IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 164

Suit No 1064 of 2014

Between

HONEY SECRET PTE LTD

… *Plaintiff*

And

1. ATLAS FINEFOOD PTE LTD
2. NARESH S/O SITALDAS NANDWANI
3. NANIK S/O SITALDAS, both trading as ATLAS FOOD

… *Defendants*

And

ATLAS FINEFOOD PTE LTD

...Plaintiff in Counterclaim

And

HONEY SECRET PTE LTD

...Defendant in Counterclaim

JUDGMENT

[Contract] — [Misrepresentation]

[Sale of Goods] — [Implied Terms as to Quality]

Honey Secret Pte Ltd
v
Atlas Finefood Pte Ltd and others

[2016] SGHC 164

High Court — Suit No 1064 of 2014
Lai Siu Chiu SJ
11, 18–20 April 2016

18 August 2016 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 This case involves a dispute concerning an exclusive distributorship agreement made between Honey Secret Pte Ltd ("the plaintiff") and Atlas Finefood Pte Ltd ("the first defendant"). It resulted in two directors of a related business called Atlas Food namely Naresh s/o Sitaldas Nandwani ("Nesh") and his older brother Nanik s/o Sitaldas ("Nanik") being sued as the second and third defendants respectively. (I will henceforth refer to Nesh and Nanik collectively as "the brothers").

The facts

2 The plaintiff is a Singapore company that was incorporated on 2 February 2012 and has a paid-up capital of $1,000.00. Its sole director and

shareholder is Jeanette Lim Min Er ("Jeanette"). The plaintiff's business is the sale and distribution of honey and honey-based products in Asean countries including Singapore and Vietnam. According to Jeanette, the plaintiff's products are sourced from various countries including Australia, New Zealand, Canada, Thailand, Vietnam and Cambodia. It does not own any apiaries or bee farms.

3 The first defendant is a Singapore company that was incorporated on 11 December 2013. Its business is the sale and distribution of food products.

4 The second and third defendants are directors and shareholders (in equal shares) of the first defendant. Both are also partners in Atlas Food, which partnership was registered on 8 April 1988. Atlas Food is a distributor of food products that include spices, nuts, tomato items, dried fruits, vinegar, canned vegetables and olive oil. It further acts as a commission agent for the sale of certain goods to third parties in Vietnam, and also derives rental income from a property it owns in Singapore. Nesh is in charge of sales and deliveries while Nanik takes charge of the finances.

5 From the evidence, it was the plaintiff that initiated the first contact between the parties. According to the plaintiff's then marketing representative Seah Ting Teck (also known as "Teckerson") he had telephoned Nesh on or about 17 November 2013[1] to introduce the plaintiff's products. That initial contact led to a further telephone call on 20 November 2013 and then a meeting between Jeanette and Nesh on 21 November 2013.

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[1] 1BOAEIC2

6 At the meeting on 21 November 2013, Jeanette introduced herself to Nesh as the director of the plaintiff. She handed to him brochures containing information on the plaintiff and its honey products and told him she was looking for distributors for the plaintiff. She also gave Nesh samples of some of the plaintiff's products, namely honey sticks and tea sachets.

7 When Nesh inquired of Jeanette why she did not sell the plaintiff's products direct to customers herself, Jeanette explained that the plaintiff faced manpower shortage and resource issues. Even though the plaintiff had, according to Jeanette, more than 500 customers,[2] the plaintiff preferred to concentrate on business development and overseas expansion. Hence, the plaintiff wanted to appoint a distributor to take over its customers and distribute the plaintiff's products.

8 When Nesh requested for the plaintiff's sales reports, Jeanette informed him the documents were with the plaintiff's auditors and she would show them to him at a later date.

9 Subsequently, Nesh met Jeanette again, this time at the office of Atlas Food. Jeanette was accompanied by the plaintiff's business development manager Wing Lim Yu Heong ("Wing"). At this second meeting, Jeanette showed Nesh on her laptop e-catalogues of the plaintiff's products and the plaintiff's overseas projects. She claimed the plaintiff was very successful and was growing rapidly overseas in such countries as Hong Kong and Russia. When Jeanette and Wing were about to leave, Nesh asked for the plaintiff's

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[2] 1BOAEIC131

sales reports, Jeanette said she had forgotten to bring them and that she would bring them to their next meeting.

10 A few days later Jeanette called Nesh to request a meeting. In fact Jeanette called at his office that very day and handed Nesh samples of the plaintiff's tea sachets. After another few days, Jeanette again called Nesh and requested to have lunch with him. They met for lunch where Nesh again expressed reservations about distributing the plaintiff's products as he was not familiar with them. According to Nesh, Jeanette assured him of following:

(a) The plaintiff had more than 500 existing customers in Singapore, which included schools, hospitals and pharmacies;

(b) The plaintiff would provide the defendants with its customers' list before the defendants ordered and distributed the plaintiff's products;

(c) 60% of the stock in each order placed by the plaintiff would have already been pre-sold (*ie*, the plaintiff would have procured customer(s) who had committed to buy 60% of the stock supplied by the plaintiff to the first defendant).[3] The defendants needed only to make delivery of the plaintiffs' stock and collect payment from the customers. The balance 40% of the stock was to be kept by the defendants as inventory to cater to orders that were made *ad hoc* or unexpectedly, had been varied;[4]

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3 1BOAEIC133

4 1BOAEIC134

(d) The distribution agreement would be beneficial to the defendants as there would be at least 20% price mark-up on the plaintiff's products to the end-customer.

I will refer to these assurances as the plaintiff's "First Representations".

11 Jeanette told Nesh her lawyer Liew Chen Mine ("Liew") "would do everything for [Nesh]" and "would be present when [Nesh] eventually signed the agreement."[5] Nesh did not know Liew. Jeanette called Nesh again a few days later and requested a meeting. They met at the office of Atlas Food where Nesh again expressed his reservations on being a distributor for the plaintiff. In response, Jeanette repeated the plaintiff's First Representations (set out in [10] above).

12 On or about 2 December 2013, Jeanette called Nesh to invite him to lunch and informed him that her lawyer had already prepared the documentation. Nesh was to bring the company stamp of Atlas Food with him.

13 After their lunch, Nesh accompanied Jeanette to her lawyer's office where she introduced him to Liew. Jeanette requested Nesh to sign a document, which she explained was not a formal document but served only to evidence the co-operation they were discussing. Nesh (whose education level is only up to primary six) could not or did not read the document. He signed it, adding his identity card number and the date to the document, on behalf of Atlas Food. Nothing turns on the document, which required Nesh to pay the plaintiff's legal expenses if Nesh failed to sign an agreement with the plaintiff

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5 1BOAEIC134

without a valid reason, the validity of which was to be determined by an arbitrator appointed by both parties.[6]

14 On 11 December 2013, after the first defendant had been incorporated, Nesh telephoned Jeanette and informed her that it would be the first defendant who would be the entity contracting with the plaintiff.

15 On the following day, Jeanette sent Nesh an email[7] which Nesh neither read nor responded to. However, in his affidavit of evidence-in-chief ("AEIC"), Nesh disagreed with the last paragraph of Jeanette's email where she said:

> With regards to your 10 years collaboration request, it is advisable to do a 5+5 agreement, whereby the next 5 years clauses and requirements can be discussed again at the 4th year of our distribution, no worries, and most importantly you have a protection under law whereby if the next 5 years you will like to continue distributing Honey Secret, we will be legally obligated to continue another 5 years.

Nesh deposed he had never requested ten years' collaboration. I should add that Jeanette's email is in any event contradicted by cl 2 of the agreement that the parties signed, which gave the first defendant ten years' exclusive distribution rights (see [20] below.

16 On 20 December 2013, a staff member of the first defendant emailed to Wing a copy of the first defendant's notice of incorporation. That morning, Jeanette telephoned Nesh to say that her lawyer wanted to see Nesh to discuss the agreement, and that Nesh should bring with him the first defendant's

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7 AB9-10

company stamp. That afternoon, Nesh met Jeanette at Liew's law firm where she requested that Nesh sign what turned out to be an exclusive distributorship agreement dated 12 December 2013 ("the Agreement") between the plaintiff (as "Supplier") and the first defendant (as "Distributor"). Just before he signed the Agreement, Jeanette told Nesh that the customers' list referred to in cl 26 of the Agreement would be provided to the first defendant after he had signed the same. (I will describe this as the plaintiff's "Second Representation".).

17 Although he could neither read nor understand the terms of the Agreement, Nesh signed three copies on behalf of the first defendant relying on Jeanette's First and Second Representations (at [10] and [16] above).

18 Some of the salient definitions in the Agreement are the following:

> "Distributor's Segments" means the hotel, restaurant, catering and airline segments and such other segments of the food and beverage market as the parties may agree in writing from time to time;
>
> "Products" mean such products listed in Schedule A to this Agreement in the range of products produced by or on behalf of the [plaintiff] and such other products as may be included in the sole discretion of the [plaintiff].
>
> "Territory" means collectively the Republic of Singapore, the Socialist Republic of Vietnam and the Republic of the Philippines.

19 Schedule A of the Agreement listed twelve items as the plaintiff's products. These included Manuka honey, pure honey, honey sticks, honey syrup and honey ginger tea which products were those purchased by the first defendant.

20 The relevant clauses in the Agreement are the following:

> Clause 2:
>
> [the first defendant] shall have the exclusive right to sell and distribute the Products in the Distributor's Segment in the Territory for a duration of ten (10) years commencing from the date of this Agreement;
>
> Clause 5:
>
> [the first defendant] shall not sell and distribute the Products at the price(s) below the list price(s) of the [plaintiff] for the Products prevailing from time to time or exceeding 20% thereof, without the consent in writing of the [plaintiff].
>
> Clause 7.1
>
> If in any calendar month during the subsistence of this Agreement, the actual number of twenty-foot containers ("containers") of the Products ordered by [the first defendant"] from [the plaintiff] shall fall short of at least one (1) container for that month, [the first defendant] shall pay the difference ("the shortfall") between the total value of one (1) container and the total value of the Products actually ordered for that month, the total value of one (1) container to be calculated on the basis of the highest priced Products in one (1) container.
>
> (Hereinafter referred to as the "minimum order obligation")
>
> Clause 7.2
>
> [The first defendant] shall make payment of the shortfall within thirty (30) days of the issuance of an invoice for the shortfall by [the plaintiff] PROVIDED ALWAYS that if [the plaintiff] does not receive the payment of the shortfall within the time stated herein, [the plaintiff] shall be entitled at its sole discretion, to terminate the exclusivity of the distributorship rights conferred on [the first defendant] or this Agreement, without prejudice to the right of [the plaintiff] to recover the shortfall and to enforce all other accrued rights against [the first defendant];
>
> Clause 32.1
>
> [The plaintiff] warrants to the [first defendant] that … all products supplied hereunder shall be of merchantable quality and complied with any specification as stated by [the plaintiff].

21 In early January 2014, Nesh for the first time informed Nanik that he had entered into the Agreement and of the plaintiff's First and Second

Representations (at [10] and [16] above). Towards end-January 2014, Jeanette and Wing visited the first defendant's office to confirm the first defendant's initial order of goods in the amount of $87,656.00 (the "first order") from the plaintiff. Nesh introduced the twosome to Nanik. In March 2013, the first defendant placed a second order of goods with the plaintiffs in the amount of $60,268.80 (the "second order").

22 In late March 2014, there was a meeting between Jeanette, Nesh and Nanik at which Nanik requested for the plaintiff's customers' list. Jeanette said she would pass the list to the defendants at end-March or the first week of April 2014 but she did not. The defendants finally saw the plaintiff's customers' list sometime between May and June 2014 (see [27] below) and it was not what Jeanette had represented to the brothers.

23 On 19 April 2014, Jeanette texted Nesh to inform him that there were a number of customers from the FoodHotelAsia trade exhibition for which she was preparing a list for the first defendant. (I shall describe this as the plaintiff's "Third Representation"). Nesh and Nanik understood her message to mean that Jeanette would be passing a customers' list to the first defendant.

24 Relying on the plaintiff's First and Second Representations (at [10] and [16] above), Nesh deposed that the first defendant continued to perform its obligations under the Agreement by making payment for the second order on 28 April 2014. In his AEIC, Nanik disclosed that the sums paid by the first defendant to the plaintiff for the first and second orders came from loans extended by Atlas Food as the first defendant did not have sufficient funds to make the payments.

25 On 28 April 2014, the first defendant received from the plaintiff $48,000.00 worth of goods under the first order. Nesh texted Jeanette on his hand-phone to say that the delivery amounted to only half of the first defendant's first order and inquired about the balance. Jeanette responded by text to say that the plaintiff was able to deliver some pallets when the goods arrived on the following Wednesday or if the first defendant could wait, the entire balance under the first order could be delivered by the following Friday.

26 About a week later, the first defendant received from the plaintiff $17,216.00 worth of goods under the first order. To-date however there is an outstanding balance of $22,440.00 worth of goods not delivered under the first order. Further, the first defendant's second order was never fulfilled by the plaintiff even though the first defendant had made full payment.

27 Between 17 May 2014 and 20 June 2014, the plaintiff's staff Annabella sent nine emails to the first defendant listing out the names, addresses, contact numbers and orders of 13 of the plaintiff's existing customers. Whenever the first defendant received those emails, it would deliver the goods ordered by the customers and invoice them. However, the plaintiff did not provide its list of more than 500 customers. The sales made by the first defendant to the plaintiff's 13 customers totalled $1,333.50, which was approximately 1.5% of the value of the first order.

28 Contrary to the plaintiff's First Representations (at [10] above), the plaintiff did not have existing customers who were ready to buy 60% of the stock supplied by the plaintiff to the first defendant. On 26 May 2014, Nanik texted Jeanette on the issue. Jeanette avoided the issue in her text reply

claiming she did not understand his question and asking for details to be forwarded to her by email.

29 The brothers did not email her. Instead, Nanik texted Jeanette reminding her of the plaintiff's First Representations (at [10] above) and said the first defendant needed sales from her side to clear the goods. Again, Jeanette requested that they send her an email. After further text exchanges, Jeanette (who claimed to be in China) repeated part of the plaintiff's First Representations by informing Nesh on 27 May 2014 that:

> I have 500+ clients total including factories clinics restaurants schools herbal tea shops, wedding favors, self label honey for medical halls and monthly subscription of honey to bungalows. This is seriously my last sms. All things by email. Thanks.

30 Nanik also deposed to a meeting that took place between himself and Jeanette around mid- to end-April 2014 at the first defendant's office. He contended that the Agreement was then varied (but this was disputed by Jeanette). In his AEIC, Nanik deposed that at this meeting, Jeanette pressed him to place a third order with the plaintiff. Nanik was unwilling to do so as the first defendant had yet to receive all the goods placed under the first and second orders as well as the plaintiff's customers' list. Nanik had no confidence that the plaintiff could pre-sell 60% of each order placed by the first defendant as Jeanette had claimed.

31 Following some argument between Nanik and Jeanette, the parties reached the following agreement (according to Nanik):[8]

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8 2BOAEIC259

(a) The Agreement would be varied to a non-exclusive distribution agreement; and

(b) The first defendant's obligation to order a minimum of one twenty-foot container of the plaintiff's products per month for ten years, or to pay the shortfall between the total value of the products ordered and the total value of one container as set out at cl 7.1 of the Agreement would be varied such that from March 2014, the first defendant was no longer under any obligation to place the minimum order with the plaintiff.

(I will henceforth refer to the arrangement as "the Varied Agreement")

32 According to Nanik, Jeanette confirmed the Varied Agreement by writing the following comment on the minutes of their meeting held on 20 March 2014 (as prepared by Jeanette's secretary Amy Chan):

> Nick sign non-exclusive so that no more 1 cont/mth. Mar[ch] no more. 2nd cont (Feb)

33 The goods to the value of $17,216.00 delivered in late April or early May 2014 to the first defendant by the plaintiff (in [26] above) were not the balance due under the first order. In addition, the cartons of pure honey only bore a label stating the plaintiff's name and logo; there was no information on the product itself such as its country of origin and its expiry date. Nanik deposed in his AEIC that the omission was a clear breach of r 5 of the Food Regulations (Cap 283, Rg 1, 2005 Rev Ed) (the "Food Regulations") made under s 56(1) of the Sale of Food Act (Cap 283, 2002 Rev Ed) (the "Food Act").

34 Consequently, Nanik called Annabella to inform her of the labelling issue. Although Annabella told Nanik the plaintiff would resolve the problem, nothing was done by the plaintiff despite a reminder from Nanik. He surmised that the plaintiff could not provide the requisite labels because it did not manufacture its products and it did not have the requisite information to prepare the labels. Nanik deposed that the first defendant could not print any labels because of cl 25.1 of the Agreement which states:

> The [first defendant] shall not make any modifications to the Products or their packaging.

The result is that the first defendant to-date is unable to sell the plaintiff's pure honey product which cartons are currently still stored in the first defendant's warehouse.

35 At end-May 2014, Annabella visited the first defendant's office to confirm the latter's next orders. Nanik was unwilling to place further orders with the plaintiff because of the labelling issue set out above. He had an argument with Annabella who left his office without obtaining any more orders from the first defendant.

36 Subsequently, the first defendant received by post the plaintiff's minutes of the May meeting (in [35] above) as prepared by Jeanette's secretary Amy Chan. Nanik disputed the minutes which were dated 22 May 2014, contending they were a self-serving document produced by the plaintiff. The minutes were accompanied by two invoices of the plaintiff, dated 30 March 2014 and 30 April 2014 respectively, each for the sum of $60,268.80.

37 Nanik decided he and Nesh had had enough of the plaintiff's conduct. He sought legal advice. On 12 June 2014, Nanik sent an email to Jeanette

(drafted by the defendants' previous lawyers) stating that because of the plaintiff's failure to fulfil the plaintiff's First Representations (set out at (a) to (c) in [10] above), the first defendant was entitled to rescind the Agreement. The brothers alleged that the first defendant was induced by the plaintiff's First Representations to enter into the Agreement. Nanik demanded the return of the $147,928.80 paid by the first defendant, less the $1,177.20 for the proceeds of the plaintiff's goods sold by the first defendant. Jeanette replied immediately contending that "Atlas Food will need to be responsible for the monthly minimum order payment for 10 years."[9]

38 The first defendant's (former) solicitors followed up with a letter to the plaintiff on 20 June 2014 repeating Nanik's allegations in his email dated 12 June 2014, and demanded the return of $147,928.80 paid by the first defendant less $1,177.20. The plaintiff was also requested to take back its consignment of honey referred to in [34] above.

39 The plaintiff replied to Nanik's email through the first defendant's (former) solicitors on 3 July 2014. The plaintiff denied it had made any of the representations alleged by the first defendant, fraudulent or otherwise. The plaintiff then countered that it was the first defendant that had breached the Agreement in failing to order the requisite minimum quantity of the plaintiff's products on a monthly basis and in wrongfully terminating the Agreement.

40 After further correspondence in August 2014 between the parties' solicitors with each side maintaining its stand, the plaintiff filed the writ of summons in this action on 8 October 2014.

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9 2BOAEIC408

The pleadings

41 The plaintiff amended it statement of claim thrice (the last being on 13 April 2016 by order of this court). In its third amendment to the statement of claim, the plaintiff alleged that it was Nesh who approached the plaintiff in October 2013 expressing an interest by Atlas Food to distribute the plaintiff's Honey Secret products. Nesh requested an exclusive distributorship for Atlas Food for Singapore, Philippines, Vietnam, Cambodia and Laos for a period of ten years. However the plaintiff was only keen to offer a distributorship for three years.

42 The plaintiff pleaded that at the first meeting (supposedly held in or about October 2013), it was induced to grant an exclusive distributorship by the following representations made by Nesh as a partner of Atlas Food:

(a) Atlas Food was an established partnership with a good trading record and it was capable of being the plaintiff's exclusive distributor;

(b) Atlas Food was the exclusive distributor in Singapore of Australian products "Natural Volcanic Spring Water" and "Beryl's chocolates";

(c) Nesh and Nanik were extremely wealthy and well-connected and were related to the owners of a Singapore trading group known as Radha Export;

(d) If made the exclusive distributor by the plaintiff, Atlas Food was more than capable of effectively and successfully distributing the plaintiff's products in Singapore, Philippines, Vietnam, Cambodia and

> Laos by purchasing not less than one twenty-foot container of the plaintiff's products every month for ten years

(I will hereinafter refer to these statements as the "defendants' representations").

43 The plaintiff alleged that it was induced by the defendants' representations to orally agree to grant an exclusive distributorship agreement to Atlas Food. Pursuant to the oral agreement, the plaintiff alleged that it prepared an agreement which was executed by the plaintiff and Atlas Food on 2 December 2013 ("the First Agreement"). The First Agreement was signed by Nesh as a partner of Atlas Food and it bound Nanik as a partner of Atlas Food. However on or about 20 December 2013, the plaintiff received an email from Atlas Food enclosing the notice of incorporation dated 11 December 2013 of the first defendant (see [16] above). It was only at this stage that the plaintiff realised that its distributor would be the first defendant and not Atlas Food.

44 The plaintiff alleged it demanded an explanation of the change from Nesh who indicated that:

> (a) Atlas Food was moving towards obtaining a premium image and was in transition. Therefore the first defendant was incorporated to be the flagship to take over the business of Atlas Food; and
>
> (b) Atlas Food would ensure that the first defendant performed its obligations under the proposed distribution between the plaintiff and the first defendant;

(I shall refer to these statements as the "First Assurances").

45 By reason of the First Assurances, which the plaintiff accepted, it proceeded to award the exclusive distributorship rights to the first defendant which it would not otherwise have done. Hence, on 20 December 2013, the plaintiff entered into the Agreement with the first defendant.

46 The plaintiff averred that its officers (namely Jeanette and her mother) met Nanik for the first time on 12 January 2014 at the birthday celebration of the Nanik's son. The plaintiff then discovered that Atlas Food had not an exclusive but only a shared distributorship of "Beryl's chocolates". Subsequently, the plaintiff also discovered from its online checks that Atlas Food was not the exclusive distributor of "Natural Volcanic Spring Water" in Singapore.[10]

47 The plaintiff raised the issue to Nanik who assured the plaintiff that Atlas Food would ensure the first defendant performed its obligations under the Agreement (the "Second Assurance"). Because of the Second Assurance the plaintiff did not rescind or terminate the Agreement with the first defendant. However, due to the failure of the first defendant to honour the Agreement, the plaintiff suffered loss and damage.

48 The plaintiff further alleged that in the course of negotiations Nesh had held himself out to be the owner of Atlas Food and had persuaded the plaintiff's marketing director Jeanette to grant an exclusive distributorship to Atlas Food by (falsely) holding out that Atlas Food was the exclusive

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[10] SOC Amendment No 3 at [15]

distributor in Singapore of Natural Volcanic Spring Water and Beryl's Chocolates. Nesh and Nanik were therefore liable to the plaintiff as partners of Atlas Food.

49 The plaintiff alleged that Atlas Food well knew the representations were false or were recklessly made not caring whether they were true or false. It relied on s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) (the "Misrepresentation Act").

50 The plaintiff claimed the sum of $30,925,440.00 against all three defendants, in the alternative the sum of $3,846,372.84, and in the further alternative the profits the plaintiff would have made over ten years in Singapore, Vietnam and the Philippines. These sums represented the product of different modes of calculating the plaintiff's profits on the unperformed parts of the Agreement.[11] I will expound on these figures later (at [75] below).

51 The plaintiff denied making the plaintiff's First and Second Representations (set out in [10] and [16] above) to Nesh and/or Nanik. Instead, it asserted that:

(a) Schools, hospitals and pharmacies were not 'distributors' segments" as defined under the Agreement (see [18] above); and

(b) Jeanette had not made any statement that the plaintiff had pre-sold 60% of the first order. That figure was just a target towards which the plaintiff hoped to guide the defendants.

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[11] SOC Amendment No 3 at[31]

52 The first defendant filed a separate defence from the joint defence filed by Nesh and Nanik. In its defence, the first defendant pleaded that it relied on the plaintiff's First and Second Representations (set out in [10] and [16] above). It further pleaded the Varied Agreement (in [32] above) contending that the first defendant was thereby discharged from the minimum order obligation and liability for payment under cl 7.1 of the Agreement (set out at [20] above).

53 The first defendant denied that it was in breach of the Agreement and asserted that due to the plaintiff's misrepresentations, it had rescinded the Agreement by way of Nesh's email dated 12 June 2014 to Jeanette.

54 The first defendant pleaded that the plaintiff failed to deliver goods worth $22,440.00 under the first order and failed to deliver goods worth $60,268.80 under the second order. Further, the first defendant was unable to sell the plaintiff's goods worth $12,096.00 due to a lack of labelling and non-compliance with the Food Regulations.

55 The first defendant claimed a declaration that the Agreement had been validly rescinded by the first defendant and it counterclaimed the sums of $22,440.00, $60,268.80 and $12,096.00, and in the alternative damages under ss 2(1) or 2(2) of the Misrepresentation Act. The provisions state:

> **Damages for misrepresentation**
>
> **2**.—(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made

> fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.
>
> (2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

56 In their joint defence, Nesh denied giving the First Assurances pleaded by the plaintiff while Nanik denied giving the Second Assurance. Both denied making any representations on behalf of Atlas Food. They contended that the Agreement was superseded by the Varied Agreement.

57 There is no necessity to address in any detail the plaintiff's reply and defence to the counterclaim (amended twice) filed in response to the first defendant's counterclaim, or the plaintiff's reply to the brothers' joint defence. Essentially the plaintiff joined issue with the defendants on their pleadings and disputed the counterclaim of the first defendant.

58 However, in relation to the defendants' complaint that the plaintiff failed to deliver any goods under the second order, I should point out that the plaintiff pleaded in its reply and defence to the first defendant's counterclaim (amendment no 2)[12] that the plaintiff would have delivered the second order's goods which was only due on 28 July 2014 (three months after payment) had

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[12] Reply and Defence to the first defendant's Counterclaim (Amendment No 2) at [15]

the first defendant not wrongfully repudiated the Agreement on or about 12 June 2014 and refused to take delivery.

The issues

59 This case requires the court to decide which party made representations to the other party. A determination of that issue will decide who breached the Agreement. A secondary issue the court has to decide is whether a Varied Agreement was made as Nanik contended but which Jeanette denied.

The evidence

The plaintiff's case

60 Besides Jeanette and Teckerson, the plaintiff's other witnesses were Jeanette's mother, Lok Hoong Wah, and Wing. I will first address Jeanette's testimony. She was the plaintiff's key witness and was in the witness box for almost two full days.

61 Jeanette's AEIC put a completely different slant on the facts as compared with the versions put forth by Nesh and Nanik. Jeanette's AEIC gave the misleading impression that it was Nesh who had expressed an interest in distributing the plaintiff's products.[13] Her claim was inconsistent with an email on the same day sent by Teckerson to Nesh. The email showed that it was Teckerson who initiated contact by making a cold call to Nesh on 18 November 2013 (see [5] above). After being probed by the court in the course of her cross-examination, Jeanette finally admitted that it was the plaintiff who made the first approach to Nesh.

[13] 1BOAEIC36

62 Jeanette's AEIC rehashed the allegations in the plaintiff's statement of claim, deposing that the defendants' representations induced her to grant the first defendant an exclusive distributorship of the plaintiff's products. She deposed that it was the brothers, and Nesh in particular, who were eager to become the plaintiff's distributor.

63 Jeanette's AEIC was not borne out by the actual facts. Instead, the facts showed how quickly she followed up on Teckerson's first contact with Nesh on 18 November 2013 by telephoning Nesh two days later to request a meeting on the third day. Contrary to her AEIC,[14] negotiations between the parties could not possibly have taken place in October 2013 when Teckerson's cold call to Nesh was only made on 18 November 2013.

64 Jeanette's AEIC tellingly omitted any mention of the many meetings she initiated with Nesh between November 2013 and the signing date of the Agreement on 20 December 2013. The fact that she pressed Nesh to sign the Agreement less than two months after 18 November 2013 is an indication that (contrary to her repeated contentions) it was Jeanette and not the defendants who were keen to commit the defendants (or any of them) to becoming distributors of the plaintiff's products.

65 Jeanette's AEIC did not address but only denied the defendants' complaints pleaded in the defences of the first defendant and the brothers. She contended that the plaintiff was not obliged to refund the sum of $60,268.80 paid by the first defendant for the second order because the latter was in breach of cl 7.1 of the Agreement.

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[14] 1BOAEIC38

66 Jeanette's allegation of the plaintiff being misled into signing the Agreement by the First and Second Assurances of Nesh and Nanik respectively must be seen in the light of the evidence that was adduced from her under cross-examination.

67 When Jeanette was questioned both by counsel for the defendants and the court, it was clear that contrary to what was stated in the Agreement, in the plaintiff's brochures and even in some minutes of meetings prepared by her staff, the plaintiff was neither a "producer" nor a "manufacturer" of honey. All that the plaintiff did was to "formulate" or mix honey products that it obtained from its suppliers – an operation which is hardly rocket science. The statements that the plaintiff manufactured and/or produced honey products were not exaggerations that were used as marketing ploys to advertise its products; they were false altogether. Considerable doubt was also raised during cross-examination as to whether the plaintiff's products actually originated from New Zealand and Australia as Jeanette claimed or were obtained from neighbouring countries such as Malaysia.

68 It further appeared from Jeanette's cross-examination that the plaintiff, in relation to the first order, over-delivered to the first defendant on two items, failed to deliver three items and overcharged for one item. In regard to overcharging, it was noted that the first defendant had ordered "economical longan honey" which cost was $108.00 per carton but received from the plaintiff "longan honey syrup" which cost was $96.00 per carton and was not in the first order. In her re-examination Jeanette admitted to the overcharging but claimed (unconvincingly) that the plaintiff compensated by delivering more honey ginger tea to the first defendant subsequently.

69 It further emerged from Jeanette's cross-examination that the plaintiff would not place any orders with its suppliers unless and until it received full payment from its customers. In other words, the plaintiff never used its own funds to pay its suppliers (most probably because it did not have the means to do so).

70 Contrary to the plaintiff's pleaded case (at [58] above) that the plaintiff would have delivered to the first defendant products under the second order had the first defendant not repudiated the Agreement, Jeanette admitted during cross-examination that the plaintiff did not even ship the products under the second order to Singapore; she sold them off in Malaysia instead.[15]

71 Although the Agreement was indeed signed with the first defendant, Jeanette claimed that it was only on the morning of 20 December 2013 that she was told by Nesh the name of the first defendant and that it would be the entity entering into the Agreement. Her testimony is contradicted by her own email headed "Distributorship agreement" which she sent to Nesh on 12 December 2013 stating in no uncertain terms that Nesh "will be representing Atlas Fine Food Pte Ltd yourself".[16]

72 When she was confronted with the above email, Jeanette changed her testimony by claiming that the signing was actually on 13 December 2013 and not 20 December 2013. That is clearly a lie as the date "20/12/2013" was appended below her signature on the Agreement.

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15 N/E 130

16 AB9

73 The court noted that in her AEIC, Jeanette deposed that the plaintiff had executed the First Agreement with Atlas Food as its distributor as early as 2 December 2013 before she was told on 20 December 2013 that the first defendant would replace Atlas Food. No document evidencing the First Agreement was disclosed. Indeed, not one iota of evidence was produced by Jeanette to substantiate the existence of such a document.

74 The defendants had engaged a forensic expert (Alireza Fazelinasab) to record every text message exchanged between Jeanette and Nesh on the latter's hand-phone between 19 April 2014 and 23 June 2014. Those text messages made no reference to any First Agreement having been concluded on 2 December 2013. Neither were there any emails before or after 2 December 2013 alluding to such an agreement.

75 Cross-examined on the plaintiff's claim for $30,925,440.00 and its alternative claim of $3,846,372.84 (at [50] above) against the defendants, Jeanette was ambivalent. She vacillated and seemed unable to decide which figure she was claiming. She was equally ambivalent on whether she had accepted the first defendant's rescission of the Agreement, suggesting at one stage in cross-examination that she had not agreed to the termination on 12 June 2014. In her AEIC and in the witness stand, she confirmed that the first defendant's alleged breach of the Agreement caused her or the plaintiff to lose profits of $262,080.00 per month for every container not shipped. The plaintiff's loss of profit was computed based on the remaining balance of 118 months left under the Agreement.

76 Further, in her AEIC, Jeanette claimed other sums: one of $4,204,764.80 and another of $45,198,720.00.[17] However, neither figure

appeared in the plaintiff's statement of claim. The figures were again based on projected profits of $35,633.00 per container or $2,230,200.00 per month for 118 months.

77 After lengthy cross-examination on the quantum of her claim, Jeanette eventually agreed that the plaintiff's claim was no longer for the highest amount of $$45,198,720.00 (which was based on the highest value product, *ie*, Manuka honey) but for $30,925,440.00. She admitted that the first defendant did not order Manuka honey. She then said the plaintiff's claim was reduced to $3,846,372.84. In her AEIC however (at page 86) she claimed another sum of $3,520,721.65 which she said was based on 3% discount over ten years and was computed by her accountant(s).

78 At the close of her testimony, Jeanette confirmed the plaintiff's claim was for $3,520,721.65, a figure which did not appear in the statement of claim. In re-examination she reverted to her claim for $3,846,372.84. It serves little purpose to review further Jeanette's testimony on the quantum of the plaintiff's claim as it was impossible to follow her reasoning on her ever changing figures.

79 Jeanette claimed that there were potential distributors waiting in the wings to take over from the first defendant. She testified she wanted this suit to be over to be fair to new distributors before she appointed them. She went so far as to say a listed company distributed the plaintiff's products.

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[17] 1BOAEIC53–54

80 Cross-examined on why the plaintiff did not exercise its rights to terminate the Agreement, Jeanette claimed that the first defendant had asked for time to pay as it was "tight". This evidence was not in her AEIC. It also flies in the face of a statement of account dated 17 June 2014 which the plaintiff sent to the first defendant setting out the March 2014 to June 2014 orders that the first defendant should have placed but did not, supposedly pursuant to cl 7.2 of the Agreement. The statement of account contained a figure of $241,075.20 (at $60,268.80 per month x 4 months). This figure is not reflected in the statement of claim. In truth, Jeanette did not want to terminate the Agreement despite the first defendant's refusal to place further orders with the plaintiff as she had no one else as replacement.

81 It would not be necessary to review the testimony of the plaintiff's other witnesses as nothing turns on their evidence. However, the court noted that Wing's AEIC alleged it was the brothers who had represented to her that 90% of Atlas Food's customers were four- and five-star hotels, but did not provide the customers' list for the first defendant despite promising to do so.[18] Wing's AEIC also accused the defendants of being slow in their payments, and that she had to help the brothers to take delivery of and to market the plaintiff's products. Her litany of complaints included a request by the brothers to repack the honey they had purchased in bulk into 1 kg bottles for which she also had to supply them with labels and stickers.

82 Wing's bare allegations were not substantiated, while her claim that she supplied the first defendant with labels was untrue. Wing's claim to have given stickers to the first defendant for affixing onto the 1 kg bottles of honey

[18] 1BOAEIC15

was contradicted by Jeanette's own email to Nesh dated 16 June 2014 where she said:

> **Expiry Date Stickers & Clienteles List**
>
> Were ready and was brought down by Annabella on the last meeting, however she will need to address minutes agenda before touching down on handing over these items.
>
> **What actually happened** -> Unfortunately, according to our knowledge from the minutes recorder, she was being thrown temper at, even with vulgarities and was clearly asked to leave too. If this has not happened, you would already have had both expiry date stickers & clientels list on your hands.

83 Wing was equally untruthful in her complaint that the first defendant was slow in making payment. The first defendant was not slow in paying because Nanik had obtained Jeanette's consent to make 50% payment for the first order. As the plaintiff did not have funds of its own but had to rely on the first defendant's funds (or rather Atlas Food's) to order the products, Wing was in no position to complain since in essence, the first defendant was paying for its own order of goods.

84 Jeanette persisted in her denial of having made representations to Nesh (as pleaded in the plaintiff's defence to the counterclaim) even though the defendants produced the minutes of the meeting dated 20 March 2014 prepared by Jeanette's secretary, which states:[19]

> **Honey Secret Pte Ltd Food Services Segment Clients Will be Handed to Atlas Fine Food**
>
> We are currently preparing and filtering all food services clients list for you, as there are a huge mixture of clinics, pharmacies and wellness retail clients. Should be ready end of

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19 AB49–50

> march or latest 1st week of April. Regardless, we will keep to our word to pass you these clients before 1st container arrival.

85 Confronted with the above minutes, Jeanette's lame explanation was that she gave the defendants a "filtered" list of the plaintiff's customers in food services out of goodwill (because they kept begging) as she could not possibly give them a list of all her customers. Her answer has to be contrasted with the definition of "Distributor's Segments" in the Agreement (set out at [18] above).

86 In Annabella's emails to Nesh sent between 17 May 2014 and 20 June 2014, the plaintiff requested the first defendant to deliver the plaintiff's products to 13 customers who were either drinks vendors at hawker centres or at coffee shops or cafes/restaurants. I accept Nanik's contention that such emails did not amount to providing the first defendant with a customers' list. In fact they were purchase orders which the first defendant was to fulfil. Jeanette lied to the brothers repeatedly in promising them a list of the plaintiff's customers which she had no intention of giving or more likely did not have to give.

87 As for the Varied Agreement, it was only when she was in the witness stand that Jeanette denied writing the words set out earlier (at [32] above). The joint defence filed by the second and third defendants states:[20]

> Jeanette, on behalf of the Plaintiffs then confirmed the terms of the Oral Agreement by handwriting the following on page 3 of a copy of a document entitled "Meeting Subject: First Official Meeting Of Our Distributorship Commencement" ("Agenda"):

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[20] Joint defence at para 38

> *"Nick sign non-exclusive so that no more 1 cont/mth. Mar(ch) no more 2nd cont (Feb).."*
>
> [emphasis added]

88 In the plaintiff's reply to the defence of the brothers, it was pleaded:

> 9 The plaintiff denies paragraphs 38 and 39 of the Defence and puts the 3rd defendant to strict proof thereof. The plaintiff did not agree with the 3rd defendant (or with any other Defendant) to vary the Contract in any manner.

The plaintiff did not say that Jeanette did not write the italicised words above.

89 My view is reinforced by Jeanette's own AEIC where she said:

> 51 I would state that contrary to paragraphs 37, 38 and 39 of the 2nd and 3rd Defendants' Defence, I did not enter into any alleged "Oral Agreement" with the 3rd defendant and therefore did not agree to vary the Contract in any manner.
>
> 52 Further and/or in the alternative, I would state that the words setting out the alleged "Amended Obligation" at paragraph 38 of the 2nd and 3rd Defendants' Defence at the very most, is only indicative of the request by the 3rd Defendant to vary the contract. This request was rejected by me

90 Jeanette deposed she rejected Nanik's request, not that she did not write the words. Her belated denial in court of the writing of the words prejudiced the defendants. Had the defendants be forewarned that Jeanette was denying her handwriting, they could have arranged for a handwriting expert to prove their case. The court accordingly rejects Jeanette's eleventh hour denial that she did not write the italicised words (in [87] above). It is more than likely that Jeanette did write those words and told Nanik the first defendant was no longer the exclusive distributor for the plaintiff.

91 At the conclusion of Jeanette's cross-examination, there was no doubt that the plaintiff did not give the first defendant any list of its customers as defined under the Agreement or at all. Neither did the plaintiff provide the first defendant with expiry date labels required under r 5 of the Food Regulations. This conclusion is based on Jeanette's own email to Nesh of 16 June 2014 and her admissions in court during cross-examination.[21] Certainly, the sample bottle of the plaintiff's honey that Nanik produced in court did not contain proper labelling – there was only one label showing the plaintiff's name and logo but no label containing nutrition information, let alone an expiry date.

The defendants' case

92 Nesh and Nanik were the defendants' two witnesses, along with their forensic consultant Alireza Fazelinasab who testified on the text messages extracted from Nesh's hand-phone.

93 In the case of Nesh, it was obvious from his difficulty in understanding even simple questions put to him during cross-examination that he was below average in intellect. Nesh's formal schooling ended with primary six. The court has no knowledge whether Jeanette was aware of this fact from her many dealings with him.

94 Earlier (at [64] above), the court had observed that Jeanette's AEIC made no mention of the many meetings she had with Nesh. Consequently, the court's understanding of what transpired in those meetings (as set out in [5] to

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[21] N/E 311–322

[22] above) was extracted from AEICs of the brothers and of Nesh in particular.

95 Hence, it would not be necessary to review the AEIC evidence of the brothers. Unlike Jeanette's testimony, the brothers' case did not change in the course of their cross-examination and their credibility was not shaken. I have no doubt they were telling the truth.

The findings

96 The plaintiff's case hinged on Jeanette's testimony. It is obvious from my earlier observations and comments on her cross-examination, that I did not find her either a reliable or a convincing witness. Indeed, Jeanette changed her testimony as a chameleon would change its colour. She took great liberties with the truth. Her testimony could not be believed.

97 Despite the fact that the Assistant Registrar had on 19 December 2014 (in hearing a striking-out application taken out by the defendants' solicitors) opined that the plaintiff well knew that the first defendant was the contracting party, Jeanette persisted in her action against Atlas Food (*ie*, the two brothers). Her cause of action against the second and third defendants must fail *in limine* – she well knew the first defendant would be the contracting party (see [69] above).

98 It was adduced from Jeanette during cross-examination that the plaintiff was not her first business venture. Starting at 22 years of age, Jeanette had two businesses operating as limited companies which were struck off. It appeared from her track record that she was not very successful. She was sued for rent arrears of $4,200.00 in 2012 and sued by a bank in 2015 for failing to

pay her credit card charges amounting to $8,141.52. When cross-examined on the credit card debt, Jeanette initially professed ignorance until the court pointed out her lie as the bank had obtained judgment against her.[22] Questioned further, Jeanette claimed she "forgot to pay" the charges, an excuse which was totally unconvincing. There also appeared to be a claim against the plaintiff for $10,000.00 for some late payment on which Jeanette offered no details.

99 It is absurd of Jeanette to give the impression in her AEIC that the plaintiff was selective in 2013 as to who should be its distributor. Hers was a proverbial case of "beggars can't be choosers". Contrary to Jeanette claim, the plaintiff was in no position to be choosy. The evidence adduced did not show potential distributors queuing up at Jeanette's door. In fact, Jeanette practically hounded Nesh to become the plaintiff's distributor because it was unlikely anyone else was interested. Indeed, according to Nesh, Teckerson called him three to four times a day, every day, asking to meet up with Nesh. And this was after sending him catalogues of the plaintiff's products. Nesh's evidence in this regard was not challenged.

100 At the outset, I would say it was most foolish of Nesh to commit the first defendant to the Agreement which he could not and/or did not read before signing on 20 December 2013. However, as the defendants have not pleaded *non est factum*, I need say no more about Nesh's folly.

101 Although Nanik's level of education was up to Secondary 4, he too had difficulty comprehending some questions during cross-examination. In re-

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22 N/E 137–138

examination, Nanik explained that despite his younger brother's poor education, he still allowed Nesh to work and be a partner in Atlas Food because he could not treat Nesh as a child. It is commendable of Nanik as an older brother to take care of his younger and less able sibling.

102 Having assessed the testimony of Jeanette and the brothers in the light of the emails, text messages, minutes of meetings produced by the parties and in their cross-examination, I make the following findings:

(a) The brothers whether individually or jointly made no representations nor gave any assurances to Jeanette as alleged in her AEIC or as pleaded by the plaintiff;

(b) On the other hand, Jeanette made the plaintiff's First and Second Representations (at [10] and [16] above) to the brothers all of which turned out to be false as:

(i) The plaintiff did not have more than 500 existing customers in Singapore let alone in schools, hospitals and pharmacies;

(ii) The plaintiff did not have and did not provide a customers' list to whom the first defendant could sell the plaintiff's products; and

(iii) The plaintiff did not pre-sell 60% of every order placed by the first defendant;

(c) Jeanette made the Third Representation to the brothers which again turned out to be false as there was no evidence she gave them a

list of customers from the FoodHotelAsia trade exhibition. It would be straining the truth to define business cards that Jeanette collected from visitors to the exhibition as a customers' list;

(d) The plaintiff did not deliver to the first defendant expiry date labels to enable the first defendant to sell the honey it bought and that was repackaged into 1 kg bottles. Without an expiry date and product information, the plaintiff's bottled honey could not be sold in Singapore because it would breach r 5 of the Food Regulations.

(e) The plaintiff short-delivered to the first defendant $22,400.00 worth of products under the first order and failed to deliver any products under the second order even though the plaintiff received full payment for both orders.

103 The law on actionable representation requires the following conditions to be satisfied:

(a) a representation was made by one party to another party;

(b) it was acted on by the other party and;

(c) the other party suffered detriment as a result.

In addition, for fraudulent representation, the representation must have been made knowingly, without belief in its truth, or recklessly not caring whether it was true or false (see *Panatron Pte Ltd and another v Lee Cheow Lee* and another [2007] 2 SLR (R) 435 ("*Panatron*") at [14]).

104 In the light of my findings (in [102] above), there is little no doubt that the plaintiff through Jeanette made representations that fulfilled the conditions set out by the Court of Appeal in *Panatron*.

105 It was unlikely that the brothers could have given Jeanette the First and Second Assurances (set out in [44] and [47] above). Indeed, it is inconceivable they would do so. Nesh and Nanik would not have given Jeanette the representations (set out in [42] above) in order to secure the plaintiff's distributorship because Atlas Food was not a food retailer. Nesh had expressed his reservations (which I believe) more than once in becoming the plaintiff's distributor.

106 As was stated in their closing submissions, there was no reason for the brothers to want to venture into selling honey and related products to the public when its primary business was/is the wholesaling and importing of certain food products (particularised in [4] above). I further accept the defendants' submission that it defies logic for a simple person like Nesh to commit himself to selling one container-load of the plaintiff's products every month unless he was fooled by Jeanette's representations as well as by the falsehoods contained in the plaintiff's brochures, and was thereby induced to enter into the Agreement.

The decision

107 The defendants had submitted that cl 7.1 of the Agreement (at [20] above) was a penalty clause; I agree. In any event, in the course of Jeanette's cross-examination, the plaintiff had abandoned its absurd and unsupported

claim for $30,925,440.00 as well as its alternative claim for $3,846,372.84. Had it not done so, I would have dismissed the claims as being totally devoid of merit, unfounded, and tantamount to a penalty. Jeanette's claim of being able to make a profit of $262,080.00 per month had the Agreement not been (wrongfully) terminated is fanciful and without basis whatsoever.

108 In regard to the plaintiff's claim for $3,520,721.65, as observed earlier (at [78] above), this was not a claim pleaded in its statement of claim. Accordingly, the claim is also dismissed.

109 On the other hand, the plaintiff's representations made to Nesh and later Nanik entitled the first defendant to rescind the Agreement, which Nesh did by his email to Jeanette on 12 June 2014, and which was repeated in the letter of the first defendant' solicitors to the plaintiff dated 20 June 2014.

110 The first defendant is saddled with the plaintiff's honey which cannot be sold in Singapore due to a breach of r 5 of the Food Regulations made under s 56(1) of the Food Act. Section 56(1)(e) of the Food Act states:

> **Regulations**
>
> **56.** — (1) The Minister may make regulations —
>
> (e) to prescribe the mode of labelling food sold in packages or otherwise, and the matter to be contained or not to be contained in such labels

111 Regulation 5 of the Food Regulations, in turn, states:

General requirements for labelling

5. — (1) No person shall import, advertise, manufacture, sell, consign or deliver any prepacked food if the package of prepacked food does not bear a label containing all the particulars required by these Regulations.

(2) Every package of prepacked food shall, unless otherwise provided in these Regulations, bear a label, marked on or securely attached in a prominent and conspicuous position to the package, containing such particulars, statements, information and words in English as are required by the Act and these Regulations.

(3) The particulars, statements, information and words referred to in paragraph (2) shall appear conspicuously and in a prominent position on the label and shall be clearly legible.

(4) The particulars referred to in paragraph (3) shall include —

(*a*) the common name, or a description (in the case where a suitable common name is not available) sufficient to indicate the true nature of the food;

(*b*) the appropriate designation of each ingredient in the case of food consisting of two or more ingredients and unless the quantity or proportion of each ingredient is specified, the ingredients shall be specified in descending order of the proportions by weight in which they are present.

For the purpose of this sub-paragraph —

(i) "appropriate designation" means a name or description, being a specific and not a generic name or description, which shall indicate to a prospective purchaser the true nature of the ingredient, constituent or product to which it is applied except as provided in the First Schedule;

(ii) it shall not be necessary to state that the food contains water …

(e) the name and address of the manufacturer, packer or local vendor in the case of a food of local origin; and the name and address of the local importer, distributor or agent and the name of the country of origin of the food in the case of an imported food.

…

112 Clause 32.1 of the Agreement (at [20] above) used the words "merchantable quality". The word "merchantable" appeared in s 14 of the (repealed) Sale of Goods Act 1893 (c 71) (UK), which no longer applies in Singapore. The word "merchantable" has been removed from and substituted by the words "satisfactory quality" in s 14(1) and (2) of Singapore's Sale of Goods Act (Cap 393, 1999 Rev Ed) (the "Sale of Goods Act") the relevant portions of which state:

> **Implied terms about quality or fitness**
>
> **14.** — (1) Except as provided by this section and section 15 and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.
>
> (2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:
>
> > (a) fitness for all the purposes for which goods of the kind in question are commonly supplied.

113 In this regard, s 4 of the Supply of Goods Act (Cap 394, 1999 Rev Ed) (the "Supply of Goods Act") is also applicable. It states:

> **Implied terms about quality or fitness**
>
> **4.** — (1) Except as provided by this section and section 5 and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods.
>
> (2) Where, under such a contract, the transferor transfers the property in goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this section and section 5, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

114 Due to non-compliance with Regulation 5 of the Food Act because of the lack of proper labelling, the honey cannot be sold in Singapore as technically it would not be considered to be of "satisfactory quality" under s 14 (2) of the Sale of Goods Act read with s 4(2) and (2A) of the Supply of Goods Act. Arguably therefore, the plaintiff had breached cl 32.1 of the Agreement.

Conclusion

115 In the result, this court dismisses with costs the plaintiff's claim against all three defendants as it failed to discharge its burden of proof that the brothers gave to Jeanette the First and Second Assurances. In regard to the first defendant's counterclaim, Nesh and Nanik had more than proven on a balance of probabilities that Jeanette made the plaintiff's First, Second, and

Third Representations, all of which turned out to be false under the Misrepresentation Act.

116 Consequently, this court awards judgment to the first defendant on its counterclaim together with costs. In this regard, the court grants a declaration that the Agreement dated 20 December 2013 was validly rescinded by the first defendant on 12 June 2014. The court further grants final judgment to the first defendant for the following sums totalling $94,804.80 paid to the plaintiff:

(a) $22,440.00 for the value of goods not delivered under the first order;

(b) $60,268.80 being the sum paid under the second order for which no goods were delivered by the plaintiff;

(c) $12,096.00 for the unsold bottled honey

in the alternative at the first defendant's option, damages to be assessed by the Registrar with interest and costs of assessment reserved to the Registrar.

117 It is ironical that the defendants are now in the position envisaged by Jeanette as to what would happen should the plaintiff win this suit, In her affidavit filed on 17 November 2014 to resist the first defendant's striking out application (of the plaintiff's pleading to be allowed pierce the corporate veil of the first defendant and hold the brothers personally liable as the company's *alter egos*) Jeanette had deposed after complaining the first defendant was a shell company:[23]

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[23] Affidavit of Jeanette Lim Min Er dated 17 November 2014 at para 10

> … equity should prevail in that the 2nd and 3rd defendants who had indeed craftily manipulated the system should not be allowed to escape liability in the event that a paper judgment is obtained against the 1st Defendants. The plaintiff must have recourse against the 2nd and 3rd Defendants should the 1st Defendants throw in the towel and walk away and that is what is a true abuse of the corporate veil by them and not an abuse of process by us as alleged by them.

It is the defendants who will now suffer prejudice as it will likely be left with a paper judgment against the plaintiff who is probably just as if not more impecunious than Jeanette.

Lai Siu Chiu
Senior Judge

Bhaskaran Shamkumar (APAC Law Corporation) for the plaintiff;
Jonathan Yuen, Doreen Chia (Rajah & Tann Singapore LLP) for the three defendants.