Global Capital Limited v Dato' Sri Chong Ket Pen [2020] MLJU 1447

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

DARRYL GOON SLEW CHYE, J

GUAMAN SIVIL NO. WA-22NCC-465-10/2018

17 August 2020

*M David Morais (AI-Firdaus Shahrul Naing, **Chelvakumar**, Najwatul Aqilah Amli and Atiqah Adena Mutiara with him) (Firdaus Chelva & Co) for the Plaintif.*
Robert Low (Ahmad Shahrizal, Chong Lip Yi and Karen Yong with him) (Ranjit Oii & Robert Low) for the Defendant.

Darryl Goon Slew Chye J:

JUDGMENT

Introduction

[1] This entire case brought by the Plaintiff, in the ultimate, revolved around a claim premised upon a provision in what was alleged to be a binding written contract between the parties dated 3rd November 2012 ('Agreemenf).

[2] That provision was to be found in clause 3.1(h) of the Agreement and it read as follows:

'3. PARTIES OBLIGATIONS

3.1 Party A shall:

(a) ...

...

(h) provide the following profit guarantees on existing businesses:

	Profit before taxation (audited accounts)
Year 1	RM 20 million

Year 2	RM 25 million
Year 3	RM 30 million
Year 4	RM 35 million
TOTAL	RM 110 million

> With an option of early release of the guarantee when the total of RM 110 million profit before taxation being met in less than 4 years.'

[3] The Agreement pertained to the Plaintiff's investment in a company called Protasco Berhad ('Protasco'). Protasco is a local public listed company with its core business in the field of engineering, especially in road and infrastructure related works.

[4] The Agreement was executed by the Defendant, Dato' Chong Ket Pen, who was referred to therein as 'PARTY A' and by one Larry PY Tey on behalf of the Plaintiff, referred to as 'PARTY 8'.

[5] Larry PY Tey was in fact one Dato' Tey Poy Yee. As this individual was often referred to as 'Larry Tey', purely to avoid any confusion, he shall be referred to as such.

[6] In executing the Agreement Larry Tey was described as 'Co-Founder of Global Capital Limited'.

Background

[7] At the time he signed the Agreement, the Defendant was a shareholder and Group Managing Director of Protasco. He subsequently became the Executive Vice Chairman of Protasco, the following year, on 20th February 2013.

[8] The Plaintiff on the other hand, is a company incorporated in the British Virgin Islands with an address in Jakarta, Indonesia.

[9] For the purposes of this case, there is no particular need to venture too far into its background.

[10] Suffice it to say that, prior to the Agreement, there was a search for an investor to purchase 80,429,515 of the ordinary shares in Protasco ('Protasco Shares'), which amounted to 27.11% of its issued share capital, from two of its then existing shareholders, Dream Cruiser Sdn Bhd ('Dream Cruiser') and FNQ Advanced Materials Sdn Bhd ('FNQ').

[11] Disagreements and board room control were attributed to the Defendant for wanting to have the Protasco Shares purchased from the two existing shareholders. However, his reasons for entering into the Agreement were of no particular relevance to what was essentially a claim in contract.

[12] Following the execution of the Agreement, which was on 3rd November 2012, a share sale agreement was entered into by a company known as Kingdom Seekers Ventures Sdn Bhd ('Kingdom Seekers') with Dream Cruiser and FNQ dated 26th November 2012 ('SSA') in respect of the Protasco Shares.

[13] Under this SSA, the purchaser of the Protasco Shares was Kingdom Seekers and the vendors were Dream Cruiser and FNQ.

[14] Although various breaches of the Agreement and other wrongs were pleaded and alleged of the Defendant in the Amended Statement of Claim, save for the claim based on clause 3.1(h) of the Agreement, these allegations were abandoned by the Plaintiff during the course of the trial. In fact, learned counsel for the Plaintiff confirmed that this was so when asked during oral submissions.

The Agreement

[15] The broad objective of the parties was disclosed in the recitals to the Agreement.

[16] In essence, the recitals disclosed that the Plaintiff, through its 'affiliates/nominees', had been granted rights to develop and produce oil and gas in Kuala Simpang Timur, Aceh, Indonesia.

[17] The recitals also disclosed that the parties had intended to develop the oil and gas project in Indonesia via Protasco and that Protasco would, in turn, enter into a master agreement with the Plaintiff towards that end.

[18] It was expressed to be in furtherance of that intention that the Defendant had entered into the Agreement in consideration for the Plaintiff's offer to purchase the Protasco Shares from Dream Cruiser and FNQ.

[19] For the purposes of the Plaintiff's claim in this case, suffice it to say that on 28th December 2012, Protasco did enter into an agreement with PTANGLO SLAVIC UTAMA ('PSU'), a company incorporated in Indonesia, to purchase the shares in a company which, through layers of corporate entities, had been granted rights to develop and produce oil and gas in Kuala Simpang Timur field located in Aceh Tamiang Regency, Nanggroe Aceh Darussalam Province, Indonesia. There was also another agreement entered into between Protasco and PSU dated 29th January 2014.

[20] The existence of the Agreement was not disputed. However, it was the Defendant's contention that the Agreement was only an agreement in principle and not intended to be legally binding.

[21] In support of this contention, the Defendant pointed to recital E of the Agreement which stated as follows:

> 'E) The parties have agreed for the execution of this Agreement to set out the general principles and guidelines to facilitate the working arrangements of their mutual obligations.'
>
> (Emphasis added)

[22] Recital E, it was maintained, made it clear that the Agreement was merely a set of general principles and guidelines to facilitate the parties' objective set out in the recitals. The Agreement was therefore, according to the Defendant, not meant to be legally binding.

[23] It was pointed out by the Defendant that set out in the Agreement were also proposals and/or exercises that were still the subject of approvals from various third parties.

[24] In addition, it was also the Defendant's contention, and to which he testified as such, that a number of terms in the Agreement were never carried out or implemented. He testified that there were also provisions in the Agreement that he could not implement on his own. These provisions set out what was to be undertaken or carried out by Protasco. Not having control of the Board of Directors of Protasco, it was contended that these obligations in the Agreement were incapable of performance.

[25] Since the Agreement was entered into with the Defendant in his personal capacity, whether he could secure performance of the various obligations therein which were subject to the approval of Protasco as a company and those of relevant regulatory authorities, remained issues at large and uncertain.

[26] The Defendant therefore maintained that the Agreement was not capable of performance and therefore unenforceable. This, it was contended, supported the Defendant's case that the Agreement was never intended to be legally binding on the parties but was merely an agreement in principle.

[27] The Defendant's contentions were predicated upon what was contained in the Agreement rather than upon consideration of any external factors.

[28] The Plaintiff of course maintained otherwise. According to the testimony of Larry Tey, the Plaintiff had entered into the Agreement because of the consideration and obligations therein and in particular, the profit guarantee in clause 3.1(h).

[29] Larry Tey was central in the negotiations for the Agreement. He was introduced to the Defendant by one Andy Yong, an investment banker in Singapore. In his witness statement Larry Tey described himself as a former director of Kingdom Seekers and a representative of the Plaintiff.

[30] In his Defence, the Defendant pleaded in paragraph 3.1 as follows:

> '3.1 The Plaintiff was and/or is a corporate vehicle and/or nominee company of Tey Par Yee (who is also commonly known as Larry Tey). Further and/or in the alternative, Tey Par Yee had and/or has ultimate control of the Plaintiff. Further and/or in the alternative, the named shareholders of the Plaintiff at the material time were nominees of Tey Par Yee and/or were accustomed to acting under his instructions and/or directions.
>
> 3.2 The Defendant avers that the acquisition of 27.11% shares of Protasco was carried out through one Kingdom Seekers Ventures Sdn Bhd ("Kingdom Seekers"). Kingdom Seekers was and/or is a corporate vehicle and/or nominee company of Tey Par Yee at the material time. Further and/or in the alternative, the named shareholders of Kingdom Seekers were and/or are nominees of Tey Por Yee and/or were accustomed to acting under his instructions and/or directions. For completeness, Kingdom Seekers is currently in liquidation.'

[31] Thus, as far as the Defendant was concerned Larry Tey was, in short, both the Plaintiff and Kingdom Seekers and vice versa.

[32] However, of the Agreement itself, there existed all the accoutrements of a formal contract in writing, entered into between the parties, both in form and in substance.

[33] Apart from recital E, there was nothing in the body of the Agreement to suggest that it was merely an agreement in principle and not intended to be legally binding. There was also neither anything expressed in the Agreement to the effect that the Agreement or its contents were subject to contract nor any words to that effect.

[34] To the contrary, in my view, the words used in the body of the Agreement pointed to the parties having come to an agreement. They were words which demonstrated an intention to create legal relations.

[35] Clause 1.1 of the Agreement stated that, 'Based on the understanding and commitment of the parties hereinafter contained, *the parties herein mutually agreed as follows:'* (emphasis added).

[36] Clause 3.1 in respect of the parties' obligations which were listed out, the words used were 'Party A shall :' The word used was not precatory in nature such as to suggest that the entire Agreement was not meant to be binding.

[37] Furthermore, there was clause 9 to the Agreement which was headed 'AGREEMENT BINDING' and thereunder it was provided that the reference to the parties, where the context admits, includes reference to their respective heirs, personal representative, successor in title and assigns.

[38] Consideration and all the ingredients of a valid contract were also clearly present.

[39] As for recital E, while reference was made to general principles and guidelines to facilitate the parties' objective, they were nevertheless general principles and guidelines expressed to have been agreed to by the parties. In addition, recital E itself also states that what are set out included the parties' 'mutual obligations'.

[40] There is no reason why 'general principles and guidelines' if agreed to by the parties, may not be the subject matter of a legally binding contract; leaving aside the question whether any specific principle or guideline agreed to may in fact, or law, be enforceable.

[41] What may have remained merely general principles and guidelines within the body of the Agreement and not intended to be an obligation required to be performed by any party is an issue that would have to be resolved as a matter of interpretation. However, there is no reason why even if there exists such a provision or provisions within the Agreement, if any, such would *per se* extinguish the otherwise legally binding effect of the Agreement itself.

[42] In addition, to assert that because some of the obligations in the Agreement were not complied with by the parties or that some were beyond the powers of the Defendant to secure compliance does not mean that no valid or legally binding contract could or had come into existence.

[43] It would be too simplistic and facile, convenient even, for any contracting party to assert that because he was in no position to secure what he had agreed to, his agreement was therefore necessarily only an agreement in principle and not legally binding.

[44] Contextually, it should not be overlooked that the Defendant is a well-educated corporate figure. He holds a B Eng (Hons) degree from the University of Malaya and a Master of Philosophy (Civil Engineering) from the University of Birmingham. He is a registered professional engineer with the Board of Engineers Malaysia and a member of Civil Engineers, United Kingdom and a Chartered Engineer with the United Kingdom's Engineering Council. He has been the Executive Vice Chairman and Group Managing Director of Protasco and, at the time of the trial when he testified, was its Executive Chairman.

[45] Suffice to say that an individual of such calibre would have no reason to miscomprehend the terms and obligations in an agreement he had negotiated and to which he had put his signature.

[46] It was also submitted by learned counsel for the Defendant that the circumstances were such that the Agreement was abandoned. Abandonment was however, never pleaded. It was not a case met by the Plaintiff at the trial. The Defendant, being bound by his pleadings, was therefore not at liberty to raise abandonment as a defence.

[47] Notwithstanding the fact that abandonment was never pleaded, the fact that specific terms in an agreement may have been breached does not necessary mean that the parties had abandoned the entire agreement. It is not an infrequent phenomenon for parties to waive specific breaches of a contract, without abandoning it in its entirety.

[48] In light of the foregoing, I am of the view that the Agreement was a binding contract between the parties and was not merely a guide or set of principles not intended to be legally binding.

Clause 3.1(h)

[49] Having held the Agreement to be a binding contract, it therefore now falls to be considered clause 3.1(h), its nature, whether it was breached and if so, whether the Plaintiff was entitled to its claim of RM5,002,000.00 thereunder, or to any general damages at large.

[50] It needs to be mentioned that the quantified claim of the Plaintiff was amended from RM10,950,000.00 to RM5,002,000.00 pursuant to a re-amendment of the Plaintiffs Amended Statement of Claim, leave for which was granted after the trial but immediately before the decision in this case was delivered.

[51] It was not disputed that Protasco's *recorded* financial performance was as follows:

	Financial Year Ending	Profit Guaranteed (RM)	Profit Before Tax (RM)	Shortfall per the Profit Guarantee (RM)
Year 1	2013	20,000,000	24,794,000	-
Year 2	2014	25,000,000	35,716,000	-
Year 3	2015	30,000,000	27,846,000	2,154,000
Year 4	2016	35,000,000	35,152,000	2,848,000
	Total	110,000,000	120,508,000	5,002,000

[52] Therefore, the Plaintiff's claim under the profit guarantee in clause 3.1(h) was in respect of the years 2015 and 2016.

[53] The Defendant maintained that properly construed, clause 3.1(h) merely provides that the Defendant *'shall provide* the following profit guarantees ...' (emphasis added). This, the Defendant contended was prospective, meaning to say the Defendant had to take a further step to actually provide such a guarantee. It also follows that clause 3.1(h) was *not of itself* the guarantee.

[54] Upon this construction of the Defendant, the guarantee that the Defendant had to provide was intended for the ultimate purchaser of the Protasco Shares, whoever it might have been. As it turned out of course, the purchaser was Kingdom Seekers. No such guarantee was however provided by the Defendant to Kingdom Seekers.

[55] It was also maintained that, notwithstanding the other contentions, clause 3.1(h) was itself vague and uncertain and was therefore unenforceable. This was because no amount payable was stipulated and there was also no formula or mechanism provided for computing any amount payable thereunder, if at all, particularly so bearing in mind that the Protasco Shares do not represent 100% of the issued share capital of Protasco. In addition, no mechanism was also provided for the exercise of the option for early release or the enforcement of the guarantee e.g. whether it was upon demand or not.

[56] The Defendant maintained, in the alternative, that even if clause 3.1(h) was enforceable, there was no breach. Clause 3.1(h), in providing a profit guarantee, should be interpreted as referring to (i) the profit before taxation of Protasco *as a group* and not Protasco alone and (ii) the profit guaranteed, although set out on an annual basis, should be read cumulatively, as guaranteeing a total amount of RM110 million over a total period of 4 years.

[57] That the profit before taxation was meant to be that of Protasco as a group including its subsidiaries, was premised on the statement in clause 3.1(h) that the profit guarantee was based on Protasco's 'existing businesses'. Since Protasco's existing and core businesses were all through its subsidiaries and Protasco itself was essentially an investment company, it must be that the profit before tax under clause 3.1(h) meant Protasco's pre-tax profits as a group.

[58] That the profit guarantee was to be read as a being a guarantee of a cumulative amount totaling RM110 million and not an annual amount was in part said to be due to the existence of the option for early release of the guarantee. That is to say, the Defendant is to be released from the guarantee should the total amount of RM110 million pre-tax profit be achieved by Protasco in less than 4 years. It was also contended that because no mechanism was provided for triggering the option, it would be triggered automatically upon RM110 million pre-tax profit being achieved as provided.

[59] Based on the foregoing, it was contended that Protasco did achieve the targeted total accumulated pre-tax profit of RM110 million, within the 4 year period. If the total pre-tax profits for each of the 4 years in question were added up, the total pre-tax profit achieved by Protasco would be RM120,508,000.00 i.e. more than RM110 million. In fact, it was contended that Protasco had achieved well beyond RM110 million pre-tax profit, if an impairment loss of RM84,643,170.00 in 2014 is taken into account.

[60] This 'impairment loss' amounting to RM84,643, 170.00 million was incurred by Protasco in 2014 in relation to the oil and gas project in Indonesia. The project, which was ultimately terminated, resulted in the need to write off or reduce the value of the project. What then happened was the RM84,643,170.00 was written in its books as an 'expense', which thereby had the effect of reducing the pre-tax profits of Protasco.

[61] Learned counsel for the Defendant argued that because the impairment loss that was taken as an expense in 2014 related to the oil and gas project in Indonesia, it had actually stemmed from Protasco's new business and not from its 'existing businesses'. The argument then developed into a contention that because the profit guarantee was on 'existing businesses', losses or expenses incurred for new businesses should, logically, not be taken into account in computing the guaranteed profit of Protasco. Accordingly, the RM84,643, 170.00 should be added back, with the result that the there would be an even larger total pre-tax profit achieved by Protaso over the 4 year period. There was therefore no breach of the profit guarantee in clause 3.1(h).

[62] The Defendant's argument also included a contention that if the RM84,643, 170.00 were to be added back, which would be for 2014, the total amount of RM110 million guaranteed would have been achieved in less than 4 years. Because the option of early release from the guarantee did not stipulate a triggering mechanism, it was

automatically triggered when the total pre-tax profit of RM110 million was achieved, resulting in the Defendant being released from the profit guarantee in clause 3.1(h).

[63] In my view, based on the Defendant's construction of clause 3.1(h), it would not matter whether the RM84,643, 170.00 is taken into account or not as the total recorded pre-tax profit of Protasco, even without the RM84,643, 170.00, would have exceeded RM110 million over the 4 year period.

[64] At this juncture, it merits being reminded of the principles that are to be applied when construing the terms of a written contract. The applicable principles have been reiterated in many reported cases. In the recent decision of the Court of Appeal in *Tan Tay Vui v MC Global Sdn Bhd* *[2020] MLJU 712*, Mary Lim JCA (as her Ladyship then was) in delivering the judgment of the Court stated:

> '**[36]** The Federal Court has expressed clear guidelines in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 CLJ 177;; *[2016] 1 MLJ 464* on how contracts ought to be interpreted:
>
> > [34] Where the natural meaning of the contract is not clear and in the particular absence of words to the effect mentioned above, the principles in ICS in their qualified form (see [28] which qualifies its application vis-a-vis rectification), remain applicable and relevant to the construction of the construct such as to enable the court to objectively determine "the meaning which the contract would convey to a reasonable person having all the background knowledge ... available to the parties.
> >
> > [35] The principles of Lord Hoffman were summarised in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 269;; *[2010]1 MLJ 597* at p. 296 CLJ; [42]620G (MLJ). Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:
> >
> > > "Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract."
> >
> > [37] Inferences may also be drawn from the conduct of the parties in order to assist in that construction and interpretation. This was explained in the Supreme Court decision of *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133:
> >
> > > 'A clear and helpful an enunciation of the principles as any which should guide the Court in determining the ever recurring question of whether there has been a contract between the parties is provided by Saville J in *Vital B.V. v Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574 at 576 in the following words:
> > >
> > > > The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.'

[65] Applying the principles of construction enunciated, there is neither any valid reason nor justification to interpret the contemplated profits of Protasco in clause 3.1(h) to be that of Protasco, as a group to include its subsidiaries.

[66] As a company, even though its businesses may be said to be undertaken by or through its subsidiaries, it nevertheless can and does receive its profits by way of dividends from its subsidiaries carrying out their various businesses. There is no basis or reason for reading into clause 3.1(h) that the pre-tax profits referred to therein was meant to be that of the Protasco group, rather than of Protasco itself.

[67] There is also no justification for reading into the table provided in clause 3.1(h) that what was guaranteed was of a total pre-tax profit of RM110 million over a period of 4 years rather than what was clearly depicted as annual amounts of pre-tax profits to be achieved by Protasco for each of the years set out in the table.

[68] The existence of the option for early release from the profit guarantee, does not assist in leading to a conclusion that a cumulative profit of RM110 million was the overriding obligation such that it would suffice if RM110 million was achieved, without having to achieve the annual stipulated pre-tax profits in the table to clause 3.1(h).

[69] The option merely allows for early termination of the profit guarantee if RM110 million pre-tax profit was achieved in *less than* 4 years. It does not necessarily follow that therefore the yearly stated pre- tax profit need not be achieved if RM110 million was achieved in less than 4 years or for that matter achieved in 4 years.

[70] More significantly, if it was intended that all that was required was for RM110 million pre-tax profit to be achieved in 4 years, there would not have been any need for a specified amount of pre-tax profit to be set out for each of the 4 years. These specific amounts were also not the same amounts.

[71] In my view, what was intended was clearly that a minimum pre-tax profit was to be achieved by Protasco annually and the minimum annual pre-tax profits were as set out in the table to clause 3.1(h). This guarantee was in turn, made subject to the option for early release from the guarantee.

[72] The contention that the option would be triggered automatically is, in itself, a contradiction in terms. An option by its nature is a right given to a party to elect to exercise should it choose to do so. An 'option' that is granted to a party that is triggered automatically is not an option properly so called. Such an 'option' would not have provided the beneficiary with any choice. If such be intended, there was no need for an option. The parties could have agreed that the guarantee would terminate upon RM110 million pre-tax profit being achieved by Protasco. However, what the parties provided for was an option. Why a guarantor would not want to terminate a guarantee if he could is quite unfathomable but thankfully that is not an issue before the Court.

[73] As was stated by Mohd Ghazali JCA in delivering the judgment of the Court of Appeal in *Soo Lip Hong v Tee Kim Huan* *[2006] 2 MLJ 49* at p 55:

> '**[18] What is an option?** According to *Osborn's Concise Law Dictionary* (8th Ed) an 'option' is 'a right of choice; a right conferred by agreement to buy or not at will any property within a certain time'.

[74] There was also no reason why the amount Protasco had incurred in respect of the oil and gas project in Indonesia ought to be added back to the year it was incurred so as to increase its pre-tax profits to what it was not.

[75] That the parties had agreed that its pre-tax profits should be based on 'existing businesses' does not mean that whatever expenses incurred in a particular year in respect of prospective future businesses should be added back as profits for that year, for the purposes of clause 3.1(h). This, in my view, was not what the parties had agreed to.

[76] All the more so, as was the case at hand, when the expense incurred was intended to be in respect of a future business that failed and did not materialise. There would clearly be no future profits from that intended future business; yet the expense would nevertheless have been incurred. To add back that expense so that the year in which it was incurred would show a higher profit would be quite illogical and absurd even.

[77] Sans the somewhat ingenuous arguments by the Defendant, it was clear that Protasco failed to meet the pre-tax profits set out in the table to clause 3.1(h) in respect of Year 3 and Year 4 i.e. 2015 and 2016.

[78] Clause 3.1(h) was, however, expressed in a manner to the effect that a guarantee was *to be provided* by the Defendant. The same formula appears in clause 3.2 (i) which provided as follows:

> '3.2 Party B shall:
>
> (a) ...
>
> ...
>
> (i) provide the following profit guarantees on the new businesses: ...'
>
> (Emphasis added)

[79] In pleading its claim in respect of clause 3.1(h), what was pleaded in the Amended Statement of Claim was as follows:

> '27. The renegation of these obligations under the Investment Guarantee Agreement by the Defendant either directly or indirectly are as particularised below:
>
> PARTICULARS OF BREACH
>
> a) ...
>
> ...
>
> The Defendant failed to ensure that Protasco is profitable in particular. making profit (before taxation) of RM30 million for Year 3 and a profit (before taxation) of RM35 million for Year 4, as required in Clause 3.1(h) of the Investment Guarantee Agreement.
>
> ...
>
> 33. As a consequence of the breaches by the Defendant as pleaded at paragraphs 27 ... (d) above ... the Plaintiff has suffered irreparable loss and damage to their investment, reputation, credibility and business.'
>
> (Emphasis added)

[80] As formulated, the pleaded claim was of a breach by the Defendant *to ensure* that Protasco returned a profit before tax in the amounts set out in the table provided under clause 3.1(h).

[81] Was it such that a 'guarantee' was *to be provided* by the Defendant following the Agreement or did the Defendant provide a 'guarantee' or perhaps, more accurately, a 'warranty' in clause 3.1(h)?

[82] Consistent with the syntax and words used, that there was meant to be a separate guarantee would also seem consistent with the provision in clause 2.4 of the Agreement which, although under the rubric in clause 2 of 'PUT OPTIONS FOR PARTY B TO SELL SHARES TO PARTY A', stated as follows:

> '2.4 Party B shall be entitled to assign or nominate any of its associate(s) or related company(s) to acquire the EXISTING PROTASCO SHARES and NEW PROTASCO SHARES and shall be entitled to mortgage, pledge or create any encumbrances over the EXISTING PROTASCO SHARES and NEW PROTASCO SHARES or any part thereof upon the purchase consideration being fully paid by Party Band/or its associate(s) or related company(s) that are not held on trusts as stated in Clause 1.'
>
> (Emphasis added)

[83] It would make commercial sense that the guarantee was something the Defendant was to provide following the Agreement. This is because the ultimate purchaser of the Protasco Shares may not actually be the Plaintiff but could be its associate or related company.

[84] Since the purchaser of the Protasco Shares need not be the Plaintiff, it would make business sense that the Defendant be obliged to provide such a guarantee to whoever may ultimately be the purchaser of the Protasco Shares.

[85] A profit guarantee would only make sense to a shareholder or the purchaser of the Protasco Shares. Giving a person a profit guarantee in respect of a company in which that person has no shares or interest in would make no commercial sense.

[86] Upon its proper construction and having regard to the Agreement as a whole, it would therefore seem appropriate and consistent with commercial sense that the guarantee in clause 3.1(h) was, as *expressed,* intended to be a further step to be taken. That is to say, pursuant to the Agreement, the Defendant was required to provide a profit guarantee.

[87] Although clause 3.1(h) does not stipulate to whom the profit guarantee was to be provided, it would make commercial sense that the profit guarantee would be provided to the ultimate purchaser of the Protasco Shares as contemplated by the Agreement. Such a purchaser could of course be the Plaintiff, its associate or related company.

[88] Such a guarantee would also be a guarantee properly so called, as it would be tripartite and collateral to the purchaser's purchase of the Protasco Shares from Dream Cruiser and FNQ. Otherwise, if provided by the Defendant to the Plaintiff in the Agreement itself, it would in law be a warranty rather than a guarantee. Construing clause 3.1(h) as providing a warranty would also clash with, and be contrary to, the word 'guarantee' that was used in clause 3.1(h).

[89] It would also be consistent with the other obligations under clause 3 of the Agreement that the giving of the profit guarantee was a step *to be taken* or an act *to be carried out* by the Defendant. This was because the other obligations under clause 3.1 were also of things or matters *to be done or carried out* by the Defendant.

[90] Accordingly, I hold that upon its proper construction, clause 3.1(h) was not itself a profit guarantee given by the Defendant to the Plaintiff.

[91] However, because no separate guarantee was provided by the Defendant to Kingdom Seekers, the purchaser of the Protasco Shares, there would have been a breach of clause 3.1(h) by the Defendant. Such however, was not the Plaintiff's pleaded case.

Damages

[92] It is appropriate that notwithstanding what I have held, that I should nevertheless consider the Plaintiff's claim for damages in the event that I be held to have erred in my foregoing conclusions.

[93] The Plaintiff's case was that since the guaranteed pre-tax profits were not achieved by Protasco in years 3 and 4, it was entitled to the short fall which totalled RM5,002,000.00.

[94] The Defendant's response was that the Plaintiff's claim in damages was not proven, quite apart and without derogating from its contentions as to the validity or nature of the obligation under clause 3.1(h).

[95] It was contended that it was not the Plaintiff who ultimately purchased the Protasco Shares. In this regard, it was not disputed and irrefragable that the Protasco Shares were purchased by Kingdom Seekers and not the Plaintiff.

[96] In addition, it was maintained by the Defendant that the Protasco Shares were subsequently sold by Kingdom Seekers and Larry Tey before the expiry of the profit guarantee period. In the process, they even made a profit in selling the Protasco Shares.

[97] According to the Plaintiff, while clause 3.1(h) stops short of spelling out what was recoverable it must be implied that the difference between the pre-tax profits guaranteed and the actual pre-tax profit achieved must be recoverable or else the guarantee would be rendered devoid of any commercial sense.

[98] While no implied term was pleaded as such, the Plaintiff's contention was not that there existed an implied term but that it was in essence based on an interpretation of clause 3.1(h) itself.

[99] The Plaintiff contended that upon its proper construction, clause 3.1(h) must be interpreted as meaning that what was payable thereunder for its breach must be the difference between the pre-tax profits guaranteed and the actual pre-tax profits achieved that was below the guaranteed amount. This necessarily stems from the very nature of a profit guarantee.

[100] Learned counsel for the Plaintiff in his submissions contended and conceded that the Plaintiff's construction in effect places clause 3.1(h) within the parameters of *section 75* of the *Contracts Act 1950*.

[101] *Section 75* of the *Contracts Act 1950* provides as follows:

> **'Compensation for breach of contract where penalty stipulated for**
>
> 75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

[102] Firstly, clause 3.1(h) does not specify any amount to be paid or provide any mechanism to determine the amount payable, should Protasco not achieve the annual pre-tax profits stipulated.

[103] To construe the clause as urged by the Plaintiff would require not merely the adding of a word or two but rather a complete sentence or sentences where none exist. In this regard, it is quite settled that it is no part of a Court's role to rewrite the contract or any term in a contract entered into between the parties (see *Trollope & Colis Ltd v. North West Metropolitan Regional Hospital Board* *[1973] 1 WLR 601*; *Berjaya Times Square (supra)* where at p. 297 CLJ; [43] 621E; *Attorney General of Belize v. Belize Telecom* [2009] UKPC 10).

[104] Secondly, there is no good reason to read into clause 3.1(h) as implying that damages equal to the difference between the amount guaranteed and the lesser amount achieved be paid, should the clause be breached.

[105] Any such implication would be strained and incompatible with the factual matrix appertaining. It is also not necessary in order to given business sense or efficacy to the intended profit guarantee.

[106] Such an implication would also mean that so long as the set targets are not achieved, the Defendant would have to pay the difference in Protasco's pre-tax profit for any given year to a party, whether or not that party has any interest in the share capital of Protasco or the extent of any such interest, regardless of what Protasco's actual profit might be after tax, if any.

[107] In its submissions, the Plaintiff relied on an unreported decision of the Kuala Lumpur High Court in *Denko Industrial Corporation Berhad v Gigantic Innovations Sdn Bhd & Anor* by Mary Lim JC (as her Ladyship then was). The facts of that case however, are quite distinguishable from the facts of the case at hand.

[108] In *Denko,* the vendor of shares in a company had given a warranty to the purchaser that the company would achieve a profit 'before tax and extraordinary items' of not less than RM3 million. The warranty itself stated that:

> '(c) In the event there is a shortfall in the Guaranteed Profits for each of the Guaranteed Financial Years, the Vendor undertakes and agrees to make good the shortfall.'

[109] Clause 3.1(h) however does not state what has to be paid and to whom. The factual matrix of this case was also different. In *Denko,* the warranty was given to the purchaser of the shares. Here, the Plaintiff was not the purchaser of the Protasco Shares, therefore there was no actual nexus between the Plaintiff and Protasco.

[110] The Plaintiff also cited and relied on the decision of the Court of Appeal in *Bon Chong Hing @ Chong Hing & Anor v Gama Trading Co (Hong Kong) Ltd* *[2011] 4 MLJ 52*. That case was concerned with a profit guarantee provided in a shareholders' agreement. The plaintiff in that case had taken up shares in a company incorporated by the defendant. In the shareholders' agreement the defendant guaranteed that the company would achieve earning a certain amount of profit over a fixed period of time. Again, unlike the case at hand, it was expressly provided in the shareholders' agreement that the defendant would pay the shortfall should the company fail to achieve the profit guaranteed.

[111] Thus, in both *Denko* and *Bon Chong Hing @ Chong Hing* there were express provisions as to what was to be paid, by whom and to whom should the warranted or guaranteed profits not be achieved. Significantly, in both those cases, the guarantee was given to a shareholder of a company whose profits were guaranteed. Such was not so in the case at hand. In addition, it merits observing that *section 75* of the *Contracts Act 1950* was not raised or discussed in either case.

[112] The fact that clause 3.1(h) does not expressly state a sum or a manner of deriving a sum to be paid for its breach does not necessarily mean that the clause was rendered otiose. Quite to the contrary.

[113] What it means is that should there be a breach of clause 3.1(h), it would sound in damages to be assessed upon the usual principles in accordance with *section 74* of the *Contracts Act 1950*.

[114] Contractual obligations in written contracts with no stipulation of any sum payable or ascertainable, are common place and they are not rendered otiose, simply by the absence of an ascertained or ascertainable sum payable for their breach.

[115] In addition, if clause 3.1(h) were to fall within the parameters of *section 75* of the *Contracts Act 1950*, it would be open to the Defendant to prove that the amount payable i.e. the difference between the pre-tax profit guaranteed and the actual pre-tax profit achieved by Protasco for the years ending 2015 and 2016, is unreasonable compensation.

[116] As was stated by Richard Malanjum CJ (Sabah & Sarawak) as his Lordship then was in the decision of the Federal Court in *Cubic Electronics Sdn Bhd (In Liquidation) v Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723 at page 752 paragraph [70]:

> '[70] We turn now to the issue on burden of proof. The initial onus lies on the party seeking to enforce a clause under *s. 75* of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein. if any.'
>
> (Emphasis added)

[117] Bearing in mind the foregoing, if the position of the Plaintiff is examined, it is clear that it has not demonstrated that it had suffered any loss or damage by reason of the alleged breach of clause 3.1(h).

[118] There was no evidence led that the Plaintiff had paid or contributed to the purchase price of the Protasco Shares bought by Kingdom Seekers. Clearly too, the Plaintiff was never the registered owner of the Protasto Shares.

[119] Conversely, even if Protasco were to have achieved the guaranteed pre-tax profits, it was not demonstrated what benefit the Plaintiff would have received thereby. If the Plaintiff had purchased the Protasco Shares it might have received dividends from Protasco which would, in turn, be based on its profit, after tax. Whether dividends would have been declared and if so how much would have been paid out in respect of the Protasco Shares, was

not established and would likely be entirely speculative. There was also no evidence of how the value of the Protasco Shares might have been affected should the pre-tax profits guaranteed be achieved and vice versa.

[120] In this context, Larry Tey had sought to assert that the Protasco Shares were held on trust for the Plaintiff. On the other hand, there was evidence that he had himself affirmed an affidavit, in a different proceeding, in which he had averred that the Protasco Shares purchased by Kingdom Seekers were not held in trust for the Plaintiff. Nothing beyond these contradictory statements were provided in evidence of this trust or of any beneficial interest acquired by the Plaintiff in the Protasco Shares. I do not find that in the circumstances, or by Larry Tey's mere say so, that it was proven that the Protasco Shares bought were held on trust for the Plaintiff.

[121] In any event, when learned counsel for the Plaintiff was asked during oral submissions if reliance was being placed on this assertion, the answer was in the negative. Quite rightly so, as such was never pleaded.

[122] Having regard to the foregoing, should *section 74* of the *Contracts Act 1950* be applicable, no actual damage was proven by the Plaintiff by reason of the alleged breach of clause 3.1(h).

[123] Even if, as the Plaintiff contended, clause 3.1(h) falls within *section 75* of the *Contracts Act 1950*, the Defendant would have clearly demonstrated that, in the circumstances of this case, the amount sought by the Plaintiff, based on the difference between the pre-tax profit guaranteed and the actual pre-tax profit achieved, could not in any way be regarded as reasonable compensation payable to the Plaintiff.

[124] Therefore, even if contrary to what I have held, clause 3.1(h) was a profit guarantee given to the Plaintiff and even if it may be said that the failure to provide the guarantee was a pleaded breach, the Plaintiff's claim must still fail as it has not proven that it had suffered any damages for the purposes of *section 74* of the *Contracts Act 1950*. In which event, the Plaintiff would only be entitled to nominal damages.

[125] In addition, even if the implication sought is valid and clause 3.1(h) falls within *section 75* of the *Contracts Act 1950*, the amount claimed by the Plaintiff cannot possibly be reasonable compensation for a company which has not demonstrated that it had suffered any loss whatsoever by reason of the alleged breach of clause 3.1(h).

Conclusion

[126] As I have held that clause 3.1(h) was not itself a guarantee given to the Plaintiff by the Defendant and, in addition, for the other reasons given above, the Plaintiffs claim must fail altogether.

[127] The Plaintiff's claim was therefore dismissed with costs.

End of Document