

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 120

Suit 309/1998

Between

Kool Team Marketing

... Plaintiff

And

Pacific Sunwear Pte Ltd

... Defendant

GROUND OF DECISION

Contract — Discharge

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Kool Team Marketing v Pacific Sunwear Pte Ltd

[1999] SGHC 120

Suit 309/1998
Lee Siu Kin JC
06 May 1999

1 : *The dispute*

2 The defendants are a company that, at the material time, dealt with a range of beachwear and accessories under the name `Ocean Pacific` as well a range of clothing under the name `Gotcha`. They would license franchisees to sell these products at retail outlets at various shopping centres. The exact terms of the franchise agreement may vary in each case, but generally the defendants would provide assistance in the form of advertising and promotion, financing, renovation and business advice.

3 The plaintiffs, a firm, was one of the franchisees of the defendants in both Ocean Pacific and Gotcha products. The business relationship between the parties began with a franchise for an Ocean Pacific shop at Shaw Leisure Gallery (`Shaw-OP`) at 100 Beach Road [num]02-57. This commenced operation sometime in December 1989. By June 1997, when the dispute between the parties came to a head, the plaintiffs had the following franchises and concessionaire from the defendants:

4 (i) Ocean Pacific shop at Wisma Atria [num]B1-51 (`Wisma-OP`);

- 5 (ii) Gotcha shop at Wisma Atria [num]B1-09 (`Wisma-Gotcha`);
- 6 (iii) Ocean Pacific shop at Junction 8, [num]01-26 (`Junction-OP`);
- 7 (iv) Ocean Pacific concessionaire at Takashimaya Department Store
(`Takashimaya-OP`).

8 In the case of the Takashimaya-OP concessionaire the plaintiffs were only responsible for the supply of sales personnel to man the counters displaying Ocean Pacific products at Takashimaya Department Store. The defendants were responsible for all other costs in connection with this outlet, including licence fees to Takashimaya Department Store and the supply of stock. The plaintiffs were paid a fixed percentage of gross sales, in this case, 20%.

9 By way of their solicitors` letter dated 30 June 1997 to the defendants` solicitors, the plaintiffs stated in part as follows:

We have been instructed by our clients that your clients have, in breach of the franchise agreement, stopped all supplies of `Ocean Pacific` products to them since 19 June 1997. As such, we have been instructed by our clients to accept your clients` repudiation of the franchise agreement with full reservation of their rights to claim against your clients for all damages suffered.`

10 The letter went on to request that the defendants conduct a joint `stock-take` at the Wisma-OP, Wisma-Gotcha and Junction-OP outlets on the same day and offered to return possession of those three outlets to the defendants on 1 July 1997. This letter was received by the defendants` solicitors at about 3pm on 30 June 1997. At about 4pm that same afternoon the plaintiffs received a letter of the same date from the defendants giving the plaintiffs three months` notice of termination of `the Franchise Agreement`. Thereafter the parties, quite sensibly, negotiated an early re-possession of the premises and by 9 July, they

had agreed on the quantity and value of the stock remaining. The defendants made an interim payment to the plaintiffs, done without prejudice, in respect of such stocks as well as refunds for deposits and renovation costs.

11 On 5 March 1998 the plaintiffs filed the writ of summons in this action. They claimed that there was a contract between the parties, in relation to the Ocean Pacific and Gotcha products, which was made partly orally, partly in writing and partly by conduct or course of dealing. The plaintiffs claimed that the defendants had breached the contract by abruptly stopping the supply of Ocean Pacific and Gotcha products to the plaintiffs. On 30 June 1997, the plaintiffs accepted the breach and terminated the contract. The plaintiffs claim the following in damages:

12 (a) loss of three months` profit in lieu of notice in respect of Wisma-OP and Junction-OP;

13 (b) loss of profit in the period 19 to 30 June 1997 in respect of Wisma-OP and Junction-OP due to shortage of stocks caused by the plaintiffs` refusal to supply them;

14 (c) loss of three months` profit in lieu of notice in respect of the Takashimaya-OP concessionaire;

15 (d) compensation paid to the staff at Takashimaya-OP for early termination; and

16 (e) losses incurred in operating the Wisma-Gotcha shop from February to June 1997 as a result of the defendants` wrongful refusal to take over the shop.

17 In addition, the plaintiffs also claim the following from the defendants as money due under the contract, or as money had and received:

18 (a) renovation costs at Wisma-OP, Junction-OP, Wisma-Gotcha and a previous outlet at Clarke Quay which were advanced by the plaintiffs in the first instance;

19 (b) payments made by the plaintiffs to the defendants for advertising costs to which the defendants were not entitled; and

20 (c) a 3% incentive payment owed by the defendants to the plaintiffs.

21 The defendants say that it was the plaintiffs who were in breach of contract. The plaintiffs had failed to pay for the goods on time and for this reason the defendants stopped supplying goods to them. The defendants say that the plaintiffs had wrongfully repudiated the contract on 30 June 1997 by ceasing operation of the Wisma-OP and Junction-OP outlets. The defendants also say that on that day the plaintiffs had abandoned the Takashimaya-OP concessionaire. The defendants say that they sent their letter of 30 June 1997 giving three months` notice and for this reason the plaintiffs could not have understood the defendants as evincing the intention that they were no longer to be bound by the contract. The defendants denied that they were liable for the other claims, viz renovation costs, payments for advertising costs and the 3% incentive payments. The defendants counterclaimed against the plaintiffs for loss of revenue in respect of the Wisma-OP and Junction-OP outlets for the period 19 to 30 June 1997 and for loss of goodwill due to the plaintiffs` cessation of business.

22 ***The 1989 agreement***

23

24 The relationship between the parties started in 1989. Woo Sook Yin (`Woo`) and Kim Kher Kiong (`Kim`) were actors with the then Singapore Broadcasting Corporation. In 1989 the defendants sponsored the attire in television serials featuring Woo and Kim. At that time, the Managing Director of the defendants was one Tony Lim Kian Nam (`Lim`). It was through this sponsorship that Woo and Kim got to know Lim. Around August 1989 Lim invited Woo and Kim to take up a franchise selling OP products. He believed that their celebrity status would be a marketing advantage. After some discussion they agreed to take it up. A written agreement was entered into (`the 1989 agreement`) after Woo and Kim registered the plaintiffs as a business in November 1989.

25 The 1989 agreement provides for the plaintiffs to operate a store at Shaw Leisure Gallery. The material terms are as follows:

26 (i) the period of the agreement was from 1 December 1989 to 30 November 1990, with an option to extend it for one year subject to negotiations, for which the plaintiffs must give three months` notice;

27 (ii) the defendants may terminate the agreement with three months` notice;

28 (iii) the defendants are to pay for all interior fixtures and decorations which shall remain their property. Any damage thereto is to be made good by the plaintiffs, subject to normal wear and tear;

29 (iv) the plaintiffs are to sell only the defendants' goods and carry a minimum stock of \$45,000;

30 (v) all wages incurred for operating the store are to be borne by the plaintiffs;

31 (vi) the plaintiffs are to pay a deposit of \$15,215.40, and are to pay in advance the following monthly charges, which are subject to change:

32 Store rental: \$4,503.00

33 Service charge: \$474.00

34 Advertising charge: \$94.80

35 Total: \$5,071.80

36 (vii) payment for stocks supplied shall be made within 90 days. The plaintiffs receive a discount of 50% off the sale price on normal items and 30% on sale items;

37 (viii) if the plaintiffs terminate the agreement, all items are to be sold back to the defendants at 90% of their invoice value;

38 (ix) all advertising are to be borne by the defendants;

39 (x) the plaintiffs agree to take part in all promotions by the defendants and to pay their share of the cost thereof;

40 (xi) if the plaintiffs' sales for the year exceeds the target of \$180,000, the defendants would give an incentive of an additional 3% discount for sales beyond that value.

41 The defendants commenced operation of the Shaw-OP shop sometime in December 1990. After the first year of operation, the plaintiffs continued the franchise. The renewal was made orally and the parties agree that the new contract was subject to any variations agreed upon between the parties. It is the nature of the variations that they disagree on. The plaintiffs operated the Shaw-OP shop until sometime in 1993.

42 ***Subsequent shops***

43

44 In August 1991, the defendants commenced operation of the Wisma-OP shop by themselves. After several months, they decided to offer this shop unit to the plaintiffs. Woo accepted the offer and began operating the Wisma-OP shop from around June 1992.

45 Sometime in 1992, Woo indicated to one of the defendants' directors, Lee Poh Seah ('Lee'), that the plaintiffs would like to look for an additional shop on their own. Lee agreed and around the end of 1992, Woo entered into an agreement to lease a shop at Clarke Quay ('Clarke Quay-OP'). After renovation was completed, the Clarke Quay-OP shop opened for business. The plaintiffs operated this shop until sometime in 1996.

46 Around January 1995, one of the defendants' franchisees surrendered two shops, one at 302 Tiong Bahru [num]01-36, and the other was the Junction-OP shop. Lee offered them to the plaintiffs who took them up. However the Tiong Bahru shop was returned to the defendants after a few months.

47 Sometime in 1995 the defendants entered into an agreement to operate a concessionaire at Takashimaya Department Store. They operated it for several months. Woo complained to Lee that this concessionaire affected the business of her Wisma-OP shop due to its proximity. In view of this the defendants offered to let the plaintiffs operate this concessionaire on a commission basis. Woo accepted it and the plaintiffs took it over from around August 1995.

48 In late 1996 the defendants procured the tenancy of the Wisma-Gotcha shop. The defendants offered this shop to the plaintiffs who took it up and began operating it from about October 1996.

49 There is no written agreement in respect of any of the subsequent shops. The parties agree that the essential terms of the oral agreements are similar to that for Shaw-OP, save insofar as they have agreed on any amendments from time to time. The dispute between the parties relates to what these amendments were.

50 ***The 3% incentive payments***

51

52 The Shaw-OP shop operated reasonably successfully in 1990 and the plaintiffs chalked up sales totalling \$226,508 for the first 12-month period. This

exceeded the \$180,000 target and on 29 January 1991 the plaintiffs were paid the 3% incentive by way of a credit note. This payment was made after the plaintiffs submitted to the defendants sometime in December 1990 a memorandum detailing the total sales they had made for that period. However, since that payment, the plaintiffs have not received any further incentive payments despite the fact that the annual sales for the Wisma-OP shop, Junction-OP shop and Wisma-Gotcha shop had each exceeded \$180,000 per year. In this action the plaintiffs claim payment of the sum of \$114,198.88 being the 3% incentive in respect of the following shops:

53 (i) the Wisma-OP shop for the period June 1992 to June 1997;

54 (ii) the Junction-OP shop for the period January 1995 to June 1997; and

55 (iii) the Wisma-Gotcha shop for the period October 1996 to June 1997.

56 Woo said that when the plaintiffs were not paid the incentive payments for subsequent years she spoke to Lee about it. Lee's reply was that he was 'working on it'. Woo said that occasionally Lee would add that the defendants' business was not doing well and asked her to wait a while. She said that she believed Lee because the defendants had on several occasions requested the plaintiffs for advance payments for goods. Woo said that she was acutely aware of the poor bargaining position of the plaintiffs and did not press for payment because she did not wish to jeopardise the business relationship.

57 The defendants did not dispute the sales figures but say that the incentive term was withdrawn after the first year of operation of the Shaw-OP shop. This matter arose out of an incident involving Woo and Lim, the Managing Director of the defendants at the time. The chairman of the Board of

Directors of the defendants was Fong Hoe Beng (`Fong`). He gave evidence that the defendants company was a business venture between him and Lim, Lee and one Tay Cheng Khim (`Tay`). Around May 1990 Fong discovered that Lim was a director and shareholder of a company, Arteam Apparel Pte Ltd (`Arteam`) together with Woo. As Fong had never heard from Lim about his involvement in any other business venture, he was surprised about this and decided to investigate the matter. He discovered that Arteam was a new customer of the defendants and that Lim had purchased goods from the defendants at a discount and supplied those goods to Sogo Department Store which was a regular customer of the defendants. In this manner, Lim had diverted secret profits from the defendants to Arteam. Fong confronted Lim with this matter on 29 May 1990 at their office. Lim admitted to it and appealed for leniency. Fong told Lim that he had no more trust in him and demanded that he signed a resignation letter as well as transfer all his shares in the defendants. Lim complied and left.

58 According to Fong, he was convinced that Woo was involved in this scheme as well. He felt that he could no longer trust her and intended to terminate the business relationship after the expiry of the 1989 agreement on 30 November 1990. A few days after Lim`s resignation, Fong met Woo at his office. He told her that he would be terminating the franchise after 30 November because of what she and Lim had done. Fong said that Woo denied that she was involved in the scheme. Subsequently Lee and Tay spoke to Fong and suggested that Woo be given a second chance. According to Lee, Fong relented and said that he would only renew the 1989 agreement if, among other things, the 3% incentive term was removed. Subsequently Fong met Woo again in his office and told her this. She agreed to the condition.

59 Woo denied ever meeting Fong on this matter. Counsel for the plaintiffs submitted that the defendants' version cannot be believed because it was inconsistent for Fong to be so angry with Lim that he would sack him immediately, yet let off someone he thought was Lim's accomplice. When confronted with this, Fong said that Lim was a business partner and employee whom he had done a lot for yet who had betrayed him. He said that it was different with Woo, who was only a franchisee. Fong also confessed that he had a soft spot for Woo. I do not see anything in Fong's explanation that is inconsistent with human nature.

60 I accept the defendants' version that there was a meeting between Fong and Woo relating to Arteam. Woo did not dispute that Lim left the defendants' employment on 29 May 1990. She said Lim did tell her that he had resigned because the defendants came to know that he was involved in Arteam. Yet her evidence was that Lee, whom she dealt with after Lim left, did not mention a word about her involvement in Arteam. Fong's evidence that he knew Woo was involved in Arteam with Lim is incontrovertible because he had exhibited a contemporaneous document, a Registry of Companies Instant Information Service printout, which provided information on Arteam. It showed Lim and Woo as its shareholders and directors. The authenticity of this document was not challenged by the plaintiffs. If Fong knew about Woo's involvement at the time, it would be only natural that he or someone else from the plaintiffs would confront her with this. Furthermore, to accept Woo's evidence would mean that Fong and Lee had concocted this story just to get out of the claim for the 3% incentive payment. In contrast to this, Woo's version is a bare denial of the meeting and a denial that she knew the true reason for Lim's dismissal. Woo's involvement in Lim's scheme is evidenced by her signing, as sales manager, Arteam's delivery orders to Sogo Department Store. She appeared to be an

intelligent woman on the witness stand and I find it hard to believe that she would not at least have a vague idea of what Lim was doing and, after Lim was dismissed, the true reason for it.

61 I find that the most important piece of corroborating evidence is the fact that the defendants have not made any further incentive payments to the plaintiffs since that first payment in 1991. If Woo is to be believed, it would be a quite incredible feat on the part of Lee to have persuaded Woo and her partners to accept a postponement of these payments from 1992 to 1997, a period of 5 years, for a sum which eventually added up to \$114,198.88. Not only did the plaintiffs not press the defendants for the incentive payments all those years, they did not even send to the defendants their sales figures from which the incentive computation could be calculated. Woo admitted in cross-examination that she did not submit any other memorandum similar to the one sent in respect of the first incentive payment. Even if the defendants had agreed to deferment of these payments, the least that one would expect them to do was to stake out their claim at the outset and get the defendants' agreement on what was owed to them.

62 Woo's partner at the time, Kim, did say that he asked Woo about the incentive payment at the time he left the partnership in mid-1993. He said that Woo told him that Lee had told her to wait as the defendants were working on it. However this version is also consistent with that of the defendants' because if Woo had lost the incentive payment term because of her involvement with Arteam, she might have been too embarrassed to tell Kim about it. I therefore find no corroborative value in Kim's evidence. Woo's current partner, Lim Soo Ann, also gave evidence that she had inquired this of Lee on several occasions. She said that each time Lee had put it off with some excuse. However, weighing the evidence, especially the fact no further payment of the 3% incentive was

ever made and the absence of any written demand or even a submission of a claim by the plaintiffs, I find that I must disbelieve Lim Soo Ann`s evidence in this respect.

63 Counsel for the plaintiffs submits that the defendants are precluded from adducing evidence of the oral terms of the contract, pursuant to s 94 of the Evidence Act, because the agreement has been reduced to writing in the form of the 1989 agreement. The short answer is that the subsequent agreements were not reduced to writing. Indeed the 1989 agreement specifically provides that it shall expire on 30 November 1990 unless extended for a further one year and that after such extension the agreement will lapse. Also, the 1989 agreement cannot apply to the subsequent contracts because it contains terms that have application only in that contract. Therefore a subsequent agreement, even if it incorporates all the terms of the 1989 agreement that are capable of being transplanted, would need to be proven by oral evidence.

64 Counsel for the plaintiffs also submits that the defendants have not proven a crucial element of their case. The defendants have pleaded that around 29 May 1990, they discovered a conspiracy between Lim and Woo. Thereafter, the pleadings continue, the defendants informed Woo that due to the conspiracy between her and Lim, they would renew the franchise only if the term providing for the 3% incentive were removed. Counsel says that the defendants have not proven the conspiracy. Indeed, the defendants` witnesses admitted that, with hindsight, they were not certain whether Woo was knowingly involved in Lim`s scheme. But in my view, this is a red herring because that is not the point in the pleading. The defendants have to prove that they honestly believed that there was a conspiracy and that was why they had acted in the manner they did. This, I hold, they have proven. Both Fong and Lee spoke of the `close relationship` between Lim and Woo. This aspect of their evidence was not challenged by

counsel for the plaintiffs and I must infer that it is not disputed. In view of his knowledge of this `close relationship` it is not unreasonable for Fong to conclude that, in the circumstances, Woo was involved in Lim`s scheme.

65 For the foregoing reasons, I dismiss the plaintiffs` claim in respect of the 3% incentive.

66 ***Renovation costs***

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68 The plaintiffs claim reimbursement for renovation costs incurred in respect of the shops at Wisma-OP, Clarke Quay and Junction-OP. They say that it was part of the franchise agreement that the defendants would bear the renovation costs for all the shops. In these cases the plaintiffs say that the defendants had paid only 20% of the renovation costs and the plaintiffs had advanced the balance 80%, which the defendants would later refund. The plaintiffs now claim the unpaid balances of these costs, totalling \$66,686.27. The details of these claims are as follows:

69 (a) Wisma-OP: When the plaintiffs took over this shop in June 1992, it was already renovated. However in 1994 the plaintiffs undertook some renovation with, they say, the consent of the defendants. Further renovation was carried out in October/November 1996. The 1994 renovation cost \$15,500 and the plaintiffs claim the unpaid balance of \$12,360. As for the 1996 renovations, the cost amounted to \$48,127 and the plaintiffs claim an unpaid balance of \$7,486.42.

70 (b) Junction-OP: The renovation for this shop was already done when the plaintiffs took it over in January 1995. However in November 1996 the plaintiffs spent \$28,543 to renovate it. The defendants have reimbursed the plaintiffs for part of this sum and the plaintiffs claim the unpaid balance of \$4,440.02.

71 (c) Lighting for Wisma-OP and Junction-OP: This was done by the same contractor at the time of the October/November 1996 renovation of these two shops and cost \$3,185.35. The plaintiffs claim the unpaid balance of \$495.50.

72 (d) Wisma-Gotcha: The plaintiffs paid \$59,288.30 for renovation costs to this shop before they commenced operation in October 1996. They claim the unpaid balance of \$10,540.31.

73 (e) Clarke Quay-OP: The plaintiffs spent \$39,200 to renovate the Clarke Quay-OP shop and were reimbursed 20% of it. They now claim the unpaid balance of \$31,364.

74 Lee said that the renovation for the first shop, Shaw-OP, was undertaken by the defendants and this was almost completed by the time the plaintiffs came into the picture. The defendants bore the renovation cost for this shop. Similarly, as the defendants had completed the Wisma-OP shop in 1991 and had directly operated it for several months, they bore the entire renovation costs. However, since the time of the Clarke Quay-OP shop in 1993, the agreement on renovation cost had been changed. Lee said that when Woo procured the Clarke Quay-OP shop he told her that the defendants would only bear 20% of the renovation. However if the plaintiffs surrendered the lease to the defendants before its expiry he would pay the plaintiffs the balance, pro-rated to the unexpired term of the lease. This was on the basis that the defendants would have the benefit of the renovation for that unexpired lease period. The plaintiffs disagree with this

and say that the defendants had merely asked them to advance 80% of the cost of renovation for which they would be reimbursed later.

75 As in the case of the 3% incentive, I find the plaintiffs' version, that they agreed to a deferment, difficult to believe because they did not make any claim for this since 1994 and have only brought this up when this dispute arose. It would appear from the plaintiffs' version that they were content to let the sums owed by the defendants in respect of the 3% incentive and the 80% of renovation costs accumulate and if not for this dispute, this accumulated sum could reach huge proportions. I have related that in July 1997 the defendants made a payment, without prejudice, to the plaintiffs in relation to renovation costs. This payment was for the 80% renovation costs pro-rated to the unexpired term of the leases in the Wisma-OP, Wisma-Gotcha and Junction-OP shops. It can be seen that, at least from July 1997, the defendants had taken this position and had acted on it. For the foregoing reasons, I accept the defendants' version of the agreement between the parties relating to renovation and dismiss the plaintiffs' claim in this respect.

76 ***Advertising costs***

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78 The plaintiffs claim the sum of \$3,239.30 which they had paid to the defendants in respect of the Wisma-OP and Junction-OP shops for the months of March to May 1997. Clause 12 of the 1989 agreement provides that all advertising shall be borne by the defendants. The plaintiffs did not pay anything for advertising and promotion under the renewed contracts for the other shops until March 1997. This arose out of a decision by the defendants to levy an

`advertising and promotion fee` amounting to 2% of the purchases made by their franchisees. The defendants say that prior to March 1997, they had sold to franchisees carrier bags printed with the Ocean Pacific logo. However sometime in 1996 the defendants discovered that some franchisees were obtaining their bags from elsewhere and these were of poor quality. Concerned that this would adversely affect the image of Ocean Pacific products, the defendants decided to stop charging franchisees according to the amount of carrier bags they took. Instead the defendants would levy a flat charge of 2% of the purchases and called it an advertising and promotion fee. This would also cover the costs of advertising, promotions and display props.

79 This matter was first raised in a meeting with franchisees on 19 June 1996. The defendants announced that they would supply carrier bags to franchisees at no cost. However the franchisees would have to pay a yearly promotion fee, the details of which would be announced in due course. The plaintiffs were one of the franchisees who took the carrier bags after this. Then, at a subsequent meeting on 20 March 1997 the defendants announced that they would impose a 2% fee. The minutes of this meeting states that most of the franchisees were not in favour of this change. However the minutes of the next meeting on 15 April 1997 states that the 2% fee would be implemented with effect from 1 March 1997. There is no record of any disagreement. The plaintiffs` were represented in all these meetings. The defendants say that the franchise agreement had been varied by consent to provide for the 2% fee.

80 The plaintiffs say that they had not agreed on this variation to the franchise agreement. They had protested at the meeting but were ignored by the defendants. However they agree that they had taken the carrier bags even after the announcement by the defendants at the 15 April 1997 meeting that the 2% fee would be implemented from 1 March. There is also no written protest by the

plaintiffs that they did not agree to this variation in the terms of their agreement, or that they were taking the carrier bags under protest. Neither is there any evidence that the plaintiffs had informed the defendants orally that they were taking the bags under protest. I am of the view that the plaintiffs had affirmed the variation by taking the carrier bags after 15 April 1997. The defendants are therefore entitled to the 2% fee levied and I accordingly dismiss the plaintiffs' claim in this respect.

81 ***The repudiation***

82

83 The problems between the parties originated from the plaintiffs' operation of the Wisma-Gotcha shop in October 1996. They incurred severe losses from it and wanted to return it to the defendants. Woo asked Lee about it sometime in February 1997. According to Woo, when Lee offered her the shop, she was reluctant to take it as Gotcha was a new brand. But Lee persuaded her to give it a try and promised that he would take it back if the plaintiffs did not find it profitable. Woo said that this was what was done in the case of the shop at Tiong Bahru, which was returned to the defendants after a few months. It was on this basis that Woo agreed to take the Wisma-Gotcha shop.

84 The defendants' position is that they had not agreed to take back the shop if it was not profitable. Lee told Woo that if the plaintiffs did not wish to continue with the Wisma-Gotcha shop, they could always give three months' notice to terminate that franchise. However he warned Woo that if she gave notice to terminate the Wisma-Gotcha franchise, they could likewise terminate her franchises for the other shops. The Wisma-Gotcha shop was incurring losses

of about \$25,000 per month and at this rate the plaintiffs would lose about \$900,000 over the duration of the three-year lease. Yet if the defendants made good their threat to terminate the other franchises if the plaintiffs terminated the Wisma-Gotcha franchise, the plaintiffs would lose those profitable outlets. They were caught between the proverbial devil and the deep blue sea.

85 In late May 1997, the plaintiffs were late in making payments to the defendants for goods supplied. Woo said that one reason for this was because of the huge losses in the Wisma-Gotcha shop. This state of affairs continued into June 1997. There is some disagreement on the amount by which the plaintiffs were in arrears. This is because the defendants say that the payment term was varied from 90 to 60 days with effect from 1 March 1997. This was announced at a meeting with the franchisees on 29 March. The plaintiffs say that this term was not validly varied and the 90-day period remained. However I need not make a determination on this issue because even if the credit period was 90 days, the plaintiffs agree that they were still in arrears, albeit by a smaller amount. It was nevertheless not an inconsiderable amount. But the defendants agree that the plaintiffs had made some payments in May, although such payments did not clear the arrears. In mid-June 1997, when the plaintiffs had still not cleared the arrears, the defendants decided to stop supplying Ocean Pacific products to the plaintiffs until they paid up.

86 At about the same time, sometime in June 1997, Woo met with Lee and some other representatives of the defendants to discuss the Wisma-Gotcha franchise. Woo offered to forgo the three months` deposit amounting to about \$90,000 if the defendants would agree to terminate that franchise. However the defendants did not agree to it and told her to give the three-month notice if she wanted to terminate it. Woo consulted her solicitors and on 18 June 1997, they

wrote a letter to the defendants which, after the introductory paragraphs, stated as follows:

There was a discussion between your company and our clients on ways to continue or terminate the commercial relationship. It appears that both parties have reached a stalemate where neither party is prepared to accept the condition proposed by the other party.

You will note that we are not instructed to embark on a confrontational path with your company. We are instructed to explore the possibility of having the matter resolved amicably for the benefit of both parties. If you are similarly inclined, you may wish to engage your solicitors to contact us or you may wish to let us have your proposal for our clients' consideration.'

87 On 19 June 1997 Woo was informed by a member of her staff at the Junction-OP shop, Ling May Choo ('Ling') that certain goods that were ordered from the defendants on 16 June were not delivered. She told Ling to call the defendants about it. Ling said that she called the defendants' sales executive, Tang, and was curtly told to 'ask Angie about it', 'Angie' being a reference to Woo. Ling told Woo about it and Woo called the defendants' store manager, Agnes. Agnes told Woo that it was 'a management decision' to stop supply of goods. From that date, no deliveries were made by the defendants to the plaintiffs' shops at Wisma-OP and Junction-OP and no orders were made by the plaintiffs. On 30 June 1997 the plaintiffs decided to instruct their solicitors to write to the defendants' solicitors to advise them that the plaintiffs would accept the defendants' repudiation of the contract and terminate the agreement between them.

88 The plaintiffs claim against the defendants for loss of the profits that they would have made over three months had the defendants given them the requisite notice to terminate the franchise agreement. Based on the past profits for the Wisma-OP and the Junction-OP shops, the plaintiffs claim \$81,370.44. In addition, the plaintiffs claim for loss of profits due to reduced sales in both

shops in the period 19 to 30 June 1997, which they say was caused by the diminished stock of goods in the shops. This amounts to \$8,054.41.

89 Lee said in his affidavit evidence-in-chief that the defendants had no choice but to suspend their supply of Ocean Pacific goods to the plaintiffs in view of their refusal to make payment. The defendants' Executive Director, Yow Wai Keong, said that he made a business and commercial decision to stop supply of goods to the plaintiffs because the invoices had remained unpaid. From their evidence, it seems that the basis for the suspension of supply was that this would force the plaintiffs to pay up. The defendants did not plead that there was a term in the contract, whether express or implied, that they were entitled to stop the supply of goods if the plaintiffs failed to comply with the credit terms. Neither was it their evidence that there was such a term. Nor can I see any reason to imply this term. The defendants' invoices state that they reserved the right to levy interest of 1.5% per month for late payments. This implies that prompt payment is not a pre-condition for further supply of goods. The defendants say that they had never enforced this provision but I cannot see that as being relevant as they had waived it of their own accord. The right to withhold supply is not necessary for the operation of the franchise agreement as it is open to the defendants to give the three-month notice of termination should the plaintiffs persistently fail to pay. The defendants submit that the plaintiffs had also not pleaded that there was a term of the contract obliging the defendants to provide a continuous supply of goods and not stop it abruptly. However para 10 of the statement of claim states as follows:

On 19 June 1997, the defendants wrongfully and in breach of contract, abruptly stopped the supply of OP and Gotcha products to the plaintiffs.

90 In my view, this paragraph contains the assertion that there was a term in the contract obliging the defendants to supply goods to the plaintiffs and not stop it abruptly.

91 I first examine whether the suspension of supply of fresh stocks by the defendants went to the root of the contract. The test proposed by Buckley LJ in **Decro-Wall International SA v Practitioners in Marketing Ltd** [1971] 2 All ER 216 (which was applied by Lord Fraser in **Federal Commerce and Navigation Co Ltd v Molena Alpha Inc** [1979] 1 All ER 307 at 318), is as follows (at p 232):

*... Each party to an agreement is entitled to performance of the contract according to its terms in every particular, and any breach, however slight, which causes damage to the other party will afford a cause of action for damages; but not every breach, even if its continuance is threatened throughout the contract or the remainder of its subsistence, will amount to a repudiation. To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The measure of the necessary degree of substantiality has been expressed in a variety of ways in the cases. It has been said that the breach must be of an essential term, or of a fundamental term of the contract, or that it must go to the root of the contract. Various tests have been suggested ... I venture to put the test in my own words as follows: **will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to the remedy in damages as and when a breach or breaches may occur?** If this would be so, then a repudiation has taken place. [Emphasis added.]*

92 Applying the test to the present case, I have no doubt that in the retail trade the consequences of termination of supply of stocks are drastic. Sales would simply be reduced until most of or all the stocks are sold. It is probably worse in the case of an upmarket product like Ocean Pacific. A poorly stocked shop of this nature would definitely not be attractive to customers. As it turned out, after the defendants stopped the supply on 19 June 1997 sales dipped

drastically. Lee himself had admitted that the continuous supply of goods by the defendants was fundamental to the business operation of the plaintiffs. And in the meantime, there are expensive overheads to bear, principally the rent for the shops and staff salaries. I cannot imagine any other action by the defendants that would inflict greater damage to the plaintiffs' business venture. It would certainly be unfair to hold the plaintiffs to the contract and leave them to the remedy in damages while they were being crushed financially by the weight of the overheads.

93 Counsel for the defendants submits that there cannot be a successful claim for breach of contract when the claimant is itself in breach. He cited the decision of the Court of Appeal in ***Brani Readymixed Pte Ltd v Yee Hong Pte Ltd*** [1995] 1SLR 205 in support of that proposition. I note that the headnote of that report seems to suggest this. However there is no such proposition to be found in the judgment and indeed the rest of the headnote makes the true position clear. The case concerns a counterclaim brought by the defendants. The court found that the defendants themselves had evinced an intention not to be bound by the contract and this repudiation was accepted by the plaintiffs. Therefore their counterclaim failed.

94 Counsel also cited ***Woodar Investment Development Ltd v Wimpey Construction UK Ltd*** [1980] 1 All ER 571 and ***V Damodharan Pillai v Chen Yock Siong*** [1997] 2 SLR 84 . The circumstances in both these cases are similar. They concern a party taking a course of action in the mistaken belief that it was entitled to do so under the contract. It was held that this by itself did not manifest an intention to abandon or not to be bound by the contract. However in the present case the defendants had stopped supply, not in reliance of what they thought was a term of the contract, but because of a 'business and commercial decision', ie to pressure the defendants into paying up.

95 I should add a further point. The defendants stopped supply without notice. The plaintiffs made an order on 16 June 1996. After the normal two days had elapsed, when they realised that the goods were not forthcoming, the plaintiffs called the defendants to inquire about it. It was only then that they were informed that they would not be supplying that or any other order. This seems to me to be a rather unprofessional and unreasonable way to conduct business. I am of the view that even if there is a term entitling the defendants to stop supply if payment is in arrears, such a term would embody a reasonable notice provision so that the plaintiffs are given an opportunity to rectify the situation before such drastic action is taken.

96 Accordingly, I hold that the defendants were in breach of contract in stopping supply of products to the Wisma-OP and Junction-OP shops. I also hold that the plaintiffs were entitled to accept the repudiation and terminate the contract on 30 June 1997. Accordingly the franchise agreements in respect of the Wisma-OP and Junction-OP shops were validly terminated on that date. The plaintiffs are entitled to damages for (a) loss of profits in lieu of the three-month notice period; and (b) the reduction in profits during the period 19 to 30 June 1997 as a result of the diminished stock. As the defendants do not dispute the figures put up by the plaintiffs, I find that the defendants are liable to the plaintiffs in the sum of \$89,424.85 made up as follows:

97 (i) Loss of profits in lieu of three months` notice: \$81,370.44

98 (ii) Reduced profits from diminished stock: \$8,054.41

99 ***Takashimaya concessionaire***

100

101 The plaintiffs also claim for the following losses incurred in respect of the Takashimaya concessionaire:

102 (a) Loss of three months` net profit in lieu of notice: \$14,974.60

103 (b) Compensation to staff for early termination: \$ 2,300.00

104 The stocks for the Takashimaya concessionaire are supplied by the defendants. All that the plaintiffs provide are sales staff. In return for this the plaintiffs was paid 20% of the gross sales. The plaintiffs agree that the defendants did not refuse to supply goods nor did they fail to fulfil any of their obligations in respect of this outlet. This is also clear from the fact that there is no claim for reduced sale as a result of stock shortage. What the plaintiffs say is that all the contracts between the parties must be looked at as a whole and that the refusal by the defendants to supply goods in respect of the Wisma-OP and Junction-OP outlets must mean that the defendants intend to repudiate all their contracts with the plaintiffs. Woo admitted that the reason they stopped operating at Takashimaya was because there was no point in it once the other shops were taken back. She said this in cross-examination:

They wanted to take back all my other shops. There is no reason for me to retain shop at Takashimaya. It was meaningless just operating the shop at Takashimaya.

105 I therefore do not see how the defendants can be made liable in respect of the Takashimaya concessionaire when they have duly maintained stocks there and were not in breach of the other terms of that contract. Furthermore, the plaintiffs` solicitors` letter of 30 June 1997 accepting the defendants`

repudiation does not mention the Takashimaya concessionaire. It was the plaintiffs who walked out of Takashimaya. Accordingly I dismiss their claim in this respect.

106 ***Wisma-Gotcha***

107

108 The plaintiffs also claim for losses incurred by them in operating the Wisma-Gotcha shop from February to June 1997 as a result of the wrongful refusal of the defendants to take over the shop. The losses for this period amounts to \$135,305.59. The plaintiffs say that the defendants had agreed to take back the shop upon request if it were not profitable. Woo had made this request to Lee in February 1997.

109 I find that there was no such term in the Wisma-Gotcha franchise agreement. The relationship between the parties was conducted by word of mouth. The parties found this a comfortable way to do business and it had been successful for seven years. But the problem with this manner of conducting a business relationship is that when a matter arises in respect of which there is no clear understanding in the agreement between them, the party that is bearing the risk is left to bear the burden. I find that to be the case here. Between Woo and Lee, there was an agreement that the defendants would help the plaintiffs in the Wisma-Gotcha venture. But I do not find anything more beyond that. At most there was a request to re-negotiate the terms, which the defendants refused to accommodate. If the plaintiffs really wanted to get out of the Wisma-Gotcha franchise, they could always have exercised their right to terminate the agreement with three months` notice. I appreciate that they did not do so for fear

that the defendants would in turn terminate their other franchises, but the defendants were legally entitled to do that. For this reason Woo vacillated for a few months before matters came to a head at the June meeting. I therefore see no provision in their agreement that obliged the defendants to take back the Wisma-Gotcha shop by a simple request nor any scope for implying such a term in it. If the plaintiffs wanted to do terminate the franchise, they would have to give notice. It was in fact the fear of the defendants giving notice of termination for the other franchise agreements that kept the plaintiffs from giving such notice. The plaintiffs had merely held on in the hope of an amicable solution which did not materialise. I therefore dismiss the plaintiffs' claim in this respect.

110 ***The counterclaim***

111

112 There are two heads to the defendants' counterclaim:

113 (i) Damages for wrongful termination amounting to \$139,534.70.

114 (ii) An overpayment of \$57,127.64 in the interim payment of July 1997.

115 The first head comprises two parts:

116 (i) loss of profit from the Wisma-OP and Junction-OP shops during the period 19 June to 10 July 1997 amounting to \$39,534.70; and

117 (ii) loss of goodwill.

118 The defendants have not adduced any evidence of the loss of goodwill. However, I need not deal with that as I have found that the plaintiffs were entitled to terminate the agreement due to the defendants' wrongful refusal to supply stocks of Ocean Pacific products to the plaintiffs. Accordingly, I dismiss this head of the defendants' counterclaim.

119 The overpayment in the second head of the counterclaim arose from the payment by the defendants to the plaintiffs of the sum of \$82,000 in July 1997 upon their taking over the four shops. As this payment was made without prejudice, the defendants are entitled to a refund of any amount in excess of what they were obliged to pay. The matters to be taken into consideration in this payment are as follows:

120 (i) Renovation costs: I have found that the defendants are liable only for 20% of the renovation costs and the balance of it pro-rated to the unexpired term of the lease. On this basis, the defendants' figure of \$88,352.84 is the correct sum that is due to the plaintiffs.

121 (ii) Security deposit: The parties agree that the amount held by the defendants as security deposit was \$172,662.84.

122 (iii) Returned stocks: The parties agree that the invoice value of the returned stocks was \$40,825.73. However the defendants claim that, pursuant to cl 11 of the 1989 agreement, which is incorporated in the franchise agreements, the plaintiffs are only entitled to 90% of this value. I accept that cl 11 was incorporated as a term in the subsequent franchise agreements. However I note that the clause operates only in the event the franchisee chooses to terminate the agreement. In this instance the termination was caused by the plaintiffs accepting the defendants' repudiatory breach. Therefore cl 11 does not

apply and the defendants must refund the full invoice value of the returned stocks.

123 (iv) Takashimaya commission: The plaintiffs claim that the commission owed by the defendants in respect of the Takashimaya concessionaire is \$11,691.73. The defendants claim that this was only \$10,533.06. However neither side produced any evidence to prove their figures. As this is the defendants' counterclaim, the onus is on them to prove that it is \$10,533.06 and not \$11,691.73. Accordingly, I have to reject their figure and accept the plaintiffs' figure.

124 (v) Unpaid invoices: The parties agree that the total amount of the unpaid invoices is \$267,652.87.

125 (vi) Pro-rated rental-July 1997: The defendants claim rental for the three shops, Wisma-OP, Wisma-Gotcha and Junction-OP for the period 1 to 9 July 1997 as they only took possession on 10 July. However in view of my finding that the termination was caused by the defendants' breach, this part of the claim is dismissed.

126 The computation for the total amount of overpayment is as follows:

Renovation costs			\$	88,352.84
Security deposit			\$	172,662.84
Returned stocks			\$	40,825.73
Takashimaya commission			\$	11,691.73
Total due to plaintiff			\$	313,533.14
Less:	(i)	unpaid invoices	\$	267,652.87

	(ii)	interim payment	\$	82,000.00
			\$	-36,119.73

127 Hence the amount overpaid by the defendants is \$36,119.73. Accordingly, in respect of this head of the defendants' counterclaim, there shall be judgment for the defendants in the sum \$36,119.73.

128 There is one other matter in relation to the counterclaim that I require to comment on. Counsel for the plaintiffs submits that the computation above does not take into account the value of returned Gotcha stocks. He said that the item 'returned stocks' in the tabulation above relates only to Ocean Pacific products. This is evidenced by two credit notes, both dated 31 July 1997, number C11117A and C11117C totalling \$40,825.73. However, there is a third credit note from the defendants to the plaintiffs of the same date, number C11117B, which relates to Gotcha goods returned and is for the sum of \$64,537.76. Counsel submits that this should be included in the above tabulation, in which case it would mean that there would be an underpayment, instead of overpayment, amounting to \$28,418.03. Counsel submits that I should give judgment to the plaintiffs for this sum instead. However, there are several problems with the plaintiffs' position:

129 (a) Firstly, there is no evidence from the plaintiffs on this. Counsel said that the payment of the \$82,000 in July 1997 was supposed to take this into account, but it was left out of the original tabulation in July 1997 which arrived at the \$82,000. He said that this was because the defendants had originally argued that they were not the supplier of Gotcha goods - presumably this was done by a related company. I note that the credit notes do not emanate from the defendants but from a company called Orient Pacific Sunwear Pte Ltd. However this is evidence from the bar and I cannot admit it in evidence.

130 (b) Secondly, this matter is not pleaded. There is no claim in respect of the returned Gotcha stocks in the statement of claim.

131 (c) Thirdly, this matter is part of the defendants' counterclaim. The defendants have claimed that there was an overpayment and are now suing for its return. I can give judgment on the counterclaim for the amount claimed or a reduced amount, or I can dismiss it. I cannot, in respect of this counterclaim, order the claimant to pay the plaintiffs.

132 In view of this, I am unable to hold in favour of the plaintiffs in respect of the returned Gotcha goods, even if they are able to prove that they are entitled to judgment. Counsel for the defendants states that it is the defendants' position that the credit note for \$64,537.76 was reflected in the defendants' invoices in respect of Gotcha products, ie the invoices were reduced by this amount. Again I note that this is evidence from the bar. In any event, I am not concerned with it. I would only like to make it clear that the credit note for \$64,537.76 was not an issue in this litigation because neither side had brought it up either in the pleadings or in evidence. In the defendants' tabulation in respect of their claim of overpayment, the item for returned stocks clearly relates to Ocean Pacific products as the amount corresponds to the sum of the figures in the two credit notes for returned Ocean Pacific stocks. Therefore this litigation would not affect any claim by the plaintiffs in respect of the returned Gotcha stocks.

133 ***Conclusion***

134

135 To recapitulate, there shall be judgment for the plaintiffs in the claim for the sum of \$89,424.85 and judgment for the defendants in the counterclaim for the sum of \$36,119.73. The difference being \$53,305.12 payable by the defendants to the plaintiffs, the defendants are ordered to pay interest on this amount at 6% per annum from the date of the writ to the date of this judgment.

136 I will hear counsel on the question of costs.

137 **Outcome:**

138 Order accordingly.

Lee Seiu Kin JC

Hee Teng Fong and Joseph Chai (Hee Teng Fong & Co) for the
plaintiffs
Wilfred Yeo and Christina Seah (Wilfred Yeo & Co) for the
defendants
