IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 215

Suit 1867/1997

Between

Class One Enterprises Pte Ltd

… *Plaintiff*

And

Movie House Trading Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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

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Class One Enterprises Pte Ltd v Movie House Trading Pte Ltd

[1999] SGHC 215

Suit 1867/1997
Kan Ting Chiu J
18 August 1999

JUDGMENT:

Cur Adv Vult

The background

1. The plaintiffs Class One Enterprises Pte Ltd are the exclusive licensees of Television Broadcast International Ltd (TVBI) of Hong Kong. The licence entitled them to grant sub-licences and to appoint dealers to distribute TVBI's Mandarin and Cantonese video programs in Singapore.

2. The defendants Movie House Trading Pte Ltd were dealers of the plaintiffs. They first became dealers in 1994 with seven sub-licence agreements for seven outlets at Yishun Street 72, Toa Payoh Central, Upper Aljunied Lane, Silat Avenue, Balestier Road, Tampines Street 81 and Whampoa Drive. That was reduced to six outlets in 1995, and then two outlets in Toa Payoh and Whampoa. The last two sub-licence agreements expired on 31 March 1997.

The claim

3. On 23 October 1997 the plaintiffs filed a claim against the defendants for the latter's breaches of the sub-licence agreements.

4. The plaintiffs alleged four breaches –

> (i) distributing tapes of TVBI programs at various outlets in contravention of the sub-licence agreements;
>
> (ii) continuing to distribute tapes after the termination of the agreements;
>
> (iii) failing to withdraw the tapes from circulation after the expiry of the agreements; and
>
> (iv) failing to surrender the tapes for erasure on the expiry of the agreements.

5. The provisions in the sub-licence agreements the complaints were founded on are clause 3(a)(i)

> The Dealer shall carry on its function and trade as a distributor of the Licensed Programmes only at its licensed premises situated at unless COEPL permits in writing to the relocation of the same.

and clause 10(d)

> Forthwith upon the termination of this licence for any reason whatsoever the Dealer shall immediately withdraw from rental distribution all video cassettes of the Licensed Programmes and surrender the same at its own expenses to COEPL for erasure. COEPL reserves the right to enter the shops of the Dealer at any time without giving notice in advance in order to erase the Licensed programmes immediately upon termination of dealership agreement and the Dealer gives consent to COEPL to so enter the premises stated herein for the purposes stated herein. The Dealer shall give a written declaration to COEPL as to all video cassettes of the Licensed programmes from rental distribution have been surrendered to COEPL for erasure. In the event of any failure to return or surrender any or all of the said video cassettes for erasure the Dealer shall pay Dollar Singapore Fifty (S$50.00) per video cassettes not surrendered and such other sum as may be proved against COEPL by the producers of the Licensed Programmes as damages for breach of this provision. The Dealer is not to erase the Licensed Programmes upon termination and if erasure is claimed by him,

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> damages of Dollar Singapore Fifty (S$50.00) per tape erased shall be payable by the Dealer to COEPL immediately.

The April and September erasure exercises

6. The plaintiffs' employees were at the defendants' Whampoa and Toa Payoh outlets to erase tapes on 16 and 17 April 1997 and again on 21 April at the Toa Payoh outlet.

7. Another erasure exercise was carried out on 15 and 16 September at the Toa Payoh outlet. That was resumed on 24 September, but there was a dispute as to whether they were there to continue erasing, or to finish what was already done on 16-17 September. According to the plaintiffs about 1,500 and 1,092 tapes were erased at the Toa Payoh and Whampoa outlets respectively in the April exercise and about 4,000 tapes in the September exercise but the defendants initially put the total figure of tapes erased on both exercises at first at 31,221 and then amended it to 29,316.

The Anton Piller order

8. The plaintiffs obtained an Anton Piller order against the defendants. The order was executed on 24 October 1997, and about 12,000 tapes were seized of which 700 were tapes that the defendants had obtained from Golden Crown Video Pte Ltd, the plaintiffs' predecessor licencee of TVBI.

9. The order was discharged on the defendants' application on 21 April 1998. In its place an order was made which required the defendants to surrender to the plaintiffs for erasure all tapes of licensed programs. In compliance of this order the defendants delivered 45,231 tapes supplied by the plaintiffs as well as other tapes.

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The defence and counterclaim

10. The defendants denied that they contravened the terms of the sub-licence agreements. They also contended that the liquidated damages that the plaintiffs sought were not recoverable for being punitive.

11. They asserted that they were the wronged party, and made a counterclaim. They claimed that the plaintiffs had in April and September 1997, erased 12,728 and 3,972 tapes respectively which were supplied to them by Golden Crown. They contended that the plaintiffs were not entitled to erase these tapes, but were only entitled to erase tapes the plaintiffs themselves supplied. They also claimed that the plaintiffs had wrongfully seized and/or damaged under the Anton Piller order 700 tapes that had been supplied by Golden Crown.

The evidence – the plaintiffs' case

12. *On Shu Kio*. The plaintiffs' managing director On Shu Kio in her affidavit of evidence-in-chief, asserted that tapes furnished to an outlet under one sub-licence agreement cannot be distributed at another outlet, but when the defendants' outlets were reduced to the two at Toa Payoh and Whampoa, they were allowed to distribute tapes supplied to the former outlets from these two outlets. However, they were not allowed to continue to distribute them from the former outlets.

13. She alleged that in 1996, the plaintiffs discovered that the defendants were distributing tapes from their Silat Avenue outlet after the sub-licence for that outlet had expired. A letter was issued on 13 August 1996 demanding that they stop doing that. When no response was received, another letter was issued on

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25 September 1996 threatening to terminate the surviving sub-licence agreements.

14. In response to this letter, the defendants provided the plaintiffs with a banker's guarantee in the sum of $10,000 to secure their compliance of the terms of the sub-licence agreements. (It was not alleged, and there was no evidence that the defendants admitted the allegation when they furnished the banker's guarantee.)

15. Mdm On deposed that tapes continued to be rented out in breach of the sub-licence agreements and that the plaintiffs' employees had secured evidence of these activities.

16. In February 1997, the plaintiffs discovered that the defendants were supplying tapes to an outlet at Holland Grove Road. Another letter of warning was issue on 24 February 1997. The plaintiffs also decided not to renew the last two sub-licence agreements when they expired on 31 March 1997.

17. *Thong Kok Leong.* With the termination of the last two sub-licence agreements arrangements were made for the erasure of the tapes. This was under the charge of Thong Kok Leong, the plaintiffs' assistant manager.

18. In his affidavit of evidence-in-chief he deposed that he made arrangements with Lim Chee Yong, the defendants' manager at the beginning of April 1997 to erase the tapes at the two outlets. Lim asked for a deferment for the defendants to appeal to the plaintiffs to extend the sub-licence agreements. About a week before 16 April, Thong informed Lim that the plaintiffs would proceed with the erasure exercise.

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19. On 16 April he attended with a team to the Toa Payoh outlet, whilst another colleague Wilson Low went to the Whampoa outlet. Thong and his team commenced with the job on 16 April but was only able to complete erasing all the tapes on the following day, 17 April.

20. Things did not go so smoothly at the Whampoa outlet. No actual erasure took place on 16 or 17 April. Instead Wilson Low only put aside the tapes for erasure. When Thong learnt of this, he went to the Whampoa outlet on 21 April and discovered that the tapes set aside earlier for erasure were missing. When he confronted Lim, the latter admitted that he had "dumped" them. Thong and his team proceeded to erase the tapes that were available for erasure.

21. Thong deposed that during the erasure exercises at the two outlets, the plaintiffs' staff sought to avoid or minimize disruption of the defendants' business. The plaintiffs erased tapes made available to them by the defendants in areas designated by the defendants.

22. When he was cross-examined by counsel for the defendants, he agreed that some Golden Crown tapes were erased during the erasure exercises. However he disagreed with counsel that on 15 and 16 September, erasure was limited to obliterating B-certificates, and reiterated that the tapes themselves were erased. A B-certificate is a certificate issued by the Board of Film Censors, affixed to each tape as evidence that it is approved for circulation. Each certificate bears a number as well as the names of the program and the owner of the tape.

23. He also produced a minute dated 13 May 1997 that he submitted to his manager in which it was recorded that he informed the defendants on 1 April that an appointment will be fixed to erase the tapes, and that on 14 April, he informed the defendants that erasure will proceed on 16 April.

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24. Thong was not satisfied after those exercises in April that all the tapes had been erased. He pursued the matter with Lim, and eventually they arranged for a further exercise in the Toa Payoh outlet on 15 and 16 September 1997. At the end of this exercise Lim told him there were no more tapes to be erased.

25. When he was cross-examined by counsel for the defendants he added that he had returned to the premises on 24 September at Lim's request to scrap off some B-certificates that Lim had complained had not been properly scrapped off. Consequently he returned on 24 September to complete the scrapping, but without bringing any erasing machine which was used on 15 and 16 September.

26. However the plaintiffs believed that the tapes were still being circulated by the defendants, and deployed enforcement officers to investigate.

27. *Yew Soon Keat.* On 22 September 1997 he opened a rental account at the defendants' Balestier Point outlet and rented 3 tapes of licenced programs. He returned the 3 tapes on 24 September and rented tapes of another licenced program and on 26 September he returned those tapes and rented the tapes of another two licenced programs. These tapes were returned on 8 October when the tapes of another licenced program was rented. The records produced by him showed that the account was opened with Jin Xing Video Pte Ltd (which was described as a related company of the defendants) rather than the defendants, and the tapes were rented from Jin Xing.

28. Yew also visited the defendants' outlet at Silat Avenue, opened an account and rented licenced programs on several occasions. Again the documents produced showed that the account was not with the defendants but with Jin Xing and the tapes were rented from Jin Xing.

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29. *Chin Chee Keong.* He was engaged in similar operations. His activities covered the defendants' outlet at Tampines where he opened an account on 22 September 1997 and rented licenced programs. The documents he produced of the transactions were all issued by Jin Xing.

30. *Anthony Ho Ping.* He is a divisional manager of TVBI and he deposed that before the plaintiffs became TVBI's exclusive distributors in Singapore, Golden Crown Pte Ltd were the exclusive distributors from 1 April 1988 to March 1994. With the change of exclusive distributors, Golden Crown entered into an agreement with TVBI on 27 May 1994 to assign to the plaintiffs its right to require its sub-licencees to return and erase licenced programs at the expiry of the sub-licences.

31. He went on to say that the defendants were sub-licencees of Golden Crown, and could not have legally purchased any tapes of TVBI programs from Golden Crown. When he gave evidence in court he produced copies of portions of a sub-licence agreement between Golden Crown and the defendants dated 8 April 1988 as well as Golden Crown's sales and order reports in April-June and December 1993 recording the defendants' dealings.

32. *Dato Yap Yee Choon.* He is a shareholder of and consultant to the plaintiffs. He referred to a deed of assignment dated 7 June 1994 between Golden Crown and the plaintiffs whereby Golden Crown assigned to the plaintiffs their rights to require from their sub-licencees the return and erasure of licenced programs.

The evidence – the defendants' case

33. The case for the defendants was set out in two affidavits deposed by their manager Lim Chee Yong. The first affidavit was deposed on 4 February 1999

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and filed on 12 February 1999 and a further affidavit was filed and served on 15 February 1999.

34. Mr Lim denied that the defendants had rented out any tapes of the plaintiffs' licenced programs after 31 March 1997.

35. He deposed that on 16 April the plaintiffs' representatives went to the defendants' Whampoa and Toa Payoh outlets unannounced and without prior warning. He protested that the plaintiffs had not informed the defendants that the sub-licence agreements were not going to be renewed, and that they should be given time to prepare the tapes for erasure.

36. When his protests failed and the erasure proceeded it was not completed on that day, and an appointment was made for them to resume work on 21 April, but "on 17 April 1997, the same 12 Plaintiffs' representatives turned up unannounced again at both the Whampoa and Toa Payoh premises to erase the remaining tapes" suggesting that tapes were erased at both outlets.

37. On 17 April he wrote to the plaintiffs to complain that

> Yesterday your enforcement team have come to our video shops at Toa Payoh #01-112 and Whampoa #01-324, to erase half of the TVB licensed programmes and has agreed to erase the rest of the programmes on Monday 21 April 1997. However, today, it has come to our notice that your enforcement team have come to our video shop to erase our TVB licensed programmes, without advance notice. Also, their visit does not comply with our agreed appointment date. Due to their sudden visit, it has caused us a lot of inconvenience and disturbance because our counter girls are not aware of the whole situation, and most important of all, our normal operation of business are being affected. Basically, in principle, we totally agreed with you in erasing all the TVB licensed programmes. But to make our job easier, we hope to compromise a confirm date with you, to erase all the TVB licensed programmes within a one day. Please kindly inform us in advance of your confirm date to erase all TVB licensed programmes. Thank you for your understanding.

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It is noteworthy that while he complained that the erasures on the 17th were not scheduled, there was no complaint that the plaintiffs erased any tapes that they were not entitled to erase.

38. The erasure was still not completed at the Whampoa outlet on 17 April and the representatives went back on 21 April to continue with the operation. In his further affidavit he agreed with Thong's account that no erasure took place at the Whampoa premises on 16 and 17 April.

39. Lim further deposed that most of the tapes were not physically erased. He said that the plaintiffs' representatives struck out the B-certificates' numbers on some tapes so that they cannot be rented out.

40. Lim alleged that a total of 33,932 tapes were erased or destroyed including 12,728 tapes of TVB licenced programs which the defendants obtained from Golden Crown which he asserted that the plaintiffs should not have erased.

41. Apparently, some tapes remained after the operation, and the defendants removed them from the Whampoa and Toa Payoh outlets to their premises at Mun Hean Building at Kim Keat Road. The defendants alleged that the relocation of the tapes were witnessed by Thong in the end of June 1997.

42. It was also alleged that on or about 3 July 1997 Thong was requested to erase the balance of the tapes, but he took no action. In August 1997 the defendants returned the tapes from Mun Hean Building to the Whampoa and Toa Payoh outlets. On 12 September 1997 the plaintiffs notified the defendants that they will continue with the erasure on 15 September.

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43. On 15 September the plaintiffs' representatives went to the Toa Payoh premises to erase the tapes. They could not finish that day, but returned on the following day and on 24 September to complete the job. According to Lim the plaintiffs had stated that they will return on 24 September to erase the balance of the tapes and not just remove the B-certificates. However when they returned on 24 September, they only removed the B-certificates.

44. On 27 Sept 1997 the defendants' solicitors wrote to the plaintiffs' former solicitors stating *inter alia*

> We are instructed that your clients came to our clients' premises on 3 occasions (15 September 1997, 16 September 1997 and 24 September 1997) to erase the tapes. However, to-date, your clients have still not given our clients a list of the tapes they have erased despite promising to do so on several occasions since 15 September 1997. In this regard, even after more than 5 months, your clients have also not given our clients a list of the tapes they erased when they simultaneously descended unannounced at 2 of our clients' premises on 17 April 1997, 18 April 1997 and 21 April 1997. Please send us the said lists for our clients' confirmation as soon as possible.

45. The tenor of the letter is that the defendants regarded the exercise as completed, leaving no more tapes for erasure, and that all that remained to be done was to have a record of all the tapes erased. No complaint was made that the plaintiffs had erased tapes that they were not entitled to.

46. According to the defendants' records 12,084 tapes were erased or destroyed including 3,972 tapes obtained from Golden Crown which should not have been erased. The total number of tapes erased by the plaintiffs in April and September 1997 was set at 31,221 (later reduced to 29,316 during the trial).

47 This did not bring the operation to an end. On 24 October 1997, the plaintiffs returned with an Anton Piller order and seized about 12,000 tapes. When the

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order was discharged on 21 April 1998 the plaintiffs were ordered to return the tapes they seized, and the defendants were ordered to surrender to the plaintiffs for erasure all tapes containing the plaintiffs' licenced programs. In compliance with the order the plaintiffs returned 11,859 seized tapes to the defendants, and 45,231 tapes surrendered by the plaintiffs containing the plaintiffs' licensed programs were erased. There were another 1,368 tapes on which the parties could not agree. The dispute was whether they contained the plaintiffs' licensed programs. These tapes were set aside and not erased.

48. In his further affidavit Lim explained that when the defendants returned tapes for erasure, the plaintiffs would record new programs on them for further circulation. The plaintiffs issued Receiving Notes and Returning Notes to the defendants, which Lim claimed showed that 51,182 tapes were received by the plaintiffs. (This was revised to 43,182 at the hearing).

49. Lim also disputed the plaintiffs' claim that after the April erasure exercise they were only able to schedule the next exercise in September. He referred to the defendants' solicitors' letter of 4 August 1997 where the solicitors had said that "our clients informed your clients' representative, Mr Edward Thong, since about 3 July 1997 that your clients could come and erase the returned video tapes at 53 Kim Keat Road, #03-03 Mun Hean Building" to which the plaintiffs had not responded or denied at that time. At the trial Thong denied that the invitation was extended.

50. Other contemporaneous correspondence raise a doubt whether the offer was made. The plaintiffs' former solicitors had written to the plaintiffs' solicitors on 17 July with a complaint of the defendants' failure to return tapes and a request that they do that within a week. The defendants' solicitors replied on 24 July that they will take the defendants' instructions and revert, and they did not revert

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till 4 August. If the offer was made on 3 July, there was no need for the letter of 17 July, and the defendants did not have to delay till 4 August to reply it.

51. Lim also deposed that –

> In fact, I had asked him on 24 September 1997 when he was coming to erase the rest of the tapes at the Toa Payoh premises as well as when he wanted to erase the tapes at the Whampoa premises as no erasure had yet taken place at the Whampoa premises. Thong did not give me a definite reply.

52. In his evidence in court, he contradicted himself and said that Thong had promised to arrange an appointment to complete the job, but did not follow up on that.

53. His evidence contradicted Thong's averment that the defendants had represented that all the tapes had been erased at that time. Of the two versions, I find Thong's to be more credible and consistent with the facts. I find it improbable that Thong would fail to go to the Whampoa premises if he was told that there were more tapes there to be erased. If there were other tapes available that the plaintiffs had not erased despite being informed, one would expect the defendants or their solicitors to put that on record but this was not referred to in the letter of 27 September.

54. When cross-examined Lim corrected his first affidavit and said that the Receiving Notes issued by the plaintiffs showed that the defendants had returned 43,182 tapes of the plaintiffs' programs to the plaintiffs rather than 51,182 that he had earlier deposed to. He explained that the revised figure was obtained from the Receiving Notes.

55. When it was pointed out that the Receiving Notes only recorded the quantities of tapes and not to their titles (and therefore do not show if they were

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programs supplied by the plaintiffs), he said that the titles were recorded on other forms that the defendants tendered to the plaintiffs together with the tapes although they did not retain copies of these forms for their own record.

56. His attention was drawn to the fact that the Receiving Notes referred not only to recycled tapes but also to blank tapes. The significance of this is that blank tapes were submitted only for recording and not for erasure. His response was that the references to blank tapes were wrong. He had not disputed the accuracy of the Receiving Notes in his affidavits, and his counsel had not suggested to any of the witnesses for the plaintiffs that the Receiving Notes were not correct.

57. On the evidence, I accepted that the Receiving Notes were records accepted by both parties when they were issued. Proceeding from that, the Receiving Notes cannot show the total number of tapes supplied by the plaintiffs that were returned for erasure because the notes do not record the title of the programs nor differentiate between recorded and blank tapes returned.

58. Lim also denied that there was a distributorship agreement between the defendants and Golden Crown. This was irreconcilable with Anthony Ho Ping's evidence, supported by documentary exhibits, that there was an agreement under which the defendants received tapes from the plaintiffs in 1993. As Lim was the manager of the defendants from 1992, his ignorance of the agreement is not credible.

59. When the defendants' records of the tapes erased in April and September and their records of the tapes they claimed to have submitted for erasure in the course of the sub-licence agreements were examined, very serious doubts arose over their veracity.

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60. First, there was a contradiction over the number of tapes supplied by Golden Crown that the plaintiffs were alleged to have erased in the April exercise. In his affidavit of evidence in chief, Lim had set that at 12,728, but in the defendants' records, it was stated to be 9,795. Lim explained mistakes were made by students who were engaged to produce the records. He was confident that the adjusted figure 12,728 was correct.

61. He was then confronted with other errors – the same B-certificate numbers appearing more than once in the records. He admitted that this was another mistake, and that meant that even the adjusted figure of 12,728 was not correct.

62. The defendants' records for the September erasure were just as unreliable. Lim deposed in his affidavit of evidence in chief that 12,084 tapes were erased or destroyed and confirmed in court that that was the total number of tapes reflected in the defendants' records. When it was put to him that the total was in fact 12,131, he asserted that the figures in the records were "draft" figures and the figures in his affidavit are correct. The explanation cannot stand since the figure in his affidavit was derived from the same records. If the records show 12,131, the correct figure cannot be 12,084.

63. Lim was also brought through the defendants' "progressive reports". Lim claimed that such reports were forwarded to the plaintiffs together with tapes sent for erasure in the course of the sub-licence agreements. The plaintiffs have disputed that they had received these documents.

64. Lim's attention was brought to instances where the same tapes were recorded twice. He admitted the errors and explained that the records may have been photocopied twice. However that explanation was shown to be insufficient because he was shown instances where the same report was repeated bearing

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different dates indicating that there was more than accidental over-photocopying involved.

65. More significantly damaging to any credibility of these reports, some reports actually recorded tapes being tendered for erasure *before* they were released!

66. Counsel's cross-examination of Lim further damaged the defendants' cause. He admitted that in the September erasure exercise, the tapes were placed in boxes and plastic bags for the plaintiffs to erase. This was contrary to his affidavit of evidence-in-chief where he had complained that 3,972 tapes obtained from Golden Crown were erased which should not have been erased. If the tapes were prepared by them for erasure, there cannot be any basis for complaint, and that part of the counterclaim relating to these tapes is without substance. In view of this, and taking into account the fact that the defendants' letter of 17 April complained of the unscheduled visit but not of any wrongful erasure, I accepted the plaintiffs' evidence that all the tapes erased were handed over by the defendants for that purpose.

67. I must state that I had a poor impression of Lim and of the documents the defendants produced. His evidence was chopped and changed at will, and he feigned ignorance of the defendants' distributorship agreement with Golden Crown even though it was in force when he was manager of the defendants. The records produced were dubious and unreliable.

Findings on the plaintiffs' claim

68. There was no direct evidence on breaches (i), (ii) and (iii) that the plaintiffs complained of. The only evidence produced were the transactions made by the investigators. The documents produced did not incriminate the defendants as

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they were not issued by them but Jin Xing. It was not the plaintiffs' pleaded case that the activities of Jin Xing are or should be regarded as the activities of the defendants.

69. On the further alleged breach for failing to surrender the tapes for erasure at the expiry of the sub-licence agreements, there was no dispute that after the expiry on 31 March, at least 45,231 tapes were not erased till the court-ordered erasure exercise in November-December 1998.

70. From the evidence the parties treated the April and September erasure exercises as a continued post-termination erasure exercise, and tapes surrendered for erasure would be regarded as tapes surrendered in compliance with the sub-licence agreements. On that basis there could be a breach in respect of tapes that are still not surrendered after these exercises.

71. I accept Thong's evidence that the defendants had represented that there were no more tapes to be erased after the September erasure exercise. I do not believe Lim's claim that Thong had declined to continue with the erasure when he was told that there were more tapes to be erased.

72. The plaintiffs claimed that they had delivered to the defendants 61,423 tapes to the Whampoa and Toa Payoh outlets and 36,011 tapes at the other five outlets under the sub-licence agreements. However they did not produce records of the quantities of tapes returned to them for erasure and recycling in the course of these agreements. There was no reliable record of the number of tapes that were not returned prior to the order of court of 21 April 1998.

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73. In the circumstances, I find that the defendants have breached their contractual obligations when they had failed to surrender the 45,231 tapes for erasure until they were compelled to do so by the order of court.

The damages arising

74. The provision that has to be considered is clause 10(d) set out in paragraph 5 hereof.

75. Counsel for the plaintiffs contended in their written submissions that clause 10(f) is also relevant to the plaintiffs' claim. The provision reads

> In the event that any of the Dealer's tapes have been wilfully transferred or sent by the Dealer to another location other than his video centres or to another country, the Dealer shall have to pay the sum of Dollar Singapore Fifty Thousand (S$50,000.00) and or all damages awarded by the court.

This clause has no application to the plaintiffs' claim because it is not a part of the plaintiffs' claim that the defendants breached this clause.

76. With regard to clause 10(d) the plaintiffs adduced evidence on it through Madam On and Dato Yap. The former said that if a tape is not surrendered, the delinquent dealer may continue to rent it out at $2.50 a time. This will mean a loss of rental for the plaintiffs' authorised dealers, and ultimately a loss to the plaintiffs who has a profit-sharing arrangement with the authorised dealers. Dato Yap explained the matter further. He said that when a dealer fails to return a tape and continues to rent it out, he may receive rental of $100 to $150 over a year. At the same time the plaintiffs have to incur expenses in legal advice, enforcement costs and trap rentals to stop him. Such breaches also have a detrimental effect on the plaintiffs' rental market, and they may lose dealers.

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77. Counsel for the defendants did not question either of them on this aspect of their evidence. The defendants' sole witness Lim Chee Yong did not refer to this issue at all in his evidence.

78. Counsel for the defendants did not address this issue in any depth. In their written submissions all that they contended was that

The Plaintiffs tried on 3 occasions to justify the amounts payable in their distributorship agreement. First Ms On tried. When she made no headway, she said Dato Yap would give his evidence. Next, Dato Yap gave evidence on 25 February 1999. He, too made no headway. Finally, he tried again on 26 February 1999. The following are the only 2 clauses in which Dato Yap tried to justify the amounts stipulated in the agreement on 26 February 1999:

…

> b. Clause 10(d) at pg 272. The sum of $50/- was allegedly based on (1) the Plaintiffs' dealers' business being affected (not the Plaintiffs') (2) lack of development of the market and (3) legal action. How this then led to the sum of $50/- was not explained. Furthermore, as regards (1), it is not the Plaintiffs' loss but their dealers. As for (2), it is rather vague and nebulous. In respect of (3), it cannot mean that legal costs increase by $50/- for each tape in which legal proceedings are taken.

79. I do not think that they have done enough. It is settled law that the onus of showing that a stipulation is a penalty clause lies upon the party who is sued upon it, see *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 @ 1477.

80. If the plaintiffs said nothing about clause 10(d), it is enforceable unless the defendants show that it is a penalty clause. The plaintiffs have not remained silent and had given explanations through Mdm On and Dato Yap which were

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not unreasonable or fanciful. The defendants did not challenge them, and offered no evidence of their own.

81. The classic test for determining whether a clause setting a fixed quantum of damages is enforceable or not is set down by Lord Dunedin in *Dunlop Pneumatic Tyre Co v New Garage & Motor Co* [1915] AC 19 @ 87-88

> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid. This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable, - a subject which much exercised Jessel MR in Wallis v Smith – is probably more interesting than material. (c) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'. On the other hand: (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

82 When the clause is put to the test, I find that the defendants have not showed that it is a penalty clause.

83. I therefore order that there shall be judgment for the plaintiffs in their action for $2,261,550, with costs to be taxed.

Findings on the defendants' counterclaim

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84. There is a dispute whether the tapes erased in the April erasure exercise were collected by the plaintiffs' representatives themselves, or were handed to them by the defendants' staff. The plaintiffs assert the former, the defendants the latter.

85. If the plaintiffs' representatives had helped themselves to tapes supplied by Golden Crown which they were not entitled to, one would expect the defendants to complain over that, but Lim did not complain about that when he wrote to the plaintiffs on 17 April.

86. In his affidavit of evidence-in-chief he deposed that 3,972 Golden Crown tapes were wrongly erased in the September erasure exercise. However he admitted in cross-examination that the tapes were prepared and made ready by his employees for erasure in that exercise.

87. The plaintiffs have been consistent on this issue, while the defendants are not. I find on the evidence that those tapes were handed by the defendants to the plaintiffs for erasure. That being the case, the defendants cannot complain that the plaintiffs had erased tapes they are not entitled to erase.

88. The defendants also did not prove the loss and expense particularised in their counterclaim despite the assurance in their further and better particulars to the defence and counterclaim that evidence on these matters will be given at the trial. These parts of counterclaim are without merit, and must fail.

89. The counterclaim in respect of the 700 Golden Crown tapes seized in Anton Piller seizure stands on different grounds. The plaintiffs' action against the defendants were framed on the breaches of the terms of the sub-licence agreements between themselves and the defendants, and nothing else.

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90. In their defence, the defendants rightly pleaded that under these agreements the plaintiffs were only entitled to erase the tapes they supplied to the defendants. The plaintiffs did not address this point in their reply but referred to the deed of assignment between the plaintiffs and Golden Crown in their defence to the counterclaim. The statement of claim was not amended.

91. In the circumstances the plaintiffs cannot rely on the deed of assignment to justify the seizure of the Golden Crown tapes. Another factor against them is that there was no evidence that notice of the assignment was given to the defendants.

92. Thus the plaintiffs are liable to the defendants for seizing the Golden Crown tapes on 24 October 1997 and retaining them till 9 May 1998 before returning them pursuant to the order of court of 21 April 1998. The defendants cannot have any complaints after the tapes were returned to them. When they decided not to rent them out pending the resolution of the issue of the plaintiffs' rights to the tapes, that was their own decision, and the plaintiffs cannot be responsible for the losses that followed.

93. However, since the defendants have not proved the particulars of their alleged loss arising from these 700 tapes, I will enter interlocutory judgment in their favour with damages to be assessed in respect of lost rental for the period 24 October 1997 to 10 May 1998. I order that the plaintiffs pay the costs to be taxed as though the counterclaim was heard in a Subordinate Court if the sum assessed does not exceed the jurisdiction of the Subordinate Courts.

Kan Ting Chiu

Judge

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Kan Ting Chiu J

Y M Jumabhoy and Zaheer Merchant with Basil Ong (Madhavan Louis & Partners) for the plaintiffs
Tan Tee Jim SC with Leonard Goh (Allen & Gledhill) for the defendants

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