IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 281

Suit No 957 of 2014

Between

(1) Supercars Lorinser Pte Ltd
(2) Supercars Singapore Pte Ltd

… *Plaintiffs*

And

Benzline Auto Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Contract – formation
Restitution – change of position
Restitution – failure of consideration – total failure of consideration

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Supercars Lorinser Pte Ltd and another
v
Benzline Auto Pte Ltd

[2016] SGHC 281

High Court — Suit No 957 of 2014
Aedit Abdullah JC
10, 11, 17–19 May 2016; 22 June 2016

23 December 2016

Aedit Abdullah JC:

Introduction

1 This case concerned the claim for repayment of a sum of money paid ahead of the entry by the parties into an exclusive dealership agreement concerning modified cars. The Plaintiffs claimed back the money for failure of basis as the agreement was not in fact entered into. The Defendant claimed that the money was paid for a specific order of cars separately from the exclusive dealership agreement. It also brought a counterclaim for amounts payable to them under the contract, which I set out at [9] below. On the evidence before me, I found for the Plaintiffs for failure of basis. I also dismissed the Defendant's counterclaim. The Defendant has now appealed.

Background

2 The 1st Plaintiff was incorporated by the 2nd Plaintiff, a company in the business of selling cars, with a view to conducting the sub-distribution of Mercedes Benz vehicles modified by Sportservice Lorinser Sportliche Autoausrustung GmbH ("Lorinser"). The Defendant, Benzline Auto Pte Limited, held the master dealer rights in Singapore for the cars modified by Lorinser. Before 2013, such cars brought into Singapore were regarded as parallel imports, which meant they did not come with service warranties from the authorised dealer for Mercedes Benz, and thus the Defendant had to provide warranty services itself. The Defendant did not actively pursue sales.

3 However in 2013, Lorinser was in discussions with the manufacturer of Mercedes Benz to extend the warranties in Singapore to Lorinser modified Mercedes Benz cars. This made the Lorinser cars more attractive, and made its sales attractive as well.

4 The Plaintiffs' director, Mr Chua Yeow Kang ("Marcus Chua"), came to know of the opportunity this presented through the Defendant's then sales manager, Mr Chong Ban Cheong ("George Chong"). Discussions ensued primarily between Marcus Chua on the one hand, and the Defendant's director, Mr Ng Seng Keong ("Kevin Ng"). At times, the principal of Lorinser, Mr Marcus Lorinser, and Lorinser's sales manager, Mr Evangelos Hatzikoitsis ("Evan"), were also involved either in face to face or email discussions with the Defendant and Plaintiffs. However, neither person from Lorinser were called as witnesses.

5 The parties discussed entering an agreement for the exclusive distribution of the Lorinser cars. There was however at trial, controversy as to

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which of the Plaintiffs was to be party to the agreement, with the Defendant denying knowledge of the existence of the 1st Plaintiff. There was also some discussion about the distribution of cars in the region, particularly in Thailand. The Plaintiffs deny anything was agreed involving them in respect of Thailand; the Defendant included losses from Thailand as part of their counterclaim.

6 While the discussions and negotiations as to the exclusive distribution agreement were going on, Lorinser sought through the Defendant, and on occasion in direct communications with Marcus Chua orders for Lorinser cars. There was some evidence that the target or the allocation for Singapore was about 100 cars. The purpose of the orders was in dispute: the Plaintiffs argued that this was only for planning, and was linked to the agreement being completed; the Defendant on the other hand argued that that these were firm orders.

7 On 22 January 2014, a payment of $300,000 was made by Mr Yu Ming Yong ("Yu"), a shareholder and adviser to the Plaintiffs, to the Defendant. The circumstances under which this payment was made was disputed. The Plaintiffs said that this payment was dependent on the exclusive dealership being entered into; the Defendant contended that this was payment for an order of 30 cars made separately from the distributorship agreement.

8 Thereafter, discussions about the exclusive dealership agreement continued. While a draft was sent as early as 24 January 2014, there was no agreement reached. Eventually, by May 2014, the relationship between the parties had deteriorated: the Plaintiffs said that the Defendant had approached Regal Motors Pte Ltd ("Regal") or an associated entity be appointed the exclusive dealer. The Plaintiffs thus sought the repayment of the $300,000.

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9 The Defendant counterclaimed for the costs of the 30 cars it said were ordered, the loss of commission on cars that were to be sold in Singapore as well as Thailand, the cost of a sales order for Lorinser parts made by the Plaintiffs, and specific performance of the 30 cars ordered (with allowance for cars already sold).

Plaintiffs' Cases

10 According to the Plaintiffs, the $300,000 was paid on the basis that the Defendant would appoint the Plaintiffs as the exclusive authorised sub-dealer of Lorinser cars. Similarly, the planning orders and the orders that were made for the 30 cars in total were also made on that basis. As it was the contract was not concluded. Thus the $300,000 should be returned.

11 The Defendants were aware that the 2nd Plaintiffs would set up a new company to handle the Lorinser sub-dealership: *ie*, the 1st Plaintiff. The Defendant's director and sole witness had actually agreed, that the $300,000 was a pre-contractual deposit on the basis that Supercars would be appointed exclusive sub-dealers. There was total failure of consideration as no contract was in fact entered into. Here, there was no contract concluded as the Plaintiffs were not appointed exclusive sub-dealers, and in fact Regal was instead so appointed. The Defendant failed to appoint the Plaintiffs as the exclusive sub dealer and had in fact decided not to appoint the Plaintiff by May 2014. There was only a sample contract exchanged in January 2014. Negotiations continued into April and May that year. But by that month, the Defendant had chosen not to deal with the Plaintiffs, and decided not to appoint the Plaintiffs as the sub-dealer. Terms were still being negotiated. While the Defendant argued that the $300,000 was non-refundable, this was

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on the basis of a term in the sales order that was not accepted nor agreed to by the Plaintiffs.

12 The Defendant's counterclaim should be dismissed as no loss or damage was actually suffered. The 30 cars were in fact sold on to Regal. In addition, the claim on a sales order dated 2 April 2014 was a claim that overlapped with the claim in respect of the 30 cars. That sales order was not in any event accepted by the Plaintiffs, and contained various errors. The evidence from Kevin Ng was also that the Defendant had confirmed the second and third orders on their own. In any event, the orders made by Supercars were on the basis of their appointment as exclusive sub-dealers.

13 As for the counterclaim for the balance purchase price, this was not supported by the evidence at all. The orders were conditional on the appointment of the Plaintiff as the exclusive sub-dealer; this did not come to pass, so the orders were not binding on the Plaintiffs. Regal had also taken the 30 car orders over, so the Defendants avoided loss. In cross-examination, Kevin Ng accepted that he had sold the 30 cars and thus did not have a claim against the Plaintiffs. No evidence was in any event adduced to show its loss. Only one of the various invoices was addressed to the Plaintiffs; the rest were addressed to Regal. No proper documents were adduced that would show any liability by the Plaintiffs. No evidence was shown either that the Defendants had paid on the invoices sent to them. What was more, the counterclaim was only made one year after the Plaintiffs sought the return of their $300,000.

14 The Defendants had also erred in claiming both expectation and reliance loss: they had to choose one or the other: either the loss of commission or the costs incurred because of the breach.

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15 There was also no evidence that there was a binding agreement under which the Plaintiffs had agreed to sell cars in Thailand. There was no such agreement. The documentary evidence showed that there was none: Lorinser told the 1st Plaintiff that the planning orders given were only for the Singapore market, and that the 1st Plaintiff should focus on that market only.

16 In any event, the planning order was not binding; it was subject to the sub-dealership contract would be entered. It was a term of the sub-dealership. The evidence was also that the planning order was merely a guideline.

17 Nothing was agreed in respect of the Thai market. Neither should specific performance be ordered. The Defendant had entered into an exclusive sub-dealership agreement with Regal. Cars could not then be ordered by and delivered to the Plaintiffs. It was also argued that Kevin Ng had not given credible testimony. He was not a disinterested witness. His testimony suffered from various inconsistencies and evasiveness. He had also changed his testimony from what was in his affidavit.

18 The various arguments put forward by the Defendant portrayed the evidence wrongly and gave a misleading impression.

Defendant's Case

19 The Defendants submissions primarily recounted the evidence given.

20 The Defendant argued that the sub-dealership and the purchase of the cars were separate. The number of cars that the Plaintiffs could commit to was a pre-requisite to the appointment as a sub-dealer. This was Yu's understanding as shown in his evidence. Marcus Chua had actually discussed the matter with Yu and accepted that an order for 100 cars was acceptable for

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the year. The Plaintiff's position that there was an oral agreement to appoint was not supported by the evidence. The reliance on an oral agreement was at odds with the Plaintiff's case that a written agreement was being pursued. The payment of the $300,000 was made as a calculated risk by Yu, who chose to pay because of the urgency of the situation. Marcus Chua also chose to proceed without a signed agreement. Additionally, the existence of the 1st plaintiff was never raised to the Defendant. The evidence of George Chong should be disregarded as he had own agenda. As they had paid the $300,000 on to Lorinser, restitution could not succeed.

21 As regards the counterclaim, this was for damages in respect of the failure of the Plaintiffs to take delivery of the 30 cars ordered, cars which they were obliged to order and the commitment to purchase cars for the Thai Market. In respect of the 30 cars, the Defendant paid €1,091,757.78, with Regal paying the rest. 11 cars were still left unsold. The Defendant's counterclaim should succeed as the 30 cars were delivered to Singapore, and the Plaintiffs failed to take delivery. The Defendant merely tried to mitigate. In that context, the appointment of Regal as exclusive sub-dealers was necessary.

22 The chronology of events showed that the Plaintiffs' version should not be accepted. Of these, the following events raised by the Defendant would seem the most pertinent:

(a) At the Frankfurt motor show in September 2013, Marcus Chua had indicated that he could sell the cars: he assured that expected to order more than 100 cars each year. The appointment of the Plaintiffs as a sub-dealer was not discussed. The decision to appoint lay with Lorinser. There was some disagreement about the commission rate.

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(b) At the Essen Motor Show in November 2013, the parties agreed to the purchase of 2014 cars for Singapore and 1347 for Thailand. But there was no agreement on the appointment of the Plaintiff as a dealer. In an email on 12 December 2013 from Lorinser, this recorded the discussion reached at Essen, and this did not support the Plaintiffs' contentions.

(c) There was also discussion about the Thai contract.

23 Eventually, when a draft agreement was sent by Lorinser, in January 2014, Marcus Chua was evasive on the contract to be signed being basically the same as that between Lorinser and the Defendant. As it was a back to back contract, the Defendant had little say on what was in the contract, and it was not for the Defendant to determine the appointment of the Plaintiffs.

24 The January draft agreement set the stage for the financing, which was the backdrop for the payment of the $300,000. Yu gave evidence that he was making the payment as deposit for the cars. Marcus Chua's and Yu's evidence on the $300,000 was also contradictory. Orders were made by George Chong after receiving them from the Plaintiffs. Evan emphasised in February that firm commitments were needed leading to a final planning order. The Plaintiffs' position that the final planning order was not firm was contradictory and went against the evidence of George Chong that what was needed was a firm order. The first order of 7 cars was made in February 2014, 11 cars in March, and the third in April for 12 cars: they were following the planning order.

25 By April, the Defendant had paid some €352,169.60 to Lorinser. However funds were not received from the Plaintiffs. This was supposedly on

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the basis that the agreement was not signed, but it was the Plaintiffs who refused to sign. Even when a final version was forwarded on 30 April 2014 by Evan from Lorinser no steps were taken by the Plaintiffs.

26 Thereafter, Marcus Chua tried to sign with Lorinser directly. He was willing to sign the contract if he were able to enter into a direct relationship with Lorinser. This did not come to pass. Yu tried to revive the arrangements thereafter on 19th May and confirmed that the 100 cars was not a problem. Eventually the Plaintiffs sought the return of the $300,000 previously paid and refused to take delivery of the ordered cars. The cancellation had to be borne by the Plaintiffs. This was admitted by Yu. 11 cars remained unsold. A claim for commission was also made.

27 There were a number of significant problems with the evidence relied upon by the Plaintiffs. The witnesses were not consistent on whether the 30% downpayment was needed before the cars would be manufactured. None of the Plaintiffs' witnesses were able to explain why the signing of the agreement was not more actively pursued.

28 It was further argued that the Plaintiffs abandoned the pleading and argument that there was an oral agreement to appoint the 1st Plaintiff the exclusive sub-distributor, and the argument that there was an agreement to refund $300,000 if the formal binding agreement was not signed.

29 The Defendant accepted that the $72,000 claim on the order was double counting and did not pursue the matter further.

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The Decision

30 The Plaintiffs' claim for the repayment was dependent on whether there was any contract between the Plaintiffs and Defendant for the supply of the vehicles without an exclusive distributorship agreement, as the Defendant alleged. I found that no contract for the *ad hoc* supply of vehicles was in fact formed. The basis for the payment of the $300,000 to the Defendant failed, and the Plaintiffs were entitled to repayment.

31 While there was objective evidence in this case, mainly in the form of emails and attachments, as well as invoices, this case turned really on the oral evidence of the various witnesses as to how the documents should be interpreted.

32 It should be noted that it ultimately made little difference in the present case which of the two Plaintiffs was to be the party to the sub-dealership arrangement, as it was not material to my ultimate conclusion whether the contract was to be with the 1st or 2nd Plaintiffs. What mattered was that there was no contract at all between either of these Plaintiffs and the Defendant. I do not generally distinguish between them in these grounds unless necessary in a specific context.

The Plaintiffs' claim

33 The payment of the $300,000 made to the Defendant was on the basis of a contract being concluded by the 1st Plaintiffs with the Defendant for the exclusive distribution of the Lorinser cars in Singapore. This payment was not made as part-payment for a specific order of cars.

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34 A number of reasons went against any finding that there was an agreement to purchase cars separate from a sub-dealership: this was not likely on the balance of probabilities given the concerns which I accept the Plaintiffs genuinely had about the viability of ordering cars without an exclusive sub-dealership. The tenor of the communications between the parties and with Lorinser, its objective interpretation was that of determining the overall supply of cars over the course of the year. While the Plaintiffs may have conveyed planning orders to Lorinser through the Defendant, these orders were not made under any *ad hoc* agreement for a specific number of cars. What the orders were were really an indication to allow an overall position to be planned for the year. However the incidence of offer and acceptance may be analysed between the parties, there was objectively no intention to be bound until the sub-dealership was agreed. And this was never actually agreed between the parties at all.

35 While the payment voucher that accompanied the cheque seemed to indicate that the amount was payment for cars, as it referred to "30% deposit for new Mercedes as per attached" given that it was also stated to be a deposit, the better interpretation was that it was a pre-contractual payment only, to show the seriousness of the Plaintiffs. There were parts of Yu's evidence about the payment that seemed to regard the payment as a part-payment of an order, but looking at his evidence as a whole, it is clear that it was a pre-contractual payment, on the basis of a sub-dealership agreement being entered into.

The Defendant's Counterclaim

36 As for the Defendant's claims for the amounts payable to them under the contract as they alleged, as well as losses relating to the supply of vehicles

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to Thailand, I found that these losses were not made out on the evidence, even if the Plaintiffs were bound by a contract to the Defendant.

Analysis

The Plaintiffs' claim for the $300,000

37 The Plaintiffs' claim was that the money, which was paid as a pre-contractual payment, should be returned as there was total failure of consideration as the contract did not materialise. The terms had not been agreed. The Defendant argued that there was a contract in the form of the *ad hoc* order of 30 cars, and the $300,000 was payment for this. I was satisfied that there was no contract. The $300,000 was paid on the basis that there would be a contract signed ultimately; as this did not happen, the $300,000 was repayable for total failure of basis. I was satisfied that it was shown that the payment was made on the basis that it was a pre-contractual payment and not payment for an order. While the amount of the payment was taken in reference to a specific quantity of cars, intended to be the first batch delivered, the payment was ultimately on the basis that an exclusive distributorship (technically a sub-distributorship) would be entered into.

38 The term "deposit" generally signifies that money was paid in part-payment of an agreed sum, and is usually paid in the context of a concluded agreement, as for instance, in return for an option to purchase. But a payment in the form of a deposit, may also be paid before a contract is concluded. This would usually serve to indicate earnestness or seriousness. Such a deposit may be repayable if the basis on which it was paid does fail: *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR(R) 791 ("*United Artists*").

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39 While there is judicial recognition of the use of the term "deposit" to include a pre-contractual payment, to avoid confusion, it may be better to move away from such usage, and simply term such "deposits" as pre-contractual payments. It is true that such payments showing seriousness create no real security for the recipient, and it may be that in many contexts it may make no commercial sense; there is thus a dearth of cases involving such payments made to show seriousness. But there is nothing in principle against payments being made for such a purpose. Indeed, it may be that such payments can be commercially useful where the parties expect a contract to be completed shortly and where either or both sides require some signal that there is serious intent to complete the discussions and enter into a binding agreement. Here the evidence, to be examined below, pointed in that direction.

40 If such payments showing seriousness are made, and these payments cannot be construed in any way, as for instance as a gift, the doctrine of failure of basis applies, and these payments are recoverable as reversal of unjust enrichment or restitution. *Chillingworth v Esche* [1924] 1 Ch 97*,* cited in *United Artists*, is an example of this. The Defendant argued that *United Artists* was distinguishable on the facts. However, there was no real argument on the applicable law in the present case.

41 What the basis is must be determined objectively. In the words of *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("*Goff & Jones*") at para 13-02:

> The basis of the transfer must be jointly understood as such by both parties. It must be ascertained objectively and the parties' uncommunicated subjected thoughts are irrelevant.

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42 The same point that the determination must be objectively ascertained was made in *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* (2005) 218 ALR 166 at [239].

43 Thus in the present case, considering the testimony of the witnesses, and the evidence as to whether any binding contract was reached, either in the form of *ad hoc* orders or the exclusive distributorship, the conclusion I reached was that objectively the payment was not made on the basis of any actual agreement, but that an agreement would be entered into.

Whether any agreement was reached for the ad hoc purchase of cars

44 The Plaintiffs argued that there was no agreement reached. The Defendant on the other hand argued that there was an agreement to purchase cars that were ordered, which was separate from the exclusive sub-distributor agreement that the Plaintiffs claimed to have been negotiating. I concluded that there was in fact no agreement.

45 I accepted that the Plaintiffs wanted a binding sub-dealerhsip agreement. It made no commercial sense for the Plaintiffs to have ordered the Lorinser cars without the assurance of the exclusive sub-dealership arrangement: otherwise, the Plaintiffs would have face the real possibility of competition from other dealers. That would have rendered the ordering of the cars a risky venture. The sub-dealership agreement on the other hand, would have provided assurance that the Plaintiffs would not have had to fend off others selling the very same product.

46 The Defendant appeared to argue that discussions about the appointment of the Plaintiff as a sub-dealer only started in January 2014: however this did not gel with the discussion which had started in November.[1]

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Given that such an arrangement was contemplated, it did not make sense for the cars to be ordered separately, unless it was shown that there was some urgency or imperative, such as a sale opportunity or perhaps to lay the foundations for the brand. There was no evidence of this nature. In particular, the evidence was that the brand was already present in Singapore, and thus there was no real imperative to have cars marketed to raise awareness of the brand. Additionally, such brand awareness could be achieved in other ways, without the need for cars to be actually ordered.

47 The argument was made by the Defendant that the Plaintiffs took the risk that the exclusive dealership would not be agreed, but entered into and paid for the order of cars in the meantime. It would have been possible for the Plaintiffs to have assumed such risk, but such a finding would have gone against the probabilities in this case. In a normal commercial deal, the parties would be expected to display a normal appetite for risk: in a franchise agreement, or distributorship, the party taking on the responsibilities of selling or distributing the products in question would generally want to have as little competition as possible. A non-exclusive franchise or distributorship carries the threat of loss of business by parties sanctioned or authorised by the supplier. This expectation may be displaced by specific evidence showing that the Plaintiff was willing to take on such risk, but there was no evidence of any such readiness on the Plaintiffs' part: the Plaintiffs' witnesses denied that there was any such intention and nothing to the contrary came from the Defendant's witnesses. There was of course nothing by way of documentation here.

48 The Defendant also pointed to the failure by the Plaintiffs to conclude the dealership agreement, though it could have done so by April 2014.

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[1] Notes of Evidence ("NE") 18 May 2016 p 23 line 5–20.

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However, as submitted by the Plaintiffs, this was not correct: at that point Lorinser had not signed its agreement with Benzline, and that contract with the Defendant was to exist back to back with the dealership agreement.[2] It is clear and accepted as common ground that the contracts were meant to operate back to back: this was evident from the Defendant's own submissions. A number of issues stood in the way of the completion of that dealership agreement. The Defendant argued that the Plaintiffs were not serious in the end. There were still discussions about the signing of the contract all the way through, and no definite agreement was reached: the contract was not signed, and in particular, the contract between Lorinser and the Defendant was not itself completed in time, or at least it was not mentioned specifically in the discussions between the Plaintiffs and the Defendant. Various matters remained unresolved, including the provision or security in the form a standby letters of credit. Ultimately, given the facts and how the case was pleaded by each side all these issues were immaterial. It may be possible that the fault of a party to negotiate and conclude a contract in good faith is a breach of an obligation of negotiation in good faith. How such an obligation could arise is perhaps better considered on another occasion: such a claim was not pleaded, and the facts as I have found them would have rendered most such claims unviable.

49 The Defendant also pointed to various matters involving Lorinser such as emails and the discussions that took place involving either Marcus Lorinser or the sales manager. However these could not assist much as they did not touch on the actual relationship between the Plaintiffs and the Defendant.

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2 NE 18 May 2016 p 40 line 28–30.

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The orders made did not show that any contract was concluded

50 The fact that the Plaintiffs put in orders did not show that any contract was concluded between the parties. I was satisfied that the orders put in by the Plaintiffs were only for planning purposes and in advance of the conclusion of the dealership agreement. The law is that intention to make an offer or to accept is determined objectively: *Bakery Mart Pte Ltd (in receivership) v Sincere Watch Ltd* [2003] 3 SLR(R) 462 at [22]; *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [1]. Applying that test, it was not shown that there was an agreement concluded for the *ad hoc* supply of cars.

51 Firstly, the tenor of the communications between the parties and with Lorinser, its objective interpretation was that of determining the overall supply of cars over the course of the year. While the Plaintiffs may have conveyed planning orders to Lorinser through the Defendant, I did not conclude that these orders were made under any *ad hoc* agreement for a specific number of cars. I was satisfied that looking at the matter objectively, what the orders were were really an indication to allow an overall position to be planned for the year, and that everything was subject to the entry of an exclusive dealership. The concern of the Plaintiffs throughout was on the finalisation of the sub-dealership agreement and conclusion of terms.

52 This was shown by the evidence. Firstly, Kevin Ng's evidence was that the agreement and orders were linked. He admitted this in his cross-examination:[3]

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[3] NE 18 May 2016 p 37 line 7–21.

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> Q: So you didn't tell Supercars the contract has nothing to do with the orders?
>
> A Because---because right from the start, we had an agreement and Supercar wanted the contract. Because for the first batch, payment was only made after the orders were placed.
>
> …
>
> Q: And the payment was made on 22nd of January 2014?
>
> A: Yes. An agreement was reached.
>
> Q: Yes. So the agreement and the orders are linked, you agree?
>
> A: Yes.
>
> Q: And it was only because of the agreement, that's why the orders were placed?
>
> A: Yes.
>
> Q: And it was placed on the condition that Supercars would be sub-dealer?
>
> A: Yes.

53 Kevin Ng's evidence was that an agreement was reached; that part was disputed by the Plaintiffs. But what was important was that Kevin Ng accepted the linkage between the two. Furthermore, it was apparent that the dealership agreement would cover the orders placed earlier: that is, the subject matter of the dealership agreement would, even on the Defendant's case, relate back to past orders. Kevin Ng testified:[4]

> Q: And the contract was to cover the 2014?
>
> A: Yes.
>
> Q: So it will cover all the orders ordered in 2014?

54 A: Yes. The Defendant argued that the discussion of appointment only came up after 21 January 2014, and that the draft agreement was not signed by

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4 NE 18 May 2016 p 26 line 20–24.

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the Plaintiffs. However, the evidence showed that there were outstanding issues that needed to be resolved, so no agreement was in fact reached, objectively. The evidence was that even in May 2014 the agreement was not ready to be signed.[5] The decision to enter into the dealership agreement was with the Defendant: Kevin Ng admitted that Lorinser left this to the Defendant.[6]

55 Furthermore, without the sub-dealership agreement, the orders would have rendered the Plaintiffs parallel importers. This would have changed the business model and an international warranty would be required for the cars to be eligible for servicing in Singapore by the Singapore authorised dealership for Mercedes Benz.[7]

56 As for the Defendant's point, about the work done by Mercedes and Lorinser, such work was not directly relevant to the issue of whether an *ad hoc* contract was entered – this would have been between the Plaintiffs and the Defendant. Furthermore, the concerns on the Lorinser side was on the manufacture and modification of cars for the Singapore market, taking into account the lead times required. Lorinser did communicate, cajole and exhort for the orders to be sent in, but the focus of all of these was on the need for planning, preparation and manufacture given the time required: these did not show that there was a concluded contract for the supply of the cars. All the Lorinser evidence was consistent with the orders being for planning, while the legal relationship between the Plaintiffs and Defendant remained unresolved and indeterminate. There was nothing in the evidence from the Lorinser emails

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5 NE 18 May 2016 p 40 line 28–30.

6 NE 18 May 2016 p 24 line 6–14.

7 NE 18 May 2016 p 36 line 12–30.

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that showed that there was any concluded contract between the parties to the present case.

57 The fact that a planning order covering 100 cars was given by the Plaintiffs did not show that there was a concluded contract. The Plaintiffs were also not liable for these 100 cars. The planning order was contingent on the Plaintiffs being able to conclude an exclusive sub-dealership agreement.

58 The conclusion of a contract for *ad hoc* orders existing alongside the exclusive sub-distributorship agreement. There was insufficient evidence in the present case for me to have concluded that the Plaintiffs agreed to this: again the probabilities of the circumstances pointed against it. The risk of competition from other persons dealing in the cars would have been too great. It is possible that such an *ad hoc* contract could have been made: but there was no evidence at all supporting such a conclusion here.

59 It may be that a *quantum meruit* claim may or may not be possible, but this was not part of the Defendant's counterclaim. In any event, as will be dealt with below, there was insufficient evidence given to support the Defendant's counterclaim.

The payment of the $300,000

60 This conclusion was reached as the $300,000 was paid only to show the seriousness of the Plaintiffs in pursuing the exclusive sub-distributorship; there was no commercial sense or objective for the cars to be purchased without such an agreement being entered into. And the contract was never signed or agreed.

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61 I accepted that the payment was made as a pre-contractual payment only. Yu's evidence showed ultimately that it was a pre-contractual payment only and not part-payment of an order.

62 The evidence of the $300,000 being a pre-contractual deposit was not entirely satisfactory. Yu was not entirely emphatic and definite in his assertion that the money was paid over as a pre-contractual deposit only. Marcus Chua's evidence also had to be considered in light of his interest in the outcome of the proceedings. The evidence of George Chong was also equivocal.

63 Yu, in his affidavit, stated that he had given a personal cheque for the $300,000 to the Defendant, on the basis that it would refundable if the exclusive dealership was not signed.[8] Yu also emphasised that he had informed George Chong that the Defendant should follow up with the appointment of Supercars as the exclusive authorised dealer. In testimony, Yu's evidence was that the payment was that it was made as a pre-contractual deposit:[9]

> Court: … What was the $300,000 for in your mind?
>
> Witness: In my mind it was for the … pre-contractual deposits of the upcoming, er, first batch of cars.

64 What had to be noted about Yu's evidence was that it was not entirely definitive and categorical about the reason for the payment: on the one hand, the affidavit pointed to the payment being on the basis that it was subject to the exclusive agreement being signed. On the other, parts of Yu's testimony, such as that reproduced above, could be read as linking the payment to the orders for cars. However, throughout it all, Yu was consistent in describing the

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8 Yu's AEIC at para 13.

9 NE 10 May 2016 p 108 line 29–32.

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payment as a pre-contractual payment or deposit. He was also adamant that the payment was not an actual payment for the order of cars:[10]

> Q: Now Mr Yu, I put it to you that the payment of the 300,000 by you to the defendant was not a pre-contractual deposit but an initial payment towards the purchase of 30 Mercedes-Benz car. Do you agree with that?
>
> A: No.
>
> …
>
> Q: That because it is a payment towards the purchase of the 30 Mercedes-Benz car, the 300,000 is not refundable because it's a purchase---a deposit for a purchase. Do you agree with that?
>
> A No

65 I did not understand Yu's evidence to be that the payment was payment for a specific order. And while he described it as a deposit, the operative part was that it was pre-contractual.

66 It was also Yu's evidence that the payment was made as the Plaintiffs were pressed ahead of the Chinese New Year holidays that year for the sum.[11] The upshot of this was that the payment was made in circumstances where the parties had not yet reached a definite position, but that the Plaintiffs wanted to show their seriousness and good faith. While in his affidavit he did mention that the Defendant's request was for the payment to be given as a deposit pending the formalisation, within the same sentence he reiterated that the intention of the parties was that what he described as the pre-contractual cooperation would not be binding unless the exclusive agreement was entered into.

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10 NE 10 May 2016 p 98 line 4–7; 12–15.

11 Yu's AEIC at para 13.

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67 Marcus Chua's evidence was more definite. He testified as follows:[12]

> Q: … So what I'm putting to you is that since you have already accepted that the 300,000 was a payment towards the 30% deposit for the car, it certainly cannot be a pre-contractual deposit anymore. Do you agree with that?
>
> A: Erm, no, … we had already informed them that… "This 300,000 is paid forward to you guys because … you have been chasing for it and it's Chinese New Year…. [Yu] has always and we have always maintained that this money is given in good faith subject to the signing and appointment of Supercars as the appointed Lorinser agent. …

68 I further accepted that the evidence was that the Defendant, through Kevin Ng, accepted that the $300,000 payment was linked to the agreement. In cross-examination, he accepted this:[13]

> Q: And it was placed on the condition that Supercars would be sub-dealer?
>
> A: Yes.

69 I noted that Kevin Ng had testified that the agreement had been reached at the point of payment.[14] However, I did not find that this was so, and this would be dealt with further below. I did note that George Chong's evidence was equivocal, but that did not adversely affect the impact of the evidence of the other witnesses. Nothing George Chong said directly contradicted such evidence.

70 Thus assessing the evidence as a whole in this area, the circumstances showed that the payment was made in response of the circumstances including

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12 NE 17 May 2016 p 61 line 12–22.

13 NE 18 May 2016 p 106 line 20–21,

14 NE 18 May 2016 p 106 line 14–15,

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the New Year period, and pressing by the Defendant. This reinforced the conclusion that the payment was to ensure that negotiations would continue.

71 The Defendant argued that it was shown that Yu decided to take the risk of the payment: that payment was made despite matters not being clear, and thus the Plaintiffs should be held to the contract. But even if the payment was made in a calculated way, meaning that the Plaintiffs or at least Yu was aware that there was some possibility that the money could not be recovered back, this did not show that the payment was not refundable. What mattered was whether there was a basis for the money being retained by the Defendants, or rather than the payment was binding and irrevocable by the Plaintiffs. The answer to that would have to be determined by the existence of a basis of payment or the existence of binding contract between the parties. It would be otherwise if the risk taken was tied to an intention to take the risk of the contract being binding – but that requires proof that a concluded contract was indeed formed.

The Payment Voucher

72 An objective piece of evidence that had to be considered was the payment voucher recording the payment, which was dated 22 January 2014. And it stated that the payment was "30% Deposit for New Mercedes as attached". Marcus Chua testified in cross-examination that the payment was a deposit for new Mercedes cars:[15]

> Q: My question is that this payment voucher states that it is 30% deposit for the new Mercedes and it does not state that it is a pre-contractual deposit, do you agree with that?
>
> A: Yes.

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15 NE 17 May 2016 p 63 line 15–26.

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> Q: So Mr Chua, you agree that insofar as the 14 cars are concerned for which you have paid the 30% deposit, effectively you cannot cancel the order and you must pay the balance and take delivery of the cars, do you agree with that position?
>
> A: Yes, if the, er, deposits are paid.
>
> Q: And therefore, you cannot cancel the order and you must pay the balance and take delivery of the cars?
>
> A: Yes.

73 That would point towards the payment of the $300,000 being payment for *ad hoc* order of cars at least. However, in re-examination, Marcus Chua further testified that this payment was subject to the conclusion of the dealership agreement:[16]

> Q: And you were asked that---you know, whether the---to confirm that the payment voucher does not state that it was a pre-contractual deposit and you said yes. And you also wanted to explain further and at that point in time, you were informed that you can explain later. So please go ahead and explain what you want about this.

74 A: Okay. This---this, erm, 30% deposit was paid for the first batch of Mercedes-Benz ordered. Erm, but it was made known to Kevin and on that day of issuing this cheque, Mr Yu did highlight again to George that this 300,000 is paid forward as in good faith and is still subject to the signing of the agreement. If not, this 300,000 has to be refunded. But George told us that there will be no problem on the appointment for Supercars as a exclusive agent. George Chong testified that the $300,000 was meant as 30% deposit for the order of cars.[17] The effect of this would be to give some support for the payment being for an *ad hoc* contract for the order of cars without the exclusive dealership. However, it was not definitive: it can be read

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16 NE 17 May 2016 p 106 line 11–22.

17 NE 11 May 2016 p 59 line 9–10.

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as tied to the order of 30 cars in terms of quantum, but not tying the Plaintiff until the dealership agreement was concluded. It was thus equivocal.

75 All of the above evidence pointed to the $300,000 as being referenced to the payment of money due on an order of cars, but did not show that that order was binding. Ultimately, the payment and the description in the payment voucher had to be taken against the backdrop of an actual contract being entered into. Thus, while the payment voucher was objective evidence, it was not unequivocal evidence of the existence of a binding contract for the order of cars. The surrounding circumstances, including the inherent probabilities of the context of the transaction pointed more strongly to the conclusion that the payment was made in advance of and subject to the dealership being finalised.

Other interpretations

76 There was no contract subject to conditions, or agreement to negotiate further. None of these were pleaded, and in any event I could not see any evidence that would have pointed to any of this.

Change of position

77 The Defendant raised change of position in its submissions, though this was not expressly pleaded. The Defendants did aver to the payment of the money to Lorinser. This would not be enough however, in fulfilment of the requirements of the defence. But in any event aside from the pleading issue, the defence was not made out on the facts.

78 For change of position to be raised successfully, it must be shown that it would be inequitable for the defendant in a case to be made to give restitution nor reverse the unjust enrichment: *Lipkin Gorman (a firm) v*

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Karpnale Ltd [1991[2 AC 548. There must be extraordinary expenditure, that is, it is not sufficient for the change of position to have resulted from expenditure that would have been incurred in the ordinary course of events, *ie* that the expenditure flowed from the enrichment: *Goff & Jones* at para 27-08.

79 However, where the basis has been found to have failed, change of position is not made out as a defendant in such a position would know that flowing from such failure, repayment would follow. It is therefore not inequitable to require repayment: *Haugesund Kommune and another v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant)* [2010] EWCA Civ 579 at [123], [125]. An exception noted in *Goff & Jones* is made in respect of situations where the basis requires some advance expenditure, such as a contract requiring work, before it is frustrated, but that is a different situation from what we have here.

80 In this case, the basis was the entry into the distributorship agreement; this did not occur, and the Defendant would be taken to have known that repayment would follow from such failure of basis. Change of position was thus not established.

Conclusion on the existence of the Contract

81 The evidence showed that there was no contract entered into between the parties, for *ad hoc* orders to be made for the cars. There was certainly nothing agreed as to the exclusive dealership. As the payment of the $300,000 was predicated on the basis that such an exclusive dealership would eventually be entered into, and this failed to happen, that sum would be repayable back to the Plaintiffs.

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82 While there was disagreement as on whose behalf the payment was made, given that the source of the funds, Yu testified that the payment was for the benefit of the 1st Plaintiff,[18] then repayment should be made to that entity. But in any event, which of the two Plaintiffs should be repaid the sum was not a material issue at the end of the day.

83 I did not have to consider whether there was valid termination, or when the claim should have been made – *ie* when time was made of the essence. It would have been at the latest by the point of the clear indication that a contract was entered into with Regal, in July 2014.

The Counterclaim

84 The Defendant's counterclaim:

(a) Claims for commission in respect of both the Singapore market and the Thai market;

(b) A claim for $78,658.06 based on a sales order; and

(c) €1,436,423.65 as the balance price for the 30 cars that they say had been ordered by the Plaintiffs.

85 The Defendants claimed both loss of commission and costs arising from the Plaintiffs' breach. As submitted by the Plaintiffs, this conflated reliance and expectation losses, and was not correct in principle. Aside from my finding that there was failure of basis, and that no contract was in fact agreed, the evidence did not support the Defendants' counterclaims.

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[18] NE 10 May 2016 p 30 line 1–27.

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The Claim for the losses from the Singapore and Thai Markets

86 The Counterclaim failed in view of my finding that no agreement was reached for the purchase of the cars for the Singapore market, or indeed for the Thai market.

87 There was scant evidence that any agreement was reached in respect of cars for the Thai market. There was no written contract. Even the planning orders relied upon by the Defendant to show the existence of a Singapore contract were only concerned with Singapore: there was no equivalent planning order coming from the Plaintiffs for the Thai market. Indeed the documents adduced related only to Singapore. No email indicated anything more than that there would be an introduction of a person or persons from Thailand to the Defendant or Lorinser. And importantly, as argued by the Plaintiffs, it is telling that when Marcus Chua appeared to be enthusiastically talking about other markets, Lorinser's sales manager in fact told the plaintiffs to focus on the Singapore market.[19]

88 No agreement was reached between the parties as to the sale of Lorinser cars in Thailand. There was no written, concluded contract between the Plaintiffs and the Defendant for sale of these cars in the Thai market. What the evidence showed was the Marcus Chua was willing, at least initially, to facilitate dealings between the Defendant and local Thai companies.

89 There was no supporting evidence to show an agreement had been reached between the Defendant and the Plaintiffs appointing the latter as sub-dealers in Thailand.

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[19] Plaintiffs' core bundle p 126.

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Damages claim not supported

90 In any event, even if the Defendant were able to make out a claim for contractual breach, *ie* that I was wrong on the repayment of the $300,000 and that there was no agreement for the order of cars, the Defendant failed to establish that damages should be awarded. Contractual damages are compensatory only. The Defendant failed to make out that any compensation was due as it had not proven the losses that it supposedly suffered.

Sales order amount of $78,658.06

91 Aside from the fact that there was, as I found, no actual order by the Plaintiffs, there was insufficient evidence to make out the claim as the reliability of the sales order was in doubt. As submitted by the Plaintiffs, the sales order had a number of discrepancies: the address and description were not correct. The Plaintiffs did point to Kevin Ng's evidence that he would not pay on an incorrect invoice; this was however immaterial. What resulted from the discrepancies or errors was that it was doubtful that the invoice properly reflected an amount that was due from these Plaintiffs in respect of the specific claim. There was no other evidence adduced in respect of this specific claim for $78,685.06, such as communications between the parties in which that amount was specifically admitted.

92 Further, as argued by the Plaintiffs, the claim here overlapped with the claim for the 30 cars, and thus was a double claim. This was conceded by the Defendant.

Balance purchase price for €1,436,423.65

93 The Defendants claimed this amount in respect of the 30 cars supposedly ordered. Again, as I have found that there was in fact no order for

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the 30 cars the discussion here is only on the basis that I was wrong as to the Plaintiffs' claim. But as argued by the Plaintiffs, the loss claimed was not in fact proven. Thus even if I was wrong on the Plaintiff's claim, the Defendants did not show that they suffered damages of the amount shown. The burden was on the Defendant to make out its case that the losses were indeed incurred. This the Defendant failed to discharge.

94 The invoices relied upon by the Defendant were not evidence of any loss suffered by the Defendant. The majority of invoices only showed that there were vehicles ordered, for supply to Regal by Lorinser: for example, at Kevin Ng's affidavit,[20] we have two invoices for equipment and vehicle for €7,353.50 and €20.015.65 respectively, from Lorinser to Regal Motors. The Defendant has tried to link these to the respective order confirmations by Lorinser and the delivery by Daimler-Benz to Lorinser, but what was not present was evidence or proof of what the Defendant, Benzline, lost through this transaction. On the face of it, without such evidence, it would seem that Regal paid the amount, and the conclusion that would have to be drawn given the absence of evidence is that there was no loss to Benzline at all. The same defect is repeated for the various invoices exhibited by Kevin Ng. The Defendant did have a summary table in Ng's affidavit[21] but that table is only a summary, and not proof of loss. No attempt was made in the submissions to support the quantification of the loss supposedly suffered by the Defendant.

95 As noted by the Plaintiffs, there were other invoices did show the Defendant's payment to Lorinser, but were for invoices other than those relating to the cars that were allegedly ordered.

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[20] Kevin Ng's AEIC pp 570–571; p 572.

[21] Kevin Ng's AEIC, exh-27 (pp 811–856)

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96 Additionally, Kevin Ng admitted in evidence that invoices to Regal should have been paid by Regal.[22] There were a number of payment supposedly made by the Defendant to Lorinser, but Kevin Ng admitted that these payments were moneys paid or matters other than the order of 30 cars upon which the Defendant claimed reliance loss. Thus for instance, the payment shown by debit advice from UOB at Ng's affidavit at page 818, was not relatable to any invoice from Lorinser in relation to the order of the 30 cars in question.

97 Thus, any loss suffered by the Defendant was not substantiated by these invoices. This was a crucial missing link: these invoices were not proof that the Defendant incurred losses – if anything, they showed that there were sales to Regal, which would show that there were no losses suffered. If the sales to Regal were at a lower price, then the difference would perhaps be claimable, but that requires evidence to be shown of what the price difference was.

98 Invoices were also exhibited in relation to the charges for new vehicles delivered, by a logistics company, Dachser; the evidence showed that these invoices related to deliveries to Regal.[23] They were thus payable by Regal under the contract between the Defendant and Regal.[24] No loss was thus made out by the Defendant.

99 In view of all this, there was considerable doubt about the Defendant's claim for loss suffered by the Defendant in relation to these orders, and thus,

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22 NE 19 May 2016 p 4 line 10–14; p 12 line 18–25.

23 Volume 3 of Defendant's bundle of affidavits ("3 DBA") p 800, 803.

24 3 DBA p 765.

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the Defendant's claim for loss would not have been made out on the balance of probabilities.

100 What is more, even if there had been any agreement to purchase the 30 cars, the price of the 30 cars did not represent the loss suffered by the Defendant. There was at the very least on this assumption, actual mitigation made by the Defendant through the sales to Regal, as even on the Defendant's own evidence, 19 of the 30 cards had been sold, and any losses avoided would not have been claimable: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.

101 It is also pertinent that while the Defendants claimed that they were ready to deliver the cars to the Plaintiffs, no cars were also received by them and nothing was adduced in evidence to show any attempted delivery.

Specific Performance not made out

102 There was a claim by the Defendant for specific performance. Such an order would not have been appropriate given the concluded contract with Regal, and had the Defendant made out its case on the merits, an order for damages would have been adequate.

Miscellaneous

103 The Plaintiffs pointed to the fact that the Defendant's counterclaim was only made a year after their claim was filed. On the facts before, however I could not conclude that this indicated fabrication or that it should otherwise render the Defendant's case or evidence suspect.

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104 Various portions of the evidence were concerned with the detailed discussions on the sub-dealership agreement. These were not in the end material to the determination of whether an *ad hoc* order was made and a specific agreement for the supply of cars was reached. There was also some time taken as to the precise sequence of events after an order was placed, but this again was not material in my mind given the conclusion reached about the *ad hoc* order and contract.

Conclusion

105 For the above reasons, the Plaintiffs' claim was allowed, while the Defendant's counterclaims were dismissed. Costs were taxed.

Aedit Abdullah
Judicial Commissioner

Ho May Kim and Harry Zheng (Selvam LLC) for the plaintiffs;
Leslie Yeo (Sterling Law Corporation) for the defendant.

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