Cain Sales & Consultancy Pte Ltd v Beyonics Technology Limited
[2003] SGHC 163

Case Number : Suit 1046/2002/M

Decision Date : 28 July 2003

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Savliwala Din and Gerald Martin Wee (Bogaars & Din) for the plaintiffs; Alvin Yeo SC and Melvin Chan (Wong Partnership) for defendants

Parties : Cain Sales & Consultancy Pte Ltd — Beyonics Technology Limited

Contract – Contractual terms – Rules of construction – Contextual approach – Sales representative agreement – Term for commission for "any contracts manufacturing related business" secured through sales representativeÂ's efforts – Whether term for commission covers complex commercial transactions.

Introduction

1 This action concerns a claim by Cain Sales & Consultancy Pte Limited, a company incorporated in Singapore, for the payment of commission under a Sales Representative Agreement dated 15 August 2000 ("the Sales Representative Agreement") with the Defendants. The Defendants, Beyonics Technology Limited formerly known as Uraco Holdings Limited ("Uraco"), are a Singapore incorporated public company whose activities are that of investment holding. Their subsidiaries are engaged in contract-manufacturing and integrated electronics manufacturing services.

2 On 1 June 2001, the Defendants (and their subsidiaries) signed an agreement ("the Asset Purchase Agreement") with Seagate Technology International ("Seagate"), a Cayman Islands company, to acquire Seagate's manufacturing facility in Batam. Concurrently, and as part and parcel of the transaction, the Defendants' wholly-owned subsidiary Beyonics International Limited, a Mauritius company, entered into a two-year Supply Agreement with Seagate on 1 June 2001 to manufacture and supply printed circuit board assemblies ("PCBAs"). The Asset Purchase Agreement and Supply Agreement are collectively referred to as the "Seagate Deal". The Plaintiffs' claim for payment of commission is that the Supply Agreement was secured through their efforts.

3 The Defendants have denied the Plaintiffs' entitlement to a commission contending that the Supply Agreement is outside the scope of the Sales Representative Agreement. The Defendants are also contending that the Plaintiffs were not instrumental in the acquisition of the manufacturing facility in Batam nor had they secured the Supply Agreement.

4 The relations between the parties came to an end on 31 October 2001, and this litigation followed.

The Plaintiffs' case

5 Mr. Dale Cain ("Dale") is the director and shareholder of the Plaintiffs and is the person with whom the Defendants dealt with. According to the Plaintiffs, Lowe Joo Chung Michael ("Lowe"), the Senior Vice-President, Sales and Marketing of the Defendants, in December 2000 told Dale that the Defendants wanted to expand their PCBA contract-manufacturing business. Dale was then tasked to approach Seagate's Singapore office, because of his relationship with its senior management, to secure PCBA contract-manufacturing business for the Defendants. During the same conversation, Lowe told Dale that the Defendants would pay 1% commission under the Sales Representative

Agreement.

6 Dale said he introduced to Goh Chan Peng ("Goh"), the Chief Executive Officer of the Defendants, the idea of acquiring an existing Seagate factory to secure from Seagate volume purchase business. This was suggested as an alternative to the conventional and time-consuming way of having the Defendants "qualify" as a supplier before tendering for contracts. The idea came from his knowledge of a transaction between a Thai company called Fabrinet and Seagate. Dale had not only introduced Goh to Seagate's senior management in Singapore but had set up a meeting on 28 March 2001 thereby giving the Defendants an opportunity to submit a bid for the purchase of Seagate's manufacturing facility in Batam. It was because of his relationship with Seagate's senior management that Dale secured for the Defendants the golden opportunity to bid for the Batam facility, despite bidding having closed and the candidates already short-listed. In addition, Dale had specifically negotiated a more favourable purchase volume and value-add price for the Defendants in respect of the supply of PCBAs during the two-year term. Put simply, the Supply Agreement was secured through the efforts of the Plaintiffs. It has been submitted that it made no difference to the Plaintiffs' entitlement to commission whether the Defendants chose to purchase the existing Seagate Batam facility to manufacture PCBAs for Seagate or upgrade their existing facilities and purchase new machine and equipment to do so.

7 Counsel for the Plaintiffs, Mr. Savliwala Din, submits that the manufacture and supply of PCBAs under the Supply Agreement is within the plain and natural meaning of "contract manufacturing related business". Therefore, the Plaintiffs are entitled to a commission of 1% of the total sums received by the Defendants for the sale of PCBAs manufactured over the two-year term under the Supply Agreement. The Defendants have breached the Sales Representative Agreement by their failure or refusal to pay commission to the Plaintiffs.

The Defendants' case

8 The Defendants have denied the Plaintiffs' entitlement to commission contending that the Seagate Deal is outside the scope of the Sales Representative Agreement. The Defendants deny giving a general authorisation to Dale to approach Seagate for the purpose of securing PCBA contract-manufacturing business. There was no promise that, if the Plaintiffs secured such business from Seagate, the Defendants would pay the Plaintiffs' commission of 1% under the Sales Representative Agreement. They further deny that the Plaintiffs had secured contract-manufacturing business for the Defendants under the Supply Agreement through the Seagate Deal.

9 Counsel for the Defendants, Mr. Alvin Yeo S.C., pointed out that the Plaintiffs had not in their Amended Statement of Claim alleged that the "Accounts Coverage" provision had been varied to include Seagate. It is only in their Reply that they pleaded the December 2000 conversation.

10 To the Defendants, Dale did not introduce the Seagate Deal to them. The idea to acquire a PCBA manufacturing facility, and in this case the Batam facility, had not come from the Plaintiffs. In March 2001, the Defendants were themselves considering setting up a factory in Batam. On or about 23 March 2001, Goh, Lowe and Richard Chee (Vice-President, Contract Manufacturing) visited Batam. During that visit they learned from an acquaintance, Santos Loy, that Seagate was looking to sell its PCBA manufacturing facility in Batam. In a subsequent telephone conversation in March 2001 between Goh and Chang Faa Shoon ("Chang"), an Executive Director of Seagate Singapore, Goh informed Chang that the Defendants were interested in taking over the Batam facility. Typically such a sale is usually part of an outsourcing strategy and would be accompanied by a supply contract to the successful purchaser with a confirmed volume over a fixed number of years and at a determinative price.

11 The Seagate Deal was initiated, arranged and completed through the Defendants' own efforts. Dale neither negotiated nor secured the Supply Agreement. He was not authorised to negotiate and agree terms, contract volume and value-add price with Seagate. Dale's involvement in the Seagate Deal was purely that of an individual with administrative and liaison functions.

12 The Defendants also point out that the Plaintiffs' computation of their entitlement to commission is incorrect. Under the Sales Representative Agreement, the Plaintiffs would only be entitled to a commission based on:

(i) the value-add price; and

(ii) for a period of one-year after termination of the Sale Representative Agreement.

According to the Sales Representative Agreement, the Defendants are to continue to pay commission for one year after termination. The Sales Representative Agreement was terminated with effect from 31 October 2001.

The Sales Representative Agreement dated 15 August 2000

13 The following provisions of the Sales Representative Agreement are relevant:

"Terms of Contract

Two (2) months notice by either party to terminate relationship with commission to continue for one (1) year thereafter.

Measurement

To secure two (2) new customers or projects or new business revenue not less than Singapore dollars Eight Million (S$8,000,000) in each financial year.

Commission

1. Commission to be paid on the 15th of each month for sales proceeds collected from the preceding month.

2. 1% commission for contracts manufacturing related business.

3. 3% for plastics moulding and metal stamping business, depend on profitability of such business.

4. As for DC/PM business, 3% commission for IBM Stingray & Hammerhead business if price maintain at US$2.85 per piece. IBM Arawana project or other IBM projects to be discussed at later stage.

Accounts Coverage

Existing Account: IBM (HDD) (San Jose & Fujisawa), Castlewood (All Sub-Contractors)

New Account:

Company	Product
IBM	PC
Cisco	Server related
Brocade	SAN's
3 Com	PDA
Spectrian	RF Amplifers
Gadzoox	SAN's
Quantum	Tape/HDD
Diamond-S3	Multimedia
Powerwave	RF Amplifers
Iomega	Removable media
Broadlogic	Broadband Devices

The Company deserves (sic) the right to review and change the account portfolio depending on relationship and circumstances."

14 By an Addendum dated 17 November 2000, the Commission clause was amended to include "Mako", an IBM product. At the material time, Seagate was an existing customer of the Defendants. As such, it was one of the accounts excluded from the Sales Representative Agreement when it was signed in August 2000.

15 The claim is put forward on the basis of the Sales Representative Agreement. The Plaintiffs' argument can only prevail if the Sales Representative Agreement is interpreted to include PCBA manufactured and supplied pursuant to the Supply Agreement in the Seagate Deal. The Plaintiffs will have to establish on a balance of probabilities the December 2000 conversation.

Findings and Decision

(i) What was it in August 2000 that the Defendants had agreed to pay for under the Sales Representative Agreement.

16 It is not disputed that the manufacture of PCBA is "contract manufacturing related business" for which a 1% commission is stated to be payable under the Sales Representation Agreement. Notwithstanding that concession, it is the Defendants' case that the Supply Agreement is outside the scope of the Sales Representative Agreement. Mr. Yeo, submits that the Sales Representative Agreement was meant to encompass the simple "purchase order" type of arrangement (where the price and volume of the products to be supplied are not usually fixed or guaranteed) and not more

complex transactions as in an acquisition deal in which the Plaintiffs have no expertise or prior experience. It could not have been intended by the parties that the Sales Representative Agreement was to encompass a complicated acquisition cum outsourcing transaction, especially in comparison to the ordinary and usual "purchase order" type of transaction.

17 Dale accepted that the Supply Agreement was a "different" or "special" situation in that the sales volume and value-add price over a fixed period was guaranteed. Ordinarily, the Plaintiffs' commission were in respect of "purchase order" type of business. Notwithstanding the differences, the Supply Agreement was for the manufacture and supply of PCBAs and therefore within the meaning of "contract manufacturing related business".

18 One of the first principles of construction is to try to give some business sense to the agreement. The modern approach to the construction of documents is the contextual approach. An understanding of the contextual sense of a legal text is necessary, as it would assist in determining how a reasonable man would have understood the language of the document. See *Chitty on Contracts, Vol. 1* (28th ed) paragraph 12-043. As Lord Wilberforce said in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570 at 574: "No contracts are made in a vacuum: there is always the setting in which they have to be placed."

19 The principles of contractual construction are discussed in the speeches of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and of Lord Bingham and Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali* [2001] 2 WLR 735. These cases promote the contextual approach to construction as opposed to the literal approach to construction. The principles of construction proposed by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* was followed and applied by the Court of Appeal in *Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443.

20 Lord Hoffmann's summary of the principles is as follows:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings

of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd [1977] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v Salen Rederierna A.B. [1985] A.C. 191, 201:

> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'" [p.913]

21 In *Bank of Credit and Commerce International SA v Ali and Ors,* Lord Hoffmann clarified the second principle. Admissible background includes anything which a reasonable man would have regarded as relevant and not absolutely anything which would have affected the way in which the language would have been understood by a reasonable man. [p 749]

22 The Sales Representative Agreement must be interpreted by reference to the circumstances in existence at the time it was entered into. Evidence of factual matrix is admissible to construe the Sales Representative Agreement. As the aim is to determine the meaning of the contract against its objective contextual sense, several considerations arise. The first question is, what were the terms of the contract? What in the circumstances of this case did sales representation entail? The reasonable man is bound to ask himself: what were the Plaintiffs' services that the Defendants were paying for? For the answers, the court will have to ask: what is the relevant background in this case?

23 I have already set out the relevant provisions of the Sales Representative Agreement. The present management took over the company in April/May 2000 and embarked on a restructuring and reorganisation of the Defendants' group of companies and their businesses. In August 2000, the Defendants' group of companies were still primarily involved in die-casting and precision engineering activities for the disk drive industry. That essentially comprised the manufacture of base-plates for hard disk drives and some small-scale contract-manufacturing operations. The Plaintiffs' business as non-exclusive sales representative of the Defendants naturally mirrors the activities of their principal at the time the Sales Representative Agreement was entered into.

24 Under the "Accounts Coverage" of the Sales Representative Agreement is a list of the Plaintiffs' existing and potential clientele. As of 15 August 2000, the date of execution of the Sales Representative Agreement, the Plaintiffs had two existing customers: IBM and Castlewood. For IBM, it was the supply of base-plates. As for Castlewood, there does not appear to have been orders from them. Castlewood's year 2000 forecast in a November 1999 email adduced by the Plaintiffs is of little or no evidential value. The only evidence of PCBA business produced by the Plaintiffs was in the past way back in 1998 from SyQuest who had since ceased business.

25 The names of companies and products listed under the heading "New Account" were those potential clientele the Plaintiffs intended to pursue and develop. The products of the potential clientele include PCBA business. The 1% commission stated in the Sales Representative Agreement was for "contract manufacturing related business" which included PCBA from those companies whose names appear as New Account under "Accounts Coverage". The list was to help demarcate those

customers the Plaintiffs would work on from others developed by the Defendants' sales and marketing staff. The Defendants' sales personnel would not approach the Plaintiffs' customers/potential customers identified in the list and vice versa. This system avoids duplication of work and any confusion over which "customer" the Plaintiffs could claim a commission for.

26 The present management decided to re-appoint the Plaintiffs as non-exclusive sales representative because of the IBM account. A subsidiary reason was Dale's outstanding loan that is being repaid progressively from commissions due to the Plaintiffs. The present management had not worked with the Plaintiffs previously and their intention was to monitor the Plaintiffs' performance over the next 12 months. The Plaintiffs at that time were the only non-exclusive sales representative of the Defendants. Although not an employee of the Defendants, Dale was given an office in the Defendants' premises and was provided with administrative support. The Sales Representative Agreement took effect from 1 August 2000.

27 The second sales representative contract dated 8 April 1998 was drafted by lawyers. It was formal and detailed. By comparison, the Sales Representative Agreement, drafted by Lowe and vetted by the Finance Director, Philip Mak, was brief. Goh also approved the terms. According to Lowe, the parties had wanted to keep the document simple.

28 The Plaintiffs' role was largely unchanged from the one they performed under the previous management. Their contractual relationship with the Defendants under the previous management started in May 1994 and ended with the termination of the second sales representative contract on 23 April 1999. It is apparent from the evidence that the Plaintiffs were an independent contractor remunerated by commission on business brought in by them. As a sales representative, the Plaintiffs in the person of Dale would be the principal force in the successful order. Typically, an order would be for a short- term period of one to three months. There was no assurance of repeat orders and prices were subject to re-negotiations. It was up to the Plaintiffs to service their customer to make repeat orders happen. A mere introduction is not likely to produce repeat orders months or years later if in the meantime there have been changes such as in price, design or in the customer's staff concerned with buying. It was the Plaintiffs' job as sales representative for the Defendants to cope with these kinds of change. Securing orders and providing "after sales" service was what the Plaintiffs had undertaken to do for their commission. I find that it is under such circumstances for these relatively straightforward and simple supply orders that the Defendants agreed to pay commission to the sales representative.

29 Mr. Din submits that Goh's testimony that the manufacture and supply of PCBAs to Seagate pursuant to the Supply Agreement is outside the Sales Representative Agreement is untrue given the Defendants' notifications to the Singapore Stock Exchange to that effect. There is no merit in the argument. Not only is it trite law that the court is not permitted to use evidence of post contractual conduct to aid the construction of the Sales Representative Agreement, the argument misses the point which is that the Seagate Deal is outside the aim, purpose and scope of the Sales Representative Agreement.

30 On the basis of the *Investors Compensation Scheme Ltd v West Bromwich* principle, a reasonable person interpreting the commission clause against the relevant background set out above would not read into it an interpretation that required the Defendants to pay the Plaintiffs' commission in the way argued for by the Plaintiffs. In my judgment, the manufacture and supply of PCBAs under the Supply Agreement is outside the scope of the Sales Representative Agreement. I reached this conclusion after having regard to the language used by the parties (including reading the clauses as a whole), the commercial circumstances that the document addresses and the objects that it intended to secure. It is important to note that in August 2000, the present management had just taken over

the company for less than three-four months. There is no evidence to suggest that the Defendants had any plans at the time of the agreement to acquire contract-manufacturing facilities that is in issue here. The Plaintiffs were re-appointed non-exclusive Sales Representative primarily because of the IBM account. There is no reason to suppose that the Defendants would have been troubled by the commission clause in language so general as to allow the Sales Representative Agreement to be triggered by the Supply Agreement under the Seagate Deal.

31 More importantly, the Asset Agreement and the Supply Agreement were interdependent in that one would not be accepted without the other. As the acquisition of the facility would be accompanied by an outsourcing arrangement with the proposed buyer, the negotiated price for the facility was closely intertwined with the volume and price of the accompanying supply agreement. The calculations for the two components must be agreed upon by the parties for the deal to occur and this made it very different from the conventional sales served by a sales representative like the Plaintiffs. Goh's unchallenged evidence is that "[t]he more favourable terms in the accompany Supply Agreement are only possible as they form part of the package of negotiated terms contained in the entire acquisition deal, and are factored into the purchase price and other terms…". The asking price for the Batam facility was US$10 million. The volume and value-add price of the supply contract were negotiated down so that the purchase price would be less. In the end, it was agreed at US$3 million.

32 As to the differences between PCBAs manufactured and supplied under the Seagate Deal and the conventional orders brought in under the Sales Representative Agreement, Goh's evidence has greater logical cogency and accords with commercial understanding compared to Dale's dismissive response that the objective to secure PCBA manufacturing from Seagate is the same, although the method to achieve that end is different. That is precisely where the difference is significant. In the routine sales representative type of transaction, the Defendants draw on their existing capacity, infrastructure and resources to meet the orders that come their way because of the sales representative's participation and efforts. The orders are also not confirmed volumes over a fixed number of years and at a determinative price. Goh said that in conventional sales, the only expenditure that the Defendants would have to incur for supply business is during the "qualification" process as regards obtaining the relevant approvals in respect of equipment and manufacturing processes. In the case of an asset acquisition in the present situation, the Defendants are required to participate in a bigger way. There would be commitment of substantial capital and other resources such as taking over a factory, equipment, know-how and a ready workforce. There would be also other agreements such as the transfer of technology, granting of licences and other ancillary agreements or arrangements to support the outsourcing arrangement.

(ii) Whether the Defendants had agreed to include Seagate in "Accounts Coverage" and pay commission of 1% under the Sales Representative Agreement for the Seagate Deal.

33 Given my finding that the Seagate Deal is outside the aim, purpose and scope of the Sales Representative Agreement, it is necessary for the Plaintiffs to establish the promise of a 1% commission based on the terms of the Sales Representative Agreement for Seagate's PCBA manufacturing business.

34 Dale's evidence is that Seagate was added to the "Accounts Coverage" clause in December 2000 pursuant to Lowe's general authorisation to secure Seagate's PCBA manufacturing business. In December 2000, Lowe told him of a "volume surge" for PCBAs by Seagate. He was given the green light to approach Seagate as he knew some of the American expatriates in Seagate's senior management to secure PCBA manufacturing business and the usual 1% commission would be paid if he succeeded in getting Seagate's business.

35 Lowe denied that he instructed Dale to approach Seagate for the purpose of securing PCBA manufacturing business generally. He also denied having told Dale that the Plaintiffs would be paid a 1% commission like in the Sales Representative Agreement. It is the Defendants' case that any conversation Lowe had in December 2000 with Dale was only in relation to surge in volume of PCBA business.

36 In a case like this where there is a conflict of evidence, in ascertaining the truth it is necessary to consider the objective facts, documents and the overall probabilities.

37 Lowe's evidence is that Sunny Tei ("Tei"), who was at that time one of the Defendants' Program Managers dealing with Seagate, informed him of an increase in demand for PCBAs and that Seagate were looking for contract manufacturers to satisfy the overflow in demand. Tei was asked to verify and follow up on the market news. It was also during this period that Dale approached him and said that he was looking to expand the scope of his experience and wanted to learn more about PCBA business, primarily so that he could approach IBM to get some of this business. Lowe had no objections to Dale's request and in subsequent conversations told Dale that he could follow Tei to call on Seagate in respect of the potential PCBA overflow business.

38 Dale disagreed with the Defendants that the Seagate's overflow requirement and the opportunity to acquire the Batam facility are separate and distinct matters. His argument is that until told differently, the general authorisation given by Lowe continued into the Seagate Deal.

39 The December 2000 conversation was not documented. Neither side wrote to the other afterwards referring to what had been discussed. Lowe's account of the conversation was different and so, there was nothing for him to put in writing. On the other hand, Dale made no note of the conversation and date it took place despite it being a momentous occasion to him. He stated in his written testimony that the December meeting with Lowe was not in his mind the usual type of causal conversation because of what was discussed. The content of the discussion was formal and involved setting up contractual obligations. In my view, it is all the more incomprehensible that a matter of commission, which is of great importance to a sales representative as it is his raison d'être, was not documented. My attention is drawn to Addendum 01 where a month earlier in November 2000, the parties had taken the trouble of amending the Sales Representative Agreement to add an IBM product to the Sales Representative Agreement.

39 Dale said he did not record in writing this alleged change to the Sales Representative Agreement, as he trusted Lowe and the Defendants. I find the reason proffered hard to believe bearing in mind that Dale was dealing with a new management and not somebody from the previous management with whom he has had dealings for over seven years. His other reason is that he was not sure of getting the business. That too is implausible as it is at odds with the purpose behind listing down names and products under the sub-heading of New Account.

40 The overflow requirements was a one-off project. On the evidence, I find that the December 2000 conversation was in relation to and limited to this one-off demand. The Plaintiffs have not on the evidence satisfied me that the authorisation continued into the Seagate Deal. I accept Goh's evidence that Dale had asked to be involved in the Seagate Deal. There would have been no need for him to do that if what he claimed to have happened were true. The Seagate Deal came up only after the Defendants' decision not to pursue the overflow business. By then, Lowe together with Chee, had discussed with Dale his 15 February email which detailed the requirements to qualify as a supplier and they concluded that it was not worth the Defendants' while to invest the time and resources to bid for the one-off business. I find that the Plaintiffs were aware of the Defendants' decision not to pursue the overflow business as the Defendants at that time did not have the necessary equipment

and capacity to take on the job and the surge business put to rest.

41 The Seagate Deal was a significant corporate transaction and was Goh's project unlike the overflow business that came under Lowe's sales and marketing division. Lowe's involvement in the Seagate Deal was peripheral and it is not disputed that Lowe had told Dale to speak to Goh about his remuneration for the Seagate Deal. It was not something that Lowe could have been able to agree to without Goh's approval.

42 There are two other matters that reinforce my view, even if they are not sufficient, when considered individually to be determinative. The first concerns Dale's alleged conversation on 10 April 2001 with Goh about his 1% commission. Dale's evidence is that on 10 April 2001 he went to see Goh in his office to discuss his 1% commission. He decided to speak to Goh after his conversation with the Seagate representative in charge of the Batam sale, Mark Grace, on 7 April where he said that the latter had reassured him that Seagate were very close to sealing the deal with the Defendants. I am puzzled as to why Mark Grace would have given the reassurance when at that stage he had not even discussed the Defendants' proposals with them. The first conference call only took place on 11 April 2001 and during that call there were discussions on pricing of the acquisition, the volume and value-add pricing of the accompanying supply agreement and the manner in which the acquisition of the facility could best be effected while minimizing the tax consequences to the parties.

43 Dale said Goh did not wish to discuss his 1% commission until after the contracts had been signed. Goh's evidence is that Dale did not speak to him about 1% commission but had on one occasion wanted to talk about his compensation. Without stipulating or pressing the point with Goh that he expected to be paid 1% commission under the Sales Representative Agreement, it is obvious that he took the risk of not being paid. Dale recognised that the Seagate Deal was special and different. That being the case, the question of remuneration, the work to be done by him and the event on which the remuneration became payable should have been clearly mapped out but instead were not discussed. In my judgment, Dale knew that if he had done so, he would have been told that 1% commission was out of the question; and there was even a risk that Goh would have stopped his involvement and therefore he would not have any role at all in the Seagate Deal. I have no doubt whatsoever that Goh would have refused; indeed that would have been the reaction of any reasonable man in his position towards the Plaintiffs in relation to the purchase of the Batam facility when Dale had a minor liaison role as far as the Defendants were concerned.

44 Goh said that when he had allowed Dale to pursue his contacts, it was not doing so as the Defendants' sales representative under the Sales Representative Agreement. Dale had asked that he be involved for the experience. I take Goh's evidence to mean that it was not on the basis that he was doing so on behalf of the Plaintiffs but for himself. Goh said that he never envisaged any payment under the Sales Representative Agreement. If he had known then that Dale had thought differently, he might not have agreed to Dale's involvement.

45 The second objective fact that reinforced my view that there was no variation of the "Accounts Coverage" in December 2000 to include Seagate and the manufacture of PCBAs is this. Dale did not seek to rely on Lowe's December conversation with him and never reminded the Defendants of this promise when he tried to persuade them to pay the 1% commission for the concluded Seagate Deal. None of the emails exchanged between the Plaintiffs and Defendants regarding remuneration to the Plaintiffs for the Seagate Deal mentioned the December 2000 general authorisation and the promise of 1% commission. From the thrust of Dale's emails, he was relying strictly on the terms of the Sales Representative Agreement as entitlement to a commission rather than any promise made in December 2000. For instance, in his 31 July 2001 email, Dale talked about provisions in the Sales Representative Agreement as a starting point for discussion. The same point

was made in his email of 27 August 2001 to Goh. There was no mention of the December 2000 promise. Again he was clearly relying solely on the Plaintiffs' rights under the Sales Representative Agreement. In his final email of 9 November 2001 on the topic, he again alluded only to his right under "the written contract". As pointed out by Mr. Yeo, the promise made in December 2000 was neither mentioned in Mr. Din's demand letter nor pleaded in the Amended Statement of Claim. It was only raised in their Reply. Mr. Yeo takes issue with these omissions and I agree with Mr. Yeo that they go some way to undermine the credibility of Dale's story.

46 In the end, I favour the Defendants' version which is supported by the objective facts and consistent with commercial reality. Accordingly, I find that the Accounts Coverage was not varied to include Seagate and there was no general authorisation and promise made in December 2000 that if the Plaintiffs were successful in obtaining PCBA manufacturing business from Seagate, the Defendants would pay the Plaintiffs a commission of 1% under the Sales Representative Agreement.

(iii) Were the Plaintiffs instrumental in achieving the Supply Agreement?

47 Even if I had held the other way in favour of the Plaintiffs that would not be enough to further their cause. For the Plaintiffs to sustain their claim for commission, they must further prove on the balance of probabilities that they had done what was required under the Sales Representative Agreement to earn that commission of 1%.

48 I have already described what is necessary, or has been agreed, by the terms of the Sales Representative Agreement to earn commission. In brief, the Defendants' commission to the Plaintiffs is for the benefit of not only an introduction when an order is secured and monies collected but for servicing the relationship with customers. In such a case, the Plaintiffs were paid a commission in respect of their services and after they had ceased to be in a position to render any services they would not to receive anything. Under the Sales Representative Agreement, commission ceases after one year of termination of the appointment.

49 I will in passing say something about the formula for the payment of commission. The formula according to the Plaintiffs is 1% of the total sales proceeds received by the Defendants from Seagate for the sale of PCBAs manufactured by the Defendants over the whole two-year term. Item 1 of the Commission clause is made up of two components. It deals with when commission is payable and the multiplicand. Payment date is the 15th of the month following the month when the customer pays the Defendants. The multiplicand is the amount of sale proceeds received by the Defendants. This interpretation is consistent with the last clause of the Sales Representative Agreement which demonstrably underlines the importance of collection in the relationship and how it is tied to the payment of commission. It is expressly stated that it is the duty and responsibility of the Sales Representative to ensure that the customer pays the Defendants. It goes on to state that in the event of bad debts the Defendants reserved the right to terminate without notice the Sales Representative Agreement.

50 In the Seagate Deal, the Defendants are required to buy the components from Seagate and then invoice Seagate for the manufacture and supply of PCBAs. No profit is made on the components. Seagate is allowed under the Supply Agreement to set off amounts owing by them to the Defendants. In this way the amount collected by the Defendants is only the value-add portion. Therefore, if commission is payable under the Sales Representative Agreement, it would be 1% of the value-add being the sale proceeds collected after allowing for the agreed set-off.

51 Dale chronicled the ensuing dealings between Mark Grace and himself in his written testimony. They produced emails and phone records during the relevant period in relation to the Seagate Deal to

prove that the Plaintiffs secured the contract-manufacturing business for the Defendants by way of the Supply Agreement with Seagate.

52 I have to consider what part Dale played in the Seagate Deal. I make the following findings:

a. This claim places a high value on the concept of the deal and access to Seagate's senior management. I do not attach much weight to the claim, as the suggestions were an exaggerated part of the Plaintiffs' evidence. The idea of buying a PCBA manufacturing facility, which came with a volume agreement, is not new to Goh given his industry background and past experience with this type of acquisitions. The lead that the Seagate Batam facility was for sale had not come from Dale. It fortuitously arose during Goh's visit to Batam. Dale agreed that he did not know whom to approach about the Batam sale and had to rely on referrals. Jim Chirico (Senior Vice President and General Manager of Seagate South East Asian Operations), Mike Roughton (Seagate's Vice President of Business) and Mark Grace were merely acquaintances contrary to the impression Dale sought to give that he used his friendship or relationship with these people to arrange the 28 March 2001 meeting as well as persuade Seagate to sell the Batam facility to the Defendants.

b. It is not disputed that Dale set up the meeting with Mark Grace, the Seagate representative in charge of the sale, on 28 March 2001. I do not agree with the Plaintiffs' argument that but for Dale's efforts in talking to Jim Chirico, Mike Roughton and Mark Grace that the Defendants would not have had the opportunity to meet with Mark Grace on 28 March 2001 in connection with the sale of the Batam facility. Goh already knew about the Batam sale and it would have indeed been a simple matter for the Defendants to find out more about the Batam sale and to approach Seagate direct. The most that can really be said to have occurred as a result of the meeting is that the parties in Seagate involved in the sale and the Defendants were put in touch with each other much quicker than would have occurred if the Defendants had found out the name of the person in charge of the Batam sale by a different route i.e. through Chang. But this is not in my judgment sufficient to establish that Dale's introduction to Mark Grace was the effective cause of the sale. Dale was only a link, and not a very important link, in the chain which led to the sale. There is no evidence that the Defendants would not have been able without the introduction to meet Mark Grace. It is not a case that the Defendants might not have otherwise learnt or have had the opportunity to participate in the tender. The Defendants could have approached Seagate through their own officers.

c. I am not satisfied that Dale was instrumental in persuading Seagate to give the Defendants an opportunity to bid for the Seagate facility after six candidates had been short listed. I accept the testimony of SF Chang which is reasonable. He testified that Mark Grace had asked him about the Defendants and to find out discreetly whether the Defendants were serious about bidding and, if so, could they submit a bid in quick time. Chang then spoke to Goh and from his conversation was able to verify and report to Mark Grace that the Defendants were indeed serious in their intentions to buy the facility and would be able to submit a bid within a short period of time. Dale (though he did not know of Chang's involvement) was contacted by Seagate about the time to meet and I am of the view that it did not matter whether that contact was before or after Mark Grace had received Chang's feedback. I am persuaded that it was Chang's feedback and comments about the Defendants' track record and vested interest in maintaining their business relationship with Seagate that lead to Mark Grace opening the bid to the Defendants. Without that, the meeting itself would not have been fruitful. The fact of the matter is that Seagate was willing to receive another tender as long as it was to their advantage. It was the Defendants' ability to put together their proposals in quick time, their presentation of their capabilities and competitiveness that they were able to stand in the same line as the other

short-listed candidates for consideration.

d. Dale did not have a pervasive involvement in what occurred thereafter. On negotiations and agreeing a more favourable term, that is not borne out by the evidence. Dale was not instrumental in persuading Seagate to sell the facility to the Defendants and for their subsidiary to enter in the Supply Agreement with Seagate. Dale's evidence that after the second conference call on his own initiative he called Mark Grace to try to get a better deal for the Defendants. He said that at the end of the telephone call, Mark Grace agreed, subject to some changes relating to retrenchment terms, that Seagate would consider paying US$1.10 per board for the value-add for the 10 million PCBAs that Seagate would purchase in the first year and to purchasing 8 million PCBAs in the second year instead of 5 million. I am not persuaded that Dale had negotiated and agreed with Mark Grace better terms for the Defendants. I am satisfied, on the evidence, that after the second conference call on 17 April there were direct negotiations between Mark Grace and Goh whereby the final price for acquisition was ultimately agreed at US$3 million and the volume/value-add pricing fixed at 10 million boards at US$1.10 per board for the first year and 8 million boards at US1.05 per board for the second year.

e. Dale came across as a consummate sales person. He was constantly positioning himself so that he could act in the way best suited to the Plaintiffs' own pecuniary advantage. By way of illustration, the email of 1 April 01 to Mark Grace when Dale was in San Jose, USA was an attempt to improve the claim and give it some veneer of importance as to his participation. But was there real participation? He knew that he would be able to approach Mark Grace with a degree of credibility if he had Goh's proposals. Hence, his telephone call to Goh whilst he was away. He needed to have an idea of what was in the proposals to be able to initiate or hold a conversation. I would add that the Plaintiffs' emails sent in September 2001 to Jim Chirico and Mike Roughton thanking them for their help were clearly self-serving and sent to give a veneer of validity to his involvement. All that Dale did was to approach Seagate, make a few phone calls, send emails to organise conference calls and organise the signing and receipt of the Letter of Intent. As a member of the transaction team, all he did was to send out clearer copies of minutes. Given the nature of the Seagate Deal, it is difficult to see what more Dale could have done than he did in the circumstances of this special transaction. But it does fly in the face of common sense in these circumstances to say that Dale was the effective cause of the resulting sale.

f. The amount of work done by Dale that contributed to the success element was so very little. Allowing for that and giving due credit for the contribution of the Plaintiffs, I see no reason to alter my assessment of the success element played by the Plaintiffs. I have to take account the likelihood that Goh's own presentation of the business proposals and competitive pricing together with his negotiating skills had a material bearing on the final price obtained for the acquisition of the Seagate facility and the volume and value-add pricing of the accompanying supply agreement. Commission under the Sales Representative Agreement was on the basis that the sales representative did a great deal of the work resulting in a successful account.

Result

52 For all these reasons, the Plaintiffs' claim fails and is dismissed with costs.