T2 Networks Pte Ltd v Nasioncom Sdn Bhd
[2007] SGHC 193

Case Number : Suit 484/2005

Decision Date : 09 November 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Anthony Lee and Pua Lee Siang (Bih Li & Lee) for the plaintiff; Jeremiah Herman, Mark Seah and Mar Seow Hwei (Rodyk & Davidson) for the defendant

Parties : T2 Networks Pte Ltd — Nasioncom Sdn Bhd

Contract – Consideration – Past consideration

Contract – Contractual terms – Certainty of contractual terms

Contract – Remedies – Agreed damages clause – Whether clause was a penalty clause

Contract – Waiver – Waiver by estoppel – Scope of doctrine of waiver by estoppel

9 November 2007 Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff, T2 Networks Pte Ltd ("T2"), is a company incorporated in Singapore that carries on the business of providing international telecommunication services and internet access and network services to bulk-users. The defendant, Nasioncom Sdn Bhd ("NC"), is a company incorporated in Malaysia which provides telecommunication services, including broadband internet access, to corporations and home users in Malaysia.

2 T2's claim against NC arose out of various agreements for the provision of services to NC. It claimed the sum of US$418,446.11 being the balance due for services rendered and various other sums arising by reason of the termination of the contracts between NC and T2. T2 also claimed the repayment of a loan of US$18,000 made to NC.

3 NC put in a defence and a counterclaim. The counterclaim was not only against T2 but also against two individuals namely, Lim Kai Shan ("KS Lim") and Wang Wei who were two of the shareholders and directors of T2. The main defence was that there was a settlement agreement that precluded T2 from suing on its original claim. The counterclaim was based on an alleged provision in the settlement agreement to the effect that KS Lim and Wang Wei would procure the transfer of 51% of the issued shares in T2 to NC. There were two other defences put forward by NC. These were that T2 was not entitled to claim certain sums arising out of the termination of the contracts and, in the alternative, NC was entitled to set off against the sums claimed by T2, loans made by it to T2 for the purchase of equipment and advances granted to T2 for the purpose of its business. T2 denied that its claims had been settled or that it was liable to NC for the amounts claimed by the latter. KS Lim and Wang Wei denied having agreed to transfer shares in T2 to NC.

Background

4 The two main protagonists in the series of events that led up to this case are KS Lim and Dato Chee Kok Wing ("Dato Chee"). Dato Chee was at all material times the person who ran NC, a company that he had founded. Between 2003 and 2006, he held the title of group managing director. KS Lim had trained as a mechanical engineer and subsequently went to work for a telecommunications service provider named Telix Network Pte Ltd.

5 KS Lim was introduced to Dato Chee some time in 2002. NC was then interested in exploring ways to control the costs of its operations. KS Lim informed Dato Chee that he was experienced in the telecommunications industry and subsequently recommended changes to improve NC's network and reduce its costs. NC was impressed and employed KS Lim as a consultant from mid-March 2003 and Wang Wei as a technical consultant from April 2003.

6 As of 2003, NC, as a network facilities and service provider in Malaysia, had existing contracts with other service providers for the purpose of routing NC's international voice traffic and internet access services. In April or May 2003, KS Lim proposed to Dato Chee that a company be set up in Singapore to route NC's international voice traffic and internet access out of Malaysia. This proposal was accepted and it resulted in the incorporation of T2.

7 The respective accounts of KS Lim and Dato Chee on the setting up of T2 differ somewhat. Dato Chee maintained that KS Lim said that in exchange for NC's support in setting up T2 by giving it loans for purchase of equipment as well as for the operation of the network in Singapore, KS Lim through T2 would provide NC with services that were efficient, reliable, at more competitive rates and therefore cheaper, and of high quality. He allegedly told Dato Chee that there would be a 20% reduction in the costs of the traffic and that T2 would only charge NC the carriers' costs plus a margin of five percent. He also said that NC would have a beneficial interest in the shares of the Singapore company to the extent of 60% thereof. It was important to Dato Chee that NC would have a controlling state in T2 since NC would have to advance substantial sum of money to T2 to fund its start up.

8 KS Lim on the other hand said that he saw a business opportunity to tap into the telecommunication market in Malaysia by being one of the service providers of NC using the cheaper services available in Singapore. He made a business proposal to Dato Chee along these lines and this proposal was evaluated by NC which concluded that the pricing was attractive enough to justify the termination of its existing service with its existing service provider. He did not make any of the representations that Dato Chee had referred to and alleged that NC's decision to support T2 was not based on such representations.

9 T2 was incorporated on 14 May 2003. It had an authorised capital of $100,000 and a paid-up capital of $100. At the time of incorporation, the shareholders of T2 were KS Lim (45%), Wang Wei (45%) and one Eddie Lam Siew Keong ("Eddie Lam") (10%). These three gentlemen were also the only directors of T2. None of them was NC's nominee. On 18 November 2003, however, the directors of T2 passed a resolution appointing one Ms Liew Yueh Chyn ("Kris Liew") as a director of the company. It was not disputed that Kris Liew was NC's nominee. At that time she was an employee of NC and worked as Dato Chee's personal assistant. She was also made a joint signatory in respect of the bank account that T2 had in Singapore. Ms Liew left the board some time in late 2004 and on 10 December 2004, one Lam Siew Sing ("Damien Lam") was appointed as a director of T2. He was Ms Liew's replacement.

10 It is convenient to mention here another person who played a somewhat mysterious role in the affairs of T2. He was present at an important meeting and his name was mentioned frequently in the correspondence and the evidence. His name is Wilson Lee and KS Lim described him as an "old friend".

Wilson Lee was not an officer or employee of T2. KS Lim asserted that Eddie Lam relied on Wilson Lee's advice and that was why Wilson Lee was consulted about decisions involving T2. Dato Chee, on the other hand, said that it was Wilson Lee who was the beneficial owner of shares in T2 and that Eddie Lam was just a proxy for Wilson Lee. Damien Lam, however, asserted that Wilson Lee's wife, one Doris Tai, was a shareholder of T2 and that in all matters dealing with T2 he had dealt only with KS Lim and Wilson Lee (whom he believed to have some sort of interest in T2) and that he believed KS Lim represented Wang Wei and Eddie Lam.

11 In September 2003, NC sent a draft shareholders' agreement to KS Lim. Thereafter, there was an exchange of e-mail correspondence between KS Lim and one of NC's employees attempting to fix a discussion about the terms of the draft. By the end of September 2003, the draft had not been finalised or agreed. Discussion on the draft seems to have lapsed thereafter. According to KS Lim, the discussions were exploratory ones relating to the possibility of NC making a capital investment in T2. No concrete plans were made and no agreement was reached.

12 T2 started operations and, from 13 October 2003, it rendered international voice routing (VOIP) services to NC. In May 2004, T2 set up internet access services for the use of NC. At that time, there were no written agreements between T2 and NC regarding the terms on which these services were being provided. Draft documents for both the VOIP services and the internet services had been provided by T2 to NC and the terms had been discussed but the documents were not signed. It was only in October 2004 that written contracts were entered into in respect of these services. The contracts were as follows:

(a) an agreement to provide internet protocol transit services and international private leased line services dated 1 October 2004 ("1st Agreement"). Under the 1st Agreement, T2 was to provide NC with a leased line for the purpose of internet access; and

(b) an agreement to provide VOIP services dated 11 October 2004 ("2nd Agreement"). Under the 2nd Agreement, NC was to direct its voice international telecommunication traffic minutes to T2 who was then to route the same to the specified destination.

13 Difficulties in the relationship between T2 and NC arose in late 2004 as a result of the delayed payment of bills by NC. By an e-mail to NC's chief executive officer on 25 November 2004, KS Lim informed NC that its payments were being made very late and, considering that the payment for September 2004 was still outstanding, KS Lim would not be able to hold off the carriers from whom T2 itself obtained these services. He warned that there would be a decrease in capacity in the following week if no payment was made to the carriers and that there might be a disruption in the services provided if nothing was done about this matter. Thereafter, T2 was continually asking for payment to be made promptly.

14 On 13 January 2005, NC paid T2 RM200,000 (or US$52,287.58) for the invoices due in October 2004. About two weeks later, KS Lim sent an e-mail to Dato Chee in which he stated that the outstanding amount was around US$300,000 and asked for payment. NC responded by stating that it was only able to pay a further RM200,000. T2 kept on pressing NC to make not only that payment but to settle the outstanding invoices in full. There was also a lot of correspondence between Damien Lam and KS Lim in relation to the affairs of T2. In one of these exchanges, in early February 2005, Damien Lam put various questions about the operations of T2 to KS Lim and asked him what the position was regarding the execution of a transfer in respect of 51% of the shares in T2. KS Lim's reply was "This will be completed after we finalised all the contract *(sic)* and agreements". KS Lim also took the opportunity to reiterate T2's position by stating "You have to understand we are a

vendor of NC. From NC they only see us as T2. If they do not pay us [we] are not able to pay the carriers and eventually service will be affected".

15 On 9 March 2005, there was a meeting between Damien Lam, KS Lim and one Patricia Foong, T2's office manager, to discuss the outstanding bills and other issues. It was noted at the meeting that T2 had just received a payment of RM100,000 towards the outstanding bills. This amount fell far short of what was required and KS Lim asked Damien Lam to persuade NC to immediately settle 50% of the outstanding bills pending from October 2004. Damien Lam stated that Dato Chee wanted the agreement on the shareholding between T2 and NC to be signed immediately and he suggested that KS Lim should write an irrevocable and binding letter to NC stating that upon settlement of all outstanding bills due to T2, T2 would immediately transfer 51% of its shares to NC's nominees.

16 On 10 March 2005, KS Lim sent Damien Lam an e-mail in which he said that it was his understanding that Dato Chee would make full payment of the outstanding bills if he received a letter indicating that 51% of T2 shares would be transferred to him. KS Lim also said that in order for him to convince Wilson Lee he would want two conditions included, the first being that NC would not have any outstanding amounts due to T2 and the second being that NC completed the shareholders' agreement with the directors of T2 by a certain date.

17 Another meeting took place on 15 March 2005. This is the meeting that is alleged by NC to have resulted in the settlement agreement. The parties have given almost completely different accounts of the meeting.

18 According to KS Lim, the meeting was an informal one held at a café outside NC's office in Mid-Valley City in Kuala Lumpur. The meeting took place by chance. What happened was that as he was walking along with Wilson Lee, he saw Dato Chee and Damien Lam sitting in a café. Dato Chee and Damien Lam invited the two men to join them. They did so and KS Lim then demanded that the outstanding amount should be paid immediately as he believed that NC would have funds due to the recent listing of its parent company. Damien Lam and Dato Chee suggested that NC should have a majority stake in T2 and discussed some terms that should be included for the majority stake. KS Lim said that he did not and could not have agreed to this proposal because such a proposal had to be agreed to by Wang Wei as well. As far as he was concerned, he impressed upon Dato Chee and Damien Lam that NC must make full and immediate payment to T2.

19 Dato Chee, on the other hand, said that the meeting was pre-arranged and that it took place in the Cigar Room of the Concorde Hotel in Kuala Lumpur. He stated that there was a fifth person at the meeting, one Willie Liew, a good friend of his who happened to be in the hotel at that time. According to Dato Chee, the meeting was prearranged by him. He had telephoned Wilson Lee one or two days earlier and asked Wilson Lee to bring KS Lim to the meeting because he himself had no way of getting KS Lim to meet with him.

20 According to Dato Chee and Damien Lam's account of the 15 March meeting, Dato Chee explained that NC had stopped paying T2 because NC was not getting what it wanted and T2 had not been transparent. He also reminded KS Lim of the understanding that they had regarding the controlling stake that NC had in T2. At the conclusion of the meeting, the parties came to an agreement and the terms of this agreement were reflected in the e-mail that Damien Lam sent the next day to KS Lim and Wilson Lee with a copy to Dato Chee and Kris Liew. It is this e-mail ("the March 16 e-mail") that NC says evidences the settlement agreement. The e-mail reads as follows:

Hi

Following the meeting held on 15th March 2005, the following has been agreed and to be executed by the named parties:

1. 51% shares to be transferred to Willie and Damien, with Wilson and Kai Shan the other 49% shares

   a. Action by Kah Yee to instruct Company Secretary (Wilson and Kai Shan to advice *(sic)* on the apportioning of the 49%)

   b. Immediate

2. NasionCom to settle the outstanding payments to T2 within a stated schedule

   a. Action by Kai Shan to instruct MobileOne that settlement will be made directly by NasionCom

   b. Action by Damien to update Dato' on the payments for Dato' *(sic)* approval

   c. Immediate partial payment and thereafter on a scheduled basis.

3. Shareholders Agreement (all)

   a. Appointment of Kai Shan as CEO with the following responsibilities:

      i. Presentation to the Board of Directors (BOD) for approval on business plan (inclusive of P&L, expenses and operating procedures)

      ii. Monthly management accounts to be presented/ submitted for BOD approval

   b. Finance controls to continue as currently implemented

      i. Action by Kris

   c. Balance Sheet to be updated (ownership of equipment)

      i. Action by Kai Shan

   d. T2 to provide full access to equipment and reports on traffic

      i. Action by Kai Shan

   e. No specific time frame was mentioned for the conclusion of the shareholders agreement but is recommended to be completed within the next 30 days for the first BOD meeting.

It was further proposed by Wilson to exclude the need to include an exit plan for both parties and the proposal was agreed.

Please advice *(sic)* if any point had been omitted or needs to be revised.

KS Lim did not respond to the March 16 e-mail.

21 Thereafter, Damien Lam asked Patricia Foong for the invoices rendered to T2 by its various service providers. He also made arrangements for share transfer forms to be prepared for the transfer of shares from Wang Wei, KS Lim and Eddie Lam to himself and Willie Liew as NC's nominees. On 18 March 2005, the company secretary of T2 sent an e-mail to KS Lim attaching copies of the transfer forms asking him to arrange for execution of the transfer forms and thereafter to send them back. Also attached were draft board resolutions to be passed by the directors of T2 approving the various transfers of the shares. On 22 March 2005, KS Lim sent a draft of the proposed shareholders' agreement to Damien Lam. It should be noted that this was the same document as had been forwarded to KS Lim in September 2003 and there were no modifications to it to reflect the fact that all the shareholders (including those representing NC) would be individuals. As originally drafted, the agreement contemplated that the shareholder holding 51% of the equity would be an investment holding company.

22 In the meantime, however, on 21 March 2005, KS Lim and Patricia Foong had met the chairman and the group finance director of NC and asked them to make full payment of the outstanding invoices. That same day, T2 wrote two letters to NC, one in respect of each of the agreements. With regard to the 1st Agreement, T2 notified NC that it had suspended NC's leased line services and stated that according to its records, there was an amount of US$104,000 for invoices issued up to 21 March 2005 which had not been settled. With regard to the 2nd Agreement, the letter stated that the VOIP services to NC had been suspended and that there was an overdue amount of US$324,427.91 for invoices issued up to 16 March 2005. These letters were followed on 24 March 2005 by legal letters of demand for the outstanding sums from T2's Malaysian solicitors.

The issues

23 The main issues to be determined are:

(a) whether there was a settlement agreement that precluded T2 from suing on its original claim under the 1st and 2nd Agreements and, if there was such an agreement, whether NC is entitled to specific performance of the same;

(b) if there was no settlement agreement, whether T2 can enforce cl G3(ii) of the 1st Agreement or whether that clause is a penalty or is unenforceable for other reasons;

(c) if there was no settlement agreement, whether T2 can claim US$950,292.20 under cl 6.2 of the 2nd Agreement by reason of NC's commitment to purchase a minimum value of VOIP services from T2;

(d) whether NC is entitled to set off against any sum due to T2, moneys paid by NC to T2.

Was a settlement agreement arrived at?

24 The onus of proof with respect to this issue is on NC since it is the party asserting that its obligation to pay T2 for the outstanding amounts due for services rendered under the 1st and 2nd Agreements has been compromised by the settlement agreement. At the outset, I should state that NC has not disputed the quantum of the outstanding invoices and, therefore, if its submissions on the settlement agreement are not accepted, T2 would be entitled to judgment (subject to any permissible set off) for US$422,274.03 being the outstanding amounts due under the 1st and 2nd Agreements up to 21 March 2005.

25 One difficulty that I face in analysing the evidence in this case is that neither of the main witnesses, KS Lim and Dato Chee, appeared to me to always be truthful in the evidence that he gave. This of course does not mean that all the evidence that these witnesses gave was not true. However, because of frequent evasions and contradictions and inconsistencies that appear in each party's account of what happened, I have to be careful in what I accept as true and must assess the assertions made in court against the contemporaneous documentary evidence. I should also say here that as far as the meeting of 15 March 2005 is concerned, I accept Dato Chee and Damien Lam's evidence that this meeting was pre-arranged and took place at the Concorde Hotel. KS Lim's account of the meeting having occurred because of a chance encounter seems to me to be improbable. At the time the parties had serious issues to work out and I do not think that Dato Chee would have left it to chance whether or not he met KS Lim in order to put pressure on the latter to effect the transfer of shares.

Did NC have an interest in T2?

26 Before I go into the issue of whether the discussion on 15 March 2005 resulted in an enforceable contract, I have to consider the nature of the interest that NC had in T2 at that time. NC's position was that it had a beneficial and controlling interest in T2 whilst T2 denied that NC had, or was entitled to, any beneficial interest in it. As far as T2 was concerned, it was an independent service provider and NC was its customer albeit its most substantial customer.

27 There were various matters that NC relied on to show that it had a beneficial interest in T2 from the very beginning. First, NC had provided funding for T2's incorporation and had also provided it with equipment for its operation. Second, from as early as September 2003, a draft shareholders' agreement had been circulated among the parties and this agreement provided for NC's nominee to have a shareholding of at least 51% in T2. Third, from the beginning, NC's interest in T2 was demonstrated by its ability to control the payments made by T2 in that Kris Liew was a joint cheque signatory for T2's bank account. Fourth, for much of the period after T2's incorporation, NC, though ostensibly not a shareholder, had a director on T2's board *viz,* Kris Liew initially and thereafter Damien Lam.

28 In relation to the funding for the setting up of T2, T2 had a paid-up capital of only $100. KS Lim was not able to prove that he had provided more than that in cash for T2's initial expenses though he did assert that he and Wang Wei had paid $5,000 as application fees for an essential licence. He said that this payment was made in July 2003 from consultancy fees that were payable to him and Wang Wei in April 2003 by NC. It was not in dispute that the funds came from NC. The question was whether the payment was made in lieu of the consultancy fees payable to the two men for April 2003.

29 During cross-examination, KS Lim was shown a payment voucher dated 16 July 2003 which he had signed and which acknowledged an advance to him of RM11,000. The question put to KS Lim was why he had signed the voucher and thereby acknowledged that the payment was an advance when his position was that the payment was settlement of his consultancy fee. His response was that he "was not an administrative guy" and just accepted the payment as made. Counsel then showed him the payment voucher dated 15 July 2003 where he had acknowledged having received RM12,000 as "payment for May 03 consultancy fee". Further, his evidence was contradicted by Wang Wei who admitted to having received the balance of his consultant's fees from NC. The evidence thus established that KS Lim was not telling the truth in relation to the receipt of RM11,000 and that when he used this money to pay the licence fee, he was using NC's funds and not funds belonging to himself and Wang Wei.

30 In relation to NC's assertion regarding the provision of equipment to T2, T2 did not deny that it

had received equipment from NC but asserted that NC was contractually obliged to provide all equipment and funds for NC to be able to receive the traffic from T2. This assertion was based on cl 2.2 of the 2nd Agreement which stated that the customer (*i.e.* NC) was responsible to procure the necessary facilities or equipment required to bring traffic to T2's facilities at T2's points of connection. KS Lim stated that the equipment provided by NC was for its own set up and its own use.

31 There was doubt, however, as to whether the equipment was provided simply because of a contractual obligation as asserted by T2. NC pointed out that in a carrier contract between T2 and MobileOne Ltd ("M1"), there was a similar clause providing that T2 as the customer there was responsible to procure the necessary facilities or equipment required to bring traffic to M1's facilities at points of connection as specified by M1. If this clause was read in the same way that T2 asserted cl 2.2 of the 2nd Agreement should be read, then T2 would have had to provide all the equipment of M1 in order to be able to bring traffic to M1. That, however, was not the case as KS Lim admitted in cross-examination when he stated that M1 provided its own equipment to receive traffic from T2.

32 There were other matters that cast doubt on KS Lim's denial that equipment had been provided to T2 by NC for T2's use. First, in its own books, T2 treated the equipment as its own assets. Secondly, in the minutes of the meeting of 9 March 2005 prepared by Patricia Foong, it was stated that KS Lim had "clarified that the equipment/fixed assets are an investment to T2 to operate the business". When KS Lim was asked whether the fixed assets and equipment referred to by him were those provided by NC, he evaded the question and said "We were hoping that those equipment that they … put in to run the service to be incorporated into T2 books and as a investment of the company. This has always been our … hope that we reach this agreement, but those investments, those equipment were used by them and eventually they were not investment to T2; they were used by them for us to provide their service, that's all". Implicit in this answer was that the equipment and assets constituted NC's investment in T2.

33 I was, however, most impressed by the evidence that showed the active part that NC played in the administration of T2. T2's stance was that it was a service provider and NC was its customer. If that were the only relationship between the two, then even though T2 was set up to capitalise on a business opportunity that KS Lim became aware of regarding the provision of cheaper telecommunication services to NC, one would not expect NC to have any say in how the affairs of T2 were handled. The evidence established, however, that NC had a large part to play in T2's financial affairs. It controlled payments by T2 through its nominee, Kris Liew, who was also Dato Chee's personal assistant. T2 contended that Kris Liew was merely assisting with its administration. The fact that Kris Liew was appointed a cheque signatory and also a director of T2 cast considerable doubt on that contention. There was no evidence that any cheque was drawn from T2's bank account with Maybank that was not signed by Kris Liew. KS Lim himself confirmed in court that all payments from this account were made with cheques signed by himself and Kris Liew. He was not able to explain why she was a joint signatory of the account and why she remained a joint signatory even after Patricia Foong joined T2 in February 2004 and took over the administration of the company.

34 There was also evidence that it was NC that approved T2's budget and approved KS Lim's salary increases in his position as chief executive officer of T2. KS Lim confirmed this in court. After Kris Liew stepped down from the board of T2, Damien Lam was appointed as NC's nominee. He took an active interest in the affairs of T2 and was concerned with improving its operations. KS Lim tried to explain away Damien Lam's appointment as necessary so that he could carry out a due diligence exercise for the purpose of an acquisition of T2 by NC. That explanation was not satisfactory. As NC pointed out, a due diligence exercise could have been carried out by Damien Lam even if he had not been made a director. Further, if he was only there for such an exercise, Damien Lam would not have

approved the increase in KS Lim's salary nor would he have had any say in the payment of that salary. The questions raised by Damien Lam were not incidental to a due diligence exercise but KS Lim at no time complained that Damien Lam was straying beyond the boundaries of his appointment. In early 2005, KS Lim did, however, make references to the 51% interest that NC wanted in T2 and he seemed prepared to formalise this and to execute transfer forms without asking for any consideration for those shares. His main concern was payment of outstanding bills for services rendered. He did not ever talk about payment for the shares themselves. That was significant.

35 On the evidence cited above and on the other evidence in the case, I find that from the beginning NC was intended to have a beneficial interest in T2. It made advances of money to T2 on that basis and supported the acquisition of equipment for T2's operations. The parties were for the first 18 months at least rather relaxed about documenting that interest properly and were more concerned about running the business and dealing with the services provided by T2 to NC. Neither party pushed for the execution of the shareholders' agreement nor were substantive discussions on its contents held. Dato Chee explained that this was because he trusted KS Lim. There may have been other reasons for the parties' lack of exertion on the matter. I have the impression that it would not have been beneficial to NC for it to be disclosed that T2 was its subsidiary and that there were advantages to be gained from disguising the true relationship between the parties. Even when NC pressed for the execution of the transfer forms, it wanted KS Lim and the other shareholders to transfer 51% of the shareholding to two nominees, Damien Lam and Willie Liew, instead of directly to itself.

Ingredients of an effective settlement agreement

36 That the parties agreed on some matters during the meeting of 15 March 2005 cannot be seriously disputed. The March 16 e-mail quoted in [20] above sets out the items which were discussed and, Damien Lam said, agreed. There was no rejoinder either that day or the next from KS Lim to the effect that Damien Lam had misstated or misunderstood the discussions at the meeting. Whilst those discussions might have taken place, however, that does not of itself mean that an enforceable agreement arose from the same. The submission made for T2 was that the basic legal requirements to enable an enforceable contract to exist were not met in this case. In the discussion that follows, where I refer to clauses of the settlement agreement, it should be understood that I am referring to the numbered paragraphs of the 16 March e-mail.

37 The first set of arguments dealt with the issue of consideration. T2 submitted that there was no good consideration moving from NC to support the agreement. First, it pointed out that cl 1 of the settlement agreement which dealt with the transfer of the shares did not mention any price for the same. In fact, only the nominal consideration of $1 was stated subsequently in the transfer forms prepared by NC. Secondly, NC's alleged promise "to settle the outstanding payments to T2" found in cl 2 was not valid consideration as NC already had a legal obligation under the 1st and 2nd Agreements to pay for services that had been rendered by T2 to it. Dato Chee had admitted in cross-examination that whether or not there was a settlement, the outstanding invoices had to be paid by T2. Thirdly, NC's submission that it had assumed T2's obligation to pay the latter's own service provider (M1), and that that assumption constituted consideration was not accepted by T2. It pointed out that there was no evidence that NC had *agreed to* or *assumed* T2's legal obligation to M1. This was shown by cl 2(b) which stated "Action by Damien to update Dato' on the payments for Dato' approval", thereby giving Dato Chee a free hand to approve or disapprove payments.

38 The above points were well taken. The consideration for the transfer of the shares was a past consideration and not capable of supporting the settlement agreement. The "assumption" of an obligation to pay M1 and the other carriers was not legally enforceable in that those creditors of T2

had not agreed to accept NC as their debtor in place of T2. In the absence of a novation, those creditors could not thereafter have sued NC for the amounts due from T2. Therefore, there was no detriment suffered by NC when it told T2 that it would make payment directly to M1 and the other carriers. The third element, the promise to pay the outstanding amounts due to T2 could not have itself formed consideration as there was already legal liability for the same as pointed out by T2's counsel. However, if there was a dispute over the outstanding amount, then the agreement by NC to set aside that dispute and pay the amounts due in full nevertheless could constitute consideration. The question that I have to decide therefore is whether the promise to make payment of the outstanding amounts was meant as a compromise of disputes that NC had in relation to these amounts.

39 NC submitted that at the time of the settlement agreement, it believed that T2 had failed to comply with its obligations under the 1st and 2nd Agreements and that NC had potential claims against T2 for its breaches. NC had, in accepting the compromise offered by T2, given up any rights NC had had to make a claim for damages for breach on the part of T2. In its defence, NC had pleaded that disputes had arisen between itself and T2 in connection with quality issues with the services provided and certain issues in respect of T2's financial, accounting and billing matters. The submission made on behalf of T2 was that whilst there may have been operational issues in connection with the provision of the services to NC, at no time did NC dispute payment because of any alleged quality or other issues.

40 The evidence that T2 relied on was as follows:

(a) the alleged quality issues did not concern the internet access services provided under the 1st Agreement and NC had no reason to believe that it could dispute payment under the 1st Agreement on this ground;

(b) NC did not assert that issues relating to quality had been the reason for non-payment of the amounts due until very late in the day, *i.e.* at the time NC amended its defence and counterclaim for the third time on 29 November 2006;

(c) under cross-examination, Chia Lee Hong (NC's senior manager, billing and wholesale), confirmed that by January 2005, NC had made full payment of the invoices for services rendered from August to October 2004. T2 contended that if, as alleged subsequently, there had truly been quality issues with those services, NC would not have paid those invoices;

(d) Ms Chia had also confirmed in court that NC had paid all invoices that were outstanding at the end of September 2004 by October 2004. In October 2004, NC signed the 1st and 2nd Agreements and T2 therefore contended that if the quality of its services had really been at issue, those Agreements would not have been signed;

(e) NC had adduced no credible evidence of what the issues as to quality really were and Dato Chee had admitted that he had no personal knowledge of the same;

(f) NC had continued to use T2's VOIP services until T2 terminated the service in March 2005 notwithstanding its alleged problems with the quality of those services and its ability to obtain similar services from other providers;

(g) on 26 January 2005, when KS Lim sent an e-mail to Dato Chee asking for payment of US$82,000 on an urgent basis, Dato Chee did not respond by stating that NC refused to pay

because of problems with the quality of the VOIP services. His only reply was that T2's request was "challenging as we just paid 200k". He then asked T2 to work with what it had for the time being. During cross-examination, Dato Chee admitted that by "challenging" he meant that NC was having cash flow problems.

41 Apart from the foregoing points, as T2 pointed out, the contemporaneous documents did not show NC refusing to make payment or delaying payment because of quality or other issues. NC made payment from time to time when it received chasers from T2. Nowhere did NC say that it would not pay until the quality issues were settled. When the parties met to discuss their concerns, quality issues were not on their mind either. The minutes of meeting of 9 March 2005 and the March 16 e-mail do not mention the alleged quality issues or how these were to be resolved. The financial, accounting and billing matters (which were referred to as "internal issues") were raised in the correspondence and discussions between Damien Lam and KS Lim but these internal issues were not raised during the meetings of 9 and 15 March 2006. The correspondence shows that the internal issues were never raised as a defence to T2's demands for payment. They were raised in order to find ways of making T2 a more profitable business and ensuring that NC could obtain the best possible rates from T2.

42 Overall, in my view, the evidence does not support NC's contention that at the material time, it considered that the quality issues and the internal issues gave it a basis on which to dispute T2's claims. It did not use these issues as bargaining chips at its meetings with KS Lim and Wilson Lee. It did not at any time prior to these meetings give a monetary value to these issues. I believe that there was no compromise of the issues at the meeting of 15 March 2005 because there was nothing to compromise. The quality issues were operational issues of the type which can arise whenever services are provided by one party to another. In this case, these issues were being worked out between the parties. The internal issues had not been turned into claims at the relevant time. I therefore hold that NC did not compromise any claims when it agreed to pay the outstanding amounts due to T2 and thus its agreement to pay those amounts without discount did not amount to consideration.

43 I have also concluded that, to the extent that it withheld payment of the outstanding invoices deliberately and not because of cash flow problems, what NC was trying to do from January 2005 onwards was to put pressure on KS Lim to regularise the situation *vis-à-vis* NC's investment in T2. NC was aware (because T2 kept telling it so) that T2 was in a critical financial state. NC made some payments and promised more but did not deliver. In February 2005, Damien Lam asked about the transfer of the 51% shareholding to NC. KS Lim's reply was non-committal. Significantly, however, he did not dispute NC's entitlement. In early March 2005, Dato Chee approved a payment of RM524,000 to T2. Subsequently, however, NC paid T2 only RM100,000. In court, Dato Chee agreed that the bigger amount of RM524,000 should have been paid to T2 and there should not have been any hold up in this payment. He was unable to explain why only a partial payment of RM100,000 was sent out. He claimed that he did not know why this had been done. T2 considered that the partial payment was meant to put pressure on KS Lim in relation to the transfer of shares and pointed out that shortly thereafter, Damien Lam had asked KS Lim for an irrevocable and binding letter stating that upon settlement of all outstanding bills, T2 would effect that transfer. As an aside, I would point out that when Dato Chee was asked why only RM100,000 had been paid, he could very well have answered that NC had disputes with T2 which affected quantum. The fact that he did not say that was significant. In any case, the background to the meetings in March was NC's anxiety about the share transfers and T2's equal anxiety about non-payment. These were the issues that were at the forefront of the parties' minds.

44 Apart from the lack of consideration to support the settlement agreement, there is another

problem with it: it is uncertain. Clause 2 does not give a schedule for NC's payment of the invoices. In court, Dato Chee could not tell me whether the schedule was agreed and, if so, how long it would take for full payment to be made. NC submitted that I should read cl 2 as providing for payment within a reasonable time. I find it difficult to do so because it is hard to determine what a reasonable time is in a situation where the creditor is desperate for money and the debtor has been stringing out payment for a long time. It was also clear to me from the evidence that all along what T2 wanted from NC was immediate payment. I do not think that it would have agreed to payment within a reasonable time as determined by Dato Chee, when NC had not previously been reliable in its payments. Further, even if cl 2(c) was agreed, how much would be paid immediately and what the amount and period of the succeeding instalments would be was left to NC to determine. As I have stated, the payment schedule was vital for T2 and if that payment schedule was not agreed, then the settlement agreement could not have been concluded. In this connection, the following observation by Lord Wright in *G. Scammell & Nephew Ltd v H.C. and J.G. Ouston* [1941] A.C. 251 is apposite:

> It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. (at p 268 – 269)

It has been held in later cases that as long as the main terms of an agreement have been arrived at, the agreement can still come into existence and be enforceable even though there are some minor terms to be worked out. I do not consider that this case comes within that situation. It was vital for T2 to have certainty as to the dates and amounts of payment from NC. These were not minor terms that T2 would have been content for NC or Dato Chee to work out in their discretion.

45 For the reasons given above, I hold that there was no legally binding settlement agreement on 15 March 2005. The assertion that T2 and KS Lim did not fulfil the terms of the alleged settlement agreement thus does not afford NC a defence to T2's claim.

The claim under cl G3(ii) of the 1st Agreement

46 T2 has claimed that by reason of the operation of cl G3(ii) of the 1st Agreement, it is entitled to be paid the sum of US$110,933.33. NC's defence to that claim was that the clause was a penalty and unenforceable.

47 Section G of the 1st Agreement is entitled "Termination". The following clauses of Section G are relevant to the discussion:

> 1 . Termination for Breach by Customer. If: (i) you fail to pay any outstanding charges due under this Agreement within five days of us notifying you of the delinquency … you will be in default of this Agreement. Once you are in default of this Agreement, we may at our sole discretion do any or all of the following (a) terminate or temporarily suspend all of the Services or just the Services that are the subject of the default; (b) terminate this Agreement; (c) … If we terminate a Service or the Agreement, in addition to all charges accruing to the applicable Service up to and including the termination date, you must also pay us the Termination Charges described in Clause G.3.
>
> …

3 . Termination Charges for Customer Breach or Early Termination for Customer Convenience. For each Service that is terminated prior to the end of the applicable term (see Clause B above), you must pay the following termination charges: (i) … (ii) for Services with an Initial Term of one year or less, all Monthly Service Charges that would have been payable for the remainder of the Initial Term; (iii) for Services with an Initial Term of more than one year, all Monthly Service Charges that would have been payable during the first year of such term (if termination is during the first year), and fifty percent of the Monthly Service Charges that would have been payable over the remaining term of the Initial Term; …

It was also T2's case that in the events that had occurred and by virtue of cl B1 of the 1st Agreement, the Effective Date was 1 October 2004, the Service Commencement Date was also 1 October 2004 and the Initial Term of the 1st Agreement was one year starting on the Service Commencement Date. Whilst NC did not dispute the foregoing, T2 in fact set up the internet access services for the use of NC in May 2004 and these services were supplied from then on although the written contract was signed only five months or so later. T2 could have specified that the Service Commencement Date fell in May 2004 rather than when the 1st Agreement was signed and, had it done so, the Initial Term would have ended in April 2005.

48 T2 submitted that as the internet access services under the 1st Agreement were terminated on 22 March 2005 by reason of NC's default, T2 was entitled to claim for the lost Monthly Services Charges that would have been payable to it during the balance of the Initial Term. According to T2, for the period from 21 April 2005 to 30 September 2005, these charges amounted to US$110,933.33.

49 The services rendered by T2 to NC under the 1st Agreement were supported by a back-to-back contract ("the ANC contract") between T2 and its service supplier, a company called Asia Netcom Services ("ANC"). It was T2's stand that once the 1st Agreement was terminated, it would be in breach of the ANC contract as well because it would no longer be buying from ANC the services hitherto supplied to NC and would become liable to pay damages to ANC on the basis of a similar clause.

50 NC submitted that cl G3(ii) was a penalty because it was not a genuine pre-estimate of loss. It did not accept that T2's liability to ANC would make cl G3(ii) a genuine pre-estimate of loss. This was because:

(a) the corresponding clause in the ANC contract was itself a penalty and therefore unenforceable against T2 since by KS Lim's own evidence, ANC could have easily redeployed their line to other customers even if the line to T2 was terminated; and

(b) the ANC contract was signed in early March 2004. Therefore, at any point in time, the sums payable by T2 to ANC for the remainder of the unexpired portion of the Initial Term (the so-called loss) would *always* be less than what NC would have to pay T2 under cl G3(ii). This was incontrovertible evidence that cl G3(ii) could not be a genuine pre-estimate of loss.

51 In response to the above arguments, T2 submitted that cl G3(ii) was not a penalty because:

(a) the 1st Agreement was a commercial contract negotiated at arms-length. NC was a network facilities and service provider in Malaysia and was well capable of protecting its commercial interests;

(b) the correspondence between the parties in July 2004 showed that NC had reviewed the terms of the 1st Agreement before it was signed and had also asked for a copy of the ANC contract in order to be satisfied that the terms of the 1st Agreement "tie[d] back" with the terms of the ANC contract;

(c) the ANC contract itself contained the same clause G3(ii) as the 1st Agreement and was back-to-back with the latter;

(d) before NC signed the 1st Agreement, it knew that T2 had acquired internet access services from ANC for resale to NC and that the general terms and conditions of the 1st Agreement were the same as those of the ANC contract. NC knew or should have known that if the 1st Agreement was to be terminated because of its breach, T2 would not be able to comply with the terms of the ANC contract or would be put to great cost to comply with those terms; and

(e) the sum under cl G3(ii) was payable upon NC's repudiatory breach of "important provisions" that justified termination under cl G1 before the expiry of the Initial Term. At common law, such breach would have entitled T2 to treat the contract as repudiated and claim the loss of the bargain for the remainder of the Initial Term. The loss would have been measured by the monthly service charges that would have been payable for the remainder of the Initial Term had there been no breach by NC. Clause G3(ii) provided, contractually, for a similar measure of loss.

52 T2 also submitted that it was only a possibility that the ANC lines could be redeployed to other customers. Although KS Lim had agreed with such a possibility, he did not say that ANC could have easily redeployed their lines as NC claimed. It was equally possible that the lines might not or could not be redeployed, whether immediately, within a reasonable time after termination or at all, for whatever reason. In any case, the issue was whether the sum stipulated under cl G3(ii) was extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach (applying Lord Dunedin's dictum in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co* [1915] AC 79). In T2's submission, NC had not shown that the sum claimed under G3(ii) was such an extravagant and unconscionable amount.

53 T2 also replied to the argument that because the ANC contract was signed in early March 2004, the sums payable by T2 to ANC would always be less than what NC would have to pay T2 under cl G3(ii). It submitted that this was an assumption that was not supported by the evidence of the duration of the ANC contract. It pointed out that cl B1 of the ANC contract provided that "[u]pon conclusion of the specified Initial Term, this Agreement will continue in effect indefinitely until terminated by either Party upon 30 days' written notice". It also argued that even if NC's potential loss was always less than the sum payable under cl G3(ii), NC had not shown that that sum was extravagant and unconscionable. It cited *Halsbury's Laws of Singapore* (Vol 7, 2005 Reissue) (LexisNexis Singapore) at p 562 for the proposition that it was for the party who was being sued for the agreed sum to prove that the term imposing that sum was a penalty.

54 Having considered the various arguments, I must say first of all that I do not accept T2's contention that cl G3(ii) provides for the same measure of loss that T2 could have recovered under common law. The difference between cl G3(ii) and the common law position is that if the clause is applied, the calculation of the sum is clear (*i.e.* the monthly service charges payable for the remainder of the Initial Term) and it may be recovered without proof of actual loss. At common law, whilst the starting point for a claim in damages would be the number of months of the Initial Term left to run and the charges that would have been received by T2 if the contract had not been terminated, the sum

recoverable would be the actual sum that T2 was able to prove that it had lost as a result of the termination. Such proof would also involve T2 showing that it had made attempts to mitigate its damages. Thus, if cl G3(ii) is not a penalty, it provides an easier route for the recovery of damages. However, the calculation of the loss would not have been difficult because in this type of contract the loss to the supplier of services during a fixed term would be the difference between the cost it billed its customer and the amount it paid to its own supplier for the same services plus any amount it was contractually bound to pay its own supplier despite its customer's breach. Thus, at the outset I do not think it would have been too difficult for the parties to estimate the loss that would flow to T2 from a breach of the 1st Agreement.

55 The basic legal principle is not in doubt. A sum that has to be paid by one party to the other when it breaches the contract can be struck down as a penalty if it is not a genuine pre-estimate of the loss that the other party may sustain by reason of the breach. The difficulty in all cases lies in applying that principle to the facts before the court. The following observation of the Privy Council in the decision of *Philips Hong Kong Ltd v AG of Hong Kong* [1993] 1 HKLR 269 provides some guidance:

> Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision. The use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages. …
>
> … Where it should be obvious that, in relation to part of the range, the liquidated damages are totally out of proportion to certain of the losses which may be incurred, the failure to make special provision for those losses may result in the "liquidated damages" not being recoverable. … However the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld. Any other approach will lead to undesirable uncertainty especially in commercial contracts. (per Lord Woolf)

56 In this case, the greatest loss that T2 could conceivably sustain from termination of the 1st Agreement would occur if on termination it was not able to find a customer to replace NC who would buy from it an equal volume of the services so as to enable it to maintain its own commitment to ANC under the ANC contract. In that case, the loss suffered by T2 would be its loss of profits for the remaining fixed period of the contract, *i.e.*, the balance of the Initial Term plus, if such termination meant that it was unable to meet its own commitment to ANC under the ANC contract and therefore became liable to pay an amount thereunder to ANC, the amount so payable.

57 The terms of the 1st Agreement have, obviously, been taken almost wholesale from the terms of the ANC contract and this was done on purpose in order to put the two documents on a back-to-back basis. As events turned out, however, the two contracts were not back-to-back because they were executed on dates that were about six months apart and therefore the Initial Term of the ANC contract did not overlap with the Initial Term of the 1st Agreement. If the two overlapped in full or very substantially, then it would be difficult for NC to contend that cl G3(ii) in the 1st Agreement was a penalty since it would mirror the same provision in the ANC contract and NC was fully aware of the

existence of that provision in the ANC contract and nevertheless wanted the 1st Agreement to follow the terms of the ANC contract.

58 It is disingenuous at this stage for NC to argue that cl G3(ii) as it appears in the ANC contract is a penalty and not binding on T2. That point does not, however, detract from the reality that at the time that the 1st Agreement was signed, it was foreseeable that because of the different time spans covered by the two contracts, the amount payable by NC on termination of the 1st Agreement would be substantially different from the amount payable by T2 if the ANC contract was terminated as a result of the termination of the 1st Agreement. This is because there would be a difference of six months' worth of monthly service charges. It was also foreseeable at that stage that if the termination of the 1st Agreement took place six months or more after the Service Commencement Date, the Initial Term of the ANC contract would either have expired or be very close to expiry and therefore very little money would be payable to ANC under the ANC contract if the same also had to be terminated in tandem with the 1st Agreement. This is so as there is no provision in the ANC contract for payment of any specified amount of monthly charges if that contract is terminated after the expiry of the Initial Term. The payment of a specific number of monthly charges notwithstanding termination relates entirely to the Initial Term and cl G3(ii) provides the calculation when the Initial Term is for a period of a year or less whereas cl G3(iii) provides the calculation when the Initial Term is for longer than one year.

59 It was therefore foreseeable at the time the 1st Agreement was entered into, that if it was prematurely terminated, the amount payable by NC under cl G3(ii) would be higher than any amount payable by T2 to ANC under the same clause. At this stage, I should point out that the difference between what ANC was charging T2 and what T2 in turn charged NC was no more than 20%. In fact according to KS Lim, T2 had intended to mark up its services by 20% but in order to keep NC competitive, it had actually marked up its services at around 10-12% from cost. Thus, it would appear that in respect of the monthly service charges, no more than 12% of the same represented revenue that T2 could keep for itself and 88% of the same would have to be passed on to ANC in payment of its charges.

60 In all the circumstances, it appears to me that cl G3(ii) was a penalty clause. Theoretically, the greatest amount of loss that T2 could have incurred in respect of the premature termination of the 1st Agreement would result from the termination of that contract very shortly after it started and the consequential immediate termination of the ANC agreement. In that event T2 would have to pay ANC six months' worth of service charges but it would, by virtue of the operation of cl G3(ii), be able to recover about twelve months worth of monthly service charges from NC. Whilst the actual amount recovered would not be double the amount of the actual loss (bearing in mind the 12% mark-up that served as T2's profit), the ratio between loss and recovery would be close to 1:2. In my judgment, such a rate of recovery would be extravagant and unconscionable. I therefore hold that T2 is not entitled to recover the sum of US$110,933.33 as it is a penalty. T2 did not prove (or indeed, claim) the actual loss it had suffered by reason of the termination of the ANC contract.

The claim under cl 6.2 of the 2nd Agreement

61 T2 claimed the sum of US$950,292.20 as amounts payable by NC under cl 6.2 of the 2nd Agreement for the period from 1 September 2004 to 31 August 2005.

62 In relation to this claim, the relevant provisions of the 2nd Agreement are as follows:

3. COMMENCEMENT AND TERMINATION

3.1 This Agreement shall commence on 1 September 2004 ("Effective Date") and shall continue in force for an Initial term of one (1) year ("Initial Term"). Thereafter, this Agreement shall remain in full force and effect unless terminated by either Party, by giving one (1) month prior written notice to the other Party or in accordance with Clause 4.1.

…

6. MINIMUM MONTHLY CHARGES AND PAYMENTS

…

6.2 The Customer agrees to commit to a minimum monthly voice International telecommunications traffic to the value of Ringgit Malaysia Five Hundred Thousand (RM500,000.00) a month and T2 shall bill the Customer accordingly each Billing Period (Billing Period as defined in Clause 6.3 below) ("Minimum Commitment") based on the then existing Rates referred to in Clause 6.1 notwithstanding that the value of the telecommunications traffic sent by the Customer to T2 is below the Minimum Commitment for that Billing Period. The Minimum Commitment to the billed per Billing Period shall be adjusted in the event that the Billing Period shall be varied, amended or altered.

…

PROVIDED ALWAYS THAT the invoice amount for each Billing Period shall not be less than an amount corresponding to the Minimum Commitment.

63 T2 submitted that the above clause was enforceable in accordance with its terms. It said that cl 6.2 did not amount to a penalty but was merely a term for the payment of a sum of money as part of the performance of the contract rather than a sum that was payable upon a breach of a party's obligation under the contract. It relied on the following observation of Steyn LJ in the English Court of Appeal decision in *Coneco Limited v Foxboro Great Britain Limited*, 24 February 1992, Court of Appeal (Civil Division) ("the *Coneco* case"):

> … For my part I am satisfied that the present case is governed by the rule that a liquidated sum payable only on an event which does not constitute a breach of contract cannot in law amount to a penalty. That rule is settled law, at least in respect of commercial contracts. If there was any doubt on the point it was removed by the unanimous decision of the House of Lords in *Export Credits Guarantee Department v Universal Oil Products Co* [1985] 2 All ER 205, [1983] 1 WLF 399. Conceivably there might be scope for a re-examination of the position in the case of consumer contracts such as hire purchase agreements. But in the *ECGD* case Lord Roskill, after emphasising the commercial context of that case, made it clear that it is not for the courts to extend the law relating to penalties. The present case is an arms-length commercial contract and it is directly covered by the holding in the *ECGD* case.

64 Based on a true construction of cl 6.2, T2 submitted:

(a) there was an obligation on NC to pay the minimum amount of RM500,000 a month ("Minimum Commitment");

(b) there was no express obligation on NC to provide traffic to the value of RM500,000 a

month;

(c) on the contrary, cl 6.2 provided that T2 was to bill the Minimum Commitment notwithstanding that the value of the VOIP traffic sent by NC to T2 was below the Minimum Commitment for the relevant billing period and this proviso therefore allowed NC to provide traffic worth less than the Minimum Commitment;

(d) the payment of the Minimum Commitment was not linked to any breach and that sum, at least, was payable whatever amount of traffic NC provided to T2; and

(e) based on the legal principles expressed in the *Coneco* case, cl 6.2 could not amount to a penalty.

65 T2 also pointed out that the 2nd Agreement was an arms-length commercial contract between T2 and NC and NC had not challenged KS Lim's evidence that cl 6.2 had been drafted by an officer of NC. The correspondence showed that NC was involved in the drafting and review of the terms of the 2nd Agreement and T2 did not dominate NC in relation to the terms of the contract. NC had agreed, with its eyes wide open, to give T2 the guarantee of the Minimum Commitment. It was not for the court to relieve NC from the consequences of a bargain which it had freely entered into no matter how onerous or commercially imprudent the court may think the bargain to be. I should state here that I accept the argument on the way that the 2nd Agreement and cl 6.2 should be viewed. The parties were commercial entities doing business on an equal basis. If anything, NC had the position of greater power. This was not the case of a powerful corporation imposing its will, through non-negotiable terms, on a hapless consumer.

66 NC had four arguments why the court should not enforce cl 6.2. The first one was that cl 6.2 was a sham and therefore unenforceable because it was intended only to enable T2 to obtain better rates from T2's carriers and was never meant to be strictly enforced. This first argument is, however, as T2 submitted, not available to NC because it did not plead the "sham" nature of the clause as part of its defence.

67 The second argument was that in any event, the clause was a penalty and therefore unenforceable. This argument is not sustainable. As NC itself submitted, a penalty must impose payment upon breach of contract which payment is not a genuine pre-estimate of loss. In this case, as is clear from the arguments of T2 which I have cited above, the Minimum Commitment was payable as part of the normal operation of the 2nd Agreement. It was not a sum that became payable only upon breach of contract.

68 NC's third argument was that the clause had been waived by T2 during the period before termination. It pointed out that until termination, T2 had billed NC only for the amount of traffic actually used. Since cl 6.2 states that T2 "shall bill" on the basis of the Minimum Commitment, the fact that it did not amounted to a representation that it was not relying on its strict legal rights. Accordingly, NC did not proceed to ensure that whilst the 2nd Agreement was in operation, the minimum traffic amount was met. Had T2 not waived, NC would have ensured that the minimum amount of traffic was provided. It was only on 13 June 2005 that T2 sent NC a bill for US$951,224.52 calculated on the basis of the Minimum Commitment. This sum comprised the difference between the amount actually billed and RM500,000 each month during the period from September 2004 to March 2005 and the sum of RM500,000 per month thereafter all the way up to August 2005.

69 In relation to the waiver point, the principle of law relied on by both parties is that set out in

paragraphs 22-040 of *Chitty on Contracts* (29th Ed) Vol 1, General Principles (London, Sweet & Maxwell 2004):

> **Waiver or forbearance**. Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has *waived* his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.

T2 also noted that in paragraph 3-092 of the same authority it was stated that although a promise or representation may be made by conduct, mere inactivity would not normally suffice for the purpose of constituting such conduct.

70 T2 submitted that its mere inaction in not billing NC the difference between the number of minutes actually sent by NC and the Minimum Commitment was equivocal and could not be the clear representation that was needed to constitute a waiver of T2's rights. It also pointed out that cl 15.1 of the 2nd Agreement provided that a failure on the part of a party to exercise the right under the agreement would not operate as a waiver thereof and under cl 15.2, the waiver of a right of benefit given by either party would only be effective if confirmed in writing and was not to be construed by virtue of any conduct on the part of the said party. Further, there was no evidence that NC had relied on the waiver in the way asserted in its submissions.

71 Given that it was an integral part of cl 6.2 that T2 was to bill NC for each billing period on the basis of the Minimum Commitment and that it was specifically stated in the proviso that the invoice amount for each billing period was not to be less than an amount corresponding to the Minimum Commitment, it is my conclusion that T2 did waive (in writing) the Minimum Commitment each time that it billed a smaller amount. It would be remembered too, that from January 2005, T2 was actively chasing NC for the unpaid bills and at that stage would have been fully aware of the amounts due and owing to it and how they had been derived. Yet at no time during the period did T2 render any additional bills in respect of the Minimum Commitment to which it was entitled under cl 6.2. Even when T2 suspended the 2nd Agreement and its lawyers sent out a legal demand on 24 March 2005 for payment, the amount claimed as being due for the provision of services under the 2nd Agreement was US$324,427.91 (RM1,232,826) only and no mention was made at all of the unbilled portions of the Minimum Commitment for each billing period. Whilst there was no direct evidence of reliance on the waiver, I consider that such reliance can be inferred from the fact that after the first bill was rendered for less than the Minimum Commitment, NC did not send traffic to the value of the Minimum Commitment for the billing periods thereafter.

72 The waiver, however, was in my view, only effective in respect of the invoices actually sent out for the billing periods that they represented. Clause 15.2 of the 2nd Agreement provided:

> A waiver of any right, remedy or benefit of or any consent to be given by either Party under this Agreement shall only be effective:
>
> (a) if confirmed in writing by such Party and shall not under any circumstances be construed or implied from or by virtue of any conduct on the part of the said Party;
>
> (b) subject to such conditions, if any, as may be imposed by the said Party; and

(c) in the instance and for the purpose for which it is given.

Thus, each invoice which billed for only the traffic actually sent by NC during the relevant billing period, could pursuant to the terms of the 2nd Agreement only be a waiver of the Minimum Commitment for that billing period. It could not extend to cover the Minimum Commitment falling due in respect of another billing period. T2 sent out invoices for the billing periods falling between 1 September 2004 and 31 March 2005. During that period, the total amount by which the traffic actually used fell below the Minimum Commitment was US$292,397.45. T2 did not bill NC for the remaining US$292,397.45 until three months after suspending the 2nd Agreement. I think that that was too late to reinstate its claim for that amount.

73 As for the Minimum Commitment claimed for the period 1 April 2005 to 31 August 2005 amounting to US$657,894.75, I move on to consider NC's fourth argument which was based on the construction of the clause. It argued that cl 6.2 did not survive termination of the 2nd Agreement because it assumed that traffic would be provided by NC and where no traffic was provided, the clause could not bite.

74 On 21 March 2005, T2 suspended the leased line services and the voice services. Thereafter, NC did not provide any more traffic to T2. NC argued that upon suspension or termination of the services, it no longer needed to commit any traffic at all to T2 let alone traffic to the value of the Minimum Commitment as if the 2nd Agreement was still in force.

75 T2 responded that under cl 4 of the 2nd Agreement, T2 had the right to suspend its services to NC by reason, *inter alia*, of NC's persistent default in making payment of T2's invoices. By cl 4.2, its right to suspend service was without prejudice to any other rights or remedies that T2 might have against NC under the 2nd Agreement. It therefore submitted that by cl 4.2, the parties intended that the suspension of the 2nd Agreement by reason of NC's default was to be without prejudice to T2's rights to the guaranteed payment of the Minimum Commitment for the Initial Term. Otherwise, it would lead to the absurdity that NC would be bound to pay the Minimum Commitment for the entire Initial Term when it was not in default under the 2nd Agreement but it would not be bound to pay when its default caused the suspension or termination of the 2nd Agreement before the expiry of the Initial Term. The argument that cl 6.2 assumed that traffic would be provided by NC should be rejected because this too would lead to an absurdity: namely that in the case of minimal traffic provided by NC, NC would be bound to pay the Minimum Commitment whereas in the case that NC provided no traffic all, it would not be bound to pay.

76 Having considered the arguments above, I accept those made by T2. They are more logical than NC's arguments. Clause 4.1 of the 2nd Agreement gave T2 the right to temporarily suspend the services if NC failed to comply with its obligations under the agreement and cl 4.4 gave T2 the right to temporarily suspend the services if any of the payments due under the agreement was not paid in full within the stipulated time. The clause also provided that if NC thereafter paid the full amount due the services would be reinstated within 48 hours. What T2 did on 21 March 2005 was to give NC notice of suspension of the service. NC did not make full payment of the outstanding amount thereafter and therefore the suspension remained in effect and, eventually resulted in termination. If NC had paid promptly, as it should have done, the service would have been reinstated and cl 6.2 would have remained in effect. It cannot be right that NC having failed to meet its payment obligations can now rely on its own wrongful conduct to avoid its obligations under cl 6.2. As T2 submitted, interpreting cl 6.2 in the manner suggested by NC would lead to an absurd and unjust

result. I therefore find that NC is liable to pay T2 the said sum of US$657,894.75.

T2's other claims

77 T2 had two other claims. The first was a claim for US$3,827.92. This was the amount of T2's invoice dated 1 April 2005 for standard voice traffic utilised by NC under the 2nd Agreement during the period from 16 to 21 March 2005. NC had no specific defence to this claim and since its general defence, that of the settlement agreement, has failed, T2 is entitled to judgment for this claim.

78 Second, T2 claimed the return of US$18,000 from NC being a loan which NC had asked for through Dato Chee and which T2 had made to NC on 5 November 2004. NC did not raise any specific defence to this claim either and therefore T2 is entitled to recover the said sum.

Conclusion on T2's claims

79 For the reasons given above, I have found that T2 is entitled to recover the following sums:

(a) US$104,000 being unpaid invoices under the 1st Agreement;

(b) US$314,446.11 being unpaid invoices under the 2nd Agreement;

(c) US$657,894.75 being the Minimum Commitment due under the 2nd Agreement for the period from April to September 2005;

(d) US$3,827.92 being the value of VOIP services rendered between 16 and 21 March 2005; and

(e) US$18,000 being the loan made to NC.

The total amount due to T2, excluding interest, is therefore US$1,098,168.78.

NC's counterclaim

80 NC made a claim, in the alternative, for the return of the moneys paid for the purchase of equipment and the cash advances made. Its case was that it had advanced various sums to T2 amounting to RM431,690 in respect of the operations of T2 and amounting to RM455,701.12 in respect of the purchase of equipment. It was NC's evidence that if the moneys advanced to T2 were not held to amount to capital investment, then at the least, it would be entitled to the return of such sums. In court, KS Lim admitted that the then current value of NC's investments would be about RM400,000 in terms of equipment in T2. Further, in T2's audited accounts, as of 31 May 2004, the sum of S$308,601was recorded as "Non current liabilities" and "Amount due to directors" and the sum of S$241,660 was recorded as being "Represented by plant and equipment". KS Lim had confirmed that the directors of T2 had not given the company any loans. All these moneys therefore, NC submitted, were moneys from NC itself except, at the most, for the sum of S$15,000 which was the amount that KS Lim asserted he, Wang Wei and Eddie Lam had invested. Therefore, on KS Lim's evidence that sum that would be due to NC would be at least S$293,601 (*i.e.* $308,601 less the sum of S$15,000 that he and his friends put in). Further, KS Lim had admitted in his affidavit of evidence-in-chief that NC had received eight sums of money of varying amounts totalling RM1,034,465.12. This amount was not inconsistent with the sum of S$308,601.

81 T2 denied that KS Lim had made the admissions in the way alleged by NC. It also pointed out that NC's pleaded case was for amounts in ringgit and not for the sum of S$293,601. It contended that it was an assumption on the part of NC that the sum of S$308,601 reflected in T2's audited accounts was clearly money from NC. It also pointed out that Dato Chee's evidence on the loans was not consistent. At first he said that when T2 bought the equipment with the advances T2 was the owner of the equipment. Subsequently, he changed his mind and said that the equipment belonged to NC and no loans were recoverable. Counsel for T2 had asked Dato Chee several times whether NC had lent money which was repayable or advanced money as capital investment which was not payable. Dato Chee had finally agreed that these were advances for investment and no loans were recoverable.

82 NC's claim for repayment of moneys advanced to T2 was based on the assumption that the court found that these advances were not capital advances. I have found that NC made capital investments in T2 and it is difficult for me at this stage to distinguish between those sums of money that were sent for purposes of capital investment and those sums of money, if any, that were sent as loans that would be recoverable. It was unfortunate that NC did not adduce the evidence of its financial officer, Carmen Chia, who might have been able to cast some light on this matter. Additionally, NC's case on this alternative claim was undermined by Dato Chee's agreement that moneys had been sent as capital advances and not as loans. Certainly, there was no documentation before me to show that the advances were intended to be loans and intended to be recoverable as such. In the event, I am afraid that I am unable to grant NC judgment on its counterclaim or recognise a set-off in its favour.

Conclusion

83 In the result, there shall be judgment for T2 for the sums stated in [79] together with interest thereon at the rate applicable to judgments as follows:

(a) from 1 April 2005 in respect of the amounts due under sub-paras 78 (a), (b) and (d);

(b) from 8 October 2005 (being seven days after the end of the last billing period) in respect of the amount due under sub-para 78(c); and

(c) from the date of service of the writ in respect of the amount due under sub-para 78(e).

I will hear the parties on costs.

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