IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 169

Suit No 119 of 1993

Between

Centrotrade Commodities Pte Ltd

… *Plaintiff*

And

Carsten Holdorff

… *Defendant*

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Centrotrade Commodities Pte Ltd v Carsten Holdorff

[1996] SGHC 169

Suit No 119 of 1993
C R Rajah JC
14 August 1996

Judgment:

J U D G M E N T

1. At all material times until his employment was terminated by the Plaintiffs, the Defendant was employed as the managing director of the Plaintiffs. The Plaintiffs claimed that it was a term of the Defendant's employment contract that he would work with complete loyalty solely for the Plaintiffs and protect the interests of the Plaintiffs to the best of his ability. The Plaintiffs also claimed that as a director the Defendant had a fiduciary duty in common law to act honestly, in good faith and in the best interests of the Plaintiffs, to safeguard the Plaintiffs'assets, to obey all lawful instructions given by the Plaintiffs and to exercise adequate skill and care in the discharge of his duties as managing director. The Plaintiffs further claimed that under the provisions of Section 157(1) of the Companies Act (Cap. 50) ("the Act") the Defendant as a director also had a statutory duty to act honestly and use reasonable diligence in the discharge of his duties as a director. The Defendant does not dispute that he has these contractual, common law and statutory duties to the Plaintiffs.

2. The Plaintiffs claim that the Defendant has acted in breach of these duties by (a) advancing to an Indonesian company called P T Oerip Mangkoedijaya ("Oerip") substantial sums of the Plaintiffs' monies which the Defendant knew he had no authority to do and which he knew the Plaintiffs' Board of Directors would not agree to do; (b) advancing a sum of $200,000/- to a company in Singapore called Brilliance Industrial Investment Co. (Pte.) Ltd. ("Brilliance") again without any authority and without approval of the Plaintiffs' Board; and (c) causing the Plaintiffs to pay $47,786/- for the cost of the maids who worked for the Defendant during his employment with the Plaintiffs when the Plaintiffs had no obligation to do so.

By reason of these breaches the Plaintiffs claim to have suffered loss and damages and terminated the Defendant's employment with them.

3. The Defendant admits authorising the advance of these monies by the Plaintiffs to Oerip but denies that he was thereby acting negligently or in breach of his duties and counterclaims for Damages and loss for wrongful termination of his employment. If, however, it is found that there was some negligence or breach of duty on his part, the Defendant seeks relief under section 391 of the Act on the basis that he acted honestly and reasonably. The Plaintiffs deny the termination was wrongful and further deny that the Defendant should be entitled to any section 391 relief. In order to decide on the Plaintiffs' claims and the Defendant's counterclaim it is necessary to understand the nature of the Plaintiffs' business and the administrative and financial procedures by which they operated.

4. At all material times, the Plaintiffs were commodity traders, principally dealing in rubber, coffee and cocoa. They were and are a wholly owned Singapore Incorporated subsidiary company of Centro International

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Handelsbank Aktiengesellschaft ("Centrobank"), a company incorporated and based in Vienna, Austria. Centrobank was run by an Executive Board comprising of Dr. Gerhard Vogt, Mr. Mag Jerzy Plusa and Mr. Christian Freidrich Sperk. The Plaintiffs' directors were nominated and appointed by entrobank and at all material times these directors were, Dr. Vogt, Mr. Plusa, Mr. Sperk, the Defendant and Mr. Leonard Peter Silvo Beschizza. Only the Defendant and Mr. Beschizza were REsident in Singapore, the other 3 being Based in Vienna.

5. Mr. Beschizza was in charge of the Plaintiffs' rubber business and the Defendant was in charge of all the Plaintiffs' other businesses as well as being overall in charge. The day to day operations of the Plaintiffs would therefore be run by the 2 of them. These operations were to be carried out in conformity with guidelines and limits set by Centrobank. These guidelines and limits were formulated by Centrobank so that it could have some control from Vienna over the operations of its various subsidiaries outside Austria.

There were various limits set and these are found in a Memorandum from Centrobank dated 24/11/88 ("the Memorandum"). Only 2 of these limits, the trading limit and the financial limit, are relevant to this case.

6. The Memorandum required the Plaintiffs to fix and observe a trading limit and a financial limit for each customer (i.e. Person they did business with). The trading limit set a ceiling for the total aggregate value of all outstanding contracts that the Plaintiffs could enter into with or for the account of any particular customer at any point in time. The financial limit set a ceiling on the total amount of unsecured credit that could at any point in time be extended to a customer. These trading and financial limits were set by Centrobank. The

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Plaintiffs had to submit an Application in a specified form to Centrobank in Vienna for the trading limit and financial limit for each customer.

7. Mr. Beschizza and the Defendant were given a blanket authority by Vienna (as defined in paragraph 13) to approve a trading limit of up to $500,000/- for any of the Plaintiffs' customers. Anything in excess of that had to be approved by Vienna. No authority was given to the Singapore directors to approve any financial limits. Any credit to be given to a customer had to be approved by Vienna.

8. The Plaintiffs say that the rules as to trading and financial limits applied to all the Plaintiffs' customers. The Defendant says that the requirement for trading and financial limits applied only to commodity trading Customers and not to customers with whom the Plaintiffs had other types of business dealings. For these other customers, the Defendant claimed Vienna gave him a carte blanche. There is nothing in the Memorandum, however, to suggest that these limits were intended to apply only to commodity trading customers nor is there any evidence that the Defendant was given such a carte blanche. It would defeat the purpose of these limits, which was to give some measure of control to Centrobank in Vienna over its subsidiaries' businesses Worldwide, if these limits were only meant to apply to some of the Plaintiffs' customers (i.e. its commodity trading customers) and not to others. The Defendant has not given any plausible explanation as to why these limits which applied to commodity trading customers were not meant to apply to the Plaintiffs' other customers.

9. In May 1992 Vienna learnt of the cash advances made on the Defendant's instructions by the Plaintiffs to Oerip, a non-commodity trading customer of the Plaintiffs, for which no financial limit had been requested for nor approved by Vienna. Vienna raised this with the Defendant by an E-mail dated 10/6/92. The

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Defendant responded by an E-mail dated 12/6/92 stating that the application for financial limit for Oerip would be made as soon as the Plaintiffs' Accountant and Financial Controller, Mrs. Chim, who was then away, returned.

At no time did the Defendant maintain or even suggest to Vienna that the rules for financial limits did not apply because Oerip was a non-Commodity trading customer. The Defendant sought to explain this by saying that owing to some bad losses suffered by Centrobank in East Europe the requirement for a financial limit had been extended even to non-commodity trading Customers. This presumably must have taken place after the advances to Oerip were made and before Vienna's E-mail of 10/6/92. No documentary or other evidence in support of this contention has been adduced and I do not accept this explanation.

10. The Defendant also signed together with all the other Plaintiffs' directors, a circular resolution in writing dated 1/9/92. This resolution states that the Defendant had been suspended as the Plaintiffs' managing director because of "violation of financial limits relating to P T Oerip Mangkoedijaya and Brilliance Pte. Ltd. which constitute justification of an immediate termination of the employment with cause.". I find that the Defendant would not have signed this resolution if the requirement for financial limits did not apply to Oerip.

11. For all the above reasons I find that the trading and financial limits were always meant to apply to all Plaintiffs' customers and not only to their commodity trading customers. I also find that the Defendant had no carte blanche in this regard when dealing with non-commodity trading customers.

12. The Plaintiffs also had to submit to Vienna weekly reports relating to their rubber and cocoa businesses and monthly management reports comprising of a Balance Sheet, Profit and Loss Account, Expenses Account, List of Accounts

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Receivables and Borrowing Report. A summary would be sent monthly summarising and consolidating the activities of the Plaintiffs for the month in one statement (E.g. Exhibit "P1A to G").

13. These weekly and monthly reports were received by the Plaintiffs' 3 Vienna-based directors in their capacities as directors of the Plaintiffs and as Centrobank's Executive Board. References to "Vienna" in this judgment, unless the context otherwise requires, are references to these 3 directors when acting in such capacities. The monthly accounts were also sent to Dr. Irgl who was at all material times Centrobank's financial controller.

14. To further Vienna's understanding and knowledge of what was going on in the Plaintiffs' operations in Singapore, Dr. Vogt and Mr. Sperk would come to Singapore 2 or 3 times a year (or more if any particular need arose). They would update themselves through the Defendant and Mr. Beschizza on the Plaintiffs' current performance and situation. The Singapore directors were therefore generally left alone to run the Plaintiffs' business of commodity brokers but they required the consent of Vienna if they wished to extend any customer's trading limits beyond S$500,000/- or grant any unsecured credit To any customer.

15. It is against this background that the Plaintiffs' claims against the Defendant are made. I shall deal with each of the 3 claims in turn.

The Oerip Claims

16. These claims are for the sums of $1,824,116.98 and $453,264/- . The first amount is the aggregate amount (inclusive of some interest) of various sums paid out from the Plaintiffs' funds either as advances to Oerip or to 3rd parties on Oerip's account. This amount has not been repaid by Oerip. The second

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amount is the SingDollar cost to the Plaintiffs in depositing US$240,000/- with Bank Pembangunan Indonesia (hereinafter called "Bapindo") as collateral for credit facilities extended by Bapindo to Oerip. This deposit has since been forfeited by Bapindo and Oerip has not reimbursed the Plaintiffs therefor.

17. There is no dispute between the parties that these amounts were in fact paid as set out above and remain Outstanding from Oerip. The Plaintiffs say the Defendant had no authority to make such payments, knew he had no such authority and concealed the fact of these payments from Vienna. These payments were therefore made in breach of his contractual, common law and statutory duties to the Plaintiffs. The Defendant says that these payments were all authorised and made with Vienna's full knowledge and consent. The background to these payments are set out below.

18. With regard to the claim for $1,824,116.98, sometime in 1989 the Plaintiffs took part in a business transaction which had nothing to do with commodity trading. It related to the purchase of 6 fishing vessels by the Plaintiffs for re-sale at a profit. This deal had been suggested by the Defendant. Dr. Vogt in his testimony says that when this transaction was approved by Vienna it was on the understanding that a buyer for the re- sale was in place and the buyer's payment was secured. In the event the buyer pulled out and there was no security for such payment. Dr. Vogt came down to Singapore and he and the Defendant then negotiated for the sale of these 6 ships first with an Indonesian company called P T Aru Fisherindo and then with Oerip. The negotiations with Oerip were conducted with Mr. Sumiskum Sumyaryo who controlled Oerip. The 6 vessels were eventually sold to Oerip for US$4.2 million giving the Plaintiffs a profit of some US$750,000/-.

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19. At the time Oerip contracted to purchase the vessels it did not have sufficient funds to pay for the 6 vessels and sought financing from Bapindo. The Plaintiffs were aware of this. Dr. Vogt testified that the Plaintiffs were repared to assist Oerip in obtaining the necessary financing but were themselves not prepared to finance Oerip. Eventually in October 1990, Oerip paid the Plaintiffs for the ships by a letter of credit payable in 180 days i.e. in April 1991. Dr. Vogt and Mr. Sperk testified that as far as Vienna were concerned, the purchase and re-sale of the 6 fishing vessels was a one-Off transaction and with the sale to Oerip that was the end of the transaction relating to these ships. There was never any intention much less any decision taken to lend any money to Oerip either to finance Oerip's purchase of the vessels or its operation of the vessels. Dr. Vogt and Mr. Sperk also testified that in 1990 after the sale of the 6 fishing vessels to Oerip, the Defendant asked them if the Plaintiffs would make a loan for working capital to Oerip to assist it in the operation of the 6 vessels and they expressly rejected this suggestion.

20. In August 1991, the Defendant sent to Vienna the Plaintiffs' business plan for the second half of 1991 and for 1992. He stated in the plan that the Defendant had begun to market fresh frozen fish in Singapore from an Indonesian source and that if the planned line of business came to fruition, it would offer Plaintiffs a regular source of income. Although there had been some general discussions between the Defendant and Dr. Vogt about the possibility of Plaintiffs doing some fish agency business, Dr. Vogt says this was the first time the Defendant had made any specific proposal relating to such a business.

At this preliminary stage the total amount of the business was small - some 2 to 3 thousand USDollars only.

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21. In the Plaintiffs' 1992 budget proposal, however, the Defendant projected a gross trading profit of US$450,000/- from a fish business. By an E-mail dated 19/2/92 Dr. Irgl asked the Defendant for particulars of this fish business. The Defendant replied by E-mail on 20/2/92 stating that the fish business involved the Plaintiffs in "merely acting as sales agents" for the owners of the fish and selling the fish in Malaysia and Singapore. The Plaintiffs would then remit the sales proceeds to the owners after deducting the Plaintiffs' sales commission of some 10%. This commission was anticipated to be US$450,000/-.

22. This response apparently did not wholly satisfy Dr. Irgl who wanted to know what risk was involved for the Plaintiffs in carrying out this fish business. So he sent another E-mail dated 21/2/92 to the Defendant asking what risk there was for the Plaintiffs in doing the fish business, stating also that if the Plaintiffs were only acting as agents, the risk should be limited. The Defendant replied on 25/2/92 reiterating that the Plaintiffs were "acting only as agents selling whatever is available on a spot basis" and that Vienna should therefore "consider this business free of risk". According To Dr. Vogt and Mr. Sperk this remained Vienna's understanding of the fish business. This is confirmed by Mr. Sperk's travel report of his visit to Singapore during 8 to 15 April 1992 which states that "As far as the fish business is concerned, Mr. Holdorff explained again that Centrotrade is only involved in marketing the chilled fish ...

" It is true that this travel report was not given to the Defendant for vetting or confirmation. However, the Defendant did agree during cross-examination that this travel report set out a fair summary of his discussions with Mr. Sperk on the fish business during that visit.

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Dr. Vogt accepted there would of course be some expenses such as travel, accommodation and the cost of employing personnel to carry out this business for which US$116,000/- had been budgetted.

23. Although no financial limit (i.e. AUthorisation for Plaintiffs to grant credit and the quantum thereof) had been obtained or even applied for from Vienna with regard to Oerip, much less approval to lend money to it, the Defendant had authorised the use of the Plaintiffs' funds to make advances to and payments on behalf of Oerip. By 31/12/91 these advances and payments totalled S$665,067.15. They continued through to July 1992 and as at 31/12/92 the total amount outstanding together with interest accrued thereon was $1,824,116.98.

24. Dr. Vogt and Mr. Sperk testified that they only learnt about the advances to and payments on behalf of Oerip upon receipt in Vienna of Mrs. Chim's fax of 22/5/96 which referred to some of these advances and payments. Thereafter Mr. Sperk who was in Kuala Lumpur at that time had a meeting with the Defendant. His travel report dated 23 - 30 May 1992 refers to the payments to Oerip as having been made without Vienna's knowledge and in violation of the financial Limit requirement. Although the Defendant neither vetted nor confirmed this report, a subsequent fax dated 11/6/92 from Dr. Vogt to the Defendant Opens with the sentence "We are still awaiting your report for Oerip on the unauthorised lending". There is no evidence of any response by the Defendant refuting the allegation of Anauthorised lending nor any explanation by the Defendant in relation thereto.

25. The Plaintiffs also point out that the monthly accounts sent to Vienna list out the names of all the Plaintiffs' debtors And the amount of their debts. The Defendant agreed during cross-examination that by October 1990 Oerip was already a debtor of the Plaintiffs. Oerip's name Should therefore have appeared

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in the list of debtors for the period from October 1990 onwards. Oerip's name, however, never appeared as a debtor in these accounts. The Plaintiffs claimed that the Defendant was responsible for this as he did not want Vienna to know about the payments to and on account of Oerip. The Defendant's evidence is that he knew little about how these accounts were prepared. This was left to Mrs. Chim who as the Plaintiffs' Financial Controller and Accountant was responsible for preparing those accounts. He did not know why she drew up the monthly accounts in a manner that did not reflect Oerip's name as a debtor.

26. At the time of the trial Mrs. Chim was still in the employ of the Plaintiffs. They could have called her to give evidence on this issue. They chose not to. Nor did the Defendant call her to give evidence. I accept that Mrs. Chim was the person in charge of preparing the monthly accounts to Vienna. Her evidence is crucial for any determination of why Oerip's name had not appeared as a debtor. Although she was available to give evidence both parties chose not to call her. The burden of proof is on the Plaintiffs to prove their allegation that it was the Defendant who was responsible for the monthly accounts failing to reflect Oerip's name as a debtor.

It is possible that the Plaintiffs' allegation is true. However, it is also possible that there is some other explanation therefor and the Defendant was not therefore responsible for the omission. In all likelihood Mrs. Chim's evidence would have settled this. Without her evidence, especially since it was available, I am not prepared to find that the Plaintiffs have sufficiently proved their allegation that the Defendant engineered Oerip's name being left out from the list of debtors. Nor has the Defendant satisfied me that he was not responsible for the omission. I simply make no finding on this issue.

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27. With regard to the claim for $453,264/-, on or about 16/3/90 the Defendant on behalf of the Plaintiffs entered into an agreement with Oerip agreeing to loan Oerip US$240,000/- so that Oerip could place that amount in deposit with Bapindo in Indonesia as security for loan facilities. In the event, the Plaintiffs did not lend Oerip the money but instead opened on or about 23/4/90 a USDollar fixed deposit with Bapindo for US$240,000/- (actually US$239,960/- as US$40/- was deducted as bank commission) by a transfer of funds from the Plaintiffs' SingDollar account with Standard Chartered Bank in Singapore. This fixed deposit was placed with Bapindo as security for Bapindo's loan to Oerip.

28. The Plaintiffs' case as testified to by Dr. Vogt and Mr.Sperk is that all this was done completely without Vienna's knowledge or authority and that Vienna would never have agreed to lending the money to nor to putting it up as collateral for Oerip. The Defendant knew this and that is why he not only failed to notify Vienna thereof but also sought to conceal it from them.

29. The Plaintiffs made the following points in support of their case. Firstly, no financial limit had been applied or approved for Oerip. Secondly, there was no Board or other resolution approving the loan or provision of collateral by the Plaintiffs to or for Oerip. Thirdly, the monthly accounts and reports sent by the Defendant to Vienna treat this deposit as a prepayment and not as a deposit. This was done to camouflage its existence and conceal it from Vienna. Fourthly, all bank accounts of the Plaintiffs require 2 signatories, usually the Defendant and Mr. Beschizza the other Singapore director. This fixed deposit account had only one signatory, the Defendant. Fifthly, there was no record in the Plaintiffs' minute book of Board resolutions nor in any of the other records of the Plaintiffs of a Board resolution having been passed for the opening of this fixed deposit. Yet when Bapindo required a copy of the Board resolution for the opening of the fixed deposit, the Defendant certified as true a copy of such a resolution as

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having been passed on 3/4/90. Sixthly, by a letter dated 26/2/92 to the Plaintiffs' auditors Deloitte & Touche the Defendant stated that the US$239,960/- deposit with Bapindo was "not under any lien and remittance to Singapore is not subject to any limiting Conditions". When the fact of the deposit became Known to Vienna and the Defendant was asked to repatriate the sum to Singapore immediately, he told Vienna that the transfer to Singapore would be delayed because of some tax Complications. This was not true. The real reason was that Bapindo would not release the deposit until Oerip's liability to them was discharged. In the event the deposit was Appropriated by Bapindo and never returned. Seventhly, the Defendant also informed Vienna at this time (May/June 1992) that one of Oerip's vessels had been given to the Plaintiffs as security for the Plaintiffs providing the deposit as collateral for Oerip. This too was not true and the Defendant knew it was not true as he had earlier received legal advice that such security was of little value as the security document "does not create either a mortgage or a maritime lien and therefore does not give Centrotrade a proprietary interest in the vessel".

30. The Defendant's case is that Vienna at all material times knew that the Plaintiffs were advancing monies to and making payments on behalf of Oerip and had approved of it. Vienna similarly knew and approved of the Plaintiffs providing the funds for the US$240,000/- deposit with Bapindo. Vienna knew that without this deposit Bapindo would not grant Oerip the loan to purchase the 6 vessels and without that loan Oerip could not pay the Plaintiffs the US$4.2 million for the 6 vessels. Vienna was prepared to provide the deposit because otherwise the sale to Oerip would not go through and the Plaintiffs would lose the US$750,000/- profit from the sale. Vienna similarly knew that without making the payments and advances making up the $1,824,116.98 claim Oerip

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would not be able to operate its fishing vessels and make the kind of catch that would give the Plaintiffs the anticipated profits of US$450,000/-.

31. The Defendant called Mr. Sumyaryo, the owner of Oerip, to testify for him. Mr. Sumyaryo said that from december 1989 to the end of 1990 he had never asked Plaintiffs for any loan. With regard to the cash deposit which had to be made with Bapindo (which in the event was US$240,000/-) Mr. Sumyaryo said that he told Dr. Vogt sometime in December 1989 that Oerip might need some assistance with this deposit but Dr. Vogt did not say anything. If Mr. Sumyaryo ever believed that Dr. Vogt would agree to the Plaintiffs providing Oerip with such assistance, Dr. Vogt's letter to him of 29/12/89 should have dispelled it. In this letter Dr. Vogt makes it clear that the Plaintiffs would not release any of the 6 vessels to Oerip until they had been fully paid for. Dr. Vogt took this position even though it was commonly recognised that if the vessels were released Oerip could operate them and generate income to help pay for the vessels whereas no such income would be earned so long as they remained with the Plaintiffs.

32. The letter also stated that the Plaintiffs would help Oerip to find bridging finance so they could pay the Plaintiffs for the vessels without having to wait for the Bapindo loan. Nowhere did the letter suggest that the Plaintiffs would themselves be prepared to provide any financial assistance to Oerip or settle for anything less than full payment before parting with the 6 vessels. Mr. Sumyaryo testified that he was disappointed with this letter because he said he believed that Dr. Vogt was prepared for a joint venture with Oerip for the operation of the 6 fishing vessels. This letter, however, showed that Dr. Vogt was only interested in obtaining full payment for the 6 vessels as soon as possible. He was obviously not interested in any continuing relationship with or providing any financial assistance to Oerip.

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33. After the meeting with Dr. Vogt in Jakarta on 28/12/89, Mr. Sumyaryo neither met him nor even spoke to him on the telephone until September 1992. As Dr. Vogt had not on or prior to 28/12/89 agreed to Plaintiffs granting Oerip any financial assistance, any such assistance granted by the Plaintiffs to Oerip prior to September 1992 must have been pursuant to arrangements made between Mr. Sumyaryo and the Defendant. All the advances relating to the $1,824,116.98 and $453,624/- claims were made to or on behalf of Oerip prior to September 1992. Any impression that Mr. Sumyaryo may have formed during this period that the Plaintiffs and Vienna were prepared to give Oerip financial support could only have come from the Defendant and not Dr. Vogt or anyone else in Vienna. I do not find that his evidence supports the Defendant's case that Vienna knew and approved of the Plaintiffs' monies being advanced to or on behalf of Oerip.

34. Dr. Vogt's letter of 29/12/89 was copied to the Defendant. Even if the Defendant did not already know it, that letter must have made it clear to him that Vienna were not prepared to provide any financial assistance to Oerip in this matter. Apart from the Defendant's own assertions, there is no other documentary or other evidence to support the Defendant's claim that Vienna knew about and approved of the payments and advances comprising the US$1,824,116.98 or the deposit of US$240,000/- as collateral.

35. The Defendant has also not advanced any reason why Vienna would have changed its mind between Dr. Vogt's letter of 29/12/89 and April 1990 when with the making of the US$240,000/- deposit the Defendant began authorising the use of the Plaintiffs' funds for Oerip's purposes. It could not have been just because Vienna was anxious to make the US$750,000/- profit on the sale because Dr. Vogt's letter of 29/12/89 was written in terms which showed that Vienna was not prepared to fund Oerip simply to ensure the sale went through.

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It also could not have been because Vienna wanted to earn US$450,000/- a year from the fish business and was therefore prepared to advance monies to Oerip to fund the expenses incurred in Oerip's fishing operations. This is because I accept that Vienna did not even know that the Defendant proposed to do any such fish business until August 1991 when they received the second half 1991/1992 business plan from the Defendant and in any event believed that it was a risk free operation. Vienna could not therefore have known that the Defendant was well on the way to financing Oerip's operations to a tune of well over US$1 million and have approved of it.

36. With regard to the 7 points the Plaintiffs make in support of their case relating to the US$240,000/- deposit and referred to in paragraph 29 hereof, except for the 3rd point on which in the absence of testimony from Mrs. Chim I make no finding, I find that the Defendant has not provided any satisfactory response to the other 6 points and hold that these 6 points support the Plaintiffs' case.

37. I accept Dr. Vogt and Mr. Sperk's testimony that the advances to and payments on behalf of Oerip relating to the $1,824,116.98 claim and the providing of the US$240,000/- deposit were all made without the knowledge or approval of Vienna. The documentary evidence there is (and in particular the circular resolution of 1/9/92 referred to in paragraph 10) also supports the Plaintiffs' case. I find that these monies were expended without Vienna's knowledge or approval although the Defendant knew that Vienna's prior approval should have been obtained before any such payments or advances or deposits were made. The Defendant was thereby in breach of his contractual as well as his common law and statutory duties to the Plaintiffs and is accordingly liable to them on the Oerip claims.

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The Brilliance Claim

38. In October 1990 the Defendant authorised the advance of $200,000/- of the Plaintiffs' monies to Brilliance purportedly as a deposit for rubber trading with or through Brilliance. The Plaintiffs claim that the monies were never placed with Brilliance for that purpose and that no rubber trading by or on account of the Plaintiffs took place with regard to those monies. The advance was unauthorised and was tantamount to theft thereof by the Defendant.

39. The Defendant's case was that the $200,000/- was advanced pursuant to a joint venture between the Plaintiffs and two other companies, Sin Huat Rubber and Singapore Tong Teik. The Plaintiffs, Sin Huat Rubber and Singapore Tong Teik were each to place $200,000/- with Brilliance who were rubber brokers. Brilliance would then use these monies to buy and sell rubber futures and physicals and engage in arbitrage business on the rubber markets. The profits would be divided equally between the 3 joint venture parties.

40. The Defendant testified there was no written agreement relating to this joint venture. He maintained that there was a file note setting out the terms of the joint venture agreement in one of the Plaintiffs' files but no such note was produced to the Court. In support of his case the Defendant called Mr. Lee Han Tiong, a director of Brilliance. The Defendant did not call anyone from Sin Huat Rubber or singapore Tong Teik to give evidence.

41. Mr. Lee's testimony initially supported the Defendant's case to the extent that he said that the $200,000/- had been deposited with Brilliance in October 1990 to purchase rubber on the rubber futures market on behalf of the Plaintiffs. Under sustained cross-examination, however, he admitted that Brilliance was a dormant company in 1990. It had earlier lost money in the course of its business

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and used the $200,000/- from the Plaintiffs to help cover this loss. Mr. Lee said the Defendant who was his old friend knew that the money was being used for this purpose. Brilliance was to repay the money to the Plaintiffs after 3 months together with interest at 8.5% per annum. However, owing to financial difficulties Brilliance was unable to repay the money in time.

42. During re-examination Mr. Lee resiled from what he had said under cross-examination. He now said that the 200,000/- had been placed with Brilliance for trading in rubber pursuant to a joint venture arrangement between the Plaintiffs, Sin Huat Rubber and Singapore Tong Teik. I reject this version of Mr. Lee's testimony and accept what he stated during cross-examination as reflecting the true circumstances behind the Plaintiffs placing the $200,000/- with Brilliance. The Defendant clearly had no authority to make such a loan to Brilliance on behalf of the Plaintiffs. Although I do not hold that the Defendant's conduct amounted to theft of this money, he was clearly acting in breach of his authority and his duties to the Plaintiffs in making such a loan to Brilliance. He must accordingly be responsible for whatever loss or damage the Plaintiffs have suffered by reason thereof.

43. The whole of the principal sum $200,000/- has since been refunded to the Plaintiffs but none of the interest due thereon was repaid. Such interest amounts to $48,726.31 and I find that the Plaintiffs are entitled to recover this amount from the Defendant.

The Maids Claim

44. Throughout his employment with the Plaintiffs between August 1986 and September 1992 the Plaintiffs paid for the cost of the maids who worked in the Defendant's home. This cost amounted to $47,786/-. The Defendant claimed

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that the plaintiffs were obliged to pay this cost under the terms of his employment. The Plaintiffs, however, say they had no such obligation and that the Defendant took this sum of $47,786/- from the Plaintiffs without the Plaintiffs' knowledge or consent and therefore stole this amount.

45. It is true that there is no specific mention in the Defendant's contract of employment with the Plaintiffs that the cost of his maids would be paid by the Plaintiffs. However, these costs were throughout his employment regularly paid for by the Plaintiffs. The payments were made quite openly and without any concealment from Vienna or anyone else. In fact, the maids were all employees of the Plaintiffs and for whom the Plaintiffs issued IR8A forms prepared each year by Mrs. Chim for Inland Revenue. They were therefore not employees of the Defendant for whose cost the Defendant had somehow reimbursed himself from the Plaintiffs' funds. They ere employees of the Plaintiffs and the fact and nature of their employment and the reason therefor must have been known to Vienna. There is no evidence of the Defendant seeking in any way to conceal from Vienna the fact that the maids had been employed and paid by the Plaintiffs for the purpose of working for him.

46. Simply because there was no specific mention in the employment contract of the Defendant being provided maids at the Plaintiffs' expense does not necessarily mean there could not have been such an arrangement agreed to either expressly or implicitly by Vienna. Vienna knew of the employment of the maids and why they were employed. By not objecting thereto and paying their salaries over the years, Vienna by its conduct, if nothing else, accepted that the Defendant was entitled to be provided with a maid. Again, Mrs. Chim may have thrown some light on this matter but she did not testify. On the basis of the evidence before me I do not find that the Plaintiffs have sufficiently proved their case on the maids claim and dismiss the same.

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Section 391

47. The Defendant has argued that even if he was in breach of duty, the Court should grant him relief under its powers granted by Section 391 of the Act. Buckley J. in In re Duomatic Ltd. < 1969 > 2 Ch 365 considered the provisions of Section 448 of the English Companies Act 1948 which is pari materia with Section 391 of the Act and said at page 375:-

"The section enables the court to grant relief where three circumstances are shown to exist. First of all the position must be such that the person to be excused is shown to have acted honestly; secondly, he must be shown to have acted reasonably; and thirdly, it must be shown that, having regard to all the circumstances of the case, he ought fairly to be excused."

The burden of proof lies on the Defendant to satisfy me that these 3 circumstances exist in relation to the Oerip and Brilliance claims. The Defendant, however, has not satisfied me that the second and third circumstances exist in this case. The Section 391 relief the Defendant claims is therefore not granted and there is no need for me to find if the first circumstance exists.

Conclusion

48. I accordingly give judgment to the Plaintiffs for the amounts of $1,824,116.98 and $453,264 on the Oerip claims and $48,726.31 on the Brilliance claim. The Defendant's counterclaim for wrongful dismissal is dismissed. I informed the parties of this decision on 17/7/96 and asked them to address me on the issue of interest which they did on 20/7/96. Having heard their submissions I decided that the Defendant should pay the Plaintiffs interest

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on the judgment sum totalling $2,326,107.29 at 6% per annum with effect from 20/7/96. In all the circumstances of this case and in particular because the maids claim was in the context of this case a relatively minor claim and comprised only a small element of these proceedings, I also decided that the Defendant should pay the Plaintiffs full costs of these proceedings on a standard basis. All this I now confirm and order.

C.R. RAJAH
JUDICIAL COMMISSIONER

C R Rajah JC

K Shanmugam assisted by Foo Maw Shen (Allen & Gledhill) for the plaintiffs
Chistopher Bridges assisted by Andy Choy (Bridges Choy & Lopez) for the defendant

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