

Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd and Others  
[2002] SGHC 198

**Case Number** : Suit 280/2000

**Decision Date** : 30 August 2002

**Tribunal/Court** : High Court

**Coram** : Lai Kew Chai J

**Counsel Name(s)** : Vinodh S Coomaraswamy , David Chan Ming Onn And Chua Sui Tiong ( Shook Lin & Bok ) for the plaintiffs; Thomas Tan , Bernadette Balen And Kueh Ping Yang ( Haridass Ho & Partners ) for the first, second, sixth, twelfth and twenty-seventh defendants; Sheela Lopez ( Sheela Lopez & Co ) for the fourth defendant; Mak Kok Weng ( Mak & Partners ) for the fifth defendant; Belinda Ang SC, Foo Maw Shen , Ng Wai Hong And Deborah Koh ( Ang & Partners ) for the eighth, ninth, tenth, thirteenth and fourteenth defendants

**Parties** : Malaysian International Trading Corp Sdn Bhd — Interamerica Asia Pte Ltd

*Trusts – Breach of trust – Constructive trusts – Conspiracy to defraud – Dishonest assistance of breach of trust – Whether permissible to prove conspiracy through circumstantial evidence – Circumstances under which person liable for dishonest assistance – Circumstances under which person liable as accessory to breach of trust – Combined test of dishonesty – Liability for traceable proceeds, increase in value of trust property and interest on trust property*

Held, Judgment for the plaintiff except in relation to the fourth, ninth, tenth, thirteenth and fourteen defendants. IAG's counterclaim against the plaintiff dismissed.

(1) It is not necessary that the party be aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party takes the risk that they are part of a fraud practised on that party. (see 58 – 63) *Kuwait Oil Tanker Company SAK v Al Bader* (2000) 2 All ER (Comm) 271 (refd); *Agip v Jackson* [1990] 1 Ch 265 (refd).

(2) For a person to be liable as an accessory to a breach of trust, he has to have acted dishonestly by the ordinary standards of reasonable and honest people and have himself been aware by those standards that he was acting dishonestly. (see 66 – 71) *Royal Brunei Airlines v Tan* (1995) 2 AC 378 (refd); *Twinsectra Limited v Yardley & others* (2002) 2 WLR 802 (refd).

(3) The test of dishonesty is a combined test whereby the concept of honesty has to be measured by the combined tests of an objective standard leavened by a subjective element based upon the characteristics and knowledge of the defendant. (see 66 – 71) *Royal Brunei Airlines v Tan* (1995) 2 AC 378 (refd); *Twinsectra Limited v Yardley & others* (2002) 2 WLR 802 (refd).

(4) A businessman is entitled to seize an opportunity so long as he has no reason to believe that he may be dealing with anything suspiciously dishonest. (see 69)

(5) Any traceable proceeds of sale or equivalents held by a party found liable will be held upon constructive trusts for the plaintiffs. Where the trust properties have appreciated and interests have been earned, such accretion in value are also held by them upon trust. (see 73 – 75) *AG v Reid* [1994] 1 AC 324 (refd); *Sumitomo Bank Ltd v Kartika Ratna Thahire & Ors* [1993] 1 SLR 735 (refd); *Williams v Barton* [1927] 2 Ch 9 (refd).

**Cases referred to**

AG v Reid [1994] 1 AC 324 (refd)

Agip v Jackson [1990] 1 Ch 265 (refd)

Kuwait Oil Tanker Company SAK v Al Bader [2000] 2 All ER (Comm) 271 (refd)

Royal Brunei Airlines v Tan [1995] 2 AC 378 (refd)

Sumitomo Bank Ltd v Kartika Ratna Thahire & Ors [1993] 1 SLR 735 (refd)

Twinsectra Limited v Yardley & others [2002] 2 WLR 802 (refd)

Williams v Barton [1927] 2 Ch 9 (refd)

## Judgment

Cur Adv Vult

### GROUPS OF DECISION

#### Introduction

This action is about a massive fraud perpetrated against Malaysian International Trading Corporation Sdn Bhd ("Mitco") which suffered a loss of US\$75.1 million plus financing and other charges and losses, as specified, which Mitco had suffered. Mitco entered into 137 individual contracts of sale of palm olein, particulars of which are set out in Schedule I annexed hereto. Two international fraudsters, an American citizen and a Japanese, deployed the strategy of 'buying high (from Mitco) and selling low' a huge quantity of palm olein (a derivative of palm oil) with no intention to pay Mitco anything like the contracted prices. They were assisted by a Taiwanese who caused to be issued or opened spurious Letters of Credit. Payments, if and when made, were only made to ensure that Mitco would as they did enter into more contracts of sales. They are respectively William Lindsay Cannon ("Cannon", the 17<sup>th</sup> defendant), Shunichi Nonaka ("Nonaka", the 3<sup>rd</sup> defendant) and Tsai Cheng Wen ("Tsai", 23<sup>rd</sup> defendant). Cannon and Nonaka used Inter-America's Group LLC ("IAG", the 15<sup>th</sup> defendant) as a corporate vehicle to carry out the fraud. Tsai was instrumental in opening inoperable letters of credit or fraudulent letters of credit. He received over US\$29 million from the proceeds of sale. I shall refer to Nonaka, IAG, Cannon, IAG and other companies related to them, and Tsai collectively as "the IAG Parties".

2 As part of the fraud, Nonaka and Cannon bribed an employee of Mitco, Mohammed Amin Najib ("Najib", the 5<sup>th</sup> defendant). He was initially Senior Trader and at the crucially relevant period he was the covering Manager of a department of Mitco. That was a key post. Having compromised him, they were able to obtain deliveries of many shipments of palm olein without having to open valid letters of credit to pay for them and, astonishingly, they were also permitted, without any regard for Mitco's interest, to take deliveries of many shipments of palm olein without having to pay or securing payment to Mitco for the original bills of lading. In effect, millions of drums of palm olein were delivered on credit to a first time customer, instead of parting with documents of title against confirmed negotiable letters of credit to ensure that payment would be assured and made by a reputable bank. This mode of payment is basic to any seller of goods in international trade who wants to ensure payment. Further, at the material times the system of controls within Mitco was lamentably wanting at nearly all critical points.

3 If the simple decision had been taken that the bills of lading would not be delivered to the buyer's agents except against payment or assurance of payment by a reputable bank, the fraud would have been exposed and shipments would have been stopped as soon as it was found out that the first letter of credit purportedly opened was not good for negotiation and, certainly, when later letters of credit were found to be suspicious. They were in terms obviously inoperable and were no guarantee for payment against any tender of valid negotiating documents. Mitco's risk management unit was in its embryonic stage and that unit also failed to carry out its duties to detect the serious failures and weaknesses in the General Merchandise Department ("GMD") of Mitco. On the other hand, it has to be noted that very often a dishonest and compromised insider can help outside fraudsters to by-pass internal checks and balances and such scams with insider assistance

are very more difficult to detect or prevent.

4 Mitco at the trial made the claim that its Chief Executive Officer, Azalan Mior Zainadi ("Azalan", the 4<sup>th</sup> defendant) had also conspired with the fraudsters to defraud Mitco. A great deal of evidence was led. The question is whether Azalan as one of the principal parties had conspired with the principal conspirators to cheat Mitco?

5 Further, a large part of the evidence was also led which related to the roles of certain other defendants who had arranged for the onward sales of the palm olein to buyers in China and India. The question of fact in this connection is whether they were genuine buyers themselves in a series of arm's length commercial transactions and they had on-sold the palm olein to the end buyers in China or India or whether they had conspired with the other fraudsters to cheat Mitco or had committed some equitable wrongs. In relation to these parties, Mitco further assert that they had 'dishonestly assisted' their employee or employees in breaching their contractual and/or fiduciary duties in such a manner and to such an extent that there was dishonest assistance when analysed under the combined tests as set out in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 and as recently clarified by the majority of the House of Lords in *Twinsectra Limited v Yardley & others* [2002] 2 WLR 802. The latter speeches were delivered by the Law Lords on 21 March 2002 after parties in this action had filed with me all their written submissions and at their requests further submissions were filed on the impact of *Twinsectra* in the applications of the facts as found by me on the evidence. In short, who of the other defendants were implicated in and had rendered the dishonest assistance, which caused the enormous loss to Mitco, is also a substantial area of enquiry and adjudication which this judgment has to address.

6 In addition to the IAG Parties and the two high level Executives of Mitco, there were essentially three downstream groups of persons and their related companies who or which had successively dealt with the IAG Parties in the disposal of the palm olein. In the end, the basic questions of fact are whether both or each of the last two groups of persons and their companies had dealt with the IAG Parties, principally Nonaka, bona fide and commercially at arm's length without notice of the conspiracy or were they fellow conspirators and/or dishonest accessories.

7 The first party Nonaka came into contact with was Tiong Tack Kieng (26<sup>th</sup> defendant), a Malaysian business operating out of Kuala Lumpur, Malaysia. He and two Malaysian companies in which he was a director, Excellead Sdn Bhd (the 24<sup>th</sup> defendant) and EP Sdn Bhd (25<sup>th</sup> defendant) reached an agreement with Mitco prior to the commencement of the trial. Mitco discontinued their claims against him and his two companies. He gave evidence for Mitco. He told the court that he had had dealings with Mitco's parent, Petronas, in the latter's "up stream" business. In mid 1998 he took an interest in possible trading opportunities in the palm oil market. Early in this new line of business he came into contact through his internet enquiries with Nonaka who described himself as the "South East Asia Regional Representative" of Ecopal Trading Group LLC, United States of America ("Ecopal", the 19<sup>th</sup> defendant). On Nonaka's assurances he negotiated as agents of Ecopal to sell 10,000 metric tons of palm olein to China Tushu Sunry International Trading Corporation ("China Tushu"), a Chinese company based in Beijing which was one of only three or four active companies in China licensed to import palm oil and palm olein. The price was US\$626 per metric ton ("PMT"). But Nonaka was unable to provide any supplier to meet the commitment despite his earlier promises and he requested Tiong Tack Kieng to source for a reliable supplier. China Tushu did not open the letter of credit. Eventually, this transaction fell through.

8 That request led Tiong Tack Kieng to make enquiries in the course of which he came to know that Mitco was also trading in palm oil and palm olein. Sometime in mid September, 1998 he met Najib for the first time. He arranged a meeting between Nonaka and Najib at Mitco's office. They explored the prospect. Nonaka introduced Ecopal and told Najib about their business. Najib made it clear that Mitco had unlimited access to palm oil and palm olein. Najib referred to market levels and he mentioned that he would sell to Nonaka at US\$715 PMT. Nonaka, to the surprise of Tiong Tack Kieng readily agreed to buy at that price without any negotiations whatsoever. It was US\$89 PMT above the price at which Nonaka had agreed to sell to China Tushu. Najib also indicated that payment would be by Letter of Credit ("LC"). Nonaka said it would not be a problem.

9 In fact, Nonaka could not open the LCs. He enlisted the help of Tiong Tack Kieng. According to the latter, he came across an advertisement for Tsai's company on the internet which claimed that the company could provide LC "financing". Tiong Tack Kieng carried out the initial discussions. He visited Tsai in Taipei, Republic of China. Later, Nonaka contacted Tsai direct. They agreed that Tsai would open the LCs in favour of Mitco in return for "commission". 84 LCs were opened or purportedly opened in respect of the contracts of sales between Mitco and IAG. 64 of them contained inoperable terms and provided no security for payment by the opening bank. Of the remaining

19 LCs, most of them were fraudulent.

10 The next two groups of people and companies may be conveniently referred to as "the Huangpu Parties" and "the IAA Parties" respectively.

11 The Huangpu Parties comprise Huangpu Industrial Holdings Pte Ltd ("Huangpu", the 8<sup>th</sup> defendants), Tiong Chiong Hing (hereafter referred to as "Mike", the 9<sup>th</sup> defendant) and Fu Rong Hua (hereinafter referred to as "Cindy Fu", the 10<sup>th</sup> defendant).

12 The IAA Parties comprise the Interamerica Asia Pte Limited (separately referred to as "the IAA" and the first defendants), Interamerica International Pte Ltd ("IAA" and the 2<sup>nd</sup> defendants), Choo Siew Lohk (separately referred to as "Lionel" and the 6<sup>th</sup> defendant) and Wu Mun Wai (separately referred to as "Jeson" and the 12<sup>th</sup> defendant).

13 I should highlight that initially Lionel and Jeson were in the employ of Huangpu when Huangpu entered into the first 22 contracts to purchase the palm olein from IAG. The first contract was entered into, as noted earlier, with Excellead. The next 21 contracts were directly between Huangpu and IAG. According to the Huangpu Parties and the IAA Parties, thereafter the Huangpu Parties, as will be set out later in this judgment, ceased to have anything to do with any further purchases and sales of the palm olein. The circumstances under which the IAA Parties under Nonaka took over from the Huangpu Parties will be elaborated later in this judgment. He (Nonaka) had recruited Lionel and Jeson and two of their colleagues to join him in IAA, a company incorporated in Singapore on 31 March 1999. The new arrangements were agreed by the Huangpu Parties. Mitco in this action, of course, take a very different view and their case is as follows.

14 For the purposes of their claims Mitco, under their primary contention that nearly all the defendants had conspired to defraud, are treating everyone and every company within the Huangpu Parties and the IAA Parties as one and that they together with Nagib and Azalan had combined to defraud Mitco. Mitco have also asserted, in the alternative, that these two groups are liable for dishonest assistance of breach of trust and inducement of breach of contract. They also claim that the IAA Parties and Flashy Properties Limited ("Flashy", the 27<sup>th</sup> defendants), a BVI company incorporated on 5 January 1995 which was beneficially owned and/or controlled by Lionel Choo, for having knowingly received property transferred in breach of trust. As against Flashy, Mitco are also seeking the relief of tracing.

15 On the other hand, the two groups who or which had filed their original joint defences, separately mounted the same defences at the trial. Basically, they assert that all 137 contracts were bona fide commercial contracts of purchases of palm olein which were separately entered into and carried out at arm's length. The Huangpu Parties upon legal advice detached themselves from the IAA Parties and conducted their defences independently, having filed their own defence. Their respective roles will be separately addressed in this judgment.

16 I now turn to the circumstances in which Tiong Tack Kieng first met the Huangpu Parties. Huangpu had been revived with a paid up capital of \$1m. For over a year Huangpu had been trading, though it had consummated only a few palm olein trades. As stated earlier, Jeson was in the employ of Huangpu. In or about mid November 1998 Cindy Fu told Jeson that China Tushu had asked her to enquire about Tiong Tack Kieng's access to palm olein at highly competitive prices. Jeson telephoned the latter and informed him that he understood that his principals were able to sell palm olein at highly competitive prices and that he had interested buyers. Tiong informed Nonaka. It transpired that Huangpu was interested to buy 3,000 metric tons of palm olein at the price of US\$626 PMT. Tiong Tack Kieng travelled to Singapore on 20 November 1998 and met Jeson, his colleague Lionel, Cindy and Mike. Tiong TK eventually contracted, with the approval of Nonaka, that Excellead could sell the palm olein at US\$650 PMT. Nonaka informed Tiong TK that IAG would be the party supplying Excellead. Huangpu caused Rabobank to open the LC. The shipment was loaded on m.v. Technochem on 26 November 1998. Huangpu had on-sold the consignment to a Chinese entity by the name of Summerwind.

17 Just before Tiong Tack Kieng's tender of shipping documents for payment under the Rabobank LC, he met with Nonaka and Cannon, a US citizen, was at all material times a Director of IAG. He was anxious to control the way the proceeds of sale was to be dealt with. On his direction and with the concurrence of Nonaka he issued to Tiong Tack Kieng written instructions for the distribution of the net proceeds of the LC totalling US\$1,915,747.70. Excellead were paid their profits and their commission. Tiong Tack Kieng eventually noticed that Nonaka was bypassing him and had dealt directly with Huangpu. He was most unhappy.

18 On 1 January 1999 Nonaka informed Tiong Tack Kieng by e-mail that Huangpu was taking over from Excellead. A termination fee of

US\$120,000 was agreed. They parted company and went their separate ways.

19 Following the first contract between IAG and Huangpu in which Excellead played a role, Huangpu on their own entered into 21 contracts of sale with IAG: Schedule 2 attached shows the particulars. The total quantity was 69,032,316 metric tons and the total invoice value was US\$34,009,294.16: these figures do not include the first shipment via m.v. "Technochem" as it was sold under the arrangements made by Tiong Tack Kieng on behalf of Excellead. Huangpu in turn on-sold the 69,032,316 metric tons of palm olein to their end-buyers in the People's Republic of China ("PRC") for the total invoice of US\$35,434,598.19. Huangpu assert that all these were bona fide arms length transactions. Huangpu entered into an agreement dated 6 February 1999 with IAG and agreed to purchase 20,000 metric tons of palm olein from IAG each month. In the Memorandum of Understanding, Huangpu would receive a discount of US\$17 from the agreed price or from IAG's selling price.

20 In February 1999 Huangpu defaulted in their payments to IAG in relation to three shipments which were effected on m.v. "Spring Grace", "Yang Pu" and "Ussuryisk".

21 Nonaka and Cannon were very dissatisfied and decided to exercise control over the disposal of the proceeds of sale paid by the end-buyers effected through the corresponding LCs. They decided to set up a Singapore office. In March, 1999 Nonaka verbally invited Lionel to be the local director of IAA. He asked Jeson to have the company incorporated. It was incorporated on 31 March 1999 with a paid-up capital of \$500,000. Its office was at the premises of Huangpu and another company related to Lionel and Jeson. Nonaka agreed with Lionel, Jeson and their two colleagues that the terms of the MOU between IAG and Huangpu would apply to them. IAG would pay them commission. Lionel and Jeson would each get 40% of the commission whilst their two other colleagues would share the remaining 20% equally.

22 To track down fraudsters and others implicated, a victim usually has to follow the money. Mitco's investigations traced how the proceeds of sale of the palm olein were distributed. The proceeds totalled about US\$124 million which was received in different proportions by the Huangpu Parties and the IAA Parties. Huangpu paid US\$3.6 million and IAA paid US\$10 million to Mitco. About US\$0.8 million was paid to Nonaka purportedly as 'commission'. Mitco assert that US\$2 million was paid to Mike Tiong and that about US\$1.1 million was paid by the IAA Parties to Flashy. Tsai was paid about US\$29.1 million out of the proceeds. Ostensibly the substantial payments were for the procurement of the LCs. There were other payments to other parties within the loop of the IAG Parties and these will be set out later.

### **The transactions**

23 Between November 1998 and June 1999 Mitco had entered into 123 spot purchase contracts with KD Energy Co Limited ("KD") for the purchase of palm olein in bulk Malaysian origin. They also entered into 123 spot sale contracts with IAG for the sale of the said palm olein under a "back-to-back" arrangement. In June, 1999 Mitco had also entered into 14 spot purchase and sale contracts with Global Commodities (M) Sdn Bhd ("Global") and IAG respectively. According to the schedules prepared by Mitco's forensic accountants, Messrs Ernst & Young, IAG on-sold 69,032,316 MT of the palm olein to Huangpu at a total invoice price of US\$34,009,294.16. This total does not include the invoice price of the first shipment by m.v. Technochem which was sold via Excellead. According to the schedules prepared by Ernst & Young, IAG on-sold 165,529,981 MT of palm olein to IAA at the total invoice price of US\$73,448,680.00. Huangpu's purchases, which were less than half those of IA, were sold only to end-buyers in the PRC. IAA's end-buyers were in India. If payments had been fully and promptly made to Mitco by IAG in the ordinary course of business, Mitco would be assured of making a profit.

24 By late 1999, Mitco had supplied to IAG a total of 307,023,648 MT of palm olein pursuant to 93 of the 137 sale contracts. The outstanding invoice value was US\$162,297,004.20. In relation to the 44 outstanding contracts it became clear to the Board of Directors of Mitco that IAG and to Azalan, and certainly to Najib, that IAG were not complying with and were not able to fulfil their contractual commitments. Mitco cancelled these contracts. In my judgment they were perfectly entitled to do so and IAG's counterclaims against Mitco in connection with these outstanding contracts were completely without merits. Of the total tonnage of palm olein supplied by Mitco, Mitco were able to collect payment in respect of 62,931,201 MT directly from the end-buyers by the process of by-passing IAG. These payments are here referred to as "the By-pass Payments". Further, Mitco were able to collect payment in respect of 9,582,068 MT on a "Cash Against Documents" basis.

25 Najib played a key role in Mitco in respect of the purchase and sale contracts. He was a very experienced trader. He was a Manager within GMD and from 11 February 1999 he was the covering Senior Manager of GMD. He personally negotiated the terms of the contracts

and agreed to them on behalf of Mitco. He knew Nonaka from 1997 and had described the latter as his "old buddy" to a colleague in the GMD. He signed all 131 out of the 137 sale contracts and witnessed the initial ones. He also signed 121 out of the 123 KD Energy purchase contracts on behalf of Mitco. In addition, he confirmed all 14 of the Global purchase contracts on behalf of Mitco. On the evidence of his colleagues within GMD, I find that he generally handled all the negotiations with KD and with Nonaka acting for IAG. He kept a tight control over the documentation and he directed the operations and procedures in respect of the purchases and sales of palm olein .

26 His colleagues within the GMD and in Finance and Administration Department ("FAD") had raised with Najib on a number of occasions their concerns about the inoperable terms stipulated in the LCs. But Najib told them not to worry because IAG would make payment by telegraphic transfers ("TT"). This action of Najib was utterly beyond his mandate and authority and it cost Mitco dearly. He had no authority to deliver any palm olein without ensuring that payment to Mitco was assured beyond question. He misled his colleagues by falsely representing that he had discussed the matter with Azalan. Azalan entrusted Najib in the palm olein sales, which were within the marketing objectives of Mitco, and most unfortunately for him he took the latter's word, which proved to be a litany of lies. I do not agree at all that these lapses of Azalan, however unfortunate, taken together were consistent only with deliberate dishonesty. Azalan was ambitious and he tried his best, amongst his multifarious duties, to earn the confirmation of his acting appointment as the Chief Executive Officer by achieving impressive performance by Mitco. In trusting Najib, which was not at all unreasonable, he was let down. But that mis-judgment, which often happens in the real world, is certainly not dishonesty, or even a manifestation of too trusting a nature. The events happened within a relatively short period of time. He had assumed, though wrongly as it turned out, that the LCs were duly in place even if 90 days' credit was given, that the payment of each Mitco's sale was fully secured. Unbeknown to him, until it was too late, Najib who was suborned had betrayed him and some of his colleagues in GMD and FAD, prominently Abu Bakar Salleh ("Bakar", one time Senior Manager of GMD in Mitco), had let him down.

27 Najib's involvement in the first sale contract incriminate him. He was involved in various communications relating to the first contract. He instructed his colleague in GMD to process the transaction. He signed the proforma invoice to Ecopal Inc, the 20<sup>th</sup> defendant which filed a defence and which is a limited company registered in the State of Texas. Cannon was President of Ecopal Inc. He arranged for Bakar to sign the contract. He signed as a witness of the first contract. The first contract, which was shipped by m.v. Technochem, was finalised in mid-September 1998. The price was US\$715 PMT. Though the term requiring the buyers to tender at sight LC, Najib agreed to a 90 day LC. The amended version was only signed again later. Yet the price remained at US\$715 PMT. In cross examination he offered the lame excuse that it was a typing error and further that prices had dropped and that the additional financing costs were absorbed in the said price. It was not. The calculations were back-dated and Najib misled Azalan into counter-signing on the calculations. The IAG Parties made payment for the shipment on 3 March 1999 and it was done so that more contracts could be entered into without anybody raising any issue about them.

28 Najib was also plainly implicated by his conduct in the second contract for sale to the IAG Parties. Though he settled the terms, he never ensured that the LC was duly opened. Worse, on 5 February 1999 he even released the shipping documents after the palm olein was loaded on board m.v. Chem Challenger to Nonaka without a valid LC in place. On the day he released those shipping documents, Nonaka had not even issued a valid LC for the palm olein under the first contract. He also knew that Nonaka had failed to open the LC and was obviously not keeping his word. I am compelled to find the document, purporting to indicate that Bakar had authorised the release of the shipping documents, was fabricated. Since Najib was the only one who had the motivation, the opportunity and knowledge of the necessary facts to fabricate it, I am also compelled to find that Najib was responsible for it.

29 In terms of compliance with the limits of authority in force within Mitco, the first 6 contracts of sale, one signed by Bakar and 5 by Azalan, were not found to have run foul of those limits of authority. Of the 5 spot sale contracts 4 were signed in January 1999 and one was signed in February 1999. After Najib was appointed by Azalan as covering Senior Manager of GMD with effect from 11 February 1999, Najib signed the remaining 131 'spot' sale contracts. If valid LCs covering each contract had been opened in time, those contracts would have been properly described as 'back-to-back' spot contracts and Mitco would not have been exposed to any risks. I accept Azalan's explanation that he thought at all material times that Najib had protected the position of Mitco and that all valid LCs were in place. That was why he thought Mitco under his leadership was doing rather well and there was no need to obtain any approval from Mitco's Board. Each of the 137 transactions was, he thought, fully covered by an LC and each of them was not a 'term' transaction involving more than one year or RM\$75 million, which according to the internal rules of Mitco, would have required Board's approval.

30 Under their internal rules, GMD's Senior Manager or covering Senior Manager was required to issue Purchase Orders in respect of

FOB purchases such as those entered into with KD Energy. In the context of the transactions under consideration in this case these were "Loading Instructions" to KD Energy. Such Loading Instructions confer on KD Energy authorisation for loading. They should therefore only be issued after GMD's receipt of acceptable LCs. FAD were to verify the acceptability of the LCs and have them authenticated by the confirming banks in Kuala Lumpur. Under the spot contracts with the IAG or the related party the buyers were required to ensure that Mitco receive the LCs no later than 10 days prior to loading.

31 In relation to the first 16 spot purchases by Mitco from KD Energy, during the period from 20 November 1998 and 13 March 1999, Najib issued the Loading Instructions. In his "Stock Position/Vessel Nomination" advice which detailed the names of the suppliers, quantities to be loaded, loading ports and loading laycans, he specified his instructions to KD Energy after he had concluded spot sale contracts with IAG and after IAG had given him the loading particulars. However, for 3 shipments on 4 February, 1999 and 82 other shipments beginning from 20 March 1999 loading instructions ceased to be issued by Najib. They were instead, most unusually, issued directly by Huangpu, purportedly as agent of IAG, directly to KD Energy who acted on them after Najib confirmed that it was quite in order for KD Energy to accept and act on those instructions.

32 In fact, 84 LCs were opened or purportedly opened in respect of the spot sales. They were inoperable in as much as Mitco were or would be unable to tender the required documents and negotiate them. These are set out in the first part of Schedule 4 of the Amended Statement of Claim. It will be instructive in a number of ways to take as an example the LCs opened for the first spot sale contract. On or about 16 November 1998 three irrevocable letters of credit were issued by FIBI Bank (Switzerland) Ltd in favour of Mitco ("the FIBI LCs"). One of the conditions was that a survey certificate was required and it was further stipulated in the FIBI LCs that *"The name of the surveyor shall be confirmed to the beneficiary through advising bank by opening bank by authenticated swift/cable which must be essential document for negotiation..."*. Plainly the FIBI LCs were not assured credits unless the accountee of those LCs gave the instructions to the opening bank and the opening bank is willing to make the confirmation. As it transpired, Bacharuddin Abrifin ("Bacharuddin"), a Senior Executive of the FAD's Trade Finance Section, attempted to negotiate the LC for the first shipment on 25 November 1998 under one of the FIBI LCs for 3,000 MT of palm olein. But FIBI Bank (Switzerland) Ltd noted that the surveyor was not confirmed by the issuing bank, the cable/telex reconfirmation of surveyor's name was not presented, the survey certificate was not presented and there were alternations on the Bill of Lading which were not approved. Because of the discrepancies, the negotiation failed and Bacharuddin alerted Najib, followed by an email on 4 February 1999 to his superior, the Senior Manager of FAD, Abdul Talib Baba ("Talib") and a colleague. On 8 February 1999 Mitco by fax informed IAG (in effect Nonaka) and IAG on the same day asked Najib by fax for Mitco's account number for payment by Telegraphic Transfer.

33 On the evidence, Najib did receive bribes from Nonaka and Cannon. They were made from the proceeds of sale by IAG on their instructions. Between April 1998 and April 2000, he received at least about US\$1.2 million, most of which were deposited into his Kuala Lumpur bank accounts in cash. His explanations that they came from commissions earned in respect of a financing deal with a party in Thailand is totally incredible. His claim that an investment of his in Prudential of MR\$1 million came from his brother was not corroborated at the trial before me, although he had ample opportunities to do so. He failed to provide any documentation to support his bare allegations. He was the beneficial and registered owner of a BMW 532i registered on 16 December 1999 and he bought on hire purchase a Isuzu Trooper on 12 May 1999 for which the monthly instalment was MR\$3,411.11. In addition, his first wife bought another Isuzu Trooper on 31 May 1999 on hire purchase. His last drawn salary from Mitco was only MR\$4,713.26 net. With two wives and 5 children, it was obvious that he could not have accumulated by savings all his wealth which were acquired during the period he was dealing with the IAG Parties.

34 On 11 February 1999 Mitco informed IAG its bank account number. The payment under the first spot sale contract was effected by TT, instead of by LC. Most unfortunately, this first transaction set the practice for the rest of the transactions in respect of the mode of payment. Najib had absolutely no authority to have agreed to this fundamental variation. Curiously, Bakar re-signed the amended contract in March 1999. There was, however, no evidence which show that Azalan at all material times was aware of the variation and that he had condoned it. I am satisfied that he was unaware and therefore there was no question of any condoning by him. Such an arrangement meant that IAG was given the credit for at least the 90 days. It left Mitco exposed. Najib was bribed and he believed on the slenderest assurances of the fraudsters, and in particular Nonaka, that IAG would pay fully by TT on due dates. In my judgment, Najib was blinded by the bribes and he did not care if Mitco were not paid. However, I did not think that he had at that time realised the extent Mitco would be defrauded. If so, he was such a dishonest but shrewd person that I had no doubt that he would have insisted on a bigger share of the spoils.

## **The Huangpu Parties**

**(a) The background**

35 I now turn to the Huangpu Parties by setting out briefly their background. Mike Tiong, a Malaysian, started business in Singapore in 1992. In that year, he and one Sun Zeng ("Sun") incorporated Huangpu Holdings International Pte Ltd ("Huangpu Holdings", the 14<sup>th</sup> defendants). Sun was a friend of the father of Mike Tiong. The paid up capital of Huangpu Holdings was 4,310,002 shares of \$1 each. It was a subsidiary of a BVI company. He and Sun held the beneficial interests in Huangpu Holdings in equal shares, despite the shareholdings. The company was planned to be holding company. Its wholly-owned subsidiary, Huangpu Asia Pte Ltd ("Huangpu Asia", the 13<sup>th</sup> defendants), was incorporated for the purpose of taking over the trading activities of Huangpu Holdings. Only 2 shares of \$1 each were issued to Huangpu Holdings.

36 While studying in USA, Mike Tiong met Lionel in 1988. Since then, they have been friends. After he graduated Mike Tiong returned to Sibul, Sarawak and worked in the father's company, Central Cold Storage Sdn Bhd. In 1994 Lionel introduced Jerson to him. He also introduced one Tan Tiong Peng aka Thomas and one Chow Wing Hong aka "Mikey" to him. In 1995 Mike Tiong invited Lionel, Mikey and Thomas to take up employment in Huangpu Holdings when all three, who did not know anything about trading, indicated that they wanted to learn how to trade. Mike Tiong showed them the ropes and they assisted him with the trading and the import/export procedures.

37 Huangpu Asia took over the trading of Huangpu. Jerson, who was a remisier, began working for Huangpu Asia in mid-1995. Sun was not willing to pay Lionel, Jerson, Mikey and Thomas the market rates for traders. They were very poorly paid. So In early 1996 Mike Tiong permitted them to trade through their own companies under the name of the Approach group of companies. In mid-1996 Lionel, Jerson, Mikey and Thomas left the employ of Huangpu Holdings and Huangpu Asia.

38 In early 1995 the businesses of Huangpu Holdings and Huangpu Asia were thriving. Huangpu Holdings sold all sorts of commodities including wool, copper, crude oil, electronics and electronic parts to the contacts of Sun in the PRC. The turnover was of the order of US\$295 million. Sun did not share the profits with Mike Tiong and he asserted total control of both companies. Towards the end of 1996, Mike Tiong lost all interest in the two companies and he transferred his interests in the BVI parent company, Radwell Holdings Ltd, which had an office in Hong Kong. He resigned all his managing directorship and all his positions in the two companies. But Sun did not file the necessary returns with the Registry of Companies. However, the business of Huangpu Asia came to a stop in 1998 and it was not disputed by Mitco that Huangpu Holdings became dormant sometime in 1997. Despite the extensive discovery orders against both Huangpu Asia and Huangpu Holdings, Mitco have not been able to uncover any evidence of any payment out of the ill-gotten gains to and receipt by both these companies. I accept the submission of counsel for the Huangpu Parties that Mitco's claims against both 13<sup>th</sup> and 14<sup>th</sup> defendants should be dismissed with costs.

39 In late 1996 or early 1997 Mike Tiong met Cindy Fu in Singapore at a party of a mutual friend. They had met in the PRC but only casually. Cindy Fu, a Chinese national and now a citizen of Brazil, is a graduate from the Zheng Zhou University of Grains, PRC and by the time they met, she had vast experience in trading commodities. In 1987 she worked as an executive in Qingdao Oils and Grains Department. Over time, he built up her network of contacts, especially people in high positions in various state-controlled companies licensed to import edible oils into the PRC. She was not making much headway because she was new in Singapore and did not have contacts. Their feelings for each other grew. In the early days, Mike Tiong proposed and they teamed up in a new business. He had in mind reviving Huangpu, which he had incorporated in January 1996, and which had been lying dormant. In the event, he paid for and took up \$500,000 shares in Huangpu at \$1 each. Cindy Fu herself invested \$499,000. Lionel took up one share. All three became directors of Huangpu. They started trading from their premises at 15 McCallum Street, #11-03, Natwest Centre Singapore with Approach Technology Pte Ltd, Approach Asia Pte Ltd and Approach Investments Pte Ltd. All Approach companies were owned by Lionel, Jerson, Mikey and Thomas. All of them eventually took up employment with Huangpu.

40 Cindy Fu's main role was to source for buyers in the PRC. Lionel, Jerson, Mickey and Thomas handled the negotiations, documentation and administration. Mike Tiong was involved in making some decisions about the first few trades and shipments of Huangpu. He was looking for opportunities to widen their investments in liquor business in the PRC or the owning of palm estate or plantation in the Riau islands. He and Cindy Fu travelled extensively. Lionel was trusted to handle the banking transactions and Mike Tiong signed blank cheques and TT application forms to facilitate businesses. In late 1998 their office was moved to 36 Purvis Street, #02-09/10 Talib Centre, Singapore.



**(b) Huangpu's business dealings**

**(i) Initial deals**

41 Before Huangpu started their deals with IAG, they had consummated a few deals. In early February 1998, Cindy Fu put together the sale of 175 MT of Indonesia dried fishmeal to Sinochem ShangdongYantai Import & Export Corporation, PRC. Huangpu's sellers were an Indonesian company and shipment was effected in April 1998. Tushu China also bought from Huangpu pursuant to two contracts 2,000 MT and 3,000 MT of palm olein. They were shipped out in March 1998. The third palm oil sale contract was to the China Grains & Oils Group Corporation ("China Grains & Oil"). Huangpu sold 3,000MT of palm olein, which they had contracted to buy from Raffles International Co Ltd ("Raffles"). Raffles in turn had bought this lot from Sigtronics Marine Pte Ltd ("Sigtronics") in favour of whom, at the request of Raffles, Huangpu opened an LC for US\$2.16 million. Huangpu's 4<sup>th</sup> palm olein sale was with Gardner Smith (SEA) Ltd for 1,500 MT of palm olein. On the evidence, the palm olein, which were under the 3<sup>rd</sup> and 4<sup>th</sup> contracts of Huangpu, were shipped on m.v. "Ibuki" in December 1998. The 5<sup>th</sup> palm olein sale contract of Huangpu was entered into with Poh Guan Ho Investment Pte Ltd through Summerwind. Huangpu bought the goods from Kong Hoo (Pte) Ltd. The goods were shipped on board m.v. "Changi". In addition, Huangpu also sold other commodities such as soya bean oil, rapeseed oil, fishmeal and aluminum ingots. Cindy Fu procured most of these deals for Huangpu.

42 From the abovementioned 5 trades, the m.v. Ibuki shipment resulted in massive losses for Huangpu. Huangpu in October/November 1998 purchased 3,000 MT of palm olein from Raffles and another 1,500 MT (in drums) from Sigtronics. Huangpu, as stated earlier, on sold the 3,000 MT to China Grains & Oils and the 1,500 MT of palm olein to Garner Smith. On the instructions of Raffles, both LCs were established in favour of Sigtronics. Sigtronics chartered a vessel named m.v. "Ibuki". The palm olein were loaded at Pasir Gudang West Malaysia. The shipping documents were presented to Huangpu's, Rabobank for negotiations. Rabobank on 9 December 1998 paid US\$2.159 million to Sigtronics under the letter of credit. The vessel disappeared en route to the PRC and did not arrive at the port of discharge. Initially, Huangpu was told that the vessel encountered bad weather and that caused the delay. Later, the news on 28 December 1998 and then on 5 January 1999 were that the vessel had engine trouble and was waiting for spares to be delivered to the vessel. Huangpu's solicitors, Messrs Rajah & Tann sometime after 14 January 1999 advised that the vessel that loaded the palm olein at Pasir Gudang was another ship masquerading as m.v. "Ibuki". As a result, the Chinese buyers refused to pay Huangpu for the cargo. Instead, Huangpu had to compensate the buyers for their losses. On top of that Rabobank secured Lionel's signature authorising the bank to deduct amounts standing in Huangpu's account to repay the advances made by the bank for the m.v. "Ibuki" shipment.

**(ii) Huangpu's deals with IAG**

43 In what has been described as an "all-embracing" allegations of conspiracy to defraud which Mitco have asserted against, inter alia, the Huangpu Parties, they relied on 22 contracts entered into by Huangpu, one with Excellead and the remaining 21 contracts with IAG directly. On 21 November 1998, after Tiong Tack Kieng had met the Huangpu Parties as described in the Introduction of this judgment, he sent a contract of sale and purchase between Excellead and Huangpu for 3,000MT of palm olein at the price of US\$650 PMT FOB basis. Tiong Tack Kieng was very keen to break into the PRC market and offered by way of inducement a price which was US\$15 PMT below the market price. Excellead in turn had a much bigger discount from IAG. Nonaka had instructed Tiong Tack Kieng to offer to Huangpu the palm olein at US\$626 PMT. At that unit price the overall price would have been US\$1,878,000. Armed with this privileged information, Tiong Tack Kieng negotiated with the Huangpu Parties and he gathered the distinct impression that the latter were prepared to pay a price higher than US\$650 PMT. His company contracted with Huangpu at that price. In turn, Nonaka caused IAG to enter into the contract to sell the same quantity of palm olein to Excellead at US\$626 PMT. It is noteworthy that the evidence adduced in this trial revealed that Tiong Tack Kieng was the only one, and no party from Huangpu Parties, knew that the IAG Parties were selling the palm olein at a significantly lower price. Tiong Tack Kieng was told by Nonaka that Cannon had a "*buy high sell low*" strategy making it viable through returns from their High Yield Investment Programs.

44 On or about 10 December 1998 Nonaka visited Huangpu's office at Natwest Centre. Jeson introduced him to Lionel and said that Nonaka was Excellead's supplier. They had a short discussion. Cindy Fu was present but she did not take part in the discussion. Lionel and Jeson showed Nonaka an LC from China Grains & Oils for 5,000 MT of soya bean oil to be shipped to China in January 1999 and they asked him if he could supply. A contract was signed between Huangpu and Excellead. Nonaka nominated a vessel, which Jeson could not locate. Nonaka nominated another vessel but Huangpu concluded that it could not deliver the goods in time. Huangpu through Cindy Fu

secured another supplier.

45 In December 1999 Jeson negotiated with Nonaka who offered Huangpu a discount of US\$17 PMT. Later this understanding was formalised. Sometime in early February, 1999 Nonaka and Cannon visited Huangpu's office. They informed the Huangpu Parties that IAG could continue to give Huangpu a US\$17 discount. Huangpu would have to sell a minimum of 20,000 MT of palm olein per month. Mike Tiong discussed the matter with Cindy Fu, Lionel and Jeson and in view of Cindy Fu's network in the PRC they decided that it was possible for Huangpu to sell that quantity to buyers in the PRC each month. Accordingly, a Memorandum of Understanding dated 6 February 1999 with IAG was signed. It should be pointed out that under the MOU Huangpu was not obliged to sell 20,000 MT per month with a US\$17 PMT discount unless the price was mutually agreed. The final price, under the MOU, was contemplated to be agreed 2 days prior to the ex tank transfer, i.e. title transfer of the palm olein.

46 It is beyond dispute that Huangpu's purchase of palm olein from Excellead, which was shipped by m.v. "Technochem" was not within the conspiracy alleged by Mitco. I will now describe the 21 transactions directly between Huangpu and IAG. These were evidently 'back to back transactions' in which, either within a relatively short time of Huangpu selling to Summerwind for end-buyers in the PRC, Huangpu would buy from IAG or vice versa. In all cases, and on the evidence of Cindy Fu, the sequence was that Summerwind or an end-buyer would contact her first to buy palm olein at an indicative price. Jeson or Lionel would thereafter contact IAG to inform Nonaka that Huangpu has an end-buyer. To be sure, in trades of this nature a lesser price would be discussed. IAG would then decide whether or not to sell to Huangpu. The US\$17 PMT between IAG and Huangpu was taken off the final price. Under the MOU, as noted above, if there was no agreement on the price within 2 days, there would be no sale. Mike Tiong had engaged in similar, though not exactly the same, method of arriving at the price in his sale of air-conditioner compressors in the PRC. Huangpu's prices to the end-buyers in the PRC were not necessarily cheaper than other sellers to the Chinese market. She denied that Huangpu gave bribes to the employees of Tushu China, though she admitted quite candidly that she had to make 'guanxi payments' which were made to ensure that the transactions went through smoothly but they were not made to harm the ultimate interests of the end-buyers.

47 On 7 December 1998 IAG contracted to sell 2,000 MT +/-2% palm olein to Huangpu at US\$609 PMT FOB Malaysia. Huangpu's sale contract with Summerwind was also about the same time. Rabobank on instructions of Summerwind on 15 January 1999 issued a letter of credit for the shipment. The latest shipment date was stated in the LC as 21 January 1999. Summerwind nominated m.v. "Chem Challenger", which was the next shipment by IAG. The next shipment was by m.v. "Spring Grace" under the contract of sale between Huangpu and IAG dated 4 January 1999. The loading on m.v. "Chem Challenger" was delayed and it was the disclosure that Mitco were the suppliers that Summerwind agreed to wait. There were faxes about the possibilities of cancellation of the contract and the payment of demurrage at the rate of US\$5,000 a day. Najib sent a Mitco fax dated 21 January 1999 confirming loading the next day "upon full formalities are in good order". Jeson found this part of the fax rather vague and he directly telephoned Najib who declined to elaborate. Jeson in evidence told the court that Nonaka was very annoyed upon learning that Jeson had contacted Najib. He reprimanded Jeson and followed up with a written warning against any repetition in the "break through the purchase/sales channels". The suggestion made on behalf of Mitco that the paper trail of the faxes and documents retrieved from their files were part and parcel of the plan to provide a smokescreen to mask the conspiracy is in my judgment on the evidence bizarre.

48 On the evidence it was clear that Mitco through Najib did not in fact agree to sell palm olein to IAG until 25 January 1999. It should be noted that Mitco's proforma invoice of 27 November 1998 was for 10,000 MT which the 2,000 MT parcel, eventually shipped on m.v. "Chem Challenger" parcel, was a part shipment. Najib was waiting for IAG through Nonaka opening the LC as promised. However, Nonaka had on two occasions requested Najib to keep Huangpu in the dark about changes in the port of loading. In the end, Mitco through Najib agreed to load the palm olein on m.v. "Chem Challenger" after learning that the LC was with Maybank.

49 Although the LCs for the first 3 shipments were received by Mitco, it was also established in evidence that they were not in order. Hasman Hassan, a trading executive of Mitco who reported to Najib and who was working at Pasir Gudang told the court that he had informed Najib that the LC was not in order. But Najib falsely told him that he had been given the green light by Azalan. IAG in the end paid for the shipment on m.v. "Chem Challenger" by TT on 23 April 1999 before the due date. In fact, Najib had agreed, without any authority, with Nonaka that IAG could pay for the goods by TT 90 days after shipment.

50 In late February 1999 after Huangpu had collected the shipping documents for the shipments on board m.v. "Chem Challenger" and m.v. "Spring Grace", Lionel presented them to Rabobank for negotiation on the letter of credit. Instead of remitting the funds to IAG upon

receipt of the sales proceeds, Rabobank set-off the proceeds to cover the credit line that had been extended to Huangpu for the shipment on board m.v. "Ibuki". The sum of US\$2,159,935.20 was deducted. The third shipment on m.v. "Ussuryisk" also encountered payment problems. China Tushu, the buyers, neglected to pay Huangpu. Huangpu failed to pay IAG for the price of the palm olein and were in default.

## **Nonaka formed IAA**

51 Although Huangpu reduced their indebtedness to US\$3.2 million to IAG, Nonaka applied a lot of pressure on Mike Tiong, Cindy Fu, Lionel and Jeson. He finally decided that he had to control the proceeds of sale of the palm olein. He visited Singapore on 24 February 1999 and he invited Lionel and Jeson to join him in his new company. By 4 March 1999 IAA was fully functioning. Nonaka held 499,999 shares and recruited Lionel, Jeson, Mikey and Thomas into IAA. Lionel was appointed resident director and held 1 share in the company. Mike Tiong and Cindy Fu were going through a very bad patch. Cindy Fu was pregnant. Their personal relationship was in a turmoil. She suffered great anguish and agony over the birth of a child outside wedlock. Their businesses had too many problems, especially the losses in the m.v. "Ibuki" shipment and default of China Grains & Oils over the m.v. "Urruryisk" shipment. Their earlier investments in a winery joint venture in the PRC ended with a stalemate and a loss of at least US\$1m which was paid in June 1998. Mike Tiong planned to buy some palm oil plantations in the Riau Islands. Huangpu invested under US\$500,000 but Mike Tiong's counterpart in Indonesia Michael Gautama did not arrange any purchase by Huangpu. Both in the business front and in their personal relationship, Mike Tiong and Cindy Fu underwent travail and tribulations. Mike Tiong left for United Kingdom towards the end of March 1999. Cindy Fu met him in London at the beginning of April 1999. After a few days in London they left for Brazil for her to visit her family. They remained in Brazil for about a month after which they returned to London. They intended returning to Singapore in mid-May 1999 but Cindy Fu, who was in an advanced stage of pregnancy, was not permitted to fly. In mid-May they left London and they went to Dublin. They were not in any meaningful way involved in the affairs and management of Huangpu during this period. They had a rough time in Dublin. Lionel, at the request of Mike Tiong, remitted US\$23,000 to him to meet the expenses. Lionel and Mike Tiong were close friends and they would, as they did, help each other out when times were bad. It is noteworthy that Mike Tiong had never received any income and/or commission from Huangpu. It was not suggested that he did except for the cash deposit of US\$2 million to which I will revert later in this judgment when I follow the money from the ill-gotten gains.

52 In March 1999 Huangpu had very few contracts and the tonnage of palm olein sold was less than 7,000 MT. Nonaka after the defaults obviously did not wish to book too many contracts under Huangpu. From April 1999 the tonnage increased significantly. In the new set-up, Huangpu was still in business. It was managed collectively by Lionel, Jeson, Mikey and Thomas. They also operated IAA but it was under the direct control and supervision of Nonaka. Whatever net commission was earned from those deals were shared among Lionel, Jeson, Mikey and Thomas in the proportion of 50, 50, 25 and 25 respectively. I have no doubt that both Mike Tiong and Cindy Fu were totally out of the picture. Both Huangpu and IAA were required to sell a minimum of 30,000 MT per month. The General Manager of Huangpu's bankers introduced Lionel and his colleagues were introduced to Tropical Oil Products Brokerage Pte Ltd. Tropical had their majority deals with buyers in India. As set out in Schedule 2 to this judgment both companies continued to trade with IAG for sales to the PRC and increasingly to buyers in India. By April 1999 Huangpu's transactions with the PRC slowed down tremendously. The PRC Government clamped down on illegal imports and they licensed the imports strictly. In addition, Cindy Fu, who was responsible in selling to the buyers in PRC, was out of town.

## **The Frauds Exposed**

53 On 30 June 1999 Dato Hamzah Bakar, the Chairman of Mitco learnt that there were invalid LCs in Mitco. He immediately sent for Azalan who told him that the sums involved were substantial, that the palm olein in question had been shipped and that he had been informed of the invalid LCs a few weeks ago. Azalan explained that he had not reported the problems to him because he tried to resolve the problems himself. Dato Hamzah instructed Azalan to give as much information as possible of the problem to the Board of Directors which was to be convened on 1 July 1999. At the Board meeting Azalan was directed to cease all loading and ordered a full investigation. The Investigation Team eventually submitted a full report. Disciplinary proceedings, which were internal within Mitco, were brought against both Najib and Azalan. The former was dismissed. Azalan, who was initially downgraded and transferred to a minor post of reduced importance, was eventually dismissed as well. Azalan claimed that there was a full and final settlement between Mitco and himself, resulting in his demotions and transfer, and it was wrongful for Mitco to have gone back on that settlement in launching these claims against him which he had to defend by selling his home to pay the legal fees.

54 In terms of the amount and the destination of the distribution of the proceeds of the palm olein there has been no dispute. The dispute of any importance has to do with the ownership of the US\$2 million deposit with the Bank of Picayunne, Mississippi, USA and standing in the name of John Dhillon doing business as Aquarius Enterprises Group Inc (the 30<sup>th</sup> defendant). Richard Abbey of Ernst & Young, London, UK, followed the money trail. In a thorough investigation, he tracked down the dispersal of the proceeds. Apart from the payments to Mitco and IAG, IAA paid out US\$20.9 million to Tsai. This amounted to 25% of the IAA proceeds. Another US\$1 million was paid to Flashy which was and is at all material times the BVI company of Lionel. Nonaka received US\$0.7 million from IAA. In my judgment and on the evidence, I accept the evidence of Mike Tiong, Lionel and Choo that the US\$2 million were part of the commission which Lionel and Choo had received from IAA and which they had sent to Mike Tiong for investment and it was eventually deposited by Mike Tiong with Dhillon. Lionel told Mike Tiong that it was his family money. As Lionel has been a long standing friend from University days and as Lionel is from a well-to-do family, there was no reason for Mike Tiong to doubt this. The contemporaneous e-mail exchanges between all parties concerned are consistent. These exchanges were not at all contrived; they had not expected that extensive trawling exercises in discovery which Mitco in litigation in several jurisdictions eventually launched against all parties targeted by them to recover the losses. Even Cannon was caught by surprise and was compelled to subject himself to cross examination in London. His answers were so incriminating that it is no small wonder that he, having filed his defence and his affidavit evidence in chief on his own behalf and on behalf of IAG, Ecopal (19<sup>th</sup> defendants) and Ecopal Inc (20<sup>th</sup> defendants) failed to appear at the trial to exercise his right of defence.

55 Huangpu paid out US\$8.2 million to Tsai. That was 23% of the proceeds received by Huangpu. They also paid out to Nonaka US\$0.5 million (in cash). At the direction of Nonaka they paid out US\$0.7 million to Ryton International, Ng Sing Kong and Schroeder KG. According to the results of the tracing, IAG paid out US\$1.2 million to Cannon personally, US\$2 million to an entity called Bayou, US\$2.6 million to an entity called Hamre, US\$1.4 million to an entity called Ski Free, US\$9 million to Venture Trading Partners II Ltd, a BVI company, the 28<sup>th</sup> defendants, and US\$0.2 million to Nonaka. Out of the sum of US\$11.1 million paid to and received by Nonaka out of the proceeds of sale of the palm olein Nonaka paid US\$3.2 million to an entity called Mitsuhishijisho. I am also satisfied that all other payments out of the proceeds which are pleaded and reported by Abbey are proved, subject to my finding that Mike Tiong does not have any beneficial interest in the US\$2 million deposit and that he did not know that it came from the 'commission' which Lionel and Jeson received from the sales of the palm olein.

### **Evidence at Trial**

56 Mitco at the trial adduced the evidence of 20 witnesses who were led by Dato Hamzah Bakar. Their evidence and the voluminous documentary evidence, which were burnt into 8 CDs, proved the fraud to a high degree of probability. They also prove dishonest assistance and the receipts of the proceeds of sales of the palm olein. The task is to identify the culprits who took part in the conspiracy, or who dishonestly assisted and the recipients of the proceeds of sale. Apart from Azalan, Najib, Mike Tiong, Cindy Fu, Lionel, Jeson who appeared and testified, and subjected themselves to cross examination, the other defendants failed to appear. No affidavit evidence were filed by Nonaka, Investpak, Nonakapak, Tsai, VTP and Kimme. The claims against these absentee claimants are accordingly allowed.

### **Mitco's Conspiracy Claims**

57 Mitco allege that the 'Primary Parties' (as identified) had agreed or combined to do an unlawful act, or do a lawful act by unlawful means. The primary parties identified are Azalan, Najib, Nonaka, Cannon, Tsai, Mike Tiong, Cindy Fu, Lionel, Jeson, Spears, Lopez, IAG, IAA, IA International, Huangpu, Ecopal, Tiong Tack Kieng, Excellead and EP. The three last-named parties are no longer defendants, Tiong Tack Kieng having settled with Mitco and he gave evidence on their behalf as PW17.

58 In *Kuwait Oil Tanker Company SAK v Al Bader* [2000] 2 All ER (Comm) 271, it was stated as follows:

"A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful actions taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

59 Mitco rely on the overwhelming circumstantial evidence. Fraud cases of this type rarely leave behind a documentary trail, unless the conspirators whilst hatching the conspiracy were electronically recorded. But evidence of overt acts and omissions together are available to prove the fact of a conspiratorial combination or agreement. In this case, the relevant question to ask is whether any of the defendants had joined in to line his pockets at the expense of Mitco.

60 In relation to the primary parties generally, but in particular, the Huangpu Parties, Mitco rely on the judgment of Millet J (as he then was) on what would amount to dishonest behaviour that would make a person part of the fraud. In *Agip v Jackson* [1990] 1 Ch 265, Millet J stated at p295:

"In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was 'only' a breach of exchange control, or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud, or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party...[the defendants] never made any enquiries of the plaintiffs or took any steps to satisfy themselves that the arrangements had the plaintiffs' knowledge and approval...I am led to the conclusion that [the defendants] were at best indifferent to the possibility of fraud. They made no inquiries of the plaintiffs because they thought that it was none of their business. That is not honest behaviour...In my judgment it is quite enough to make them liable as constructive trustees."

61 The following passage on p293 bears reminder:

"If a man does not draw the obvious inference or make the obvious inquiries, the question is why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however reasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because 'he did not want to know'...or because he regarded it as 'none of his business'...that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."

62 On the evidence, I am satisfied that they prove persuasively to a high degree and I find that Najib, Nonaka, Cannon and the IAG Parties had combined to defraud Mitco in the transactions. They caused Mitco the losses as claimed. Najib broke the internal procedures at critical points. Being such an experienced trader, I could not accept that he did not know that the FIBI Bank LC was defective and inoperable. Yet he made a song and dance about this LC, kissing it flamboyantly as if to lull everybody into a false sense of security. He should have protected Mitco's interest from the start. Yet he deceived his colleagues and betrayed the trust and confidence which his CEO Azalan had reposed in him. His actions ruined the life and prospects of an innocent but too trusting a man, Azalan, who was far too overworked, if somewhat ambitious which is not altogether bad. Otherwise, where is the motive power to excel? I scrutinised Azalan when he was on the stand and having considered his evidence and the passion he felt for Mitco and Petronas, I was utterly convinced that he was innocent and was lamentably misled by Najib and let down by the other personnel in both GMD and FAD. He found out the fraud too late. Tried as he did to salvage the situation, the international fraudsters with inside suborned help cynically led him down the garden path.

63 In addition, I also find that Lionel and Choo after they had joined Nonaka in IAA became aware of the fraud. They learnt that the IAG Parties, led by Nonaka and Cannon, had bought at a high price from Mitco and were selling low. They were not so naive as to believe that by the so-called High Returns Programs, the IAG Parties could in the end make a profit. That Nonaka was offering them as individuals the high discount of US\$17 PMT should have alerted them that something dishonest was practised against Mitco. Lionel and Jeson were in the thick of arranging the loadings. They knew the LCs were not used. Yet they could get their hands at the original shipping documents, including the bills of lading. On top of that, they followed Nonaka's and Cannon's instructions to distribute the proceeds of sale in a manner

that any honest businessman would ask the question: 'with all these payments to unknown parties for undisclosed purposes, how will Mitco be paid?' When the quantities escalated from April 1999 until the bubble burst, they should have known better. They chose to see nothing hear nothing and say nothing and they assisted because they stood to gain. That was dishonest. They did not appear to me to have dealt with the transactions, after the departures of Mike Tiong and Cindy Fu, with Nonaka and Cannon bona fide and at arm's length. On the contrary, I am satisfied that they were hand in glove with Nonaka because they wanted to profit, whatever the means.

### Mike Tiong and Cindy Fu

64 I now come to address the roles of both Mike Tiong and Cindy Fu. In my judgment, they were not part of the conspiracy to defraud. They had met Nonaka for not more than 3 times. Nonaka presented a business opportunity, first through Tiong Tack Kieng and Excellead. Mitco had let off Tiong Tack Kieng. And this inspite of the fact that Tiong Tack Kieng clearly knew that Nonaka was buying high from Mitco without any bargain and selling low through him and his company, Excellead. In turn, Tiong Tack Kieng could give a US\$15 PMT discount to the Huangpu Parties. Mike Tiong and Cindy Fu were actively in business. Both had considerable experience, especially in the market in the PRC.

65 The expert of Mitco, Favre, in his evidence referred to a number of oddities in the pricing from KD Energy down the string to Huangpu. He compared the prices of KD Energy and IAG with the quoted prices at the relevant period of the Malaysian Palm Oils Board. Admittedly, they made very interesting reading. But in the absence of Mitco claiming against KD Energy and in the absence of any evidence which remotely suggests that either Mike Tiong or Cindy Fu knew of the prices at which IAG bought, or even any material to raise any suspicion on their part, I am satisfied that they had nothing to do with either of them. They are highly prejudicial evidence but they have no probative value on the issue whether they had joined in the conspiracy. Favre pointed out that comparing the market prices with the IAG-HP contracts referred to in Schedules 1 and 2 of the defence of the Huangpu Parties it was seen that on the average Huangpu were buying from IAG at a discount to the market of US\$47.75. This trend could not conceivably form any basis for suspecting the Huangpu Parties. Cindy Fu obtained his requisitions and indicative prices from the buyers in the PRC. With her information, Lionel on behalf of Huangpu reverted to Nonaka. Nonaka on behalf of IAG would sell so long as he could dispose of the ill-gotten palm olein, as he had no intention to pay for them when the game was up. It would be wholly unjustifiable to attribute to either Mike Tiong or Cindy Fu any of these 'oddities' when they were not responsible for them and when Nonaka for obvious reasons was anxious to dispose of the palm olein, very much like the thief anxious to dispose of their tipplings over the back of lorries.

66 The more difficult task is to ascertain if Mike Tiong or Cindy Fu were dishonest accessories or either of them was a dishonest accessory. Did they dishonestly assist the IAG Parties at the expense of Mitco and thereby commit an equitable wrong within the meaning of the concept set out in *Royal Brunei Airlines v Tan* (supra). As foreshadowed earlier, the discussion must involve a consideration of *Twinsectra* (supra). In that case, the House of Lords had to consider the liability of a solicitor to account to a third party from whom his client had borrowed 1 million. To the knowledge of the solicitor this sum was lent subject to a stipulation that it be used for acquiring property (which normally would give rise to a Quistclose trust but that question is not relevant for our present purposes). The other question was whether the solicitor had acted in such a way as to satisfy the requirements of one or both forms of third party liability which had been labelled for quite a while in cases and in academic writings as 'knowing receipt' or 'knowing assistance'. After *Royal Brunei Airlines Sdn Bhd v Tan* (supra) the latter form of third party liability at the encouragement of Lord Nicholls of Birkenhead has been identified as 'dishonest assistance'.

67 And now to the facts in more details. *Twinsectra*, the plaintiffs, lent 1 million to Mr Yardley for his property development business. Mr Yardley's solicitor, Mr Leach, was joined as a defendant for having dishonestly assisted in paying out a portion of the 1 million for purposes other than the acquisition of property in breach of trust. The sum involved was 34,000. Mr Leach knew that another solicitor had given an undertaking to *Twinsectra* that the 1 million was earmarked for the acquisition of property. Another solicitor gave the undertaking to *Twinsectra* to disburse the money only for that purpose. That solicitor sent the entire loan to Mr Leach. On Yardley's instructions, he paid out of the loan the sum of 34,000. The judge at first instance found that Mr Leach had shut his eyes to the problems or the implications of what was happening. Yet he acquitted him of any dishonesty. That Mr Leach did assist in the breach of the Quistclose trust was established. However, the question whether Mr Leach did so dishonestly proved more difficult. Was the test a single-dimensional reference to the subjective dishonestly or was it a combined test whereby the concept of honesty has to be measured by the combined tests of an objective standard 'leavened by a subjective element based upon the characteristics and knowledge of the defendant': see *Alistair Speirs* [2000] 2 Web JCLI, 'Caught in the Tangled Web' and pages pp 105-6 of Tan's case (supra). The Court of Appeal reversed the trial judge and gave judgment

against Mr Leach for the proportion of the loan which had not been applied in the acquisition of property.

68 The House of Lords restored the trial judge's decision. By a majority they held that for a person to be liable as an accessory to a breach of trust he had to have acted dishonestly by the ordinary standards of reasonable and honest people and have been himself aware that by those standards he was acting dishonestly. The majority concluded that the trial judge had applied the test, and had found that Mr Leach had honestly believed that the undertaking given to the lender was not his concern and that, once in his hands, he could treat the loan money as at the free disposal of the client. Mr Leach on the evidence had been aware of all the facts and could not be said to have been dishonest by deliberately failing to make any enquiries for fear of finding out something he did not want to know. I should accordingly apply the combined tests when considering the roles of Mike Tiong and Cindy Fu.

69 There was no evidence which suggested that Mike Tiong or Cindy Fu should have made enquiries. Nonaka offered the supply of palm olein. Cindy Fu's network of a few licensed buyers in the PRC were looking out for these goods. Malaysia palm oil and palm olein were preferred. They entered into contracts of sale. After meeting Nonaka and Cannon, a Memorandum was later signed. It was an in-principle agreement and, as described above, once Cindy Fu obtained interest and a request from PRC buyers for an indicative price, of a certain quantity and delivery date, she negotiated with IAG through Lionel and parties would fix the price PMT in accordance with the MOU. In eminently commercial deals of this sort and size, where the supplier is of such a stature as Mitco, there was no reason for Mike Tiong or Cindy Fu to suspect anything. The margin was good. If the profit margins were on the high side, every businessman is entitled to seize the opportunity so long as they have no reason to believe that they may be dealing with anything suspiciously dishonest. All the more reason why questions or enquiries, which were out of turn and which could be regarded as 'opening the channels' in the string of sellers and sub-sellers in breach of business ethics, had to be avoided.

70 Their first purchase of palm olein for Huangpu was from Tiong Tack Kieng. There the gross margin of profit was about US\$15 PMT. Of the next 21 contracts concluded directly between Huangpu, 10 of them were signed when Mike Tiong and Cindy Fu were in Singapore, but their roles were limited to Cindy Fu's contacts with the PRC buyers. In respect of those 10 contracts, the two of them had other matters to occupy their attention. Prominently, they had their personal problems which I have referred to. Lionel and Jeson played increasingly important roles. The other 11 contracts were concluded by Lionel and Jeson, as sales to PRC buyers presented themselves, and whilst Lionel and Jeson were building up their markets in India.

71 In these circumstances, neither Mike Tiong nor Cindy Fu was in my judgment a dishonest accessory.

72 Counsel for Mitco further submitted that the corporate veil should be pierced and that all the acts of conspiracy committed by Huangpu but played out by Lionel and Jeson should also be visited upon Mike Tiong and Cindy Fu. I reject these submissions. When Lionel and Jeson initially carried out the administrative acts to ensure that shipments were effected and payments collected by Huangpu in respect of the first 11 contracts, in fact Lionel and Jeson did not know that the IAG Parties had conspired to defraud Mitco. Unknown to Mike Tiong and Cindy Fu, Lionel and Jeson were separately cultivated by Nonaka and over time they were brought into the loop. They eventually learnt what Nonaka was up to but they were looking to line their own pockets, and over US\$4 million were received by them and the two colleagues. When Mike Tiong and Cindy Fu returned to Singapore in August 1999 the true picture became gradually clearer. By that time, the fraud had been exposed. Mike Tiong obtained reimbursement of about US\$100,000 during the period he was away in Europe and South America. There was nothing wrong in recovering his own money to meet his expenses whilst overseas. In the end, both Mike Tiong and Cindy Fu lost their investments in Huangpu which has become insolvent, owing more than US\$3 million.

### **Proprietary & Tracing Claims**

73 Mitco are asserting proprietary and tracing claims. In the light of my findings, Najib holds the bribes in his accounts or the equivalent of those bribes in the form of the vehicles I have mentioned upon constructive trusts for Mitco: see *AG v Reid* [1994] 1 AC 324 which followed the High Court of Singapore in *Sumitomo Bank Ltd v Kartika Ratna Thahire & Ors* [1993] 1 SLR 735 and *Williams v Barton* [1927] 2 Ch 9. Further, I declare that any of the parties I have found liable are holding any traceable proceeds of sale or equivalents thereof upon constructive trusts for Mitco. If those trust properties had appreciated and interests have been earned, such accretion in value are also held by them upon trusts. I will deem them as good fiduciaries who in equity will do what should be done. They hold them for Mitco.

74 On the evidence, I have no hesitation in declaring that the sum of US\$9 million paid into the VTP account (prior to the seizure by the

IRS) and any accrued interest were and are held on trust for Mitco. If any claim to those sums are asserted by IAG or Cannon to the return of those monies they are also to be held upon trust for Mitco. This sum, in my judgment, came from the proceeds of sale of the palm olein of Mitco. In the same way, and for the same reasons, the US\$2 million deposit in the Bank of Pecayunne standing in the name of Dhillon trading as Aquarious Enterprises Group Inc and any accrued interest or equivalent of both items are held upon trust for Mitco.

75 I now refer to the condominium in Hawaii purchased by Nonaka from a 'loan' from Investpak. For all purposes, Investpak and Nonaka are one and the same. It was on the evidence paid for from the proceeds of sale of the palm olein. It is part of the spoils of his fraud on Mitco. It is allegedly sold. Further, Nonaka had transferred what in effect were Mitco's monies in the sum of US\$3.2 million to 'Mitsubishijisho', a real estate company in Japan. If the proceeds of sale of the palm olein were used to purchase the property in Tokyo I declare that the said property in Tokyo is held upon trust for Mitco entirely or to the extent Mitco's monies are traceable to that property.

76 Accordingly, there will be judgment and orders against the parties in accordance with this judgment. Mitco are entitled to costs and I award a certificate of two counsel for the causes Mitco won. Mitco are entitled to a set of comprehensive orders from this court on the basis of this judgment. They are directed to furnish a draft to each of the parties affected for their concurrence in writing, failing which the same are to be referred to me for further arguments. In respect of Mitco's claims against Mike Tiong and Cindy Fu they are dismissed with costs. I also award a certificate of two counsel in favour of both of them. The claims against Huangpu Asia and Huangpu Holdings are, as I stated earlier, dismissed with costs. Finally, IAG's counterclaims against Mitco are of course dismissed with costs. If there are further orders required or if there are any clarifications, any party in these proceedings is at liberty to apply.

Sgd:

Lai Kew Chai

Judge

Singapore

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