

41/85

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 -

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

Respondents
(Defendants)

CASE FOR THE APPELLANTS

RECORD

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1. This is an appeal from an order of the Court of Appeal of the Republic of Singapore (Wee Chong Jin C.J., Sinnathuray and Wahab Ghows JJ.) that the judgment for the Appellants (the Plaintiffs in the action) given by Kulasekaram J. on the 28th June 1982 be set aside and that the Respondents' counterclaim be allowed and that damages on the counterclaim be assessed by the Registrar on a date to be fixed. Kulasekaram J. had given judgment for the Appellants against the 1st, 2nd and 3rd Respondents in the sum of 180,012 Deutschmarks less the equivalent in Deutschmarks of Singapore \$4,695.55, and for the 1st, 2nd and 3rd Respondents on the counterclaim in the sum of Singapore \$38,541.

p.118, 119

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p.110, 111

2. The primary issue raised upon this appeal is whether the Court of Appeal was justified in reversing findings of fact by Kulasekaram J. Both the trial judge and

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p.135: 10-14	the Court of Appeal dealt with the case upon the basis that it turned on questions of fact. The Court of Appeal considered that the trial judge had over-looked or failed to consider what it described as vital documentary evidence and unchallenged testimony of independent witnesses, which, in the view of the Court of Appeal, contradicted his findings on issues of fact. A subsidiary issue is whether the Court of Appeal had jurisdiction to order that the damages on the Counterclaim be assessed by the Registrar.	10
p.119:8-11		
p.27	3. The Appellants are a company incorporated and carrying on business in Spain. Their principal activity is the manufacture and sale of lashing systems for securing cargo and of cargo handling equipment; the latter category includes devices known as spreaders, used to lift containers from quay to ship or vice versa. The Appellants' claim was for, inter alia, 188,012.00 Deutschmarks as the value of such goods supplied on consignment by the Appellants to the Respondents in Singapore between January and May 1978 for sale by the Respondents, for the proceeds of which sales less commission the Respondents were to account to the Appellants. The goods had been supplied pursuant to an agreement or arrangement, the precise nature and extent of which was in dispute. The Respondents contended that by an oral agreement made in September 1977 they were appointed the Appellants' sole agents and distributors for the Far East and Asean (Singapore, Malaysia, Thailand, Indonesia and the Philippines) regions for a period of 2 years from January 1978. The Appellants contended that provisionally in September 1977 and finally in January 1978 the Respondents were appointed as its distributor for Singapore, Malaysia and Hong Kong only, that there was no sole agency, and that the appointment was not for any fixed period. It was common ground that from about February 1978 the parties were negotiating with a view in the formation of a new company (eventually agreed to be named Inter Lashings Systems Far East Pte Ltd.) as a	20 30
p.8: 18-25		40
pp.13-16		
p.30:30-35 p.81:24-26		50

vehicle for a joint venture between them in Singapore: in the event that joint venture did not take place.

4. At the trial it was agreed that the Appellants' claim was to be reduced by Singapore \$4,695.55 by reason of a payment of that amount having been made to the Appellants by the Respondents, and that the Respondents were entitled to a payment of Singapore \$38,541 as commission on a contract for the construction of a vessel at Fukuoka Shipyard. These agreed sums are reflected in the Order of Kulasekaram J. The principal point, however, taken by the Respondents was that by causing the incorporation of a company known as Inter Equipos (Far East) Pte. Ltd. in Singapore on the 30th May 1978 as a vehicle for the sale of the Appellants' products in the Far East and Asean regions the Appellants had prevented the Respondents from continuing to sell such products and had thereby breached the sole agency and distributorship agreement alleged by the Respondents. The Respondents therefore counterclaimed loss for the unexpired portion of the 2 years' term, estimated at Singapore \$1,120,000.00. The Appellants, in addition to their contentions (described in paragraph 3 above) as to the limited nature and extent of the Respondents' appointment, submitted that it was in any event entitled to establish and deal through Inter Equipos (Far East) Pte. Ltd. since the Respondents' agency and distributorship (whether or not sole and whether or not of a fixed term of 2 years) had been lawfully terminated or was in law discharged at the end of May 1978 by reason of the conduct of the Respondents. The principal matter relied upon by the Appellants was that the Respondents secretly and fraudulently manufactured imitations of the Appellants' products and offered them for sale or sold them in competition with the Appellants' products at lower prices. The Appellants' president and main witness, Birger Merten, visited the Respondents' factory at Jurong, Singapore, on the 19th May 1978. He there saw, according to his evidence, spreaders in the course of manufacture and also a crate of items

p.106:20-30

p.106:18-20

p.9:20-25

p.10:5-10

p.17

p.17:3-13

p.30:40 to p.31:25 and p.42:36 to p.43:27

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	of lashing equipment (transverse lashing units, with hooks screwed into a retaining block) identical to but not in fact those of the Appellants. The Respondents	
p.81:1-20	admitted the manufacture of some items of equipment up to May 1978 but said that these were incidental parts necessary for the completion of orders and that	
p.81:20-25	that practice was known to the Appellants. They denied the manufacture of spreaders	10
p.87:10-20	in 1978 and said that the spreader parts which Merton saw on the 19th May 1978 were the rusty remains of unfinished products manufactured in 1976. They admitted the presence of retaining blocks (although without hooks) and averred that they had been bought in 1976. They contended that from the outset the Appellants' intention had been to make	20
p.46:1-5	use of the Respondents to establish	
p.98:30-33	itself in the Far East, and to jettison them once so established; and that the Respondents' manufacture of parts was raised simply as an excuse by which the Appellants might extricate themselves from their agreement with the Respondents.	
	5. The issues in the case, described above, were plainly questions of fact. Kulasekaram J. correctly so recognised	30
p.107:16	in the first sentence of his judgment. He made the following findings of fact:-	
p.108:8-10	(i) The Respondents were the Appellants' agents and sole distributors of their goods for the Far East and South East Asia.	
p.107:24-27	(ii) On his visit to the Respondents' factory at Jurong Merton saw that the Respondents were manufacturing	
p.108:16-27	copies of the Appellants' goods; his evidence of what he saw on that occasion was correct.	40
p.108:16 to p.109:5	(iii) Before that visit he had suspected that the Respondents were manufacturing copies of the Appellants' goods, but it was during that visit that his suspicions were confirmed and that he first knew for certain of the copying.	
	(iv) It was his discovery of the	50

10 Respondents' copying on the occasion of his visit which decided him to bring the Appellants' agreement with the Respondents to an end. Before coming to Singapore in May 1978 he had asked Hernandez, the Appellants' representative there, to find out if the new company (Inter Equipos (Far East) Pte. Ltd.) could be registered, and that was in the back of his mind as a possible course of conduct if his suspicions were confirmed; but he would not have taken action but for his discovery of the fabrication during his visit to the factory in Jurong.

p.108:20-27

20 6. Upon those findings of fact Kulasekaram J. held that the Respondents were in breach of their fiduciary duty to the Appellants as sole distributors of the Appellants' goods and that the Appellants were therefore entitled to terminate their contract with the Respondents forthwith.

p.109:1-5
10-16

7. The Court of Appeal criticised the findings of Kulasekaram J. on five grounds, namely:

30 (i) The evidence of Tan Kay Bin, an advocate and solicitor of the Supreme Court of Singapore, instructed on behalf of the Appellants in respect of the incorporation of Inter Equipos Navales (Far East) Pte. Ltd.

p.127:16 to
p.129:4

(ii) Merten's telexes in connection with manufacture by the Respondents in Singapore.

p.129:5 to
p.131:15

(iii) The failure of the Appellants to call Hernandez as a witness;

p.131:16-24

40 (iv) Merten's signature of a draft of the joint venture agreement on the 18th May 1978 and of amendments thereto on the 19th May 1978;

p.132:1-10

(v) The terms of a letter of the 20th May 1978 from the Appellants to the Respondents.

p.132:14 to
p.133:5

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8. The Evidence of Tan Kay Bin

pp.57, 58

Tan Kay Bin's evidence in substance was as follows:

- (i) On the 16th March 1978 he was instructed by Hernandez and one James Khoo to ascertain if the name "Inter Equipos Navales (Far East) Pte. Ltd." was available for registration as a company name; 10
- (ii) On that date he made a written enquiry to that effect to the Registrar of Companies;
- (iii) By letter dated the 3rd April 1978 the Registrar confirmed that the name proposed was available for registration.
- (iv) By letter dated the 13th April 1978 Tan Kay Bin informed James Khoo that the relevant documents were ready for signature. 20
- (v) On the 19th May 1978, the first occasion on which Tan Kay Bin met Merten, Merten, Khoo and Hernandez signed the statutory consent to act as directors of Inter Equipos Navales (Far East) Pte. Ltd.

p.221

p.45:10-20

Merten's evidence was that after his visit to Jurong he gave instructions for the incorporation of the new company, Inter Equipos Navales (Far East) Pte. Ltd. In the Court of Appeal's view, Kulasekaram J. failed to assess that evidence against the background of the documentary evidence (viz: the correspondence conducted by Tan Kay Bin) and Tan Kay Bin's evidence. The Court of Appeal over-estimated the effect of Tan Kay Bin's evidence and erred in finding that it diverged from the evidence of Merten. Merten's evidence that he saw his lawyer (Tan Kay Bin) after the visit to Jurong and then gave instructions for the incorporation of the new company was in accord with the evidence of Tan Kay Bin. The latter's evidence that on the 16th March 1978 he was instructed to ascertain the availability of the proposed company name is, moreover, consistent with a lack of settled intention at 40

10 that stage by the Appellants to proceed
to incorporation. Indeed, that there was no
such settled intention as confirmed by his
evidence that it was as long before
the 19th May 1978 as the 13th April 1978
that he wrote to James Khoo that the
documents were ready for signature and
that the Appellants took no further step in
the matter until the 19th May 1978.
There is therefore no inconsistency between
the evidence of Merten and Tan Kay Bin.
Kulasekaram J.'s conclusion that before
coming to Singapore Merten asked Hernandez
to find out if the new company could be
registered, merely as a possible course
of action if his suspicions were confirmed,
was a legitimate inference from the
evidence given both by Tan Kay Bin and
20 Merten; in particular Tan Kay Bin's
evidence as to the limited extent of his
initial instructions and the date (the
19th May 1978) on which further steps
to incorporation were instituted, and
Merten's evidence of his suspicions prior
to May 1978. Further and in any event
Kulasekaram J. plainly considered the
question of the impact of Tan Kay Bin's
evidence upon the evidence given by
30 Merten. He referred expressly as a
difficulty to the question of the date upon
which Merten saw Tan Kay Bin, that is
whether it was before or after his
discovery of the Respondent's fabrication
work.

p.108:20-23
pp.57, 58
pp.42:20-30
50:23-24
55:32-38
p.107:18-23

9. The Telex Messages

40 The Court of Appeal's criticism is that
the judge did not mention the fact that
Merton had agreed to the manufacture in
Singapore of what they described as
"certain types of equipment" to meet
urgent orders. The judge was not obliged
to refer to every item of evidence in
his judgment, and in any event expressly
stated that in arriving at his decision
in the case he had considered all the
evidence that had been placed before him.
That he did not refer expressly to the
telex messages cited by the Court of
50 Appeal is, moreover, not surprising
since those documents are consistent
with and indeed support his findings.
The permission to manufacture thereby
given related only to lashing bars

pp.129-131
p.109:14-16
p.50:8

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p.50:30-40 (parts BT-5 and BT-2), described in evidence by Merten as very simple parts. Permission to manufacture spreaders was expressly refused. That permission to manufacture was limited to two specific and minor instances, and indeed that permission was apparently thought necessary by the Respondents, supports the Appellants' and not the Respondents' case. 10

10. Hernandez

Hernandez was in Singapore as the Appellants' representative at all material times from January 1978. The Court of Appeal's view, that if there had been any unauthorised fabrication of the Appellants' equipment in the Respondents' factory Hernandez should have seen it, fails to take account of the facts that Hernandez' office was at the Respondents' offices at Kallang Place and not at their factory at Jurong where the fabrication occurred and that his functions lay in the marketing of the Appellants' products; there was nothing in his duties to take him to the factory in Jurong; indeed there was no evidence that he had any right to go there. In any event the inference if any to be drawn from his absence from the witness box was eminently a matter for the trial judge. That the point is not referred to in his judgment does not mean that he did not consider it. Moreover, this was not a case in which the witness's absence was unexplained. Merten gave evidence that Hernandez had left Singapore in November 1978 and was not prepared to return because of threats by the Respondents. Furthermore, the Appellants at trial sought to put in evidence by Hernandez in the form of two affidavits, which had been disclosed in the course of Discovery. The Respondents objected to their admission and Kulasekaram J. declined to admit them; nonetheless it could not be said that the Appellants were seeking to conceal Hernandez' evidence. 20 30 40 50

p.59:20-22

p.29:20-30

p.51:36 to p.52:18

p.53:8-13

11. The Draft Joint Venture Agreement and the Amendments

10 That Merten signed the draft joint venture agreement on the 18th May 1978 and the amendments thereto on the 19th May 1978 is consistent with Kulasekaram J.'s findings. Merten's evidence was that he signed the amendments on the 19th May before his visit to the factory at Jurong. p.43:40-50

12. The Letter of the 20th May 1978

20 The Court of Appeal's observation that if it was true that Merten had seen the lashings and spreaders fabricated by the Respondents without authority in the Respondents' factory on the 19th May 1978 he would have mentioned it in the letter of the 20th May as the reason for cancelling the agreement overlooks the statement at the end of the first paragraph of the letter that "The reasons have been explained and will be confirmed by written letter by Mr Hernandez himself". That letter by Hernandez was in evidence. p.132:19 to p.134:15 and pp.213,214 p.212

30 It expressly referred to the Respondents' activities at Jurong and to the production of equipment by the Respondents without the Appellants' consent. It is therefore submitted that the Court of Appeal's criticism on this point was misconceived. Moreover, the Court of Appeal was wrong in regarding the letter of the 20th May as apologetic, and in attaching significance to the suggestion of new negotiations. Further and in any event there is no reason to suppose that Kulasekaram J. failed to apply his mind to the letter of the 20th May. On the contrary he expressly referred to it, when stating that after his discovery of the fabrication Merten "followed that up by letters and brought the matter to an end". p.109:5,6

50 13. It is therefore submitted that neither individually nor collectively did the grounds specified by the Court of Appeal justify interference with the trial judge's findings of fact. Kulasekaram J. had the advantage not shared by the Court of Appeal of having seen and heard the witnesses. The evidence before the trial judge was sufficient to justify his findings and conclusions.

14. The Court of Appeal ordered damages on the Counterclaim to be assessed by the Registrar. It does not appear that this aspect of the Court's order was discussed at the hearing. It is not clear upon what basis the assessment was ordered, or what form the assessment is intended by the Court of Appeal to take. There was no application to the Court of Appeal for a re-hearing on the issue of damages or for leave to adduce fresh evidence on that issue. Had any such application been made it ought to have failed, since no grounds for its success were shown; in particular, there was no evidence of any matters having occurred after the date of trial. It is submitted that the Court of Appeal should have assessed damages on the basis of the material before it or, if such material was inadequate, dismissed the Counterclaim as incomplete (or given judgment on the Counterclaim for nominal damages only); alternatively the question of damages could, conceivably, have been remitted to Kulasekaram J. for his decision on the basis of the evidence submitted to him at trial. In the event the Respondents have applied to the Assistant Registrar to adduce fresh evidence upon the assessment and he was acceded to that application. An appeal by the Appellants against that ruling was dismissed on the 16th May 1983 and an application for leave to appeal against that dismissal was refused by the Court of Appeal on the 12th August 1985.

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15. Further, the Court of Appeal was in any event wrong to set aside the Order of Kulasekaram J. that the 1st, 2nd, and 3rd Respondents do pay the Appellants on their claim the sum of 180,012 Deutschmarks less the equivalent in Deutschmarks of the sum of 4,695.55 Singapore dollars. The Appellants' entitlement to that sum was admitted by the Respondents, subject to the Counterclaim. Until damages on the Counterclaim are assessed it cannot be known whether they will be of greater, equal or lesser amount than the sum to which the Appellants are indisputably entitled on

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the claim. The Court of Appeal should therefore have allowed the judgment on the Appellants' claim to stand subject to a stay of execution pending assessment of damages on the Counterclaim.

10 16. The Appellants respectfully submit that this appeal ought to be allowed with costs for the following (amongst other)

R E A S O N S

- 20 (1) BECAUSE the Court of Appeal wrongly reversed findings of fact by the trial judge.
- (2) BECAUSE the trial judge's findings of fact were supported by sufficient evidence.
- (3) BECAUSE the Court of Appeal's order that damages on the Counterclaim be assessed by the Registrar was made without jurisdiction or was wrong in principle.
- (4) BECAUSE the Court of Appeal wrongly set aside the judgment upon the Appellants' claim when the sum thereby ordered to be paid was undisputed subject to Counterclaim.

GEORGE NEWMAN, Q.C.

AUSTIN ALLISON

ON APPEAL
FROM THE COURT OF APPEAL IN THE
REPUBLIC OF SINGAPORE

BETWEEN:

INTER EQUIPOS NAVALES S.A.

- AND -

- (1) LEW KAH CHOO
 - (2) LEW KAH HOOK
 - (3) LEW KAH HOO
 - (4) LEW KAH BENG
(all trading under the name and
style of HOCK CHEONG & COMPANY)
-
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CASE FOR THE APPELLANTS

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