Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd
[2006] SGHC 53

Case Number : Suit 770/2004

Decision Date : 24 March 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Arthur Quay and Jamilah bte Ibrahim (Dominion LLC) for the plaintiff; Thio Shen Yi, Adrian Tan and Angela Thiang (TSMP Law Corporation) for the defendant

Parties : Van Der Horst Engineering Pte Ltd — Rotol Singapore Ltd

Contract – Breach – Subscription and option agreement – Warranty that defendant's accounts giving true and fair view of defendant's financial position – Whether defendant's failure to disclose defaults by judgment creditor and guarantor of judgment creditor amounting to breach of the agreement

Contract – Breach – Subscription and option agreement – Warranty that no "threatened litigation" against defendant which might have adverse effect on defendant's financial position – Whether claims made by and against defendant's subsidiary amounting to "threatened litigation" – Whether defendant's failure to disclose claims amounting to breach of agreement

Damages – Measure of damages – Contract – Whether damages for breach of contract may include wasted pre-contract expenditure

24 March 2006

Andrew Ang J:

1 This suit concerns disputes arising out of a subscription and option agreement dated 30 April 2004 ("the SOA") between the plaintiff, Van Der Horst Engineering Pte Ltd ("VDH"), and the defendant in the original action, Rotol Singapore Ltd ("Rotol").

2 Under the SOA, VDH agreed, subject to the terms thereof, to subscribe for 110m new shares in Rotol at 11.5¢ per share. The same agreement included a call option granted by Rotol to VDH to subscribe for another 110m new shares at the same subscription price of 11.5¢. The subscription for the aggregate 220m shares would give VDH a controlling interest in Rotol.

3 The second defendant to the counterclaim, Kwan Chee Seng ("Kwan"), was a director of VDH and, under the SOA, gave a guarantee to Rotol for VDH's performance of the SOA.

4 Pursuant to the terms of the SOA, VDH paid a sum of $100,000 to Rotol as earnest money when the SOA was executed. After the execution of the SOA, VDH learnt certain information (mentioned below) concerning Rotol from which it concluded that Rotol had breached certain warranties and undertakings given under cll 7 and 8 respectively of the SOA. After unsuccessful negotiations between the parties, VDH terminated the SOA and sought, *inter alia*, the refund of the earnest money, as well as special and general damages.

5 The relevant parts of cll 7 and 8 of the SOA provide as follows:

> 7 REPRESENTATIONS AND WARRANTIES OF THE COMPANY
>
> 7.1 The Company hereby warrants to the Subscriber and acknowledges that the Subscriber has entered into this Agreement in reliance on such warranties that as of the date of this

Agreement and up to the Placement Shares Completion Date (save as disclosed to the Subscriber prior to the date of this Agreement or in the Accounts or in information which is publicly available):-

(a) …

(b) …

(c) …

(d) …

(e) the Accounts give a true and fair view of the financial position of the Company and the Group for the period ended on and as at the Accounts Date;

(f) so far as the Company is aware having made enquiries, no litigation against or by the Company or any of its subsidiaries is in progress, pending or threatened, which individually has or collectively have a material adverse effect on the financial position of the Company or the Group taken as a whole;

(g) …

(h) all publicly available information which had up to the time of signing this Agreement been disseminated by the Company (including without limitation all announcements and publications appearing on MASNET or the SGX-ST website pertaining to the Company) are true and correct in all material respects and the Company, having made enquiries, is not aware of any matter, fact or circumstance which would lead to any such information to be untrue or inaccurate or misleading.

7.2 The Company undertakes to indemnify the Subscriber against any losses, liabilities, costs, claims, actions, damages, expenses or demands which the Subscriber may incur, or which may be made against the Subscriber, as a result of or in relation to any actual misrepresentation of a material nature in, or actual breach in any material respect of, any of the Company's representations or warranties.

7.3 Upon:-

(a) breach in any material respect of any of the Company's representations or warranties coming to the notice of the Subscriber before the Placement Shares Completion Date or an Option Shares Completion Date (as the case may be); or

(b) breach in any material respect by the Company of any undertaking or failure to observe any condition; or

(c) …

the Subscriber shall, in addition to any other remedy available to the Subscriber, be entitled (but not bound) by written notice to the Company to elect to treat such breach as releasing and discharging the Subscriber from its obligations (including, without limitation, to complete any subscription of the Placement Shares or of any Option Shares) under this Agreement, and upon such election the Earnest Money (if not already applied towards the payment for the Placement Shares pursuant to the Placement Shares Completion) shall be fully refunded

to the Subscriber, without any deduction or withholding whatsoever.

8 THE COMPANY'S UNDERTAKINGS

8.1 The Company hereby acknowledges that the Subscriber has the intention to participate in the management of the Company and undertakes to each of the Subscriber and to the Guarantor that:-

(a) …

(b) …

(c) until the earlier of the date the Placement Shares Completion has been effected and the Long-Stop Date, the Company will not and will procure that each of its subsidiaries will not (except, in each case, with the prior written consent of the Guarantor):-

(i) dispose of any of its respective tangible or intangible asset, other than at its full value and in the ordinary course of business; or

(ii) …

(iii) …

(d) the Company will not take any steps or actions which is inconsistent with, or otherwise will have an adverse effect on, the interest of the Shareholders and the Company;

(e) …

(f) …

(g) the Company will not, as from the date of this Agreement up to the date of appointment of the Subscriber's Nominees Directors on the board of directors of the Company, enter into any agreement or arrangement with any of its bankers for the prepayment of any of the facilities granted by such bankers to the Group otherwise than any payment or prepayment which is in accordance with or required by such bankers pursuant to any existing arrangements or contractual obligations subsisting as at the date of this Agreement.

6 VDH cited five instances in which Rotol had allegedly breached the SOA. They are as follows:

(a) failure to disclose a claim by Rotol's subsidiary, Aluminium & Technologies (Altech) Pte Ltd ("Altech"), against Inbuilt Engineering Pte Ltd ("Inbuilt"), and one by the latter against the former;

(b) failure to disclose a claim by BP Singapore Pte Ltd ("BP") against Rotol;

(c) failure to disclose Rotol's claims against Dex Building Products Pte Ltd ("Dex") and Lim Teck Seng ("Lim");

(d) sale of Jiaxing property in Zhejiang, People's Republic of China ("the Jiaxing property"); and

(e) repayment of loan taken from Oversea-Chinese Banking Corporation Ltd ("OCBC").

7 Rotol's defence was as follows:

(a) there was no breach of the SOA in any of the five instances, either individually or collectively;

(b) even if there was a breach, such breach did not entitle VDH to terminate the SOA as it was not material; and

(c) even if the breach(es) entitled VDH to terminate the SOA, VDH was precluded from doing so as they had elected to affirm the contract. This third contention was abandoned at the closing of Rotol's case for lack of evidence.

8 Rotol therefore counterclaimed against VDH and Kwan (as guarantor) for damages for wrongful repudiation of the SOA.

9 I gave oral judgment in favour of VDH and dismissed Rotol's counterclaim, together with costs in each such action. I now give my reasons for doing so.

The Altech/Inbuilt claims

10 On 4 May 2004 (four days after the SOA was signed by the parties), Altech, a subsidiary of Rotol, issued a statutory demand against Inbuilt claiming a sum of $447,773.07 for works done. In turn, Inbuilt filed a writ of summons against Altech for breach of contract claiming an amount of $504,465.

11 VDH alleged that prior to the signing of the SOA, Rotol was aware that there was a dispute with Inbuilt over the sum claimed by Altech. VDH contended that it was reasonably foreseeable that the dispute would end up in court (which it did after the SOA was executed).

12 VDH first came to know of Altech's claim against Inbuilt and the latter's suit against Altech only on 15 June 2004 when VDH received a draft of a circular which was to be sent out by Rotol to its shareholders.

13 On the basis of evidence given by Rotol's witnesses themselves, I was of the view that in March 2004 it was already clear that Altech's claim of $447,773.07 was going to be disputed by Inbuilt who had offered to pay only $200,000. Tan Khee Bak ("Tan"), Rotol's managing director, knew of the dispute then. Tan admitted in cross-examination that, in the circumstances, it was reasonable to expect that Inbuilt would dispute Altech's statutory demand. He also admitted that it was an oversight on his part not to have disclosed this information to VDH. Finally, he also admitted that there had been delay on Altech's part in the installation works done for Inbuilt and that there was merit in Inbuilt's claim.

14 Inbuilt subsequently withdrew its suit and a settlement was reached whereunder Altech accepted a reduced aggregate sum of $273,419.54. This was approximately $174,000 less than what was earlier demanded by Altech.

15 The question was whether Rotol's failure to disclose the claims was a breach of cl 7.1(f) of the SOA. This in turn raised two issues in the construction of that clause. They are:

(a) whether Altech's claim against Inbuilt and/or the latter's claim against Altech qualified as "litigation … pending or threatened"; and

(b) whether individually or together with other such litigation it/they had a "material adverse effect on the financial position of [Rotol] or [the group comprising Rotol and its subsidiaries] taken as a whole".

16 As regards the first issue, counsel for Rotol contended that neither Altech's claim nor Inbuilt's claim qualified as "pending or threatened" litigation. Whilst I agree that for litigation to be "pending" an originating process must have been issued and possibly served on Rotol (see *Arab Monetary Fund v Hashim (No 4)* [1992] 1 WLR 1176), I do not accept his contention that "threatened" litigation must necessarily go beyond the making of a formal demand and must be more than a claim.

17 To me, "threatened litigation" is litigation of the approach of which there was, at the material time, some sign or indication. As counsel for Rotol conceded, such sign or indication need not be an actual utterance, written or verbal, of an intention to sue. It suffices if, objectively speaking, the facts and circumstances were such that it was reasonable to conclude that litigation might ensue.

18 The meaning to be ascribed to "threatened" litigation must also be considered in the context of the overall scheme of the SOA. Under the SOA, VDH had undertaken to subscribe for shares in Rotol after only limited "due diligence". Amongst the safeguards which VDH secured for itself were Rotol's representations and warranties as to the state of health of Rotol and, in particular, its financial well-being. The intention was that if at any time prior to the date fixed for completion of the shares placement, any representation or warranty was found to be incorrect, VDH could, by written notice in that behalf, elect to be released from its undertaking to subscribe for the shares without prejudice to any other remedy available to it.

19 However, apart from other exclusion provisions, VDH would have no such right of exit if, prior to the date of the SOA, Rotol had disclosed to VDH sufficient information to forestall any allegation of breach of representation or warranty.

20 On the facts, I have no difficulty in finding that in respect of Altech's claim, there was a threat of litigation. There was a gap of about $247,000 between what Altech was claiming and what Inbuilt was offering to pay. It was clear that Inbuilt would dispute the claim. A statutory demand was made a mere four days after the SOA was signed. This demand could not have been made on impulse at the last moment. Certainly, no evidence was led to suggest this. It was a natural consequence of an unresolved dispute, Inbuilt having disregarded two reminders on 28 March 2004 and 30 April 2004. That it was within Altech's contemplation before 30 April 2004, I have little doubt.

21 As regards Inbuilt's suit against Altech, it is probably fair to say that it was not reasonably foreseeable at the time the SOA was executed. As Rotol's counsel submitted, there was no reason to expect that Inbuilt would bring a claim against Altech in respect of delays to the project as they were not caused by Altech. The fact that Inbuilt subsequently discontinued its action lends support to this contention.

22 I shall defer consideration of the second issue, *viz*, whether Altech's claim against Inbuilt alone or together with other such litigation had a material adverse effect on the financial position of Rotol or the Rotol group of companies taken as a whole. This will be more conveniently dealt with after I have considered the BP claim against Rotol and Rotol's claims against Dex and Lim earlier referred to in [6](b) and [6](c) respectively.

The BP claim

23 Rotol had entered into an agreement with BP on 1 June 1998 ("the BP Agreement") to purchase all the liquefied petroleum gas ("LPG") that it needed in its business exclusively from BP for a period of five years. On 9 January 2002, Rotol entered into an agreement with Sembcorp Gas Pte Ltd ("Sembcorp") to purchase liquefied natural gas ("LNG"). Thereafter, Rotol switched to LNG and failed to place orders for LPG from BP for some time.

24 As early as 3 September 2003, BP-Wearnes Gas Pte Ltd (to whom BP had sought to novate the BP Agreement) had claimed from Rotol compensation of $145,000 for breach of the BP Agreement in that Rotol had dismantled without BP's consent certain equipment ("the Outfit") belonging to BP which was used in connection with the supply of LPG. This was followed by a formal letter of demand from BP's lawyers, Drew & Napier LLC ("D&N"), on 10 December 2003. In that letter, D&N also stated that they were assessing the loss and damage suffered by their client in respect of Rotol's failure to purchase LPG and fully reserved their client's rights.

25 In the next letter from D&N dated 7 January 2004, they refuted certain contentions made by Rotol's own lawyers, M/s Loo & Chong, in a letter of 19 December 2003. However, it ended by informing Loo & Chong that BP was prepared to meet with Rotol, as proposed by the latter, on a without prejudice basis to explore the possibility of an amicable settlement. Loo & Chong advised Rotol in a written opinion dated 13 January 2004 that Rotol did breach the BP Agreement by not purchasing LPG from BP since January 2003 and dismantling the Outfit without BP's consent.

26 Although discussions were held between Rotol and BP, it was admitted by Tan that the dispute remained unresolved up to the time of signing of the SOA. VDH signed the SOA without knowledge of the dispute. Based on e-mail correspondence between representatives of Rotol and BP respectively in the period 27 April 2004 to 6 July 2004, it was clear that BP was still threatening suit if the matter was not satisfactorily resolved.

27 VDH contended that by failing to disclose the BP claim prior to the signing of the SOA, Rotol had breached cl 7.1(f) thereof. In addition, VDH contended that Rotol breached cl 7.1(e) of the SOA by failing to disclose the BP claim as a contingent liability in its 2003 audited accounts. Finally, VDH contended that by the same omission Rotol had breached cl 7.1(h) of the SOA in that the 2003 audited accounts which constituted public information disseminated by Rotol was inaccurate contrary to Rotol's representations otherwise.

28 Counsel for Rotol did not dispute that BP had asserted that they had a claim for $145,000 by BP's letter of 3 September 2003 to Rotol. It was also not disputed that as of the date of signing of the SOA (30 April 2004), the dispute had not been resolved. However, he sought to distinguish "threatened litigation" from "unresolved dispute or claim". He contended that the correspondence showed that BP was ready to deal with the matter in a commercial manner and that there was no threatened litigation.

29 For the reasons which I gave earlier (in [17] and [18] *supra*), I find that there was threatened litigation in respect of BP's claim and that Rotol should have disclosed the same prior to the signing of the SOA. Tan admitted as much when he was cross-examined. I therefore find that Rotol was in breach of cl 7.1(f).

30 I also find that Rotol breached their representation in cl 7.1(e) by failing to disclose the BP claim in note 32 to the 2003 audited financial statements under the heading "contingent liabilities not provided for in the financial statements". Support for this position can be found in the fact that Rotol

had disclosed a lesser contingent liability in the amount of $91,000 in their audited accounts for 2001. This set, as it were, a benchmark which Rotol ought to have followed consistently. It is significant that in the 2004 audited accounts Rotol did disclose BP's claim although it sought to explain that away by saying that it had done so only because the dispute had arisen between VDH and Rotol in regard thereto.

31 Rotol argued that even if the BP claim had been disclosed in note 32, the line items in the 2003 accounts would have remained as they were. The short answer to that is that VDH would have been alerted to the existence of the claim and would have been able to factor that information into its decision whether or not to subscribe for Rotol's shares and, if so, at what price. The fact that the claim was not for a liquidated amount and could not be determined with reasonable certainty (as contended by Rotol in its note to the 2004 audited accounts) did not, in my view, excuse Rotol from disclosure. A claim, liquidated or otherwise, is still a claim; it was ignored at Rotol's peril.

32 Given my findings in regard to breaches of cll 7.1(e) and (f), it is not necessary to dwell at length on the question whether there was also a breach of cl 7.1(h) by the same non-disclosure of the BP claim. Suffice it to say that a case could quite easily be made that cl 7.1(h) was also breached. However, in practical terms, that adds little to VDH's case.

33 I shall again defer consideration of the question whether, for the purpose of cl 7.1(f), the BP claim, by itself or together with other undisclosed threatened litigation, had a material adverse effect on the financial position of Rotol or the Rotol group of companies taken as a whole.

The Dex/Lim receivables

34 The relevant facts are as follows:

(a) There were trade receivables from Dex arising out of invoices issued by Rotol between 28 October 2002 and 23 December 2003.

(b) Rotol issued a writ against Dex for the sum of $118,196.41 on 30 May 2003.

(c) Rotol obtained final judgment against Dex for the sum claimed together with costs and interest on 17 June 2003.

(d) Rotol agreed to allow Dex to pay its judgment debt by instalments with post-dated cheques, secured by a guarantee from Lim on 8 September 2003.

(e) Rotol received two instalments totalling $10,000 under the instalment payment plan but Dex defaulted in the November 2003 and subsequent instalments.

(f) When Rotol stopped receiving payment from Dex, Rotol sued Lim on his personal guarantee and the writ was issued on 1 April 2004, before the SOA was signed.

(g) Rotol obtained final judgment against Lim on 24 June 2004 (after the SOA was signed) for $115,826.92 together with interest and costs.

35 It is clear that from November 2003, Rotol was aware that Dex had failed pay the judgment debt and that Lim had, likewise, defaulted on his personal guarantee.

36 VDH asserted that cl 7.1(e) had been breached because in the absence of provision for non-payment the 2003 audited accounts did not give a true and fair view of the financial position of Rotol.

Rotol raised two defences. Firstly, it argued that VDH's representative ("Kantilal") had been told by Deon Kwok, Rotol's financial controller, about the overdue Dex receivables during the due diligence process. However, it emerged that Kantilal had also been told that no provision for doubtful debt was necessary as a payment guarantee had been obtained from Lim. Significantly, Rotol omitted to add (as it ought to have done in order that the disclosure was not misleading) that Lim had also defaulted on the guarantee. In my view, this half-truth was as good as a failure to disclose.

37 VDH was therefore entitled to assert that there had been insufficient disclosure to alert it to the fact that the 2003 audited accounts did not give a true and fair view of the financial condition of Rotol contrary to the warranty in cl 7.1(e).

38 I do not accept Rotol's contention that it was incumbent on VDH to plead that the guarantee was of poor quality and not merely that no provision had been made in the accounts for the non-payment of the receivables. That would have been necessary only if Rotol had pleaded that it had made disclosure to Kantilal of the overdue amounts.

39 Parenthetically, I should say that if Rotol's second contention was that VDH could have discovered the circumstances regarding the Dex receivables through publicly available information, there could be no breach of sub-cll (e), (f) or (h) of cl 7.1.

40 A LawNet Litigation search would certainly have revealed the writ issued against Lim on 1 April 2004. However, in my view, VDH was entitled to rely on the information given by Rotol during due diligence on 15 March 2004 that, although there was an overdue receivable of $108,000, a provision for doubtful debt was not required as the debt was guaranteed by Lim. Indeed, counsel for Rotol sought to rely upon the passing of this information as being disclosure which relieved Rotol from liability for breach of warranty under cl 7.1(e). Having chosen to tell VDH this half-truth, it does not lie in the mouth of Rotol to say that VDH ought to have relied on its own LawNet Litigation search. It might have been different if Rotol had merely kept silent. I therefore find Rotol in breach of cl 7.1(e).

41 It follows, from the finding that the 2003 audited accounts did not present a true and fair view of the financial position of Rotol, that Rotol also breached cl 7.1(h).

42 Clearly, in the light of the writ issued by Rotol on 1 April 2004 against Lim, cl 7.1(f) could not be correct in so far as it warranted that there was no pending litigation. However, a LawNet Litigation search would have disclosed this suit. This aspect of the matter therefore fell squarely within the exclusion "save as disclosed … in information which is publicly available" at cl 7.1. I therefore find that there was no breach of cl 7.1(f) so far as the Dex/Lim claim was concerned.

"Material adverse effect"

43 I move on now to consider the question whether, for the purpose of cl 7.1(f), Altech's claim against Inbuilt and BP's claim against Rotol alone had a "material adverse effect" on the financial position of Rotol or the Rotol group of companies. In this particular case, given the circumstances which I shall elaborate upon, I do not think it is necessary for me to define what the standard of materiality ought to be.

44 In Rotol's fourth draft circular to shareholders dated 10 June 2004, cl 18 stated as follows:

> *Save as disclosed below*, neither the Company nor any of its subsidiaries is in the last 12 months preceding the Latest Practicable Date engaged in any litigation or arbitration proceedings either as plaintiff or defendant which might *materially affect the financial position of the Group* taken as

a whole and the Directors are not aware of any legal or arbitration proceedings pending or threatened against the Company or any of its subsidiaries, or any facts likely to give rise to any such litigation or arbitration proceedings, which might *materially and adversely affect the financial position of the Group taken as a whole[.]* [emphasis added]

It then went on to disclose under "Claims filed or threatened against the Company and its subsidiaries" the Inbuilt claim against Altech and the BP claim for breach of contract. Under "Claims filed or threatened by the Company and its subsidiaries" it disclosed the claim against Dex, the claim against Lim and Altech's statutory demand against Inbuilt.

45 Rotol had in fact submitted the circular to the Singapore Stock Exchange on 10 September 2004 but on the same day, upon realising that cl 18 would be used by VDH as proof of materiality, retrieved the shareholders circular and amended it.

46 The most significant admissions, however, came from Rotol's own witnesses.

47 Tan, Rotol's managing director, made the following admissions:

(a) That a loss of $145,000 under the BP claim would have a material adverse effect on Rotol.

(b) That the reason why the BP claim was disclosed in the 2004 audited accounts was because it had a material adverse effect on the financials of Rotol.

(c) That as the amount Altech recovered from Inbuilt was about $180,000 less than it originally claimed, such shortfall would have a material adverse effect on Rotol's financial position.

48 Deon Kwok, Rotol's financial controller, made the following admissions:

(a) That BP's claim was a contingent liability and that it was material; that was why it was disclosed in the 2004 accounts.

(b) Inbuilt's claim against Altech was material.

(c) Altech's statutory demand against Inbuilt was material.

49 I see no reason why I should not accept this evidence. Accordingly, I find that the requirement that the pending or threatened litigation had a material adverse effect on Rotol's financial position was satisfied. Rotol therefore breached cl 7.1(f) by reason of non-disclosure of the Altech claim and the BP claim.

50 Given my findings above, it will not be necessary for me to go on to consider the other alleged instances of breach of the SOA, *viz*, the failure to disclose the sale of the Jiaxing property and the repayment of the OCBC loan.

Damages

51 I go on to consider the question of damages. VDH had claimed special damages in the aggregate amount of $150,000 although Kwan's affidavit of evidence-in-chief gave the figure of $157,885.95. This included legal and professional fees incurred in due diligence and in the negotiation and preparation of the SOA.

52 Rotol put up the argument that VDH was only entitled to claim for losses caused by the breach and not the expenses they incurred prior to the breach. It was argued that VDH would have eventually incurred the losses anyway, even if the SOA had not been signed.

53 This is an interesting argument but it is not novel. A similar situation arose in *Anglia Television Ltd v Reed* [1972] 1 QB 60. In that case, the defendant, a well-known actor, contracted with the plaintiff to play the lead role in a television play which it was producing. A few days later he repudiated the contract, having belatedly discovered that he had been double-booked. The plaintiff sued for damages claiming wasted expenditure of £2,750. The defendant contended that the plaintiff could only recover its expenditure after the contract was concluded in the amount of £854. The master gave judgment for the plaintiff for £2,750. On the defendant's appeal it was held, dismissing the appeal, that the plaintiff having elected to claim its wasted expenditure instead of its loss of profits, was not limited to the expenditure incurred after the contract but could claim the expenditure *before* the contract provided it was reasonably in the contemplation of the parties as likely to be wasted if the contract was broken. It is interesting to note that the expenditure included director's fees, designer's fees, stage managers' fees, *etc*, all of which were incurred before the plaintiff got the leading man.

54 Traditionally, a plaintiff could either recover for gains prevented by the breach of contract or, if such gains could not easily be quantified or were unlikely owing to the contract being unprofitable, he could, as an alternative, claim expenses rendered futile by the breach. As noted in Harvey McGregor, *McGregor on Damages* (The Common Law Library) (Sweet & Maxwell, 17th Ed, 2003) at para 2-033 the decision in *Anglia Television Ltd v Reed* presented "something of a halfway house between the two competing measures of damages" for it did more than just put the claimant in his pre-contractual position. *Chitty on Contracts* vol 1 (The Common Law Library) (H G Beale, gen ed) (Sweet & Maxwell, 29th Ed, 2004) at 26-067 takes the position that "(i)f, at the time of contracting, it was within the reasonable contemplation of the parties that the claimant would be able to recoup this expenditure [from the benefit of the defendant's performance of the contract], he may recover damages for any wasted part of the expenditure arising from the breach". The author of *McGregor on Damages* (*supra*), in similar vein, submit that the decision should be regarded as being premised on "the assumption that a contracting party expects to recover his expenses by the profit he makes and as therefore giving him his potential loss of profit to the limit of his expenditure, whether pre-contractual or post-contractual".

55 The situation in the present case is similar. In my view, it was within the reasonable contemplation of the parties that VDH's pre-contractual expenditure incurred in connection with due diligence and the negotiation and preparation of the SOA would be wasted if Rotol was to breach the SOA, thereby causing VDH to rescind the contract. Whilst, admittedly, in the context of a subscription for shares, it may not be entirely appropriate to speak of VDH "recouping" its expenditure from the "profit" it would make if the contract was duly performed, the principle, in my view, remains the same. Clearly, in entering into the SOA, VDH expected to derive a benefit from Rotol's performance of the SOA. That such benefit is not easily reducible to a monetary figure should not preclude recoupment of the expenses incurred if the contract was not duly performed. To put it another way, it may reasonably be inferred that, to VDH, the benefit to be derived from Rotol's performance of the SOA would have been worth at least the expenditure incurred by VDH. (To that, a qualification ought to be made; if the subscription for the shares under the SOA was a bad bargain, Rotol could not put itself in a better position than if the SOA had been duly performed. However, there was no suggestion by Rotol that such were the circumstances here).

56 For all the foregoing reasons, I granted judgment to VDH and declared that VDH was released and discharged from all obligations under the SOA. I also ordered the following:

(a) that Rotol refunded VDH the $100,000 earnest money;

(b) that Rotol paid VDH $150,000 by way of special damages;

(c) that Rotol paid interest at 6% per annum on the $100,000 earnest money from 9 September 2004 to date of refund; and

(d) that costs be awarded to VDH and that the same be taxed.

I also dismissed Rotol's counterclaim with costs to be taxed.