

No. 32 of 1984

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL IN THE REPUBLIC OF
SINGAPORE

B E T W E E N :

INTER EQUIPOS NAVALES, S.A.

Appellants
(Plaintiffs)

- and -

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
All trading under the name
and style of
Hock Cheong & Company

Respondents
(Defendants)

RECORD OF PROCEEDINGS

VOLUME I

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London EC2V 7LD.

Solicitors for the
Appellants

JAQUES & LEWIS,
2 South Square,
Grays Inn,
London WC1R 5HR.

Solicitors for the
Respondents

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Description of Document	Date
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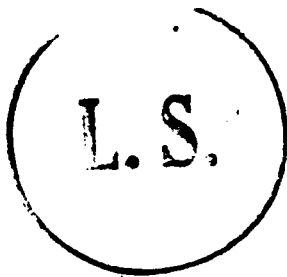
**WRIT OF SUMMONS
IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

Suit No. 1092 of 1979

BETWEEN

Inter Equipos Navales S.A.

Plaintiff



AND

1. **Low Kah Choo**
 2. **Low Kah Hook**
 3. **Low Kah Hoo**
 4. **Low Lay Beng (f)**
- all trading under the name and style of **Hock Cheong & Company**

Defendants

THE HONOURABLE MR. JUSTICE WEE CHONG JIN
CHIEF JUSTICE OF SINGAPORE, IN THE NAME AND ON BEHALF OF THE PRESIDENT OF THE
REPUBLIC OF SINGAPORE.

- To
- 1) **Low Kah Choo** of 19, Li Ewan Valk, Singapore 19.
 - 2) **Low Kah Hook** of 1, Li Ewan Close, Singapore 19.
 - 3) **Low Kah Hoo** of 19, Li Ewan Valk, Singapore 19.
 - 4) **Low Lay Beng (f)** of 3J, Track 29, Mandai Road, Singapore 25

all trading under the name and style of **Hock Cheong & Company.**

We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in a cause at the suit of **Inter Equipos Navales S.A.** a company incorporated in Spain and have their registered office at Calle De Ferraz, 2-Segunda Equierda, Madrid-3, Spain and take notice that in default of your so

doing the plaintiff may proceed therein to judgment and execution.

WITNESS Mr. *Jan Seck Sam* Registrar of the Supreme Court
in Singapore, the 12th day of April, 1979.

Solicitors for the Plaintiff.

Jan Seck Sam
Asst. Registrar,
Supreme Court, Singapore.

This Writ may not be served more than twelve calendar months after the above date unless renewed by order of Court.

The defendant (or defendants) may appear hereto by entering appearance (or appearances) either personally or by a solicitor at the Registry of the Supreme Court.

A defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for \$5.00 with an addressed envelope to the Registrar, Supreme Court, Singapore, 6.

Note:- If the defendant enters an appearance, then, unless a summons for judgment is served on him in the meantime, he must also serve a defence on the solicitor for the plaintiff within 14 days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against him without notice.

Amended in green ink the 1st March 1982 No. 1 - Writ & Statement of
pursuant to Orders of Court made the 12th day of Claim - 12th
November 1981 and the 10th day of February, 1982 April 1979

(cont'd)

STATEMENT OF CLAIM

Allen & Gledhill
Solicitors For the Plaintiffs

1. The Plaintiffs are manufacturing company incorporated in Spain and have their registered office at Calle De Ferraz, 2-Segunda Izquierda, Madrid-8, Spain.

10

2. By an ^{oral} Agreement made on or about the ^{15th} 4th day of January 1978 ~~November 1977~~ between the Plaintiffs and the Defendants the Plaintiffs agreed to supply to the Defendants on consignment ~~for sale in Singapore, and the Far East,~~ ^{the Federation of Malaysia and the Colony of Hong Kong} a stock of their manufactured products marketed under the "Inter" brand name.

~~3. The said Agreement is contained in letters from the Plaintiffs to the Defendants dated the 6th October 1977 and from the Defendants to the Plaintiffs dated 4th November 1977. The Plaintiffs will refer to the said letters at the trial of this action for their full terms, true meaning and effect.~~

20

4. In pursuance of the said Agreement the Plaintiffs delivered on consignment to the Defendants a stock of their products.

PARTICULARS

<u>Date</u>	<u>Invoice No.</u>	<u>Material</u>	<u>Value</u>	<u>Total</u>
3.1.78	7670-12-77	1 Fairlead max 500 kgs for rollers: 1 Hawse pipe size C-20: Package charges:	DM. 1,800.00 DM. 990.00 DM. 235.00	
			<u>DM. 3,025.00</u>	DM. 3,025.00

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In the High Court

No. 1 - Writ &
Statement of Claim
12th April 1979
(cont'd)

- 2 -

<u>Date</u>	<u>Invoice No.</u>	<u>Material</u>	<u>Value</u>	<u>Total</u>
25.1.78	7659-1-78	3,000 pcs. CIE-1D	DM. 34,500.00	
		200 pcs. TP-5	DM. 7,600.00	
		1,000 pcs. CIE-5L	DM. 36,000.00	
		300 pcs. FCM-1D	DM. 4,500.00	
		150 pcs. FCM-2D-25	DM. 4,200.00	10
		500 pcs. CIE-2D-25	DM. 15,000.00	
		500 pcs. CPM-1D	DM. 10,500.00	
		500 pcs. CIV-1-36 (4.2510.0)	DM. 66,500.00	
			<hr/> DM. 178,800.00	
		Less: 8% commission	14,384.00	
			<hr/> DM. 164,496.00	20
		Package:	3,515.00	
		For delivery C.I.F.	8,976.00	
			<hr/> DM. 176,987.00	
			*****	DM. 176,987.00
				<hr/> DM. 180,012.00

5. On divers dates between January 1978 and May 1978 the Defendants sold goods from the consignment stock referred to in paragraph 4 above and the price in respect of the said sales became due to and payable to the Plaintiffs.

6. The Defendants have collected the sale price for such goods but have never paid any part thereof to the Plaintiffs and have failed to deliver particulars of the stock of goods sold from the aforesaid consignment stock and of the remainder of the stock in their possession to the Plaintiffs. 30

7. On or about the 20th day of May 1978 the Plaintiffs

by letter of the said date addressed to the Defendant terminated the Agreement referred to in paragraphs 2 and 3 above.

8. The Plaintiffs by letter dated 20th May 1978 addressed to the Defendants requested the return of the remaining portion of the consignment stock still in the possession of the Defendants but not withstanding the said letter and frequent oral and written demands subsequent thereto the Defendants have failed to return the said goods or to account therefor to the Plaintiffs.

10 9. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage.

And the Plaintiffs claim:-

- (a) under paragraph 4 above the sum of DM.180,012.00
- (b) an account of what is due to the Plaintiffs from the Defendants by way of stock in the Defendants' possession and for an order for the return of such stock of goods to the Plaintiffs or for the value thereof found due on the taking of such account;
- (c) the account of what is due from the Plaintiffs to the Defendants by way of the price of goods sold by the Defendants from the consignment stock in their possession and for an order for the payment of such monies to the Plaintiffs;
- (d) interest on the sum found due to the Plaintiffs on the taking of such accounts referred to in sub-paragraphs (b) and (c) above at the rate of 8%

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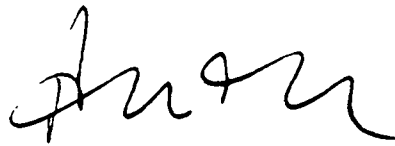
In the High
Court

No. 1
Writ &
Statement
of Claim
12th April
1979
(cont'd)

per annum from the date when it appears by the
said accounts that the said sum became due to
the Plaintiffs until payment or judgment;

- (e) costs;
- (f) all further proper accounts, inquiries and
directions.

Dated this 12th day of April 1979.



Solicitors for the Plaintiffs

In the
High
Court
No. 1
Writ &
Statement
of Claim
12th
April
1979
(cont'd)

And \$ 125.00 (or such sum as may be allowed on taxation) for costs, and also, if the plaintiff obtains an order for substituted service, the further sum of \$ 60.00 (or such sum as may be allowed on taxation). If the amount claimed and costs be paid to the plaintiff or their solicitors within 8 days after service hereof (inclusive of the day of service), further proceedings will be stayed, but if it appears from the indorsement on the writ that the plaintiff are resident outside the scheduled territories, as defined by the Exchange Control Act (Cap. 245) or is acting by order or on behalf of a person so resident, proceedings will only be stayed if the amount claimed and costs is paid into Court within the said time and notice of such payment in is given to the plaintiff or their solicitors.

10

This Writ is issued by Messrs. Allen & Gledhill of 1st Floor, OUB Chambers, Raffles Place, Singapore, Solicitors for the said plaintiff ~~XXXXXXXXXXXXXXXXXXXX~~ a company incorporated in Spain and have their registered office at Calle De Ferras, 2-Segunda Izquierda, Madrid-8, Spain and whose address for service is at Room 3, 1st Floor, OUB Chambers, Raffles Place, Singapore i.

NOTICE

Take notice that the writ served herewith is served on you as a partner and/or as the person having control or management of

20

Dated this day of 19

SOLICITORS FOR THE PLAINTIFF

This writ was served by by way of persons service
(or as may be) on the Defendant (who is known to me)
(or who was pointed out to me by) (or who admitted to me
that he was) at (place)
on the day of 19
Indorsed the day of 19

Process-server

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

In the
High
Court

No. 2
Defence
and
Counter-
claim
18th July
1979

Suit No. 1092)
)
of 1979)

Between

INTER EQUIPOS NAVALES S.A.

.. Plaintiffs

And

1. LEW KAH CHOO
 2. LEW KAH HOOK
 3. LEW KAH HOO
 4. LEW LAY BENG (O)
- ALL TRADING UNDER THE
NAME AND STYLE OF HOCK
CHEONG & COMPANY

10

Defendants

DEFENCE AND COUNTERCLAIM

D E F E N C E

1. Paragraph 1 of the Statement of Claim is admitted.
2. As regards paragraphs 2 and 3 of the Statement of Claim, the Defendants say that by an oral agreement made on or about the 25th day of September, 1977, between Karl-Friedrich Birger Merten acting for and on behalf of the Plaintiffs and the 1st Defendant, acting for and on behalf of the Defendants, the Plaintiffs appointed the Defendants as their distributor and sole agent for their products marketed under the "INTER EQUIPOS NAVALES" brand name in the Far East and Asean Regions for a period of two (2) years from January 1978.
3. It was expressly agreed between the Plaintiffs and the Defendants that the Defendants would receive an 8% commission as follows :-
 - (a) On direct sale from the stock of products sent on consignment to the Defendants by the Plaintiffs;

20

- (b) On every confirmed order for the Plaintiffs' products made through the Defendants; and
- (c) On every confirmed order for the Plaintiffs' products originating from the Far East or Asean Regions.

In the High Court
 No. 2
 Defence and Counterclaim
 18th July
 1979
 (cont'd)

4. In pursuance of the said agreement, the Plaintiffs delivered on consignment for sale by the Defendants as their agents, the stock of products referred to in paragraph 4 of the Statement of Claim.

10 5. As regards paragraphs 5 and 6 of the Statement of Claim, the Defendants say that of the said stock of products, 169 pieces GTV-1-36 (and not CIV-1-36) amounting to DM 19,868.06 and 160 pieces CIE-5L amounting to S\$4,695.55 were sold as at 18th May, 1978.

6. The Defendants had informed the Plaintiffs of the said sales and on 18th May, 1978, the said sum of S\$4,695.55 was collected by the said Karl-Friedrich Birger Merten in Singapore on behalf of the Plaintiffs.

20 7. As regards the sum of DM 19,868.06, the Defendants say that they are entitled to set off the same against damages suffered by the Defendants as a result of the Plaintiffs breach of agreement. Similarly, the Defendants are also entitled to retain the balance of the said goods against the said damages suffered by them.

8. On or about the 30th day of May, 1978, the Plaintiffs in breach of the said agreement, incorporated a company in Singapore known as Inter Equipos (Far East) Pte. Ltd. to sell the Plaintiffs' products in the Far East and Asean Regions. Thereafter, the Defendants have been unable to sell the Plaintiffs' products.

9. Save as expressly admitted aforesaid, the Defendants deny each

In the High
Court

No. 2
Defence and
Counter-
claim
18th
July
1979
(cont'd)

and every allegation in the Statement of Claim as if the same were set out seriatim and specifically traversed.

C O U N T E R C L A I M

10. The Defendants repeat paragraphs 2 to 8 of their Defence.

11. By reason of the aforesaid matters, the Defendants had suffered loss and damage.

P A R T I C U L A R S

- 1) 8% commission on the estimated turnover for two (2) years at \$7,000,000.00 per year equivalent to \$1,120,000.00.
- 2) 8% commission on the invoice price of parts mentioned in the contract signed with Fukuoka Shipyard (Project Reference No. 1068-5-78) for construction of the two vessels belonging to Tanaka Sangyo at :-
 - i) Minami Nippon Shipyard No. M-522.
 - ii) Fukuoka Shipyard No. 1071.

10

And the Defendants counterclaim as follows :-

- 1) Under paragraph 11(1) - \$1,120,000.00;
- 2) Under paragraph 11(2) the said 8% commission;
- 3) Interest on the sums due to the Defendants under sub-paragraphs (1) and (2) above at the rate of 8% per annum from the dates when the said sums were found due to the Defendants

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In the High
Court

No. 2
Defence and
Counterclaim
18th July
1979
(cont'd)

until the date of judgment; and

(4) Costs.]

Dated and Delivered this 18th day of July, 1979.



Solicitors for the Defendants

To the abovenamed Plaintiffs and
their Solicitors

In the High Court

No. 3

Amended Reply and Defence to Counterclaim - 25th November 1981

No. 3 Amended Reply and Defence to Counterclaim 25th November 1981

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Suit No. 1092 of 1979

Between

INTER EQUIPOS NAVALES S.A.

... Plaintiffs

And

1. LEW KAH CHOO
2. LEW KAH MOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
all trading under the name and style of HOCK CHEONG & COMPANY

... Defendants

AMENDED
REPLY AND DEFENCE TO COUNTERCLAIM

AMENDED
REPLY

Amended in green ink pursuant to Order of Court made on the 25th day of November, 1981.

Allen & Gledhill

Amended as underlined in red pursuant to Order of Court dated 31st day of July, 1981.

Dated this 26th day of August, 1981

Registrar

Save in so far as the same consists of admissions, the Plaintiffs join issue with the defendants upon their defence.

~~2. The Plaintiffs deny that the defendants were appointed as their distributors and sole agents for their products marketed under the 'INTER EQUIPOS NAVALES' brand name in the Far East and Asean region and in particular deny that there was any oral Agreement made on or about the 25th day of September 1977 or on any other date to such effect between the Plaintiffs' representative, Karl-Friedrich Birger Merten, and the 1st Defendant. The Plaintiffs therefore put the Defendants to strict proof of the allegations set out in paragraph 2 of the Defence.~~

~~3. The Plaintiffs reiterate the contents of paragraphs 2, 3, 4 and 5 of the Statement of Claim in reply to the contents of paragraphs 3 and 4 of the Defence filed herein.~~

November 1981
(cont'd)

~~4. As regards paragraph 7 of the Defence the Plaintiffs~~

deny that the Defendants are entitled to retain the sum of DM.19,868.06 or any other sum by way of set-off or part set-off of any damages allegedly due to the Defendants herein. The Plaintiffs further deny that the Defendants are entitled to retain the balance of the goods delivered to the Defendants on consignment by way of set-off towards damages allegedly due to them for breach of contract or for any other reason.

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2. The Plaintiffs admit the allegations in paragraphs 5 and 6 of the Defence except that the Plaintiffs say that the item of stock comprising 160 pieces of CIX-51 mentioned in paragraph 5 is not included in the stock listed in paragraph 4 of the Statement of Claim and is not included in the Plaintiffs' claim in this action.

AMENDED
DEFENCE TO COUNTERCLAIM

~~5. The Plaintiffs join issue with the Defendants on their counterclaim and put the said Defendants to strict proof thereof.~~

20

3. The Plaintiffs admit that an oral agreement was made in Madrid, Spain, on or about the 25th September 1977 between Karl Friedrich Birger Merten (hereinafter called "Mr. Merten") on behalf of the Plaintiffs and the 1st ^{provisionally} Defendant on behalf of the Defendants whereby the Plaintiffs appointed the Defendants to be their distributor in the Republic of Singapore, the Federation of Malaysia and the Colony of Hong Kong (hereinafter referred to as "the said territories") for their products in the range of their container lashing systems marketed under their brand name of "Inter" (hereinafter referred to as "the said products")

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In the
High
Court

No. 3
Amended
Reply &
Defence to
Counter-
claim
25th
November
1981
(cont'd)

subject to the terms hereinafter mentioned, but deny :-

- (a) that the appointment was for a period of 2 years or any fixed period;
- (b) that the region of the distributorship was any part of the Far East or ASEAN Regions other than the said territories;
- (c) that they appointed the Defendants to be their sole agents;
- (d) that there was any agreement for the payment of commission to the Defendants on the basis alleged in sub-paragraphs (a) and (c) of paragraph 3 of the Defence and Counterclaim.

10

4. The terms of the Defendants' said appointment were as follows :-

- (a) the Defendants would place orders for the said products and the Plaintiffs would supply the same upon the establishment of irrevocable letters of credit;
- (b) for every order for the said products received from third parties through the introduction or intervention of the Defendants and executed by the Plaintiffs, the Plaintiffs would pay the Defendants a commission of 8% of the value of such order.
- (c) The Defendants' appointment was provisional and subject to confirmation after the arrival in Singapore in January 1978 of the Plaintiffs' delegate hereinafter mentioned.

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At a subsequent meeting in or about the month of November 1977
5. ~~On the same occasion,~~ it was provisionally agreed

between the Plaintiffs and the Defendants subject to confirmation (inter alia) that :-

(a) the Plaintiffs would send to Singapore Vincente Hernandez (hereinafter called "Mr. Hernandez") as their delegate to advise the Defendants on the organisation of their business so as to manage and operate efficiently the sale and distribution of the said products in the said territory and to import technical knowledge to the Defendants and their staff about the Plaintiffs' container lashing systems;

(b) Mr. Hernandez would assess the market situation in the said territories for the said products, after which he would advise on the stocks of such products that should be maintained by the Defendants for the proper conduct of the said business and, to the extent that the level of stock recommended by him exceeded the Defendants' financial capacity, the Plaintiffs would consider sending the excess on consignment to the Defendants;

(c) the Defendants would give full cooperation and support to Mr. Hernandez in his said functions;

(d) Mr. Hernandez's appointment would be for a ^{maximum} period of 2 years.

The said terms were recorded in a written memorandum signed by both the said parties ~~and the agreement was confirmed in an exchange of letters from the Plaintiffs to the Defendants dated 6th October 1977 and from the Defendants to the Plaintiffs dated 4th November 1977.~~ on the same occasion.

In the
High
Court
No. 3
Amended
Reply &
Defence
to
Counter-
claim
25th
November
1981
(cont'd)

6. Pursuant to the said agreement Mr. Hernandez came to Singapore and assumed his functions as aforesaid on or about the 16th January 1978.

7. On or about the 15th January 1978 it was orally agreed between Mr. Merten on behalf of the Plaintiffs and the 1st Defendant on behalf of the Defendants (inter alia) that :-

- (a) the Defendants' said appointment as distributor of the said products for the said territories was confirmed;
- (b) the Plaintiffs would pay the Defendants 8% commission on orders for and sales of consignments of the said products as stated in sub-paragraphs (a) and (b) of paragraph 3 of the Defence and Counterclaim;
- (c) that the stocks of container lashing systems and fittings to be carried by the Defendants would be only of the Plaintiffs' "Inter" brand and the quantity and range of such stock would be as advised by Mr. Hernandez, but subject to the Defendants' financial capacity.

10

20

8. The Plaintiffs admit that they caused a company named Inter Equipos Navales (Far East) Pte. Ltd. to be incorporated in Singapore and that the intended business of the said company was to include the sale of the Plaintiffs' products in South East Asia and the Far East; but they deny that this was in breach of their agreement with the Defendants or that sales of the said products were adversely affected

or that the Defendants suffered any loss by the
incorporation of the said company.

9. The said agreement was discharged, or alternatively,
lawfully terminated by the Plaintiffs at the end of May 1978
by reason of :-

- 10
- (a) the Defendants' fundamental breach of the said
agreement in that they, in breach of the faith
and duty owed by them to the Plaintiffs,
secretly and fraudulently caused imitations
of the said products to be made and offered for
sale and sold the same in competition to the
said products and at lower prices, whereby it
became impossible to market the said products;
- (b) the Defendants' breach of the said agreement
in that they constantly kept relevant information
material to the said business secret from
Mr. Hernandez and prevented him from performing
the functions agreed to be performed by him;
- 20
- (c) the Defendants' breach of the said agreement
in that they ignored Mr. Hernandez's advice
and directions in matters within his competence
and failed to refer to him technical problems
of customers of the said products which the
Defendants were incompetent to deal with
themselves, whereby the reputation of the said
products and the Plaintiffs' goodwill suffered.

In the
High
Court

No. 3
Amended
Reply and
Defence to
Counter-
claim
25th
November
1981
(cont'd)

10. The Plaintiffs deny that the Defendants are entitled to retain the sum of DM.19,868.06 or any part thereof, or the Plaintiffs' stock or any part thereof, for the reason stated in the said paragraph or any other reason, except that the Defendants may retain the said stock only upon payment to the Plaintiffs of the price thereof, less 8% commission.

11. The Plaintiffs deny that the Defendants are entitled to the moneys claimed by them in the Counterclaim or any part thereof.

10

6. 12. Save as is herein expressly admitted the Plaintiffs deny each and every allegation set out in the counterclaim as if the same was set out herein seriatim and specifically denied.

~~Dated this 1st day of August 1979.~~

Re-dated this 26th day of August 1981.

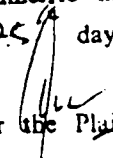
Re-dated this 25th day of November, 1981.


Solicitors for the Plaintiffs

To: the Defendants and their Solicitors,
Messrs. Chua, Hay & Wee,
718, Colombo Court,
Singapore, 0617.

20

We consent under Order 3 rule 5(3) to
extend the time to file this document.
Dated the 25th day of August 1981.


Solicitors for the Plaintiffs/Defendants.

No. 4 - FURTHER AND BETTER -
PARTICULARS OF AMENDED DEFENCE &
COUNTERCLAIM

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Suit No. 1092 of 1979

In the
High
Court

Between

Inter Equipos Navales S.A.

... Plaintiffs

And

1. Lew Kah Choo

2. Lew Kah Hook

3. Lew Kah Hoo

4. Lew Lay Beng (f)

all trading under the name and
style of Hock Cheong & Company

... Defendants

No. 4
Further &
Better
Partic-
ulars of
Amended
Defence &
Counter-
claim
21st
October
1981

PARTICULARS SERVED PURSUANT TO REQUEST

Further and better particulars of the Amended
Defence to Counterclaim.

Served pursuant to request dated the 14th day
of October, 1981.

PARTICULARS REQUESTED

PARTICULARS

1. Of the allegation contained
in paragraph 9(a) of the
Amended Reply and Defence
to Counterclaim, particu-
lars of the date when the
Defendant was alleged to
have acted secretly and
fraudulently, particulars
of the alleged imitations,
offer and sale of the same;

1(a) The Defendants acted
secretly and fraudulently
as alleged in paragraph
9(a) during the period
between late January
1978 and the 20th May
1978;

(b) The imitations referred
to in paragraph 9(a) are
the items of equipment
which are mentioned and/
or illustrated in the
documents which are
numbered 41, 42, 43, 47,
48, 49, 50 and 51 in the
Plaintiffs' Supplementary
and Second Supplementary
Lists of Documents filed
herein on the 29th
September 1981 and 2nd
October 1981 respectively.

In the
High Court

PARTICULARS REQUESTED

PARTICULARS

No. 4
Further &
Better
Particulars
of Amended
Defence &
Counterclaim
21st
October
1981
(cont'd)


2. Of the allegation contained in paragraph 9(b) of the said Amended Reply and Defence to Counterclaim, identify the occasions when the Defendant kept relevant information material from Mr. Hernandez;
3. Of the allegation contained in paragraph 9(c) of the Amended Reply and Defence to Counterclaim, the occasions when Mr. Hernandez advised and directions were ignored and the alleged technical problems.

1(c) The offers for sale by the Defendants of the said items of equipment are contained in the documents numbered 47 to 51 (inclusive) abovementioned, as well as other offers of which the Plaintiffs are unable to give particulars before discovery and interrogatories.

2. The Defendants kept the information referred to in paragraph 9(b) secret from Mr. Hernandez throughout the period from the middle of January 1978 to the 20th May, 1978.

3. The Defendants ignored Mr. Hernandez's advice and directions in matters within his competence, and failed to refer to him any technical problems of customers during the period between the middle of January 1978 and the 20th May, 1978.

Dated the 21st day of October, 1981.



SOLICITORS FOR THE PLAINTIFFS

To:

The abovenamed Defendants and their Solicitors,
Messrs. Chua Hay & Wee,
718 Colombo Court,
Singapore 0617.
(Your Ref: RC/502-38/HCC)

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPOREIn the High
CourtSuit No. 1092)
)
of 1979)No. 5
Reply to
Amended
Defence and
Counterclaim
29th October
1981

Between

INTER EQUIPOS NAVALES S.A.

... Plaintiffs

And

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (†)
all trading under the name and
style of HOCK CHEONG & COMPANY

... Defendants

REPLY TO AMENDED DEFENCE TO COUNTERCLAIM

1. Save in so far as the same consists of admissions, the Defendants join issue with the Plaintiffs upon their Defence to Counterclaim.
2. The Defendants admit the allegations mentioned in paragraph 5 of the Defence to Counterclaim.
3. The Defendants admit that the said agreement was discharged or alternatively terminated by the Plaintiffs at the end of May 1978 but say that the said discharge or termination was unlawful and in breach of the said agreement. The Defendants deny the allegations mentioned in paragraphs 9(a), (b) and (c) and put the Plaintiffs to strict proof thereof.
4. Save as is herein expressly admitted, the Defendants deny each and every allegation set out in the Defence to Counterclaim as if the same was set out herein verbatim and specifically denied.

In the High
Court

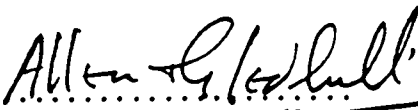
Dated this 29th day of October, 1981.

No. 5
Reply to
Amended
Defence and
Counterclaim
29th October
1981
(cont'd)

.....
Solicitors for the Defendants

To: The Plaintiffs and their Solicitors,
Messrs. Allen & Gledhill,
Singapore.

We hereby consent to the late filing of the Reply to the Amended
Defence to Counterclaim.

..... 
Solicitors for the Plaintiffs

10.

No. 6

Note of Proceedings

IN THE HIGH COURT IN SINGAPORE

Suit No. 1092 of 1979

Between

Inter Equipos Navales S.A.

Plaintiffs

And

1. Lew Kah Choo

2. Lew Kah Hook

3. Lew Kah Hoo

4. Lew Lay Beng (f)

all trading under the name and
style of Hock Cheong & Company

Defendants

Coram: T. Kulasekaram J.

NOTES OF EVIDENCE

Wednesday, 11th November 1981

Mr. Simon Elias for the pltfs.

Mr. Cheong with Mr. Chua for the defts.

Ct. Mr. Chua who is a witness to remain out
during Marten's evidence.

Mr. Simon Elias opens his case.

Refers to Amended Pleadings P.1 - 33.

(1) whether pltfs. breached the contract
of appointing the defts. agents;

(2) what damages if any followed from that
breach.

Hands in Agreed Bundle marked AB.1-106.

AB.3 - 4

Oral agreement is at AB.9 Sept. (signed by both
parties in Madrid)
about sending Hernandez to S'pore.

AB.9 became subject of correspondence in AB.5.

In the High
Court

No. 6
Note of
Proceedings
11th
November
1981

In the High
Court

No. 6
Note of
Proceedings
11th
November
1981
(cont'd)

AB.6 is a repeat of AB.9 - Reply at AB.8, Nov 4, 77.

Telex at AB.10 9 Nov 77

AB.14 - 23 Nov 77

AB.15 - defts' telex

Reply by our client - we would discuss when we meet.

Hoping to have a joint venture.

AB.18 - 19 Mins of meeting on 15.1.78 - prepared by
defts.

AB.20 - 21 same as AB.18 - 19 but has also another
signature at AB.21. Signature of H with words
"noted" in Spanish.

10

We say Hernandez was only a technical adviser. He
has no power.

Adj. to 2.15 p.m.

Notes of Evidence
Plaintiffs' Evidence

No. 7

PW1 Kelvin Richard Elis

In the High Court

Notes of Evidence
Plaintiffs' Evidence
No. 7

PW1 - Kelvin
Richard Elis
Examination
11th November
1981

2.15 p.m.

Calls -

P.W.1 Kelvin Richard Elis, s.s.

10 I am G.M. of Industrial Alloy Pte. Ltd. who are the successors to Jurong Alloys Pte. Ltd. We later took over the papers and files of Jurong Alloys. I see AB.41. I have a similar document in my file. I have letter from Hock Cheong & Co. which led to the quotation here, dated 28.2.78 - marked P.1.

No order was placed with our Co. as a result of all this. In our copy of AB.41 there is a manuscript "Average 10% higher than S.S." I take S.S. to mean Singapore Steel our competitors - P.2.

20 Xxd. by Mr. Cheong

Cross-
Examination

When that transaction took place I was not in S'pore. I was the Divisional Manager of the Co. then. Mr. Irving who was then Manager dealt with the matter. I could not say if Mr. Irving personally visit the defts' place at 138 Kallang Place. I did not speak to Mr. Irving about the contract or transaction.

30 The handwriting in P.2 is that of Mr. Irving I think. I am not certain. I am familiar with Mr. Irving's handwriting. I agree "SS" stands for Singapore Steel Pte. Ltd. I do not have in my file AB.33 and 34.

Rxd.

Re-
Examination

Mr. Irving is now in Australia. This file which I have here from which P.1 and P.2 are kept in the ordinary course of our Co.'s business.

Released

In the High
Court

Notes of
Evidence
Plaintiffs'
Evidence
No. 8
PW2
Shah Jahan
11th
November
1981
Examination

Notes of Evidence

Plaintiffs' Evidence

No. 8

PW2 Shah Jahan

P.W.2 Shah Jahan s/o Jamal Mohideen, a.s.

528 6th Avenue, Bukit Timah.

I am the Manager of a firm of photographers called Orchard Enterprises of North Bridge Rd. In Feb. 1978 on the instructions of Inter Equipos Navales (Far East) Pte. Ltd. I took certain photographs at the Hyatt Hotel S'pore during an exhibit there known as Asia Marine. Marine products were on display. I produce six photographs which I took there - P.3 - P.8. and the six negatives P3N - P8N. All these were exhibited by the deft. Co.

10

Xxd. by Mr. Cheong

No questions

Released

Notes of Evidence
Plaintiffs' Evidence

No. 9

PW3 Birger Merten

P.W.3 Birger Merten s.s.

I am living in Madrid, Calle la Maso,
23 Madrid, Spain.

I am now staying at Hotel Marco Polo.

10 I am the President of the pltf. Co. which
is incorporated in Spain. I was dealing with the
defts' subsidiary Co. in England and not with them
directly. This was in 1977 when I was visited by
the Manager of the subsidiary Co. We have been
supplying the S'pore Co. based on the orders
placed by the subsidiary Co. in U.K. I made a
visit with one of my naval architects in June,
July 1977 to S'pore to meet the mother Co. in
S'pore.

20 We have been dealing with them to find out what the
market and the possibilities in S'pore were. We
wanted to see what their position was, what the
market was in S'pore. I met Mr. Lew and Mr.
Stanley Yeo who were the Mg. Director and General
Manager respectively of the deft. Co. We felt
they were green in this field of business. We were
prepared to back them up with technology and supply
as we had done previously during that year after we
had come to know the deft. Co.

30 AB.3 is a confirmation letter after our visit to
S'pore. Mr. Cidon mentioned here (AB.3) was the
naval architect who accompanied me. We had been
trying to persuade the Deft. Co. to buy the marine
stocks as mentioned in AB.3 to be able to engage
in interesting sales. We thought there was scope
for \$2m to \$3m of sales in these equipment here in
a year. We took this figure as a cautious one as
the competition from Japanese counterpart was very
keen.

40 Our business is in lashing systems of all kinds for
all kinds of cargo to be secured on board ships.
Besides we have a second line which is cargo
handling equipments. In this case we are producing
spreaders. Spreaders can be used either to pick
containers from the quay to put it on board a ship
and vice versa.

In the High
Court

Notes of
Evidence
Plaintiffs'
Evidence

No. 9

PW3

Birger Merten

Examination

11th & 12th

November

1981

In the High Court

Notes of Evidence Plaintiffs' Evidence

No. 9

PW3

Birger Merten Examination

11th & 12th

November 1981

(cont'd)

Hands a photocopy of the Co.'s catalogue of their equipments - P.9.

My next meeting with depts. was in Madrid in the latter part of Sept. 77. I met Mr. Lew, Mr. Choo and Mr. Chua of the depts. there.

On my side beside me was Mr. Hernandez who was my assistant director. In this meeting we stressed all what I had already mentioned before - that they were fairly green in business without backing.

AB.5 shows what I expressed of my mind to them on the business and they said they would consider it and come back with their proposals. We were not sure of the success of doing business with the debt. Co. due to confusing way they were dealing with us. We were doubtful whether they would be the right people to deal with. They finally agreed to basically what we have exposed in the letter AB.5. What was finally agreed as contained in AB.9 in late Oct, Nov 77 at second meeting in Madrid. Mr. Lew replied to my letter in AB.8 as on 4.11.77. AB.9 was the agreement after the letter AB.8. Mr. Hernandez's signature is in the bottom margin, then mine, next Mr. Lew and on the right that of Sonny Choo.

10

20

(Mr. Elias says his pleadings is not quite correct). We were going on as before. They would place orders with us and we would supply against letters of credit.

When orders were placed, and the goods were ready they were late in furnishing the L of C for us to ship. This was our difficulty with Hock Cheong. During the whole year 77 they were asking for supply on consignment basis and we declined saying we will not give on consignment basis until we heard from our delegate first in S'pore to grant them permission to take stock from the store.

30

In AB.10 we received a direct inquiry from a S'pore based shipowner - NOL - for container fittings - items are in telex AB.11.

HCC had been visiting them and offering our goods at very much higher prices than the list prices and what I had offered when I was in S'pore. So they sent the inquiry direct to us and we offered. We sent a copy of what we quoted to NOL to Mr. Lew and he telephoned me and complained that we were under quoting his prices.

40

We said he had the direct dealing as there was no exclusiveness in the agreement. We had an agreement that we would supply the agent the orders and that we grant them an 8% commission for all direct orders they obtained for us.

In the High Court

Notes of Evidence Plaintiffs' Evidence

No. 9

PW3

Birger Merten

Examination

11th & 12th

November 1981

(cont'd)

10 This agreement was for the period July 77 to Jan 78. I confirmed in AB.11 the orders (NOL's) and I said I would send sample parts and drawings so that they could see if these mobile parts they had ordered would fit with the fixed parts that were being built by the Japanese in the Japanese yard for them.

20 The next significant event is our meeting in S'pore in Jan 78 when I came with Mr. Hernandez. We had a meeting then with Mr. Lew in his office to discuss what was the main target to attack in our future operations after the incorporation of our delegate Mr. Hernandez. It is not correct about what is stated in the minutes of AB.18-19. I object to items (1) and (2) of the minutes. All the other items are basically as discussed at that meeting.

Mr. Hernandez had the authority only to dispose of our stocks - to release our stocks to Hock Cheong or our other clients on consulting us directly. He was the man on the spot looking after our stocks. He had the technical knowledge to sell the equipment in this business. He was a commercial man with technical knowledge of the goods we were dealing in.

30 Regarding items (1) and (2) of AB.18, what we agreed to was, we would give Hock Cheong a consignment stock, however exclusively released by our delegate. The stocks were in Hock Cheong's warehouse but they could only get them when released by our man who was there on the spot.

AB.21. Above Mr. Hernandez's signature there is the Spanish note "I have seen it".

Adj. to 10.30 a.m.

Thursday, 12th November 1981.

40 Hearing resumed.

As before

P.W.3 B. Merten, ofa)

xn-in-ch (contd)

I see AB.22. I was not here in S'pore on 2 Feb 78.

In the High Court

I know nothing about the amendment. I did not agree to this at all.

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Examination 11th & 12th November 1981 (cont'd)

I see AB.24. This contemplates the cost of advertising in S'pore and this was agreed to. I agreed to share 50% of the advertising costs. We had to approve what they were going to advertise to see that it was commercially and technically correct.

I see 24A. We would not have agreed to this advertisement if we had seen it before it appeared as it does not show knowledge of the system of lashings we were going to sell. We would also have objected to heading of 24A if we had seen it before it appeared.

10

Q. Look at AB.33 and AB.41? When do you first see them?

A. I saw the first during my visit to S'pore in May 1978. Mr. Hernandez showed me these documents in hotel here to show me what had been going on with the deft. Co.

20

Q. Look at AB.37 - 40 and AB.64 - 65? When did you first see them?

A. On the same occasion as the previous documents. They were showing that behind our back the deft. Co. was trying to copy and manufacture our equipments. It shows that the items shown in the letter were taken from our stocks and sent to them for copying.

At this time we had already started incorporating a new Co. in joint venture with deft. Co. These negotiations for a joint venture are reflected in the telexes from AB.42 onwards. We had started negotiations about the joint venture in Feb. March 1978. All our proposals for the joint venture are laid down in our telex at AB.43. When I saw the documents that Mr. Hernandez showed me at the hotel in May 78 I felt cheated by the defts.

30

We did not do anything at once but were waiting for two or three days to coordinate our actions. Officially these were not given by Hock Cheong - the documents. We were trying to get more details. So we went to Hock Cheong's factory at Jurong on the information I had received. I and Mr. Hernandez went there. At the factory I met Mr. Gan an employee of the defts. Mr. Gan showed me round the factory. We saw tent spreader frames in different stages of

40

10 fabrication. AB.93 - 95 show the spreaders. I had not given permission for the defts to fabricate them in S'pore. The defts. did not ask me or advise me about the fabrication of these spreaders. Prior to this visit they had placed orders for these spreaders - two units. We supplied them. First one we supplied in 1977 and the other one in Jan 78. These two spreaders had already been sold by the time of my visit to the factory. There were no outstanding orders for spreaders in May 78.

When I saw what was going on in the factory it confirmed my suspicion that the defts were manufacturing our equipment behind our backs.

20 I also saw another item of lashing - EAT 3 - one crate of these items without being able to say the quantity. They were identical to our item EAT3 but not manufactured by us. This item can be seen in pg. 11 of P.9. Our items would have name "Inter" moulded on the parts - those manufactured by us. Those items that I saw there did not have our name "Inter" on them. We did what is explained in our letter. I refer to my letter AB.83 dated 20.5.78. We cancelled our negotiations for a joint venture.

AB.76 - 80 show the last stage of negotiations in the joint venture that we had reached dated 18.5.78.

AB.81 is an amendment to the same negotiations.

30 AB.82 is letter by Mr. Hernandez (dated 19.5.78) why he was not joining the joint venture. This was written on the same day after my visit to the factory on that day.

I have already referred to AB.83 - 84. Item 5 there refers to an order made on 20.5.78. We were prepared to pay commission to the deft up to the date of cancellation of the agreement.

40 In items 7 and 8 of AB.83 we offer new negotiations and Mr. Hernandez was no more joining us in the joint venture. The defts did not take up our proposal for new negotiations. The defts were continuing to fabricate our items and they were selling our goods which they had on consignment without any release by Mr. Hernandez.

When we cancelled our negotiations we also asked for the return of our goods which were on site on consignment.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Examination 11th & 12th November 1981 (cont'd)

In the High Court

Notes of Evidence Plaintiffs' Evidence

No. 9 - PW3 Birger Merten Examination 11th & 12th November 1981 (cont'd)

(I see AB.93-94. I now produce the originals marked AB.93A-94A. This is an advertisement placed by Hock Cheong in a business magazine dated July/Aug 1978).

The top picture in AB.93. It is a copy from our catalogue with certain items added on.

The lower picture is a reproduction from a catalogue - shows the original catalogue - also in last page of P.9. The building seen in the background is our storehouse in Madrid.

The date of the business magazine where this advertisement appears is July/Aug 78. The advertisement would have been placed by Hock Cheong at least one month before that.

10

AB.97-106 refer to incorporation of a Co. called Inter Equipos Navales (F.E.) Ltd. This was done to protect our interest here of the market in S'pore and the Far East as successors of marketing our products through Hock Cheong and then we went on our own. By incorporation of this new Co. we went on our own with our policy to market our products in the market in the Far East. This new Co. did its best to promote our goods in the market.

20

I produce statements of accounts of the new Co. for the years 1979,80, 81.

In 1979 we had a considerable loss of \$133,264/=

1980 \$48,490/= Total loss \$181,754.

1981 \$144,993/= Total net loss \$36,761/=.

Hock Cheong from the exhibition in 1979 where they displayed our goods as agents of our rivals in Madrid - Tec Containers, Madrid, I understand Hock Cheong had by then agency from Tec Containers, but the goods displayed in the exhibition 1979 shows in the photographs P.3-8 are our goods.

30

For each of the items there I can show the corresponding item in our catalogue.

I have prepared an index a photocopy of AB.89 where I have inserted the numbers 1-48 against the items there and in the index attached I show the corresponding number in our catalogue with page in P.9. This document is marked AB.89A. The numbers given in the advertisement against each item like "HC401" and the Hock Cheong's numbers.

40

Xxd. by Mr. Cheong

In the High
Court

I agree in May 1977 I was introduced to one Mr. Sonny Choo (i.d) in Madrid. Mr. Sonny Choo was the representative of the defts. of the U.K. Co. known as HCC Offshore Supplies (U.K.) Ltd.

Notes of
Evidence
Plaintiffs'
Evidence
No. 9 - PW3
Birger Merten
Cross-
Examination
11th & 12th
November 1981

10 In May 1977 he did not discuss possibilities of representation of my Co.'s products Inter but he was asking me whether we were willing to supply the mother Co. in S'pore with our lashing fittings. I said I was willing to supply against payment by L.C. I agree we gave 8% commission to the U.K. Co. on certain deals. It was not a fixed arrangement.

Q. Put that you agreed to pay 8% commission on all transactions by the U.K. Co.?

20 A. That is not correct. I don't have any documents here regarding this claim of 8% commission by the U.K. Co. I would say that in most of the cases we got the L.C. late in our transactions with Hock Cheong. This refers to our dealings in 1977.

12.45 p.m. Adj. to 2 p.m.

2 p.m.

P.W.3 Merten, ofa.

Xxd by Mr. Cheong contd.

(Mr. Cheong hands up 4 invoices of the pltfs. to the defts. dated 5.8.77, 14.9.77, 6.10.77, 14.11.77 marked D1A - D1D).

30 Q. Do you agree that the Ls of Cr were opened within two weeks of the order being placed?

A. No. In the case D1 the order was placed on 24.6.77 and they advised on 8.7.77 that they would open letters of credit and we shipped on 4.8.77.

Q. I suggest you are not telling the truth because the letter of credit can only bear the credit No. when the letter of credit has in fact been opened?

40 A. When they the defts open a letter of credit on 8.7.77 and obtain a L.C. No. in S'pore we don't receive that information on that date.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 11th & 12th November 1981 (cont'd)

We did not see the conditions of the L.C. opened in S'pore until the Bank in Spain receives that L.C. It is only then that we can ship the goods. I agree in these four cases the delay seems normal and I would consider it normal. These are not the sort of delays I am complaining of. There were delays of a more serious nature in 1977. I say there were more transactions between us and the defts than is represented in these four invoices D1A - 1D. But during 77 for certain orders we received the L.C. very late. We shipped late because we received the L.C. late.

10

Q. I suggest after you get the L.C. you have to pack the goods and look for a suitable ship before you can ship them?

A. I agree. I see these four invoices. In all four cases as I can take it from the invoices they are direct orders by Hock Cheong against L.C. payment. So no commission would arise. I can't say from these invoices who placed these orders. If it was by the U.K. Co. then they would get the commission. I can't say from D1A - 1D what happened here. In Jun, July 77 when I came to S'pore with Mr. Cidon, I was later accompanied by Mr. Lew to see the warehouses of our competitors in S'pore. Mr. Lew did it on my request. We also went over with Mr. Lew to see the Malaysian shipyard on the other side of the causeway - the mainland of Johor. I can't say I went to NOL also. I can't say I met Soe Aung on this trip. I know the gentleman in question but I can't say if I saw him here or on subsequent visits. I agree I recorded my impressions in AB.3-4 of this visit. Here we recommended a minimum quantity of stock they should carry. This minimum stock may exceed the defts' financial capability. It is possible the defts were not prepared to hold the minimum stock as it would not be worthwhile holding such stock. The defts suggested that we send this minimum stock on consignment but we did not accept it. Of course the defts were seeking the technical assistance from us.

20

30

40

In July 77 on the question of Hock Cheong representing our company's products in this region coming up for consideration I visited the defts at their Jurong factory.

Q. And you were shown spreaders manufactured in the defts.' factory in Jurong?

50

A. No. I am very surprised when the defts at that time did not even know what a spreader was. The defts proposed to come to Madrid to make their proposal for our future business and we agreed.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 11th & 12th November 1981 (cont'd)

10 It is correct the defts. came to seek our representation for our goods but I can't say whether it was to be for S.E.A. and the F.E. I agree the discussions were conducted in English. I agree first deft Mr. Lew did not speak English well but he spoke in English to me.

20 Mr. Choo and Mr. Chua explained to Mr. Lew in Chinese. I can't say if the defts in the discussions used the words "sole agent". At this stage I did not grant any representation to the defts on our goods in this region or any region at all. The letter AB5 - 7 records our discussions. No agreement of any kind was reached at that time. I say the defts did not at this stage agree to our proposals here. They did propose in these discussions that they be our sole agent or sole distributor in this region for a minimum period of two years. We were only discussing about the presence of our supervisor here for a maximum period of two years.

30 Our purpose of Mr. Hernandez being stationed in S'pore was to find out if up to a certain period we would agree to Hock Cheong representing us in this region. We did not agree at this stage to Hock Cheong representing us at all. No period was discussed then about this matter.

Mr. Hernandez joined our company in about March 77. We were prepared to send him to S'pore as our technical and commercial adviser here. It may be Mr. Hernandez describes himself as a real estate agent (vide AB.99).

40 Q. Put that Mr. Hernandez is no expert at all in container lashing systems?

A. He had a basic technical knowledge to see the equipment. During the period March 77 to Jan 78 he went through our technical departments, our commercial departments and he went on board ships with naval architects.

In the High Court
Notes of Evidence Plaintiffs' Evidence No. 9- PW3 Birger Merten Cross-Examination 11th & 12th November 1981 (cont'd)

Q. Put that when the defts sought Mr. Hernandez's advice on technical matters about container lashing systems he was no use at all and he had to telex to Madrid for the information?

A. If it was a technical calculation question of course he would have to get it from our technical department in Madrid. If it was a commercial question Mr. Hernandez could give the answer

What was finally agreed is recorded in AB.9. I agree this document refers to the conditions of Mr. Hernandez's stay in S'pore - nothing else was agreed there.

10

We sent Mr. Hernandez with a lot of costs to ourselves because we were interested in coming into business here and we would explore the possibility of doing business with Hock Cheong (refers to pleadings page 15 para. 3)

Q. There you admit there was an oral agreement in Sept. 77 that defts be appointed distributors for the territories stated there and now you tell us that at time AB.9 was signed there was no agreement with defts about their representation?

20

Mr. Elias at this stage makes an application to amend his pleadings.

Mr. Cheong. No objection.

Ct. Pltfs at liberty to amend his pleadings and defts at liberty thereafter to make application to amend their pleadings.

30

Adj to a further date to be fixed by the Registrar.

Intld. T.K.

Certified true copy.

Sgd. Illegible
Private Secretary to Judge
Court No. 3
Supreme Court Singapore.

Suit No. 1092 of 1979 (Part-Heard)

In the High Court

Between

Inter Equipos Navales S.A. Plaintiffs

And

1. Lew Kah Choo
2. Lew Kah Hook
3. Lew Kah Hoo
4. Lew Lay Beng (f)
all trading under the name and
style of Hock Cheong & Company Defendants

Notes of
Evidence
Plaintiffs'
Evidence
No. 9 PW3
Birger Merten
Cross-
Examination
10th February
1982
(Contd.)

10

Coram: T. Kulasekaram J.

NOTES OF EVIDENCE

Wednesday, 10th February 1982

Hearing resumed

Mr. Simon Elias for the pltfs.
Mr. Cheong with Mr. Chua for the defts.

Mr. Elias

Page 3 of Pleadings

20

Hands up amended S/Claim in conformity with
the other amendments in Reply and Defence to C/
Claim.

Calls

PW3 Birger Merten, ofa

Xxd by Mr Cheong

30

I have been back in S'pore after the last hearing.
I did say there were several more transactions in
1977 other than those recorded in D1A - D1D. It
was not precisely what I said. What I said was that
there were serious delays in the other transactions.
As far as I can remember I said that the exact date
of delays can be put only after I had received the
L/C from S'pore.

Q. Refers to N of E at page 15 - D.

A. I agreed to check the other documents. I went
back and checked for documents representing
transactions other than D1A - 1D. I did find
some documents relating to other transactions.

In the High Court

Adj a few mins. to enable Mr. Cheong to examine the documents.

Notes of Evidence Plaintiffs' Evidence No. 9-PW3 Birger Merten Cross-Examination 10th February 1982 (cont'd)

Hearing resumed.

PW3 B. Merten

xxd. by Mr. Cheong contd.

When I visited S'pore with Cidon I thought there might be interesting sales - scope for 2m to 3m dollar sales.

Q. Refers AB96 - Advert in Business Times Supplement June 18/79?

10

A. I did not speak to any reporter on this matter about that time. This is I guess an interview Mr. Khoo has been giving a reporter. James Khoo is the Marketing Manager of Inter Navales (F.E.) Pte Ltd.

Q. In 1977 before Mr. James Khoo joined Inter Equipos did he work for the defts.?

A. Yes. He is still working for Inter Equipos Navales (F.E.). I have read AB96 before coming to court. I saw it a few days after it appeared in the paper. I have no serious objections to this then.

20

Q. Refers to AB96. Had fabrications of Inter goods been done locally in early 1978?

A. Yes, after May 1978 - with permission of Inter.

Q. Very frequently vessels would require to be fitted with a complete system of lashings and very often when the whole system is required you may not be able to supply the whole of it?

A. Yes depending on the requirements and the occasion. Whether they will take a complete system depends on their requirement and the occasion.

30

Q. Can a container take some of your parts and then complement it by parts developed by your competitors?

A. It depends on what they get from the others and the parts they require.

- | | | |
|----------------|--|---|
| Q. | In some containers when a container requires the whole system and you can't satisfy the requirement completely you would find a local supply source or manufacturer who could supply or manufacture the parts? | In the High Court |
| A. | Not manufacture but buy the required parts from elsewhere. | Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross- Examination 10th February 1982 (cont'd) |
| 10 Q. | In early 1977 and early 1978 before May did the pltfs. receive any orders from S'pore through the defts for the equipment which orders you cannot completely satisfy? | |
| A. | All the orders we received we are able to satisfy. I am not able to say for certain. | |
| Q. | Did the pltfs. before May 78 request the defts to manufacture any part of the equipment in S'pore? | |
| 20 A. | We asked our delegate Mr. Hernandez to investigate the price for this item in S'pore and to see if we can get them here. Not to manufacture them here. | |
| Q. | Look at AB45. In early March 78 you were asked by 1st deft for your opinion on whether they could manufacture spreader spare parts? | |
| A. | Yes. My answer is at AB46. We only agreed to manufacture of BT-5 which were mere metal bars. | |
| 30 Q. | Look at AB55. The words on the second line "is based on HCC production and prices". By that you were aware of the defts manufacturing some of your parts in S'pore? | |
| A. | By production there I meant secure the parts from other sources and not manufacturing them. | |
| | <u>By court</u> | |
| Q. | On 17.3.78 did you know the defts were manufacturing any of your parts here? | |
| A. | No. | |
| 40 <u>Xxd.</u> | (contd.)
There are parts in the system which are inter-changable for other systems. Such parts can | |

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 10th February 1982 (cont'd)

- be got locally from other suppliers. I later discovered the defts were manufacturing some of our parts shown in P9. We have no patent rights for our parts. We use our own design and our trade mark to promote the sales of our equipment. Our trade mark is "Inter" and the logo shown in the back of P.9.
- Q. Look at AB37 - 40. These are stock cards from HCC's office at Kallang. There were remarks against certain items "on loan 1 pc to S'Steel to Jurong Alloy"? 10
Do you say if the defts are attempting to manufacture these items secretly they would have these remarks written on?
- A. These cards were kept by HCC and not available to us. It was kept secretly.
- Q. Nonetheless you have copies of the stock cards?
- A. Yes. Mr. Hernandez showed me these cards. I can't say when he showed me these cards. He got them from one of the defts' secretaries. 20
- Q. Look at AB33 and 34. Mr. Hernandez on 4.3.78 was your delegate and his office was at Kallang. You had a person from S.S. Pte Ltd visiting the defts' office. Are you suggesting the defts would ask a responsible office from S.S. to visit them at Kallang when Mr. Hernandez was at Kallang?
- A. No. Mr. Hernandez our delegate at that time was not even in S'pore. He was on a business trip. All I can say is this quotation was obtained and negotiated in the absence of Mr. Hernandez. 30
- Q. Are you suggesting the defts. could get written quotations from S.S. and Jurong Alloy?
- A. Why not.
I agree Mr. Hernandez should have access to these stock cards but in fact he did not have such access.
- Q. Put that Mr. Ong got the quotations from S.S. and Jurong Alloy as at AB33 and AB41 on instructions of Mr. Hernandez? 40
- A. I don't know about it. He never informed me about it. I would be surprised if he had done so.

- Q. Look at AB5 - 7. Refers to para. 2 of AB5. Was this period of two years mentioned? In the High Court
- A. Yes. We mentioned a period of two years for Mr. Hernandez to be attached to HCC. Notes of Evidence Plaintiffs' Evidence
- Q. Did the defts at the meeting suggest that the pltfs. appoint them as sole agents for S.E.A. and the F.E. for a period of two years? No. 9 - PW3 Birger Merten Cross-Examination 10th February 1982 (cont'd)
- 10 A. They did suggest that. The only agreement we arrived at was to send Mr. Hernandez to S'pore as our delegate for two years. We merely agreed to appoint the defts. agents provisionally. We gave a maximum period of two years. We never appointed the defts. our agents for two years.

2.30 p.m. Hearing resumed.

PW3 B. Merten

Xxd. (contd.)

- 20 Q. In the meeting at Madrid was the word provisional ever used?
- A. I can't recall. I can't recall if the words "subject to our confirmation" were ever used.
- Q. Are these words used in AB6 and AB9?
- A. I don't now recall the details.
- Q. That before 1978 the defts were acting as distributors with 8% commission?
- A. Yes.
- Q. So before 1977 you could appoint any number of distributors in S'pore?
- 30 A. We could.
- Q. Is it your evidence that after the 15th January 1978 the defts would continue to be distributors?
- A. Yes until we learnt further from Mr. Hernandez's experiences in this market.
- Q. Are you suggesting that they agreed to bear

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 10th February 1982 (cont'd)

part of Mr. Hernandez's expenses here for two years with no additional benefit to the defts.?

- A. They have sufficient benefit on their selling price besides their commission. Mr. Hernandez gave them technical knowledge and our experience and services. We paid Hernandez's salary. The passage to S'pore and back plus a rent of a house in S'pore and a car were all paid by HCC.

The defts did not even know where the equipment could be used. Mr. Hernandez provided the technical knowledge for the sale of the equipment. Because Mr. Hernandez was here the goods were sent on consignment to HCC but the administration of this consignment of goods was to have been exclusively at the control of Mr. Hernandez. In fact it was not in the exclusive control of Mr. Hernandez as envisaged by all parties due to the activities of the defts.

10

20

- Q. Did Mr. Hernandez before 20 May 78 complain to you about the defts.' conduct?

- A. By telephone yes on various occasions. After we had left him in S'pore for a short while he started complaining about the defts.' irregularities. He told me about various suspicious talks he had heard about the defts. We found what they were when I came here about 10 days before 20.5.78.

- Q. Did you enquire about the complaints from the defts.?

30

- A. When we had the evidence we pointed it out and then decided not to go ahead with our joint venture.

- Q. What is the evidence that you found out?

- A. What I have already told here. I went to Jurong works of the defts. to see what they had physically in stock there. Mr. Gan an employee of the defts. showed me around. He was apparently not told that we would come.

40

I saw they were having under production tents, spreaders and one item EAT-3. They had a certain quantity of them which were not supplied by ourselves. We saw only the spreaders and the EAT units. We saw these

spreaders in different stages of production from the start to almost completing the complete unit. There was no single complete unit. There were about 10 units in the course of production. I have no patent rights in respect of these spreaders. There is nothing wrong in the defts. trying to manufacture these spreaders. My complaint is that without copying our design it would not be possible for the defts. even to complete the steel frame of these spreaders. They could not however produce the movable parts without our drawings. I gave evidence to the effect earlier that the defts. have copied the design of the spreader from the one I supplied them in 1977. They bought that on L.C. terms. There is nothing legally wrong in their copying our design. In the spirit of our agreement for sale and distribution their conduct is wrong. All the investigations on the defts.' conduct took place before 20.5.78. I visited the place of the defts. in Jurong where they fabricated our goods on 19.5.78 on the same day as Mr. Hernandez wrote the letter AB82 - it was the 19th May 78.

In the High Court
Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 10th February 1982 (cont'd)

In the afternoon of 19.5.78 Mr. Hernandez wrote this letter to the defts (HCC).

Q. Look at AB76 - 80. What is this?

A. This is proposal of the joint venture. This is a letter written in HCC's office based on our discussion. He had not accepted the proposal here. It is merely one possibility. My reply is at AB80. I accepted in general the contents of the proposal. I signed the amendment at AB81. I can't recall when I signed AB81. This document AB81 was signed before we backed out of the joint venture on that day.

The dinner party was before we had seen the fabrication taking place at Jurong. If I knew of this fabrication at Jurong I would not have gone to the dinner party. AB81 was signed before we discovered the fabrication. When we discovered the fabrication Mr. Lew, the first deft. had gone to Japan. On his return he wrote AB85. AB80 and AB81 were agreed as to what was discussed in the negotiations. It was not a final agreement between the parties.

In the High
Court

Notes of
Evidence
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(cont'd)

The dinner was not to celebrate the successful conclusion of the discussions and the consequent agreement. It was a normal dinner as Mr. Lew was leaving the next day for Japan.

I agree at the dinner I was informed by the first deft. and Sunny Choo that they were leaving the next day for Taiwan and Japan.

I see AB81. I can't recall who brought up the amendments. It could have been done by Mr. Hernandez. Mr. Hernandez told me that he had written to the defts. AB82 after the discussions. Mr. Hernandez gave me a copy of AB82 after he had written it. I wrote AB83 and I had seen AB82. I agree there was this meeting referred to in AB83. after Mr. Lew had gone to Japan.

10

I agree my company had decided to incorporate a local company.

I see AB99. This I see is dated 20th May 1978. This was after the meeting referred to in AB83. I gave instructions to Mr. Hernandez to have this company incorporated. This is not the joint venture company envisaged in an earlier discussion. This was after the meeting referred to in AB83. We had to do this as the defts. were sitting on our stocks and refused to give them to us.

20

Q. Put that long before the 20th May you had instructed your solicitor Tan Kay Bin on this matter?

30

A. No. As far as I recollect the name was thought of by HCC when we were thinking of the joint venture.

Q. Put the name of the joint venture company is as at AB71?

A. Our name and logo were reserved for us. The defts. did not inform me of the joint venture Co.'s name or proposed name.

Q. Look at AB75?

40

A. I agree the name is mentioned there. If I had noted this letter carefully I would have known of the joint venture Co.'s proposed name.

Adj to 10.30 a.m.

Thursday, 11th February 1982

In the High Court

Hearing resumed.

Parties as before.

PW3 B. Merten, ofa.

Xxd. (contd.)

The joint venture Co.'s name was suggested by me besides others. I can't remember now all the other names suggested. I say various names were suggested before we agreed on this name.

Notes of
Evidence
Plaintiffs'
Evidence
No. 9 - PW3
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(cont'd)

- 10 Q. Well before 20.5.78 you had the intention of setting up your own company in S'pore without the participation of the defts?
- A. No.
- Q. When did you give instructions to Mr. Hernandez to form the new Co.?
- A. After the visit to Jurong with Mr. Hernandez. I can only say when I gave the instructions for the new Co. to be formed. I can't say when it was incorporated. I shall give my approval for solicitor to give evidence as to
- 20 when I gave instructions for the formation of this Co.
- Q. Put when you first came to S'pore to see the defts. they took you around to give you an idea of what the market possibility in S'pore was like - July 77?
- A. This is so. I agree according to me there could be very interesting business to be done. I estimated that the turn over would be about
- 30 \$2m to \$3m per year. It was based on the volume not on the S'pore market alone but on the Far East market. It could have been achieved even without the cooperation of the defts.
- Q. If that was so why was it necessary to appoint the defts as distributors and also enter into a joint venture?
- A. We appointed HCC in S'pore as our distributors to have stock supply source in S'pore. We had
- 40 to join with a Chinese company to be in the market.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 11th February 1982 (cont'd)

Q. I put it to you that from the very beginning your intention was to make use of the defts. until such time as the market was established in the Far East and you will then throw them out?

A. I deny this for we had good intentions from the very beginning.

Q. From the beginning you were behaving less than a gentleman with the defts? Look at AB10?

A. This example in AB10 is not accepted. We have stated the facts of this case. 10

Q. Put that you were not supposed to go directly to NOL as they were the defts' customers. Because the agreed course of business between you and the defts was that NOL could place an order through the defts who were either to sell directly ex stock or place their orders through you thereby earning the 8%?

A. We had already deals with NOL before the defts took me to them in July 77. Secondly, we were dealing with NOL for orders for two ships built in Japan. We want a distributor here but not a sole agent for complete ship set. We had been enquired to by NOL directly in S'pore. NOL was making a direct order to us for supply in Japan. Defts were trying to secure the order in S'pore and supply the goods from S'pore to Japan. This was a case the client ordered in bulk and we supplied direct to client in Japan. 20

In this case NOL complained of the very exorbitant prices quoted by the defts. So they wanted to place a direct order for direct shipping to Japan. We quoted directly and got the order directly. 30

I visted NOL not on my first visit but on a subsequent visit.

I had an inquiry from NOL in Spain. As a result of that I saw NOL here on my visit to S'pore. I quote direct to them for shipment to Japan.

They were quoting 40 to 50% over our list prices ex Spain. HCC's prices were from stocks purchased from the pltfs. 40

Q. Your agreement with the defts was that you can't take any direct orders from the defts' customers in S'pore?

A. This would only apply for orders where the customer wants spare parts. If the order is for a complete set for a ship then we quote direct to the customer. If it was for supply in S'pore we would have contacted the defts and they would have got the 8%.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 11th February 1982 (cont'd)

Q. The defts demanded an immediate reply to AB10 and your reply is at AB11?

10

A.

Q. In AB11 you have referred to the defts as our agents. Is it correct that the defts are your agents and not your distributors?

A. This telex was written by a commercial clerk and it is common practice to use the term "agents" generally.

Q. What is the distinction between an agent and a distributor?

20

A. We have distributors all over the world without being our agents.

Adj to 2.00 p.m.

2.00 p.m. Hearing resumed.

PW3 B. Merten xxd. by Mr. Cheong contd.

Q. There was a meeting between you, Mr. Hernandez and first deft with two others at the defts' office on 15.1.78 in the afternoon?

A. Yes.

30

Q. The purpose of the meeting was to settle the sole agency of the defts.?

A. No. The purpose was to promote the market outside S'pore in the following months and the possible extension of the territories for the future.

Q. Look at AB20-21. These are the minutes of that meeting which took place?

40

A. It is a unilateral representation of what took place at the meeting. All that I say is we do not agree with the minutes on this special feature.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 11th February 1982 (cont'd)

Refers to purpose as stated in AB20. That subject of sole agency was discussed but nothing was agreed at this stage. They were our distributors still and would get 8% commission on all orders booked by them.

Sub-agency was also discussed but not agreed on at this stage. We did not agree to the defts appointing sub-agents.

Para. 3 was agreed but as our distributors. Para.4(a) agreed but not the last sentence. Para.4(b) This is correct. Para.5 is correct.

10

I agree Mr. Hernandez has signed it as having seen it.

- Q. Is it correct that Mr. Hernandez has authority to agree to documents in your absence?
- A. No. If the defts wanted it approved then he would have to send it to me in Spain for it to be approved by me.

I see AB9. Mr. Hernandez has signed it. He signed this as Asst. Director on behalf of the pltf. Co. I don't remember when Mr. Hernandez sent a copy of AB.20-21. We had received it but it had been superseded by telephone conversations we had. I had already pointed out in telephone conversations with the first deft. that AB20-21 was not correct. We spoke to each other in English.

20

- Q. Look at AB24. You were told of this by the defts about the announcement and a copy of the advertisement was also given to you to sign. Did you object to the wording of the announcement?

30

- A. No. I paid half the advertising costs. Commercially we were happy with what was stated. We did not take it seriously. We understood it as a normal commercial promotion of goods.

I agree with para.1 of AB7. The area which the defts were our distributors was at the beginning S'pore only. For other areas as and when they placed their orders we would decide whether they were entitled to commission or not.

40

- Q. If that were agreed, why should the defts agree

to spend a lot of money to enable Mr. Hernandez and his staff to travel and market your products in the Far East and S.E.A.?

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 11th February 1982 (cont'd)

A. Mr. Hernandez went to investigate the orders of the debts in those areas.

I see AB17. Mr. James Khoo went on behalf of the debts to make a market study. I don't recall if Mr. Hernandez and Mr. J. Khoo made many visits to these places. I agree we received and executed an order for the fitting of two vessels at Fukuoka, Japan.

All that I know is that we sent an engineer from S'pore to Japan to study the shipyard there and make the recommendations for the supply of our goods to their requirement.

Q. Put that Mr. Hernandez was sent there by the debts in connection with the order?

A. I do not know about this but I can't deny it if they had done so.

Q. Put that you knew about this and you are not denying it because Mr. Nishikawa is now in S'pore and he will give evidence?

A. In this case we have granted the debts their commission. I can't see what they are complaining about. I have not written to the debts yet that I agreed to pay this commission.

Q. What is the total value of this order?

A. I can't remember now.

Q. Put it is over \$1m?

A. No. It is less than 400,000/= DM. I agree the debts were entitled to 8% commission on this order as agreed later. It was not agreed initially. This agreement was reached after the agreement with the debts had been breached. Debts breached the agreement by fabricating our goods without our permission. We gave them permission for one order and only for one item in the order.

(Two telexes put in by Mr. Cheong dated
(1) 13.3.78 - D5 and
(2) 6.4.78 - D6)

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Cross-Examination 11th February 1982 (cont'd)

In D5 we authorised the manufacture of the item BT-5 (36T).

Q. Even in March to your knowledge the defts had been manufacturing these parts to service your customers?

A. We gave special powers to make these parts - - lashing bars according to our specifications. It was a very simple part. Then there was a similar situation where we gave permission BT-2.

10

Q. Is the situation in D5 one of those frequent situations in which the order cannot be satisfied because a few parts are missing?

A. This is so.

Q. In fact the defts manufactured those missing parts at a loss to merely satisfy the order?

A. I have no knowledge of this. I did not give them any permission.

Q. Has Mr. Hernandez ever told you of this?

A. I don't recall.

20

Q. When the defts manufactured these parts they were not doing them secretly and fraudulently?

A. We had no knowledge of this at all. We were suspecting them. We were not told about it and we never gave them permission. In the cases where we saw them manufacture parts we may have given permission on certain terms depending on the situation and the circumstances.

Q. If the defts had manufactured a complicated part because it was urgently required would it have caused the pltfs loss?

30

A. Of course. I see D6. Here again we agreed to allow the defts to manufacture the parts. This is a situation where the part required was BT-2 a similar rod as in the other case. These were the two occasions where we allowed the defts to manufacture.

Q. You recall that the stock cards and the quotations from S.S. and Jurong Alloy were kept away from Mr. Hernandez?

40

- A. That is what I was told.
- Q. Did you instruct Mr. Hernandez to make a statutory declaration in Oct 1978?
- A. I do not recall.
- Q. Did Mr. Hernandez tell you in March 1978 that he instructed a general clerk by the name of Angela Tang (id.) to produce for his inspection a stock list of the goods held by the defts on consignment for the pltfs.?

In the High Court
Notes of Evidence
Plaintiffs' Evidence
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(cont'd)

- A. I know nothing about this.
- Q. Put that the stock list of the defts was readily available to Mr. Hernandez?
- A. I was told this was not so and so he had to procure it by a special way. It was not available to him. He did not tell me what was the special way he employed to get this stock list.

Adj to 10.20 a.m.

Friday, 12th February 1982.

12th February 1982

Hearing resumed
Parties as before.

PW3 B. Merten, ofa.

Xxd. by Mr. Cheong contd.

I see this gentlemen. He is Nishikawa (id.) I agree he was introduced to me in S'pore by the first deft when I came in Jan 1978. He was working with another company and doing some general business with the defts. not as a sub-agent of the defts.

I deny the pltfs. secured the Fukoka order through this gentleman.

- Q. Have you ever sent Mr. Nishikawa any telexes promising him a commission for the Fukoka order?
- A. I don't recall sending any such telexes. I did not meet Mr. Hernandez in Madrid in Oct 81 just before this trial. I caused a statutory

In the High Court

Notes of
Evidence
Plaintiffs'
Evidence
No. 9 - PW3
Birger Merten
Cross-
Examination
12th February
1982
(cont'd)

declaration from Mr. Hernandez to be put in in Oct. 81. Mr. Hernandez was threatened in S'pore and he was not prepared to come to S'pore.

There was a general fear in Mr. Hernandez's mind and he made no specific complaint. After 20th May 1978 when our new company was incorporated Mr. Hernandez was the Mg.Dr. As far as I can remember he remained as Mg.Dr. till Nov 1978. He left because he was threatened by HCC.

The house where he was living with his wife and children was several times invaded. He has been to the police but there was no physical pressure there and so they could not do anything.

10

I am not fabricating this to explain why Mr. Hernandez is not here.

Re-
Examination

Rxd. by Mr. Elias

I see D5. I see the ref. No. 0/1030-3-78.
I see AB45. This refers to the same ship.
I see AB53. Ref. No. 0/1027-3-78. I compare it to AB55 first para. there. These two telexes refer to a feasibility study and not to an actual case.

20

Q. Look at D6?

A. The ref. No. 0/1046-3-78
I see AB59. The ref. No. is the same as in D6. AB59 is a reply to D6.
We gave them permission to manufacture lashing bars; in this case BT-2.
I see P9, pages 7 and 8.
In page 7 we have BT-2 Model 131.
In page 8 we have BT-5 Model 136.
In D6 there is a reference to a spreader. The spreader mentioned there is one which we had supplied to the defts on consignment. It had been sold.
It should have been billed in the name of Inter but it was billed in the name of HCC. I am complaining there about the billing of this spreader.
I see AB59 and para.2 there. I am asking for the money.
This spreader is not locally manufactured.
I see AB20 para. 3 there.
New construction refers to new construction of ships.
I see AB96. The \$2m facility has not been built yet.

30

40

I see P.10. I see the Profit and Loss A.c. ending June 79. The nett loss is \$133,264. In the year ending June 1980 - made a loss of \$48,490/=. Total loss is \$181,754/=. Mr. Hernandez as Asst. Dr. was not on the Board of Directors.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Re-examination 12th February 1982 (cont'd)

10 Mr. Elias applies to put in two affidavits by Hernandez as he is not available here. It was disclosed in the affidavit of documents.

Mr. Cheong.

I object to its admission.

Ct. Application refused.

The Fukoka order is worth about 400,000 D.M.

- Plaintiffs' Case -

"Sole agent" is not a legal term. An agent is an An agent in commercial terms - there are different connotations given to this and must be determined.

20 What defts say appears in page 9 of the Pleadings para. 3.

We agree that from Jan 78 para. 3(a) and (b) apply - as in para. 7(a) and (b)

(c) We don't agree to part of para. 3 at page 10. This they say was arrived at by an oral agreement on Oct 25, 1977 at Madrid. What were the territories to which it applies, S. Malaysia & H.K. or F.E. & S.E.A.

30 Mr. Elias to comment on this later before he closes the pltfs.' case.

3.00 p.m.
Ct. Additional Agreed Bundle marked AB1-22.
PW3 recalled (resworn)
B. Merten, xxd. by Mr. Cheong

Recalled Further Cross-Examination 10th May 1982

Q. When you filed these AAB why didyou leave out T107?

40 A. It is difficult to trace them. As I traced them I filed. This was not traced earlier. I agree my bundle of documents started with T102. I can't trace T101. They are not our

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Recalled Further Cross-Examination 10th May 1982 (cont'd)

documents. I have no idea where T104 is. I say to the best of my knowledge this is all we have relating to this matter - AAB 1 - 22. I don't know what T101 relates to. Similarly I also don't know what T104 relates to. Similarly I do not know what the T documents set out in AAB1 - 22 relate to. When the request for these documents were made my people at my office traced these documents which I have now produced. I was only told of the request for T105 this morning. I have brought with me all the documents that I found. From my records I say

10

(1) For one ship set the value was US\$83,498.97

(2) For the two ships set the value was US\$88,589.51

T102 the value C & F is valued US\$15,036.07. I am prepared to pay 8% on the FOB price. I am prepared to pay 8% on the following two amounts:-

20

U.S. (1) 83,498.97
(2) 88,589.51

The only documents not in AAB 1 - 22 are

T107 for the amount of US\$3,996.00
and T105 " " " 160.00
US\$4,156.00

Q. Take the case of T106. Total value is C & F 97,652.90?

A. Yes. AAB11 US.\$69,502.90

30

Adj to 10.30 a.m. tomorrow

11th May 1982

Tuesday, 11th May 1982

Parties as before

Mr. Elias hands up AAB repaged

AAB1-22 and this really is the old AAB1-22 but pages rearranged and repaged.

PW3 B. Merten (ofa)

Xxd. by Mr. Cheong (contd)

Mr. Cheong: From the invoices produced we have agreed that the total sum is US\$221,058/=. This is the value of the invoices in AAB1 - 22 and 8% on that value is US\$17,684/=. We have given discovery to the pltfs and they have now no objection to my questioning Mr. Merten on this matter.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Recalled Further Cross-Examination 11th May 1982 (cont'd)

Q. Look at this document?

10

A. I have not seen this document before but the person who recorded it is Mr. Hernandez. The attachments to this letter are AB41 & AB42.

Q. Was there one telephone conversation between Mr. Hernandez and you as mentioned in this letter?

A. I can't say if it was in March or April. The telephone conversation was reporting the irregularities found by Mr. Hernandez.

20

Q. Does this letter speak about any irregularities?

A. No. It was confidential matter which was told me during the telephone conversation.

Q. Did you receive the letter in your office?

A. I don't remember receiving this letter. I could have signed this letter or I may have been out and other people in my office may have handled this matter.
(Refers to N of E page 9E ...)

30

Q. The first time you knew about these irregularities were in May 78 when you were shown these documents?

A. I was told over the telephone before May about the irregularities of HCC by Mr. Hernandez. The suspicions there giving out samples of our original parts without his permission to get an offer from the founderies for turning them out. He said he could prove it for the time being but would get the documentation.

40

Q. I suggest that you are fully aware that your last evidence in court is untrue?

A. I deny that.

In the High Court

Notes of Evidence Plaintiffs' Evidence No. 9 - PW3 Birger Merten Recalled Further Cross-Examination 11th May 1982 (cont'd)

Q. And in order to get round that you have to say that you did not receive it?

A. No. I would classify this letter as a confidential letter from Mr. Hernandez.

Q. And yet it is not expressed as confidential with a carbon copy to HCC and using HCC's letter head?
(This was from HCC's file)

A. The real information is contained in the telephone conversation I had with Mr. Hernandez. 10

Letter marked D7.

Q. Put the confidential letters between you and Mr. Hernandez were in Spanish?

A. No. They were in English. The telephone conversation on confidential matters was in Spanish.

Q. The defts had complained about the correspondence in Spanish between the two of you?

A. Only some telexes and telephone conversation were in Spanish where it was confidential matters between Mr. Hernandez and me. 20

Further Re-Examination

Rxd. by Mr. Elias

Q. The first order in AAB is dated 30.8.78?

A. No orders were received from Fuk before the agreement with defts in May 78. Before 20 May 78 all that we had was information from Mr. Hernandez about two ships being built in Japan. After 20 May 78 Mr. Hernandez went to Japan. And an engineer from F. Shipyard was met in Europe to conclude the technical scale exactly. Following the discussions in Europe with our men we had to send our engineer to Japan and he concluded the order. I say HCC had made no contributions at all. 30

During the period May 78 until Oct 78 we had negotiations with HCC for an amicable way of cancellation of our relationship.

During these negotiations we accepted to pay them a commission on this order for compensation reasons before they would give us back our stock. I have so far paid no commission to anybody in respect of this order. 40

Defendants' Evidence

No. 10

DWl Tan Kay Bin

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 10 -DWl
Tan Kay Bin
Examination
12thFebruary
1982

Mr. Cheong - wants to call a few of his witnesses who are here specially for the case.

Mr. Cheong calls

DWl Tan Kay Bin, a.s.

10 I am an advocate and solicitor of the Supreme Court of S'pore. In 1978 I was instructed to incorporate the Co. - Inter Equipos Navales (Far East) Pte. Ltd. - name as in AB97. I first received instructions to find out if this name was available for incorporation - was on 16.3.78. That was the day I wrote to the Registrar to find out if this name was available for registration.

Q. Who gave you these instructions?

A. Two persons (1) Mr. James Khoo and (2) Mr. Vincente Hernandez Sanchez.

20 Q. Look at AB97 - 99. The date of all the document is given as 20 May 1978?

A. Yes.

Q. Can you confirm that the three persons mentioned there signed them on 20.5.78?

A. The only document signed by the three persons is the document 99. They signed this document on the afternoon of 19th May 78. These gentlemen came to my office to sign AB99 - I confirm that.
(Refers to his file)

30 On 3rd April 1978 the Registrar of Companies wrote and confirmed that the name proposed was available for registration. I wrote on 13.4.78 to Mr. James Khoo that the documents were ready for signature and to request him and Mr. Sanchez to call at my office and sign the documents.

Xxd. by Mr. Elias

Cross-
Examination

Q. Were you also the solicitor for HCC & Co.?

A. I have never acted for HCC.

40 Q. When did you first see Mr. Merten?

In the High
Court

Notes of
Evidence
Defendants'
Evidence
No. 10 - DWI
Tan Kay Bin
Cross-
Examination
12th February
1982
(cont'd)

A. I first saw Mr. Merten on 19.5.78.

Xd. by Ct.

AB99 was prepared much earlier than 20th May 1978. Initially the subscribers to this Co. were to be Mr. Khoo and Mr. H. Sanchez. Towards May I was then instructed that there would be three subscribers instead of two. That the third subscriber would be Mr. Merten.

Q. Who told you this or when?

A. This was told to me by Mr. Khoo and Mr. Hernandez and I can't remember the date.

10

It is possible that the particulars of Mr. Merten stated in AB99 were given to me on that day when he signed AB99.

The letter to the Registrar to incorporate the Co. submitting the documents was dated 19.5.78 was deferred till 20.5.78 as there was no time on that day.

I have no attendance or other record that Mr. Merten attended on me on 19.5.78. I would say it was 19.5.78 when they attended on me and signed AB99 otherwise my letter would not be dated 19.5.78.

20

(Released)

Defendants' Evidence

No. 11

DW2 Angela Tan Gar Keow

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 11 - DW2
Angela Tan
Gar Keow
Examination
12th February
1982

DW2 Angela Tan Gar Keow, as..

Blk 19, No. 197-F Tampines Way, S'pore.

I am a clerk employed by the defts and I was so employed from Feb 1978.

10 Q. Was it your duty or part of your duty to keep and record the stock cards of the defts.?

A. Yes.

Q. In 1978 when you were employed there you came to know one Mr. Hernandez?

A. Yes.

Q. Do you know what Mr. Hernandez was and what he was doing there?

A. I know that he was sent down by Inter Equipos Navales in Spain as a technical adviser to the defts.

20 Q. Did he have an office at the defts.' office at Kallang Place (138 Kallang Place)?

30 A. Yes.
It was part of my duties to take instructions from Mr. Hernandez. The stock cards were kept just next to Mr. Hernandez's office. They were kept in a room. The door of that room was not kept locked all the time. The stock cards were kept in a cardex tray in our office. Our's is a small office and part of it is partitioned off as Mr. Hernandez's room. To go to Mr. Hernandez's office he has to enter through the main door of our office and then go into his office. The cardex tray is not locked. Mr. Hernandez has access to the tray any time he wants.

Q. Has he ever asked you to produce the cards for his inspection?

A. Yes.

In the High Court

Notes of Evidence Defendants' Evidence No. 11 - DW2 Angela Tan Gar Keow Examination 12th February 1982 (cont'd)

Q. How many times?

A. I could not say clearly. I would do as and when instructed by Mr. Hernandez. I see AB37 - 40. I can recognise these cards. This is not a card index but this is a stock report. This is kept by me and written in my own handwriting. The remarks in the remarks column were written by me. Mr. Hernandez had asked me for these stock reports. I gave them to him. I got them from the cabinet inside Mr. Hernandez's room. This cabinet was not locked. When he asked for these stock cards I did not consider his request unusual. I have never been told by the depts not to give Mr. Hernandez these stock reports when he wants them.

10

Cross-Examination

Xxd. by Mr. Elias

I would normally prepare the stock reports and hand them to Mr. Ong and Mr. Ong hands these reports to Mr. Hernandez. I have no idea what Mr. Hernandez does with these reports. There were days when Mr. Hernandez was not in S'pore and was away from S'pore. All that I know is that I prepared these stock reports. Normally three copies of the stock reports are prepared by me. One was kept by Mr. Ong, one to Mr. James Khoo and one to Mr. Hernandez. Mr. Ong did the distribution. I don't know what each of them does with it after looking at it. Mr. Ong's copy will be in the stock position file. I prepared the documents for the stock cards. I would prepare the stock reports once a month. Each stock report would be about four pages. The stock report prepared in early March would show the stock position at the end of Feb. The physical stock is kept in the warehouse adjoining our office. Storekeeper has keys to the warehouse and has access to them.

20

30

Re-examination

Rxd. by Mr. Cheong

Mr. Hernandez has also keys to the warehouse.

40

Adj to 2.15 p.m.

2.30 p.m.

Hearing resumed

Defendants' Evidence

No. 12

DW3 Ninji Nishikawa

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 12 - DW3
Ninji Nishikawa
Examination
12th February
1982

DW3 Ninji Nishikawa, S.s.

1-30 Tahome Kitahorie Nishi-Ku, Osaka,
Japan. I am the Mg. Dr. of a Japanese Co. by
name of Dai-Ishi Kocki Co. Ltd.

Before 1978 I have business dealings with the deft.
Co.

10 In Jan 1978 I came to S'pore to visit the defts
(HCC). My Co. in Japan were the suppliers of goods
to HCC. While I was here I was introduced by first
deft to Mr. Merten (id.) I
I was told by Mr. Merten the pltfs were the
suppliers of container equipment to the defts and
their customers. I was told the defts were the
agents of the pltfs. I can't remember who told
me this. Many persons told me so. The first
deft told me about this also. I did discuss with
20 Mr. Merten about lashing chains for containers.
When I returned to Japan I tried to secure orders
for container equipment - from all the shipyards in
Japan.

Q. Did you have in particular receive an inquiry
for the construction of two vessels requiring
container equipment to be built at the
Fukoka Shipyards?

A. Yes. Having received the inquiry I tried
to contact the defts.

30 Q. Did the defts on hearing from you send any-
body to Osaka?

A. I received quotations from Inter Spain.
Before I received the telex from Spain I
received a small telex from S'pore under Mr.
James Khoo's name. I can't remember 100%
but remember James Khoo saying that he got
trouble with the defts. Mr. James Khoo sent
an inquiry to Inter Spain and I got the
quotation direct from Inter Spain.

40 I can't remember if Mr. Hernandez came to
Osaka.
I sent the inquiry about the Fukoka project

In the High
Court

Notes of
Evidence
Defendants'
Evidence
No. 12 - DW3
Ninji Nishi-
kawa
Examination
12th February
1982
(cont'd)

to the defts.

Mr. Hernandez came to Osaka to go to the
Fukoka shipyard. I can't remember when this
was.

Mr. Hernandez came there the same year I
started my Co. I started my Co. in 1978 March.
My Co. was dealing in shipping building
equipment. We were exporting shipping
building equipment from Japan.

Mr. Hernandez went to Osaka after I came to
S'pore in Jan 1978. I can't remember how long
after Mr. Hernandez came to Osaka. I met Mr.
Hernandez at Osaka airport.

Fukoka Shipyard is in Nagasaki city. We paid
Mr. Hernandez's air ticket to Japan. I took
him to Fukoka Shipyard to get the order for
Inter. I expected to get a commission from
Inter. Inter agreed to pay me a commission.
I received a telex from Inter in Spain. Mr.
Merten sent only the telex.

10

20

(Mr. Elias undertakes to produce the invoice
from Inter to Fukoka regarding this job).

(Mr. Nishikawa was to give some idea of the
value of the work at Fukoka)

Defendants' Evidence

No. 13

DW4 Roy Chua Keng Loy

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 13 - DW4
Roy Chua
Keng Loy
Examination
12th February
1982

DW4 Roy Chua Keng Loy, a.s.

I am an advocate and solicitor of the Supreme Court here, living at 25 Jln. Merlimau, S'pore. I am a solicitor of the defts and my firm has been the solicitors for the defts for some time.

- 10 Q. Were you asked by the first deft and one Sunny Choo to accompany them to Spain?
- A. Yes. We flew from London to Spain on 22.9.77. We were in Spain from 22.9.77 to 25.9.77. We were in Madrid for three days. In Madrid I met Mr. Merten (id.) and we were also introduced to a Mr. Hernandez. During the time we were in Madrid we were taken around to the office of the pltfs. and their factory. During our stay in Madrid
- 20 discussions took palce between Mr. Merten of the pltfs and the first deft representing the defts regarding the defts' appointment by the pltfs as their distributor and sole agent in S'pore. These discussions took place in the pltfs' office in Madrid. The language used between Mr. Merten, Sunny Choo and myself was English. The first deft used the Chinese dialect Hokkien to communicate with me. At times I or Sunny Choo acted as
- 30 interpreter for the first deft in his discussions with Mr. Merten. I am conversant with the Hokkien dialect.
- Q. At the end of the discussions was there any form of agreement?
- A. It was orally agreed between Mr. Merten for the pltfs. and the first deft for the defts that the defts were appointed sole agent of the pltfs for a period of two years commencing from January 1978. It was agreed
- 40 that the defts would be paid commission of 8% based first of all (1) on direct sales from consignment stock to be carried by the defts in S'pore. In fact there were discussions about supply to the defts of stocks on consignment basis. The amount of

In the High
Court

Notes of
Evidence
Defendants'
Evidence
No. 13 - DW4
Roy Chua
Keng Loy
Examination
12th February
1982
(cont'd)

consignment stock was not stated then. Not all goods to be supplied by the pltfs to the defts were to be on consignment basis. The amount of the stock to be supplied on consignment basis were to be determined by both parties after the pltfs' delegate Mr. Hernandez had arrived in S'pore. So the 8% was to be on sales from these consignment stocks. The position as I understood it was the defts were to sell the goods on behalf of the pltfs and they were to get 8% of the sale price as their commission. The second category was the defts were entitled to an 8% commission on any confirmed order executed by the pltfs through the defts. In other words if the defts received an order for the pltfs and that order comes from a S'pore customer or any other customer in any part of the world and it resulted in the pltfs supplying the goods then the defts would be entitled to 8% of the value of that confirmed order. In this case the price will be fixed by the pltfs.

10

20

The third category where the defts were entitled to 8% was on the price of any confirmed order that comes from the Far East or any of the Asean countries irrespective of whether the confirmed order was made through the intermediary of the defts or not.

If the order comes from the territories within the defts' agreement then he is entitled to the 8% commission on the order.

30

It was envisaged that the debt Co. would have to incur expenses in promoting the products of the pltfs after their appointment and then they will only sell the pltfs' products for the duration of the appointment.

I understood the limitation of territory was only as far as the third country was concerned.

It was agreed that the pltfs would send Mr. Hernandez to be stationed in S'pore and the maintenance of his stay in S'pore would be borne by the defts. It was kept at that. The details were to be worked out subsequently.

40

In the first category the goods were not consignment stocks but stocks of the defts that he can sell them at whatever price he chose to sell them.

When the defts buy direct from the pltfs then no commission arises. The defts get the best price they were able to negotiate.

In the High Court

; Adj to a date to be fixed by the Registrar ;

Notes of Evidence Defendants' Evidence No. 13 - DW4 Roy Chua Keng Loy Examination 12th February 1982 (cont'd)

Suit No. 1092 of 1979 (Part-Heard)

Between

Inter Equipos Navallas S.A. Plaintiffs

10

And

Lew Kah Choo & 3 others Defendants

Coram: T. Kulasekaram J.

NOTES OF EVIDENCE

Cross-Examination 10th May 1982

Monday, 10th May 1982.

DW4 Roy Chua Keng Loy, ofa.

Xxd. by Mr. Elias

20 I went to Spain both as a friend and a legal adviser. I was called to the Bar here in Feb 1968. In Sept 77 I was a member of the Bar of 9½ years' standing. If I was instructed I was capable of drawing up an agreement which was arrived at during the meeting. I did not advise my client to have such an agreement recorded in writing. I did not receive any instructions to reduce them into writing.

Q. Did you advise them to have a proper agreement drawn up at the end of the meeting?

30

A. I did not advise them because my understanding was that the agreement which was on very broad terms would be reduced into writing after both Mr. Hernandez's and Mr. Merten's arrival in S'pore in Jan of the following year i.e. Jan 78. To my mind there was an agreement on those terms reached on 25.9.77 in my presence. There were further details to be worked out like Mr. Hernandez's stay in S'pore for the duration of the agreement. These details would have to be worked later. We had to leave for London the next day rather urgently.

In the High Court

Notes of Evidence Defendants' Evidence No. 13 - DW4 Roy Chua Keng Loy Cross-Examination 10th May 1982 (cont'd)

Q. I suggest that in fact you have to leave for London the next day is not a valid reason for not having reduced into writing that agreement because here you were able to repeat those terms as in the pleadings?

A. As I said earlier there were other details to be worked out and I did not receive instructions to reduce that oral agreement into writing.

Q. I suggest your memory is not as clear as you find it without attaching your integrity on this point whether there was a firm agreement and what those terms were? 10

A. It is clear to me that there was an agreement and the terms were as I have indicated. The word 'provisional' was never used during the discussions.

Q. I suggest even if the word provisional was not used the intent of the parties was that what was discussed was to be provisional? 20

A. This is not my instructions.

Q. Look at AB5 - 7. This is letter dated 6.10.77. Is this not inconsistent with agreement you say was reached. Here it speaks of step by step study of market conditions etc.?

A. All that is stated here was not agreed on 25.9.77.

Q. Were you after you left Madrid consulted by your client as to recording that agreement in writing? 30

A. No.

No Rxm.

Defendants' Evidence

No. 14

DW5 Sonny Swee Choo Soon

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 14 - DW5
Sonny Swee
Choo Soon
10th May 1982
Examination

DW5 Sonny Choo Swee Soon, as.s.
living at 323H, Blk.111, Bedok Nord Rd,
S'pore.

I am the marketing director of the H.C.
group of companies.

10 In Oct 1976 I was not working for the defts
Hock Cheong Co. My connection with HCC in 1976
was the setting up of the U.K. Co. called HCC
Offshore Supplies (U.K.) Ltd. of which I was the
Managing Director. My job then was the marketing
of wire ropes and fittings for ships and offshore
industries - to the North Sea oil rigs. My job
was also to visit manufacturers in Europe and try
and represent them in S'pore and the Far East.

20 In May 77 I came to know the pltf. Co. through a
friend working in that Co. called Mr. W. Watson.
I sent a telex to Spain to the pltf. Co. making
certain enquiries. I had a telephone call from
Mr. Merten (PW3) from Madrid. As a result I went
to Spain. I was met by Mr. Merten. My U.K. Co.
was to be paid 8% commission on all orders
generated by my Co. I arranged to visit of Mr.
Merten and Mr. Hernandez to S'pore in July/Aug 77.
They wanted to see HCC7s set up in S'pore.

30 I knew HCC in S'pore were manufacturing spreaders
in July/Aug 77. In fact even before that they
were manufacturing spreaders.

40 During my first visit to Mr. Merten in Spain I
explained to him that the defts were buying
container fittings from Japan as well as the U.K.
and that the defts were also manufacturing
spreaders in S'pore. After Mr. Merten's and Mr.
Hernandez's visit to S'pore Mr. Merten by telephone
expressed his intention to appoint the defts as
sole agents for their products - "Inter" products
in the F.E. and S.E.A. and the defts should come
down to Spain to finalise the terms.

So on 22.9.77 Mr. Lew the first deft together with
Mr. Chua and myself went to Spain.

In the High Court

Notes of Evidence Defendants' Evidence No. 14 - DW5 Sonny Swee Choo Soon 10th May 1982 Examination (cont'd)

- Q. Can you tell us whether any agreement was reached between the pltfs and the defts?
- A. Yes. There was. It was agreed that Inter would pay the defts 8% commission on
- (1) all direct sales from the consignment stock to be held in HCC;
 - (2) on all confirmed orders recommended by the defts;
 - (3) on all confirmed orders originating from the F.E. and S.E.A. irrespective whether the orders were recommended by the defts.

10

The agreement was for a period of two years from Jan. 1978.

- Q. Was there any talk about one Mr. Hernandez?
- A. Yes. The defts would have to pay as follows:-
- (1) Mr. Hernandez's, his wife's and child's flight from Spain to S'pore;
 - (2) the defts will have to provide a flat for Mr. Hernandez and his family;
 - (3) the defts were to provide a car during Mr. Hernandez's stay in S'pore;
 - (4) the defts were to provide an English speaking servant for Mr. Hernandez;
 - (5) the defts were to provide all travelling expenses to visit the countries within the F.E. and S.E.A. where HCC the deft. Co. were agents.

20

Q. Do you know anything about a joint venture?

A. Yes. That was in March 1978.

30

Q. Were you in S'pore when AB76 - 80 were signed?

A. Yes. I was present when this document was signed. It was at the defts' office at Kallang Place.

Q. Was there any celebration to mark this event?

A. Yes. The same evening we all went down to Mandarin Hotel. We had champagne and

celebrated the success of the joint venture. Mr. Hernandez and Mr. Merten were present at the party. Either of them did not complain about the conduct of the defts. There was no complaint at all by them. The following morning i.e. 19.5.77, first deft and myself left for Taiwan and from there we proceeded to Japan. While we were in Japan on 22.5.77, at Mr. Nishikawa's office (DW3) Mr. Nishikawa received a call from Mr. Hernandez. On 24.5.77 we rushed back to S'pore.

In the High Court
Notes of Evidence Defendants' Evidence
No. 14 - DW5
Sonny Swee Choo Soon
10th May 1982
Examination
(cont'd)

10

Q. Why?

A. We heard about the cancellation of the joint venture. I drafted a telex on behalf of first deft (AB85) to Mr. Merten protesting.

Q. Did you see these two letters AB82 and AB83?

20

A. Yes. When we were in Taiwan the first deft telephoned HCC in S'pore and learnt about the first letter. We learnt about the second letter also by telephone from Taiwan to HCC in S'pore. First deft did the telephoning.

Q. Can you say if there is any truth in these two letters?

A. None whatever.

Xxd. by Mr. Elias

Cross-
Examination

I came to S'pore on 7.5.78.

Q. How can you say whether anything in AB82 or AB83 is true? When were you in S'pore?

30

A. Between Jan 78 and May 78 I was in London and not in S'pore.

Q. The meeting in Sept. 77 in Madrid you also told about an agreement on five specific points concerning Mr. Hernandez?

A. Yes.

Q. Mr. Chua in his evidence said the details about Mr Hernandez's stay in S'pore had not been agreed?

40

A. I say that these points were agreed. I don't know what Mr. Chua said.

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 14 - DW5
Sonny Swee
Choo Soon
Cross-
Examination
10th May 1982
(cont'd)

- Q. Look at this letter AB5 - 7. At AB5 last para - "Our ideas....." Is that true or not - only partially discussed?
- A. There was no partial discussion in these matters but was completely discussed and settled.
- Q. Look at AB7. Had it to be confirmed as stated there?
- A. No. It was agreed in Spain and nothing had to be confirmed.
- Q. Look at the penultimate para of AB7. Are you saying this is unnecessary as there is no more decision to be made?
- A. That is so.
- Q. I suggest Mr. Choo that your memory about the whole agreement is incorrect?
- A. In what respect.
- Q. There was no agreement made in Madrid?
- A. Yes there was.
- Q. Look at first para at AB7 - "... will be extended step by step...." What have you to say about this?
- A. It does not tally with what was agreed.
- Q. You say you knew the defts were manufacturing spreaders in July 77? Were you in S'pore in July 77?
- A. I was in S'pore in March 77.
- Q. Did you in March 77 see any spreaders being manufactured by the defts?
- A. Yes.
- Q. Of what design?
- A. I don't know the technical design. I can't say if a complete spreader was manufactured by the defts. I saw parts of a spreader lying around. I saw the parts being manufactured by the defts. I saw the welders welding those parts. I don't know the design of these spreaders.

10

20

30

Q. At that time there were no spreaders from "Inter" in S'pore?

In the High Court

A. I don't know about that. I did not even know about " Inter" then. I have not effected any sales of spreaders on behalf of the defts.

Notes of Evidence Defendants' Evidence No. 14 - DW5 Sonny Swee Choo Soon Cross- Examination 10th May 1982 (cont'd)

Q. Did you at any time see a complete spreader manufactured by the defts?

A. No.

10

Q. Could you not have written down the agreement that was reached in Spain?

A. Yes.

Q. Then why did you not do so? It was an important agreement?

A. Both parties agreed that after Mr. Hernandez's arrival in Jan 78 it would be put down in writing.

Q. Why had it to be postponed till Jan 78. Why was it not put down in writing there and then?

20

A. (no answer given)

Q. I suggest no agreement was reached in Madrid. It was all tentatively discussed only?

A. It wasn't so.

No Rxm.

Adj to 2.15 p.m.

In the High Court

Defendants' Evidence

Notes of Evidence Defendants' Evidence

No. 15

DW6 Ong Geok Quee

No. 15 - DW6

Ong Geok Quee DW6 Ong Geok Quee, a.s.
Examination living at Blk. 17, No. 117-H, Teban Gardens Rd,
11th May 1982 S'pore.

I am now the Managing Director of Pacific Unimas (Pte) Ltd. I was employed by the defts on 6.1.78 and I left them in Feb 81. Before that I worked for two years with Vosper Tonycroft as purchasing officer. I was similarly employed for two years with Selco (S) Pte Ltd. before I joined the defts. I was employed by the defts as their General Manager of the Container Lashing & Fittings Dept of the defts. I was told my duties with the defts were to organise the dept. I was told that I was dealing with "Inter" products of container lashing and fitting equipment. I was only to deal with "Inter" products. I was told I had to work with Mr. Hernandez the technical adviser to Inter and one other employee who worked under me. I met Mr. Hernandez when he arrived in S'pore on 15.1.78.

10

20

Q. There was a meeting in the defts' office on 15.1.78 at about 4 p.m. between Mr. Merten and Mr. Hernandez for Inter, the first deft, myself and one Mr. James Khoo?

A. That is correct. I was supposed to record the discussions at the meeting.

Q. Look at AB20 - 21. Is that a record of the meeting prepared by you?

30

A. Yes.

Q. Is there anything there which was not discussed at that meeting?

A. No. Everything discussed is there. My signature is at the bottom of AB21. The other signature is that of Mr. Hernandez. In AB21 the words were cancelled because it was not accurately recorded. It was pointed out by Mr. Hernandez. This was corrected.

I see AB22. This is the correction of that minute.

40

I worked with Mr. Hernandez between Jan 78 and May 78.

Q. Do you have any comments about Mr. Hernandez as a technical adviser?

In the High Court

10 A. I don't think he is a qualified technical adviser. Many times when there were enquiries he had to send these enquiries back to Spain for advice on the technical details like calculations and also for prices before we could send the quotation to the client. As a technical adviser he should have been able to communicate directly with the client and give the calculations straightaway. Our business was affected by this. I did not obstruct Mr. Hernandez in his duties. In fact he was given a free hand of running the business.

Notes of Evidence Defendants' Evidence No. 15 - DW6 Ong Geok Quee Examination 11th May 1982 (cont'd)

20 I agree there were stock cards for Inter products kept in the office. The stock cards were always in the office and he had a set of keys for the doors to the office, and the cabinet contains the stock cards.

Q. Look at AB33 and AB41. Are they not quotations from S.S. and Jurong Alloys?

A. Yes. These are quotations from these two foundries to obtain the price comparison whether it is cheaper to manufacture here or to manufacture in Spain as I was instructed by Mr. Hernandez.

Q. Why did Mr. Hernandez require you to obtain these quotations?

30 A. For the future requirements in the joint venture.

Q. Was there anything secret in these things?

A. No.

Q. Look at D7. Have you seen this letter before?

A. Yes. It was sent by Mr. Hernandez to Mr. Merten. This letter was kept in the file in the office along with other correspondence.

Q. Were you instructed by anybody to work out the project costs of the joint venture agreement?

40 A. Yes. The first deft Mr. Lew instructed me to do that.

In the High Court

Notes of Evidence

Defendants'

Evidence

No. 15 - DW6

Ong Geok Quee

Examination

11th May 1982

(cont'd)

Q. Look at AB76 - 80, Were these documents prepared by you?

A. Yes.

Q. Could you tell us what the overheads per month would have been?

A. About \$15,000/= a month.

Q. Were you involved in estimating the volume of sales of Inter products for the year 1978?

A. Yes. There are written records of the estimates I made. From my estimates the value of sales for 1978 was projected at \$55 million. Of this amount HCC would have received directly 15 to 20%.

10

Xd. by ct.

[Q. What do you mean by received directly?

A. When we bid for a job we should be able to secure the business.]

Q. Were you in your office on 19 and 20th May 78?

A. Yes. I received two letters from Mr. Hernandez and Mr. Merton one dated 19.5.78 and the other dated 20.5.78 regarding the joint venture. They are AB82 and AB83. I received those letters. I found them very strange.

20

Q. Why?

A. We were already agreed on the joint venture and the next day we received this kind of letters.

Q. So what did you do?

A. On 19.5.78 when the first deft telephoned me from Japan I explained to him the contents of the letters. He was also very surprised.

30

Cross- Examination

Xxd. by Mr. Elias

There was a party to celebrate the joint venture on 18.5.78. It was at the Mandarin Hotel in the night. Mr. Lew left for Japan on the 19.5.78.

I see AB82 - third para from the bottom. All

persons mentioned there met at the coffee house that morning - 19.5.78. Jimmy Lew is the second deft.

In the High Court

Notes of Evidence Defendants' Evidence No. 15 - DW6 Ong Geok Quee Cross-Examination 11th May 1982 (cont'd)

Q. Did Mr. Hernandez explain his reasons then?

A. No. He only said he did not want to participate in the joint venture and he would give his reasons in the afternoon.

[Xd. by ct.]

Q. What was your reaction?

10 A. To wait for the letter. I was a little bit surprised but I did not know the reason why he did not want to participate.

Q. What was Mr. Merten's reaction?

A. He said he may send another delegate later on. I took it he would send another person to replace Mr. Hernandez.]

Q. I put it to you Mr. Merten never said any such thing?

A. I say Mr. Merten did say that.

20 Q. Re the meeting of 15.1.78, there are two sets of minutes?

A. Yes.

Q. Look at AB18, para.1 - Far East and Asean Regions? Look at AB20 - corrected to S.E.A. Why this correction?

A. This was corrected by Mr. Hernandez. I recorded it wrongly at first.

30 Q. You refer to correction in para. 4(b) at AB21. That correction appears at AB19. But the correction at AB22 is a substituted para and not a mere correction?

A. I say it is just the correction. The amendment at ab22 is an addition to the earlier minutes.

Q. I put it to you that para. 1 of the minutes is not correct. It was discussed but no sole agency was granted at that time?

In the High Court

Notes of Evidence Defendants' Evidence No. 15 - DW6 Ong Geck Quee Cross-Examination 11th May 1982 (cont'd)

A. That is not true. This is a correct record of all that took place. There is no document in the files produced showing my estimated figure of \$55 million at the projected profits for 1978.

Q. When did you arrive at this figure?

A. After the breach. I found the \$23 million of contract in the five months. Somewhere around last year based on this figure I estimated the value for 1978 \$55 million.

10

Adj to 2.15 p.m.

2.15 p.m.

Hearing resumed.

Xxd. by Elias contd.

On the basis of the first five months of 1978 I estimated that \$55 million would be the quotations that HCC would be making for the year 1978.

During the first five months HCC studied projects to the value of \$23 million.

20

Of these in some cases HCC did not even make a quotation. In the first five months the total value of work secured by HCC was below a Million dollars.

Working on the agency the profit would be 8% of the work actually secured and done i.e. 8% of \$1 million for the five months in 1978. I produce this document, marked D8. It is working paper showing how I arrived at \$23 million for the first five months of 1978.

Q. Look at items 1001 to 1027 of D8? I put it to you only two items resulted in firm orders, viz. 1008 for \$13,318.71 and 1012 for \$14,437.50. Do you agree?

30

A. I have to go through all the documents to give an answer.

Q. Put that for all these items the total value quoted or estimated is \$8,628,531/= ? Do you agree?

A.

- | | | | |
|----|----|--|--|
| | Q. | Put that it is very much less than \$1 million? | In the High Court _____ |
| | A. | No. | Notes of Evidence Defendants' Evidence No. 15 - DW6 Ong Geok Quee Cross-Examination 11th May 1982 (cont'd) |
| | Q. | Put you did not make a list of all work secured during the first five months of 1978? | |
| | A. | That is so. | |
| | Q. | So your figure for less than a million dollars is mere conjecture only? | |
| 10 | A. | Yes. | |
| | Q. | Look at AB33. It is addressed to attention of Michael Lew? | |
| 20 | A. | I sought this quotation from S.S.Ltd. I asked for a representative from S.S. Ltd. to come to our office and it was I who asked for this quotation. Probably S.S. Ltd. was giving respect to Mr. Michael Liew. He may have been present at the discussion in our office when I gave S.S. Ltd. instructions for the quotation. | |
| | Q. | Put that if you asked for this quotation you did this at the instruction of Michael Liew and not at Mr. Hernandez's instruction? | |
| | A. | No. It was on Mr. Hernandez's instructions. Mr. Hernandez wanted the quotation for the purpose of the joint venture. He wanted to find out whether it was cheaper to manufacture here or in Spain. | |
| 30 | Q. | But the joint venture was for the whole range of Inter goods. Why quotations for only the small parts? | |
| | A. | It was one of the several. | |
| | Q. | Put that HCC wanted to find out the cost to produce the parts here without buying from Inter? | |
| | A. | That is not so. | |
| | Q. | Look at AB41. Put, this inquiry for quotation was not from Mr. Hernandez but from HCC? | |
| | A. | That is not so. | |

In the High Court

Rxd. by Mr. Cheong

Notes of
Evidence
Defendants'
Evidence
No. 15 - DW6
Ong Geok Quee
Re-
Examination
11th May 1982

The two files I have refer to all inquiries for projects from Jan to May 78. Each project is given a separate project number. The project numbers are from 1001 to 1068. The second figure there shows the month the project was started. I have heard of the Fukoka Shipyard project. It is project No. 1068-5-78 (in the pleadings page 11). The papers relating to this project are not in the file. This project was subsequently dealt with by Inter.

10

Q. Are the projects in the file on-going projects?

A. Yes. Some of the projects may be dealt with after the termination of the agreement here.

Q. Are you able to say from your file how many of the projects were dealt with by Inter after the termination of the agreement?

A. It is not possible.

20

Defendants' Evidence

No. 16

DW7 Lew Kah Choo

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 16 - DW7
Lew Kah Choo
Examination
11th May 1982

DW7 Lew Kah Choo, a.s. in Hokkien

10 I am also known as Michael Lew living at 19 Li Hwan Walk, S'pore. I am the first deft and the Managing partner of the deft firm. I am not literate in the English language. Around July/Aug 77 I was contacted by Sonny Choo (DW3) who was then in London and he told me that he might be able to obtain representation for the defts from the pltfs who were in Spain. I then instructed him to put every effort to obtain this representation. As a result Mr. Merten (PW3) and a Mr. Cidon visited my firm in July 77.

Q. Before the visit to S'pore your firm was dealing in container equipment?

A. We have been dealing in container equipment since 1976.

20 Q. And has your company been manufacturing container parts?

A. Yes. I know what a "spreader" is. I also manufacture spreaders. I have been importing container parts from Japan and Britain. All this activity was before Mr. Merten and Mr. Cidon arrived in S'pore in July 77.

Q. When Mr. Merten and Mr. Cidon were in S'pore did you shown them around to your customers?

30 A. Yes, including the Neptune Orient Line. Subsequent to their visit I, DW4, DW5 went to Madrid in Sept 1977. The purpose of my visit to Madrid was to negotiate for the agency for container fittings from the pltfs. At that meeting both DW4 and DW5 acted as interpreters as I could not speak English properly. Representing the pltfs were Mr. Merten and Mr. Hernandez.

Q. Was there any agreement reached between the pltfs and the defts regarding the agency?

40 A. There was an agreement reached as far as I understood it.

In the High Court

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Examination 11th May 1982 (cont'd)

- Q. What was agreed. Tell us in your own words?
- A. The agreement was that we were to receive 8% commission for consignment stock. As far as the Far East and S.E.A. was concerned we were to receive 8% commission based on the business recommended by us.
- Q. Anything else?
- A. It was also agreed that the pltf Co. would send a representative over to S'pore.
- Q. Was there any agreement about the duration of this agreement? 10
- A. Yes for a duration of two years beginning from 1st Jan 1978.
- Q. In return for all that did HCC agree to do anything at their expense?
- A. They agreed that all the travel and advertising expenses incurred by the representative of the pltf Co. be borne by us. We were also to provide a car, a house and a secretary for the said representative during his stay in S'pore. 20
- Q. At that meeting in Madrid we know you did not reduce it into writing?
- A. That is so.
- Q. Why did you not instruct Mr. Chua to reduce it into writing right away then and there?
- A. Because Mr. Merten told me through the interpreter Mr. Chua that the agreement would be formally signed in S'pore when he arrived in S'pore in Jan 1978.
- Q. On 15.1.78 there was a meeting in your office between Mr. Merten, Mr. Hernandez, yourself, Mr. Ong (DW6) and Mr. James Khoo? 30
- A. Yes. Mr. Ong acted as the person to record the minutes of the meeting. AB20 - 21 is the record of that meeting.
- Q. It has been suggested that your company had been secretly and fraudulently manufacturing container equipment parts?
- A. This is not so.

Q. Is there any reason for you to secretly and fraudulently manufacture those parts?

In the High Court

A. There is no reason for me to do that.

Notes of Evidence Defendants' Evidence

Q. Is it true that your company has been manufacturing some parts of container equipment even up to May 1978?

No. 16 - DW7
Lew Kah Choo Examination
11th May 1982
(cont'd)

A. Yes that is true.

Q. Why did you do that?

10 A. Container equipment consists of many items. In order to complete the orders we have to manufacture some of the parts to meet the orders.

Q. By doing that would you enhance or damage the pltfs' interests?

20 A. Of course we would enhance the pltfs' interests. We were actually manufacturing those parts at a loss. The reason being it would be cheaper to import these parts rather than have the parts manufactured here. We were doing this merely to complete the orders and meet the customers demands. Mr. Hernandez knew about this. Mr. Merten also agreed it was a good idea.

Q. Around Feb/March 1978 you were keen on starting a joint venture company with the pltfs?

30 A. I was. There was a lot of correspondence and negotiations leading to signing of AB76 - 80. At the bottom of AB80 appears my signature on the right. The other signature is that of Mr. Merten.

Q. Did you celebrate the conclusion of this agreement?

A. Yes at the Mandarin Hotel.

Q. On the next day you and DW5 left for Taiwan?

40 A. Yes. There I was informed by DW6 when I telephoned him in S'pore from Taiwan that Mr. Hernandez and Mr. Merten had said in letters that they were calling off the joint venture. I was taken by surprise that this thing should happen. When I came back to S'pore Mr. Sonny Choc (DW5) drafted a telex (AB85) which was sent in my name to Mr. Merten.

Adj to 10.30 a.m.

In the High Court

Wednesday, 12th May 1982

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Examination 12th May 1982

Parties as before

DW7 Lew Kah Choo (ofa)

xn-in-ch (contd.)

Q. Between Jan and May 78 when Mr. Hernandez was in S'pore what was the average monthly expenditure of your container department?

A. About \$15,000/= or over \$180,000/= a year.

Q. So if the turnover of the container department was less than \$3 million a year then you would incur a loss?

10

A. Yes.

Q. Look at AB17 dated 5.1.78? Why did the defts send Mr. James Khoo on a market survey to the places mentioned there?

A. After we had been appointed sole agent in the Far East and S.E.A. regions we had to send our representatives to these countries to survey the market so that we could furnish a reply to Mr. Merton after the survey.

20

Q. Look at AB24A. That is an advertisement the defts placed in the Sunday Times of 19th Feb 1978? Was Mr. Merten fully aware of this advertisement before it was placed?

A. Yes he was aware of it.

Q. Did he object to anything in the advertisement?

A. He did not.

Q. Was a copy of this advertisement sent to Mr. Merten with a covering letter as at AB24. In that we asked for half the advertising costs?

30

A. Yes. I agree that sum was subsequently paid by Mr. Merten.

Q. By AB24A you describe yourself as sole agent in the Far East and S.E.A. Why do you so describe yourself?

A. Because in Sept 77 when we were in S'pore to negotiate for the agency it was already

confirmed that we were to be the agents in the Far East and S.E.A.

In the High Court

Q. You said it was for a period of two years. Why did you agree to a period of two years?

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Examination 12th May 1982 (cont'd)

A. We had to bear all the travelling and advertising expenses. It would take at least two years to recover these expenses. In addition we had to provide a car, accommodation, a secretary and office staff for the pltfs' representative's stay in S'pore.

10

Xxd. by Mr. Elias

Cross-Examination

In the meeting at Madrid I did not speak in English but through the interpretation of Mr. Choo and Mr. Chua. Though I did not understand English everything was explained to me through my interpreters. I actively participated in the discussions.

20

Q. So your understanding of that meeting was what was told to you by Mr. Chua and Mr. Choo?

A. Yes.

Q. If you thought an agreement was reached why did you not ask it to be recorded there and then?

A. It was Mr. Merten's idea that the agreement was to be signed when he came to S'pore. The discussion was conducted on mutual trust.

30

Q. But eventually it was the intention of the parties to have a written document? Why was it not done there and then?

A. The agreement was only to be put into operation in Jan 1978 after Mr. Merten and Mr. Hernandez came to S'pore.

Q. In other words what was discussed in Madrid was to be finally decided in S'pore in January?

40

A. No. All that had to be done in S'pore was to reduce it into writing.

Q. Look at AB20. This document was prepared by Mr. Ong (DW6)?

In the High Court

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Cross-Examination 12th May 1982 (cont'd)

- Q. There it is stated the objects were to finalise the contract....?
- A. Yes.
- Q. So up to this meeting there was no final contract?
- A. Yes.
- Q. It further said "the following agreed and accepted in principle"? So this meeting was not final as the matters were accepted only in principle?
- A. Yes.
- Q. Nothing more was agreed than what is stated in the minutes here?
- A. All that was agreed is included in these Minutes.
- Q. As amended by AB22?
- A. Yes.
- Q. Put that Mr. Merten himself never used 'sole agency' on your appointment?
- A. He did.
- Q. Look at AB22, reply to para 4(a). Did you (HCC) in fact carry stock to the equivalent of the consignment stock?
- A. Yes.
- Q. Did you in fact purchase stock to the value of the consignment stock?
- A. Yes.
- Q. Would it be more advantageous to sell your stock before you sold the consignment stock?
- A. No.
- Q. Why not?
- A. The container items consist of many items. We had to comply with the customers' request.
- Q. Does your stock and the consignment stock consist of the same stock?
- A. No.

10

20

30

- 10 Q. In company stock your capital is not involved but in your stock your capital is involved.
- A. Yes it would be advantageous to sell our stock first.
- Q. The arrangement at 4(b) is to prevent under cutting?
- A. Yes.
- Q. Mr. Hernandez was not kept informed of what was going on?
- A. That is not so. Mr. Hernandez was kept informed.
- Q. Look at AB33. This is addressed to your attention. Did you ask for this quotation from S.S. Ltd.?
- A. No.
- Q. Then why is it addressed to your attention?
- A. How do I know.
- Q. When did you first see this document?
- 20 A. I have not seen this document. Soon after 4th March 78 I knew about it. This quotation was sent to our Kallang office. I was stationed in our office in Jurong.
- Q. Your Jurong office is a manufacturing plant?
- A. It is a manufacturing factory.
- Q. Did you ask why a quotation of this nature was asked for?
- A. I was aware they wanted to check on the price.
- Q. But why?
- 30 A. This was to find out whether it would be cheaper to manufacture locally or to import these parts from Japan.
- Q. These are Inter parts? Did you ask Mr. Merten's permission to manufacture parts in S'pore?

In the High Court

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Cross-Examination 12th May 1982 (cont'd)

A. We were interested in a joint venture and we were trying to find out whether it was feasible to manufacture the parts locally or to get them from Spain. Mr. Merten knew about it all along.

Q. How do you know Mr. Merten knew about this?

A. Because we had discussed this matter with Mr. Merten. Mr. Merten had agreed that we should get the supplies from the cheapest source. After that Mr. Merten and Mr. Ong proceeded to investigate the matter.

10

Q. When did Mr. Merten discuss this matter?

A. I can't remember.

Q. Put to you that Mr. Merten never discussed such a matter with you?

A. He did otherwise we would not take the trouble to check on the prices.

Q. Look at AB45. There you asked for permission from Mr. Merton?

A. Yes.

20

Q. The reply is in AB46?

A. Yes. Permission was granted to manufacture of lashing bars. Qualified permission in one of spreaders as at AB46

Q. Why was not permission sought for inquiry concerning these parts?

A. Mr. Hernandez was aware.

Q. Look at AB41. Another request for quotation. When did you know about this?

A. About the same time.

30

Q. Put that was a secret inquiry?

A. No. It was not a secret inquiry.

Q. In May 78 were you manufacturing spreaders in your Jurong factory?

A. No.

- Q. But Mr. Merten said he saw spreaders in the course of manufacture in May 78?
- A. That is only what Mr. Merten says. We were manufacturing these spreaders way back in 1976. We were manufacturing spreaders on a small scale in 1976. In May 1978 we were not manufacturing spreaders.
- Q. Refer to Mr. Merten's evidence at N of E page 10? What do you say?
- 10 A. The spreader parts which Mr. Merten saw that day were actually the left overs of unfinished products we were manufacturing in 1976. If we were manufacturing the spreader parts in May 1978 we would not be foolish enough to show Mr. Merten around the factory.
- Q. Yes you did not show Mr. Merten around but Mr. Gan innocently showed Mr. Merten around that day?
- 20 A. These spreaders were left there over a long period - they were rusty.
- Q. Do you agree that all spreaders are not of the same design?
- A. I say all spreaders are of standard design.
- Q. If they were of standard design why had you to ask for their permission.
- A. We were their sole agents and so we had to ask their permission. We were trying to find out whether it would be cheaper to manufacture them in S'pore rather than get them from Spain.
- 30 Q. Look at AB46. What is Merten willing to agree there?
- A. Agree that the spreaders will be manufactured in S'pore using Inter spare parts. The frame will be made in S'pore but we will be importing the other parts of Inter. All spreaders are about of standard design.
- Q. Look at N/E page 11. That item of EAT3 - shown in page 11 of P9. In May 78 did you have a stock of these items EAT 3 without the Inter mark?
- 40 A. I am not very sure whether we had any or not.

In the High Court

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Cross-Examination 12th May 1982 (cont'd)

In the High Court
Notes of
Evidence
Defendants'
Evidence
No. 16 - DW7
Lew Kah Choo
Cross-
Examination
12th May 1982
(cont'd)

- Q. Merten says on his visit to your factory in May 78 at page 11 of N of E. (Refers to the evidence on EAT3 at page 11 of N/E)
What have you got to say to this evidence?
- A. These parts which Merten saw may have been the items bought by us in 1976.
- Q. These parts are identical to EAT3 of Inter. Are you saying in 1976 someone else was manufacturing these parts identical to "Inter" parts?
- A. That is only what he alleged.
- Q. If you had these parts in 1976 why did you not sell them for these two years?
- A. I have not been able to find any buyers.
- Q. Look at AB38. There is item 211, EAT-3. 20 pieces of this item in stock - consignment stock. Why import 20 pieces EAT-3 from Spain on consignment if you have a crate of these items in your factory?
- A. In 1976 when we bought these parts they were not in complete form whereas in 1978 when we purchased these parts they came in complete form with the hook.
- Q. Isn't the hook the most important part of that item?
- A. Some may make use of the hook while others make use of the clam. I only had the clam and not the hook.
- Q. Merten says he saw the item EAT-3, a crate of it which includes the clam and the hook?
- A. That is not so I did not buy the hooks. So Mr. Merten's evidence can't be the truth.
- Q. Look at AB41, Item 1. That relates to EAT-3?
- A. I was seeking quotation for this item.
- Q. Look at AB38 - one piece was taken and sent to Jurong Alloy for manufacturing that item?
- A. I have no knowledge of this.

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Q. I put to you that you or the defts caused EAT-3 to be copied without Inter's name and those copied items were seen by Merten at your factory in May 1978?

In the High Court

A. That is not true.

Q. Look at this file. Does it contain items as in the catalogue of HCC?

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Cross-Examination 12th May 1982 (cont'd)

10

A. Yes. I see nine pages of photocopies from HCC's catalogue - marked P14 (9 pages collectively).

Q. Do you agree that these items in P14 are the same as those illustrated in P9? Take page 1 of P9 and P14.

A. I agree the parts are the same. The numbers are different.

Q. Turn over to the next page of both P9 and P14 - are the items the same?

20

A. I agree the parts are the same but the numbers are different. I see page 5 of P14 is the same as page 11 of P9. EAT-3 is the same as HT-2. All the parts are essentially the same.

Q. How do the costs of your items compare with the purchase price of pltfs' items?

A. Our price would be more. Our goods are manufactured in Japan, Taiwan and U.K. They cost more than the purchase price of the pltfs.

Q. Then why don't you buy them from the pltfs.?

A. We are having trouble with the pltfs.

30

Adj to 2.15 p.m.

2.30 p.m. Hearing resumed.

DW7 Lew Kah Choo (ofa)

Xxd. (contd)

Q. In Feb 1979 in the Asia Marine Exhibition at Hyatt Hotel did the deft exhibit his products?

A. Yes. I see P3-8. These photographs of the HCC stand out at the exhibition. I am the agent of Tec Container S.A. That Co. is in the same business as the pltfs.

In the High Court

Notes of
Evidence
Defendants'
Evidence
No. 16 - DW7
Lew Kah Choo
Cross-
Examination
12th May 1982

- Q. When did you become their agent? How long before that exhibition?
- A. Some time towards the end of 1978 - late 1978.
- Q. In respect of what territories were you their agent?
- A. Singapore. Nowhere else. The other companies mentioned in P6 are not in the same business. I remained the agent of Tec Containers for about one year.
- Q. Why was that agency discontinued? 10
- A. Their products were not of a popular variety. The sales of their products were unsatisfactory. Their prices were high.
- Q. Look at AB89 - 95. All these advertisements were placed by the deft firm?
- A. I can't recall. I accept they are so.
- Q. Was AB89 placed before or after the termination of agreement?
- A. I can't recall when it was.
- Q. If it was before May 78 would it not have "Inter's" name or the pltfs' name? 20
- A. Yes. Pltfs' name does not appear here. I agree this advertisement would be after May 78.
- Q. Do you know when AB90 was published?
- A. I can't recall.
- Q. What about AB91?
- A. Feb 78 as shown in there. AB92 was July/Aug 78. AB93 in July/Aug 78. AB95 in March/Apr 79.
- Q. So even after the termination of the contract you were in business selling the same identical goods? 30
- A. Yes. Business was done on a small scale. The goods I was selling did not have the name "Inter" on them.
- Q. Look at P14 page 9?
- A. That shows our factory in Jurong.

- Q. Look at AB95. It is the same P9, page 53? In the High Court
- A. Looks like it. Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Cross-Examination 12th May 1982 (cont'd)
- Q. You were offering to sell the pltfs' spreaders?
- A. All the spreaders are practically the same.
- Q. What were the expenses of Mr. Hernandez?
- A. We did not pay Mr. Hernandez's salary in S'pore. We paid Hernandez's air passage and that of his wife and child from Spain to S'pore. I can't recall the exact amount. We paid his house rent around \$600/= p.m. He used a car belonging to HCC.
- 10
- Q. Look at AB5 - 7. Mr. Merten said at AB7 that the business will be extended step by step extended to Malaysian ... at para.1 of AB7 and your reply at AB8?
- A. We were granted the agency for the Far East and S.E.A. territories.
- Q. The territories were limited to S'pore, Malaysia and Hong Kong only?
- 20
- A. In the Sept 77 agreement we were granted the agency for the Far East and S.E.A.
- Q. The pltfs agreed to pay commission on
- (1) direct sale of consignment stock and
- (2) on every confirmed order that came through the defts?
- A. Yes.
- Q. But not on orders originating from the Far East and S.E.A. regions unless it originated from the defts?
- 30
- A. We would still be entitled to the commission even if not originating from us.
- Q. Pltfs' case is that the spreaders were in the course of production in the factory in Jurong with a view for sale by you instead of selling the pltfs' goods?
- A. That is not true. We did not manufacture these spreaders at that time.

In the High Court

Notes of Evidence Defendants' Evidence No. 16 - DW7 Lew Kah Choo Cross-Examination 12th May 1982 (cont'd)

Re-Examination

Q. The items identical to EAT-3 that Mr. Merten saw in Jurong were intended to be sold instead of selling pltfs' EAT?

A. There is absolutely no truth in that statement. It will cost more to manufacture the parts in S'pore than to get them from the pltfs in Spain.

Q. At which price did you buy pltfs' EAT-3?

A. I don't remember the price.

Rxd. (contd)

10

The container equipment are essentially standard in design. I am producing copies of various catalogues from manufacturers in Europe and Japan (not put in as exhibits)

Puts in a catalogue from Fuji Trading Co. - D9.

Item TB-1 in D9 is identical to GTV-1 in P9 page 2.

Q. In D9 page 3 item PH801A is identical to what in P9?

A. In P9 at page 9 the item is TP-1.

Q. In D9 page 5 item Tensioner is identical to what item in P9?

20

A. In P9 page 1 item GTP-1.

Q. In D9 page 7 item FA-08-1 - to which item in P9?

A. In P9 at page 18 item Model FA-2.

Q. In D9 page 12 item Model L-5 to which item in P9?

A. In P9 page 11 item EAT-3.

Q. In D9 page 13 item LB12 - what item in P9?

A. In P9 page 11 item EAT-1.

30

Q. After the pltfs terminated the agreement with the defts did the defts try to continue the container business?

A. Yes we did.

- | | | |
|----|--|---|
| Q. | Were you successful? | In the High
Court |
| A. | No. | Notes of
Evidence |
| Q. | Why? | Defendants'
Evidence |
| A. | On the one hand the prices were high and
on the other hand the pltfs had set up their
own company in S'pore and we are not able
to compete with them. | No. 16 - DW7
Lew Kah Choo
Re-
Examination
12th May 1982
(cont'd) |
| Q. | What happened to your container business? | |
| A. | We ceased doing this business some time in
1979 or 1980. | |
| Q. | Did the defts after the break with the pltfs
in May 78 try to manufacture in S'pore any
of the items catalogued in P14? | |
| A. | No. | |

10

Defence Case

- Adj to a date to be fixed by the
Registrar -

In the High
Court

No. 17
Note of
Proceedings
26th, 28th
May & 28th
June 1982

No. 17

Note of Proceedings

Wednesday, 26th May 1982

Hearing resumed
Parties as before

Mr. Cheong

Ct has to decide as a matter of law what the legal relationship between the parties were at the material time, then the ct will have to decide whether that relationship could be terminated at all before the expiry of the stipulated period beginning Jan 1978, i.e. before 1980. If the ct decides that it can be terminated before that time it will have to decide the length of notice required of the pltfs before they could terminate it presuming the defts were not in breach of any of the terms of the agreement. The ct will also have to decide assuming the defts were in breach of their duties to the pltfs as alleged, whether their allegations were sufficiently serious and inconsistent with their duties to entitle the pltfs to terminate the agreement as they did. The ct will next turn to decide that assuming the breaches by the defts were sufficiently serious to entitle the pltfs to terminate the agreement, the length of notice required.

10

20

The next issue the ct has to decide is if the defts were not in breach of their duties to the pltfs, or if the defts were in breach and those breaches were not sufficiently serious to entitle the pltfs to terminate the agreement before the expiry of the two year period, then the measure of damages to be awarded to the defts. And lastly, if the ct finds the agreement was an indeterminate one, then what is the measure of damages to be awarded in such a case.

30

All these issues depend very much on the facts here. Chronological order in which the pleadings have been filed from time to time.

- (1) The original S/C filed on 12.4.79 The claim was simply for the return of goods sent on consignment to defts or their value.
- (2) the defence and counterclaim was filed on 18.7.79 and it sets out in detail the defts'

40

version of what took place - it was an agency contract. The defts have never made a single amendment to their defence and c/claim. Their evidence both oral and documentary is entirely consistent with their pleadings.

In the High Court

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Note of Proceedings
26th, 28th
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(cont'd)

10 (3) On the other hand when the pltfs filed their original reply and defence to the c/claim on 1.8.79 they completely denied any form of agency agreement as alleged by the defts. They even went to the extent of denying para 5 of the defence and para 6 of the defence (at page 10 of the pleadings).

(4) The defts gave discovery of documents on 3.11.80 and those documents are basically those in the agreed bundle.

20 In the face of these documents the pltfs must have realised that the position was untenable so that they applied to amend their "reply and defence to c/claim" on 31.7.81 and for the first time they admit to the oral agreement but dispute some of its terms.

(5) There was a further amendment applied for on the second day of hearing on 12.11.81 when para 3 of the amended defence to the c/claim was further amended by the insertion of the word "provisionally" after evidence for the pltfs had been led.

30 (6) After the case was adj part-heard on 12.11.81 the pltfs demanded to know what the defts meant by the term "Far East" in their pleadings. The pltfs then applied by way of s/chambers for particulars of the term "Far East". It was then pointed in the statement of claim at para 2 - they themselves used the expression "Far East". They then applied to this ct on 10th April 1982 to delete the term "Far East" and substitute the words "the Federation of Malaysia and the Colony of HongKong". From this, this ct can
40 see the pltfs have shifted ground continuously.

(Refers to AB5 and the pleadings - the amended "Reply and defence to C/claim" at page 15 of pleadings para.3 "appointed the defs to be in the Republic of Singapore, the Federation of Malaysia and Colony of HongKong")

It is submitted that this particular allegation is

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(cont'd)

nothing but the repetition of the heading in AB5 which was disclosed by the defts prior to the amendment.

From all the welter of amendments and reamendments this ct has to decide whether there was this agreement and if so what the agreement was. The pltfs admit an oral agreement in their pleadings - page 15 of pleadings para 3.

(Reads page 16 & 17 of pleadings)

Defts say they were appointed sole agents for the Far East and Asian territories. Pltfs deny that and say they were distributors for S'pore, Malaysia and H.K.

10

If pltfs' allegation is correct then para 9 of the amended reply and defence to c/claim would be inconsistent because if the defts were mere distributors they owed no duty not to manufacture their own products which look like the pltfs.

Geographical area - refers to AB5, 6, 7.

AB7 para 1 - step by step to be extended...

20

AB8 - second last para - on a step by step basis to be extended to other territories.

AB9 para 9 is only a supplemental agreement. Defts will bear expenses in this field.

AB14 is an amplification of what this field is - last para there. Again borne out by AB17, last para there.

AB20 - I submit is a correct record of what took place at that meeting.

AB24 and AB24A - They paid for this advertisement - half share. They raised no objections to this advertisement.

30

The overwhelming evidence is defts were appointed by the pltfs as their sole agent for South East Asia and the Far East.

Page 36 of N of E supports our contention.

Defts say the agreement was for a fixed period of two years. The pltfs deny this.

AB9 - Re Hernandez. Defts agree to pay Mr. Hernandez's stay in S'pore for his wife and child. All other things for Mr. Hernandez - for a period of two years. Defts would want a minimum period for the agency to run - for them to recoup their expenses etc. What is the evidence denying this - solely the testimony of Mr. Merten (PW3).

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NE17C.

(cont'd)

10 Let us look whether the termination was right in law or not. Whether it was the pltfs' case that defts had secretly caused imitations of their products to be manufactured and offered for sale and sold in competition to the pltfs' products.

Refers page 19 of pleadings para 9 sub paras (b) and (c). Where is the evidence in respect of (b) and (c) of this para.

20 Hernandez was not a witness here. All that Merten said about Hernandez is merely heresay. That evidence is relevant only as an explanation of Mr. Merten's subsequent conduct. There is no evidence in respect of para 9(c) - that pltfs' goodwill suffered as a result of those allegations. We have evidence from Ong and first deft that defts co-operated fully with Mr. Hernandez.

(1) As to para 9(a) of pleadings if they were mere distributors then even if pltfs did what is alleged, still they are not in breach.

30 (2) Mr. Merten held no patent rights whatever. When somebody else produces his product and markets it he is perfectly entitled to do so.

Secretly and fraudulently -

40 Mr. Elis (PW1). He came - it was recorded in the stockcard report. They were doing it openly. It was done on the instructions of Hernandez. Mr. Ong said he got those quotations on the instructions of Mr. Hernandez. They were getting those quotations against the background of the joint venture. It was done as a preparatory step towards a joint venture.

No order was placed as a result of all this as the joint venture fell through.

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D7 - a memorandum dated 6.4.78.

Mr. Merten's evidence that he saw quotation of prices in May 1978.

Refers to page 9 of N of E. Mr. Merten's evidence in AB33 and AB41.

When Mr. Merten was confronted with D7 he said he did not see it. I submit it effectively puts his evidence as a lie.

The defts had all along said that once in a while they had to manufacture small parts even at a loss to complete the sets of an order. They do this rather than lose the business. This benefited the pltfs because their reputation was enhanced. If they can manufacture these parts cheaper here why should they not do so rather than deal with the pltfs. There was no protection by patent in respect of pltfs' goods.

10

I submit the pltfs unlawfully terminated the agreement between the parties.

Adj to 2.15 p.m.

20

2.15 p.m.

Mr. Cheong

As far as the defts were concerned things were going smoothly till the letter determining the agreement. The reason why the agreement was determined was that when Mr. Merten came to S'pore in July 77 for the first time he was taken around by the defts he had realised that there was big business to be done - NE page 5C.

At page 32 & 33 of NE.

30

I say they broke the contract because they were established now and did not require the defts' assistance.

He wanted to incorporate a local Co. He went to Tan Kay Bin his lawyer after he discovered the fabrication - on 19.5.78. Pg. 45.

In fact Tan's evidence is that instructions to incorporate this private company has taken place two months prior to discovery of fabrication 16.3.78. All along defts had been led to believe that the joint venture company would be formed between the parties. Tan Kay Bin (DW1) was instructed to

40

incorporate the joint venture as will be seen from AB71 to AB81. Even as late as 18.5.78 Mr. Merten on behalf of the pltfs signed the joint venture agreement with the defts and they celebrated this event with a champagne party. The next morning the first deft left for Taiwan and Japan.

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10 This fact was known to Mr. Merten and Mr. Hernandez. With this knowledge they acted very quickly and sent AB82, 83 and 84 to Mr. Ong - PW6. At the coffee house Mr. Ong and Mr. Jimmy Lew the 2nd deft and younger brother of the first deft. they were told they would be calling off the joint venture and letters to that effect will be delivered to them. Refers to AB83, item 8. This is not the attitude of a man who has been cheated but someone who wants to call off the contract, saying let us re-negotiate again.

20 Fukuoka project - We are entitled to this commission. We started the project. The pltfs came in, completed it. We say the pltfs unilaterally terminated the agency agreement wrongfully. If the agreement is one for an indeterminate period then it is terminable on the pltfs giving reasonable notice.

Martin-Baker Aircraft Co. Ltd. v Canadian Flight Equpt. Ltd. 1955, 2 Q.B. 556

The defts say the running expenses were \$15,000/= a month. For a year \$180,000/=.

30 Pltfs submitted statement of accounts of the Far East Ltd. Co. for the years 1978, 79 and 80 P.10, page 17.

The running expenses for 1 year is \$224,583/=.

I say the defts are entitled to commission on repeat orders.

(1972) 2 Q.B. 586
Roberts v Elwells Engineers Ltd. at 595.

We are claiming commission due to us from Jan 1978 to Dec 1979.

40 I ask for one year's commission up to Jun 79 as I am entitled to one year's notice.

Adj.

In the High
Court

Friday, 28th May 1982

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(cont'd)

Hearing resumed
Parties as before.

2.15 p.m.

Mr. Cheong

Measure of damages
Refers to AB96,
Refers to pleadings page 11 para 11.

Particulars. Loss of commission for two years
1.120000 less expenses of \$360,000/= 10
for two years. = \$760,000/=

The basis of this claim amongst other things based
on report AB96 which quotes PW3 as saying in its
first year of its operation the pltfs' S'pore Co.
of the pltfs had supplied lashing equipment worth
about 7 m. and this sum does not include conversion
or replacement.

Goh Ya Tian v Tan Song Gou & ors.
(1981) 2 MLJ 317.

We gave discovery of this document on 31.10.81. 20
I therefore rely on O.27 R.4.

Mr. Merten said when referring to AB96 that he had
no serious objections vide NE page 22.

We also rely on Mr. Ong's evidence that between Jan
and May 78 the defts had received enquiries for
quotations which he proceeded to deal with as
projects - contained in two files disclosed in
discovery. He quoted the value of these enquiries
at \$23 m. for five months and projected for 12
months at \$55 m. 30

Based on his business experience he was confident
they would receive 15 to 20% of the inquiries
which makes the gross value to be between 7 and 11
million a year. I submit our figure tallies with Mr.
Merten's figure at AB96.

It is probable and not speculative that defts would
receive orders worth \$7 m. a year.

We are claiming a profit of \$380,000/= a year
against a capital outlay of \$180,000/=.

The defts' claim is both reasonable and probable 40

Chitty on Contract, 24th Ed. vol. 1
para 1562 page 733.

In the High
Court

Pltfs admit conditions under pleadings page 9
para 3(a), (b) and (c).

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Pltfs admit (a) and (b) but deny (c).

Under head (a) - as the consignment stock is with
the defts - the defts should say what the amount
of entitlement is.

10 Under head (b) we have no means of saying how much
is due. Can be sent to the Registrar for
assessment as was done in Robert's case, (1972) 2Q.B.

We havenow in our power pltfs' goods to the value
of DM76,003/=.

Damages under particular (2) in page 11 para 11
of pleadings.

Fukuoka projects admitted, the sum of \$38,541/=.

Mr. Elias

20 Pltfs' claim is in para 4 of S/C. In that sum
credit has been given for 8% commission.
That has not been denied in the defence.
\$4,695.55 not admitted by the pltfs.

Their goods are not part of our claim. They have
not proved they sold these goods.

On our claim we are entitled to judgment for full.
What was the agreement?

Two conversations - one in Madrid and the other
in S'pore. Chua recited the agreement in Madrid
as in the pleadings precisely.

30 Chua of his standing does not advise his client
to record the agreement. Why?

Not even an attendance note by Chua.

I say he remembers what is in pleadings more
clearly than of the events which took place 4½ years
ago. It was to be finalised in S'pore.

Xxn. of Mr. Lew (DW7).
Pltfs gave discovery on 13.3.80
Defts gave discovery on 3.12.80.

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The letter AB5 was disclosed in pltfs' list on March 80 as item 3.

That has no bearing at all for our making the amendments.

The original Reply & S/Claim was drawn by a sol. When I looked at it regarding amendments, (refers to para 5 of the original Defence to C/Claim) it had to be amended.

Amended "provisionally" at para 3 came from para 4 of page 16. We say it was provisional all along.

10

Note material terms in the amendments.

Page 54 N of E.

Only Chua says defts undertook not to sell other's goods. He can't sell our goods as his - copy our goods and sell them.

The fiduciary duty at page 6.

Although we have no patent rights he is not to copy our goods and sell it.

Page 7 of my written submissions.

Adj to a date to be fixed by
the Registrar.

20

Monday, 28th June 1982

Hearing resumed
Parties as before

Mr. Elias continues his final submission.

Agent - meaning. Refers to his written submissions. page 1 - deft here is not that type of agent. Refers to his quotation at page 2. Refers to quotation at pages 3 and 4.

I submit that we should look and see what was agreed between the parties.

30

Page 9 of pleadings - para 3 of Defence & C/Claim, 3 items (a), (b) and (c). We have agreed to (a) and (b).

At page 18 of pleadings we agreed to it, para. 7.

We do not agree to (c) where the defts had no hand and share in securing that order.

In the High Court

(1) The sole issue is whether item (c) of para 3 of Defence and C/Claim was agreed between the parties.

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(cont'd)

(2) The other issue territories to which items (b) and (c) apply.

The defts claim - page 9 of pleadings para. 2 - Far East and Asean regions.

10 The pltfs say at page 15, para 3, S'pore, Malaysia and HongKong.

In considering those two issues both assert they were in oral agreement. Defts say - page 9 para 2 - by oral agreement of 25 Sept 77.

Pltfs say that was only a provisional agreement subject to confirmation - vide page 15 para 3 and page 16 para 4(c). Pltfs say the effective agreement was made on or about 15 Jan 78 - page 18 of pleadings para 7.

20 Roy Chua says the effective agreement was made in Madrid. Mr. Lew the 1st deft says in xxn what was decided in Madrid was to be finally decided in S'pore.

AB20. - Q. So at commencement of this meeting no final contract was made?

A. Yes.

I submit there was no final contract in Madrid. The contract is between M. Lew and Merten and not between Roy Chua and Merten.

30 No consensus ad idem between them in Madrid. Both the principals say so.

Next, what was agreed in S'pore on 15th Jan. Another issue for consideration is the period of two years - duration of contract.

40 Merten's mind and Michael Lew's mind were not on item (c). Both Merten and Michael Lew did not say they agreed on item (c). Only Roy Chua says item (c) was also agreed. Roy Chua a busy lawyer has no note of that meeting which took place in 1978. He can't depend too much on his memory.

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Refers minutes of that meeting at AB20. Object of that meeting was to finalise the contract that was agreed in item 1 does not cover item c of defence.

AB20 is a record of the minutes of the meeting recorded by Mr. Ong who in his evidence said item 1 rolls up items (b) and (c) of the Defence and C/Claim.

Ong's item 4 at AB21 had to be amended as at AB22. Entirely different para. So on Ong's record one can't place too much reliance.

This document AB20-21 is prepared by the defts and should be construed in favour of the pltfs and against the defts.

10

"contra proferentum"

In AB20-21 not one word said about the duration of that agreement. Mr. Lew agreed that there was nothing agreed which is not recorded in the minutes AB20-21.

Mr. Hernandez who signed those minutes was described as the technical adviser. When Mr. Hernandez signed those minutes he signed "Vto. Bo." which means "seen well" and then signed his name.

20

In AB5 para 2 Mr. Hernandez is going to S'pore as an (illegible) of the defts for a maximum period of two years, and at AB9 para 8 Mr. Hernandez "to hold Inter's representation for a maximum period of two years".

Re the extent of the territories AB7.

In AB8 penultimate para - step by step extended.

It was not agreed from the beginning for the whole of the territories claimed. So much for the contract itself.

30

Next for the termination of the contract.

First the justification for terminating the contract. The pltfs say there was a fundamental breach of the contract on the part of the pltfs. When the defts wanted to manufacture certain parts openly they asked for permission and permission was only granted for making lashing bars. Mr. Merten says when he went to Jurong he saw spreaders in the course of construction. Various stages of completion.

40

Defts say they were left overs from what they were doing many years ago.

In the High Court

Merten discovered this the day before he cancelled the agreement. Mr. Hernandez and Mr. Merten went to the Jurong factory without any warning.

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Parties were agreed that this agency agreement would be superceded by the joint venture project - actually signed on 18.5.78 - AB76 - 80.

10 AB81 dated 19.5.78

Refers page 8 of his written submissions. page 9.

Defts had abused their fiduciary duty. Had used information from the pltfs secretly for the defts' own gain.

If this court comes to the conclusion that the contract had been wrongfully terminated, then this court must consider the period of notice that should have been given.

20 What have the defts spent?

House, air passage for him, his wife and child. In return they had his services.

Length of notice has to be determined as at the time notice was given. Defts never committed themselves to selling only our products. They could sell other products as well.

30 The new joint venture agreement superceded the old agreement. The old agreement is no longer in force. What the defts are complaining is the joint venture agreement has been terminated. Both letters say the joint venture - we are not going on with it.

Adj. to 2.15 p.m.

2.15 p.m.

Mr. Elias

Defts spent some money on market research. Each market research they did would be value to them anyhow as they were in same line of business.

40 They spent on Mr. Hernandez \$3,400/= for the four months he was here.

In the High
Court

Boustead, page 193 Art. 63
14th Ed.

No. 17
Note of
Proceedings
26th, 28th
May & 28th
June 1982
(cont'd)

Damages would be how much he would have lost during the period of notice. Onus of proving loss would be on the deft on the counterclaim.

Marten's evidence - NE21.

Ong's evidence. - no substance for his conclusions and figures.

We produced the audited accounts of the new Co. we formed. We suffered loss.

10

It is defts' duty to mitigate the loss.

We invited the defts to come and renegotiate fresh terms. The defts have suffered no loss. If they continued they would have done what our new Co. did. They did not make any profits. The Fukuoka contract. Mr. Merten said he would pay on the Fukuoka contract. This contract was originally started by the defts. Therefore we are prepared to pay on the contract.

The value of the Fukuoka contract has been agreed at \$38,541/=.

20

We ask for our claim to be paid in Deutsche Marks. We are entitled to be paid in D.M.

Mr. Cheong

says pltfs have received \$4,695.55 in respect of 160 pieces CIE-5L which the defts sold. Stock card shows this.

Mr. Elias and I agree this amount has been received. S/C less the amount.

Remuneration after termination of agreement.

Refers to AB83.
The defts have spent all this money.

30

Court:

Pltfs' claim is allowed in full and to be paid in Deutsche Marks and the counterclaim of the defts allowed in respect of the commission arising from the Fukuoka contract in the agreed sum of \$38,541/=.

In the event of an appeal the judgment sum is to be paid to the pltfs' solicitors who will place it in a deposit account until disposal of the appeal or further notice.

40

Intld. T.K.

IN THE HIGH COURT IN SINGAPOREIn the High
CourtSuit No.1092 of 1979No. 18
Judgment of T.
Kulasekaram J.
28th June 1982

Between

Inter Equipos Navales S.A.

Plaintiffs

And

1. Lew Kah Choo
 2. Lew Kah Hock
 3. Lew Kah Hoo
 4. Lew Lay Beng (f)
 all trading under the name and
 style of Hock Cheong & Company

Defendants

Coram: T. Kulasekaram J.O r a l J u d g m e n t

In this case it is essentially a question of fact. One issue I have to decide is whether Merten's evidence should be accepted and what value to attach to it. The difficulty is in his statement that he saw his lawyer only after discovery of these fabrications by the defendants. It is there that I have some doubts. Merten's evidence is weak on this one point, whether he saw his lawyer before or after his finding out of the breach by the defendants. My finding is that the main reason for Merten taking the action was because on that day when he went to Jurong he found that these articles were being fabricated there. Merten was justified in so acting when he went to the place and found that the defendants were fabricating his goods

In the High
Court

No. 18
Judgment of
T.Kulasekaram
J. - 28th
June 1982
(cont'd)

without his knowledge and had thereby breached their fiduciary duty to him. This fiduciary duty arose from their relationship that the defendants were the sole distributors in this part of the world of the plaintiffs' goods. Now, as for the territories concerned, the defendants themselves in their advertisement say the Far East and South East Asia. There were no complaints from the plaintiffs about this. I find that they, the defendants, were the agents or sole distributors of the plaintiffs' goods for the Far East and South East Asia. And it is because of their breach of the fiduciary duty that Merten was justified in terminating the contract forthwith. I think in those circumstances it was not necessary for the plaintiffs to give any reasonable notice at all. The plaintiffs were entitled to terminate the contract forthwith. I accept Merten's evidence of what he saw that day. He was not quite accurate about what action was taken thereafter. He had suspected such activities for some time past; he had some information about it. Before coming to Singapore he had asked Hernandez to find out if this new company can be registered. He had that in the back of his mind as a possible course of conduct if his suspicions were confirmed. He would however not have taken any action but for the fact that when he visited the defendants' place at Jurong without prior notice to the defendants, he saw this fabrication taking place there. Once he saw it, that was it. I accept his

10 evidence on that point. It was quite clear that the
defendants were fabricating these goods without his
knowledge. He was convinced that his earlier suspicions
had been confirmed and that was the first time he knew
about it for certain. He followed that up by letters
and brought the matter to an end. That being so there
shall be judgment for the plaintiffs for the full amount
of claim less \$4,695.55 as admitted by the defendants.
On the counterclaim the defendants are entitled to the
commission on the Fukuda contract. That was agreed
between the parties at \$38,541/=. As the statement of
claim is in Deutsche Marks the full claim is for D.M.
180,012/= and the plaintiffs are entitled to be paid
this amount in Deutsche Marks. In arriving at this
decision in this case I have considered all the evidence
that has been placed before me. On the claim and
counterclaim, one of the reasons why I wanted to give
half the costs only to the plaintiffs was because it
was Merten who prolonged this trial in various ways.
20 In the event of an appeal the judgment sum is to be
paid to the plaintiffs' solicitors who will place it
in a deposit account.

Taken down by me and approved by the
Honourable Mr. Justice T. Kulasekaram

28th June 1982


Koh Bee Kiat
Private Secretary to Judge

No. 19
Formal Judgment

In the High
Court

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

No. 19
Formal
Judgment
28th June
1982

Suit No. 1092 of 1979.

L.S.

Between

INTER EQUIPOS NAVALES S.A.

... Plaintiffs

And

1. LEW KAH CHOO
 2. LEW KAH HOOK
 3. LEW KAH HOO
 4. LEW LAY BENG (f)
- all trading under the name and
style of Hock Cheong & Company

10

... Defendants

J U D G M E N T

The 28th day of June, 1982

This action having been tried before the Honourable Mr. Justice Kulasekaram on the 11th and 12th days of November, 1981, the 10th, 11th and 12th days of February 1982, the 10th, 11th, 12th and 26th days of May 1982 and this day in the presence of Counsel for the Plaintiffs and for the 1st, 2nd and 3rd Defendants

20

IT IS ADJUDGED that the 1st, 2nd and 3rd Defendants do pay the Plaintiffs on the claim 180,012 Deutschmarks less the equivalent in Deutschmarks of the sum of \$4,695.55

AND IT IS ADJUDGED on the counterclaim that the Plaintiffs do pay to the 1st, 2nd and 3rd Defendants

£38,541

In the High Court

AND IT IS FURTHER ADJUDGED that the 1st, 2nd and 3rd Defendants do pay to the Plaintiffs half the Plaintiffs' costs of this action to be taxed.

No. 19
Formal Judgment
28th June 1982
(cont'd)

AND IT IS ORDERED that in the event of an appeal the 1st, 2nd and 3rd Defendants do pay to the Plaintiffs' Solicitors the balance payable on the claim by the Defendants to the Plaintiffs after giving credit to the Defendants for the amount payable on the counterclaim by the Plaintiffs to the Defendants (the deduction of £38,541 as an amount in Deutschemarks for the purpose of this reckoning to be at the rate of exchange prevailing this day) upon the Plaintiffs' Solicitors' undertaking to hold the same in a deposit account with a Bank in their name for the benefit of the Plaintiffs until the determination of appeal or further order.

10

Sanj
ASST. REGISTRAR *n*

Entered the 31st day of August 1982
in Volume 250 Page 7 No. *at 11.55 am*

NOTICE OF APPEAL TO COURT OF APPEAL

In the Court
of Appeal

No. 20
Petition
of Appeal
11th
September
1982

Civil Appeal No. 46 of 1982

BETWEEN

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
all trading under the name and
style of HOCK CHEONG & COMPANY

Appellants

10

AND

INTER EQUIPOS NAVALES S.A.

Respondents

IN THE MATTER OF SUIT NO. 1092 OF 1979

BETWEEN

INTER EQUIPOS NAVALES S.A.

Plaintiffs

AND

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
all trading under the name and
style of HOCK CHEONG & COMPANY

Defendants

20

PETITION OF APPEAL

TO THE HONOURABLE THE JUDGES OF THE COURT OF APPEAL

The Petition of the abovenamed Appellants showeth as follows:-

1. The Appeal arises from a claim by the abovenamed Plaintiffs/
Respondents for the sum of DM 180,012 representing the value of
goods alleged to have been consigned to the Appellants/Defendants
pursuant to an oral agreement made on or about the 25th day of
September, 1977 and from a counter-claim by the Appellants against
the Respondents for commission due and damages for breach of the
terms of the said oral agreement.

30

2. By oral judgment given on the 28th day of June, 1982 judgment was given for the Respondents in the sum of DM 180,012 less the sum of \$4,695.55 on their claim and for the Appellants in the sum of \$38,541.00 in respect of their counter-claim.

3. Your Petitioners are dissatisfied with the said judgment on the following grounds:-

i. The Learned Trial Judge erred in law and in fact in finding against the weight of the evidence adduced (particularly the evidence of Merten himself - Notes of Evidence at Page 30,32), that Merten had suspected that the Appellants had been fabricating his goods and had his suspicions confirmed on the 19th May, 1978, thereby leading him to terminate the Appellants' contract with the Respondents.

ii. The Learned Trial Judge erred in law and in fact in failing entirely to consider the evidence of the Respondents' solicitor, Tan Kay Bin, (DW1 - Page 46 etcetra of the Notes of Evidence) which was adduced solely for the purpose of contradicting Merten's evidence (at Page 30/32 of the Notes of Evidence) and to support the Appellants' suggestion that the Respondents had all along planned to set up a local company without the Appellants' participation and falsely accusing the Appellants of breach of their fiduciary duty as an excuse of terminating the said contract.

iii. The Learned Trial Judge erred in law in failing to consider whether, even if the Appellants had fabricated goods similar to the Respondents' (which is denied) it amounted in law to a breach of fiduciary duty justifying the Respondents' immediate termination of the sole agency contract.

In the
Court of
Appeal
No. 20
Petition
of Appeal
11th Sept-
ember
1982
(cont'd)

In the
Court of
Appeal
No. 20
Petition
of Appeal
11th
September
1982
(cont'd)

iv. The Learned Trial Judge erred in law and in fact in completely disregarding the many occasions when Merten (PW3) was untruthful, not the least being the finding of the learned Judge that the Appellants were the sole distributors for the Far East and South East, which was denied by him. The Judgment was totally against the weight of the evidence adduced.

4. Your Petitioners pray that such judgment may be reversed or such other order may be made as the Court thinks fit.

Dated the 11th day of September 1982.



Solicitors for the Appellants

To:
The Respondents and their solicitors,
M/s Allen & Gledhill,
Singapore.

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RESPONDENT'S NOTICE

In the Court
of Appeal

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

No. 21
Respondents
Notice of
Appeal-20th
September
1982

CIVIL APPEAL NO. 46 OF 1982

BETWEEN

1. LEW KAH CHOO
 2. LEW KAH HOOK
 3. LEW KAH HOO
 4. LEW LAY BENG (f)
- all trading under the name and
style of HOCK CHEONG & COMPANY

10

... Appellants

AND

INTER EQUIPOS NAVALES S.A.

... Respondents

IN THE MATTER OF SUIT NO. 1092 OF 1982

BETWEEN

INTER EQUIPOS NAVALES S.A.

... Plaintiffs

AND

20

1. LEW KAH CHOO
 2. LEW KAH HOOK
 3. LEW KAH HOO
 4. LEW LAY BENG (f)
- all trading under the name and
style of HOCK CHEONG & COMPANY

... Defendants

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TAKE NOTICE that, on the hearing of the above
Appeal, the Respondents abovenamed will contend that
the decision of the Honourable Mr. Justice Kulasekaram
given on the 28th day of June 1982 ought to be varied
and on the grounds hereinafter set out :-

- (a) it ought to be varied by the inclusion of
interest on the sum awarded to the Respondents

In the Court
of Appeal

No. 21
Respondents
Notice of
Appeal-20th
September
1982
(cont'd)

from the 20th day of May 1978 until judgment
at the rate of 8 per centum per annum,
on the grounds that :-

(i) the question of interest claimed in
the Statement of Claim was not dealt
with in the judgment;

(ii) it is just and reasonable that such
interest should be awarded to the
Respondents;

(b) it ought to be varied by specifying that the
Deutschemarks equivalent of \$4,695.55 to be
deducted from the sum of 180,012 Deutschemarks
awarded to the Respondents should be calculated
on the basis of the rate of exchange prevailing
on the date when the said sum of \$4,695.55
was paid to the Respondents, that is to say, on
the 18th day of May 1978, on the ground that
the reduction in the amount of the Appellants'
liability to the Respondents actually occurred
that day and at the rate of exchange prevailing
that day.

10

20

SOLICITORS FOR THE RESPONDENTS

Dated the 20th day of September, 1982.

To:-

The Registrar,
Supreme Court,
Singapore 0617

and to :-

Messrs. Chua Hay & Wee,
Solicitors for the Appellants,
718 Colombo Court,
Singapore 0617.

In the Court
of Appeal

No. 21
Respondents
Notice of
Appeal-20th
September
1982
(cont'd)

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The address for service of the Respondents
is Messrs. Allen & Gledhill, 2401, OCBC Centre,
Chulia Street, Singapore 0104.

In the Court
of Appeal

No. 22
Order
8th July
1983

IN THE COURT OF APPEAL IN SINGAPORE

Civil Appeal No. 46 of 1982

BETWEEN

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
all trading under the name and
style of HOCK CHEONG & COMPANY

Appellants

10

AND

INTER EQUIPOS NAVALES S.A.

Respondents

IN THE MATTER OF SUIT NO. 1092 OF 1979

BETWEEN

INTER EQUIPOS NAVALES S.A.

Plaintiffs

AND

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
all trading under the name and
style of HOCK CHEONG & COMPANY

Defendants

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BEFORE: THE HONOURABLE CHIEF JUSTICE
MR. JUSTICE WEE CHONG JIN
THE HONOURABLE MR. JUSTICE T.S. SIVATHAYARAJ
THE HONOURABLE MR. JUSTICE JALAB CHOW

IN OPEN COURT

DATED THE 8TH DAY OF JULY 1983

30

ORDER

THIS APPEAL called on for hearing this day in the presence of
Mr. Cheong Yuen Kee Counsel for the Appellants/Defendants and Mr. S.H.D.
Elias of Counsel for the abovenamed Respondents/Plaintiffs AND UPON

READING the Record of Appeal filed herein AND HEARING Counsel as
aforesaid THIS COURT DOETH ORDER that:-

1. The Judgment obtained herein on the 22nd of June, 1982 be set aside.
2. The Appellants/Defendants' Counterclaim be allowed and that damages on the Counterclaim be assessed on a date to be fixed by the Registrar.
3. The costs of this action the Appeal herein and the Assessment before the Registrar be taxed and paid by the Respondents/Plaintiffs to the Appellants/Defendants.
4. The sum of \$500.00 lodged in Court as security for the costs of this Appeal be paid out by the Accountant-General to Messrs. Chua, Hay & Wee, Solicitors for the Appellants/Defendants.

Given under my hand and seal of the Court

this 15th day of August 1983.

Sd/Lun Joo Teon
ASST. REGISTRAR

In the
Court of
Appeal
No. 22
Order
8th July
1983
(cont'd)

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

CIVIL APPEAL NO 46 OF 1982

Between

- 1. Lew Kah Choo
- 2. Lew Kah Hook
- 3. Lew Kah Hoo
- 4. Lew Lay Beng (f) all trading
under the name and style of Hock
Cheong & Company

..... Appellants

10

And

Inter Equipos Navales S.A.

..... Respondents

In the Matter of Suit No. 1092 of 1979

Between

Inter Equipos Navales S.A.

.....Plaintiffs

And

- 1. Lew Kah Choo
- 2. Lew Kah Hook
- 3. Lew Kah Hoo
- 4. Lew Lay Beng (f) all trading
under the name and style of Hock
Cheong & Company

..... Defendants

20

Coram: Wee Chong Jin, C.J.
T.S. Sinnathuray, J.
A. Wahab Ghows, J.

J U D G M E N T

The appeal arose from a claim by the respondents/30
plaintiffs (hereinafter called "the plaintiffs") for the

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984

sum of DM.180,012.00 being the value of the stock (cont'd)
of goods delivered on consignment to the appellants/
defendants (hereinafter called "the defendants")
and for an account of what was due to the plaintiffs
from the defendants by way of stock in defendants'
possession and by way of the value of the plaintiffs'
goods already sold by the defendants plus interest
thereon and costs. The defendants admitted receiving
the stock of goods referred to in para.4 of the state-
ment of claim and stated that they received
DM.19,868.06 and S\$4,695.55 for some of plaintiffs'
goods they had sold. They added that they had paid
the said sum of S\$4,695.55 to the plaintiffs'
representative, Karl-Friedrich Birger Merten, in
Singapore on behalf of the plaintiffs and that as
regards the sum of DM.19,868.06 the defendants said
they were entitled to set off the same against
damages suffered by the defendants as a result of
the plaintiffs' breach of the oral agreement made on
25.9.77 under which the plaintiffs appointed the
defendants as their distributors and sole agents
for their products marketed under the "Inter Equipos
Navales" brand name in the Far East and Asean regions

for

In the Court
of Appeal
No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

for a period of two years from January 1978. In breach of the said agreement, the defendants alleged, the plaintiffs on or about 30.5.78 incorporated a company in Singapore known as Inter Equipos (Far East) Pte Ltd to sell the plaintiffs' products in the Far East and Asean regions. Thereafter the defendants had been unable to sell the plaintiffs' products. The defendants then counterclaimed for the sum of S\$1,120,000/- being 8% commission on the estimated turnover for 2 years at \$7,000,000 per year and 8% 10 commission on the invoice price of the parts mentioned in the contract signed with Fukuoka Shipyard for the construction of two vessels belonging to Tanaka Sangyo, plus interest thereon and costs.

In their Amended Reply the plaintiffs averred that by the oral agreement made on or about 25.9.77, the plaintiffs provisionally appointed the defendants to be their distributor in Singapore, Malaysia and Hongkong but denied that this appointment was for a period of two years or for any fixed period, that 20 the distributorship extended to any part of the Far East or the Asean regions other than Singapore, Malaysia and Hongkong, that the defendants were appointed

their....

FOUNDATIONS OF JUDGMENT

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

their sole agents or that there was any agreement for the payment of commission to the defendants as alleged in the Defence and Counterclaim. The plaintiffs' Amended Reply then set out the terms of the said oral agreement made on 25.9.77, the terms of the agreement between the parties made in November 1977 and the terms of another oral agreement between the plaintiffs and the defendants made on or about 15 Jan 1978.

10

The plaintiffs admitted in their Amended Reply that they caused a company named Inter Equipos (Far East) Pte Ltd to be incorporated in Southeast Asia and the Far East but denied that this was in breach of their agreement with the defendants or that the defendants suffered any loss thereby. In any case, the plaintiffs averred, the said agreement was discharged, or alternatively, lawfully terminated by the plaintiffs at the end of May 1978 by reason of the defendants' fundamental breach of the said agreement in that they secretly and fraudulently and in breach of their fiduciary duty to the plaintiffs caused imitations of the plaintiffs' products to be made and offered for sale and sold in competition with

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plaintiffs'..

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

plaintiffs' products and at lower prices and also by reason of the defendants constantly keeping relevant information secret from one Mr Hernandez, the plaintiffs' delegate in Singapore, and ignoring his advice and directions and failing to refer to him the technical problems of customers of plaintiffs' products, whereby the reputation of the said products and the plaintiffs' goodwill suffered.

Kulasekaram J gave judgment for the plaintiffs against the defendants for the sum of DM.180,012/- 10 less the equivalent in Deutschemarks of the sum of S\$4,695.55 but allowed the defendants their counterclaim in respect of their commission arising from the Fukuoka contract in the agreed sum of \$38,541/-.

The plaintiffs have also given notice asking for the aforesaid judgment to be varied by including interest on the sum awarded to them at 8% p.a. from the 20th May 1978 until judgment.

At the conclusion of the hearing of the appeal we allowed the appeal with costs, set aside the aforesaid judgment, allowed the counterclaim and ordered the Registrar to assess the damages on the counterclaim. We now give our reasons.

FOUNDATIONS OF JUDGMENT

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

It seemed to us that the issue whether or not the plaintiffs were in breach of their oral agreement with the defendants which was made on or about 25.9.77 was the crux of the whole matter. Merten gave evidence to the effect that he suspected that the defendants had been fabricating his goods and had his suspicions confirmed on 19.5.78 when he and Vincente Hernandez visited the defendants' factory at Jurong. So he terminated the plaintiffs' oral agreement with the defendants and incorporated the company called Inter Equipos Navales (Far East) Pte Ltd to look after his company's interests in Singapore. The learned trial judge in his oral judgment had this to say about Merten's evidence :-

"One issue I have to decide is whether Merten's evidence should be accepted and what value to attach to it. The difficulty is in his statement that he saw his lawyer only after discovery of these fabrications by the defendants. It is there that I have some doubts. Merten's evidence is weak on this one point, whether he saw his lawyer before or after his finding out of the breach by the defendants. My finding is that the main reason for Merten taking the action was because on that

day....

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

day when he went to Jurong he found that these articles were being fabricated there. Merten was justified in so acting when he went to the place and found that the defendants were fabricating his goods without his knowledge and had thereby breached their fiduciary duty to him. This fiduciary duty arose from their relationship that the defendants were the sole distributors in this part of the world of the plaintiffs' goods. And it is because of their breach of the fiduciary duty that Merten was justified in terminating the contract forthwith. I think in those circumstances it was not necessary for the plaintiffs to give any reasonable notice at all. The plaintiffs were entitled to terminate the contract forthwith. I accept Merten's evidence of what he saw that day. He was not quite accurate about what action was taken thereafter. He had suspected such activities for some time past; he had some information about it. Before coming to Singapore he had asked Hernandez to find out if this new company can be registered. He had that in the back of his mind as a possible course...

GROUNDS OF JUDGMENT

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

course of conduct if his suspicions were confirmed. He would however not have taken any action but for the fact that when he visited the defendants' place at Jurong without prior notice to the defendants, he saw this fabrication taking place there. Once he saw it, that was it. I accept his evidence on that point. It was quite clear that the defendants were fabricating these goods without his knowledge. He was convinced that his earlier suspicions had been confirmed and that was the first time he knew about it for certain. He followed that up by letters and brought the matter to an end."

10

The judge's findings of fact were however contradicted by the documentary and other unchallenged evidence adduced in this case. Mr Tan Kay Bin, the plaintiffs' solicitor, said in evidence that on 16.3.78 he was instructed by one James Khoo and Hernandez to find out if a company could be registered with the name Inter Equipos Navales (Far East) Pte Ltd. That same day he wrote to

20

the

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

the Registrar of Companies who replied on 3.4.78 that the name proposed was available for registration. On 13.4.78 he wrote to James Khoo informing him that the company documents were ready for signature and requesting him and Hernandez to call at his office to sign them. Towards May 1978 Tan Kay Bin was instructed that there would be three subscribers instead of two and that the third subscriber would be Merten. On 19.5.78 in the afternoon, Merten, Hernandez and James Khoo attended at Tan Kay Bin's office and signed the company documents which were forwarded the following day to the Registrar of Companies. Tan Kay Bin's evidence was not challenged and is supported by certified copies of documents from the Registrar of Companies. The judge's oral judgment made no reference to the documentary evidence or to Tan Kay Bin's evidence or to the defendants' suggestion that the plaintiffs had all along planned to set up a local company without the defendants' participation and were falsely accusing the defendants of breach of fiduciary duty as an excuse for terminating the agreement between them. In our opinion, the judge

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failed...

GROUNDS OF JUDGMENT

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

failed to assess Merten's evidence that he saw his lawyer only after discovery of these fabrications of the defendants against the background of the documentary evidence and the evidence of his lawyer.

The judge's oral judgment also did not mention the fact that Merten had agreed to the manufacture in Singapore of certain types of equipment to meet urgent orders.

On 14 March 1978 the following telex was sent to Merten :-

10

"RE POSSIBLE MANUFACTURE OF SPREADERS IN S"PORE
MR LIEW IS VERY INTERESTED IN THE MANUFACTURE
OF SPREADERS IN SINGAPORE WITH INTER SPARE
PARTS.

PLSE REPLY SOON.

V HERNANDEZ/J. KHOO

HCC"

Merten replied as follows :-

20

"WE AGREE THE MANUFACTURING AT YR SIDE FOR
THIS CASE OF LASHING BARS ST-5 ONLY.

REGARDS.

SD: MERTEN"

RE: MANUFACTURING OF SPREADERS IN S"PORE

ATTN: MR HDEZ

In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

IN GENERAL WE ARE WILLING TO AGREE PROVIDED
AGREEMENT REGARDING JOINT VENTURE WILL BE
REACHED.
REGARDS.
SD: MERTEN."

In this connection the following telexes sent
by the plaintiffs to the defendants on 7.4.78 and
13.4.78 are also relevant :-

"THANKS FOR YR TX 7.4.78.

1. FOR O/CALCULATIONS AND QUICK OFFERS, WE 10
ESTIMATE THAT VOYAGES FROM SPAIN TO S'PORE
TAKES 24/30 DAYS. BUT THIS SHOULD BE COUNTED
FROM SCHEDULE SAILING DATES. EARLIEST
SAILING FROM BARCELOMA IS 17.04.78 AND
ARRIVAL IN S'PORE 10.05. IF THIS CAN'T BE
ACCEPTED PLS MANUFACTURE YOURSELVES THE
LASHING BARS AND SPLIT THE BENEFIT.
2. REGARDING THE SPREADER ALREADY SOLD IF 2
NOTHING CAN BE DONE AS TO INTER'S BILLING,
PLS ADVISE WHERE IS THE MONEY.
3. REGARDING O/LAST PARAGRAPH IN SPANISH
LANGUAGE OF O/TX 1495, WE TRANSLATE IT :
"AS LONG AS THE NEW COMPANY ISN'T LEGALLY
AND FORMALLY CONSTITUTED, MATERIAL IN STOCK
IN S'PORE SHOULD BE BILLED BY INTER AS
OWNER AND SELLER."

REGARDS.
INTER/AREAL."

GROUND'S OF JUDGMENT

IN the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

"YR TX 1046-3-7
OUR 8032-3-78

KINDLY CONFIRM WHETHER YOU PROCEEDED WITH
MANUFACTURING ACCORDING TO OUR TX 1529
AND FOLLOW THEN WITH COPY OF INVOICE TO
CLIENT, AS WELL AS INFORMING OF BENEFIT.

BEST REGARDS.

INTER/DE ANDRES."

On 14.4.78 the defendants replied as follows :-

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"BT-2 MANUFACTURING IN PROGRESS.

APPROXIMATE COSTS IS SD60.00 EACH (FULL DETAILS
WILL FOLLOW LATER WITH COPY OF INVOICE TO
CLIENT).

REGARDS.

INTER/HERNANDEX."

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The plaintiffs' delegate, Vincente Hernandez,
arrived in Singapore in January 1978 and was working
with and advising the defendants right up to the date
Merten terminated the contract between the plaintiffs
and the defendants. If there had been any unauthorised
fabrication of plaintiffs' equipment in defendants'
factory, he should have seen it. He was not called to
give evidence and this the learned trial judge
apparently failed to consider.

The proposal for a joint venture was raised

in ...

In the Court
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1984
(cont'd)

in February 1978. Several telexes were exchanged between the plaintiffs and the defendants and a final draft of the joint venture agreement to form a company to be called Inter Lashing Systems Pte Ltd was signed on 18.5.78 by Merten on the plaintiffs' behalf and by a representative of the defendants. The draft joint venture agreement was amended on 19.5.78 and Merten's signature appears on the amendments. However, that same afternoon Merten, Hernandez and James Khoo went to their solicitor's office and signed the documents to be forwarded to Registrar to incorporate their own company to be called Inter Equipos Navales (Far East) Pte Ltd. Then on 20.5.78 Merten sent the following letter to the defendants declining participation in the joint venture and in effect cancelling the agreement of 25.9.77 :-

"Dear Sirs,

Re: Joint Venture

We have to confirm our today's meeting at the Singapore Hilton Hotel which took place in the presence of Mr G Q Ong, Mr Jimmy Lew, Mr V Hernandez and the under-signer. It was informed to Mr G Q Ong and Mr Jimmy Lew that Mr Hernandez

is

GROUNDS OF JUDGMENT

In the Court
of Appeal

No. 23
Grounds of
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31st January
1984
(cont'd)

is declining to be shareholder and Managing Director in a joint-venture between Hock Cheong & Co and Inter. The reasons have been explained and will be confirmed by written letter by Mr Hernandez himself.

Inter facing this new situation has been forced to decline participation in the joint-venture as to the conditions negotiated with you previously in the past days. We have therefore taken following decision :

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- 1 Removing the consignment stock from your premises to a bonded warehouse.
2. Engaged Mr Hernandez until further decision with the administration of this material.
3. Registering our name as private company in Singapore to provide legal backing of our interest.
4. Authorise Mr Hernandez to keep contact with all customers on Inter's behalf to secure orders of pending projects.
5. Give guarantee to Hock Cheong & Co for their commission on all projects pending until your no. 1068-5-78.
6. Provide the supply of possible orders to Hock Cheong & Co if any order would be booked by them ex our bonded stock at same price as indicated in your price list for consignment stock, granting your full commission.
7. The board of shareholders of Inter Spain will be informed of the new situation and authorisation will be asked for to re-negotiate with Hock Cheong & Co new conditions.
8. The undersigner suggest to meet Mr Lew or Mr Choo in Madrid or London in mid-June for new negotiations.

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We

In the Court
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Grounds of
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1984
(cont'd)

We trust that you will understand that without having a man of our confidence in a joint-venture where we are supposed to have 51 percent we cannot go on for the time being. Besides it is of essential condition to have a technical standard and service guaranteed to the client which requires an adequate trained man in our systems.

We regret the actual situation and sincerely hope that a solution will be found quickly to satisfy all parties.

We remain Dear Sirs,

Yours faithfully

INTER EQUIPOS NAVALES, S.A.

SD: B MERTEN."

Yet despite the reasons given by Merten in this letter to the contrary, the learned trial judge found that Merten cancelled the agreement of 25.9.78 because he had seen the fabricated equipment in the defendants' factory on the previous day. If it were true that Merten had seen the lashings and spreaders fabricated by the defendants without authority in the defendants' factory on 19.5.78, he would have mentioned it in his letter as the reason for cancelling the agreement. He should have been angry at what he had seen and could not

have....

FOUNDATIONS OF JUDGMENT


In the Court
of Appeal

No. 23
Grounds of
Judgment
31st January
1984
(cont'd)

have forgotten it. He would not have been apologetic about terminating the said contract and would not have offered to re-negotiate a new agreement with the defendants. The trial judge plainly failed to apply his mind to these matters.

We were aware that normally an appellate court would not interfere with a trial judge's findings of fact as he had seen and heard the witnesses and would therefore be in a better position to assess their credibility. But in this case, it was manifestly clear that the learned trial judge had overlooked or failed to consider vital documentary evidence and the unchallenged testimony of independent witnesses which contradicted his findings on issues of fact. After taking into consideration all the relevant evidence adduced in this case, we allowed the appeal.

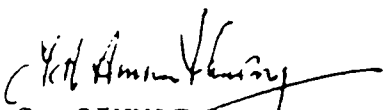
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(WEE CHONG JIN)
CHIEF JUSTICE

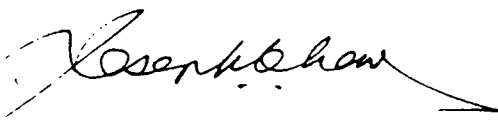
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Secretary to Judge
at No 8
Singapore


(T.S. SINNATHURAY)
JUDGE

Certified true copy


Secretary to Judge
at No 8
Singapore


(A.W. GHOWS)
JUDGE

SINGAPORE, 31st January 1984.

IN THE COURT OF APPEAL

No.24

Order granting leave to appeal
to the Judicial Committee

In the Court
of Appeal

No.24

Order granting
leave to
Appeal to
the Judicial
Committee
10th October
1983

IN THE COURT OF APPEAL IN SINGAPORE

CIVIL APPEAL NO. 46 OF 1982

BETWEEN

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
all trading under the name and
style of HOCK CHEONG & COMPANY

... Appellants

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AND

INTER EQUIPOS NAVALES S.A.

... Respondents

IN THE MATTER OF SUIT NO. 1092 OF 1979

Between

INTER EQUIPOS NAVALES S.A.

... Plaintiffs

And

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
all trading under the name and
style of HOCK CHOENG & COMPANY

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... Defendants

ORDER OF COURT

BEFORE THE HONOURABLE THE CHIEF JUSTICE
MR. JUSTICE WEE CHONG JIN
THE HONOURABLE MR. JUSTICE F.A. CHUA
THE HONOURABLE MR. JUSTICE A.P. RAJAH

IN OPEN COURT

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UPON reading the Respondents' Notice of Motion dated

Order granting leave to
Appeal to the Judicial
Committee

10th October 1983

(Contd.)

the 19th day of September, 1983, AND UPON hearing Mr.
S.H.D. Elias of Counsel for the Respondents and Mr. Cheong
Yuen Hee of Counsel for the Appellants AND UPON reading the
affidavit of James Khoo filed herein on the 19th day of
September 1983 :

IT IS ORDERED THAT :-

1. The Respondents do have leave under section 3(1)(a) of
the Judicial Committee Act (Cap.8) to appeal to the
Judicial Committee of Her Britannic Majesty's Privy
Council against the whole of the judgment of the Court
of Appeal delivered herein at Singapore on the 8th day
of July 1983;
2. The Respondents' application for execution of the said
judgment to be suspended pending the conclusion of
appeal to the Privy Council be disallowed;
3. The time for the Respondents to prepare and send to
the abovenamed Appellants the index pursuant to Order
58 Rule 5(1) be extended to 4 weeks;
4. The time for the Respondents to prepare and send to
the Registrar a copy of the record pursuant to Order
58 Rule 6(1) be extended to 60 days;

In the Court
of Appeal

No.24

Order granting leave to
Appeal to the Judicial
Committee
10th October 1983 (Contd.)

IN THE COURT OF APPEAL

5. The Respondents do provide security in the sum of \$10,000.- (Dollars Ten thousand), to the satisfaction of the Registrar, for the payment of all such costs as may become payable to the Appellants in the event of the Respondents failing to proceed with the appeal or the Judicial Committee ordering the Respondents to pay the costs of the Appellants, as the case may be.

Dated the 10th day of October, 1983.

ASST. REGISTRAR

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL IN THE REPUBLIC OF
SINGAPORE

B E T W E E N :

INTER EQUIPOS NAVALES, S.A.

Appellants
(Plaintiffs)

- and -

1. LEW KAH CHOO
2. LEW KAH HOOK
3. LEW KAH HOO
4. LEW LAY BENG (f)
All trading under the name
and style of
Hock Cheong & Company

Respondents
(Defendants)

RECORD OF PROCEEDINGS

VOLUME I

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Solicitors for the
Respondents