KONINKLIJKE PHILIPS ELECTRONICS NV ... **Appellant**

AND

AIFA SDN BHD ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No 13 of 2014)

Before: Mortimer P, Leonard and Burrell JJ A.
3rd December, 2014

Damages – Quantum of damages pursuant to undertaking in ex parte Anton Pillar Order and injunction

Ms Dy Hjh Feridahanam Abang Hj Zen for Plaintiff
Mr Lim Boon Khai and Mr Lim Rui for Respondent

Cases cited in the judgment

Booker Mc Connell plc v Plascow [1985] RPC 425
Malik Vs Bank of Credit [1977] UKHL 23; [1980 AC 20]
Hoffman La Roche & Co. AG v. Secretary of State for Trade and Industry [1975] AC 295 [@ Pages 63 – 140, of ABOA]
Saville J in Financiera Avenida SA v Shiblaq

Burrell, JA.:

This is an appeal by the Plaintiff in HCCS 117/2004 ("Philips") against an assessment of damages in the defendant's ("AIFA") favour made after a two day hearing in April 2014 by Senior Registrar Hazarena bte POKSJ DP Hj Hurairah. Her decision is dated 22nd July 2014.

Background

The claim for damages arose out of an application made, ex parte, by Philips for an Anton Pillar Order and injunction over 10 years ago, on 10th June 2004. Philips were concerned about alleged copyright infringements in relation to 6 specific juice blenders being sold by AIFA in Brunei.

The ex parte application was granted and, in outline, provided that up to 13 solicitors and assistants could enter AIFA's premises in Muara and up to 10 solicitors and assistants

could enter their premises in Gadong to search for and seize, the allegedly offending items. Section 5 of the order continued in the following terms:

1. *Except for the purpose of obtaining legal advice, the Defendants or anyone else with knowledge of the Order must not directly or indirectly inform anyone of these proceedings or of the contents of this Order, or warn anyone that the proceedings have been or may be brought against him by the Plaintiffs until 24th June 2004 ("the return date") or further Order of the Court…*
3. *The Defendants are restrained until after the 24th day of June 2004 or until further Order of Court in the meantime from doing, whether by themselves, their servants or agents or any of them or otherwise howsoever the following acts or any of them, that is to say:-*
   (i) In any way to sell, offer to treat, advertise or offer for sale, distribute or otherwise part with possession, power, custody or control over or destroy or deface or hide any of the following (hereinafter called the "infringing goods").

The order was executed on 11th June 2004 and "a lorry load" of items were taken away from each of the two premises. In addition to the attendance of many lawyers there was also a police presence. It is not clear how many police were involved but it is likely to have been more than "a couple" as claimed by Philips in evidence. In any event, the police presence was not at the behest of Philips; they had been arranged by the Court.

The next day, on 12th June 2004, AIFA's Managing Director, Mr Andy Lau, called a meeting to which about 10 of their distributors attended; the distributors being people who sold the blenders from their own outlets around Brunei. In a nutshell, he informed them about the Anton Pillar Order and the injunction. He explained at trial that his purpose was to ensure they complied with the Order and not sell any of the blenders seized. There was further evidence suggesting that the distributors' response was, out of an excess of caution, to stop selling a wider range of products supplied by AIFA in addition to those specifically covered by the Order. One or two further similar meetings were held before the return date of the ex parte order on 24th June 204.

These meetings gave rise to important issues both at trial and on appeal namely, whether or not AIFA were in breach of the Order by calling them and, if so, the effect and consequences of the breach. This is the first of three issues we consider in this appeal.

On 27th July 2004, AIFA applied to strike out the Order and discharge the injunction. On 15th March 2005 their application was granted and an inquiry into damages pursuant to Philip's undertaking made at the time of the ex parte order was initiated.

The undertaking had been in the following terms:-

> *If the Court later finds that this Order or carrying it out has caused loss to the Defendants, and decides that the Defendants should be compensated for that loss, the Plaintiffs will comply with any Order the Court may make. Further, if the carrying out of this Order has been in breach of the terms of this Order or otherwise in a manner inconsistent with the Plaintiff's Solicitor's duties as*

Officers of the Court the Plaintiffs' will comply with any order for damages the Court may make.

We have noted also that at the time of the Order and injunction being discharged, there was an Order for the seized goods to be returned to AIFA. This was done and from March 2005 onwards AIFA began to sell the seized items. It follows therefore that from 11th June 2004 to 15th March 2005 they were deprived of the opportunity to sell the 6 blender models which had been the subject of the Anton Pillar Order.

After the inquiry into damages was ordered in March 2005 it seems that nothing of significance happened for the next 6 years. Apparently, Philips had decided to appeal against the discharge of the Order and injunction but little or no progress was made in the ensuing years.

AIFA have stated that the reason they did not take steps in furtherance of their claim for damages was that they were waiting for the outcome of Philips' appeal. In the event, Philips' appeal had still not been heard when AIFA eventually applied for a damages inquiry on 22nd February 2011.

Philips finally withdrew their appeal, stated to be for "commercial reasons" (further particulars of what this means are not given), on 27th June 2012. Both at trial and on appeal Philips' complain about AIFA's delay in prosecuting their claim. This is the second issue we consider later.

The Judgment

On 22nd July 2014 the Senior Registrar granted AIFA's application and held that:

i The Defendant is entitled to damages under breach of contract for loss of profits as a result of the Plaintiff's undertaking for any losses resulting from the Anton Pillar Order.
ii The Defendant is entitled to losses incurred as a result of the 'stigma' attached to the loss of confidence in the Defendant's products.
iii On the issue of aggravated damages, the Defendant is not entitled to any damages due to insufficient evidence.

Her evaluation of the evidence and lengthy submissions led her to make the following orders:

i Damages amounting to loss of profit to be payable to the Defendant in the amount of $403,441.85.
ii Damages to be awarded in respect to the additional advertising and/or marketing costs in the amount of $4,040.00.
iii No damages awarded for aggravated damages.
iv Costs awarded to the Defendant to be taxed if not agreed.

The three issues which arise from her judgment and which form the basis of this appeal area as follows:

1. What is the effect of the distributors' meetings called by AIFA between 11th and 24th June 2004? If it is a breach of the Order and injunction, does the breach defeat AIFA's claim? If not, what is the effect, if any, on quantum?
2. Should the Senior Registrar have dismissed AIFA's claim due to the 6 years delay in commencing the damages inquiry?
3. If AIFA had established a prima facie case of entitlement to damages had they discharged the burden on them to prove an actual loss flowing from the execution of the Anton Pillar Order and injunction? Were the alleged losses too remote and was her method of quantifying the losses erroneous?
   We shall deal with these 3 issues in turn.

(1) The "distributors' meetings"

The Senior Registrar summarises the relevant evidence concerning these meetings at paragraph 6 – 22 of her judgment. The high water mark of AIFA's case on the meetings was that their lawyer, Mr Francis Chiew, was present and it was considered prudent to inform the distributors of the order because they could be regarded as AIFA's "agents" within the term of the injunction and therefore it was necessary to ensure that they too complied with the Order.

After considering the underlying intention of a "gagging" provision in an Anton Pillar Order, namely to preserve the confidentiality of the seized items and thereby reduce or eliminate the risk, described in *Booker Mc Connell plc v Plascow [1985] RPC 425* as:

> *"If the Defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden or taken beyond the jurisdiction, and so the ends of justice be defeated,"*

she went on to decide that as Mr Lau's intention was not to impede the plaintiff's investigations (a finding of fact on the evidence) but rather to "clarify to the distributors of their concerns, thus mitigating his loss" AIFA had not been in breach of the "underlying objective of the restraining part of the Order" and that the "underlying objective should prevail."

We think that whether or not AIFA was in breach of the underlying objective begs the question. If the Senior Registrar's decision is intended to mean that AIFA was not in breach of the order we think she has fallen into error.

No criticism could have been leveled against AIFA if the distributors had continued to sell the blenders prior to the return date. The distributors were not agents within the meaning of the order and the order was not directed against them. Moreover, it was impossible for Mr Lau to predict what effect the meetings would have. He had no control over the distributors' reaction. They might have made the situation better, but equally, they might have made it a lot worse. Rather than call the meetings it would have been more prudent of Mr Lau to apply to the court for an early inter parties hearing to clarify the matter.

However, breaching the order does not necessarily negate AIFA's entitlement to damages which may arise from Philips' undertaking, which is the crux of this case.

The first and most obvious consequence of a breach is that it exposes the breaching party to contempt proceedings. No such steps were taken in this case.

The second consequence is in relation to the damage caused by the breach. We can see little damage done to Philips' case for copyright infringements. They were already in possession of all the items listed in to Anton Pillar Order. More relevantly, in the context of this appeal, does it adversely affect AIFA's claim for damages?

We have concluded that whilst a breach was committed it was not so serious as to defeat AIFA's claim pursuant to the undertaking. Its relevance is confined to the question of quantum. The Senior Registrar was therefore right to continue her consideration of the claim. The distributors' meetings were to be taken into account when embarking on the difficult task of calculating AIFA's loss.

For the sake of completeness we reject Philips submission that AIFA is "seeking to benefit from its own breach." The value of its claim could, depending on the facts, be reduced as a result of its own breach. Equally, at the end of the day, it might have had little or no effect. We consider these questions later.

(2) Delay

The general rule is that an application to enforce an undertaking should be made promptly and where the undertaking is dissolved at or before the trial should be made then. However, it is not a strict rule and in a proper case damages maybe awarded at a later stage.

In this case there has plainly been a delay. The application was made approximately 6 years after the discharge of the Order and injunction. The question to be addressed is whether or not, because of the delay, AIFA has conducted itself so unreasonably that the inquiry should be struck out. Philips submit that not only is the delay unexplained and unacceptable but also it supports their contention that, in truth, no significant losses had been sustained by AIFA. If there had been, so the argument goes, they would have claimed them at or nearer the time.

The Senior Registrar took a different view. She accepted AIFA's primary submission that the reason for the delay was because AIFA thought it more prudent to await the outcome of the litigation before spending time and money on a claim for damages which might ultimately come to nothing should they be found to have been at fault in the main action.

The Senior Registrar concluded as follows:

> *"Although I find that there has been a delay, I find no evidence to suggest that that the defendant had conducted himself so unreasonably that the inquiry into the assessment should be struck out. I find it quite reasonable that the defendant who was very much an underdog in the market compared to the plaintiff, had waited*

for the appeal to be heard before pursuing the matter any further and incurring any further costs and losses."

There is sparse information as to what occurred during the 6 years delay. It seems Philips did little to prosecute their claim. In fact it was AIFA who rekindled the matter in February 2011 when Philips' appeal against the discharge was still unresolved. It was not until 16 months later in July 2012 that they finally abandoned then appeal "for commercial reasons."

It is noteworthy that after the revival of AIFA's assessment claim in February and before Philip's abandonment of the appeal (in July 2012) Philips themselves advanced the opinion that the damages issue should be delayed further when in August 2011 they applied, unsuccessfully, for the appeal to be heard first and the damages claim to be "adjourned generally."

Although 6 years is an unusually long delay, we think that there were unusual circumstances which the Senior Registrar took into account when making what we regard as a sensible and fair decision on the question of delay.

(3) Quantum

We agree with the Senior Registrar that there are no grounds for a preliminary strike out. The question now is what, if any, are AIFA's damages and how should they be quantified?

The Senior Registrar gave thoughtful consideration to all the oral evidence, affidavits and submissions made at trial. For the purposes of this appeal we note the following from her detailed written judgment.

"As rightly submitted by the plaintiff, the burden of proof is on the defendant to prove that he had suffered a loss as a result of the court orders. The defendant must prove the court orders or injunction was an "effective cause of the loss" [Bonz Group (Pty) Ltd Vs Bonz Group (NZ) Ltd (2000) N.Z.C.A 44 (March 9, 2000)]…"

"I find that the loss of sales in both the 'infringing blenders' and also reduction in sales due to the stigma attached on AIFA products was reasonably caused by the court orders. Brunei is a very small community and it would only be natural for other distributors to be wary of the defendants AIFA products for fear of the same consequence"

With regard to the method of assessment she decided that:

"How well a company performed should not be based solely on the accumulated loss. Other facts should be taken into account. It is quite apparent that different factors impact the defendant's business and one cannot simply rely on the accumulated loss to determine whether or not a company is performing."

She recognized that separate consideration needed to be given to the pure economic loss resulting from the absence of 6 blenders on the shelves, on the one hand and damages resulting from a loss of reputation based on contractual principles, the so-called "stigma" head of damages, on the other hand.

> *"An Anton Pillar Order and injunction would cause damage to reputation and thus cause financial loss however, one must remember that in situations where damages are based on breach of contract the object of damages is to recover any financial losses and not to compensate the defendant. This was discussed in the case of Malik Vs Bank of Credit [1977] UKHL 23; [1980 AC 20] at page 9 whereby:*
>
> > *"An award for damages for breach of contract has a different objective; compensation for financial loss suffered by breach of contract, not compensation for injury to reputation.*
> >
> > *Sometimes in practice, the distinction between damage to reputation and financial loss can become blurred. Damage to the reputation of professional persons carrying on a business, awarding damages for breach of contract courts take care to confine the damages to their proper ambit: making good financial loss.*""

In other words, the damages should reflect business losses not dented pride or a sense of indignation.

(i) Philips' case

The written submission advanced on Philips' behalf have been detailed and helpful.

They correctly submit that the burden was on AIFA to establish that (a) they had suffered loss (b) caused by the Order or by the carrying out of the order and (c) that any losses caused were not too remote.

They submit that the Senior Registrar's approach to each question was flawed.

Their primary position is that any award of damage must be confined to what losses were suffered by reason of AIFA's inability to sell the 6 blender models seized, between 11th June 2004 and 15th March 2005. There should be no damages for losses arising from the inability to sell any other products.

Philips complain that the court below placed undue reliance on the evidence of AIFA's expert witness, Mr Sylvester Leong, whose report was focused on the losses to the entire business spread over many years. He estimated, "the drop in AIFA's turnover from 11th June 2004 TO 15th March 2005" and then opined that the loss was "a direct result of the Anton Pillar Order…" Philips submit that, on the contrary, the evidence adduced should have led the court below to the conclusion that the execution of the order had little impact on AIFA's turnover.

A further complaint is that the period examined was up to March 2007, about 2 years after the discharge of the order and the injunction. They submit that this seems to be an arbitrary period of time.

Philips place much reliance on the figures for annual losses which, they point out, show that the annual losses in 2004 and 2005 were in fact less than the annual losses in 2002, 2003 and 2006. As already noted, the Senior Registrar in her judgment looked at the bigger picture.

Philips' complaint, in a nutshell, is that Mr. Leong's report addressed the wrong questions and the Senior Registrar's conclusion was "purely speculative."

Turning to the second question to be considered, namely were such losses, if any, caused by the order and nothing else, the proper approach is clear. AIFA should be compensated for such losses which the court finds flowed from the order and/or the method of carrying it out. They should be assessed on a contractual basis and should not compensate AIFA for losses which might have occurred regardless of the order such as because of the overriding litigation, or for losses which Philips argue were self inflicted such as losses arising from their own breach of the order.

We deal later with the question whether or not the Senior Registrar followed this principle.

(ii) AIFA's case

AIFA's first contention was rightly rejected by the Senior Registrar. They submitted that the evidence supported a finding that Philip's had been malicious in applying for the order and injunction in the first place which, if so, meant there was no need to establish forseeability when calculating damages. Whilst a correct statement of law it was rejected on the facts.

Before leaving the issue however, one point should be made. In support of its contention of "malice" AIFA referred to, inter alia, the numbers of people, and particularly the police, who were involved in the initial raids on their two premises to seize the allegedly infringing blenders. We regard the facts of the raids, including the police presence, as relevant to the quantification of contractual losses flowing from damage to business reputation (but not to malice).

AIFA's secondary position, and the one upon which the case was determined, was that it had proved quantifiable losses from the order itself and its carrying out which were not too remote. Both parties and the court below adopted Lord Diplock's words from:

Hoffman La Roche & Co. AG v. Secretary of State for Trade and Industry [1975] AC 295 [@ Pages 63 – 140, of ABOA]:

> *"If the undertaking is enforced the measure of the damages payable under it is not discretionary The assessment [of damages] is made upon the same*

basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant."

AIFA contends that the Philips approach is too narrow and that limiting damages merely to the inability to sell 6 Blender models for just over one year is wholly artificial. The effect of the order and how it was executed on AIFA's businesses must be considered. They cite *Booker Mc Connell p/s v Plascow [1985] RPC at page 441;*

"…it follows that the making of an Anton Pillar Order against a trading company may well be regarded as a serious stigma on that company's commercial reputation. Even more importantly…it follows that there is a responsibility in each case on the plaintiff's advisers to consider seriously whether it is justifiable to seek an Anton Pillar order against the particular defendant or whether it would be enough to obtain negative injunctions."

AIFA relies on evidence as to how much its business had suffered as a whole. With some force they cite the words of *Saville J in Financiera Avenida SA v Shiblaq* (The Times 21st November 1988):

"Once a party has established a prima facie case that the damage was exclusively caused by the relevant order, then in the absence of other material to displace that prima facie case the court can, and generally would, draw the inference that the damage would not have been sustained but for the order. In other words, the court seeks to approach and deal with this question of causation in ***a common sense way****."*

In support of Mr Leong's financial report AIFA places considerable emphasis on the way in which the original raids were conducted to persuade the court that in a small community such as Brunei, as a matter of common sense, such a public execution of the order and injunction must have damaged AIFA's business reputation.

There was much evidence, which we do not propose to refer to any length, concerning the "climate of fear", "the chilling effect…" and "panic."

Further analysis of AIFA's submissions is not necessary. In short, they submit that the Senior Registrar's approach was in keeping with the words of Saville J above.

The key passage from her judgment is as follows:-

"I turn now to the actual amount of compensation. The defendant has sought damages for loss of profits from the date of execution of the court orders until the recovery of the Defendant's business in the total amount of $667,769.00. This is based on a period of 4 years from the date of the court orders. Mr.Leong's opinion is the only available opinion available. I find that his method of using the average loss of profits (turnover minus cost of goods sold) is a reasonable method. I also agree with Mr.Leong's opinion that the profits

for the years affected by the court orders should be excluded as these figures were influenced by the court orders and are thus an anomaly. The defendant's have sought damages for a period of 4 years, as according to the defendant it took recover. However, from the figures I find that based on the audited accounts, the defendant had already recovered by the financial year of 2007 (31st October 2006 to 31st October 2007) when it made a profit. The defendant should only be entitled to loss of profit amounting from June 2004 to November 2006 (this is the accounting periods for the years 2004 to 2006) this would mean a total of 29 months amounting to ($459,089.00/33x29) ***$403, 441.85****."*

Our decision

The first head of damages is the economic loss directly attributable to the fact that the six Blender models were not on AIFA's shelves for over one year. The evidence was that the seized goods were returned when the order was discharged and sold. The profit on the later sales is not known, neither is it known what profits might have been made if those 6 Blender models had remained on the shelves. An exact figure is impossible to achieve. In all the circumstances damages under this narrow head would be relatively modest. For the purposes of this case they may be subsumed in the second more significant head of damages to which we now turn.

The court below was right to attempt a quantification of by how much, in monetary terms, AIFA's business had suffered as a result of the raids on their premises. This task faced obvious difficulties. Perhaps the main difficulty was in assessing the consequences of AIFA's own breach by calling the distributors' meeting. The court proceeded on the basis that the manner of the raids did cause lasting damage to the business reputation. In the circumstances this was plainly a correct starting point.

Philips point out that they did not request a police presence. However, the order they sought and were granted permitted a very large number of lawyers. It was a sudden, unannounced and public raid at which a police presence may well have been both cautious and prudent. It is not open to Philips to disassociate themselves from the circumstances of the raids in an attempt to lessen the financial consequences of their undertaking. The court below also noted that, in the normal course of events, there would be, and were, distributors' present at AIFA's premises at the material time which added to the embarrassment and the spread of the news within the close knit business community in Brunei.

The evidence of "chilling effect…" and a "climate of fear' although possibly tinged with hyperbole, is nonetheless a real factor resulting in real losses.

With regard to the relevance of AIFA's breach of the order on 11th June 2004 and on subsequent days the court below considered it more an attempt to clarify the situation and possibly even to mitigate the loss. We have taken a different view of the breach but reach a similar conclusion as to its effect on damages in that it should have little or no effect. The court's task is to quantify the losses flowing from the raids. By how much did the business suffer? We do not see how that damage is made worse by alerting the distributors to cease trading in certain items. The damage, viewed in the context of this

particular community, had already been done. Needless to say, the damage was a continuing problem. Somehow the court was required to evaluate it.

It seems to this court that once it has been established that a recoverable loss has been caused there can only be three possible outcomes on appeal. Firstly, as advanced by Ms Feridahanam for Philips, if it is not possible to interpret the figures so as to reach a fair figure for the loss, then only nominal damages should be awarded. Secondly, if the court considers the method adopted was plainly flawed it should either conduct is own assessment or remit the matter for retrial with specific questions to be answered. Thirdly, if the court below has embarked on a reasoned and considered exercise to provide an answer (in terms of compensation) to the right questions, this court should be slow to interfere.

We do not favour the first option. It would produce an unjust and unrealistic outcome. Simply because the task has difficulties it does not mean that it should be ignored.

We do not favour the second option. An attempt by this court to revisit the financial evidence is not practical. It would be open to this court to amend glaring errors but we do not find there to be any. Neither would it be just or desirable to remit the matter for a further hearing. We do not think that this would be likely to achieve any greater justice than has already be achieved. In any event, the matter is now over 10 years old and there comes a time when litigation requires finality.

In this case we consider the third option to be the correct one. We are satisfied that the Senior Registrar was addressing the correct issues. Plainly, different courts may have adopted different methods. Her final figure maybe regarded as somewhat generous but we find no grounds upon which it would be proper to amend, adjust or reassess.

We also make no alteration to the award of $4,040 for additional costs of promotions and advertising. The Senior Registrar reduced this claim by 90% on the basis that the seized blenders only represented 10% of AIFA's models. AIFA submit this was wrong but there is no cross appeal. The Senior Registrar could have included this sum in one global figure but she chose not to and explained why. Again, we find no grounds to interfere.

Philips's appeal is dismissed.

There are three final matters. Firstly, the question of interest. AIFA seek an order for interest. It was not claimed and it was not argued below. Unsurprisingly, the Senior Registrar's written judgment is silent on the matter. In the circumstances we make no order with regard to interest save that the judgment rate shall apply from the date of the Senior Registrar's judgment, 22nd July 2014, until payment.

Secondly, the parties, since the hearing of the appeal have made written submissions (by way of correspondence) to this court on the question of costs arising from Philips' application for an extension of time to file its Notice of Appeal. We have considered those submissions and agree that there should be no order as to costs on that application. No order was made at the time.

Finally, we make a final order on the costs of the appeal. We find no reason why costs should not follow the event. The cost of the appeal will be to the respondent, AIFA SDN BHD to be taxed if not agreed.

We express our appreciation for the detailed and helpful written and oral submission from both parties.

Mortimer, P.

Leonard, J.A. **Burrell, J.A**