

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 52

Suit 1520/1993

Between

Todd Trading Pte Ltd

... Plaintiff

And

Aglow Far East Trading Pte
Ltd

... Defendant

GROUND OF DECISION

Agency — Disclosure by agent; Contract — Remedies — Damages

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Todd Trading Pte Ltd v Aglow Far East Trading Pte Ltd

[1997] SGHC 52

Suit 1520/1993
Kan Ting Chiu J
11 March 1997

1 **KAN TING CHIU J**

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In this action the plaintiffs claimed damages from the defendants arising out of an aborted contract for the sale of 30,000 metric tonnes of Vietnamese rice to the defendants. The plaintiffs claimed damages for loss of expected profits from the contract and for loss suffered in compensating their own supplier for cancelling their contract to buy the rice for delivery to the defendants.

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2.A range of defences was pleaded. They fall into three broad classes. Firstly, it was that there was no contract between the parties. Secondly, there was no consideration to support the contract because no letter of credit and insurance cover note were forwarded to the plaintiffs by the principal buyer. Thirdly, the defendants were acting as agents for a disclosed principal buyer, Heriot Exports

(Pty) Ltd (Heriot). They were not maintained with equal vigour or conviction, and the closing submissions were focused on the agency issue.

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3.The documents connected to the transaction were produced at the trial. The first is a quotation dated 11 February 1993 from Sinamex Trading Pte Ltd (Sinamex) to the plaintiffs offering to sell 30,000 metric tonnes of rice at US\$215 per metric tonne. The plaintiffs in turn offered the rice to the defendants at US\$220 per metric tonne.

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4.On 12 February, the defendants wrote to Kestrel Financial Services SA (Kestrel) referring to the plaintiffs' offer of 11 February, adding that 'Todd Trading Pte Limited is a very reliable and major company in Singapore in the commodities trade.' They informed Kestrel that 'in our opinion, the offered price is a little high. However, please obtain Heriot Exports (Pty) Limited counter bid price' and that 'the subject transaction would be beyond our company's financial ability to handle. We would be happy for Heriot to deal directly with Todd Trading Pte Ltd and earn a small commission.' These are the first references to Heriot in the documents produced in evidence in the trial, but the letter was not copied to the plaintiffs.

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5.On 17 February the defendants wrote to the plaintiffs saying '*our principal* is prepared to accept at US\$209.50/MT' (emphasis added) without suggesting that the plaintiffs deal directly with the unnamed principal. In response the

plaintiffs replied on the same day starting with `We thank you for your fax message ... today. We confirm having ***sold to you*** the following ...` (emphasis added). They set out the conditions for the sale, inter alia, that a letter of credit for the full purchase price was to be established within three working days of business confirmation. It was also stated that the letter of credit was to be transferrable, but that this term was deleted by the defendants. Another term provided that `Any over-price (above US\$209.50 MT) to be for buyer`s account and to be reimbursed to an offshore bank account designated by Aglow Far East Trading Pte Ltd immediately upon completion of each negotiation of documents with bank.` The defendants confirmed the terms of the sale by placing its stamp and signature on the letter without qualification and returning it to the plaintiffs on 19 February.

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6. On the same day that they sent out the confirmation of sale to the defendants, the plaintiffs also confirmed their purchase from Sinamex at US\$205 per metric tonne, payment also to be by letter of credit. The plaintiffs did not disclose their negotiations or contract with Sinamex to the defendants until after the sale to them was aborted.

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7. On 18 February, the defendants sent to Kestrel a copy of the plaintiffs` offer of 17 February, adding that `we confirm our acceptance of US\$0.50 per metric tonne as our commission for the over price margin which will be established by way of L/C from Heriot Exports (Pty) Ltd directly to Todd Trading Pte Limited.` This letter was copied to Heriot but not to the plaintiffs.

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8. On the same day the defendants informed the plaintiffs that a letter of credit for US\$6,510,000 (at US\$217 per metric tonne) would be established on or before 22 February and that they have been advised by their principal that the remittance for such amount of the credit and the purchase price has to be remitted to a specific account. The principal was not named, and the defendants added that `all communications and correspondence other than those initiated by the banks should be channelled through us.`

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9. No letter of credit was established by 22 February. On 2 March the defendants informed the plaintiffs that `the confirmed irrevocable letter of credit is expected to be issued in your favour by our principal at any moment.`

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10. On 8 and 10 March, the defendants faxed to the plaintiffs portions of two messages that they received from their principal. The principal was not named by the defendants and all references of its identity were removed from the copies of the messages.

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11. When the letter of credit was still not issued on 12 March the defendants wrote to the plaintiffs saying `the establishment of the letter of credit is not within our control. As requested, we will try our best to get our principal to expedite on the L/C.`

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12. On 15 March the defendants wrote to Heriot saying `As ***we have committed ourselves*** with the Vietnamese government ***on your behalf***, we are very concern (sic) for the fact that after almost one month later, we have not received your advice on the establishment of your letter of credit.` (Emphasis added). This letter was not copied to the plaintiffs. This letter is noteworthy in that it showed that the defendants were aware that they could commit themselves contractually on behalf of Heriot. Nevertheless they did not indicate that they were contracting on behalf of Heriot when they confirmed the contract.

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13. On 5 April, the defendants sent to the plaintiffs a copy of Heriot`s letter of 2 April to CTT Castle Trade and Trade Finance (Castle) in which Heriot said that it expected to receive the letter of credit from Castle, which would then be sent to the defendants. This was the first occasion on record of the defendants informing the plaintiffs of Heriot.

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14. On 8 April the plaintiffs informed the defendants that the Vietnamese seller was pressing for the letter of credit and was concerned over the long storage and interest accruing in holding the rice. The defendants in turn wrote to Heriot on 14 April seeking a commitment on the letter of credit, saying `We have to notify our Vietnamese parties accordingly.` This letter was copied to Castle and the plaintiffs.

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15. On 16 April the defendants wrote to Heriot registering their disappointment. The defendants complained that 'we cannot accept your non performance on your commitment as a situation which is beyond your control' and warned Heriot that 'by Monday, 19 April 1993, we have to give the Vietnamese government a final decision on the subject matter and we shall hold you responsible for any claims for damages from the Vietnamese government as a result of your breach in the subject matter.' No explanation was given why the defendants represented themselves to be dealing with Vietnamese parties, or the Vietnamese government. A reasonable inference is that they did not want Heriot to know about the plaintiffs, just as they kept Heriot's identity from the plaintiffs at the initial stages of the dealings.

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16. On 17 April the defendants informed the plaintiffs that the transaction was cancelled and that the plaintiffs were to advise the Vietnamese party to submit its claim for transmission to Heriot. This letter indicated that the defendants accepted that another party besides the plaintiffs was involved in the transaction.

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17. The plaintiffs accepted the repudiation of the contract and informed Sinamex that they were unable to tender the letter of credit under their contract and on 23 April they gave notice to the defendants that 'our seller in Vietnam' had made a claim for US\$6 per metric tonne for non-fulfilment of the contract and that the plaintiffs were passing the claim to the defendants for payment. In reply the defendants advised the plaintiffs on 23 April that they will submit the claim to

Heriot. At the same time the defendants notified Heriot when they received the claim, they would institute a claim against Heriot for loss of business opportunities and legal costs.

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18. By 13 May Sinamex and the plaintiffs agreed to cancel the contract between them, or in their words, wash it out with the plaintiffs paying Sinamex US\$5,000.

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19. Each party called one witness at the trial. The plaintiffs' witness was Mr Eddie Heng who dealt with the defendants' witness, Mr Anthony Khoo Yee Tong. In his affidavit of evidence in chief Mr Heng deposed that when the defendants confirmed the purchase of the rice of the plaintiffs, the plaintiffs made a back-to-back purchase of the rice from Sinamex for which the plaintiffs paid compensation of US\$5,000 to Sinamex when the purchase fell through. Mr Heng emphasised that at all times the defendants purchased as a principal in their own right.

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20. Under cross-examination he said that to him the defendants' reference to 'our principal' in their letter of 17 February meant that the defendants had sold the rice to their principal and that the plaintiffs were prepared to accept payment by a transferrable letter of credit issued by the defendants' principal. He explained that the term relating to the reimbursement of the over-price would apply if the defendants tendered a letter of credit for a higher sum than the contract price,

the excess or over-price would be reimbursed to any account designated by the defendants. Mr Heng also explained that the Vietnamese seller mentioned in the plaintiffs' letter of 8 April referred to Sinamex which has an office in Vietnam.

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21. When no letter of credit was tendered by the defendants, the plaintiffs had no other buyer for the rice and the defendants did not help them to find another buyer. The plaintiffs tried to get an extension of time to purchase the rice, but Sinamex refused, so they cancelled the contract with Sinamex and paid US\$5,000 as compensation in an amicable settlement founded on the good relationship between the parties and with the plaintiffs making a purchase of groundnuts from Sinamex. The defendants denied in their defence that the plaintiffs had suffered that loss but did not dispute during the trial that the contract was washed out or that the compensation was paid.

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22. Mr Heng said that the defendants did not disclose their principal before the contract was executed and that he regarded Heriot as the defendants' buyer for the rice. Counsel for the defendants did not put to Mr Heng that the plaintiffs knew that the defendants were not buying on their own account but expressly as agent for Heriot as pleaded in para 7 of the defence.

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23. Mr Khoo, the defendants' managing director, deposed in his affidavit of evidence in chief that when they accepted the plaintiffs' offer of 17 February,

they did so on behalf of their principal. Mr Khoo did not say in his affidavit that he identified the principal to the plaintiffs.

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24.Mr Khoo said in court that:

It is quite conceivable that the plaintiff knew our principals like Kestrel and Heriot at the very beginning of the transaction. In our correspondence we just addressed them as 'principal'.

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It was significant that he was not saying that the plaintiffs knew about Kestrel or Heriot, but only that it was quite conceivable that they did.

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25.According to him Heriot was not the defendants' only principal in this transaction. Initially the principal was Kestrel, then Heriot became the principal after the contract was signed, when Kestrel informed them that Heriot would be the eventual buyer. This was not pleaded, and contradicted the defence that Heriot was the defendants' disclosed principal at all material times.

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26.When he was cross-examined Mr Khoo revealed his perception of the defendants' role in the transaction, which I set out:

Q: With regard to the 30,000 tons of rice is it your position that you entered into a contract with the plaintiff as agent? A: My position is that I did not enter into any contract with the plaintiff and that I was negotiating or arranging with the

plaintiff to make the sale with my principal. Q: You executed the document AD40 [the letter of 17 February] as an agent? A: That was not as an agent. Q: You didn't sign it as a principal or an agent? A: That is correct. Q: What did you sign it as? A: I signed it as someone working with the plaintiff to sell the rice to my principal.

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When his counsel re-examined him he said:

Q: Did you enter into this agreement as the buyer? A: No. Q: Were you an agent acting on behalf of a disclosed principal? A: Yes. Q: Who is disclosed principal? A: Kestrel Financial Services. Q: Who did you tell that to? A: Eddie Heng. Q: When did you tell that to him? A: From the very beginning.

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27. He did not explain how the agreement between the plaintiffs and Heriot pleaded in the defence can arise in those circumstances, or when Heriot became the principal in place of Kestrel.

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28. He also claimed that the plaintiffs had not claimed against the defendants, but had requested the defendants to pass the claim to their principal. This was contradicted by Mr Heng's evidence and the plaintiffs' letter of 23 April setting out their claim to the defendants for their settlement.

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29. Mr Khoo also confirmed that the defendants had required proforma invoices in previous dealings with the plaintiffs because their bankers required them to

issue letters of credit. He agreed that as the defendants were not going to apply for any letter of credit for the rice transaction, they did not require any proforma invoice, contradicting the pleaded defence.

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30. He also agreed that it was reasonable and possible that the plaintiffs would buy the rice to sell to the defendants in the course of their general business and trade.

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31. The first matter that I had to determine is the basis on which the defendants dealt with the plaintiffs during the negotiations and when they made the contract of sale. There is no doubt that the defendants had disclosed that they had a principal, but equally clearly, they did not name Heriot as the principal as alleged in their defence. I did not accept Mr Khoo's evidence that he had identified Kestrel as the principal because that was inconsistent with the defence and was not put to Mr Heng. In their written submissions, the defendants conceded that they did not disclose the name of their principal.

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32. The defendants were conscious of their position from the start. In their letter to Kestrel of 12 February they stated their preference for Heriot to deal directly with Todd, and that they earn a commission for themselves, but they did not pursue this. There was no evidence that they proposed to the plaintiffs or Heriot that they contract directly, and Heriot's identity was not even disclosed to the

plaintiffs. When the plaintiffs set out the terms of sale identifying the defendants as the buyer, they confirmed them without qualification.

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33. Decided cases on an agent's liability on contracts do not set down principles of general application. There is no shortage of decided cases but they tend to turn on their own facts and are not always consistent, as a reference to para 9-014 of ***Bowstead & Reynolds on Agency*** (16th Ed) will show.

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34. The situation is better for written contracts. Article 101 of ***Bowstead & Reynolds*** states that:

The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a deed, bill of exchange, promissory note or cheque, depends upon the intention of the parties as a whole, the construction of which is a matter of law.

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35. Even for such contracts the authors advised that decided cases should be regarded as 'single applications exemplifying the application of a rather imprecise principle' and warned that generalisations about particular formulae are dangerous - see para 9-035. Proceeding on this cautious basis, they set down three rules which serve as starting points: (a). If the contract is signed by the agent in his own name without qualification, he is deemed to have contracted personally unless a contrary intention plainly appears from other portions of the document.

39 (b). The mere fact that the agent is described as an agent, director, secretary, manager, broker, etc, whether by words connected with or forming part of the signature, or in the body of the contract, and whether the principal is named or not, raises no presumption that the agent did not intend to contract personally; but here again an intention to contract as agent only may be gathered from the whole document and surrounding circumstances.

40 (c). But if the agent adds words to his signature, indicating that he signs as an agent, or for or on behalf or on account of a principal, he is deemed not to have contracted personally, unless it is plain from other portions of the document that, notwithstanding such qualified signature, he intended to bind himself. This is so even though he does not name his principal. But this proposition should be read subject to art 102(2) regarding the liability of agents under trade custom.

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36. The defendants' position fell between the first and second rules. They confirmed the contract as buyer in their own name without qualification, after having disclosed the existence of an unnamed principal during the negotiations.

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37. The disclosure of a principal, named or unnamed, does not release an agent from liability. In ***Parker v Winlow*** (1857) 7 E & B 942; 119 ER 1497 the defendant signed a charterparty as 'GW Winlow, agent for E Winlow & Son' without qualification. In answer to a claim for demurrage, the defendant contended that it was not a contracting party, and that the action should have been brought against E Winlow & Son. This failed. Lord Campbell CJ found

that `He makes the contract, using apt words to shew that he contracts; and the only ground suggested for rebutting his personal liability is that he is agent for another but he may well contract and pledge his liability, though he is agent for another.`

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38. In **Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd** [1968] 2 QB 543 a company, Richards Marketing Ltd, contracted to buy machines from the defendants. In the course of the negotiations with the seller, the company had referred `our clients` which were the plaintiffs. After the sale took place the plaintiffs sued the seller who contended that the plaintiffs as undisclosed or unnamed principals were not entitled to sue. The Court of Appeal rejected that. Lord Denning also considered Richards Marketing Ltd's position and said that `Richards Marketing Ltd could, I think, sue and be sued on the contract in their own name. They signed the contract in their own name without qualification. They did not add the words `as agents for` or `for and on behalf of` or any of the phrases which exclude personal liability`. I agree entirely and respectfully. The disclosure of a party's status as an agent does not ***ipso facto*** relieve it from liability from a contract unless the contracting parties intended that when they contract. The disclosure is not evidence of the intention; there must be more. If there is no more, as in the two cases mentioned and in the present case, liability is not avoided.

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39. There was nothing in the agreement that suggested that the defendants did not intend to contract personally. Looking beyond the contract at the conduct of the parties, we see the same picture. The defendants had informed Kestrel on 12

February that they preferred Heriot to contract directly with the plaintiffs, but they did not communicate that to the plaintiffs. They did not declare that they were contracting on behalf of their principals although they knew that they could do that. On their part the plaintiffs were consistent throughout in their position that the defendants were answerable and liable to them.

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40. Referring back to art 101 of ***Bowstead & Reynolds***, there was no evidence that the parties as a whole intended that the defendants should not incur liability as buyer under the contract. As Brandon J had noted in ***The Swan; Bridges & Salmon Ltd v The Swan (Owners)*** [1968] 1 Lloyd's Rep 5 when referring to the article at p 12, 'The intention for which the court looks is the objective intention of both parties, based on what two reasonable businessmen making a contract of that nature, in those circumstances, in those terms and in those surrounding circumstances, must be taken to have intended.' Applying art 101 and the rules to the present situation, the defendants are liable on the contract.

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41. On that basis the defendants are liable to the plaintiffs. The next question is the damages that the plaintiffs are entitled to. They claimed damages under two heads, first, the loss of profits under the contract with the defendants amounting to US\$135,000 and second, the US\$5,000 compensation they paid to wash out their contract with Sinamex.

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42. The defendants disputed the plaintiffs' right to claim the loss of profits and

contended with an implied reference to s 50(3) of the Sales of Goods Act (Cap 393, 1994 Ed) that the damages should be the difference between the contract price and the market price. Section 50 provides that:

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.

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43. Section 50(3) does not apply in every situation where a buyer defaults. It applies only where there is an available market for the goods in question, and even then it is not an absolute rule. As Upjohn J said in **Thompson (WL) Ltd v Robinson (Gunmakers) Ltd** [1955] 1 Ch 177 at pp 187-188, 'sub-s (3) provides only a prima facie rule, and if on investigation of the facts one finds that it is unjust to apply that rule, in the light of the general principles mentioned above, then it is not to be applied.'

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44. In **Trans Trust SPRL v Danubian Trading Co Ltd** [1952] 2 QB 297, the rule was not applied when a buyer failed to furnish a letter of credit for steel that it contracted to buy. The seller was awarded damages representing the lost profits on the contract. Denning LJ explained at p 304 that:

This is another case concerned with the modern practice whereby a buyer agrees to provide a banker's confirmed credit in favour of the seller. This credit is an irrevocable promise by a

banker to pay money to the seller in return for the shipping documents. One reason for this practice is because the seller wishes to be assured in advance not only that the buyer is in earnest but also that he, the seller, will in fact obtain his money when he delivers the goods. Another reason is because the seller often has expenses to pay in connexion with the goods and he wishes to use the credit so as to pay those expenses. He may, for instance, be himself a merchant, who is buying the goods from the growers or the manufacturers, and has to pay for them before he can obtain delivery, and his own bank will only grant him facilities for the purpose if he has the backing of a letter of credit. The ability of the seller to carry out the transaction is, therefore, dependent on the buyer providing the letter of credit, and for this reason the seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods.

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and he explained further at pp 305-306 that:

A banker's confirmed credit is a different thing from payment. It is an assurance in advance that the seller will be paid. It is even more than that. It is a chose in action which is of immediate benefit to the seller. It is irrevocable by the banker, and it is often expressly made transferable by the seller. The seller may be relying on it to obtain the goods himself. If it is not provided, the seller may be prevented from obtaining the goods at all. The damages he will then suffer will not in fact be nominal. Even if the market price of the goods has risen, he will not be able to take advantage of the rise because he will not have any goods to resell. His loss will be the profit which he would have made if the credit had been provided. Is he entitled to recover that loss? I think he is, if he can show that such a loss was at the time of the contract foreseeable by the buyer as the probable consequence of a breach.

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45. The same question was considered by FA Chua J in **Bulsing Ltd v Joon Seng & Co** [1972] 2 MLJ 43 ; [1969-1971] SLR 565. The facts in that case were quite similar to that in the present case. The plaintiff and the defendant agreed that the plaintiff should sell to the defendant, and the defendant should

buy from the plaintiff, 50,000 metric tons of urea at US\$69 per metric ton. It was a condition of the contract that payment should be made by way of letters of credit opened in favour of the plaintiff on various specified dates. The defendant failed to open the letters of credit on the due dates. In order to fulfil the contract with the defendant, the plaintiff entered into a contract to purchase 50,000 metric tons of urea at US\$66 per metric ton from Chimimport of Bulgaria. When the plaintiff failed to establish the necessary letter of credit, Chimimport claimed damages for non-fulfilment of the contract and finally settled for agreed damages of US\$33,000, being 1% of the amount of the contract. Under the penalty clause, the plaintiff had to pay 2% of the total amount of the contract to Chimimport.

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46.FA Chua J referred to s 50 of the Sale of Goods Act and held that:

In my opinion the general rule in the case of breach of contract is that the plaintiff, by way of damages, is entitled to be put in the same position as he would have been in if the contract had been completed. Subsections (2) and (3) of s 50 give the measure of general damages and the measure of damages laid down in sub-s (3) is not to be applied in cases where it is not appropriate to achieve the result required by sub-s (2), for example in the case where the plaintiff is a dealer in the particular goods sold. In such a case, what ensues from the breach in the usual course of things is that the plaintiff loses the profit that he would have made had the sale to that particular buyer been completed and he is entitled to be recompensated for that loss. It is no answer to say that he has sold, or may readily sell the goods to another person, for even if he has been successful the fact remains that he has profited from one sale instead of two.

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47.In the present case, the plaintiffs also relied on the letter of credit that the defendants were to furnish to pay for their own purchase from Sinamex. Without

the letter of credit the plaintiffs could not buy the rice, and in any event, there was no available market for rice when the defendants defaulted. In these circumstances, the plaintiffs are entitled to claim as damages the profits they would have made if the defendants had not defaulted. I therefore allowed the claim of US\$135,000.

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48. The plaintiffs' other claim for the US\$5,000 that they paid to Sinamex for washing out the contract with them. There was no explanation how that sum was arrived at. There was evidence of a claim for US\$6 a tonne or US\$18,000 and an eventual settlement at US\$5,000 following negotiations.

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49. When the plaintiffs defaulted on their contract with Sinamex, Sinamex was entitled to claim damages from them. The plaintiffs can recover this from the defendants if, as Denning LJ said, 'such a loss was at the time of the contract foreseeable by the buyer as the probable consequence of a breach.'

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50. On the evidence, the defendants knew that the plaintiffs were commodity traders, and Mr Khoo their managing director agreed that it was reasonable and possible that the plaintiffs had to buy the rice to sell to the defendants.

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51. In ***Bulsing*** a similar claim was made where FA Chua J held at p 45:

I am also of the view that the plaintiff is entitled to recover from the defendant the damages which the plaintiff had to pay to Chimimport. The defendant knew that the plaintiff was not the manufacturer of the urea and that the plaintiff had to purchase it from Bulgaria. It must have been in the contemplation of the parties that in the event of a breach of the contract the plaintiff would have to pay damages to the supplier in Bulgaria.

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52. It was foreseeable by or within the contemplation of the defendants that if they defaulted, the plaintiffs would have to pay compensation to their supplier. Mr Khoo acknowledged that he was expecting such a claim, except that he thought it would be from Vietnam rather than a Singapore company. The significance of the acknowledgment is that he knew that the plaintiffs had to face their own suppliers.

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53. In **Bulsing** too there was little said of the quantification of the sum Bulsing paid to its Bulgarian supplier. All that was known was that there was a penalty clause providing damages at 2% of the contract sum, and that the parties settled for US\$33,000 after negotiations. FA Chua J allowed the claim on the basis that such a payment was within the contemplation of the parties. That is a sufficient basis for the plaintiffs to claim and recover the US\$5,000 from the defendants.

Kan Ting Chiu J

Todd Trading Pte Ltd v Aglow Far East Trading Pte Ltd

[1997] SGHC 52

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