# Fornet Enterprise Co Ltd v Howell Universal Pte Ltd and Others
[2006] SGHC 33

**Case Number** : Suit 60/2003

**Decision Date** : 02 March 2006

**Tribunal/Court** : High Court

**Coram** : Andrew Ang J

**Counsel Name(s)** : Lim Tong Chuan and Awyong Leong Hwee (Loo and Partners) for the plaintiff; Lim Chong Boon (PKWA Law Practice LLC) for the first to third defendants

**Parties** : Fornet Enterprise Co Ltd — Howell Universal Pte Ltd; F I Holdings Pte Ltd; Wu Cheng I Henry; Funai Electric Co Ltd; Funai Technology (Taipei) Co Ltd; Funai Electric Company of Taiwan; Funai Electric (Malaysia) Sdn Bhd; Wu Lin Hua

*Contract – Breach – Whether defendants breaching alleged agreement by failing to exercise due care and diligence, acting contrary to plaintiff's interests and failing to remit certain monies to plaintiff*

*Contract – Contractual terms – Plaintiff claiming agreement with defendants constituted partly orally, partly in writing and partly based upon course of past dealings between parties – Whether relationship between plaintiff and defendants under alleged agreement one of mercantile agency or partnership or joint venture*

*Contract – Parties – Plaintiff suing defendants for breach of alleged agreement – Whether defendants parties to alleged agreement*

*Tort – Conspiracy – Whether defendants involved in conspiracy to injure plaintiff and conspiracy by unlawful means*

*Tort – Conversion – Whether defendants liable in conversion for failing to remit to plaintiff proceeds of sale collected*

2 March 2006 *Judgment reserved.*

**Andrew Ang J:**

1 The plaintiff is a finance company incorporated in Taiwan whose main business activities are in the leasing or financing of motor cars, trucks, construction tractors and equipment.

2 The first defendant (formerly known as "Funai International Pte Ltd") was incorporated in Singapore in 1995 as a joint venture between a Hong Kong company and the third defendant. After the first defendant suffered major losses in 1999, the Hong Kong company divested their interest in the first defendant in March 2001, transferring their shares therein to the third defendant.

3 The first defendant was in the business of import and export of "Funai" electrical goods such as television sets, video players and computer monitors ("the Products").

4 The second defendant is also a Singapore company and, at the material time, carried on the business of buying and selling electronic consumer products. It is substantially owned by the third defendant.

5 The suit by the plaintiff was originally against eight defendants but before the trial the plaintiff discontinued its claims against the fourth, fifth, sixth, seventh and eighth defendants without

giving any reason for so doing.

6 The plaintiff's case as pleaded is that by an agreement on or about 2 November 1997 it appointed the first and/or second and/or third defendants (hereinafter in its alternative combinations called "the Defendants") to be its mercantile agent(s) to trade in electronic goods. Alternatively, the plaintiff pleaded that the nature of its relationship with the Defendants was that of a partnership or a joint venture.

7 According to the plaintiff, the agreement was partly oral, partly in writing and partly based upon a course of past dealings between the parties. In so far as the agreement was oral, the plaintiff said that it was made at a meeting on 2 November 1997 at the first defendant's premises in Singapore between the third defendant and representatives of the plaintiff. (It is in contention between the parties whether the third defendant was attending the meeting as a director of the *first defendant and/or of the second defendant and/or* in his personal capacity. We shall return to this later.)

8 In so far as the agreement was in writing, the plaintiff's pleaded case as set out in para 6 of the statement of claim is that it was:

> contained in or [was] to be inferred from the following documents or one of them:
>
> 6.1 the minutes of meeting on 2 November 1997; and
>
> 6.2 the undated draft Business Agent Contract.

(It is important to note that unlike the minutes which were confirmed by the signatures of the plaintiff's representatives and the third defendant, the Business Agent Contract was never signed.) In so far as the agreement was based on a course of past dealings, the plaintiff said that the relevant transactions were those (during a trial period) between January and October 1997.

9 In essence, the plaintiff contended that under the agreement their only obligation was to provide funding and the Defendants were to buy and sell goods on their behalf for which the plaintiff would pay the Defendants a commission of 40% of the net profits.

10 The plaintiff alleged that the Defendants breached the agreement in that, amongst other things, they:

> (a) did not exercise due care and diligence, purchasing excessive quantities of goods when the market was depressed or purchasing the goods at higher than the prevailing market prices;
>
> (b) acted contrary to the interests of the plaintiff, buying from or selling to the Defendants or the third defendant's associated or related companies on terms unfavourable to the plaintiff;
>
> (c) did not remit to the plaintiff the sale proceeds which they had collected;
>
> (d) did not ensure that transactions would be done at a minimum of 4% profit; and
>
> (e) failed to disclose to the plaintiff the identities of the sellers or purchasers.

The plaintiff also alleged that having received and retained sale proceeds which they ought to have remitted to the plaintiff, the Defendants were liable in conversion. Finally, the statement of claim also includes allegations, in the alternative, that the eight defendants conspired to cause the plaintiff economic loss by lawful or unlawful means.

11 The three defendants denied any and all liability to the plaintiff. The cumulative effect of the three defendants' respective pleaded cases is as follows:

(a) On 2 November 1997, the plaintiff and the first defendant entered into an agreement for a joint venture using Fornet Corporation Pte Ltd as the joint-venture vehicle ("JV Company"). The agreement was partly oral and partly in writing. In so far as it was oral, it was made at the same meeting of 2 November 1997 referred to by the plaintiff. In so far as it was in writing, it was contained in the minutes of the said meeting. That much was common ground between the parties. (However, unlike the plaintiff, the first defendant did not regard the unsigned draft Business Agent Contract as part of the agreement between them. Neither did it agree that any of the terms of the agreement was derived from the course of past dealings during the trial period.)

(b) The second and third defendants deny that they entered into any agreement with the plaintiff.

(c) The plaintiff bought and sold the goods on its own.

(d) The Defendants did not commit any breach of the agreement.

(e) The plaintiff did not suffer any loss.

(f) The Defendants did not receive or keep any sale proceeds belonging to the plaintiff.

(g) There was no conspiracy.

Lest there be confusion, I should add that each of the second and third defendants also entered alternative pleas to the effect that even if there was an agreement between itself/himself and the plaintiff, it/he did not commit any of the breaches alleged by the plaintiff. For this reason, despite the primary defence that only the first defendant was party to the agreement, in many instances in the judgment I have referred to the defendants collectively as "the three defendants" where similar contentions were made by them.

12 The first defendant also counterclaimed against the plaintiff for damages for breach of the agreement in that the plaintiff did not arrange for or provide credit facilities of US$60m to the JV Company as agreed and that instead of using the JV Company to trade, the plaintiff itself traded in the Products.

13 The following questions arise:

(a) Who were the parties to the agreement?

(b) What were the terms of the agreement?

(c) Whether the Defendants breached the agreement?

(d) Whether the Defendants were liable in conversion?

(e) Whether there was a conspiracy to injure the plaintiff?

14 Before answering these questions, a few prefatory remarks would be in order. The plaintiff's case is an arduous one for several reasons. Firstly, it was unsure who the proper defendants should

be. Secondly, it was unsure whether the relationship was one of mercantile agency, partnership or joint venture, the latter two being pleaded as alternatives to the first. (As I see it, the alternative pleadings in regard to the relationship were brought about by uncertainty as to what the court would eventually find to be the terms of the agreement between the parties.) The third uncertainty, *ie*, as to the terms of the agreement arose from the fact that, as pleaded, the agreement was a composite one, made up of terms orally agreed at the meeting of 2 November 1997, written terms set out in the minutes and the Business Agent Contract and finally, terms to be inferred from past dealings between the plaintiff and the Defendants during the trial period. In this connection, I note that although para 8 of the statement of claim set out the alleged terms of the agreement both express and implied, there was no attempt to identify which terms were express and which implied. It goes without saying that so far as the contractual claims are concerned, the burden of proof is on the plaintiff to satisfy the court on a balance of probabilities who the parties to the agreement were, what the terms of the agreement were and whether the Defendants breached the agreement.

**Who were the parties to the agreement?**

15 Before determining who the parties to the agreement were, I should mention, if only to dismiss, an attempt by the plaintiff's second witness, Chen Wu-Hui ("Chen"), to assert that the agreement actually took place in 1996 and that the plaintiff was also suing in respect of transactions that took place before 2 November 1997.

16 The pleadings on both sides aver that the agreement took place on 2 November 1997. It was not open to Chen to contend otherwise. This was not a case where the parties began to act on the terms of an agreement before the contract between them was actually concluded on the understanding that, once concluded, the contract would have retrospective effect so as to apply to transactions that took place before its conclusion.

17 As noted, the three defendants' position is that the first defendant alone entered into the agreement with the plaintiff on 2 November 1997 orally and as contained in the minutes of the meeting on that day between representatives of the plaintiff and the third defendant in his capacity as director of the first defendant. The minutes were captioned "Funai Int'l Pte. Ltd. & Fornet Enterprise Co., Ltd. Records of Singapore Business Meeting". The "Participants" at the meeting were recorded as follows:

> FUNAI PTE LTD. Mr Wu Zhengyi
>
> FORNET ENTERPRISE CO., LTD.
>
> Managing Director Lin Hongxi, Managing Director Liao Guodong,
>
> Special Assistant Lin Hongbin, General Manager Chen Wuhui,
>
> Assistant Manager Zhang Lianzhang, Mr Li Bingtao

The "Venue" was "Funai Int'l Pte Ltd. (Singapore) Conference Room". Although para 1 required "Mr Wu Zhengyi" to reveal all business operations in the market and not to be involved in the market "in the event such that all risks and rights [were] controlled and managed by Fornet Enterprise Co Ltd", and para 5 of the minutes provided for profit distribution to "Mr Wu" and Fornet Enterprise Co Ltd, preponderantly the minutes referred to the first defendant as the party to the agreement.

18 The unsigned draft Business Agent Contract (which the plaintiff contended but the three

defendants strenuously denied to be part of the agreement) likewise clearly named the first defendant as the contracting party opposite the plaintiff. Neither the second nor third defendants was mentioned anywhere in that document. It was drafted by the plaintiff itself. [That the plaintiff itself was unsure who the defendants ought to be can be seen in the way its statement of claim and the affidavits of evidence-in-chief of its witnesses refer to the Defendants.] I therefore have no difficulty finding that only the first defendant was a contracting party opposite the plaintiff. Any involvement on the part of the third defendant was only as a director representing the first defendant.

**What were the terms of the agreement?**

19 After reviewing the pleadings, the affidavits of evidence-in-chief of Lin Hong Shi ("Lin"), Lin and Chen's evidence given in cross-examination, the minutes of the meeting of 2 November 1997 and the Business Agent Contract, I have come to the conclusion that the plaintiff has not made out its case that the agreement is a combination of written and oral terms, and terms based on a course of past dealings between the parties, the combined terms being as alleged in para 8 of the statement of claim.

20 Let me explain. Notwithstanding that it was only a draft prepared by the plaintiff subsequent to the meeting of 2 November 1997 and had not been signed, the plaintiff pleaded that the Business Agent Contract formed a written part of the agreement. Clearly, this could not be.

21 In order for the Business Agent Contract to be an agreement in writing, it had to be signed by the party against whom the agreement was to be enforced. Conceivably, the unsigned Business Agent Contract could be evidence of terms previously agreed by word of mouth. Lin averred in his affidavit of evidence-in-chief that the draft Business Agent Contract reflected "all the terms that were verbally agreed at the said meeting" (*ie*, the meeting of 2 November 1997). The difficulty with this averment is that the draft Business Agent Contract is six pages in length and contains 17 main paragraphs, many of which are of a somewhat technical nature, especially to the plaintiff who had confessed to being totally lacking in knowledge or experience in international trade. It strains credibility to suggest that the parties could have orally agreed to those terms at the meeting when the draft had not yet been prepared.

22 Given Lin's averment that the draft Business Agent Contract reflected "all the terms that were verbally agreed" at the meeting of 2 November 1997, one would have expected that the minutes of the meeting would, in general terms at least, accord with the terms of the Business Agent Contract. Instead, one finds glaring inconsistencies between them. The minutes contemplated the use of a Singapore vehicle, Fornet Corporation Pte Ltd (Singapore), to be used in their collaboration (see para 4), and that both the plaintiff and the first defendant would jointly manage the sale of the products (see para 1). It also provided, though in somewhat fractured language, that all risks and rights would be controlled and managed by the plaintiff (see para 1). The plaintiff also agreed to "dispatch sufficient personnel to Fornet Corp. Pte. Ltd. (Singapore) to assist in the business promotion" (see para 4). Overall, one gets the impression that what the parties agreed to at the meeting was a rudimentary joint venture. None of the above appears in the Business Agent Contract. Given that the parties accepted the minutes as correct, the Business Agent Contract could not co-exist alongside the minutes.

23 A further difficulty is that Lin's affidavit of evidence-in-chief appeared to deviate from the plaintiff's case as pleaded in the statement of claim. At para 20 of Lin's affidavit of evidence-in-chief, he stated:

> Although the Business Agent Contract was never signed by the 1st, 2nd and 3rd Defendants,

they were well aware of all the terms contained therein. The 1st, 2nd and 3rd Defendants never objected to any of the terms stipulated in the Business Agent Contract, but proceeded to act under the Agreement and to commence trading.

The plaintiff's counsel confirmed as much when he said (at p 63 of the transcript of the evidence dated 27 June 2005):

> [O]ur case is that these drafts were produced to all three defendants, and they understood the terms and proceeded to perform under the agreements. So we are saying that in a way it is acceptance by conduct, …

This was, of course, a departure from the plaintiff's pleadings where at paras 4 and 7 of the statement of claim the plaintiff made clear that where the agreement was made by conduct, the conduct consisted of *past dealings* between the parties during the trial period between January and October 1997. Despite objection from the three defendants' counsel that the plaintiff had departed from its pleaded case, no application was made to amend the pleadings.

24 It is clear that "[a] court may not make a finding or give a decision on facts not pleaded and a finding or decision so made will be set aside": *per* GP Selvam JC (as he then was) in *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793 at 800, [24]. In *Blay v Pollard and Morris* [1930] 1 KB 628 at 634, Scrutton LJ stated:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.

The above statement was cited with approval by the Court of Appeal in *The Ohm Mariana* [1993] 2 SLR 698 at 715, [51]. And in *Ong Seow Pheng v Lotus Development Corp* [1997] 3 SLR 137 at [40], the Court of Appeal refused to hold the appellants liable as joint tortfeasors in the absence of a plea to that effect. The court reiterated the fundamental principle that the court cannot make a finding based on facts which have not been pleaded.

25 It was also not open to the plaintiff to contend that the unsigned draft Business Agent Contract formed part of the agreement between the plaintiff and the first defendant on the basis that the terms thereof had been accepted by subsequent conduct.

26 There are further difficulties yet. In para 17 of Lin's affidavit of evidence-in-chief, he set out certain terms, amongst others, which he said were agreed between the parties at the meeting of 2 November 1997. In para 18, he averred that the terms agreed at the said meeting were "briefly recorded in a document known as 'Records of Singapore Business Meeting'". Upon examination, one finds that certain of the alleged terms set out in para 17 are not found in the minutes. Worse still, some of them are even contradicted in the minutes. Examples of both types are set out below:

(a) Whereas para 17.1 alleges that the Defendants "shall exercise their skill and experience in purchasing and selling electrical goods", para 1 of the minutes provides, "Both parties shall jointly manage the sale of Funai household electrical appliances based on principles of trust and mutual benefit".

(b) Whereas para 17.2 alleges that the Defendants "shall only enter into transactions that will yield a minimum of 4% net profit", para 3 of the minutes does not place this responsibility on

any of the three defendants but merely provides, "The profit margin of the products shall be maintained at above 4%".

(c) Whereas para 17.9 alleges that the Defendants "shall render a true and proper account to the [plaintiff] by 31 December of each year of trading", para 5 of the minutes merely says, "The accounts shall be settled and submitted on 31 December each year", without placing the responsibility on the three defendants or any of them.

(d) Whereas para 17.10 alleges that the Defendants "shall be responsible for collecting sale proceeds and remitting the same to the [plaintiff]", this is not found anywhere in the minutes.

(e) Similarly, whereas para 17.12 alleges that the Defendants "shall be authorised to issue the sale Invoices on the [plaintiff's] stationery", this is not provided for in the minutes.

Indeed, given that the minutes provide (in para 1 thereof) that both parties shall manage the sale of the appliances and, more importantly, that "all risks and rights will be controlled and managed by [the plaintiff]", one would not expect to see contradictory terms such as those alleged in paras 17.1, 17.2, 17.9, 17.10 and 17.12 of Lin's affidavit of evidence-in-chief.

27 Therefore, to the extent that the alleged agreed terms in para 17 of Lin's affidavit of evidence-in-chief are inconsistent with the minutes, Lin cannot be believed. Besides, the alleged terms set out in paras 17.10 and 17.12 of Lin's affidavit of evidence-in-chief were never pleaded.

28 Apart from para 17, there are other statements in Lin's affidavit of evidence-in-chief which I cannot accept because they are inconsistent with the minutes. Firstly, para 40 of Lin's affidavit of evidence-in-chief is clearly false in that it alleges that the agreement (*ie*, the agreement concluded on 2 November 1997) "provides for the trading to be wholly and completely undertaken by the 1st, 2nd and/or 3rd Defendants". This same contention was raised by the plaintiff's counsel in para 22 of his closing submissions where he said:

> No [*sic*] where in the minutes of meeting, is it stated that all tradings are to be operated under Fornet Corp. On the contrary, Paragraph 1 of the minutes state that the 3rd Defendant shall "openly reveal all business operations" while the Plaintiffs shall "not be involved in the market", which imply that all trading operations will be carried out by the 1st, 2nd and 3rd defendants.

Counsel for the plaintiff misread para 1 of the minutes – the relevant portion of which provides:

> Mr Wu Zhengyi shall openly reveal all business operations in the market and, in the event such that all risks and rights will be controlled and managed by Fornet Enterprise Co., Ltd., consent not to be involved in the market. Both parties shall jointly manage the sale of FUNAI household electrical appliances based on principles of trust and mutual benefit.

29 It is clear from the language and the juxtaposition of the commas that Mr Wu Zhengyi, rather than the plaintiff, was to refrain from involvement in the market. Counsel for the plaintiff's construction of this sentence would also conflict with the last sentence in para 1 providing that "[b]oth parties shall jointly manage the sale of FUNAI household electrical appliances based on principles of trust and mutual benefit". If the plaintiff was to jointly manage the sales, it could not possibly consent not to be involved in the market. In contrast, Mr Wu could so consent since the joint management of sales would be between the plaintiff and the first defendant, the other party to the agreement. (Admittedly, Mr Wu could not consent unless he was a party too. I believe this technicality probably escaped the parties. It should not detract from my earlier finding that the

agreement was between the plaintiff and the first defendant.)

30 Secondly, Lin averred in his affidavit of evidence-in-chief that although in April 1997 the parties had reached an understanding to incorporate Fornet Corporation Pte Ltd as the vehicle for trading purposes, the plaintiff subsequently decided that it was unnecessary to utilise the company even though meanwhile it had been incorporated. According to Lin, in consequence thereof, although the parties had signed a non-binding memorandum of understanding on or around 18 April 1997 in regard to Fornet Corporation Pte Ltd providing that a more detailed agreement would be prepared within three months, this was never done.

31 If Lin's evidence was true, it is strange that para 4 of the minutes of 2 November 1997 still referred to Fornet Corporation Pte Ltd. Specifically, it provided that the plaintiff would send sufficient personnel to Fornet Corporation Pte Ltd "to assist in the business promotion and establishing the direct window with Taiwan".

32 In these circumstances, Lin's assertions in paras 39 and 41 of his affidavit that the agreement between the parties did not contain any provision that Fornet Corporation Pte Ltd was to be used for trading purposes was at best a half truth. Whilst the minutes did not provide expressly that Fornet Corporation Pte Ltd was to be used for the business, that could be quite easily inferred from para 4.

33 For all its unwarranted averments, Lin's affidavit of evidence-in-chief stopped short of asserting categorically that the three defendants or any of them were mercantile agents of the plaintiff. As noted, the plaintiff had pleaded this as its primary case. Alternatively, the plaintiff pleaded that the nature of its relationship with the Defendants was that of a partnership or a joint venture.

34 It was at the trial that counsel for the plaintiff finally declared that the Defendants were the plaintiff's mercantile agents. (See plaintiff's opening statement at para 18.) This was reiterated by Chen in cross-examination when he said, "It's an agency relationship". Significantly, Chen did not originally think so.

35 Under cross-examination a day earlier, Chen had in fact conceded that the agreement of 2 November 1997 was in fact one in which the plaintiff and the first defendant agreed to a joint venture and to use Fornet Corporation Pte Ltd as the joint-venture vehicle to conduct the trading. (This was essentially the first defendant's case.)

36 After objection by the plaintiff's counsel that the court interpreter had not accurately communicated Chen's answer, the latter appeared to resile from his earlier concession. I was more inclined to believe the interpreter who denied the plaintiff counsel's complaint of misinterpretation.

37 Even *sans* Chen's concession, the minutes appear to me far more to suggest a joint venture rather than an agency relationship.

38 For all the above reasons, the plaintiff's claim that the Defendants were the mercantile agents of the plaintiff must fail. In consequence, there is no room for implying into the agreement terms which such a relationship might import.

39 Before I leave this subject, I should mention that, initially, I was a little reluctant to conclude that the plaintiff's claim that the Defendants were its mercantile agents had to fail. This was because the plaintiff had included in its bundle of documents many copies of invoices on the plaintiff's

stationery allegedly signed on the plaintiff's behalf by the third defendant. The third defendant strenuously disputed the authenticity of the documents and, in particular, of the signature. If it were necessary for me to decide, I would have inclined to the view that at least certain of the signatures were genuine on the strength of the handwriting expert's evidence. Even so, the existence of a mercantile agency relationship was incompatible with the express terms of the minutes.

40 It would have been easier for the plaintiff if the minutes of the meeting were not part of the agreed terms for then the plaintiff possibly could have relied upon past dealings between the parties. This, however, is not the plaintiff's case; it pleaded specifically that where the agreement was in writing it was set out in the minutes and the Business Agent Contract. In these circumstances and for the reasons set out above, I find that the plaintiff has not made out its case on a balance of probabilities that the Defendants were the mercantile agents of the plaintiff.

41 The plaintiff's alternative plea that the Defendants were the plaintiff's partners can be readily ruled out, the plaintiff not having adduced any evidence of such relationship.

42 This leaves us only with the joint venture. Nevertheless, for completeness, we shall examine the plaintiff's claims in paras 9.1 to 9.7 of the statement of claim without ruling out the possibility of a mercantile agency relationship.

**Whether the first defendant breached the agreement and whether the Defendants were liable in conversion**

***Paragraph 9.1 of the statement of claim***

43 In para 9.1 of the statement of claim, the plaintiff alleged that the Defendants failed to exercise care and skill by buying too many goods at a time when the market was depressed, thereby causing an oversupply in stock. Counsel for the Defendants contended that there was simply no proof in support of the pleaded case and that the plaintiff's evidence was a bare allegation by Chen where he said:

> The 1st, 2nd and/or 3rd Defendants had breached the Agreement by failing to exercise proper skill in deciding what goods to purchase and in what quantity. The 1st, 2nd and/or 3rd defendants had purchased excessive goods taking into consideration the prevailing market conditions.
>
> …
>
> Since the excessive goods could not be sold, the Plaintiffs decided to mitigate the losses by trying to sell the same in Europe.

44 The learned authors on *Chitty on Contracts* vol II (The Common Law Library) (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) at para 31-112 state:

> An agent acting under a bilateral contract must exhibit such a degree of skill and diligence as is appropriate to the performance of the duties that he has accepted. In particular, a professional agent must show the degree of care to be expected of those in his profession. *But he is not responsible to his principal for a mere mistake or error of judgment, not amounting to a failure to exercise proper care or skill, and the mere fact that by a different course of action he might have averted a loss sustained by his principal is not of itself evidence of such a failure*. [emphasis added]

Thus, even if there was a mercantile agency relationship, there was no proof that the first defendant had failed to exercise the requisite degree of care and skill.

45 Besides, whether or not the first defendant was the plaintiff's mercantile agent, para 1 of the minutes provided that "all risks and rights [would] be controlled and managed by [the plaintiff]" and that both parties were to manage the sale of the appliances. The plaintiff has not made out its case why the first defendant should be made liable.

***Paragraph 9.2 of the statement of claim***

46 The passage from *Chitty on Contracts* cited in para 44 above is also appropriate here.

47 The plaintiff alleged that the Defendants purchased the goods "at higher than the prevailing costs of the goods at all material time". Counsel for the Defendants again submitted that no proof was given in support of this allegation. On behalf of the plaintiff, Chen gave examples of alleged instances of such breach by using six different product models and comparing the "purchase cost" with their "prevailing unit cost". However, when asked during cross-examination how he obtained the "prevailing unit cost", he admitted that it was based only on his estimate. That, clearly, was unsatisfactory. Paragraph 9.2 of the statement of claim therefore must fail regardless whether the relationship was one of joint venture or mercantile agency.

***Paragraph 9.3 of the statement of claim***

48 The plaintiff alleged that the Defendants:

> 9.3 acted contrary to and in conflict with the interest of the Plaintiffs' by entering into transactions which promote the 1st Defendants', the 2nd Defendants', the 3rd Defendant's and/or 3rd Defendant's associated or related companies' respective interests to the detriment of the Plaintiffs': …

49 The Defendants contended that the plaintiff failed to show the link between the transactions referred to in Chen's affidavit of evidence-in-chief where the first defendant bought on behalf of the plaintiff and later transactions where the first defendant bought from the plaintiff (thereby causing loss to the plaintiff).

50 Under cross-examination, Chen agreed with counsel for the Defendants that the goods in the transactions where the first defendant bought goods on behalf of the plaintiff were not the goods which the first defendant bought from the plaintiff. The claim under para 9.3 should therefore fail.

***Paragraphs 9.4 and 9.5 of the statement of claim***

51 Paragraphs 9.4 and 9.5 of the statement of claim deal with the allegation that the Defendants failed to promote the sale of the goods and failed to disclose the identities of the buyers/sellers to the plaintiff. Apart from a single bald sentence in para 143 of Chen's affidavit of evidence-in-chief, the plaintiff had offered no evidence to substantiate its claim. If the Defendants were in breach, surely the plaintiff, as experienced businessmen, would have sent letters of complaint or reminders to the Defendants to comply. There was none. The claim therefore fails for lack of evidence.

***Paragraph 9.6 of the statement of claim***

52 The plaintiff alleged that the Defendants did not remit to the plaintiff the proceeds of sale which they had collected. According to Chen in his affidavit of evidence-in-chief, the Defendants wrongfully retained US$12,101,274.40 out of the total sale proceeds of US$40,922,435.55. Chen's answers in cross-examination were unsatisfactory. He claimed that the plaintiff did not know which customer had paid into its bank account and which invoices had not been paid. He subsequently conceded that he did not know whether or not the Defendants did in fact receive and retain the alleged sale proceeds.

53 All the plaintiff's invoices expressly stipulated that its customers were to make payment directly to the plaintiff's own bank account. It is beyond belief that so many of the plaintiff's customers would disregard the clear payment instructions and pay the Defendants instead, thereby running the risk of having to pay again if the plaintiff sued them for non-payment.

54 It is also difficult to understand why no evidence was given by any customer to the effect that they had paid sale proceeds to the Defendants. There was also no evidence that the plaintiff wrote to any customer demanding payment. In this regard, Chen could only give the feeble excuse that the plaintiff was precluded from contacting its customers under the agreement. It is instructive to note that such an alleged provision in the agreement did not prevent the plaintiff from seeking out one of its customers to sell goods on the plaintiff's behalf. In truth, as the plaintiff's counsel himself pointed out (in his written submissions at para 57.2), there was no such prohibition in the agreement.

55 To rebut the plaintiff's contention that the first defendant was under a duty to remit sale proceeds to the plaintiff, the first defendant pointed out that the plaintiff failed to produce any bank statement to show that indeed the Defendants had remitted funds to the plaintiff on other occasions. After all, of the total amount of approximately US$40m of sale proceeds, only US$12m or thereabouts were alleged to be outstanding. Therefore, the balance of sale proceeds must have been remitted previously. The only evidence was the plaintiff's own internal "receipts", the authenticity of which was vigorously challenged by the Defendants and rightly so. The probative value of such internally generated documents must surely be negligible compared to bank statements. The plaintiff's claim under para 9.6 therefore fails.

56 For the same reasons set out in [52] to [54] above, the plaintiff's claim in conversion must also fail.

***Paragraph 9.7 of the statement of claim***

57 In para 9.7 of the statement of claim, the plaintiff alleged that the Defendants failed "to ensure and maintain transactions at a minimum of 4% net profit". As I noted earlier, this was not exclusively the first defendant's obligation. The minutes merely provided that "[t]he profit margin of the products shall be maintained at above 4%". Besides, para 1 of the minutes also provided that both parties were to jointly manage the sale of the appliances. The plaintiff failed to show why the Defendants should be made liable.

**Conspiracy**

58 The plaintiff also pleaded that the defendants (*ie*, the first to eighth defendants) conspired between themselves and/or with parties unknown to the plaintiff to cause substantial economic loss to the plaintiff with the sole or predominant purpose of injuring the plaintiff ("conspiracy to injure"). In the alternative, it was pleaded that the defendants conspired to use unlawful means ("conspiracy to use unlawful means").

59 Counsel for the Defendants contended that the alternative claim was not covered in the plaintiff's endorsement on the writ of summons and ought to be disregarded. Having considered submissions by both counsel, I am of the view that the alternative claim arose from facts which are the same as, or include or form part of, facts in the endorsement on the writ giving rise to causes of action for breach of contract and conspiracy to injure.

60 In regard to both types of conspiracy, no evidence was led to prove any agreement. In fact, nowhere in the affidavits of evidence-in-chief filed on behalf of the plaintiff is there any mention of the conspiracy claim.

61 In *Seagate Technology (S) Pte Ltd v Heng Eng Li* [1994] 1 SLR 534 at 549, [54] Goh Phai Cheng JC in the Singapore High Court, said:

> [T]he starting point in a claim in conspiracy is an agreement or understanding between two or more persons to carry out an act or acts. The existence of such an agreement must be proved before [the court needs] to consider the predominant purpose for which the act or acts are carried out and the means by which such acts are carried out. … The burden of proving the existence of an agreement … is on the [plaintiff] and … a high degree of proof is needed.

On appeal to the Court of Appeal, the learned judicial commissioner's decision on the failure to prove a conspiracy was upheld.

62 It is clear from the statement of claim that all the eight defendants in this action were involved in the alleged conspiracy to injure and conspiracy by unlawful means. Yet, for reasons that were never disclosed, the plaintiff abandoned its claims against the fourth to eighth defendants before the exchange of affidavits of evidence-in-chief. This is inexplicable because, according to the statement of claim, the fourth to eighth defendants were key participants in the alleged conspiracy to injure; the fourth defendant was the party that allegedly sold the goods to the plaintiff and the eighth defendant allegedly facilitated or induced the other defendants to enter into the transactions complained of.

63 The withdrawal of the claims against the fourth to eighth defendants seriously compromised the plaintiff's claim as regards the conspiracy to injure.

64 The particulars in the statement of claim as to conspiracy to use unlawful means allege the involvement of only the first three defendants.

65 Counsel for the plaintiff sought to rely on *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 ("*Belmont Finance*") for the proposition that a company, being a legal person, is capable in law of conspiring with its directors. Counsel for the Defendants, on the other hand, cited *Chong Hon Kuan Ivan v Levy Maurice (No 2)* [2004] 4 SLR 801 ("*Chong Hon Kuan Ivan*") for the proposition that a director cannot be liable in tort for conspiracy with the company if he acted *bona fide* within the scope of his authority.

66 In the latter case, the plaintiff was employed as the managing director and chief executive officer of a company for a term of five years with a provision for renewal for another five. As a result of disputes arising, a board meeting of the company was held in which one of the directors proposed a resolution to terminate the plaintiff's employment with the company. The resolution was passed. The plaintiff then commenced an action against the directors and certain others for conspiracy to induce and for inducing the company to terminate his employment in breach of the employment contract. Woo Bih Li J held, following *Said v Butt* [1920] 3 KB 497, that the directors could not be

made liable if they acted *bona fide* within the scope of their authority.

67 Upon close examination, it seems to me that *Belmont Finance* ([65] *supra*) is distinguishable. Adopting the relevant portions of the headnotes, the facts of the case are as follows:

> The first defendant (a company known as 'Williams') owned all the shares in the second defendant (a company known as 'City') which in turn owned all the shares in the plaintiff company ('Belmont'). The chairman of all three companies was J. The third defendant, G, was the controlling shareholder of another company ('Maximum') which was engaged in property development. … In 1963 G and his associates wished to purchase Belmont in order to use its assets to finance the property development projects of other companies owned by them. At the same time J, who was impressed by G, wanted to obtain the benefit of G's expertise and flair in property development for the Williams group of companies. Accordingly, on 3rd October, G and his associates agreed with Williams and City to sell Maximum to Belmont for £500,000 and to buy the share capital of Belmont from City for £489,000. … Although G and J negotiated at arm's length, neither J, City nor Belmont sought or received an independent valuation of the worth of Maximum. It was realised by the parties involved that there was a possibility that the transaction might involve a breach of s 54(1) of the Companies Act 1948 which made it unlawful for a company to give 'any financial assistance for the purpose of … a purchase … made … by any person of or for any shares in the company'. … At board meetings of City and Belmont held on 11th October it was resolved that the agreement of 3rd October should be implemented, and the transaction was completed later that day. Belmont subsequently went into liquidation with debts of £176,269. The receiver of Belmont obtained an independent valuation of Maximum on the basis of advising Belmont of a fair price to pay for Maximum as at 3rd October 1963. That valuation suggested that Maximum was worth only £60,069 at that date and not £500,000. The receiver accordingly commenced an action on behalf of Belmont against, inter alios, Williams, City and G alleging (i) that the price of £500,000 for Maximum had been arrived at to enable G and his associates to purchase Belmont with the money provided by Belmont in contravention of s 54, (ii) that the defendants had wrongfully conspired together to carry into effect the sale and purchase of Belmont's share capital in contravention of s 54, … At the trial, J, on behalf of Williams and City, asserted that he genuinely believed that buying Maximum for £500,000 was a good commercial proposition for Belmont because he and Belmont were buying G's ability to make money. The judge accepted that and, having decided that the agreement of 3rd October was a bona fide commercial transaction, dismissed the claim. Belmont appealed.
>
> **Held** —The appeal would be allowed for the following reasons —
>
> (i) …
>
> (ii) Having regard to the fact that, as a director of both companies, J's knowledge of the objects of the agreement was to be imputed to Williams and City, the claim of conspiracy had been established against the defendants because (a) they had combined to participate in a common intention to enter into the agreement of 3rd October, to procure that Belmont entered into it, and then to ensure that it was implemented, (b) that combination had been to effect an unlawful purpose, namely the provision of financial assistance to G and his associates to acquire Belmont using money provided by Belmont, in contravention of s 54 of the 1948Act, and (c) that had resulted in damage to Belmont …

68 It will be observed that the two defendant companies, Williams and City, were held to be in conspiracy with G. J, however, was not found liable as such. Buckley LJ said at 404:

> Williams and City were parties to the agreement and so, in my opinion, are fixed with the character of parties to the conspiracy. Moreover, Mr James [*ie*, J] knew perfectly well what the objects of the agreement were. He was a director of both Williams and City. Mr Harries and Mr Foley, who also knew the objects of the agreement, were a director and the secretary respectively of City. Mr Foley was also the secretary of Williams. Their knowledge must, in my opinion, be imputed to the companies of which they were directors and secretary, for an officer of a company must surely be under a duty, if he is aware that a transaction into which his company or a wholly-owned subsidiary is about to enter is illegal or tainted with illegality, to inform the board of that company of the fact. *Where an officer is under a duty to make such a disclosure to his company, his knowledge is imputed to the company (Re David Payne & Co Ltd¸ Re Fenwick, Stobart & Co Ltd*). *In these circumstances, in my opinion, Williams and City must be regarded as having participated with Mr Grosscurth in a common intention to enter into the agreement and to procure that Belmont should enter into the agreement and that the agreement should be implemented. That Mr Grosscurth was a party to that common intention is, in my opinion, indisputable*. [emphasis added]

69 Similarly, Waller LJ, stated as follows at 417:

> I conclude therefore on this aspect of the case that Williams and City were a party to a conspiracy to commit a breach of s 54 of the Companies Act 1948 and that as a result of that conspiracy Belmont suffered damage, and that accordingly Williams and City are liable to Belmont for the damage suffered. *I have not sought to identify the other conspirators. Suffice it to say that Grosscurth was clearly one, and that is sufficient to establish the conspiracy*. [emphasis added]

It can be seen therefore that the knowledge of J as to the objects of the agreement was imputed to the two defendant companies, Williams and City, so that, in entering into that agreement with that knowledge, they were co-conspirators with G. There was no finding that J was part of the conspiracy.

70 What the plaintiff is seeking to do in the present case is to make the third defendant liable in conspiracy together with the first defendant. *Belmont Finance* ([65] *supra*), is of no assistance to him. Faced with *Said v Butt* ([66] *supra*), and *Chong Hon Kuan Ivan* ([65] *supra*), it is incumbent upon the plaintiff to prove that what the third defendant did was not *bona fide* and was outside the scope of his authority. That has not been proven. Accordingly, the claim of conspiracy by unlawful means ought also to fail.

71 In the result, I dismiss the plaintiff's action in its entirety with costs to be taxed.

**First defendant's counterclaim**

72 Finally, I come to the first defendant's counterclaim. I cannot see how that can succeed. The plaintiff lost a very substantial sum of money in the business during the Asian crisis. The three defendants themselves gave evidence of the very difficult business conditions and the losses they themselves suffered. The first defendant could not reasonably expect that the plaintiff would throw in more money into the venture under those circumstances. Besides, para 2 of the minutes of the 2 November 1997 meeting was couched in permissive rather than imperative terms. It merely provided as follows:

> Both parties consent to Fornet Enterprise Co., Ltd. preparing funds of about US$60 million in 1998 and the estimated turnover for the year is US$200 million.

73 I therefore dismiss the counterclaim with costs.

Copyright © Government of Singapore.