**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[1996] SGHC 123**

Suit No 2837 of 1987

Between

Nalin Industries Sdn Berhad

*… Plaintiff*

And

Hong Seng & Company (Private) Limited

*… Defendant*

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# GROUNDS OF DECISION

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# Nalin Industries Sdn Berhad v Hong Seng & Company (Private) Limited

**[1996] SGHC 123**

Suit No 2837 of 1987
Amarjeet Singh JC
18 June 1996

1 **Judgment:**

2 **GROUNDS OF DECISION**

3 The Plaintiffs claimed against the Defendants a balance of US$239,280.90 due and owing in respect of breach of contracts entered with the Defendants concerning the purchase of RBD palm olein ( palm olein ). The Plaintiffs adduced evidence confirming the Defendants purchases over the telephone by telexes which telexes included essential terms relating to the sale and purchase of the said palm olein.

4 The Defendants denied the claim and counterclaimed a sum of US$18,533.44cts. which consisted of a sum of US$1,033.92cts. for a short delivery, a sum of $10,000/- as commission due and the claim for the balance of US$7,499/- was abandoned by the Defence on the opening of the trial. The Plaintiffs conceded the short delivery and the commission as due to the Defendants.

5 The Plaintiffs evidence showed that various contracts were entered on behalf of the Plaintiffs either by K D Mall ( Mall ) their Marketing Manager or N V Avalani ( Avalani ) the Defendants Assistant Marketing Officer. It was the evidence of Mall and Avalani that they had entered into the contracts with the Defendants through one N.R. Roy ( Roy ) since 1984 and all telexes and correspondence concerning the sale and purchases were addressed to them. They testified into entering the following relevant contracts for the sale and purchase of palm olein with the Defendants:

6 (1) Contract 240/85 made on 31.5.85 which was amended and later rolled into Contract 455/85 on 27.8.85 which in turn ended in Contract 121/86 on 1.3.86.

7 (2) Contract 315/85 made on 5 July 1985 which was rolled into Contract 456/85 whereby which the Defendants incurred a loss of US$7,500/- for the rollover facility in respect of which a part payment of US$4,000/- was paid.

8 (3) 2,500 metric tons of palm olein consisting of Contract 631/85 for 2,000 metric tons and rollover Contract 456/85 for 500 metric tons for sale to the Defendants and delivery to their customer in Chittagong in November 1985.

9 (1) Contracts 240/85, 455/85 and 121/86 Contract 240/85 was entered by Avalani and Contract 455/85 by Mall with the Defendants through Roy as stated in the telexes. Essentially by Contract 240/85 the Defendants were to exercise their Option and advise the Plaintiffs whether they chose to ship their purchase in bulk (at US$547.50cts per metric tons) or in new drums (at US$627.50cts per metric tons) during a shipment period which was to end on 31.8.85. The Defendants were obliged to advise the date and the manner of the

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shipment by this date at the latest. The Defendants through Roy opted for shipment by drums but some time before 31.8.85 they requested for extension of time. Contract 240/85 was in the circumstances rolled over by agreement of the parties i.e. to be performed at the original contract price (US$627.50cts per metric ton) less US15/- per metric ton by the new extended shipment date of September/October 1985. In other words, to effect the rollover, the Plaintiffs purchased 500 metric tons in purchase Contract 55/85 and concluded the rollover of the 500 metric tons in Contract 455/85 (at US$607.50cts) with the Defendants relating to the extended shipment date September/October 1985. The Plaintiffs raised a debit note for US$15 x 500 metric tons i.e. US$7,500/- which remains unpaid. By October 1985 the Defendants failed to lift their purchase. Between November and January Roy further promised to lift and asked for various extensions of time which the Plaintiffs allowed and eventually on 27 February 1986 the Plaintiffs served a default notice as required requesting the Defendants to lift their purchase. On expiry of the Notice they bought back the 500 metric tons of palm olein at US$300.00 per metric ton, a price set and later published by the Palm Oil Refineries Association of Malaysia (PORAM) in Contract 121/86. From September/October 1985 to Ferbuary/March 1986 the prices of palm olein had been falling as documented in the PORAM publication evidenced in Court. The Plaintiffs thus claimed the difference between the contract price and the market price at < (US$607.50cts x 500) - (US$300 x 500) > amounting to US$153,750/- in addition to the earlier unpaid amount of US$7,500/-.

10 (2) Contracts 315/85 and 456/85 Contract 315/85 entered into by Avalani was for the delivery of 500 metric tons of palm olein in new drums at US$572.50cts and the delivery period for shipment was 10.8.85 to 30.8.85. On or about 27 August, i.e. shortly before the end of the shipment period, Roy

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requested the Plaintiffs for an extension of the shipment dates. A similar agreement was reached at Roy s request as in Contract 240/85. In the circumstances, in respect of the extended shipment the Defendants were to incur an immediate liability of US$15/- per metric ton for the 500 metric tons they had bought (US$7,500/-) setting at the same time the new contract price in Contract 456/85 at US$557.50cts per metric ton (US$572.50cts - US$15/-). To effect the rollover, the Plaintiffs purchased 500 metric tons in Purchase Contract 56/85 and concluded the rollover of the 500 metric tons in Contract 456/85 with extended shipment in October/November 1985. In respect of the immediate loss by the Defendants of US$7,500/- in Contract 315/85 a Debit Note was raised and the Defendants made part payment of US$4,000/- leaving a balance of US$3,500/- unsettled.

11 (3) Contracts 631/85 and 456/85 On about 5 or 6 November 1985 i.e. before the end of the shipment period on 30 November 1985 Roy intimated that the Defendants wished to purchase 2,500 metric tons of palm olein for resale to an end buyer in Chittagong, Bangladesh. It was agreed after negotiations between Mall and Roy that the basis of the purchase would be a fresh contract for 2,000 metric tons of palm olein and the remaining 500 metric tons would come from Contract 315/85 rolled into Contract 456/85. In the circumstances, Contract 631/85 on was concluded on 6.11.85 for the sale to the Defendants of 2,000 metric tons of palm olein at US$360/- per metric ton, bulk shipment being in November 1985. The price of Contract 315/85 which was FOB in drums at US$557.50cts per metric tons was adjusted downwards to US$507.50cts bulk and to reflect the absence of the use of drums as with Contract 631/85. The Defendants lifted both Contract 631/85 destined to buyer in Chittagong, Bangladesh and Contract 456/85 (rolled from Contract 315/85). The Plaintiffs were paid by L/C the sum of US$898,884.70cts in respect Contract 631/85 and

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part payment of Contract 315/85. The Defendants owed the Plaintiffs a balance of US$73,293.05cts together with the then still unsettled balance of US$3,500/-.

12 Mall and Avalani referred to the necessary documents which were evidenced in support of the above evidence in PB1 - PB151.

13 The Plaintiffs case was that in breach of the aforesaid contracts, the Defendants failed to advise or properly advise the Plaintiffs of the Defendants shipping instructions and or advise the Plaintiffs as to how to make delivery of the said palm olein at all to the Defendants and thereby repudiated the aforesaid contracts and or failed to make the balance of payments in respect of the contracts performed resulting in loss and damage to the Plaintiffs as claimed.

14 The Defendants defence substantially was: (i) one of denial of the various contracts as stated in respect of which the Plaintiffs claimed they suffered loss and damage and non-admission of receipt of the debit note/s or of making any part payment of monies as claimed by the Plaintiffs.

15 (ii) no Notice of Default had been given to the Defendants. In the absence of such notice, the Plaintiffs could not maintain the action.

16 (iii) that the contract for the purchase of 2,500 metric tons of palm olein was at the price of US$360/- per metric ton for shipment to Chittagong and the Defendants had caused a Letter of Credit to be opened in that sum for a total of US$898,884.70cts and as such they had paid in full the value of the said contract.

17 There were other miscellaneous submissions.

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18 I have already earlier set out the Defendants Counterclaim and briefly its basis.

19 During the hearing the Defendants applied for leave to re-amend their Defence by adding an alternative prayer to their denial of the claims as set out by the Plaintiffs in their Statement of Claim. The alternative prayer stated:

20 10a. Alternatively, the Defendants say that N.R. Roy was the manager of the Defendants from 1st February 1984 to 5th January 1987 and that he had no authority by the Defendants to enter into any contract without the approval of its directors. N.R. Roy was to acquire business for the Defendants and that any contract relating to such business will have to be signed by 2 directors of the Defendants with a chop of the Defendants affixed to such contracts. The alleged Contracts Nos 240/85, 455/85, 121/85, 315/85 and 456/85 were not signed by the directors of the Defendants with the chop of the Defendants, as such, there was no contract in respect of the aforesaid contracts.

21 10b. The Defendants admit entering into a contract for the purchase of 2500 mts RBD palm olein at 360 pmt and negotiated an LC for $898,884.72 for the delivery of 2496.902 metric tons.

22 Counsel for the Plaintiffs strenously objected to the eleventh hour application for leave to amend as the amendment was introducing a completely new ground that went to the root of the Plaintiffs claim as the Plaintiffs were claiming for the first time that Roy had no authority to enter any contracts without the approval of two of their Directors and that the contracts required their signatures and a chop and had not been so signed and chopped. I exercised

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my discretion nevertheless and allowed the Defendants leave to make the necessary amendments as stated above.

23 To give a complete history, I may add that the Plaintiffs went into receivership on 13 August 1992. One Kenneth Teh Ah Kian, a wintess (PW1) and another had been jointly appointed Receivers and Managers of the properties and undertakings of the Plaintiffs. Because of the many pressing problems connected with the receivership Sim Thean Wah a Sn. Consultant with Price Waterhouse (Malaysia) (PW2) was assigned to oversee the present proceedings only in 1994 and he thenceafter began putting the papers in the present case together as well as locating Mall and Avalani who had since left Singapore.

24 I shall now deal with the various defences raised which in my opinion had no merit.

25 Prior to the commencement of the trial, the Defendants defence was that there were no signed contracts between the Plaintiffs and the Defendants in Contract Nos. 315/85, 455/85 and 456/85. After the amendment introduced in Court during the trial the defence was or additionally was that the contracts were not in the form in which the said pleadings were amended in para.10(b) of the Defence and Counterclaim. Tan Kin Toa, DW1, the Managing Director and patriach of the Defendants by his Affidavit filed on 2 February 1988 had accepted that there was a signed contract (Exh. PB6-11) between the parties in Contract No. 240/85. At the trial he shifted his ground or changed his tact to conform to the eleventh hour amended defence and said there was no contract as it was an unauthorised one not being signed and chopped by two Directors and for any contract to be valid it must be so signed and chopped. He also said

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there were no contracts which two Directors had signed and chopped. I found all this completely untenable. In my opinion, the various contracts referred were concluded on the telephone and the telexes in each contract evidenced that fact. These telexes confirming the purchases made were never questioned or denied by the Defendants when they were received by the Defendants. The Defendants also did not deny receiving the telexes nor the other correspondence relating to amendments made to the contracts or the further correspondence relating to them as disclosed in the bundle of documents PB1-151.

26 Tan Kin Toa did not deny he had all this correspondence in his office. In my opinion, the Defendants raised no such dispute as the telephonic placing of orders for the purchases of palm olein and the purchases as confirmed by the telexes constituted the contracts as both Roy and the Defendants for whom he worked. Roy was an experienced trader in palm olein having previously worked for another firm Makhallal buying and selling palm olein contracts as testified to by Mall. Mall had also testified that he had visited Roy at the Defendants office soon after he was hired and traded with him as the employee of the Defendants. The visit was in the presence of both DW1 and his son Tan Yeow Leong ( Yeow Leong ). I further found that there was no necessity to put the already concluded contracts evidenced by the telexes into a written form as per the proforma form of the Palm Oil Refineries Association of Malaysia (PORAM) of which Exh. PB4- 11 a PORAM FOB contract is an example ( the proforma PORAM Contract ). Indeed nothing was brought to my attention by Defence Counsel to indicate the contrary. The proforma PORAM contract was mostly meant for submission and registration with PORAM as stated by Mall whose evidence as a trader in that speciality I accepted.

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27 I was satisfied that PORAM terms were substantially understood and applicable to the contracts concluded by the Plaintiffs and Defendants. Mall and Avalani testified that application of PORAM terms was common and Roy himself a commodity trader especially in palm olein was familiar with the said terms. In any event, I agreed with the Plaintiffs Counsel s submission that the Defendants had been trading with the Plaintiffs and were acquainted with the PORAM terms set out in the proforma PORAM contracts and that there was no merit to the Defence suggestion that the contracts were subject to the Defendants de facto receiving the PORAM FOB terms. For instance, one of the PORAM FOB terms was that a Notice of Default had to be given by the seller and the same was made an issue in relation to the rolled over contract 455/85 in respect of which I held there was such a notice as discussed later. Another was the arbitration clause which I shall deal wiht later. I was also satisfied that the validity of the oral contracts between the Plaintiffs and Defendants confirmed by telexes did not render them unlawful because the Plaintiffs failed to prove that they had registered the contracts with PORLA as required. The registration no doubt was in my opinion a requirement for administrative purpose and for statistical information. It added nothing to the relationship between the parties. The lack of registration with PORAM did not render the contract unenforceable. The Defendants had also not raised the matter in their pleadings at all nor Mall and Avalani questioned about the significance of the registration if it was that significant. Mall s evidence which I accepted as truthful after having heard him and assessed him, was that after the confirmatory telexes were sent a proforma PORAM contract would also be sent out to the Defendants after it was signed by the Plaintiffs for the signature of the Defendants and for its return and submission by the Plaintiffs for PORAM. According to him such PORAM contracts would be sent in respect of all contracts entered but often were not returned by the Defendants and in such an event would not be sent onwards to

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PORAM. Clearly it was a technical document which fact the Defendants knew or must have known. I was of the opinion that entering into formal written contracts would be plainly absurd and were it so would bring trading of commodities like palm olein (not to mention rubber, tin or other produce) the price of which fluctuated by the minute and hour to a halt. To state an example or two from the facts of the case: Contract 240/85 was entered into on the telephone on 31/5/85 and a confirmatory telex was dispatched to the Plaintiffs. In that case a PORAM contract was sent to the Defendants. Roy only signed it on 13 June 1985 as the date alongside the signature of Roy shows (Exh. PB11). it cannot be that the Plaintiffs should have been left in the lurch about knowing whether they had a contract or not if they had to depend on the Defendants returning the PORAM contract at their fancy in relation to a time sensitive transaction where the trading price fluctuated rapidly. Again in Contract 631/85 for 2,000 metric tons (part of 2,500 metric tons) the contract was performed by the Defendants and yet not signed by the Defendants although the Plaintiffs had signed it (PB97 - 100).

28 Tan Kin Toa s evidence on behalf of the Defendants in support of the amended paragraph 10(a) of the Defence and Counterclaim, that Roy had no authority by the Defendants to enter into any contract without the approval of two Directors and that a signature and and chop of the two Directors were required on the PORAM contract and that Roy s signature as put on the proforma PORAM contract 240/85 would not do may be dealt with in two stages. Firstly, I have found that the proforma PORAM contract was not required to bind the Defendants to their obligation as the contracts were being concluded on the telephone and confirmed by telexes. The proforma PORAM contract was not the decisive document. Whether it was Roy or whether it was the Defendants two Directors who signed and returned the proforma contracts

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was again not important as a contract expressed in that form from the evidence I evaluated was not intended by the parties to be the decisive or determining document to create a legal relationship between them. There only remained the other residual question which was also part of the alternative prayer i.e. para. 10(a) of the Amended Defence and Counterclaim and that is whether Roy had authority by the Defendants to enter and make contracts on the telephone as is customary in commodities trading on their behalf with the Plaintiffs and whether he communicated the purchases to the Defendants. I found ample and convincing reasons that he had not only such authority but that Tan Kin Toa s evidence that no contract is valid unless it is chopped and signed by two Directors as a meaningless afterthought that had been conjured. I am simply unable to believe his evidence that he and his son were not aware of the contracts being transacted by Roy on their behalf. Tan Kin Toa admitted that Roy was employed to deal in edible oils and dealt with all the edible oil dealings with the Defendants. If a deal was struck he would have to be informed. He had been asked at one point by the Plaintiffs Counsel You did not follow the trades and left it to Roy to which he had answered I would be kept informed by Roy. At another point he had said though that Roy did not keep them informed. In my opinion, Roy would have no reason not to inform Tan Kin Toa and/or his son immediately after the transaction was entered on the phone or at least on receipt of the confirmatory telex if that was not read by the son who was receiving telexes as prices fluctuated daily and it was in his interest that his employers knew about the price and the transacted contract immediately so that the Defendants knew of the risk of their purchase in a moving market and as they were buying for resale especially for the Bangladesh market.

29 As it was, after Tan Kin Toa concluded his evidence, his son Yeow Leong was not called to testify although it was intimated earlier that he would

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be a witness. It was Tan Kin Toa s evidence that all the incoming telexes were received by his female clerk and passed on to Yeow Leong and the outgoing telexes went through Yeow Leong. Yeow Leong was the one therefore who knew of the goings on in the office. He was a material witness to the telexes exchanged and the correspondence between the Plaintiffs and the Defendants. He would have been able to give first hand evidence of the various transactions concerning the palm olein entered and as to what Roy told him and what he said to Roy or whether Roy consulted him at all in the purchases on which purchases he was consulted and which not. The Defendants chose not to produce him to give evidence. His evidence was absolutely crucial to the Defence as he could speak and write English according to Tan Kin Toa s evidence and would be able to read and dispatch correspondence in English. Tan Kin Toa s evidence of what Yeow Leong told him was simply in the circusmtances hearsay. Also what Tan Kin Toa told Yeow Leong was unsubstantiated. He had said for instance that he had told Yeow Leong to speak to the Plaintiffs to inform the Defendants that they were unaware of Contract 455/85 in relation to which the Notice of Default (PB 32) had been sent. Tan Kin Toa had not mentioned this important fact in his Affidavit filed in 1988. Yeow Leong did not appear in Court to confirm Tan Kin Toa s story. Also Exh. PB33 sent by the Defendants in respect to the Notice of Default shows that Tan Kin Toa s story is untruthful. Exh. PB36 in reply simply stated that they were awaiting Roy s return who was overseas. Nothing was mentioned about the present allegations or there was no contract. Defence Counsel had also submitted that no Notice of Default or such adequate notice as in the PORAM FOB terms had been given or that it was inadequate. The Notice in Exh. PB32 on the other hand speaks for itself and refutes the Defendants submission. I therefore drew the inescapable conclusion that evidence of Yeow Leong which could be and is not produced would if produced

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- here - through Yeow Leong would be unfavourable to the person who withholds it i.e. unfavourable to the Defendants.

30 Tan Kin Toa had further testified that the Defendants did not make any part payment of US$4,000/- in connection with the liability of US$7,500/- concerning the rollover of Contract 315/85 to 456/85 as the Defendants had entered no such contracts. He provided a copy of a cheque for US$4,000/- (Exh. D4A) drawn on DBS and made payable to the Plaintiffs. He said the cheque was issued by Roy from his bank account with DBS which same was confirmed by an Asst Customer Service Officer of DBS. However, Tan Kin Toa merely stated that he did not make the payment when asked to confirm that the US$4,000/- received by the Plaintiffs was in fact recorded in their books as having been received from Hong Seng and not from Roy. When asked to clarify by the Court as to who paid he said he had no idea and he further stated he knew of no reason why Roy would want to pay the sum for a debt shown on the documents to be incurred by Hong Seng. Tan Kin Toa had also stated that in the 2 years Roy had worked with the Defendants he had no complaints against him. I found that the payment although made through a cheque belonging to Roy must have in all probability come from funds that the Defendants put him in possession of to make the payment. Roy was then only earning S$1,500/- - S$1,600/- per month in the employment of the Defendants. There was no reason for Roy to personally pay the Defendants debts.

31 As to the commission of $10,000/- the Plaintiffs evidence and case was that it was agreed that the commission was payable to the Defendants, not to Roy. The payment of the commission rose out of the Defendants entering a new contract with the Plaintiffs for sale of palm olein of 2,000 metric tons in Contract 631/85 which was, according to the Plaintiffs, amalgamated with the

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outstanding Contract 456/85 rolled over from Contract 315/85 thereby constituting 2,500 metric tons of palm olein to be sold to the Defendants and which was being delivered by the Plaintiffs to a Chittagong end buyer in a sub-sale by the Defendants. Mall had explained in his Affidavit (para.32) that the commission which he called a brokerage was to be given to the Defendants because Roy on behalf of the Defendants had arranged for the Bangladeshi end buyer to open a letter of credit directly in favour of the Plaintiffs - a sort of short cut which would ensure that monies would be received promptly by the Plaintiffs upon shipment as the Defendants had not been performing their contractual obligations as they should have been. The commission had been fixed at $5/- per metric ton in respect of the new order 2,000 metric tons (but not on the balance of 500 metric tons on the outstanding Contract 456/85). The Plaintiffs had conceded this commission as being payable to the Defendants and was confirmed in the Plaintiffs Statement of Account Exh. PB19 dated 31.7.86 some ten years earlier and well before the action was commenced. Defence Counsel relied on an Affidavit filed by one Agarwall in 1988 that the commission was payable to Roy which was not before the Court but Avalani had testified that Agarwall had no personal knowledge of the contracts. I accepted the evidence of Mall and Avalani as highly plausible on the matter that no commission was payable and none had ever been paid personally as such to Roy. If a secret commission was to be paid to Roy then Defence Counsel failed to explain why it was not paid to Roy although the contract for the sale of 2,000 metric tons (part of 2,500 metric tons) went through in November 1985. The Defendants not paying the Plaintiffs the balance of monies of US$73,293.05cts. could not be the reason for non-payment as the commission would have already been earned by Roy for putting the deal through and getting the end buyer to open a Letter of Credit in favour of the Plaintiffs for US$898,000/- which the Plaintiffs received. It was also all the more strange that Mall and Avalani did

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not arrange to pay or pay Roy the commission as Defence Counsel had put it to Avalani that from the kick back Roy was supposed in turn to give a kick back to one of you by which I suppose he meant Avalani or Mall. It would have been in the interest of Mall and or Avalani to do so if Defence Counsel s submission had any strength. Mall also testified that there were no arrangements for a commission other than that on this occasion as explained.

32 Tan Kin Toa had testified and denied that the Defendants entered the two contracts Contract 631/85 and 456/85 making up 2,500 metric tons. His evidence was there was only one contract for 2,500 metric tons at a price of US$360/-. In presenting his case thus, he was coruscating on thin ice. I have earlier stated how Contract 631/85 for 2,000 metric tons and Contract 456/85 (rolled from Contract 315/85) were purchased by the Defendants for their end buyer in Chittagong. I also found the facts as I have set out earlier. Tan Kin Toa was not able to produce or refer to the single contract for the said 2,500 metric tons of palm olein. The reference in the L/C (Exh. PB74) and the Plaintiffs Invoice which followed it and which reads: Quantity: 2,496.902 and Rate: US$360/- per metric ton have for their true construction to be read with the reference Contract Nos. ....631/85 and .....456/85 at the top of the page in the exhibit and , the other contemporaneous documents and the explanation of Mall. He explained the L/C was thus opened to reflect the end-buyers price for the 2,500 metric tons at US$360/- amounting to US$898,000/-. On the other hand Exh. PB7 a telex from the Defendants, a damaging piece of evidence against the Defendants, confirmed they bought 500 metric tons at US$507/- per metric ton and 2,000 metric tons at US$360/- per metric ton for loading on vessel Nyung Sung . What could be clearer than that? The truth therefore is as contained in Mall s evidence in Court and in para.32 of his Affidavit concerning the price of the shipment of the 2,500 metric tons of palm olein. Furthermore if there was

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one new contract for 2,500 metric tons, the commission payable to the Defendants would have been US$15,000/- (2,500 x US$5/-) and not US$10,000/- (2,000 x US$5/-).

33 Further, the Plaintiffs provided their internal sales contract and telex to the Defendants showing the quantity sold on 6.11.85 as amounting to 2,000 metric tons (PB72/73). The follow up telex of 8.11.85 (PB81) to the Defendants shows the shipment of 2,500 metric tons was effected as to 2,000 metric tons in respect of Contract 631/85 and the balance 496.902 metric tons in respect of Contract 456/85. The 3 plus tons short delivery was acknowledged by the Plaintiffs and their claim was based only on 496.902 tons delivered and not 500 metric tons.

34 Defence Counsel had made another submission of law mainly that the option to buy in new drums rendered the contracts where that was stipulated as uncertain and there was no contract until the option was exercised. The Defendants were on a sticky wicket. The option was only a subsidiary term of the contract giving the Defendants a choice in the method of shipment they wanted to employ and nothing else. The contract is set out in the telexes provided for a fixed price adjustment and there was no uncertainty. In any event, the Defendants exercised the option to ship new drums when the Defendants agreed with the Plaintiffs to rollover Contract 240/85 to 455/85.

35 As for Defence Counsel s submission that the PORAM contract required a dispute to go to arbitration and that the Court had no jurisdiction to hear the proceedings, the submission was, in my view, made on the hoof. It was made notwithstanding the fact that the Defendants had already taken numerous steps in defending the proceedings and s 6 of the Arbitration Act 1952 (Revised 1972)

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Laws of Malaysia which in effect is not dissimilar to the equivalent Singapore provision (s 7, Cap 10), would not apply.

36 Finally, it was the Defence Counsel s submission that the Plaintiffs should have mitigated their loss and bought back and contra d the purchases of the Defendants when a loss was showing at the end of the shipment period especially in regards to Contract 455/85. It was actually a circular submission. The Defendants had kept on asking for extension of the shipping dates. It was for them at some point to cut their losses and instruct the Plaintiffs instead. The only conclusion I drew was that the Defendants did not give such instructions as they were hoping that the market would turn in their favour. Instead it continued to head south.

37 I also dismissed the Defendants Counsel s submission that the Plaintiffs had not shown that they had a licence to trade in palm olein. It was not pleaded nor were the relevant witness questioned on it.

38 From the evidence, I was therefore satisfied on a balance of probabilities that:

39 1) Contract 240/85 was rolled into Contract 455/85 ending in Contract 121/86 involving the following payments owing by the Defendants: (i) US$7,500/- for the first rollover; (ii) US$153,750/- in respect of the default on Contract 121/86.

40 2) Contract 315/85 was rolled into contract 456/85 whereby which the Defendants incurred a loss of $7,500/- for the rollover facility of which US$4,000/- only has been paid and US$3,500/- remains due.

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41 3) the 2,500 metric tons of palm olein sold to the Defendants for their sale and delivery to a customer in Chittagong in November 1985 consisted of Contract 631/85 for 2,000 metric tons and Contract 456/85 being the rolled over contract for 500 metric tons as is evidenced by the documents on record. Under the rolled over contract I find the Defendants liable to pay the Defendants the balance on the shipment to Chittagong in the sum of US$73,293.05 for the 500 metric tons of which about 3 plus metric tons being short delivery was taken into account.

42 The Plaintiffs having admitted the Defendants counterclaim in the sum of $10,000/-, I find this sum payable to the Defendants.

43 In acceding to the Plaintiffs claim, I propose to make no order as to interest. The conduct of the Plaintiffs proceedings could have been expedited by them. They have taken a considerable time to have the same brought up for hearing. The blame for the long delay could not be attributed to the Defendants. In my opinion, it would not be fair to penalise the Defendants with additional interest being ordered against them.

44 I therefore make the following orders:

45 1) Judgment for the Plaintiffs in the sum of S$238,043.05cts. and costs to be taxed.

46 2) Judgment for the Defendants in the sum of US$10,000/- in respect of their Counterclaim and costs to be taxed.

47 3) There be no order as to interest.

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48 Dated this 18th day of June 1996

49 AMARJEET SINGH

JUDICIAL COMMISSIONER

Amarjeet Singh JC

Kenneth Tan assisted by Kevin Kwek (Shook Lin & Bok) for the plaintiffs
V Ramakrishnan (V Ramakrishnan & Co) for the defendants

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