

DBS Vickers Securities (Singapore) Pte Ltd v Chin Pang Joo and Another
[2009] SGHC 248

Case Number : Suit No 601/2008
Decision Date : 02 November 2009
Tribunal/Court : High Court
Coram : Philip Pillai JC
Counsel Name(s) : Eddee Ng, Joanna Poh and Serene Gan (Tan Kok Quan Partnership) for the plaintiff; Clarence Tan (Unilegal LLC) for the first defendant; Suresh s/o Damodara and Leonard Hazra (Damodara, Hazra, K Sureshan LLP) for the second defendant
Parties : DBS Vickers Securities (Singapore) Pte Ltd — Chin Pang Joo; Tang Boon Hai
Agency – agent's warranty of authority – construction of agent's authority – oral authority – implied authority of agent

Contract – Defence – Contributory negligence

Civil Procedure – Costs – Sanderson order – Bullock order

2 November 2009

Philip Pillai JC:

1 The plaintiff's, DBS Vickers Securities (Singapore) Pte Ltd ("DBSV"), claim is firstly against the first defendant, Chin Pang Joo ("Chin") for the sum of S\$ 775,124.97 in respect of contra losses incurred between 8 May and 10 June 2008, on his securities trading account No H2/2039922 ("DBSV Account"). Secondly, it is for interest accruing thereon, in accordance with Clause A.5 of the DBSV General Trading Agreement, at the rate of 6.25% per annum for the first 30 days from the date of the contra loss and thereafter at the rate of 8.25% per annum which as at 28 October 2009 amounted to S\$88,315.93.

2 The plaintiff's claim is alternatively against the second defendant, Tang Boon Hai ("Steven Tang"), for the same amount and interest for breach of warranty of authority to the plaintiff.

The Undisputed Facts

3 The DBSV Account was opened sometime in April 2008, following Chin's signing the DBSV Account Opening Form and trading commenced thereon on 8 May 2008. Chin did not sign DBSV's mandate authorising Steven Tang or any other person to trade in the DBSV Account. Instructions for trades on this DBSV Account between 8 May 2008 and 10 June 2008, were given by Steven Tang to DBSV's remisier Vincent Tay Chai Hee ("Vincent Tay") evidenced by transcripts of tape recordings. Trade confirmations relating to the DBSV Account were thereafter emailed by Vincent Tay to Steven Tang. DBSV's contract notes, contra and set-off statements and monthly statements and Central Depository (Pte) Ltd's ("CDP") statements and confirmation notes were all sent in the normal way to Chin's residential address. Chin first disputed the trades on this DBSV Account on 16 June 2008 after receiving the plaintiff's solicitors' letter of demand dated 12 June 2008 and he lodged a police report against Tang on 16 June 2008.

The Plaintiff's case

4 The plaintiff's case is founded on implied or apparent authority that Steven Tang was

authorised by a course of conduct to trade on the DBSV Account, based on the following:

- (a) That there was an arrangement between Vincent Tay on behalf of the plaintiff, Chin and Steven Tang in which Chin gave Steven Tang the discretion to trade on Chin's behalf;
- (b) That Chin had knowledge of and approved of the trades entered into by Steven Tang on his behalf from 8 May 2008 to 10 June 2008, including the period from 23 May 2008 to 4 June 2008 when Chin was in hospital; and
- (c) That even if Chin had not approved of the said trades, Chin is nonetheless precluded from objecting to the same by reason of Clause A.20 of the General Trading Agreement of DBS Vickers ("Clause A.20"). Clause A.20 reads as follows:

A.20. Statements, Confirmations and Advice

20.1 The Customer shall verify all statements, Confirmations and advice sent by DBS Vickers to the Customer. If no objection is raised within fourteen (14) days of the date of the statement, Confirmation or advice (or such other time period set out in the said statement, Confirmation, or advice), such statement, Confirmation or advice shall be deemed conclusive and binding against the Customer, who shall not be entitled to object thereto. However, DBS Vickers may at any time rectify any error on any statement, Confirmation or advice which has been proved to its satisfaction.

20.2 The Customer shall immediately notify DBS Vickers if a statement, Confirmation or advice is not received by the Customer in the ordinary course of business.

5 Steven Tang's Affidavit Evidence in Chief ("AEIC") confirms the trades and the trading processes described by Vincent Tay in his own AEIC and further that he did not make any untrue representations to Vincent Tay regarding his discretion and authority to trade on behalf of Chin.

6 Chin's defence is that he did not appoint Steven Tang as his agent with the discretion to buy and sell shares or to trade with DBSV. Chin did not sign any document appointing Steven Tang as agent. In his defence pleading he avers that he is not liable to the plaintiff for transactions made without his knowledge, permission or authorization. In the event that the first defendant is adjudged liable, the first defendant avers that the plaintiff was negligent in the operation of his DBSV Account by having failed to verify with him whether such agency existed and/or failed to procure a written document evidencing such agency and in the operation of the account. Chin's defence also avers that he was admitted to hospital on 23 May 2008 and discharged for home on 4 June 2008 (although he later claims but provides no evidence that he was discharged on 6 June 2008) and could not reasonably be expected to read his mail and to raise objections to the DBSV statements within the stipulated 14 days.

The Issues:

7 The primary issue is whether or not the first defendant authorised, impliedly or apparently, the second defendant, Steven Tang, to trade on his DBSV Account with respect to the trades conducted between 8 May 2008 to 10 June 2008 and failing such authorisation whether the second defendant Steven Tang, warranted to the plaintiff, that he had authority to trade on behalf of the first defendant. Failing this and in the alternative the plaintiff seeks to rely on the conclusive evidence Clause A.20 of its General Trading Agreement.

8 The first defendant's defence, apart from denying authorisation and challenging the conclusive evidence Clause A.20, has raised, in the event that he is adjudged liable to the plaintiff, a secondary issue of contributory negligence on the part of the plaintiff.

The Evidence

9 The plaintiff's witness is its remisier Vincent Tay, who describes in his AEIC, a prior relationship with Chin in 2007 when in the presence of Steven Tang, Chin signed an account opening form with UOB Kay Hian ("UOB KH") leading to the opening of UOB Kay Hian account number 3114553 ("UOB KH Account") on 17 July 2007. Chin had informed Vincent Tay that he would be giving Steven Tang the discretion to carry on trades on his behalf but he refused to sign the UOB KH authorisation form, saying that his verbal authorisation was sufficient.

10 Trading commenced on the UOB KH Account with Steven Tang giving Vincent Tay instructions to execute. Vincent Tay avers that Chin never contacted him directly on such trades. Steven Tang would instruct Vincent Tay on the telephone on trades and at the end of each day Vincent Tay would email Steven Tang with a summary of trade confirmations. UOB KH and the CDP would in due course send Chin at his residential address, the respective relevant contract notes and statements. It is Vincent Tay's evidence that Chin duly paid for all his trades and contra losses at UOB KH by cash or cheque and profits were deposited in his UOB KH trust account or sent by cheque to his residential address.

11 Vincent Tay avers that as he was planning to leave UOB KH to join DBSV that he met Chin and Steven Tang around March/April 2008. He provided them copies of the DBSV account opening forms and General Trading Agreement and avers that the account opening form was signed by Chin and that in Steven Tang's presence, Chin informed Vincent Tay that the previous arrangement he had at UOB KH would continue.

12 Trading commenced in May 2008 and contract notes and statements relating to trades in the DBSV Account were issued, in the same modes as previously undertaken with the UOB KH Account. The trades during the period of 8 May 2008 to 10 June 2008, with the exception of the purchase of 300,000 China Energy shares, all related to the purchase and sale of the Hang Seng Index covered warrants ("HSI"). For the months May and June 2008, China Energy was trading at declining prices and the HSI25800MBC80627 was trading at declining prices whilst HSI25600MBP80627 was trading at volatile prices.

13 On 20 May 2008, DBSV sent Chin a contra statement requiring payment of a loss of S\$50,419.28. A letter of demand dated 3 June 2008 and 10 June 2008 were followed by their solicitors' letter of demand dated 12 June 2008. Chin's solicitors replied by letter of 16 June 2008 stating that Chin denied having authorised the trades.

14 The first defendant, Chin avers in para 15 of his AEIC that he did not, nor was it his intention to appoint Steven Tang as his agent to operate his UOB KH Account and that he had only treated Steven Tang as his advisor and nothing else. In para 17 of his AEIC, he denies that he gave Steven Tang the absolute discretion on what shares to buy, what shares to sell and at what price. In para 20 of his AEIC, he avers that at the material time he had no idea of what Steven Tang was doing *ie* making calls to Vincent Tay to buy and sell shares without his proper authorization or documentation or otherwise. In para 23 of his AEIC, he states that his trading loss at UOB KH was approximately S\$426,000 which upon cross examination he was obliged to correct, upon being shown the UOB KH statement, that this amount represented his net trading position and not his trading loss which latter amount was S\$81,119.17. Chin confirms in his AEIC that he filled in his name and NRIC number and

signed the DBSV account opening form. In para 42 of his AEIC, Chin avers that he had no intention to commence trading and/or speculating on shares again as he had suffered huge losses from previous trading with UOB KH.

15 Chin avers that it was only sometime in June 2008 after he had returned from hospital that he went through the pile of unopened letters stacked on his writing table at home and then discovered the CDP statements and a few letters from the plaintiff. On 16 June 2008, Chin filed a police report at Bedok South Neighbourhood Police Post in which he states that he was admitted to hospital on 23 May 2008 and discharged on 4 June 2008 and had received the plaintiff's solicitors letter dated 12 June 2008 for contra losses on his trading account with respect to 12 transactions in the period 21 May to 11 June 2008. He states that during the period he was in hospital he did not call the broker to do any transaction at all and neither had he made any transaction on this account before his hospitalisation. He concludes that a few days before he received the letter, Steven Tang called him and admitted using his account to do some transaction. He had not told Steven Tang to do any transaction for him at all.

16 Upon cross examination, Chin came to admit that he had given Tang authority to trade on his behalf in relation to all his trading accounts with several other broking firms, including the DBSV account. In particular he admitted that his testimony that the UOB KH trades were not authorised contradicts the concession that he is not disputing the UOB KH trades contained in the letter from his solicitors dated 24 September 2009.

17 Chin admits that he had received the contract notes and the contract statements, including those from 8 May 2008 until 23 May 2008 (*ie* before his hospitalization) in the usual way within one or two days after the transactions.

18 Chin did not dispute any of the statements until 16 June 2008. Chin admits that para 61 of his AEIC averring that he went through the letters the next day after 16 June 2008 contradicts his testimony that he had done so immediately upon the receipt of the letter of demand from the plaintiff's solicitors.

19 Chin accepted under cross examination that his statement at para 25 of his AEIC did not make sense because if Chin was "in the driving seat" in respect of the trades done at UOB KH, there would have been no need to tell Steven Tang that he needed to stop trading.

20 On cross examination Chin was obliged to confirm that he had given Tang authority to trade on his behalf on all his other trading accounts including the DBSV account, which he retracted upon re-examination without explanation. He admitted that he had settled the UOB KH trading losses even though he had not signed any mandate appointing Steven Tang or any other person to trade on this account. Chin upon cross examination, concedes that he may have given Steven Tang his internet trading passwords for his OCBC Securities and Phillip Securities Trading accounts. Steven Tang gave evidence as to the exact internet trading secret password that he had received from Chin. Coupled with Chin's evidence that he is an executive director of a listed company with many responsibilities which leaves him little time to monitor the market, all these are consistent and corroborate the evidence of Steven Tang and Vincent Tay that there has been an arrangement between Chin and them by which Steven Tang has been impliedly authorized to trade at his discretion on Chin's behalf.

21 In any case, by reason of Chin's admission of being aware of the receipt of DBSV's and CDP's statements and confirmations in the normal course and by reason of his failure at any material time to object to DBSV of any or all of the trades reported in these statements and confirmations until 16 June 2008, Chin would also have held out to the plaintiff that Steven Tang was authorized to

trade on his DBSV Account. No question has been raised as to whether anything would turn on trade statements and confirmations made prior to or after 23 May 2008 the date of his hospitalization as first defendant's counsel has conceded that Chin's medical condition is irrelevant to these proceedings. In any event, evidence, including a text message/"sms" of 12 June 2008 at 06:32:14pm, from him to Steven Tang asking:

How are you handling the Vickers side?

and Steven Tang's response the same day at 06:35:03pm:

Need to talk to u on tat 2. Maybe if tomorrow u better, I discuss wif u? strike an agreement wif them but need yr endorsement.

indicate that Chin was otherwise aware of the trades at DBSV Account.

22 Steven Tang avers in para 8 of his AEIC that he provided insurance assistance to Chin since 2004 and subsequently introduced Chin to potential business and other opportunities for which he was not rewarded save that he hoped to participate in some of them that might become lucrative. In para 11 of his AEIC, he avers that this later led to Chin giving him discretion to trade on his behalf with the full broker approved limit and giving him Chin's internet secret password for his Phillips Securities trading account to execute trades. When cross examined, Steven Tang provided Chin's internet trading account secret password as being "220467" being Chin's birthday which was unchallenged on re-examination. Sometime in March 2008 Steven Tang arranged for Vincent Tay to meet Chin at which time Chin signed DBSV's account opening form and informed Vincent Tay that the previous *modus operandi* of trading by Steven Tang on behalf of Chin would continue with the DBSV Account. Steven Tang accordingly traded on Chin's DBSV Account from 8 May 2008 to 10 June 2008. He avers that during this time he would speak to Chin about the trading positions and market trends and was informed sometime on 23 May 2008 of Chin's hospitalisation and of his visit to Chin in hospital on 28 May 2008 where he discussed the trading positions. He refers in para 20 of his AEIC, to a 11 June 2008 mobile telephone text message/"sms" from Chin to him in support of his statement that Chin was working on last ditch efforts to procure funds to settle his losses. He denies misrepresenting in any way his authority to trade on behalf of Chin and that the plaintiff knew at all times that he had authority to trade on Chin's behalf through their representative Vincent Tay.

23 Steven Tang confirms the arrangement between Chin, Vincent Tay and himself in relation to the opening and trading on the UOB KH Account and the DBSV Account. He confirms that his trading instructions to Vincent Tay would give the impression that they were instructions entered into on behalf of Chin and had he not been so authorised by Chin that he would have been misleading Vincent Tay and misrepresenting his authority to act on behalf of Chin.

The Law

(i) Primary issue of implied/apparent authority

24 The fact that Chin had not signed DBSV's mandate form authorising Steven Tang or any other person to operate Chin's DBSV Account is not fatal to the plaintiff's claim, if implied or apparent authority is established. Actual authority may be implied or inferred from the conduct of the parties and the circumstances. *Banque Nationale de Paris v Tan Nancy & Anor* [2002] 1 SLR 29. The elements to establish apparent authority are simply stated in *Boustead & Reynolds on Agency*, 16th Ed art.74:

Where a person by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.

(ii) Secondary issue of contributory negligence in contract

25 The first defendant has raised, in the event that he is adjudged liable to the plaintiff, a defence of contributory negligence. The availability or otherwise of contributory negligence defence in contractual claims is uncontroversial and succinctly stated by the Court of Appeal in *Jet Holding Ltd & Ors v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 at [100] as follows:

The Singapore position in this regard is clear: the doctrine of *contributory negligence* is applicable where the defendant's liability is the same as his or her liability in the tort of negligence independently of the existence of any contract ...

[emphasis in original]

(iii) Primary issue of implied/apparent authority

(a) The evidence relating to implied authority

26 The plaintiff's witness Vincent Tay averred and the second defendant Steven Tang confirmed the existence of a prior similar trading at his discretion arrangement whereby Steven Tang traded on Chin's behalf in Chin's UOB KH Account, the losses in which account were duly settled by Chin. Similarly they both aver that Chin confirmed to them upon his signing of the DBSV Account opening form that the same arrangement would continue. The first defendant's vacillation when cross examined on his denial of the existence and continuance of the arrangement in his AEIC leads me to have doubts about his veracity on this. Chin's AEIC in which he avers that he instructed Steven Tang to stop all trading in shares immediately on learning of his losses in his UOB Account, by his own admission under cross examination, contradicts his statement that it is he who decides "what to buy, what to sell, when to buy and when to sell". His evidence under cross examination by the second defendant's counsel that Steven Tang only called him after the trades were executed and not prior to making these trades, under his UOB KH Account, reinforces his authorisation of Tang with discretion to trade in such account and the continuance of such arrangement under his DBSV Account. Chin's confirmation that he had other pressing business duties and his insurance and securities markets reliance on Steven Tang provide further background to his continuing to invest Steven Tang with discretion to trade on his behalf in his DBSV Account. Chin's receipt at his residential address of DBSV and CDP trading statements and confirmations, triggering no response or action from Chin until 16 June 2008 render it difficult to believe that he was unaware of the trades carried out on his DBSV Accounts. He has admitted familiarity with broker and CDP statements and his general understanding of checking and objecting to credit card statements. As it has been conceded by his counsel that his medical condition during his hospitalisation is irrelevant to these proceedings, I do not consider them.

27 On the evidence of Steven Tang and Vincent Tay which has not been contradicted by Chin's bald, unsubstantiated and often changing evidence under cross examination, I accordingly find that there was sufficient evidence of a continuing arrangement such as would constitute implied authority for Steven Tang to trade on the DBSV Account on his behalf.

(b) The evidence relating to apparent authority

28 The relevant elements relating to apparent authority would include: (i) Chin's signing the DBSV account opening form in the presence of Steven Tang and Vincent Tay, (ii) his concurrent confirmation that previous arrangements were to continue; (iii) Steven Tang's telephone trading instructions to Vincent Tay and (iv) Chin's raising no queries or objections either to the plaintiff or to Vincent Tay, upon his receipt of from the outset of the first and thereafter continuing regular DBSV and CDP trade statements and confirmation at any time until 16 June 2008 when he received the plaintiff's solicitors' letter of demand. These would be sufficient representation to the plaintiff as would constitute apparent authority.

29 As there is ample evidence to establish that Steven Tang had been authorised by Chin to trade on his DBSV Account, the question of the effects of the conclusive evidence Clause A.20 of DBSV General Trading Agreement as argued by plaintiff's counsel in the alternative does not arise. I will however for completeness, deal with this insofar as the first defendant's counsel in his closing submissions, has denied being bound by this term for two reasons: firstly he disputes having received a copy of the DBSV General Trading Agreement from Vincent Tay although Vincent Tay stated in his evidence that he gave Chin a copy together with the account opening form; and second that by its terms he had 14 days in which to respond and that he was in hospital from 23 May 2008 to 4 June 2008.

30 The DBSV account opening form concludes with a section headed Customer Declaration for Securities Trading, Derivatives Trading and/or other account(s) just before the signature page on which the customer signs the account opening form. Para (b) of this declaration reads:

that I/we have read, understood, accepted and agreed to the terms and conditions set out in this application and in the DBS Vickers General Trading Agreement and [as the case may be] DBS Vickers Online Trading Agreement as it may be amended from time to time;

31 The second ground raised is that by its terms the conclusive evidence clause kicks in only after 14 days. Assuming that the confirmations were received 2 days after the first trade of 8 May 2008, 14 days would, the first defendant's counsel submits, run to 24 May 2008 by which time the first defendant would have been in hospital. The first defendant's counsel submits that the objection time line of the last trade of 10 June 2008 would similarly have run to 26 June 2008 and accordingly that the first defendant had objected within the time limit as he had objected to the plaintiff's solicitors letter of demand on 16 June 2008 and had on the same day made a police report. It is the first defendant's evidence that he never opened or read any of the DBSV or CDP statements received by him with respect to the trades between 8 May 2008 and 10 June 2008 until after he had received the plaintiff's solicitors' letter of demand on 16 June 2008. First defendant's counsel has conceded in these proceedings that the hospitalisation of the first defendant is irrelevant. With respect to the trades of 8 May 2008, there is not a scintilla of evidence that it was on the mind of the first defendant at any time prior or during his hospitalisation to object. There is no evidence in any event that the first defendant raised any objection by telephone, email or letter with DBSV or Vincent Tang. Even when the first defendant first challenged the trades, he did not challenge some but challenged all of them and only, by his admission on 16 June 2008, after he had received the plaintiff's solicitors' letter of demand. The first defendant is disputing all trades and not some of the trades from 8 May 2008 to 10 June 2008. The first inkling he would have had of any trade on his DBSV Account would have been statements of trades dated 8 May 2008. It does not sit well, in these circumstances to assert that he is entitled to dispute all trades from 8 May 2008 provided that his objections were made within 14 days of the date of the statements relating to the last trades of 10 June 2008. As he objects to all trades as being unauthorised, he would be expected to object from the very first trade

and he has conceded that the hospitalisation of the first defendant is irrelevant to these proceedings. In these circumstances, I find the defence submissions relating to the conclusive evidence clause A.20, to be without merit.

(iv) The evidence and submissions on defence of contributory negligence

32 The first defendant's counsel submits that in the event he is adjudged liable to the plaintiff, the plaintiff was negligent in the operation of the DBSV Account to wit that upon Vincent Tay failing to obtain Chin's signature on the mandate form, it did not check or verify this with the first defendant; (Vincent Tay did not inform his employer of such an arrangement; and generally in their operation of the account.)

33 The availability of contributory negligence defence exists when the contractual claim independently evinces a tortious claim. The plaintiff's claim is founded on contract which does not concurrently evince a tortious claim. In any event, the foundation of the submission of negligence is weak. The evidence indicates that Vincent Tay did give the DBSV mandate form to Chin for signature which he declined to do. It is difficult to envisage how in these circumstances Vincent Tay is to check or verify this from Chin himself. The fact that Vincent Tay did not inform the plaintiff of the arrangement would not, without more, suggest any negligence.

34 Accordingly I find no merit in this defence.

Conclusion

35 Having assessed the evidence and the totality of the circumstances and relationships, I come to the conclusion that there was a continuing arrangement between Steven Tang, Vincent Tay and the first defendant Chin which evidences that Chin authorised Steven Tang to trade at his discretion on his DBSV Account. Accordingly, the plaintiff succeeds in its claim for S\$775,124.97 and interest as of 28 October 2009 of S\$88,315.93.

36 Consequentially, the plaintiff has no case in the alternative against the second defendant for breach of warranty of authority.

37 I will now hear submissions as to costs.

38 The plaintiff has prayed for a Bullock or Sanderson Order to be made against the unsuccessful defendant in its Statement of Claim for costs of the successful defendant to be borne by the unsuccessful defendant.

39 The relevant principles to be considered relating to a Bullock or Sanderson Order have been succinctly set out in *Denis Matthew Harte v Dr Tan Hun Hoe and Gleneagles Hospital Ltd* [2001] SGHC 19 ("*Harte v Dr Tan Hun Hoe*") by Chan Seng Onn JC (as he then was) at [11]:

(a) What facts are reasonably ascertainable by the plaintiff before the decision is made to join the successful defendant ('D1');

(b) Whether the facts themselves are unclear to such an extent that it is necessary to safeguard the plaintiff's position by bringing in D1. Where it is reasonable for the plaintiff to adopt the position that either one or the other or both defendants may be liable and hence prudence dictates that both should be joined, then a *Bullock or Sanderson* order may be appropriate;

(c) Of considerable importance is whether the unsuccessful defendant ('D2') has tried to shift all or some of his liability to D1 or has characterised the facts such that D1 is more blameworthy and should bear a greater proportion of the damages, in which case it may be appropriate to make D2 (and not the plaintiff) shoulder D1's costs because D2 has put the plaintiff in a difficult position, thereby forcing him to join D1.

(d) Whether the plaintiff's claim against D1 and D2 is in reality separate and distinct, in which case it will be inappropriate for D2 to pay D1's costs (See *Donovan v. Walters* (1926) 135 L.T. 12). Being independent claims, it is unlikely for D1 to have influenced the joinder of D2. Hence, the plaintiff must answer for the costs of D1 himself.

(e) The likelihood of the plaintiff or D2 becoming insolvent may dictate whether a *Bullock or Sanderson* order should be made. The court has to determine whether it is more equitable to put the risk of non-recovery of D1's costs from D2 on the shoulders of the plaintiff or on D1 himself. Thus the conduct of the plaintiff *vis-à-vis* the successful defendant has to be considered.

[emphasis in original]

40 The first defendant's counsel conceded that in the event that it is adjudged that the first defendant is liable to the plaintiff on the basis of there having been authorisation by the first defendant, that the first defendant bears the costs of the successful second defendant. The first defendant's counsel submits however, in the event that that it is adjudged that the first defendant is liable to the plaintiff not on the basis of authorisation but on the basis of Clause A.20, that the second defendant's cost be ordered to be paid by the plaintiff. The second defendant's counsel expressed indifference as to which party would pay its costs.

41 I would award the Sanderson Order that the second defendant's costs be borne by the first defendant as it is reasonable to safeguard the plaintiff's position to adopt the position that either one or the other of the defendants may be liable in these circumstances and the first defendant has in these proceedings tried to shift his liability to the second defendant.

42 Judgment for the plaintiff against the first defendant.