Tan Poh Kien … **Appellant**

AND

Mikuni (B) Sdn Bhd … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 4 of 2009)

Mortimer, P.; Davies and Leonard, JJ.A.
18th November, 2010.

Evidence – Evidence Act, Cap 108, Section 114(g). The plaintiff invited the judge in his discretion to draw an adverse inference from the absence of a potential witness for the defence. The judge did not do so. Held on appeal: in the circumstances of the case the judge did not err.

Mr Christopher Sawan of Messrs. Sheikh Noordin Mohamad for the Respondent.
Mr.Siva Sankaran of Messrs. Sankaran Halim for the Appellant.

Leonard, J.A.:

This appeal arises out of an action brought in the High Court by the Appellant Tan Poh Kien ('Tan'), a Brunei National, against the Respondent company, Mikuni (B) Sdn Bhd ('Mikuni') which is registered under the laws of Brunei Darussalam. The appellant's claim was for a sum of BND 703,417.98 allegedly due to him by way of commission on sales. On the 1st March 2020 Barnett JC dismissed the claim. It is against that decision that Tan now appeals.

Mikuni is a subsidiary of Mikuni (Malaysia) Sdn. Bhd., which is based in Malaysia. It was established in Brunei with a view to obtaining contracts for the supply of products, principally valves and valve locks, to Brunei Shell Petroleum ('BSP'). In particular, it wanted to secure a contract described in the documents as 'IN-SITU MOV Repair Contract'. It recruited Tan, a Brunei National and appointed him by a letter dated 22nd July 2004 to be Mikuni's Sales and Marketing Manager with effect from the 1st August 2004. The matter of Tan's remuneration was dealt with in the paragraph numbered 1 of the letter which reads:

> *"1. SALARY.*
>
> *a) Your monthly basic salary shall be B$3,000.00. In addition to the above, you may submit claims every month with supporting bills for any entertainment expenses, petrol and handphone charges (excluding personal calls) for approval and reimbursement.*
>
> *b) IN-SITU MOV Repair Contract with BSP shall be on a net profit sharing basis at 50% - 50%*

c) Any other commission or incentive scheme shall be allocated separately on a case to case basis"

There was also provision for a bonus to be paid. Numbered paragraph 3 reads:

"3. BONUS
Bonus is at the discretion of the Board of Directors."

The person to whom Tan reported was Yong Chun Khiong ('Yong'), a director of both companies.

By letter dated 31st May, Tan's employment was terminated and he subsequently brought the action.

The IN-SITU MOV Repair Contract was never obtained, as Tan reported to Mikuni in an email dated 15th April 2005, but Tan did succeed in obtaining other business. During the course of his employment with Mikuni he was paid a salary, reimbursement of expenses and, from time to time, substantial additional sums by way of loans or advances. It was his case that Yong and he had agreed orally that Tan would be paid commission in relation to certain contracts at a rate of 50% of net profits, as had been contemplated in relation to the hoped for IN-SITU MOV Repair Contract. In the Statement of Claim he said that

"... the total profits for each of the said projects is calculated by deducting the Defendant's costs of the material from the sum received from BSP and from the aforesaid total profits a sum equivalent to half (1/2) of the total profits shall be taken as due and payable to the Plaintiff for each and every of the said sale project (sic). In calculating the cost for each of the said projects, the costs to be considered shall be limited to the costs of the acquiring the material or item in the BSP order and only that shall be taken into account and to be excluded are all other expenditure of the Defendant such as salary, operational expenditure, office expenditure."

He set out particulars of the projects with his calculation of the commission payable according to the formula pleaded. Based on that calculation, allowing for monies he admitted receiving, namely B$146,329.38, he claimed the sum of B$703,417.98, allegedly due to him. The difference between the price paid and the price obtained by the vendor of an item is normally regarded as the gross profit whereas net profit is calculated by taking into account the costs of the business. Tan's definition of net profit would have given him a greater share that that which Mikuni would have after bearing all the expenses of the business.

There was documentary evidence that money had been paid to Tan by way of commission. The issue was whether he had been paid all to which he was entitled. Instead of bringing an action for an account, Tan chose to nail his colours to the mast by assuming the burden of proving his specific claim. The defence was that Tan had received all the money to which he was entitled and it put him to proof.

Before the trial court were documents recording payments said to be advances or payments of commission to Tan. A cash voucher, dated 26 January 2006 for B$15,000 records that the payment is cash in advance to Tan for 'Netherlock Project'. That was business that Tan had procured for Mikuni. There is a voucher dated 2nd December 2005 showing an advance to Tan of B$25,000.00 as an advance for 'Pump project.' A payment voucher dated 31st October 2006 for B$10,000.00 describes the payment as being 'towards sale commission for PQ 4510136373'. There are vouchers recording payments of sales commission on PO 4510150899 and on PO 4510158166. A payment voucher dated 31st January 2008 shows a payment to Tan of B$5,000.00 described as 'sales commission year 06 c/f" and also a payment of B$2,556.00 as sales commission for PO451059073. One cash voucher dated 9 December 2005 records a payment to Tan of B$800.00 as an advance 'to contra against profit sharing contracts'.

Tan relied among other things on the Respondent's ledger report as at 31st December 2005 under the heading "*CASH ADVANCE – TAN POH KIEN*" *Account Code 239000 dated 30th September 2005; Ref:JV012/09/200. PROFIT SHARING – NETHERLOCK PROJECT 50% OF BND 33,699.05"* resulting in a credit entry for BND16,849.53. If Mikuni chose to pay that sum to Tan on a particular occasion it does not necessarily follow that Mikuni was contractually obliged so to do. There was also a service entry form from BSP for work to be done. It is endorsed by Yong *"No allocation of commission".* Apparently that is because there was no profit. Also in Yong's handwriting is a note on the form. There is the word 'profit' over the figure 2 followed by an equal sign and the *words "material cost plus handling ÷ 0.85."* Nobody at the trial explained that formula: its significance is a matter of speculation and it seems to us that the note does not assist Tan.

PW1, Pengiran Haji Moksin bin Pengiran Haji Yusof, partner in Deloitte Touche, Brunei, the firm which was Mikuni's auditor, produced confirmations of payment signed by Tan, who was familiar to him. In them Tan confirmed payment to him in 2005 of commission in the total sum of B$320,585.00 representing B$220,525.85 in relation to Netherlock and B$100,000.00 in relation to Firewater pump. There was also a confirmation signed by Tan of B$35,000.00 commission paid to him in 2006. PW1 had not been able to obtain a confirmation from Tan of a payment in 2007, apparently recorded in the accounts, of B$24,000.00. In cross-examination Tan admitted signing the confirmation for the sum of B$35,000.00, which sum he agreed he had received. As to the 2005 figure of B$320,585.00 he agreed in cross-examination that he had signed the acknowledgement and nobody had forced him to sign. However, he said that he had not received the $220,525.85 and as to the B$100.000.00 Yong had arranged payment 'for pump as subcontractor charges' and it was done in two sums, one of B$60,000.00 and one of B$40,000.00. The evidence was supported to some extent by PW4 Melissa Moi Yee Ling ('Melissa') who had been Mikuni's sales co-ordinator during the relevant period. According to Tan the money was sent to Shell before the pump orders were in place. He produced documents which he said supported his story about the latter sum, though some doubt was cast on this in cross-examination.

Tan said he had received payments of $146,329.44. He had never enquired as to the state of the accounts between him and his employer in relation to commission, nor had he ever asked for payment of commission due, being content, according to him to request loans

and advances and get the money in that way. This was because it was a relationship of trust and he was thinking long term. In cross-examination he said that several agreements had been made orally with Yong as to the rate of commission that he would be paid. The first such agreement was around the end of 2004 in the Kuala Lumpur office in the presence of Melissa, Daisy and Sunny, employees of the Respondent. In his affidavit, tendered as evidence in chief he had mentioned Joe Pui as having been at the meeting but if Joe Pui was DW1, Pui Shak Lin, the Miri branch manager, he did not support the allegation when he came to give evidence.

According to Tan the second agreement was also made in the Kuala Lumpur office in the presence of the same people in early 2005.He saw Sunny taking a minute of that meeting. He did not ask for a copy of the minute or remind Yong of the agreement. His reason was that it was based on trust. Everyone, according to him, was aware of 50/50 profit sharing. He admitted that he did not demand that the agreement be reduced to writing. Since it was not until 15 April 2005 that Tan reported the failure to obtain the IN-SITU MOV Repair Contract, any mention of a 50/50 arrangement that there may have been at meetings prior to that date could not be of assistance to Tan, since it could have related to the agreement about that contract.

DW1, Pui Shak Lin had worked for Mikuni (M) in sales and marketing, coming to Brunei once in a while to help the defendant in sales and marketing. He recalled meeting Tan in Kuala Lumpur on a few occasions, with Yong present, but could not recall any promises by Yong. He had no commission on sales or share of profits but the company might give bonus at its discretion 'to motivate us'.

DW2, Daisy Ong Siew Ling, contract and procurement manager of Mikuni (M) Sdn Bhd was quite clear in her affidavit, tendered as evidence in chief that B$323,885.38 had been paid to Tan., the bulk coming from sales of Netherlock and Nijhuis Pump but the money had been paid by way of incentive payments and not in accordance with any agreed percentage of commission. She said there was no percentage to be calculated. By the time his service was terminated there was nothing due. She did not recall if she had been present at the 2004 meeting and she had never been at a meeting when Tan, Yong and Sunny were present.

Some reliance was placed by Tan on the evidence of PW4 Melissa Moi that at the first meeting in Kuala Lumpur in late 2004 soon after Tan had joined, Yong had said that the plaintiff came in 'like a business partner' and he would have a 50/50 share in projects brought in. There being no record of the remarks, Melissa's recollection of a conversation held in 2004, not shared by anyone else alleged by Tan to have been present, may understandably not have carried much weight with the judge and if anything like that had been said it might well have reflected the agreement concerning the then hoped-for contract that never came into being.

During the trial, an application was made on 18th February on behalf of the defendant, after two defence witnesses had completed their evidence, for an adjournment to 1 March so that Yong, who according to counsel was unable for personal reasons to attend at that stage of the trial, might attend. The judge rejected the application because he would not

be available on 1 March or thereafter. He said that if Yong did not attend on the next trial day, 20 February, the defendant would have to proceed without him.

Yong did not appear on the 20th and the defence case closed.

At the end of the trial, Tan's case can be said to have depended on his own word, a recollection by one witness of something said in 2004 and one ledger entry. No agreement for the commission claimed had ever been recorded in writing by anyone, including Tan. He had never asked for an account. He had never asked for payment of commission, though he had asked for loans. Towards the end of his service it was common ground that he had asked twice by email for a loan and the request was twice refused. If he had believed at that time that there was outstanding commission due to him and if he really needed the money he wanted to borrow, as he said he did, one is bound to wonder, as did the judge, why he did not ask for the commission to be paid.

The central submission by Mr Sankaran for the Appellant is that the judge should have exercised his discretion under section 114(g) of the Evidence Act, Chapter 108 to draw an adverse inference against the Respondent from the fact that Yong, who was abroad, did not attend to give evidence. The judge did not draw such an inference nor is the submission mentioned in his judgment. Whereas it is not incumbent upon the judge to examine every rejected submission he ought to have given his reasons for doing so here particularly if he had concluded that the failure to grant an adjournment was a good reason for Yong not giving evidence. We note that he refused an adjournment to enable Yong to attend because he, the judge, would not be available on or after the 1st March. It may well be that Yong did have good reason for seeking an adjournment and the Respondent can hardy be blamed for difficulties arising out of the court's listing system. In delivering his judgment the trial judge observed that Tan's case was not without substance whereas Mikuni's case suffered from the absence of Yong. There was in evidence an affidavit made by Yong, intended to stand as his evidence in chief but the judge decided that in the circumstances he would attach no weight to the controversial parts of it. It is impossible to say what advantage either side might have gained by his presence. We do not think that in the circumstances the judge erred in failing to draw an adverse inference. We have examined the evidence in some detail and it is clear to us that it was open to the judge to find against the appellant on the facts. What is more, he gave cogent reasons for making that finding. Even if the judge had exercised his discretion to draw an adverse inference against the Respondent, this would not have enabled the Appellant to establish his case. The judge's reasoning for finding against the Appellant on the evidence before him shows that no adverse inference would, or even could, have remedied the absence of evidence acceptable to him of any agreement about profit sharing or commission or the rate on individual contracts other than the hoped for Shell contract.

Whereas it is true that there was mention of a share of profits in the Statement of Claim, all the calculations shown are in terms of commission and at the end the claim is expressed thus:

"AND THE PLAINTIFF'S claim against the Defendant as follows:

a) the sum of BND703,417.98 being the commission due sum abovementioned."

Yet by the end of the trial, counsel for Tan submitted that the issues to be determined were:

"1. whether the plaintiff is entitled to a share of the profits of the contracts, and
2. if the Plaintiff is entitled to a share of the profits, whether he is entitled to ½ of the total profits of the said contracts, and
3. The manner in computing the said profits."

The judge while saying that the appellant had on the face of it a case for the existence of a collateral agreement giving a 50% share of the Respondent's profits pointed out that all concerned had made indiscriminate use of 'profit sharing' and 'commission' but that the claim was couched in terms of commission. He took the view that it was most unlikely that a new employee who has been given a detailed letter of employment would somewhat casually be informed that he would get 50% of the profits. It seemed to him to be even more unlikely in respect of an employee deeply in debt (as, it was common ground, Tan was). He would have expected such an agreement to be recorded in the company's books, as it would materially affect the profits of both companies. The judge found it extraordinary that, until his service was terminated, Tan made no enquiry about the state of the account between him and Mikuni. He made the point that after the refusal of his request for a loan of money that he said he really needed, it was to be expected that Tan might seek clarification of what money was due to him from profits accrued. He did not find convincing the reasons advanced by Tan for not doing so. Adverting to some disputed documents (where there were suggestions that bribery had taken place) he observed that neither party emerged with any credit from the relationship. A matter upon which he placed considerable weight was Tan's lack of particularity about the terms of the alleged oral agreements. On the one hand he had asserted that he would have 50% of the gross profit, deducting only the cost to Mikuni of the material. Yet in cross-examination he conceded that he was claiming net profit though he would concede only some but not all of the expenses usually to be taken onto account when calculating net profit, as listed by PW1 in his evidence. The judge contrasted Tan's vagueness as to how, where and when Yong came to propose to him that Tan should have a profit sharing arrangement with Tan's other evidence in cross-examination where he insisted on the clarification of questions and gave precise and detailed answers to those questions.
It is important to remember that the judge saw and heard the witnesses and was in the best position to form a view as to their credibility. At the end of the day he was not prepared to accept Tan's version of the arrangements that existed between him and his employer.

At page 6 of his judgment, the judge says *"Ms. Ong of course accepted that the plaintiff was entitled to commission. That, it seems to me, is a much more likely arrangement than that asserted by the plaintiff."* We do not think that Ms Ong's remark, if looked at in the context of her other evidence, some of which we have mentioned, necessarily means that there was an entitlement as of right to commission at a particular rate. The judge went on

to conclude that "*...the plaintiff has failed to persuade me, on the balance of probabilities, that there was a collateral oral agreement made between him and Mr Yong for the plaintiff to share in the profits of the defendant. Accordingly, the plaintiff's claim is dismissed."*

For the reasons we have given there are no grounds or interfering with the judge's conclusion and the appeal must be dismissed

There is no basis for maintaining the Mareva injunction against the Respondent dated the 6th May 2010 and it is discharged. The order provided for costs in the cause.

There will be an order nisi that unless application is made by the 29th November 2010 for some other order the Respondent's costs here and below be taxed if not agreed and paid by the Appellant.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**