IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

SUIT NO: D3-22-553-2008

BETWEEN

LGB ENGINEERING SDN BHD ... PLAINTIFF

AND

1. **SAIFUL RAIS BIN SHAIKS SALIM**
2. **MUDA BIN AWANG**
3. **OPERASI MURNI SDN BHD ... DEFENDANTS**

Grounds of Decision

Azizah Nawawi, J:

Appeals

[1] There are two (2) appeals before me; both appeals are against the decision of the learned Deputy Registrar ('the DR') with regards to his findings of the assessment of damages. The learned DR made the following orders:

(i) that the Plaintiff be awarded damages in the sum of RM74,530,000.00 (RM75.53 million) by the Defendants; and

(ii) cost of the assessment of the damages proceedings of RM30,000.00 be paid by the Defendants to the Plaintiff.

[2] Enclosure (188) is an appeal by the 1st and 2nd Defendants, whilst enclosure (189) is an appeal filed by the 3rd Defendant ('the Company').

The Salient Facts

[3] Pursuant to an Option Agreement dated 25-4-2006 ("the Option Agreement") entered between the Plaintiff and the Defendants, it was agreed amongst others that in consideration of the sum of RM4.5 million paid by the Plaintiff to the 1st and 2nd Defendants, 1st and 2nd Defendants have agreed to grant to the Plaintiff the Option to Purchase a specified number of shares in the 3rd Defendant in the manner and within the period stated therein.

[4] Despite the Plaintiff's election to exercise the option to purchase the Shares option on 31.10.2008, the Defendants delayed in completing the Option Agreement. As such, the Plaintiff sued the Defendants for specific performance of the Option Agreement.

[5] Pursuant to the Judgment of the High Court dated 27-1-2012, it was ordered that the Option Agreement be specifically performed and carried into execution, in that, the original share certificates of 5,000 Ordinary shares of RM1.00 each in the capital of the 3rd Defendant ("the Shares") which represent 50% of its issued and paid up capital of the 3rd Defendant held by the 1st and 2nd Defendants be delivered to the Plaintiff. The Court also ordered that the Plaintiff is entitled to damages to be assessed by the senior assistant Registrar and paid by the Defendants to the Plaintiff.

[6] The 3rd Defendant's only asset is the sum of RM4.5 million in respect of the paid-up and issued shares it own in Titisan Modal (M) Sdn. Bhd. ("Titisan Modal") which at the date of the Judgment amounted to 45% of the total paid-up and issued shares of Titisan Modal.

[7] Titisan Modal is a subsidiary of Kumpulan Perangsang Selangor Sdn Bhd ('KPSB').

[8] On 8.7.2011, during an Extraordinary General Meeting ('the EGM') of Titisan Modal, a resolution to increase the paid-up capital of Titisan Modal was approved. 39,050,000 new ordinary shares in Titisan Modal was issued to its parent company, KPSB on 1.8.2011.

[9] In suit No. 22NCC-1253-2011, the 3rd Defendant, Operasi Murni sued Titisan Modal and KPSB over the said allotment. On 3.8.2011, the Court granted an interim injunction to restrain KPSB and Titisan Modal from putting into effect the resolutions passed during the EGM held on 8.7.2011 for the increase in the paid-up capital.

[10] On 24.8.2011, (suit No. 22NCC-1253-2011) the Court recorded an undertaking given by both KPSB and Titisan Modal not to facilitate the sale, not to sell, dispose, transfer the 39,050,000 new ordinary shares of Titisan Modal allotted and issued to KPSB on 1.8.2011 until the hearing of the matter.

[11] On 23.5.2012, the suit No. 22NCC-1253-2011 filed by the 3rd Defendant, Operasi Murni against Titisan Modal and KPSB was dismissed with cost and the undertakings given by both Titisan Modal and KPSB on the 39,050,000 shares are discharged. As such, the 3rd Defendant maintained its 4,500,000 shares in Titisan Modal, whereas KPSB holds 44,550,000 shares in Titisan Modal. With only 4,500,00 shares in Titisan Modal, the 3rd Defendant's share in Titisan Modal have been diluted from 45% to 9.17%.

The Settled Law on Assessment of Damages

[12] It is trite law that the Plaintiff bears the burden of proving its damages. In order for the Plaintiff to be able to claim damages, the Plaintiff must prove the damage and it is not enough to merely write down the particulars and rely on the same. **In Tan Sri Khoo Teck Puat & Anor. v. Plenitude Holdings Sdn. Bhd.** [1995] 1 CLJ 15, the Federal Court held as follows:

> *"Before we embark upon a detailed consideration of the specific issues which arise for decision, there are three preliminary matters which, at the outset, require emphasis.* ***Firstly, that part of the judgment which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the***

purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we reminded of the words of Lord Goddard in Bonham – Carter v. Hyde Park Hotel Ltd 64 TLR 177 at p. 178:

> ***Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'this is what I have lost, I ask you to give me these damages' They have to prove it".***

[13] In **Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1989] 3 MLJ 360**, the Court held at p. 367:

> ***"It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see Marzetti v. Williams 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or***

at all, the court will usually decree nominal damages. *See, for example Dixon v Deveridge (1825) 2 C & P 109; 172 ER 50 and Twyman v. Knowles 138 ER 1183".*

[14] The Plaintiff's claim against the defendants is for the specific performance of the Option Agreement dated 25.4.2006. After the completion of the trial, judgment was entered against the Defendants on 27.1.2012, and the Court ordered the specific performance of the Option Agreement and damages to be assessed by the DR. It is not very clear if the claim for damages is made pursuant to section 18(3) of the Specific Relief Act 1950 ('the SRA 1950'). However, in **Tan Sri Khoo Teck Puat & Anor** (supra), Justice Edgar Joseph Jr FCJ made the following observation:

"It is undisputed, and indeed it was common ground, that in law, in appropriate circumstances, compensation may be awarded against a vendor in addition to specific performance. (see s 18 of the SRA 1950)..."

[15] In **Quah Ban Poh v Dragon Garden Pte Ltd** [1985] 2 MLJ 159, the High Court had granted the Plaintiff's application for specific performance of a sale and purchase agreement of a house. In addition to that, the Court also awarded damages for incomplete work and defects in the said house under section 18(3) of the SRA 1950.

[16] In **Wee Choong Motor v Housing Developer Sdn Bhd** [1990] 2 CLJ 569, the High Court held that the basis of assessment of compensation under section 18(3) of the SRA 1950 is similar to the assessment of damages under section 74 of the Contracts Act 1950.

[17] With regards to section 74 of the Contracts Act 1950, in **Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd** [1994] 3 MLJ 569 SC, it was held by Mohamed Dzaiddin SCJ at page 575/b-e:

> *"In considering the above question, it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of Hadley v Baxendale (1854) 9 Ex 341 (Teoh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 ; Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 , SC). In essence, the section states that the party* ***may recover any loss or damage for any breach which:*** *(a)* ***naturally arose in the usual course of things;*** *or (b) which the* ***parties knew,*** *when they made the contract, to be* ***likely to result from the breach of it.*** *For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of Hadley v Baxendale, which is,* ***the party may recover damages which may 'reasonably be supposed to have been in contemplation of both the***

parties, at the time they made the contract' (emphasis added)

[18] In **Voo Nyuk Fah & Anor v Lam Yat Kheong & Anor** [2012] 5 CLJ 229, the Court held as follows:

> *"It is trite law that the task of accounts and assessment of damages is an exercise of judicial discretion. Such discretion is based is a judicial one, as it is not exercised based on whims and fancies, but be reference, guidance and application of established judicial principles and of course having regard to all the facts and evidence adduced before the officer or the judge who undertakes the assessment."*

The Findings of the Court

[19] Premised on the settled principles above, I am of the considered opinion that in the proceedings before the DR the Plaintiff bears the burden of proving both the fact and the amount of damages suffered as a result of the delay by the Defendants to honour the Option Agreement. If the Plaintiff fails to prove both the fact and the amount of damages, his claim will fail. If he proves the damage but not the amount, he may be entitled to nominal damages only.

[20] In their written submission dated 19.2.2014, the Plaintiff submits in paragraph 6(b) as follows:

"(b) by virtue of the Defendants' failure to honour their obligation pursuant to the Option Agreement, the Plaintiff is entitled to damages to be assessed by the Senior Assistant Registrar and paid by the Defendants to the Plaintiff."

[21] I am therefore of the considered opinion that that the assessment of damages is pertaining to the loss by the Plaintiff, if any, due to the failure of the Defendants to comply with the terms of the Option Agreement, namely the delay in transferring the shares in the 3rd Defendant to the Plaintiff.

[22] It is the submission of the Defendants that the Plaintiff has failed to adduce any evidence to prove that the Plaintiff suffered loss of RM74.53 million as a result of the delay in the transfer of the 5,000 shares in third Defendant to the Plaintiff.

[23] The Plaintiff however contended that they have suffered loss and damages due to the Defendants' delay in completing the Option Agreement. The Plaintiff submits that the Option Agreement is to benefit the 3rd Defendant's 45% share in Titisan Modal (M) Sdn Bhd. The Plaintiff says that by reason of the increase of paid-up capital in Titisan Modal and the non-subscription of allotted shares by the third defendant in Titisan Modal, the Plaintiff did not received what they had bargained for in terms of value in the third Defendant as the third Defendant's shareholding in Titisan Modal has been reduced from 45% to 9.17%. The Plaintiff submits that it is this loss and damage suffered by the Plaintiff that was assessed by the learned Registrar.

[24] I am of the considered opinion that the dilution of the 3rd Defendant's share in Titisan Modal is due to the increase in the share capital of Titisan Modal, which is within the management prerogative of Titisan Modal itself. The 3rd Defendant cannot be held liable for the resolution taken by Titisan Modal to increase its share capital. Indeed the Defendants tried to challenge the same in the Courts but failed to do so. As such, I am of the considered opinion that the ***dilution resulting from the increase in the share capital of Titisan Modal cannot be said to be the natural consequence of the delay or failure to perform the Option Agreement*** or ***that which the parties knew, when they made the contract, to be likely to result from the breach of it.*** (see **Malaysian Rubber Development Corp Bhd** (supra). Indeed in the case of **Zaleha bt. Abd Rahman & ors v Dato' Ramesh a/l Rajaratnam (W-03(IM) 169-12/2012)**, in an appeal against the findings of the Senior Assistant Registrar in an assessment of damages, which was affirmed by the High Court, the Court of Appeal held that the 1st Defendant's claim for damages for loss of reputation arising from a mareva injunction was too remote in terms of causation to be recoverable.

[25] In paragraph (6) (see second paragraph at page 4) of his grounds for award of damages, the learned DR held as follows:

> *"6. If the option agreement would have gone through or had materialised without any delay by the defendants, the plaintiff would have benefitted from the 3rd defendant's substantial asset of 45% shareholding in Titisan Modal*

(M) Sdn Bhd since 2008 based on the plaintiff's ascribed value of shares then. Due to the defendant's failure to perform its obligation, the plaintiff has suffered losses which he could have gotten based on the ascribed value of the shares ..."

[26] I fail to appreciate how the delay in implementing the transfer of the shares resulted in the Plaintiff's suffering losses. Even if the option agreement had materialised without any delay, once Titisan Modal has decided to increase its share capital, the new allotted shares are not freebies. I am of the considered opinion that if the 3rd Defendant is to maintain its 45% shareholding in Titisan Modal, it must inject a sum in proportion to its shareholding.

[27] Therefore, the Plaintiff must show that it is in a position to inject the equivalent sum into the 3rd Defendant Company in order to enable the 3rd Defendant to subscribe the new shares and maintain its 45% shareholding in Titisan Modal. The Plaintiff has failed to show that it has the capital to inject the equivalent sum in order to enable the 3rd Defendant to maintain its 45% shareholding in Titisan Modal. Premised on the Plaintiff's calculations itself, the Plaintiff would have to inject RM731.45 million in order to enable the 3rd Defendant to maintain its 45% shareholding in Titisan Modal.

[28] Further, even if we calculate the value of the reduced 9.17% shares in Titisan Modal, and premised on the Plaintiff's calculation, the shares of the 3rd Defendant in Titisan Modal is

worth about RM187.2 million. That is worth much more than the RM4.5 million paid by the Plaintiff under the Option Agreement. As such, there is no loss suffered by the Plaintiff.

[29] I find that premised on the evidence adduced, the Plaintiff has failed to prove both the fact and the amount of damages on the balance of probabilities. As such, the decision of the learned DR cannot be supported in law and on the evidence before him. I hereby allow both appeals and set aside the order of the learned DR with costs to the Defendants.

(DATIN AZIZAH HAJI NAWAWI)
JUDGE
HIGH COURT
(Commercial Division)
KUALA LUMPUR

Dated: 30th September 2014

For the Plaintiff/Respondent : S. Bhuvaneswary
Messrs Izral Partnership

For the 1st and 2nd Defendants : Alex Chang/Lim Soo Lee/
Shaikh Harun Mustafa
Messrs Shaikh Harun & Co

For the 3rd Defendant : Tina Ann Francis
Messrs Mathews Hun Lachimanan

Salinan Diakui Sah

NOR LAILY BTE HASIM
Setiausaha kepada
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