IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 247

CC No 39 of 1997

Between

Etrali Societe Anonyme

… *Plaintiff*

And

Trianco Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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

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Etrali Societe Anonyme v Trianco Pte Ltd

[1997] SGHC 247

CC No 39 of 1997
Lai Siu Chiu J
02 October 1997

Judgment:

Cur Adv Vult

The facts

1. The plaintiffs are a company incorporated in France and are manufacturers of Etradeal Dealer Board Systems (the system[s]) with their spare parts and accessories. These systems are used by banks and other financial institutions for purposes of trading in foreign currencies. The defendants are a Singapore company which at the material time were the exclusive distributors in Singapore of the systems under an agreement signed with the plaintiffs dated 11 November 1992 (the agreement). The agreement also appointed Trianco Sdn Bhd (the Malaysian company) and PT Triancoria Megah (the Indonesian company) as exclusive distributors of the systems in Malaysia and Indonesia respectively.

2. The agreement contained the following terms:

a. the plaintiffs would lend the defendants a demonstration set of the system for 6 months, which period may be extended;

b. the plaintiffs would provide assistance and complimentary training for the first system installed;

c. all systems would be provided with one year's warranty against manufacturing defects by the plaintiffs;

d. the defendants would pay 30% of the system upon ordering and the balance 70% 30 days after delivery;

e. the defendants would be allowed to sell the plaintiffs' products in other Asean countries with the plaintiffs' approval.

3. Pursuant to the agreement, the plaintiffs supplied to the defendants thirteen (13) of the systems which the defendants sold to banks in Singapore. However the plaintiffs either received late or no payments from the defendants for the orders with the result that in late September 1994, the plaintiffs' President and General Director Henri Baude (Baude) and the accounts manager Marc Mantelet (Mantelet) visited the defendants in Singapore and met with their director/chairman John Tay Keng Hock (Tay). Baude and Mantelet requested payment of the plaintiffs' overdue invoices and delivered an ultimatum that unless the same were settled within one (1) week, the agreement would be terminated.

4. As payments were not received from the defendants within the plaintiffs' deadline, the plaintiffs terminated the agreement by a letter dated 7 October

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1994 taking the position that the agreement had been repudiated by the defendants.

5. The defendants through their solicitors contended that they did not pay because the plaintiffs failed to provide proper accounts. The plaintiffs' solicitors rebutted the defendants' allegation in a letter dated 18 May 1995. Further correspondence between the parties' solicitors failed to resolve the dispute and eventually the plaintiffs commenced these proceedings.

The pleadings

6. In the statement of claim, the plaintiffs alleged that the defendants had breached the terms of the agreement in that they:

(i) failed to pay 30% upon placing their orders where the end-users made a down payment and failed to pay the balance 70% 30 days after delivery of the goods;

(ii) failed to pay 15% upon issuing their purchase orders where the end-users did not make a down payment, and failed to pay the balance 85% 30 days after delivery.

The plaintiffs alleged that by such conduct the defendants evinced an intention not to be bound by the agreement and had repudiated the same, which repudiation the plaintiffs accepted.

7. The plaintiffs averred that despite repeated requests from themselves and their solicitors, the defendants refused to pay the following outstanding sums:

Date	Invoices	Customer	Amount
8.2.94	11195	Krediet Bank FF	52,500
29.10.93	10793	Bank of China	37,030

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11.10.93	10691	Bank of China	20,800
18.1.94	38376	Bank of China	27,260
8.1.94	11196	Bank of China	63,610
29.9.94	12172	Banco Santander	13,020
30.11.94	12476	Societe Generale	1,648,143
9.12.93	10913	(Others)	29,850
			1,892,213
30.12.94	12604	Fimat Futures Pte Ltd	$38,440.55

8. The plaintiffs further claimed the return of demonstration materials which they lent to the defendants, of the value of FF167,133.

9. In the (amended) defence and counterclaim, the defendants denied they were in breach of the agreement, pointing out that the agreement was silent on the time period within which they had to make the balance payment in cases where the customer does not make a down payment. They further denied that they had refused to pay the plaintiffs and or that the agreement had been terminated due to their conduct.

10. Instead, the defendants countered that it was the plaintiffs who had repudiated the agreement which repudiation the defendants accepted. The defendants particularised the plaintiffs' repudiatory conduct as follows:

a. the defendants were given the exclusive right to market the plaintiffs' products in Singapore. Yet in violation of such rights, the plaintiffs through their agents, associates or subsidiary companies intervened in a transaction between the defendants and Fimat Futures Pte Ltd (Fimat) and attempted to deal directly with Fimat in September 1994;

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b. in or about October 1994 and thereafter, the plaintiffs had alleged that the defendants had failed to settle outstanding debts and had misappropriated payments made on account; the plaintiffs then refused to carry on a working relationship with the defendants;

c. the agreement appointed the defendants as the exclusive distributor. Yet on or about 10 November 1994 the plaintiffs or their agents incorporated Etrali Singapore Pte Ltd (Etrali) which activities were/are in direct competition with the defendants' as it dealt with products which are similar or identical to those dealt with by the defendants;

d. the plaintiffs had, through their agents, actively sold products in territories covered by the agreement;

e. the agreement provided for the defendants to purchase spare parts from the plaintiffs at a quantity to be determined by the plaintiffs for purposes of maintaining the systems sold. After the defendants had done so, the plaintiffs wrote to the purchasers to advise that the defendants were no longer authorised to maintain the systems and offering to maintain the systems themselves, thus depriving the defendants of the benefit of the maintenance agreements. This resulted in the defendants having spare materials to the value of FF587,943;

f. the plaintiffs through Etrali, offered employment to the defendants' staff and enticed them to breach their contracts with the defendants.

11. The defendants contended that the invoices listed in the statement of claim did not present a true picture of the situation for the following reasons:

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a. the plaintiffs had agreed to a discount for invoice 11195 by issuing invoice 11843 in the sum of FF48,000, which the defendants paid on 30 September 1994;

b. similarly the plaintiffs had agreed to a discount for invoices 38376 and 11196 by issuing invoice 11842 in the sum of FF69,930 which the defendants paid on 30 September 1994;

c. the plaintiffs did not deliver the goods ordered under invoice 12172;

d. the defendants withheld payment of invoices 12476 and 12604 as, by the time they were issued, legal action by the plaintiffs was imminent and the defendants did not wish to prejudice their position.

12. The defendants contended that they had returned one large demonstration set to the plaintiffs together with a small portable demonstration set in November 1994 and, after the writ was issued, the plaintiffs' representative took delivery of the last remaining demonstration set.

13. The defendants also asserted that the plaintiffs owed them monies under four (4) invoices issued by the defendants, totalling S$52,198.40.

14. At the commencement of and at various stages during, the trial, the defendants withdrew their counterclaim for S$52,198.40 and admitted all the sums in the plaintiffs' invoices save for Fimat (S$38,440.55). The main issue left for determination therefore is whether the plaintiffs were entitled to terminate the agreement due to the defendants' non-payment of the outstanding invoices. Determination of this issue will decide the defendants' counterclaim for damages for loss resulting from termination of the agreement, including loss

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of the benefit of the maintenance agreements made with customers and will, in turn, decide the defendants' claim for the value (FF587,943) of the surplus stocks they hold.

The evidence

(i) the plaintiff's case

15. According to Baude (PW1), his visit to Singapore with Mantelet in September 1994 (the September meeting) was prompted by the fact that some of the plaintiffs' invoices were outstanding since October 1993 involving a sum of approximating S$420,000. He was also concerned that the defendants had received monies on contracts they had signed with customers but the defendants had not placed the corresponding orders with the plaintiffs. He denied Tay's allegation that his visit was prompted by the plaintiffs' intention to deal direct with the defendants' customers. Baude pointed out that of the thirteen sales secured by the defendants in Singapore (with the plaintiff's assistance), eleven (including Societe Generale and Fimat) were made to local branches of the plaintiffs' existing international customers; the only new customers were Postipankki and Industrial & Commercial Bank of China. No sales were made by the Malaysian company whilst the Indonesian company secured one small order from Bank Umum in Indonesia. This showed that the defendants were ineffective in marketing the systems. Moreover, the plaintiffs assisted the defendants to install the systems where so requested by the customers, as in the case of Banque Paribas (Paribas).

16. With regard to the spare parts, Baude explained that they were for the purpose of maintaining the systems sold in Singapore. Once the defendants' distributorship was terminated, they no longer had the right to sell the spare

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parts or to maintain the systems they had sold. Although the plaintiffs were not obliged to, they offered to buy back the spare parts from the defendants at the original sale price provided that the same was in the same good condition as when sold to the defendants. The plaintiffs were also willing to set-off the value of the spares returned against their claim. However their offer made through their solicitors' letter dated 4 June 1996 (1AB184A) to the defendants' solicitors did not receive a response; it can only be assumed that the defendants did not have the spares as claimed.

17. Etrali was incorporated on 10 November 1994 to market the systems in the areas previously covered by the agreement. The plaintiffs only advised their customers in June 1995 that the defendants were no longer authorised to maintain the systems. The defendants' complaints therefore were unfounded -- there was no interference with their rights whilst the agreement was still subsisting.

18. The defendants' allegation that the plaintiffs had induced the defendants' employees to breach their contracts of employment was also unfounded. The employees in question were Ser Lay Yong and Low Eng Hong who allegedly installed the Banque Worms system on behalf of the plaintiffs and Etrali Japan. This had been refuted by Banque Worms and by the said employees who asserted that, whatever assistance they rendered to the plaintiffs and others whilst employed by the defendants, was at the defendants' request.

19. As for the Fimat deal, Baude explained that it was actually arranged by Etrali Japan, the plaintiffs' Japanese subsidiary and for which the plaintiffs would have given the defendants 15% commission based on the contract price. Fimat issued a purchase order to Etrali Japan but was misled into making 50% down-payment

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to the defendants by the defendants' invoice 4775 dated 1 September 1994 which Fimat thought was issued on behalf of Etrali Japan.

20. Baude complained that the defendants therefore had no basis to issue their invoices 4800 and 4801 to Fimat seeking payment of $126,636.95. They then sued Fimat in Suit No 444 of 1995 for the said amount even though they retained the sum of $38,440.55 which sum exceeds the 15% commission. As a 'tit for tat' measure, Baude decided to accept the defendants' purchase order 9082 dated 19 0ctober 1994 for the Fimat deal.

21. Baude explained that the plaintiffs' credit terms to the defendants were 30 days from the date of the invoice and this was indicated in all documents. By not placing orders with the plaintiffs for the contracts the defendants had secured, the plaintiffs would not be paid the requisite 30% deposit by the defendants; this particularly referred to the orders of Societe Generale (Soc-Gen) and Fimat where the defendants had obtained down payments; he learnt this from the two customers. This troubled Baude who thought the defendants were not in a position to pay the plaintiffs. After his letter to the defendants dated 17 October 1994 (1AB141) he found out the percentages paid by Fimat (50%) and Soc-Gen (30%) and that Soc-Gen had issued their purchase order to the defendants at the beginning of September 1994. In the case of Banco Santander, the defendants did not pay the 30% deposit at all; they remitted payment to the plaintiffs on 6 September 1994 for their purchase order dated 17 March 1994 which the plaintiffs confirmed on 30 April 1994. The defendants used the deposits they collected to pay the old outstanding invoices of the plaintiffs. Nevertheless, although the defendants did not pay the 30% deposits in many cases, the plaintiffs still supplied the systems they ordered because the plaintiffs knew the customers and it would be unfair to the latter to withhold or delay delivery. He acknowledged however, that there was no complaint either

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in his affidavit evidence-in-chief or in any document, of the defendants' delay in submitting purchase orders. One reason the plaintiffs wanted the defendants to submit their purchase orders immediately after customers had placed their orders was so that the plaintiffs would have sufficient time to ship where the delivery schedule was tight, as in the Banco Santander order. Baude could not say however, that it was the practice of the defendants to submit their purchase orders late but requested the plaintiffs to expedite shipment.

22. At the September meeting, Tay offered to sell the defendant company to the plaintiffs; Baude indicated he was not interested as the company was small (4-5 staff) and it reinforced his view that the defendants were in deep financial trouble; he gave Tay seven (7) days in which to pay up the outstanding sum. When no payment came, he wrote to the defendants on 7 October 1994 (1AB137) to say that the agreement was terminated. He followed up with his letter dated 17 October 1994 wherein he requested for the then outstanding sum of FF1,326,174 (which included 30% deposits for Fimat [FF375,760] and Soc-Gen [FF706,344] orders respectively, and reiterated that the agreement had been terminated. Eventually the plaintiffs did receive from the defendants the deposits paid by Fimat and Soc-Gen.

23. In July 1995, Baude again came to Singapore and he proposed an amicable settlement to Tay who bargained over the outstanding sums due to the plaintiffs and eventually agreed to pay the sum of FF1,892,213. Baude informed Tay that if this sum was paid immediately, he would discount the amount due on the demonstration set. He and Tay then signed the list of outstanding invoices at 2AB134-135 to signify the agreement reached which original Tay took away to write out the cheques for payment, but he did not.

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24. Cross-examined, Baude denied that at the September meeting, Mantelet had agreed with Tay that the outstanding sum was FF688,032, which sum the defendants paid on 30 September 1994. Baude further denied that he had agreed to check the invoices to ensure there was no double billing as the defendants claimed. He pointed out that after the meeting Mantelet had sent a fax to the plaintiffs' Paris office on the defendants' queries and had reverted to the defendants with the answers and supporting documents before he and Mantelet left Singapore.

25. As for the Fimat deal, it was Etrali Japan who informed the defendants about Fimat's purchase order dated 29 August 1994; Fimat also copied the order to the defendants; there was no attempt by the plaintiffs to hide the order from the defendants. If not for Fimat's purchase order which Etrali Japan then sent to the plaintiffs, how could the defendants invoice Fimat two (2) days later, on 1 September 1994 (1AB117)? Yet the defendants only issued their own purchase order to the plaintiffs on 19 October 1994 (1AB119) which the plaintiffs accepted. two (2) days later. The reason Fimat wanted to deal with the plaintiffs direct was because they required a guarantee from the plaintiffs, as in the case of Paribas. Notwithstanding that both Fimat and Paribas were direct deals between the plaintiffs and the customers, the defendants accepted and were paid, 15% commission.

26. Baude denied counsel's suggestion that the agreement was not terminated but only suspended, by the plaintiffs' letter to the defendants dated 7 October 1994; he had made it clear to Tay in the September meeting that if the plaintiffs did not receive payment within seven (7) days, the relationship between the parties would be terminated and that was subsequently effected. There was no question of compensating the defendants let alone the S$2m Tay requested since, it was the defendants who were in breach of the agreement. The reason

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the plaintiffs still delivered systems to the defendants of the value of FF2m after that date was because the same were ordered by the defendants especially for Fimat and Soc-Gen, before 7 October 1994. All in, Baude made three (3) trips to Singapore (between October 1993 and July 1995) to collect payment from the defendants, apart from another trip in April 1994 to solve some problems related to the Paribas order. Although it was against the terms of the agreement, in practice what Tay said in his affidavit was true -- Baude was forced to come to Singapore every time in order to collect the payments. The plaintiffs periodically sent statements of account to the defendants (see 1AB135) but the defendants did not pay.

27. As for the demonstration set, Baude explained that he agreed at the September meeting to discount the sum of FF167,133 which invoice (12605) the plaintiffs subsequently cancelled.

28. With regard to the maintenance contracts, Baude said the plaintiffs did not impose any policy on the defendants; the duration of such agreements as well as the period the defendants provided free maintenance to their customers was a matter between the defendants and the latter. On the plaintiffs' part, they gave a manufacturer's warranty of one year, against defects in the system(s), from the date of installation. However even if the defendants did lose $230,000 in maintenance fees per year due to the termination of the agreement as they claimed, it was not the fault of the plaintiffs -- the defendants were in breach of the agreement and they have to accept the consequences of their default.

29. I move next to the testimony of Mantelet (PW2) who is the plaintiffs' accounts manager. In the light of the defendants' late minute concession to the plaintiffs' invoices save for Fimat, it is not necessary for me to refer to all the

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evidence adduced from this second witness but only to those portions touching on the areas of dispute.

30. Mantelet disagreed with Tay's allegation that the plaintiffs out of greed, demanded 15% of the maintenance contract the defendants made with Paribas when they had nothing to do with the deal whatsoever. Mantelet explained that the sale agreement was between the plaintiffs and Paribas (see 1AB187) and cl 7.3 therein provided that at Paribas's option, the plaintiffs were obliged to take back the system sold in the event that there was a fault. Under cl 9.4 the plaintiffs could invoice 50% of the contract value only one year after the date of installation notwithstanding which they paid the defendants 15% commission amounting to FF390,239 on 22 October 1993, at the end of the installation period, even though the contract was made between the plaintiffs and Paribas direct. Further, the plaintiffs had to monitor the system from time to time with their engineers and would be responsible for bad maintenance. Therefore it was not unreasonable of the plaintiffs to ask the defendants for 15% of the annual maintenance fees of S$82,700.

31. On Tay's claim that the plaintiffs did not issue receipts for the defendants' payments, Mantelet testified that before 7 October 1994, the defendants did not ask for receipts. In any case it was not the plaintiffs' practice to issue receipts since they did not receive cash payments; every payment was via a bank.

32. Mantelet also disagreed with Tay's assertion that it was the course of dealings between the parties for the plaintiffs to settle the accounts by meeting the defendants in Singapore. The first time he came to Singapore to settle the accounts with the defendants was in late October 1993; this resulted in the plaintiffs' obtaining payment of FF663,095. At the same time, he and Tay agreed on the figure for the 20% discount given to the defendants for the orders they

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placed with the plaintiffs. When the defendants again did not pay subsequent invoices, he and Baude were obliged to visit Singapore in September 1994. He could not have met Tay on 6 September 1994 as alleged as, he was in New York that day according to his passport. The upshot of the September meeting was, that both parties agreed that all the undisputed items would be settled by the defendants (marked in square boxes at 2AB77), he would provide proof of shipment of the remaining items which the defendants complained were double invoiced and, the plaintiffs would credit items which were returned by the defendants. At no time did Tay inform him that the defendants could not pay because the defendants had not been paid in turn by the customer or, that the defendants did not have the means.

33. Mantelet testified that there was in fact no double billings (which complaint he first received around 30 June 1994 from Tay) -- there were double shipments of the same order from the defendants -- the defendants would fax their orders to the plaintiffs followed 4-6 weeks later by their mail orders. The plaintiffs would receive a telephone call from the defendants asking for urgent delivery but in their subsequent mail orders the defendants did not mention that they had already received the shipments, so the plaintiffs thought the defendants were placing new orders. In the case of purchase orders nos. 9065 and 9066, the defendants sent the order twice to the plaintiffs, almost 11 weeks apart. Hence the plaintiffs issued two (2) invoices for the double shipments under each purchase order. Notwithstanding Mantelet's clarification after he had checked independent customs' documents, the defendants did not pay despite his telephone call to Tay requesting for payment or, return of the second shipment. Because of the defendants' complaint of double billing, Mantelet printed out the statement of account (1AB135) as at 30 June 1994 which was the same as the list at 2AB77 based upon which he and Tay settled the accounts.

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34. As for the demonstration materials, the plaintiffs sent three (3) sets to the defendants under lots nos. 10308, 10408 and 11188. The defendants returned part of lots 10308 and 10408 and failed to return the entire lot 11188. Although the defendants declared in their shipping documents that they had returned FF100,000 worth of demonstration material, the plaintiffs credited them with the value of FF242,372 even though the discrepancy in weights in their shipping documents caused considerable clearing problems for the plaintiffs and resulted in their being fined by the French authorities for making a wrong declaration. On 23 November 1995, after proceedings had begun, the defendants returned to the plaintiffs' representative Henry Vautheny (see 1AB110-114) some materials under lot 10308.

35. Mantelet said he could not recall the defendants ordering spare parts from the plaintiffs at all by way of a purchase order, let alone of the magnitude set out in the schedule (the schedule) to their defence and counterclaim. However the defendants could also order spares by adding it onto their purchase order for a system or, they could also use the demonstration set. In any case the plaintiffs can ship spares to their distributors within 24 hours of an order being placed. Because the plaintiffs were constantly upgrading the system, spares parts which were delivered to distributors in 1992-93 would no longer be compatible with the actual systems delivered by the plaintiffs in 1996-97. Banks also have to renew the system totally once every 5-10 years. Mantelet opined that the defendants' counterclaim of FF587,943 as the value of the spare parts they hold seemed to be very high. This can be seen by comparing items in the plaintiffs' demonstration sets with the equivalent items in the schedule. If indeed the defendants had such large stocks it was due to double shipments.

36. At this juncture, I should state that in the midst of trial, counsel for the defendants (N/E139) agreed that where there was a discrepancy between their

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prices and the plaintiffs', the defendants would accept the plaintiffs' prices for the materials returned by the defendants. It was at this stage that the defendants conceded the plaintiffs' claims (save for Fimat) saying they were finally satisfied that the accounts were correct which, according to Tay, was not the case previously.

(ii) the defendants' case

37. Tay was the only witness for the defendants. Tay's explanation (N/E184) for the defendants' late or non-payment of the plaintiffs' invoices was, he was confused by their double billing, no receipts were issued and it was difficult for the defendants to compile the accounts as neither Baude nor Mantelet informed the defendants which outstanding invoices had been paid. Even the letter from the plaintiffs' solicitors dated 18 May 1995 (see 1AB170-175) explaining the outstanding invoices did not help. He concluded that the plaintiffs wanted to take away the defendants' business for themselves because, when he requested the plaintiffs to 'stay out' as in the Paribas transaction, they refused. If the defendants' late payments were due to financial difficulties as the plaintiffs thought, Tay said he would have asked for deferred payments which he never did. He disagreed that the defendants failed to pay the plaintiffs according to the terms of the agreement.

38. In the light of the defendants' concessions to the plaintiffs' claims, I need only refer to Tay's evidence concerning the two (2) remaining areas of dispute; I start with the Fimat deal. Tay testified that the defendants had given a quotation to Fimat dated 20 June 1994 (see 2AB24), however it was not accepted. Nevertheless Fimat paid the defendants 50% deposit amounting to $106,448.95 on 30 September 1994 (see 2AB30) pursuant to the defendants' invoice no.4775 dated 1 September 1994, and the defendants paid the plaintiffs

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on 30 October 1994 30% as deposit. Tay denied that the defendants were shown a copy of Fimat's purchase order to Etrali Japan by either Fimat or the plaintiffs. He considered that the sale was a joint effort of the defendants and the plaintiffs as, after placing the order with the plaintiffs the defendants had to purchase distribution boxes, liaise with Fimat's contractors who supplied the dealing tables and liaise with Telecoms Singapore on the number of lines to be laid and lay the cables.

39. If he did not co-operate with the plaintiffs on such deals as Banque Worms, Tay said the defendants would have lost out to other competitors. However, apart from the plea in para 5(a) of the defence and counterclaim, Tay offered no evidence to support the defendants' allegation that the plaintiffs *interfered* in the Fimat transaction, apart from the fact that the balance 50% was paid to the plaintiffs by Fimat.

40. With regard to the maintenance agreements, Tay contended that the plaintiffs had no right to make such agreements with the defendants' Singapore customers. Notwithstanding that the terms of the contract between the plaintiffs and Paribas stipulated that the plaintiffs were responsible for maintenance and the defendants received 15% commission for the sale, Tay insisted that the plaintiffs had no right to make such agreements with Paribas or with the defendants' other customers, even after the plaintiffs terminated the agreement and which he accepted, on 25 November 1994.

41. Tay refused to accept that the defendants' staff Ser Lay Yong and Low Eng Hong were not involved in the installation of the system at Banque Worms, despite the written confirmation from the latter.

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42. As for the defendants' claim for the value of spare parts they held, Tay said he could not find the related purchase orders. He agreed with Mantelet's evidence that the plaintiffs could ship spares out within 24 hours of an order being placed. Even so, the defendants, to be on the safe side, wanted to have and did order, more cards. He denied that the defendants did not order spare parts from the plaintiffs and that the surplus stocks the defendants held were due to double shipments.

43. As for the demonstration sets, Tay maintained that the defendants had returned all three (3) sets even though the defendants did not itemise all the items which they returned or, which were collected by Henry Vautheny. He was not in the defendants' office when Vautheny came to collect and it could be that his son Augustine forgot to state in the acknowledgment signed by Vautheny, that the third and last demonstration set was returned. As for the value of FF100,000 inserted in the customs declaration form for the two demonstration sets shipped back to the plaintiffs, Tay said he put in that value at the request of Mantelet.

44. Apart from the assertions in his affidavit, Tay was unable to produce any evidence to substantiate his claims that, he had made a large investment in the defendants' business and lost profits due to the plaintiffs' wrongful termination of the agreement; neither did he quantify or particularise his start-up costs.

The findings

45. In the light of the defendants' admissions, the plaintiffs are entitled to judgment outright on their claim in the sum of FF1,892,213.00. I find no merit in the defendants' claim that they were justified in delaying payment or not paying at all, due to the plaintiffs' double billing. I accept Mantelet's evidence

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that there was in fact no double billing but double shipments, due to the defendants' own omission and poor administration -- they failed to advise the plaintiffs the relevant purchase order when they requested urgent delivery by fax, resulting in the plaintiffs making a second similar shipment when the defendants' mailed purchase order was eventually received. The defendants only have themselves to blame for the double shipments. Even then, they did not avail themselves of the plaintiffs' offer to return the surplus goods in such cases. The defendants' conduct in not paying for the double shipments and yet not returning the goods, is to say the least unreasonable and I have no doubt that it was deliberate, in the light of Tay's assertion that the defendants were not in financial difficulties.

46. I reject as absurd Tay's contention that it was the practice of the parties for the plaintiffs' representatives to meet with the defendants in Singapore before the latter settled the outstanding invoices. This alleged practice went against the clear terms of the agreement and it was not pleaded in the defence at all let alone that the practice superseded the agreed terms. What happened was, the plaintiffs' representatives were forced to come to Singapore (in particular Baude on at least three occasions), to collect payment from the defendants, until Baude's patience ran out in September 1994. Even if the defendants were confused about the outstanding accounts, that excuse was no longer tenable after the September meeting when Mantelet reviewed with Tay all the outstanding accounts after which Tay had agreed to pay the undisputed invoices (amounting to FF688,032 at 2AB77), not to mention that Mantelet reverted to Tay overnight, after checking with the plaintiffs' office, on whatever queries Tay had raised on disputed items; Mantelet's evidence was neither challenged nor rebutted. I should also point out that the letter of demand dated 18 May 1994 from the plaintiffs' solicitors (prior to commencement of these proceedings) gave a

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comprehensive explanation to the defendants of all the outstanding invoices; yet, the defendants still did not pay.

47. Tay's excuse that the plaintiffs never issued receipts for the defendants' payments is equally without merit. As Mantelet said, the defendants never asked for receipts. Further, the defendants' payments were remitted through banks, they had records of what they paid, why was there a need for receipts? There was no occasion when the defendants' payments were not received by the plaintiffs. It was also not suggested that the defendants paid the plaintiffs on a running account. One would have thought that the defendants would know better than the plaintiffs, what invoices they were paying.

48. I turn now to the Fimat sale under the plaintiffs' invoice 12604. My preliminary observation is, that this was not the first transaction (Paribas was) in which the plaintiffs or their subsidiaries had contracted with a Singapore customer direct, notwithstanding the agreement. Leaving aside Tay's claim that he protested without avail which veracity I doubt, the defendants were adequately compensated for their exclusion by the plaintiffs' payment of 15% commission which they accepted, with no evidence of protest. Accordingly there was already a precedent for such direct transactions.

49. In Fimat's case, it was Baude's testimony that Fimat insisted on contracting direct with the plaintiffs or their subsidiaries rather than with the defendants. Indeed this was admitted by Tay under cross-examination (see N/E202) and he went further to confirm that Paribas and Banque Worms were also direct deals. Far more significant, I note that despite the defendants' pleaded case, there was no correspondence from the defendants to the plaintiffs before or after any of these direct transactions right up to the commencement of these proceedings, to show that the defendants objected to such *interference* let alone that they

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considered such conduct to be a breach by the plaintiffs of the agreement. Certainly there is nothing to suggest that the three customers would have contracted with the defendants had it not been for the plaintiffs' *interference*.

50. On the contrary, I find it was the defendants who interfered with the Fimat deal by issuing their invoice no 4775 dated 1 September 1994 and obtaining 50% deposit from Fimat, to which they were not entitled. Their wrongful conduct was compounded by the fact that they deliberately withheld 20% of Fimat's payment. Even then, having received Fimat's payment on 30 September 1994, the defendants did not issue their own purchase order (no 9082) to the plaintiffs until 19 October 1994 and did not make the down-payment of 30% to the plaintiffs until 30 October 1994, according to Tay's own testimony. To add insult to injury, the defendants then had the gall to sue Fimat in Suit No 444 of 1995 for the balance payments under their invoices to Fimat 4800 and 4801 when they well knew that Fimat did not accept the defendants' quotations dated 20 June (2AB24) and 3 August 1994 respectively (2AB26). The sale was by Etrali Japan based on Fimat's purchase order dated 29 August 1994. Despite his denials, I am certain that Tay was informed by the plaintiffs and or Fimat about Fimat's purchase order; otherwise, why would the defendants issue invoice no 4775 to Fimat two (2) days later? Tay's denial is also at variance with his own counsel's cross-examination (N/E 24A) where he put to Baude that Fimat had copied their purchase order to the defendants. The plaintiffs are clearly entitled to payment of S$38,440.55 for the 20% wrongfully withheld by the defendants, not to mention that the defendants' claim against Fimat in Suit No 444 of 1995 should be dismissed. I believe Baude when he said accepting the defendants' purchase order was the only way the plaintiffs could recover Fimat's payment from the defendants.

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51. Following upon the findings in my previous paragraphs, I am of the view that the plaintiffs were justified at law, due to the defendants' persistent non-payment of outstanding invoices some dating as far back as October 1993 (despite repeated requests) as well as the defendants' conduct on the Fimat and Soc-Gen transactions, to terminate the agreement.

52. It is true that there is no term in the agreement which states that time is of the essence with regard to payments. Further, failure to pay and delay in payments per se, do not constitute a repudiation of a contract unless the breach goes to the root of the contract. This was the decision of the English Court of Appeal in *Decro-Wall v Practitioners in Marketing Ltd* [1971] 2 AER 216, a case cited by both parties in their closing submissions. The appellate court's views were echoed by our own Court of Appeal in *Brani Readymixed Pte Ltd v Yee Hong Pte Ltd & Anor* [1995] 1 SLR 205. Where, as in our case, there is no express provision that breach of one of its terms will go to the root of the contract so as to amount to repudiation, the court must look at the practical results of the breach in order to decide whether or not it does go to the root of the contract (per Salmon LJJ in *Decor-Wall* at p 221J).

53. In their submissions the defendants argued that after the September meeting, the defendants remitted immediately (on 30 September 1994) the undisputed sum of FF688,032 equivalent to S$194,575.11 (see 2AB115) to the plaintiffs. That remittance however did not include the deposits the defendants had received from Soc-Gen and Fimat. The reason, although denied by Tay, was obviously because the defendants used the deposits to pay the plaintiffs, as Baude correctly surmised. Having received the deposit from Soc-Gen on 26 September 1994, the defendants delayed issuing their purchase order no 9081 to the plaintiffs until 4 October 1994, after Baude had found out about the deposit direct from Soc-Gen. The defendants well knew that the plaintiffs could

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not issue an invoice to them until after the plaintiffs had received their purchase order. There is therefore no merit in the excuse set out in the defendants' solicitors letter dated 18 October 1994 (1AB142) -- that the delay in making the down-payment (for Soc-Gen and Fimat) was because the defendants did not receive the plaintiffs' invoice. The non-payment was not only not challenged but is clearly admitted by the defendants in their closing submissions at p 10 para 37. The deposits totalled S$321,479.50 equivalent to FF1,272,541 as at 30 September 1994 (at the exchange rate of S$25.2628 to FF100). The defendants' submission in para 37 that they paid the plaintiffs more than what they had received is no answer to the plaintiffs' demand that all outstanding invoices had to be settled within 7 days of the September meeting. There is no condition in the agreement that the plaintiffs' entitlement to payment was conditional upon the defendants receiving payments in turn from their customers (emphasis added), bearing in mind that as distributors, the defendants were not the plaintiffs' agents and, they were at liberty to put their own mark-up on the plaintiffs' prices. It would also be stretching the meaning of the word to say that the defendants paid *immediately* when some of the invoices in 2AB77 had been outstanding since October 1993.

54. Counsel for the defendants criticised the fax/letter of the plaintiffs to the defendants dated 7 October 1994 as being vague; that letter written by Baude states:

Following our various meetings, we confirm here below that our commercial relationships shall be susceptible to be carried on after the settlement of our invoices.

Undoubtedly the letter could have been better worded but, it referred to important matters: 1) the parties' meetings; 2) their commercial relationship

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would carry on after the settlement of the plaintiffs' invoices. In other words, the letter confirmed what had transpired at the September meeting, where Baude gave Tay an ultimatum; Tay could not feign ignorance of what Baude meant by this letter, as claimed in the defendants' reply dated 11 October 1994 (1AB138).

55. The defendants' conduct throughout was to stall for time to pay the plaintiffs, using one excuse after another. That in itself may not be enough to amount to repudiatory conduct under normal circumstances but, Baude had made time of the essence for payment of all outstanding sums by his ultimatum. In my view that ultimatum put a totally different complexion on this case altogether; it rendered the defendants' non compliance with the plaintiffs' deadline conduct sufficient to constitute a breach which went to the root of the agreement. To interpret the agreement otherwise would be absurd as it meant that the plaintiffs would have to put up with the defendants' consistent late payments ad infinitum, with no recourse to any relief whatsoever. It is not open to the defendants to say that the plaintiffs could not have intended to terminate the agreement since, after 7 October 1994, they shipped the Soc-Gen order. Baude had explained that the plaintiffs were obliged to fulfill the order as it was placed on 4 October 1994 before the agreement was terminated and Soc-Gen was one of the plaintiffs' important international clients.

56. I shall now deal with the ancillary issues briefly. With regard to the demonstration sets, I am satisfied that the plaintiffs substantiated their claim that they received from the defendants less than what they lent. The onus shifts to the defendants to prove that they did indeed return all three (3) demonstration sets. Due to their own poor administration, the defendants could not be certain whether they did so, save for Tay's own belief, which is contradicted by documentary evidence and which, as with other aspects of his testimony, I view with considerable circumspection.

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57. There is no merit in the defendants' allegation that the plaintiffs enticed their two staff to leave the defendants' services. No evidence whatsoever was presented to support the bald assertion. The same comment would apply to the defendants' claim for the alleged surplus stocks they held. Under the agreement, the plaintiffs were not obliged to take back stocks from the defendants. Further, Mantelet could not recall the defendants placing any order for spares parts at all. Thirdly, if the stocks were due to double shipments effected by the plaintiffs, the defendants as I said earlier, only had themselves to blame. Finally it is noteworthy that as late as 4 June 1996 (see 1AB184A/B), the plaintiffs through their solicitors had offered to buy back the stocks, subject to certain conditions. The letter added that if the defendants did not revert by 7 June 1996, it would be presumed that they no longer had any of the stocks in their possession; the defendants did not respond to the letter at all.

58. As for Tay's claim that the plaintiffs wanted to buy-over the defendants, I think it is absurd that the plaintiffs would want to take over a company let alone for S$2m, when that company is their debtor in a substantial sum. What happened was, Tay made the proposal only to be told by Baude that the plaintiffs were not interested.

59. With regard to the maintenance agreements, there is no basis for the allegation that the plaintiffs attempted to cut in on such agreements with the defendants' customers. Baude explained that the plaintiffs wanted 15% of the maintenance fees paid/payable to the defendants by Paribas because the responsibility of maintenance lay with the plaintiffs and, the sale was transacted between the plaintiffs and Paribas direct. No evidence was adduced by the defendants to show that the plaintiffs deprived them of other maintenance contracts. Even if they did wrest such contracts from the defendants, if it was done after 7 October 1994, the plaintiffs were perfectly within their rights to do

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so, they having terminated the agreement. The same comment would apply to the plaintiffs' incorporation of Etrali Singapore Pte Ltd as it took place on 10 November 1994.

60. Looking at the totality of the evidence, I prefer the testimony of the plaintiffs' witnesses as being more consistent with the documents produced in court; I am satisfied that Baude and Mantelet spoke the truth, unlike Tay whose testimony did not stand up to close scrutiny or cross-examination and was often times inconsistent. Accordingly I dismiss the defendants' counterclaim.

61. In conclusion, I award judgment to the plaintiffs in the sums of FF1,892,213, S$38,440.55 (less 15% commission due to the defendants if that has not been deducted/paid by the plaintiffs) and FF167,133 (representing the value of the balance of the demonstration set not returned by the defendants). The plaintiffs shall also have costs together with interest on the three judgment sums at 6% per annum from the date of the writ herein; the defendants' counterclaim is dismissed with costs. The security for costs furnished by the defendants totalling $30,000 shall be paid out to the plaintiffs' solicitors pending taxation of their costs.

Lai Siu Chiu

Judge

Lai Siu Chiu J

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Wong Yu Chien (Arthur Loke & Partners), Anthony Soh and Prakash Mulani (Azman, Soh & Murugaiyan) for the plaintiffs
Sunil Gill, Lawrence Lee & Wee Choo Hua (David Chong & Co) for the defendants

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