IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 173

OS 1256/1997

Between

Ferrari-Linn Hardware Pte Ltd
Lim Ah Joo

… Plaintiff

And

Agostino Ferrari S P A

… Defendant

GROUNDS OF DECISION

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

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Ferrari-Linn Hardware Pte Ltd and Another v Agostino Ferrari S P A

[1998] SGHC 173

OS 1256/1997
Amarjeet Singh JC
20 May 1998

1 **Judgment:**

2 **GROUNDS OF DECISION**

3 The Agreement

4 1. The 1st Plaintiffs Ferrari-Linn Hardware Pte Ltd are a Singapore company incorporated on 26th June 1984. The 2nd Plaintiff at all relevant times was a Director of the 1st Plaintiffs and running and controlling its business.

5 2. Agostino Ferrari Spa, the Defendants, are a company incorporated in Italy.

6 3. The 2nd Plaintiff and the Defendants each hold 50% of the shares in the 1st Plaintiffs. The 1st Plaintiffs were used as a vehicle for distributing the Defendants' products such as hinges and slides used for manufacturing furniture and fittings in Singapore, Malaysia, Thailand and Indonesia. Payments by the 1st Plaintiffs to the Defendants would normally be made soon after deliveries.

7 4. However, from 1993 onwards, the 1st Plaintiffs experienced difficulties in meeting payments to the Defendants. By mid 1994, the 1st Plaintiffs were owing the Defendants $1,519,323.06 and by the end of 1994 the debt had risen further resulting in deteriorating relationship between the 1st and 2nd Plaintiffs on the one hand and the Defendants on the other. The 1st Plaintiffs though continued to make occasional payments to the Defendants.

8 5. Eventually, the 2nd Plaintiff and the Defendants agreed that the 2nd Plaintiff would buy over the Defendants' 50% shareholding in the 1st Plaintiffs by a Deed dated 28 April 1997. The key provisions of the Deed were:

> "(1) Ferrari-Linn acknowledges that it is indebted to Agostino Ferrari in the amount of US$989,323.00 (the "Debt") for cettain goods sold to Ferrari-Linn. Ferrari-Linn undertakes to:-
>
> (a) pay US$50,000 within three weeks from the signing of this Deed; and (b) settle the outstanding balance of the Debt on or before 14 August 1997.
>
> (2) Mr Lim hereby undertakes to guarantee the payment of the Debt.
>
> (3) Subject to the terms and conditions herein, Agostino Ferrari shall sell and Mr Lim and/or his nominee shall buy 80,500 fully paid ordinary shares of S$1.00 each in the capital of Ferrari-Linn ("Sale Shares") free from all encumbrances.
>
> (4) The purchaser's price for the Sale Shares shall be S$445,000.000 to be paid as follows:-
>
> (a) S$30,000.00 (**the "Deposit"**) to be paid upon execution of this Deed; and (b) the balance S$415,000.00 (**"Balance Payment"**) to be paid on or before 14 August 1997.
>
> (5) Upon execution of this Deed and in exchange for the Deposit, Agostino Ferrari shall deposit duly executed share transfers for the Sale Shares together with the share certificates in respect thereof (**the "Completion Documents"**) with Lee & Lee as stakeholder. Agostino Ferrari and Mr Lim agree:-
>
> (a) upon due payment of the Debt and Balance Payment on or before 14 August 1997, Lee & Lee shall release the Completion Documents to Mr Lim. In the meantime Agostino Ferrari S.p.a. shall continue to be entitled to exercise all voting rights in

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

> respect of the Sale Shares; (b) in the event that Mr Lim fails to pay the Debt and/or the Balance Payment on or before 14 August 1997, Lee & Lee shall return the Completion Documents to Agostino Ferrari, in which case the Deposit all other sums forming part of the Balance Payment which may have been paid by Mr Lim shall be applied to satisfy the Debt provided that any excess after satisfying the Debt in full shall be returned to Mr Lim. Interest shall be payable on any outstanding balance of the Debt at the prevailing interest rate of the Development Bank of Singapore, such interest to be charged from 1 March 1996."

9 Carrying out the Agreement

10 6. The 2nd Plaintiff paid to the Defendants:

> (i) on 26 May 1997 the sum of US$50,000/- referred to in cl 1(a) of the said Deed.
>
> (ii) on 8 August US$69,603.67cts.
>
> leaving the outstanding Debt at US$869,720.33cts.

11 The 2nd Plaintiff also paid the sum of $30,000/- referred to in clause 4(a) of the Deed on 22 May 1997. Pursuant to clause 5 of the Deed the Defendants deposited the Completion Documents with Ms Lee & Lee as stakeholders undercover of a letter dated 9 May 1997 to them.

12 7. On 15 August 1997 by which date the balance of the Debt and the Balance Payment for the shares had already become due, the 2nd Plaintiff's solicitors wrote to the Defendants' Italian solicitors that the 2nd Plaintiff wished to set off a personal debt of US$100,000/- owing to him by Adelchi Ferrari the President of the Defendants against the Balance Payment for the shares leaving that amount outstanding therefore at S$265,000/- (after deduction of S$30,000/- plus US$100,000/- the equivalent of S$150,000/-) and sought the Defendants' agreement thereon. Ms Lee & Lee in their letter of 15 August 1995 also stated they had received:

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

13 (i) Cashier's Order for US$869,720.33 being the outstanding balance of the Debt in favour of the Defendants.

14 (ii) 2 cheques and Cashier's Order for the balance of S$265,000/- in favour of the Defendants in respect of Balance Payment for sale of shares after setting off $150,000/- (US$100,000/-) against the Debt owed to 2nd Plaintiff by Adelchi Ferrari.

15 The letter went on to say:

16 "x x x x x x x x

17 Our instructions are to release the payments to you upon:

18 (a) your client's confirmation that the above payments (including the set off) are in order;

19 (b) x x x x x x x x "

20 7.1 On 23rd August 1997, Ms Arthur Loke & Partners the Defendants' local solicitors in response to the letter dated 15th August 1997, confirmed that the payments as referred to concerning payment for Debt and Balance Payment for sale of shares were agreeable to the Defendants with the reservation that the Defendants agreed to such a course for speedy resolution of the dispute and that Mr Ferrari's **alleged indebtedness was not to be construed as an admission of the same.** The Defendants' solicitors further stressed that under the Deed no conditions were imposed whereby the 2nd Plaintiff was to withhold the two sums. **It went on to state that once payment was effected, the Defendants would consider the remaining matters.** In this connection, the matter can be

put in its proper perspective by referring to paragraph 21 of the Affidavit of Agostino Ferrari in which he stated that he was very surprised in the first place that Ms Lee & Lee as stakeholders had accommodated the 2nd Plaintiff and had written letters after 14 August 1997 by dictating new terms contrary to the Deed and thereby assisting the 2nd Plaintiff in breaching his obligations instead of simply returning to the Defendants their Completion Documents which were deposited with them. During that period after 14th August 1997 the 2nd Plaintiff well knew he would be in his holiday home in Sardinia and not at work.

21 7.2 In any case, on 25th August 1997, Ms Arthur Loke & Partners again confirmed to the 2nd Plaintiff that the Defendants would accept payments of US$869,720.33 in relation to the Debt and S$265,000/- in relation to the Balance of Payment.

22 7.3 Thereafter on 26th August 1997, Ms Lee & Lee sent to Ms Arthur Loke & Partners a letter with cheque and cashier's order payments and a new term as follows:

23 " x x x x x x x

24 We enclose herewith the following, **in discharge of our clients' obligations under the Deed of 28 Apr 97** in respect of the Debt and the Balance Payment for the Sale Shares:-

25 (1) Cashier's Order for US$869,721.33 being the outstanding balance of the Debt; and

26 (2) Bank of Singapore cheque no. 497405 for S$115,000, DBS Bank cheque no. 655062 for S$100,000 and POSBank Cashier's Order for S$50,000,

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

being payment of the outstanding balance of the Balance Payment for the Sale Shares.

27 Kindly acknowledge receipt of the above.

28 In accordance with the Deed and as confirmed in your letter of 25 Aug 97, we shall release the Completion Documents to Mr Lim.

29 x x x x x "

30 7.4 On 27th August 1997, Ms Arthur Loke & Partners wrote simply to Ms Lee & Lee as follows:

31 " x x x x x x x x

32 2. **We acknowledge receipt of the following:**

33 a. Cashier's Order No. 014048 for the sum of US$869,720.33 issued by Four Seas Bank;

34 b. Bank of Singapore cheque no. 154762 for the sum of S$115,000.00;

35 c. Bank of Singapore cheque no. 655062 for the sum of S$100,000.00; and

36 d. Cashier's Order from POSBank for the sum of S$50,000.00. "

37 7.5 On 1st September 1997, the Defendants sent a fax message to Ms Lee & Lee as follows:

38 "We were informed by BCI Singapore that the check of US$869,720.33 has not yet been credited to our account since issued on a NY bank. Therefore our shares of Ferrari-Linn should be delivered to Mr Lim only when we will inform you that the check has been collected. We will give you this information as soon as we get it from the bank. "

39 7.6 On 8th September 1997, the Defendants faxed to Ms Lee & Lee again stating:

40 " x x x x x

41 I have to inform you that the check of Four Seasons Bank has not yet been credited to our account.

42 We will send you the confirmation you need to deliver the Completion Documents as soon as the bank will inform us we can dispose the money. "

43 The Dispute

44 7.7 On 11th September 1997 the Defendants wrote to Ms Lee & Lee informing them that the US$ amount was credited to their Singapore bank account only on 10th September 1997 and their collection was delayed by 27 days calculated from 14th August 1997 and had therefore lost interest for 27 days. They had also suffered an exchange loss as well when reconverting the money into the lire. The losses amounting to US$23,335/- were quantified as follows by an annexure:

> (a) US$869,220.33 x 8% x 27 days/365 days (from 14/8/1997 to 10/9/1997) = **US$5144**

(b) (i) US$869,220.33 x Lit.1805 (exchange rate as of 14/8/1997) = Lit. 1,568,942,000

(ii) US$869,220.33 x Lit.1768 (exchange rate as of 10/9/1997) = Lit.1,536,781,000

Loss on Exchange = Lit.32,162,000 (**US$18,191**)

45 The Defendants' case was that they had by their letter on 14 April 1997 informed the 2nd Plaintiff that the payment had to be made by a direct bank transfer into the Defendants' account at BCI Singapore.

46 The 2nd Plaintiff had deliberately not done so being a difficult person and always presenting the Defendants with a fiat accompli. However, the Defendants no doubt wanted to close the matter having progressed thus far. They requested that they be compensated by the 2nd Plaintiff in respect of this loss. The implication was that if the 2nd Plaintiff accepted the Defendants' offer to pay for the immediate partial losses of US$18,191/-, they would waive their right to interest from 1st March 1996. But the 2nd Plaintiff refused/neglected to take up the Defendants' new offer.

47 8. At the hearing before me, the Defendants' Counsel submitted that as a result the Defendants were not only entitled to interest as provided for by the Deed on account of the late payment of the Debt by the 2nd Plaintiff but additionally the 2nd Plaintiff was also liable to the exchange loss so caused in view of the fluctuation downwards of the Italian lire, into which currency the Defendants converted the monies paid by the 2nd Plaintiff.

48 Orders at Hearing

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

49 9. At the conclusion of the hearing, I made the following orders:

50 " (1) It is hereby declared that Lim Ah Joo is entitled to the Completion Documents referred to in cl.5 of the Deed dated 28 April 1997 between Ferrari-Linn Hardware Pte Ltd and Agostino Ferrari S.p.a., subject to Lim Ah Joo paying interest on the sum of US$989,323/- or any outstanding balance in respect thereto at the prevailing interest rate of DBS, such interest to be charged from 1 March 1996.

51 (2) It is Further Ordered that the cut-off date for the payment of the interest be 26 August 1997.

52 (3) It is Further Ordered that the Defendants' claim in respect of exchange losses be dismissed.

53 (4) Costs to be taxed or agreed and paid by Plaintiffs to Defendants. "

54 Filing of Appeal

55 10. The Plaintiffs' new solicitors have now appealed against "the whole of the said decision". I am unable to understand fully the Plaintiffs' solicitors' Notice of Appeal in this regard as I did not accede to the Defendants' claim of the exchange losses as the same was not a term of the Deed. I also granted an order that the 2nd Plaintiff was entitled to receive delivery of the Completion Documents which the 2nd Plaintiff had prayed for but conditioned on payment of the interest due to the Defendants as set out in the Deed. The Defendants not having appealed, the only appellable issue was that the 2nd Plaintiff should not be made liable to bear any interest on the Debt of US$989,323/- and that the

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

Completion Documents should be released without payment of the said interest. On this matter, I held against the 2nd Plaintiff and I assume this is the point that the Plaintiffs' solicitors are appealing in respect of my orders. I shall therefore address the said issue and give my reasons for deciding on the issue of the interest in favour of the Defendants.

56 Evaluation and Findings

57 11. The main submission of Counsel for the 2nd Plaintiff was that the 2nd Plaintiff was not liable to pay interest on the Debt of US$869,720.33. Counsel's argument went as follows:

58 The 2nd Plaintiff's solicitors had written a letter to the Defendants' solicitors stating on 26 August 1997 that the payments as set out in the letter concerning the Debt and Balance Payment of shares were being made:

59 **"……in discharge of our client's obligations under the Deed of 28th April 1997….."**

60 By such words, the Deed had been varied to exclude interest considering the Defendants' solicitors' reply on 27 August 1997 by which they *acknowledged receipt* of the cheques and Cashier's Orders; further, on 1st September 1997 the Defendants had written directly to Ms Lee & Lee that their shares should be delivered to 2nd Plaintiff only when the Defendants informed them that the cheque's funds had been collected; then on 8th September the Defendants in another letter to Ms Lee & Lee intimated that they would confirm the need for Ms Lee & Lee to deliver the Completion Documents as soon as their bank informed them that the money was at their disposal. Counsel

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

suggested that as such, the Defendants' acceptance of the 2nd Plaintiff's method of payment was unqualified. Finally, counsel asserted that the Defendants had only raised the question of interest on 11th September 1997 a day after the Cashier's Order was encashed. It constituted a reversal of their previous intimations and conduct. All this, Counsel submitted implied that the Defendants had before 11th September 1997 already accepted the terms of the 2nd Plaintiff's solicitors' letter that the cheques and Cashier's Orders were received in discharge of the 2nd Plaintiff's obligations under the Deed in respect of the Debt and Balance Payment of shares. The Defendants' demand for interest should, in the circumstances, be rejected.

61 12. The Defendants' Counsel rebutted the above contentions of Counsel for the 2nd Plaintiff submitting in essence:

62 (1) that the only agreement reached between the parties in substance related to a variation of the quantum to be paid by the 2nd Plaintiff in respect of the Balance Payment of the shares under cl.4(b) of the Deed and

63 (2) that the Defendants had not waived their contractual rights to interest when the reduced price concerning the Balance Payment of the shares was agreed to or thereafter and that the right to interest was dependent on non-payment of the Debt and/or the Balance Payment as to the shares and was not on the escrow party returning the Completion Documents.

64 12.1 I agreed with the submission made on behalf of the Defendants. The Debt and Balance Payment on the shares was to be made on or before 14 August 1997. If the 2nd Defendants had so paid, Ms Lee & Lee were thereupon entitled to release the Completion Documents to the 2nd Plaintiff. In the event

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

of failure to do so, the aforesaid documents were to be returned to the Defendants. If any payments were made concerning the Balance of Payment on shares the same were in any case to be applied to satisfy the Debt and any excess returned to 2nd Plaintiff. Thus, the satisfaction of the Debt took precedence over the Balance Payment of the shares. Furthermore, it was provided that failure to pay any outstanding amount of the Debt by 14 August 1994 would thereafter attract interest on the outstanding amount at the prevailing interest rate of the Development Bank of Singapore and such interest was chargeable from 1 March 1996.

65 12.2 The glaring fact is that the 2nd Plaintiff failed to pay the Debt or pay the Balance Payment due on the shares by 14 August 1997 and the stakeholders failed to return the Completion Documents thereafter as they should have because of such failure. Instead, the 2nd Plaintiff caused a letter to be sent through Ms Lee & Lee, the stakeholders, to the Defendants' solicitors the next day on 15th August 1997 offering a mode of payment as described in the letter which offered to set off $150,000/- on the Balance Payment of shares thereby reducing his liability on the shares to $265,000/- from $415,000/-. Nothing else was expressed or implied in the letter. The 2nd Plaintiff did not raise the question of not paying the interest under the Deed. The 2nd Plaintiff was presenting the Defendants with a fiat accompli here and this example of the 2nd Plaintiff's conduct lent credence to the Defendants' criticism of his conduct. The Defendants' solicitors accepted in their reply on 23 August 1997 the straighforward diminution in the sum payable on account of the Balance Payment of the shares whilst rejecting the indebtness of Mr Ferrari to the 2nd Plaintiff by the amount to be diminuted i.e. $150,000/-. The Defendants' solicitors had also expressly stated in reply that **once all the monies were paid, the Defendants would consider other matters**. That reservation or position of

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

the Defendants did not alter or change notwithstanding the sudden **unilateral** declaration of the 2nd Plaintiff's solicitors on 26 August 1997 (when they sent the various payments by Cashier's Orders and cheques) that such Cashier's Orders and cheques were being sent *"…in discharge of our obligations under the Deed of 28 April 1997…."*. Defence Counsel had submitted and I agreed with the submission that where a contract is wholly executed on one side a unilateral discharge of the obligations of the party yet to perform its obligations under the contract is ineffective unless made by Deed or some valuable consideration is given by the party to be released. There was no consideration in the reduction of the Balance Payment by $150,000/- and there was as such no benefit to the Defendants - only a detriment.

66 12.3 The 2nd Plaintiff's Counsel was, in my opinion, plainly and hopefully, in my opinion, reading too much into the letters of the Defendants' solicitors sent on 27 August 1997 and the Defendants on letters of 1 September and 8 September 1997. The Defendants' solicitors' letter of 27 August 1997 did not accept anywhere that the cheques and cashier's orders received for the amounts stated on them would discharge the 2nd Plaintiff's obligations under the Deed. The acknowledgement of receipt of the Cashier's Orders and cheques was as can be amply seen a **bare** acknowledgement of what was received. The Defendants' letters of 1 September and 8 September merely stated that the Cashier's Orders for US$869,000/- issued by the 2nd Plaintiff on a New York bank had yet to be credited to their account and once credited that fact would be made known to the 2nd Plaintiff. The letter of 8 September 1997 further stated that the release of the Completion Documents to the 2nd Plaintiff by Ms Lee & Lee would only be confirmed after the same payments was received.

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

67 11.4 I find that the Defendants had up to this stage, therefore not waived their right to interest under the Deed. On receipt of the monies due to them under the Deed, they wrote to the 2nd Plaintiff's solicitors as they had reserved to themselves the position that once the monies were paid they would consider the other matters. Thus, on 11 September 1997 the Defendants wrote to Ms Lee & Lee *in effect offering* to waive their right to interest under the Deed **if** the 2nd Plaintiff paid:

> (i) *interest* for the limited period from 15 August 1997 to 10 September 1997 the date the US$859,000/- was cleared by the New York bank and credited to their account.
>
> (ii) exchange losses incurred by the declining lire during that time a fact which they say the 2nd Plaintiff ought to have known or reasonably know being in business with them for some twenty years. The 2nd Plaintiff had made the payment through a New York bank which payment took 27 days to clear in the face of clear arrangements made on 14 August 1997 and in defiance of them, that the payments had to be made by a direct bank transfer to the Defendants' account at BCI Singapore.

68 12.5 The 2nd Plaintiff refused/neglected to pay the limited interest and the exchange losses totalling S$23,000/- as explained and as set out earlier resulting in the Defendants thereafter insisting on their right to the full interest as set out in the Deed plus additionally the exchange losses. Although the exchange losses were occasioned by the conduct of the 2nd Plaintiff and for which he ought to be blamed as shown in the Affidavit, I nevertheless declined to award the same to the Defendants as they were not a term of the Deed.

69 13. I was satisfied that the balance of probabilities were in favour of the Defendants and their right to interest under the Deed. For the reasons stated, I made the orders as already set out.

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

70 Dated this 20th day of May 1998

71 AMARJEET SINGH

72 JUDICIAL COMMISSIONER

Amarjeet Singh JC

Chua Lee Ming (Lee & Lee) for the plaintiffs
Paul Fitzerald (Arthur Loke & Partners) for the defendants

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