plaintiffs have rendered all technical assistance which are 'technology concerned' (T Fuji's evidence at N/E p 44) by: a. introducing Sekine and Ihara's director Yano to EDB and participating in negotiations for incentives from the EDB; b. conducting investigations into available factory space, advising defendants of the same and applying to the JTC for a factory at Woodlands and Jurong; c. arranging for Sekine and Yano to see the operations of a feedmill in Jakarta of which the plaintiffs were consultant; d. sourcing and studying quotations from suppliers for the plant and machinery in the factory and discussing and negotiating with Ow of Star Union to ensure the construction of the feedmill was on a turnkey basis, after explaining to Sekine the differences between an extrusion and a pelletizing system; e. giving the defendants a list of suppliers of ingredients and customers, and a feasibility study on prawn farming; f. requesting the defendants to hire staff in readiness for their training by the plaintiffs.

68 The plaintiffs were unable to supervise the installation of the machines as:

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69 a. the defendants ignored the plaintiffs' instructions and continued construction without BCD approval; b. construction of the superstructure had to be but was not, completed, before the machinery could be installed notwithstanding which the defendants proceeded to install the machinery.

70 The defendants cannot complain that the plaintiffs did not supervise installation and commissioning when the plaintiffs were not informed that works were being carried out.

71 As for cl 2 of the agreement, the word used is 'formula'. If the plural word 'formulas' was intended then it would have been used as in cll 3 and 16. K Fuji had testified that only one good formula was needed for one species of prawn. If there is any ambiguity it should be construed against the defendants whose lawyers drafted the agreement. The plaintiffs in any event developed 6 formulas for the defendants. The allegation that these formulas were incomplete is clearly an afterthought. There was no need for the formulas to be complete as the agreement provided for supervision of production by the plaintiffs in particular K Fuji. In any event the defendants cannot complain about lack of specifications for the ingredients as they failed to purchase them when requested by the plaintiffs.

72 It was not possible for the formulas to have been taken from the project as even on Nancy Wong's evidence there were differences between the two. It was only upon the completion of the plant and the commencement of production based on the 6 formulas that tests on the feeds can be conducted and R & D carried out to improve the formulas.

73 As for the 100 formulas, it was never K Fuji's intention to use them for production purposes; he had merely shown them to the defendants out of

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goodwill. K Fuji had developed numerous formulas over the years and the 100 were extracted from the plaintiffs' records. In any event whether they came from the project is not relevant as the parties to the project had agreed to rescind the prohibition against publishing its findings. It was also Nancy Wong's evidence that only 88 of the 100 formulas could be traced to her worksheets and 13 out of the 88 could not be traced to the report. At least 25 formulas did not come from the project. K Fuji had pointed out many qualitative differences between the 100 and the project's formulas and small differences can give rise to different formulations.

74 With regard to R & D, the plaintiffs' obligation under cl 3 of the agreement can only arise after the plant had commenced production and tests conducted on actual feeds produced. It would be pointless and irrelevant to conduct tests on feeds not produced by the defendants as the character and quality of feed is very much dependent on the feedmill that produced it. Therefore the time for performance had not arrived when the agreement was terminated. The same argument applied to the plaintiffs' obligations under cll 7 (sales and marketing), 8 and 13 (training the defendants' personnel) as training has to be on a 'hands-on' basis.

75 The defendants terminated the agreement not because the plaintiffs were in breach but because they no longer wanted to be bound by the same and they thought SK Lim would be able to replace the plaintiffs; Hitachi's letter written by Kawachi was to help build up their case. Any delay in installation of the plant was due to the defendants' purchase of the factory which completion was two months after the scheduled date for completion of the plant.

76 The findings

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77 Before I determine the only issue in this case namely, who was the party in breach, it is pertinent to look at the consideration which the defendants were contractually bound to pay the plaintiffs under the agreement. Under cl 9 the sums payable by the defendants were, $100,000 upon the signing (29 August 1989) of the agreement and another $50,000 upon commencement of production. In addition, under cl 11, for 36 months from 29 August 1989, the defendants were to pay a monthly management fee of $10,000. Under cl 10 the plaintiffs would also collect a royalty of 3% on the production profits for 5 years. By April 1990, the defendants had paid the upfront fee of $100,000 and a further $70,000 in management fees, a total of $170,000 which is no small sum. Spread over the 8 month period (August 1989-March 1990) that the defendants paid the management fees the defendants' payments averaged out to $21,250 per month. The question of breach of the agreement must surely be viewed from the angle of whether the services provided by the plaintiffs were commensurate with the payments they received. As an extreme example it cannot be disputed that there is a vast difference between the expectations in performance of a person who receives remuneration of $100 as against a person who is paid $10,000.

78 I shall first set out the findings which emerged from the evidence adduced at the trial:

79 a. Sekine and in turn Ihara, were prompted to go into prawn feed manufacture by the rosy picture painted by T Fuji of the prospects of such a business; b. whilst it is true that the Fuji brothers had never acted as consultants in the construction and installation of prawn feed manufacturing facilities (as their counsel took pains to point out), the fact remains that they did not apprise Sekine or Ihara that their expertise was strictly limited to aquaculture and prawn feed formulations as they contended at the hearing; c. as was rightly pointed out

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by counsel for the defendants, the preliminary work done by T Fuji in bringing together Sekine, Ihara and the EDB before the agreement was signed cannot be considered as performance under cl 1 of the agreement nor can the fact-finding trip to Jakarta in June 1989; d. the 6 formulas handed to defendants by the plaintiffs were not tried or tested but they were developed by the plaintiffs. Without results of tank trials, the defendants would not know whether the 6 formulas could be used for feed production; e. the 100 formulas did not belong to the plaintiffs as undoubtedly they came from the PPD-Hitachi-Ebikken project to which the plaintiffs were not a party although K Fuji with Nancy Wong's assistance developed them. The plaintiffs' argument that at the final meeting of the project's participants the restriction against publishing its findings was lifted is irrelevant to the issue of ownership. In any case the meeting took place on 12 May 1990 after the defendants had allegedly breached the agreement. I am also not convinced by the arguments of the Fuji brothers that subtle differences in the ingredients would result in a completely different formula. I prefer the evidence of Nancy Wong in this regard that whatever dissimilarities there were between the two sets of formulas were due to typographical or keying-in errors and poor proof reading but they were one and the same. I reject K Fuji's explanation that he only handed the formulas to the defendants upon their request as a goodwill gesture and for comparison purposes only. This flies in the face of the plaintiffs' letter (written by T Fuji) to the defendants dated 17 April 1990 (DB19) where it was stated 'We are also enclosing a hundred formulations that we think may become necessary for your future production and procurement of raw materials'; f. there is no doubt that apart from preliminary inspections at the time when Sekine decided to purchase the factory, the Fuji brothers did not visit the factory to supervise the installation of the machinery which is why they were not aware until informed by Sekine in April 1990, of the work in progress. Indeed they tried to stop the defendants

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from continuing with installation for lack of approval from the BCD. The plaintiffs miscalculated the height required for the factory necessitating the floor having to be dug to accommodate the machinery. It would also appear from Tan's evidence that the flow chart T Fuji provided to Star Union was seriously flawed. In this regard the contention of counsel for the plaintiffs that the word 'plant' under cl 1 of the agreement does not refer to the entire factory is not borne out by the meaning of 'plant' in the Oxford English Dictionary (2 ed) where it is defined to include 'the premises and fixtures of a business; a place where an industrial process is carried on'. I therefore cannot accept her argument that the plaintiffs' obligation to supervise extends only to the equipment and not to the factory proper. Consequently the plaintiffs' contention that they do not have to assist the defendants to apply for government approvals is untenable; g. by T Fuji's own admission the plaintiffs' staff were never seconded to the factory to train the defendants' staff as provided under cl 8 of the agreement. His contention that he did not want his staff to waste their time waiting for the machinery to be installed is against the understanding in cl 11. That clause stipulated that the management fee of $10,000 'shall include the salaries of all necessary personnel from Trudina working on this project'. In other words even if the seconded staff were idling, their time was at the expense of the defendants. It would also appear from Tan's evidence that training does not necessarily have to be 'hands-on' as the plaintiffs contended. In any case this was not told to the defendants as Sekine's letter dated 17 April 1990 (AB54-55) to the plaintiffs for details of the training drew no response. On the defendants' failure to hire the 10 staff the plaintiffs had requested, it should be noted that the plaintiffs did not specify their requirements; h. no R & D was conducted by the plaintiffs. If the plaintiffs' reasoning is correct, namely that different machines albeit under the same system will produce different feeds notwithstanding that the same formula is used, I cannot imagine why the three parties to the project tested so many

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formulas bearing in mind that both Hitachi and PPD subcontracted feed manufacturing to different third parties; i. Sekine's testimony that the list of customers furnished by the plaintiffs was of no use (as they were no longer in the prawn farming business) was not challenged, neither was Kawachi's negative assessment of the Fuji brothers. The plaintiffs did not furnish a further list of customers when requested by Sekine, their explanation that in order to market the defendants' product they needed to have samples of the actual feed seems somewhat feeble when they had no customers at all save for possibly one at Pulau Ubin; j. the suggestion that the reason the defendants terminated the agreement was because they had recruited SK Lim from Hitachi as the plaintiffs' replacement is not borne out by subsequent events. If indeed that was true, the defendants would not have encountered so many problems (in themselves the problems are self evident that the plaintiffs did not discharge their obligations) and would not, even after employing Nancy Wong, still be incurring losses. Moreover SK Lim neither had the expertise nor the experience of the Fuji Brothers; k. despite the valiant efforts of counsel for the plaintiffs that the defendants' photographs do not conclusively prove that the factory was ready for production in May 1990, I am satisfied that it was ready for operation by 15 May 1990 as confirmed by Kawachi who attended the opening ceremony. It may be that for the whole of April and the first part of May 1990 Star Union had to work feverishly to get the factory ready for Ihara's representatives to attend the opening but they succeeded.

80 In summary what the plaintiffs provided under the agreement were the following:

81 a. the introduction and the appointment of, Star Union as a turnkey contractor for the factory; b. explanation of the differences between an extrusion and a pellet system feedmill; c. a flow chart to assist Star Union in the

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construction and installation of the machinery which turned out to be flawed; d. 6 unproven formulas and 100 other formulas which they did not own; e. a list of suppliers of ingredients, literature and brochures of other prawn feed manufacturers and a feasibility study on prawn farms.

82 The plaintiffs failed to provide the services stipulated in cll 3, 4, 5, 6, 7, 8 and 13 and only partially discharged their obligations in cll 1 and 2 of the agreement.

83 On the evidence I cannot but come to the conclusion that the plaintiffs in particular T Fuji promised more than what he or his brother or the plaintiffs could deliver and what was actually provided fell far short of what was stated in the agreement and far short of what a reasonable person would expect for payments totalling $170,000 spread over 8 months.

84 I accept that the test to be applied as to whether there has been a breach is that set out by Diplock LJ in Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd < 1962 > 1 AER 474. If I may paraphrase Diplock LJ's test (at p 488 letter I) what the court has to do where one party relies on a breach by the other party as giving him (the plaintiffs in this case) a right to elect to rescind the contract is to look at the events which have occurred as a result of the breach at the time at which the defendants purported to rescind the contract and to decide whether the occurrence of those events deprived the defendants of substantially the whole benefit which it was the intention of the parties as expressed in the agreement that the defendants should obtain from the further performance of their own contractual undertakings.

85 Applying the foregoing test it is clear that the defendants were not in breach when they did not pay the management fee for April 1990. In this regard

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I turn to a case cited by the defendants to support their stand but which the plaintiffs submit has no application, namely Fercometal SARL v Mediterranean Shipping Co SA < 1988 > 2 AER 742.

86 The dispute in that case concerned a charterparty for the carriage of cargo from Durban to Bilbao. Under the terms of the charterparty the charterers were entitled to cancel the charterparty if the vessel was not ready to load on or before 9 July. On 2 July the owners requested an extension of the cancellation date because the shipowner wished to load other cargo first in which case the vessel would not be ready to load the charterer's cargo until 13 July. The charterers cancelled the contract forthwith and engaged another vessel then at Durban to carry the cargo. The owners did not accept the charterers' repudiation which was in any event premature because it was given in advance of the cancellation date and on 5 July the owners notified the charterers that the vessel would start loading on 8 July. When the vessel arrived in Durban on that day the owners tendered notice of readiness although they were not in fact ready to load the charterer's cargo. The charterers rejected that notice and began loading their cargo into the substitute vessel. The owners brought a claim for deadfreight which was upheld on arbitration on the ground that the charterers' wrongful repudiation of the contract relieved the owners from complying with their own obligations and that therefore the owners' failure to tender the vessel ready to load on time did not prevent them claiming damages for the charterers' wrongful repudiation. On appeal the judge set aside the award. On further appeal, the Court of Appeal held that the charterers' prior unaccepted repudiation did not prevent them from cancelling the charterparty when the owners failed to tender a valid notice of readiness on 9 July. The owners appealed. The House of Lords dismissed the appeal and held that where a party to a contract wrongfully repudiated his contractual obligations before he was required to perform those

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obligations the innocent party could either affirm the contract by treating it as still in force or treat it as being conclusively discharged but if he elected to affirm the contract he was not absolved from tendering further performance of his own obligations under the contract. On the facts, the owners having affirmed the contract when they refused to accept the charterers' premature repudiation, could only avoid the operation of the cancellation provision in the charterparty by tendering the vessel ready to load on time (which they had failed to do) or by establishing (which they could not) that their failure was the result of their acting on a representation by the charterers that they had given up their option to cancel.

87 Counsel for the defendants relied on the case to contend that even if the defendants had repudiated the agreement the plaintiffs did not accept such repudiation until their solicitors' letter dated 4 June 1990 (AB176) and therefore they remained liable to perform their obligations under the agreement until then. His opponent argued the case is inapplicable as the House of Lords stated the position in a case of wrongful repudiation in anticipation of the time of performance.

88 I agree the case has no relevance but not for the reason put forward by the plaintiffs. On the facts I find no evidence, as alleged by the plaintiffs, that the defendants were in breach and did not intend to continue with performance of the agreement. This is clear from the defendants' letters (2) to the plaintiffs the first dated 12 April 1990 where Sekine requested the plaintiffs for information on how several clauses in the agreement would be implemented (see AB55) and said (in diplomatic terms as he testified), 'I am determined to maintain our friendly relationship if your company fulfills our requirements regarding your consultancy service to us, keeping in mind that this project stemmed from our personal relationship and that you supported me during my

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time of difficulty'. The second letter is dated 6 May 1990 (AB99-100) where in the concluding paragraph Sekine said 'with completion of the installation and test running the machines close at hand, it is necessary for every arrangement to be made clearly and precisely. Therefore, this is the time to clarify the content of our agreement, and call for substantial performance of your responsibilities. Unless you completely implement both our agreement and the items I requested to you in my letter of April 12 and in this letter of May 6 1990, we shall not pay you in the future'. The plaintiffs' response was to inquire if the defendants had obtained BCD approval and if not to stop all construction immediately. What is clear from Sekine's second last letter (10 May 1990) to the plaintiffs before the letter of demand from the plaintiffs' solicitors dated 17 May 1990 (see AB165) was that the defendants wanted the plaintiffs 'to make any substantial offer to us to improve our relationship'. Such words are hardly indicative of an intention to terminate a contract especially from a party who was highly dependent on the other's expertise.

89 Counsel in their submissions sought to discredit each other's witnesses pointing out what they considered to be inconsistencies in their evidence which was material. In particular counsel for the plaintiffs cautioned that Sekine's evidence should not be accepted because

90 (i) he was uncertain whether he first approached T Fuji or vice versa and his oral testimony contradicted his affidavit filed in court on 8 August 1990; (ii) his insistence that neither T Fuji nor K Fuji visited the factory after his letter dated 12 April 1990 cannot be believed as in the exchange of letters between the defendants and Star Union on 17 and 18 April 1990 (AB56 and 72) there was mention that the roof extension was not yet done and K Fuji had testified that the roof had a hole. Therefore K Fuji's visit must have been after 12 April 1990; (iii)he was unable to pinpoint the date when Ihara wanted to appoint the

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plaintiffs as consultants; (iv) he was wrong on the losses sustained by Hitachi in the project and grossly exaggerated the figure; (v) his insistence that the superstructure of the factory was completed in March 1990 is clearly not borne out by Star Union's progress payment schedule dated 27 April 1990 (DB24) which showed that only 30% of the superstructure had been completed. Further he proceeded with the work illegally without BCD approval; (vi) he testified that the defendants purchased tanks in September 1990 to conduct trials but Nancy Wong said the defendants were not equipped to commence tank trials when she joined them in 1992.

91 As for Nancy Wong, counsel said there was every reason for her evidence to be suspect as she left the plaintiffs' services and joined the defendants immediately.

92 Counsel for the defendants on the other hand argued that the evidence of the Fuji brothers lacked credibility in the following material aspects:

93 (i) K Fuji's claim under cross-examination that he did not understand the concept of ownership when he was questioned on the 106 formulas coupled with his uncertainty on the ownership of the 100 formulas as compared with his subsequent change of mind; (ii) K Fuji's claim that acetes was totally different from dried shrimp analogous to the differences between a cow and a pig when the test results showed that acetes is a species of shrimp; (iii)T Fuji's claim that installation of the equipment in the factory was not completed as late as early May 1990 when photographs DB67-71 clearly showed it was indeed completed as proven by the fact that the opening ceremony was held on 15 May 1990.

94 Having reviewed the evidence in particular that of the Fuji brothers and Sekine's, I am inclined to accept the latter's evidence as the more probable as

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Sekine's evidence on crucial points is supported by Kawachi and Yamanishi who I consider to be independent witnesses. The plaintiffs' criticisms of Sekine's evidence as highlighted above touched on what I consider a common error made by witnesses namely recollection of when events actually took place. Quite understandably no one can be certain of events which happened some 3-4 years before the trial and incorrect recollection of dates on what I consider to be inconsequential events should not be construed adversely against a witness.

95 I am of the view that the defendants were not in breach of the agreement notwithstanding that they did not pay the April 1990 management fee as, in the interval between April and May 1990, they were attempting to persuade the plaintiffs to comply with various clauses in the agreement and their efforts received no satisfactory response. Indeed it seems to me from the conduct of the Fuji brothers that the plaintiffs were looking for an excuse to avoid their contractual obligations, a prime example being the fact that the defendants proceeded with construction without BCD approval which fact even if true is irrelevant to the plaintiffs' responsibility to supervise the installation. I therefore dismiss the plaintiffs' claim with costs.

96 I turn next to the defendants' counterclaim wherein they sought a refund of the $170,000 paid to the plaintiffs. Whilst I find that the services provided by the plaintiffs amounted to less than $170,000 as alleged in para 12 of the defence, at the same time it cannot be said that such services had no value at all which would be the effect if the court awards the defendants judgment on the counterclaim pursuant to para 17 of the defence. I accept that the plaintiffs did not provide any consideration for the upfront fee of $100,000 paid by the defendants. At the risk of being arbitrary I would assess the value of the actual services provided by the plaintiffs to be worth 25% of the management fees ($70,000) paid namely $17,500. On the counterclaim therefore the defendants

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shall have judgment under para 17 in the reduced sum of $152,500 ($170,000 - $17,500) together with interest at 6% from the date of the writ (6 June 1990) until judgment and costs. Although the evidence adduced at the trial was minimal as to the loss and damage sustained by the defendants as a consequence of the plaintiffs' failure to perform the contract, I award the defendants interlocutory judgment on their claim for damages with the amount to be assessed by the registrar and the costs of such assessment are reserved to the registrar.

Lai Siu Chiu J

Zahara Bakar (Tan Rajah & Cheah) for the plaintiffs
Patrick Chong (Ong Tan Nair & Kwek) for the defendants

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