New Health International, Inc v Tan Hoo Kim
[2007] SGHC 62

Case Number : Suit 848/2005

Decision Date : 07 May 2007

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Michelle Angelique Armand, Elaine Sew and Jemy Ong (Hin Tat Augustine & Partners) for the plaintiff; Lam Wai Sing and Ng Hon Wai (Lam W.S. & Co) for the defendant

Parties : New Health International, Inc — Tan Hoo Kim

7 May 2007 Judgment reserved.

Belinda Ang Saw Ean J:

1 The plaintiff, New Health International, Inc, is an American company with a registered office at 17201 Daimler Street, Irvine, California, USA. The plaintiff is in the business of the manufacture and sale of health foods and nutritional supplements ("health supplements"). The defendant, Tan Hoo Kim (also known as Sandra Tan), is the sole proprietor of two businesses registered in Singapore, namely, Viva Top Marketing ("Viva Top") and New Health Nutrition Enterprise ("NHNE").

2 In this action, the plaintiff has sued for invoiced sums totalling US$332,333.05, being mainly the price of health supplements supplied to the defendant in 2001 and 2002 ("the products"). The defendant denies that she is contractually liable to pay the plaintiff for the products. Her pleaded case is that she was, at all material times, the plaintiff's handling and transhipment agent in Singapore for the health supplements intended for the plaintiff's distributors in Malaysia, Brunei, Indonesia and Taiwan.

Background

3 Dr Houn Simon Hsia and the defendant met sometime in the mid to late 1990s. At that time, Dr Hsia was the chief scientific officer of a multi-level marketing company known as Viva Life Science Inc ("Viva Life"). At Viva Life, Dr Hsia was responsible for research and development of nutritional and health supplements. The defendant was a stockist of Viva Life's products in Singapore. Their dealings with each other concerned Viva Life's products.

4 According to Dr Hsia, after he resigned from Viva Life, Jonathan Lim ("Lim"), the then General Manager of Viva Life in Indonesia, invited Dr Hsia to join him and his brother in the company they were setting up to manufacture and sell health supplements. Dr Hsia was expected to continue with his research to develop new or improved health supplements, and for his participation, he was promised a share of the profits. Dr Hsia agreed. The plaintiff company was incorporated in August 2000. On this aspect of the pre-incorporation history of the plaintiff, the defendant's version is that Dr Hsia was not the chief executive officer of the plaintiff because of his ongoing legal dispute with Viva Life. In any case, before incorporation, Lim and Dr Hsia visited Singapore in June 2000 and met the defendant and other Viva Life stockists from Malaysia and Brunei to inform them of the new venture. The prospect of an Asian operation to market health supplements manufactured by the new venture was discussed. Their business plan envisaged the setting up of offices in Singapore, Malaysia, Indonesia and Brunei

bearing the "New Health" name. What in fact happened thereafter was the incorporation of New Health Nutraceutical Pte Ltd ("New Health Nutraceutical") in Singapore on 31 January 2001. Dr Hsia, the defendant and one Tay Yi Qun were the shareholders of New Health Nutraceutical. From the documents discovered, there were other companies such as PT New Health Mitra Makmur in Indonesia, New Health Nutrition Sdn Bhd and New Health Nutrition Marketing Sdn Bhd in Malaysia. There was New Health Product Company Co Ltd in Taiwan.

The pleaded case and defence

5 The plaintiff's pleaded case is that the defendant trading through her registered businesses Viva Top and NHNE was, at all material times, the plaintiff's distributor of health supplements. The plaintiff's Statement of Claim was substantially as follows:

> 3 Between January 2001 and December 2002, the Plaintiff delivered to the Defendant, at the Defendant's request, varying quantities of the Products. Full particulars of the same are known to the Defendant, the short particulars of which are as follows:
>
> Particulars
>
> (a) Products delivered to the Defendant trading as New Health Nutrition Enterprise

Date	Invoice No.	Amount (US$)
06/08/01	2	25,593.03
11/09/01	9	21,962.13
30/10/01	16	1,844.60
12/11/01	19	17,125.79
20/12/01	34	16,095.20
19/02/02	47	2,570.12
19/02/02	48	12,195.45
08/03/02	52	9,307.31
22/03/02	55	4,211.96
25/03/02	56	15,318.20
12/04/02	61	40,646.21
26/04/02	67	2,992.30

05/08/02	70	2,096.37
20/06/02	93	371.04
23/02/01	96	5,119.42
24/06/02	98	6,925.39
27/06/02	103	45.00
24/07/02	114	2,377.48
29/07/02	115	17,910.50
24/05/01	125	2,634.34
24/05/01	126	11,323.12
25/06/01	135	24,083.19
04/10/02	136	1,860.59
27/07/01	139	2,426.65
11/10/02	140	18,543.61
12/12/02	158	90.00
12/12/02	159	242.44
		Total: 275,911.44

(b) Products delivered to the Defendant trading as Viva Top Marketing

Date	Invoice No.	Amount (US$)
26/01/01	81	2,392.07
26/02/01	98	8,970.13
03/12/01	102	17,476.92

03/12/01	103	15,045.42
27/03/01	112	23,364.74
		Sub-Total : 67,249,28 Less: 10,827.67 Total : 56,421.61

4. Despite several requests and demands for payment including a letter of demand from the Plaintiff's solicitors, Hin Tat Augustine & Partners dated 13th October 2005, the Defendant has failed, neglected and/or refused to pay the total sum of US$332,333.05 (US$275,911.44 + US$56,421.61) (equivalent to S$565,298.52 at S$1.701 to US$1) or any part thereof.

6 Mr Lam Wai Sing for the defendant expressed considerable scepticism about the alleged sales to the defendant. He points to the implausibility of the plaintiff's case as pleaded. First, no terms of the sale between the plaintiff and the defendant were pleaded. Second, there was no first purchase order let alone continued lodgement of purchase orders in the defendant's capacity as buyer. Third, the defendant's appointment as distributor was lacking in details.

7 I am bound to say that this apparent inadequate pleading in the Statement of Claim was later supplemented by answers provided by the plaintiff in the further and better particulars filed on 18 January 2006 and 25 April 2006 respectively. In the further and better particulars filed on 18 January 2006, the plaintiff provided the various dates in which the defendant orally requested the plaintiff to despatch the products to her. In addition, the defendant's operations manager, Siew Kok Mun, had also from time to time placed orders by fax on behalf of Viva Top and NHNE. In its Reply of 15 March 2006, the plaintiff pleaded that it ceased using the defendant as its distributor because she did not pay for the products sold and delivered to her. It was a term of the distributorship agreement that the defendant as the plaintiff's distributor was contractually liable to pay the plaintiff for the health supplements as well as the freight charges.[note: 1]

8 In the premises, the plaintiff has sufficiently set out its cause of action. What is clear is that it is for the plaintiff to prove that the defendant was its distributor in Singapore and, in that capacity, was contractually liable for the products supplied pursuant to the invoices referred to in the Statement of Claim.

9 In her defence, the defendant denies having entered into any sale contract with the plaintiff for the products. The defendant has also averred that, at all material times, no legal relationship was created as a result of the delivery of the plaintiff's products to the defendant and/or arose from the issuance of the plaintiff's invoices to the defendant.[note: 2] Viva Top and NHNE did not import the products as the plaintiff's buyers or customers. The defendant's businesses acted as the plaintiff's transhipment agent in Singapore for the importation of the plaintiff's health supplements as was the case with the products in this action. The practice was for the New Health companies in Malaysia, Brunei, Indonesia and Taiwan to place their orders for the plaintiff's health supplements with the plaintiff. Later on, they would receive the health supplements from Viva Top and NHNE. The defendant maintained that the plaintiff used Singapore as a receiving or collection hub to serve the plaintiff's distributors in Malaysia, Brunei, Indonesia and Taiwan. Distribution of the products imported into Singapore was carried out by the various distributors such as New Health Nutraceutical in Singapore and the other New Health companies in Malaysia, Brunei, Indonesia and Taiwan.

10 In the defendant's counterclaim, she alleged that she paid US$100,000 to subscribe for 100,000 stock shares in the plaintiff. Lim in his letter of 15 October 2000 promised to send to the defendant the stock certificate for 100,000 stock shares. He never did. The defendant duly counterclaimed to recover this money. After the writ of summons was issued, the plaintiff paid this sum under protest and without admission of liability on 22 March 2006. The defendant now claims interest from 30 August 2000 to 22 March 2006 at the rate of 6% per annum.

The evidence

11 The parties called two witnesses each. The plaintiff called Dr Hsia and Nong Elaine Wu ("Elaine"). Besides, the defendant herself, the other witness for the defendant was Andrew Ang Wee Hua who had previously serviced the logistics and freight forwarding requirements of Viva Top and NHNE. Now that both parties have adduced their evidence, the court has to consider the evidence and counter-evidence. The difficulty I have with this seemingly straightforward case is that even after hearing all the evidence, it is not possible to confidently conclude that with the evidence before the court, one has got to the bottom of the dealings between the parties. Without a doubt, the evidence is limited. Consequently, I have to approach the evidence to the extent that I find it credible.

12 The starting point is to remember that the legal burden of proof lies upon the plaintiff as the party affirming a fact in support of its case. This legal burden, which is constituted by the pleaded case, remains with the plaintiff and is assessed at the end of the trial after hearing evidence and counter-evidence from the parties (see generally ss 103 to 105 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act"). As with most civil suits, the evidential burden starts with the plaintiff and it shifts or alternates from one party to the next in the progress of a trial according to the nature and strength of the evidence offered in support or in opposition of the main fact to be established (see *Ong & Co Pte Ltd v Quah Kay Tee* [1996] 2 SLR 553 at 560). Lord Hanworth in *Stoney v Eastbourne Rural District Council* [1927] 1 Ch 367 at 397 explained the shift of the onus of proof in the following words:

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given.

13 With these rules of evidence in mind, I turn to the principal issues argued at the trial that fall to be determined. Taking the plaintiff's Statement of Claim on its own, or taking it as the court should, the plaintiff in seeking to claim for the invoiced sums is, in effect, making a claim for the price of the products sold and supplied to the defendant as the plaintiff's distributor. The claim is said to be founded on the defendant's contractual liability as a distributor to pay for the products ordered. The short point for the defence is that the defendant obtained possession of the products as transhipment agent for the plaintiff and, hence, property in the products had not passed to the defendant in fact and in law.

Was there any contractual liability to pay for the products?

14 This question is to be resolved by determining whether the defendant was a distributor of the plaintiff's health supplements in Singapore and the terms of the distributorship agreement. Counsel for the plaintiff, Ms Michelle Armand submits that the plaintiff has established a *prima facie* case in the plaintiff's favour based on Dr Hsia's evidence on the stand as to the nature of the plaintiff's

relationship with the defendant and the several customers in Brunei, Indonesia, Malaysia and Taiwan. If Ms Armand is right, the next consideration is whether the defendant has produced evidence to undermine the *prima facie* case against the defendant thereby restoring the evidential burden to the plaintiff.

15 Ms Michelle Armand points out that the defendant purchased the plaintiff's health supplements to distribute them in Singapore. At all material times, she was operating a multi-level marketing scheme for the sale and distribution of the plaintiff's health supplements in Singapore and that was Dr Hsia's reason for dismissing as baseless the defendant's claim that she was a transhipment agent for the plaintiff. The defendant on hearing the proposed business plan of the new venture offered to be a distributor. She was also interested in acquiring shares in the plaintiff. Dr Hsia maintained that although there was no formal distributorship agreement entered into between the parties, the defendant operated the distributorship business for the plaintiff's health supplements through businesses registered in her sole name, namely, Viva Top and NHNE. The defendant through her registered businesses ordered the plaintiff's health supplements for her own account. The plaintiff duly met those orders which were made periodically by delivering them to the defendant between 2001 and 2002. This business between the plaintiff and the defendant appeared to have developed without any particular event until the plaintiff refused to grant the defendant further credit for the health supplements ordered by her or on her behalf because of the outstanding accounts then owing by the defendant to the plaintiff. The defendant was unhappy with the withdrawal of credit and, around that time, began demanding the return of US$100,000 for the stock shares. Eventually, the plaintiff issued proceedings for payment of unpaid invoices totalling US$332,333.05 on 23 November 2005.

16 I have difficulty accepting Ms Armand's optimistic evaluation of Dr Hsia's oral testimony. Dr Hsia is a scientist and his research work related to health and nutritional supplements. Credentials aside, I did not find Dr Hsia to be an impressive witness. His testimony, particularly in cross-examination, was sketchy and at times incoherent. It was difficult to draw together from his testimony the threads to make out the plaintiff's case.

17 It is clear from his written testimony that Dr Hsia was in no position, as he had no personal knowledge, to testify to the status of the defendant as distributor of the plaintiff's products in Singapore and especially of those products despatched to the defendant between 2001 and 2002 under the umbrella of their alleged distributorship agreement. It was common ground that there was no written document setting out the terms governing the distributorship agreement between the parties. Dr Hsia had acknowledged that he was not involved in the management of the company which was left to Lim and his wife, and whatever he knew after August 2000 and in 2001 and 2002 was told to him by Lim.[note: 3] Dr Hsia said he left the employ of the plaintiff "sometime in 2002" to set up New Health Enterprise Inc. He bought the plaintiff company in January 2003. However, he did not actually take over the company until 2004 (and that was after paying Lim in full) whereupon he became its president, secretary and sole director of the plaintiff company.

18 Furthermore, contemporaneous correspondence of 7 December 2000 and 3 January 2001, which Dr Hsia relied upon, do not support his claim that the products were supplied to the defendant as a multi-level marketing distributor and that the defendant in that capacity was contractually obliged to pay for the products she imported in the name of Viva Top and NHNE. They do not unreservedly lead to a conclusion that an agreement in the terms pleaded and contended for by the plaintiff was ever concluded. Not only were they sent before the incorporation of New Health Nutraceutical, Dr Hsia himself had no personal knowledge of how the products came to be sent to Viva Top and NHNE instead of New Health Nutraceutical. I am not persuaded that the facsimile dated 3 January 2001 supported the plaintiff's stance that the defendant was ordering the products for her own enterprise. It was incongruous, to say the least, for a buyer, if the defendant was one, to report to the plaintiff

as seller on operational expenses such as office overheads and renovation expenditure. This sort of evidence is consistent with the defendant's story which I will come to later.

19 I shall now consider whether the contractual liability of the defendant to pay for the products and freight charges was that constituted by the orders placed by the defendant or on her behalf and the invoices issued to her businesses. It was also accepted that the defendant received the products despatched by the plaintiff to the defendant between 2001 and 2002. Would these facts be sufficient to give rise to a reasonable inference, until the contrary is proved, that orders were placed for the supply of the products with the plaintiff by the defendant for her own enterprise? If that were so, the initial onus which was on the plaintiff to prove privity of contract for the sale of the products between the parties stood discharged, and the burden shifted to the defendant to prove that there was no privity of contract between the parties.

20 The defendant claims that the evidence supports her position as the plaintiff has not produced in evidence any purchase order emanating from the defendant. The only purchase order which was said to be from Viva Top for the products forming the subject matter of invoice no 72 dated 1 December 2000 was ruled inadmissible at the trial. The defendant had disclaimed the purchase order as hers. She said Viva Top never issued it and objected to its authenticity. It was thus incumbent upon the plaintiff to produce at the trial the purchase order itself (see s 64 of the Act) and prove that it came from Viva Top. In the context of this case, the original copy of the purchase order was not produced at all to the court for inspection. What the plaintiff sought to do was to rely on a photocopy of the purchase order (*ie* secondary evidence of the contents of documents) without first bringing itself within any of the exceptions in s 67 of the Act. In fact, the plaintiff here did not address the court on s 67 and that meant that there was nothing before the court to warrant the admission of secondary evidence of the contents of the purchase order. On top of that the authenticity of the document was not established. I therefore ruled that the document was inadmissible in evidence.

21 I already noted that the dates in which the defendant had requested the plaintiff to despatch the products to her were furnished (see [7] above). However, neither Dr Hsia nor Elaine attempted to match those dates with any of the 32 invoices in question. Dr Hsia said that he personally hand delivered the items covered under invoices nos. 103, 158 and 159 to the defendant. The invoices were dated 27 June 2002 (invoice no. 103 for Certificate of Manufacture) and 12 December 2002 (invoice no. 158 for company catalogues and invoice no 159 for 75 bottles of liquid Gingko Biloba plus). His testimony here has to be viewed against the backdrop of his earlier evidence that he left the plaintiff to set up New Health Enterprise Inc "sometime in 2002". Notably, after 12 December 2002, the invoiced sums totalled US$332,333.05 and Dr Hsia claimed that the plaintiff was having cash flow problems. Inexplicably, the plaintiff did not sue the defendant until 23 November 2005.

22 Elaine is presently the chief financial officer of the plaintiff. She was the accounts assistant before her promotion in January 2003. She said the defendant had in the past telephoned her to place orders for the plaintiff's products. Some of her other colleagues in the company had also received similar telephone calls from the defendant. Even though Elaine recalled taking some orders and that she had spoken on the telephone to the defendant about payment of the outstanding invoices, I find her testimony of little or no evidential value given her clear admission in the witness box that she had no knowledge of the relationship between the plaintiff and the defendant.[note: 4] Her rationalisation that she was to collect payment from whichever company the plaintiff had shipped the products to has no legal basis given her admission.

23 My view that the plaintiff has not proved its case is not altered by the extent that from time to time invoices were issued to the defendant for the various products shipped to Viva Top or NHNE. Nor

does this conduct necessarily require the conclusion that an agreement was concluded by a course of trade (which was not pleaded) and evidenced by the 32 invoices. Despite Elaine's claim that she "wanted to use [the invoices] to collect money from the defendant",[note: 5] the invoices do not in themselves support the plaintiff's assertion that the defendant's bought the products. What appears to be relied upon is the despatch of the invoices to the defendant which does not *ipso facto* connote that the defendant is liable to pay for the products identified in the invoices and invoiced sums. There are no terms printed on the back of the invoices to evidence the terms of the despatch. I find Elaine's acknowledgement that the invoices were required by the defendant to clear the goods and the defendant's own explanation that the invoices were needed to ascertain the amount of GST payable in Singapore to be additional indicators that support the view I have taken.

24 Apart from the 32 invoices, no periodic statement of account detailing the unpaid invoices to the defendant was discovered. Similarly, no accounting records of the plaintiff relating to the sales to Viva Top and NHNE were discovered. If Viva Top and NHNE were trade debtors, it stood to reason that the debts supposedly incurred in 2001 and 2002 would appear in the plaintiff's accounting records. The fact that the plaintiff disclosed not the plaintiff's but New Health Enterprise Inc's A/R Aging QuickZoom record as at 15 September 2003 pertaining to New Health Nutraceutical, which was not the subject matter of this action, was telling.[note: 6] The proper inference to be drawn from this was that there were no similar accounting records for Viva Top or NHNE despite Elaine's claim that they were left behind in the company.

25 Moving on, the plaintiff sought to rely on past payments as being indicative of the defendant's obligation to pay the invoiced sums. Elaine in her affidavit of evidence-in-chief avowed at [13]:

> Sandra has paid for some products invoiced to her by way of a US$10,000.00 telegraphic transfer made by her into the plaintiff's bank account on 19th January 2001. New Health Nutraceutical Pte Ltd, a company in which she is a director and shareholder, also paid a sum of US$10,000.00 to the plaintiff's bank account on 23rd March 2001 for products sold and delivered to her under the trade name Viva Top.

26 In response, the defendant explained that the two separate payments of US$10,000 each, the first from Viva Top in January 2001 and the second from New Health Nutraceutical in March 2001 were loans from her to the plaintiff as the latter was facing cash flow problems at that time. Elaine disagreed that the first remittance of US$10,000 was a loan from the defendant personally to the plaintiff.

27 I have to say that I did not find either explanation credible. Similarly, neither version of two other further payments, this time from the plaintiff to the defendant's personal bank account, was compelling one way or the other. The first payment of US$20,000 was on 26 June 2001 and the second payment of US$10,000 was on 5 July 2001. These two payments were recorded in the plaintiff's accounting records as an investment. In contrast, the defendant's pleaded case was that these monies were to pay for the operating and other expenses of NHNE as transhipment agent in Singapore for the plaintiff's products.

28 What also appear to be relied upon are acts of the defendant which, on the evidence, are to be construed as no more than performance of her obligation as transhipment agent. What is more, there is evidence of payment by the other distributors direct to the plaintiff. It is convenient at this juncture to mention that I do not find Andrew Ang Wee Hua's testimony of any assistance. It is irrelevant to the main issue before me (see [14] above). As for the defendant, she has in some instances given conflicting and confusing evidence. However, I have no reason to disbelieve aspects of the defendant's evidence that are corroborated by contemporaneous documented evidence. I shall

now discuss the defendant's evidence.

(i) Communications from Vincent Chang

29 Between May 2001 and July 2001, Vincent Chang of the plaintiff communicated with the defendant on, *inter alia*, the operations of NHNE.[note: 7] Vincent Chang's communications to the defendant contained statements whereby he referred to NHNE as "our import company". Vincent Chang's absence as a witness at the trial did not alter the fact that the defendant received the communications in question. The language used in these communications contradicted the plaintiff's case that Viva Top and subsequently NHNE was the buyer of the plaintiff's products. To Mr Lam, they supported and confirmed the defendant's case that Viva Top and later NHNE acted as a forwarder or transhipment agent for the plaintiff's products.

(ii) Respective roles of NHNE and New Health Nutraceutical

30 The defendant maintains that after NHNE was registered, it was used exclusively as the entity to import the plaintiff's products into Singapore. NHNE would break up the consignment into smaller parcels before sending them to the distributors. Some of the plaintiff's products imported into Singapore were passed to New Health Nutraceutical. In cross-examination, the defendant said she never bought the products from the plaintiff. Any goods bought from the plaintiff were bought by New Health Nutraceutical. Initially, Viva Top was used to bring in the plaintiff's products. Subsequently, NHNE took over the role of Viva Top but NHNE was not regarded as the plaintiff's customer.

31 In a facsimile dated 21 December 2000 from Lim to the defendant, Lim said:[note: 8]

> We finally decided that you may register a local limited company under the name of *New Health Nutrition Enterprises*, then *after few months later we will register the real company under the name of New Health Int. Inc*. This will help us ease our cash flow till we have accumulated the sales to support itself. This will take 3 to 6 months.
>
> [emphasis added]

32 What was said in the above-mentioned facsimile and what in fact happened was not stated. I note that New Health Nutraceutical was registered on 31 January 2001. Shortly thereafter, NHNE was registered on 15 February 2001 which took over the import and export duties of Viva Top. New Health Nutraceutical Pte Ltd did not assume the duties of Viva Top. If NHNE did not have any role to play, as the plaintiff alleged, it was peculiar that the plaintiff addressed the invoices to NHNE and sent the products to it.

33 Significantly, on 8 November 2001, Lim in a letter addressed to New Health Product Company Co Ltd (Charlie Chang in Taiwan), New Health Nutraceutical (Sandra Tan) and NHNE (Adrian Tan) not only announced the appointment of Vincent Chang as CFO of the plaintiff with effect from 1 November 2001, Lim also informed each of them that Vincent Chang as CFO would oversee and assist them in their "daily accounting activities, [and] conduct bi-annual audits on [their] accounting reports and inventory controls."[note: 9] That letter from Lim as CEO and president of the plaintiff is objective evidence which strongly indicated that the two entities (*ie* NHNE and New Health Nutraceutical) had different functions.

34 In a letter dated 31 March 2002 from Dr Hsia addressed "To whom it may concern" ("the handling charge letter"), stated:[note: 10]

> I hereby state and confirm that I have consented to *the payment of US$0.55 as handing (sic) charge* to New Health Nutrition Enterprise for each bottle of New Health Nutrition products it imported from US. This payment dates back to its first such import and shall remain effective until such time as otherwise resolved by both parties. *The import and export handling charge and GST incurred would be paid by New Health International (HQ) to New Health Nutrition Enterprise*.
>
> [emphasis added]

35 It is fair to say that the handling charge letter signed by Dr Hsia was consistent with the defendant's pleaded case that NHNE would pay for the GST on the products and the handling charges in advance and the plaintiff would then reimburse the defendant.

36 The significance of this handling charge letter was not lost on Dr Hsia who tried to suggest that it was not binding on the plaintiff as he had no authority to give it since he was not an office bearer of the plaintiff. In addition, he also claimed that the letter was prepared on the defendant's initiative and she got him to sign it.

37 To this the defendant responded that it was Dr Hsia who had asked her to prepare the letter for him to sign and, contrary to Dr Hsia's insinuation, it was not signed in haste. The defendant disagreed that there was no agreement between the plaintiff and the defendant that the plaintiff would pay her US$0.55 per bottle as handling charges for the importation of the plaintiff's products into Singapore.

38 The matters raised by Dr Hsia in [36] above did not appear in any pleadings or written testimony. His oral testimony has an air of desperation about it. The overall evidence, on a balance of probabilities, pointed to the use of Viva Top and subsequently NHNE to import the products which were then repacked and forwarded to the plaintiff's distributors.

(iii) Payments of the products by the plaintiff's customers

39 There is evidence that the plaintiff's respective customers paid the plaintiff direct for the products sent by or collected from the defendant. In a facsimile dated 4 August 2004 from Ker Kain Cheng ("Ker") of New Health Nutrition Sdn Bhd to Elaine, the relevant portion of the communication read:[note: 11]

> I have received your fax and have [sic] confirmed that the company's outstanding debts as follows…
>
> Today I will wire two TT (telegraphic transfer) amount to you.
>
> … I will pay by installments till fully paid.

40 The plaintiff's Indonesian distributor also paid the plaintiff direct. The plaintiff received payment of US$10,827.27 direct from P T New Health Mitra Makmur for products that were delivered by the plaintiff to the defendant and which were in turn shipped from the defendant to the Indonesian company.

41 Besides evidence of payment, which is consistent with my conclusion in [38] above, the distributors' orders were placed through the defendant. Notably, the words used in the facsimiles sent by Ker such as "please also help us to notify Vincent" and "Please instruct" showed that the plaintiff's distributor in Malaysia was actually placing orders with the plaintiff and he was using the defendant as a conduit to inform the plaintiff. [note: 12]

42 As for the packing lists covering the orders, it appeared that the plaintiff faxed them to the defendant and the plaintiff's customer.[note: 13] In cross-examination, Mr Lam referred Elaine to five packing lists originating from the plaintiff, two were dated 22 March 2002 and the rest dated 12 April 2002, 8 May 2002 and 27 July 2001 respectively. Elaine agreed that all five packing lists were faxed by the plaintiff to the defendant and Ker at the same time. Elaine agreed that Ker needed to be apprised of the contents of the packing list to know what was in the intended shipment.[note: 14] Notwithstanding, her own reading of the situation was the opposite. If the defendant was the direct buyer, there would be no need for the plaintiff to fax the packing list to other parties at all.The defendant was, and I so find, intentionally kept informed of the status and quantities of the products ordered. This stance tied in with the defendant's evidence that she had to break up the consignment into smaller parcels to cater to the orders of the plaintiff's distributors in the region.

43 In conclusion, as I have foreshadowed in [11] above, I have approached the evidence and counter-evidence to the extent that I find them credible, and bearing in mind the axiomatic rule in s 103 of the Act, I am left in no doubt, and I so find, that the plaintiff has not established that the defendant was contractually liable for the products supplied pursuant to the invoices referred to in the Statement of Claim. There is before the court cogent evidence pointing the other way, namely that the products were despatched to the defendant for the purposes of import and subsequent despatch to the other distributors. Consequently, the plaintiff's claim in this action must necessarily fail.

Counterclaim for interest under Civil Law Act

44 The defendant has received the sum of US$100,000 from the plaintiff which was once the subject matter of the counterclaim. Having been paid, the defendant is only seeking interest under s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed). Section 12 applies where there is a recovery of any debt or damages. Notably, the court has the discretion to make an award of interest on an amount for which judgment has been given. In this case, there was no adjudication by the court on the sum of US$100,000 as the plaintiff made payment sometime before trial was issued. Consequently, s 12 is inapplicable. The defendant's counterclaim for interest must fail for this reason.

Result

45 For all these reasons, the plaintiff's claim in the action is dismissed with costs. The defendant's counterclaim is also dismissed. However, I have decided not to order any costs on the Counterclaim as there were no arguments on the claim for interest from both sides.

[note: 1] Plaintiff's further & better particulars filed on 25 April 2006

[note: 2] Paras 33 and 34 of Defence

[note: 3] Dr Hsia's affidavit of evidence-in-chief para 2

[note: 4] Transcript of Evidence p 15 line 14

[note: 5] Transcript of Evidence p 32 line 28

[note: 6] DB 87

[note: 7] 1AB 181, 1AB183, 1AB 217 and 1AB228

[note: 8] 1AB 98

[note: 9] 1AB 263

[note: 10] 2AB 330

[note: 11] 2AB 432, DB 104

[note: 12] 2AB 319 & 320; DB 93 & 94;DB 89 & 90; Transcript of evidence p 148 line 3 to 12

[note: 13] 1AB 228

[note: 14] Transcript of evidence p 47 line 22-24