Agrosin Pte Ltd v Martynov Igor
[2009] SGHC 148

Case Number : Suit 111 of 2007

Decision Date : 26 June 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Haridass Ajaib, Yogarajah Sharmini and Subashini Narayanasamy (Haridass Ho & Partners) for the plaintiff; Philip Fong, Navin Lobo and Shanti Jaganathan (Harry Elias Partnership) for the defendant

Parties : Agrosin Pte Ltd — Martynov Igor

Companies – Directors

26 June 2009 Judgment reserved.

Andrew Ang J:

Introduction

1 The plaintiff, Agrosin Pte Ltd, filed this action against the defendant, Igor Martynov (its former director and finance director) claiming losses suffered by the plaintiff as a result of the latter's breach of his contractual, common law and statutory duties owed to the former. The defendant denied responsibility for the losses and counterclaimed for his unpaid salary.

The dispute

2 The plaintiff is a Singapore company primarily carrying on the business of trading in chemical and fertiliser products. The defendant was employed as the plaintiff's finance director from April 1993 to 9 February 2007 and was appointed director on the plaintiff's board of directors from 2 June 1998 to April 2006. During his time with the plaintiff, the defendant introduced two businesses to the plaintiff involving Caprolactam, a chemical, and nitrogen phosphate potassium ("NPK"), a fertiliser. The Caprolactam and NPK businesses involved:

(a) Direct purchase and sale of Caprolactam; and

(b) Tolling of both NPK and Caprolactam which involved the purchase of raw materials to produce the fertiliser and chemical.

3 The plaintiff's complaint pertained to these businesses. The plaintiff claimed that the defendant, despite knowing the actual costs of sales of Caprolactam and NPK ("Actual Costs"), had dishonestly understated the costs of sales in the Monthly Statements of Shipment Purchase Costs and Freight ("Provision of Costs") in the two relevant periods, *viz*, 2000 to 2003 (in respect of Caprolactam) and 2003 to year end 2005 (for NPK). In the result, it was alleged that the defendant gave the plaintiff the illusion and/or impression that the Caprolactam business was profitable when in fact the plaintiff had incurred losses therein.

4 Similarly, in relation to the NPK business, the defendant was alleged to have given the plaintiff the illusion and/or impression of profit for the years from 2003 to November 2004 and smaller losses in

end 2004 to end 2005 when, in reality, the plaintiff had incurred huge losses in both periods.

5 The plaintiff therefore sought to recover against the defendant the sum of US$10,009,594 in respect of the NPK losses and US$4,579,708.43 in respect of losses in the Caprolactam business. Briefly, the sum of US$10,009,594 represents the costs of sales of NPK that was understated by the defendant in the Provision of Costs. This amount was arrived at by taking the difference between the Actual Costs and the defendant's Provision of Costs for the sales of NPK for the period the NPK business was carried out by the defendant from 2000 to 2003. Similarly, the sum of US$4,579,708.43 represents the costs of sales of Caprolactam that was understated by the defendant in the Provision of Costs. The amount was arrived at by taking the difference between the Actual Costs and the defendant's Provision of Costs for the sales of Caprolactam for the period the Caprolactam business was carried out by the defendant from 2003 to 2005. The aggregate amount of losses claimed was reduced in the course of trial to US$11,678,820.03.

6 The defendant denied any responsibility for the losses and counterclaimed against the plaintiff for unpaid salary in the aggregate sum of S$323,950.71. In his defence, the defendant admitted that he owed the plaintiff contractual, fiduciary and statutory duties as alleged by the plaintiff. However, in his closing submissions, counsel for the defendant, Mr Philip Fong ("Mr Fong"), admitted that the defendant owed "certain general duties" to the plaintiff, without defining what they were.

Issues raised

7 The defendant, as director of the plaintiff, owes a duty under s 157 of the Companies Act (Cap 50, 2006 Rev Ed) to "act honestly and use reasonable diligence in the discharge of the duties of his office". Encapsulated in this provision are the common law duties imposed on directors which include (1) the duty to act *bona fide* in the interests of the company; and (2) to exercise reasonable diligence in the discharge of their functions. These duties are also implied in the contract between the parties. The issue raised by the plaintiff's claim is whether the defendant was in breach of either of these duties.

8 The issue raised by the defendant's counterclaim is whether he is entitled to his unpaid salary in the aggregate sum of S$323,950.71.

Whether the defendant was in breach of his director's duties

Whether the defendant had wrongfully understated the estimate of costs

9 I was satisfied that the defendant had failed to act *bona fide* in the interests of the plaintiff. On the evidence, I found that he had been dishonest and had intentionally understated the costs incurred in the manufacture of tolled NPK and Caprolactam that was sold. The defendant contended that there was no evidence that the estimates of cost were made wrongly or unlawfully. In making this argument, the defendant vainly sought to portray himself as a mere employee who had little knowledge of the NPK and Caprolactam businesses.

10 The truth, however, was otherwise. Quite apart from the evidence given by so many of the witnesses as to his pivotal role, he himself declared in a memorandum to a fellow director, Firoudin Aliev, that as financial director, he did not have to take instructions nor report to any head of department, and that he was overall in charge of the plaintiff's finance department. Given his position, the defendant must have been privy to information on the NPK and Caprolactam businesses. Further, it must be remembered that it was the defendant who had brought in the NPK and Caprolactam businesses in the first place. It was thus inconceivable that the defendant had little knowledge of the

said businesses. On the evidence, I was thus convinced that he had effective, if not complete, control of the NPK and Caprolactam businesses and actual knowledge of all costs incurred in the manufacture of tolled NPK and Caprolactam that was sold.

11 Given the defendant's knowledge of the said costs, he must have known that the costs were understated in the Provision of Costs. Indeed, the defendant admitted to the falsity of these estimates. Yet, he gave no credible explanation whatsoever for the understatement. I was therefore satisfied that the defendant had deliberately understated the costs of sales of Caprolactam and NPK.

12 On this point, I note that the defendant had sought to take cover from the fact that the plaintiff's auditors had issued unqualified Statutory Audit Reports and had not at any time issued "Management Letters" or "Representation Letters" taking issue with the estimate of costs. The truth, however, is that the auditors had accepted the defendant's explanation with regard to the payments reflected in the prepayment accounts, *viz*, that they represented payment for future deliveries of goods when in actual fact they were part of the costs of sales. This came to light only at the end of 2005 when the plaintiff learnt that, although all the raw materials for the manufacture of Caprolactam and NPK had been exhausted, a substantial sum still remained unaccounted for in the prepayment accounts. As a result, the fact that the plaintiff's auditors had not taken issue with the estimate of costs was no answer to the plaintiff's complaint. In fact, it showed that the defendant had deceived not only the plaintiff, but the plaintiff's auditors as well.

13 The consequence of the defendant's misstatements was that the monthly financial statements presented to the board of directors showed that the NPK and Caprolactam business were making profits when, in truth, losses were being suffered. The plaintiff pleaded in its statement of claim (Amendment No 1) ("the Amended Statement of Claim") at para 18 that:

> By reason of the Defendant's breach of duties set out above, the Plaintiffs were prevented from taking timely action to minimise losses incurred by the Plaintiffs by, inter alia, reviewing the trading of Caprolactam and NPK and/or immediately cease the trading of Caprolactam and NPK and/or investigating the reason for the losses incurred and/or taking immediate steps to avoid and/or minimise the losses for the abovementioned relevant periods.

With regard to the Caprolactam business, I accept evidence on behalf of the plaintiff that had the costs not been understated, the plaintiff would have taken timely action to immediately cease the trading of Caprolactam. As for the NPK business, I accept the evidence of Konstantin Khalimov ("Khalimov") (managing director of the plaintiff) that the plaintiff would not have even embarked on the business in the first place and would have thus avoided the loss suffered from the NPK business altogether. In his affidavit of evidence-in-chief filed on 12 July 2008 at para 4, Khalimov gave evidence that the defendant had misstated the cost of the NPK business at a meeting in 2003 with the plaintiff's board of directors thus leading the board to decide to go ahead with the NPK business. This misstatement was subsequently repeated in the Provision of Costs. Khalimov's evidence on this point was not controverted in cross-examination. I therefore found the defendant in breach of his duty to act *bona fide* in the interests of the plaintiff and thus liable for the losses caused to the latter (concerning the quantification of which more will be said later).

Whether the court was in a position to assess the standard of care expected of the defendant in the latter's estimation of costs

14 Mr Fong had tried to argue that the court was not in a position to assess whether the defendant's estimates of costs incurred "were made in circumstances which were below the standard expected of him". This, according to Mr Fong, was because there was no expert evidence as to what

the standard of care was. In support of this contention, Mr Fong cited *Kua Kok Kim v Ernst and Young* [2000] 1 SLR 707 ("*Kua Kok Kim*") where the court considered the standard of care applicable in relation to the question whether an auditor had valued certain shares accurately. In that case, the court concluded that the plaintiffs failed to prove negligence on the part of the defendants because they could not establish errors of principle on the part of the defendants.

15 Mr Fong argued that, similarly in the present case, the plaintiff had not presented cogent evidence that the defendant's "accounting practices" in under-estimating the cost of goods sold in the usual course of trade was wrong or erroneous or unlawful. Mr Fong contended that the plaintiff had not shown any error of principle on the part of the defendant. In so doing, he appeared to characterise that which separated the parties as a difference of principle in accounting. To my mind, his use of this argument was akin to a drowning man clutching at straws.

16 The plaintiff's case is founded upon dishonesty and not mere negligence. A director's duty to exercise reasonable diligence which is an aspect of his duty not to be negligent is distinct from his duty to act honestly which entails acting *bona fide* in the best interests of the company (see *Lim Weng Kee v PP* [2002] 4 SLR 327 at [27]–[29] and [32]). In this instance, the plaintiff's case is a straightforward one of dishonesty and concealment on the part of the defendant (see para 15 of the amended statement of claim). As the defendant was in breach of his duty to act *bona fide* in the interests of the plaintiff by his dishonesty in intentionally understating the costs of the NPK and Caprolactam businesses (see [9] to [13] above), it was not necessary to consider whether the defendant had also been in breach of his duty to exercise reasonable diligence in the discharge of his functions, and therefore not necessary to consider the standard of care owed by the defendant.

17 In any event, even if I was required to consider the question whether the defendant had breached his duty to exercise reasonable diligence, I would answer the question in the affirmative. The court is in a position to assess the standard of care expected of the defendant and the defendant fell short of that standard. The defendant was unable to show how the under-estimation was attributable to application of any principle to allow him to draw parallels with *Kua Kok Kim*. Unlike in *Kua Kok Kim* ([14] *supra*), which involved a question of professional negligence in the valuation of shares, an area in which there is room for honest difference of opinion between experts without their forfeiting their claim to professional competence, our present case involved little more than adding up all the cost elements that went into the sale of the products.

18 Even allowing for the fact that it would not have been possible to be 100% accurate in estimating the costs of each transaction when the defendant put in his "costs provisions" in the monthly statements, it was possible to calculate the average actual cost per metric ton of the products, as was demonstrated by the plaintiff. The figures supplied by the defendant bore no relationship to the true costs; they were indefensible. Neither did the defendant seek to justify any of those figures as being a fair estimate. I therefore rejected Mr Fong's argument that the court was not in a position to assess whether the defendant had fallen short of the standard of care owed in estimating the costs of the sale of Caprolactam and NPK.

19 In the result, I found the defendant to be in breach of both his duty to act *bona fide* in the interests of the plaintiff and his duty to exercise reasonable diligence.

Whether the misstatement caused the plaintiff's losses

20 Mr Fong had also tried to argue that the defendant's misstatement did not cause the plaintiff's losses. He contended that in the course of the business operations the losses would have been sustained regardless of whether the estimates were true or false. Clearly, Mr Fong missed the point.

The plaintiff's case (as set out in para 18 of the Amended Statement of Claim) is that by reason of the defendant's breach of duty in understating the costs of sales, thereby giving the illusion that both businesses were profitable when they were not, the plaintiff was prevented from taking timely action to avoid or minimise the losses. In other words, had the plaintiff known the Actual Costs, it would not have continued the Caprolactam business or embarked on the NPK business. It was thus clear that the defendant's understatement of the cost of sales had caused the plaintiff to suffer losses.

21 The second argument raised by Mr Fong on causation was based on the English Court of Appeal decision in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360. In that case, the negligent failure of auditors to discover and report upon inaccuracies in the accounts of two companies (GL and GM) which would have shown that the companies were insolvent, led the companies to continue to trade and, in the process, incur further losses. It was held that the auditors did not cause the losses but merely provided the opportunity for them to be incurred.

22 In the same case, a claim made by an investor (HD) in GM (which owned all the shares in GL), on the basis that he would not have made such investment nor lent moneys to the two companies had the auditors performed their duties with reasonable skill and care, was similarly dismissed. It was held that the fact that it was foreseeable that a potential bidder for shares in a company or a potential lender might rely on a company's audited accounts was not of itself sufficient to impose on the auditor a duty of care owed to the bidder or lender. However, if the auditor had been made aware that a particular bidder or lender would rely on the audited accounts and the auditor intended that he should so rely, he owed a duty of care to that identified party and could be liable in damages for any breach thereof.

23 I must confess I cannot see how the case helps the defendant despite some superficial similarity. To begin with, the plaintiff's case is founded upon dishonesty and not mere negligence (see para 15 of the Amended Statement of Claim). It is one thing to determine the scope of the duty by reference to the kind of damage from which a defendant must take care to save the plaintiff harmless (see *Caparo Industries plc v Dickman* [1990] 2 AC 605 *per* Lord Bridge at 627). This is a matter of policy. It is another thing altogether to suggest that a finance director of a company, practically in sole charge of certain businesses of the company, may with impunity mislead the company as to the profitability of the businesses when it should have been obvious that had it known the truth, the company would not have continued the Caprolactam business or embarked on the NPK business. The defendant owed the plaintiff fiduciary duties as director and was in breach of those duties. It is clear that the defendant's breach was the effective or dominant cause of the plaintiff's loss.

24 On a separate point, the defendant appeared to suggest that the company need not have made a loss in the NPK business and that it could have secured a higher sale price for NPK and/or lowered its fixed costs. This was not pleaded at all. Neither was there any evidence to suggest that the NPK was sold below market price or that fixed costs could have been reduced.

25 The third submission made by Mr Fong was a surprising one. He pointed out that the total amount by which the Actual Costs of sales of NPK was under-estimated was 22.33% of the NPK turnover for the entire period and that the corresponding percentage for Caprolactam was 4.34%. The defendant then went on to say that an estimation that was erroneous by 4.34% or even 22.33% did not necessarily show that the defendant had fallen short of the standard expected of him. The plaintiff's claim against the defendant is in respect of his dishonesty. It is no answer to such a claim that the dishonesty involved only a 4.3% understatement much less 22.33%.

26 For the fourth submission, the defendant introduced the doctrine of loss of chance considered by the Court of Appeal in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd*

[2005] 1 SLR 661. He contended that the loss the plaintiff complained of was the loss of the chance or opportunity to avoid and/or minimise the losses that were occurring in the Caprolactam and NPK businesses. He further contended that the plaintiff had failed to prove on a balance of probabilities that, had it been aware of the Actual Costs, it would have taken action to prevent the losses. In elaboration of the latter contention, the defendant argued that the plaintiff had not given evidence as to (a) the steps it would have taken to prevent or minimise further losses; and (b) how such steps would affect the quantum of damages the plaintiff is seeking against the defendant.

27 The defendant argued that it could not be "taken at face value that if the plaintiff wanted to cease the NPK and Caprolactam businesses, [it] would be able to do so without repercussions for third parties". He submitted that even if the plaintiff discovered the Actual Costs incurred as early as possible and took steps to prevent or minimise further losses, some trading losses would already have been incurred for which the defendant would not be liable.

28 I do not think it right to characterise the plaintiff's claim as one for loss of a chance. The defendant's characterisation of the plaintiff's claim in this manner, was based on his interpretation of para 18 of the plaintiff's Amended Statement of Claim (see [13] above). It is clear to me that the plaintiff did not claim for a loss of chance. If it had, para 18 of the Amended Statement of Claim would have read: "… the Plaintiffs lost an opportunity to take timely action to minimise losses incurred by the Plaintiffs" or something to that effect. Instead, the plaintiff's Amended Statement of Claim asserts that "the Plaintiffs *were* prevented from taking timely action". It appeared to me that the present case had nothing to do with loss of a chance. On this point, the observations of Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 on the distinction between what falls within the realm of loss of a chance and what requires proof on the balance of probabilities are apposite. The learned judge's observations made in the context of a case in which loss was caused to the claimant by negligence are well summarised in Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed 2003) ("*McGregor on Damages*") at para 8-034:

> In his judgment Stuart-Smith L.J. distinguished between three types of situation or categories. In his first category fall cases in which the defendant's negligence consists in some positive act or misfeasance and the question of causation is one of historical fact; this is of course the situation to which Lord Reid adverted in *Davis v Taylor* and proof on the balance of probabilities prevails here. In the second category fall cases in which the defendant's negligence consists of an omission where causation depends not upon a question of historical fact but upon the answer to the hypothetical question what would the claimant have done if there had been no negligence; how the claimant would have reacted is again subject to proof on the balance of probabilities. In the third category fall cases in which the claimant's loss depends upon the hypothetical action of a third party, whether in addition to action by the claimant or independently of it; here the claimant need only show that he had a substantial chance of the third party acting in such a way as to benefit him. …

29 In my view, the present case fell within the second category described by Stuart-Smith LJ. It is not a case which concerns the loss of a chance. The plaintiff had to prove on a balance of probabilities that it would have acted to prevent the loss had the defendant not been in breach of its duties owed to the plaintiff. I was satisfied that the plaintiff had proven this. Accordingly, I rejected the defendant's argument on loss of a chance. The defendant's case was wholly misconceived. In this connection, I share the sentiments of the learned author of *McGregor on Damages* who observed at para 8-037 that:

> At the same time as a widening of the loss of a chance doctrine may be in the air, there is undoubtedly today an unfortunate tendency to argue loss of a chance in situations where it can

have no conceivable application. The temptation is of course great; if total success cannot be achieved, aiming for a percentage success is attractive. …

Of course the learned author's comments pertained to claimants who sought to couch their claim as one for loss of a chance to obtain percentage success. But it seems that even defendants sometimes feel tempted to overcomplicate matters by bringing in the loss of a chance doctrine when it could have no conceivable application. This was the case here.

30 Be that as it may, I nevertheless found there to be some merit in the defendant's argument that the plaintiff could not have extricated itself so as to prevent *all* losses and that it would have suffered some losses even if the defendant's Provision of Costs had stated the Actual Costs. This argument applies only in relation to the Caprolactam business for, as I have found earlier (at [13] above), the plaintiff would not have entered into the NPK business in the first place if it had known that the defendant's estimate of costs had been understated. In any event, this question is one which presents itself only at the assessment of damages stage. It does not preclude liability on the part of the defendant altogether.

31 I turn now to the question of the quantum of damages.

Whether the quantum of damages sought is justified

32 One major point of contention raised by the defendant pertained to the quantum of damages. The plaintiff sought to rely on *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162 ("*Vita Health*") for quantifying the losses as being the difference in each instance between the Actual Costs incurred and the defendant's Provision of Costs. It was submitted that "[t]he true loss he caused is captured *in this case* by pinning the defendant personally to the false picture he painted" (*Vita Health* at [98]).

33 In *Vita Health*, the defendant (Pang Seng Meng) was the operating and controlling mind of the Vita Health Group of Companies ("VHGC") which carried on the business of import, export and distribution of medicinal and pharmaceutical products. VHGC was made up of Vita Corporation Pte Ltd ("VCL") which was the parent company of Vita Health Laboratories Pte Ltd ("VHLS") and Vita Health laboratories (Hong Kong) Ltd "VHLHK"). Between 1997 and 1998, the defendant procured substantial investments in VCL from two large investment companies. It was a term of the investment agreements that VHGC would be listed or, to be more precise, that VHGC would be held by a listed vehicle, by the end of 1999.

34 To effect the backdoor listing of VHGC on the Australian Stock Exchange, the defendant arranged for a reverse takeover whereby an Australian listed company, later re-named Vita Life Sciences Limited ("VLS") would take over VHGC in exchange for shares issued by VLS. The arrangement was documented in a share sale agreement ("SSA"). The defendant became the largest shareholder in VLS and was appointed managing director. He was later forced to step down in March 2002 and proceedings were instituted against him by VHLS (first plaintiff), VHLHK (second plaintiff), VCL (third plaintiff) and VLS (fourth plaintiff) for breach of fiduciary duties which included the fraudulent creation of false and irrecoverable receivables purportedly due from third party entities in Indonesia, the Philippines and Taiwan. The court found, *inter alia*, that:

(2) To create the illusion of a successful and profitable regional business, the defendant created and maintained false and unrecoverable receivables purportedly due from PT Vitaton Humanoria Lestari Indojaya ("Vitaton") in Indonesia and Vita Health Laboratories (Phils) Inc (VHLP") in the Philippines. He represented that Vitaton and VHLP were independent third parties

purchasing goods from VHLS when, in reality, they were run and managed as *de facto* subsidiaries of VHLS. The purported "sales" never existed as true sales: at [30] to [32], [42].

It held that:

(3) In claims involving fraud, damages were not restrained by foreseeability *per se*. A claimant could recover all the direct losses flowing from a fraudulently induced transaction, including consequential losses. In assessing damages, a mechanical approach was to be eschewed in favour of flexibility in fashioning the appropriate remedy. The true principle was to justly compensate the claimant for all financial losses and/or damages flowing directly from the fraud: at [91] and [93].

The defendant asserted, in regard to the transactions between VHLS and Vitaton/VHLP, that the true loss, if any, suffered by VHLS was limited to the actual cost of the products VHLS purchased from its suppliers less all the moneys received from the Indonesian operations. In the judge's view, that approach blatantly attempted to attenuate the causative effect of the defendant's tortious conduct and ignored the corrosive consequences of his deceit. He therefore held that in the factual matrix of the case it was appropriate that the defendant bore the difference between what he led VHLS to believe it would recover and what it actually recovered. Hence, his statement that "[t]he true loss he caused is captured *in this case* by pinning the defendant personally to the false picture he painted".

35 The defendant argued that *Vita Health* was distinguishable as it was a case involving fraud and the factual circumstances were vastly different. Although I do not think counsel for the defendant cogently distinguished *Vita Health*, I agree that the proper measure of damages is the loss actually suffered by the plaintiff in continuing with the Caprolactam tolling business and in embarking on the NPK tolling. The line quoted above from *Vita Health* at [98] was not intended to be of universal application but, as it clearly stated, "in this case".

36 It will be observed that the facts of that case were complex and the court in that case was seeking a method of quantifying the damages that would "justly compensate the claimant for all financial losses and/or damages flowing directly from the fraud" that being the true principle. VK Rajah JC had referred to the House of Lords' decision in *Smith New Court Securities v Citibank NA* [1997] AC 254 to show how, in assessing damages for fraud, a mechanical approach was to be eschewed in favour of flexibility. In that case, the claimants were induced to purchase shares in the Ferranti company by the defendant's agent's fraudulent statement that other persons were interested in acquiring the shares. The shares were bought by the claimants as a market-making risk and at a price commensurate with an acquisition as such. The Ferranti shares turned out to be worth far less as a result of the disclosure that a fraud, unrelated to and occurring in advance of the purchase, had been perpetrated on the company. The claimant disposed of their shares over a period of five to six months and incurred a substantial loss which they sought to recover against the defendant. The normal measure of damages would have been the purchase price of the shares less their actual value at the time of acquisition. The House of Lords held that this was not an inflexible rule and decided, reversing the Court of appeal, that in order to compensate the plaintiff for the fraud, what fell to be deducted from the purchase price was not the value of the shares at the date of their acquisition but the actual proceeds of their disposal.

37 In referring favourably to this authority, Rajah JC's emphasis was on the flexibility required when assessing damages for fraud. *Vita Health* should thus not be read to mean that in every case involving fraud, the quantification of the loss would require the application of the same methodology as in that case. In the present case, my view is that it would be inappropriate to quantify the loss as the difference between the Actual Costs incurred and the Defendant's Provision of Costs. If the loss was

so quantified, the plaintiff would effectively recover the "profits" it would have made had the Defendant's Provision of Costs been accurate. This is not consistent with the plaintiff's case. The plaintiff's case is that it would have stopped the Caprolactam and would not have even embarked on the NPK businesses if they had known the Actual Costs but that the defendant's breach prevented the plaintiff from taking timely action. If the plaintiff had stopped the Caprolactam business and refrained from embarking on the NPK business, *ex hypothesi*, it would not have made any profit. Therefore, in my view, the proper compensation due to the plaintiff is simply that for the actual losses suffered due to it being prevented from taking timely action to stop the Caprolactam and NPK businesses. Hence, the losses recoverable should be limited to the actual losses it suffered.

Whether the defendant is entitled to recover the sum of S$323,950.71 representing his salary which has yet to be paid by the plaintiff

38 The defendant sought payment of his unpaid salary from December 2005 to 9 February 2007 which amounted to $323,950.71. The plaintiff resisted this claim on the ground that the plaintiff had made a decision in 13 January 2006 to postpone expatriate staff salaries from December 2005. The defendant had agreed to the plaintiff's proposal. The plaintiff thus argued that as long as the plaintiff had yet to lift this suspension, it need not pay the defendant his salary. This may be so if the defendant was still in the plaintiff's employ. However, it is inconceivable that the plaintiff would be entitled to suspend payment of the defendant's salary even *after* the termination of the defendant's employment. The defendant, like all other employees of the plaintiff, is contractually entitled to his salary. The decision of the plaintiff to *suspend* payment of the staff salaries could not possibly have so far-reaching an effect as to abrogate this right.

39 On a separate point, in the plaintiff's defence to counterclaim filed on 24 April 2007, the plaintiff disputed the amount claimed on the ground that on or about 13 June 2006, it had informed the defendant that he would only be paid half his salary with effect from 1 July 2006. According to the plaintiff, taking into account this reduction, the defendant's unpaid salary amounted to $241,145.36. I could not accept this argument for there was no evidence that the defendant had accepted this variation of his salary. While the plaintiff could have terminated the defendant's employment the moment it discovered the misstatements, it did not do so because it wanted to give the latter an opportunity to compensate the plaintiff for the loss it had suffered. Having chosen not to terminate the defendant's employment, the plaintiff has to pay the defendant his full salary.

40 I therefore allow the defendant's claim for his unpaid salary.

Conclusion

41 In the result, I granted the plaintiff interlocutory judgment with damages to be assessed together with interest at 5.33% from 22 February 2007. I also allowed the defendant's counterclaim for his unpaid salary with interest at 5.33% from 29 March 2007. The plaintiff shall be entitled to set-off its claim against the defendant's counterclaim.

42 I will hear the parties on costs.

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