

**DESIREE COUTURE SDN BHD & ANOR v.  
ANNE F CO LTD & ORS**

HIGH COURT MALAYA, KUALA LUMPUR  
AZIZUL AZMI ADNAN JC  
[CIVIL SUIT NO: 23NCVC-3-01-2014]  
10 DECEMBER 2015

**CONTRACT:** *Joint venture – Joint venture agreement ('JVA') – Termination – Shipment of goods delivered prior to termination of JVA – Price of goods sold not determined in JVA – Whether price of goods sold should be wholesale price, agreed price under joint venture or ex-factory price – Whether plaintiffs returned unsold goods within reasonable time – Whether plaintiffs deemed to have appropriated goods – Whether plaintiffs liable for diminution in value of returned goods*

**TORT:** *Defamation – Defamatory statements – Appointment of debt collector by defendant to collect amount owed by plaintiff – Debt collector issued flyers referring plaintiff as cheat – Relationship between defendant and debt collector – Whether debt collector an independent contractor – Whether defendant vicariously liable for defamation – Whether defendants participated in defamation*

The second plaintiff and the second defendant entered into discussions regarding an establishment of a joint venture, and following that the second plaintiff incorporated the first plaintiff. The parties intended for the first plaintiff to sell clothes that were manufactured by Anne F Co Ltd ('the first defendant'), a company incorporated in Hong Kong. However, the price in which the clothes were to be sold were not determined by the parties. By 29 June 2012, the relationship between the parties deteriorated and the joint venture was terminated. By that time, two shipments of goods were delivered by the first defendant to the first plaintiff. Accompanying each shipment was a packing list, in which the ex-factory and wholesale prices for each item were set out. On 12 July 2012, *vide* an email, the third defendant (financial controller of the first defendant) demanded for the return of the unsold goods 'within a reasonable period of time such as seven days'. In this email, the third defendant also told the second plaintiff that the defendants had employed and authorised someone who was a Malaysian citizen to be responsible for the return of the goods. However, by September, the unsold goods still remained in the possession of the plaintiffs. At this point, the second plaintiff decided to send the unsold goods back to the first defendant in Hong Kong. The unsold goods arrived in Hong Kong on 19 September 2012, but delivery was not accepted by the defendants. In the end, the goods were returned to Malaysia, where they remained in storage. The first defendant then appointed a company known as Hup Lik Debt Collection (M) Sdn Bhd ('Hup Lik') to recover the amounts allegedly owed by the plaintiffs. As a result, the second plaintiff claimed that she had been defamed by the circulation of certain flyers by Hup Lik which contained the photograph of

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A the second plaintiff. In addition, the second plaintiff also alleged that certain  
emails from the third defendant and Hup Lik amounted to harassment. As  
such, the second plaintiff sought to make the defendants liable for defamation  
on the basis that: (i) the first defendant was vicariously liable for the  
defamatory acts of Hup Lik; and (ii) by providing the photograph to Hup Lik,  
B the defendants had themselves participated in the tortious act. On the  
contrary, the defendants counterclaimed against the plaintiffs on the basis  
that upon termination of the joint venture, the first plaintiff came under an  
obligation to return the unsold goods to the first defendant, either within a  
reasonable period or within the time that the first defendant had specified.  
C According to the defendants, as the first plaintiff failed to discharge this  
obligation, the first and second plaintiffs were deemed to have appropriated  
the goods. The issues that arose for determination were (i) the determination  
of the appropriate price that the first plaintiff ought to pay the first defendant  
for the goods sold; (ii) whether the plaintiffs had returned the unsold goods  
within a reasonable time; and (iii) whether the parties agreed for the goods  
D to be deemed appropriated by the plaintiffs.

**Held (dismissing plaintiffs' claim and defendants' counterclaim; each party to bear their own cost):**

- E (1) There was no evidence to show that the parties had addressed their  
minds to the applicable price in the event that the joint venture did not  
proceed. Although the second defendant testified that his intention for  
including the wholesale price in the packing list was for this price to be  
applied in the event that the joint venture failed, there was no agreement  
between the parties for the wholesale price to apply in such  
F circumstances. The testimony of a party that was merely declarative of  
its subjective intention could not be taken into account in determining  
the terms of a contract. (para 23)
- G (2) Since there was no express agreement between the parties as to the  
applicable price in the circumstances where the joint venture had fallen  
through, it falls to the court to infer from the evidence to determine the  
applicable price. Based on the facts, had the parties addressed their  
minds to the issue of the most appropriate price to apply in  
circumstances where the joint venture fell through, they would have  
selected the wholesale price because the wholesale price would be the  
H most efficacious business result for the parties. (paras 24, 26 & 27)
- I (3) There was no credible evidence that the parties had agreed that, in the  
event that the goods were not returned to the defendant within a  
reasonable period, the goods would be deemed to have been  
appropriated by the plaintiffs. It was not open to the first defendant to  
unilaterally impose such a term on the plaintiffs. Nor was it open to the  
first defendant to unilaterally impose a time within which such goods  
were to have been returned, when no such time had been agreed between  
the parties. (para 34)

- (4) Under s. 47 of the Contracts Act 1950, where no time was provided in a contract for the performance of an obligation, it was an implied term of the contract that the obligation must be performed within a reasonable time. Based on the evidence, the reason that the goods were not re-delivered to Hong Kong was that the plaintiffs were waiting for the goods to be inspected by an agent of the first defendant in Malaysia. Although there was evidence that the first defendant had 'employed and authorised' a Malaysian agent, there was no credible contemporaneous evidence that the plaintiffs had relied upon such representation, or that such reliance was the reason why the goods were not re-delivered earlier. The plaintiffs had taken eight weeks rather than four weeks to return the goods. Therefore, first plaintiff was liable to the diminution in value of the returned goods. (paras 36, 38 & 39) A B C
- (5) The first defendant had acted unreasonably in not accepting the returned goods once the goods had reached Hong Kong. In refusing to accept re-delivery of the returned goods, the first defendant became the author of a substantial proportion of its own loss. The first defendant was also liable to the first plaintiff for the freight and related charges incurred in re-shipping the goods back to Malaysia and for storage charges incurred by the latter in connection with the returned goods. (para 40) D
- (6) Vicarious liability does not apply in a defamation action, as only the person who had published the defamatory statement could be held liable. On the facts, the first defendant and Hup Lik entered into an agreement to govern the provision of debt collection services by the latter to the former. Based on the agreement, Hup Lik was described as an independent contractor. An employer or principal was liable for the acts of its employees, servants and agents, but not for the acts of an independent contractor. Further, the first defendant did not specifically authorise Hup Lik to publish the defamatory statements. Since Hup Lik was an independent contractor, the first defendant was not liable for the acts of the former by reason of the application of the principles of vicarious liability. (paras 44, 45, 46, & 47) E F G
- (7) The giving of a photograph did not of itself amount to libel. The situation would have been different had the defendants provided the text to be included in the flyers, in which case both the provider and publisher of the statements would be liable for libel. Further, assuming that a cause of action for harassment existed in the common law of Malaysia, the plaintiffs' case would fail because Hup Lik was an independent contractor and the defendants were not vicariously liable for the actions of Hup Lik. The emails from the third defendant were simply emails given to the plaintiffs to update them on the status of the amounts that the defendants regarded as being owed to the first defendant. The sending of some 16 emails over the course of slightly more than one year could not be construed to constitute acts of harassment by the defendants. (paras 53, 54, 57 & 58) H I

**A Case(s) referred to:**

*Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 FC (*refd*)  
*Honeywill & Stein Ltd v. Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191 (*refd*)

*RHB Bank Bhd v. Moon Trading Sdn Bhd* [2014] 5 CLJ 443 CA (*refd*)

*Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 FC (*refd*)

**B** *UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor* [2012] 1 LNS 1436 CA (*refd*)

**Legislation referred to:**

Contracts Act 1950, s. 47

Sale of Goods Act 1957, s. 42

**Other source(s) referred to:**

**C** *Gatley on Libel and Slander*, 9th edn, para 8.28

*For the plaintiffs - LK Chow (EJ Lim with him); M/s Josephine, LK Chow & Co*

*For the defendants - Cheah Soo Chuan (Lincoln Seow with him); M/s Tay & Partners*

*Reported by Sandra Gabriel*

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**JUDGMENT**

**Azizul Azmi Adnan JC:**

**Introduction**

**E** [1] The second plaintiff, Madam Woo Sau Wan, owns a boutique selling ladies' clothing. Among the items she sold were clothes that were manufactured by Anne F Co Ltd, the first defendant, which is a company incorporated in Hong Kong. The second defendant, Mr Hung Wing Heung (who is also known as William Hung) is a director of the first defendant and manages the first defendant's daily business operations and affairs. The third defendant, Ms Cheung Man Fong (also known as Carol Cheung) is the financial controller of the first defendant.

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**G** [2] The second plaintiff and the second defendant entered into discussions regarding the establishment of a joint venture. The joint venture fell through, and disputes arose regarding goods of the first defendant that had been delivered to the plaintiffs in anticipation of the joint venture. Apart from the contractual dispute between the parties, the plaintiffs also claimed that the defendants had defamed the second plaintiff and had harassed the plaintiffs.

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**Material Facts**

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*The Proposed Joint Venture*

**I** [3] Following the discussions on the proposed joint venture, the second plaintiff incorporated the first plaintiff, which was to have been the joint venture company between the second plaintiff and the first and second defendants. The parties had intended for the first plaintiff to sell Anne F branded clothes at a counter located in the Parkson departmental store located in Pavilion Kuala Lumpur.

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[4] I find that there existed an agreement between the second plaintiff and second defendant for the establishment of the joint venture, even though no formal agreement was executed between the parties. Under the terms of this agreement, the second defendant was to have been appointed as a director of the first plaintiff and 50% of the issued and paid up share capital in the first plaintiff was to have been transferred to the second defendant.

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*Termination Of The Joint Venture*

[5] Although the second defendant was appointed as a director, the shares were never transferred. By 29 June 2012, the relationship between the parties had deteriorated to such an extent that the second plaintiff effectively terminated the joint venture. The reasons for the deterioration in the relationship are not germane to the determination of the issues between the parties, and so I will not recite them here.

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[6] By that time, two shipments of goods had been delivered by the first defendant to the first plaintiff, the first in April 2012 and the second in early June 2012. Accompanying each shipment was a packing list, in which the ex-factory and wholesale prices for each item were set out. (The difference between the prices is important, and is explained at para. 26 post.)

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*The Terms Of The Joint Venture*

[7] I find that, under the terms of the proposed joint venture, the parties had agreed that:

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- (a) the goods were to have been sold by the first plaintiff on a consignment basis, which in law meant that the property in the goods would remain with the first defendant until such time the goods were sold by the first plaintiff to retail customers;
- (b) the retail selling price of each item of clothing would be proposed by the second plaintiff; and
- (c) the first plaintiff would pay the first defendant 36% of the net selling price of the goods. The net selling price would be determined after applying retail discounts (in the region of 30%) on the retail selling price.

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[8] Counsel on both sides did not seek to argue that the governing law of the contract was a law other than Malaysian law.

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*The Sold Goods*

[9] By the time the joint venture was terminated, the first plaintiff had sold some of the goods at the Parkson counter. An issue that arose was how much ought the first plaintiff to pay to the first defendant for the goods sold. Would the applicable price be the wholesale price, the agreed price under the putative joint venture, or (as asserted by the plaintiffs) the ex-factory price?

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A *The Unsold Goods*

[10] Various heated correspondence then ensued between the parties, some of which the defendants claim never to have received (a fact that occupied much time and effort at trial but which I have determined not to be relevant for deciding the issues at hand). These correspondences concerned, among  
B others, the goods that had not been sold. The first defendant (through the third defendant) stated in an email dated 9 July 2012 that in the event that the first plaintiff failed to return the unsold goods, the first defendant would be regard the goods as having been appropriated by plaintiffs, who would be invoiced for such goods at the wholesale price. Later, on 12 July 2012, the  
C third defendant demanded for the return of the unsold goods “within reasonable period of time such as 7 days”, failing which the plaintiffs would be invoiced for all the goods delivered. In this email, the third defendant also told the second plaintiff that the defendants had “already employed and  
D authorised someone who is Malaysian citizen to be responsible for return of goods”. The plaintiffs claim that they had relied on this representation, and as a result had been waiting for the defendants’ agent to receive the goods in Malaysia.

[11] By September, the unsold goods still remained in the possession of the plaintiffs. At this point, the second plaintiff made the decision to send the  
E unsold goods back to the first defendant in Hong Kong. The unsold goods arrived in Hong Kong on or about 19 September 2012, but delivery was not accepted by defendants. The third defendant in an email on the same day raised certain queries regarding the shipment, including whether the shipping agent or the second plaintiff was able to verify the correctness, quality and  
F condition of the returned goods. She also stated that these issues needed to be clarified “with solid documentary evidence” before the first defendant was able to consider its next steps.

[12] In the end, the goods were returned to Malaysia, where they remain in storage.

G [13] The first defendant proceeded to invoice the second plaintiff for all the goods that had been delivered to the first plaintiff.

[14] The issue regarding the unsold goods was whether property in the goods had passed to the first plaintiff and/or the second plaintiff at any time  
H prior to the attempted re-delivery of the unsold goods in Hong Kong. In determining the answer to this question, the subsidiary issues were whether there was any deadline before which the goods ought to have been returned and whether the parties had agreed for the goods to be deemed to have been appropriated by either one of the plaintiffs in the event this deadline was not  
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[15] The matter did not however end there.

*Defamation And Harassment*

[16] The first defendant had appointed a company known as Hup Lik Debt Collection (M) Sdn Bhd (referred to here as Hup Lik) to recover the amounts it regarded as being owed to it by the plaintiffs. The second plaintiff claimed that she had been defamed by the circulation of certain flyers by Hup Lik that referred to her as a cheat. She also claimed that Hup Lik had harassed her, her employees and her sister through visits, text messages and expletive-ridden telephone calls to such an extent that she had to change the telephone numbers for her home and her business.

[17] The crisp issue for determination was whether the first defendant was vicariously liable for the acts of Hup Lik. In addition, it was alleged that the defendants had participated in the act of defamation by providing Hup Lik with a photograph of the second plaintiff, which was incorporated into the offending flyers. The plaintiff also alleged that certain emails from the third defendant over the course of a period of approximately one year amounted to harassment.

[18] I mention for completeness that it does not appear to be settled law in Malaysia whether there exists a tortious cause of action for harassment. Counsel for the plaintiffs capably argued the time was right for such a cause of action to be recognised in Malaysia.

[19] The defendants in their counterclaim had pleaded that the second plaintiff had made fraudulent representations to the defendants to induce them to enter into the proposed joint venture. However, this point was not pursued in argument by counsel, and I have taken it as having been abandoned.

**Applicable Price For The Goods Sold**

[20] It was not disputed that the goods that had been shipped to the first plaintiff were delivered on a consignment basis, which meant that although the possession of the goods had been transferred to the first plaintiff, the property in the goods remained with the first defendant.

[21] Once the joint venture fell through, the question that arose was what was the applicable price that the first plaintiff ought to have paid for the clothes that had been sold by it at the Parkson counter.

[22] It was argued for the defendants that the applicable price ought to be the wholesale price, because the wholesale price listing was included in the packing list when the goods were delivered to the first plaintiff and that this wholesale price list was provided “for the purpose of future invoicing” to the first plaintiff.

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A [23] I find that there is no evidence to support the proposition that the parties had addressed their minds to the applicable price in the event that the joint venture did not proceed. Although second defendant had testified that his intention for including the wholesale price in the packing list was for this price to be applied in the event that the joint venture failed, I find that there  
B was no agreement between the parties for the wholesale price to apply in such circumstances. The testimony of a party that is merely declarative of its subjective intention cannot be taken into account in determining the terms of a contract: see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd*<sup>1</sup>.

C [24] Due to the fact that there was no express agreement between the parties as to the applicable price in circumstances where the joint venture had fallen through, it falls to the court to infer from the evidence what the applicable price would have been had the parties addressed their minds to the issue.

D [25] The following passages from the Federal Court's decision of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong*<sup>2</sup> outline the tests to be applied by a court in drawing an inference on the existence of an implied term:

E Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course"'.  
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G The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '... it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw's* case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making  
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I the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p 605 as '... of course, so and so will happen, we did not trouble to say that, it is too clear'.

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Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239 at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* [1977] 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

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The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained.

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[26] There are three possible prices that could apply in the present case:

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- (a) the wholesale price: this is price at which a manufacturer sells on a wholesale basis to a retailer, who then on-sells the goods to the consumer;
- (b) the ex-factory price: this is the cost to the manufacturer of producing the goods. In the present instance, there is evidence to the effect that the ex-factory price is the value at which the goods are carried in the books of the first defendant; and
- (c) the agreed price under the terms of the joint venture. Based on the evidence received at the trial, the joint venture was to have paid the first defendant 36% of the net selling price of the goods, after applying retail discounts.

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[27] Applying the tests in the *Sababumi's* case, I find that:

- (a) had the parties addressed their minds to the issue of the most appropriate price to apply in circumstances where the joint venture fell through, they would have selected the wholesale price; and
- (b) the wholesale price would have been the price that would have arrived at the most efficacious business result for the parties.

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[28] The reasons underlying this finding are as follows:

- A (a) the ex-factory price would have been the cost to the first defendant of producing the clothing items. If the first plaintiff were to pay the ex-factory price, this would mean that the first defendant would not have obtained any profit at all for the sale of the goods. Indeed, it would have probably incurred a loss in selling the goods at the ex-factory price, to the extent that its fixed overheads may not have been reflected in the ex-factory price; and
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- (b) the putative joint venture price would not have been appropriate either, because had the joint venture proceeded as initially planned, the first defendant would have been entitled to 50% of the retained earnings of the first plaintiff. Thus in a situation where the joint venture has failed to take off, the application of a price which took into account the fact that the first defendant would have otherwise been entitled to two sources of revenue (from the sales of the goods to the first plaintiff, and from a share in the profits of the first plaintiff) would have left the first defendant undercompensated as the manufacturer of the goods.
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[29] Counsel for the plaintiffs argued that the first defendant did not have to bear the costs of establishment of the joint venture. However, this is no answer to the issue at hand, because the costs of incorporation of the first plaintiff and other related costs were not made a subject matter of the plaintiffs' claim before me.

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[30] I exercise my discretion not to award interest on the sums awarded for the sold goods, on the basis that the plaintiffs had been prepared to tender payment for the sold goods (*albeit* at the ex-factory price).

F **The Unsold Goods**

[31] The case of the defendants was that upon termination of the joint venture, the first plaintiff came under an obligation to return the unsold goods to the first defendant, either within a reasonable period or within the time that the first defendant had specified. According to the defendants, the first plaintiff failed to discharge this obligation, with the attendant result that it (or the second plaintiff) was deemed to have appropriated the goods for itself or herself, as the case may be.

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[32] It was not disputed that the nature of couture wear meant that the value of the goods would be time-sensitive, in that the price at which one would be able to sell the clothes would decline rapidly, in line with changing fashions and taste.

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[33] The plaintiffs had taken approximately eight weeks to return the goods to the first defendant. The second plaintiff testified at trial that it would have taken two weeks to physically remove the goods from the Parkson counter, which would have included undertaking a stock-take and liaising with

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Parkson. It was also advanced for the plaintiffs that the defendants had told them that a person by the name of Ryan would inspect the goods in Malaysia, and the plaintiffs had acted in reliance of this representation and as a result did not send the goods back to Hong Kong earlier than it would have.

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[34] In my judgment, there is no credible evidence that the parties had agreed that, in the event that the goods were not returned to the defendants within a reasonable period, the goods would be deemed to have been appropriated by the plaintiffs. It was not open to the first defendant to unilaterally impose such a term on the plaintiffs. Nor was it open to the first defendant to unilaterally impose a time within which such goods were to have been returned, when no such time had been agreed between the parties.

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[35] It was advanced for the defendants that the first plaintiff had continued to sell the Anne F branded goods at the Parkson counter after the termination of the joint venture, and this was an act inconsistent with the ownership in goods residing with the first defendant. By reason of s. 42 of the Sale of Goods Act 1957 – argued counsel for the defendants – the goods were taken to have been retained by the second plaintiff for her own use. I am unable to agree with the contention that the evidence showed that the goods had continued to be sold at the Parkson counter by the first plaintiff. The invoice from *Parkson Corporation Sdn Bhd*<sup>5</sup> does not indicate whether the goods sold were Anne F branded clothes. Nor do the invoices from the shipping agent employed by the plaintiffs prove that the Anne F branded clothes had been sold at the Parkson counter after termination of the joint venture. On the other hand, I found the second plaintiff to be a reliable and credible witness, and saw no reason to doubt her testimony that the Anne F branded clothes ceased to be sold at the Parkson counter following termination of the joint venture. It was not for the plaintiffs to show that the goods had ceased to be sold post-termination. Rather, because the first defendant was the claimant in the counterclaim and it alleged that the goods continued to be sold by the first plaintiff following termination, the burden lay on the defendants to satisfy the court that such was the case.

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[36] Under s. 47 of the Contracts Act 1950, where no time is provided in a contract for the performance of an obligation, it is an implied term of the contract that the obligation must be performed within a reasonable time.

[37] Therefore, the key question is whether the first plaintiff had returned the goods within a reasonable time.

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[38] Based on the evidence in this case, I am not satisfied that the reason that the goods were not re-delivered to Hong Kong was that the plaintiffs were waiting for the goods to be inspected by an agent of the first defendant in Malaysia. Although there is evidence that the third defendant had sent an email to the second plaintiff informing her that the first defendant had

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A “employed an authorised” Malaysian agent, there is no credible contemporaneous evidence that the plaintiffs had relied upon such representation, or that such reliance was the reason why the goods were not re-delivered earlier.

B [39] Based on the second plaintiff’s own testimony and taking into account the time required for the goods to be shipped back to Hong Kong, I am of the view that the plaintiffs ought to have sent the goods back within a period of four weeks of termination of the joint venture. Accordingly, the first plaintiff is liable to the diminution in value of the returned goods over the period of four weeks, as the plaintiffs had taken eight rather than four weeks to return the goods. I assess the damages to be 5% of the wholesale price of the returned goods.

C [40] I am of the view that the first defendant had acted unreasonably in not accepting the returned goods once the goods had reached Hong Kong and insisting on the issues raised in the third defendant’s email of 19 September 2012 being addressed before accepting re-delivery of the goods. The questions raised by the third defendant may well have been grounded on legitimate concerns, but it was always open to the defendants to themselves undertake a verification exercise on the quantity and condition of the returned goods. Having refused to accept re-delivery of the returned goods, the defendants then sought to argue that the goods had been appropriated by the second plaintiff. By such refusal, the first defendant became the author of a substantial proportion of its own loss. The first defendant is also liable to the first plaintiff for the freight and related charges incurred in re-shipping the goods back to Malaysia (but not for the shipment from Malaysia to Hong Kong), and for storage charges incurred by the latter in connection with the returned goods.

**Defamation**

D [41] The acts of defamation complained of by the second plaintiff relate to the distribution of flyers to, among others, the neighbours of the second plaintiff. It was not in dispute that these flyers not only contained statements that casted aspersions on the character of the second plaintiff, but also carried a photograph of her. Again, it was not in dispute that this photograph originated from one of the defendants, who had given it to Hup Lik. The implication therefore was that Hup Lik had published the offending flyers.

E [42] The second plaintiff sought to make the defendants liable for defamation on the basis that:

- F (a) the first defendant was vicariously liable for the defamatory acts carried out by Hup Lik; and
- G (b) by providing the photograph to Hup Lik, the defendants had themselves participated in the tortious act.
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[43] These are considered in turn.

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*Vicarious Liability*

[44] The relevant principles of law with respect to vicarious liability in the context of a defamation action may be summarised as follows:

(a) the Court of Appeal in *UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor*<sup>4</sup> held that vicarious liability does not apply in a defamation action, as only the person who had published the defamatory statement can be held liable. This principle was subsequently applied in another Court of Appeal case, *RHB Bank Bhd v. Moon Trading Sdn Bhd*<sup>5</sup>;

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(b) an employer or principal is liable for the acts of its employees, servants and agents, but not for the acts of an independent contractor. Whether a person is an independent contractor is a question that has to be determined from the facts of the case, and in doing so the court must look beyond the appellations and labels that the parties may attached to one another in describing their relationship; and

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(c) the applicable test in determining whether a person is an independent contractor or a servant/agent is that set out in *Honeywill & Stein Ltd v. Larkin Brothers (London's Commercial Photographers) Ltd*<sup>6</sup>, applied by the Malaysian Court of Appeal in *RHB Bank Berhad v. Moon Trading Sdn Bhd* (*op. cit.*):

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The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.

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[45] The first defendant and Hup Lik entered into an agreement dated 18 October 2012 to govern the provision of debt collection services by the latter to the former. This agreement expressly provided for an obligation on Hup Lik to comply with applicable laws. Accordingly, there is no question that the first defendant did not specifically authorise Hup Lik to publish the defamatory statements. In my view, a possible exception to the rule expounded in *UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor* (that vicarious liability does not apply in a defamation action) would be where the master or principal expressly authorises the servant or agent to make the defamatory statement. That was not the case here.

G

H

[46] At cl. 5.1 of the agreement, Hup Lik was described as an independent contractor. The nature of this relationship was corroborated by the second defendant, who testified in court that neither he nor the first defendant determined the manner in which the debt collection services were to have been conducted.

I

A [47] I accordingly find that Hup Lik was an independent contractor, and that the first defendant was not liable for the acts of the former by reason of the application of the principles of vicarious liability.

B [48] It was advanced for the plaintiffs that the independent contractor point was not specifically pleaded, and therefore the defendants ought to be precluded from raising it in argument. I am unable to agree, for the following reasons:

C (a) the defendants had stated in their defence that the first defendant had appointed Hup Lik to collect the debt that was claimed to have been owed by the first plaintiff, and that an agreement had been entered into for this purpose. This agreement was included in the trial bundles. While the defendants did not specifically use the term “independent contractor”, it was clear that the first defendant was looking to the existence of the debt collection services agreement to exonerate itself from any wrongdoing. It is trite law that only material facts and not legal consequences need be pleaded. It is the role of the court to consider and draw conclusions on the legal result of the pleaded facts (see *RHB Bank Berhad v. Moon Trading Sdn Bhd (op. cit.)*, at para. 44). Accordingly, it was sufficient for the defendants to plead the existence of the debt collection services agreement, and it will be for the court to determine whether or not the terms of the agreement created any liability for the first defendant for acts of Hup Lik; and

D (b) in any event, the plaintiffs cannot claim to have been surprised by the defence that Hup Lik was an independent contractor. Directions were given for the trial bundles to be filed by 15 May 2015, and trial commenced in mid-July, concluding on 26 October 2015, giving the plaintiffs ample time to review the documents to be adduced at trial. It would have been clear from even a cursory review of the debt collection services agreement that it described the debt collector as an independent contractor. The question that arises is whether the second plaintiff could have led any evidence to rebut the assertion that Hup Lik was an independent contractor. I am of the view that she could not, and hence not only was she not taken by surprise by the argument raised by counsel for the defendants, but also her case was not prejudiced by it.

E [49] Mr Lim counsel for the plaintiffs sought to distinguish *RHB Bank Berhad v. Moon Trading Sdn Bhd* on the basis that that case concerned the principle of vicarious liability whereas the present case was one of agency. I am afraid this submission misunderstands the concept of vicarious liability. It is not limited to the employer-employee relationship and applies equally to the principal-agent relationship, as can be seen from the *dicta* of the Court of Appeal of England and Wales in *Honeywill & Stein Ltd v. Larkin Brothers (London's Commercial Photographers) Ltd* quoted at para. 44(c) *ante*. Broadly

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defined, vicarious liability is the liability imposed on one person for the wrongful act of another on the basis of the legal relationship between them. That legal relationship may be one of an employee and an employer, or a principal and its agent.

A

[50] The point was also advanced by counsel for the plaintiffs that the defendants had ratified the actions of Hup Lik because of their “nonchalant and lackadaisical attitude” in failing to adequately oversee the actions undertaken by Hup Lik. I am afraid that I am unable to see how the fact that the defendants had not exercised any control over the behaviour of Hup Lik could amount to a ratification of its actions. If accepted, this argument would mean that a debt collection agency can never be employed as an independent contractor: if an employer had exercised control over the conduct of the debt collector, the collector would be regarded as its servant, and hence making the employer vicariously liable for the collector’s action; on the other hand, if it did not exercise control, it would be taken to have ratified the collector’s action, again rendering it liable as principal.

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C

D

*Whether The Defendants Had Participated In The Defamation*

[51] The concise question for consideration here is whether, by the fact that the defendants had provided the photograph of the second plaintiff to Hup Lik, the defendants had participated in the publication of the libel. It will be recalled that Hup Lik had included the photograph of the second plaintiff in the offending flyers.

E

[52] The following passage from *Gatley on Libel and Slander*<sup>7</sup> was cited in support for the proposition that the first defendant ought to be liable for its own act of publication:

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[A]ny person who has authorised or participated in the publication of a libel is treated as publishing the libel and hence is liable in his own right. Thus if B writes a book and A publishes it, A is liable for his act of publication whether B is his servant or agent or neither. The position is the same where newspaper A publishes an article or letter submitted by B.

G

[53] In my judgment, this principle is applicable to impose liability on a person who had participated in the publication of the libel if the act of that person itself amounted to a libel. Thus, a newspaper will be liable for the publication of an offending article or letter. However, in the present instance, the giving of a photograph does not of itself amount to libel. The situation would have been different had the defendants provided the text to be included in the flyers, in which case both the provider and publisher of the statements would be liable for libel.

H

[54] In addition, as mentioned in para. 45 *ante*, I am not persuaded that the defendants had authorised the publication of the libel.

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**A Harassment**

[55] The second plaintiff also claimed against the defendants for harassment. It was argued *in extenso* by counsel for the plaintiffs that this court should recognise as part of the common law in Malaysia the existence of the tort of harassment.

**B**

[56] The acts that are complained of may be broadly divided into two:

- (a) the acts that were alleged to have been committed by Hup Lik; and
- (b) the emails from the third defendant to the plaintiffs.

**C**

[57] It will not be necessary for me to rule on whether a cause of action of harassment exists in the common law of Malaysia because, even assuming for a moment that such a cause of action exists, the plaintiffs' case fails for the following reasons:

**D**

(a) as far as the acts purportedly carried out by Hup Lik are concerned, the analyses in paras. 44 to 50 apply here. Hup Lik was, on the facts of this case, an independent contractor, and the defendants are not vicariously liable for the actions of Hup Lik; and

**E**

(b) as far as the emails from the third defendant were concerned, these were simply emails given to the plaintiffs to update them on the status of the amounts that the defendants regarded as being owed to the first defendant. Of course, I have determined that not all the amounts claimed by the first defendant were owed by the first plaintiff, but nonetheless the sending of some 16 emails over the course of slightly more than one year cannot by any stretch of the imagination be construed to constitute acts of harassment by the defendants.

**F**

[58] I should however note that I found the arguments in support of the existence of the tort of harassment persuasive, and the time may well be upon us to follow the examples of Hong Kong and Singapore in recognising such a cause of action under the common law.

**G**

**Orders**

[59] For the reasons set out above, there is judgment as follows:

**H**

- (a) the first plaintiff is to pay the defendants in US dollars for:
  - (i) the value of the goods that have been sold; and
  - (ii) 5% of the value of the unsold goods, determined by reference to the wholesale price of such goods;

**I**

- (b) the first defendant is to pay the first plaintiff for the costs of shipping of the unsold goods from Hong Kong to Malaysia and all related charges. Such amounts shall be paid in the currency in which such costs had been incurred;

- (c) the first defendant is to pay the first plaintiff for the storage costs incurred by the latter in connection with the unsold goods until the date of this judgment; A
- (d) the first defendant is to collect the unsold goods from the first plaintiff within 30 days of the order issued pursuant to this judgment, failing which the first plaintiff will be entitled to dispose of the unsold goods in any manner as it considers fit; B
- (e) the plaintiffs' claims against the defendants for:
- (i) the costs of shipping the unsold goods from Malaysia to Hong Kong and all related charges; C
  - (ii) defamation; and
  - (iii) harassment,
- are dismissed; D
- (f) the defendants' counterclaim is dismissed (to the extent that the counterclaim exceeds the amount awarded at sub-para. (a) *ante*);
- (g) each party is to bear its own costs in this action; and
- (h) the amounts referred to in sub-paras. (a) to (c) *ante* are to be ascertained by this court. E

**Endnotes:**

1. [2010] 1 CLJ 269; [2010] 1 MLJ 597.
2. [1998] 3 CLJ 503; [1998] 3 MLJ 151
3. At B/426-428 F
4. [2012] 1 LNS 1436; [2013] 2 MLJ 235.
5. [2014] 5 CLJ 443.
6. [1934] 1 KB 191.
7. 9th edn, at 8.28 G

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