Chun Cheng Fishery Enterprise Pte Ltd *v* Chuang Hern Hsiung and another
[2011] SGHC 167

Case Number	: Suit No 763 of 2005 (Registrar's Appeal Nos 422 and 423 of 2010)
Decision Date	: 11 July 2011
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Tan Cheng Han SC (TSMP Law Corporation) and Lim Kim Hong (Kim & Co) for the plaintiff; Lok Vi Ming SC and Vanessa Yong (Rodyk & Davidson LLP) for the defendants.
Parties	: Chun Cheng Fishery Enterprise Pte Ltd — Chuang Hern Hsiung and another

Damages – *Assessment*

11 July 2011

Andrew Ang J:

Introduction

1 This matter concerned two appeals – Registrar's Appeal No 422 of 2010 (by the plaintiff) ("RA 422") and Registrar's Appeal No 423 of 2010 (by the defendants) ("RA 423") against the assessment of damages by the Assistant Registrar ("AR") in Suit No 763 of 2005.

2 The plaintiff, Chun Cheng Fishery Enterprise Pte Ltd, is a company incorporated in Singapore. It is, and was at all material times, carrying on business, *inter alia*, as importers and exporters of marine products. The first defendant, Chuang Hern Hsiung, was employed as the Group President and Chief Executive Officer of the plaintiff while the second defendant, Chuang Hsin-Yi, the first defendant's eldest son, was the Vice-President of Development of the plaintiff. Both were directors of Chun Cheng USA ("CCUSA"), a wholly-owned subsidiary of the plaintiff.

3 On 21 October 2005, the plaintiff commenced an action against the first and second defendants in Suit No 763 of 2005 for, *inter alia*, damages for the defendants' breaches of contractual and fiduciary duties, damages for conspiracy and for unlawful interference in the plaintiff's business and/or contracts. Interlocutory judgment was given in favour of the plaintiff with damages to be assessed by the Registrar. Both defendants appealed to the Court of Appeal against the trial judge's decision. The appeals were dismissed with costs. However, the Court of Appeal directed that the damages payable to the plaintiff be confined to those caused by the acts of the defendants from 1 May 2005 onwards.

4 The parties subsequently appeared before the AR for the assessment of damages. Since they had agreed partially on certain items of the plaintiff's claim, the remaining items were as follows:

(a)	Professional fees of TecBiz Frisman Pte Ltd	S$62,710.30
(b)	Professional fees of Fourwin Co Ltd	S$496,530.46
(c)	Professional fees of Chio Lim & Associates	S$311,153.43

(d)	Loss of revenue/profit arising from the suspension/reduction of credit facilities	S$2,102,000
(e)	Loss of overstocking mahi mahi	S$513,000

The AR awarded the plaintiff the following:

(a)	Professional fees of TecBiz Frisman Pte Ltd	S$62,710.30
(b)	Professional fees of Fourwin Co Ltd	S$99,306.09 Disbursements at S$4,759.57
(c)	Professional fees of Chio Lim & Associates	S$278,013.13*
(d)	Loss of revenue/profit arising from the suspension/reduction of credit facilities	S$722,815*
(e)	Loss of overstocking mahi mahi	S$318,080.44
* These figures were corrections to figures in the AR's Judgment as agreed between the parties and notified to the AR at a hearing on 29 November 2010.		

5 In RA 422, the plaintiff appealed against the AR's award of $722,815 for loss of revenue/profit arising from the suspension/reduction of credit facilities. This was the only head of claim the plaintiff appealed against. The defendants appealed in RA 423 against the AR's award in respect of all the items of claim listed above.

6 At the hearing before me, counsel for the defendants stated that they were proceeding only with items (b), (d) and (e) and that the defendants had already paid to the plaintiff the remaining items claimed in (a) and (c).

7 I affirmed the AR's award with regard to item (b) quantified at S$99,306.09 but varied the award with regard to items (d) and (e). In respect of item (d), I awarded the plaintiff the sum of US$435,111 which, converted at an agreed exchange rate of S$1.51 to US$1, worked out to S$657,017.61. In respect of item (e), I awarded the plaintiff US$16,016 which worked out to S$24,184.16. The plaintiff has appealed against my decision in respect of both items (d) and (e) while the defendants' appeal is in respect of item (d). The defendants did not appeal against my affirmation of the AR's award in respect of item (b). Accordingly, I need only to deal with items (d) and (e) in these grounds.

Loss of revenue from the suspension/reduction of credit facilities

8 With a view to facilitating a better understanding of the issues under this head of damages, it would perhaps be useful to undertake a brief history of the events relating to the suspension or reduction of banking facilities and the methodology employed by the plaintiff's witness Chee Yoh Chuang ("Chee") in computing the plaintiff's loss under this head.

Background

9 Prior to 6 July 2005, the plaintiff had credit facilities from eight banks amounting to US$12.05m:

		Credit Facilities (US$ '000)
1	Bank of Taiwan, Singapore Branch ("BOT")	2,500
2	Chang Hwa Bank, Singapore Branch ("CHB")	600
3	Chiao Tung Bank, Singapore Branch ("CTB")	1,000
4	Citibank NA, Singapore Branch (CB")	1,000
5	DBS Bank Ltd ("DBS")	2,500
6	Standard Chartered Bank ("SCB")	1,500
7	UFJ Bank Ltd (UFJ")	1,250
8	United Overseas Bank Ltd ("UOB")	1,700
	Total credit facilities:	**12,050**

10 Between 6 July 2005 and 16 July 2005, the plaintiff's credit facilities were substantially reduced to US$8.8m as a result of various damaging rumours concerning the plaintiff and its chairman Lin Chao Feng ("Lin"). A conference was held with the plaintiff's bankers on 19 July 2005 to dispel the rumours. Chee, nominee of the creditor banks, was appointed on 22 July 2005 as a Special Accountant to monitor/report on the financial position of the plaintiff.

11 Meanwhile, the banks suspended any further utilisation of the facilities. In order to avoid the business of the plaintiff grinding to a halt, the plaintiff requested a moratorium from the banks to allow the plaintiff to put forward a plan to reduce/restructure the loans in an orderly manner.

12 The banks agreed to a moratorium until November 2005 but on the basis that the plaintiff was able to utilise or draw down on each bank's facilities only as much as it repaid that bank under maturing trust receipts. Consequently, from July to November 2005 (the moratorium period), the plaintiff was unable to conduct its business with the eight bankers in the usual manner. Instead, the plaintiff had to repay a dollar in order to utilise a dollar of the facilities, while trying to ensure that the trust receipts were not overdue.

13 Subsequent to the moratorium period, BOT, CTB, CHB and CB terminated their facilities and recalled loans granted to the plaintiff. Thus the plaintiff's credit facilities were further reduced to US$6.95m. The remaining bankers, DBS, UOB, SCB and UFJ, normalised their banking relationship with the plaintiff in December 2005. The severe reduction of credit facilities by US$5.1m (from US$12.05m to US$6.95m) caused the plaintiff to suffer a loss of business opportunities.

14 The trial judge held the defendants liable, *inter alia*, for conspiracy to injure the plaintiff and unlawful interference in the plaintiff's business thereby causing loss and damage to the plaintiff. In particular:

(a) the first defendant had failed to take reasonable steps to clarify with the plaintiff's bankers the rumours pertaining to Lin;

(b) the first defendant had caused rumours to be passed to the bankers, which shook the bankers' confidence in the plaintiff;

(c) the first defendant made misrepresentations to UOB about the plaintiff; and

(d) the first defendant restricted the cash flow of the plaintiff by refusing to sign or accept offers of credit from the plaintiff's bankers.

Methodology

15 The task of the plaintiff's expert, Chee, was to determine how much revenue/profit was lost as a result of the termination of the banking facilities. The intricacies of the methodology employed need not be described in detail as the experts on both sides agreed that the methodology was appropriate. However, they differed on the inputs to be used in the application of such methodology, in particular:

(a) the "quantification period" for the computation of damages (*ie*, the period of time which the plaintiff would reasonably have required to obtain new credit facilities to make up for those which had been terminated as a result of the defendants' wrongful acts); and

(b) the gross profit margin ("GPM") which would have been derived from usage of the credit facilities had they not been terminated.

16 The plaintiff's historical percentage usage of credit facilities worked out to be 74.2%. Applying that historical rate of usage to the reduction in credit facilities of US$5.1m, the amount of facilities that the plaintiff would likely have used ("A") out of the amount reduced would be 74.2% of US$5.1m. Based on the plaintiff's records, the tenor of the trust receipt facilities offered by the banks ranged from 120 to 150 days. The historical average trust receipt turnover (*ie*, the average number of days taken to settle each trust receipt in full) worked out to be 103 days. The total number of days in a year divided by the average trust receipt turnover days yielded the number of times ("B") the plaintiff would have been able to turn over the facilities in a year.

17 The product of A and B (*ie*, A x B) yielded an estimate of the value of additional purchases that the plaintiff could have made in a year had the credit facilities of US$5.1m not been terminated.

18 The gross profit of the plaintiff for each of the financial years 2003 through 2006 was then ascertained from the audited financial statements using the formula:

Gross Profit = Revenue – Cost of sales.

The GPM was then obtained by dividing the Gross Profit by the revenue. After some adjustment for consistency to take into account an accounting change in the classification of "carriage outwards" (*ie*, freight charges), the historical GPM for the financial years 2003 through 2006 were as follows:

	FY 2003	**FY 2004**	**FY 2005**	**FY 2006**
GPM	19%	14.3%	10.5%	15.5%

Chee used the figure of 15.5% in his computations.

19 To determine the increase in revenue from additional sales had the banking facilities not been

cancelled, the potential additional purchases were re-grossed using the GPM of 15.5% following the formula:

$$\text{Additional revenue} = \text{Additional purchases} \times \frac{100}{(100 - 15.5)}$$

$$\text{Therefore additional revenue} = A \times B \times \frac{100}{(100 - 15.5)}$$

The GPM was then applied to the increase in revenue to arrive at the increase in gross profit. Finally, an adjustment was made to the profit estimate by deducting variable expenses that would have increased with the increase in sales but were not included under the cost of sales.

20 The resultant figure represented the additional revenue/profit that the plaintiff would have obtained in a year had the credit facilities not been reduced. The plaintiff's loss of revenue/profit was then worked out depending on how long it ought reasonably to have taken the plaintiff to obtain new credit facilities to make up for those which had been terminated.

The plaintiff's appeal

21 As stated earlier, item (d) was the only head of claim that the plaintiff appealed against. The first ground of appeal was that the AR had incorrectly applied a discount for income tax with respect to the damages awarded for 2005. I agreed with the plaintiff's counsel that as the plaintiff would have made a net loss in 2005, even with the benefit of the award, no discount for income tax ought to have been applied to the damages for 2005.

22 Next, the plaintiff contended that the "quantification period" allowed by the AR for the computation of damages was too short. This was the period which the plaintiff would reasonably have required to obtain new credit facilities to make up for those banking facilities which had been terminated as a result of the defendants' wrongful acts. Obviously, the longer the quantification period, the greater the damages would be.

23 The plaintiff's expert was of the view that the quantification period should be from October 2005 to December 2006 while the defendants' expert was of the view that it should be for only three months commencing 1 December 2005 to end February 2006. The AR held that the plaintiff should have found its feet within six months from the dismissal of the defendants.

24 Counsel for the plaintiff made three main points in support of the longer period of 15 months from October 2005 to December 2006. First, he pointed out that the Special Accountant was still in place as required by DBS right up to early 2007. Second, the trial judge had allowed interest in respect of the professional fees of the Special Accountant for the period July 2005 to December 2006. That, according to the plaintiff's counsel, clearly indicated that it was necessary for the Special Accountant to be in place until the end of 2006. He went further to conclude that the banks were right to be concerned about the financial position of the plaintiff and that the Special Accountant was rightly in place till 2006. Third, the plaintiff's counsel submitted that with the continued appointment of the Special Accountant, it was not reasonable to expect the plaintiff to find new bankers. Moreover, it was a little "rich" for the defendants to place the plaintiff in a position that the latter should never have been in and then argue that the plaintiff could have done better. (I should immediately say that this last point, though attractive at first blush, sounded like an argument against the duty to mitigate damages. That cannot be right.)

25 Counsel for the defendants argued that the plaintiff's revenue loss was not caused by the

reduction/termination of credit facilities but by the collapse in fish prices. He went so far as to suggest that if the plaintiff had been able to enjoy the same level of credit facilities as before the reduction/termination and had bought more fish, it would probably have incurred greater loss in the second half of 2005. Obviously, this was pure conjecture and he was unable to back it up.

26 Counsel for the defendants also argued that the evidence showed that the plaintiff had done woefully little to secure new facilities, apart from approaching three banks following the defendants' dismissal. With respect to two of the banks (*viz*, OCBC and RHB), there was no follow up at all. Counsel for the defendants further pointed out that not only did the plaintiff fail to secure fresh facilities, it was so inept that it further lost facilities in subsequent years.

27 On the quantification period, counsel for the defendants argued that as the dismissal took place on 11 July 2005, the six-month period allowed by the AR commencing on that date should end on 11 January 2006 and not at the end of February 2006.

28 I was inclined to share the AR's view that six months was reasonably sufficient for the plaintiff to have secured new credit facilities to make up for those which had been terminated but was of the view that the six-month period should be from November 2005 when the facilities were terminated. The plaintiff's failure to obtain new credit facilities appeared to have been due to a lack of serious effort on its part. I did not think that just because, as trial judge, I had allowed interest on the Special Accountant's professional fees for the period July 2005 to December 2006, I necessarily had to agree that the plaintiff ought to be allowed time up to December 2006 to find new credit facilities. Rightly or wrongly, DBS had required the Special Accountant to remain until December 2006. The plaintiff had little choice but to comply. In those circumstances, it was therefore right to allow the plaintiff interest on the fees it incurred *vis-a-vis* the Special Accountant.

29 In the face of the defendants' submissions arguing for a shorter quantification period than that sought by the plaintiff and my inclination to agree therewith, the plaintiff's counsel asked for at least a period of six months from November 2005 to April 2006, on the basis that the termination of facilities took place in November 2005 and not on 11 July 2005 when the defendants were dismissed. The plaintiff's counsel later asked that the period be from October 2005 to April 2006 but this was met with objection from the defendants' counsel who pointed out that the period the plaintiff's counsel had earlier asked for was six months and not seven. I accordingly allowed six months (from November 2005 to April 2006).

30 Another area of contention was the GPM to be applied. The AR had accepted the plaintiff's expert, Chee's adoption of a GPM of 15.5%. The defendants' counsel pointed out (without demurrer by the plaintiff's counsel) that the historical GPM was not 15.5%. I accepted that the average GPM based on figures in Chee's report (at para 8.2.6) was 14.825% (*ie*, 19% + 14.3% + 10.5% +15.5% divided by 4). Accordingly, I allowed a GPM of 14.825% to be used in the computation of the loss of revenue.

Loss from overstocking "mahi mahi"

31 Before the AR, the plaintiff claimed S$513,000 as the loss suffered due to the deliberate failure of the defendants, in the face of a falling market, to sell the overstocked mahi mahi in CCUSA from 1 May 2005 despite clear instructions from Lin, Chairman of the plaintiff company, to do so even if it was at a loss. The defendants contended, *inter alia*, that:

(a) the overstocking of mahi mahi in CCUSA had to be excluded from the assessment of damages as the overstock resulted from purchase of mahi mahi made prior to 1 May 2005;

(b) it was unreasonable to expect the defendants to sell the whole mahi mahi stock within days or even a month;

(c) the period of assessment ought to end on 11 July 2005 when the defendants were dismissed since they could no longer sell the mahi mahi thereafter.

32 The AR emphasised that the Court of Appeal did not overturn the trial judge's findings of fact – that the defendants' failure to heed Lin's instructions resulted in the overstocking of mahi mahi and that Lin was prepared to sell the mahi mahi even at a loss. The Court of Appeal, however, had ordered that the inquiry into damages to be assessed was to be confined to the acts of the defendants from 1 May 2005 onwards. The defendants were instructed to sell the stock of mahi mahi in November 2004, but they were only liable for their failure to sell mahi mahi from 1 May 2005. Given that the purchases of mahi mahi which led to the overstocking were made by the defendants in 2004 (there being none in 2005), this in effect meant that the defendants were liable only for disregarding Lin's instructions to sell and not for the overstocking *per se*.

33 The defendants contended that only the period from 1 May 2005 to 11 July 2005 ought to be taken into account in quantifying the loss since after 11 July 2005 the defendants, being no longer in the plaintiff's employ, could not possibly sell any of the mahi mahi stock. The question therefore was how much the defendants could have sold during that period. This was rejected by the learned AR. In her view, the defendants had committed serious breaches and it was absurd for them to be able to rely on their termination which had arisen out of their egregious breaches to argue that they ought only be liable for losses incurred up to 11 July 2005.

34 The plaintiff, on its part, contended that the defendants should be liable for the difference between the price in May 2005 and the actual prices at which the plaintiff eventually sold the entire stock over a period of 14 months from July 2005 to August 2006.

35 The AR decided that it was reasonable to expect the plaintiff to have sold the entire stock of mahi mahi by December 2005. On that basis, the loss from the delayed sale of the entire stock of mahi mahi was computed from the difference in price between May 2005 and December 2005 as quoted by Umer Barry Publications. This yielded a figure of US$190,547.20.

36 In my view, the defendants should be liable only for failing to sell what they reasonably could have sold during the period 1 May 2005 to 11 July 2005 (when they were dismissed), a period of two months and 11 days. This is because, consistent with the Court of Appeal's direction, the defendants are not to be made liable for overstocking *per se*. Therefore, whatever could not reasonably have been sold within that period of two months and 11 days would no longer be the concern of the defendants.

37 As for the quantity they could have sold, I decided that the fairest way was to make the assumption that the defendants could have sold within that period (from 1 May 2005 to 11 July 2005) as much as the plaintiff did sell within a similar duration of two months and 11 days commencing 12 July 2005 (the day after termination of the defendants' employment). Unfortunately for the plaintiff, as it turned out, the plaintiff had sold little during that period.

38 On that basis, counsel for the parties worked out the damages for mahi mahi to be US$16,016 which was equivalent to S$24,184.16 at the agreed exchange rate of S$1.51 to US$1.

39 I made no order as to costs in the appeals.