Metalform Asia Pte Ltd v Ser Kim Koi and Another (Holland Leedon Pte Ltd (in liquidation), Third Party)
[2008] SGHC 131

Case Number : Suit 496/2006, RA 410/2007

Decision Date : 13 August 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : C R Rajah SC, Chew Kei-Jin and Lavinia Rajah (Tan Rajah & Cheah) for the plaintiff; Philip Jeyaretnam SC, Ajinderpal Singh, Kirindeep Singh and Koh Jiaying Hsien (Rodyk & Davidson LLP) for the defendants; Lee Eng Beng SC and Farrah Salam (Rajah & Tann) for the third party

Parties : Metalform Asia Pte Ltd — Ser Kim Koi; Ser Song Cheh — Holland Leedon Pte Ltd (in liquidation)

Civil Procedure – Pleadings – Striking out – Buyer claiming damages in statement of claim for breach of warranties with reference to multiplier which formed component of purchase price – Whether high threshold necessary to enable court to strike out portions of statement of claim on basis that it disclosed no reasonable cause of action was reached

Contract – Remedies – Damages – Buyer claiming damages for breach of warranties with reference to multiplier which formed component of purchase price – Whether damages for cost of cure could be claimed by applying multiplier used to derive the purchase price – Whether damages for loss of bargain could be claimed by applying multiplier used to derive purchase price

13 August 2008

Judith Prakash J:

Introduction

1 By summons 4377 of 2007 ("SUMS 4377"), the defendants applied for certain parts of the plaintiff's Statement of Claim (Amendment No. 2) ("the SOC") to be struck out. This application was heard by the Assistant Registrar on 13 December 2007. She, very substantially, granted the defendants' application. The plaintiff appealed to the judge in chambers and I dismissed this appeal with costs on 31 March 2008. The plaintiff now seeks to appeal further to the Court of Appeal.

Background

2 Pursuant to a sale and purchase agreement dated 13 June 2004 ("SPA"), the plaintiff purchased the business and specified assets of the Third Party, Holland Leedon Pte Ltd ("HLPL"). The completion date for the acquisition under the SPA was 1 July 2004 ("the Completion Date").

3 The defendants were the directors and together the majority shareholders of HLPL at all material times, including the period of time between 13 June 2004 and the Completion Date.

4 Pursuant to the SPA, HLPL furnished the plaintiff with several warranties pertaining to several aspects of the business and assets of HLPL. The plaintiff subsequently alleged that several of these warranties were breached by HLPL. The plaintiff also alleged that the defendants who became directors of the plaintiff as well, three days before the Completion Date, knew or ought to have known of HLPL's breach of the warranties under the SPA. By virtue of the fact that the defendants

had become directors of the plaintiff prior to completion, the plaintiff contended that the defendants had a duty to inform the plaintiff of the alleged breaches but failed to do so. The present action was started by the plaintiff to claim damages from the defendants for their alleged breach of fiduciary duties to the plaintiff.

5 The purchase price paid by the plaintiff was around US$264m and was fixed as provided by cl 4.1 of the SPA. The purchase price comprised various components, the largest one of which was an item known as "EBITDA" multiplied by seven. The term EBITDA stands for Earnings Before Interest, Tax, Depreciation and Amortisation of HLPL for the financial year ending on 30 June 2004.

6 It is the plaintiff's case that if the warranties which HLPL has allegedly breached had in fact been true (*ie* that HLPL had run its business in a way which complied with the warranties), HLPL would have had to incur much greater costs in the conduct of the business. Such costs would have been "Recurring Costs" in the operation of the business and would have reduced the amount of the EBITDA. The purchase price would accordingly also have been reduced by:

The difference between the EDBITDA element of the purchase price paid by the plaintiff and the lower EBITDA figure which would have been the EBITDA if the warranties were true	x	7

In the SOC therefore, the plaintiff made a claim for damages calculated by multiplying the difference in EBITDA by seven and referred to this claim as the "Recurring Costs" claim. To be more specific, the SOC stated that the quantum of damages payable for the alleged breach of fiduciary duties was at least $30,943,960.18, made up of the following elements:

(a) costs allegedly incurred in the year after completion so as to rectify the alleged warranties; and

(b) the Recurring Costs which were the costs allegedly incurred in the year after completion so as to rectify certain alleged breaches of warranties but which were then multiplied by seven.

7 The portions of the SOC which the defendants applied to strike out related entirely to the Recurring Costs claim. As stated, the defendants were substantially successful.

The appeal – summary of the plaintiff's case

8 In summary, the plaintiff made the following arguments. First it reiterated the well known principle that the power to strike out a claim under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) will only be exercised in cases where it is plain and obvious where there is no reasonable cause of action disclosed. The courts will allow a plaintiff to proceed with the action unless its case is wholly and clearly untenable.

9 Secondly, the plaintiff noted that the issue of whether or not Recurring Costs could be claimed for breaches of warranties under the SPA had been determined in SIAC Arbitration No. SIAC ARB068/DA17/05 ("the Arbitration") between the plaintiff and HLPL. The tribunal had determined that Recurring Costs could be claimed from HLPL as part of the claim for damages for breaches of warranties under the SPA. It could not therefore be argued by the defendants that a claim for

Recurring Costs by the plaintiff was wholly and clearly untenable and that no reasonable cause of action was disclosed. Further, it could not be argued that such claim is frivolous and vexatious and an abuse of the process of court.

10 Thirdly, the plaintiff said that claims which involve a detailed consideration of the law and documents should not be struck out pursuant to O 18 r 19 of the application. The issue of whether or not the plaintiff can pursue a claim for damages comprising Recurring Costs for breaches of warranties under the SPA could only be made after a protracted examination of documents and facts of the case and a detailed examination of the law.

11 Fourthly, it was also the plaintiff's case that the defendants were estopped from making this application. This was because the defendants were bound by the decision of the tribunal in the Arbitration that the plaintiff could make a claim for Recurring Costs as part of its damages claim.

My decision

12 I did not accept the plaintiff's arguments. I was aware of the high threshold that has to be reached to enable the court to strike out portions of a statement of claim on the basis that they disclose no reasonable cause of action. In the present case, I was satisfied on the pleadings and the facts and after considering the defendants' arguments as well that this threshold had been reached. I did not understand the basis on which the plaintiff could justify multiplying the costs it incurred in rectifying the alleged breaches by seven. I accepted that if the warranties were breached and costs were incurred rectifying those breaches, those costs would be claimable as part of the plaintiff's damages. I did not accept that simply because one element of the purchase price was the EBITDA multiplied by seven and that the EBITDA (which was for a period of one particular financial year) would have been reduced had HLPL incurred costs to rectify the matters that led to the breaches of warranties, the plaintiff was entitled to multiply those costs by seven as well. I found this argument to be totally unsustainable.

13 As the defendants pointed out, at first blush, it would seem that the plaintiff's case was for damages measured on the basis of the costs of rectification, and that some breaches could be rectified by incurring costs and expenses just once, whereas other breaches actually required expenses to be incurred for a period of seven years. However, perusal of the SOC showed that this was not the plaintiff's claim. Instead, the plaintiff sought damages calculated on the basis that certain costs could be recovered with a multiplier of seven whether actually to be incurred for that period of time or not. No contractual provision to this effect was pleaded. The only relevant contractual provisions pleaded were for the calculation of the purchase price of the business based on the EBITDA for the prior year multiplied by seven. The plaintiff's case was that it could claim damages multiplied in this way:

(a) without pleading and proving that such costs were in fact incurred for a period of seven years after completion;

(b) without pleading and proving that these costs multiplied by seven represented the difference in value (contract versus market) of the business at the time of completion; or

(c) without pleading and proving any contractual provision providing for damages to be calculated in this manner.

I accepted the defendants' submission that on the pleaded case, the plaintiff's claim for damages calculated by reference to EBITDA multiplied by seven was wholly unsustainable and should be struck out. It appeared to me also that rather than being a claim for damages sustained by reason of the breaches, the plaintiff's claim was in fact for a discount on the purchase price without a pleaded basis, relating to the value of the assets (as affected by the non-compliance with the warranties) that would justify such discount.

Amplification of the points

14 Both *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) ("*McGregor*") (at p 29) and *Sinclair on Warranties and Indemnities on Share and Asset Sales* (Sweet & Maxwell, 6th Ed, 2005) ("*Sinclair*") (at p 21) agree that the basic rule for measuring damages in contract is that the innocent party should be compensated for its loss of bargain due to the breach of the contract. This means that if one party defaults in performance of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. In the context of contracts for sale of a business, the basic loss would be the value of the business as represented at the time of the sale less its market value in fact. Alternatively, where the breach is a transfer of a business which is either defective or not of the quality promised or the defective performance affects the business, the claimant may claim the costs of putting the property into proper condition *ie* the costs of cure (see *Chitty on Contracts*, vol 1: General Principles (Sweet & Maxwell, 29th Ed, 2004)). This is sometimes called the "rectification or repair costs" measure. As *McGregor* at p 32 makes clear, a claimant's loss cannot be measured by using both methods. The measure of damages must be calculated either on the basis of "the costs of cure" or "loss of bargain" and which one is applicable depends on the circumstances of the individual case.

15 The plaintiff's case as set out in its submissions was that it was claiming damages on the basis of the loss of the bargain measure. To establish the measure of this loss of bargain, it reasoned as follows:

> (a) the purchase price paid by the plaintiff for the business was made up largely of EBITDA times seven;
>
> (b) HLPL had given several warranties in respect of the business that were not satisfied or were not true and to satisfy these warranties, HLPL would have had to incur additional expenses. These expenses would have lowered the EBITDA of the business;
>
> (c) the plaintiff calculated its loss of bargain by taking the difference between the EBITDA element of the purchase price and the EBITDA figure which would have been derived had the warranties been true and multiplying that difference by seven.

16 It argued that this approach in calculating the damages was supported in law. It cited the following passage from *McGregor* at p 718:

> The normal measure of damages, as stated in s 53(3), is the value of the goods as warranted less their value as they are, both values being taken at the contractual time for delivery, since this represents the amount that will put the buyer into the position he would have been in had the warranty been satisfied. Many everyday cases illustrate this rule; probably the clearest illustration in the reports is the early case of *Dingle v Hare*. A modern application of this measure to the sale of a business rather than to a sale of goods, is found in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd*, where, by overstating the profits of the business sold, the seller was in breach of warranty and it was common ground that "if [the claimants] established a loss, the measure of damages was the difference between the price actually paid … and the true

value of the business at the time of the agreement. If the value at actual delivery is nil, then the market value of the goods as warranted forms the measure of damages.

17 It also quoted *Sinclair* at p 18:

The entitlement of the purchaser, who finds that the company or business is not as it anticipated, to claim damages for breach of contract will depend on the scope of the warranties expressly or implied given to it. The contractual remedy for a breach will generally be damages or, rather exceptionally, rescission.

18 *Sinclair* also contained passages at pp 318, 319 and 321 which were relevant. These were:

At p 318:

In order to understand the use of warranties and indemnities in the context of the sale and purchase of companies and businesses it is necessary to have an understanding of the way that such businesses are valued, as without this the negotiation of the warranties and indemnities will be undertaken in a vacuum. The purchaser’s legal advisors will need to understand the valuation mechanism that has been used or they will not be able to ensure that likely losses to the purchaser (which affect the valuation of the target company or business) have been properly addressed.

…

The three most common bases are by reference to the net assets of the target company or business, a multiple of historical earnings, usually by reference to EBITDA (earnings before interest, taxation, depreciation and amortisation), or by reference to future earnings on a discounted cashflow basis.

At p 319:

The most common method of valuation is by reference to a multiplier of EBITDA or occasionally EBITA (where in the latter case the valuer believes that depreciation should be treated as a cost to be deducted from the earnings).

…

For this type of valuation it would normally be appropriate to ensure that any price adjustment mechanism, whether through warranty, indemnity or completion accounts, relates to the earnings of the target company and by reference to the actual multiplier used to arrive at the enterprise value, as slightly adjusted by the impact of the netting off of any debt or the addition of any cash.

At p 321:

Where a transaction involves completion accounts with a specific adjustment mechanism, perhaps by reference to the levels of net assets or a multiple of earnings as in the example provided, then if there is a breach of warranty it is likely that the courts will use the adjustment basis in the completion accounts as a basis for determining the loss for breach of warranty. The completion accounts mechanism in such circumstances will be taken as evidence as to how the parties valued the target company.

19 Reliance was also placed on the case of *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 ("*Senate Electrical*"). There, one of the issues was the assessment of damages suffered by the purchaser of a business (the plaintiff) as a result of a breach of warranty by the seller (the defendant) that the management accounts gave a true and fair view of all the assets and liabilities and the state of affairs and financial position and results of the business. The court found that the warranty had been breached in that the profit as reflected in the management accounts had been overstated. The plaintiff argued that damages should be assessed by applying a price/earnings ratio (p/e) of 13.67 to the difference between the warranted profit and actual profit. The court found that such damages were inappropriate on those facts as it did not accept that the purchase price of the business was calculated based on the said ratio. The court observed at paras 32 to 34 of its judgment as follows:

> 32. It is for the plaintiff to prove both the fact of the loss and the quantum of damage (*McGregor on Damages*, 16th ed, par 357). Moreover, the assessment of damages is subjective in the sense that the loss is loss sustained by the actual plaintiff, not some hypothetical plaintiff (see per Mr Justice Phillimore in Thomas McGhie & Sons Ltd v British Transport Commission [1962] 2 All ER 646 at p 656).
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> 33. Mr Field relied upon three cases where the Court had applied a p/e ratio to the difference between the actual and warranted profit. The first of these is Lion Nathan Ltd v C-C Bottlers Ltd, [1996] 1 WLR 1438. That was a case involving a share sale. The price paid by the plaintiff was calculated on the basis of 20 times the forecast profits after tax in the company's year of account ending Sept 2, 1989. The forecast for the two months in issue was warranted to have been "calculated on a proper basis" and "was achievable based on current trends and performance". There was a substantial shortfall. The measure of damages was assessed by multiplying the shortfall by the multiplier of 20. We can find nothing in the decision of the Privy Council or the opinion of Lord Hoffman to indicate that this is the only way in which damages for breach of warranty or the sale of assets and goodwill in a business is to be calculated. In our view it is quite clear that if this is how the original price is calculated, it is the obvious way to calculate the damages by applying the same multiplier to the shortfall in maintainable earnings/ profits.
>
> 34. A similar exercise was done by Mr Justice May in ADT Ltd v BDO Binder Hamlyn [1996] BCC 808 and Mr Justice Jacob in Witter v TBP Industries, [1996] 2 All ER 573 at p 606. But these are also cases where the original price appears to have been calculated on a p/e basis or the experts were agreed that it was the proper basis for assessment.

20 The plaintiff submitted that it had paid a price which included EBITDA times seven and this was paid in reliance on the representation by HLPL that the warranties were correct or had been satisfied. The damages suffered by the plaintiff when some warranties turned out to be untrue was the loss of the bargain calculated by multiplying the effect that these warranties would have had on the EBITDA, had they been satisfied, by the multiple of seven.

21 I was not able to accept the plaintiff's argument. I could not agree that the loss of the bargain sustained by the plaintiff was automatically equivalent to the cost of rectification times seven simply because the purchase price had been calculated on the basis of multiplying EBIDTA by seven.

22 It might be helpful to set out the relevant passages from the SOC. These are paras 29 to 31 which read as follows:

> 29. Following the completion of the sale and purchase of the Business and Assets as provided

under the terms of the SPA and upon taking over the carrying on of the Business, Metalform Asia discovered numerous breaches of warranties and other provisions of the SPA by Holland Leedon.

30. A summary of the said breaches of warranties and other provisions of the SPA is set out in the table below:

…

31. The loss and damage suffered by Metalform Asia as a result of the breaches of warranties is a sum in the amount of not less than S$30,943,960.18, such loss and damage comprising one-off costs and recurring costs. By way of explanation:

(a) one-off costs are costs that only have to be incurred once to rectify the said breaches of warranties and were incurred during the period after 1 July 2004; and

(b) recurring costs are recurring annualised costs that are multiplied by 7 (being the multiplier applied to the EBITDA to determine the purchase price for the Business and the Assets pursuant to Clause 4.1.1 of the SPA as set out earlier above ("the purchase multiplier")). As recurring costs arise from breaches of warranties relating to the Business and the Assets, such recurring costs would have resulted in an increase in the costs base to the Business and hence a decrease in the EBITDA applied to determine the purchase price of the Business and the Assets, if Metalform Asia had known of Holland Leedon's relevant breaches of Warranties at the time of purchase. Metalform Asia had therefore paid more than it should have (by 7 x the recurring costs incurred) for the Business and Assets under the SPA. Thus, applying the purchase multiplier reflects the damages suffered by Metalform Asia.

23 The defendants submitted that the plaintiff's pleaded case was confusing because it contained some but not all of the averments needed for a cost of cure measure. Yet, the plaintiff had been adamant that its claim was really for loss of bargain. However, in that form, it was unsustainable.

24 The plaintiff's definitions of "one-off costs" and Recurring Costs, and various paragraphs of the SOC indicated that the plaintiff's pleaded case was for damages measured by the cost of rectifying the breaches of warranties *ie* cost of cure:

(a) Paragraph 35: "Therefore Metalform Asia claims one-off costs and recurring costs of at least S$828,124.63 **in having to take the above compliance measures**";

(b) Paragraph 62 : "… **To meet the requirements, Metalform Asia had to use, inter alia, interleaf, thus incurring higher costs.** A breakdown of the recurring costs of at least $443,793 incurred by Metalform Asia in using, inter alia, **interleaf in order to comply with the requirements of Seagate** has been given to Holland Leedon and the 1st and 2nd Defendants are aware of the same"; and

(c) Paragraph 64: "By reason of the matters referred to in paragraphs 44 to 48 herein and **the fact that that monitoring and documentation requirements of Seagate and the PMPs were not met, Metalform Asia has had to employ 64 additional staff to adequately perform and meet monitoring and documentation requirements of Seagate** and the PMPs. Details of the recurring cost of $10,717,969.90 incurred by Metalform Asia in hiring the new employees have been given to Holland Leedon and the 1st and 2nd Defendants are aware of the same".

[Emphasis added]

25 Having claimed the cost of cure, however, the plaintiff had then sought to multiply these costs (or some of them) by seven without pleading or proving that such costs had been or would be incurred for seven years. One example of this was the allegation that HLPL had been in breach of a warranty (Warranty 8.1) that the terms of all contracts, leases, tenancies and other contracts to which it was a party had been complied with in all material respects and that there were no circumstances likely to give rise to any breach of such terms. Damages claimed for an alleged breach of this warranty would be the actual cost of ensuring compliance with the terms of the contract concerned. That could not be the amount of such costs multiplied by seven. The plaintiff did not even attempt to plead why it would have to incur such rectification costs for seven years. This example is particularly significant as the claims for the alleged breach of Warranty 8.1 amount to nearly $27m out of a total claim of about $30.9m.

26 The defendants submitted that the plaintiff was attempting to use the formula which had been set out in the contract to determine the purchase price for the business and assets of HLPL, to calculate the Recurring Costs. It argued that the plaintiff was not entitled in law to adopt this formula or any part of it to calculate its damages and, apart from the lack of a pleaded factual basis, there was no legal basis for the same either. Hence, the relevant portions of the SOC in relation to the Recurring Costs based on the formula had to be struck out. Even if the plaintiff amended its SOC to seek damages on the basis of the loss of the bargain only, the plaintiff would still not be able to claim the Recurring Costs because there is no direct relation between the cost of cure for one year and the market value of the business.

27 The formula (the "Purchase Price Formula") in the contract was as follows:

(EBITDA) x 7 +/- (adjustments pursuant to Clause 4 SPA)

The defendants argued that there was no legal basis for applying the Purchase Price Formula to the annualised costs of rectifying the breaches of warranties. It was clear from the SPA and from the SOC itself that the Purchase Price Formula was restricted to the calculation of the purchase price. The multiplier of seven was also specific to the EBITDA as of 30 June 2004. The plaintiff had not pleaded a contractual basis on which it could apply the Purchase Price Formula and, in particular, the multiplier of seven in calculating its damages.

28 The reason that the plaintiff sought to use the multiplier of seven to calculate its damages was that it said that if the Recurring Costs had been incurred in the financial year ending 2004, the result would have been an increase in the annual cost of the business and hence a decrease in the EBITDA for that same year. A decreased EBITDA would have translated into a lower multiplicand which would have been multiplied by seven to determine the purchase price. That was why the plaintiff sought to apply the multiplier of seven to the Recurring Costs although it was undertaking a completely different task *viz*, that of assessing damages for the alleged breach of warranties.

29 However, as the defendants submitted, for such a claim to be sustainable in law (without proof of the actual incurring of costs for a seven year period), a contractual provision would have to be identified and pleaded providing for the calculation of damages in this way or there would have to be identified a contractual provision for the abatement or adjustment of the purchase price using this formula.

30 In this case, the multiplier of seven was only relevant under the SPA to the calculation of the purchase price. The SPA did not provide for any other use for that figure. In the court below, in fact, the Assistant Registrar had agreed that it did not follow that the EBITDA should be a function of the damages payable if there was a breach of warranty since the EBITDA was a function of the purchase

price as provided for under the SPA and was no more and no less than that. Further, since the Recurring Costs were in fact not incurred as at 30 June 2004, they could not and would not have had any impact on the actual costs base or the actual EBITDA. The EBITDA had been assigned a particular meaning in the SPA and this was only for the purpose of computing the purchase price. It could not be changed or adjusted by any notional Recurring Costs which the plaintiff said HLPL should have incurred.

31 Further, under cl 4.1 of the SPA, it had been provided that the purchase price for the business and the assets would be the amount obtained by adding together the various items set out in the sub-paragraphs of this clause (EBITDA was one of the items mentioned) and together they would form "the 'Purchase Consideration' as set out in the Completion Statement". In the definition section of the SPA, the term "Completion Statement" was stated to mean various items including the EBITDA agreed by the parties or determined in accordance with Schedule 2 of the SPA. Under cl 8 of Schedule 2, it was provided that the Completion Statement was to be final and binding on all parties in the absence of fraud or manifest error. Thus, if there was no fraud or manifest error, the EBITDA would be final and binding and would be deemed to be accurate. If the actual EBITDA was accurate, then there was no basis for the plaintiff to assert that the EBITDA was higher than it ought to have been. The plaintiff did not in the SOC assert that the Completion Statement was wrong because it was the result of fraud or manifest error. Hence the plaintiff had not in its pleadings challenged the actual EBITDA.

32 In any case, since there was no contractual provision in the SPA providing for the reduction of the purchase price by reference to the costs to be incurred to remedy the alleged breaches of warranties multiplied by seven, there was no legal basis for the plaintiff to use that multiplier to quantify its damages in relation to the costs of cure.

33 As pointed out earlier, the plaintiff had not pleaded that in fact it would have to incur the Recurring Costs for seven years. The defendants argued that such a pleading would not in any case have been available because there was no possibility of the plaintiff incurring many of the purported costs for such a period. Giving one example of this assertion, the defendants referred to the plaintiff's allegation in para 36(j) of the SOC that in breach of warranty, several workers had not been sent for mandatory training courses as required by the Factories (Safety Training Courses) Order and the Factories (Safety Training Courses) (Amendment) Order 2002 and that Recurring Costs had to be incurred to remedy these breaches. Even if there was a failure to comply with these Orders, there was no evidence that there would be more than one set of costs incurred in respect of training each of the relevant workers. The plaintiff had not pleaded that each worker would have to be sent for such training every year for seven years. Further, it had not been pleaded that HLPL had warranted that the EBITDA was calculated after the incurring of such costs in the financial year ending 30 June 2004. The relevant pleaded breach was not that the EBITDA was overstated by the Recurring Costs for the training courses but simply as at 30 June 2004, certain workers had not been sent for training courses. As such, it was clear that the plaintiff was trying to get an adjustment in the purchase price rather than claiming a reimbursement of costs that it would actually need to incur.

34 I agreed that to permit the plaintiff to advance a damages claim for Recurring Costs in respect of this alleged breach was to permit it to advance a claim for adjustment of a value that it was contractually bound by and to permit the recovery of damages that had not been suffered and would thus result in permitting recovery in excess of the actual loss of the plaintiff.

35 As stated earlier, when a claim is made for damages on the basis of the loss of the bargain, the damages to which the injured party is entitled is the difference between the contract price and the actual value of the thing contracted for in its defective condition. The plaintiff did not plead what the

actual value of HLPL was but instead sought to measure the loss of the bargain by subtracting the alleged costs of cure multiplied by seven. The case which the plaintiff relied on was *Senate Electrical*. It contended that the case stood for the proposition that when a purchase price of a company was calculated by multiplying the EBITDA by an agreed multiplier, damages for a breach of warranty should be calculated by multiplying the costs of cure by the same multiplier. In my view, that proposition could not be derived from the decision in *Senate Electrical*. In the course of his judgment, Stuart-Smith LJ referred to three cases where a similar measure had been applied including the Privy Council's decision in *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 ("*Lion Nathan*"). He noted that in *Lion Nathan* where the price paid by the plaintiff for a business was calculated on the basis of 20 times the forecast profits after tax in a particular financial year, a breach of a warranty that the forecast had been calculated on a proper basis and was achievable based on current trends and performance, had resulted in the measure of damages applied being the multiplication of the shortfall in the profits by the same multiplier of 20. Stuart-Smith LJ commented that this case and the other two cited by counsel were cases where the original price had been calculated on a profits/earnings ratio or where the experts had agreed that this method of calculation was a proper basis for assessment. He, however, declined to apply the same measure when assessing damages for breach of warranty in *Senate Electrical* itself. The court reminded itself that the plaintiff had to prove both the fact of the loss and the quantum of damages. In *Senate Electrical*, Stuart-Smith LJ held that the price/earnings approach was not appropriate where there were so many other factors apart from the earnings which had induced the purchaser of the business to pay the price that it had for the business.

3 6 *Lion Nathan* itself did not help the plaintiff. As the defendants pointed out, the multiplicand in *Lion Nathan* was the earnings forecast as opposed to the historical earnings figure. That was important but less important than the point that the first question of enquiry was whether the multiplicand was warranted. If it was warranted, then the second question was whether the warranty had been breached and the third was to assess damages for that breach. The Privy Council in *Lion Nathan* held that the multiplicand was warranted but also proceeded to discuss the nature of the warranty given. It opined that if the seller had warranted that the earnings in August and September 1989 would be $X, there would have been an analogy with a warranty of quality and the damages would *prima facie* have been the difference between what the shares would have been worth if the earnings had been in accordance with the warranty and what they were actually worth (*ie* the difference between what the goods as warranted would have been worth and what they were actually worth). Accordingly, the measure of damages would be the difference the company valued on the assumption that the earnings would be $X and the actual value of the company, calculated by applying the same multiplier to the actual earnings after tax.

37 The Privy Council also highlighted that, on the other hand, that where the warranty given was that reasonable care had been taken in the preparation of a forecast, there would be no analogy with a warranty of quality. As such, the *prima facie* rule for a breach of warranty of quality of goods would not be applied, and then the damages should be the difference between the price agreed upon on the assumption of $X earnings and what the price would have been, using the same method of calculation, if the forecast had been properly made.

38 In the present case, the plaintiff had not pleaded that there was a warranty of the value of the EBITDA or a warranty that the EBITDA in the Completion Statement was a figure upon which the plaintiff could rely in calculating the purchase price, nor did any such warranties actually appear in the SPA. Accordingly, the principles enunciated in *Lion Nathan* could not apply *ie* the multiplier of seven applied to the EBITDA to obtain the purchase price could not be used in any manner to calculate damages. There was a leap of logic in the plaintiff's conclusion that "applying the purchase multiplier reflects the damages suffered by [the plaintiff]". If the proper measure of damages was the

loss of bargain, then damages should be the difference between the price actually paid and the true value of the business at the time of the agreement. This true value in the light of the alleged breaches would have to be pleaded and proved.

39 Finally, I shall deal very briefly with the argument of estoppel. In this connection, the plaintiff's argument was that the issue of whether it was entitled to claim damages by multiplying the Recurring Costs by seven had been determined in the Arbitration and therefore the defendants were estopped from raising it for determination before the court. However, the decision of the Arbitrator was not a final and conclusive judgment because it was a domestic arbitration and HLPL had applied for leave to appeal against the decision on the basis that it was wrong in law. Secondly, and perhaps more importantly, the parties to the Arbitration and the parties to these proceedings are different. The only parties to the Arbitration are the plaintiff and HLPL. The defendants are not parties to the Arbitration and the decision made in the Arbitration cannot bind them. The defendants here are sued in their personal capacity as directors of the plaintiff. They have no right to be heard in the Arbitration in their personal capacity albeit they may give evidence therein on behalf of HLPL as its directors and may also be giving instructions on behalf of HLPL in relation to the conduct of the Arbitration. I considered that the determination of the arbitral tribunal did not offer any basis on which the defendants could be estopped from questioning the way in which the damages claim in this suit had been formulated.