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

BETWEEN

TITAN METAL WORKS SDN BHD **...**
PLAINTIFF

(CO. NO..: 207540-H)

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)**
4. **LEONG SIEW LENG [NRIC No.: 740814145422** **...**
DEFENDANTS

JUDGMENT (NO. 2)

Introduction

[1] The Plaintiff was appointed as the sole manufacturer of certain vehicle safety devices intended for sale to China. The parties had anticipated the implementation and enforcement of certain regulations that would make the installation of such safety devices on heavy vehicles in China mandatory. Unfortunately for the parties, the enforcement of the regulations was postponed.

[2] The main dispute centered on whether there was an agreed guaranteed minimum purchase that was to be made by the Defendants from the Plaintiff. The Defendants contended that the

supply agreement that was entered into which stipulated a guaranteed minimum purchase was never intended to be binding. In any case, the Defendants contended that the quantity was always subject to the market demands and to the enforcement of the said regulations which was something outside their control. In any event, it is the Defendants' case that the Plaintiff had waived its rights to claim for the breach of contract and or the Plaintiff is otherwise estopped from making such claim.

[3] The 2nd Defendant also counterclaimed against the Plaintiff for the wrongful conversion of certain toolings that were needed for the manufacture of the safety devices.

Background Facts

[4] The Plaintiff was a business partner with the Tyron entities which for the purposes of this action are:

(1) Tyron Runflat Ltd ("**Tyron UK**") which granted the Plaintiff the license to manufacture its Tyron wheel bands under a Manufacturing Licensing Agreement dated 28.2.2017;

(2) Tyron Flat Tyre Protection Asia Pte Ltd ("**Tyron Singapore**") the 1st Defendant in this action who is a signatory of a Supply Agreement dated 18.1.2017 which is the subject matter of this action ("**Supply Agreement**");

(3) Tyron Sales and Services (M) Sdn Bhd ("**Tyron Malaysia**"), the 2nd Defendant who subsequently made the purchases under the Supply Agreement from the Plaintiff in place of Tyron Singapore;

(4) Tyron Technology and Development (Beijing) Ltd ("**Tyron Beijing**") which was the distributor company to whom the 1st and 2nd Defendants would purchase the wheel bands from the Plaintiff under the Supply Agreement to meet the expected

demands of the Tyron wheel bands in China.

[5] It is not in dispute that the 3rd Defendant and his wife were at the material times the shareholders and directors of the 1st Defendant and the 2nd Defendant. The 3rd Defendant was the majority shareholder of both the companies.

[6] One of the 1st Defendant's shareholders, one Ikea Wu, was the General Manager of Tyron Beijing. Both Ikea Wu and the 3rd Defendant are also shareholders of Tyron Beijing.

[7] The 1st Defendant was the master distributor of Tyron UK for Asia and the 1st Defendant appointed the 2nd Defendant and Tyron Beijing as its distributors for Malaysia and China respectively.

[8] The 4th Defendant is a director of the 2nd Defendant.

[9] The relationship between the Tyron entities and the Plaintiff began sometime in late 2016 when Tyron UK was exploring the possibility of appointing the Plaintiff as its licensed manufacturer of its Tyron wheel bands. This led to the formal appointment of the Plaintiff as Tyron UK's licensed manufacturer sometime in March 2017.

[10] The motivation for the appointment of the Plaintiff as licensed manufacturer was the expectation at the time that China would be requiring passenger cars, trucks, buses and other heavy-duty vehicles on her roads to install emergency safety devices in case of tyre blowout. This would give rise to a huge demand for the Tyron wheel bands.

[11] Initially, the purchases from the Plaintiff would be made by Tyron UK directly. This was subsequently modified to permit the 1st and the 2nd Defendants to made the purchases on its behalf.

[12] For the purposes of manufacturing the Tyron wheel bands, the Plaintiff was commissioned to manufacture certain toolings needed for the manufacture of the Tyron wheel bands ("**the Toolings**"). It is

common ground that Tyron UK had paid the sum of USD 138,700.00 to the Plaintiff for the Toolings. It is also not disputed that the property and intellectual property rights in the Toolings belong to Tyron UK.

[13] Sometime between April to December 2017, the Plaintiff was asked to make modifications to the Toolings as the Tyron wheel bands could not meet the standards required by the Chinese authority. These modified wheel bands manufactured from the modified Toolings are referred by the parties as the Titan Series wheel bands to distinguish from the Tyron wheel bands.

[14] Following an announcement by the Chinese authority sometime in September 2017 on the implementation of GB7258 which is a mandatory safety regulation requiring the installation of safety devices to motor vehicles in China, the 1st Defendant was expecting a huge demand for the Titan Series wheel bands to be delivered to Tyron Beijing, its distributor in China.

[15] To meet the expected demands, it is the Plaintiff's case that it had proceeded to increase its warehouse space by entering into new tenancy agreement, employed more workers and purchased machineries and raw materials for the production of the wheel bands.

[16] The Supply Agreement that was entered into with the 1st Defendant was a three-year contract where the 1st Defendant, for the contractual year in 2018, agreed and 'guaranteed' to purchase a minimum quantity of 400,000 units of the Titan Series wheel bands and other products stipulated in Appendix A of the agreement.

[17] It is further provided that for the subsequent contractual years in 2019 and 2020, unless a new figure was mutually agreed between the parties, clause 5.2 states that the minimum purchase quantity of 400,000 units would remain.

[18] The 2nd Defendant was not a party to the Supply Agreement.

Beijing Meeting

[19] In its Amended Statement of Claim, the Plaintiff pleaded that *'[I]n around January 2018*', there was a meeting in Beijing between the Plaintiff's Senior Manager, Mr Danny Ng ("**PW1**"), the 3rd and 4th Defendants and some representatives of Tyron Beijing at Tyron Beijing's office.

[20] At the Beijing Meeting, Ikea Wu the General Manager of Tyron Beijing, presented a sales plan which set out, among other things, a sales forecast of 200,000 units of the Titan Series wheel bands for the year 2018. This was a substantial reduction from the 400,000 units that was stated in the Supply Agreement. The reason for the same was because of a delay in the enforcement of the GB 7258. In fact, the forecast for 2018 was as follows:

(a) The annual sales for 2018 was 200,000 units for 50,000 vehicles;

(b) The sales for the 2nd quarter of 2018 was expected to be 62,000 units for 15,500 vehicles;

(c) The stock on hand was to be kept at 300,000 units.

("**the 2018 Forecast**")

[21] The Plaintiff claimed that at the Beijing Meeting, the 3rd Defendant had by his words and or conduct instructed and or promised the Plaintiff that:

(a) The Plaintiff was to make the necessary preparations including purchase of raw materials in accordance with the 2018 Forecast;

(b) The 1st and the 2nd Defendants would purchase from the Plaintiff a total of 200,000 units of the Titan Series wheel bands for the year 2018 ("**the Reduced Quantity**")

instead of the 400,000 units as originally contracted under the Supply Agreement;

(c) The 3rd Defendant would ensure that the 1st and 2nd Defendants purchase from the Plaintiff the Reduced Quantity for the year 2018.

("**the 3rd Defendant's Promise**").

[22] It is the Plaintiff's case that following from the Beijing Meeting, the Plaintiff had proceeded to act on the 2018 Forecast and made all necessary preparations for the production of the anticipated 200,000 units purchases.

[23] Whilst initially the purchases under the Supply Agreement were made by the 1st Defendant, the 4th Defendant testified that after the Beijing Meeting, the 2nd Defendant was the entity that made the purchases from the Plaintiff. This was notwithstanding that the Supply Agreement was signed with the 1st Defendant. However, the Plaintiff, the 1st and the 2nd Defendants accepted this arrangement without any issues at all.

[24] About four months later, in May 2018, the 3rd Defendant informed the Plaintiff that the 200,000 units was also not achievable.

[25] Notwithstanding the aforesaid, it is not disputed that parties had continued their relationship under the Supply Agreement albeit for a much reduce purchases. In fact, from 2018 to 2020 the total purchases of the Titan Series wheel bands by the 1st and 2nd Defendants were only in the region of 20,000 units. Nonetheless, the Plaintiff did not demand that the 1st and 2nd Defendants to honour the purchases of the Reduced Quantity. The option to terminate the Supply Agreement was also not exercised.

[26] It appears from the testimony given at the trial that sometime in late May or early June 2020, the 2nd Defendant had required the Plaintiff

to return the Toolings to them for certain 'audit' purposes urgently required by Tyron Beijing.

[27] As the Plaintiff would not be able to continue manufacturing the Titan Series wheel bands without the Toolings, the Plaintiff had agreed to release only 2 out of 4 of the Toolings to the 2nd Defendant which the 2nd Defendant had failed to collect.

[28] Subsequently, sometime in early June 2020, Tyron UK terminated the Plaintiff's license to manufacture the Tyron wheel bands citing certain business disagreements and instructed the Plaintiff to deliver the Toolings to the 2nd Defendant.

[29] However, the Plaintiff refused to return the Toolings despite repeated demands. Tyron UK subsequently assigned the rights to the Toolings to the 2nd Defendant.

[30] The Plaintiff then commenced this action on 31.12.2020 for its loss of profits arising from the breach of the obligations by the 1st and 2nd Defendants to purchase the Reduced Quantity. The Plaintiff also sought to make the 3rd and 4th Defendant personally liable for its losses claiming that the 3rd Defendant had promised to procure the 1st and 2nd Defendant to purchase the Reduced Quantity at the Beijing Meeting and that the 4th Defendant being an agent for the 1st Defendant, being a foreign merchant, is personally liable under Section 183 of the Contracts Act 1950.

[31] The Plaintiff also seeks a sum of RM 98,197.51 being unpaid debt for goods sold and delivered. The 2nd Defendant is not disputing this debt but contended that it is entitled to set off the said sum with its Counterclaim for damages arising from the Plaintiff's wrongful conversion of the Toolings.

Defendants' respective positions

[32] The Defendants' respective positions in response to the Plaintiff's

claims can briefly be stated as follows:

(a) The 1st and 2nd Defendants deny that at the Beijing Meeting, the 3rd Defendant's Promise was made. More specifically, it is their case that the 2018 Forecast was nothing more than '*targets*' that Tyron Beijing had presented to the parties and that the 200,000 units were never intended to be 'sales' for which promise or representation was made to the Plaintiff by the 3rd Defendant that the 1st and 2nd Defendants would purchase from the Plaintiff under the Supply Agreement;

(b) The 1st Defendant further claims that the Supply Agreement was never intended to be binding and was a mere 'formality' to satisfy the Plaintiff's Managing Director;

(c) The 2nd Defendant denies any liability to the Plaintiff under the Supply Agreement, not being privy to the same;

(d) The 1st and 2nd Defendants also claim that the minimum purchase figure stated in the Supply Agreement or for that matter, the Reduced Quantity, was always subject to the market demands as the Plaintiff was aware at all material times that the demands would depend on the enforcement of GB 7258 in China, a matter outside their control;

(e) The 1st and 2nd Defendants claim that the Plaintiff had waived its right to claim for the breach under the Supply Agreement and or is otherwise estopped from raising the same by its failure to raise any notice of the breach during the period from 2018 to 2020;

(f) The 2nd Defendant contends that the Plaintiff had wrongly converted the Toolings when the Plaintiff refused to deliver the same when demanded by the 2nd Defendant as

assignee of the Toolings;

(g) The 1st Defendant contended that it is entitled to set off a sum of USD 33,000.00 from any sums due to the Plaintiff, the said USD 33,000.00 being a credit given by the Plaintiff to Tyron UK which has been assigned by Tyron UK to the 1st Defendant;

(h) The 4th Defendant denies Section 183(a) of the Contracts Act 1950 is applicable and that she is personally liable to the Plaintiff as claimed.

Court's Analysis and Deliberations

[33] There is no dispute that by the Licensing Agreement, Tyron UK had granted the Plaintiff a licence to manufacture the following Tyron wheel bands, namely the 17.5", 19.5"and 22.5" wheel bands for Tyron UK. It is also not in dispute that Tyron UK had paid the Plaintiff the sum of USD 138,700.00 to manufacture the Toolings which were necessary for the manufacturing of the Tyron wheel bands.

[34] Whilst the initial arrangement between Tyron UK and the Plaintiff was for Tyron UK to purchase the Tyron wheel bands from the Plaintiff with Tyron UK authorising the 3rd and 4th Defendants to place the orders on its behalf, this was subsequently replaced by a formal agreement in the form of the Supply Agreement.

[35] In this regard, the 1st Defendant has contended that the Supply Agreement was not intended to be binding and executed as a mere formality to satisfy the Plaintiff's Managing Director.

Supply Agreement – a binding contract?

[36] From the testimony of the parties, I find that the prelude to the Supply Agreement was the issuance of GB7258 sometime in September 2017 by the Chinese Government which was a set of

regulations requiring all buses with vehicle length of more than 9 metre and road transportation vehicles of dangerous goods with weight of more than 3,500 kg to be equipped with emergency protective devices for tyre burst.

[37] At around this time, the 3rd Defendant had testified that he had informed the Plaintiff that the Chinese Road Transport Authority was expected to issue a similar safety requirement for protective wheel bands to be installed onto every heavy vehicles of more than 12,000 kg in a very near future ("**the 12 Ton-Vehicle Safety Requirement**").

[38] It was in view of the aforesaid GB 7258 and the 12 Ton-Vehicle Safety Requirement that the 3rd Defendant had requested the Plaintiff to upgrade its production capacity to accommodate the expected surge in demands for the Tyron wheel bands in China.

[39] In fact, during this time, the Toolings were modified by the Plaintiff with the approval of all parties with the steel feet substituting the polymer feet. This was because the Tyron wheel bands with the polymer feet had failed the compliance test in China and Tyron UK was not prepared to undertake the design modifications. As alluded above, the wheel band manufactured using these modified Toolings were the Titan Series wheel bands to differentiate from the Tyron Series wheel bands.

[40] PW1 testified that in response to the 3rd Defendant's request for the Plaintiff to upgrade its production capacity, the Plaintiff had undertaken the following:

(a) Securing the tenancy of an additional warehouse from 1.12.2017 to 30.11.2019;

(b) purchased additional machine for RM 342,380.00;

(c) employed additional workers from 1.1.2018 to 30.11.2018.

[41] PW1 also testified that the Plaintiff's Managing Director had directed PW1 to secure a supply agreement to be executed with a commitment of a purchase of a minimum quantity of the Titan Series wheel bands annually from the 1st Defendant.

[42] It was following from the aforesaid that the Supply Agreement was executed between the Plaintiff and the 1st Defendant on 18.12.2017 with a commitment from the 1st Defendant of a minimum purchase of 400,000 pieces of Titan Series wheel bands for the first contractual year of the contract in 2018.

[43] It must be noted that with the execution of the Supply Agreement, the purchase of the wheel bands would no longer be by Tyron UK but instead by the 1st Defendant. In fact, it is common ground that during the initial contractual period of the Supply Agreement, orders were made interchangeably between the 1st and 2nd Defendants from the Plaintiff.

[44] At the trial of this action, the 3rd Defendant had sought to undermine the Supply Agreement by contending that the 400,000 units that was the guaranteed quantity to be purchased was impossible to be achieved from the very beginning and this was known to the parties. However, when subject to cross examination, the 3rd Defendant clearly had great difficulty justifying his statement and kept changing his evidence on this point. He initially stated that he was wrong for making the assertion and then claimed that he did not know how to answer the question and finally, reluctantly maintained his original position.

[45] He did not come across well at all and appeared disingenuous to the Court.

[46] I am unable to accept the 3rd Defendant's suggestion that the Supply Agreement was not intended to be binding.

[47] Every agreement in writing, properly and duly signed by the parties

to the agreement must be presumed to reflect the intention of the parties as regards the terms and conditions therein. More so when the parties are corporate entities and the transactions dealt with in the agreement fall within the usual business of the contracting parties.

[48] Apart from the 3rd Defendant's say so, there is nothing to suggest that the Supply Agreement was a sham and not intended to bind the parties to the terms and conditions stated thereto at all.

[49] On the contrary, given the extent of the financial commitments required of the Plaintiff to meet the expected purchases by the 1st Defendant based on the 1st Defendant's representation regarding the potential impact of GB 7258 that would be enforceable in China in 2018, this Court accepts the testimony of PW1 that the Plaintiff's Managing Director needed a minimum degree of commitment from the 1st Defendant on the purchases for the Titan Series wheel bands. This was the reason why the Supply Agreement was required to be executed between the parties and the terms therein were intended to be binding. Reasonable businessmen are not expected to act in vain.

[50] For completeness, at the trial, learned counsel for the 1st Defendant had suggested to PW1 that the minimum purchase of 400,000 units stated under the Supply Agreement included the TPMS brackets which are accessory to the wheel bands. This is on the basis that the word 'product' in the Supply Agreement is defined to include the TPMS brackets.

[51] However, the 3rd Defendant has effectively conceded during cross examination that the TPMS brackets are optional accessory to the Titan Series wheel bands and that the 400,000 units referred to in the Supply Agreement *'... is only on the product itself because the accessory can't function. The accessory is not the lifesaving product. It's the items stated in 1,2 and 3 [of Appendix C]'*.

[52] Accordingly, it is my judgment that the Supply Agreement was not a

mere formality and that the 1st Defendant had indeed agreed to purchase a guaranteed minimum of 400,000 units of the Titan Series wheel bands from the Plaintiff for the first contractual year in 2018.

Whether Supply Agreement varied at the Beijing Meeting

[53] As stated above, notwithstanding the finding of this Court that the Supply Agreement is valid and binding, it is the Plaintiff's pleaded case that the minimum guaranteed quantity in the Supply Agreement was varied at the Beijing Meeting to the Reduced Quantity.

[54] More specifically, the Plaintiff by its Amended Statement of Claim, in particular, paragraph 22A expressly pleaded that the Supply Agreement had been varied and or replaced by the 3rd Defendant's Promise made in Beijing sometime around January 2018. It is this 'promise' that I will now turn to.

[55] Oddly, the Defendants denied that the Supply Agreement was varied or that the minimum guaranteed quantity thereto was reduced to the Reduced Quantity at the Beijing Meeting. In the circumstances of this case, the Reduced Quantity claimed by the Plaintiff under the 3rd Defendant's Promise would only favour the Defendants. Instead, the Defendants had preferred to hedge their position on the submission that the Supply Agreement was not intended to be binding.

[56] "The 3rd Defendant's Promise' as pleaded in the Plaintiff's Amended Statement of Claim refers to a meeting which had taken place in Beijing, China sometime '*in around January 2018'*. However, at the trial, PW1 testified that the meeting was in fact held sometime in *"the first week of February 2018*".

[57] There is no dispute that 'the meeting' in this case was a meeting held at Tyron Beijing's office in Beijing which was attended by *inter alia*, PW1, the 3rd Defendant, the 4th Defendant, Mr Ikea Wu and one Ah Long who were the General Manager and Sales Manager of Tyron Beijing respectively. It is also not disputed that at this Beijing

Meeting that Mr Ikea Wu or a representative from Tyron Beijing had presented a forecast sale plan for the sale of the Titan Series wheel bands in China for 2018. The 2018 Forecast had set a sale target of 200,000 units or 50,000 vehicles for 2018.

[58] By its pleaded case, the Plaintiff claimed that at the Beijing Meeting, the 3rd Defendant had by his words and or conduct instructed or made the 3rd Defendant's Promise which the 3rd Defendant has denied at the trial.

[59] In evaluating the existence or otherwise of the 3rd Defendant's Promise, it is important to appreciate the background to the meeting in Beijing in February 2018.

[60] To begin, it is significant that the Plaintiff was at the material times the only manufacturer of the Titan Series wheel bands needed for the Chinese market. To my mind, the Beijing Meeting was clearly convened with the purpose for the parties, namely, the Plaintiff and the Defendants to learn first-hand from Tyron Beijing as to the expected demands in China for the Titan Series wheel bands as a consequence from the GB 7258 and for the Plaintiff to appreciate what was expected of them as the manufacturer of the products.

[61] In this regard, I accept the testimony of PW1 as to the reason he attended the Beijing Meeting. This was what he said:

> "And my role, during that meeting is to make sure that my production facility is able to support that sales forecast. And Chris Koh in that meeting is a coordinator, you know, to ensure that the sales and the production, they are aligned so that we are able to support their plans over in China"

[62] I must add at this juncture that throughout his testimony, I had the opportunity of observing PW1 and I have found him to be forthright and candid. He was truthful and did not prevaricate or changed his

evidence. His testimony was consistent.

[63] On the other hand, the 3rd Defendant had been caught more than a few times having to retract his testimony when confronted with conflicting evidence. On the Beijing Meeting which he knew was an important event for the Plaintiff's claim, the 3rd Defendant had sought to undermine PW1's presence by testifying that PW1's attendance was not pre-arranged or pre-planned but fortuitous because PW1 was purportedly on a social visit to China at that time. However, upon being confronted with conflicting WhatsApp exchanges between PW1 and the 4th Defendant, the 3rd Defendant conceded that PW1's attendance at the Beijing Meeting was pre-planned.

[64] The 3rd Defendant nevertheless attempted to downplay the significance of the Beijing Meeting by saying that the said meeting was merely 'an in-house meeting'.

[65] In fact, the 3rd Defendant made express amendments to his witness statement filed for the trial prior to giving his testimony to change the reference to the 'sales forecast' in the 2018 Forecast to 'sales target' and thereafter testifying that the 2018 Forecast was nothing more than Tyron Beijing setting targets for itself to achieve, which he sought to emphasize is different from forecast or projection.

[66] With respect, the 3rd Defendant's shift in the description of the 2018 Forecast come across more as an afterthought as he had in his own pleadings and affidavits filed in Court used the description 'sales forecast' instead of 'target'.

[67] Accordingly, I am more inclined to accept PW1's version of the events at the Beijing Meeting to that of the 3rd Defendant. I accept that PW1 was asked to join the Beijing Meeting because the 3rd Defendant wanted the Plaintiff, who was at the time the only manufacturer of the Titan Series wheel bands, to know of the 2018

Forecast and to act on the same.

[68] Following from the 2018 Forecast, as the sole manufacturer of the Titan Series wheel bands, it is only natural that the Plaintiff would need to make the necessary preparation in anticipation of meeting the orders that would be coming from the 1st Defendant based on the monthly forecasts presented at the Beijing meeting for 2018.

[69] The 3rd Defendant himself admitted during cross examination that production of the Titan Series wheel bands required advance planning and preparation. In fact, PW1 had informed the 3rd Defendant that he needed a forecast to plan for the purchase of raw materials and to reduce the lead time for the production.

[70] PW1 had informed the 3rd Defendant that for the initial orders, he needed between 3.5 to 4 months to complete the delivery of the orders, depending on the quantity required. Thereafter, the Plaintiff could start building the '*safety stock for the raw material and parts'*.

[71] The aforesaid, coupled with the expected sudden surge of demand arising from the GB7258 announcement in end September 2017 which was discussed at the Beijing Meeting means that actions had to be taken to capture the anticipated market demands in 2018.

[72] In fact, after receiving the 2018 Forecast, PW1 had proceeded to prepare the Plaintiff's production forecast and acting on the 2018 Forecast, proceeded to produce the Titan Series wheel bands accordingly. This was recorded in the chat messages between PW1 (Danny Ng) and the 3rd Defendant:

> "04/06/2018 2:16:39PM Danny Ng: Can we invoice you for the goods here? **We produced according to your order during our discussion in Beijing.** … We have 3,971 pcs in our stock. We will ship them together with R17W75".

[73] Accordingly, I find that the Plaintiff was in fact instructed by the 3rd Defendant to make the necessary preparation including the purchase of raw materials in order to meet the orders for the forecasted 200,000 units of Titan Series wheel bands in accordance with the 2018 Forecast at the Beijing Meeting.

[74] PW1 further testified that although he was disappointed with the reduction in the quantity to be purchased, nevertheless, he said that the Plaintiff was still prepared to accept the Reduced Quantity as, according to him, the said quantity was '.. *still very good business* ...' for the Plaintiff.

[75] I see no reason to reject PW1's testimony in this regard. Based on a simple calculation, the 200,000 pieces of Titan Series wheel bands would give the Plaintiff gross revenue of more than RM5.6 million (based on the prices of Titan Series wheel bands stipulated in Appendix B of the Supply Agreement). This is more than Plaintiff's gross income of any of year 2016, 2017 and 2018 recorded in its Audited Financial Statements.

Uncertainty on date

[76] Learned counsel for the 1st and 3rd Defendants submitted further that the Plaintiff's claim is doomed to fail as the Plaintiff was inconsistent as regards the date the 3rd Defendant's Promise that was allegedly made. Whilst the Plaintiff has pleaded that the 3rd Defendant's Promise was made at the Beijing Meeting, PW1 had testified during the trial that the Beijing meeting was in February 2018 when the Plaintiff had in its pleadings stated that the said meeting was "*in around January 2018*".

[77] In support, learned counsel for the 1st and 3rd Defendants relied on the Singapore case of *Likpin International Ltd v. Swiber Holdings Ltd* [2015] SGHC 248 where Steven Chong J (as he then was) dismissed a claim for breach of an oral contract for, amongst others,

failure to account for the disparity as to when the oral contract was said to have been concluded:

> "42 While it is possible for a party to plead (a) that a contract was made orally and merely evidenced in a written document; or (b) that the written document per se constitutes the agreement of the parties to be contractually bound, **there should only be one date on which the contract could be said to have been concluded: that is the date there was consensus ad idem - a meeting of minds to be bound by terms which are both certain and complete. But this is not so in the present case. No explanation has been provided to account for the wide disparity in the contract dates. It is plainly unarguable to assert that an oral contract was concluded over a two-month period.** It is vexatious for the plaintiff to experiment by pleading different dates and different bases for the same contract. Thus, I accept the defendants' submission that the plaintiff's inability to specifically identify when the Procurement Agreement was concluded points against the existence of the said agreement." (Emphasis added)

[78] With respect, the facts in our present case are different from that in **Likpin International Ltd.** In this case, it is clearly the Plaintiff's case that the 3rd Defendant's Promise was made at the Beijing Meeting. During PW1's testimony, he merely confirmed that the Beijing Meeting was in fact in early February 2018 and not in January 2018.

[79] Neither the 3rd nor the 4th Defendants had challenged PW1's testimony on the actual date of the Beijing Meeting and or that the Beijing Meeting never took place at all. The Plaintiff has specifically identified the occasion when the 3rd Defendant's Promise was made i.e. at the Beijing Meeting. On the other hand, in **Likpin**

International Ltd, there was no evidence as to the specific occasion when the alleged oral contract was concluded.

[80] In any case, it is my judgment that the phrase 'in around January 2018' does not preclude early February 2018.

[81] Accordingly, I reject that the 1st Defendant's contention that the Plaintiff's claim based on the 3rd Defendant's Promise made at the Beijing Meeting ought to be dismissed for uncertainty.

Quantity based on market demands

[82] The Defendants next contended that the Plaintiff could not hold the 1st and or 2nd Defendants to the Reduced Quantity because the parties were fully aware at all times that the figures were based on the enforcement of the GB 7258 which was something outside the control of the parties.

[83] With respect, I do not agree.

[84] In the first place, there is nothing in the Supply Agreement stipulating that the guaranteed quantity to be purchased would be conditional on the enforcement of GB 7258.

[85] Furthermore, as this Court has found, during the Beijing Meeting the parties had all proceeded on the basis that the enforcement of GB 7258 was imminent and the Plaintiff had proceeded to take preparatory steps to meet the anticipated demands. As the sole manufacturer of the Titan Series wheel bands, the Plaintiff's obligations were to ensure that it could meet the orders agreed without delay. The risks that the enforcement of GB 7258 by the Chinese authorities could be delayed or for that matter even cancelled must necessarily lies with the 1st Defendant and 2nd Defendants.

Whether 1st Defendant assume personal liability

[86] However, I find that there is *no* evidence to support the Plaintiff's case that the 3rd Defendant had provided his personal assurance that the 1st and 2nd Defendants would purchase from the Plaintiff the Reduced Quantity for the year 2018.

[87] The fact that the 3rd Defendant was at the material times a shareholder and a director of both the 1st and 2nd Defendants and that he was actively involved in the business and operation of both companies, does not mean that the 3rd Defendant had agreed to assume personal liabilities for the orders made by the 1st and or the 2nd Defendants in relation to the purchase of the Titan Series wheel bands from the Plaintiff.

[88] The Plaintiff also could not show any contemporaneous documents where a reference was made to the 3rd Defendant's purported personal assurance that the 1st and 2nd Defendants would indeed purchase the Reduced Quantity.

[89] Accordingly, it is my judgment that the Plaintiff's claim against the 3rd Defendant on this ground is to be rejected.

Defence of waiver and estoppel

[90] The Defendants next contended that even if the 3rd Defendant's Promise was in fact made, the Plaintiff is nevertheless estopped from claiming that the 1st and 2nd Defendants had breached the Supply Agreement by failing to purchase the 200,000 units in 2018 as the Plaintiff had waived its rights in respect of the same.

[91] It is the Defendants' case that the Plaintiff had by its conduct led the Defendants to believe that the Plaintiff had chosen to forego its rights to sue for the breach of the 3rd Defendant's Promise to purchase 200,000 units of the Titan Series wheel bands in 2018. Having forego its rights, the Defendants contended that the Plaintiff cannot now insist on enforcing the said breach.

[92] In support, the Defendants referred to the Court of Appeal's decision in *Puncak Alam Housing Sdn Bhd v Menta Construction Sdn Bhd & Anor* [2013] 1 LNS 148 where the principle of waiver held by Lord Denning MR in *W J Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 was endorsed:

> "It is trite law that when one party conducts himself in such a fashion as to lead the other party to believe that he has been given a unilateral waiver of performance of a particular part of the contract, then the party who is relying on that conduct is entitled to claim such a waiver. Lord Denning MR in *W J Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 (CA), writing a separate judgment had this to say about 'waiver' at p 140 of the report:
>
> "The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so - see *Plasticmoda Soc. per Azioni v. Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep 527 at p 539 per Denning LJ.

[93] Further, in *Banning v Wright (Inspector of Taxes)* [1972] 2 All ER 987, Lord Hailsham held as follows:

> "Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right is conferred by the *term* of the contract which has been broken by the appellant. When a contract is broken the injured party in condoning

the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach".

[94] In the present matter, the breach had occurred in 2018. Until the filing of this suit in 2020, the Plaintiff had never raised the issue as to the Reduced Quantity to be purchased under the Supply Agreement or demanded or insisted that the 1st Defendant purchase the balance 200,000 units of Titan Series Wheel Bands despite the continuing business relationship between the parties, which had lasted until 2020. In this regard, reference was made to PW1's testimony during cross-examination where he admitted as follows:

"**JUDGE:** The question is, the supply agreement had put minimum of 400 units.

NG: 400,000, yes, Yang Arif.

JUDGE: The Beijing meeting, parties were looking at 200,000 units.

NG: Yes.

JUDGE: As your target according to…

NG: Target.

JUDGE: To counsel. And by May, the parties, at least you have agreed, were fully aware that the 200,000 units could not have been met.

NG: Yes, Yang Arif.

JUDGE: **The question put by counsel to you is**

that, in the like of all these, did you at any point in time wrote to…

GKT: **D1.**

JUDGE: **D1. Particularly, D1**

GKT: **Or any of the Defendants.**

JUDGE: **That you had, that you would insist on the purchase of a certain minimum number of units?**

NG: **No, I didn't, Yang Arif.**

JUDGE: **Alright.**

…

GKT: **I also put it to you that there was no demand to fulfil orders at the end of 2018. Correct? To fulfil orders either 400,000 wheel bands or 200,000 wheel bands, at the end of 2018.**

NG: **I agree.**

GKT: **Similarly, there was no demand to fulfil orders at the end of 200,000 or 400,000**

NG: **I agree."**

[95] More specifically, reliance was placed on the fact that sometime in May 2018, the Plaintiff was informed by the 3rd Defendant that even the figure of 200,000 units that was stated in the 2018 Forecast could not be met. Notwithstanding the aforesaid, the Plaintiff had never taken any objection to the same nor demanded for any loss arising from the failure by the 1st and or 2nd Defendants to purchase the

Reduced Quantity.

[96] In this regard, PW1 has explained in his witness statement why he did not demand from the 1st and or 2nd Defendants to comply with Reduced Quantity under the Supply Agreement when in May 2018, the 3rd Defendant informed PW1 of the delay in the enforcement of GB7258 and as a result the 200,000 units that was initially forecasted at the Beijing meeting cannot be met. This was what he said:

> "Q: Instead of 200,000 pieces for year 2018, the total sales of Titan Series Wheel Bands since 2018 is less than 10% of that under the 2018 Forecast. What did Chris or Adelyn say about that?
>
> A: **Somewhere in May 2018, Chris told me the market did not react to GB7258 and JT/T1178 as expected, and therefore they could not order the volume set out in the 2018 Forecast. He however said he was hopeful about the market because GB7258 was not cancelled, only that its enforcement was postponed to 1.1.2021. He said that we needed to work together to strengthen the connection with the China vehicle assemblers to realise our goal as tabulated in the 2018 Forecast.**
>
> Q: What was the response of Titan Metal Works to that?
>
> A: **We trusted the potential of the China Market Chris advocated and believed that the sales would pick up. We therefore continued to provide technical support to Chris, Adelyn and Tyron Beijing, expecting that Chris will honour the promise under the 2018 Forecast even though with delay".**

[97] What is clear from the evidence is that the initial expectation that

GB7258 would be enforced in 2018 did not materialize. Instead its enforcement was postponed to 1.1.2021.

[98] In this regard, it is significant that GB7258 was *postponed,* not cancelled, this was admitted by the 3rd Defendant:

"NSS	I accept your answer. Now, you also acknowledge that the reason 200,000 is not happening because the enforcement was postponed two years later. Right?
KOH	Yes.
NSS	**So, that means GB7258 was not cancelled. The effect of that two years was the postponement of enforcement of that regulation. You agree?**
KOH	**Yes".**

[99] As alluded to above, PW1 had explained that he did not object to the figures in the 2018 Forecast because 200,000 pieces for a year were still '*good business*' for the Plaintiff, and he saw the potential of the China market and wanted to continue working with Tyron.

[100] Accordingly, I accept the Plaintiff's submission that the Plaintiff was motivated and influenced by the anticipation that in 2021, the Plaintiff would be expecting a substantial order from the 1st and or 2nd Defendants. In his testimony PW1 explained that he did not want to sour the relationship when the future in 2 years' time looked promising. This was what he said:

NSS	Ok? So, Mr Ng, now the Defendant in

their Defence for the 2nd Defendant in their counterclaim, they say that Titan Metal Works never complained about any breach because, now, you see, Titan Metal Works is claiming for loss of profit. And Titan Metal Works say, there was a promise, and the promise was not fulfilled. So, you are claiming for loss of profit. Now, the Defendant says, no, the was never any notice from Titan Metal Works to any of the Defendants to say "Hey, you breached your promise," yes, and you never complained about them not fulfilling the promise. So, what is your response to that?

NG Yang Arif, it is true that we did not issue any notice to the Defendants, even though there was a breach in the supply agreement because we were still hopeful that it's just a matter of timing and we have worked alongside with them for that period of time, and we don't want to sour that relationship. We know that it's coming, the orders are coming, we just continue to support them. Because we understand that it is a matter of timing that the implementation of the standards will then bring in the orders. So, at that point of time, we just wanted, you know, to continue to support them and not to sour that relationship that we have with Tyron

[101] .I agree with learned counsel for the Plaintiff that in this case the lack of complaint or demand from the Plaintiff regarding the breach of the promise to purchase a minimum of 200,000 units in 2018 cannot be equated with waiver. It is trite law that mere silence does not amount to waiver.

[102] The Court of Appeal in *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783, when dealing with an allegation of waiver, held:

> "[34] The respondents did not dispute the fact that they did nothing when the date for delivery vacant possession came into being. The appellant termed this as silent on the part of the respondents. **Silence by itself could not be interpreted as waiver. It does not mean anything unless there is addition factor which together with the silence could be interpreted or inferred as waiver and / or estoppel …**"

[103] Separately, in *Jabatan Kerja Raya Malaysia & Anor v Sunissa Sdn Bhd* [2022] 5 MLJ 705, the Court of Appeal held that indulgence granted by an employer under a building contract to consider the contractor's appeal against a final certificate did not amount to the employer's waiver of the conclusiveness of the final certificate:

> "[43] In Chitty on Contract (13th Ed), waiver is defined as follows:
>
> > Waiver or forbearance. Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of 'waiver by estoppel' rather than 'waiver by

> election') may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that interpretation.
>
> [44] In the instant case, all that happened was that the contractor had appealed against the rejection of the further claim time and again. And the employer had stated upon receipt of each of the appeals that they will consider it. … [I]t is significant to note that at no time a concession or forbearance was granted by the employer to the effect that they would refrain from treating the certificate as final on account of the appeals. Thus, indulgence granted by the employer to merely consider the appeals cannot be equated with a waiver to treat the certificate as final".

[104] Based on the aforesaid cases, I find that the Defendants have not established that there was in fact and in law a waiver of the Plaintiff's rights at all. At its highest, if at all, there was a postponement of the right until after 2021 when the parties had expected the GB 7258 to come into force. This was because the Plaintiff was continuously given the assurance "*that the volume would be coming soon because of the implementation date*".

[105] The Defendants further contended that because the Plaintiff had failed to provide any notice as required under the Supply Agreement to the 1st Defendant to remedy the breach on the 1st Defendant's part, the Plaintiff is estopped from making the present claim.

[106] However, as correctly pointed out by counsel for the Plaintiff, Clause 12.2 of the Supply Agreement requires a notice of breach to be given to the defaulting party before the 'aggrieved party'

may *terminate* the Supply Agreement on the ground of failure to remedy the breach. However, it is clear that the Plaintiff did not want to terminate the Supply Agreement.

[107] In fact, the Plaintiff had continued to provide technical assistance to the 1st and 2nd Defendants during the period from 2019 to 2020 on the expectation that come 2021 when the GB 7258 is fully enforced, the volume of purchases would increase substantially.

[108] However, what the Plaintiff did not anticipate was the sudden demand by the 2nd Defendant to the Plaintiff for the return of the Toolings and thereafter the 2nd Defendant procuring Tyron UK to terminate the Licence Agreement when the Plaintiff refused to deliver the Toolings to the 2nd Defendant. More will be said on this later but at this juncture it suffices to state that the Plaintiff had treated the demands for the return of the Toolings as a repudiation of the License Agreement and the Supply Agreement and the Plaintiff was consistent in maintaining that it wanted to *affirm* and continue to perform the 2 contracts.

[109] Based on the aforesaid, it is difficult to see how the Plaintiff's failure to issue the notice under Clause 12.2 of the Supply Agreement can give rise to an estoppel against the Plaintiff.

[110] Furthermore, the 1st and 2nd Defendants have not shown how they have changed their position such that they are now prejudiced by the Plaintiff's insistence on its strict contractual rights under the Supply Agreement.

Whether 1st and 2nd Defendants liable jointly and severally

[111] Although the Supply Agreement was executed between the Plaintiff and the 1st Defendant only, the 4th Defendant had testified that sometime after the Beijing Meeting, the purchases were made by both the 1st and the 2nd Defendants. The purchases were subsequently made by the 2nd Defendant only in place of the 1st Defendant. This

was what the 4th Defendant said:

"**JUDGE**: So, when did Malaysia take over from Singapore?

LEONG: I can't remember exactly the date. But it was, it happened because of this [logistics and the cost issue]. Anyhow to UK, it doesn't matter, because they collect royalties.

JUDGE: Yes, so, Malaysia will then issue its own purchase order to –

LEONG: Yes, because we need to export through Malaysia, so we need to, Tyron Malaysia needs to buy. Otherwise, you don't buy, how do you export? That's an issue.

JUDGE: And how do you relate all that to the supply agreement, which is only signed by Singapore?

LEONG: Well, I cannot remember at that time, how we related, but everybody seemed ok with it, and then we just carry on. Nobody questioned and just carry on with that."

[112] Thus, it would appear that the parties had treated both the 1st and 2nd Defendants as one for the purposes of the purchases made under the Supply Agreement. In fact, the Plaintiff made no distinction between the purchases by the 1st Defendant and that of the 2nd Defendant in the computation of the total guaranteed purchases for 2018. This was also the position taken by the 1st and 2nd Defendants.

[113] For the aforesaid reasons, it is my judgment that both the 1st and 2nd Defendants have indeed assumed jointly and severally liability under the Supply Agreement.

Return of Toolings

[114] Under the Manufacturing Licensing Agreement, Tyron UK is the owner of the Toolings which comprised of:

Tooling 1	–	for 22.5" wheel band (50mm, 60mm & 80mm)
Tooling 2	–	for 15" to 18" car band (42.5 mm, 50 mm, 57.5mm, 65mm, 75mm, 85mm)
Tooling 3	–	for Titan Series;
Tooling 4	–	for TPMS brackets

[115] I have alluded to Tyron UK's purported termination of the manufacturing license in June 2020 and that Tyron UK had demanded from the Plaintiff the return of the Toolings above.

[116] The first formal notice of demand for the return of the Toolings was from M/s Michael Chow dated 30.6.2020 then acting for Tyron UK. The Plaintiff responded *vide* its solicitors by letters dated 2.7.2020 and 6.7.2020 where the Plaintiff took the stand that Toolings 2 and 3 were '*essential to the continuation of the agreement between the Parties*' and therefore could not be returned but stated that Tooling 1 and 4 were ready for collection.

[117] However, Tyron UK had refused to collect Toolings 1 and 4, despite the Plaintiff's reminder again on 14.7.2020 through its solicitors that the Plaintiff was ready to release Toolings 1 and 4.

[118] It was the Plaintiff's position that without the possession and use of the Toolings, the Plaintiff would not be able to manufacture the wheel bands under the Supply Agreement. This is confirmed by the 4th Defendant during cross-examination:

NSS	Ok, you would also agree with me that if the Plaintiff gives up, surrenders the toolings to you or to Tyron at that time in June 2020, the Plaintiff would not be in the position to continue to

manufacture Titan series wheel band for Tyron?

LEONG Yes.

[119] PW1 further explained why the Plaintiff had refused to release Toolings 1 and 4 as demanded by Tyron UK:

"NSS So Item 1 and 4, you said you are ready to release. 1 is tooling for 22.5 inch wheel band and then 4 is tooling for TPMS brackets, ok. So can you tell the Court why did you agree to release Item 1 and 4, but not 2 and 3?

NG Yang Arif, at that point of time, **we were holding substantial raw material for item, for the parts under Item 2 and 3. So if we were to return the tooling to Tyron UK, which means all the raw material that we have put on standby for Tyron will then be useless. Therefore, we made, we actually asked Tyron you know that we are ready to in the initial stage we are ready to surrender, return all the toolings provided that they take responsibility of the raw material and also the finished goods that we have purchased, that we have gotten ready but they rejected. So therefore we need to hold on to the tooling because otherwise then all the raw materials would have eventually been gone to waste."**

[120] Sometime on 25.9.2020, Tyron UK assigned its rights to the Toolings to the 2nd Defendant. Subsequent to the assignment, the 2nd Defendant then demanded from the Plaintiff the return of the

Toolings purportedly for certain IATF 16949 certification process that was needed by Tyron Beijing in order to be listed as a supplier to one of its customers for the wheel bands.

[121] It is not in dispute that notwithstanding the 2nd Defendant's demands, until today, the Plaintiff has failed to return the Toolings to Tyron UK or the 2nd Defendant as its assignee.

[122] The 4th Defendant testified at the trial that a new set of toolings has since been procured. It is not clear who had in fact procured the toolings. In this regard, the 2nd Defendant sought to claim the sum of USD 138,700.00 being the original costs of the Toolings as damages for the conversion of the Toolings by the Plaintiff.

[123] In support, learned counsel for the 2nd Defendant relied on the following passage by the authors in **Clerk & Lindsell on Tort (18th Ed)** and adopted by the Court in *KFH Sjarah House (M) Sdn Bhd v Lembaga Kemajuan Wilayah Pulau Pinang* [2012] 3 MLJ 850:

> "…In Clerk & Lindsell on Tort (18th Ed), at p 776 at paras 14– 104, the learned author stated:
>
> > How is the value assessed? If there is a market price, the value of the goods is to be taken as the market price at the relevant time. **If not, the value of the goods must be determined by any available evidence, such as the price at which the goods had been bought,** or sold under a sub-contract …"

[124] At the outset, it must be stated that at the time when the 2nd Defendant made the demand for the return of the Toolings from the

Plaintiff as the assignee of the same, the Supply Agreement was still valid and subsisting. The parties were still anticipating the enforcement of GB 7258 in 2021. There was no indication from the 1st and 2nd Defendants that the Supply Agreement would be terminated and or that the Plaintiff would no longer be required to manufacture the Titan Series wheel bands for them.

[125] In the circumstances, the demand for the return of the Toolings by the 2nd Defendants would tantamount to a repudiation of the Supply Agreement as the Plaintiff would no longer be able to continue manufacturing the same once the Toolings are no longer in its possession.

[126] I agree with learned counsel for the Plaintiff that by the Plaintiff's conduct in refusing to deliver the Toolings to the 2nd Defendant, the Plaintiff was effectively affirming the Supply Agreement and not accepting the repudiation of the same.

[127] In fact, from the testimony given by the 4th Defendant, there are reasons to believe that the 2nd Defendants had wanted the Plaintiff to release the Toolings to Tyron Beijing because there was plan for Tyron Beijing to take over the manufacturing of the wheel bands in place of the Plaintiff.

[128] Although the Plaintiff was told that Tyron Beijing needed the Toolings purportedly for the IAFT 16949 Certification, which was said to enable Tyron Beijing to be listed as one of the official vendors for one Foton Motors, a truck manufacturer in China, nevertheless, there was no evidence in support of this purpose at all. Critically, Tyron Beijing was a distributor and not a manufacturer of the wheel bands. The IAFT Certification was a certification of a manufacturer and not a distributor.

[129] Furthermore, the 4th Defendant during her cross examination had conceded that Tyron Beijing had previously relied on the Plaintiff's

IAFT Certification when requested for the same by its customers.

[130] The 4th Defendant testified that the reasons why the 2nd Defendant no longer requires the Toolings to be returned from the Plaintiff is because Tyron Beijing now manufactures the wheel bands. It has been manufacturing the wheel bands since late 2020.

[131] I also view the 4th Defendant's testimony at the trial that she had informed the Plaintiff that the Toolings would be returned to the Plaintiff after the IAFT Certification in China with suspicion as there is no documentary evidence in support of the same.

[132] In fact, the 4th Defendant's testimony contradicts Tyron UK's position who had sometime on 7.6.2020 informed the Plaintiff that Tyron UK would no longer be working with the Plaintiff. According to the email dated 7.6.2020 from Richard Glazebrook to PW1, he said:

> "There is **no future for us** so I am instructing you to release our tooling with immediate effect into the safe keeping of Adelyn and Chris"

[133] The 4th Defendant admitted during cross examination that it was she who had prompted Tyron UK to issue the email demanding the Plaintiff to release of the Toolings to the 2nd Defendant after the Plaintiff had refused to release the same to the latter.

[134] Clearly the suggestion that the Toolings would be returned to the Plaintiff after the purported IAFT Certification is an afterthought.

[135] Accordingly, it is my judgment that the Plaintiff's refusal to return the Toolings to the 2nd Defendant when demanded in 2020 did not amount to wrongful conversion.

[136] For the records, this Court makes no determination as to whether the Plaintiff has acquired intellectual property in the *modified* Toolings.

Loss of Profit

[137] There is no dispute that neither the 1st and or then 2nd Defendants had fulfilled the obligation to purchase the Reduced Quantity in 2018, or any time thereafter from the Plaintiff. The combined purchases by both the 1st and 2nd Defendants from April 2018 to February 2020 was only 18,092 pieces.

[138] The Plaintiff's claim is for projected net profit computed as follows:

> (Agreed Price per band – Projected Cost per band) x (Agreed Quantity for 2018 – Quantity Already Purchased) = Loss of Profit

[139] In this case, the price and quantity are clear and certain as the price is spelled out in the Supply Agreement and the quantity is the Reduced Quantity of 200,000 units less the 18,092 units already purchased. In computing the "Projected Cost per band", PW1 has explained in his Supplementary Witness Statement that he had factored in wastages and inefficiency in the manufacturing process and he used cost estimates which were higher than the actual costs that the Plaintiff had incurred for the actual purchases. The higher costs estimate would actually result in a lower projected profit. He has also provided sufficient evidence to show that his cost estimation has included all relevant factors and was realistic compared to the actual costs.

[140] Further, PW1 has given detailed explanation of his methods of calculation in his witness statement, which were not challenged in cross-examination or by rebuttal evidence by the 1st and 2nd Defendants. On the method of computation for loss of projected profit, the Court of Appeal in *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd & Anor case* [1995] 3 CLJ 171 held as follows:

> "The projection to be worth anything should have been

> backed by evidence of inter alia wages to be incurred eg employment contracts, costs of material eg quotations from suppliers, actual prices at which medical practitioners purchased bottles and so on."

[141] Significantly, in calculating its loss of profit, the Plaintiff has taken into account Titan Series wheel bands purchased by the 1st and 2nd Defendants not only in year 2018, but the total purchases made up to year 2020, but only confining its claim to the guaranteed Reduced Quantity of 200,000 units for 2018.

[142] PW1's calculation shows that the loss of projected profit is at least RM1,501,468.63 based on quantity of 200,000 but the Plaintiff has limited its claim to RM882,435.44 only.

[143] On the question of damages, paragraph 12(e) of 2nd Defendant's Defence & Counterclaim states that the Plaintiff did not mitigate its losses. However, no details or suggestion as to what steps the Plaintiff ought to have taken to mitigate its losses were pleaded.

[144] The Federal Court in *Leong Yoong v Lee Sem Yoong* [1968] 2 MLJ 72 has held that the burden is on the defendant to allege and prove the plaintiff's failure to mitigate damages:

> "If there were grounds for mitigation it was for the appellant to have alleged and proved them:
>
> > 'The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each case, the burden of proof being upon the defendant' (see Halsbury, vol 11, 3rd Ed)"

[145] The High Court in *Noor Azahar Habin v Rajaswari Sithampara Pillai & Anor* [1991] 3 CLJ (Rep) 339 applied the same principle and held:

> "It was not put to the Plaintiff or any other witness in cross examination or at all that the plaintiff had available to him such employment. It is true that a plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong. … However, as I see it the burden of proof is on the defendant to show that the plaintiff should have taken certain steps to mitigate his loss and the normal measure of damages will not be cut down unless the defendant succeeds in showing that the plaintiff ought reasonably to have taken suggested mitigating steps."

[146] In our case, there was no suggestion from any of the Defendants that certain steps should have been taken by Plaintiff to mitigate its loss of profit, either during cross-examination of PW1 or during their case.

[147] It must be also borne in mind that the Defendants themselves have proceeded on the basis that the intellectual property of the Titan Series wheel band does not belong to the Plaintiff which means that it was not allowed to manufacture the wheel bands for any third parties except the Tyron entities, and therefore could not have reduced its loss of profit by contracting with other parties to supply the wheel bands. Neither was there any suggestion that the raw materials that were purchased by the Plaintiff could be sold to other third party.

[148] The Plaintiff's claim for the loss of project profits is in fact heavily discounted. The claim is confined to only the guaranteed Reduced Quantity for 2018 even though the Supply Agreement was for 3 years. The Plaintiff has also taken into its computation the purchases made by the 1st and 2nd Defendants in 2019 and 2020 instead of confining the purchases to the year 2018. The Plaintiff has also based its computation on the lowest purchase price out of the 3 Titan Series wheel bands. Even so, the Plaintiff is claiming its loss of profits not based on the agreed purchase price under the Supply

Agreement but on a lower figure.

[149] Significantly, at the trial, only counsel for the 4th Defendant had questioned PW1 on his method of computation of the Plaintiff's loss of profits. However, his main complaint was that the expenses relied upon by PW1 in computing the loss of profit are not relatable to the production of the Titan Series wheel bands. However, PW1 has clearly based his computation on the production of the W50 Titan Series wheel bands.

[150] Learned counsel for the 1st and 3rd Defendants contended that the computation by PW1 is based upon self-serving documents. However, if one were to examine PW1's computation, the same is supported by third party documents.

[151] Accordingly, this Court holds that the Plaintiff has proven its claims for loss of profit of RM 882,435.44.

Claim against the 4th Defendant personally

[152] The Supply Agreement was entered into by the Plaintiff as the seller and the 1st Defendant as the buyer. It is not disputed that the 4th Defendant had signed the Supply Agreement as the authorised representative of the 1st Defendant.

[153] The Plaintiff seeks to rely on Sections 183 and 186 of the Contracts Act 1950 to hold the 4th Defendant personally liable for the obligations of the 1st Defendant under the Supply Agreement.

[154] More specifically, these sections stipulate thus:

> "**183**.In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> Such a contract shall be presumed to exist in the following cases:

(a) where the contract is **made by an agent** for the sale or purchase of goods for a merchant resident abroad;

(b) where the agent does not disclose the name of his principal; and

(c) where the principal, though disclosed, cannot be sued."

"**186**.In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton."

[155] In reliance of Section 183(a), the Plaintiff contended that the 4th Defendant, being an agent of the 1st Defendant when she signed the Supply Agreement, there is a presumption that the 4th Defendant had made a contract to be personally bound by the agreement.

[156] With respect, I disagree.

[157] In **Danaharta Manager Sdn Bhd** v **Khairol Anuar Bin Amran & 2 Ors** (D3-22-494-2004), the High Court drew a distinction between a mere servant and an agent:

"(a) Agency concept generally will not arise just because some persons or employee are authorised by the 1st defendant to give instructions to the 2nd and/or 3rd defendant. […];

The Learned author of Halsbury Laws of England make the

following observations:

> "The term 'agency' and 'agent' have in popular use a number of different meanings, but **in law the word "agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties.** The relation of agency arises, whenever one person, called the 'agent' has authority to act on behalf of another called the 'principal' and consents to act ...

The Supreme Court of India in Lakshiminarayan Ram Gopal & Sons v. Hyderabad Government adumbrated on the word "agent" and "servant" and made the following observations:

(a) An agent has the authority to act on behalf of his principal and to create contractual relations between the principal and a third party. This kind of power is not generally enjoyed by a servant.

(b) A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it to be done. A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given to him in the course of his work. But an agent is not subject in its exercise to the direct control or supervision of the principal,"

[158] Section 183 of the Contracts Act is identical to Section 230 of the Indian Contracts Act 1872. In **VR Mohanakrishnan** v **Chimanlal Desai & Co** (AIR) (47) 1960 Madras 452 at 456, the Indian Court held:

> "It appears to us that, in at least certain of the Indian

decisions, the distinction is not clear, and that a certain element of confusion has crept in, because the ascertainment of probable intention has been imported into the situation. On contrary **we must be very clear indeed in a given case whether the contract is, in juridical and substance, between the home merchant and the home agent of the foreign principal, entering into the contract on behalf of his principal, or whether the home merchant are the direct principals.**

In the latter case, Sec.230 itself is inapplicable, sub-section (1) therefore will not apply.

[…] In the later decision of this Court in Arunachalam Chettiar v. Kasi Navendra Pillai, 24 Ind Cas 1007: (AIR 1914 Mad 97), Sadasiva Iyer, J., followed the earlier Bench decision, and observed:

"The presumption raised under S. 230 of the Indian Contract Act is rebutted by the fact that the contract is made in the name of the first defendant's principal (whoever he may be), and not of the first defendant."

[159] The following passage in **Wong Yan Mok** v **Indo-Malaya Trading Co** (1975) 1 MLJ 147 further illuminates the point:

"Paragraph 518 at page 230 of Halsbury's Laws of England Vol.1 states,

"where a person in **making** a contract discloses both existence and the name of the principal on whose behalf he purports to make it, he is not, as a general rule, liable on the contract to the other contracting party, whether he had in fact, authority to make it or not; but a personal liability may be imposed upon him by the express terms of the contract, by the ordinary course of the business, or by usage. **In particular when an**

> **agent makes a contract on behalf of a foreign principal, there is a presumption based upon the custom off merchants that the agent has no authority to pledge the credit of the foreign principal so as to establish privity of contract between the foreign principal and the third party, and that the agent, although he discloses the name off the principal, contracts personally, unless a contrary intention appears from the contract itself or from the attendant circumstances. But where the foreign principal is brought into privity of contract the presumption does not operate so as to render the agent liable as well as the principal**."
>
> [...] Even if **any** presumption arises, I find that it has been amply rebutted by the contract itself and the attendant circumstances which clearly establish privity of contract between the plaintiff and Sultan Textile Mills (Karachi) Ltd. In Pakistan. (See Miller, Gibb & Co. v. Smith & Tyrer, Ltd)."

[160] Similar principles have been stated in **Swee Hock Chan Sdn Bhd** v **Tan Seng Hin** (1984) 2 CLJ (Rep) 478 at 480 and in **Syarikat Econlite (M) Sdn Bhd** v **Macro Jaya Marine Engineering Sdn Bhd & 2 Ors** (Suit No. SDK-22NCVC-8/3-2020).

[161] Thus, there is a distinction between a case where the agent is making a contract on behalf of a foreign merchant and one where the party privy to the contract is in fact the foreign merchant who had merely authorised a local party to execute the agreement on its behalf. In the latter scenario, the local person signing the agreement is not liable personally for the contract unless there is contract to the contrary.

[162] The Plaintiff's pleaded case against the 4th Defendant is confined to the plea at paragraph 39B of the Amended Statement of Claim, which is as follows;

> "The 1st **Defendant** and, by virtue of sections 183 (a) and 186

of the Contracts Act 1950, the 4th Defendant, are jointly and severally liable to the Plaintiff for such losses."

[163] At paragraph 20A of the Amended Statement of Claim, the Plaintiff avers that;

"The Supply Agreement was signed by the 4th Defendant on behalf of the 1st **Defendant**."

[164] Based on the aforesaid, by the Plaintiff's own pleaded case, it is known to the Plaintiff that in executing the Supply Agreement, the 4th Defendant was not acting in her personal capacity and she did not at any time agree to assume personal liability of the obligations thereto. Further, the parties to the Supply Agreement were expressed to be between the Plaintiff and the 1st Defendant as principals.

[165] In our case, the 4th Defendant signed the Supply Agreement as an authorised representative of the 1st Defendant. The Supply Agreement was not entered into by the 4th Defendant as agent of the 1st Defendant at all.

[166] Further, it was not the Plaintiff's case that the 4th Defendant entered into the Supply Agreement as an agent of the 1st Defendant.

[167] For the reasons stated and relying on the principles governing the law on Section 183 of the Contracts Act 1950, it is plain that the Plaintiff's action against the 4th Defendant is not sustainable.

Plaintiff's USD 33,000.00 Claim Against 1st Defendant

[168] In addition to the loss of profit, the Plaintiff has a separate claim of USD 33,000.00 against the 1st Defendant for goods sold and delivered. This claim is not disputed. However, the 1st Defendant has sought to set off the claim with an identical sum of USD 33,000.00 which the Plaintiff owed to Tyron UK which Tyron UK had assigned to the 1st Defendant.

[169] The sum of USD 33,000.00 owed to Tyron UK from the Plaintiff is based on an agreement where the Plaintiff had agreed to give Tyron UK a 'credit note' as a compromise to certain allegations of defects in the products that the Plaintiff had sold to Tyron UK. This 'credit note' is evidence by PW1's hand-written note, which states '*issue CN (offset against 30% invoice value for future deliveries)*', '*Total CN value = $33,000.00*'

[170] The Plaintiff contended that because the 'credit note' was specifically confined to future orders to be made by Tyron UK, it is not permissible for Tyron UK to assign the 'credit note' to the 1st Defendant.

[171] However, there is nothing to suggest that the 'credit note' was non-assignable. Further, with the execution of the Supply Agreement, the parties were aware that all purchases by Tyron UK would be taken over by the 1st and 2nd Defendants.

[172] Accordingly, it is my judgment that the Plaintiff's contention that the 'credit note' cannot be assigned is without merits.

[173] For the aforesaid reason, the 1st Defendant can set off the Plaintiff's claim with the similar sum under the credit note assigned by Tyron UK to the 1st Defendant.

Plaintiff's Claim for RM 98,197.51 against the 2nd Defendant

[174] Similarly, apart from the loss of profits, the Plaintiff has a claim of RM 98,197.51 against the 2nd Defendant being a debt due and owing for goods sold and delivered.

[175] The 2nd Defendant does not dispute the said claim but has raised a Counterclaim against the Plaintiff for conversion of the Toolings as a defence to the claim.

[176] As I have rejected the 2nd Defendant's Counterclaim for conversion, it is my judgment that the 2nd Defendant is to pay the Plaintiff the

said sum of RM 98,197.51.

Conclusion

[177] For the above reasons, I hereby make the following orders:

(a) The 1st and 2nd Defendants are jointly and severally to pay the Plaintiff its loss of profits in the sum of RM 882,435.44 with interest at the rate of 5% per annum from 31.12.2020 until full realisation;

(b) The 2nd Defendant to pay the Plaintiff the sum of RM 98,197.51 with interest at the rate of 5% per annum from 31.12.2020 until full realisation;

(c) The 2nd Defendant's Counterclaim for conversion is dismissed;

(d) The 1st and 2nd Defendants to pay the Plaintiff's costs in the sum of RM 85,000.00 subject to payment of allocator;

(e) The Plaintiff's claim against the 3rd Defendant is dismissed with costs fixed at RM 20,000.00 subject to payment of allocator;

(f) The Plaintiff's claim against the 4th Defendant is dismissed with costs fixed at RM 35,000.00 subject to payment of allocator.

[178] The Court thanks the counsel for their respective written and oral submissions and for the authorities cited in support which have been helpful in arriving at the decision.

Dated: 19 JUNE 2023

(ONG CHEE KWAN)
Judge of the High Court of Malaya
High Court of Kuala Lumpur, NCC2

Counsel:

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

For the 1st and 3rd defendant - Goh Keng Tat & Elfeez Thariq Zainuddin; M/s Goh Keng Tat & Co

For the 2nd defendant - Wong Zhi Khung & Neoh Kai Sheng; M/s. Michael Chow

For the 4th defendant - Prakash Lachimanan; M/s Prakash Lachimanan (Petaling Jaya)

Cases referred to:

Araprop Development Sdn Bhd v Leong Chee Kong & Anor [2008] 1 MLJ 783

Banning v Wright (Inspector of Taxes) [1972] 2 All ER 987

Jabatan Kerja Raya Malaysia & Anor v Sunissa Sdn Bhd [2022] 5 MLJ 705

KFH Sjarah House (M) Sdn Bhd v Lembaga Kemajuan Wilayah Pulau Pinang [2012] 3 MLJ 850

Leong Yoong v Lee Sem Yoong [1968] 2 MLJ 72

Likpin International Ltd v. Swiber Holdings Ltd [2015] SGHC 248

Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd & Anor case [1995] 3 CLJ 171

Noor Azahar Habin v Rajaswari Sithampara Pillai & Anor [1991] 3 CLJ (Rep) 339

Plasticmoda Soc. per Azioni v. Davidsons (Manchester) Ltd. [1952] 1 Lloyd's Rep 527

Puncak Alam Housing Sdn Bhd v Menta Construction Sdn Bhd & Anor [2013] 1 LNS 148

W J Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127 (CA)

Legislation referred to:

Contracts Act 1950, S. 183 and 186

Indian Contracts Act 1872, S. 230

Book & Article Reference:

Clerk & Lindsell on Tort (18th Ed)