HH Media-Tech Pte Ltd v Kim Yong Hyun
[2002] SGHC 282

Case Number : Suit 359/2002

Decision Date : 25 November 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Sin Lye Kuen & Jassy Bragassan (Khattar Wong & Partners) for the plaintiffs; Thean Chow Leong & Ho Chee Tong (Chris Chong & CT Ho) for the defendat

Parties : HH Media-Tech Pte Ltd — Kim Yong Hyun

Judgment

Cur Adv Vult

GROUNDS OF DECISION

The facts

1. HH Media-Tech Pte Ltd (the plaintiffs) are a company incorporated in Singapore and are in the business of selling electronic components and developing e-commerce applications. The plaintiffs were previously known as Honhee Pte Ltd. The company's managing-director is Tang Boon Siew (Tang) who took over the running of the family business in 1986. His sister Shirley Tang Boon Ser (Shirley) is the plaintiffs' accounts/administration manager.

2. Kim Yong Hyun (the defendant) is a South Korean national who is a director and (majority) shareholder in a company called DS Media Pte Ltd (DSM) as well as of another company called Duplex Electronics Pte Ltd (Duplex), before it was struck off the Registry of Companies on 26 January 2002.

3. Tang first met the defendant in 1992 when the latter was the research and development chief at Thomson Singapore (Thomson), designing television chassis. The parties met again in 1998 by which time, the defendant had left Thomson, had started DSM and was selling television components to Korea and Japan.

4. In 1996, the plaintiffs' business was concentrated on selling television parts to customers in India and the Middle East, for manufacture of television sets (TV sets). Tang decided there was potentially good profits to be made if the plaintiffs went into the business of supplying television chassis to poorer countries; such countries could then produce local branded TV sets cheaper and cheaply, instead of paying much higher prices for TV sets made under established brands like Sony and Panasonic.

5. Tang then met up with the defendant to discuss his business plan. Tang wanted the defendant to design the television chassis which the plaintiffs' customers could then assemble and turn into custom-made TV sets. As a result of their discussions, an oral agreement (the agreement) was concluded in May 1998 between the plaintiffs and the defendant whereby the defendant agreed to design and develop a series of micro-processor ICs, layouts and modules for the plaintiffs (collectively referred to as components), for use in televisions kits (TV kits) to be sold by the plaintiffs. It was also agreed that the plaintiffs would pay the defendant a development fee for each of the components to be supplied by the defendant, through his company DSM. The development fee would be incorporated into and form part of, the price for each of the components.

6. One reason (according to Tang) for the defendant's willingness to enter into the agreement was the fact that DSM was then not doing well at all. The defendant needed financial assistance to

keep his company afloat and to pay his staff. In May 1998 itself, the plaintiffs advanced S$80,000 to the defendant. Between 8 May 1998 and February 2000, the loans extended by the plaintiffs to the defendant and or DSM totalled US$488,257.55 and S$120,000 of which US$331,890.18 and S$10,000 respectively, had been repaid by the defendant. According to the plaintiffs, the advances were for the defendant to purchase/pay for 'key' components, elaborated upon in para 9 below.

7. Besides the advances which the plaintiffs made to the defendant, Tang alleged that the company assisted the defendant in other ways. The plaintiffs allowed him to use rent-free, a portion of the plaintiffs' office at Commonwealth Drive, which the plaintiffs renovated at their own cost ($7,000). The plaintiffs also bore the movers' costs when the defendant shifted in. The defendant occupied the plaintiffs' premises between March and June/July 1999, when he moved out of his own accord.

8. The defendant's profit under the agreement would be the 'mark-up' he charged the plaintiffs for the components. The defendant was only to be responsible for providing technical support and supplying the components whereas the plaintiffs had to bear the credit risks (from their customers and suppliers), and the costs of logistics such as warehousing, packing, transportation/shipping, as well as bank charges.

9. To be able to purchase/source for the components, the plaintiffs needed the defendant, who had the necessary expertise and contacts (from his days with Thomson and Samsung), to provide a list for the components. Consequently they asserted, it was the defendant's responsibility to check with suppliers regularly and to update the price list for the components, as well as their availability. Key components however (which would include the micro-processor chip and power module), would be ordered by and delivered to, the defendant who would sell them (personally or through his nominated company) to the plaintiffs, presumably again with a mark-up for his profit. The plaintiffs claimed they would advance monies to the defendant (at his request) to enable him to buy the key components. The defendant would consequently know the total cost of the entire chassis. Tang would discuss with the defendant before coming up with the final selling price of the chassis to customers.

10. The plaintiffs left it to the defendant to handle complaints from customers regarding the technical aspect of things. It was for the defendant to solve the customer's problem and if necessary, to change the list of components so as to eliminate the problem for future orders.

11. The first order which the plaintiffs secured after entering into the agreement, was from a company called Marcon Holdings (Singapore) Pte Ltd (Marcon) which expressed an interest to manufacture TV sets in Thailand. A Thai public company called Distar Electric Corporation (Distar) was supposed to assemble and manufacture the TV sets with a chassis to be provided by the plaintiffs/the defendant. To that intent and purpose, the four (4) parties signed a contract dated 8 April 1998 (the contract). Unfortunately, the contract was never performed as Distar changed its mind about manufacturing the TV sets. Eventually, a Malaysian company Setron Sdn Bhd was contracted to manufacture the TV sets (5,000 units) instead, with chassis supplied by the plaintiffs/the defendant.

12. In November 1998, Tang and the defendant visited Egypt and Turkey to look for business opportunities. In the course of the trip, they met up with representatives of an Egyptian company called International Electrical Products Company (IEP) which eventually became the plaintiffs' customer. IEP had the moulds and design for manufacturing TV sets. The company wanted the plaintiffs/the defendant to design the internal circuitry and electronics, find suppliers for all the components, trouble- shoot and export all the parts to IEP to enable the latter to assemble a

complete chassis for their production of TV sets. On its part, IEP would make the cabinets and source for the picture tubes elsewhere.

13. Tang and the defendant managed to secure an initial order for 7,000 units of chassis from IEP on that trip, which the plaintiffs shipped to IEP in February 1999. Payment from IEP for that first and subsequent orders were by letters of credits. It usually took 2-3 months for a letter of credit from IEP to come through to the plaintiffs; this was due to the difficulty of finding American dollars in Egypt. IEP would place its orders 3-6 months ahead of delivery time. According to Tang, the plaintiffs would normally not place orders for components with suppliers (including the defendant) until after their receipt of the letters of credit. Nevertheless business with IEP continued satisfactorily until June 2001. However, over time, their letters of credit to the plaintiffs took longer and longer to arrive, despite Tang's pressing of IEP.

14. On the other hand, the defendant's prices to the plaintiffs increased steadily. Initially, he charged the plaintiffs US$2.10 for the micro-processor. Gradually, the defendant increased his price, first to US$4.80 and then to US$6.90. On a few occasions, Tang requested the defendant not to increase his price when the former mentioned his intention to do so to Tang, the reason being it would cut into the (already thin) profit margins of the plaintiffs.

15. The only hitches in the business relationship between the plaintiffs and the defendant when it subsisted, were the periodic delays in shipments to the plaintiffs' customers, due to a number of reasons. Sometimes, the plaintiffs encountered problems with suppliers and they had to revert to the defendant for alternative solutions. At other times, the customer changed the make of the picture tubes, necessitating a change in components at the plaintiffs' end. On other occasions, the defendant discovered defects which had to be rectified, when he did random testing of the components.

16. The plaintiffs claimed that the agreement provided that the components developed by the defendant would be sold exclusively and solely to the plaintiffs and their customers. Further, the defendant would not sell TV kits incorporating the components, to the plaintiffs' customers without the plaintiffs' consent. Neither would the defendant solicit any work/orders from the plaintiffs' customers without the latter's consent.

17. In June 2001, Tang ascertained from one of the plaintiffs' suppliers that the defendant had supplied components direct to IEP. At that time, IEP had an outstanding order of 75,000 units of chassis, with the plaintiffs. Efforts made by Tang to contact the defendant were fruitless, despite 20 or more attempts. The plaintiffs alleged they also discovered that the defendant had attempted to solicit one other of the plaintiffs' customers, an Iranian company called Silk Road Manufacturing (Silk Road), from whom the plaintiffs had secured a contract for a television mould in March 2000, followed by an order for 10,000 sets of chassis in December 2000.

18. The relationship between the plaintiffs and the defendant soured as a result of what the plaintiffs discovered in June-August 2001. The plaintiffs' advances to the defendant had ceased by February 2000.

19. The plaintiffs' solicitors made a demand on 6 February 2002 of the defendant for repayment of the balance of US$156,367.37 and S$110,000 owed on the advances made by the plaintiffs; the defendant did not comply with the demand.

The claim

20. Consequently, the plaintiffs commenced these proceedings against the defendant in April 2002, claiming the aforementioned two (2) sums, an account of profits made from sales of television components and kits to the plaintiffs' customers and to customers solicited by the defendant.

21. In the (lengthy) defence and counterclaim which he filed to the plaintiffs' statement of claim, the defendant alleged that:-

> (i) the agreement provided that the plaintiffs would bear the entire research and development (R& D) costs of the components;
>
> (ii) in consideration for (i), the parties agreed that the plaintiffs could sell the components to the plaintiffs' customers as well as to the parties' mutual customers;
>
> (iii) all intellectual property rights, including design of the components, would be retained by the defendant through DSM as his agent;
>
> (iv) the plaintiffs would arrange the logistics and bear the costs, of selling to the parties' mutual customers;
>
> (v) DSM would incorporate a development fee of about US$3.00 into each television set or components sold by DSM to the plaintiffs;
>
> (vi) all profits derived from sales to the parties' mutual customers would be shared equally between the plaintiffs and DSM.

22. The defendant asserted he was instrumental in introducing IEP (as well as Silk Road) to the plaintiffs. He contended that the plaintiffs lost IEP as a customer due to poor service. The defendant asserted he had never agreed that IEP would be the plaintiffs' exclusive customer, nor had he agreed that the plaintiffs were solely entitled to sell TV kits to the plaintiffs' customers and he could not, without the plaintiffs' consent or, that he was not permitted to solicit any work from the plaintiffs' customers relating to design, development and or sale of micro-processor ICs.

23. The defendant did not dispute the advances made to him by the plaintiffs save for three (3) amounts namely, S$20,000 (given in October 2000), US$31,367.36 (by way of a letter of credit in favour of Mitsubishi (Mitsubishi) in August 1999) and S$10,000 (given in February 2000). He contended however that the advances made by the plaintiffs were in any case set-off against discounts DSM had given (for micro-processors ICs) at the request of Tang, totalling US$177,456.52 (for which he furnished a breakdown).

24. The defendant alleged it was the plaintiffs who were in breach of the agreement by failing to provide funding for R&D after February 2000. Even so, he alleged that he continued to supply the plaintiffs with TV kits for the purpose of selling to IEP as well as to Silk Road.

25. The defendant counter-claimed against the plaintiffs for:-

> (i) discounts he had given to the plaintiffs on micro-

processors sold by DSM;

(ii) an account of profits derived from sales of TV kits/components the plaintiffs made from IEP and other customers;

(iii) failing to take delivery of components ordered by the plaintiffs under the plaintiffs' purchase order no. HH/366//10/100 dated 1 December 2000 and under the defendant's tax invoice D1-21003HH dated 29 January 2001;

(iv) the sum of US$300,000 for loss of development fees resulting from the aborted contracts between the plaintiffs and IEP as well Silk Road Manufacturing.

(v) the sum of US$43,775 (inclusive of 3% GST) for the cost of developing software, micro-processor and chassis, under DSM's offer sheet no. 0S2002HH dated 17 January 2000.

The defendant quantified his claim under item (ii) at US$460,198.85.

26. In its Reply and Defence to Counterclaim, the plaintiffs:-

(i) said it was at IEP's repeated requests that it was mutually agreed between Tang and the defendant that the price of components would be reduced so as to make the plaintiffs' price of TV kits more competitive with those manufactured by China and Korea. The defendant continued to receive his development fee;

(ii) averred that as there were no new components to be developed after February 2000, there was no need for further loans to be extended to the defendant for R & D;

(iii) contended that it was the defendant's delay in delivering components that caused the plaintiffs to be unable to comply with IEP's delivery schedule for television kits. The defendant then took advantage of the situation to approach IEP direct to solicit for orders of TV kits incorporating the components;

(iv) denied the various heads of the defendant's counterclaim.

The plaintiffs' case

27. I start my review by referring to the testimony of Tang (PW1), who, with his sister Tang Boon Ser (Shirley) were the plaintiffs' two (2) witnesses.

28. Tang (who is known to the defendant as Victor Tang) has had experience in special export business in electrical goods and in electronics since 1982. He exported Sony and Akai TV sets and radio-cassettes to African countries, India and Pakistan. However, those export sales comprised assembled sets, not what he and the defendant did under the agreement.

29. Cross-examined, Tang testified that he understood from the defendant that the plaintiffs' profit margin on each TV kit could be as high as US$10-$12. In reality however, the plaintiffs only made US$2 or less per kit, on top of all the commercial risks they had to bear, whilst the defendant, who was only responsible for the technical aspects, received a development fee of US$3.00 per kit regardless of what the plaintiffs made or lost.

30. Tang's attention was drawn to a draft agreement (2AB6-7) he had handed to the defendant sometime at end 1999 but which was back-dated to 12 May 1998. He explained that the plaintiffs' auditors had been chasing him to regularise the loans the company had made to the defendant; so his general manager drafted the document for discussion between the parties. However, the defendant refused to sign as the draft agreement contained a clause stating that the intellectual property arising out of the defendant's R&D work would belong to the plaintiffs. As a result, the plaintiffs stopped their advances to him in February 2000. When he testified, the defendant's explanation for not signing was that the terms of the draft did not reflect what the parties had agreed. Tang said he had also chased the defendant to sign a loan agreement to no avail. He agreed with counsel for the defendant that the micro-processors for the TV sets had to be purchased from the defendant/DSM as only the defendant had access to the chip from Mitsubishi. Tang pointed out that the plaintiffs were totally dependent on the defendant as, if there was even one (1) component missing, the entire TV kit would not work.

31. As for the three (3) advances made by the plaintiffs which the defendant disputed, Tang's testimony was as follows:-

(i) $20,000 paid to the defendant in October 1998

The defendant had called him (frequently) to say he (the defendant) needed the money urgently. Tang instructed Shirley to arrange to pay the amount to the defendant. Shirley then had a sum of US$20,000/- which she was changing into Singapore dollars. Shirley in turn instructed the plaintiffs' production manager John Khoo Kim Huat (Khoo) to change the foreign into local currency (S$33,720) with a moneychanger and to deliver S$20,000 therefrom to the defendant. Shirley and Khoo's affidavit corroborated Tang's evidence in this regard. Khoo deposed that he had been instructed to obtain the defendant's signature to the plaintiffs' payment voucher when he handed over the S$20,000. However, the defendant had refused to sign the payment voucher on 2 October 1998. After Khoo had telephoned Shirley (who then checked with Tang), he was told to hand over the cash without the need for the defendant to sign the payment voucher, which instruction Khoo complied with. This item is no longer in issue as at the trial, the defendant conceded the claim. Consequently, by agreement between the parties, Khoo was not called to testify.

(ii) *sum of US$31,367.36 paid on 5 August 1999*

Tang explained that this advance related to the first order from IEP. The defendant had ordered key components from Mitsubishi for which he did not pay. Instead, the defendant represented to Mitsubishi that the plaintiffs would make payment, by a fax dated 18 June 1999, resulting in Mitsubishi amending their invoice to substitute the plaintiffs' name for DSM's. Mitsubishi then looked to the plaintiffs for payment. When Tang called the defendant on Mitsubishi's invoice to the plaintiffs, he was told that the defendant was cash-strapped and the plaintiffs were requested to settle the said

invoice on the defendant's behalf. Consequently, the plaintiffs treated their payment to Mitsubishi as a loan to the defendant.

(iii) cash of $10,000/- handed to the defendant in February 2000

This amount was personally handed over by Tang to the defendant, at the plaintiffs' office. Tang testified he remembered it clearly as it was the only time he had handed cash to the defendant. Tang pointed out that the defendant's contention that the plaintiffs' advances were investments in R&D is not sustainable because the defendant did not work exclusively for the plaintiffs. Moreover, the plaintiffs' agreement was with the defendant personally, not with DSM or any of his other companies. Further, DSM had design contracts with other companies (such as Toshiba Electronics).

The defendant's counterclaim

(a) discounts

32. Tang denied the defendant/DSM had given discounts to the plaintiffs. On a few occasions when the defendant indicated to Tang that he wanted to increase the price of micro-processor chips, Tang requested him not to do so or, to moderate the increase so as not to affect the plaintiffs' margin since, their prices to their customers were fixed.

33. Similarly, Tang opined that the defendant's claim for account of profits from the plaintiffs was baseless. Indeed, it was the defendant who had to account to the plaintiffs for profits he had made from selling television kits to the plaintiffs' customers.

(b) loss of development fees

34. The defendant had claimed US$210,000 and US$90,000 for loss of the orders of IEP and Silk Road for 70,000 and 30,000 television kits respectively. Tang also questioned the bona fides of this claim; the defendant had taken away IEP's business from the plaintiffs when there was an outstanding order of 75,000 TV kits. As the letter of credit never came from IEP for this order, the plaintiffs did not issue a purchase order for nor did the defendant develop, any kits for this order. The same explanation applied to Silk Road; their order for 30,000 kits was never formally placed with the plaintiffs and in turn with the defendant because, the company's letter of credit (which covered an earlier completed order of 10,000 sets) had lapsed by then. Similarly, the plaintiffs had never placed any order with the defendant as shown in his offer sheet no. 0S2002HH. Indeed, Tang saw it for the first time in court. It was also unlike the defendant not to have asked for advance payment from the plaintiffs for this order. However, when he was cross-examined, it was put to Tang that the plaintiffs had actually made an advance payment of US$25,500/- (see 2AB 250) on or about 18 February 2000, towards the aforesaid offer sheet.

(c) account of profits

35. Tang pointed that that the profits due to the defendant had already been disbursed between the parties and nothing more was due to the defendant, over and above the US$3/- he charged and which the plaintiffs paid, for each component.

The defendant's case

36. I move now to consider the defendant's testimony. Besides himself, the defendant called another witness, Ahmed Ibrahim (Ibrahim) from IEP, for his case. By agreement between the parties,

the calling of defendant's third witness (Jeon Young Sek), was dispensed with, as the plaintiffs had conceded the only fact stated in his affidavit of evidence-in-chief namely, that he introduced IEP to the defendant sometime in July 1998.

37. In his written testimony (para 6), the defendant set out his own version of the terms of the verbal agreement he had reached with Tang, these were:-

> (i) the plaintiffs would provide the defendant with R&D funding of S$50,000-$60,000 per month;
>
> (ii) in exchange for funding, the plaintiffs would be allowed to sell the TV kits to the plaintiffs'/the parties' customers;
>
> (iii) the plaintiffs would purchase components for the TV kits based on a list provided by the defendant;
>
> (iv) DSM would charge a development fee of US$3/- per kit to cover DSM's operating costs such as staff salaries and other overheads;
>
> (v) the plaintiffs would be responsible for sale logistics including packing, storage and shipping;
>
> (vi) profits from sales of TV kits/components would be shared equally between the plaintiffs and DSM;
>
> (vii) intellectual property rights arising from the R&D would remain with the defendant.

38. The defendant claimed that he, together with 3-4 other engineers often worked 12-13 hours per day developing the micro-processors for the TV kits. He acknowledged that the plaintiffs made several payments to him/his various companies some of which the plaintiffs requested him to repay immediately. The defendant listed out (in para 11 of his affidavit) the dates and amounts he/his companies had received from the plaintiffs, between 8 May 1998 until 25 May 2000. He added that it was agreed between him and Tang that two (2) payments made by the plaintiffs namely $60,000 (paid to Duplex in March 1999) and $51,890.19 (paid to DSM in May 1999) would be set-off against DSM's invoice no. IC5T90004466 for US$101,890.18. The set-offs formed part of the agreed facts between the parties before trial commenced. There is therefore no need to dwell on the items further.

39. Other facts agreed between the parties before trial commenced included the following:-

> (i) the plaintiffs' purchase order no. HH/366/PO/10/00 dated 1 December 2000 was cancelled on the invitation of the defendant;
>
> (ii) DSM issued a credit note no. CN-21003HH dated 19 June 2001 for the sum of U$166,342.90 in favour of the plaintiffs for the plaintiffs' cancelled purchase order;
>
> (iii) the defendant/DSM did not issue any pro forma invoice for the plaintiffs' oral order of an additional 30,000 units of

> the same components ordered in their cancelled purchase order.

40. I turn now to the defendant's testimony on the two (2) advances of the plaintiffs which remain disputed:-

(i) $10,000 cash in February 2000

In his written testimony, the defendant merely deposed that to the best of his knowledge and recollection, the plaintiffs never made this payment either to him or to DSM. Cross-examined (N/E17), he maintained he could not recall receiving the money at Tang's office; he had 'no idea'. It was pointed out to the defendant by counsel for the plaintiffs that, after disputing (in his pleadings and affidavit evidence) receiving cash of $20,000 from the plaintiffs in October 1998, the defendant did a *volte face* and instructed his lawyers to admit to the claim in October 2002. Consequently, counsel questioned the defendant whether the same could be said of this loan - it was extended to the defendant but he had no recollection of it. No satisfactory answer was given by the defendant in this regard.

(ii) payment to Mitsubishi of US$31,367.36

In para 15 of his affidavit, the defendant had this to say of the claim:-

> I confirm that the plaintiffs had paid for the electronic components on DSM's behalf. However this formed part of the plaintiffs' funding of the R&D works. Further or in the alternative, I am liable to pay the said sum in light of my defence of set-off and counterclaim a set out below, I will elaborate on them in greater detail below.

Such a confusing statement is no answer to the plaintiffs' claim on its merits.

41. Although he repeatedly maintained that the sums paid to him periodically by the plaintiffs were for R&D funding (save for 6 items), the defendant testified that he nevertheless returned US$331,890.18 and S$10,000 to the plaintiffs, because Tang requested him to do so.

42. The defendant admitted under cross-examination that he charged the plaintiffs more than US$3/- per TV kit. In this regard, reference was made to the plaintiffs' purchase order no. HH/PO/10/00 dated 20 October 2000 (1AB197) wherein the defendant charged the plaintiffs US$3.65 per chip whereas his purchase price from Mitsubishi was US$2.75 (see 3AB18). He admitted his profit in actual fact was about US$4.86 per TV kit. However, he denied counsel's suggestion that his profits from the plaintiffs were between US$663,390 and US$799,890 (see 1AB197A) from such mark-ups. He defended his mark-up on the basis that heavy investment was required for his/his company's R&D. He also asserted that the aforesaid purchase order was for a micro-processor different from others he had developed for the plaintiffs earlier. No evidence was produced to substantiate this contention. Based on US$3 per kit, the defendant conceded his profit could be about US$409,500, based on the total number (136,500) of micro-processors he supplied to the plaintiffs throughout their relationship. However, the defendant pointed out that the sum had to be divided by 37 months, which meant the monthly profit was only $11,067.57. The figure of US$409,500 should be contrasted with the plaintiffs' profit which, calculated at US$2/- per kit based on Tang's and Shirley's unchallenged testimony, would amount to US$273,000; this approximates ? of the profits made by the defendant, who unlike the plaintiffs, did not have to bear any of the attendant commercial risks.

43. No documents were produced in court to show that the defendant had even once asked the plaintiffs for an account of his 50% share of profits before he filed his counterclaim; neither was it stated in his affidavit of evidence-in-chief. Even so, the defendant insisted he had repeatedly asked Tang orally but to no avail; Tang's excuse to him was that the profits were not high, the plaintiffs were in financial difficulties and, the profits were needed to cover the plaintiffs' expenses.

44. The defendant did not deny selling micro-processors direct to IEP. This was also confirmed by IEP's representative (Ibrahim) who testified. However, he denied it was part of the agreement between himself and the plaintiffs that he could not sell direct to IEP or to any of the plaintiffs' other customers.

45. Although he acknowledged cancelling the plaintiffs' purchase order HH366/PO/10/00 by DSM's credit note no. 21003HH, the defendant contended that DSM was still keeping the goods under the cancelled purchase order. He denied he cancelled the plaintiffs' order because he was unable to fulfil the order, due to these remarks in the said credit note:

'The good are not able to be delivery'

The defendant claimed to have placed orders with suppliers for components based on the cancelled purchase order, referring to his purchase order to Mitsubishi dated 23 October 2000 (at 3AB18). However, counsel for the plaintiffs pointed out that the plaintiffs' said purchase order came later (1 December 2000). The defendant explained the discrepancy by saying (N/E 47) that was how business was done – he would normally pre-order as he was aware of the plaintiffs' requirements, despite the financial risks involved. Time was also needed to source for what they wanted. For the same reason, the defendant pre-ordered components for the plaintiffs' tentative order (which did not materialise), of 30,000 TV kits from Silk Road. Such pre-orders, placed months in advance of the plaintiffs' purchase orders (see 3AB9) resulted in his claim of US$460,198.85. I did not find the defendant's explanation at all convincing not to mention that before the plaintiffs' writ of summons was filed, he had never once broached this claim with them.

46. In relation to his alleged discounts to the plaintiffs, for which he counter-claimed US$177,456.52, the defendant admitted under cross-examination (N/E 82) that his invoices did not reflect such discounts; neither were there any other documents which recorded the discounts, nor was there any agreement between himself and the plaintiffs that, the discounts were to be repaid to him.

47. It was not easy to understand the defendant's evidence which was translated from the Korean language; his attempts to speak in English did not help. His recollection of events and dates was also poor. At times, his oral testimony contradicted either his own affidavit or the documents in court, as exemplified in the preceding paragraph; in those instances he would resort to oral orders from the plaintiffs or verbal agreements reached with Tang, to explain the discrepancy. At other times, his oral evidence was something new; it was either not pleaded in his defence/counterclaim or not reflected in his written testimony. Further, both from his pleadings and from his testimony (oral and written), it was clear that the defendant made and could see, no distinction between himself and his companies (including DSM) when it came to advances taken from and dealings with, the plaintiffs. The advances he took were either for his own purposes or for his company, depending on the need.

48. As earlier stated (para 36), the defendant's (only) other witness was Ibrahim (DW2), the custom clearance department manage of IEP. Ibrahim corroborated the defendant's claim that the defendant was instrumental in introducing the plaintiffs to IEP. He also supported the defendant's claim that the plaintiffs lost IEP as a customer because of poor service. Ibrahim complained there

were late shipments or partial deliveries from the plaintiffs, resulting in the stoppage of production of TV sets by IEP and causing the latter to lose potential sales of approximately 75,000 TV sets in the second half of 2000. Further, due to inaccurate shipping documents, IEP had to pay double (import) taxes in many instances, referring to specific bills of lading as examples. Notwithstanding IEP's complaints, Ibrahim alleged that the plaintiffs did nothing to address the problems. As a result, IEP decided to cease business with the plaintiffs and instead dealt with DSM direct, with whose services IEP was happy. Under cross-examination, Ibrahim agreed that while he was aware of the delay in the plaintiffs' shipment, he did not know the reasons therefor nor who was responsible either for the delay or the short-shipments. Consequently, his testimony did not help to advance the defendant's case.

49. It would be appropriate at this juncture to refer to the plaintiffs' version of the reasons for the delay and short shipments to IEP. Tang had testified (N/E22) it was impossible to fulfil IEP's order within the 45 days stipulated under their letters of credit, because the plaintiffs had to buy components from 20-50 suppliers, bearing in mind they had to depend on the defendant to first come up with the buying list. In such cases, the plaintiffs would ask IEP to extend the expiry dates of the letters of credit issued to the plaintiffs, at the latter's cost. If for one example, IEP decided to change the picture tube, it necessitated the plaintiffs starting all over again to source for parts, causing an inevitable delay. Further, it was impossible to count each and every component packed for shipment. If IEP complained of short shipment of any parts, the plaintiffs accepted the complaint at face value and would ship the short-supplied components (at their own cost) to IEP subsequently, resulting again in delay.

50. Shirley also dealt with the issue of delay in her testimony. In her affidavit (paras 30-50), she deposed that the fault largely lay with the defendant. She identified three (3) purchase orders of the plaintiffs namely, HH55/PO/3/2000, HH65/PO/3/200 and HH/86/PO/3/2000 as examples. The defendant was paid in advance as he had requested but, although he issued an invoice (0005/1042/HHPL) and delivery order (0005/1042/HHPL) giving a delivery date of 6 May 2000, he did not meet the deadline. Instead, deliveries for these orders were only made on 19 May, 31 May and 12 July 2000. Indeed for one micro-processor DSM 225-050SP, the 10,000 units ordered were not delivered until October 2000, after confirmation by IEP on 24 July 2000; the defendant did not deny this allegation.

51. Shirley alleged that at other times, the defendant made mistakes either in the components the plaintiffs needed to procure or, in the pricing. She said the resultant to-ing and fro-ing between the plaintiffs, the defendant and suppliers was very time-consuming. Further, 1999-2000 was a supplier's market which meant that changes to components list caused further delays in getting the components from suppliers, who were all overloaded and could not cope, with orders. For all the problems the plaintiffs encountered with the components list, the plaintiffs' expected profit of US$5/- per chassis never materialised, it was less than US$2/-.

52. With regard to IEP's complaint of paying double import duties, Shirley explained that because of delay on the part of the defendant, the plaintiffs decided on one occasion to ship the bulk of the components first (for an order for 18,000 sets), before expiry of IEP's letter of credit, whilst waiting for the remaining items to be supplied. She understood from IEP subsequently that the plaintiffs' shipment posed problems with the Egyptian customs authorities. She blamed the defendant and said IEP was aware that the fault did not lie with the plaintiffs.

53. Shirley deposed in her affidavit that the defendant lost interest in the joint business with the plaintiffs and it became increasingly difficult to contact him; the defendant would push responsibilities to his engineer H W Lee. He would not assist the plaintiffs even where he or his engineer committed errors although he continued to demand and to receive, advance payment from them for his purchase of components made on the plaintiffs' behalf.

The findings

54. I have set out in the preceding paragraphs the sum total of the testimony adduced from the four (4) witnesses who testified. Arising therefrom, I have arrived at the findings set out in the following paragraphs. I start by saying that I much prefer the testimony of the plaintiffs as given by the two (2) Tang siblings, as opposed to the defendant's. I have no doubt that Tang and his sister Shirley were truthful in their testimony. Earlier (para 47), I had made certain observations on the defendant's testimony. I now add one further adverse comment to those observations -- the defendant did not come across as either convincing or truthful.

The plaintiffs claim

55. On a preponderance of the evidence adduced, I find that the plaintiffs have discharged the burden and proved that, the advances they made to the defendant and or DSM from time to time were not and could not have been for purposes of R&D. Details of the loans were set out in Shirley's affidavit of evidence-in-chief. Counsel's cross-examination of her did not cast doubt on any of the figures. In reality, the plaintiffs made the loans to accede to the defendant's demand that they not he, bear the cost of components the defendant had to procure in order to develop the micro-processor the plaintiffs needed for the TV kits, well before the defendant invoiced them. The monies advanced could not have been for R&D as the defendant claimed since, he repaid a large part thereof, which evidence he did not deny. The defendant's explanation that he refunded the loans at Tang's request is incredible. If indeed they were payments for R&D, he was not at all obliged to repay the sums, regardless of what demands the plaintiffs/Tang made and the reasons therefor.

56. On the first disputed loan, the documents (including the defendant's own fax dated 18 June 1999 to Mitsubishi at 1AB47) proved that the plaintiffs paid on the defendant's behalf in August 1999, the sum of US$31,367.36 which he owed to Mitsubishi. In any event, the defendant did not put forward any credible defence (save on the question of set-off) to this claim.

57. As for the second disputed loan, I also find on a balance of probabilities, that Tang did hand cash of S$10,000 to the defendant in February 2000; again the defendant's testimony (that he could not recall this loan) was unconvincing. Consequently, I award the plaintiffs judgment for the total outstanding sums of US$156,367.37 and S$110,000, with interest at 6% from date of the writ (2 April 2002) until date of this judgment.

58. Turning next to the plaintiffs' other claim for an account of profits, I entertain little doubt that the defendant deliberately went out of his way to cut them out from further dealings with IEP (which he had introduced to the plaintiffs), resulting in their losing the company's outstanding order for 75,000 units of TV kits, which he then supplied.

59. Where IEP is concerned, it would not matter whether it was the understanding between the parties that the defendant would not approach the plaintiffs' customers direct. I find that the defendant took away the plaintiffs' order of 75,000 TV kits units. It is also my view that it must be an implied term in the agreement between the parties based on *The Moorcock* test that, the defendant would not approach let alone 'poach', the plaintiffs' customers. What the defendant did was reprehensible, his conduct reflecting him as a person without morals or scruples. Accordingly, the defendant must account to the plaintiffs for the profits he made in fulfilling IEP's order(s) and orders placed by Silk Road Manufacturing, if any. The Registrar shall hold an inquiry in that regard and the costs of such inquiry shall be reserved to the Registrar.

The defendant's counterclaim

60. The defendant's claim for discounts is clearly unsustainable, in the light of his own admissions under cross-examination, as set out in para 46 above.

61. As for the defendant's other claims:-

> (i) share of profits arising from plaintiffs' sale of TV kits — apart from his bare assertion (which I do not believe), the defendant had no evidence to support this claim. The parties' course of dealings certainly did not suggest any profit-sharing arrangements, bearing in mind that the agreement did not constitute a partnership;
>
> (ii) loss of US$300,000 development fees — this claim is completely unfounded. The defendant did not produce one iota of evidence in support thereof. It was Tang's testimony which I accept, that if the plaintiffs did not fulfil a customer's order, then no development charge was payable to the defendant. Considering it was his own conduct which caused the plaintiffs to lose the outstanding order of 75,000 (not 70,000) TV kits from IEP, the defendant had the gall to claim US$210,000 relating to the unfulfilled order. Similarly, his claim for US$90,000 relating to Silk Road's purported order is also dismissed;
>
> (iii) claim for US$460,198.85 for cost of components ordered by the plaintiffs — it was part of the agreed facts between the parties when trial commenced, that the plaintiffs' purchase order no. HH/366/PO/10/00 had been cancelled at the invitation of the defendant and the defendant then issued credit note no. CN21003HH in the plaintiffs' favour for the cancelled order. How then can he mount this claim? The fact that the defendant's closing submissions did not address this claim reinforces my finding.
>
> (iv) DSM's offer sheet no. 0S2002HH for US$43,775 — this claim is equally unmeritorious and is hereby dismissed. I believe Tang's testimony that he/the plaintiffs had not seen this document before the trial; it was concocted by the defendant. I had pointed out to counsel for the defendant (N/E 85) that it was illogical to suggest to Tang (para 21 *supra*) that the plaintiffs had made a second part-payment of US$25,500 towards this offer sheet, when the plaintiffs never made a first part-payment at all. Apart from counsel's suggestion to Tang, no evidence was adduced from the defendant to connect DSM's invoice DI-2008HH (at 2AB250) for US$25,500 to this offer sheet. Further, no evidence was tendered to prove the plaintiffs' payment of the invoice.

In contrast to the plaintiffs, the defendant did not, prior to the commencement of these proceedings, make any demand of the plaintiffs for any item he now counterclaims. Such omission lends credence to my belief that his claims are false.

Conclusion

62. Accordingly, there will be judgment for the plaintiffs as claimed with costs to be taxed on the standard basis, unless otherwise agreed. The defendant's counterclaim is dismissed with costs.

Sgd:

LAI SIU CHIU

JUDGE