FEDERAL COURT OF AUSTRALIA

Sharbutt v Supatech Holdings Pty Ltd (ACN 120 898 679) [2009] FCA 612

DAVID EDWARD SHARBUTT v SUPATECH HOLDINGS PTY LTD (ACN 120 898 679) and BRIAN WOOD
VID 132 of 2009

GORDON J
9 JUNE 2009
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 132 of 2009**

BETWEEN:	**DAVID EDWARD SHARBUTT** **Applicant**
AND:	**SUPATECH HOLDINGS PTY LTD (ACN 120 898 679)** **First Respondent**
	BRIAN WOOD **Second Respondent**

JUDGE: **GORDON J**
DATE OF ORDER: **9 JUNE 2009**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. There be judgment for the Applicant against the First Respondent:

   (a) for US$2,000,000 together with interest at 8% per annum from 2 February 2007; and

   (b) for US$500,000 together with interest at 8% per annum from 21 June 2007.

2. The First Respondent pay the Applicant's costs of the application for summary judgment.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 132 of 2009**

BETWEEN: **DAVID EDWARD SHARBUTT**
Applicant

AND: **SUPATECH HOLDINGS PTY LTD (ACN 120 898 679)**
First Respondent

BRIAN WOOD
Second Respondent

JUDGE: **GORDON J**
DATE: **9 JUNE 2009**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION

1 The Applicant, David Edward Sharbutt ("Mr Sharbutt"), is a resident of Lubbock, Texas in the United States of America ("the USA"). He describes himself as an "investor in various business enterprises". These proceedings concern his investment in Supatech Holdings Pty Ltd ("Supatech Holdings"), the First Respondent.

2 Supatech Holdings is part of a group of companies and businesses ("the Supachill Companies") operated and controlled by the Second Respondent, Brian Wood ("Mr Wood"). Mr Wood resides in Victoria. The Supachill Companies are involved in the manufacture of commercial refrigeration systems and food technology services in Australia, the USA and Europe. The Supachill Companies own patents relating to a high speed freezing technology known as Supachill and also high speed defrost technology used in the food industry.

3 On 27 February 2009, Mr Sharbutt commenced proceedings in the Federal Court of Australia against Supatech Holdings in relation to Mr Sharbutt's investment in Supatech Holdings. Mr Sharbutt's application claims damages for breach of contract together with

claims for breach of trust, breach of fiduciary duty, damages and consequential orders for allegedly misleading and deceptive conduct in contravention of ss 51A and 52 of the *Trade Practices Act 1974* (Cth) ("the TPA"). Mr Sharbutt makes other claims and seeks other relief against Mr Wood, the sole director of Supatech Holdings.

4 Mr Sharbutt applied for summary judgment of part of his overall claim against Supatech Holdings, being the recovery of US$2,500,000. The sum of US$2,500,000 was paid in two tranches by Mr Sharbutt to Supatech Holdings: US$2,000,000 on 2 February 2007 and US$500,000 on 21 June 2007. Mr Sharbutt seeks to recover the amounts paid as debts due and owing by Supatech Holdings to Mr Sharbutt under two Convertible Notes: one dated 22 February 2007 in the sum of US$2,000,000 ("the First Note") and the second dated 15 June 2007 in the sum of US$500,000 ("Note 1A"). Supatech Holdings does not dispute that the amounts were paid by Supatech Holdings to Mr Sharbutt or that the amounts were paid pursuant to the terms and conditions set out in the Convertible Notes.

5 Initially Supatech Holdings' contention was that Mr Sharbutt had 'elected' to convert his investment in Supatech Holdings into shares by conduct said to comprise the execution of a Conversion Agreement dated 21 December 2007 ("Conversion Agreement") and by subsequent conduct including requests in writing. On the hearing of the summary judgment application, Counsel for Supatech Holdings properly conceded that it was not correct to characterise Mr Sharbutt's conduct in terms of 'election or waiver'. Instead, Supatech Holdings' case in answer to the application for summary judgment was that by Mr Sharbutt's conduct, Mr Sharbutt had represented to Supatech Holdings that he would invest up to $5 million in Supatech Holdings, he would convert his investment into shares in Supatech Holdings and then encouraged the application of the funds he invested and the additional funds to be provided by Mr Sharbutt for the expansion of the Supachill Companies. Supatech Holdings contended that in reliance on those representations it had incurred significant expenses and then suffered loss and damage when Mr Sharbutt failed to convert his investment into shares and called for repayment of the amounts invested as debts.

RELEVANT LEGAL PRINCIPLES

6 Mr Sharbutt's application for summary judgment is made under s 31A of the *Federal Court of Australia Act 1976* (Cth) ("the FCA"). In determining such an application,

the principles to be applied are not in dispute: see *Dandaven v Harbeth Holdings Pty Ltd* [2008] FCA 955 at [5]-[6]:

> 5. Section 31A lowers the bar for obtaining summary judgment: *White Industries Australia Ltd v Commissioner of Taxation* [2007] FCA 511; (2007) 160 FCR 298. The second reading speech of the Migration Litigation Reform Bill 2005 which introduced s 31A stated that its purpose was to strengthen "the power of the courts to deal with unmeritorious matters by broadening the grounds on which federal courts can summarily dispose of unsustainable cases": *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* [2006] FCA 1352; (2006) 70 IPR 146 at [45]; *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60 at [124].
>
> 6 Success under s 31A does not require a demonstration that the case is hopeless or bound to fail. The following principles are of general application to an application under s 31A:
>
> (a) the Court must be very cautious not to do a party an injustice by summarily dismissing proceedings;
>
> (b) the Court ought not dismiss a claim based on a predictive assessment of prospects, where it is possible that if the claim went to trial, it may succeed;
>
> (c) in a case where evidence can give colour and content to allegations, and where questions of fact and degree are important, the Court should be more reluctant to dismiss a proceeding on the face of a pleading;
>
> (d) it is not Parliament's intention to require the Court to engage in lengthy and elaborate trials on an interlocutory basis for the purposes of determining whether or not a proceeding has no reasonable prospects of success. It may be necessary for the opposing party to provide no more than an outline of evidence, sufficient to show that there is a genuine dispute, to prevent the summary application becoming a trial;
>
> (e) if there is a real issue of fact or law to be decided, and the rights of the parties depend upon it, it is obviously appropriate that the matter goes to trial. It cannot be said that where there is a real factual dispute *and* that factual dispute must be resolved to determine whether the claim succeeds that there is ‘no reasonable prospect of success’;
>
> (g) it ought not be used to shut out proceedings where, on a proposition of law, there may be room for doubt. On questions of law, an inquiry as to their merit should not be for the purpose of resolving them and also not simply to determine whether the argument is hopeless, but in order to decide if it is sufficiently strong to warrant a trial;

(h) evidence of an ambivalent character will usually be sufficient to amount to reasonable prospects;

(i) in determining if there are real issues of fact in issue so as to preclude summary judgment the courts must draw all reasonable inferences in favour of the non-moving party.

See *Genovese v BGC Construction Pty* Ltd [2007] FCA 923 at [5]; *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* [2006] FCA 1352; (2006) 70 IPR 146 at [42]- [48]; *Hicks v Ruddock* [2007] FCA 299; (2007) 156 FCR 574 at [13]; *Bond v Barry* (2007) 73 IPR 490 at [46]; *Commonwealth Bank of Australia v ACN 000 247 601 Pty Ltd (in Liq) (formerly Stanley Thompson Valuers Pty Ltd)* [2006] FCA 1416 at [30]; *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401 at [21]; *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* [2008] FCAFC 60.

7 With those principles in mind, I now turn to consider the application for summary judgment.

FACTS

8 Discussions between Mr Sharbutt and Mr Wood, the principal of Supatech Holdings, about a possible investment of funds by Mr Sharbutt in Supatech Holdings commenced in December 2006. On 12 January 2007, a letter agreement was prepared and signed by Mr Sharbutt addressed to Mr Wood of Supatech Holdings. The opening paragraphs of the letter stated:

> This will confirm my recent conversations with you regarding the proposed acquisition by me or my assigns …
>
> Based on the information you have furnished to me I am interested in acquiring 2/35th of all the outstanding and issue (sic) stock of [Supatech Holdings] subject to the following terms and conditions.
> …

The terms and conditions were then set out.

9 On 2 February 2007, Mr Wood, Supatech Holdings and Mr Sharbutt executed a document entitled "Terms of Agreement". The recitals recorded that Mr Sharbutt (defined as 'The Investor') wished to invest in Supatech Holdings. Diagrams of the current and proposed structure of Supatech Holdings and its related entities were annexed to the Terms of Agreement. Clause 2.1, under the heading, 'First Note' provided that Mr Sharbutt would be

issued with the First Note in consideration of providing US$2,000,000 to Supatech Holdings. (Clauses 3, 4 and 5 provided for the issue of other Convertible Notes in the sum of US$3,000,000, US$1,000,000 and US$1,000,000. These Notes were never issued and are not relevant to the issues to be resolved.)

10 In the event that the First Note was not converted into shares in Supatech Holdings on or before 30 June 2007, Mr Sharbutt was entitled to register a first ranking debenture charge over Supatech Holdings in a form reasonably agreed by the parties with a maximum liability amount equal to 1.25 times the value of the Note not converted by 30 June 2007: cl 2.4 and 6.1. The First Note was not transferable (cl 2.5) and was issued on the terms set out in Attachment D entitled "Terms of Issue - Convertible Note".

11 So far as is relevant, Attachment D provided that the Notes would expire on 30 June 2008: cl 4.1 and 1.1 (definition of Maturity Date). Significantly, cl 4.1 went on to provide that:

> [O]n [30 June 2008] the outstanding principal and interest must be repaid in full, unless earlier:
>
> (a) repaid in full by [Supatech Holdings] as set out in clause 7; or
>
> (b) converted to ordinary shares as set out in clauses 6.1 or 6.1.

12 All Notes were to carry interest at a fixed interest rate of 8% per annum: cl 5.1. Interest was to be paid quarterly in arrears for the term of the Notes: cl 5.2. However, if the Notes were converted to ordinary shares under clause 6.1, all outstanding interest as at the Conversion Date had to be paid within 30 days of the Conversion Date and no further interest would accrue from the Conversion Date: cl 5.2.

13 Clause 6.1 of the Terms of Issue is important. It provided that:

> Subject to the conditions specified in the Terms of Agreement, at any time following the issue of the Notes until 30 June 2007, [Mr Sharbutt] may, by giving notice in writing to [Supatech Holdings], elect to convert a Note into ordinary shares in the capital of [Supatech Holdings]. The conversion rate will be in accordance with the terms of the relevant Note specified in the Terms of Agreement.

14 Finally, cl 9.1 provided that the Terms of Issue may only be varied by the written agreement of both Supatech Holdings and Mr Sharbutt.

15 The First Note could be converted at Mr Sharbutt's option into shares in Supatech Holdings on or before 30 June 2007: cl 2.2 of the Terms of Agreement. If the First Note was converted, Mr Sharbutt was to be issued with new shares in the capital of Supatech Holdings so that, following the exercise, Mr Sharbutt would hold 2/35th of the issued capital of Supatech Holdings: cl 2.3 of the Terms of Agreement.

16 On 2 February 2007, US$2,000,000 was paid by Mr Sharbutt to Supatech Holdings. Consistent with the express terms of the Terms of Agreement, Supatech Holdings issued a Convertible Note certificate to Mr Sharbutt for the First Note. The First certificate was in the following form:

> (a) [Supatech Holdings] will upon written notice from [Mr Sharbutt] convert this Note into ordinary class shares in the capital of [Supatech Holdings] on or before 30 June 2007 so that following the conversion [Mr Sharbutt] will hold such number of shares that is equal to 2/35th of the issued capital of [Supatech Holdings];
>
> (b) No fraction of a share will be issued on conversion of this Note. Shares issued upon conversion will rank equally in all respects with all other existing shares outstanding at the date the Note is converted (**Conversion Date**) and be entitled to all dividends and other distributions the record date of which falls on a date on and after the date of conversion notice;
>
> (c) If [Mr Sharbutt] does not convert this Note on or before 30 June 2007 pursuant to (a) [Supatech Holdings] will pay to [Mr Sharbutt] on or before 30 June 2008 (**Maturity Date**) upon presentation of this Note and subject to the Terms of Issue the principal sum of US$2,000,000 together with such additional amounts (if any) as may be payable under the Terms of Issue;
>
> (d) [Supatech Holdings] will pay interest on the … principal sum from 2 February 2007 at the rate of 8% per annum paid every quarter in arrears for the term of the Note, provided however, that if the Note is converted to ordinary shares pursuant to (a), all outstanding interest as at the Conversion Date must be paid within 90 days of the Conversion Date and no further interest will accrue from the Conversion Date; and
>
> (e) This Note is issued with the benefit of and subject to the Terms of Issue;
>
> (f) Where a conflict exists between the terms of this Note and the Terms

of Issue, the Terms of Issue prevail to the extent of the inconsistency.

17 On 15 June 2007, consistent with cl 9.1 of Annexure D, Mr Wood, Supatech Holdings and Mr Sharbutt executed a Deed of Variation ("Deed of Variation No. 1"). The parties varied the original Terms of Agreement and the First Note to increase Mr Sharbutt's investment by US$500,000 through the issue of an additional note (Note 1A) and to extend the period during which Mr Sharbutt could convert the Notes into ordinary shares in the capital of Supatech Holdings from 30 June to 30 September 2007: cl 1(b) and 2 of the Deed of Variation No. 1.

18 On 21 June 2007, US$500,000 was paid by Mr Sharbutt to Supatech Holdings. Note 1A entitled "US$500,000.00 CONVERTIBLE NOTE" was issued on 15 June 2007. It was in similar terms to the First Note and provided:

> (a) [Supatech Holdings] will upon written notice from [Mr Sharbutt] convert this Note into ordinary class shares in the capital of [Supatech Holdings] on or before 30 September 2007 so that following the conversion [Mr Sharbutt] will hold such number of shares in total (including the shares from the conversion of the First Note) that is equal to $2.5/35^{th}$ of the issued capital of [Supatech Holdings];
>
> (b) No fraction of a share will be issued on conversion of this Note 1A. Shares issued upon conversion will rank equally in all respects with all other existing shares outstanding at the date the Note 1A is converted (**Conversion Date**) and be entitled to all dividends and other distributions the record date of which falls on a date on or after the date of conversion notice;
>
> (c) If [Mr Sharbutt] does not convert this Note 1A on or before 30 September 2007 pursuant to (a) [Supatech Holdings] will pay to [Mr Sharbutt] on or before 30 June 2008 (**Maturity Date**) upon presentation of this Note 1A and subject to the Terms of Issue the principal sum of US$500,000 together with such additional amounts (if any) as may be payable under the Terms of Issue;
>
> (d) [Supatech Holdings] will pay interest on the … principal sum from … at the rate of 8% per annum paid every quarter in arrears for the term of the Note 1A, provided however, that if the Note 1A is converted to ordinary shares pursuant to (a), all outstanding interest as at the Conversion Date must be paid within 90 days of the Conversion Date and no further interest will accrue from the Conversion Date;
>
> (e) This Note 1A is issued with the benefit of and subject to the Terms of Issue; and

> (f) Where a conflict exists between the terms of this Note 1A and the Terms of Issue, the Terms of Issue prevail to the extent of the inconsistency.

19 On 3 August 2007, Mr Wood prepared a summary of the proposed restructure of the Supachill Companies and provided a copy of the summary to Mr Sharbutt. That summary referred to Mr Sharbutt investing US$10 million in Supatech Holdings. By the end of August 2007, negotiations had come to an end because Mr Wood refused to grant Mr Sharbutt a fixed and floating charge over Supatech Holdings pending execution of a Shareholders' Agreement and the balance of the consolidation documents relating to the restructure. On 30 August 2007, the respondents' solicitors sent an email in the following terms:

> We are instructed that our client is not interested in continuing any discussions in regards to the advance of the additional US$500,000 from … [Mr] Sharbutt.
>
> Our client advised your client that time was of the essence and our client is no longer in a position to continue negotiations. Your email of even date setting out that a separate standalone guarantee would be required by … [Mr] Sharbutt from Supatech Food Services Limited and … [Mr] Wood is an additional reason why our client is simply no longer in a position to continue discussions.
> …

20 Subsequently, Mr Sharbutt withdrew his request for a fixed and floating charge and preparation of the Shareholders' Agreement and the balance of the consolidation documents recommenced.

21 On 26 September 2007, Supatech Holdings and Mr Wood executed "Deed of Variation No. 2". Mr Sharbutt executed the Deed on 16 October 2007. The parties agreed to vary again the Terms of Agreement, the First Note and Note 1A by extending further the period during which Mr Sharbutt could convert the Notes into ordinary shares in the capital of Supatech Holdings from 30 September 2007 to 31 October 2007. On 1 November 2007, the parties executed "Deed of Variation No. 3". The parties agreed to vary again the Terms of Agreement, the First Note and Note 1A by extending further the period during which Mr Sharbutt could convert the Notes into ordinary shares in the capital of Supatech Holdings from 31 October 2007 to 30 November 2007. Consistent with cl 9.1 of the Terms of Issue, each variation was with the written agreement of both Supatech Holdings and Mr Sharbutt. It was common ground that the period during which Mr Sharbutt could convert the Notes into

ordinary shares was *not*, consistent with cl 9.1, extended by written agreement of Supatech Holdings and Mr Sharbutt beyond 30 November 2007.

22 On 20 November 2007, Mr Wood sent an email to Mr Sharbutt which, in part, provided:

> My view is that we need to pull the consolidation process together before Christmas. We have many new opportunities and we are devaluing the companys (sic) potential by not moving forward with them. I would like to see the consolidated group at least part funded by then. I will then feel comfortable with moving forward.

23 As at 1 December 2007, Mr Sharbutt became entitled to register a first ranking debenture charge over Supatech Holdings in a form reasonably agreed by the parties with a maximum liability amount equal to 1.25 times the value of the Notes not converted by 30 June 2007: see [10] above. For reasons which were not explained, that step was not taken by Mr Sharbutt.

24 Between mid November and 21 December 2007, Mr Sharbutt and Mr Wood did further work towards the consolidation of the Supachill Companies. Mr Sharbutt prepared a "Conversion Agreement" and "General Agreement" which he provided to Mr Wood. On 21 December 2007, the parties executed the "Conversion Agreement". That agreement provided:

> 1. The planned consolidation of the various Supachill entities is targeted for completion on Feb.15. 2008. …
>
> 2. The interim financial statements of [Supatech] Holdings and the various Supachill companies will be stated effective Dec.31, 2007. …
>
> 3. The shareholder agreement which will be executed by all [Supatech] Holdings shareholders will be in the form provided by Dibbs Abbott modified as indicated on the attached "Comments on Shareholder Agreement".
>
> 4. *An agreement for the conversion of David's debt to stock* in [Supatech] Holdings will contain representations & warranties similar to those shown in the attached "Supatech Entities Representation % Warranties" & executed on behalf of the various Supachill entities.
>
> 5. At closing, [Mr Sharbutt] will be indemnified by [Supatech] Holdings & [Mr Wood] from any claims associated with any action

which was taken prior to the date of the merger, including the transactions with GE Pension & Southern Refrigeration Group.

6. All employee agreements which commit the employer to a future bonus of stock, equity, or equity instruments in any Supachill entity will be amended to grant options or performance stock in [Supatech] Holdings. A stock option pool which equals 10% or less of the company's outstanding equity will be established from which these forementioned bonus awards will be allocated, as well as future awards. All awards will be expressed in specific share amounts tied to vesting requirements of tenure &/or performance targets. All equity/stock awards will be approved by the Board.

7. The Board will approve the company's compensation plan for all employees. The Board will also establish & approve the specific compensation arrangement for the senior executives (CEO, CFO, COO).

8. The terms of the consolidation are reflected in the attached "General Agreement"

9. [Mr Sharbutt] will immediately loan an additional $250k (US) to Supatech Holdings. The note will be secured by a personal guarantee by Brian Wood.

(Emphasis added.)

25 The "General Agreement" referred to in cl 8, in part, was in the following terms:

The consolidation will be done as an Australia Holding Company. Subsequent to that further study will be done to select the best jurisdiction for Holdings (which may be Australia) based on considerations:

- tax considerations
- statutory rules for corporate governance
- free flow of funds (non-restrictive)
- currency stability

Holdings consolidation will include the following shareholders:
…

Consolidation Documentation will include:

- Appropriate Representations & Warranties
- Indemnification of new shareholders for acts prior to consolidation
- Mutual Release by all shareholders participating in swap

…

Funding

- [Mr Sharbutt] will agree to convert $2.5 (sic) loan to equity at $1 per share at closing
- [Mr Sharbutt] will loan an additional $.25m immediately which will be converted to equity at $1 per share at closing
- Holdings will negotiate debt package to fund capital

> expansions
> - [Mr Sharbutt] et al will contribute additional $2.25m to $7.25m within 90 day at $1 per share
> - At this valuation [Mr Sharbutt] et al would hold 28.5714% (based on $10m total contribution) of the outstanding equity.
>
> …
>
> Ownership (based on New Shareholders purchase @ $1.25 per share)
> At the completion of the fund raising, the ownership will be (approximately):
> …
> [Mr Sharbutt] et al 10m shares 19.61%

26 The Conversion Agreement reflected the position as it then existed – Mr Sharbutt did not retain a right to convert the debt to equity and was not exercising such a right. That right had expired. What existed was a debt. And, as Counsel for Supatech Holdings properly conceded, the Conversion Agreement was, at least in some respects, no more than an agreement to agree.

27 Mr Sharbutt advanced additional sums not the subject of this summary judgment application totalling US$1,250,000: US$250,000 on 21 December 2007 (in accordance with the General Agreement attached to the Conversion Agreement), US$500,000 on 26 February 2008 and US$500,000 on 11 April 2008.

28 The Respondents contended that Mr Sharbutt's involvement in the Supachill Companies was now substantial. By way of example, they pointed to the fact that in February 2008 Mr Sharbutt, accompanied by Supachill Technology Pty Ltd's US attorney, represented that company in negotiations with the landlord of its site in Texas.

29 On 22 February 2008, Mr Sharbutt sent an email to Mr Wood. In part, Mr Sharbutt stated that:

> In order to simplify the transaction & the documents, let me propose the following:
>
> - That we state in the documents that following the completion of the consolidation, that the outstanding shares held by all shareholders other than me & those associated with me will equal 30 million shares.
>
> - I will make an immediate payment of US$500k to be used in the SRG transaction in return for 500K shares. The loan of US$250k which I made last month will be immediately converted to 250k shares in Holdings. The accrued interest on the debt will be paid to me in cash.

> - As soon as possible, a purchase document containing the reps & warranties which we have agreed upon will be executed & I will purchase another 500k shares for US$500k.
>
> - *Upon completion of the consolidation, including the conversion of GE Pension's ownership in Holdings, I will convert the existing debt to Holdings into stock – 2.5million shares for US$2.5m in debt. The accrued interest will be paid in cash on the debt.*
>
> - Following this completion of the consolidation, I, plus possibly others, will make additional stock purchases of up to US$3.25m.
>
> (Emphasis added.)

30 As noted earlier (see [27] above), Mr Sharbutt advanced a further US$500,000 on 26 February 2008. On the same day, Mr Sharbutt sent an email to Mr Wood in the following terms:

> I understand that potential customers are causing pressure for the business. The opportunities appear to be significant.
>
> On the use of cash, the description sounds ok except $250k is actually a debt conversion (or the funds are used to redeem debt). Also, do you have a breakdown on leasehold improvements, purchase of equipment, & working capital? I think the statement should include wording that "funds will be used for assets which are wholly owned or for assets within subsidiaries which are wholly owned by Holdings".
>
> I agree that the timing is critical. I am prepared to fund the additional $1.25m by March 15. We discussed as early as last May that the GE conversion was a central element & needs to be completed.
>
> I will forward this document to my attorneys for their review. My correspondence to you dated Feb.22 outlined a process to facilitate imediate (sic) funding of $500k followed by the next $500k plus debt conversion of $250k upon agreement on the purchase agreement. I assume your current proposal is that we agree on the Purchase Agreement before funding any additional amounts.
> …

31 On 29 February 2008, Mr Sharbutt sent a further email to Mr Wood requesting Supatech Holdings allot him 5,263 shares in the company at A$257.1258 each fully paid. The application was stated to be unconditional. Significantly, Mr Wood described the request in his affidavit evidence in opposition to the summary judgment application in the following terms:

> This equated to the US$1.25 million payments, which had been made by [Mr] Sharbutt since December 2007.

32 The outstanding issues were not resolved. By 29 March 2008, at least one of the critical outstanding issues was an indemnity by Mr Wood and Supatech Holdings in favour of Mr Sharbutt. However, on 29 March, Mr Sharbutt also told Mr Wood that "[he] was anxious to complete [his] investment in Supachill" and that he "[expected] that investment to be $5m (US)", not US$10 million.

33 By 9 June 2008, the terms of the Subscription Agreement and the Shareholders Agreement had been agreed and were ready for execution. What had not been resolved was Mr Sharbutt's requirement for a Deed of Indemnity.

34 On 23 June 2008, Mr Sharbutt's solicitors sent a letter by email to Mr Wood's solicitors. By this date, although the terms of the Shareholders Agreement had been resolved, at least two significant issues remained to be resolved: deletion of a section of the Share Subscription Agreement and the request by Mr Sharbutt for a Debenture Charge and Deed of Acknowledgement under cl 6 of the Terms of Agreement: see [10] above.

35 The terms of the draft Shareholders Agreement and the draft Share Subscription Agreement should be noted. The parties to the draft Share Subscription Agreement are recorded as TexasChill LLC (an entity belonging to Mr Sharbutt) and Supatech Holdings. The shares proposed to be issued to TexasChill LLC were 5,263 shares at a total cost of US$1.25m. The total investment was to be US$2.5m. Clause 2.2 of the draft Share Subscription Agreement provided that, on completion, Supatech Holdings would use the US$1.25m provided as consideration by TexasChill LLC to "repay a US$1.25 million advance from Mr David Sharbutt". On any view, the reference to the "US$1.25 million advance from Mr David Sharbutt" was a reference to the advances listed in [27] above.

36 On 30 June 2008, Mr Sharbutt's solicitors sent an email to the respondents' solicitors in the following terms:

> Please see attached copies of the following:
>
> Convertible Note Certificate – Note Number 1; and
> Convertible Note Certificate – Note Number 1A.
>
> The original Convertible Note Certificates will be sent to you in due course.

Convertible Note Certificate – Note Number 1
As you are aware, this note is an interest bearing, convertible, non-transferable note of US$2,000,000 (**"Note"**) constituted by the Terms of Issue attached to the Terms of Agreement between Supatech Holdings Pty Ltd (**"Company"**) and David Edward Sharbutt (**"Noteholder"**).

Paragraph (c) states that:
*"if the Noteholder does not convert this note on or before 30 June 2007 pursuant to (a) the Company will pay to the Noteholder on or before 30 June 2008 (**Maturity Date**) upon presentation of this Note and subject to the Terms of Issue the principal sum of US$2,000,000 together with such additional amounts (if any) as may be payable under the Terms of Issue."*

Paragraph (d) states that:
"the Company will pay interest on the said principal sum from 2 February 2007 at the rate of 8% per annum paid every quarter in arrears for the term of the Note…"

In contravention of your client's obligations pursuant to this Note, your client has not paid any interest on the principal sum every quarter in arrears for the term of the Note, to my client.

Convertible Note Certificate – Note Number 1A
As you are aware, this note is an interest bearing, convertible, non-transferable note of US$500,000 constituted by the Terms of Issue attached to the Terms of Agreement between the Company and the Noteholder.

Paragraph (c) states that:
*"if the Noteholder does not convert this Note 1A on or before 30 September 2007 pursuant to (a) the Company will pay to Noteholder on or before 30 June 2008 (**Maturity Date**) upon presentation of this Note and subject to the Terms of Issue the principal sum of US$500,000 together with such additional amounts (if any) as may be payable under the Terms of Issue."*

Paragraph (d) states that:
"the Company will pay interest on the said principal sum from at the rate of 8% per annum paid every quarter in arrears for the term of the Note…"

…

In contravention of your client's obligations pursuant to this Note, your client has not paid my client with interest on the principal sum every quarter in arrears for the term of the Note.

Presentation of Notes
As Note Number 1 and Note Number 1A have not been converted into ordinary shares, my client has instructed me to formally present the Notes to the Company. Take this letter as [CHECK] service of those Notes. Therefore, the Company must pay my client US$2,500,000 together with such additional amounts (if any) as may be payable under the Terms of Issue. Further, the Company must pay my client interest at the rate of 8% per annum calculated from 2 February 2007.

> Within 7 days of this letter, your client must pay the full amount of Note Number 1 and Note Number 1A into the Kliger Partners Lawyers Trust Account on behalf of my client.

37 By letter dated 14 July 2008, Mr Sharbutt's solicitors issued a letter of demand for repayment of US$2,791,208.92 pursuant to the terms of the First Note and Note 1A. The Notes were formally presented at the Respondents' solicitors offices on 17 July 2008. No payment was made by or on behalf of Supatech Holdings.

BASIS OF SUMMARY JUDGMENT

38 As noted earlier, Mr Sharbutt's application for summary judgment concerns only part of his overall claim in these proceedings, being the recovery of US$2,500,000 (together with interest) and is pursued only against Supatech Holdings. Mr Sharbutt seeks to recover the amounts paid as debts due and owing by Supatech Holdings to Mr Sharbutt under the First Note and Note 1A. Supatech Holdings does not dispute that the amounts were paid by Supatech Holdings to Mr Sharbutt or that the amounts were paid pursuant to the terms and conditions set out in the Convertible Notes.

39 As the earlier analysis of the facts reveals, the contractual documents clearly provide that the amounts advanced in consideration of the issue of the Notes remain due and payable. Under the First Note, Supatech Holdings is indebted to Mr Sharbutt in the sum of US$2,000,000 together with interest from 2 February 2007 at the rate of 8% per annum. Under Note 1A, Supatech Holdings is indebted to Mr Sharbutt in the sum of US$500,000 together with interest at the rate of 8% per annum. A difficulty with Note 1A is that the date on which interest was to start to accrue had been left blank in the Certificate: see [18] above. Counsel for Supatech Holdings accepted that interest was to accrue and that the date from which interest was to accrue was the date on which the funds were advanced - 21 June 2007: see [18] above.

SUPATECH HOLDINGS' DEFENCE TO SUMMARY JUDGMENT

40 As noted earlier, Supatech Holdings opposes the application for summary judgment: see [5] above. Supatech Holdings identified five (5) facts or matters said to be evidence of a factual dispute between the parties which was appropriate to go to trial. As will become evident, none of these facts or matters taken singularly or collectively identifies any factual

dispute concerning the subject matter of the summary judgment application – the indebtedness of Supatech Holdings to Mr Sharbutt under Note 1 and Note 1A. In particular, none of the facts and matters supports the contention of Supatech Holdings that Mr Sharbutt had represented to Supatech Holdings that he would invest up to $5 million in Supatech Holdings, he would convert his investment into shares in Supatech Holdings and then encouraged the application of the funds he invested, and the additional funds to be provided by Mr Sharbutt, for the expansion of the Supachill Companies.

41 First, Supatech Holdings referred to the fact that the time for conversion of debt to equity under Note 1 and Note 1A totalling US$2.5 million was extended from time to time by three Deeds of Variation until 30 November 2007 and that after the execution of the Conversion Agreement, the Convertible Notes were not further extended. As the factual analysis reveals, after 30 November 2007 Mr Sharbutt did not retain a right to convert and was not exercising such a right. That right had expired. The Conversion Agreement did not alter that fact. The Conversion Agreement did not even refer to Note 1 or Note 1A.

42 Secondly, Supatech Holdings referred to the email Mr Sharbutt sent to Mr Wood on 22 February 2008 (see [29] above) advising that he would make *another* payment of US$500,000 to be used to purchase shares in Supatech Holdings, being an amount paid on 26 February 2008. This concerns an agreement or arrangement separate from and not dependent on the terms of the Notes.

43 Next, Supatech Holdings referred to the letter Mr Sharbutt sent to Supatech Holdings on 29 February 2008 requesting the unconditional allotment of 5,263 shares at a price which totalled approximately $1.25 million: see [31] above. Counsel for Supatech Holdings submitted that this request was in some way related to the debts then existing under the Notes. That contention finds no support having regard to the express terms of the request or any other fact or matter and should be rejected: see [31] above.

44 Fourthly, Supatech Holdings referred to the fact that, on 11 April 2008, Mr Sharbutt advanced a further US$500,000 to Supatech Holdings while the lawyers were finalising the terms of the Shareholders Agreement and the Share Subscription Agreement. Again, this advance was separate from and not dependent on the terms of the Convertible Notes.

45 Finally, Supatech Holdings contends that Mr Sharbutt encouraged Mr Wood to apply the funds he had invested in projects to expand the Supachill Companies, that Mr Sharbutt continued to have an active involvement in the Supachill Companies and the expansion projects and that as a result of that conduct, "Supatech [Holdings] incurred substantial expenses in relation to expansion projects on the encouragement of [Mr] Sharbutt to apply the funds invested in Supatech [Holdings] as soon as possible".

46 In support of the last matter, Supatech Holdings referred to paras 15 and 38 and Ex BW15 of the affidavit of Mr Wood. Paragraph 15 refers to discussions in 2007. Those discussions predate the issue of the Notes.

47 Paragraph 38 and Ex BW15 concern further payments of US$1.25 million and do not in terms directly or indirectly concern the debt under the Notes owed by Supatech Holdings to Mr Sharbutt. Counsel for Mr Sharbutt described the debt under the Notes as having been "quarantined" by Mr Sharbutt. On any view, he treated the amounts owing under the Notes as separate from the subsequent advances. So much was accepted by Mr Wood in his affidavit in opposition to the summary judgment application: see [31] above.

48 Notwithstanding the alleged factual disputes identified by Supatech Holdings, I am satisfied that Supatech Holdings has no reasonable prospect of successfully defending Mr Sharbutt's claim under the Notes. None of the factual disputes identified by Supatech Holdings raise any doubt about Mr Sharbutt's entitlement to claim the amounts under the Notes as a debt which is both due and payable.

49 For the sake of completeness, however, it is also appropriate to consider the various legal propositions raised by Supatech Holdings in opposition to the application for summary judgment. The analysis proceeds on the basis that I assume (for the purposes of determining this application) each of the factual disputes outlined in [41]-[47] to be resolved in favour of Supatech Holdings.

50 First, Supatech Holdings submitted that by reason of a series of documents created after 30 November 2007, Mr Sharbutt *elected* to convert his debt to equity. Clearly, and as was ultimately conceded by counsel for Supatech Holdings, that did not occur. On the proper construction of the terms of the Terms of Agreement, the Terms of Issue, the First Note, Note

1A and the various Deeds of Variation, the right of Mr Sharbutt to convert his debt to equity expired on 30 November 2007. Thereafter there was no choice to make between competing rights. No question of election arises: cf *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641 and *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 251 ALR 322 at [58]. Moreover, none of the facts and matters suggest, let alone support, a contention that Mr Sharbutt had 'waived' his right (whether by unilateral release or abandonment) to claim the amounts due under the Notes as debts.

51 Secondly, Supatech Holdings submitted that through words and conduct Mr Sharbutt was *estopped* from calling on the relevant debts outlined in [39] above. This claim fails at a number of levels. Supatech Holdings was unable to articulate with any precision the representation or representations said to have been made by Mr Sharbutt. However, even if I were to assume that the representation or representations relied on was or were to the effect that Mr Sharbutt would convert his debt to equity or that he would not call for repayment of the amounts advanced under the Notes, none of the conduct identified by Supatech Holdings whether taken singularly or collectively supports a finding that such a representation was made or that such a representation was relied upon by Supatech Holdings. Mr Sharbutt was involved in certain activities connected with the Supachill Companies and, for a relatively long time, he was interested in investing in those businesses. However, as the summary of events records, those arrangements were fluid and ultimately involved entities other than Mr Sharbutt and Supatech Holdings, the parties under the Notes.

CONCLUSION AND ORDERS

52 For those reasons, there will be judgment for the Applicant against the First Respondent:

1. in the sum of US$2,000,000 together with interest at 8% from 2 February 2007;

2. in the sum of US$500,000 together with interest at 8% from 21 June 2007.

53 The First Respondent should pay the Applicant's costs of the application for summary judgment.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gordon.

Associate:

Dated: 9 June 2009

Counsel for the Applicant:	Mr D Hyde
Solicitor for the Applicant:	Kliger Partners
Counsel for the Respondents:	Mr J Tsalinidis
Solicitor for the Respondents:	Thomson Playford Cutlers
Date of Hearing:	1 June 2009
Date of Judgment:	9 June 2009