IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 124

Suit No 860 of 2013
HC/Summons No 5786 of 2016

Between

Aries Telecoms (M) Berhad
(formerly known as V Telecoms Berhad)

… *Plaintiff*

And

ViewQwest Pte Ltd

… *Defendant*

And

Fiberail Sdn Bhd

… *Third Party*

GROUNDS OF DECISION

[Contract] — [Remedies] — [Damages]

Aries Telecoms (M) Bhd
v
ViewQwest Pte Ltd (Fiberail Sdn Bhd, third party)

[2017] SGHC 124

High Court — Suit No 860 of 2013 (HC/Summons No 5786 of 2016)
Woo Bih Li J
12 January; 7 February 2017

26 May 2017

Woo Bih Li J:

Introduction

1 The main action was a claim by the plaintiff, Aries Telecoms (M) Bhd ("Aries") against the defendant, ViewQwest Pte Ltd ("ViewQwest") for conversion arising from ViewQwest's refusal to return certain information technology equipment to Aries after a letter of demand was sent by Aries to ViewQwest. The equipment was eventually returned before the trial of the action without prejudice to the parties' rights.

2 After the trial was part heard over some days, ViewQwest eventually consented on 11 October 2016 to an interlocutory judgment to be granted against it with damages to be assessed. Accordingly, I granted interlocutory judgment in favour of Aries against ViewQwest that same day. I also indicated

that it might be appropriate for an application to be made for a preliminary point to be decided as to the nature of the relief which Aries was entitled to.

3 Eventually Aries filed Summons No 5786 of 2016 ("Summons 5786") for the determination of a preliminary issue pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The preliminary point was whether Aries was entitled to (a) an account of profits made by ViewQwest arising from the conversion of the equipment or (b) an order that ViewQwest disgorge such profits to Aries.

4 Summons 5786 was heard by me on 12 January 2017 and 7 February 2017. In the course of arguments, Aries also sought to claim, as an alternative, punitive, exemplary or aggravated damages. The hearing continued on the basis that I was to rule also on those damages. On 7 February 2017, I decided that Aries was not entitled to claim an account of profits from ViewQwest nor an order for ViewQwest to disgorge its profits from the use of the equipment. I also decided that Aries was not entitled to punitive, exemplary or aggravated damages. I will refer to this as "the 7 February 2017 Order". My decision meant that Aries was entitled only to ordinary damages. I then gave directions for the assessment of such damages including the filing of pleadings and affidavits of evidence-in-chief.

5 However, on 23 February 2017, Aries filed a notice of appeal to the Court of Appeal against the 7 February 2017 Order.

The arguments and the court's reasons

6 Aries' claim for an account of profits from ViewQwest merged into its claim for ViewQwest to disgorge the profits which it had earned from the use of the equipment before the equipment was returned eventually to Aries. Thus, in Aries' written submissions dated 9 January 2017, Aries asserted that "the thrust of [its] claim lies potentially in the Disgorgement of Profits Claim".[1]

7 Aries based such a claim on suggestions made by Professor James Edelman (now a judge of the High Court of Australia) in his book *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002). In particular, Aries focussed on a suggestion by Mr Edelman that disgorgement of profits was an appropriate relief for wrongs committed deliberately and cynically because the tortfeasor had calculated that his gain would exceed the damage he might be liable for. This was a form of deterrence for tortfeasors where profit was the motive and was appropriate where compensatory damages were not adequate as a deterrence. Such an award would apply even where material gain was not the main motive although Aries' case rested on profit as ViewQwest's motive.

8 However, Aries accepted that in Singapore, it was still unclear whether our courts would grant such a relief. It referred to *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 ("*Strand*") which was discussed by the Court of Appeal in *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 ("*ACES*") and submitted that in *ACES*, the Court of

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[1] Plaintiff's written submissions dated 9 January 2017, para 9.

Appeal said, at [54], that this was a rather thorny area of the law of damages and deferred arriving at a conclusive or definitive view as to what the law ought to be.

9 Yet, as ViewQwest submitted, neither *Strand* nor *ACES* involved a claim for disgorgement of profits. As the Court of Appeal took pains to reiterate in *ACES* at [32], the question of a possible award of damages for the profits gained by the tortfeasor was "*not* the fact situation in either [*Strand*] or [*ACES*]" [emphasis original]. Rather, the question in each case was whether the plaintiff ought to be granted the loss of hire for certain goods detained by the defendant. In *ACES*, the Court of Appeal was discussing whether damages awarded in such a claim were awarded pursuant to the user principle analysed as an *exception* to the general compensation principle, or analysed as an *alternative and distinct* principle in itself. The court referred to the latter as "the Possible Alternative Analysis". It was this question which the court referred to at [54] as a rather thorny area of the law of damages. At [58], the Court of Appeal also discussed punitive and aggravated damages and again mentioned the thorny nature of this particular area of the law. Although disgorgement of profits was discussed in *Strand* and in *ACES*, this was in passing only. No definitive finding was made on the availability of this form of relief as it was not a live issue before either court.

10 Thus, for example, in *Strand*, Denning LJ said (at 255) that, "I can imagine cases where an owner might be entitled to the profits made by a wrongdoer by the use of a chattel, but I do not think this is such a case". Contrast this observation with the view expressed by Somervell LJ in the same case (at 252) when he said, "I think the actual benefit which the defendants

have obtained is irrelevant. The damages could not, in my view, be increased by showing that a defendant had made by his use of the chattels much more than the market rate of hire. Equally they cannot be diminished by showing that he had made less".

11 Coming back to *ACES*, the Court of Appeal noted that a claim for disgorgement of profits was different from a claim for damages awarded pursuant to the user principle as adopted by Denning LJ in *Strand*. Under Denning LJ's analysis, the user principle would characterise the benefit to the tortfeasor as one *of* the detention of property without the payment of a fee and the possible award of damages for profits gained by the tortfeasor *from* the detention of property without the payment of a fee was beyond the scope of the user principle. The latter had not been definitively decided by courts and was still very much open to debate (at [32]).

12 Thus, Aries faced two hurdles. The first was whether the relief in the form of disgorgement of profits was applicable in Singapore for the tort in question. The second was whether the facts justified the granting of such a relief even if it was applicable in Singapore. As it turned out, Aries could not overcome the second hurdle and thus it failed on the facts before this court.

13 It was important to bear in mind that this was not a case where ViewQwest knew right from the start when it first received the equipment that the equipment belonged to Aries.

14 ViewQwest had a contract with a company known as Fiberail Sdn Bhd ("Fiberail"). It also had a contract with Aries. It was unclear from the documentation under each contract whether the equipment had been initially

supplied to ViewQwest by Fiberail under Fiberail's contract with ViewQwest or by Aries under its own contract with ViewQwest. All that was undisputed was that ViewQwest did receive the equipment. Aries emphasised that it had bought and paid for the equipment from the original supplier who had delivered the equipment to ViewQwest. But that was neither here nor there. Even if Aries was the purchaser, this did not preclude it from supplying the equipment to Fiberail under its own contract with Fiberail which in turn then directed that the equipment be sent to ViewQwest under Fiberail's contract with ViewQwest.

15 It was only by a letter dated 5 March 2013 that Aries demanded the return of the equipment from ViewQwest.[2] Significantly, after receipt of such a demand, ViewQwest replied on 20 March 2013 to say that it had received the equipment from Fiberail.[3] Consequently, Aries wrote to Fiberail on 20 March 2013[4] and Fiberail replied on 24 April 2013 to say that the equipment did not belong to it and Aries was to liaise directly with ViewQwest to reclaim the equipment.[5] Although this appeared conclusive in favour of Aries, ViewQwest subsequently obtained a letter from Fiberail dated 11 October 2013 to say that the equipment was supplied to ViewQwest to establish an initial interconnection between Fiberail and ViewQwest.[6] This was done as part of a business arrangement between Fiberail and Aries.

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2 Wan Alias Bin Wan Ngah @ W Yahya's Affidavit of Evidence-in-Chief dated 18 February 2015 ("Wan's AEIC"), Exhibit WAN-9.

3 Wan's AEIC, Exhibit WAN-10.

4 Wan's AEIC, Exhibit WAN-11.

5 Wan's AEIC, Exhibit WAN-12.

6 Wan's AEIC, Exhibit WAN-20.

Therefore, this letter appeared to contradict Fiberail's own letter dated 24 April 2013. It appeared that one of Fiberail's officers who had been dealing with Aries and ViewQwest, one Norazmi Bin Termuzi, was no longer in Fiberail's employment and hence the confusion.

16 In any event, ViewQwest eventually agreed to return the equipment to Aries without prejudice to the rights of the parties prior to the return. Notwithstanding ViewQwest's intention to return the equipment, there was some further delay as the parties were negotiating the terms and the logistics for the return. The equipment was finally returned to Aries in September 2015.

17 The trial commenced on 2 February 2016 and Aries adduced evidence first. It ended on 4 February 2016 and was therefore adjourned for fresh dates to be given. When the second tranche commenced on 10 October 2016, ViewQwest then adduced evidence through its first and main witness, Lim Hock Koon ("Mr Lim") who was Senior Vice President of ViewQwest.

18 ViewQwest finally consented to interlocutory judgment being entered against it for damages to be assessed. Subsequently, upon Aries' application for the determination of a preliminary issue, I decided that Aries was not entitled to an account of profits or disgorgement of profits from ViewQwest. Neither was it entitled to exemplary, punitive or aggravated damages, as mentioned above (see also *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd (Fiberail Sdn Bhd, third party)* [2017] SGHC 83).

19 Therefore, this was not a case where Aries was denied an opportunity of presenting its own evidence or an opportunity to cross-examine ViewQwest. It had closed its case in the trial and was in the midst of cross-

examining ViewQwest's Mr Lim. The cross-examination was effected over about one and a half days at the second tranche before interlocutory judgment was entered.

20 Aries' position in the initial supporting affidavit of its counsel, Mr Troy Yeo and in its written submissions for its application for the determination of a preliminary issue in Summons 5786 was that it did not have sufficient evidence to establish its claim to a disgorgement of profits or to punitive or aggravated damages.[7] Whether its claim would be made out would depend on the evidence at the assessment. This was an illogical argument because if Aries was not ready to establish its claim, then it should not have filed its application for a preliminary determination.

21 In any event, at the first hearing of Aries' application on 12 January 2017, Aries' counsel said that he was prepared to proceed with Aries' application without more evidence. He took the position that there was already sufficient evidence to establish Aries' claim for the reliefs sought.

22 However, all that Aries' counsel could point to eventually was the fact that ViewQwest was still using the equipment for profit after Aries' demand dated 5 March 2013 for the return of the equipment. While it was true that Mr Lim did say during cross-examination that ViewQwest did not really need the equipment and could replace it easily,[8] this was still consistent with its

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7 Affidavit of Troy Yeo Siew Chye dated 30 November 2016 at para 34; Plaintiff's written submissions dated 9 January 2017 at para 22.

8 Notes of Evidence, 10/10/16, 129:9–129:15; 133:24–134:15; 135:15–135:22.

perception that it thought it was entitled to use the equipment under its contract with Fiberail.

23 Based on the evidence given at trial, Mr Lim appeared to be more steady as a witness than Aries' witness, Wan Alias Bin Wan Ngah @ W Yahya.

24 It seemed to the court that it was likely that ViewQwest had genuinely believed that the equipment had been delivered to it pursuant to Fiberail's contract with ViewQwest and not Aries' contract with ViewQwest. Hence, when Aries initially demanded the return of the equipment, ViewQwest was not being cynical or deliberate in refusing to return the equipment to Aries.

25 True, ViewQwest did eventually agree to return the equipment to Aries. However, this was not because ViewQwest came to accept that the equipment had been initially delivered to it pursuant to Aries' contract with it. This was a point which was still contested at the trial. The reason why ViewQwest agreed to return the equipment was because the court had noted that even if the equipment had been initially delivered to it pursuant to Fiberail's contract with it, Fiberail was not claiming ownership of the equipment. Neither was Fiberail alleging that Aries was precluded from claiming the return of the equipment from ViewQwest or that ViewQwest ought to refuse to return the equipment to Aries. In such circumstances, ViewQwest eventually realised that it no longer had a legal basis to refuse Aries' demand. Whatever recourse it might have against Fiberail for not being able to continue to use the equipment was a separate matter.

26 In such circumstances, it seemed to me that ViewQwest's continued refusal to return the equipment to Aries, after Aries' demand and after sufficient time to investigate and consider its legal position, was misguided but not cynical or deliberate. In any event, the burden of proof was on Aries to establish the latter which it failed to do. I add that I have not yet determined how much time was reasonable for ViewQwest to make its investigation and seek legal advice. That would be addressed more specifically at the assessment hearing. For the time being, I accept that ViewQwest should have agreed to return the equipment earlier than it did. However, its omission to do so was due to a misguided view.

27 I also took into account that when ViewQwest was agreeable to return the equipment to Aries, there was a further delay in effecting the return as the parties were negotiating on issues pertaining to the terms and logistics of the return. ViewQwest's counsel stressed that this further delay was not due to its fault and Aries' counsel accepted that part of the delay could perhaps be attributed to Aries itself. Much time was needed to resolve such issues pertaining to the return of the equipment.

28 The fact that the further delay could not be attributed solely to the fault of ViewQwest reinforced my impression that ViewQwest was not and had not been acting cynically or deliberately when it initially refused to return the equipment to Aries.

29 In the circumstances, I concluded that Aries had failed to establish its claim for disgorgement of profits.

30 As for Aries' claim for punitive, exemplary or aggravated damages, the first two are actually one and the same claim, *ie*, punitive damages are also referred to as exemplary damages (see *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] SGCA 26 at [63]).

31 Furthermore, Aries did not draw any specific distinction between punitive damages on the one hand and aggravated damages on the other. Its point was that such damages were available when a defendant deliberately detained a plaintiff's goods even if profit was not a defendant's motive. Unfortunately for Aries, as it presented its claim for such damages based also on deliberate conduct by ViewQwest, such a claim could not proceed further than its claim for disgorgement of profits and was likewise unsuccessful.

Woo Bih Li
Judge

Troy Yeo (Chye Legal Practice) for the plaintiff;
John Sze and Nicola Loh (Joseph Tan Jude Benny LLP) for the defendant.