

A Desiree Couture Sdn Bhd & Anor v Anne F Co Ltd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 23NCVC-3-01
OF 2014

B AZIZUL AZMI ADNAN JC
10 DECEMBER 2015

C *Contract — Joint venture — Joint venture agreement — Termination — Good delivered before termination of joint venture agreement — Price of goods sold not determined — Demand for return of unsold goods — Whether unsold goods returned within reasonable time — Whether goods appropriated — Whether correspondence in relation to unsold goods amounted to harassment*

D *Tort — Defamation — Libel — Debt collector appointed to recover amount of monies allegedly owed — Photograph of alleged debtor included in flyers*
E *Relationship between defendant and debt collector — Whether debt collector independent contractor — Whether employer/principal company vicariously liable for defamator for debt collector's actions*

F The second plaintiff and the second defendant entered into discussions to establish a joint venture. Following that, the second plaintiff incorporated the first plaintiff. The parties then intended for the first plaintiff to sell clothes that were manufactured by the first defendant, a company which was incorporated in Hong Kong. The price for the clothes were not determined by the parties. The joint venture was, however, terminated and by that time, two shipments of goods were delivered by the first defendant to the first plaintiff along with a packing list. In the packing list, wholesale prices for each item were set out. The **G** financial controller of the first defendant ('the third defendant') demanded for the return of the unsold goods within a reasonable period of time such as seven days. The unsold goods still remained in the possession of the plaintiffs. The second plaintiff decided to send the unsold goods back to the first defendant in Hong Kong. The unsold goods arrived in Hong Kong but since delivery was **H** not accepted by the defendants, the goods were returned to Malaysia and remained in storage. The first defendant then appointed Hup Lik Debt Collection (M) Sdn Bhd ('Hup Lik') to recover the amounts allegedly owed by the plaintiffs. The second plaintiff initiated an action and claimed that she had been defamed by the circulation of certain flyers by Hup Lik which contained **I** the photograph of the second plaintiff; and alleged that certain emails from the third defendant and Hup Lik amounted to harassment. The defendants counterclaimed against the plaintiffs that upon termination of the joint venture, the first plaintiff was obligated to return the unsold goods to the first defendant. Since the first plaintiff failed to do so, the first and second plaintiffs

were deemed to have appropriated the goods. The issues that arose for determination were the determination of the appropriate price that the first plaintiff ought to pay the first defendant for the goods sold; whether the plaintiffs had returned the unsold goods within a reasonable time; and whether the parties agreed for the goods to be deemed appropriated by the plaintiffs.

Held, dismissing the claim and the counterclaim:

- (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. 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. There was also 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 (see paras 23 & 34).
- (2) 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 (see paras 38–39).
- (3) 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 (see para 40).
- (4) The first defendant and Hup Lik entered into an agreement to govern the provision of debt collection services by the latter to the former. 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. 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 (see paras 44–45 & 47).

A

B

C

D

E

F

G

H

I

- A (5) 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. 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 emails over the course of slightly more than one year could not be construed to constitute acts of harassment by the defendants (see paras 53 & 57).

C **[Bahasa Malaysia summary]**

- D Plaintiff kedua dan defendan kedua memulakan perbincangan untuk mewujudkan usaha sama. Berikutan itu, plaintiff kedua memperbadankan plaintiff pertama. Pihak-pihak kemudiannya berniat untuk plaintiff pertama menjual pakaian yang dikilangkan oleh defendan pertama, sebuah syarikat yang diperbadankan di Hong Kong. Harga untuk pakaian tidak ditentukan oleh pihak-pihak. Usaha sama tersebut, bagaimanapun, ditamatkan dan pada masa itu, dua penghantaran barang-barang telah dihantar oleh defendan pertama kepada plaintiff pertama bersama-sama dengan senarai pembungkusan. Dalam senarai pembungkusan, harga borong bagi setiap barang telah dinyatakan. Pengawal kewangan defendan pertama ('defendan ketiga') menuntut untuk pengembalian barang-barang yang tidak terjual dalam tempoh masa yang munasabah seperti tujuh hari. Barang-barang yang tidak terjual masih kekal dalam milikan plaintiff. Plaintiff kedua memutuskan untuk menghantar barang-barang yang tidak terjual kembali kepada defendan pertama di Hong Kong. Barang-barang yang tidak terjual tiba di Hong Kong tetapi memandangkan penghantaran tidak diterima oleh defendan, barang tersebut dikembalikan ke Malaysia dan kekal dalam simpanan. Defendan pertama kemudiannya melantik Hup Lik Debt Collection (M) Sdn Bhd ('Hup Lik') untuk mendapatkan semula jumlah yang didakwa terhutang oleh pihak plaintiff. Plaintiff kedua memulakan tindakan dan mendakwa bahawa dia telah difitnah melalui pengedaran risalah tertentu oleh Hup Lik yang mengandungi gambar plaintiff kedua; dan mendakwa bahawa e-mel tertentu daripada defendan ketiga dan Hup Lik merupakan gangguan. Defendan menuntut balas terhadap plaintiff bahawa selepas penamatan usaha sama, plaintiff pertama berkewajipan untuk mengembalikan barang-barang yang tidak terjual kepada defendan pertama. Memandangkan plaintiff pertama gagal berbuat demikian, plaintiff pertama dan kedua dianggap telah mengambil barang-barang. Isu-isu yang timbul untuk penentuan adalah penentuan harga yang bersesuaian yang sepatutnya plaintiff pertama bayar kepada defendan pertama untuk barang yang dijual; sama ada plaintiff telah mengembalikan barang-barang yang tidak terjual dalam tempoh yang munasabah; dan sama ada pihak-pihak bersetuju untuk barang-barang dianggap diambil oleh pihak plaintiff.

Diputuskan, menolak tuntutan dan tuntutan balas:

- (1) Tiada keterangan yang menunjukkan bahawa pihak-pihak telah menetapkan minda mereka untuk harga yang terpakai sekiranya usaha sama itu tidak diteruskan. Tiada perjanjian tersurat antara pihak-pihak mengenai harga yang terpakai dalam keadaan di mana usaha sama telah ditamatkan, maka bergantung kepada mahkamah untuk membuat kesimpulan dari keterangan untuk menentukan harga yang terpakai. Tiada apa-apa bukti yang boleh dipercayai bahawa pihak-pihak telah bersetuju bahawa, sekiranya barang tersebut tidak dikembalikan kepada defendan dalam tempoh yang munasabah, barang tersebut akan disifatkan telah diambil oleh pihak plaintif. Tidak terbuka kepada defendan pertama untuk secara unilateral mengenakan terma sedemikian ke atas pihak plaintif. Tidak juga terbuka kepada defendan pertama untuk secara unilateral mengenakan masa di mana sekiranya barang-barang tersebut perlu dikembalikan apabila tiada apa-apa masa yang dipersetujui antara pihak-pihak (lihat perenggan 23 & 34). A
B
C
D
- (2) Walaupun terdapat keterangan bahawa defendan pertama telah 'menggajikan dan memberi kuasa' kepada seorang ejen Malaysia, tiada keterangan semasa yang boleh dipercayai bahawa plaintif telah bergantung kepada representasi tersebut, atau bahawa pergantungan tersebut adalah sebab mengapa barang itu tidak dihantar semula lebih awal. Plaintif telah mengambil lapan minggu daripada empat minggu untuk memulangkan barang-barang. Oleh itu, plaintif pertama bertanggungjawab kepada pengurangan dalam nilai barangan yang dikembalikan (lihat perenggan 38–39). E
F
- (3) Defendan pertama telah bertindak secara tidak munasabah dengan tidak menerima barang yang dipulangkan apabila barang tersebut sampai di Hong Kong. Keengganan menerima penghantaran semula barangan yang dikembalikan, defendan pertama menjadi punca utama kerugian sendiri. Defendan pertama juga bertanggungjawab kepada plaintif pertama untuk pengangkutan dan caj berkaitan yang terlibat dalam penghantaran semula barang-barang kembali ke Malaysia dan untuk caj penyimpanan yang dialami oleh defendan pertama berhubung barang yang dikembalikan (lihat perenggan 40). G
H
- (4) Defendan pertama dan Hup Lik memasuki perjanjian untuk mentadbir peruntukan perkhidmatan kutipan hutang oleh Hup Lik kepada defendan pertama. Hup Lik telah digambarkan sebagai seorang kontraktor bebas. Seseorang majikan atau prinsipal bertanggungjawab ke atas tindakan pekerja, kakitangan-kakitangan dan ejennya, tetapi bukan untuk tindakan seorang kontraktor bebas. Defendan pertama tidak secara khusus memberi kuasa kepada Hup Lik untuk menerbitkan kenyataan fitnah. Memandangkan Hup Lik adalah seorang kontraktor bebas, defendan pertama tidak bertanggungjawab ke atas tindakan Hup Lip I

- A atas alasan penggunaan prinsip-prinsip vikarius liabiliti (lihat perenggan 44–45 & 47).
- (5) Pemberian gambar itu sendiri tidak terjumlah kepada fitnah. Keadaan ini akan berbeza sekiranya defendan meletakkan teks yang dimasukkan ke dalam risalah, di mana kedua-dua pembekal dan penerbit kepada pernyataan tersebut akan bertanggung ke atas libel. E-mel daripada defendan ketiga adalah hanya e-mel yang diberikan kepada plaintif untuk memaklumkan kepada mereka mengenai status jumlah yang defendan anggap sebagai terhutang kepada defendan pertama.
- B Penghantaran e-mel sepanjang lebih daripada satu tahun tidak boleh ditafsirkan untuk membentuk tindakan gangguan oleh defendan (lihat perenggan 53 & 57).]
- C

Notes

- D For cases on joint venture agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5911–5917.
For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

- E *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (refd)
Honeywill & Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd [1934] 1 KB 191, CA (refd)
- F *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 MLJ 151, FC (refd)
UG Hotel Property Sdn Bhd v Chee Soo Lam & Anor [2013] 2 MLJ 235, CA (refd)

G Legislation referred to

Contracts Act 1950 s 47
Sale of Goods Act 1957 s 42

- H *LK Chow (EJ Lim with him) (Josephine, LK Chow & Co) for the plaintiff.*
Cheah Soo Chuan (Lincoln Seow with him) (Tay & Partners) for the respondent.

Azizul Azmi Adnan JC:

INTRODUCTION

- I [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.

A

[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.

B

C

MATERIAL FACTS

The proposed joint venture

D

[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.

E

[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.

F

G

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.

H

[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.)

I

A *The terms of the joint venture*

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

- B** (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;
- C** (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.
- D**

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

E *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 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?
- F**

The unsold goods

- G** [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 correspondence concerned, among 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 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 third defendant demanded for the return of the unsold goods 'within reasonable period of time such as seven 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 authorised someone who is Malaysian citizen to be responsible for return of goods'. The plaintiffs claim
- H**
- I**

that they had relied on this representation, and as a result had been waiting for the defendants' agent to receive the goods in Malaysia. A

[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 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 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. B C

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

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

[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 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 met. F

[15] The matter did not however end there. G

Defamation and harassment

[16] The first defendant had appointed a company known as Hup Lik Debt Collection (M) Sdn Bhd ('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. H I

[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

- A 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.
- B [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.
- C [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.
- D APPLICABLE PRICE FOR THE GOODS SOLD
- E [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.
- F [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.
- G [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.
- H [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 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 Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597.
- I [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.

[25] The following passages from the Federal Court decision of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 outline the tests to be applied by a court in drawing an inference on the existence of an implied term:

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 his with a common 'Oh, of course'.'

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 ten 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 ten 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 ten years to Shirlaw as both parties must have intended it at the time when making 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'.

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'.

A 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.

B

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

(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;

C

(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

D

(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.

E

[27] Applying the tests in the *Sababumi* 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

F

(b) the wholesale price would have been the price that would have arrived at the most efficacious business result for the parties.

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

G

(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

H

(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

I

in the profits of the first plaintiff) would have left the first defendant undercompensated as the manufacturer of the goods. A

[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 plaintiff's claim before me. B

[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). C

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. D E

[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. F

[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 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. G H

[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 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. I

A [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 defendant — the goods were taken to have
B 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 defendant. The invoice from Parkson Corporation Sdn Bhd at B/426–428 does not indicate whether the goods sold
C 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
D 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 defendant following termination, the burden lay on the defendants to satisfy
E the court that such was the case.

[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.

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

G [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 ‘employed an authorised’ a Malaysian agent, there is no credible contemporaneous evidence
H that the plaintiffs had relied upon such representation, or that such reliance was the reason why the goods were not re-delivered earlier.

I [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 four weeks to return the goods. I assess the damages to be 5% of the wholesale price of the returned goods.

[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

[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.

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

- (a) the first defendant was vicariously liable for the defamatory acts carried out by Hup Lik; and
- (b) by providing the photograph to Hup Lik, the defendants had themselves participated in the tortious act.

[43] These are considered in turn.

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* [2013] 2 MLJ 235 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*

- A *Moon Trading Sdn Bhd* [2014] 5 CLJ 443;
- (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
- B
- (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* [1934] 1 KB 191, applied by the Malaysian Court of Appeal in *RHB Bank Bhd v Moon Trading Sdn Bhd*:
- C
- D 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.
- E
- [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.
- F
- G That was not the case here.
- [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.
- H
- [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.
- I

[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:

- (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 Bhd v Moon Trading Sdn Bhd* 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
- (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.

[49] Mr Lim for the plaintiffs sought to distinguish *RHB Bank Bhd 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). Broadly 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
B 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
C 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.

Whether the defendants had participated in the defamation

D [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
E recalled that Hup Lik had included the photograph of the second plaintiff in
the offending flyers.

[52] The following passage from Parkson Corporation Sdn Bhd Ninth Ed, at
8.28 was cited in support for the proposition that the first defendant ought to
be liable for its own act of publication:

F (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
G an article or letter submitted by B.

[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
H 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.

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

HARASSMENT

A

[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
- (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.

E

F

G

[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.

H

ORDERS

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

- (a) the first plaintiff is to pay the defendant 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

- A** (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;
- B** (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;
- (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;
- C** (e) the plaintiffs' claims against the defendants for:
- D** (i) the costs of shipping the unsold goods from Malaysia to Hong Kong and all related charges;
- (ii) defamation; and
- (iii) harassment, are dismissed;
- E** (f) the defendants' counterclaim is dismissed (to the extent that the counterclaim exceeds the amount awarded at sub-para (a));
- (g) each party is to bear its own costs in this action; and
- F** (h) the amounts referred to in sub-paras (a) to (c) are to be ascertained by this court.

Claim and counterclaim dismissed.

Reported by Afiq Mohamad

G

H

I