Trigen Industries Ltd v Sinko Technologies Pte Ltd and another
[2002] SGHC 252

Case Number : Suit No 968 of 2000

Decision Date : 29 October 2002

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Harold Seet and Indra Raj (Harold Seet & Indra Raj) for the plaintiffs; S H Almenoar and Michelle Jeganathan (Tan Rajah & Cheah) for the first defendants

Parties : Trigen Industries Ltd — Sinko Technologies Pte Ltd and another

Civil Procedure – Pleadings – Whether plaintiffs, in framing claim against second defendants in alternative, estopped from proceeding against first defendants

Contract – Privity of contract – Sale of goods – Whether contract with first defendants as contracting party or first defendants acting only as sourcing agents or intermediaries

HELD, JUDGMENT FOR THE PLAINTIFF :

> The key document in this case was the purchase order. The signature by JB Lee, inserted without prior consultation or knowledge of the plaintiffs, did not in any way alter the character of the contract entered into, where the first defendants were unequivocally identified and described as the vendors. If the first defendants were indeed the sourcing agents, they should have, before the return of the purchase order to the plaintiffs, pointed out that their role was merely that of sourcing agents or intermediaries. From the e-mail exchanges, it would seem that the first defendants were at all times seen to be projecting themselves as vendors of the goods. Furthermore, their contention that they were only sourcing agents did not seem to cohere with their representation that the second defendants were their branch office in US in their e-mail dated 26 August 2000. Another unsettling aspect in the first defendant's case was that although JB Lee of the second defendants was admittedly in Singapore on 3 and 4 September 2000, Philip Loh who met JB Lee, did not even arrange for JB Lee to meet with the plaintiffs' representatives. Having regard to all the evidence and arguments, the conclusion was that the first defendants did indeed enter into the contract with the plaintiffs, not as sourcing agents or intermediaries, but on the basis that they were the contracting party (See [41]-[44], [47], [49]).
>
> The plaintiffs were not estopped from proceeding against the first defendants as a result of paragraph five of their statement of claim because there had not been any election by the plaintiffs, which must be unequivocal. Final election would not take place until the party had obtained judgment against one party (See [55])

CASE(S) REFERRED TO

Bulsing Ltd v Joon Seng & Co

[1972] 2 MLJ 43 (folld)

Clarkson, Booker Ltd v Andjel

[1964] 3 All ER 260 (folld)

Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd

[1968] 2 All ER 886 (refd)

Judgment

GROUNDS OF DECISION

Facts

1 In this trial, the following facts by and large were not in dispute. The plaintiffs are a company incorporated in the Republic of China. They wanted to purchase 1,920 pieces of computer chips (model Intel E28F320J5-120) for resale to their customers. In this they enlisted the assistance of a Singapore commission agent, one Sean Lim Chong Jin (PW-1) ('Sean Lim'). Sean Lim became the plaintiffs' local representative since early January 2000.

2 Sean Lim for his part sent out a mass electronic mail ('e-mail') to prospective suppliers. The result was that he received an e-mail on 11 August 2000 from the first defendants, a company incorporated in Singapore. The said e-mail (DB-8) read thus:

> Attn: Mr Sean Lim
>
> From: Philip Loh
>
> Dear Sean
>
> We are pleased to offer as follow (sic):
>
> 1. Model : Intel E28F320J5-120
>
> 2. Unit price : 6K pcs @ $74.00; 10K pcs @ $73.00
>
> 3. Date Code: Year 1999 or later; specific request for Year 2000 can be made at time of order placement, but with no guarantee.
>
> 4. Packaging: Will be genuine Intel packaging; qty per package unknown at this time. May be 300 pcs per package.
>
> 5. Delivery schedule/lead time: End of August or better. There is a good possibility of having delivery made sooner than end of August but Intel factory cannot make commitment at this time.
>
> 6. Payment is T/T advanced, FOB U.S.
>
> Please respond ASAP because our supplier says that demand for this product is present increasing and supply is based on limited allocation qtys to suppliers willing to pay higher prices.
>
> Kindly let us know your decision soon AS OUR SUPPLIER can only hold for 24hrs.

Regards.

Sinko Technologies Pte Ltd

…

[Highlight added.]

3 There followed a series of e-mail exchanges between the parties. Two amongst them both dated 23 August 2000 – one sent at 10.56am (DB-11) and the other sent later (PB-6) appeared to be relevant and require reproduction and they are as follows:

DB-11:

From: Sinko Technologies [sinko@singnet.com.sg]

Sent: Wednesday, August 23, 2000 10.56 AM

To: trigen_ind@hotmail.com

Subject: QUOTATION

Attn: Mr Sean Lin

From : Philip Loh

Dear Sean

We are pleased to offer as follow :

1. Model : Intel E28F320J5-120

2. Unit price : US$ 70.00 Qty : 1920 pcs

3. Delivery / Lead time : Immediately after received payment

4. Payment is T/T in advanced, (sic) FOB U.S.

Bank Information : Bank of America

Account
Holder
:
T
&
M
International

Account
No.
:
02078
07872

Address
:
401
N.
Harbor
B1.,
Fullerton,
CA92832,
U.S.A.

Please fax P/O immediately and send us a copy of your T/T application document. Kindly understand that we need to receive all these document by this afternoon in order for us to secure these cargo.

Thank you and looking forward to your favourable reply soon.

Regards.

PB-6:

From: "Sinko Technologies" <sinko@singnet.com.sg>

To: <trigen_ind@hotmail.com>

Subject: FW: QUOTATION

Date: Wed, 23 Aug 2000 14:14:14 +0800

Dear Sean

As per our telecommunication this afternoon, you can contact us at the following:

Company Name : Sinko Technologies Pte Ltd

Address : 10 Anson Road #23-15

International Plaza

Singapore 079903

Tel: 227 8689

Fax: 227 8609

e-mail : sinko@singnet.com.sg

My pager : 933 10888

Please issue purchase order to Sinko urgently.

Regards

Philip Loh

4 Then on 24 August 2000, a proforma invoice dated 23 August 2000 for US$134,400 addressed to the plaintiffs was received by the plaintiffs by way of fax. It was reportedly from T & M International and was sent to Sean Lim by the first defendants.

5 In the event, on 24 August 2000, the plaintiffs forwarded their purchase order to the first defendants. Since the said purchase order became the central piece in this litigation, it requires reproduction in full and is as follows:

Attn: Mr Philip Loh

Purchase
Order

P.NO.:SK-001

Date: Aug. 24, 2000

Vendor : Sinko Technologies Pte Ltd

10 Anson Road #23-15, International Plaza

Singapore 079903

Tel: 65-227-8689 Fax: 65-227-8609

Deliver to: 8F-6, No. 678, Sec. 4, Pa-The Rd.,

Taipei, Taiwan R.O.C.

(…)

Payment: By T/T In Advance

Delivery(ies): A.S.A.P. (F.O.B. USA)

Item	Description	Quantity	Unit Price	Amount
1.	Intel PC E28F320J5-120	1920 pcs	@USD70.00	USD134,400.00
	TOTAL:	1920 pcs		USD134,400.00

Terms And Condition

1. Parts must be new, unused and original sealed packaging

2. Replacement or credit of defective parts guaranteed

3. We reserve the right to cancel if terms stated on this PO is not fulfilled.

4. Subjected to customer confirmation

Confirmed By: ……

_____ (signed)

_____

Trigen Industries Ltd.

6 Some aspects of the said purchase order need highlighting here. The purchase order which was forwarded to the attention of Philip Loh of the first defendants named the defendants as vendors. At the bottom left-hand corner of the purchase order, there was a space for signature under the notation 'confirmed by'. This was reportedly signed by one JB Lee describing himself as the president of one T & M International and returned to the plaintiffs. At the time the plaintiffs forwarded the purchase order to the first defendants, the plaintiffs had admittedly no clue as to the actual relationship between the first defendants and the said T & M International.

7 The plaintiffs next wrote to the defendants on 25 August 2000 stating that they would be arranging for telegraphic transfer of the sale amount on 28 August 2000 and requested the first defendants to arrange shipment of the goods by Fedex immediately after receipt of payment. Following the said communication, the plaintiffs, on 28 August 2000, remitted US$134,400 to T & M International as advised by the defendants' Philip Loh in his e-mail dated 28 August 2000.

8 Contrary to expectation, the goods were not despatched to the plaintiffs. On 30 August 2000, JB Lee of T & M International reportedly wrote to the first defendants that payment for the goods had already been made to 'Intel U.S.' and that T & M International expected delivery of the goods by 6 September 2000 latest. On 31 August 2000 the plaintiffs protested to the first defendants regarding the delay. They warned the first defendants that if the plaintiffs' customers were to insist on cancelling the order because of the delay, the plaintiffs would look to the first defendants not only for the return of the amount paid but also for compensation for any resulting loss. On 4 September 2000, the plaintiffs wrote to the first defendants again, this time conveying their customers' demand for compensation as a result of the delay in the delivery of the goods. This letter was followed by a letter from the plaintiffs' solicitors dated 12 September 2000 in which the plaintiffs' solicitors said that the non-delivery of the goods by 30 August 2000 constituted a breach of the agreement entered into between the parties and that the amount paid towards the purchase of the goods be refunded to the plaintiffs within three days from the date of the letter together with a sum to be determined in respect of losses suffered by the plaintiffs.

9 On 20 September 2000, the first defendants' solicitors replied to the plaintiffs' solicitors. In this letter, the first defendants' solicitors stated that their clients were not liable to the plaintiffs in any way as they were only acting as an intermediary between T & M International and the plaintiffs and the role of the first defendants was no more than mere sourcing agents.

Pleadings

10 The pleaded case of the plaintiffs against the first and second defendants was in the alternative. The earlier parts of the statement of claim (paras 1 to 4) were directed against the first defendants for breach of contract. The plaintiffs averred in those paragraphs as follows:

1. By a contract in writing as evidenced by the following documents:-

(a) an offer in writing from the First Defendants addressed to the Plaintiffs, through the Plaintiffs' Singapore representative, dated the 23rd day of August, 2000; and

(b) a Purchase Order No: SK-001 from the Plaintiffs addressed to the First Defendants dated the 24th day of August, 2000;

the First Defendants agreed to sell and deliver 1920 pieces of computer chips model: Intel E28F320J5-120 at US$70.00 per piece to the Plaintiffs immediately after receipt of payment from the Plaintiffs. The Plaintiffs will refer to the documents at the trial for their full terms and effects.

2. On the 28th day of August, 2000, and acting on the terms of the contract or the instructions of the First Defendants, the Plaintiffs made payment of or remitted a sum of US$134,400.00, by way of telegraphic transfer through a financial institution, to the Second Defendants in full payment of the agreed price for the 1920 pieces of computer chips Model: Intel E28F320J5-120. The Second Defendants have duly acknowledged receipt of the said sum of US$134,400.00.

3. At all material times, the First Defendants well knew that the Plaintiffs bought the said 1920 pieces of computer chips Model No: E28F320J5-120 in the ordinary course of their business for resale at a profit to their customers.

4. In breach of the said contract, the First Defendant wrongfully failed refused and/or neglected to deliver any of the 1920 pieces of computer chips Model No: E28F320J5-120 within a reasonable time or at all and the First Defendants have wrongfully repudiated the said contract, which repudiation the Plaintiffs have accepted by way of a letter from the Plaintiffs' Solicitors dated the 12th day of September, 2000.

11 Averments in second part of the claim framed in the alternative against the second defendants, were as follows:

5. Alternatively, by a contract in writing as evidenced by a Proforma Invoice No. I-23080 from the Second Defendants addressed to the Plaintiffs dated the 23rd day of August, 2000 but sent by the First Defendants to the Plaintiffs, the Second Defendants agreed to sell and deliver 1920 pieces of computer chips Model: Intel E28F320J5-120 at US$70.00 per piece to the Plaintiffs on the following terms :-

(a) the Plaintiffs are to arrange for telegraphic transfer of the full purchase price to the Second Defendants in advance; and

(b) the computer chips so ordered will be shipped Free On Board (F.O.B.) via the United States of America to the Plaintiffs.

The Plaintiffs will refer to the said Proforma Invoice at the trial for its full terms and effects.

6. On the 28th day of August, 2000, the Plaintiffs made payment or remitted a sum of US$134,400.00, by way of telegraphic transfer through a financial institution, to the Second Defendants in full payment of the agreed price for the 1920 pieces of computer chips Model: Intel E28F320J5-120. The Second Defendants have duly

acknowledged receipt of the said sum of US$134,400.00.

7. At all material times, the Second Defendants well knew that the Plaintiffs bought the said 1920 pieces of computer chips Model No: E28F320J5-120 in the ordinary course of their business for resale at a profit to their customers.

8. In breach of the said contract, the Second Defendants wrongfully failed refused and/or neglected to deliver any of the 1920 pieces of computer chips Model No: E28F320J5-120 within a reasonable time or at all and the Second Defendants have wrongfully repudiated the said contract, which repudiation the Plaintiffs have accepted by the issuance of the present Writ.

9. By reasons of the matters stated in paragraphs 5 to 8 aforesaid, the consideration for the payment of US$134,400.00 has wholly failed, and the Second Defendants have had and received the said sum of US$134,400.00 to the use of the Plaintiffs.

12 The second defendants did not file any defence and neither did they take any steps to contest the plaintiffs' claim. As for the first defendants, their defence in sum, was that they acted only as sourcing agents and as intermediaries between the plaintiffs and the second defendants. Their defence insofar as was material (paras 1 to 5), read thus:

1. The 1st Defendants deny that they made the contract alleged in paragraph 1 of the statement of claim or any contract with the Plaintiffs.

2. The 1st Defendants say that the Plaintiffs knew or ought to have known that at all material times, the 1st Defendants acted only as sourcing agents; and as intermediary between the Plaintiffs and the 2nd Defendants.

3. The 1st Defendants further say that the alleged offer in writing dated 23rd day of August 2000 and the Purchase Order No. SK-001 dated 24th August 2000 from the Plaintiffs to the 1st Defendants do not constitute in law an offer and acceptance necessary and required for the formation of a contract between the Plaintiffs and the 1st Defendants.

4(a) The 1st Defendants also say that the contract for the sale and purchase of the goods referred to in the statement of claim, namely 1920 pieces of computer chips model: Intel E28F 320J5-120 at U$70.00 per piece, is evidenced by the following documents (and not by the 2 documents referred to in paragraph 1 of the statement of claim):-

(1) the Plaintiffs said Purchase Order No. SK-001 dated 24th August 2000 which said Purchase Order was duly confirmed (hence accepted) by the 2nd Defendants (and not by the 1st Defendants).

(2) The Proforma Invoice No. I-23080 dated 23rd August 2000 from the 2nd Defendants to the Plaintiffs referred to in the paragraph 5 of the Statement of Claim.

(b) The 1st Defendants admit paragraph 6 of the Statement of Claim in that the

Plaintiffs made payment or remitted a sum of US$134,400.00 as therein stated, to the 2nd Defendants. The 1st Defendants received no payment whatsoever from the Plaintiffs.

5. By reason of the aforesaid matters, the 1st Defendants say that:-

(a) no contract exist between the Plaintiffs and the 1st Defendants for the sale and purchase of the said goods;

(b) the contract for the said sale and purchase is between the Plaintiffs and the 2nd Defendants.

Evidence

13 The facts which were not in dispute have already been summarised earlier. I now propose to highlight some aspects of the parties' evidence which were at variance.

14 Sean Lim, a sales executive who was the plaintiffs' local representative and the person who was charged with the task of procuring the goods under reference for the plaintiffs, testified on behalf of the plaintiffs. After narrating the events and the e-mail exchange which led to the placing of the purchase order referred to, he said that following the plaintiffs' complaint that they had yet to receive the goods despite their remitting the purchase price, he met Philip Loh of the first defendants on 30 August 2000. At that meeting, Philip Loh told him amongst other things that 'the second defendants were the branch office of the first defendants in the US and that the boss of the second defendants was a good friend of his boss and that shipment of the goods would be delayed until the 5 or 6 September 2000.

15 Subsequently, he met Simon Tan the marketing manager of the first defendants on 1 September 2000. At that meeting, Sean Lim told Simon Tan that the plaintiffs' customers were threatening to cancel their contract with the plaintiffs on account of the non-delivery of the said goods and were demanding an immediate refund of the purchase price as well as compensation from the plaintiffs.

16 Simon Tan assured Sean Lim at that meeting that the goods would be delivered by 6 September 2000. At that meeting, Simon Tan suggested to Sean Lim that the plaintiffs ought to look to the second defendants or the manufacturers of the goods for compensation for the late or non-delivery of the said goods. Nonetheless, Simon Tan also assured Sean Lim that there would not be any problems or difficulties for the first defendants to make refund of the sum of US$134,4000 or to meet any compensation sought by the plaintiffs' customers arising from the late or non-delivery of the goods.

17 As it transpired, on 4 September 2000, the plaintiffs demanded from the first defendants, a sum of US$14,000 as compensation for the delay in delivery of the goods contracted to be supplied. But the demand went unheeded by the first defendants. Not only that, the first defendants in fact sought to shift the blame for such non-delivery of the goods on to the plaintiffs, stating that the delay was due to late remittance of the purchase price by the plaintiffs.

18 On 8 September 2000, the plaintiffs' General Manager Kao Wen Teng arrived from Taiwan. He, together with Sean Lim and another person by name Tony Tang, called at the offices of the first defendants. Later, they had a fruitless meeting with Simon Tan who suggested they go after the second defendants or the manufacturers of the goods. Simon Tan also stated at that meeting that he would be flying to the US to check on the situation and to collect the sum of US$134,400 from the second defendants. Since nothing seemed to be materialising, the plaintiffs sought legal advice and the upshot was a demand letter from their solicitors dated 12 September 2000, addressed to the first defendants.

19 On 13 September 2000, the plaintiffs received a letter of demand from their customers, one Component Sourcing House, demanding the return of a sum of US$149,760 being the sum paid by them to the plaintiffs for the purchase of the said goods. This sum of $149,760 was subsequently paid over by way of instalments to Mitkem Technologies who are the customers of Component Sourcing House.

20 According to Sean Lim, the plaintiffs were sent a copy of a letter dated 27 September 2000 from the first defendants to T & M International. It appeared from that letter that the first defendants had asked T & M International to deal with the plaintiffs directly stating that the first defendants' 'role as a middleman is limited and [they were] in no position to reply [to the plaintiffs] on the refund of money.'

21 There were other details recounted by Sean Lim which do not require mention here save for the aspect that the second defendants were apparently willing to assume responsibility for the fiasco and in the process were seen to be blaming one Malaysian Corporation known as Nikiwa for the default.

22 It must be mentioned presently that Sean Lim's assertion that Philip Loh told him on 30 August 2000 that the second defendants were the branch office of the first defendants in the US was not disputed by the defence.

23 The testimony of Kao Wen Tang (PW-2), the General Manager of the plaintiffs was confirmatory of the account narrated by Sean Lim. Additionally, Kao Wen Tang averred how the plaintiffs arranged to pay Mitkem Technologies their claim for refund of the sums paid by them.

24 Anita Kuo Hsiu-Chin (PW-3), Assistant Manager of the plaintiffs, in her testimony adopted what was narrated by Sean Lim and Kao Wen Tang.

25 Philip Loh Wei Siang (DW-1), sales manager was the only person who testified for the defence. His evidence can be summarised as follows.

26 The first defendants' business included import and export of goods in the electronic field. The first defendants also acted as intermediaries between buyers and sellers. Between 31 July and 23 August 2000, he had a number of telephone conversations with the plaintiffs' representative Sean Lim. In one of his conversations - he could not quite recall when it was – he told Sean Lim that the first defendants were only sourcing agents and that they would try to source for the goods the plaintiffs wanted. He told Sean Lim that the first defendants would not be supplying goods themselves but would be middlemen or intermediaries between the plaintiffs and sellers.

27 Philip Loh claimed that the plaintiffs knew or ought to have known that the first defendants would not enter into any contract with the plaintiffs and the contract would be between the plaintiffs and the actual supplier of goods. He then recounted the e-mail exchanges between the parties culminating in the purchase order from the plaintiffs. He added that he sent the purchase order to the second defendants and after it was signed by the second defendants below the column 'confirmed by' he forwarded the confirmed purchase order to the plaintiffs. He further claimed that the purchase order thus confirmed by the second defendants ought to have made the plaintiffs aware that the second defendants were the sellers of the goods to the plaintiffs and the first defendants were only the intermediaries. Further, according to him, the second defendants had also given the plaintiffs a proforma invoice dated 23 August 2000 (DB-15).

28 According to Philip Loh, unfortunately the goods were not delivered by the second defendants to the plaintiffs after payment from the plaintiffs had been received by the second defendants. He disclosed that the first defendants even made a report to the police on 7 September 2000 casting aspersions on the plaintiffs' motives. In the said police report (DB-24/25), the first defendants' Philip Loh and Simon Tan described the second defendants as their 'US contact point'. In the last two sentences of the first paragraph of the report, both Philip Loh and Simon Tan said: '*In the meantime we find it highly suspicious the default of the Malaysian supplier coincided exactly with Trigen (sic) urgency for delivery. We have refused to pay compensation to Trigen as we think they are in league with the Malaysian supplier and are trying to make off with the compensation.*'

29 As it transpired, the Commercial Affairs Department of Singapore informed the first defendants on 28 December 2000 that they had carefully considered the matter and that they were of the view that no criminal offence had been disclosed (DB-27).

30 In cross-examination, Philip Loh reiterated that he told Sean Lim on 31 July 2000 before the issuance of the purchase order that the first defendants were a trading company and they would like to source for the plaintiffs for the items under reference (page 240 of the NE). He was then referred to an e-mail dated 26 August 2000. The said e-mail reads as follows:

1. My branch office in U.S. found 30K pcs Intel DA28F640J5-150 at US$105.00

with 2000+ data code. Anyway, I rejected them due to high price. They are still searching and believe they can have the price early next wk, price that is near our current item. They also found some qty <5.6K pcs> going at US$88.00 but need to be confirmed. Anyway, need to check on the packing because standard is not 960 pcs. Will keep you update asap. Any idea on its standard pack ???

2. Current item, Intel E28F320J5-120, found 3840 pcs going at US$71.00. Are you interested. Got this news in the late evening, U.S. timing, can only confirm on Monday.

3. Need your help. Regarding the T/T remittance, I need your Taiwan office to wire early on Monday morning, so that when U.S. starts their Monday, hopefully the money will be in. (takes 24-36 hrs to be in). Please call Anita to arrange this, it is very important to us. Please help. Our branch office actually have their difficulties to answer to their supplier when the money was delayed. I'm afaraid any more delay will spell trouble and my head will roll. I need to answer to my boss.

Thank you for your kind attention and look forward to your reply soon.

Regards.

P.S. This e-mail address is my home address, while I work on wkends. Anyway, you have my contact number if you need to call me, right ???

31 When questioned by the court (page 280 of the NE) whether the first defendants had indeed a branch office in the US, he replied in the negative. When asked why then he used the phrase 'our branch office in U.S.' in his e-mail dated 26 August 2000 addressed to the plaintiffs, his reply was: 'In this market, it is common to use counterparts' branch office to show the close link with the supplier' (page 280 of the NE, lines 24-26). He admitted however that his representation was untrue (page 281 of the NE).

32 His answers in cross-examination suggested (pages 303 and 304 of the NE) that the first defendants were contemplating paying compensation to the plaintiffs after the police had concluded that there was no criminal offence. He added that they would have paid the compensation provided there was a second purchase order from the plaintiffs. The evidence in this respect (pages 303 and 304 of the NE) reads as follows:

Q All right. Now, I'm going back to your police report, that is DB25, to the last sentence again which we've just touched on earlier, (reads) "We have refused to pay the compensation to Trigen as we think that they are in league with the Malaysian supplier and are trying to make off with the compensation", right?

A Yes.

Q So would I be correct to say now, all right, the only reason that the 1st Defendants refused to pay the compensation is because you believe that they're in league with the Malaysian supplier? Now the police have concluded the investigation, they have found no criminal offence. So there are no reasons now for the 1st Defendants not to pay the compensation, would you agree?

A I would agree at that time provided there was a second purchase order.

His Honour: Do you seriously expect a second purchase order when you've not even supplied the

goods for the first purchase order?

Witness: Sorry, your Honour?

His Honour: You haven't supplied the goods, neither you nor T&M.

Witness: Mm-hmm.

His Honour: Then do you expect the Plaintiffs to give you a second order and send you further monies?

Witness: At that time, before the 3rd of September, before meeting up with Mr Lee, the Plaintiff actually told us that there would be a second purchase order. So at that time, we wanted to pay for the compensation---

His Honour: What is the value of the second purchase order?

Witness: The second purchase order is one dollar above the original one, that is seventy-one.

His Honour: For how many units?

Witness: The same unit, 1,920 pieces.

His Honour: So you will not make any money. The first purchase order, you'll be making about US$6,000.

Witness: Yes.

His Honour: Second one, you'll make probably about $7,000. You pay about $16,000 of compensation, your Company will lose $3,000. Wouldn't your head roll?

Witness: We know from the Plaintiff that subsequent purchase order would continue to come.

His Honour: I see.

Witness: Every week one purchase order.

His Honour: All right.

Q All right, Mr Loh, I'm putting to you, all right, these are my instructions. One, now, there is a contract between the Plaintiffs and the 1st Defendants for the purchase of the computer goods, that's 1,920 pieces of the computer chips, would

you agree?

A No.

Issues

33 The main issue in this case was whether there was in fact a contract for sale of goods between the first defendants and the plaintiffs or whether the contract, if any, was between the plaintiffs and the second defendants, the first defendants acting only as an intermediary or sourcing agents. The next issue related to a pleading point. The issue here was whether the plaintiffs in framing a claim against the second defendants in the alternative, as pleaded in para 5 of the statement of claim, were prevented from proceeding against the first defendants.

Arguments

34 Let me first summarise the first defendants' contentions as advanced by their counsel. His submissions as contained in the concluding part of his closing submission read thus:

> (1) the contract for the sale of the goods [was] not between the Plaintiffs and the 1st Defendants.
>
> (2) The contract for the sale of the goods [was] between the Plaintiffs and the 2nd Defendants.
>
> (3) The quotation D11 [was] not the offer and accordingly incapable of acceptance.
>
> (4) The purchase order (DB 13/14) [was] the offer by the Plaintiffs.
>
> (5) The 1st Defendants did not accept the offer; the offer was accepted by the 2nd Defendants.
>
> (6) The Plaintiffs were aware that they were dealing with the 2nd Defendants as their sellers and paid the purchase price of US$134,400.00 to the 2nd Defendants in accordance with the Proforma Invoice (DB-15) issued by the 2nd Defendants to the Plaintiffs.
>
> (7) The Plaintiffs' "branch office allegation" [was] an afterthought. The evidence [showed] that the allegations [were] untrue and cannot be relied upon.
>
> (8) The 1st and 2nd Defendants [were] separate legal entities and sued as such by the Plaintiffs. The "branch office allegation" [was] a material allegation which [had] not been pleaded. The Plaintiffs [were] estopped from doing so.
>
> (9) The Plaintiffs' claims against the 1st Defendants [were] unsupported by the evidence. The Plaintiffs [had] failed to prove their case on a balance of probabilities.

35 The first defendants' counsel's supplemental submission insofar as was material, was as follows:

> The Pleading Point:
>
> (1) The specific point requiring address here is:-

> "whether or not, the Plaintiffs are bound by paragraph 5 of the amended statement of claim"

(2) Paragraph 5 starts off with the words:

> "Alternatively, by a contract in writing as evidenced by a proforma Invoice No. 1-2308 from the Second Defendants addressed to the Plaintiffs dated the 23rd day of August 2000 but sent by the First Defendants to the Plaintiffs, the Second Defendants agreed to sell and deliver 1920 pieces of computer chips Model: Intel E28F320J5-120 at US$70.00 per piece to the Plaintiffs on the following terms ….."

(3) In essence, this paragraph states that it was the 2nd Defendants who agreed to sell and deliver the goods in question.

(4) As it turned out, on the special facts in this particular case, what the Plaintiffs had pleaded in paragraph 5 is in fact what the 1st Defendants say are the true facts of the matter.

(5) It is well established that pleadings have a binding effect. The Plaintiffs (and the Defendants) are bound by their respective pleadings.

(6) The need for and the very purpose of pleadings make it crucial that the rule whereby parties are bound by the respective pleadings be adhered to strictly. Otherwise the position would be quite chaotic. Parties in a civil case would be at large to wander as they wish and justice would not be done.

…

(9) The nett effect … is that the Plaintiffs' are estopped and cannot be heard to say that paragraph 5 of their amended statement of claim is of no effect and do not bind them.

…

36 The plaintiff's counsel's closing submission in brief was that the plaintiffs, in the first instance entered into a contract for the supply of goods with the first defendants as vendors. It was further submitted (see page 32 of plaintiffs' written submission) that when DB-14 (the purchase order) was returned by the first defendants to the plaintiffs, the plaintiffs had no reason to doubt that there was in fact a contract between the plaintiffs and the first defendants as vendors and not otherwise. Plaintiffs' counsel also highlighted the aspect that Philip Loh in his e-mail (DB-18) addressed to the plaintiffs, intimated to them that the first defendants' branch office in US had found the goods under reference for sale and their 'branch office' were encountering difficulties in answering their suppliers on account of the delay in payment.

37 In relation to the pleading point, counsel for the plaintiffs argued that the alternative plea in para 5 of the statement of claim did not prevent them from seeking judgment against the first defendants. He submitted that the plaintiffs had made it clear at the commencement of the trial that they were pursuing their claim only against the first defendants (see page 21, para 3.3 of their written submission) and so long as the plaintiffs had not entered judgment against the second defendants, they were not precluded under law from seeking relief and obtaining judgment against the first defendants.

Conclusion

38 As mentioned by me earlier, there were two main issues to be decided in this case. The first issue was whether there was in fact a contract between the plaintiffs and the first defendants for sale by the first defendants to the plaintiffs, of 1920 pieces of computer chips (marked Intel E28F 320 J5-120) or whether the first defendants acted purely as sourcing agents or intermediaries between the second defendants and the plaintiffs in relation to the said sale. The other issue was whether the plaintiffs' claim framed in the alternative against the first and second defendants, barred the plaintiffs from claiming relief against the first defendants in this action.

39 In determining who is entitled to sue or liable to be sued on a contract, a useful point as suggested by Diplock LJ (as he then was) where the contract is in writing, is to look at the contract itself (***Teheran- Europe Co Ltd v S T Belton (Tractors), Ltd*** [1968] 2 All ER 886 at 890G). He further said at page 893B:

> … The task of the court in construing any contract is to look at the words used in the contract and at what has passed between the contracting parties before it was made, and to determine what it was that the party alleged to be in breach, by the words of the contract and his conduct, induced the other party to believe he was accepting a legally enforceable obligation to do or to refrain from doing. …

40 The key document in this case was the purchase order (DB-13). Dealing with this document, the first defendants' counsel's submission was that the purchase order DB-13 was to be regarded as an offer and that offer was accepted not by the first defendants but by the second defendants and hence the contract, if any, was between the plaintiffs and the second defendants and not with the first defendants. In my determination, having regard to the manner in which the parties were dealing with each other and the exchange of the e-mails between them, the argument presented by the defendants' counsel did not appear to possess much cogency.

41 Much was spoken by counsel for the first defendants on the significance of the signature under the confirmation column of the purchase order (DB-14) by J B Lee of T & M International. In my view, the said signature - that too inserted without prior consultation or the knowledge of the plaintiffs – did not in any way alter the character of the contract entered (between the plaintiffs and the first defendants) where the first defendants were unequivocally identified and described as the vendors. If the first defendants indeed were the sourcing agents, then they should have, before they returned the purchase order to the plaintiffs, pointed out to the latter that their role was merely that of sourcing agents or intemediaries.

42 Counsel for the first defendants attempted his best to argue his clients' case by characterising them as sourcing agents and intemediaries between the plaintiffs and the second defendants. But the documents produced to the court, viewed in their proper perspective did not support his contention. On the contrary, the first defendants were at all times seen to be projecting themselves all along as the vendors of the goods. This was evident from the first defendants' e-mail dated 11 August 2000 (DB-8) – which commenced with the opening line: 'We are pleased to offer as follow. (sic)' The said e-mail also ended with this line: 'Kindly let us know your decision soon as our *supplier* can only hold (sic) for 24 hours (highlight added).' Again in the first defendants' e-mail dated 23 August 2000 (DB-11) with a subject heading 'quotation', the first defendants after stating, 'we are pleased to offer as follow' (sic), seemed to be requesting the plaintiffs to forward them the purchase order and T/T documents 'in order for [the first defendants] to secure these cargo.' Similarly, in another e-mail dated 23 August 2000 (PB-6), the first defendants were seen to be urging the plaintiffs to issue the purchase order to Sinko – the first defendants - urgently.

43 Furthermore, the first defendants' contention that they were only sourcing agents or intemediaries did not seem to cohere with their representation that the second defendants were their branch office as contained in the first defendants' e-mail dated 26 August 2000 (DB-18). When asked by the court why they chose to describe the second defendants as their branch office, Philip Loh could only say: 'In this market, it is common to use counterparts' branch office to show the close link with the supplier.' (page 280 (lines 24-26) and page 281 (lines 8-9) of the NE). In my evaluation, if the first defendants were in fact acting as sourcing agents or intemediaries, there was no reason for Philip Loh to portray the second defendants as their branch office in their e-mails.

44 It would also appear from the evidence of Sean Lim - which I accepted as cogent and having a persuasive ring to it - that even after the non-delivery, Philip Loh of the first defendants was trying to assuage the plaintiffs by saying that the first defendants' branch office ie, the second defendants could not meet the agreed delivery deadline and the goods would be delayed to the 5 or 6 of September 2000. There was no

mention even at this stage that the second defendants were the contracting parties with the plaintiffs and that the plaintiffs should look to the second defendants and not to the first defendants for relief.

45 Counsel for the first defendants submitted that since the branch office aspect was not pleaded by the plaintiffs, the court should disregard any submissions based on it. I found this argument totally disingenuous since the very assertion that the second defendants were the branch office of the first defendants was contained in the e-mails sent by the first defendants to the plaintiffs and these documents were included in the defence bundle (DB-18) and admitted in evidence without any qualification by the parties. In my opinion, there was no validity in the argument by the first defendants' counsel that a litigant cannot rely on an uncontroverted document to add weight to his claim or cast doubt on the veracity of the opponent. In the circumstances, the argument so advanced by counsel for the first defendant ought to fail *in limine*.

46 Another unsettling aspect in the first defendants' case was that although J B Lee of the second defendants was admittedly in Singapore on 3 and 4 September 2000 (pages 284 to 285 of the NE), Philip Loh who met J B Lee did not even arrange for J B Lee to meet with the plaintiffs' representatives. This aspect strengthened the plaintiffs' contention that the first defendants were treating the second defendants as part of the latter. Furthermore, the first defendants' complaint to the police on 7 September 2000 (page 290 of the NE) seemed to suggest that the first defendants were not mere sourcing agents or intemediaries. If they were indeed such sourcing agents, they would not have made the complaint in the form in which it had been made; and they would have in fact required the second defendants to make the complaint.

47 Moreover, the report itself contained a passage which implied that the parties who would be liable to pay compensation were the first defendants. The passage adverted to reads: 'We have refused to pay compensation to Trigen as we think they are in league with the Malaysian supplier and are trying to make off with the compensation.' In this regard, Philip Loh let slip in his explanation to the court (page 300 of the NE, lines 1 to 12) that at that stage they were expecting another order from the plaintiffs and if such a second order materialised, the first defendants would have paid the compensation. In my determination, this explanation did not seem to lend any credence to the first defendant's stand that they were just sourcing agents for the goods and at this juncture, I must also observe that I did not find the evidence of Philip Loh that the first defendants were only sourcing agents or intemediaries, as worthy of any credit.

48 Having considered all the evidence and arguments presented in regard to the first issue, my conclusion was that the first defendants did indeed enter into the agreement bespoken with the plaintiffs in the first instance, not as a sourcing agents or intemediaries, but on the basis that they were the contracting party. The first defendants' subsequent acts in disclosing the name and identity of their suppliers, ie the second defendant, requiring the plaintiffs to make payment to the second defendants and making the second defendants sign the purchase order as a confirming party, did not, in any way, absolve the first defendants of their liability to the plaintiffs. In my view, even if the first defendants were to be held as agents, it is a settled principle of law (see para 168, Vol 1(2) ***Halsbury's Laws of England***, 4th Edn, reissue) that where a person makes a contract in his own name without disclosing either the name or the existence of a principal, he is personally liable on the contract to the other contracting party though he may be in fact acting on a principal's behalf. He will continue to be liable even after the discovery of the agency by the other party unless and until there has been an election by the other contracting party to look to the principal alone.

The pleading issue

49 As regards the second issue ie the pleading issue raised by the first defendants in relation to para five of the statement of claim which was framed in the alternative and the plaintiffs' prayers for reliefs in the alternative, plaintiffs' counsel was on record from the outset that the plaintiffs were not intent on applying for judgment against the second defendants and that the inclusion of the second defendants in the statement of claim was merely to set out both defendants' respective liabilities. The plaintiffs' counsel also made it clear that the present hearing was directed only against the first defendants and that the plaintiffs had not availed themselves of the opportunity to enter interlocutory judgment against the second defendants, although they could have done so much earlier. In my view, inasmuch as the plaintiffs had not so far elected to obtain judgment against the second defendants, they were not precluded from praying for judgment against the first defendants.

50 In the case before me, the first defendants claiming to be the suppliers of goods and later projecting the second defendants as their branch office were in a position akin to persons acting on behalf of undisclosed principals. The liability of such agents came for discussion

before the English Court of Appeal in ***Clarkson, Booker Ltd v Andjel*** [1964] 3 All ER 260. The facts of the case as appear in the headnotes of the case are as follows.

51 Acting on behalf of his undisclosed principals, an agent (the defendant) for a travel agency company, contracting as if he were principal, booked flights from Athens to London with the plaintiffs and received credit from them for the tickets, having previously done business with them on credit terms. The plaintiffs' solicitors wrote letters to both the defendant and the company stating that failing payment, proceedings for recovery from the recipient of the letter might be commenced. They subsequently wrote further to the travel agency company stating that they had instructions to obtain judgment against the company 'to safeguard [the plaintiffs'] interests', and subsequently they issued and served a writ against the company. Being later informed that the company was insolvent and was going into voluntary liquidation, the plaintiffs did not proceed with the action, but brought an action against the defendant. The defendant contended that there had been a binding election by the plaintiffs to pursue their remedy against the principals, the company.

52 Affirming the decision of the court below, the Court of Appeal held that although the commencement of proceedings by the plaintiffs against the principals was *prima facie* evidence of election, the issue of the writ against them was not necessarily an abandonment of the plaintiffs' cause of action against the defendant, the agent; and, on the facts in the present case, there had not been any final election by the plaintiffs to rely on the liability of the company in exoneration of the defendant.

53 It was further held in that case (per curiam) if judgment had been obtained by the plaintiffs against the principals, the cause of action would have merged in the judgment and the plaintiffs could not subsequently have recovered against the defendant.

54 It would appear from the views expressed in ***Clarkson Booker Ltd*** that election had to be unequivocal and final election would not take place until the party had obtained judgment against one party. I am also of the same opinion and in the premises, the argument by the first defendants' counsel that the plaintiffs were estopped from proceeding against the first defendants as a result of para five of the statement of claim and the attendant prayers for relief in the alternative, was in my determination, ill-founded.

55 There was one other detail which ought to be mentioned at this stage. The plaintiffs' claim was for the refund of the amount paid for the goods, ie US$134,400 under prayer 1 and a further sum of US$15,360 under prayer 2 of the statement of claim against the first defendants. There was no dispute raised as to the figures stated by the parties and the evidence of the plaintiffs' witnesses, in this connection, stood uncontroverted.

56 Following the principles articulated by Chua J in ***Bulsing Ltd v Joon Seng & Co*** [1972] 2 MLJ 43, that the general rule in the case of breach of contract is that the plaintiffs by way of damages are entitled to be put in the same position as he would have been if the contract had been completed, I awarded judgment for the plaintiffs in the sum of US$134,4000 under prayer 1 and a further sum of US$15,360 under prayer 2 of the statement of claim against the first defendants together with interests thereon at the rate of 6% per annum on the said sums from the date of writ until judgment, and costs to be taxed, if not agreed upon.

Order accordingly.

Sgd:

MPH RUBIN

Judge