IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF WILAYAH PERSEKUTUAN
(COMMERCIAL DIVISION)
[SUIT NO.: WA-22NCC-640-12/2020]

BETWEEN

TITAN METAL WORKS SDN BHD
(CO. NO..: 207540-H) **... PLAINTIFF**

AND

1. **TYRON FLAT TYRE PROTECTION ASIA PTE LTD**
(UEN No.: 200708384-D)

2. **TYRON SALES AND SERVICES (M) SDN BHD**
(Company No.: 804434-W)

3. **KOH KIA YEONG**
(Singapore ID S1240764E) **... DEFENDANTS**

GROUNDS OF JUDGMENT

Introduction

[1] This Judgment deals with the 3rd Defendant's application to strike out the Plaintiff's claim against him pursuant to Order 18 Rule 19(1)(a) and/or (b) and/or (c) and/or (d) Rules of Court 2012 ('**Enclosure 28**').

[2] On 20.10.2021, I dismissed Enclosure 28 with costs. My grounds for the decision are set out below.

Background Facts

[3] The 3rd Defendant is a director and shareholder of the 1st and 2nd Defendants. This is an undisputed fact.

[4] For completeness, the 3rd Defendant is one of two directors and one of five shareholders of the 1st Defendant and one of three directors and one of two shareholders of the 2nd Defendant.

[5] The Plaintiff's pleaded claim against the 1st and 2nd Defendants is for loss of profits for the sum of RM 882,435.44 arising from a Supply Agreement dated 18.12.2017 which had been varied such that the 1st and 2nd Defendants would need to purchase a total of 200,000 units of Titan Series Wheel Bands from the Plaintiff.

[6] However, instead of purchasing 200,000 Titan Series Wheel Bands from the Plaintiff, the 1st and 2nd Defendants had only purchased 18,092 Titan Series Wheel Bands from the Plaintiff leaving a shortfall of 181,908 wheel bands that were not purchased.

[7] Such shortfall is alleged to have caused the Plaintiff to suffer a loss of profits amounting to RM 882,435.44.

[8] The Plaintiff is also seeking the sum of USD 33,000.00 from the 1st Defendant based on an invoice dated 19.11.2018 as well as a sum of RM 98,197.51 from the 2nd Defendant based on a series

of invoices. However, these claims are irrelevant for our present purposes.

[9] As an *alternative* to the Plaintiff's pleaded case against the 1st and 2nd Defendants, the Plaintiff claims that the 3rd Defendant is personally liable to pay the Plaintiff the said sum of RM 882,435.44 based on the 3rd Defendant's personal promise and assurance that the 1st and 2nd Defendants would fulfil the agreement to purchase the said 200,000 Titan Series Wheel Bands.

[10] More specifically, paragraph 22, 23 and 24 of the Statement of Claim state:

> '22. As a result of the meeting in Beijing, the Supply Agreement was varied and or replaced by the 3rd Defendant's promise ('**the 3rd Defendant's Promise**'), by conduct and or implication, that the entities under his control, ie, the 1st and 2nd Defendants, would purchase from the Plaintiff a total of 200,000 units of the Titan Series Wheel Bands for year 2018 ('**the Reduced Committed Quantity**'), instead of the 400,000 units stipulated in the Supply Agreement.
>
> 23. The 1st and 2nd Defendants are bound by the 3rd Defendant's Promise as the 3rd Defendant has the authority, actual and or ostensible, to act on behalf of the 1st and 2nd Defendants.
>
> 24. Further and in the alternative, the 3rd Defendant is bound by and is liable to fulfil the 3rd Defendant's Promise.'

[11] Further, in paragraph 25 of the Statement of Claim, the Plaintiff averred that it had relied upon the 3rd Defendant's Promise in that the Plaintiff had increased its production capacity and had further proceeded to place order for raw materials to cater for the 62,000 units required for the 2nd quarter of 2018 according to the 2018 Forecast.

[12] At paragraph 27 of the Statement of Claim, the Plaintiff referred to the 3rd Defendant's representation to the Plaintiff that:

> '27.1. the Chinese authority has delayed the implementation of the GB7258 Rule;
>
> 27.2. the 12 Ton-Vehicle Safety Requirement was formalised as JT/T 1178.1-2018 issued by the Chinese Ministry of Transport in February 2018 ('**the JTT 1178 Rule'**). The JTT 1178 Rule requires tyre pressure monitoring system (such as Titan Series Wheel Bands) to be installed on goods vehicles of 12,000 kg or more and with maximum speed greater than 90km/h, but this did not generate the expected demand.'

[13] At paragraph 28 of the Statement of Claim, the Plaintiff averred that the 3rd Defendant had made the following further assurances:

> '28.1. It would only be a matter of time for the China Government to enforce GB7258 -2017;
>
> 28.2. He would ensure that the Plaintiff continues to be a strategic partner of the 1st and 2nd Defendants and Tyron Beijing (collectively 'the Tyron entities'); and

28.3. The Plaintiff would be rewarded with manufacturing orders when the demands for safety wheel bands in China picked up to at least make up for the Plaintiff's losses resulted from the Defendant's failure to fulfil the 3rd Defendant's Promise.

('the 3rd Defendant's Assurances')'

[14] The Plaintiff claimed in the Statement of Claim that the 3rd Defendant had breached both the 3rd Defendant's Promise and the 3rd Defendant's Assurances resulting in losses and damages to the Plaintiff.

[15] The 3rd Defendant filed the application under Enclosure 28 to strike out the action against him. According to the 3rd Defendant, the Plaintiff has not pleaded that the 3rd Defendant had acted in bad faith or that the 3rd Defendant had acted in breach of his personal legal duties to the 1st and 2nd Defendant.

[16] Further, the 3rd Defendant contended that there are no pleaded facts or particulars justifying the piercing of the corporate veil against the 3rd Defendant.

[17] In support, the 3rd Defendant referred to my decision in *Chen Khai Voon v. Lim Beng Guan & Ors* [2020] 1 LNS 2222 and *Cranborne Enterprises Limited & Anor v. Export-Import Bank Of Malaysia Berhad & Ors (No 2)* [2019] 1 LNS 1580.

[18] The 3rd Defendant submitted that the Plaintiff in the Statement of Claim merely alleges that the 3rd Defendant was the owner of the 1st and 2nd Defendants and that he was the person in control of the Tyron entities. The pleaded claim is silent as to whether

the 3rd Defendant had agreed to assume personal liability for the 1st and 2nd Defendant's transactions.

[19] In addition, the Plaintiff has pleaded that the 3rd Defendant had acted on behalf of the 1st and 2nd Defendants in paragraph 23 of the Claim which states: -

> '23. The 1st and 2nd Defendants are bound by the 3rd Defendant's Promise, as the 3rd Defendant has the authority, actual and/or ostensible to act on behalf of the 1st and 2nd Defendants'

Court's Deliberations

[20] With respect, the 3rd Defendant has completely misconstrued the Plaintiff's causes of action against the 3rd Defendant as pleaded in the Statement of Claim.

[21] The Plaintiff is not seeking to lift the corporate veil in its claim against the 3rd Defendant at all. Instead, the Plaintiff is seeking to make a claim against the 3rd Defendant for the Plaintiff's losses and damages arising from the Plaintiff's reliance on the 3rd Defendant's Promises and the 3rd Defendant's Assurances made in his *personal* capacity.

[22] In *Cranborne Enterprises Limited & Anor v. Export-Import Bank of Malaysia Berhad & Ors (No 2)* (*supra*), I was referring to situation where a personal claim is made against a director of a company in tort in respect of acts by the director done within his scope of authority and in good faith. More specifically, I was alluding to the principle in *Said v. Butt* exempting directors from personal liability for the contractual breaches of their

company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other personal legal duties owed to the company.

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[23] Similarly, *Chen Khai Voon v. Lim Beng Guan & Ors* [2020] 1 LNS 2222, I was dealing with a claim by the plaintiff thereto to lift the corporate veil based purely on the averment that the plaintiff was the controlling and directing mind of the company, which I held to be insufficient. The following passage from the judgment makes this plain:-

> '[104] If the basis for the claim is that LBG is the 'controlling and directing mind of Agathis Management ' and therefore LBG is the alter ego of Agathis Management, there are no particulars in the Statement of Claim to support the plea for the lifting of the corporate veil. The mere allegation that LBG is the controlling and directing mind of Agathis Management is, without more, insufficient to justify piercing of the corporate veil. This much was conceded by learned counsel for the Plaintiff'.

[24] As I have stated above, the Plaintiff in the present action is not seeking to lift the corporate veil. Further, the 3rd Defendant's submission that the Plaintiff had made *no* express promise that the 1st and 2nd Defendants would commit to purchase the volume of wheel bands from the Plaintiff, is not entirely correct.

[25] A quick perusal of paragraph 22 of the Plaintiff's Statement of Claim as reproduced in paragraph 10 above will disclose that the Plaintiff had in fact pleaded either expressly or by implication

that by reason of the 3rd Defendant's Promise, the 1st and 2nd Defendants would purchase the wheel bands from the Plaintiff.

[26] Finally, the 3rd Defendant referred to paragraph 34 of the Statement of Claim where it is pleaded that the 3rd Defendant had acted in collusion with Tyron UK to terminate the manufacturing license granted to the Plaintiff and thereby resulting in a breach of the 3rd Defendant's Promise and Assurances. According to the 3rd Defendant, the Plaintiff has not sought for any remedy for such breaches.

[27] However, the omission of any remedy against the 3rd Defendant arising from the claim in paragraph 34 of the Statement of Claim is no ground for striking out the Plaintiff's action against the 3rd Defendant.

Conclusion

[28] Accordingly, I am not persuaded that the Plaintiff's claim against the 3rd Defendant in the present case is scandalous, frivolous and vexatious nor do I find that the claim is an abuse of the Court's process and will lead to delay, prejudice and or embarrassment as contended by the 3rd Defendant.

[29] In the premises, I dismissed Enclosure 28 with costs.

Dated: 5 NOVEMBER 2021

(ONG CHEE KWAN)
Judicial Commissioner
High Court of Kuala Lumpur, NCC2

COUNSEL:

For the plaintiff - Ng Siau Sun & Tee Yee Man; M/s Sun & Michele (Kuala Lumpur)

For 1st & 3rd defendant (and mentioning on behalf of 2nd defendant's solicitors) - Goh Keng Tat; M/s Goh Keng Tat & Co (Petaling Jaya)

For the 2nd defendant - Wong Zhi Khung; M/s Michael Chow (Kuala Lumpur)

Case(s) referred to:

Chen Khai Voon v. Lim Beng Guan & Ors [2020] 1 LNS 2222

Cranborne Enterprises Limited & Anor v. Export-Import Bank Of Malaysia Berhad & Ors (No 2) [2019] 1 LNS 1580

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396

Zulfikri Abdul Rashid v. Yasmin Norhazleena Bahari Md Nor & 3 Ors [2012] 1 LNS 275

Tenaga Nasional Bhd v. Propak Sdn Bhd & Anor [2000] 1 MLJ 479

Mazni bt Ibrahim v. Rosaidy Effandy [2013] 2 MLJ 499

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 34 r. 2