SCTC15980/10
SCTC15981/10
SCTC15982/10
SCTC15983/10

IN THE SMALL CLAIMS TRIBUNAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
CLAIM NO. 15980 OF 2010

Claimant 1 周一哲(未成年)
Claimant 2 周雄

and

Defendant Fonterra Brands (China) Limited

IN THE SMALL CLAIMS TRIBUNAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
CLAIM NO. 15981 OF 2010

Claimant 1 武原冰(未成年)
Claimant 2 李潔麗

and

Fonterra Brands (China) Limited

IN THE SMALL CLAIMS TRIBUNAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
CLAIM NO. 15982 OF 2010

Claimant 1 叶灿熙(未成年)
Claimant 2 叶紅波

and

Fonterra Brands (China) Limited

IN THE SMALL CLAIMS TRIBUNAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
CLAIM NO. 15983 OF 2010

Claimant 1 朱茉涵(未成年)
Claimant 2 陳璐

and

Fonterra Brands (China) Limited

Reasons for Ruling

The claimants are victims of the wide spread contamination diary products manufactured and distributed by the Sanlu Group in mainland. The defendant was at the material time a shareholder with 43% shareholding of the Sanlu Group. The claimants alleged the defendant after learning the matter, allowed the Sanlu Group continued the tort beyond 2nd August 2008, by failing to make a public announcement, was in breach of their duty owed to claimants as ultimate consumers, and held the defendant responsible for damages.

The defendant applied to strike out the claims on ground of *forum non conveniens* and no possible cause of action under the laws of Hong Kong.

In each of the current cases, the second claimant is the parent of the first claimant. On 4 May 2010, the call over date, only the second claimant of SCTC15983/10 was present, and she represented all the rest of the claimants. On the other hand, the defendant was represented by an officer from the Fonterra Group. No issue has been taken on representation by either side on the call over date.

Directions have been given to the claimants for further statements, documents and submission:

1. an account of the incident they relied on
2. specify their cases against the defendant and the evidence they intended to rely on
3. state out the evidence they obtained and to be obtained
4. clarify the remedies they claimed for

5. reply the various issues raised by the defendant in their application to strike out

Direction was also given to the defendant to file reply upon receipt the claimants' further materials.

Towards the end of the call over, the claimants submitted further statements and documents to support their cases and reply to the various issues raised by the defendant in their application to strike out. From the further material submitted by the claimants, it transpired that all the first claimants are minor.

The case was adjourned to 25th May 2010 and further re-fixed to 27th May upon the defence application and supported by the claimants. On the mention date, further statements were submitted by the claimants; and all parties made oral submission in relation to the strike out application.

Claimants' case

By 2nd August 2008, the defendant being shareholder of 43% shareholding of Sanlu Group, with power to appoint 3 out of 7 of the directors, and being employer of the 3 directors appointed, with knowledge of the contamination, failed to disclose the matter to the consumers to stop the feeding of the contaminated products to the infants, thus caused the disclosure delayed for some 40 days; in that the defendant failed to stop the wrong committed by the Sanlu Group.

Where the Sanlu Group is not in a position to compensate, the defendant is liable to compensate the first claimants who suffered personal injuries after consuming the contaminated products; and their parents, the second claimants accordingly.

Defence's case

All the activities complained occurred in Mainland and no connection with Hong Kong, the tribunal has no jurisdiction, nor a proper forum for the claims. Further, the claims disclose no cause of action under the laws of Hong Kong against the defendant. Hence the claims should be struck out.

Background

The claimants are all residents in Mainland. The claimants in each case are child and parent in relation, each child has a history of consuming Sanlu dairy products and all claimed to suffer physical injury as a result of the consumption. There is no dispute that the Sanlu Group manufactured and

distributed contaminated dairy products in Mainland, which would injury physical health of the consumers, and by that the Sanlu Group committed a tort.

Bodily integrity is an interest protected in tort. Protection against personal injury, vindication of each individual's interest in health and physical well-being, are of prime importance in the law of torts [Clerk & Lindsell on Tort, 19th Ed. Para 1-23].

A number of the Sanlu Group officers had been convicted for the wrong in Mainland, which including Tein Min Wah (田文华), the legal representative and the principal director of the Sanlu Group.

In or about December 2008, an administrator was appointed to take over the assets of Sanlu Group for distribution; the victims did not get any from the distribution. The Sanlu Group was wound up in or about November 2009. The claimants alleged the compensation fund mentioned by the defendant was not officially established under the laws in Mainland.

The claimants held the defendant liable for her failure to disclosure the contamination to the public upon learning the matter on 2nd August 2008. The defendant denied the claims and applied to strike out the claims on ground of *forum non conveniens* and no possible cause of action.

Forum Non Conveniens

The law in respect to *forum non conveniens* is well settled and clearly encapsulated in Mr. Justice Nazareth's (as he then was) judgment in *Lanka Muditha* [1991]1 HKLR 741 (at p. 744), as follows:

(I) *Is it shown that Hong Kong is not only not the natural and appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong...*

(II) *If the answer to (I) is yes, will a trial at this other forum deprive the plaintiff of any "legitimate personal or juridical advantage"? The evidential burden here lies upon the plaintiff.*

(III) *If the answer to (II) is yes, a court has to balance the advantage of (I) against the disadvantages of (II) ... Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant provided that the court is satisfied that notwithstanding such loss "substantial justice will be done in the available appropriate forum"... Proof of this rest upon the applicant for the stay."*

That the defendant is incorporated and registered in Hong Kong was merely a factor to be weighed in the scale going to the appropriateness of forum and I did not consider this to be a powerful factor in the circumstances of the cases.

The tort, the parties, and the damages suffered have an overwhelming strong nexus with Mainland and no significant connection with Hong Kong. I considered that the claimants had failed to demonstrate that Hong Kong was clearly and distinctly the appropriate forum. I considered that Hong Kong is not the natural or appropriate forum or the forum having the most real and substantial and connection with the action. Mainland is undoubtedly the more appropriate forum.

No possible cause of action under the laws of Hong Kong

The case against the defendant is that the defendant failed to notify the public that the dairy products are contaminated with melamine on 2 August 2008, the disclosure was delayed 40 days until 11 September 2008. Whatever the consequences, a failure to act is only actionable in tort if there is a prior duty to act to safeguard the relevant interest of the claimants [Clerk & Lindsell. 19th Ed. Para. 1-47].

In Smith v Littlewoods Organisation Ltd [1987] 2 A.C. 241 Lord Goff referred to Home Office v Dorset Yacht Co Ltd and stated the fundamental principle that "common law does not impose liability for what are called pure omissions". "A manufacturer aware of a dangerous feature in its product may be under a duty to warn users and this may apply where the dangerous defect is discovered subsequent to the sale of the product. It was said that a manufacturer who realizes that omitting to warn customers about something which might result in injury to them must take reasonable steps to attempt to warn them, however lacking in negligence he may have been when the goods were sold [Clerk & Lindsell, 19th Ed. Para.8-43]"

The manufacturer of the contaminated products complaint of was Sanlu Group. Evidence from the claimants shown that the defendant had no control in the manufacturing and management of the Sanlu Group. The directors appointed by the defendant were only informed the matter on 2nd August 2008 and their spontaneous suggestion for public recall was rejected by the majority of the board of directors.

In Sandhar v Department of Transport [2004] EWCA Civ 1440, [2005] P.I.Q.R. P183, the claimant's husband had been killed when his car skidded on an icy road which it was said the defendant should have gritted. May L.J. rejected the claim as there was no evidence that the deceased had relied on the gritting process or that the defendant had assumed a general responsibility to all road users to ensure that all roads would be salted in freezing conditions. He commented that "an assumption of responsibility sufficient to create a duty of care normally requires a particular relationship with an individual or individuals ... a general expectation cannot alone support an assumption of responsibility."

Even the knowledge of the 3 directors appointed by the defendant can be imputed to the defendant; there is no evidence that the defendant has assumed any responsibility towards the consumers.

The tort of an employee of a corporation committed in the course of his employment will render the corporation responsible. The claimants argued that the defendant should be vicariously liable for the act of the directors appointed by her. The assumption of this argument is that the director had committed a tort. Again, the tort was committed by the Sanlu Group. In order to fix a director with personal liability it had to be shown that he was in breach of statutory duty or had assumed personal responsibility for the tort.

The claimants' cases revealed that criminal prosecution has been carried out against Tein Min Wah (田文华), the legal representative and principal director of Sanlu Group, but there is no evidence nor suggestion that any of the 3 directors in Sanlu Group appointed by the defendant was in breach of any statutory duty.

Aldous L.J. in Standard Chartered Bank v Pakistan National Shipping Corporation (No. 2) [2000] Lloyd's Rep. 218, at 233-235, set out a number of exceptions to the principle that directors and employees are not liable for the torts of the company, :

1. where the director or employee commits the tort (e.g. a lorry driver involved in an accident in the course of his employment);
2. where the director or employee assumes a personal responsibility – what constitutes an assumption of responsibility depends on the facts of each case, but this is judged objectively on the basis of what was said and done by the director ("It is necessary to enquire whether the

director conveyed directly or indirectly to the plaintiff that he assumed a personal responsibility towards the plaintiff");

3. where the director procures and induces the company to commit the tort, the director then becomes a joint tortfeasor. However, the carrying out of the duties of a director will never be sufficient, in itself, to make a director liable.

This is common ground that the board of director of Sanlu Group consisted of 7 directors, 3 of which were appointed by the defendant. Most of the evidence relied on by the claimants are news reporting from various sources, the reliability is in doubt. Yet no evidence relied by the claimants suggested that the directors appointed by the defendant were involved in the daily operation of the Sanlu Group, nor in control of the management; there is only evidence suggested that resolution of the board only required to be passed by a majority, the 2 August 2008 resolution without the support of the 3 directors could still be passed.

The claimants suggested that a director appointed by the defendant produced materials caused the Sanlu Group come to a conclusion that each kg with less that 20mg melamine is harmless by referring to Exhibit Item 4 submitted on 4 May 2010, which referred to a statement by Wong Yuk Leung (王玉良) that a director appointed by the defendant produced a report about melamine study and after consideration they came to a conclusion that each kg with less than 20mg melamine would be harmless to infant; the "they" referred by Wong is unknown, similar reference can be found on Exhibit 3 received on 12 May 2010, in which it is reported that it was Tein Min Wah who took out the report obtained from New Zealand Fonterra.

With the stand of the mother company in New Zealand and the defendant's directors suggested a public recall of the contaminated products on 2 August 2008 as revealed in the Claimants' evidence, the evidence relied on by the claimants does not show that the directors appointed by the defendant authorized, directed or procured the manufacture and distribution of any contaminated dairy products nor had assumed any personal responsibility.

Even the 3 directors appointed by the defendant were the servants or agents of the defendant and they attended the board meeting were to safeguard the defendant's interests in Sanlu Group, the evidence relied on by the claimants, does not show that the directors appointed by the defendant is a joint

tortfeasor with the Sanlu Group; nor the defendant is a joint tortfeasor with the Sanlu Group.

Merely as a shareholder not involved in the manufacturing and distribution of the contaminated dairy products, the defendant assumed no responsibility to the consumer of the company products, thus no prior duty to act to safeguard the relevant interest of the claimants. The evidence relied on by the claimants does not show that the defendant owed them any duty of care under the laws of Hong Kong.

However, I do consider the question should be whether the defendant owed the claimants any duty of care under the laws of Mainland, and that would be better resolved by the Mainland Court.

Fraudulent trading
The claimants also referred to Section 275 of the Companies Ordinance Cap.32,

"Responsibility of directors for fraudulent trading

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the Offical Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.
(2) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, ...
(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in manner aforesaid shall, whether or not the company has been or is in course of being wound up, be guilty of an offence and liable to imprisonment and a fine."

Pursuant to the interpretation section "court" means the Court of First Instance; and "company" means a company formed and registered under the Ordinance or a company formed and registered under the Company Ordinance 1865 or under the Company Ordinance 1911.

But most importantly, the claims made against the defendant, a solvent company, are for damages for personal injuries. This section simply has no application in the present cases.

Minor
Minors in the present cases must sue by next friend or guardian; this tribunal has no power to appoint a person next friend or *guardian ad litem*. However, because of the abovementioned reasons, I would not exercise my discretion to transfer the case to the District Court.

Conclusion
It hurt everyone in learning children especially babies became victims of unconscionable act. From the first claimants' medical reports, I see the parents' worries. All the babies and their families who suffered in this wide spread dairy products contamination do have my sympathies.

Having said this, for the abovementioned reasons, I do not consider Hong Kong is an appropriate forum nor the claimants have any cause of action against the defendant under the laws of Hong Kong. With respect to all the claimants, I strike out their claims accordingly.

Dated 27 May 2010

Ada Yim
Adjudicator