

Inter Equipos Navales, S.A.

Appellants

v.

- (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

FROM

THE COURT OF APPEAL OF THE
REPUBLIC OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 18TH NOVEMBER 1985

Present at the Hearing:

LORD KEITH OF KINKEL
LORD FRASER OF TULLYBELTON
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD MACKAY OF CLASHFERN
[Delivered by Lord Mackay of Clashfern]

This appeal from an order of the Court of Appeal in Singapore (Wee Chong Jin C.J., Sinnathuray and Ghows J.J.) dated 8th July 1983, the grounds of judgment for which were issued on 31st January 1984, setting aside an order of Kulasekaram J. dated 28th June 1982, is confined to the question whether counterclaim has been correctly dealt with in the courts in Singapore.

The plaintiffs, who are the appellants before this Board, are a company incorporated in Spain whose principal activity is the manufacture and sale of lashing systems for securing cargo and of cargo handling equipment, the latter category including spreaders which are used to lift containers from quay to ship or vice versa. The appellants' claim was in respect of goods supplied on consignment to the defendants, who are the respondents here, pursuant to an arrangement the precise nature and extent of which were in dispute. The respondents contended that by

the arrangement made by oral agreement 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 two years from January 1978. The appellants contended that provisionally in September 1977 and finally in January 1978 the respondents were appointed as their distributor for Singapore, Malaysia and Hong Kong only, that there was no sole agency and that the appointment was not for any fixed period. The claim and the counterclaim, so far as relating to commission on the goods which are the subjects of the claim, have been decided by the judge in a manner not criticised before their Lordships by either party.

In their counterclaim the respondents alleged that the appellants, by incorporating on 30th May 1978 a company for the sale of the appellants' products in the Far East and Asean regions, had breached this arrangement and they counterclaimed for damages for the unexpired portion of the two years' term estimated at \$1,120,000.00, being 8% on a turnover estimated by them at \$7,000,000.00 per annum. The appellants replied that the arrangement had been lawfully terminated on or about 20th May 1978 by reason of the conduct of the respondents. The conduct of the respondents alleged by the appellants and relied upon as justifying this termination 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.

After a trial which began on 11th November 1981 and occupied some ten days in all, having frequently been adjourned and eventually terminating in the afternoon of 28th June 1982, the judge immediately delivered an oral judgment in which he found that the respondents were the sole distributors or agents for the appellants' goods for the Far East and South East Asia, that in breach of the fiduciary duty which they in consequence owed to the appellants, the respondents were on 19th May 1978, fabricating articles in their factory in Jurong which were copies of the appellants' goods without the knowledge or approval of the appellants and that in consequence the appellants were justified in terminating forthwith the contract under which the respondents were appointed as sole distributors and agents for the appellants and no damages for breach of the contract were due.

The learned trial judge considered the issue he had to determine was essentially a question of fact which depended on whether or not he accepted the evidence of Merten, the appellants' president and principal witness, that on 19th May 1978 he had seen the

unauthorised fabrication taking place in the respondents' factory at Jurong. The learned judge accepted Merten's evidence of what he saw that day. Although the learned judge found for the appellants on the matter disputed before him, he awarded the plaintiffs only half their costs in the action since he held that Merten had prolonged the trial in various ways.

The respondents appealed to the Court of Appeal who reversed the judge's decision. In doing so they summarised their reasons thus:-

"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."

Before considering the documentary evidence and the testimony of independent witnesses to which the Court of Appeal referred it is necessary to summarise the history of the relationship between the parties prior to 19th May 1978.

The first business contact between the appellants and the respondents was made through HCC Offshore Supplies (UK) Limited, the English company associated with the respondents. In about May 1977 the managing director of that company, Mr. Sonny Choo Swee Soon, contacted the appellants in Spain with a view to determining whether or not his company would be able to represent the appellants in selling container fittings and lashing equipment. After this initial contact the appellants began to supply the respondents with container fittings and lashing and handling equipment which the respondents paid for by means of letters of credit opened in the appellants' favour. Subsequently in about July 1977 Mr. Merten visited Singapore for the purpose of investigating the potential market for the appellants' products. While in Singapore, Mr. Merten visited the respondents' factory at Jurong and met the first respondent, Mr. Lew Kah Choo (also known as Michael Lew), the respondents' managing partner. It was proposed that the respondents should meet the appellants in Madrid to discuss representing the appellants in the sale of their container lashing products. Evidence was given on behalf of the respondents that at the time of Mr. Merten's visit to

Singapore, the respondents were and previously had been dealing in container equipment, buying container fittings and lashing equipment from suppliers in Japan and the United Kingdom and manufacturing container handling equipment in the form of spreaders. However, Mr. Merten's evidence was that the respondents did not know what a spreader was and he denied that he had seen spreaders in various stages of construction at the respondents' factory in Jurong when he visited the factory in July 1977. The next meeting between the parties took place in September 1977 in Madrid; the appellants were represented by Mr. Merten and Mr. Vincent Hernandez and the respondents were represented by Mr. Michael Lew, Mr. Swee and Mr. Roy Chua. The respondents' case was that at this meeting it was orally agreed that the respondents were appointed the appellants' sole agents and distributors for the sale of their container fittings and lashing and handling equipment in Singapore, the Far East and Asean regions for a period of two years. The parties discussed arrangements for Mr. Hernandez to be sent to Singapore as the appellants' delegate for a period of two years commencing in January 1978 when Mr. Merten and Mr. Hernandez planned to meet with the respondents in Singapore. The appellants by their reply and defence to the counterclaim dated 1st August 1979 at first denied that there was any such oral agreement between the parties but by paragraph 3 of the re-amended defence to counterclaim dated 25th November 1981, filed after Mr. Merten had given evidence-in-chief at the trial on 11th and 12th November 1981, the appellants alleged that at the September 1977 meeting the respondents were provisionally appointed distributors of the appellants' equipment in Singapore, Malaysia and Hong Kong only. Moreover, the appellants alleged that at another meeting in Madrid in or about November 1977, the parties agreed upon the terms under which Mr. Hernandez would be sent to Singapore to work with the respondents in establishing their container equipment business and that those terms were recorded in a written memorandum signed by the parties at the November 1977 meeting.

In any case it was common ground that there was a further meeting between the parties on 15th January 1978 in Singapore when Mr. Hernandez was seconded to the respondents for a period of two years to assist in the organisation and running of their newly established container fittings and lashing equipment department. For the purpose of establishing this department, prior to the January 1978 meeting, the respondents hired Mr. Ong Geok Quee to act as the department manager and Mr. James Khoo to act as the department's sales and marketing supervisor. The terms which were agreed between the parties at the January 1978 meeting were recorded by Mr. Ong in the

form of minutes which were initialled by Mr. Hernandez on behalf of the appellants. Mr. Hernandez also initialled an amendment to the minutes dated 2nd February 1978. Mr. Merten's evidence was to the effect that the minutes which purported to record the confirmation of the respondents' appointment as sole agent and distributor for the appellants' products in Singapore, the Far East and South East Asia were not an accurate reflection of what had been agreed. Mr. Merten did not accept that the respondents became at this, or any other stage, sole agent and distributor of the appellants' container lashing products. Following the January 1978 meeting, the respondents publicly announced their appointment as the appellants' sole agents and distributors in Singapore, the Far East and South East Asia by means of advertisements placed in the Singapore Press, a trade publication and a catalogue of the products offered for sale.

In a telex dated 15th December 1977 from the respondents to the appellants, the suggestion is first made that the two parties should jointly establish a new company for the marketing of the appellants' products. Thereafter, from early March 1978 down to the memorandum executed on 18th May and amended on 19th May 1978, the development of the proposals for the constitution of the joint venture company may be traced in the documentary record comprising the telexes exchanged between the parties in March and April 1978. On 13th March 1978 the appellants telexed the respondents proposing *inter alia*, that the new joint venture company should be named "Inter Lashing Systems Far East Ltd. (Pty)". The parties met on 18th May 1978 at the respondents' offices in Kallang to discuss the terms of the joint venture. The memorandum of the joint venture agreement reached on 18th May 1978 was prepared by Mr. Ong and signed by Mr. Merten on behalf of the appellants and by Mr. Michael Lew on behalf of the respondents. An amendment dated 19th May 1978 was also signed by Mr. Merten. After their meeting on 18th May the parties dined together at the Mandarin Hotel in Singapore and the following morning Mr. Michael Lew and Mr. Swee left Singapore to visit Taiwan and Japan.

Mr. Merten gave evidence that when he came to Singapore in May 1978 for the purpose of concluding the joint venture agreement, Mr. Hernandez showed him copies of two price quotations and a series of stock reports maintained by the respondents which recorded that in March 1978 samples of some of the appellants' products had been loaned to two foundries in Singapore for the purpose of obtaining production quotations. Mr. Merten's evidence was that these documents had been kept secret from Mr. Hernandez and that on 19th May 1978, after the joint venture

memorandum and the amendment thereto had been signed, he and Mr. Hernandez visited the respondents' factory at Jurong and found that the respondents were manufacturing spreaders and a particular model of lashing bar which were copies of the appellants' products. According to Mr. Merten, this discovery confirmed suspicions Mr. Hernandez and Mr. Merten already had about the respondents and as a result, the appellants terminated their agreement with the respondents and immediately formed a new Singapore company, Inter Equipos Navales (Far East) Pte. Ltd., to market their products in place of the respondents. Mr. Merten said that it was necessary for the appellants to form the new company as the respondents were holding stocks of the appellants' goods which they refused to return and that accordingly he gave instructions to Mr. Hernandez to have the new company incorporated. He denied that before 20th May 1978 the appellants had the intention of setting up a Singapore company without the participation of the respondents and stated that he gave instructions to have the new company formed after the visit to Jurong on 19th May. The directors and shareholders of the new company were Mr. Merten, Mr. Hernandez and Mr. James Khoo.

The first matter on which the Court of Appeal relied, as contradicting the findings of fact by the learned trial judge, was the evidence of Mr. Tan Kay Bin, the appellants' solicitor. He said in evidence that on 16th March 1978 he was instructed by James Khoo and Hernandez to find out if a company could be registered with the name Inter Equipos Navales (Far East) Pte. Ltd., and that he wrote to the Registrar of Companies who replied on 3rd April 1978 that the name proposed was available for registration. On 13th April 1978 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 19th May, 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. He accepted, in answer to questions by the learned trial judge, that it was possible that he was given particulars of Mr. Merten for inclusion only on 19th May. He further stated that the application for incorporation was completed so late on 19th May that he could not send it off till the next day.

The evidence of Mr. Tan Kay Bin was available to the respondents because Mr. Merten agreed in the course of his cross-examination that his solicitor should give evidence about when he gave instructions for the formation of their company. This evidence makes clear that instructions to proceed to

incorporate the company were given for the first time late on 19th May and it appears to their Lordships that what preceded that date is explained by a desire on the part of Mr. Merten to keep his options open and to know whether he could proceed to incorporate, if necessary, a company in Singapore to look after the appellants' interests there if the negotiations with the respondents for a joint venture were not successfully concluded. This evidence also appears to fit Mr. Merten's assertions that Mr. Hernandez had before 19th May 1978 had suspicions about the respondents' conduct which he communicated to Merten in confidential conversation on the telephone and which was followed up by a guarded letter, [exhibit D7 on page 234 of the Record].

The trial judge did consider this matter and felt there was a weakness in Merten's evidence on this point which gave him cause for some doubts but these were not sufficient to prevent him holding that Merten's evidence on the principal matter in contention should be accepted. In their Lordships' view he was entitled to reach that conclusion.

The Court of Appeal next go on to find that the judgment of the learned trial judge did not mention the fact that Merten had agreed to the manufacture in Singapore of certain types of equipment to meet urgent orders. There was indeed evidence that Merten had agreed to the use of certain locally produced components in order to meet urgent orders for equipment in Singapore that could not be timeously supplied from Spain. There is, however, no evidence whatever that he had agreed to the manufacture of such major items as spreaders or that he had agreed to the manufacture of the EAT 3 units which he said he saw at Jurong on 19th May. The documentary evidence is clear that he would consent to the manufacture of spreaders by the respondents only if the joint venture were agreed and in pursuance thereof. Any manufacture he saw on 19th May 1978 obviously did not fulfil the latter condition. It was neither suggested in the respondents' pleadings nor in cross-examination of Merten that he had agreed to the manufacture on 19th May 1978 by the respondents of spreaders and EAT 3 equipment identical to the appellants' equipment. That he had not done so is strikingly confirmed by the first respondent when he said in the course of his cross-examination:-

"If we were manufacturing the spreader parts in May 1978 we would not be foolish enough to show Mr. Merten around the factory."

The Court of Appeal next point out that if there had been any unauthorised fabrication of the appellants' equipment in the respondents' factory, Hernandez should have seen it. They continue:-

"He was not called to give evidence and this the learned trial judge apparently failed to consider."

Merten's evidence was that Hernandez was with him at Jurong on 19th May 1978 and that he also saw the unauthorised fabrication there on that day, but he explains the reason that he was not called. According to him, Mr. Hernandez had been the managing director of the appellants' new company incorporated, in accordance with the instructions given by Merten on 19th May 1978, till November 1978 when he left Singapore because he was threatened by the respondents and consequently he was not prepared to come to Singapore to give evidence. Mr. Hernandez had sworn two affidavits which were disclosed in the appellants' affidavit of documents. Counsel for the appellants applied to put these in evidence but this was objected to by counsel for the respondents and the application was refused. Their Lordships consider that, in these circumstances, the absence of Hernandez from the witness box did not preclude the learned judge from accepting the evidence of Mr. Merten on the crucial matter.

The final ground stated by the Court of Appeal for reversing the trial judge's finding was that the learned trial judge had in their view plainly failed to apply his mind to the stage the joint venture negotiations had reached by 19th May 1978 and the terms of Merten's letter of 20th May 1978 which they set out in full. They considered the terms of this letter surprising if Merten had seen unauthorised imitations of the appellants' products in the respondents' factory in Jurong the day before. Their Lordships agree that the fact that this letter does not mention expressly the findings at Jurong made some explanation of it desirable. However, for whatever reason, this letter was not referred to in the cross-examination of Mr. Merten and their Lordships certainly cannot say that, if it had been, Merten would have been unable to produce a convincing explanation of its terms. The letter does mention that Hernandez was writing separately to explain why he was declining to participate in the joint venture in the manner in which it had been proposed that he should. He had not by then signed the joint venture documents although they had been drawn up with provision for his signature. In his letter of 19th May, Hernandez said among other things:-

"3. For several times Hock Cheong & Co. has tried to produce the same equipment as Inter without their consent."

Although this is not a precise reference to a finding of unauthorised manufacture on a visit to Jurong on that day it is certainly broad enough to include it

and it is worthy of note that when the first respondent came to reply to this correspondence by telex of 29th May 1978 [AB 85 on page 215 of the Record], he does not in terms dispute this assertion in Hernandez's letter and says that the reasons given by Mr. Hernandez were of no significance as reasons for his resignation. It is also to be noted that although Merten's letter does not in terms express anger, the first decision reported in it is a very decisive departure from the stance of negotiating a joint venture and suggests that something fairly dramatic had occurred between the time when Merten signed the joint venture agreement and the amendment to it and his writing of this letter. In the light of these considerations their Lordships are clearly of the view that the terms of this letter, unexplored in evidence, did not preclude the trial judge from holding that Merten's evidence of what he saw in Jurong on 19th May 1978 was true and it is clear that, in giving his oral judgement, the learned trial judge had this letter in view since he states that after Merten had received confirmation of his earlier suspicions by finding out for certain about the unauthorised manufacture "he followed that up by letters and brought the matter to an end".

For these reasons their Lordships have reached the view that the Court of Appeal were not justified in interfering with the trial judge's findings of fact on the basis of the reasons they gave for so doing.

Before this Board, counsel for the respondents urged upon their Lordships that the learned trial judge had either declined, or should have declined to accept the evidence of Merten on other matters, particularly with regard to the nature of the arrangement between the appellants and the respondents, and that since Merten was unreliable on other matters it was perverse for him to accept Merten's evidence on the crucial matter at least without giving very full reasons for his so doing. Their Lordships consider that while these other matters involve questions of Merten's reliability and the accuracy of his memory some three years after the events in question the central issue was one on which there was no room for mistake. On that issue either Merten's evidence was true or it was a deliberate falsehood. It was given clearly and considered by itself in the judge's notes it contained nothing which would stigmatise it as unworthy of credit. The only evidence challenging it was vague and unsatisfactory and no explanation was offered of how spreaders at various stages of manufacture but none finished came to be sitting in the respondents' factory at Jurong for a period of some two years. That evidence came from the first respondent. The person who actually received Merten and Hernandez at the factory was not a witness. Their Lordships would

only add that it may well be that, in terminating the arrangement with the respondents, Merten had in view that it might have been profitable for the appellants to proceed on their own rather than by joint venture with the respondents, but if the respondents had manufactured spreaders in imitation of the appellants' equipment for sale in competition with the appellants and without their authority and thus committed a repudiatory breach of contract, the appellants were entitled to terminate the contract whatever motives they might have for grasping the opportunity to do so.

For these reasons their Lordships allow the appeal and restore the order of the trial judge. The appellants must have their costs in the Court of Appeal and before this Board.



