

PT Dwiputra Sumber Sukses v Ho Ming Siang
[2000] SGHC 182

Case Number : Suit 600142/2000
Decision Date : 06 September 2000
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Prabhakaran Nair with Jayanthi Menon (Ong Tan & Nair) for the plaintiffs; Liaw Jin Poh with Wan Fairuz Wan Hussin (William Lai & Alan Wong) for the defendant
Parties : PT Dwiputra Sumber Sukses — Ho Ming Siang

JUDGMENT:

Cur Adv Vult

1. The plaintiffs are a trading company incorporated in Indonesia. They are active mainly in the oil and gas and the pulp and paper trades. The plaintiffs also act as agents for foreign suppliers of equipment and materials who sell to manufacturers in Indonesia. When they act in such capacity, their foreign principals will pay the plaintiffs a commission on sales effected to the Indonesian customers. The plaintiffs' managing director is one Mr Justin Margono.
2. The defendant is a Malaysian. He was previously employed by PT Indah Kiat Pulp and Paper Corpn ('IKPP'), an Indonesian paper mill, as an engineer in their chemical plant. The plaintiffs had dealings with IKPP on behalf of a foreign principal named Eimco and thereby came to know the defendant sometime in 1990.
3. Sometime in early 1993, the defendant left IKPP and joined the plaintiff company in order to run its pulp and paper division. He was paid a monthly salary of US\$2,500, and provided with a car and paid accommodation while he was in Jakarta for the purposes of the plaintiffs' business. He was also promised a share in the profits of the plaintiffs' pulp and paper division.
4. In 1993 the plaintiffs were introduced to a Spanish manufacturer of equipment for pulp and paper concerns. This company, officially named Procesos Y Sistemas de Separacion SA, but always referred to as HPD, appointed the plaintiffs as its Indonesian agent on 22 July 1993. It was the defendant who negotiated the terms of the agency agreement with HPD and who signed the formal agreement on the plaintiffs' behalf.
5. In October 1994, the defendant's employment with the plaintiffs came to an abrupt halt. Mr Margono said that he fired the defendant because he had discovered that the defendant was siphoning funds intended for the plaintiffs to his own account instead. The defendant denied having done so and professes bewilderment at his termination.
6. The plaintiffs commenced this action to recover from the defendant monies had and received by him for their use alternatively for conversion. The defendant denies liability. He admits receiving some monies from HPD. He says these monies were not commissions due to the plaintiffs. They were 'commissions' payable to employees of IKPP who had assisted HPD in obtaining supply contracts with IKPP. The defendant merely acted as the conduit between these 'contacts' and HPD and his role was known to and approved by the plaintiffs. Therefore, the plaintiffs have no ground to recover the monies from him.

The pleadings

(i) Statement of claim

7. The substance of the plaintiffs' complaint is contained in paras 5 to 10. The first assertion the plaintiffs make is that on or about 15 July 1994, they procured the contract numbered IKP1/2/V/E/HPD/51 ('IKP/HPD/51') between IKPP and HPD and that

the commission payable by HPD to the plaintiffs for this contract was US\$380,000. Secondly, they asserted in para 6 that the following amounts were due and payable by HPD to the plaintiffs as commission:

	<u>Document</u>	<u>Amount</u>
(a)	DSS/HPD/001/93	US\$ 30,000.00
(b)	AH/HD/023	US\$ 1,163.70
(c)	AH/HD/043	US\$ 7,295.00
(d)	DSS/HPD/IKPP/94/003	US\$ 38,000.00
(e)	CKS/HPD/IK-VE/94-001	<u>US\$ 34,143.00</u>
		<u>US\$110,601.70</u>

These amounts were never paid to the plaintiffs and they subsequently discovered that the defendant had received the same but had not paid them over to the plaintiffs as he ought to have done as an employee of the plaintiffs.

8. In para 8, the plaintiffs alleged that the defendant had wrongly directed HPD to pay the sum of US\$380,000 due to them under contract IKP/HPD/51 to a Singapore company named Chemkonsult International Pte Ltd ('Chemkonsult'). Chemkonsult turned out to be a Singapore company incorporated on 24 November 1994. The defendant was a director and its principal shareholder. The plaintiffs alleged that the defendant was in breach of fiduciary duty by diverting commission earned by the plaintiffs into the account of a company which did not exist when contract IKP/HPD/51 was negotiated and in which the plaintiffs had no interest. They alleged in para 9 that HPD had followed the defendant's instructions by paying the commission to Chemkonsult and/or to the defendant's personal account. The other amounts specified in para 6 had also been diverted to the defendant's personal accounts.

9. By para 10 the plaintiffs stated that the defendant had wrongfully received and applied to his own use payments received from HPD when neither he nor Chemkonsult were entitled to do so. The defendant had wrongfully appropriated money belonging to the plaintiffs to his own use. By para 12, the plaintiffs claimed the total sum of US\$490,601.70 as monies had and received by the defendant to the plaintiffs' use. In the alternative, the plaintiffs pleaded in para 13 that the defendant had wrongfully deprived the plaintiffs of the use and possession of commission due to them and had converted the same to his own use.

(ii) Defence

10. Para 5 of the defence deals with contract IKP/HPD/51. The defendant pleaded that by a letter dated 23 April 1994 from the plaintiffs to HPD, the plaintiffs terminated the agency agreement. As such no commission was payable by HPD in respect of that contract. Further, by letters dated 29 July 1997 and 18 December 1997, the plaintiffs through their solicitors had demanded from HPD commission of US\$160,000 for this contract.

11. Para 6 of the defence first denies para 6 of the statement of claim and then goes on to deal with each amount claimed by the plaintiffs in that paragraph. First, the sum of US\$30,000 claimed pursuant to invoice DSS/HPD/001/93, was pleaded to have been paid by HPD to the contacts of the plaintiffs and the defendant through the defendant. The plaintiffs' claim against HPD was time barred. Secondly, the sum of US\$1,163.70 claimed pursuant to invoice AH/HD/023 was paid by HPD to the defendant for Christmas gifts for contacts of the plaintiffs and the defendant. The plaintiffs' claim against HPD was time barred.

12. The third amount, the sum of US\$7,295 claimed under invoice AH/HD/043, was paid by HPD through the defendant to contacts of the plaintiffs and the defendant. The fourth sum, US\$38,000, claimed under invoice DSS/HPD/IKPP/94/003, was a ten percent downpayment in respect of contract IKP/HPD/51 entered into by HPD after the agency agreement had been terminated. It was paid by HPD to the contacts of the plaintiffs and the defendant through the defendant. The plaintiffs were making a double claim. Finally, the sum of US\$34,143 claimed under invoice CKS/HPD/IK-VE/94-001 was paid to Chemkonsult on 21

November 1994 pursuant to an invoice from Chemkonsult. It had nothing to do with the plaintiffs.

13. The defendant went on to deny the other paragraphs of the statement of claim. He asserted that as the agency agreement between the plaintiffs and HPD had been terminated on 23 April 1994, no commission was payable to the plaintiffs in respect of contracts entered into by HPD on or after that date.

(iii) Reply

14. The main assertion in the plaintiffs' reply was that they were not aware of the termination letter dated 23 April 1994. They had not authorised the defendant to sign such a letter on their behalf and he had done so on their letterhead without their consent, knowledge or authority. They further stated that the defendant had perpetrated a fraud against the plaintiffs by signing that letter.

Issues

15. The main issues arising from the pleadings are:

- (1) whether there was an arrangement between HPD and the defendant that he would issue invoices for commission ostensibly due to the plaintiffs but in reality to facilitate the payment of bribes to IKPP employees and, if so, whether the plaintiffs were aware of this arrangement;
- (2) whether the agency agreement was terminated on 23 April 1994;
- (3) whether the sum of US\$380,000 was commission due to the plaintiffs in respect of contract IKP/HPD/51;
- (4) whether the sum of US\$38,000 (DSS/HPD/IKPP/94/003) was part of the commission of US\$380,000 under contract IKP/HPD/51 and therefore could not be claimed as a separate item;
- (5) whether the sums of US\$30,000 (DSS/HPD/001/93) and US\$7,295 (AH/HD/043) were commissions due to the plaintiffs or were payments meant for contacts;
- (6) whether the plaintiffs are entitled to the sum of US\$1,163.70 apparently paid in reimbursement for Christmas gifts purchased for contacts by the defendant;
- (7) whether invoice CKS/HPD/IK-VE/94-001 for US\$34,143 was in respect of work done by the plaintiffs.

The evidence

(i) The plaintiffs' version

16. The plaintiffs had only one witness: Mr Margono. He testified that the defendant was employed to run the pulp and paper division of the plaintiff company as he was familiar with this industry and Mr Margono himself was busy with the oil and gas division. It was also agreed that the defendant would benefit from a profit sharing arrangement in respect of the pulp and paper division. The defendant was not, however, considered a partner in the plaintiffs' business.

17. Mr Margono asserted that the defendant had been given the authority to operate only the day to day business of the pulp and paper division. At all times, all major decisions and/or proposals were to be made only after prior discussion and consultation with Mr Margono. The defendant was not given a carte blanche to do whatsoever he desired with the business. Instead he was at all times accountable to the plaintiffs.

18. HPD was introduced to the plaintiffs by one of Mr Margono's business associates. Mr Margono authorised the defendant to follow up and liaise with HPD and to sign the agency agreement that HPD had drafted. Under the agreement, the plaintiffs were entitled to commissions based on a prescribed scale as per the agreement. For example, for the first 10 million pesetas of the sale price, the plaintiffs were entitled to 5% as commission; for the next 40 million pesetas, they were entitled to 4% as commission; for the following 100 million pesetas, they were entitled to a commission of 2.5%, and so on. The agreement also provided that the commission rate could be varied by mutual agreement in any case where a normal commission would hinder the operation.

19. Mr Margono said that he left it to the defendant to discuss and conclude the assessment of how much money, in terms of commission, would be payable to the plaintiffs in each case of a sale which the plaintiffs concluded for HPD. Once this was ascertained, the defendant would issue an invoice on the plaintiffs' behalf for the monies payable to the plaintiffs.

20. About a year after employing the defendant, the plaintiffs discovered that the pulp and paper division was not profitable and that they were in fact losing money. Mr Margono became concerned for the defendant as he was not going to benefit from the profit sharing arrangement due to the losses. When he raised the issue with the defendant, however, the latter did not appear to be concerned that the division was not making profits.

21. In October 1994, a few months later, the defendant went on leave and Mr Margono had to handle the day to day operations of the division in his place. In the course of doing so, Mr Margono stumbled upon documents evidencing that certain payments due to the plaintiffs were instead being made to the defendant's own personal account upon his own request. Upon further investigation, Mr Margono found out that the defendant had been doing this for some time. He then terminated the defendant's employment with immediate effect.

22. Mr Margono telephoned HPD to find out the status of the commission payments due to the plaintiffs. He spoke with Mr Santos Digon Arizmendi ('Mr Digon'), HPD's technical director, who had been in constant contact with the defendant regarding HPD's business with Indonesian customers. The next day, 25 October 1994, the plaintiffs sent HPD a fax informing them of the dismissal of the defendant and asking them to ensure that all outstanding commission was paid directly to the plaintiffs and not to the defendant.

23. Thereafter, Mr Margono asked HPD to give him a list of the commission that it had paid the plaintiffs. This list was only supplied on 23 March 1995 after several reminders. It set out seven invoices, two of which had been issued by Chemkonsult. It is notable that of the five invoices sent out under the letterhead of the plaintiff company, the defendant now says that only one was in respect of commission due to the plaintiffs, the rest were for payment to contacts. In more than a year of working for the plaintiffs in relation to HPD the defendant only managed to earn them commission of some US\$30,638 from that company (per invoice AH/HD/035).

24. In his affidavit, Mr Margono gave details of the invoices to HPD which the defendant had sent out under the plaintiffs' letterhead and in respect of which he had instructed HPD to make payment to his own account. These are the invoices mentioned in the statement of claim and I will not deal with them further. Mr Margono went on to say that upon further investigation, the plaintiffs had ascertained that the defendant had formed Chemkonsult and had intercepted payments due to the plaintiffs by using this company as the recipient. Subsequently, HPD had informed the plaintiffs that from 5 August 1994 onwards, all payments made by them under the agency agreement had been directed to Chemkonsult in accordance with a letter dated 5 August 1994 from the plaintiffs. Mr Margono asserted that the plaintiffs had no record of this letter being sent out from his office and he first saw it when HPD forwarded a copy of it to the plaintiffs' solicitors this year.

25. The letter dated 5 August 1994 was written by the defendant on the plaintiffs' letterhead and addressed to HPD. It acknowledged that a sum of US\$380,000 had been awarded to the plaintiffs as commission for contract IKP/HPD/51. It went on to direct HPD to pay the said amount against invoices which would be issued by Chemkonsult. Mr Margono found this curious since Chemkonsult had not been registered as a company when this request was made and, further, the plaintiffs had had no prior knowledge of the transaction and had never agreed to allow the payments to be made to the account of Chemkonsult.

26. In relation to the alleged termination of the agency agreement, Mr Margono denied that this had happened. He asserted that the very first time he learnt about the termination letter of 23 April 1994 was when the defendant made reference to it in his defence in these proceedings. The plaintiffs' records contained no copy of such a letter nor had they any record of this letter being faxed out from their office. The letter was apparently written by the defendant himself. He certainly did not have the plaintiffs' authority to write it.

27. Mr Margono stated that the correspondence between HPD and himself subsequent to the defendant's termination never once suggested that either the agency agreement was terminated or even that the commissions due to the plaintiffs were not actually due to them. From October 1994 onwards, he had constantly asked HPD to give him details of all the commissions paid or payable to the plaintiffs but he failed to get any substantive response until 23 March 1995 when he received a fax from HPD giving him copies of all invoices and receipts of payment. Since then the plaintiffs had constantly demanded from HPD the commissions that were rightfully theirs.

28. Under cross-examination, Mr Margono asserted that he had employed the defendant at the request of his principal, Eimco. The defendant had gained knowledge of the recausticizing process employed by the pulp and paper industry and Eimco, as a supplier of the recausticizing equipment, thought that the plaintiffs would be better able to sell Eimco's products if they had such knowledge.

29. Mr Margono admitted that although HPD had been introduced to the plaintiffs by Eimco, he had had no dealings with them himself. He had asked the defendant to negotiate with them and to meet their representatives. When asked about the scale of commissions annexed to the agreement, Mr Margono was unable to explain exactly how it worked. He said that this was because the scale had been drawn up in Spanish currency and the exchange rate between that currency and the US dollar that was used as the currency for the supply contracts, always fluctuated.

30. Mr Margono denied that he had left the running of the pulp and paper division solely to the defendant. He asserted that the defendant had to make periodical reports to him on what was happening in the division and consult him on major decisions because he had supplied the capital.

31. A series of questions was put to the witness about the practice of paying bribes in the course of doing business in Indonesia. He disagreed this practice was common in Indonesia. He also asserted that he himself had never agreed to pay bribes though he had agreed to fund entertainment expenses. He was then shown the list of expenses that the defendant had submitted for September 1994. The witness's attention was drawn to the item on 12 September 1994 described as 'Commission to Mr Johanatan – IKPP Purchasing Jakarta (Order EIMCO W24 P Parts)'. The amount next to this description was 1 million rupiah. Then the next item, for another 2 million rupiah, was described as 'Commission to Tan Bak Tjuin – IKPP Perawang (Order EIMCO W24 P Parts)'. Mr Margono accepted that he had seen these items in September 1994 but asserted that he did not question the defendant about them. Mr Margono did not admit that these had been bribes paid on Eimco's behalf. He was not, however, able to explain what the payments were about. He said he did not know how the money had been spent.

32. It was put to Mr Margono that the arrangement between the plaintiffs and HPD was that the plaintiffs would issue invoices to HPD so that HPD could make legitimate payments to its contacts in IKPP. These monies would be paid to the defendant's account and the defendant would then pay the contacts. It was understood that these invoices would not be paid by HPD to the plaintiffs. Mr Margono denied any knowledge of this arrangement.

33. The witness was also asked about the steps that he had taken when he discovered the payments to the defendant. He said that he had tried to recover the money. First, he had tried to make the recovery from HPD because he thought that HPD had

been wrong to transfer funds to the plaintiffs' employee but at that time there was a big contract in the offing so he could not be too aggressive toward HPD. He also explained that he was slow in getting his solicitors to issue a demand for commission from HPD because he had no experience with court cases and three countries were involved ie Singapore, Spain and Indonesia.

34. The witness was questioned as to why his demand on HPD in respect of the contract IKP/HPD/51 had originally been for only US\$160,000 as commission when he was now claiming that the commission payable for that contract was US\$380,000. He explained that Mr Digon had given the figure of US\$160,000 to him as the commission payable. He could not confirm whether that figure was correct according to the scale of commissions but said that he had changed the claim to US\$380,000 when he discovered the existence of the letter (purportedly from the plaintiffs) dated 5 August 1994. There was some discrepancy in this account in that even accepting the witness's statement that he had not seen that letter until he had been given it by his lawyer in May 1998, his lawyers had still sent out a demand claiming US\$360,000 as commission for two contracts in July 1998. Mr Margono was not able to explain the discrepancy in the figures amongst the various letters of demand except by saying that he had left everything to his lawyers.

35. The witness was shown a letter dated 27 July 1994 from HPD to the defendant at the plaintiffs' office. The typed written portion of the letter stated that HPD agreed to pay US\$380,000 as commission for contract IKP/HPD/51. But there was a handwritten notation that said 'Be sure this money is paid cash to our common friends as agreed'. Mr Margono denied having ever seen this letter in his office. He also denied that the plaintiffs had ever received a letter dated 24 September 1993 from HPD instructing the defendant to transfer US\$30,000 to 'our common friends in Indonesia' or one dated 13 February 1994 instructing the defendant to transfer the amount of US\$7,295 'to our common friends in Indonesia'. Both these letters were signed by Mr Digon.

(ii) The termination letter of 23 April 1994

36. Before I go on, I think it would be helpful to give a precis of the termination letter. It was written by the defendant and addressed to Mr Digon. The defendant stated that he fully agreed with Mr Digon that HPD's priority must be to secure its contract with IKPP. IKPP was a tough negotiator and vendors were 'squeezed' until they had an extremely tight budget. Without the contacts it had within IKPP, HPD would have difficulty securing the project and there were certain people there who preferred not to deal with an agent. The defendant said he was willing to 'forfeit agent's commission on the VE-1 job in IKPP' and also to terminate the agency agreement if that was what it took to secure an order for HPD. He continued that he and Mr Digon should sit down to discuss a deal for the plaintiffs as agent on a case to case basis. He concluded by saying that with this letter, on behalf of the plaintiffs, he officially declined the agent's commission for the job and officially terminated the agency agreement with effect from 26 April 1994.

(iii) The defendant's version

(a) Santos Digon Arizmendi

37. There were two witnesses for the defence: the defendant himself and Mr Digon. Mr Digon testified first. He is still working with HPD in the position of Technical Director.

38. In his affidavit, Mr Digon averred that the agency agreement with the plaintiffs was cancelled with the consent of both the plaintiffs and HPD as shown by the termination letter.

39. Mr Digon said that it was agreed that to sustain the business relationship between the plaintiffs and HPD, the plaintiffs would issue invoices to HPD to enable HPD to make 'legitimate payments to the contacts'. He went on that HPD accepted the fact that these 'so-called clandestine payments' to the contacts were necessary to keep HPD in the latter's good books.

40. Dealing with the IKP/HPD/51 contract, Mr Digon averred that the sum of US\$380,000 was not commission due to the plaintiffs. Instead the money was to be paid to the plaintiffs and the defendant's contacts that he personally met and agreed with. In any case, the contract had been made on 15 July 1994, after the termination of the agency agreement and therefore no commission would have been payable to the plaintiffs. He and the defendant had, however, agreed that at a later time, the defendant and he would discuss some compensation for the work done by the defendant acting as an agent on a case to case basis. This had not happened due to the termination of the defendant's employment.

41. Mr Digon went on to deal with the other invoices. As regards DSS/HPD/IKPP/94/003, he echoed the defendant's position that the sum of US\$38,000 was a downpayment of the lump sum payment of US\$380,000 due to the contacts. In regard to DSS/HPD/001/93, he again confirmed the defendant's version that the sum of US\$30,000 had been paid by HPD to the contacts through the defendant. He went on to say that the actual commission due to the plaintiffs on this transaction had been paid to them on 11 April 1994. In support he exhibited an invoice which the plaintiffs had issued to HPD on 11 April 1994 for US\$31,018.

42. In relation to the sum of US\$1,163.70 claimed under invoice AH/HD/023, he confirmed the story about reimbursement for the purchase of Christmas gifts. On the sum of US\$7,295 claimed under AH/HD/043, he referred to HPD's fax of 13 February 1994 to the plaintiffs to show this sum was due to the contacts. He asserted also that the plaintiffs had already been paid commission for this matter.

43. As for invoice CKS/HPD/IK-VE/94-001, he said the payment of the contacts was effected through an invoice from Chemkonsult and that the sum involved of US\$34,143 was sent to Chemkonsult on 21 November 1994 after the defendant had left the plaintiffs' employment.

44. Mr Digon was at pains to stress that Mr Margono had not been personally involved in the projects secured by HPD but that the defendant had done all the work. Mr Margono had not known any of the contacts until the defendant introduced them to him. As far as Mr Digon was concerned, the defendant was the only one capable of dealing with IKPP. Further, when HPD was dealing with the plaintiffs, they dealt with the defendant only and as far as they were concerned, the defendant was the decision-maker of the plaintiffs. Mr Digon went so far as to assert that it had been the defendant who had 'accepted' the agency agreement in the first place. He was implying that Mr Margono had no part to play in the plaintiffs' decision to become HPD's agent.

45. Under cross-examination, Mr Digon was asked how HPD had received the termination letter. He answered that it was probably by post but that he had no idea how long it took for a letter from Indonesia to reach Spain. He then said there was a formal acceptance by HPD of the termination and when asked to show it, his answer was that his signature on the letter was the formal acceptance. It should be noted that at the bottom of that letter, the words 'Please sign and return copy' are hand-written and next to them are found Mr Digon's signature and the date 'April 28, 1994'.

46. Mr Digon was then shown a document that appeared in the defendant's bundle. It was apparently a letter dated 28 April 1994 written by Mr Digon addressed to the defendant at the plaintiffs' office and sent to the plaintiffs' fax number. This began 'We refer to your fax of past 23 April' and, after dealing with some other matters, went on to state that HPD was negotiating a possible new order with IKPP and asking the plaintiffs to stay away from those negotiations. It ended by thanking the plaintiffs/the defendant for help in past projects.

47. Mr Digon was asked which fax of 23 April he had been referring to. His answer was he could not say. He did not say whether it was the termination letter or another fax. He admitted that the new order referred to in the 28 April letter was the VE-1 job mentioned in the termination letter. He went on to say that during that period, he and the defendant had talked every day on the telephone so his fax of 28 April was probably just an answer on a situation and not to a specific fax.

48. The witness was shown a record from the plaintiffs' office of the faxes sent out over a few days in April 1994. It was pointed out that as this record showed no fax had been sent out from that office to Spain on 23 April, he should specify what fax of 23 April he had been referring to. His answer was that he did not remember but that he saw on the record that the plaintiffs had sent a fax to HPD on 22 April and he therefore postulated that due to the time difference, he had received the fax of 22 April on

23 April and that might have been the one he was referring to.

49. Mr Digon was asked why it was that the plaintiffs had in the termination letter expressed their willingness to forfeit a large commission. He said it was because HPD's agreement was with the defendant not with the plaintiffs. All their relations had been with the defendant. Although the defendant wrote letters on the letterhead of the plaintiffs, HPD did not know that company. The witness was then asked why HPD had signed an agency agreement with the plaintiffs. His response was that they had signed an agreement with the defendant who said that he was working with the plaintiffs and for them it was normal to work with an individual who owned the company. When pressed, he admitted that he did not think that the plaintiff company belonged to the defendant and he was, when shown the agency agreement, able to identify the parties to the contract as being HPD and the plaintiffs. He agreed that it was clear from the agency agreement that there was a contract between the plaintiffs and HPD and not between the defendant and himself personally.

50. Subsequently, however, when asked why payment of commission was being made to the defendant instead of to the plaintiffs, he said that at that time the plaintiffs and the defendant were the same thing so HPD paid to the defendant under the letterhead of the plaintiffs. Then even later, when he was asked whether it was correct that the plaintiff company had been involved in contract IKP/HPD/51, his reply was that it was the defendant who was involved in the contract.

51. Mr Digon was referred to his statement in para 7 of his affidavit that at a later time (ie after the termination) the defendant and he would be discussing compensation for the work done by the defendant acting as an agent on a case to case basis. He was asked whether he was aware at that time that the defendant was an employee of the plaintiffs. His answer was no. He was asked why then he had said he wanted to discuss compensation for work done by the defendant. The answer was because the defendant had asked for it. He then confirmed that the defendant had asked for a personal compensation and that he had paid this to the defendant. As for the meaning of the last sentence of that paragraph ie 'This did not happen as the defendant left the plaintiffs' employment subsequently', Mr Digon said that that was the legal aspect and he was always confused when talking about the plaintiffs because for him the only relationship had been with the defendant until Mr Margono appeared in 1995. Mr Digon then admitted that the defendant had never been officially appointed agent for HPD.

52. The witness's explanation for the plaintiffs being agreeable to foregoing their commission on the IKP/HPD/51 contract was that they knew that HPD's cost was becoming too high due to the unexpected money asked for by the contacts. These were persons working for IKPP who had asked him for money to enable the order to be given to HPD. When I asked him who these contacts were, he refused to name them. He denied that they were imaginary people made up so that he and the defendant could siphon off money. He said that he still had dealings with IKPP but he was no longer taking care of the contacts in the same manner as people had changed or moved to different positions.

53. Mr Digon was asked why HPD could not have made its payments directly to the contacts instead of going through the defendant. His reply was that some of the contacts had been very shy to receive money directly from HPD. He asserted that payments were not a problem on HPD's side as under Spanish law HPD was allowed to pay commission of up to 10% of the contract price. I asked him whether the law allowed him to pay someone in his purchaser's office a commission for procuring a purchase and his reply was in the affirmative. He was then asked to explain why in para 5 of his affidavit he had stated that in order to sustain the business relationship between the plaintiffs and HPD, the plaintiffs would issue invoices to HPD to enable HPD to make 'legitimate payments' to the contacts. His answer was 'We are an international company and we are audited. We need to keep the accounting in a normal way for the auditors. Every payment the company is making must be supported by an invoice'.

54. Under further questioning as to why the money could not have been paid directly by HPD to the contacts, the witness admitted that there was a clause in the IKPP standard form contract that indicated there would be an adverse consequence if a supplier paid commission to an employee of IKPP. He was therefore aware that IKPP did not approve of the practice of paying its employees commissions. Mr Digon also admitted that it was he who had told the defendant to draw up invoices so that he could satisfy his accounting department that each payment was in order.

55. The witness's attention was drawn to invoice DSS/HPD/IKPP/94/003 dated 4 August 1994 for US\$38,000 described as 'Being

commission for [contract IKP/HPD/51] as per agreement of July 27, 1994'. He was asked why this invoice for commission had been put up in August 1994 by the plaintiffs since the agency agreement had allegedly been terminated. His answer was 'Because every payment was against an invoice'. Another invoice, AH/HD/043 dated 16 June 1994 for US\$7,295 was shown to him. He admitted it had been issued after termination of the agreement and yet HPD had paid it. He denied, however, that both invoices were paid by HPD because the agreement had never been terminated.

56. Dealing with the IKP/HPD/51 contract, Mr Digon admitted that on the face of HPD's letter of 27 July 1994 to the defendant at the plaintiffs' office, HPD had agreed to pay the plaintiffs US\$380,000 as commission for that contract. He asserted that the figure of US\$380,000 was not based on a percentage of the contract but was the total of the amounts asked for by the contacts and, notwithstanding the typed contents of the letter, the money was not due to the plaintiffs. He said the full amount of commission had been paid. Ten percent had been paid pursuant to the plaintiffs' invoice of 4 August 1994 while the remaining 90% had been paid against the invoice issued by Chemkonsult. He was sure that Chemkonsult had issued the invoice but asserted that the money had not gone to it. Instead, the money had been paid to the contacts in cash. He himself had made some of the payments and the defendant had made the rest.

57. Mr Digon went on to say that the 90% had been brought by him from Spain to Singapore in cash on one of his trips here. In the end, HPD had not paid out US\$380,000 but something less than that as it had bargained with the contacts. He thought that in total US\$330,000 had been paid. He was not able to remember how much of the US\$330,000 had been given to the defendant to pay contacts and how much he himself had paid the contacts. He could not even remember in general terms the proportion of payments made by each of them. He himself had handed over cash to his contacts in Singapore but he did not know where the defendant had paid his contacts.

58. The witness testified that if the agency agreement had not been terminated, the plaintiffs' commission for the IKP/HPD/51 contract would have been roughly US\$150,000 to US\$160,000. He did not remember telling Mr Margono at a meeting that the commission was roughly US\$160,000. All he remembered telling the latter was that at least US\$250,000 would go to the contacts. He denied that HPD was liable to pay the plaintiffs US\$160,000 as commission even if the termination of the agreement was invalid as he said that in that case HPD would have had negotiations with the plaintiffs on the amount of commission as was its usual practice.

59. It was pointed out to the witness that at the time the termination letter was sent; HPD's negotiations with IKPP were well under way. His response was:

'Yes. Negotiations took a lot of months. This was one of the reasons to terminate the agency contract because it was not flexible enough to deal with special cases.'

He was then referred to his previous evidence that HPD could negotiate its commission with the plaintiffs and queried as to the need to terminate the agency agreement in this situation. His response that did not make much sense was 'At the same time we were also negotiating to be acquired by Wheelabrator'.

60. The witness was referred to a series of letters from HPD in 1995 that appeared to indicate that the plaintiffs were still acting then as HPD's agent. He did not, however, accept that they had continued as such. He explained that HPD had told third parties that the plaintiffs were still their agent simply because they were afraid of Mr Margono 'making too much noise' and not because that was the actual situation.

(b) The defendant, Andy Ho Ming Siang

61. In his affidavit, the defendant asserted that from January 1992 up to July 1994, he was an employee of the plaintiffs and that Mr Margono had been well aware of the business and activities of the plaintiffs. Mr Margono's other company was located in the same building as the plaintiffs and Mr Margono had access to the plaintiffs' office at all times and to every file and

document.

62. The defendant had earned US\$5,000 plus accommodation when he worked with IKPP. He agreed to a salary of US\$1,800 plus a car and accommodation from the plaintiffs. He would not have accepted a job with a significantly lower pay unless he was part of the company. He considered it safe to say that he had an interest in the plaintiffs' business in terms of a partnership with Mr Margono as an incentive to run the business entirely on his own.

63. The defendant asserted that he was given full authority, as agreed between himself and Mr Margono, to run the plaintiffs' operations and be responsible for all business that could be generated, which included pulp and paper, chemical industries and the sale of spare parts. All decisions would be made by him with or without the consent of the plaintiffs. At no time was he accountable to the plaintiffs every step taken by him. This was very clear as all the documents were signed by him.

64. The defendant went on to say that the agency agreement had been cancelled with the consent of both parties as shown by the termination letter. Mr Margono had been briefed about these matters. The defendant was not required to seek approval for contracts signed and terminated. All agreements, contracts and correspondence for the plaintiff company were signed only by the defendant and the plaintiffs had no right to interfere with the operations of the company because Mr Margono and the defendant had agreed that the defendant would be in charge of this business.

65. The defendant stated that the plaintiffs, in order to cultivate their relationship with HPD, agreed to issue invoices to HPD so that HPD could make payment to the contacts legitimately. The defendant asserted that 'I made it clear to both the plaintiffs and HPD that the payment of "commission" was essential to secure the jobs for HPD and they agreed'. It was understood that the plaintiffs would not be paid for these invoices. The monies were to be paid to him and he would then make the necessary arrangements to pay the contacts. Mr Margono knew about and entirely approved the arrangement with HPD.

66. The defendant dealt with the various invoices on which the plaintiffs based their claims. I need not go into that evidence here. In relation to the last payment he said that Chemkonsult was established on 24 November 1994 as an avenue to pay the contacts. He left the plaintiffs' employment in October 1994 and he had the right to register his own company anywhere he wished after his departure, as there was no contractual prohibition against it. HPD had informed him that they had wished to continue dealing with him for payments to the contacts. Any invoices issued by Chemkonsult to HPD were therefore not the concern of the plaintiffs at all.

67. The defendant concluded by stating that HPD was merely making legitimate payments to the contacts pursuant to the plaintiffs' invoices. The payments were not commission due to the plaintiffs. If any commission was due and owing by HPD to the plaintiffs, it was up to the plaintiffs to pursue their claim against HPD. They should not make any claim against him as he was only acting as a middleman for payment to the contacts.

68. The defendant was cross-examined at length. He first had to agree that the dates of his employment with the plaintiffs as set out in his affidavit were not correct. He agreed his employment had ended in October 1994 not July 1994. He was unable to remember when he joined the plaintiff company and said he would have to accept the starting date as given by the plaintiffs.

69. On his assertion of having an interest in the plaintiffs' business, the defendant conceded that he had not invested any capital in the company. He qualified this concession by stating that 'we' was supposed to put commission from the Eimco order into the company. He explained that since he was the one who helped Eimco get the order while he was working for IKPP, Eimco and the plaintiffs agreed with him that he should leave IKPP and run the plaintiffs. He then admitted that commission was due to the plaintiffs because they were Eimco's agent and therefore the commission had to go to the plaintiffs in any event but asserted that his incentive to give the deal to Eimco was to get the plaintiffs to employ him. When questioned why this had not been put in his affidavit, his answer was that he did not know that he had to explain everything in so much detail and he thought that by saying he had an interest in the plaintiffs' business he had sufficiently explained the situation.

70. It was put to the defendant that there was no agreement between him and Mr Margono for the commission to be treated as his investment. The witness said there had been a verbal agreement and it was for the parties' investment and not for his

investment alone. He disagreed that the incentive for him to leave IKPP was that he would have a share in the profit generated by the plaintiffs' pulp and paper division. The defendant then went on to agree that his interest in the plaintiff company was to manage the pulp and paper division and not the rest of the plaintiffs' business and that he did not make decisions on other aspects of the plaintiffs. He agreed also that he was an employee of the plaintiffs and as such had to be honest and accountable to his employers. By these admissions he was, impliedly, retracting his earlier claim to be a partner of Mr Margono.

71. The defendant was then shown three documents that indicated that the plaintiffs had paid him US\$2,500 per month and not US\$1,800 per month. He was asked whether he agreed that his affidavit was incorrect in this respect. His response was that US\$1,800 had been what was agreed in the first place. He agreed he was actually paid US\$2,500 but said he had not thought it necessary to say in his affidavit that that was his salary.

72. On the issue of his autonomy, he agreed that he had briefed Mr Margono on all major decisions. He did consider a cancellation of an agreement to be a major decision. He had also to submit his expense account to the plaintiffs and this account had to be approved by Mr Margono before his claims were paid. It was put to the defendant that he was accountable to the plaintiffs for his expenses and he said that he agreed insofar as his petty cash claims were concerned. When it was put that he was accountable to the plaintiffs for all his actions, the defendant's reply was 'Don't totally agree with that'.

73. The defendant asserted that he had briefed Mr Margono about the termination letter before it was sent out. It was put to him that the letter was never sent by him to HPD and was created by him after the suit commenced. The defendant disagreed. He asserted that the letter had been sent by post from the plaintiffs' pulp and paper division office. He was then asked whether he claimed reimbursement for the cost of postage. The defendant's answer was in the negative. The defendant's attention was drawn to his expense account for May 1994 and the two items there which were claims for the costs of sending letters to the United States and Spain. He then agreed that the pulp and paper division had to buy stamps and that this cost would be reflected in his expense account. Then the defendant's expense account for April 1994 was produced and it was pointed out that there was no claim in that account for postage to Spain. The defendant, however, disagreed that this was evidence that he had not posted the termination letter to HPD in April 1994.

74. The defendant testified that he considered the termination of a lucrative agency to be in the interest of the plaintiffs. He gave three reasons for this: first, that HPD was going to be acquired by Wheelabrator which did not require a local agent; second, HPD was losing a potential order for IKPP because of the price; and thirdly, that HPD had made a commitment to pay its contacts. It was pointed out to him that all these reasons showed that the termination was HPD's benefit and not to the plaintiffs'. Despite questioning he was not able to explain how the termination was in the plaintiffs' interest.

75. The defendant was asked why the agreement had been terminated by the plaintiffs instead of by HPD. His reply was that he had had conversations about this with Mr Digon and the latter's superior Mr Manuel Fernandez. Asked the same question again his answer was 'Because I wanted the pulp and paper division to get something out of the business we had developed. There were other jobs coming up in Indah Kiat.' He was then asked why he could not have waived the commission for that contract while continuing as agent for other deals. The defendant replied 'I could have'. On further questioning he said he did not do it that way even though his intention had been to carry on with HPD on a case to case basis for future jobs and when he was asked, he agreed that of course it would have been better to preserve the legal relationship. The rather lame excuse for not doing so was that Wheelabrator did not require a local agent.

76. On the contacts, the defendant explained that the plaintiffs and HPD each had their own contacts in IKPP. For contract IKP/HPD/51, the defendant himself had dealt with only one contact, one Mr Sheshadri. He was not sure exactly who HPD's contacts were but suspected they were two Taiwanese gentlemen.

77. The defendant was asked to explain why if the arrangement was that the plaintiffs would put up an invoice to cover payments to contacts, the funds had to be paid to his personal account. His response was that that was the arrangement the parties had made prior to issuing invoices. He further explained the payment could not be made to the plaintiffs' account because the contacts did not want their names to appear in the claim form. If the money were paid to the plaintiffs, then to reimburse the money there would have to be a claim form. Next, since the defendant had asserted that Mr Margono was aware of

the arrangement, he was asked why it could not have been agreed that after receipt of funds into the plaintiffs' account, the money could have been taken out by Mr Margono and the defendant to pay the contacts. His answer was that it could have been done provided that there was no claim form or the names of the contacts had not appeared on the claim form. He was asked whether it would not have been possible for him to describe the claims as entertainment or commission expenses without using names. He said it could not be done. When asked why not, his answer was 'We agreed to do it the first way'.

78. The evidence showed that the defendant had directed HPD to pay the sums invoiced by the plaintiffs to his personal accounts in Singapore with Citibank N.A. and the Hongkong Bank. The Hongkong Bank account was a joint account held in the names of the defendant and his wife. The defendant confirmed that he did not authorise the Hongkong Bank to receive monies on behalf of the plaintiffs but that he had discussed the plan to deposit monies in a Singapore account with Mr Margono who agreed to it. The defendant knew that Mr Margono had a residence in Singapore and that his family lived here. He was asked why, if Mr Margono knew of the plan, an account had not been opened in Singapore in the joint names of the defendant and Mr Margono into which the money could have been paid so that both of them could deal with the contacts. His answer was 'It could be done that way but the agreement was to pay into my account'.

79. The defendant was asked how he had made payment to the contacts. He said he withdrew the money in Singapore from his Hongkong Bank account and passed it to Mr Sheshadri when the latter came here. His modus operandi was that as soon as he received the money, he would inform Mr Sheshadri who would tell him how the payments were to be made. He agreed that Mr Sheshadri would fix a date to come to Singapore and that he would then go to the bank, withdraw cash and hand the same to Mr Sheshadri.

80. In relation to invoice AH/HD/043 for US\$7,295, Mr Sheshadri was the contact who received this payment and the mode of payment was as earlier explained. The defendant said that the entry in his Hongkong Bank statement showing that on 10 August 1994 an amount of US\$7,276 was received from HPD was the entry relating to invoice AH/HD/043. He then said that he made payment to Mr Sheshadri towards the end of August 1994. He was asked to point out the debit entry showing his withdrawal of US\$7,276 to pay Mr Sheshadri. The defendant pointed to the withdrawal of US\$2,800 he made on 24 August and that of US\$2,600 he made on the next day. Those totalled US\$5,400. When asked what had happened to the difference of about US\$1,800, the defendant remembered that at that time Mr Sheshadri had only required US\$5,400 and that the money had been paid in stages and not in one lump sum.

81. When it was pointed out to him that he had not previously mentioned that Mr Sheshadri was paid in stages, the reply was that when counsel asked him how the money was paid, of course the defendant said that he went to the bank and withdrew the money and that he was not specific because counsel had not asked him how many times he had been to the bank. The defendant's attention was then drawn to his further and better particulars where he stated that he had paid Mr Sheshadri on 12 July 1994. His response was that 12 July 1994 was the date on which the money was paid to him by HPD. Then he said he had made a mistake in interpreting the question that he had thought related to when HPD had made payment to him.

82. The defendant had also given particulars in relation to the invoice of 4 August 1994 for US\$38,000. He had said that the contact paid in this case was Mr Sheshadri and that the payment was effected on 20 September 1994 in cash. He agreed that the amount of US\$37,975 credited to his account on 7 October 1994 was in fact the amount that HPD had remitted to him in response to that invoice. He then asserted that the amount of US\$37,975 had been paid entirely to Mr Sheshadri with the first payment being made towards the end of October. He had withdrawn US\$10,605 on 14 October and US\$9,090 on 19 October. He had then paid the total amount of US\$19,695 to Mr Sheshadri. The defendant could not remember the reason why he had needed to make two separate withdrawals. He speculated that at first Mr Sheshadri had wanted a smaller payment.

83. The defendant's responses to the questions put to him after that answer were interesting. The evidence went:

Q When you called Mr Sheshadri the first time how much did he tell you he wanted?
A Should be around US\$20,000.

Q Why then did you draw out \$10,605 and then \$9,090?

A Your question was not clear. When I called him the first time he wanted a smaller sum than US\$20,000. I would think it was about US\$10,000 plus. So I went to the bank and withdrew US\$10,605. Then he decided to have more. So I went back to withdraw the US\$9,090. The total of about US\$20,000 was given to him in October. The balance was paid later.

Ct When?

A I am not sure. It may be some time in January.

Ct Why should Mr Sheshadri make 2 trips to Singapore for the money and leave so much with you in the meantime?

A I'm not sure,

84. The defendant went on to say that the US\$380,000 had been meant for Mr Sheshadri and the two Taiwanese gentlemen, Mr Liew and Mr Cheng. He knew how much Mr Sheshadri had received (initially US\$38,000 and later on another US\$10,000) but not how much the other two received or what the split was. The last US\$10,000 had been paid to Mr Sheshadri sometime in 1996 after Mr Digon had come to Singapore with the cash. He had brought US\$292,000 with him and this money had not been sent to the defendant's account because the contacts had wanted the money in cash. I asked if he was saying that had the money been sent to his account, the contacts could not have received cash. His answer was 'No. But that was the arrangement with [Mr Digon]'.

85. The defendant was asked to produce the invoice that Chemkonsult had sent to HPD. He was unable to do so. His explanation was that after Chemkonsult had closed down in 1997, he had got rid of all its documents as he did not see the need to keep them. On 7 July 2000 I directed him to produce this document by 12 July or to file an affidavit explaining why he could not comply with the direction. In his affidavit of 12 July, the defendant stated that he did not have the invoice and exhibited a copy of a fax from HPD to his solicitors stating that they were unable to assist in obtaining the document. HPD's letter had been sent by Mr Digon from his hotel in Jakarta on 10 July 2000 and it stated that the administrative staff of HPD would not disturb its daily work by going to the basement to 'dive in old files'. Therefore HPD could not look for the invoice. The defendant admitted that he had not contacted HPD's office in Spain asking for the invoice. He considered it more logical to go to Mr Digon for the document even though he knew the latter was in Indonesia at that time.

86. Later the defendant said that he had sent the invoice of 4 August 1994 for 10% of the total payment of US\$380,000 as that was the amount supposed to be paid to his own contact, Mr Sheshadri. The remaining US\$292,000 was supposed to be paid by Mr Digon to his contacts and the arrangement was to make the payment through Chemkonsult which was the name of a company which the contacts intended to set up. He had on 5 August 1994 directed HPD to pay the US\$380,000 to Chemkonsult for that reason. Since by the time he left the plaintiffs, the contacts had not set up Chemkonsult, he had then established a company using that name.

87. The defendant said that he had other contacts in respect of other transactions for IKPP. He named them as Mr Benda, Mr Tan Bak Tjiun and Mr Jonathan (it is not clear whether this is the same Jonatan named in the defendant's expense account given to the plaintiffs). These three men had been paid in Indonesia. The funds had been paid by HPD into his Citibank account and he had withdrawn them to pay the contacts. The defendant did not, however, produce any Citibank statement to substantiate this assertion. His reasons for not doing so were that first he had not been asked for them and secondly he did not feel they were necessary.

Analysis

88. The plaintiffs have put their case as being one in which the defendant, as their agent or employee, having received monies on their behalf and for their use, has failed to pay the monies to them but has wrongfully retained the same for his own account. The defendant admits that all except one of the ingredients necessary for this claim are present here. The disputed ingredient is

whether the monies received by the defendant were in fact meant for the plaintiffs.

89. In order to find in the plaintiffs' favour, I would have to be satisfied that each payment that was directed to the defendant or received by him was money to which the plaintiffs were entitled. The plaintiffs have put up a *prima facie* case in relation to most of their claims by showing that the payments were remitted by HPD in response to invoices issued by the plaintiffs and apparently in settlement of commission due to the plaintiffs under those invoices. Since it is the defendant who says those invoices are shams, it is he who has the burden of proving that the remittances were not meant for the plaintiffs but were made for entirely different reasons. He has to show not only the general arrangement between himself/the plaintiffs and HPD that existed for payment of money to IKPP employees but also that each payment that the plaintiffs claim was a payment made pursuant to that general arrangement and was not money payable to the plaintiffs.

(i) What was agreed and by whom in relation to the contacts?

90. The first issue that I must deal with is whether there was any arrangement to facilitate HPD's payments of bribes to IKPP employees and, if so, the exact nature of that arrangement and the plaintiffs' knowledge of the same. The documentary evidence shows, contrary to Mr Margono's assertions, that the plaintiffs did, at least occasionally, pay commissions to IKPP employees in relation to contracts awarded to their principal Emco. Although those commissions were of small amounts of money, their payment and the entertainment expenses incurred indicate that it was necessary for foreign suppliers or their agents to sweeten up IKPP employees in order to get or retain contracts. It therefore appears probable that HPD would have taken a similar course in relation to the contracts it wanted from IKPP despite IKPP's own intimations that it would strongly object to any payments to its staff.

91. The defendant's evidence was that it was HPD's idea to set up the arrangement whereby the plaintiffs would send HPD invoices for commission to enable HPD to pay out the funds for the contacts. Mr Digon, however, was evasive when he was asked who had drawn up the plan to put up invoices for payment to the defendant's account in Singapore. It took a considerable amount of pressing before he admitted that he had instructed the defendant to send out the invoices. Even then he did not admit that he had suggested that payment be made to the defendant's own account. He did not even want to admit outright that that was where the funds had gone and said to HPD the plaintiffs and the defendant were the same thing, so HPD had paid to the defendant under the letterhead of the plaintiffs and there was nothing wrong with this action.

92. As I have noted above, Mr Digon gave conflicting evidence from time to time about the distinction between the plaintiffs and the defendant. He did not want to admit knowing that the defendant was only an employee of the plaintiffs. He kept referring to the two as being the same. He was obviously keen to blur the lines between them so as to justify HPD's conduct in making payment to an individual when it had been invoiced by a company.

93. Having considered the evidence overall, I accept that Mr Digon and perhaps others in HPD were willing to make payments to contacts in Indonesia in order to get business from IKPP. I accept that Mr Digon and the defendant set up the arrangement described so as to enable such payments which Mr Digon himself variously described as both 'legitimate' and 'clandestine' to be made under a veneer of respectability. I do not know the extent to which this practice was condoned by the directors of HPD. The fact that HPD needed commission invoices from the plaintiffs, their official agent, for the purposes of their accounting records and payments, is some indication that, despite what Mr Digon proclaimed, the practice was not widely known in HPD and may not have been known to anyone else on the board.

94. The defendant produced two letters ostensibly written by Mr Manuel Fernandez, the managing director of HPD, which would show that he was aware of the practice. Mr Fernandez did not testify, however, and there was no independent evidence to indicate that either he or the board as a whole was aware that the payments were being made to the defendant's personal account. The two letters that were signed by Mr Fernandez were, significantly, sent to the plaintiffs though put to the attention of the defendant.

95. It is also interesting that in HPD's instruction to its bank given on 1 December 1993 for the payment for the sum of US\$30,000, claimed by the plaintiffs under invoice DSS/HPD/001/93, the name of the beneficiary was given as 'P.T. Dwiputra Sumber Sukses/Ho Ming Siang'. The plaintiffs were named as the sole beneficiary in a payment instruction given by HPD on 30 December 1993 in respect of the sum of US\$1,163.70. This happened again in HPD's payment instruction dated 12 July 1994 for US\$7,295 and its instruction dated 20 September 1994 for US\$38,000. In all four cases, the payment instruction went on to name the defendant's bank account and the defendant's bank as the recipient of the payment and to give the name of the defendant as the account holder.

96. Having reviewed the evidence carefully, I am satisfied that Mr Margono was not aware of the procedure set up by Mr Digon and the defendant. If he had been aware of HPD's intention to pay substantial bribes to IKPP employees, the procedure would have been established in a different way. During cross-examination, various alternatives were put to the defendant. He agreed that these alternatives would have been practically possible. If they had been adopted (for example the suggestion of an account in Singapore in the joint names of himself and Mr Margono) there would have been no doubt as to the plaintiffs' knowledge of what was happening. It would have been entirely reasonable to involve Mr Margono in the procedure since if IKPP had found out what was happening, it was likely to hold the plaintiffs responsible and to blacklist them. The defendant could not give any good reason for not having Mr Margono as involved as he himself was. All he could say, rather feebly, was that the procedure adopted was that which had been agreed between himself and Mr Digon.

97. The procedure as adopted gave both Mr Digon and the defendant full licence to dispense the bribe monies as they saw fit and even, if they wanted to, to keep some for themselves. There was no way of holding the defendant to account. The contacts would not give receipts. Although Mr Digon asserted that if the defendant had not paid the contacts he would have known about it, since he did not even know who all the contacts were, he was not likely to hear a full list of complaints. Further, he would not know whether the amount that the defendant told him the contacts wanted was what they had actually asked for or if they were willing to accept less. Mr Digon did not deal with the defendant's contacts. He left it to the defendant to pay them directly while he apparently paid his own contacts.

(ii) Credibility of the witnesses

98. On the whole, I found Mr Margono to be a credible witness. He was untruthful in relation to the commission paid to some IKPP employees as revealed in the defendant's expense list. He must have known that those commissions were bribes. Most of the rest of his evidence was, however, straightforward and was not successfully challenged in cross-examination.

99. I was not impressed with the defendant and Mr Digon. Both were evasive. Mr Digon was not willing to assist the court by giving it full information. His memory proved to be poor. He needed to be prodded before he would make admissions and he was often inconsistent and illogical. The defendant was no better. A flavour of his evidence can be obtained from the account of it that I have given above. He was given to wide-ranging and exaggerated statements and was not even truthful about mundane details like his salary and the period of his employment.

(iii) Was the agency agreement terminated?

100. The defendant alleged that the plaintiffs were not entitled to any commission in respect of the IKP/HPD/51 contract because the agency agreement had been terminated in April 1994. The defendant therefore had the burden of proving this. In my judgment, he has not discharged that burden.

101. There was no evidence that the letter of 23 April was actually sent out to HPD in April 1994. The defendant did not claim the postage expenses that would have incurred if the letter had been posted. The plaintiffs' fax records show no fax transmission to HPD on 23 April. More telling than this negative evidence is, however, the positive evidence of the conduct of

HPD and the plaintiffs after April 1994. HPD continued to hold the plaintiffs out as their agents until mid 1995 and the plaintiffs did do work on HPD's behalf until that time. At no time after October 1994 when they were informed by the plaintiffs that the defendant had been sacked and that the plaintiffs wanted a full accounting of all commissions paid and payable, did HPD assert that the plaintiffs were no longer their agents because of the termination letter. Mr Fernandez and Mr Digon met Mr Margono personally in Jakarta in early 1995 and even though the issue of commissions was brought up there was not a word on the termination of the agency agreement.

102. The termination letter was not a logical document. There was no reason for the plaintiffs to terminate the whole of the agency arrangement simply because the bribes asked for by the contacts were driving up HPD's costs. The agency agreement had made provision for such a situation by cl 4 and the parties could have negotiated either for a reduction in the plaintiffs' commission or for it to be waived altogether. The defendant was not able to give a good reason as to why the plaintiffs' interests required the termination of the agency agreement. Neither was it in HPD's interest to terminate the agency agreement. Once the agreement was terminated, the whole procedure for payment of bribes would have fallen apart. That procedure was still necessary as shown by the defendant's letter of 5 August 1994 thanking HPD for awarding the plaintiffs commission for the IKP/HPD/51 contract. That letter only made sense in the context of an existing agency relationship with the plaintiffs. If the agency had ended, HPD's accounting department could never have approved the payment of the commission and the IKP/HPD/51 contacts could not have received their bribes.

103. I am satisfied that the termination letter was not written in April 1994 but much later in order to boost the defendant's defence to this claim. It was concocted by the defendant with the assistance of Mr Digon who put his signature on the letter and wrote the date 'April 28, 1994' in an attempt to show that he had received the letter and accepted the termination on that date. Mr Digon also concocted the reply of 28 April 1994 which referred to 'your fax of past 23 April'. As noted, he was not able to explain what fax he had been referring to in the first line of that letter since the plaintiffs had not sent any fax to HPD on that date. Mr Digon had to resort to asserting that probably he was referring to a fax of 22 April which he had only seen on 23 April. That fax was not, however, produced. HPD's letter of 28 April 1994 was so specifically tailored to the matters raised in the termination letter that really it could not have been connected with any fax sent on 22 April.

(iv) The specific claims: (a) the commission payable under contract IKP/HPD/51

104. The plaintiffs' claim is that they are entitled to US\$380,000 as commission for this contract whereby IKPP agreed to purchase an evaporator plant from HPD at a price of US\$10,117,000. They rely on the letter of 5 August 1994 which the defendant sent under their letterhead to HPD congratulating HPD on obtaining contract IKP/HPD/51 due to the combined hard work of the plaintiffs and HPD. The letter went on to thank HPD for the commission awarded to it amounting to US\$380,000 and indicated that this amount should be paid against invoices to be issued by Chemkonsult.

105. The plaintiffs also point to a letter dated 27 July 1994 from HPD agreeing to pay US\$380,000 as commission for the contract and stating that payment would be made by them in line with the payment terms they had with IKPP ie 10% with the contract and 90% with the partial shipments. The plaintiffs submitted that this was proof that the commission was due to them since the payment terms in the contract itself provided for 10% of the purchase price to be paid immediately against an invoice issued by HPD and the balance to be paid by way of an irrevocable letter of credit which could be drawn on pro-rata as each shipment of equipment was made.

106. The defendant had three main grounds on he disputed this claim. First, that since the agency agreement had been terminated, no commission accrued on contract IKP/HPD/51. Second, as shown by the hand-written notation on the letter of 27 July, the US\$380,000 was meant for the contacts. Third, that the plaintiffs were aware that they were not making a genuine claim as they had taken three years to quantify it and even after quantification, the amount had varied between US\$160,000 and US\$380,000.

107. In view of my finding on the termination of the agency agreement, the first objection has no basis. Both defence witnesses

conceded that work had been done by the plaintiffs in respect of the IKP/HPD/51 contract. Prima facie, they were entitled to commission on that contract in accordance with the terms of the agency agreement. The defendant knew this. HPD knew this too and Mr Digon had no difficulty in coming up with the amount of commission payable when pressed on this issue during his meeting with Mr Margono. He told Mr Margono that the amount due was US\$160,000. At that stage, he made no mention of the fact that the agreement had been terminated or that there had been any agreement for the plaintiffs to forego commission because of the high costs of paying the contacts. Though Mr Digon maintained that he could not remember telling Mr Margono this, he did not deny that Mr Margono had asked him about the commission. I accept Mr Margono's evidence that he was given the figure by Mr Digon personally. This was corroborated by the appearance of that figure in the plaintiffs' first letter of demand for the commission and also by Mr Digon's oral testimony when he confirmed that if the schedule of rates annexed to the agency agreement had been applied to contract IKP/HPD/51, the plaintiffs' commission would have been US\$150,000 to US\$160,000.

108. The second objection is that the money was due to the contacts. There is no evidence that the whole of the sum of US\$380,000, was agreed to be paid or paid to the contacts. There is no evidence of payment of even the reduced amount of US\$330,000. Significantly, this figure was mentioned for the first time in court and did not appear in the defence or either of the affidavits filed on behalf of the defence. In the original version of his affidavit, Mr Digon said that the sum of US\$380,000 'was paid' to the plaintiffs and defendant's contacts. In court, he changed the words 'was paid' to 'was to be paid' and then came out with the story that actually only US\$330,000 had been paid. He was unable, however, to give any details of the payments or produce any documents to show that apart from the sum of US\$38,000 which had been sent to the defendant initially, the remaining US\$292,000 had been taken out of HPD and given to the defendant and/or the contacts. He claimed to be unable to even remember how much he had given the defendant and how much he had given his own contacts. To cover up the lack of documentation, he told a story of having brought the money to Singapore in a suit case and then having distributed it amongst the defendant and his own contacts.

109. I found Mr Digon's story incredible. The lack of particularisation was telling. Further, the defendant was not able to give any credible reason why the money had to be brought to Singapore in cash when there was already a system set up to remit money to his account. All he said was that the contacts required cash but he then had to concede that they could still have received cash if the money had been sent to a bank account. He was also unable to produce the invoice which Chemkonsult had, it was alleged, sent to HPD to enable HPD to process the payment to the contacts. The defendant had a lame story of having destroyed all Chemkonsult's documents. He did not make a true effort to get the document from HPD. All he did was to ask Mr Digon for it when he knew that Mr Digon was in Indonesia not Spain where the records were. Mr Digon's response was significant: basically he could not be bothered to even ask his administration department whether they could locate the document. There must have been some reason why no one was willing to produce this invoice. Perhaps no invoice was sent. Perhaps the invoice was for the full US\$380,000 or perhaps it was for US\$342,000 (ie US\$380,000 less US\$38,000) and not for the reduced amount of US\$292,000.

110. Even assuming that the defendant and Mr Digon did pay some money to their contacts, I am not satisfied that these payments would have come close to US\$380,000, or even the reduced sum of US\$330,000. The defendant was unable to produce documentation to show withdrawals from his accounts which would support even the initial payment of US\$38,000 which he claimed to have given to Mr Sheshadri. All he could point to were the two withdrawals totalling US\$19,695.

111. I do not accept that US\$380,000 was due to the contacts. The defendant has failed to discharge his onus of proof in that regard. That does not, however, mean that the plaintiffs are entitled to that sum as commission. The evidence showed that their commission would have been around US\$160,000 depending on the exchange rate of the Spanish peseta to the United States dollar (one calculation done by Mr Digon and given to me showed the amount payable as US\$162,942). The plaintiffs initially accepted this figure of US\$160,000 as given to them by Mr Digon. It must have accorded with their own calculations (even though at one stage Mr Margono said that he was unable to compute the commission). The plaintiffs were somewhat opportunistic in revising their claim to US\$380,000 on the basis of their subsequent discovery of the defendant's letter to HPD but this does not mean that they are debarred from claiming what is indeed due to them.

112. I note here that Mr Digon confirmed that all payments due to HPD under the IKP/HPD/51 contract had been made and that

the defendant had been given all the money due to the contacts. Whilst I cannot work out exactly what the defendant received (either directly or through Chemkonsult) since his evidence and that of Mr Digon on this point was not full or properly documented, I am satisfied that it is safe to infer that he received at least the US\$160,000 which would have been payable to the plaintiffs as their commission on this contract. I therefore hold that he should repay this sum to the plaintiffs as money had and received for their use.

113. I must also deal here with the plaintiffs' invoice DSS/HPD/IKPP/94/003 dated 4 August 1994 for US\$38,000. The defendant submitted that this was an invoice for part of the commission due in relation to contract IKP/HPD/51 as clearly reflected in the invoice itself. Thus, the plaintiffs were making a double claim by asking both for the US\$380,000 specified in the letter of 5 August 1994 and this sum of US\$38,000 under the invoice of 4 August. I accept the defendant's submission on this point.

114. The plaintiffs have not been able to point to any other contract under which they would have been entitled to commission of US\$38,000. Their sole reason for submitting that this sum was not related to the US\$380,000 is that by the letter of 5 August HPD was directed to pay US\$380,000 against invoices issued by Chemkonsult even though the invoice for US\$38,000 had already gone out. They say that if the two had been related, HPD would have been directed to pay only US\$342,000 to Chemkonsult. Whilst there is an inconsistency between the two documents, this alone cannot establish an entirely separate contract between HPD and IKPP for which the plaintiffs would be entitled to be paid commission. I am therefore unable to make any separate award to the plaintiffs in respect of the invoice of 4 August 1994.

(b) The commission payable under Invoice DSS/HPD/001/93

115. This invoice is dated 24 November 1993. It is for an amount of US\$30,000 described as 'Being for the supply of detained piping engineering for Two (2) NCG systems in Perawang and Jambi, Indonesia'. The invoice refers to two orders namely orders no. IK/HPD/NCG/864 and WK/HPD/NCG/W64 and is apparently in respect of two contracts procured by the plaintiffs on HPD's behalf. There is supporting evidence in the form of a fax dated 3 September 1993 from the plaintiffs to IKPP arranging for a meeting between the defendant and Mr Digon on the one hand and employees of IKPP in Perawang on the other to clarify and finalise what is described as the 'NCG proposal'.

116. The defendant submitted that this sum was not commission due to the plaintiffs. He relied on a fax dated 24 September 1993 to the plaintiffs from HPD on the subject of 'NCG Order'. It stated 'With the official acceptance of this order, please proceed immediately to transfer the said amount of US\$30,000 to our common friends in Indonesia, as already commented'. This was one of the letters from HPD which were produced by the defendant and which the plaintiffs said they knew nothing about.

117. The defendant further submitted that the commission due to the plaintiffs in respect of the NCG contracts was paid to the plaintiffs pursuant to their invoice AH/HD/035. This invoice was dated 11 April 1994. Three items appear on it. The first is described as 'Agent Commission for Pulp 8 NCG System PT. IKPP Perawang contract no. IK/NCG/HPD 864' and is quantified at US\$15,319. The second is described as 'Agent Commission for J-Pulp NCG System PT. WKS Jambi contract no. WKS/NCG/HPD/W64' and is quantified at US\$15,319. The invoice specifically directed HPD to pay the amounts invoiced to the plaintiffs' account with Bank Buana Indonesia. The plaintiffs do not deny that this invoice has been settled in full. It would be noted that the contract numbers on this invoice are identical to the contract numbers quoted on invoice DSS/HPD/001/93.

118. The defendant gave evidence that HPD had remitted the sum of US\$30,000 in respect of this contract to his account with Citibank N.A. He said that he had then withdrawn the money and paid it over to a Mr Benda of IKPP. Whilst no bank statement was produced to substantiate this payment and it is possible that the defendant might not have paid over all the money to Mr Benda, it appears to me that this payment was not intended for the plaintiffs but for the contacts. The plaintiffs did receive commission on the two NCG contracts and they cannot be entitled to two sets of commission on the same contracts. Accordingly, in relation to this sum the defendant has discharged the burden of establishing that the money was not the plaintiffs'.

(c) The Christmas gifts invoice

119. This invoice, AH/HD/023 dated 28 December 1993, is for the sum of US\$1,163.70 being the amount due in respect of 'one lot Christmas presents for key personnels (*sic*) of PT Indah Kiat Pulp and Paper Corp. Indonesia'. The defendant said that he used the money to pay for customary Christmas gifts such as hampers and other small items for employees of IKPP.

120. The plaintiffs pointed out that the defendant was unable to name the persons to whom the gifts were given nor give exact descriptions of the gifts. In the plaintiffs' submissions, they also said that amounts claimed from them by the defendant as reimbursement for gifts given to IKPP employees in September 1993 were almost as much as the amount claimed from HPD for the Christmas gifts and therefore that he must have been making a double claim.

121. I do not accept that argument. The amounts were not identical and the dates were different. The defendant's expense accounts submitted to the plaintiffs showed that he bought gifts on their account in September and October. He also incurred entertainment expenses in relation to IKPP personnel. The defendant's expense accounts show that it was routine for him to expend money on keeping the plaintiffs' customers' employees happy. In that situation there is no reason to conclude that the September gifts must have been the Christmas gifts and that he could not have given two different sets of gifts altogether. The plaintiffs have not established that the money received by the defendant under this invoice was received by him for their account.

(d) The sum of US\$7,295 under invoice AH/HD/043

122. This invoice was dated 16 June 1994. It comprised two items. The first, in the amount of US\$3,559 was described as 'Commission for Piping Take-off PTIKPP Pulp 8 NCG System' and the second, in the amount of US\$3,736, was described as 'Commission for Piping Take-off PTWKS J-Pulp NCG System'. The defendant said that this was to cover further payments to the contacts due in relation to the contracts mentioned in invoice DSS/HPD/001/93 and that the plaintiffs had already received their commission via the invoice AH/HD/035 mentioned in para 117. However, the withdrawals from his bank account which the defendant identified as being the payments to Mr Sheshadri for this invoice fell nearly US\$2,000 short of the funds he had received and there were other improbabilities in his account of how that payment was made.

123. Under cross-examination, however, Mr Digon conceded that invoice AH/HD/043 could possibly relate to two orders that were additional to those covered by AH/HD/035. He also conceded that further commissions could have been payable by virtue of additional orders for piping sets mentioned in correspondence in March 1994. These orders were for goods worth US\$80,000 and US\$84,000 respectively. Using the commission table in the agency agreement, the plaintiffs calculated the commission payable for those orders as coming up to approximately US\$3,914 and US\$4,074 based on an exchange rate of US\$1 = 140 pesetas. They submitted that the difference between their figures and those in the invoice AH/HD/043 could be due to fluctuation in exchange rates.

124. In my judgment, the plaintiffs are entitled to this sum of US\$7,295. The defendant sent out invoice AH/HD/043 for commission on the plaintiffs' letterhead and he was unable to explain why this document was not an authentic invoice. HPD had already paid its contacts US\$30,000 pursuant to DSS/HPD/001/93 for the contracts mentioned in AH/HD/035 and it was up to the defendant to show that those contracts were the same as those invoice under AH/HD/043. He did not do so. The evidence given by Mr Digon was contrary to the defendant's stand. Further, he gave no reason why HPD would be paying the contacts an extra US\$7,295 for the same contracts when it was clearly unhappy about hard bargaining to reduce what it thought had been previously agreed prices. Finally, it appears from the correspondence that invoice AH/HD/035 related to plant supplied to the customers whereas invoice AH/HD/043 related to piping.

(e) Chemkonsult invoice no. CKS/HPD/IK-VE/94-001

125. This invoice appears on the letterhead of Chemkonsult and is dated 21 November 1994, that is a few days before Chemkonsult commenced its legal existence. The reference is 'No. 1027 NCG for Jambi' and the description of the work done is 'Assorted Pippings material according to HPD Supervisor for PT. WKS Jambi'. The amount due is US\$34,143.

126. In the defendant's submission, he noted that the plaintiffs had notified HPD on 25 October 1994 that he had left the plaintiffs. He asserted that notwithstanding that letter, HPD had continued to deal with him personally for payment to their contacts and as such the invoice issued by Chemkonsult did not concern the plaintiffs. Further, the invoice did not state that it was commission for work done. The defendant submitted that the plaintiffs had not proved that they were entitled to receive this sum in the first place. The plaintiffs did not know how the sum was arrived at and it was submitted that the money was more likely to have been for the contacts than for the plaintiffs.

127. The plaintiffs conceded that they were unaware how the amount had been calculated. They pointed out that reference was made, however, to the NCG project in Jambi in respect of which the plaintiffs had been HPD's agents and for which commission was payable. In cross-examination, the defendant had conceded that the work in Jambi had been done when he was employed by the plaintiffs. He had further conceded that Chemkonsult was not involved in this project at all nor was there any contract or agreement between Chemkonsult and HPD under which these monies became due. The defendant's stand appeared to be that the money belonged to Chemkonsult, and that he was not obliged to say what had happened to the funds. The plaintiffs submitted that the Chemkonsult invoice had been drawn up only for the purpose of diverting sums due to the plaintiffs to itself in a seemingly 'legitimate' manner. Although the invoice instructed that payment be made to Chemkonsult, the account number that was given was the defendant's personal account and this made it clear that the end recipient was always the defendant.

128. The defendant has not explained to my satisfaction why the Chemkonsult invoice was not the plaintiffs' concern. He took a rather arrogant stand in relation to it. Although he repeated his usual refrain about the money being meant for contacts, he gave no details of these contacts or when payment was made to them. The agency agreement between the plaintiffs and HPD was ongoing at the time the Chemkonsult invoice was issued. The defendant had no business issuing invoices to HPD after he left the plaintiffs' employ for projects in which he had been involved during his employment with the plaintiffs. He must account to the plaintiffs for the money received on this invoice.

Conclusion

129. I have found the defendant liable to account for the sums of US\$160,000, US\$7,295 and US\$34,143. There will be judgment for the plaintiffs in the total sum of US\$201,438, interest thereon at 6% p.a. from 28 September 1998 being the date of the plaintiffs' solicitors letter setting out the plaintiffs' full claim against the defendant and costs.

Judith Prakash

Judge

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