

HONG KONG / JUDGMENT

MC.FOUNDER (TECHNOLOGY) LTD v. E28 HONG KONG LTD

COURT

Court of First Instance

DECIDED

20 November 2007

CASE / FILE NUMBER

HCA2512/2005

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCA 2512/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 2512 OF 2005

BETWEEN MC.FOUNDER (TECHNOLOGY) LIMITED Plaintiff and E28 HONG KONG LIMITED
Defendant

Before: Deputy High Court Judge Gill in Court Dates of Hearing: 6-9 November 2007 Date of
Judgment: 20 November 2007

J U D G M E N T

The two claims and counterclaim in this action arise out of the attempted performance of a contract between the parties called the Distribution Agreement; so called because by its terms, for a short period, the principal, E28 Hong Kong Limited (E28 HK) appointed MC.Founder (Technology) Limited (MC Founder) to be its sole distributor in Hong Kong and Macau of a top-of-the-line mobile telephone it had developed and made, called the e2800+ SmartPhone. Things got underway when MC Founder took delivery of the first order of 2,000 phones paid for at an agreed price called the Transfer Price; this providing for an acceptable profit margin below the expected price which the consumer would be required to pay, called the Current Retail List Price. Whatever was the cause, the anticipated sales volume failed to materialize, and as time passed MC Founder and its retailers found themselves stuck with large numbers of the phones. Meanwhile MC Founder had outlayed a significant amount to meet the Transfer Price and as well was out of pocket in the cost of promotions and advertising. Over a period of several months the parties through their sales management personnel tried to find a solution that would be

commercially acceptable to both. That which MC Founder sought was a recouping of the P and A costs it claimed E28 HK owed it under the Distribution Agreement, and a reduction in the Transfer Price already paid so that the stock of phones could be sold off, perhaps in bulk, at a lower figure. Realistically, caught up in this proposal was no expectation of a profit or even a break even; rather, this was to cause the overall loss to be reduced because it would be shared. Whatever may have been agreed or by construction was properly due, nothing has been paid, and MC Founder issued this writ. The claim to recover the P and A costs relies for its success or otherwise on an interpretation of the Distribution Agreement. The claim for relief from the Transfer Price depends upon whether the parties reached a compromise agreement. There is a dispute of fact with which I have to deal to resolve this. The counterclaim derives from E28 HK's assertions that MC Founder has not properly performed its obligations under the Distribution Agreement; in particular, by not having taken any steps towards buying more phones after the first order. It calls for specific performance and/or in the alternative damages.

Background

E28 HK is a Hong Kong based company but whose Managing Director in overall control, called Roger Kung, is based in Shanghai, and he spends most of his time there. The Sales and Marketing Director at the time, called Jason Chen, was also based in Shanghai. The e2800+ phone was the successor to an earlier model incorporating additional features and was designed to meet the top end of the market at a retail price in Hong Kong of just under HK\$4,000. The task of finding and negotiating with a suitable distributor in Hong Kong and Macau fell to the Sales and Marketing Manager of E28 HK based in Hong Kong called Pheona Kan. Pheona joined the company in December 2003 with about five years of experience in sales and marketing of mobile phones. It was she who found MC Founder and then negotiated with her counterpart in that company the terms and conditions which eventually culminated in the Distribution Agreement. But throughout her evidence and as well that of Roger Kung, the MD, it was emphasized that when it came to the company's marketing policy and conditions she had no discretion but that all proposals had to be run past Jason Chen and then ultimately Roger Kung for approval. Pheona's counterpart in MC Founder was called Desmond Cheng. He had been General Manager, Production Development, since October 2001; he, too, thus had experience in the field. He said MC Founder at all material times has distributed in Hong Kong high tech products including iPods, pocket PCs and PDA phones. All along its distribution network has been comprehensive; there are more than 30 retail dealers therein. The email traffic reveals that Pheona and Desmond first met to discuss a relationship in February 2004. Since then they communicated regularly, at times daily, as they worked on the way forward. The Distribution Agreement was finally signed and came into being on 26 August 2004. Little need be mentioned about the discussions during the intervening time as they are expressly contractually excluded. Suffice to say a great deal of time and effort went into the formation of the agreement, exercising the minds of two experienced marketeers. I come to its terms next. The Distribution Agreement Pertinent provisions I summarize as follows: Entire agreement : There was an entire agreement clause, in usual terms (cl.12.03). The duration : It was set to run for an initial period of 12 months from 28

August 2004 (cls.1.01, 8.01). The product : The e2800+ SmartPhone (app.1) The territory : Hong Kong and Macau (cl.1.01) The distributorship : To MC Founder, to the exclusion of any other, including E28 HK (cls.2.01, 2.05) Marketing : This is covered by clause 5. Clauses 5.01 and parts of 5.02 are pertinent, and read as follows: 5.01 The Distributor shall use its best endeavours to promote the sale of the Product throughout the Territory. In particular the Distributor shall be entitled to resell the Product to its customers at such prices and on such terms as it may determine. Marketing promotion shall include, but not limited to, media advertising, give away advertising, sales display and trade shows. 5.02 (1) any advertising, promotional or sales plans (including their estimated cost) relating to the Product shall be submitted to the Principal for its consent prior to implementation. The Principal shall notify the Distributor of its consent which shall not be unreasonably withheld or objection within three (3) working days from receipt of such plans; (ii) The Principal shall be responsible for payment of the cost for such consented advertising and/or promotional and/or marketing activities and agrees to promptly reimburse the Distributor for all such payment made by the Distributor on behalf of the Principal; (iii) The budget for such consented activities (intended to cover the Guaranteed Minimum Order) is HK\$700,000. The parties shall negotiate in good faith on budgets for similar activities covering future purchase orders to be placed by the Distributor as and when the occasion arises; The term Guaranteed Minimum Order (GMO) is described in clause 3.02 as the minimum number of 4,000 units which MC Founder undertook to place purchase orders for, subject to the applicable conditions set out in Appendix 2 (called the GMO conditions). Next I reproduce pertinent provisions under clause 4:

4. PAYMENT FOR THE PRODUCT AND PRICE 4.01 The Principal shall supply the Product covered by the Guaranteed Minimum Order to the Distributor at the transfer price (as defined in Appendix 2). The transfer price of the Product under any subsequent purchase orders to be placed by the Distributor shall be determined by mutual agreement. The unit price payable by the Distributor to the Principal for the Product (the transfer price) shall be the amount equivalent to the retail list price as may from time to time agreed by the parties less 22%. The current retail price, transfer price and discount to the Distributor are listed in Appendix 2. The retail list price, transfer price and discount may be varied by agreement of both parties. If the Principal shall agree with the Distributor on a new retail list price which falls below that stated in Appendix 2, the transfer price shall forthwith be adjusted such that the discount to the Distributor remains the same as that listed in Appendix 2. The Principal shall also compensate the Distributor (by way of cash payment or credit note) the difference between the original transfer price and the new transfer price for each Product in the possession of the Distributor, its sub-distributors or resellers remaining unsold to end users. For this purpose, the Principal shall be entitled to take stock of all such unsold Product in the possession of the Distributor and its sub-distributors or resellers, and their sales outlets at any time on giving 2 days prior notice. Such number of unsold Product shall be agreed by both parties in writing. The parties shall in good will use their best endeavours to agree on the number of unsold Product. And now Appendix 2, incorporating the GMO conditions: APPENDIX 2 Current Retail List Price: HK\$3,980.00 Transfer price to MCF: HK\$3,104.40 for

the first 2,000 units, transfer price for subsequent units to be mutually agreed Delivery: FOB, Hong Kong Package List: Item Qty e2800+ transceiver 1 1030mAh Li-Polymer Battery 2 Travel Charger 1 Stereo Headset 1 USB cable 1 Stylus 2 CR-ROM 1 Leather-Holster 1 e2800+ User Manual (TC version) 1 Quick Guide 1 eZone User Manual (TC version) 1 Warranty Card (TC Version) 1 Desiccant 1 Carry bag 1 32MB SD/MMC card 1 SD Card User Manual (TC version) 1 Order and Delivery Schedule:- Expected Expected Quantity Order Date Delivery Date on or before on or before 1st Purchaser Order 2,000 [31/8/2004] [30/9/2004] 2nd Purchaser Order 1,000 [30/11/2004] [31/12/2004] 3rd Purchaser Order 500 [28/2/2005] [31/3/2005] 4th Purchaser Order 500 [31/5/2005] [30/6/2005] Minimum Order Quantity: 4,000 The GMO Conditions:-

- (1) Save and except the 1st Purchase Order, the Distributor shall not be obliged to place any subsequent Purchase Orders if by noon on the day before the relevant Expected Order Date the total stock of the Product in the possession of the Distributor and its sub-distributors and resellers (the Total Stock) shall exceed 800 units in which event Purchase Order shall be postponed until the Total Stock shall decrease to 800 units or below.
- (2) If by noon on 28th May 2005 the Total Stock shall exceed 800 units then the Distributor shall be released from all liabilities to purchase and pay for any undelivered quantity of the Product covered by the Minimum Order Quantity, if any.
- (3) For the purpose of these Conditions and verifying the Total Stock level reported by the Distributor the Principal shall be entitled to (a) conduct stock checks at the Distributor's retail outlets or its resellers outlets on prior reasonable notice being given; and (b) obtain from and the Distributor who shall supply monthly sell-in and sell-out stock reports (down to the resellers level). Clause 8 deals with the right by one party to terminate the Distribution Agreement if the other is in material breach or falls into receivership or goes into liquidation. In addition clause 8.05 gives either party the right to terminate on 90 days notice to the other. What emerges from a reading of the Distribution Agreement are the following bullet points: The Current Retail List Price for the 1st order of 2,000 phones was fixed at \$3,980. This less 22% gave rise to the Transfer Price of \$3,104.40. Thus for the first order MC Founder paid $\$3,104.40 \times 2,000 = \$6,208,800$. The Guaranteed Minimum Order (GMO) was a total of 4,000 phones which the parties were obliged in turn to purchase and supply, subject to the escape provisions of the GMO conditions (the Price Protection Scheme). During the course of the Distribution Agreement the Transfer Price was to be 22% below the Retail List Price, with the discount and the two prices able to be varied by agreement. If there was to be an adjustment of the Retail List Price to stock already bought and paid for by MC Founder, there would be a consequent adjustment to the Transfer Price and refund of the amount overpaid. In the event of there being stock unsold at the time of any adjustment in the Retail List Price or Transfer Price or the discount, E28 HK would have the right to carry out its own stock take. Under clause 5.01, once the Transfer Price had been determined MC Founder was free to fix the price of resale to its customers. Performance What transpired following the signing is helpfully documented in the exchange of emails between Pheona and

Desmond. The first order of 2,000 units at the Transfer Price of \$3,104.40 per piece (in all \$6,208,800) was supplied and paid for in September 2004. By this time marketing and promotion activity was already underway, and this continued through to January 2005. Pursuant to the provisions of clause 5 of the Distribution Agreement, MC Founder pursued and was given the consent by E28 HK to the expenditure; in all \$405,822.60. There is no dispute about this, as to quantum or approval given. It was soon apparent that there were sales and marketing problems. A feature of the e2800+ was that it could read emails, but this was found not to function and required a software upgrade. This was not sorted out until the end of October 2004. Then there emerged competition in the shape of the household brand Motorola, whose model has similar features and was for sale at a similar price. By an email of 28 October from Desmond to Pheona, he proposed as an incentive to buyers including in the package free of charge a 512M MMC card as a seasonal promotion. He ended the email with these words: Please feel free to discuss our coming price and sales to sell more. A sales report of 31 October was not exciting. In it MC Founder reported that 443 units had been distributed to dealers in Hong Kong and Macau, of which 171 had been sold to end consumers. The monthly sales reports thereafter were no more encouraging. In November, 20 units were sold, in December 28, January 5, February 189, March 21 and by early April none at all. So for the seven months, only 434 out of the first order of 2,000 had been sold to end buyers (technically called sold-thru). These depressing figures were addressed by Desmond in an email to Pheona of 21 December, when he proposed a reduced Retail List Price (to \$2,980) and Transfer Price (to \$2,480) as from the New Year. He followed this up with another email of 28 December, in which he reported a request by the Macau distributor for a special price of \$2,200 in order to clear stock of 185 sets. He proposed that the Transfer Price be reduced to \$2,500 to enable compliance. Thus already, MC Founder was prepared to take a of \$300 x 185. Pheona responded that she needed to talk to Jason (Chen), and having learned that by this date the sale-thru figures were but 263 units she sent a proposal to clear the remaining 1,737 units of the first order: Dear Desmond, After the discussion with Jason, we do agree to reduce the SRP to HK\$2,980 in order to drive the sell-thru. Due to the budget constrain and minimize the negative impact on PRC market, the best we can do is give US\$20 per units for this program, which is 2,000

(263) = 1,737 x US\$20 = US\$34,740. Thank you for your understanding. Many thanks Pheona This amounted to a proposed reduction of the Transfer Price to \$2,948.40, well above Desmond's proposal of \$2,500. That seems not to have been an acceptable solution, for Desmond wrote this rather mournful email of 20 January: Dear Pheona, There is still 183 sets e2800+ in CTM Macau, and no movement for a long time. Pls discuss this case. Desmond And in reference to the sales of January, on 26 January: Dear Pheona, FYI. Almost no sales last. Desmond Then on 2 February there was a meeting between Desmond and Pheona recapped by Desmond by email of the same day, which I reproduce in full: From: Cheng, Desmond Sent: 2/2/2005, 12:12 To: PheonaKan (E-mail) Subject: Contingency Plan of e2800+ sales clearance program Dear Pheona, Further to our meeting this morning, I would like to recap the key point and waiting for your reply by Feb 3rd of 2005 (Thur). Main Vision

- Clear e2800+ in MCF & its channel by Mar 31st of 2005
- Sell all the e2800+ as early as possible, as price of mobile phone is going down-trend rapidly

Background

MCF current transfer price is USD398, i.e. HK\$3,104.4 1718 total stock remaining Tactical program launched by Wilson Telecom is FAIL selling price at \$2,980 w/o gift back; & \$3,380 w a bundle pack detail pls see the attached images Sales Action Plan: Action 1: e2800+ will buy back all MCF & its channel stock if the overseas deal completed stock return action will be conducted from Feb & March Contingency plan if the above deal cannot materialized Contingency Plan A:

- MCF return all the e2800+ at lowest USD360, action by Feb 28th Contingency Plan B: Allow MCF to conduct the trading of e2800+ to all region incl. PRC selling price will be HK\$2,000 HK\$2,200 cost to MCF TBC, cost indication is about \$2,000-2,200 Contingency Plan C: new channel selling price at \$2,480, effective from Feb 5th retailer transfer price \$2,200; MCF cost is \$2,200 tentative Qty 300 price protection will be \$271,320 max. Selected channels: Wilson telecom, CTM, Peoples Phone Contingency C1: if Plan C is working, the price will be extended to all channels, incl. Broadway & all channel resellers MCF cost TBC Contingency Plan D new RSP in March at \$1,980 if Plan C is not working transfer price TBC Look forward to hearing from you. Rgds, Desmond The response came the next day: Hi Desmond, After the several discussion with Jason, Jason is very disappointed to the sell-thru and is unable to accept the RSP keeps going down infinity. What we propose is we try our best to compensate the maximum amount of HK\$512K and allows MCF to sell out the e2800+ anywhere as fast as you can. If it is okay with you, I will escalate to Roger for budget approval. I am still follow up with the UK deal, will get back to you before the CNY. Thank you for your understanding. Best Regards Pheona Based on 1,718 units unsold, this translated to a proposed reduction in the Transfer Price of about \$298 per unit, to about \$2,806.40. This was not acceptable. Desmond wrote back by return, proposing a sale back of all remaining stock at an overall loss to MC Founder of \$523,000. He also noted that sales were getting worse. Then there was an important email from Pheona of 4 February: Dear Desmond, After discussion with Jason, he has accepted to reduce the RSP to HK\$2,480 for 300 units trial run before CNY and see if it will improve the sell through. Thanks very much. This was taken to be an acceptance of Desmond's contingency plan C, thus for the 300 sets, reducing the Transfer Price to \$2,200. Then there emerged, for the first time, the proposition that the unsold sets be sold to traders, an effective way of disposing of stock that was not selling through conventional channels, but at fire sale figures. This from Pheona, of 1 March: Hi Desmond, As per our last conversation, I think we both admitted that the best way to deplete all the e2800+ inventories is on trade basis. Therefore, beside the UK business case, I am currently in talk with two overseas traders for e2800+ trade opportunity in Middle East and Eastern European market respectively. FYI, I have asked my SH colleague for help as well, he said that there is a distributor shows interest in buying all of your stocks at HK\$1,400 per unit. As the asking price is too low, I would suggest to wait and see the trade opportunity for overseas market.

Will keep you posted. Best Regards Pheona And Desmond s response of the same date: Dear Pheona, Shall you agree the new transfer price to MCF is HK\$2,200-2,300? As I am talking to a trader & they are asking for around HK\$2,000 to take 500 sets Let s discuss it by phone this afternoon. Rgds, Desmond There followed over the next few weeks a series of emails, as the parties through Pheona and Desmond struggled to resolve the conundrum of disposal of the remaining units on a falling market. Desmond clearly regarded time to be of the essence. One of his emails included this exhortation: However the sales solution is getting worse and stock clearance actions are therefore suggested to minimize our further lost. As later we react we would lose more! And then: As discussed, the price of mobile phones goes down rapidly. To minimize our lost in stock depreciation, earliest stock clearance is a must! Meanwhile, Desmond reported sale of 197 sets of the 300 promoted at the retail asking price of \$2,480. And so into April. Pheona asked for a sales summary to date, and was sent the figure I have already recorded, showing total sales of 434. So 1,566 remained unsold. Then another crucial email, from Pheona, of 11 April 2005: Dear Desmond, After the discussion with Roger, he would suggest MC.FOUNDER to keep selling the e2800+ at the ceiling price of HK\$2,200 in Hong Kong region while stock last. I will go to Shanghai this afternoon, please do feel free to call me for further discussion. Thanks very much. As will be seen, central to a vital issue in this case is the interpretation of the phrase while stock last . At any event, as a proposal, there came from Desmond by email of 13 April this counter offer: Dear Pheona, I would suggest we can try to revise the HK Retail sales price under the following condition: Starting: Apr 13th Retail sales price: \$2,480 Transfer price of MCF: \$2,000 (19.4% off, i.e. less than 22% mandated in agreement)

- as retailers looking for 15-20% margin
- Motorola selling at \$2,480-2,680 currently Review date: May 10th, after Golden week of May MCF tactics: Consignment sales to all channels to get a bigger coverage Pls revert your comment ASAP. Desmond The next event, as it happened, was not recorded. But both parties accept that it was a telephone call between Pheona and Desmond, in which Pheona was responding to Desmond s latest email on the same day, 13 April. She told Desmond that his proposal was rejected, but that the terms of her email of 11 April still stood as a proposal. Desmond accepted the proposal. It was his understanding that what was thus agreed was that for the remaining stock the Transfer Price had been reduced to \$2,200 per unit to enable clearance of that stock at a loss which was bearable. Roger Kung and Pheona were to say otherwise in evidence. By email of 3 May Pheona wrote in part: Sorry for the slow respond. I am still waiting for the price protection plan from Roger. FYI, Roger will come over to HK next week, shall we arrange the meeting for you? There followed on 10 May a request by Pheona for the latest sales report. Desmond sent it by email of 11 May revealing total sales of 1,814, including as described as Special Channel Sell-out of 1,365 units, leaving a balance still in stock of 186. Of the total sold, 1,588 were, as he believed was agreed, at a reviewed Transfer Price of \$2,200 per unit. On that same day Pheona left the employ of E28 HK. By debit note of 20 May MC Founder sought payment of what it claimed to be an agreed discount; namely, 1,588 units x (\$3,104.40 - \$2,200) = \$1,436,187.20. Nothing was

forthcoming. A further account was sent on 21 July 2005 including reimbursement of the P and A expenditure of \$405,822.60, making a total of \$1,842,009.80. There followed email traffic, but still no payment. Then by email of 4 November 2005 came the following from E28 HK: After further review with E28 management team in Shanghai, here is the feedback, based on the signed contract dated 26th August 2004:

1. The original signed contract between MC Founder and E28 has an agreement for 4K (Four Thousands) units Guaranteed Minimum Order Commitment from MC Founder.
2. The written agreement in the contract (Appendix 2) stated that if by noon on 28th May 2005 the Total Stock shall exceed 800 units then the Distributor shall be released from all liabilities to purchase and pay for any undelivered quantity of the Product covered by the Minimum Order quantity, if any . As there was no inventory by 28th May 2005 MC Founder has liability for the remaining 2K GMO commitment. Which amounts to HK\$6,208,800.00
3. Because this minimum commitment was not met MC Founder has breached the original signed contract.
4. The marketing fund (HK\$700,000) from E28 was to cover the minimum order of 4K units marketing fund (5.02 iii). As the GMO commitment was not met by MC Founder, E28 is not liable to provide the marketing funding.
5. For the Price Protection as there are no signed agreement between E28 management team and MC Founder on the Retail List Price, and MC Founder did not fulfil the GMO, E28 is not liable for the Price Protection payment. The Price Protection payment was the discount Desmond believed had been agreed between himself and Pheona back on 13 April 2005, and charged for in the debit note of 20 May. This gave rise to the issue of this writ by MC Founder on 7 February. The original claim was for the sum of \$1,842,009.80. Since then there has been added the non-invoiced sum of \$117,572 for the balance stock since disposed of. The Pleadings By its statement of claim (as amended) MC Founder sues to recover the P and A expenditure of \$405,822.60 and, as adjusted, the agreed compensation of \$1,553,759.20, making a total of \$1,959,581.80, with interest. By its defence E28 HK denies any of this is due. As to the P and A expenditure, it refers to clause 5.02(iii) of the Distribution Agreement which indicates an overall budget of \$700,000 for the whole of the GMO. As MC Founder failed to purchase all of the units in compliance with the GMO it is entitled to no reimbursement at all. It further denies any liability to make a refund on the agreed Transfer Price. Clause 4.04 made provision for a new retail price for unsold stock. But there was no stock take undertaken as provided for by the sub-clause so that there could be no agreement as to the numbers of units subject to price protection. It was further specifically pleaded (at paragraph 8) that any revision of the Retail List Price shall require approval by the management of [E28 HK] in Shanghai , and that [MC Founder] was and ought to be aware of that. Pausing here, it is difficult to see the relevance of this pleading. It indicates that Pheona made unauthorised proposals or concessions. Yet there was nothing further to particularize what these were. And by the time the action got to trial it was accepted that nothing Pheona

did was unauthorized. E28 HK goes on to plead a counterclaim. First, that MC Founder failed to use its best endeavours to promote the product and otherwise fulfill its contractual obligations to market the product under clause 5; secondly, it failed to comply with clause 3.02 and satisfy the GMO, and by refusing to agree on a New Retail List Price prevented compliance with the obligation to purchase the remaining 2000 units. The counterclaim is for specific performance and/or damages. In its Reply, MC Founder disputes that payment to it of the P and A expenditure incurred was conditional upon completion of the GMO. In respect of the refund of the Transfer Price it relies on the commitment to a reduced amount in the shape of the agreement evidenced by the email from Pheona of 4 February and that which flowed from her email of 11 April 2005. As to the counterclaim, it claims to have complied with its obligations under clause 5 in the promotion of the product. It also avers that it was not obliged to comply with the GMO by virtue of the GMO conditions. The Issues From the pleadings the following emerge:

- (1) Was there an agreement to drop the Transfer Price to a sum specific, first as to 300 units, then the remainder of the stock held by or on behalf of MC Founder?
- (2) On a construction of the Distribution Agreement, was E28 HK entitled to refuse to pay the total P and A expenditure?
- (3) Was MC Founder in material breach of the Distribution Agreement, entitling E28 HK to pursue consequential remedies? I come to deal with these next. Price Protection: the Evidence and Analysis Those who gave evidence were Desmond Cheng for MC Founder, and Roger Kung and Pheona Kan for E28 HK. I should also mention that in the lead up to trial MC Founder engaged the services of a company whose primary activity is to protect email servers from spams and viruses. The task given it was to establish whether the emails purportedly sent by Pheona to Desmond on 4 February, 7 April and 11 April were sent from the computer said to have been operated by Pheona whilst she was with E28 HK. This was apparently a necessary precaution because in the run-up E28 HK s instructing solicitors refused to accept the authenticity of these emails, putting MC Founder to strict proof; presumably, this on the basis that it did not admit the emails were genuine or otherwise wanted to distance itself from them. This was quite apparently totally unnecessary, given that it was neither pleaded nor was there any evidence to ground the belief that they were not genuine. That the notice of non-admission was withdrawn before trial did not alter the fact that considerable cost was incurred when it should not have been; this will be reflected in the costs order nisi that I shall come to. The chief protagonists being Desmond and Pheona, it was their evidence that featured predominantly. Mostly it was uncontrovertible, laying out the history that I have already endeavoured to summarize. What was not disputed is that the parties did agree to a price reduction as to 300 units. There does not seem to be any justification in E28 HK withholding payment of compensation in respect of this number of units. Its reason for not doing so was that there was no stock taking to verify the number of unsold units. But this was not a prerequisite. E28 s management could have called for a stock take but did not do so. In fact MC Founder s stock figures were never queried. That

which is disputed focused on Pheona's email of 11 April. Both sides accept that with the rejection of Desmond's counterproposal of two days later, the parties committed to the terms of Pheona's email. It was her contention from the witness box that the expression while stock last referred to the balance of the stock of 300 units, and referred back to the agreement to dispose of that number of units at \$2,480 and a Transfer Price of \$2,200. This formed the basis of what she and Desmond agreed to by telephone. And this was backed up by Roger Kung, he having authorized the terms of the email. I have already given Desmond's understanding; that while stock last was no more than the obvious, referring to all stock that remained unsold of the 2,000 units received. There being no recording of the agreement, I turn for clues to surrounding circumstances. In support of E28 HK's version is the email of 3 May, in which Pheona recorded that she was still awaiting a price protection plan from Roger; this of course to suggest it was still in the pipeline. But in respect of that email there was an exchange in cross-examination between Mr Shum representing MC Founder and Roger Kung. It was put to the witness that the reason he instructed Pheona to write the email was because he wanted to rethink and retract the compensation plan. He admitted that was the reason. That may have been a slip of the tongue or a misunderstanding of the question. But he was not re-examined on the point; thus there remains in the record Roger Kung's admission on a point adverse to his company's interests, and as a matter of fact and law likely to be truthful. Further is that MC Founder's case emerged in its pleaded Reply of 25 January 2006 and then in Desmond's witness statement dated 13 June 2006 (paragraph 26(b)) and was emphasized and analysed in his supplemental statement of 22 March 2007 (paragraph 3(c)). Yet there was no denial or other specific response either in the defence pleaded or the witness statements; no mention at all until Roger Kung's and Pheona's attendance in the witness box. Given that the pleaded defence was to the effect that only Roger Kung could commit E28 HK, and the refusal to admit as genuine Pheona's email when she all along accepted she had sent it, are telling features that E28 HK was attempting to distance itself from this damaging document. But what is perhaps most compelling is a review of the email traffic leading up to 11 April. Pheona and Desmond were engaged in the primary objective of disposing of all the remaining stock in hand. The fate of 300 units had already been decided some time before. And following the email and the subsequent communication in which its terms were accepted, discussion between Desmond and Pheona effectively ended. Mr Wong representing at trial E28 HK made the reasonable point in submission that for his client to accede to such a significant reduction in the Transfer Price would have been voluntarily to give up well over a million dollars when there was no legal obligation to do so. Perhaps that is right. But it begs the question; why did it give up on 300 units, and why did its sales executive devote so much energy and time in trying with Desmond to come to a workable solution? The answer perhaps is that this was not simply a one-off sale and purchase, from which the vendor could walk away with the profit from the sale in its pocket. The Distribution Agreement provided for an ongoing relationship between principal and agent, co-operation being an underlying feature of it, with prospectively future products to be introduced for distribution. Finally on this point was the lack of response from E28 HK to the price protection debit note MC Founder sent on 20 May. One

would have thought that there would have been a violent reaction as the distributor sought to claw back \$904.40 times 1,588 units, instead of up to 300 only if that was to be the way the 11 April email should have been read. By then Pheona had left. But there was a paper trail. And as Roger Kung persistently reminded me, nothing was allowed to be proposed or agreed without it being cleared by him. He surely could not have overlooked events that had taken place so recently as the previous month. I conclude that the parties in making and accepting the proposal intended the words while stock last to have their ordinary meaning; the agreement was to cover the remaining stock held by or on behalf of MC Founder; that realistically the demand at or approaching the hoped for Current Retail List Price was never going to eventuate; rather, it could only get worse. On this issue MC Founder has made out its claim for reimbursement. The Promotion and Advertising Expenditure It is not in dispute that with E28 HK's consent MC Founder expended the sum of \$405,822.60. Was this refundable under the terms of Distribution Agreement? The short and simple answer is yes, applying clause 5.02(ii), by which terms reimbursement had to be promptly made. The defence pleaded that the obligation to refund was dependent and conditional upon the completion of the GMO is to attempt to introduce into the Distribution Agreement words that were simply not there. Quite apart from that, it would make no sense for the distributor to be at risk of non-recovery if for whatever reason at some time in the future the GMO was not fulfilled. In the natural order of things promotion of a new product is concentrated at the time it is first introduced to the market. That the obligation to reimburse was required to be promptly made belies any proposition that the principal was entitled to wait and see about the fulfilling of further orders down the line. In respect of this claim MC Founder has also made out its case. The Counterclaim The first part of the counterclaim are the allegations that MC Founder did not adequately promote the product, or provide adequate information as to sales performance. It is first to be noted that these are general allegations with no particulars. I find nothing to the point. When asked whether the distributor had adequately complied with its obligations both Pheona and Roger Kung gave the bald response. But neither condescended to detail. And both admitted that no complaints had been made about any deficiency during the performance of the contract. That was, as I am satisfied, because there was no deficiency. In his supplemental statement Desmond recorded with some detail steps taken by MC Founder to show the efforts expended in promoting the product and keeping E28 HK fully and regularly informed. This was not materially challenged. All it had to do it had duly done. The second complaint was that it had not placed further orders in compliance with the GMO or agreed on a new price in respect of further orders. The Distribution Agreement provided at Appendix 2 for the price for the remaining 2,000 units to be mutually agreed. There was no obligation for compliance without an agreed price; of course that would be an absurdity. Nor was there any obligation, as was submitted by Mr Wong, for MC Founder to take the initiative. The fact is there was no agreed price. Realistically it would have been impossible for the parties to have reached terms acceptable to both. Evidence adduced by E 28 HK was that it could not contemplate a price below \$2,200 because that was the stated cost of production. And that was far higher than the price per unit MC Founder had had to settle for in disposing of the balance of stock

under the 1st order at significant loss. There was no communication or negotiation between the parties let alone agreement because of the poor performance of e2800+ in the market during the currency of the 1st order. I am satisfied that both parties recognised this and for obvious commercial reasons took the matter no further. There is as I find no breach by MC Founder and no entitlement to a counterclaim.

Conclusion

I find on the claim in favour of MC Founder for the full amounts; namely, \$1,553,759.20 and \$405,822.60. Interest at 10% shall run on the first sum from 20 May 2005, and on the second from 1 February 2005, both to the date of this judgment. Thereafter the rate of interest shall be the judgment rate. The counterclaim is dismissed. Costs These are nisi. In respect of both claim and counterclaim these are to MC Founder taxed if not agreed on a party and party basis, save for the costs of and related to the non-admission filed by E28 HK. Those including but not limited to the costs of preparing a forensic report shall be taxed if not agreed on an indemnity basis. (D M B Gill) Deputy High Court Judge Mr E Shum, instructed b 1udk 1udk J K L M N O P Q R S T U V i\$&`G L. Chan-HCA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=59210

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/mc-founder-technology-ltd-v-e28-hong-kong-ltd-2007>

Prepared on 26 October 2026 · Esheria