Max Media FZ LLC *v* Nimbus Media Pte Ltd
[2010] SGHC 30

Case Number : Suit No 804 of 2008

Decision Date : 26 January 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Fong Yeng Fatt Philip, Yang Ziliang and Sunil Nair(Harry Elias Partnership) for the plaintiff; Chandra Mohan s/o Rethnam, Mabelle Tay Jiahui and Chong Li Lian(Rajah & Tann LLP) for the defendant.

Parties : Max Media FZ LLC — Nimbus Media Pte Ltd

Contract

Damages

26 January 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 This is a claim by Max Media FZ LLC ("the plaintiff") for the return of money paid out under a bank guarantee ("the 1st BG") to Nimbus Media Pte Ltd ("the defendant"). The defendant resisted the claim on the ground that it was entitled to keep the money drawn under the 1st BG pursuant to the parties' agreement and counterclaimed against the plaintiff for damages arising from the plaintiff's breach of contract.

Background

The parties

2 The plaintiff is a sales and management agency operating in the Middle East incorporated in the United Arab Emirates. It deals in television advertising and broadcast sponsorship and is part of the Emirates Neon Group LLC of companies. The defendant is a Singapore incorporated company in the business of television programme production. Through an arrangement with Neo Sports Broadcast Pvt Ltd ("Neo Sports"), an Indian company that broadcasts all cricket matches played under the aegis of the Board of Control for Cricket in India ("the BCCI"), the defendant acquired the rights to exhibit advertising material during the transmission of cricket matches in Neo Sport's Middle Eastern television networks ("the advertising inventory").

3 The following are the key persons involved in the present dispute:

(a) The plaintiff's representatives – managing director, Muhammad Rehan Merchant ("Mr Merchant"); head of Strategic Business Planning from the Emirates Neon Group LLC, Akella Lakshminarayana ("Mr Akella"); and finance manager, George Thomas ("Mr Thomas").

(b) The defendant's representatives – chief financial officer, Shah Umeet Bharat ("Mr Shah");

the previous chief financial officer, Arvind Agrawal ("Mr Agrawal"); senior vice-president of International Sales & Syndication, Mr Vikram Das ("Mr Das"); and legal counsel, Mr Benedict Ball Laurence ("Mr Ball").

The Agreement

4 Sometime in April 2007, the defendant issued an Invitation To Tender ("the ITT") for the exclusive right to sell the advertising inventory it obtained pursuant to its arrangement with Neo Sports. The ITT covered both international and domestic cricket events. A schedule of specific international cricket events, the BCCI International Cricket Series, comprising 19 Test matches and 47 One Day International games that would be broadcast by Neo Sports up to 2010 was included. A "Minimum Guarantee" sum was attributable for each of these international events, although a pro rata addition or subtraction was applicable if any specific matches were added or taken off the schedule. Unlike the international events, no specific schedule was provided for the BCCI Domestic Cricket Series, although there was an "indicative listing of matches". For the domestic events, a "Minimum Guarantee" sum was attributable to each financial year from 2007 to 2010. The ITT also stated that Neo Sports would be acquiring more properties for distribution and provided an "Additional Matches Matrix" for the calculation of the "Minimum Guarantee" applicable to new events acquired by Neo Sports which were not in the original list.

5 The plaintiff won the bid and commenced negotiations over the terms of the contract. Subsequently, the parties entered into an Advertising Sales Agency agreement dated 18 April 2007 ("the Agreement") under which the plaintiff was appointed the exclusive sales agent for advertising inventory with respect to cricket matches broadcast by Neo Sports Pte Ltd in the Middle East region for a period of three years. In consideration, the defendant was promised the Minimum Guaranteed amount of US$6,675,000 (cl 6.1.1) and any "incremental Minimum Guarantee if applicable". The ITT was included as Annexure 3 of the Agreement. The specific event listing, the "Minimum Guarantee" amounts and the "Additional Matches Matrix" were also separately included as Annexure 4 to the Agreement. Separate timelines were stipulated for payment of international and domestic events (see cl 6.1.1 below). The Agreement also provided for pro rata increases or reductions in the Minimum Guaranteed amount should events be cancelled or added (see cl 6.2). The Agreement was governed by English law although it provided for Singapore as the forum. Other salient terms of the Agreement were as follows:

> 6.1.1…
>
> (a) In respect of payments for international Events (Tests and ODIs) payment shall be due within seventy five (75) days of issuing the invoices to clients. Invoices to the clients will be issued within 3 days from the date of receiving the Telecast Certificates from [the defendant];
>
> (b) In respect of domestic matches and other programming, payment shall be due in twelve (12) Equal Monthly Instalments over the course of that contract year as per the payment schedule set out in Annexure 4;
>
> (c) In respect of all remaining payments, including for new or additional events, and including additional payments after deduction of Commission, as set out in Annexure 4, payment shall be due in accordance with [the defendant]'s standard invoice terms and conditions, as per 6.1.1(a);
>
> …

6.1.2 To secure [the plaintiff's] obligations in respect of the Minimum Guaranteed amount, [the plaintiff] shall provide irrevocable and unconditional Bank guarantees [in accordance with cll 6.1.2.1, 6.1.2.2 and 6.1.2.3 of the Agreement].

6.1.2.1 [The plaintiff] shall deliver to [the defendant], Bank Guarantee for the aggregate attributable values for BCCI International cricket series and other programming on the channel as set out in Annexure 4 for the 1st contract year for USD2,475,000 (United States Dollars Two Million Four Hundred and Seventy Five Thousand) on or before 23rd April 2007. This bank guarantee will be valid for 1 year with the claim period thereafter of 3 months.

6.1.2.2 [The plaintiff] shall deliver to [the defendant], Bank Guarantee for the aggregate attributable values for BCCI International cricket series and other programming on the channel as set out in Annexure 4 for the 2nd contract year for USD2,050,000 (United States Dollars Two Million fifty thousand only) on or before 15th March 2008. This bank guarantee will be valid for the period 1st April 2008 to 31st march [sic] 2009 with the claim period thereafter of 3 months.

...

6.1.3 *Time is of the essence in relation to [the plaintiff's] payment obligations as hereunder*. The bank guarantee in force from time to time (as mentioned in bank guarantee with payment schedule attached to Annexure 4) may be drawn upon by [the defendant] in accordance with its terms to make up the full amount of each and every instalment of the Minimum Guaranteed amount due from [the plaintiff] to [the defendant] which is not paid by the due date for payment, in respect of that instalment. *[The defendant] shall be entitled to draw upon and retain the full amount of the bank guarantee in force from time to time in the event that [the plaintiff] misses three (3) payment dates over the entire contract period. In such event, [the defendant] may also terminate this Agreement forthwith upon written notice*.

...

6.3.4 Time is of the essence in relation to [the plaintiff]'s payment obligations hereunder.

...

9. **Termination**

9.1 [The defendant] will be entitled to terminate this Agreement forthwith in the event that [the plaintiff]:

9.1.1 is materially or persistently in breach of its obligations hereunder, non-exhaustive illustrations of which are failure to make any payment by the due date (constituting a material breach) or 3 late payments beyond 15 days from due date in the contract period (constituting a persistent breach) or

9.1.2 does not comply with any of its obligations hereunder and fails to remedy the defect(s) within 5 days following receipt of written notice from [the defendant] specifying in what respect it has failed to comply or

…

9.1.6 fails to provide a bank guarantee within the prescribed time;

…

[emphasis added]

6 I should add two things. First, the term "Telecast Certificates" was not defined within the Agreement nor was its format specified. This is significant because there was contention as to whether "stamped" Telecast Certificates, *ie*, Telecast Certificates containing the defendant's letterhead and stamp, were required (see below at [8]). Secondly, the draft version of cl 6.1.3 originally circulated to the plaintiff by the defendant did not contain the words "and retain"; they were included during the course of the negotiations over the terms by Mr Ball, the defendant's legal counsel.

The events leading to the present dispute

7 Pursuant to cl 6.1.2.1 of the Agreement, the plaintiff's parent company, Emirates Neon Group LLC, provided the defendant with bank guarantee PEB/GTY/0751888/B, *ie*, the 1st BG dated 25 April 2007 for the sum of US$2.5m to secure the plaintiff's payment obligations in respect of the first contract year. However, during the course of the first contract year, the plaintiff was either late or had not made payment at all for the following invoices:

S/No	Invoice	Due date	Actual payment date	Amount due
1	NMPL/2007/DIS/018	31 Oct 2007	16 Nov 2007	US$105,000
2	NMPL/2007/DIS/048	31 Jan 2008	5 Feb 2008	US$25,000
3	NMPL/2007/DIS/056	28 Feb 2008	25 Mar 2008	US$25,000
4	NMPL/2007/DIS/057	28 Feb 2008	25 Mar 2008	US$500,000
5	NMPL/2007/DIS/074 ("Invoice No 74")	31 Mar 2008	Partial payment on 13 April 2008; 24 April 2008; and 20 May 2008.	US$1,120,000
6	NMPL/2007/DIS/083	30 Apr 2008	Outstanding	US$25,000

8 Invoice No 74 was issued by the defendant on 13 December 2007 for the India *v* Pakistan event which was broadcast sometime in late 2007. As the defendant alleged was its practice, unstamped Telecast Certificates (*ie*, without the defendant's chop and stamp) for this event were issued to the Plaintiff soon after. The plaintiff encountered difficulty in collecting payment for this event and Mr Thomas explained to the defendant in an e-mail dated 5 January 2008 that the plaintiff did not have "complete Telecast Certificates" which he claimed would "affect the recovery [of payments]". Stamped Telecast Certificates were then provided to the plaintiff on 7 January 2008 and, by agreement, the plaintiff was given until 31 March 2008 to make payment for this event. [note: 1]

9 Notwithstanding this, no payment was made for Invoice No 74 on or before 31 March 2008.

Instead, partial payments were made throughout April and May 2008: US$136,072.94 on 13 April 2008; US$200,000 on 24 April 2008; and US$350,000 on 20 May 2008 (there was reference on the invoice itself to a credit note for US$280,000 issued on 12 April 2008 but this was with respect to the reduction of the originally invoiced sum of US$1.4m to US$1.12m).

10 Not all the events which were broadcast by Neo Sports were invoiced. In particular, the parties were in negotiations as to whether to waive the plaintiff's obligation to pay for the BCB Bangladesh *v* South Africa event, which Neo Sports broadcast beginning from 22 February 2008. Mr Das had informed the plaintiff of the addition of the event on 6 February 2008 but the plaintiff alleged that no advertising inventory could be sold for it because of the short notice. Mr Merchant, in an e-mail dated 12 February 2008, stated that:

> Yes contractually we are there to pick up series we get from NEO but not if such is the timeline to sell …
>
> Then we don't have to as this was not defined in the agreement – hence if we don't talk over it to sensibly agree on something – then we don't take it …

On 3 March 2008, the parties held a meeting. Mr Agrawal and Mr Das represented the defendant; the plaintiff was represented by, *inter alia*, Mr Merchant, Mr Akella and Mr Thomas. The minutes of that meeting recorded, in relation to the BCB Bangladesh *v* South Africa event, that:

> [The plaintiff] to send a note/letter to Mr Arvind for MG waiver for the current series as well as revaluation of all Bangladesh future series. [The Plaintiff] to provide realistic projections for the Bangladesh Calendar. And Arvind will present to Neo Board for approval.
>
> Review of all Matrix apart from "A" team cricket boards that are not realistic/saleable. [The plaintiff] to write separate letter to NEO for revision/delete same from the original contract. Neo to present this to its Board and if approved by Board the rebate will be passed to [the plaintiff].
>
> [emphasis in original]

However, the plaintiff did not send the requisite letter and the issue remained unresolved.

11 Separately, the plaintiff encountered problems in procuring the second bank guarantee ("the 2nd BG") by 15 March 2008, as it was obliged to do under cl 6.1.2.2 of the Agreement. Its bank, HSBC Bank Middle East Ltd ("HSBC"), was unwilling to issue the 2nd BG while the 1st BG was still extant. As a result, the plaintiff failed to provide the 2nd BG to the defendant on 15 March 2008. Negotiations were commenced to resolve the issue. Mr Agrawal suggested that the plaintiff request its bank to "increase the validity of the current Bank Guarantee and make it valid till 30th June 2009". Mr Thomas replied that the 2nd BG was being issued and that there would be a clause that the 2nd BG would be valid from the expiry date of the 1st BG. Mr Das, in an e-mail dated 27 March 2008, stated that (3AB.828):

> [w]e want you to reproduce the clause as per your mail on bank letter head and the clause should be irrevocable, this is to ensure that the understanding is same between all the parties involved and we are on the same page.

A few days later on 2 April 2008, HSBC issued a letter to the defendant ("HSBC's 2 April 2008 letter") that stated (3AB.837):

> This is with reference to the issuance of new Bank Guarantee in your favor [*sic*] for USD2,050,000/- as per Clause 6.1.2.2 of Advertising Sales Agency Agreement dated 18.04.2007, for the sale of Advertising Inventory on the Neo Sports Broadcast Pvt Ltd.
>
> As per the terms of agreement, the guarantee is to be valid from 1st April 2008. However, please note that since there is already a Bank Guarantee for USD2.5 Million in place for the above mentioned contract and which is expiring on 31st May, 2008, we will be able to provide the new Bank Guarantee for USD2.05 Million only after expiry of the earlier Guarantee having reference No. PEB/GTY/0751888/B.
>
> As such, [p]lease note our confirmation that the Bank Guarantee for USD 2.05m will be issued from 01st June 2008 valid till 31st May 2009.

However, on 10 April 2008, the defendant rejected HSBC's 2 April 2008 letter, stating that it was "not acceptable" because it "does not protects [*sic*] [the Defendant] in any manner".

12 On 18 April 2008, the defendant, through Mr Shah, sent an e-mail to the plaintiff informing it that it was in default of its contractual obligations:

> (a) to pay the sum of US$984,000 outstanding for the India *v* Pakistan Series (*ie*, Invoice No 74); and
>
> (b) to provide the 2nd BG on or before 15 March 2008.

The defendant reserved its rights with regard to the breaches, although it stated that it "[did] not wish to take any drastic measures at this moment in time". It requested the plaintiff to rectify the breaches by 24 April 2008.

13 Mr Akella, on behalf of the plaintiff, replied to the defendant on 21 April 2008 and promised to pay the defendant the outstanding sum for Invoice No 74 in three tranches: US$200,000 by 22 April 2008; US$350,000 by 12 May 2008; and US$434,000 by 31 May 2008. He assured the defendant that the 2nd BG would be issued by the first week of June 2008.

14 The correspondence continued on 25 April 2008, when Mr Shah acknowledged receipt of the first tranch of US$200,000 but rejected Mr Akella's proposed timelines for the other two tranches of payment and the provision of the 2nd BG. Instead, he counter-proposed that the plaintiff pay US$400,000 on or before 1 May 2008, and subsequently US$384,000 on or before 8 May 2008. He also suggested that the 2nd BG be issued and exchanged for the 1st BG in the presence of the plaintiff's bankers, although he qualified that this proposal was made on a without prejudice basis and subject to the ratification of the defendant's board of directors. In response, Mr Merchant asked Mr Shah on 28 April 2008 if the board of directors had ratified the proposal, although he did not comment on Mr Shah's proposed timelines for payment of Invoice No 74.

15 No payment was made on 1 May 2008. On 6 May 2008, Mr Merchant sent another e-mail to Mr Shah stating that the plaintiff would be "transferring a payment very soon". Mr Merchant reiterated that the defendant should not insist on the issuance of a 2nd BG that would overlap with the 1st BG. He also acknowledged that the defendant had not agreed to the proposal as set out in HSBC's 2 April 2008 letter.

16 On 14 May 2008, Mr Merchant sent Mr Das a text message stating that he was "signing off

cheques today and [S]aturday of all payments". On 20 May 2008, the defendant initiated the process of drawing down the 1st BG. On 26 May 2008, Mr Merchant again sent Mr Das a text message promising to transfer the moneys "by tomorrow dayafter [*sic*] …". This was not done and, on 30 May 2008, the defendant sent another default notice to the plaintiff, stating that the plaintiff was in breach of cll 9.1.1, 9.1.6 and 9.1.7 of the Agreement. It warned the plaintiff that failure to remedy the breaches within five days of the letter would entitle the defendant to terminate the Agreement. On 2 June 2008, Mr Merchant asked the defendant to withdraw its claim on the 1st BG and confirmed the plaintiff's intention to honour the Agreement.

17 On 4 June 2008, the defendant received US$2.5m from HSBC pursuant to its drawing on the 1st BG. On 5 June 2008, the defendant sent a notice informing the plaintiff that it was terminating the Agreement on the following grounds:

(a) under cl 9.1.6 for the plaintiff's failure to provide the 2nd BG by 15 March 2008;

(b) under cl 9.1.1 for the plaintiff's persistent breach due to there being at least three late payments beyond 15 days from the due date in the contract period; and

(c) under cl 6.1.3 for the plaintiff having missed at least three payments over the entire contract period.

The plaintiff was told to stop selling advertising inventory for the BCB Kitply Triseries event (otherwise known as the "Kitply Cup") which was broadcast from 8 June 2008 onwards. After terminating the Agreement, the defendant entered into another advertising contract with Integrated Advertising Services FZ LLC on 2 October 2008.

The issues

18 It is not disputed that the plaintiff owes at least US$700,378 to the defendant. The defendant, on its part, conceded that the plaintiff was entitled to the marketing expenses it had incurred in the course of selling the advertising inventory. The amount in dispute is confined to the plaintiff's liability for post-termination damages and payment for three items ("the 3 Uninvoiced Events") amounting to US$459,167 that were delivered but not invoiced by the defendant:

(a) the BCB Bangladesh *v* South Africa event, amounting to US$105,000;

(b) the Kitply Cup, amounting to US$325,000; and

(c) the BCCI Minimum Guarantee scheduled payment of US$29,167 for June 2008.

19 Since the consequence of the defendant's termination of the Agreement is that both parties are released from performing obligations which had not fallen due at the time of the termination, the plaintiff is still bound to make payments which had fallen due by 5 June 2008, but not for payments which would have fallen due after that date had the Agreement not been terminated. The defendant is, however, entitled to recover these future instalments as damages if the plaintiff's breach was repudiatory (see below at [29]). This distinction may be significant should I find that the defendant is *not* entitled to post-termination damages because it is unclear *when* payment fell due for the 3 Uninvoiced Events (if at all). In at least one case, the Kitply Cup, it is obvious that payment could not have fallen due by 5 June 2008 because the event was only broadcast after the termination of the Agreement.

20 For this reason, it is easier to examine the issues in this order: First, whether cl 6.1.3 is a penalty clause. Second, whether the defendant is entitled to post-termination damages. Third, whether the plaintiff is liable to pay for the 3 Uninvoiced Events.

21 I should point out that despite the Agreement providing that the governing law was to be English law, neither party submitted on this point and no evidence was led as to any difference between English law and Singapore law relevant to this case. Accordingly, I will proceed on the basis that there is none.

Whether cl 6.1.3 is a penalty clause

The parties' arguments

22 Mr Philip Fong ("Mr Fong"), counsel for the plaintiff, argued that the defendant in calling on and retaining the US$2.5m drawn under the 1st BG had unjustly enriched itself by the sum of US$1,799,622 in excess of the plaintiff's actual debt of US$700,378 owed to the defendant because cl 6.1.3 was a penalty clause and should be struck down. He submitted that:

(a) a proper construction of the second limb of cl 6.1.3 showed it was penal in nature as it sought to deter non-performance by the plaintiff;

(b) the defendant's pleadings and evidence revealed its utilisation of cl 6.1.3 in a "penal fashion"; and

(c) the factual matrix showed that the objective construction of the second limb of cl 6.1.3 was oppressive.

23 Not surprisingly, Mr Chandra Mohan ("Mr Mohan"), counsel for the defendant, argued that cl 6.1.3 was not a penalty clause but should be interpreted to mean that the defendant was entitled to retain the 1st BG to compensate it in respect of:

(a) the plaintiff's missed payments; and

(b) the losses suffered by the defendant as a result of the plaintiff's breach of the Agreement. [note: 2]

The predominant contractual function of cl 6.1.3 was "protective" rather than *in terrorem*. At the time the Agreement was entered into, the greatest conceivable loss for the first contract year flowing from a possible breach of the Agreement was US$2.8m. In comparison, the sum of US$2.5m provided for under the 1st BG was neither "extravagant and unconscionable" nor "greater than the sum which ought to have been paid", and there was no oppression given that both parties were legally advised and had negotiated at arm's length.

The applicable principles of law

24 As rightly pointed out by the defendant, ordinarily restitutionary principles are supplemental to the law of contract where the parties are in a contractual relationship: see *Lancore Services Ltd v Barclays Bank Plc* [2008] EWHC 1264 at [110] and also *Firstlink Energy Pte Ltd v Creanovate Pte Ltd and another action* [2007] 1 SLR(R) 1050 at [46]–[48]. The rationale behind this general rule is that the law of restitution should not redistribute the risks which the parties have, by contract, already allocated. In this case, the defendant drew and kept the full amount of the bank guarantee pursuant

to cl 6.1.3 of the Agreement. Nonetheless, one recognised exception where restitution may apply to a contract is where the consideration for the contract has failed. The relevant principle applicable here is this: where money has been paid out under a contract that is or becomes ineffective, the payer may recover the money if the consideration for the payment has totally failed; but this right of recovery only arises where there is *no* express or implied term in the contract making the payment irrecoverable: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 ("*Fibrosa*") at 67 *per* Lord Wright; Goff and Jones*, The Law of Restitution* (Sweet & Maxwell, 2007, 7th Ed) at pp 56–58. This failure of consideration is judged from the payer's point of view and refers (*ibid*, at 48):

> … not [to] the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.

The failure must be total because consideration is normally viewed as "whole and indivisible" and the court will not divide or apportion unless it is clear that the parties intended it to be so: *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93 at 100. Thus, *partial* failure of consideration would normally bar an unjust enrichment claim, unless the contract is divisible (*Fibrosa* at 77).

25 The law on penalty clauses was laid out in the seminal case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 ("*Dunlop*"), which was in turn endorsed by the Court of Appeal in *Beihai Zingong Property Development Co and another v Ng Choon Meng* [1999] 1 SLR(R) 527. Whether a clause is penal depends on the construction of the contract: a penalty clause is a payment *in terrorem* of the offending party, in contrast to a liquidated damages clause which is a genuine pre-estimate of the damages that may flow from a breach of contract. Lord Dunedin further elaborated on the principles to be applied when construing such a clause as follows (*Dunlop* at 87–88):

> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. …
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid …
>
> (c) There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage …
>
> (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that the pre-estimated damage was the true bargain between the parties …

The construction of cl 6.1.3

26 I am unable to agree with the plaintiff's case that cl 6.1.3 is a penal clause. First, the plaintiff took inconsistent positions. On the one hand, the plaintiff argued that, on an objective or proper construction of the second limb of cl 6.1.3, it was penal in nature; but on the other hand it argued that it understood cl 6.1.3 to mean that:

> … in the event the Plaintiff missed 3 payment dates and there were sums outstanding, the Defendant could draw down and retain the full amount of the BG until the actual sum outstanding was reconciled between parties, and the excess would be returned to the Plaintiff forthwith …
>
> [plaintiff's closing submissions at para 189]

This latter interpretation was substantially the same as the position adopted by the defendant, which was *not* seeking to retain any money over and above the payments which had fallen due and the post-termination damages which it had suffered as a result of the plaintiff's breach. Put another way, while an interpretation of cl 6.1.3 to the effect that the defendant was allowed to draw down and retain the *full amount* of US$2.5m without reduction for payments made by the plaintiff may or may not be penal in nature, this was not an interpretation adopted by the defendant and therefore not an interpretation I have to consider. Parenthetically, given the plaintiff's denial of liability for post-termination damages, its interpretation of cl 6.1.3 did not contemplate the money drawn under the 1st BG being applied to post-termination damages. However, if I were to decide that post-termination damages are payable, I do not think the plaintiff would have reason to object to the defendant being allowed to set off the balance of such moneys against post-termination damages. Hence, while it is true that the defendant's position on this issue was not entirely clear from its pleadings or at the start of the trial, the fact of the matter is that there is no longer any substantial divergence between the parties' understanding of cl 6.1.3.

27 Secondly, in any event, the sum of the bank guarantees for the three contract years represented the total amount of payments due to the defendant as *per* the schedule of events contained in Annex 4 of the Agreement. The maximum loss the defendant is potentially exposed to is not, as the plaintiff asserts, the sum of three missed payments; the defendant may be faced with the loss of more than three instalments over the entire contract period, and possibly also post-termination damages. Each bank guarantee in force under cl 6.1.3 would thus represent a genuine pre-estimate of the total loss that may befall the defendant.

28 Finally, I agree with the defendant that there is no suggestion of oppression here. I would add that I do not think there is much significance to the fact that Mr Ball had added the words "and retain" to cl 6.1.3. The plaintiff was legally advised when it entered into the Agreement and had the opportunity to review the document before binding itself to it. Thus, cl 6.1.3 is *not* a penalty clause, and the plaintiff cannot seek restitutionary relief since the Agreement had expressly provided for the retention by the defendant of the US$2.5m drawn under the 1st BG. The defendant is entitled to retain the payments due to it which had not been made, as well as damages (if any).

Whether the defendant is entitled to post-termination damages

29 Although there is no issue that the defendant had validly terminated the Agreement, the question now arises as to whether there was, under common law, a repudiatory breach by the plaintiff allowing the defendant to claim post-termination damages.

The parties' arguments

30 The gist of the defendant's counterclaim was this: The plaintiff's failure to pay amounts due to the defendant and/or to provide the 2nd BG either on time or at all were breaches that entitled the defendant to terminate the Agreement under common law. Therefore, the plaintiff was liable to the defendant for post-termination damages. This assertion was supported by the following factors. To begin with, the plaintiff had never disputed the defendant's termination of the Agreement nor had it pleaded that it was not in repudiatory breach of the Agreement. In any case, the construction of

the Agreement as a whole rendered both terms conditions of the Agreement, the breach of which would entitle the defendant to repudiate the Agreement under common law. From the language of the Agreement itself, time was expressly made of the essence in relation to both the plaintiff's payment obligation and the provision of the bank guarantee, and both terms gave rise to a right of termination under the Agreement. Additionally, the provision of the bank guarantees was fundamental to the Agreement because they secured the "very essence" of the Agreement and protected the defendant from being financially exposed to non-payment by the plaintiff. For this reason, the plaintiff's suggestion to provide the 2nd BG after the 1st BG had expired was contrary to the parties' express understanding that the bank guarantees were designed to overlap. With regard to the plaintiff's payment obligation, Mr Mohan submitted that the encashment of the 1st BG did not equate to "rectification of the breach" as the Agreement did not contemplate payment by way of a bank guarantee to be the same as payment by the plaintiff for the Minimum Guaranteed amount.

31 Mr Mohan argued that based on the English Court of Appeal decision in *Lombard North Central Plc v Butterworth* [1987] QB 527 ("*Lombard*"), the defendant was entitled to post-termination damages. He sought to distinguish an earlier English Court of Appeal decision in *Financings Ltd v Baldock* [1963] 2 QB 104 ("*Financings*") on the basis that the latter did not involve a repudiatory breach.

32 Although Mr Fong did not dispute that the Agreement was validly terminated, he submitted that the defendant was to blame for the plaintiff's non-payment because it had failed to provide proper Telecast Certificates. He argued that the mere phrase "time is of the essence", without more, was insufficient to transform an ordinary term into a condition. On that basis, he argued that the decision of *Lombard* should be distinguished from the present case. Further, the encashment of the 1st BG had rectified the plaintiff's non-payment within the stipulated time given in the defendant's second default notice of 20 May 2008. Mr Fong argued that those factors supported the plaintiff's position that it had never intended to repudiate the Agreement and there was in any case no substantial deprivation by the delayed payment. With regard to the provision of the 2nd BG, Mr Fong asserted that the plaintiff had made best efforts to procure the 2nd BG and these efforts should have been accepted by the defendant. There was also, he submitted, no substantial deprivation of the whole of the benefit of the Agreement as a result of the failure to provide the 2nd BG.

The law on damages for loss of bargain

33 It is by now well-established that a breach of contract will entitle the innocent party to terminate the contract where it falls within one of the four situations laid out in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*"). Briefly, the situations include:

(a) where the contractual term clearly and unambiguously states that the innocent party is entitled to terminate upon the occurrence of an event (Situation 1);

(b) where the party in breach by its words or conduct renounces the contract (Situation 2);

(c) where the term breached is a condition of the contract under the "condition-warranty approach" (Situation 3(a)); and

(d) where the breach of a term deprives the innocent party of substantially the whole benefit intended under the contract (Situation 3(b) or "the *Hongkong Fir* approach").

34 The focus in Situation 3(a) is on the nature of the term breached whereas the focus in

Situation 3(b) is on the nature and consequences of the breach. The Court of Appeal concluded in *RDC Concrete* at [106] that the approach in Situation 3(a) takes precedence over the approach in Situation 3(b) because the foremost consideration must be to give effect to the contracting parties' intention (see also Lord Wilberforce's speech in *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 at 726 ("*Bunge v Tradax*")). In *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 ("*Sports Connection*"), the Court of Appeal went further to explain that Situations 1 and 3(a) were substantially the same, only that Situation 1 was a more explicit way of characterising a situation that would otherwise fall within Situation 3(a).

35 This observation raises an interesting issue. Currently, where a contract is terminated pursuant to an express provision alone, *ie*, under Situation 1, damages for loss of bargain may be recoverable only if there is a concurrent repudiatory breach under common law: see Lord Nicholls' speech in *Lombard* ([31] *supra*) at 546 which was reaffirmed by the Court of Appeal in *Sports Connection* at [55] (see also *Tan Wee Fong v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2009] SGHC 290 (unreported) at [31]–[35]). On the other hand, without a repudiatory breach under common law, the innocent party may not claim for damages arising after the contract's termination (see generally *Financings*), although it will still be entitled to recover damages in respect of the loss it suffered at or before the date of termination. But if Situation 1 is substantially the same as Situation 3(a), then this bifurcated principle would make no sense. It is artificial to ask what is the nature of a term under common law where there is within the contract an express provision stating that the breach of that term would give the innocent party the right to terminate. This quandary was also recognised in Brian R Opeskin's article, "Damages for Breach of Contract Terminated under Express Terms" [1990] LQR 106 (Apr) 293.

36 The difficulty stems from the decision in *Lombard* ([31] *supra*), which caused some unease because it seemed to undermine the earlier decision in *Financings* ([31] *supra*), where Lord Denning expressed his hesitance at awarding damages for the loss of bargain when the consequences of the breach were actually very minor. The facts of the two cases best illustrate the artificiality of the bifurcated principle. In *Financings*, the defendant entered into a hire purchase contract for a truck, under which he was obliged to make a down-payment and several instalment payments. The contract provided that any failure to pay within ten days of the due date entitled the owner to terminate the hiring and call for a minimum payment equivalent to the remainder of the instalments. The defendant failed to meet two instalment payments and the contract was terminated. However, damages for the loss of bargain were held to be irrecoverable because the defendant's failure to pay only two instalments was not a wrongful repudiation or a breach of a condition. This was regarded as an eminently fair result because the defendant's non-payment was regarded as a very minor breach which could not possibly have entitled the plaintiff to claim for *all* the future instalments payable. The facts of *Lombard* were essentially the same with one key difference. The defendant entered into a hire-purchase contract for a computer, but time was stipulated to be "of the essence" in relation to the defendant's payment obligations. The defendant defaulted, and Lord Nicholls found, "with considerable dissatisfaction", that the drafting of the contract in *Lombard* meant the court had to regard the lateness of the payment as going to the root of the contract, thereby obliging the court to awarding damages for the loss of bargain even though there was no practical difference with the contract in *Financings*. The plaintiff had succeeded in terminating and claiming damages for the loss of the whole bargain for what was, in the court's opinion at least, an inconsequential breach.

37 Professor G H Trietel suggests, in his case comment on *Lombard*, "Damages on Rescission for Breach of Contract" [1987] 2 LMCLQ 143 at pp 144–145, that a distinction should be drawn between terms which are classified by law as conditions because of the likelihood that the breach will cause serious prejudice to the injured party; and terms expressly classified by the parties to be conditions which may not have such a tendency. The concern raised by Lord Nicholls in *Lombard* could be avoided by awarding damages for loss of bargain only for breaches falling under the first limb.

However, Prof Trietel's suggestion has yet to be adopted by the English courts.

38 As it stands, therefore, the law permits the recovery of post-termination damages simply on the basis that the parties have classified the term in question as a condition, regardless of the nature or consequences of the breach. Here, the issue really is whether the term breached fell within either Situation 3(a) the condition-warranty approach, or Situation 3(b), *ie*, the *Hongkong Fir* approach. Under the condition-warranty approach, the court's function is to determine the nature of the term. As was emphasised by the Court of Appeal in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*"), there is no magic formula enabling a court to determine if a contractual term is a condition. The focus must be on (see [161]):

> … *ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole* … [emphasis in original]

Factors which could assist the court include: (a) statutory provisions; (b) the express classification by the parties; (c) prior precedents; (d) the nature of the transaction.

39 Interestingly, the Court of Appeal in *Man Financial* read *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 ("*Schuler*") – a case normally cited for the proposition that the express language of a contractual term may not be determinative of its nature – as being consistent with the *Hongkong Fir* approach/Situation 3(b) of *RDC Concrete* ([33] *supra*). Following *RDC Concrete*, the Court of Appeal took the view that the intention of the parties (pursuant to the condition-warranty approach) ought to take precedence, a view which it considered was shared by the decisions of the House of Lords after *Schuler*, such as *Bunge v Tradax* ([34] *supra*). Thus, if it is clear from the express language of a particular contractual provision that it is meant to be a condition, then the court must give effect to the contracting parties' intention in so classifying that particular term.

Whether there was a repudiatory breach under common law

40 The relevant clauses are cl 6.1.1, governing the instalment payments, and cl 6.1.2.2, governing the provision of the 2nd BG. Both these provisions are governed by the stipulation that "time is of the essence" in cll 6.1.3 and 6.3.4. As discussed in the preceding paragraph, the courts must give effect to the parties' intention, and if the parties agree that a particular contractual term is a condition, then that is the interpretation that must be given to that provision. Viewed in isolation, punctual payment will ordinarily not be regarded as a condition of the contract: see for example, *Financings* ([31] *supra*) and more recently, *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602. However, the courts have consistently interpreted stipulations that "time is of the essence" to mean that parties have agreed that a failure by one party to perform within the stipulated time would entitle the other party to terminate the contract: *Lombard* ([31] *supra*); *Steedman v Drinkle* [1916] 1 AC 275. It is not an unfamiliar term to lawyers. The applicability of this precedent is not entirely without difficulty and there may be an element of surprise where it is applied to obligations to pay in consumer contracts: see Edwin Peel, *Treitel, The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at paras 18-069 and 18-090 where the author discusses *Lombard* in some detail. However, where both parties are commercial entities, having had the benefit of legal advice and the opportunity to negotiate before entering into a contract, then clearly the compelling interpretation is that the *nature* of both cll 6.1.1 and 6.1.2.2 are conditions, pursuant to the condition-warranty approach.

41 Even looking at the *consequences* of the breach, *ie*, the *Hongkong Fir* approach, the plaintiff

was also in repudiatory breach. Despite multiple extensions of time granted by the defendant for the 31 March 2008 deadline (which took into account the fact that new Telecast Certificates were issued, see above at [8]), the plaintiff failed to make payment for Invoice No 74 and had previously been late in making payment for several other invoices (see above at [7]). Further, the plaintiff did not challenge the defendant's drawing upon the 1st BG, which was an admission that it had missed three payment dates over the entire contract period.

42 The encashment of the 1st BG does not amount to a rectification of the breach. First, this is contrary to cl 6.1.3 – any rectification must have been for the purpose of avoiding the termination of the Agreement. Since the drawing of a bank guarantee was in itself a ground for termination, it could not at the same time operate as a means of rectifying the plaintiff's misconduct. Secondly, even if it absolved the plaintiff from liability for instalments it had yet to pay, the encashment did nothing towards curing the failure to provide the 2nd BG. Lastly, the encashment was not a means of rectification in the contemplation of the parties. When the second default notice was sent on 30 May 2008, the plaintiff was aware that the defendant had initiated the process of encashing the 1st BG and that payment by HSBC to the defendant was imminent. The second default notice should be interpreted in this context. Rectification could not have been by way of the defendant's receipt of money pursuant to the 1st BG since both parties knew the encashment process was already under way. There would have been no need to send the second default notice asking for rectification if indeed encashment was the remedy sought by the defendant.

43 Independently, the requirement for the provision of the 2nd BG also appears to me to be in the nature of a condition. The purpose of the bank guarantee is to provide the defendant security against financial exposure. It is fair to say that the Agreement may not have been entered into if there had not been adequate protection for the defendant against such risk. The Agreement expressly and unambiguously provided for the terms and duration of each bank guarantee. The plaintiff's argument that it was taken by surprise by HSBC's unwillingness to provide overlapping bank guarantees is patently unsupportable. Likewise, I find difficulty in understanding the plaintiff's suggestion that the overlap in bank guarantees was not foreseeable or that such a fact should have been highlighted to it. Both parties were legally advised and the plaintiff had ample time to review the terms of the Agreement. Whatever the commercial considerations behind the parties' eventual decision to structure the provision relating to the bank guarantees as such, I do not think that the plaintiff could turn and say that it was surprised when the nature of its obligations were fully contained within the contractual provisions. It goes without saying that it is incumbent on the plaintiff to meet its obligations and any hurdles which it cannot surmount in the process would be no excuse to its non-performance (unless, of course, the circumstances allow it to plead one of the legally recognised exceptions, such as frustration).

44 As shown by the correspondence on record, the parties had nearly, but not quite, reached an agreement to allow the plaintiff to provide the 2nd BG on 1 June 2008, immediately after the expiry of the 1st BG on 31 May 2008. Unfortunately for the plaintiff, the proposal from HSBC contained in its letter of 2 April 2008 (see above at [11]) was ultimately rejected by the defendant on 10 April 2008. The plaintiff asserted that it had, in substance if not in form, complied with the defendant's offer to restructure the provision of the bank guarantees. However, Mr Shah himself had acknowledged that no agreement was reached for the provision of the 2nd BG and that he was attempting to reach a compromise on the issue right up till the eventual termination of the Agreement.

45 I should add for good measure that it does not matter if the plaintiff always had an intention to make payments or to provide the 2nd BG. The Agreement called for performance and the plaintiff's continued failure to do so leads me to the conclusion that it had committed a repudiatory breach of the Agreement under common law, whether looking at the nature of the term or the severity of the

breach, entitling the defendant to damages for the loss of bargain.

Whether the plaintiff was obliged to pay for the 3 Uninvoiced Events

46 Since I have determined that the plaintiff's breach was repudiatory and that the defendant is entitled to post-termination damages, it is not strictly necessary to consider whether the plaintiff was obliged to pay for the 3 Uninvoiced Events. Nevertheless, in view of the lengthy arguments advanced by both parties, I shall deal with this issue. Before addressing the bulk of the parties' arguments, it should be noted that while Mr Fong in his submissions suggested that payment could not be due unless an invoice was issued, Mr Merchant had already admitted, during cross-examination, that there was no requirement for the defendant to issue an invoice to the plaintiff to "activate the payments".

The parties' arguments

47 Mr Fong made the following arguments in support of his contention that the defendant was not entitled to payment for the 3 Uninvoiced Events. With respect to the BCB Bangladesh *v* South Africa event, no advertising inventory was sold by the plaintiff and no Telecast Certificates were issued to the plaintiff; there was no consideration provided and therefore the plaintiff's payment obligation did not arise. The parties:

> … had for all purposes agreed to waive the entire [Minimum Guaranteed] amount for this event, as evinced in the meetings of the 3 March 2008 meeting.
>
> [plaintiff's closing submissions at para 273]

It was further admitted that:

> … the Defendant's representatives at the meeting did not have sufficient power to bind the Defendant without obtaining formal board approval …
>
> [plaintiff's closing submissions at para 274]

although Mr Fong contended that this requirement could not be established without Mr Das's evidence. With respect to the BCB Kitply Triseries event, Mr Fong submitted that the cricket matches took place *after* termination, Telecast Certificates were not provided, and the plaintiff was not allowed to sell advertising inventory after the defendant terminated the Agreement. Mr Fong went further to assert that many pre-termination bookings by the plaintiff's clients were cancelled as news of the defendant's termination was leaked. [note: 3] This was based on Mr Merchant's testimony during cross-examination that bookings for advertising inventory would normally be made all the way through to the last few days of an event and that the news was out in the market that the defendant was terminating the Agreement. However, this explanation appeared to be an after-thought made only during cross-examination and was not included in any of Mr Merchant's affidavits. Finally, with respect to the BCCI Minimum Guaranteed sum for June 2008, Mr Fong argued that no consideration was given to the plaintiff for this payment.

48 Mr Mohan maintained that the plaintiff was liable for payment for the 3 Uninvoiced Events. Generally, he argued that there was no failure of consideration for any of the 3 Uninvoiced Events since:

> (a) there was no dispute that the plaintiff's payment obligations arose irrespective of whether the defendant had issued an invoice to the plaintiff;

(b) the events were broadcast; and

(c) the advertising inventory was aired.

With respect to the BCB Bangladesh *v* South Africa event, Mr Mohan submitted that there was no minimum notice period to sell advertising inventory for each event and Mr Merchant had admitted to the fact that the plaintiff had requested a waiver of payment for this event pre-supposed that it was under an obligation to pay. In any case, the meeting of 3 March 2008 did not amount to a waiver, the minutes of the meeting explicitly stated that such waiver would only be considered by the defendant upon receipt of the plaintiff's written request and the plaintiff had conceded that such a written request was never made. Further, it was illogical for the plaintiff to insist on a blank Telecast Certificate since it did not sell any advertising inventory for this event and would not be collecting any money from its clients. With respect to the BCB Kitply Triseries event, Mr Mohan submitted that the plaintiff had failed to plead that it was not given the full benefit of the event and that it was entirely unconscionable for the defendant to seek payment of the full Minimum Guaranteed amount. The plaintiff had also failed to adduce evidence that its existing bookings were affected by the termination of the Agreement or that it had difficulty in collecting payment due to the lack of proper Telecast Certificates. In fact, it continued to send cue sheets to the defendant via e-mail from 7 to 10 June 2008, although the Agreement was terminated on 5 June 2008.

BCB Kitply Triseries / The Kitply Cup (US$325,000)

49 The Kitply Cup took place from 8 to 14 June 2008, *after* the plaintiff had sent its Letter of Termination on 5 June 2008. The Letter of Termination specified that the plaintiff was not allowed to sell advertising inventory for the Kitply Cup post-termination and only bookings made before termination would be honoured by Nimbus. Since the plaintiff had, in fact, an opportunity to sell some of the advertising inventory for this event, it would not be open to it to claim there was a total failure of consideration. As pointed out by the defendant, the plaintiff had not adduced evidence aside from Mr Merchant's testimony given at the very late stage of cross-examination that its clients had rescinded their purchases of advertising inventory upon learning that the defendant intended to terminate the Agreement. No documents were provided for this assertion. While the defendant had forbidden the plaintiff from continuing to sell advertising inventory for the Kitply Cup, it is not clear at all from the evidence that the plaintiff had actually ceased selling advertising inventory. In any event, at the very most there may have been a partial failure of consideration.

50 Another argument raised by Mr Fong was the defendant's alleged failure to provide proper Telecast Certificates (only unstamped Telecast Certificates were provided by the defendant). As with the India *v* Pakistan series, the plaintiff requested for Telecast Certificates "in the proper form", *ie*, stamped Telecast Certificates. During cross-examination, Mr Ball confirmed that the defendant had, to date, not responded to such a request. I do not think this was fatal to the defendant's claim. At trial, Mr Thomas testified that the industry practice within the Middle East was to provide stamped Telecast Certificates and Neo Sports was aware of this practice. However, aside from Mr Thomas's testimony, no evidence of such industry practice was provided. The only occasion on which stamped Telecast Certificates were evidently provided was the India *v* Pakistan series (*ie*, Invoice No 74), and that was upon Mr Thomas's request. That request could be seen as a complaint that the defendant had acted contrary to the established practice between the parties, *ie*, by providing Telecast Certificates in "improper" form, or it might simply reflect an *ad hoc* arrangement for the particular event. There is no evidence either way and it would be a stretch to find that the defendant had acted contrary to the established practice based on the language of Mr Thomas's request alone. What is clear is that the Agreement itself did not provide for a fixed format and, aside from Invoice No 74, there was no prior record of a request for a stamped Telecast Certificate.

51 Hence, it is not clear to me that the plaintiff's obligation to make payment only arose upon the defendant's provision of a stamped Telecast Certificate. Nothing in the express language of the Agreement or the circumstances surrounding how the Agreement was actually carried out pointed to this conclusion. Previous invoices had been met without the plaintiff insisting on stamping the Telecast Certificates. Notably, even after the plaintiff's difficulty in collecting payment for Invoice No 74, there was no variation to the Agreement to make clear what form the Telecast Certificate should take. The plaintiff cannot now rely on the absence of stamping of the Telecast Certificates to evade its payment obligations.

52 Both parties have adopted an "all or nothing" approach. The defendant concentrated on the fact that the plaintiff had actually sold advertising inventory for the event, even adducing cue sheets submitted after 5 June 2008, without regard to the fact that it had forbidden the plaintiff to make further sales after termination of the Agreement. The plaintiff, on the other hand, insisted it was not liable to make *any* payment for the Kitply Cup at all; it did not admit that it had the opportunity to and did in fact sell some advertising inventory for this event. It also did not seek to challenge the applicability of the 1st BG with respect to the payment for the Kitply Cup. The plaintiff has not shown that there was a total failure of consideration. It had been given the opportunity to sell the advertising inventory and the advertisements were in fact aired; there is no room for the plaintiff to assert that it had been denied the bargain it had entered into; at best there was a partial failure of consideration. The partial failure of consideration would not have entitled the plaintiff to deny the defendant payment for the particular event. On the other hand, it would be unjust for the defendant to insist upon strict performance of the Agreement after having forbidden the plaintiff from selling advertising inventory after termination. A fair solution which I might have been tempted to attempt was an apportionment. Fortunately, on the view that I have taken, namely, that the plaintiff is liable for post-termination damages, it is not necessary for me to embark on this exercise. As alluded to earlier at [19] and [26] above, even if strictly speaking the defendant may not bring a claim for the Kitply Cup as such, the money received under the 1st BG could be applied towards post-termination damages (including what would have been received under the Kitply Cup). In the circumstances, I find on balance that the better view is that the defendant is entitled to the payment for the Kitply Cup.

BCB Bangladesh v South Africa (US$105,000)

53 The Agreement clearly contemplates the inclusion of additional cricket events to the existing schedule provided in Annexure 2. Although cl 6.2 provided that a pro rata adjustment of the Minimum Guaranteed amount payable would be made upon the addition or reduction of cricket matches broadcast by Neo Sports, there was no provision stipulating a minimum notice period prior to the additional event in order for the plaintiff to sell advertising inventory, nor was the plaintiff given the option to reject the opportunity to sell the extra advertising inventory from additions to the schedule. Here, a distinction may be made with cl 4.1 which stipulated that the plaintiff had to give BCCI sponsors an exclusive two-week negotiating period for the purchase of exclusive commercial airtime packages and/or broadcast sponsorship, provided the defendant gave notice prior to the event in question (although the actual time-frame for notification was ambiguous). As drafted, the Agreement would arguably allow Neo Sports to add a new event to the original schedule at the very last minute and still collect payment from the plaintiff pursuant to cl 6.2. This situation may not have been within the contemplation of parties when they entered into the Agreement, since the plaintiff could receive no tangible benefit if it was not given an opportunity to sell advertising inventory. From his e-mail on 12 February 2008, Mr Merchant also seemed to be of two minds as to whether the plaintiff was obliged to pay.

54 However, there was in any case consideration provided for this particular event. The plaintiff was given some time, from the notification by Mr Das on 6 February 2008 till the actual broadcast

beginning on 22 February 2008, to sell the advertising inventory to its clients. The plaintiff had not shown that it had been completely denied the opportunity to sell *any* advertising inventory to its clients but was billed under cl 6.2 nevertheless. (In that case there might conceivably be at least a partial failure of consideration.) Beyond Mr Fong's assertion that in this case there was no possibility of selling the advertising inventory, there is no evidence as to how long a period of time was sufficient or reasonable for such sales to be conducted. It may well be that the two weeks provided by Mr Das would ordinarily be sufficient for the sale of advertising inventory to be concluded, but that for some other reason it could not be done in this instance.

55 Contrary to Mr Fong's submissions, I do not think there was any serious dispute that Mr Das lacked the authority to bind the defendant to the alleged waiver. The minutes clearly recorded that the defendant was not bound until formal board approval was given for a waiver, and I do not think the plaintiff can seriously argue that the minutes were falsified or that the defendant had been bound by the representations of Mr Das. Accordingly, there was no agreement between the parties to waive the payment for the Bangladesh *v* South Africa event and the plaintiff must be held to its contractual obligations under cl 6.2.

BCCI – Minimum Guarantee for June 2008 (US$29,167)

56 The BCCI Minimum Guaranteed amount for June 2008 was part of the scheduled payments, spread over the entire contract year, for the domestic cricket matches broadcast by Neo Sports. The plaintiff submitted that because no advertising inventory was sold by the plaintiff for June 2008, there was no consideration for this payment. In my view, this was not tenable. Consideration for the payments cannot be separated according to each monthly instalment because this was not how the Agreement was structured. Unlike the international events where a certain Minimum Guaranteed sum was attributed to each individual event and payment was dependent on the broadcast of the event in question; there was no breakdown of the cost of each domestic series: domestic cricket matches were not evenly spread over the contract year. Payment for the domestic series, however, was to be made in equal monthly instalments over the contract year (as can be seen from Annexure 4 of the Agreement). Therefore each monthly instalment payment did not necessarily correspond to a particular domestic series. Even if the plaintiff was deprived of the opportunity to sell advertising inventory for the domestic series broadcast after the defendant's termination of the Agreement, it was difficult to imagine there being a total failure of consideration given that the payment due in June 2008 could not be said to have arisen from any one particular domestic series. The June 2008 payment was only part of a series of payments promised in exchange for the right to sell advertising inventory for *all* the domestic cricket events for that contract year. The plaintiff is not absolved of its responsibility to make payment.

57 Neither party addressed the question when in June 2008 the payment was to be made. If it was after termination on 5 June 2008, the plaintiff would not have been required to make such payment since termination of the Agreement released both parties from further performance of the Agreement (but without prejudice to rights arising by reason of the repudiatory breach). However, this is not an argument I have to consider because of the view that I have taken that post-termination damages are payable.

Conclusion

58 In the result, the plaintiff's claim is dismissed and the defendant's counterclaim is allowed in each case with costs. The plaintiff failed to establish that cl 6.1.3 should be struck down as a penalty. There is therefore no room for it to claim unjust enrichment. Its breach of the Agreement was repudiatory whether under the express stipulations or under common law and, as a result, the

defendant is entitled to claim post-termination damages. The damages are to be assessed by the registrar. The amount drawn under the 1st BG is to be applied not only to default payments but to the damages assessed.

[note: 1] Mr Das wrote an email on 18 April 2008 to Mr Shah explaining that "due to late TVR certificate delivery to them", the payment obligation only arose on 22 March 2008, although this was amended to 31 March 2008 by agreement: see 3AB.882.

[note: 2] It argued that Mr Merchant had in fact adopted that position during his cross-examination: see 4NOE pp 40–41.

[note: 3] Plaintiff's closing submissions at para 279, citing 4NOE p 5, lines 22–27.

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