JM & Sons Co and Another v Benzline Auto Pte Ltd
[2000] SGHC 243

Case Number : Suit 224/2000
Decision Date : 22 November 2000
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Lin Ming Khin Charles (Donaldson & Burkinshaw) for the plaintiffs; Christopher Bridges & Kasturibai Manickam (Christopher Bridges) for the defendants
Parties : JM & Sons Co; Jongkie Budiman — Benzline Auto Pte Ltd

JUDGMENT:

Grounds of Judgment

The facts

1. JM & Sons Co (the first plaintiffs) are a firm dealing in the import and export of inter alia, automobiles; Jongkie Budiman (the second plaintiff) who is an Indonesian businessman is the firm's authorised agent. Benzline Auto Pte Ltd (the defendants) are a company incorporated in Singapore and are (parallel) importers of such luxury cars as Mercedes Benz (Mercedes).

2. Sometime in early February 2000, the second plaintiff telephoned a sales manager of Cycle & Carriage (C & C) one Low Joo Tin Amos (Low) to ask for quotations (for export) of Mercedes 'M' and 'S' series models 280 and 320; C & C are the Singapore distributors for Mercedes vehicles. Low informed the second plaintiff that C & C does/did not do export sales and, after making some telephone inquiries of other Mercedes suppliers, Low forwarded the defendants' quotations to the second plaintiff. The quotations included prices of between S$135,000-$140,000 for cars on an 'indent' basis while those on a 'ready' basis were quoted at about S$150,000.

3. A few days later, the second plaintiff called Low to request a meeting with the defendants as the former urgently needed two (2) S series Mercedes cars for resale purposes. Low arranged for the parties to meet on 16 February 2000. The meeting was attended by Low, the second plaintiff, the first plaintiff's representative Rony Tedy (Rony) and the defendants' managing-director Ng Seng Keong (Kevin Ng). Low conveyed to Kevin Ng the second plaintiff's urgent request for two (2) units of 'S' series Mercedes; Kevin Ng arranged for the plaintiffs to look at models of the car available on the following day; he said one black and one silver coloured model were available.

4. On 17 February 2000, the second plaintiff did not see the defendants' stock of cars as he had to leave for another appointment but Rony did the viewing with Kevin Ng at PSA Distripark. The second plaintiff arranged with Kevin Ng to meet at the defendants' office on the following day (Friday) to pay a deposit for the two cars.

5. The Friday appointment was cancelled by Kevin Ng who re-fixed the appointment for the next day. On Saturday 20 February 2000, the second plaintiff telephoned Kevin Ng who said he was in Malaysia and would only be back in Singapore at 5pm; he asked the second plaintiff to call him again at 5pm. The second plaintiff called Kevin Ng again at 5pm and was told the latter was still in Malaysia. The second plaintiff, who was becoming increasingly frustrated, contacted Low to inquire whether Kevin Ng was serious at all about selling the 'S' series cars. Low called the second plaintiff subsequently to say that he (Low) had fixed an appointment for the second plaintiff with Kevin Ng on Sunday 20 February 2000.

6. On Sunday 20 February 2000, the second plaintiff, Rony and Low called at the defendants' office. When Kevin Ng arrived, he told the three (3) visitors that the black and silver cars were no longer available as they had been sold the previous day. However, his partner (James Tan) had three (3) units of the same model available, which cars had just landed in Singapore on Saturday 19 February 2000. As Kevin Ng was uncertain about the colours, the second plaintiff requested confirmation. Kevin Ng asked that they wait while he checked. After about two (2) hours, Kevin Ng reverted to say that two cars were black and one

was silver.

7. The second plaintiff and Rony then confirmed that the plaintiffs would purchase one black and one silver Mercedes, they paid and were receipted for their (cash) deposit of $16,000 to the defendants and indicated they would pay the balance in the next few days. They also fixed an appointment to see the cars that day at 3pm. However, when the second plaintiff telephoned Kevin Ng at 2pm, he was told the cars were not available for inspection. They were told to meet Kevin Ng at 5pm.

8. However, when the second plaintiff and Rony arrived for the inspection, they were not able to see the 'S' series because the cars had yet to be released to the forwarder; instead they were shown a Toyota Cynus; Kevin Ng promised that the plaintiffs would be able to inspect the Mercedes cars the following day.

9. Consequently, on Tuesday 22 February 2000, the second plaintiff and Rony called again at the defendants' office. As Kevin Ng was engaged in a meeting with another party, the second plaintiff asked the defendants' staff to show him additional accessories for the 'S' series which he later agreed to purchase at $16,000 which sum they paid Kevin Ng at the same time informing him that they had transferred the balance 30% of the deposit to him. They gave him a copy of the TT advice from Bank Nusantara Parahyangan dated 22 February 2000. Kevin Ng then told his secretary Angela (Song Ah Moi) to issue a receipt and prepare a pro forma invoice which she did.

10. The pro forma invoice no. 1038/00 (1AB5) referred to 2 units of Mercedes S320L, colours black and silver, unit price of $152,000 and a total price of $304,000 and listed out various options by their codes. The document also included the following remarks:

> Payment: 30% deposit
> Terms: Ex-Singapore

Angela also hand-wrote the following remarks on the pro forma invoice:

> Cash recvd on 20/02 --- $16,000 -- by Kevin
> By TT --- $49,200
> Cash recvd on 22/02 --- $26,000 by Angela

confirming that the defendants had received a total of $91,200 from the plaintiffs. On Kevin Ng's instructions given on the plaintiffs' request, Angela made inquiries and obtained a quotation for freight to ship the cars to Indonesia.

11. Neither the plaintiffs nor the defendants signed the pro forma invoice. Kevin Ng was not in the defendants' office and, when his partner Albert requested the second plaintiff to sign (after speaking to Kevin Ng on the telephone), the latter pointed out that the pro forma invoice referred to the cars which Kevin Ng had said were already sold whereas the plaintiffs were buying two (2) units which had landed in Singapore.

12. At about 5pm, Kevin Ng returned to the defendants' office and said there was a mistake -- the 3 units the plaintiffs were supposed to inspect were not available for viewing. He indicated that if the buyer of the 2 units in the pro forma invoice did not show up in ' hour, he would let the plaintiffs have the cars. At about 5.30pm, the buyer did show up to pay the deposit. Kevin Ng asked the second plaintiff and Rony to wait while he obtained data on the other 3 units of cars.

13. Later (at about 6.40pm), there was a fax to the defendants confirming that only 2 black Mercedes were available. The second plaintiff decided to take them in place of one black and one silver units at the original price agreed even though one had less equipment and should be cheaper. Accordingly, Kevin Ng confirmed that the 2 units would be delivered to the plaintiffs within 7 days and asked that the plaintiffs arrange for the balance payment to be ready at the time of inspection. The second plaintiff requested and Kevin Ng signed, (and also stamped and dated [22 February 2000]) the fax containing the specifications of the 2 units and wrote the words *Del time 7 days* thereon. At about 8pm, Low received a call from the second plaintiff stating that everything had been settled, that the cars would be delivered to the plaintiffs in Singapore within 7 days of 22 February 2000

and, the second plaintiff would return to Singapore before 29 February 2000 to inspect the cars prior to packing and shipment.

14. Relying on the expected delivery date of 29 February 2000, the second plaintiff contacted his buyer in Indonesia that same evening. He informed his buyer that he would be able to deliver two (2) black Mercedes to her by end March 2000; he agreed to execute a sales agreement with her to that effect. He then returned to Indonesia the following morning and executed the sales agreement that very day (the sub-sale agreement) with one Rosemeri Leng (Rosemeri) agreeing to sell her the 2 Mercedes cars at S$230,000 each, excluding value added tax (VAT). Rosemeri paid the second plaintiff a deposit (S$215,000) equivalent to 50% of the sale price. The following terms were also incorporated into the sub-sale agreement:-

> (i) the second plaintiff agreed to show Rosemeri the bill of lading by 6 March 2000, failing which the second plaintiff had 3 more days in which to do so;
>
> (ii) if the second plaintiff failed to show the bill of lading by 9 March 2000, the second plaintiff must return the deposit together with a penalty equivalent to 20% of the purchase price;
>
> (iii) similarly, if the second plaintiff failed to deliver the cars by end March 2000 he had to pay Rosemeri the same penalty.

15. On the same afternoon of Wednesday 23 February 2000, the second plaintiff was shocked to receive a telephone call from Rony (who was at the defendants' office) who said that the defendants were unable to supply the 2 black Mercedes. When the matter could not be resolved amicably, the plaintiffs consulted solicitors in Singapore who sent a letter of demand (dated 24 February 2000) to the defendants giving the defendants notice that if they failed to confirm the delivery date of the 2 Mercedes by the close of business that day itself, legal proceedings would be commenced against them (see 1AB53). Although the defendants' solicitors' reply (dated 7 March 2000) stated that *our clients…are trying to negotiate with your clients to settle this matter amicably*, nothing came out of those attempts. The defendants neither delivered the 2 black Mercedes nor returned the deposit of $91,200 to the plaintiffs.

The claim

16. Consequently, the plaintiffs commenced these proceedings. In the statement of claim, they alleged that an oral agreement (the agreement) had been made between the parties on or about 22 February 2000 whereby the plaintiffs agreed to purchase and the defendants agreed to sell, 2 units of black Mercedes, for the total price of S$304,000 plus $16,000 for additional compulsory accessories. Pursuant to the agreement, the plaintiffs averred that they paid $91,200 to the defendants on 2 separate occasions as a deposit for the purchase of the cars.

17. The plaintiffs further alleged that it was an express term of the agreement that the cars would be delivered within 7 days of 22 February 2000, relying on the fax set out in para 13 above. They pleaded that the defendants knew at all times that the plaintiffs purchased the cars for the purpose of sub-sale to their Indonesian buyers.

18. In reliance on the foregoing express term, the plaintiffs alleged that they entered into the sub-sale agreement, agreeing to deliver the 2 cars to their sub-buyer on or before 9 March 2000. They alleged that the defendants failed to deliver the cars on or before 29 February 2000 despite numerous demands from the plaintiffs and their solicitors. Accordingly, the plaintiffs contended, the defendants repudiated the agreement and as they were entitled to, the plaintiffs accepted the breach by their solicitors' letter dated 7 March 2000. As a result, the plaintiffs lost the benefit of the sub-sale agreement and suffered loss and damages of $192,400 made up as follows:

a. damages paid to sub-buyer	S$ 86,000.00
b. loss of profits	S$ 106,400.00

S$192,000.00

The plaintiffs claimed the above figure as well as the refund of the deposit they had paid.

19. In the defence, the defendants denied the agreement alleged. They contended that Kevin Ng had, on 18 February 2000 given the second plaintiff a quotation to sell 2 Mercedes, one black and the other silver, which quotation was valid for 2 days only. Hence, when on 20 February 2000, the second plaintiff indicated to Kevin Ng his intention to purchase the 2 cars quoted, he was told that the quotation period had expired. It was then that Kevin Ng indicated he was willing to assist the second plaintiff who agreed, to purchase 2 other similar cars of the same colours on an 'indent' basis. The second plaintiff was asked to pay a deposit of 30% ($91,200) for the plaintiffs' orders which were reflected in the pro forma invoice. The second plaintiff paid firstly $16,000 in cash followed by another $26,000 in cash and finally $49,200 by telegraphic transfer.

20. The defendants contended that the words *Del time 7 days* on the fax dated 22 February 2000 meant that delivery would be effected within 7 days of the defendants' receipt of the cars if they were successful in sourcing for them. The defendants asserted they were willing to return the deposit of $91,200 to the plaintiffs without any admission of liability, as set out in their solicitors' letter dated 9 March 2000.

The decision

21. Having heard the testimony in September 2000 over three (3) days from Low, the second plaintiff, Kevin Ng, Angela and the second plaintiff's Indonesian lawyer (who drew up the sub-sale agreement), I had no hesitation in coming to the conclusion that there was an agreement between the parties, as reflected in the fax dated 22 February 2000, that the defendants had repudiated the agreement and the plaintiffs were entitled to claim damages for such breach of contract. Accordingly I awarded judgment to the plaintiffs in the sums of $91,200 (for the deposit they had paid) and $106,400 (for loss of profits on the aborted sub-sale to Rosemeri). The defendants have now appealed against my decision (in Civil Appeal No. 128 of 2000).

The evidence

(i) the plaintiffs' case

22. The plaintiffs' case has essentially been set out in paras 2 to 15 above. As stated earlier, the second plaintiff testified for the plaintiffs and his testimony where Low (PW1) was involved, was corroborated by the latter, in particular paras 2, 3, 5, 6 and 13.

23. As for the sub-sale agreement, the plaintiffs called Bertomeno Edward Simanjuntak (Simanjuntak) from the Jakarta law firm Bernard & Associates to testify that he had drafted the sub-sale agreement and that the same was executed in his office by the second plaintiff and Rosemeri on the morning of 23 February 2000. As he was not cross-examined, Simanjuntak's (PW3) evidence stood unchallenged.

24. The undisputed evidence adduced in court including the following events/facts:-

> (i) Low and Kevin Ng were told by the second plaintiff that the plaintiffs needed 2 units of Mercedes 'S' cars urgently for purposes of resale;
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> (ii) the defendants had given the quotation (see 1AB2) for 1 unit each of the black and silver cars the plaintiffs wanted, to the second plaintiff because the cars had landed in Singapore;
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> (iii) the second plaintiff and Rony were supposed to inspect (finally on 21

February 2000) the 3 Mercedes cars which the defendants had available for sale in lieu of the black and silver units in (ii) above which had been sold to third parties. As proof of this intended inspection, the PSA pass issued to Rony was produced as part of the agreed documents (1AB4);

(iv) the pro forma invoice was not signed by either party;

(v) Angela testified that on Kevin Ng's instructions, she obtained on 22 February 2000 on the plaintiffs' behalf the quotation in 1AB10 for the freight payable for shipment of 2 units of Mercedes to Jakarta;

(vi) the exact same specifications of the substitute black cars meant for the plaintiffs spelt out in the fax signed, stamped and dated by Kevin Ng on 22 February 2000 appeared in the subsale agreement under para 2 of Article 1 (see 1AB18).

A question which would come to any person's mind, looking at the sequence of events and (iii) and (v) in particular is, why would the plaintiffs be invited to view the defendants' stock of cars, which fact Kevin Ng admitted (N/E52)? Inspection would be unnecessary if the cars were to be sold to the plaintiffs on an indent basis. Why would the second plaintiff need to ascertain the freight to Indonesia unless he ordered the 2 cars on a ready basis and he required to know the landed cost (in Jakarta) of the cars before he on-sold them to his own customer?. No explanation was proffered by the defendants or their counsel. Obtaining the cars on an indent basis would surely defeat the plaintiffs' purpose of securing them urgently in order to resell.

25. My finding that the plaintiffs ordered and the defendants agreed to sell, 2 units of Mercedes on a ready basis is reinforced by the following testimony:-

a. the second plaintiff had testified that if indeed he had purchased from the defendants on an indent basis, he would have paid a lower price for the cars and he could have chosen the colours as well as the options instead of accepting whatever accessories the defendants then had available;

b. in his written testimony, Low had stated that when he obtained quotations for the 'S' series from suppliers (including the defendants) for the second plaintiff when first contacted, the price for 'indent' orders was $135,000- $140,000 whereas for 'ready' orders, the price was about $150,000; the plaintiffs paid $152,000 for each car;

c. the second plaintiff had also deposed that he had purchased accessories worth $16,000 from the defendants as reflected in the defendants' invoice at 1AB7;

d. Kevin Ng had admitted (N/E53) the second plaintiff had told him the plaintiffs needed 2 Mercedes because they had a ready buyer in Indonesia.

26. If Kevin Ng's contention that he agreed to sell 1 black and 1 silver Mercedes 320 to the plaintiffs on an indent basis is to be believed, why did he have to write the words *Del time 7 days* on the fax? All that he needed to do was to instruct Angela to prepare an invoice for the plaintiffs' indent order on the following day setting out all the options/accessories the second plaintiff had selected together with the terms of delivery and payment. In this regard the testimony of the second plaintiff (N/E26) should also be borne in mind -- he did ask for an invoice (in order to commit the defendants) but Kevin Ng could not oblige as Angela had left the office; Kevin Ng's signature and the defendants' rubber stamp on the fax was the best alternative to a proper invoice which Kevin Ng promised him the following day. As the second plaintiff said (N/E25), by 22 February 2000, the defendants had

already collected 30% payment from the plaintiffs, the issue was, what could the defendants give to the plaintiffs on an urgent basis in lieu of the cars in the pro forma invoice which had been sold? The second plaintiff said the plaintiffs did not have much of a choice at the time.

27. I should also point out that the pro forma invoice did not state a delivery date; neither did the quotation which was only valid for 2 days, notwithstanding that the former related to cars which were on the way to Singapore while the latter referred to cars which had landed in Singapore. Hence, the 2 documents were not helpful at all in distinguishing an indent from a ready sale. However, if it were not for the urgency of the matter, why was there a necessity for the second plaintiff and Rony to wait at length (6 hours) at the defendants' office until Kevin Ng could confirm the options that came with the cars the plaintiffs decided to buy? It cannot be a coincidence that the plaintiffs also paid for accessories on 22 February 2000; they were meant for the cars which the defendants could supply. It did not make any sense for the plaintiffs to buy accessories in advance of their indent orders when they could order options at one and the same time as the indent orders. These factors pointed to a sale to the plaintiffs on a ready and not on an, indent basis.

(ii) the defendants' case

28. As against the clear testimony presented by the plaintiffs and their witnesses, the defendants had a befuddled witness in Kevin Ng whilst Angela's testimony supported the plaintiffs' case in regard to the payment of the deposit and the inquiry she made of freight for shipment of the cars to Jakarta. She (DW2) further revealed that the Mercedes cars in the pro forma invoice were eventually sold to an Indonesia buyer in early March 2000.

29. On his part, Kevin Ng had testified (N/E 45) that the fax he had signed was for cars which were ready stock in Singapore and the quotation was given to him by his partner Jams Tan very late on 22 February 2000 at the plaintiffs' request, because they wanted to know the options for the 2 black Mercedes. He admitted that when the plaintiffs' solicitors sent their letter of demand (dated 24 February 2000) alleging there was an oral agreement relating to 2 obsidian black Mercedes S320l, he did not deny the allegation as he *left it to his lawyers to handle* (N/E46). Pressed further why he did not respond to the allegation, Kevin Ng said it was because he did not consider the fax a contract but only a quotation as the plaintiffs had not confirmed the price. Moreover, as the plaintiffs' solicitor had already made a claim against the defendants, he decided there was no need to take the matter further. As for his failure to return the deposit before the plaintiffs' action, Kevin Ng said it was because the plaintiffs wanted to claim more ($287,000) but admitted he never attempted to tender the sum to the plaintiffs through his solicitors. He defended his decision to sell the cars under the pro forma invoice to a third party (notwithstanding that the plaintiffs had paid him 30% deposit) on the basis that the plaintiffs' 30% (total) payment was only received on 24 February 2000 when his bank advised him of their remittance. This statement was factually incorrect as the plaintiffs' TT advice from their bankers was dated 22 February 2000 meaning the sum of S$49,200 was transferred out of their account by that date and the defendants produced the same document (see 2AB5) and no other TT advice from their own bankers, Overseas Union Bank to show the money was only received by their bank on 24 February 2000.

30. Although I had indicated to counsel that I would only determine liability and leave the issue of damages to be assessed by the Registrar in the event the plaintiffs succeeded on their claim, I nevertheless went further to quantify the plaintiffs' damages because the figures were all before the court. It would be useful at this juncture to set out the relevant law namely, s 51(1) and (2) of the Sale of Goods Act (the Act):-

> (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

Kevin Ng had admitted (N/E53) that not only was he told by the second plaintiff about the plaintiffs' sub-sale of the 2 units of Mercedes they purchased from the defendants but also that the plaintiffs would suffer a loss if the cars were not delivered to them; this was even before the plaintiffs placed their order with the defendants.

31. It would be equally useful to look at the principles enunciated in *Hadley v Baxendale* (1854) 9 Ex 341 governing award of damages, as restated (by Asquith LJ (at pp 539-540) in *Victoria Laundry v (Windsor) LD v Newman Industries* [1949] 2 KB 528 and summarised by *Mcgregor on Damages* (16th ed p 159 para 250) as follows:-

> 1. It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule; hence;
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> 2. in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
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> 3. What was at that time reasonably so foreseeable depends on the knowledge then 'possessed' by the parties, or, at all events, by the party who later commits the breach.
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> 4. For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v Baxendale*. But to this knowledge, which a contract breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.
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> 5. In order to make the contract breaker liable under either rule, it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result.
>
> 6. Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough....if he could foresee it was likely so to result...

32. Pursuant to s 51(2) of the Act and, the above rule in *Hadley v Baxendale* as restated in *Victoria Laundry v (Windsor) LD v Newman Industries*, I awarded the plaintiffs their loss of profits ($106,400) arising from the non-fulfilment of the sub-sale agreement. I did not however award the plaintiffs the penalty of 20% of the purchase price namely $86,000 (which should be $92,000 if based on $460,000 for the 2 cars) as I thought it was too remote a loss. Moreover, no evidence was produced by the

plaintiffs to show that it was actually paid to their buyer Rosemeri, unlike the refund of the 50% deposit to her.

33. I had also considered whether the plaintiffs had mitigated their loss, as they were duty bound to do at law. In this regard, the plaintiffs (through their solicitor) waited until 2 March 2000 (see 1AB54-58) before writing to other Mercedes suppliers (3) to source for the same cars the defendants failed to supply. The second plaintiff explained (N/E30) it was because he took his solicitors' advice that the plaintiffs must mitigate their loss by 6 March 2000 if he did not hear from Kevin Ng; (the defendants through their solicitors gave an inconclusive reply only on 7 March). I am of the view that the lapse of 10 days from the date of the plaintiffs' solicitors' letter of demand is not an unreasonable delay, as the plaintiffs no doubt were still hoping the defendants would comply with their contractual obligations. In any case, the second plaintiff testified, none of the suppliers approached had ready stock, they could only provide cars on an indent basis 2-3 weeks later.

The conclusion

34. In brief, it was clear from the documentary evidence produced in court that the defendants had agreed orally to supply by 29 February 2000 to the plaintiffs, 2 black Mercedes S320L inclusive of the options set out in the fax which Kevin Ng signed, stamped and dated 22 February 2000. As they failed to do so and, they were made aware by the second plaintiff that the plaintiffs' purchase was for purposes of re-sale, the defendants must pay by way of damages, the plaintiffs' loss of profits as well as refund the deposit the plaintiffs had paid. I accordingly awarded judgment to the plaintiffs on the two sums with interest at 6% per annum (from the date of the writ) and costs to be taxed unless otherwise agreed.

Lai Siu Chiu

Judge