

Szecket et al. v. Huang et al.
[Indexed as: Szecket v. Huang]

42 O.R. (3d) 400
[1998] O.J. No. 5197
Docket No. C21653

Court of Appeal for Ontario
McMurtry C.J.O., Laskin and Borins J.J.A.
December 10, 1998

Corporations — Contracts — Pre-incorporation contracts — Negotiations for contract revealing that party not intending any personal liability, and party signing contract on behalf of company to be incorporated — Contract not containing any express term precluding party's personal liability under s. 21(1) of the Business Corporations Act — Company never incorporated and contract not performed — Party liable for breach of contract — Business Corporations Act, R.S.O. 1990, c. B.17, s. 21.

In 1985, AS and AG, who had developed a process for bonding metals, were approached by GH about marketing the bonding technology in Taiwan. In July 1988, a letter of understanding was signed and, in August 1988, a co-operation agreement was signed, after which the parties began negotiating a formal technology licence and assistance agreement to introduce the bonding technology to Taiwan. During the negotiations, GH and his associates rejected a draft of an agreement in which they would provide personal guarantees. Ultimately, the parties signed an agreement in which GH and his associates were described and signed the agreement as "acting on behalf of a company to be formed". However, GH and his associates did not form a company and the agreement, which included a licence for the use of bonding technology, was never performed. AS and AG, who had moved to Taiwan to provide services under the agreement, returned to Canada. They sued GH for breach of contract. In their action, Conant J. applied s. 21(1) of the Business Corporations Act (OBCA), which provides that a person who enters into a contract on behalf of a corporation before it comes into existence is personally bound by the contract, and found GH personally liable to AS and AG. AS was awarded U.S.\$304,726, and AG was awarded U.S.\$227,995. GH appealed. It was his position that under s. 21(4) of the OBCA, he had contracted out of the personal liability imposed by s. 21(1) and was not bound by the contract. Section 21(4) provides that if expressly provided in the contract, a person who purported to act on behalf of a corporation before it came into existence is not in any event bound by the contract. GH argued that the evidence showed that he had expressed a clear intention not to assume personal liability and that Conant J. should have applied s. 21(4)

Held, the appeal should be dismissed with costs.

The legislature enacted s. 21 of the OBCA to overcome the confusing state of the law about pre-incorporation contracts. Section 21(4) requires that an express term be included in a pre-incorporation contract to limit the liability of a person signing it on behalf of a company to be formed. Here there was no express term and s. 21(4) did not apply. Accordingly, Conant J. was correct in applying s. 21(1), although it was unnecessary for him to undertake a complex two-stage analysis that combined common law principles with the statutory regime. This was a

straightforward case; personal liability under s. 21(1) prevailed unless either contracted out of pursuant to s. 21(4) or displaced by the adoption of the contract by the contract by the company subsequent to its incorporation pursuant to s. 21(1).

Cases referred to

Sherwood Design Services Ltd. v. 872935 Ontario Ltd. (1998), 39 O.R. (3d) 576, 158 D.L.R. (4th) 440, 38 B.L.R. (2d) 157 (C.A.); Westcom Radio Group Ltd. v. MacIsaac (1989), 70 O.R. (2d) 591, 36 O.A.C. 288, 63 D.L.R. (4th) 433, 45 B.L.R. 273 (Div. Ct.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.17, s. 21

APPEAL from an award of damages for breach of contract.

Robert J. McComb, for appellant.

J. Gardner Hodder, for respondents.

BY THE COURT: — The issue raised by this appeal is whether Conant J. correctly applied s. 21(1) of the Business Corporations Act, R.S.O. 1990, c. B.17 (the "OBCA") in finding that the appellant, Geoffrey Huang, was personally liable to the respondents, Alexander Szecket and Alberto Geddo, for the breach of a contract which the appellant, and others, entered into with the respondents "on behalf of a company to be formed", in circumstances where the company was not formed and the contract was not performed. It is the position of the appellant that under s. 21(4) of the OBCA he was not bound by the contract.

The appellant has also appealed from the trial judge's award of damages on the ground that the amount awarded to each respondent was excessive on a proper interpretation of the provision of the contract that provided for their remuneration. Dr. Szecket was awarded U.S.\$304,726 and Mr. Geddo was awarded U.S.\$227,995.

Conant J. also found liability on the part of Mr. Huang on the basis of negligent misrepresentation, although it would appear that damages were assessed as arising from the breach of the contract. An appeal was also taken from this finding. Given that it is our opinion that Conant J. correctly decided that the appellant was liable under s. 21(1) of the OBCA, we do not propose to deal with whether this finding was erroneous.

FACTS

The facts that underlie this appeal are straightforward and essentially not in dispute.

Dr. Szecket, a research scientist, and his associate, Mr. Geddo, a consulting engineer, developed a process, or technology, for the bonding of dissimilar metals called "Dynamic Bonding", for which Dr. Szecket held three patents. In the mid-1980s they lived, and were

employed, in the Toronto area. About 1985 they were approached by Mr. Huang who represented that he was aware of specific opportunities in Taiwan for the development of the respondents' technology, including the financing required to do so.

Over the next three years, considerable discussion took place between the respondents and the appellant and his associates toward the goal of the formation of a business relationship to develop and market the respondents' technology in Taiwan. The parties exchanged their views concerning the proposed business venture mainly through correspondence. The respondents travelled to Taiwan to investigate the plant and facilities where Mr. Huang proposed that the business would be located, and to meet Mr. Huang's associates.

On July 18, 1988, the respondents and Mr. Huang signed a letter of understanding, the purpose of which was "to define a mutual understanding" among them of the proposed business venture. On August 13, 1988, a co-operation agreement was signed by the respondents and Mr. Huang, as well as by his associates, Hsu Mien and Luis Lan Lu. This agreement expanded upon the terms of the letter of understanding, provided that Mr. Lu would "immediately make available" the funding for the venture and contemplated the preparation and execution of "a formal agreement". It contained the following recital:

The following Parties agree to cooperating in introducing advanced high energy explosive bonding technology to Taiwan under the following terms and conditions:

Subsequent to August 13, 1988, a rudimentary draft of the contemplated formal agreement was prepared. Shortly after its preparation, a more comprehensive draft agreement was prepared by a solicitor retained by the respondents. This draft served as the vehicle for the final round of negotiations among the parties and culminated in the final agreement dated September 1, 1988, which was not executed until the end of October 1988.

The evidence disclosed that it was the respondents' wish that Mr. Mien and Mr. Huang personally guarantee the benefits the respondents were to receive under the contract. To that end, the respondents instructed their solicitor to include the following provision in the second draft of the proposed contract:

The parties MIEN and HUANG personally guarantee the payment to the Licensor of the Licence and Technical Assistance Fees payable during the initial three year term of this agreement as set forth in Article 3 of this Agreement.

In addition, this draft provided that Mr. Mien and Mr. Huang were to execute the agreement "Personally and on behalf of a Company to be incorporated".

However, Mr. Mien and Mr. Huang were opposed to providing their personal guarantees. Consequently, when the final draft of the agreement was prepared it did not contain the above provision and the words "Personally and" below the signatures of Mr. Mien and Mr. Huang had been deleted. The agreement contained no provision expressly providing that Mr. Mien or Mr. Huang were not bound by the contract or entitled to its benefits.

It is helpful to reproduce the first page of the agreement which the parties executed to illustrate the description of the parties and the capacity in which Mr. Huang and his associates executed the agreement:

TECHNOLOGY LICENCE AND TECHNICAL ASSISTANCE AGREEMENT

This Agreement made as of the First day of September, 1988

MADE BETWEEN:

ALEXANDER SZECKET, Research Scientist and Consultant and ALBERTO A. GEDDO, Consulting Engineer, both of the City of Toronto, in the Province of Ontario, Canada

(hereinafter called collectively the Licensor and individually as SZECKET and GEDDO respectively)

-and-

HSU MIEN, GEOFFREY HUANG and LAN LU, acting on behalf of a company to be formed

(the Company hereinafter called the Licensee)

-and-

TAIWAN CLAD METAL CORP., a corporation formed under the laws of Taiwan, Republic of China, having its Head Office at Taipei, Taiwan, represented by Hsu Mien and Geoffrey Huang

(hereinafter called "TCMC")

-and-

LAN LU, Finance Consultant, of the City of Taipei, Taiwan, Republic of China, (hereinafter called LU)

Following Mr. Huang's signature on the last page of the agreement are the words "on behalf@2 of a company to be incorporated".

In general, this was a licence agreement pursuant to which the respondents granted the company to be formed a licence to use their technology to manufacture products and provide services in Taiwan for the three-year term of the agreement. The respondents were to reside in Taiwan and supervise the operations of the company. Mr. Lu was to provide capital of a minimum of Taiwan \$20 million.

Except for the provision in art. 3 for the payment of the respondents' fees, which is reproduced in part in the next paragraph, there is no need to review any of the other provisions of the agreement in any detail. This is because the contract was not performed. Mr. Lu did not provide the capital and Mr. Huang and his associates did not form the company. The respondents, who had given up their employment in Canada, moved to Taiwan in the autumn of 1988. Ultimately, they returned to Canada in March 1989, and began to seek employment.

Because the appellant has taken issue with the trial judge's assessment of the respondents' damages, it is necessary to review the compensation they were to receive pursuant to art. 3 of the

agreement. Dr. Szecket and Mr. Geddo each were to receive a weekly fee, living and travel expenses, the use of two cars, insurance coverage, an allowance for meals, an equity position in the company to be formed, 10 per cent of the company's annual profit and a royalty of 10 per cent of the net sales of the company for a period of ten years. All moneys to be paid to the respondents were to be paid in United States dollars. As it was central to the trial judge's assessment of damages, it is helpful to reproduce art. 3(i) of the agreement:

3 PAYMENT OF FEES

In consideration of the rights granted hereunder the Licensee shall pay to the Licensor for the grant of license and for the technical assistance as follows:

- (i) a fee payable in instalments of \$2,600.00US per week to each of SZECKET and GEDDO (it being understood that of that figure \$1,000.00US is an overseas allowance and may be de-escalated in accordance with a Co-operation Agreement signed between the parties on August 15, 1988) for the period commencing September 1, 1988, to and including August 31, 1991. An initial payment of \$10,400.00US shall be paid to each of SZECKET and GEDDO on the 1st day of September, 1988, regularly weekly payments to commence the fifth week thereafter.

The "licensee" referred to in art. 3(i) was the company to be formed.

The clause in the "co-operation agreement" referred to in art. 3(i) of the agreement reads as follows:

- b. Party B shall receive a salary of USD1,600 per week each plus an allowance of USD1,000 per week. The allowed sum will become deescalated when the Company shall succeed to receiving work orders of substantive nature (USD3 Million Plus). Additional terms to be based on an Understanding signed between Party B and Geoffrey Huang in Toronto, Canada, per appended. All minor details to be adjusted between Party B and the Company in the spirit of good will and genuine cooperation.

"Party B" referred to Dr. Szecket and Mr. Geddo.

THE TRIAL JUDGE'S REASONS

Conant J. stated that the issues to be determined were:

1. Is Huang personally liable for the breach of contract when he signed "on behalf of a company to be incorporated"?
2. Is Huang liable for negligent misrepresentation?

It would appear from the reasons of the trial judge that it was common ground that the agreement had been breached and that the only issue was whether Mr. Huang was personally liable for the breach.

As the company had not been formed, Conant J. found Mr. Huang personally liable to compensate the respondents for the damages they suffered as a result of the breach by applying s. 21(1) of the OBCA and common law principles. It is to be noted that although the respondents sued all three individuals who had entered into the contract on behalf of the company to be formed, they subsequently discontinued their action against Mr. Mien and Mr. Lu because they did not know their whereabouts for the purpose of serving them with the statement of claim.

This appeal deals with a pre-incorporation contract. An analysis of the reasons of Conant J. discloses that he appears to have based his finding of personal liability on a combination of common law principles of liability for pre-incorporation contracts and the application of s. 21(1) of the OBCA. Why he chose to take this approach is not entirely clear. However, it would appear that he did so on the basis of his understanding of the reasons of the Divisional Court in *Westcom Radio Group Ltd. v. MacIsaac* (1989), 70 O.R. (2d) 591, 63 D.L.R. (4th) 433. Conant J. interpreted this decision to require the court, before considering whether s. 21(1) applied, "to decide whether there is any evidence tending to demonstrate that the parties intended that Huang be personally liable for the obligations of [the company to be incorporated] to the plaintiffs". It seems that his ultimate finding on this question was that it was not the intention of Huang to be personally liable for the obligations of the company to be incorporated. However, in our view, nothing turns on this finding as the liability of Mr. Huang ultimately is to be determined pursuant to s. 21 of the OBCA, which the legislature enacted to overcome the confusing state of the common law pertaining to pre-incorporation contracts.

Because of our view of this appeal, there is no need to deal further with Conant J.'s analysis which led to his finding of liability pursuant to s. 21(1) of the OBCA. As stated earlier our view of the appeal precludes any need to review the trial judge's finding of liability based on the negligent misrepresentation of the appellant.

As for his award of damages, the trial judge based it on the breach of the contract. In doing so, he focused on art. 3(i) of the agreement, which is reproduced in para. 14 [p. 405 ante]. He stated:

I find that the Plaintiffs had a three-year employment agreement akin to an employment contract for the payment of \$2,600.00 (U.S.) per week to each of the Plaintiffs from Sept. 1/88 to Aug. 31/91. This amounts to \$405,600.00 (U.S.) to each for employment under the agreement.

As the trial was not held until 1995, Conant J. was able to quantify the loss of each respondent during the three-year period contemplated by the agreement. In doing so, he found that each respondent had been compensated for 16 weeks prior to the breach of the contract, and had taken appropriate steps to mitigate his loss subsequent to the breach. Accordingly, he made appropriate deductions from the U.S.\$405,600 which each respondent stood to earn had the contract been performed, and he awarded Dr. Szecket U.S.\$304,726 and Mr. Geddo U.S.\$227,995.

ANALYSIS

Liability

The only liability issue before this court is whether the trial judge was correct in his application of s. 21(1) of the OBCA in finding Mr. Huang liable for the non-performance of the contract. Counsel for Mr. Huang took the position that the trial judge erred in doing so and that he should have applied s. 21(4) of the OBCA and found that Mr. Huang had contracted out of the personal liability imposed by s. 21(1). Counsel for the respondents took the position that s. 21(4) has no application to the circumstances of this case as there was non-compliance with the strict requirements imposed by s. 21(4) for the limitation of personal liability of one who enters into a contract on behalf of a company to be formed.

To provide the context for the discussion that follows, it is necessary to reproduce s. 21 of the OBCA:

21(1) Except as provided in this section, a person who enters into an oral or written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof.

(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,

- (a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
- (b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

(3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit.

(4) If expressly so provided in the oral or written contract referred to in subsection (1), a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof.

Counsel for the appellant argued that the trial judge erred in failing to invoke s. 21(4) to exclude the appellant from personal liability under s. 21(1) on the evidence that Mr. Huang had expressed a clear intention not to assume personal liability for the obligations of the company to be incorporated. He pointed to the position taken by the respondents in their initial negotiations with Mr. Huang and his associates that they should assume personal responsibility for the obligations of the company. Counsel submitted that the respondents' position was manifested by the second draft of the agreement, which contained a guarantee by Mr. Huang and Mr. Mien of the obligations of the company and required that they execute the agreement both in their

personal capacity, and on behalf of a company to be incorporated. This guarantee was ultimately deleted from the draft of the agreement at the insistence of Mr. Huang and his associates, which they executed solely on behalf of the company to be incorporated. It was counsel's position that this satisfied the requirements of s. 21(4) and relieved Mr. Huang of personal liability under s. 21(1) when the company was not incorporated and the contract was not performed.

Counsel for the respondents, on the other hand, submitted that s. 21(4) has no application to the circumstances of this appeal. He argued that s. 21(4) requires that an express term be included in a pre-incorporation contract to limit the liability of a person signing it on behalf of a company to be formed. As there was no express term in the contract limiting the appellant's liability, this contract did not fall within the class of contracts contemplated by s. 21(4), with the result that Conant J. correctly found Mr. Huang liable for the breach of the contract pursuant to s. 21(1). In our view, the submission of counsel for the respondents is correct.

Counsel for the appellant and the respondents directed us to the analysis of the law of pre-incorporation contracts found in the dissenting reasons of Borins J.A. in *Sherwood Design Services Ltd. v. 872935 Ontario Ltd.* (1998), 39 O.R. (3d) 576 at pp. 593-600, 158 D.L.R. (4th) 440 (C.A.) where he explored the common law position respecting rights and obligations arising from pre-incorporation contracts and the legislative response to the unsatisfactory state of the common law, with particular emphasis on the legislative history and evolution of s. 21 of the OBCA.

Counsel for the respondents urged us to adopt and apply this analysis to the circumstances of this appeal, notwithstanding that it is contained in the dissenting reasons of a member of the panel that decided the *Sherwood* case.

Although it is a salutary principle that it is inappropriate for one panel of this court to disagree with the decision of another panel on a question of law, we are satisfied that it would not offend this principle for us to adopt Borins J.A.'s analysis of the law of pre-incorporation contracts. If neither the reasons, nor the result of the majority, are in any way inconsistent with the legal analysis of the minority, it is open to a subsequent panel of the court to adopt the legal analysis of the minority. We have reached this conclusion because the issue in the *Sherwood* case was different from the issue we have to decide in this appeal. Further, because the majority in *Sherwood* did not comment on the legal analysis of pre-incorporation contracts, there was no essential difference of opinion between the majority and the minority of the court on this subject. Finally, the result of this appeal does not impugn the result reached by the majority in the *Sherwood* case. The main issue in the *Sherwood* case centred on the interpretation of s. 21(2) of the OBCA and its application of the facts to that case, whereas in this appeal the focus is on the interpretation of s. 21(4).

In the *Sherwood* case, at the conclusion of his legal analysis, Borins J.A. summarized the elements of s. 21 of the OBCA and its counterpart, s. 14 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C.44, at pp. 599-600:

The intent of the statutory reforms was to eliminate the problems of the common

law of pre-incorporation contracts. The elements of s. 14 of the C.B.C.A. and s. 21 of the O.B.C.A. are as follows:

- A promoter who enters into a contract, by or on behalf of a corporation before it comes into existence, is personally bound to perform the contract and is entitled to its benefits.
- If a corporation comes into existence and adopts the contract
 - the corporation is bound by and is entitled to the benefits of the contract, and
 - the promoter is no longer bound by or entitled to the benefits of the contract.
- The other contracting party may apply to a court for an order fixing both the corporation and the promoter with liability (joint, joint and several, or apportioned) regardless of whether or not the corporation has adopted the contract.
- The other contracting party and the promoter may agree in the contract that the promoter is not bound by the contract in any event.

He continued at p. 600:

Section 21 of the O.B.C.A., which is reproduced in para. 44 [p. 590 ante], reflects the inviolability of the corporate form. The corporation is given the option to adopt a contract entered in its name, or on its behalf, before coming into existence, instead of being bound automatically to pre-incorporation agreements upon incorporation. As such, the corporation is required to take positive steps if it wishes to adopt the contract. This requires that it have knowledge of the contract and its terms. In this way, s. 21 accepts and propagates the philosophical and legal fiction of the corporation as a separate and distinct personality. However, it does not do so at the expense of third parties, who are not without recourse in circumstances where the contract is breached. Although the corporation is not automatically bound by the contract at its inception, third party interests are protected. Section 21(1) ensures that the promoter is bound by the agreement until it has been adopted by the corporation, unless, under s. 21(4) the parties expressly provide that the promoter is not bound by the contract or entitled to its benefits.

The term "promoter" is used in the legal literature to identify the individual who has entered into a contract on behalf of a company to be incorporated, and in the circumstances of this appeal is the appellant, Mr. Huang.

In our view, the final sentence in the above passage provides a complete answer to this appeal. Section 21(4) is clear and unambiguous. To limit the liability of a person who enters into a pre-incorporation contract, an express provision to that effect must be contained in the pre-incorporation contract. The contract in this appeal did not contain such an express provision. Whatever may have been the result of the negotiations between the parties preceding the execution of the contract about the personal responsibility of Mr. Huang for the obligations of the company to be incorporated, the contract itself contained no express provision relieving Mr. Huang from personal liability under s. 21(1) if the company was not incorporated, or if it was

incorporated, and failed to adopt the contract. Had he wished to avail himself of s. 21(4), Mr. Huang could have sought the consent of the respondents to include an appropriate provision in the agreement. In the absence of such a provision, it follows, in our view, that Conant J. was correct in his application of s. 21(1) to the circumstances of this appeal and his conclusion that Mr. Huang was personally liable for the breach of the contract. We note that in his reasons, Conant J. did not consider the application of s. 21(4).

We feel obliged to comment on the analysis undertaken by the trial judge in determining the appellant's liability. With respect, we question his reliance on the Westcom case, *supra*, which made his analysis of the evidence and s. 21(1) unnecessarily complex. We have not been asked to consider the correctness of the decision in Westcom, and, therefore, we decline to do so. In any event, it is distinguishable on its facts from this appeal where there is no evidence that Mr. Huang believed he was contracting on behalf of an existing company that, in fact, did not exist, as was the case in Westcom. In this appeal, all the evidence pointed to only one conclusion -- that the respondents and Mr. Huang knew, and, indeed, intended, that Mr. Huang and his associates were contracting on behalf of a company to be incorporated. As Borins J.A. concluded in his analysis of the law pertaining to pre-incorporation contracts in the Sherwood case, in a situation like this where the company is not incorporated and the contract is not performed, liability for breach of the pre-incorporation contract depends on the application of s. 21, which was enacted to replace the common law.

Accordingly, Westcom was of no assistance to the trial judge in resolving the issue of Mr. Huang's personal liability. There was no need for him to undertake the two-stage analysis suggested by Westcom and first determine whether it was the intention of the parties to the pre-incorporation contract that Mr. Huang incur personal liability before determining the ultimate issue of his liability through the application of s. 21(1). This represented one of the problems arising from the common law of pre-incorporation contracts, which the legislature intended to remedy by the enactment of s. 21. As we have stated, personal liability of the promoter is established by s. 21(1) and prevails unless either contracted out of pursuant to s. 21(4), or displaced by the adoption of the contract by the company subsequent to its incorporation pursuant to s. 21(2). Indeed, on its facts this is a simple and straightforward case, which clearly attracts the application of s. 21(1).

Damages

As we have indicated, the trial judge assessed the respondents' damages on the basis that each was deprived of earning U.S.\$2,600 a week for the three year term of the contract. This weekly sum is derived from the provisions of art. 3(i) of the agreement, which is reproduced in para. 14 [p. 405 ante].

Counsel for the appellant attacked the assessment on the basis of the understanding expressed in art. 3(i) that a component of the weekly sum of U.S.\$2,600 was an "overseas allowance" of U.S.\$1,000 which "may de-escalate in accordance with a Co-operation Agreement signed between the parties on August 15, 1988". Counsel submitted that because the respondents were not required to remain overseas, the damages should have been assessed on the basis that the respondents were deprived of earning U.S.\$1,600 a week. Because the respondents had worked

overseas for 16 weeks, and were paid for doing so before returning to Canada in March 1989, the effect of this submission would be to reduce the amount of the damages of each respondent by U.S.\$140,000.

In our view, there is no merit to this ground of appeal. Indeed, we find it difficult to understand its underlying logic. After all, the reason why the respondents were unable to work overseas was because the contract was not performed. It is trite law that as a result of the breach the respondents are entitled to be placed in the position they would have been in had the contract been performed.

Moreover, in our view, a proper interpretation of art. 3(i) requires consideration of the relevant provision of the "co-operation agreement", which was incorporated by reference into art. 3(i), as well as consideration of the other provisions of art. 3 that provided for remuneration for the respondents, in particular, the payment to the respondents of 10 per cent of the profit of the company to be formed and a royalty of 10 per cent of the net sales of the company for a ten-year period. The relevant provision of the co-operation agreement is found in para. 15 [p. 405 ante] of our reasons. It provided that the allowance of U.S.\$1,000 a week "will become deescalated [sic] when the company shall succeed to receiving work orders of substantive nature (USD3 Million Plus)".

In our opinion, the intention of the parties was that each respondent would receive compensation of U.S.\$2,600 a week for the three-year term of the contract. This amount contained two components, one of which was a base weekly compensation of U.S.\$1,600. As for the other component, it was anticipated that when the company was up and running and earning a profit and generating royalties, U.S.\$1,000 would be generated from the respondents' 10 per cent share of the company's profits and their 10 per cent share of the royalties. Thus, properly interpreted, the weekly allowance of U.S.\$1,000 was intended to reflect a start-up allowance for the company. This amount was to be "de-escalated" to accord with the respondents' share of the company's profits and their royalties, provided that each week each respondent received U.S.\$2,600. In the final analysis, it is clear to us that the respondents had negotiated a weekly remuneration of U.S.\$2,600 and that they were deprived of it because the contract was not performed.

RESULT

For all of the above reasons, the appeal is dismissed with costs.