Hup Huat Food Industries (S) Pte Ltd v Liang Chiang Heng and Others
[2003] SGHC 244

Case Number : Suit 1110/2002

Decision Date : 17 October 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Hee Theng Fong, Tay Wee Chong and Doris Damaris Lee (M/s Hee Theng Fong & Co)for the plaintiff; Manoj Sandrasegara, Tan Mei Yen, Yarni Loy and Sim Chong (Drew & Napier LLC) for the first and second defendants; Lai Kwok Seng (M/s Lai Mun Onn & Co) for the third and fourth defendants; Andre Maniam, Liew Yik Wee and Vanessa Lim (M/s Wong Partnership) for the fifth defendant

Parties : Hup Huat Food Industries (S) Pte Ltd — Liang Chiang Heng; Liang Kim Poh; Koh Tong Chye Jenson formerly trading in the name of Taisan Import & Export; Tan Kwang Heng trading in the name of Taisan Import & Export; Ban Hock Trading Pte Ltd

Companies – Directors – Duties – Whether in breach of fiduciary duties as directors for wrongfully causing closing down of plaintiff's business and wrongful diversion of business – Whether conspiracy or dishonest assistance given by other defendants.

Companies – Directors – Duties – Whether in breach of fiduciary duties as directors for paying to themselves remuneration without the approval of shareholders.

Companies – Directors – Duties – Whether misappropriated and misapplied company money.

Trade Marks and Trade Names – Infringement – Whether 'Apollo' trademark infringed by importing and selling Apollo products.

Trade Marks and Trade Names – Passing off – Whether passed off such products as goods of or connected or associated with the plaintiff.

Introduction

1 The Plaintiff is a company incorporated in Singapore. It carried on the business of importing and exporting biscuits, chocolate wafers and confectionery products packaged under the trademark 'Apollo'. The first and second defendants are brothers ('Liang brothers') and are the minority shareholders of the plaintiff. They were also its directors until 31 March 2002. The third defendant is the nephew of the first and second defendants and the sole proprietor of Taisan Import and Export ('Taisan') from 14 January 2002 to 26 March 2002. The fourth defendant is the sole proprietor of Taisan with effect from 27 March 2002 to date. The fifth defendant is a company incorporated in Singapore carrying on the business of wholesalers in confectionery products, including Apollo products.

2 The plaintiff's claim against the first and second defendants was for breach of fiduciary duties under common law and under s 157 Companies Act for wrongfully causing the closing down of the plaintiff's business and wrongful diversion of the business. The plaintiff claimed that the Liang brothers were in further breach of their fiduciary duties in paying to themselves remuneration without the approval of the shareholders. The plaintiff also claimed that the first defendant misappropriated and misapplied the sum of US$49,800 belonging to the plaintiff by encashing the company's travellers' cheques for his personal use.

3 The plaintiff's claim against all five defendants was for conspiracy to do harm to the plaintiff by unlawful means through the diversion of the plaintiff's business and dishonestly assisting the Liang

brothers in their breach of fiduciary duties. In addition, the plaintiff claimed an amount of S$158,331.75 from the fifth defendant. This was admitted by the fifth defendant at the start of the trial and judgment was entered accordingly. The plaintiff also claimed that the fifth defendant had infringed its 'Apollo' trademark by importing and selling Apollo products and had passed off such products as goods of or connected or associated with the plaintiff.

The plaintiff's case

4 The plaintiff is the registered proprietor of the 'Apollo' trademark in Singapore. Apollo food products are manufactured in Malaysia by Apollo Food Industries (M) Sdn Bhd ('AFI'). The same trademark is owned by Hap Huat Food Industries Sdn Bhd ('HHM'). AFI and HHM are wholly owned subsidiaries of Apollo Food Holdings Berhad ('AFH'), a company listed on the Kuala Lumpur Stock Exchange ('KLSE'). The Apollo Group of companies comprises AFH, AFI and HHM.

5 The plaintiff used to manufacture Apollo products in Singapore while HHM did the same in Malaysia. In late 1989, since it was cheaper to manufacture and package the products in Malaysia, it was decided that AFI be set up to be the manufacturing and packaging arm. The plaintiff's and HHM's operations were therefore transferred to AFI. The plaintiff's business after that time consisted of purchasing Apollo products from AFI, importing them into Singapore and then selling them here as well as abroad, particularly the Middle East, Indonesia and Taiwan.

6 44.4% of the plaintiff's shares are held by the Liang brothers with the rest of the shares held by Tan Song Cheng and his son, Tan Kok Guan. Tan Kok Guan and the Liang brothers are also directors of AFI and of AFH, its holding company. Tan Song Cheng was at various times a director of AFH and its subsidiaries. He is still a director of AFI but is no longer a director of AFH or HHM. Each of them also has some small personal shareholding in AFH. 50.82% of the shares in AFH are controlled by a company called Keynote Capital Sdn Bhd which is in turn controlled by the Liang brothers with 50.29% of its shareholding while the Tans hold 49.71%.

7 The Liang brothers were therefore effectively in control of the Malaysian companies while the Tans were in control of the plaintiff in Singapore. The first defendant is the managing director and chairman of the board of directors of AFI and of AFH. The second defendant is an executive director of AFI and of AFH and is in charge of both local and export sales.

8 Until 2002, AFI was the manufacturer and sole supplier of Apollo products to the plaintiff. The plaintiff would make its orders for such goods by way of purchase orders which would contain its address, telephone number, fax number and authorised signature. The products would usually be delivered to the plaintiff's premises in Singapore where they would then be loaded into containers for export.

9 Two issues were of relevance to the plaintiff's claims against all the defendants. They were:

(1) whether the plaintiff's shareholders at the plaintiff's Annual General Meeting ('AGM') held on 7 January 2002 resolved that the company's business be closed down; and

(2) whether the plaintiff had an exclusive distributorship agreement with AFI for the distribution of Apollo products in Singapore or exported through Singapore.

10 At the said AGM of 7 January 2002, attended by the Tans, the Liang brothers and the company secretary (not an employee of the plaintiff), various resolutions were passed. One of these was that the audited accounts for the financial year ending on 31 December 2000 be approved. In

those accounts, the directors' remuneration was stated as $50,660. The first defendant was then the managing director.

11 After that AGM, the company secretary recorded the following in his draft minutes of meeting under the caption 'Other Business':

> 'The Managing Director informed the Meeting that the Company would closed down the export business together with the packing production until such time that the closing stocks had been used up. He also proposed to let other dealers to handle the local business of the Company.
>
> All the Shareholders present agreed to the proposal without any objection.
>
> The meeting then terminated with a vote of thanks to the Chairman.'

12 On 9 January 2002, the Liang brothers began retrenching all the plaintiff's staff except for the accounts clerk, Ling Sway Hwa. Their last day of service was said to be 28 February 2002. Three of them were re-employed on that date on a temporary basis. In January 2002, the plaintiff's business was reduced by 45% compared to the previous month. In February 2002, the third defendant, using the name Taisan, imported Apollo products from AFI and exported them directly to the Middle East customers. At the same time, the Liang brothers, through the fourth defendant, arranged for the plaintiff's staff to load Apollo products into containers for Taisan in front of the fifth defendant's premises. The fifth defendant not only consented to that but provided a forklift and warehousing space for Taisan as well. This was reported by private investigators engaged by the plaintiff to conduct surveillance on the defendants. The fourth defendant, still an employee of the plaintiff then, worked for Taisan at night at home and delivered Taisan's purchase orders to the second defendant's residence.

13 On 1 February 2002, the second defendant issued the first purchase orders for Taisan to AFI. These handwritten purchase orders had no address, no telephone or fax number and no authorised signature. The address used on AFI's invoices to Taisan was that of a company called Hiang Li Engineering Pte Ltd. On that day, after receiving the draft minutes of the AGM, Tan Song Cheng wrote to the company secretary to state that he was not agreeable to the inclusion of the section under 'Other Business' because the issue was not included in the agenda for the AGM and was not put to a vote. He asserted that such an issue should be the subject of a special resolution at an Extraordinary General Meeting ('EGM'), the convening of which would require the board of directors' prior approval and the issuance of a proper notice with an agenda. As far as Tan Song Cheng was concerned, the issue was only mentioned by the first defendant angrily at the end of the AGM and was discussed by the Liang brothers between themselves. There was, in his view, no reason why a company making S$1.7 million annual profits should be closed down.

14 On 6 February 2002, the first defendant drew on the plaintiff's account an amount of US$49,800 and purchased 49 American Express ('Amex') travellers' cheques. 44 of these were encashed by him, 18 of which were encashed in the casino on board a Star Cruise ship on 30 and 31 August and on 1 September 2002. The remaining five travellers' cheques were still in his possession.

15 On 21 February 2002, Tan Song Cheng wrote two letters to the company secretary. The first was to ask that an EGM be convened. The second was to remind the company secretary to reply to his earlier letter of 1 February 2002. Both of these letters were copied to the Liang brothers by fax and by registered post.

16 On 15 March 2002, the EGM was held and Tan Kok Guan was appointed a director while Tan

Song Cheng, his father, was appointed Executive Chairman and Finance Director. The Liang brothers tendered their resignation as directors, which was to take effect from 1 April 2002.

17 By March 2002, the plaintiff's export business had completely ceased. However, AFI continued to supply Apollo products to the order of the plaintiff until September 2002.

18 On 22 March 2002, Tan Song Cheng instructed his then solicitors to write to the Liang brothers to inform them that their resignation was not accepted as the company's affairs, which had been under their management, had not been properly resolved. Tan Song Cheng wanted various corporate matters taken care of by the Liang brothers before he would consider accepting their resignation. In particular, he wanted them to resolve the following:

> '(d) disposal of all remaining stocks of the Company;
>
> (e) resolution and/or termination of the lease of the Company's office and store premises at Hup Huat Food Industrial Building;
>
> (f) termination of employment of existing employees of the Company in accordance with the relevant labour legislations and regulations in Singapore;
>
> (g) ……….'

19 On the same day, he asked the said solicitors to write to the company secretary about the draft minutes of the AGM. The letter to the company secretary enclosed a copy of the letter of the same date addressed to the Liang brothers and instructed that no statutory submissions in respect of their resignation be prepared. Referring to the draft minutes of the AGM of 7 January 2002 and to Tan Song Cheng's letters of 1 and 21 February 2002, the solicitors demanded a reply on the matters raised in those letters 'and/or a new draft minutes with appropriate amendments to address the matters raised'. The company secretary was also instructed to prepare the minutes of the recent EGM.

20 On 25 March 2002, the company secretary replied to Tan Song Cheng's solicitors stating:

> 'With reference to the 28th Annual General Meeting held on 7 January 2002, we wish to put on record that the issue of "closing down" the Company's export business, etc was brought up and discussed during the Meeting and Mr Tan Song Cheng, as Chairman of the Meeting, had not ruled the discussion as "out of order". We had therefore recorded the discussion under "Other Business". However, as Mr Tan (being the Chairman at the Meeting) will be the person that will certify the correctness of the recording, we will act according to his instruction and remove the section. He will then be responsible to deal with any objection to this omission should the matter be brought up by the other Shareholders at the next meeting adopting the Minutes.'

Apparently, nothing else happened where the draft minutes were concerned and the final version was never approved or discussed.

21 In June 2002, Tan Song Cheng discovered that the Liang brothers' remuneration for the financial year ending on 31 December 2001 was $183,794. That was $154,435.44 above the authorised directors' remuneration.

22 In June 2002, Taisan started to use the premises of the Liang brothers at the Ang Mo Kio Industrial Park as its office with the brothers still having their own keys to the same. In July 2002, the

fifth defendant stopped purchasing Apollo products from the plaintiff and from 23 August 2002, began selling Apollo products using the plaintiff's trademark and the plaintiff's name as importer of the products. By September 2002, the plaintiff's local business ceased altogether.

23 On 6 September 2002, upon the advice of the special accountant appointed for the company, Tan Song Cheng wrote to the company's auditors to reverse the sum of US$49,800 (S$91,134) from the sales discount account to the first defendant's directors' loan account. This reversal was done as a temporary measure. The directors' resolution of 14 June 2002 and the audited accounts for the financial year ending on 31 December 2001 were all signed by Tan Song Cheng and his son in October 2002.

24 On 10 October 2002, in reply to the auditors' request to confirm the amounts outstanding, the first defendant disputed that the amount of S$91,134 was due and owing from him to the company.

25 In two circulars to shareholders issued by AFH in September 2001 and in October 2002 for the proposed renewal of the shareholders' mandate for recurrent related transactions of a revenue or trading nature, AFH and AFI stated they intended to continue manufacturing and/or supplying Apollo products to the plaintiff's order until October 2003. In February 2003, the address of Hiang Li Engineering Pte Ltd still appeared as the address of Taisan in AFI's invoice to Taisan.

26 Although there was no written distributorship agreement between AFI and the plaintiff, an oral agreement existed for an indefinite period. Tan Song Cheng agreed that by the end of April 2000, the plaintiff no longer exported Apollo products to Indonesia as it was cheaper for AFI to export directly from Malaysia. One of the plaintiff's customers who traded in Apollo products testified that he also purchased Apollo products from another supplier in Singapore some seven or eight years ago as its prices were cheaper. Another said he had been buying Apollo products from Malaysia instead of the plaintiff from about 1995. He had also exported such products to overseas customers. Although Tan Song Cheng had instructed solicitors in October 2002 to write to AFI alleging a sole and exclusive distributorship agreement for Apollo products in Singapore and for such products exported elsewhere, he did not instruct that legal proceedings be commenced against AFI. This was because the Tans also had beneficial interests in AFI and they did not wish to affect the listed parent company, AFH.

27 Four of the plaintiff's employees testified that no one discussed the retrenchment and they were unaware of any decision to close down the business. This was despite the company's letters informing the employees of the cessation of the activities of their departments with effect from 1 March 2002. Although the plaintiff had no real work for them since September 2002 when AFI stopped supplying Apollo products to the company, they remained in the plaintiff's employ.

The case for the defendants

28 The Liang brothers testified that their relationship with the Tan family turned increasingly bad in recent years and closing down the plaintiff's business was not something new in January 2002. They maintained that the company secretary's contemporaneous recording of the minutes of the AGM was accurate and that the issue of closing down the business was indeed discussed and agreed upon. The declaration of dividends, which was also not in the agenda, was transacted without complaint from the Tans. In any event, no shareholder was misled into not attending the AGM or was prejudiced because the matter of closing down the business was not stated in the agenda. The closing down of the export business was a step towards winding up the plaintiff but it was not a decision to wind up the company.

29 The first defendant said he also suggested that the business be given to some other people to handle and he asked Tan Song Cheng whether he would like to take over the business. Tan replied he did not know how to handle such business. The company secretary asked if anyone objected to the proposal to close down the export business and no one raised any objections. After that, the company secretary asked whether there was any other matter to discuss. As all the shareholders present remained silent, the AGM came to an end. The first defendant denied the suggestion that he had asked the company secretary to record that the disputed issue was discussed and agreed upon. He also denied that any agreement to close down the business was on the understanding that the business would be transferred to AFI.

30 After the AGM in January 2002, the first and second defendants went about retrenching all the staff save for the accounts clerk. The first defendant also consulted an independent director of AFH and the head of the internal audit team for AFH and AFI on the matter of AFI exporting directly to the overseas customers who used to purchase Apollo products from the plaintiff. Both the persons consulted were of the view that that would be in line with AFI's policy of reducing its reliance on the plaintiff, a related party, as its export arm. However, sales to the Middle East customers required commissions to be paid to their agents. AFI was the subsidiary of a listed company and all commissions had to be properly documented and, if of substantial amounts, approved by the directors. As documentation of such commissions could not be done, the idea of direct export by AFI was shelved for the time being.

31 As AFI could not take over the business in the Middle East, AFI, acting through the first defendant, decided to give that business to Taisan as a temporary arrangement until the issue of commissions could be resolved. In the meantime, AFI took over the export of Apollo products to countries other than the Middle East. The plaintiff continued with the local business until it was transferred to the fifth defendant in July 2002.

32 At the EGM in March 2002, the issue of the draft minutes of the AGM was not mentioned at all. The Liang brothers raised the subject, with prior notice, of their resignation as directors. They stated that although their resignation would take effect on 1 April 2002, they would continue to go to the office daily and perform the same duties as before until the company was 'wound up'. The Tans did not seek to correct their belief that the plaintiff's business was going to be closed down.

33 Pursuant to the solicitors' letter of 22 March 2002, the Liang brothers went about attending to the various matters stated therein such as the collection of outstanding trade debts, disposal of the remaining stocks, termination of the lease of the plaintiff's premises and of the employment of the staff. When it was realised that the outstanding matters could not be resolved by February 2002, the first defendant instructed that three of the staff be retained on a temporary basis from 1 March 2002. The Liang brothers informed the plaintiff's landlord through the plaintiff's solicitors that the company was winding down its operations and requested that the lease be terminated. By a letter dated 7 June 2002, they informed Tan Song Cheng's then solicitors about what they had done in compliance with the earlier request, stating that the balance stock of the plaintiff could be disposed of once the company confirmed the date of stoppage of operations.

34 The letter of 1 October 2002 by AFH seeking a renewal of the shareholders' mandate for related party transactions was drafted in June or July 2002. On 16 August 2002, AFH, through the first defendant, announced that it was seeking a renewal of the mandate. The renewed mandate provided for a drastic reduction of the related party transactions between AFI and the plaintiff from RM12 million to RM3 million for the period between October 2002 and October 2003. Around June 2002, the plaintiff was still carrying on the limited business of supplying Apollo products to customers in Singapore. AFI also had to continue purchasing machinery from the plaintiff and a mandate for this

was also necessary.

35 The Liang brothers stated that it was the common intention of the plaintiff's shareholders to wind down the business after the sale of the plaintiff's building in August 2000. In 1997, the plaintiff took a bank loan of more than S$8 million. This amount was then lent to the directors and shareholders with the plaintiff incurring substantial interest payments. Since the directors and shareholders were in no position to repay their loans with interest, it was agreed among the shareholders that the plaintiff's building would be sold to repay the bank loan. The company would then be wound up with the loans owing by the directors and shareholders set off against the capital and the dividends upon winding up. The loan was necessitated by the financial difficulties of one of Tan Song Cheng's brothers in the first place. That brother (Tan Kim Yam) sold his shares in the plaintiff to all the other shareholders. As a result, the remaining shareholders had to take over the loan. The Tan brothers promised that when the factory was sold and the plaintiff's debts to the bank were paid up, the company could be wound up. AFI had also taken over some of the plaintiff's direct export business since 1996.

36 The relationship between the Tans and the Liangs began to break down in the 1980s when one of the Tan brothers started a business called Denmark Chocolate Industries (S) Pte Ltd which was in the same trade as the plaintiff. Tan Song Cheng and his wife invested in that company by holding some 23% of its shares. As Denmark Chocolate was using similar product packaging, the first defendant, as a director of the plaintiff, initiated a passing off action. An injunction was obtained but the suit was subsequently discontinued upon Denmark Chocolate's undertaking to cease the passing off.

37 Further, in 1987, Tan Song Cheng's brother incorporated another company called Central Chocolate in which Denmark Chocolate held 48.9% of the shares. Central Chocolate committed infringement of a trademark belonging to HHM and was sued by the plaintiff.

38 The Liang brothers were initially not the majority shareholders of Keynote Capital, which held a majority stake in AFH. By virtue of events in 1997 and in 1998, several members of the Tan family agreed to sell some of their shares in Keynote Capital to the Liang brothers. The transfer of shares was approved by Keynote Capital's board of directors and that resulted in the Liang brothers gaining control over that company and, in turn, AFH. Tan Song Cheng and his son, Tan Kok Guan, apparently changed their minds after that and tried unsuccessfully to buy back the shares and to annul the directors' resolution. In cross examination, the Tans alleged they had signed the directors' resolution without knowing its contents. This was despite the fact that payment amounting to millions of RM was made to the Tan family and one of the Tan brothers had made a statutory declaration that he and Tan Kok Guan did sign the resolution together with the Liang brothers.

39 Insofar as the remuneration of the directors was concerned, the Liang brothers said that was decided by the managing director at the start of a financial year by reviewing the profits made for the preceding one. For the financial year ending on 31 December 2000, the first defendant wanted to raise it to S$176,363 as the plaintiff had made a profit of some S$1,475,000 the year before. In December 2001, Tan Song Cheng informed the company secretary that he refused to approve the accounts for the year ending on 31 December 2000 as he did not agree with the directors' remuneration, which he wanted reduced to S$50,600. This amount did not appear to have been approved by the directors or the shareholders.

40 As a result of the acrimony built up over the years, the Liang brothers decided to stop working with the Tans in the plaintiff and concentrate instead on AFI. The remuneration suggested was not worth their time and effort as they were in Johor Baru daily and returned to Singapore to

attend to the plaintiff's business after completing their work there.

41 Besides the breakdown in relationship, there was another reason why the plaintiff's business had to be closed down. In January 2001, new KLSE Listing Requirements were issued which made it compulsory for listed companies and their subsidiaries to set out in detail their existing recurrent transactions with related parties and to seek an annual mandate from their shareholders for such transactions. The Apollo group and the plaintiff had common directors and shareholders and were therefore related parties. Keynote Capital, being an interested major shareholder, was not allowed to vote on the shareholders' mandate. Consequently, there was a risk that the mandate might not be given for a particular year. Time and expense had to be incurred in getting the annual mandates too. Accordingly, AFI had to trim and eventually phase out its dependence on the plaintiff for its exports and. would ultimately do its own exports.

42 There was never any exclusive distributorship agreement or arrangement between AFI and the plaintiff. Such was not mentioned in AFH's prospectus in 1996. In various documents issued thereafter, it was made clear that there was no agency, distributorship or marketing agreement. Further, AFI was now dealing directly with its customers in China, Hong Kong, Laos, Australia and Indonesia. These customers used to deal with the plaintiff. AFI appointed the fifth defendant to handle some of its business in distributing Apollo products in Singapore. Where the Middle East customers were concerned, due to the commission payable to the agents, it was decided by AFI that Taisan take care of this business for the time being. The fourth defendant, who operated Taisan, had 29 years of experience doing this while working for the plaintiff and with the Liang brothers. Both the third and the fourth defendants understood that this was a temporary measure. The third defendant was related to the Tans and to the Liang brothers but he was not caught by the definition of related party under the new KLSE Listing Requirements. There was therefore no need to seek the mandate of the shareholders in dealing with Taisan. The Liang brothers did not have any beneficial interest in Taisan or in Hup Huat Import & Export ('HHIE'), the other business set up by the third defendant in December 2001.

43 The alleged profit of S$1.7 million made in 2001 by the plaintiff (and therefore allegedly also made in 2002 by Taisan) actually included other profits and income such as interest and profit from sale of its plant and equipment. The profit from sale of Apollo products was only about S$1.125 million. Out of this amount, the profit attributable to the local business and to the export business taken over by AFI must be deducted, resulting in profits of about S$600,000 and not S$1.7 million as alleged by the Tans.

44 The Liang brothers had to ensure that Taisan handle the important Middle East business properly as the long-term plan was for AFI or another subsidiary to take over. The Liang brothers therefore assisted Taisan by renting to it part of their premises in the Ang Mo Kio Industrial Park for S$3,000 a month. These premises were also used by AFI to receive supplies of machine parts and to meet its customers. Before Taisan had a proper place of business, the first defendant allowed the fourth defendant to use the fax machine in his home for Taisan's dealings. Further, as the fourth defendant had to give up the car provided by the plaintiff upon his retrenchment, the second defendant allowed him to use his spare car for Taisan's business. He also provided him with a mobile phone for easy contact. The fourth defendant was a close and trusted friend of the Liang brothers. Taisan bore the operating expenses of the car and the mobile phone.

45 Between February and July 2002, when Taisan did not have proper premises to store the Apollo products, the second defendant enlisted the help of his old friend and business associate, Lau Chuan Eik of the fifth defendant, to allow Taisan to store them in the fifth defendant's warehouse and to make use of its forklift for loading and unloading. The loading and unloading of goods were done

along the road in front of the fifth defendant's premises but that was a public road anyway. The enlistment of the plaintiff's employees for such tasks on a number of occasions was nothing unusual as AFI and the plaintiff would help each other whenever the need arose and the second defendant was acting in the belief that the plaintiff was closing down its business.

46 AFI, through the second defendant, approved Taisan's application for a credit facility of US$150,000 for 30 days so that Taisan would not have to look to the banks for financing.

47 The Liang brothers were open in their conduct in helping their nephew and their old friend/former employee. They appointed Taisan and therefore felt responsible in ensuring that the Middle East business was handled properly. It transpired that Taisan imported from AFI and then exported to the Middle East through HHIE. The first defendant discovered the arrangement between Taisan and HHIE only sometime in April 2002 during one of his visits to the Middle East when he was asked by the customers there about HHIE. Although not pleased with that arrangement, he condoned it so long as the customers there got the Apollo products on time and had no complaints.

48 The second defendant would take orders for goods from Taisan over the telephone when the orders were urgent. He did the same for other regular customers without even asking for purchase orders to follow the telephone calls. He signed invoices to indicate that the goods had been received by the customers when the customers forgot to do so. He did so in the presence of Tan Song Cheng's children who were working in AFI.

49 The directors' remuneration was the subject of an EGM on 5 July 2002. Tan Song Cheng objected to the amount of S$183,794 paid for the financial year ending on 31 December 2001 and wanted it reduced. The Liang brothers objected to any reduction. Although Article 95 of the plaintiff's Articles of Association stated that the directors could be paid fees for their services as determined by the company in general meeting from time to time, that provision was never followed by the Tans or the Liang brothers. This was not disputed by the Tans. In any case, such payments were made to the directors in their capacity as employees of the plaintiff and not by virtue of their office and could therefore be made in accordance with the prevailing practice of the company. The practice since 1972 was that the managing director would determine the salaries based on the preceding year's profitability. This was so even before 1998 when one of Tan Song Cheng's brothers was the plaintiff's managing director. The first defendant was appointed managing director in February 1998.

50 Where the Amex travellers' cheques were concerned, before 2002, the fourth defendant, while working for the plaintiff, had withdrawn such cheques and cash for the first defendant to pay commissions to the Middle East agents when he made trips there. There was no doubt that the first defendant had made numerous trips there. Taisan also paid such commissions. There was no documentation as the payment of commissions was prohibited in the Middle East. The commissions paid were reflected in the plaintiff's books as sales discounts or as directors' expenses.

51 The withdrawal of US$49,800 in travellers' cheques (US$800 being the bank charges) by the first defendant in February 2002 was to complete the unfinished business of the plaintiff by paying the commissions. The amount involved was to be entered in the company's books as a discount for export debtors. US$5,000 worth were encashed in the Middle East in May 2002.

52 Sometime that year, the first defendant was told by the plaintiff's accounts clerk over the telephone that a decision had been made to reverse the US$49,800 into his directors' loan account. He then subsequently encashed the balance of the travellers' cheques on and after 30 August 2002 in the belief that the reversal had been done. Despite the written instructions (to reverse the entry) by Tan Song Cheng to the auditors being dated 6 September 2002, it was evident that the draft report

of the special accountant reviewing the company's books was ready before that date. The special accountant had testified that he started his work sometime in August 2002 and it took about two weeks. He drafted the letter of 6 September 2002 for Tan Song Cheng, who lived in Johor Baru, to sign. The first defendant asserted that he was informed about the reversal before 30 August 2002. This was denied by the accounts clerk who said she spoke to him after the date of the letter. An audit confirmation dated 13 September 2002 indicating the amount in question was treated as a loan was sent to him subsequently. The company's accounts for the year ending on 31 December 2001 reflected it as such but did not state it was a temporary reversal.

53 This allegation of misappropriation was added to the Statement of Claim only in March 2003 although the writ of summons was issued in September 2002. By then, the first defendant did not have access to the company's documents and had only slightly more than a month to respond to this allegation. He was prepared to return the amount claimed to the plaintiff.

54 The third defendant is the nephew of the Liang brothers and the grand nephew of Tan Song Cheng. He was an employee of the plaintiff between 1988 and 1991. He set up Taisan on 14 January 2002 and was its sole proprietor until 26 March 2002. He is also the sole proprietor of HHIE. The fourth defendant, after having been retrenched by the plaintiff, became the sole proprietor of Taisan from 27 March 2002. He was dealing with import and export documentation while working for the plaintiff. He was the one instructed by the first defendant after the AGM of 7 January 2002 to issue the letters of termination of employment to the staff.

55 The third defendant approached the first defendant as chairman and managing director of AFI for a distributorship of Apollo products after the plaintiff decided to close down its export business. He also asked the fourth defendant to help him with the import and export business. The first defendant had confidence in the fourth defendant because of his experience and ability to do the task. The Liang brothers also assisted them openly as it was in the interests of AFI to ensure that supply to the Middle East continued smoothly. The fourth defendant helped the third defendant in the evenings while serving out the rest of his employment contract with the plaintiff. All profits made by Taisan were declared in the third and fourth defendants' income tax returns.

56 When the fourth defendant became the sole proprietor of Taisan, he took over the import of Apollo products and continued to help the third defendant with the documentation in the export business of HHIE. The choice of the name Hup Huat, which also appeared in the name of the plaintiff, was because the third defendant thought it was a good and prosperous name and wanted to commemorate his grandfather's name. It was not a trademark and the records of the Registry of Companies and Businesses revealed many businesses with this name anyway. After October 2002, upon the suggestion of the first defendant that they use only one business entity to deal with the Middle East customers, Taisan started to deal directly with those customers. Due to the fact that both Taisan and HHIE were new businesses, they did not have permanent premises and fixed telephone numbers. This was of no consequence because AFI, essentially a family business, knew the fourth defendant for almost three decades.

57 The fifth defendant used to purchase Apollo products from the plaintiff between 1984 and July 2002 for resale, including export to Brunei. The second defendant was able to supply the products at better prices when the purchases were made directly from AFI. In its dealings with both the plaintiff and AFI, the contact person was the second defendant and it made no difference to the fifth defendant whether it was dealing with one or the other. The plaintiff and AFI were the same or related as far as it was concerned.

58 The fifth defendant had allowed the use of its forklift and of its warehouse for occasional

storage of Apollo products as a favour to the second defendant. It did not know whose goods they were. It was only after the commencement of this action that it became aware that the Liang brothers had resigned as directors of the plaintiff and that the two companies it had been dealing with were separate entities.

59 Since 2002, AFI had been dealing directly with the fifth defendant and others in Singapore but the plaintiff sued only the fifth defendant. The plaintiff was in fact seeking to restore its position as a middleman between AFI and Singapore purchasers and was attempting to use its trademark to enforce purported exclusive distribution rights.

60 There was no dispute that the loading and unloading of Apollo products took place outside, and not within, the fifth defendant's premises. Some of the goods were ordered by the fifth defendant and the plaintiff's employees also went there to collect the plaintiff's goods. The warehouse area in Woodlands was a convenient spot to do loading and unloading and the plaintiff had done so even before February 2002. The fifth defendant did not have the requisite knowledge to render it liable for conspiracy or dishonest assistance as it did not know the precise relationship between the plaintiff and the Apollo Group or the duties the Liang brothers owed. It was merely doing business on the best possible terms it could obtain.

61 Parallel import of genuine products was not an infringement of trademark. The plaintiff's registration was liable to be revoked for non-use under s 22 of the Trademarks Act and it had consented to Apollo products being put on the market by AFI, a defence under s 29(1) of the same Act. The certificate from the Registry of Trademarks showed the plaintiff holding the Apollo trademark as 'manufacturers' but it had not manufactured any Apollo products for more than a decade since around 1990 when AFI took over that function. The packaging of Apollo products stated that AFI was the manufacturer.

62 Parallel import of genuine goods also did not amount to passing off. While it was possible in law to establish a claim for passing off if an importer had acquired a local goodwill as importer, as distinct from the goodwill attaching to the product, that was not the case here. The public must attach importance to the plaintiff as importer and people must have been buying the product because it was imported by the plaintiff. Here, the plaintiff simply imported and resold Apollo products without adding any value to it. The evidence showed that traders in the industry and the public merely purchased the product because it bore the name Apollo and nothing else.

63 The fifth defendant did sell Apollo products bearing the name of the plaintiff as importers between July and October 2002 but there was never any intention to deceive the public. The fifth defendant possessed some old stocks bought from the plaintiff. In any case, it ensured that the goods offered for sale no longer bore the plaintiff's name as importers after the issue was brought to its attention. There was no difference in the quality of the Apollo products sold by the plaintiff and the fifth defendant. Further, the plaintiff had failed to prove loss suffered as a consequence of any alleged confusion and such failure was fatal to its action for passing off.

The decision of the court

64 It was clear from the evidence adduced that a decision had been made to close down the business of the plaintiff. The discussions on this during the AGM of 7 January 2002 were precipitated by the increasingly acrimonious relationship between Tan Song Cheng and the Liang brothers. The cordiality which permitted the smooth running of the company over the many years had deteriorated to the extent that a parting of ways was inevitable. Tan Song Cheng was flexing his majority shareholder's muscles unreasonably in apparent retaliation against the Liangs for having displaced the

Tan family as kingpins in the Apollo Group.

65 There was no reason why that issue could not be brought up under ‘Other Business’. No shareholder was absent or misled by the agenda for the AGM. Tan Song Cheng could have ruled that discussions on it be postponed to another date but did not do so. The business had always been run on an informal basis and Tan Song Cheng was accorded due respect as an elder and majority shareholder by being allowed to take the chair as a matter of course. The shareholders had never needed to proclaim their ayes and nays formally when voting on any particular issue. It was sufficient that no one voiced opposition to the proposal to close down the business. Resolutions can be constituted by the informal assent of all members of the company regardless of whether or not there is a formal meeting or proper notice (*Cane v Jones & Ors* [1980] 1 WLR 1451; *Jimat bin Awang & Ors v Lai Wee Ngen* [1995] 3 SLR 769).

66 The corporate secretary was not an employee of the plaintiff. Even after it became clear that the Tans would be the controlling minds of the company after the 15 March 2002 EGM, the corporate secretary still maintained his position stated in the draft minutes of meeting for the AGM. If the corporate secretary was dishonest in his dealings, he would surely have switched sides and backed the Tans’ version of the events since the Tans were going to be his future paymasters. The disputed minutes were not even discussed at the EGM although a fundamentally important matter was at stake.

67 The Liang brothers acted openly in instructing that staff be retrenched and subsequently that some be retained on a temporary basis. They terminated the tenancy agreement of the plaintiff. This was required by the Tans’ former solicitors and the Liangs in fact reported to them on what they had done pursuant to their belief that the company was closing down its business. On the one hand, Tan Song Cheng was instructing solicitors to remind the Liangs to take the necessary steps to close down the business and on the other, was instructing the same to dispute the minutes of meeting which recorded the decision to close down.

68 The schizophrenic legal stances adopted by Tan Song Cheng were simply inexplicable. It was as if he was laying a legal minefield for the Liang brothers and was luring them into it. By the time of the EGM in March 2002, he already had private investigators looking into the activities of the Liang brothers. He could have easily mentioned during the EGM that the plaintiff intended to carry on its decade-long business of distributing Apollo products or that its intention was that the business be transferred to a particular entity. Instead, he allowed the Liangs to continue with their actions based on their honest belief that the business was to cease, even when they resigned and offered to stay on to help until the closure was complete.

69 There was no doubt in my mind that the version given by the Liangs on this issue was true. Since the plaintiff had assented to the closure of its business, it could not now allege that anyone had diverted it away. There could be no diversion of the waters of business when the company at the AGM decided to shut the valves and to allow the remaining trickles to dry up.

70 No one appeared to know of any exclusive distributorship agreement other than Tan Song Cheng. AFH and AFI did not know. Even his son did not know. What Tan Song Cheng seemed to be saying was that AFI had been using the plaintiff exclusively as its distribution arm for Singapore and for the export market for many years. Even if that were so, the arrangement never crystallised into an agreement. It did not appear from the evidence that the plaintiff had a monopoly in Singapore or over the export of Apollo products anyway. Before 2002, AFI had done its own exports and others had imported into Singapore and resold the good locally or overseas. Even if Tan Song Cheng did not wish to sue AFI over the alleged breach of an exclusive distributorship agreement because of his

beneficial interest in that company, there was no evidence adduced that he had made any complaint in any of the meetings of AFI about this issue.

71 Clearly, the plaintiff did decide to close down its business in January 2002 and there was never any exclusive distributorship agreement between AFI and the plaintiff. The Liang brothers were therefore not in breach of their fiduciary duties in appointing and assisting Taisan or any others to take over the plaintiff's former business. Since there was nothing to divert from the plaintiff, the claims of conspiracy and dishonest assistance on the part of the other defendants must also fail.

72 If the Liang brothers had a beneficial interest in Taisan or in HHIE, the entity that they must answer to would be AFI/AFH. On the evidence, no such beneficial interest was proved. There was nothing to prohibit them from helping a nephew and a loyal and able former employee in their careers. As directors of AFI, it was also in their interests to ensure that the exporting arm appointed by them was able to meet the demands of the customers of Apollo goods.

73 The directors' remuneration, as in all other matters of the plaintiff, was not decided in a formal fashion although Article 95 of the company's Articles of Association provided that 'the directors may be paid out of the funds of the company by way of directors' fees for their services as directors and such fee shall be determined by the company in general meeting from time to time'. There was no dispute that the procedure in Article 95 was not adopted in the past. The remuneration was authorised in accordance with the mutual understanding of the shareholders as in previous year, even during the managing directorship of one of the Tan brothers. It would be inequitable for the company, many months after services had been rendered and such remuneration had been paid, to insist on a retrospective application of an article which had been consistently bypassed by all the directors and the shareholders.

74 The amount of remuneration was not such that it was commercially indefensible. The profits for 2001 were in the region of S$1.7 million and the remuneration was slightly more than 10% of the profits. It could not be disputed by the Tans, who admitted to having no experience in the distribution and export business of the plaintiff, that the growth of the business was due essentially to the diligence and ability of the Liangs. Accordingly, I did not think the Liangs were in breach of their fiduciary duties in paying themselves the amount complained of.

75 The evidence by the first defendant regarding commissions paid to agents in the Middle East was corroborated by the independent directors of AFH who were consulted by him on such payments. It was because of such commissions that AFI could not export to the Middle East directly as there would be no documentation concerning such payments and AFI, being a subsidiary of a listed company, was obliged to keep proper records of payments. The fourth defendant had also withdrawn travellers' cheques and cash for the first defendant before his numerous trips to the Middle East.

76 Consistent with past practice, the first defendant instructed that the US$49,800 withdrawn by him be entered as discounts for export debtors. The payment of commissions was one of the matters he felt obliged to take care of for the plaintiff. US$5,000 worth were encashed in May 2002 in the Middle East when he travelled there.

77 When was the first defendant told about the decision to treat the amount in issue as a loan taken by him? The only document available on this was the letter dated 6 September 2002 written by Tan Song Cheng to the company's auditors. However, it was clear that that letter was not written contemporaneously with the advice of the special accountant reviewing the company's financial records. The special accountant could have completed his work towards the end of August 2002 and informed Tan Song Cheng about his recommendation to reverse the accounts. Tan Song Cheng was

not resident in Singapore. There was every possibility that the letter drafted by the special accountant was only typed and dated sometime later.

78 The accounts clerk was adamant that she conveyed the intention to reverse the entry to the first defendant only after 6 September 2002. The first defendant was equally adamant that he was told by her before 30 August 2002 and that was why he used the money withdrawn as if it were his own on and after that date.

79 On a balance of probabilities, I did not think the plaintiff had proved its case of misappropriation against the first defendant. The dates were close enough for the accounts clerk to have been mistaken. The first defendant did deny owing the money to the plaintiff during the audit query in October 2002 but that could be due to the fact that he had always maintained that the money was withdrawn for commissions and some of it had been paid as such. It was unlikely that the first defendant, aware of the complete breakdown in the relationship between the two families and of the fact that the Tans were examining the finances of the company, would be so foolish as to embezzle the company's money in the midst of investigations and to leave a trail behind. Since he accepted now that the amount of US$49,800 was to be treated as a loan to him, he would have to repay the company at the appropriate time when all such loans are recalled.

80 Where the claims against the fifth defendant were concerned, I agreed that, until these proceedings were commenced, it was not aware of the precise relationship between AFI and the plaintiff or the troubles that were brewing among the shareholders. As far as it was concerned, it was trying to do business in the most profitable way possible and was willing to buy Apollo goods from whichever source was willing to supply it at the lowest prices. It would surely be stretching things too far to say that it was liable to the plaintiff simply by allowing loading and unloading to take place along a public road next to its premises, allowing some Apollo goods to be stored in its warehouse from time to time and permitting a long time business associate to make use of its forklift. In any event, as I have held above, there was nothing to divert from the plaintiff and no breach of fiduciary duties by the Liang brothers.

81 There was no trademark infringement or passing off by the fifth defendant. Like some other businesses here dealing with Apollo products, it was importing genuine Apollo products from AFI for resale. Indisputably, the plaintiff allowed AFI to manufacture Apollo products in Malaysia and to sell them in Singapore and elsewhere. The fifth defendant was entitled to invoke s 29 (1) Trademarks Act which reads:

> '29 (1) Notwithstanding section 27, a registered trademark is not infringed by the use of the trademark in relation to goods which have been put on the market, whether in Singapore or outside Singapore, under that trademark by the proprietor of the registered trademark or with his express or implied consent (conditional or otherwise).'

The present case was not unlike that in *Revlon Inc v Cripps & Lee Ltd & Ors* [1980] FSR 85 where it was observed that the Revlon Flex mark had become in effect the house mark of the Revlon group, indicating that the goods to which it was applied originated from the Revlon group but not any particular entity in the group. Here, the Apollo trademark was applied freely in Malaysia by AFI, the manufacturer, with HHM being the owner of the trademark in Malaysia. The products were then sold in Singapore and elsewhere. The trademark was no longer the preserve of the plaintiff.

82 I did not think it necessary in the circumstances to consider the revocation of the plaintiff's trademark for non-use under s 22 Trademarks Act.

83 The Apollo products sold by the fifth defendant bearing the plaintiff's name as importers between July and October 2002 were the old stocks purchased from the plaintiff. There was no time limit set for the fifth defendant to sell those stocks. In any case, the plaintiff did not possess a local goodwill in Singapore distinct from the goodwill in respect of the product overseas unlike the case of *Fender Australia Pty Ltd v BEVK trading as Guitar Crazy* (1989) ALR 89 where the applicant was held to have its own Australian goodwill associated with the trademark in Australia by virtue of its advertising and the additional services, such as inspections and rectification works, provided. Traders in Singapore did not purchase Apollo products because they were imported by the plaintiff. Instead, they purchased them for what they were – Apollo products. There was no difference in quality between the Apollo products that the plaintiff imported and those imported by the fifth defendant. In any event, no loss caused by any alleged confusion was proved.

84 Apart from the judgment entered against the fifth defendant for the amount of S$158,331.75 (referred to in paragraph 3 above) together with interest and costs, the rest of the plaintiff's claims against all the defendants failed and were accordingly dismissed with costs.

Plaintiff's claim against all the defendants dismissed except for claim against fifth defendant for S$158,331.75.