Nop Wen Xuan Cultural Artifacts Pte Ltd v Leong Hwa Chan Si Temple and Another [2003] SGHC 300

Case Number : Suit 1027/2002

Decision Date : 02 December 2003

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Rey Foo Jong Han (KS Chia Gurdeep & Param) for the plaintiffs; Edwin Tay and Peter Ezekiel (Edwin Tay & Co) for the defendants

Parties : Nop Wen Xuan Cultural Artifacts Pte Ltd — Leong Hwa Chan Si Temple; Chia Eng Soon

Contract – Contractual terms – Parol evidence rule – Alleged implied terms contradicted the written terms of the contract – Whether the terms could nonetheless be implied into the contract.

Contract – Privity of contract – A partnership entered into a contract with the defendants – The plaintiffs were incorporated and took over the assets of the partnership – Whether the plaintiffs had the locus standi to sue the defendants.

At the conclusion of the trial, I dismissed the plaintiffs' claim with costs to the defendants. I shall set out my reasons now that the plaintiffs have appealed (in Civil Appeal No 89 of 2003).

The facts

1 NOP Wen Xuan Cultural Artifacts Pte Ltd (the plaintiffs) were incorporated on 15 December 2000 to acquire and take over as a going concern, the undertaking and all the assets as well as liabilities of, NOP Wen Xuan Cultural Artifacts (the firm), a partnership which was originally registered on 17 November 1998 by two (2) siblings Phang Song Hua (Phang) and Phang Hock Chin. The plaintiffs have an authorised capital of $100,000 of which only $2.00 has been paid-up. The firm was officially terminated on 21 February 2001 but this fact was unknown to the first defendants who say they only found out after this suit was initiated. The Phang brothers were the original subscribers to the memorandum of the plaintiffs and Phang (who calls himself Hillary Phang) was also a founding director and shareholder. Phang Hock Chin (who calls himself James Phang) is the chairman of the plaintiffs. Phang is a self-styled geomancer who has three (3) outlets in Singapore for this line of business.

2 Leong Hwa Chan Si Temple (the first defendants/the temple) is located at No. 72 Shrewsbury Road, Singapore. It is registered with the Registrar of Societies and is the owner and developer (jointly with two [2] other parties) of a columbarium (the columbarium) situated on a piece of land at Choa Chu Kang, leased from the Urban Redevelopment Authority (URA). By the time this dispute came on for trial, the columbarium had been completed with 100,000 niches for urns to hold the ashes of the dead. Chia Eng Soon (the second defendant) is the abbot and trustee put in charge of the day-to-day operations of the temple by the first defendants' management committee. He is also known as Reverend Sek Meow Ee. The second defendant with his brother Chia Yoong Hui are the directors and shareholders of AsiaCorp Holding Pte Ltd (AsiaCorp) incorporated on 7 October 2000 as an investment holding company

3 By an agreement dated 14 September 2000 (the agreement) made between the first defendants and the firm, it was agreed that the first defendants would appoint the firm as Special Sales Agent (together with seven (7) other companies in the Four Seasons Group of companies), to market and sell 20,000 niches in the columbarium.

4 The salient terms of the agreement are contained in the following clauses:-

(4) the niches were to be sold at fixed prices, starting at $5,000 each for level 1 and increasing to $8,000 each for level 4;

(5) sales could only commence after the date the Temporary Occupation Permit (TOP) was granted and must be completed by 31 December 2002;

(9) the firm was entitled to the following reserved prices per niche:-

(a) $3,000 at level 1;

(b) $3,000 at level 2;

(c) $3,500 at level 3;

(d) $4,000 at level 4.

(12) the firm was entitled to commission for each niche it sold. For a niche sold at $5,000, the commission was 40% whilst a price above $5,000 would be liable to 50% commission. The commission was payable only when full payment was received from a customer;

(13) the firm would be solely responsible for the promotion, marketing and sales of its allotment of 20,000 niches and bear the costs and expenses thereof;

(14) (i) the firm would hold monthly seminars commencing from October 2000 to provide information and progress reports to members of the sales agency (including other agents appointed by the first defendants);

(ii) it would compile all information and progress reports into a CD ROM and distribute it monthly to all sales personnel subject to a maximum distribution of 6,000 copies per month;

(15) the firm was required to submit all relevant publicity and promotion materials to the first defendants for prior vetting and approval;

(16) in the event of any breach of the terms and conditions, the first defendants were entitled to terminate the agreement forthwith and sue for damages.

The plaintiffs contended (which the defendants denied) that certain other terms were implied into the agreement; I shall refer to those implied terms later in the context of the plaintiffs' statement of claim.

5 By way of promotion and publicity for the columbarium, a company called efuneral21 Pte Ltd (efuneral) placed an advertisement in the Chinese press as organiser together with two other companies (NOP International Holdings and NOP Wen Xuan Buddhist Temple) as co-organiser, announcing a three (3) day prayer event for members of the public at a Chinatown venue, between 13 and 15 April 2001. In conjunction with the event, the plaintiffs claimed they provided tours to the columbarium, which held an 'open house' on those days, although it was not stated in the advertisement. Phang claimed buses took members of the public to the columbarium accompanied by the plaintiffs' agents and employees. He further claimed his agents/employees managed to sell about

300 niches on those days. Using a multi-level marketing strategy (of agents and sub-agents), Phang said that the plaintiffs sold 494 niches by end April 2001 on which $1,030,250 in commission was due to the plaintiffs. Subsequently, in response to the first defendants' objections, the firm inserted an apology to the first defendants in the Chinese newspaper Lianhe Wanbao and Shin Min ReBao on 18 April 2001, for the unauthorised promotion of the columbarium done by efuneral.

6 In a letter dated 18 April 2001 to the first defendants, the firm recorded an agreement had been reached between the parties that the promotional price of $5,000 per niche on level 1 and $6,000 per niche on other levels would be extended to the end of the month.

7 Phang claimed that from late April 2001 onwards, the first defendants commenced hindering the plaintiffs' agents in the marketing and selling of niches to the public; these included

(i) restricting the plaintiffs to bringing visitors to the columbarium on Saturdays and Sundays only;

(ii) unilaterally deciding that the plaintiffs' agents and employees could not market the niches or bring potential purchasers to the columbarium unless they had first attended a training course conducted by the second defendant and, paid a deposit ($1,000) and administrative fee ($100) to AsiaCorp;

(iii) informing the plaintiffs that niches booked (and for which deposits had been paid for) by the plaintiffs' buyers had already been booked by other buyers;

(iv) declining on several occasions to accept sales submitted by the plaintiffs, causing the plaintiffs' buyers to entertain doubts whether the plaintiffs were authorised to sell the niches;

(v) denying access to documents by the plaintiffs' staff to enable them to match sales that were done;

(vi) refusing on 25 May 2001, to accept a booking from the plaintiffs' purchaser, on the ground that the agreement had been terminated. On appeal by the plaintiffs, they were told the purchaser would be treated as the first defendants' and no commission would be paid to the plaintiffs.

8 Phang surmised that the first defendants' actions were prompted by greed on seeing how the plaintiffs conducted sales with such apparent ease. The first defendants thought they could do the same by removing the plaintiffs from the equation. Due to the restrictions imposed by the first defendants, Phang claimed that the plaintiffs' agents were prevented from continuing to sell the balance of the 20,000 niches. The plaintiffs would otherwise have earned gross and net commissions in the region of $40m and $22m respectively. Phang claimed that the plaintiffs then had more than 100 very able agents who could have generated many sales. He cited as an example, his former agent Madam Tan Lian Hoy who sold 100 niches for another company Octopus-Link Private Limited (Octopus) from March to June 2003, to support his contention. Octopus was appointed by the defendants subsequently to market and sell the niches, in place of the plaintiffs. Octopus is a company of which Phang's older brother Phang Hock Chin, is both a director and shareholder.

9 By a letter dated 21 March 2001 to the first defendants, the firm referred to recent discussions it had with the second defendant and recorded that besides cash sales, it had been agreed that the niches could be sold on deferred payment terms *viz* a down payment of 30%, followed by the balance in 6, 12 or 18 instalments. In para 4 of the letter, the firm stated:-

We confirm our offer to be the guarantor for all our purchasers under this monthly instalment scheme. Subject to your approval, in the event of failure by any of our purchasers to continue with the purchase/monthly instalment payment, we undertake to accept the assignment of the purchase and outstanding monthly instalment payment(s) thereof and continue with the purchase and payment(s) thereof.

Although the above letter was typed on the firm's letterhead, Phang using the name Hillary Phang, signed the letter as '*director*' below the firm's name.

10 Phang claimed he had reached an oral agreement with the second defendant which varied cl 12 of the agreement: for purchasers procured by the plaintiffs who opted for instalment payments, the commission payable to the plaintiffs would be pro-rated, based on the instalments paid. If a niche cost $5,150 (inclusive of 3% GST) and a purchaser chose to pay for the same by three (3) instalments of $1650, $1750 and $1750, the commission payable would be $600, $700 and $700 respectively based on 30%, 35% and 35%. I should add that according to Phang's testimony (N/E 48), of the $2,000 commission received by the firm for selling a niche, the firm would in turn, pay $600 to $800 (30% to 40%) to its own agents.

11 Further Phang claimed, the first defendants could forfeit the deposit and instalments paid by any purchaser who defaulted in further payments due. However, the plaintiffs would still be entitled to commission proportionate to whatever instalments paid by the purchaser. The commission would be payable within ten (10) days of receipt of payment from the purchaser. Phang said the variation of the agreement was evidenced by payment of part of the commission, in the sum of $297,000 on or about 8 May 2001, for 27 niches sold by the plaintiffs.

12 Whatever the reasons for the plaintiffs' failure or inability to complete their sale of 20,000 niches allotted to them, the agreement did not work out between the parties. Other than sales made between 27 March and May 2001, the first defendants contended that the firm did not sell any more niches. In fact sales completely stopped after 5 June 2001, after the first defendants' letter of that date to the firm, signed by the second defendant. The letter referred to a meeting that same day between Phang and the second defendant at the temple, alleged the firm had breached the agreement in allowing efuneral to represent the columbarium and added:

2) Clause 15 - Your agents did not submit any publicity and promotion materials for our approval prior to distribution i.e. agents distributing their own promotion materials without approval from us in HDB housing estate.

3) Clause 11 - Those customer who did not pay or the selling price is lower than our list price NOP is obliged to pay us the full sale price.

4) Some agents allow special rebate to customers.

5) NOP agents proceed directly to our office making unnecessary enquiries and unreasonable arguments.

6) NOP agents approached our buyers that they are able to give special discount.

7) NOP agents make use of our brochures and write their contact numbers on the brochures for their personal interest without our approval.

8) We will work out on the balance commission and contact you once it is ready for

collection.

9) As agreed, we will terminate the agreement dated 14 September 2000.

Although there was a space for Phang to confirm and agree to the letter on behalf of the firm, he did not sign. (Hereinafter the letter dated 5 June 2001 will be referred to as the termination letter)

13 Notwithstanding the purported termination of the agreement by the first defendants, the firm continued to correspond with the first defendants. It complained that purchasers brought to the columbarium by its agents did not have their sales orders accepted and, the firm also submitted proposals on the training course to be conducted by the second defendant although no training sessions resulted therefrom.

14 On its part, the first defendants wrote to the plaintiffs from 24 January 2002 onwards to press for payment from customers who were in arrears or in default, of their instalment payments. Further correspondence on this subject was exchanged between the parties until a letter dated 1 July 2002 from the first defendants to the plaintiffs, giving notice that there were bad debts of $456,895 arising from 146 niches sold by the firm. The response from the plaintiffs was a letter of demand from its solicitors, for the balance commission of $708,600 due ($1,006,000 less $297,400 paid). The first defendants countered with a letter dated 2 August 2002 counter-claiming a sum of $21,640 after setting off the firm's commission (which it said was only $583,140) and publicity and other expenses billed to the firm/plaintiffs.

15 As at the date trial commenced, the mortgagees (OCBC) have taken possession of the columbarium due to default on its loan of $25m and 70,000 niches remain unsold.

The pleadings

16 The plaintiffs commenced this action on 30 August 2002. In the (re-amended) statement of claim, it was alleged that the plaintiffs were incorporated to take over the firm's assets as a going concern. The plaintiffs alleged the defendants were in breach of the agreement and further contended the following terms were implied into the agreement:-

a. that the defendants would render to the plaintiffs a regular update of the account of monies that have been paid to them in respect of the sale of the niches;

b. that the defendants would allow the plaintiffs to market and sell the niches and generally for the plaintiffs to perform their obligations under the agreement without hindrance or restriction;

c. that the defendants would give credit to the plaintiffs for any introduction of a prospective purchaser directly to the defendants, where such prospective purchaser eventually purchases a niche;

d. the sale and purchase agreement between niche purchasers and the first defendants would provide for full payment to be made by the purchasers upon completion of the agreement;

e. where there were instalment arrangements between the first defendants and the purchasers, payment would first go to the plaintiffs in satisfaction of their share of the commission due.

17 The plaintiffs alleged that the second defendant wrongfully induced and procured the first defendants to hinder the plaintiffs from marketing and selling the niches and stop payment of commission to the plaintiffs. The plaintiffs alleged they sold 494 niches for a total commission of $1,030,250 of which $732,850 was still outstanding, which sum formed one of the reliefs claimed from the defendants.

18 Although they filed separate Defences, the first and second defendants essentially raised the same defences. They denied the agreement was made between the plaintiffs and the first defendants. The defendants averred that they were unaware of the incorporation of the plaintiffs as, the plaintiffs neither informed them nor gave notice of their incorporation of the firm as a going concern and, they did not consent to dealing with the plaintiffs. They alleged that at all material times even after incorporation of the plaintiffs, the firm not the plaintiffs, continued to deal with the defendants, pointing out that all correspondence the temple received prior to the termination letter, was from the firm and not the plaintiffs. Even after the termination letter, it was the firm and not the plaintiffs who continued to correspond with the first defendants until 18 March 2002.

19 Both defendants contended that the firm was in breach of the agreement, highlighting the paramount terms thereof. They averred that the firm was not the exclusive marketing agent for the niches. Both defendants admitted that the firm sold 494 niches and that only $297,400 in commission had been paid to the firm. The firm was not entitled to any more commission as, purchasers procured by the firm who had bought on instalment payment basis had not paid in full.

20 The defendants denied there were any terms to be implied into the agreement and contended that the implied terms alleged by the plaintiffs ran contrary to the express terms.

The evidence

(i) the plaintiffs' version

21 Phang was the main witness for the plaintiffs. He referred to his (unsigned) letter (on the firm's letterhead) dated 9 June 2001 to the first defendants recording a complaint (of his regional director Edwin Chu) that a customer who urgently needed a niche had his order rejected by the temple staff and was told that the agreement between the firm and the first defendants had terminated. Phang added that the customer's order was only accepted, after Edwin Chu appealed to the second defendant's personal assistant (Alfred Koh), who relented provided the customer was treated as the first defendants' and, no commission was payable to the firm. He relied on the letter for his assertion that the agreement had not been terminated but showed that the first defendants were reneging on the terms.

22 Phang contended he did advise the first defendants of his termination of the firm. He claimed that he had written a letter some time in mid-February 2001 which letter he handed to S K Kong (the temple's adviser) but, because he (S K Kong) had not received 20% of the temple's gross revenue, S K Kong kept the letter instead of handing it to the first defendants.

23 Cross-examined, Phang said he did not/could not produce a copy of his notice letter. Neither could he produce any letters to support his contention that <u>before</u> the termination letter or even <u>before</u> January 2002, he had written to the defendants on the plaintiffs' (<u>not</u> the firm's) behalf, as evidence they were aware of the change in legal status of the marketing agent for the 20,000 niches allotted to the firm. Pressed further, Phang asserted that he received no objections from the defendants verbally or in writing, to the plaintiffs' taking over the agreement from the firm, an answer predicated on the assumption that the defendants were indeed notified of the change. Neither could

he substantiate his assertion that the plaintiffs received the part commission of $297,400 due to the firm, as the cheque from AsiaCorp in payment thereof was issued in the firm's favour and, by Phang's own admission, credited to the firm's bank account.

24 Phang then attempted to show that the second defendant offered to enter into other agreements with the plaintiffs. He referred to a draft agreement between AsiaCorp and the plaintiffs, signed by his brother (as James Phang) but not signed by AsiaCorp. Cross-examined, he agreed this draft was proposed in June-July 2001, after the termination letter.

25 Phang was also cross-examined on the guarantee contained in the firm's letter dated 21 March 2001 (para 9 *supra*); he conceded it was a personal liability of the firm. If indeed the first defendants accepted the substitution of the plaintiffs as guarantor, Phang agreed it meant that the guarantee was only worth $2.00, in view of the plaintiffs' paid-up capital.

26 Although the plaintiffs had written to the second defendant's brother Chia Yoong Hui on 18 March 2002 (1AB65) to confirm that the list of defaulting creditors provided by the first defendants was correct, Phang had in his written testimony (para 25 of his affidavit), alleged that *the defendants have not provided and continue to refuse to provide any evidence of non-payment by these buyers*. Phang sought to justify his untrue statement with the excuse that apart from the outstanding account, the first defendants did not furnish details of the defaulting purchasers nor how the plaintiffs could contact them.

27 Phang admitted that some of his own agents (in fact 85) were in default of payment on niches they had purchased. The plaintiffs' claim for commission included niches sold on instalment payments, for which full payment had not yet been received by the first defendants. Although Phang had claimed there was an oral agreement between himself and the second defendant for pro-rated commission to be paid to the firm for such sales, he retracted this assertion with the excuse that the first defendants had breached the agreement; the oral agreement was therefore no longer applicable. He further blamed the first defendants for the default by such purchasers as, they were supposed to help the purchasers obtain financing for the instalments (from a co-operative Telecom Credit Corporation), but failed to do so.

28 Phang had his own interpretation of cl 15 of the agreement which required the firm to submit all promotion and publicity materials to the first defendants for prior vetting and approval. He claimed that was not done because the first defendants required the firm/the plaintiffs to use the first defendants' brochures without printing the names of the plaintiffs' agents and telephone numbers. As the plaintiffs did not need pamphlets from the first defendants, they should not have to bear the marketing and promotion expenses (N/E 41).

29 Although he admitted that the plaintiffs apologised to the first defendants for the unauthorised publicity initiated by efuneral for the columbarium, Phang claimed he was compelled to do so as otherwise, the first defendants had threatened to ban those involved in the prayer event as well as the plaintiffs' agents, from visiting the columbarium. Notwithstanding that efuneral placed the offending advertisement, the plaintiffs claimed it bore the advertising expense of $21,832.70 despite its name not being mentioned in the advertisement. There was a further unjustified item in the advertising expenditure of $877,122.44 stated in the plaintiffs' letter dated 14 October 2002 to the first defendants, as having been incurred in promoting and marketing the niches. It pertained to $239,938.57 for *website design and software development* which Phang admitted, was incurred for efuneral's website (www.efuneral21.com) which website appeared in the offending advertisement (referred to in para 5). Phang agreed that the first defendants had their own website and advertised on prime-time television on channels 5 and 8 (N/E 53).

30 Phang admitted that besides his network of 70,000 members he had told the first defendants that his customer base was five times (350,000) that number. He denied the intent behind the agreement was for the firm to sell niches to its own agents and customer base while the first defendants would focus on selling niches to the public. He agreed however that only a small portion of his 70,000 members were involved in the firm's sale of niches.

31 Phang claimed the plaintiffs conducted monthly agency seminars at the World Trade Centre auditorium but could not produce any evidence in support thereof. As for the monthly quota of 6,000 CD ROMs the firm was obliged to distribute, Phang testified the copies were produced by efuneral but gave no reasons why they were not distributed.

32 Notwithstanding his own testimony evidencing that the firm failed to perform a number of obligations under the agreement, Phang insisted that there was no breach which entitled the first defendants to terminate the agreement. He maintained (N/E 27) that the first defendants attempted to make it difficult for his agents to visit the columbarium and sell the niches, including restricting the firm from selling niches on levels 5 to 8. Further, the second defendant insisted on his agents undergoing a course the second defendant conducted before they were allowed to sell niches. A closer examination of the correspondence on this subject however, revealed that the course, its content and time-table were a matter of negotiations between the parties. Indeed, the firm in its letter to the first defendants dated 8 August 2001, proposed that the course fee of $200 be shared equally between them, contradicting Phang's claim that the course was initiated by the second defendant to benefit AsiaCorp. Eventually, it was agreed that the firm would receive a quarter ($50) of the course fee. The course was however never conducted even though some agents like Tan Lian Hoy paid the fee.

33 One of Phang's complaints against the first defendants was, that it refused to allow his agents to bring visitors to the columbarium after the 'open house' weekend. Phang's attention was drawn to the firm's letter (signed by him) dated 21 May 2001 which confirmed that four (4) of the firm's agents were not permitted to promote and sell niches. Phang would not admit it represented a reprimand of the persons concerned. Questioned whether the ban was because the said agents solicited customers from members of the public at the columbarium, Phang prevaricated saying his witness Ho Liang Hasin (known as Kelvin Ho), one of the agents named, could better answer counsel's questions. He claimed he was 'forced' to return to the first defendants sales orders transacted by Kelvin Ho and not because Kelvin Ho (with one Jimmy Ang Ah Lam) had 'poached' customers from members of the public, even though he had apologised for such conduct in his letter dated 10 April 2001 (exhibit **D4**) to the first defendants.

34 Phang accused the second defendant of wanting to make profits for his own benefit as a businessman. He alleged the second defendant owns 99% of AsiaCorp, that the company is the exclusive agent of the first defendants, commissions were paid out by AsiaCorp, the second defendant wanted the plaintiffs to deal with AsiaCorp after taking over the agency from the firm/the plaintiffs and, the second defendant wanted to reduce the commission generated by the plaintiffs. Phang denied counsel's suggestion that it was the plaintiffs that wanted AsiaCorp to sign a new agreement, as per the drafts incorporated in the plaintiffs' bundle of documents. He alleged that the second defendant's whole family was practically helping out at the first defendants' premises (N/E 50).

35 Tan Lian Hoy (Madam Tan) was the second witness for the plaintiffs. Her testimony did not bear out Phang's claim she was one of his 'star' agents whose selling abilities were curtailed by the first defendants' termination of the agreement. To the contrary when cross-examined, Madam Tan revealed that the seven (7) niches she personally sold were to her relatives or members of her

immediate family, including her husband and son. She bought four (4) niches by 12 monthly instalments which she had fully paid; she was not aware who introduced the instalment scheme. She had a team of members under her who sold another 28 niches or thereabouts.

36 Notwithstanding her full payment for four (4) niches, Madam Tan testified she did not receive her commission save for one payment of $400. She could not recall how much commission she was entitled to but relied on the computer-generated statements of her employer as accurate records. She could not remember how much commission she did receive for selling the niches as she was normally paid a lump sum, inclusive of what she earned for selling other products marketed by her company. Her commission was based on points, for which she would receive a fortnightly report from her company. As a senior manager, she was entitled to as much as 55% for commission. She had demanded payment but was told by her company it had not been paid its commission and she was sympathetic (N/E 80).

37 Madam Tan was vague on the identity of her employer at the material time. As far as she was concerned, she had worked for NOP for 16 years and she had no idea whether it was a partnership or otherwise. She was equally unclear when cross-examined on other matters deposed to in her affidavit including, whether she paid $280 or $200 fees for the course which she understood (from James Aw) was to be conducted by the second defendant and was a requirement before the plaintiffs' agents could continue to market the niches. She did not even know that James Aw (to whom she handed the fees) was a senior staff in her employer's organisation.

38 The plaintiffs' last witness was Kelvin Ho (Ho) who claimed that the plaintiffs' agents were smartly dressed, well-organised, better informed and more competent, unlike the sales representatives of the columbarium, who were part-timers and did not give talks or answered questions from the public. As a result, *it was not unusual to see walk-in visitors gravitating to the impromptu sales presentations and answering of questions given by the plaintiffs' agents to people that came on the plaintiffs' tour buses* (para 7 of his affidavit of evidence-in- chief). Ho went further (as did Madam Tan) to depose that he sensed hostility on the part of the staff of the columbarium, which increased as the days went by, when they saw the plaintiffs' agents *doing a roaring trade*. He himself was accused of stealing potential walk-in buyers from the defendants. He had personally experienced their attempts to disrupt sales by the plaintiffs' agents. Chia Yoong Hui, the second defendant's brother, was particularly nasty to him. On a number of occasions, he was refused permission by the staff to register a sale; he had to beg the second defendant (*who was always standing around*) before the staff relented. On other occasions, the plaintiffs' agents would be told by the staff that unmarked niches chosen by the plaintiffs' purchasers were reserved or had been sold; the purchaser and or the agent would have to plead and grovel before the first defendants' staff would relent and allow the agent to register the sale.

39 Despite all the hindrance and disruptions they encountered, Ho claimed the plaintiffs' agents managed to sell almost 500 niches. He himself sold 13 niches excluding those sales made by his sales staff. Ho's sales included a niche he purchased for himself on which he admitted he defaulted, after making one instalment payment.

40 Cross-examined, Ho said he never visited the columbarium in May 2001, as he was barred from entry. Shown the firm's letter dated 10 April 2001 (**D4**) which stated he and Jimmy Ang Ah Lam had *remorsefully apologised* for what they had done, he denied he had solicited for business within the premises which caused him to be barred from the 'open house' on 13-14 April 2001; he claimed he was at the columbarium between 10 and 15 April 2001. He claimed he 'offered' to return one sale order form (of Simon Chia Wee Meng in exhibit **D8**) to the columbarium. Unfortunately, sales orders (exhibit **D7**) of his customers produced by counsel for the defendants, which were all dated 7 April

2001, rebutted Ho's testimony; he could not produce any of his sales orders for the period 10 to 15 April 2001.

41 Questioned further, Ho revealed it was his company's other agents who told him that the defendants unilaterally required the plaintiffs' agents to attend and pass a course conducted by the second defendant himself, before they could qualify to market the niches.

42 Ho testified he did not keep records of the sales transacted by his staff. He kept track by obtaining copies of documents from the temple and from his sales agents. Ho said he encountered problems in getting from his company data he was supposed to have; his request was met with the response that it was the temple which handled all the administrative work. Ho said he had receive partial commission for the niches he sold, based on the down payments made but, not the overriding commissions for the orders secured by his sales team.

(ii) the defendants' version

43 The second defendant (DW1) was the main witness for both defendants. He refuted the many allegations made by Phang and the plaintiffs' other two (2) witnesses and gave his own version on a number of events which I now set out in subsequent paragraphs.

44 The second defendant disagreed that the plaintiffs' agents were better in all respects than the first defendants'. He pointed out that the temple's sales staff who numbered 25 wore long-sleeved shirts, ties and maroon vests and hence were easily recognisable. They closed about 977 sales in toto as against 483 by the firm. In fact, during the three day 'open house' promotion, the first defendants sold 325 niches as opposed to 220 by the firm.

45 The second defendant explained that as the columbarium only obtained its Temporary Occupation Permit (TOP) on 13 July 2001 (see 2AB127), it needed special permission from the URA to hold the 'open house' between 13-15 April 2001, after which no one was permitted to visit the columbarium, as the site had to be returned to the building contractor. Consequently, the plaintiffs' allegation that the defendants barred their sales agents from visiting the columbarium after 15 April 2001 was groundless.

46 As for the course which never materialised, the second defendant testified it was Phang who requested his assistance to conduct some form of training for the firm's agents (so that they would have a better understanding on how to market the niches). It was Phang not he, who imposed the condition that agents had to pass the course before they could continue to market the niches. The firm's request was evidenced in its letters dated 21 May 2001 (1AB45) and 8 August 2001 (1AB52) to the first defendants. The second defendant had accepted the firm's suggestion that $500 be charged to agents who wanted to attend the course, which fee was refundable. Consequently, the plaintiffs had no basis to complain about the amount.

47 The second defendant testified that in the draft agreement (2AB129) which the plaintiffs proposed (and signed) to AsiaCorp, there was a provision (cl 5.3) for marketing consultants appointed by the plaintiffs to pay a refundable deposit of $500. He confirmed the temple did receive $800 from four (4) agents as course fees. He agreed the firm wrote on 15 August 2001 (1AB55) requesting him to commence the course on 27 August 2001. However, the course did not commence as scheduled because only four (4) agents signed up. He had spoken to Phang on receipt of the firm's aforesaid letter and it was agreed training would be postponed until there was a better response. However, Phang never reverted to him after 15 August 2001 on the new training dates.

48 The $1,000 fee Phang had alleged the first defendants imposed was actually a performance bond to ensure anyone who wished to carry out sales did not violate regulations. The refundable bond was implemented to ensure there would not be a repeat of the many untoward incidents which took place between 13 to 15 April 2001, which included soliciting of customers from members of the public by the firm's agents.

49 The second defendant testified that when Phang approached him to market the niches, Phang told the second defendant that he had 70,000 net-workers and five (5) times that number as members, giving a total customer base of 420,000. The second defendant believed Phang. Consequently, he expected Phang to sell niches to his own members. Hence, the firm was prohibited from selling niches to the public as, that was the task of the first defendants. Otherwise there would be confusion.

50 Cross-examined further, the second defendant testified that the defendants only became aware that the firm had ceased to exist, from a search done in the Registry of Businesses after the commencement of this suit. He denied that the firm's letter dated 21 March 2001 signed by Phang as *director*, constituted notice to the first defendants that the plaintiffs had taken over the obligations of the firm under the agreement. True, there were other letters written on the firm's letterhead signed by Jeffrey Phang as *managing-director* but, the second defendant said he did not take notice nor did he know which company the signatory represented. The distinction only came to light after the defendants were sued. He pointed out that the firm continued to write to the first defendants in April 2001, even after the plaintiffs were incorporated. When his attention was drawn to letters which the first defendants had written to the plaintiffs in January 2002 and subsequently, the second defendant explained those letters touched on matters pertaining to payments outstanding on niches sold by the firm, of which he was not aware and which letters *the management* not he, signed. In any event, Chia Ti Yu (who was <u>not</u> related to him as Phang had alleged) was in charge of accounts, not he.

51 The second defendant explained that the first defendants would never have agreed to the plaintiffs' marketing the niches, which cost totalled $100m when the company's paid-up capital was only $2.00. In the same vein, the management would not have agreed to accept the plaintiffs' undertaking to pay, in the event of buyers' default.

52 Before AsiaCorp was incorporated, another company (WCL Management Pte Ltd) was the marketing agent. The second defendant testified it was the management of the first defendants who appointed him to take charge of marketing. Questioned on AsiaCorp's source of funds, the second defendant revealed that he had his own funeral service business, an IT as well as a trading, company. He pointed out that in the year 2000, AsiaCorp contributed over $1m to the temple whilst he contributed over $2m personally. He and Chia Ti Yu are signatories to cheques issued by AsiaCorp, not by the first defendants. As construction of the columbarium was a joint-venture between the first defendants and two (2) other parties, the second defendant explained that the first defendants are responsible to pay the joint-venture partners (even though its share is only 5%), their portion of profits from sale of niches including cases where payments were still outstanding.

53 Although there was no clause in the agreement that the firm would pay the first defendants 10% of the gross sales transacted for using the first defendants' publicity and other materials, the second defendant said the agreement was reached in a meeting by the first defendants' management with Phang, after the agreement was terminated. It did not make sense for the first defendants to pay such a high commission of 40-50% to the firm and still have to bear all the promotion expenses. The second defendant testified he had never seen the CD Rom, which 6,000 copies per month Phang was supposedly to have distributed to his 420,000 members.

54 The second defendant testified there was no reason for efuneral to promote the niches, let alone for Phang to publish a notice to say he (Phang) could give discounts to the public by taking smaller commissions. This was neither allowed nor contemplated under the agreement. The second defendant pointed out that efuneral was not one of the companies (7) listed in the agreement as forming part of the Four Seasons group. The notice also adversely affected the first defendants as, prices for the niches had already been fixed and, there were other agents who were helping the first defendants to promote the niches. Hence, he personally requested efuneral to apologise in the Chinese newspapers. The temple in any case had its own website (www.jile.com.sg), it did not need that of efuneral.

55 The second defendant criticised the firm's agents for using the first defendants' brochures, photocopying half and inserting the agents' names on the other half. The first defendants had spent a lot of money in printing the brochures (which sample the second defendant produced in court) and yet the agents distributed photocopies to HDB housing estates. Worse, the agents did not obtain the brochures from the first defendants but, went to the temple and removed those that were displayed. Yet another breach committed by the agents was, to sell the niches at a discount. Instead of selling at $5,000 per niche, they would sell at $4,500. The second defendant conceded there was no clause in the agreement prohibiting the firm's agents from selling at a discount. However, neither was there a clause which allowed them to do so.

56 As for the termination letter, the second defendant explained he had handed the same personally to Phang and asked for an acknowledgement. Phang said he would sign and return the letter later but never did.

57 As the monthly interest to service the bank loan of $25m came to $150,000, the second defendant denied it was of any commercial benefit (as counsel had suggested) to him or the first defendants, to stop the firm's agents from marketing the niches until after they had undergone the training course (N/E 174). AsiaCorp's role in marketing the niches was in any case short-lived. The second defendant revealed that by December 2002, OCBC together with the temple's joint venture partners, had appointed special accountants for the project and the latter in turn appointed APM Consultants Pte Ltd to market the niches.

58 The second defendant denied the common allegation of the plaintiffs' witnesses that the first defendants purportedly sold off niches booked by the firm's customers; it was not possible for a niche not to be available when the first defendants had 100,000 niches to sell. He further refuted the plaintiffs' allegation that the firm was not allowed to sell niches at levels other than 1 to 4. During the 'open house', the firm was allowed to and did sell 189 niches at, levels 5 to 8.

59 The defendants called Jenny Lim (Lim) as their second witness. Lim is a member of the first defendants and is its honorary advisor. She is the vice-president of Viriya Community Services, which is an approved charitable organisation and the community service arm of the first defendants. She confirmed she attended the management committee meeting on 4 June 2001 with inter alia, the second defendant and Chia Ti Yu, where the decision was made to terminate the agreement, due to breaches committed by the firm, which were minuted (see 3AB42).

60 Lim referred to the first defendants' letter (which she drafted) dated 11 December 2001 (2AB6) to Keppel TatLee Finance Limited (now merged with OCBC Finance), signed by the second defendant as one of the signatories (3). The letter states:

> Up to 31 October 2001, a total of $2,023,936.57 was collected and disbursed as follows:

Sales rebate due to NOP, special marketing agent $1,020,000.00

Commission due to the temple.....$ 203,936.57 (there is still a balance outstanding of $925,403.76 due to us)

Other payments -- plse raise it at the meeting this wk ..... $ 800,000.00

Total $2,023.936.57

Lim explained that payment of commission to the firm was subject to the provisions in the agreement. The sum of $1,020,000.00 was set aside as a matter of prudence. It did not mean (as plaintiffs' counsel suggested to her) that the first defendants made a representation that the sum had been collected and disbursed to the firm.

61 Lim testified that in a follow-up letter dated 26 November 2002 (3AB52) to the lawyers (Allen & Gledhill) of OCBC Finance, the first defendants clarified that partial payment of commission was made to NOP on its claim (which figure had increased to $1,030,250.00) as the temple disputed the balance.

62 The last witness for the defendants was Chia Ti Yu (Chia), the honorary treasurer of the first defendants who is a qualified accountant and full-time auditor. Chia was primarily in charge of accounts relating to the agreement and computed all the figures in the letters from the first defendants to the firm and or the plaintiffs. In his affidavit, Chia deposed that it was made known to the firm that their agents could not entertain walk-in customers of the columbarium. Consequently, some sales recorded by the firm were subsequently discarded because of breach of this rule.

63 Chia corroborated Lim's testimony regarding the meeting at the temple on 4 June 2001, and what transpired therein. He testified it was a collective decision made by the management committee to terminate the agreement, due to breaches committed by the firm.

64 Chia further confirmed that as at the date of this trial, there was no commission outstanding and due to the firm. However, the firm still owed the first defendants $488,797 for customers who had defaulted on payments. In re-examination, Chia explained that were it not for the efforts of the first defendants, the default list would have been worse. The first defendants mobilised their entire organisation to make telephone calls and send reminders to customers to ask them to pay up and thereby recovered $952,000 which obligation was actually the firm's, under the terms of the agreement. The final number (146) of defaults was reflected in his statement of account set out in the first defendants' letter dated 1 July 2002 (1AB73) to the plaintiffs, marked for the attention of James Aw. He was appointed to take charge of marketing and promotion expenses for the first defendants and his counterpart in the firm was James Aw

65 Chia also corroborated the second defendant's claim, that the firm had agreed to a deduction from its commission for publicity costs. In its letter dated 15 August 2001 to the first defendants under the heading *amendments to agreement dated 14 September 2000* (1AB56), it said:

> Accordingly, we will pay to Ji Le Memorial Park for the right to draw on their marketing and promotional materials. Kindly advise us of the cost thereof.

Later, when the plaintiffs negotiated with the defendants on the new agreement to be signed with AsiaCorp, the 10% figure was agreed to, as reflected in cl 4.1 of the draft. Instead of a commission of $2,000 per niche sold, the plaintiffs agreed to a lower commission of $1500 because $500 (10% of

$5000), would be set aside for promotion expenses. The plaintiffs' agreement was evidenced in their signing both copies of the draft agreement produced in court. In fact, the first defendants initially wanted to charge the firm based on the gross sales but relented, when James Aw appealed for a lower figure. Instead, they charged 10% based on the commission. Hence, in the first defendants' correspondence subsequent to 15 August 2001, the 10% charged to the firm was based on the firm's commission.

66 Like the second defendant, Chia argued that if the firm failed to comply with cll 13 and 15 of the agreement vis a vis publicity, it must be implied that they would have to bear the first defendants' costs of printing the publicity materials and doing the promotion on the firm's behalf.

67 As for the commission of $297,400 paid to the firm in May 2001, Chia testified it was based on 26 niches for which full payment ($52,000) had been received. There were another 401 niches sold on instalment basis, for which the firm was paid $245,400, based on the down-payments made by the buyers.

The issues

68 There were only 2 issues to be determined for this case:

(i) did the first defendants accept the plaintiffs in place of the firm under the agreement?

(ii) were the first defendants in breach of the agreement as the plaintiffs alleged or, was it the firm that breached the agreement as the first defendants claimed?

The decision

69 In dismissing the plaintiffs' claim, I answered the first issue in the negative and on the second issue, I held it was the firm not the first defendants, that breached the agreement.

(i) Privity of contract

70 There was no formal assignment of the agreement by the firm to the plaintiffs. Consequently, the only way the plaintiffs could substantiate their claim that the first defendants had accepted them in place of the firm was, to prove that Phang had handed a letter to the first defendants' adviser S K Kong giving notice of the plaintiffs' taking over from the firm. However, they did not produce SK Kong as a witness. Further, contrary to Phang's allegation that S K Kong had some sort of profit-sharing arrangement with the first defendants which had soured, the second defendant produced two (2) business cards (exhibit **D5**) which showed S K Kong was a business advisor to NOP Investment Pte Ltd, one of the companies in Phang's stable. Even then, Phang still denied S K Kong was the plaintiffs' business advisor. Whatever the truth about S K Kong's position vis a vis the plaintiffs, the fact remained that the defendants had specifically denied privity of contract with the plaintiffs in their Defence. In order to meet this positive averment, the plaintiffs were required to call rebuttal evidence to prove notice had indeed been given to the first defendants' representative of their change in status from a partnership and, that the defendants at the very least did not object. I drew an adverse inference against the plaintiffs for failing to call S K Kong as a witness as, no reasons were given to the court why he was not called or was unable to be called, to testify.

71 It did not advance the plaintiffs' case at all, as their counsel sought to do, to rely on the numerous letters which the firm wrote to the first defendants but which Phang signed as *director*

(and sometimes James Phang signed as *managing-director*) suggesting this can only be done on behalf of the plaintiffs. Just as Phang was not aware of the legal implications of a directorship at law, neither were the defendants. What is noteworthy is, the firm's letter dated 9 June 2001 to the first defendants clearly recorded that the first defendants' staff had informed the firm's agents and acted on the basis that, the agreement had been terminated after 5 June 2001.

(ii) breach of the agreement

72 Although the plaintiffs failed on their claim *in limine* on the first issue, I went on to determine the merits of their claim. On the oral and documentary evidence before the court, there was little doubt it was the firm, not the first defendants, that was in breach of the terms of the agreement, in particular cll 11, 13, 14 and 15 thereof.

73 Phang was not a truthful witness and an even less convincing liar. Repeatedly, he had to be exhorted by the court to answer counsel's questions during cross-examination. He was evasive and his answers often contradicted his own evidence or case and, the documents before the court or both.

74 Despite the clear terms of the guarantee to the first defendants in the firm's letter dated 21 March 2001, Phang would not admit the firm was liable for the purchasers who defaulted on their instalment payments or on the purchase price. According to the first defendants' records (which were confirmed by Chia) the value of the defaulting cases totalled $488,797. Phang's interpretation that the guarantee was only enforceable if the plaintiffs were allowed to continue sell niches, is without basis. There were no conditions imposed in the aforesaid letter to qualify the guarantee in that or any other, manner.

75 Even though he had written to the first defendants confirming the accuracy of their calculations on the number of defaulting purchasers for which the firm was responsible, Phang repeatedly and unreasonably maintained there were no bad debts. In the aforementioned letter dated 21 March 2001, Phang had accepted the first defendants' instalment payment offer to the firm's purchasers. He changed tack in cross-examination and alleged (N/E 40) that he was 'forced' to accept the instalment scheme although it was not stated in the agreement. Phang had the audacity to deny that it was the firm which initiated the instalment plan, even when confronted with the firm's/his letter dated 5 March 2001 (3AB27) to the first defendants, making the proposal. Yet another instance of Phang's untruthfulness can be seen from his denial of liability for $46,500 for the cost of pendants owed to the first defendants, when the plaintiffs' letter dated 18 March 2002 admitted the sum could be deducted from the commission the plaintiffs were then claiming. His counsel however, conceded this item of claim in the plaintiffs' concluding submissions.

76 One allegation (which was completely frivolous in my view) related to the levels of niches the firm could sell. Clause 9 of the agreement clearly stated that the firm was allowed to sell levels 1 to 4. Yet, Phang complained that his agents were prohibited from selling other levels, claiming the first defendants prevented them from selling the best niches (for which no cogent evidence was offered), even though it was pointed out by counsel for the defendants that the best niches are at eye level, *viz* at levels 1 to 4. Phang nonetheless asserted that levels 5 and 6 are at eye level and were the most expensive.

77 It was Phang who revealed that Octopus marketed the niches at $2,000 each as against the prices of $5,000-$6,000 allotted to the firm. Consequently, his allegation that the defendants wanted to hinder and deny the firm from making sales made no commercial sense; his prices and commission were higher, benefiting the first defendants as well as the firm.

78 Questioned by the court (N/E 65), Phang had admitted that he would not be entitled to commission from a purchaser who defaults in payment, after making the 30% deposit, effectively nullifying the greater part of the plaintiffs' claim. In para 7 of the statement of claim, the plaintiffs had based their claim for $1,030,250 commission on sale of 494 niches. They did not/could not rebut Chia's testimony that only 26 of the niches they sold had been fully paid whilst another 401 were only partially paid. In accordance with cl 11 of the agreement, the firm was obliged to pay to the first defendants the full sale price if the firm's purchasers did not. As the firm/its purchasers failed to pay, the firm was not only not entitled to commission on the 146 defaulting cases but, the first defendants were within their rights to set off the outstanding purchase price of $488,797 against commission due to the firm. Phang had blamed the first defendants for the purchasers' default in payment, alleging it was because they had lost confidence in the first defendants (N/E 65), again without any supporting evidence.

79 Phang had opined (N/E 72) the defendants had appointed him to market the niches because of the structure of his company, the capability of his sales staff, his profession as a geomancer and his sales record in the past. Nothing could be further from the truth. He had told the second defendant of his supposed marketing abilities but he could not deliver what he promised. Instead, he sold through a haphazard multi-level marketing system which was carried out by staff and or recruits who were poorly educated and unprofessional (like Madam Tan and Ho).

80 Needless to say, I was equally unimpressed by Madam Tan's testimony nor was I convinced she was as capable as Phang had made her out to be. She had deposed in her affidavit to selling more than 100 niches for Octopus since March 2003. What she failed to disclose (and so did Phang until cross-examined) was, that niches she marketed for Octopus were sold at $2,000 each, a reduction of $3,000-$4,000 from the prices sold by the firm.

81 Ho fared no better than Phang or Madam Tan as a witness. He was not truthful and grossly exaggerated his selling abilities and those of the plaintiffs' other agents, not to mention he was a defaulting purchaser himself. I am certain he solicited purchasers from walk-in customers of the columbarium, prompting the temple to bar him from visiting the premises during the 'open house' of 13 to 15 April 2001. Like Madam Tan's, parts of Ho's written testimony were pure hearsay. There was no evidence to support such allegations as the requirement that agents must attend a training course (coupled with payment of a non-refundable fee) conducted by the second defendant before they were allowed to continue selling niches.

82 The many other allegations Phang levelled against the second defendant (para 34 *supra*) were either not substantiated or, were rebutted when the second defendant testified. Neither did Phang produce any evidence to support the plaintiffs' pleaded case that, the second defendant had induced the first defendants to hinder the plaintiffs in marketing and selling the niches and had stopped payment to them of commission. Indeed, when cross-examined on this allegation, he said *I don't know* (N/E 38F).

83 In accordance with the parol evidence rule encapsulated in s 94 of the Evidence Act Cap 97, there is no room for incorporating into the agreement, the implied terms alleged by the plaintiffs in para 3 of their statement of claim, particularly where some of them contradict the express terms of the agreement.

84 One of the closing arguments of counsel was that the purported termination by handing the termination letter to Phang was not in accordance with cl 17 [not cl 16] of the agreement. I believe cl 17 refers to sufficiency of notice if termination is made in writing and sent by registered post. I was of the view that the agreement was validly terminated by the first defendants on 5 June 2001

notwithstanding that Phang did not acknowledge receipt of the termination letter handed to him that day. Once the agreement was validly terminated which I held it was, it was of no concern to the firm or the plaintiffs, that the second defendant intended AsiaCorp to take over marketing of the niches for the first defendants. It was therefore unnecessary of counsel for the plaintiffs to cross-examine the second defendant at length on developments, after 5 June 2001. In any case, the plaintiffs' case was not that it was AsiaCorp but the second defendant, who induced the first defendants to breach the agreement.

85 On the whole, I preferred the testimony given by the witnesses for the defendants. The second defendant was forthright and direct in his answers during cross-examination. Neither his testimony nor that of Lim and Chia was rebutted or challenged in any way such as to cast doubts on their veracity.

86 Based on the evidence adduced in court, I accepted that the first defendants had paid the firm its entitlement to commission for sale of 26 fully paid niches. Commission not paid was rightfully withheld due to default by purchasers on 401 niches sold by the firm, as well as the firm's failure to prepare and pay for publicity materials pursuant to cll 13 and 15 of the agreement. Since the first defendants were responsible for the publicity materials utilised by the firm, they were entitled to set off the costs involved, which they limited to 10% of the commission figure. This was also agreed to in principle by the firm, in its letter dated 15 August 2001. Consequently, nothing else was due or owing to the firm let alone the plaintiffs, with whom the first defendants had no privity of contract. As such, I dismissed the plaintiffs' claim with costs to the defendants.

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