Out of the Box Pte Ltd *v* Wanin Industries Pte Ltd
[2012] SGHC 95

Case Number	: Suit No 317 of 2009 (Registrar's Appeal No 326 of 2011 and Registrar' Appeal No 330 of 2011)
Decision Date	: 04 May 2012
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Tham Wei Chern and Ivan Lim (Allen & Gledhill LLP) for the plaintiff; Aqbal Singh s/o Kuldip Singh and Adeline Chong (Pinnacle Law LLC) for the defendant.
Parties	: Out of the Box Pte Ltd — Wanin Industries Pte Ltd

Contract – remedies – damages

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 61 of 2012 was dismissed by the Court of Appeal on 17 October 2012. See [2013] SGCA 15.]

4 May 2012 Judgment reserved.

Choo Han Teck J:

1 In 2007, Out of the Box Pte Ltd ("the plaintiff") designed a sports drink known as "18". In the hope that that "18" would eventually become a global brand, the plaintiff spent more than $700,000 to advertise and promote the brand. Wanin Industries Pte Ltd ("the defendant") was a manufacturer contracted by the plaintiff to produce "18". In breach of contract, the defendant supplied defective quantities of "18" which were either of a different colour from what was agreed between the parties or contained foreign particles. Following an advisory warning by the Agri-Food and Veterinary Authority of Singapore, the plaintiff recalled stocks of "18" and subsequently decided to discontinue the brand. At the assessment stage, the plaintiff's main claim in damages was for its "reliance loss" or various advertising and promotional expenses incurred relying on its manufacturing contract with the defendant. The breakdown of the relevant expenses on appeal is as follows:

Supplier	**Amount**
Act Media Singapore Pte Ltd ("Act Media")	$342,658.01
Clear Channel Singapore Pte Ltd ("Clear Channel")	$74,900
Groovy Pte Ltd ("Groovy")	$50,000
The Catalyst Agency Pte Ltd ("Catalyst")	$199,369.87

2 In an agreement dated 15 December 2006, distinct from that between the plaintiff and defendant, Act Media purchased from the plaintiff the rights to use advertising space at various golf courses ("golf media rights"). Pursuant to the purchase agreement, the plaintiff was entitled to license golf media rights from Act Media, and to set off the fees incurred up to an amount of $600,000 ($600,000 worth of "advertising credits"). In August 2008, the plaintiff negotiated with Act Media to use the balance of the advertising credits ($342,658.01 at the time) for the promotion of

"18". It is pertinent to note that the advertising credits could only be used to obtain services from the relevant agency, were not assignable or transferable, and would have expired if they were unused by the end of 2008 (although the plaintiff could extend the utilization period on showing special circumstances). Moreover, the plaintiff had no other product for which it could have obtained advertising services.

3 In respect of expenses incurred with Clear Channel, the plaintiff claimed $74,900 for bus-stop advertisements placed in December 2008. The advertisements were paid for, not in cash, but by way of redemption of a prize won in a competition (with the exception of $4,900 incurred as GST which was discharged in cash). Again, the prize was not assignable or transferable and would have expired if it was unused by 31 December 2008.

4 For both categories of the above expenses, the defendant's primary objection related to the fact that the advertisements were obtained through the redemption of credits or a prize with no market value. Thus, the defendant alleged that the plaintiff did not suffer pecuniary loss in respect of the advertisements. The defendant's second argument was that the plaintiff had benefited from the marketing exposure generated by the advertisements. This particular argument can be easily dispensed with. The Assistant Registrar rightly held that any direct benefit accruing to the plaintiff would have been accounted for in the deduction of sales revenue from the claim amount, while any indirect benefit (such as goodwill) would be wasted in light of the discontinuation of the brand.

5 The Assistant Registrar found that the plaintiff had indeed suffered pecuniary loss. However, he classified the plaintiff's loss as the loss of the value of the advertising credits and prize respectively, rather than the loss of the advertising services obtained upon their redemption. In his view, advertising services cannot exist in a vacuum and must be attached to or be used for a particular product. Since the plaintiff had no other product for which the advertising services could be used, the Assistant Registrar reasoned that the plaintiff's loss was in reality the loss of the ability to obtain future advertising services, namely, the loss of the credits/prize. The Assistant Registrar then calculated the "objective value" of the credits and prize. For the Clear Channel prize, he assessed the value as S$49,000 by applying a discount of 30% to the prize due to its fast-approaching expiry date and non-transferability. A lower discount rate of 20% was applied to the Act Media credits, in light of the fact that the expiry date could be extended. In doing so, the Assistant Registrar drew attention to the fact that the plaintiff was no longer distributing "18" or any other product. In his view, this necessarily meant that the plaintiff's loss was the loss of the advertising credits or prize. I do not agree with this view. I think that it would be wrong to link the plaintiff's loss with an existing product. That was besides the point as the plaintiff's lack of a product was directly caused by the defendant's breach. Once the court awards a monetary substitute for the lost services, it no longer concerns itself with whether the plaintiff would actually use the money to purchase those services (see *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344).

6 Instead, the plaintiff's loss would be more appropriately defined as the loss of the value of the advertising services. While compensation for 'reliance loss' usually aims to put the injured party in his pre-contractual position, this shorthand is not useful in this particular case. I am of the view that the fundamental principle of compensation should apply, namely, that the measure of damages should be "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation" (see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25). Here, the plaintiff's position *sans* breach would entail possession of the advertising services, and a product to use them on. Giving effect to the underlying principle of compensation, the plaintiff's loss was the value of the advertising services it would have retained had the contract been performed. However, having reached this definition, we now face the difficulty of putting a figure to this loss.

7 Even in a claim for reliance loss, the fundamental principle of compensation requires that damages should put the injured party in the same position as he would have been if not for the breach. The focus is therefore on promised performance. This principle comes from the idea that recovery for reliance loss is an alternative means of protecting the expectation interest of the plaintiff. In A.S. Burrows on *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd Ed, 2004) at [70], the author explained the basis of reliance damages as follows:

> As the courts will not knowingly award reliance damages which put the claimant into a better position than if the contract had been performed, the best interpretation of the cases awarding reliance damages is that they are concerned to protect the claimant's expectation interest, albeit in a different way than the expectation is normally protected. That is, one can say that the law accepts an alternative way of putting the claimant into as good a position as if the contract had been performed, because it allows the claimant the benefit of a presumption, rebuttable by the defendant, that the claimant has not made a bad bargain. Hence, where the claimant can prove its reliance expenses, this rebuttable presumption enables it to recover that amount on the ground that if the contract had been performed it would at the very least have made gains to cover those expenses...
>
> On the other hand, it may at first sight appear puzzling why, on this interpretation, the courts are willing to give the claimant the benefit of a rebuttable presumption that it would have recouped its expenses. But it is submitted that this is simply a consequence of the fact that the defendant is a contract-breaker. It is as a result of breach by the defendant that one does not know what the position would have been had the contract been performed. It is therefore only fair and proper that the problems of proving that the claimant would not have recouped its reliance loss should fall on the contract-breaker and not on the innocent claimant.

That approach was followed in *Anglia Television v Reed* [1972] QB 60("*Anglia Television*") and *C.C.C. Films (London) v Impact Quadrant Films* [1985] QB 16 ("*C.C.C Films*"). In the former case, the English Court of Appeal held that recovery of pre-contractual expenditure is permissible if it was within the parties' contemplation that such expenditure would probably be wasted upon breach. Thus the editors of *McGregor on Damages* (Sweet & Maxwell, 18th Ed., 2009) at [2-033] remarked:

> This presents something of a halfway house between [damages for gains prevented by the breach and expenses rendered futile by the breach], for it does more than put the claimant in his pre-contractual position and to that extent seems difficult to justify. It is submitted that the decision should be regarded as based on the assumption that a contracting party expects to cover his expenses by the profit he makes and as therefore giving him his potential loss of profit to the limit of his expenditure, whether pre-contractual or post-contractual.

8 Both *Anglia Television v Reed* and *C.C.C Films* are consistent with the proposition that the burden of proof is generally placed on the defendant to show that the bargain was bad and that the plaintiff would not have recouped its expenditure. However, the foregoing cases can be distinguished from the present one for a number of reasons, most significantly due to the present plaintiff's inability to even prove its loss with respect to Clear Channel and Act Media. The plaintiff must prove his loss, even though the law does not require him to prove with certainty the exact amount of damage. Moreover, faced with an inability to put a value to the services lost, the question of whether the benefit of them would have become profits (but for the defendant's breach) is entirely speculative. The difficulty is that, unlike in the cases cited above, the plaintiff here is not claiming for out-of-pocket losses ie. money losses borne personally by the plaintiff. The court is confronted with the task of assessing the value of the advertising services rendered futile, but this is an assessment which is subjective and imprecise at best, and perhaps, even impossible in the absence of at least some

objective evidence. The value of the advertising services in terms of any goodwill or publicity generated is unquantifiable. Moreover, while it would usually be appropriate to take the invoice price of the services at face value barring evidence to the contrary, the situation changes significantly where the services are procured using fast-expiring credits or prizes.

9 There was no evidence that the value of the relevant services was commensurate with their "sticker" price. This was because the latter could have an element of arbitrariness depending on the balance of the advertising credits remaining at the time that they were used (which the plaintiff had to utilize fully or else allow to lapse). Notwithstanding that uncertainty, it is the plaintiff's responsibility to provide some means of gauging the extent of its loss. The plaintiff must satisfy the court both as to the fact of damage and as to its amount, or else be awarded nominal damages at most. Furthermore, it is for the plaintiff to prove that the expenses claimed would be recouped on the balance of probabilities. Due to the ill-defined nature of the plaintiff's loss, the current situation is not one which justifies the imposition of the burden on the defendant. Taking into account the present plaintiff's inability to provide the necessary evidence, I disallow its claim for the Act Media and Clear Channel expenses.

10 The plaintiff claimed $50,000 for photography expenses incurred with Groovy. The defendant objected on the grounds that these expenses were inflated, unusual or special such as to warrant further scrutiny pursuant to the decision in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623. As held in *Thode Gerd Walter v Mintwell Industry Pte Ltd and others* [2010] SGHC 33 at [39]–[40], as long as the plaintiff provided cogent evidence of its loss, there is no general requirement at law that the makers of any quotations or invoices adduced must explain them in court. However, an explanation may be warranted where the figures in the quotation or invoice appear to be inflated, unusual or special, so as to cast doubt as to whether or not the expenses were in fact incurred. In the present instance, the plaintiff adduced evidence of all relevant invoices and supporting documents. Nevertheless, the defendant argued that it was not enough for the plaintiff to merely produce these invoices, if the invoices themselves give rise to a doubt as to the services charged or the quantum of the fee charged. The defendant denied that the plaintiff had adequately proved its loss on a number of grounds. According to Mr James Quek of Groovy, the plaintiff's bill was based on a number of factors including out-of-pocket fees charged by models, stylists and photographers, as well as various overhead expenses. However, the defendant relied on evidence that Groovy's models and stylists had not been paid in order to allege that those fees were irrelevant to the overall amount it had charged the plaintiff. Moreover, the defendant also attempted to rely on isolated quotations and invoices from two other photography studios to assert that Groovy's bills were unusually high, such as to warrant closer scrutiny. Finally, the defendant alleged that the "nexus between Groovy and the Plaintiff [was] a close one" and sought to draw an inference that the fees charged were inflated or unusual from the fact that a plaintiff witness, Mr Tan Muey Hwa ("Mr Tan"), was a former director of Groovy and that Groovy had not taken any action against the plaintiff despite the latter's failure to pay its outstanding bills. In rebuttal to the defendant's assertion, the plaintiff called witnesses and adduced photographic evidence of the final work product in order to explain the invoices and the work done by Groovy.

11 In my view, the plaintiff had adduced sufficient evidence to show that it had in fact incurred the Groovy expenses, and it did not need to justify the breakdown of Groovy's charges in minute detail. On the other hand, the defendant's allegations that the plaintiff had been overcharged by Groovy because of some "nexus" between them was not adequately proved. Finally, the quotes on which the defendant relied were inadmissible by virtue of the hearsay rule, and the defendant did not call any witnesses or adduce any other evidence to prove that Groovy's fees were inflated, unusual or special. As such, the Assistant Registrar was entitled to accept the plaintiff witness Mr Tan's uncontradicted testimony that the quotes adduced by the defendant were for a different product and

scope of work, and were not comparable with the work undertaken by Groovy for "18". In these circumstances, I accept the Assistant Registrar's finding that the plaintiff's loss with regard to Groovy was the $50,000 claimed.

12 The plaintiff engaged the advertising agency Catalyst to run the advertising campaign for "18", including overseeing its strategy, creating the slogan, and designing various packaging and promotional materials. The expenses in relation to Catalyst amounted to a sum of $199,369.87. The defendant raised various objections to the nature of the evidence adduced by the plaintiff. In relation to Catalyst's fees for the strategy, concept and strapline for "18", the defendant suggested that Catalyst was not involved in the development of the product because the plaintiff had already decided on the name "18 for Life" and had registered a trademark for the same before engaging Catalyst's services. In relation to Catalyst's fees for the bottle label designs, the defendant asserted that the final draft designs could have been completed in a modest number of hours. Moreover, Catalyst was obliged under the contract to provide written cost estimates but failed to do so without any explanation. The defendant argued that the absence of pre-estimates and man hour breakdown, coupled with "the fact that [the] final work produced could easily have been done in a number of hours", the "irresistible inference was that Catalyst's invoice did not reflect the true value of work done". In this situation, the defendant appeared to be conflating the issue of the "true value of the work done" with the loss suffered by the plaintiff. The purpose of the assessment hearing is merely to satisfy the court as to the latter. Services generally, and advertising services in particular, are notoriously difficult to evaluate, and speculations about how much effort went into developing a certain concept or catchphrase are futile and unhelpful. Without the defendant providing evidence that the fees appear inflated, unusual or special, the plaintiff need only adduce cogent evidence that Catalyst had indeed charged the plaintiff for the expenses claimed. The plaintiff has discharged this burden by producing the relevant invoices, correspondence and resulting work.

13 Since the plaintiff had failed to prove its loss in relation to the Act Media and Clear Channel services, I shall confine my consideration of remoteness of damage to the expenses incurred in relation to Groovy and Catalyst. In *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM Restaurants*"), the Court of Appeal reaffirmed that the two limbs set out in *Hadley v Baxendale* (1854) 9 Exch 341 ("*Hadley v Baxendale*") as continuing to govern the doctrine of remoteness of damage in contract law. In cases of breach, a plaintiff is only entitled to recover such part of the losses occasioning as was, at the time of contracting, within the parties' reasonable contemplation as a not unlikely result of the breach. This in turn depends on the knowledge then possessed by the parties. As explained by Lord Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ld* [1949] 2 KB 528 ("*Victoria Laundry*"),

> ... knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley v Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things", of such a kind that a breach of those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

The defendant's general objection was that the overall amount claimed could not have been within the parties' reasonable contemplation. The defendant contended that as far as they were concerned, the agreement with the plaintiff was a straightforward supply contract for modest quantities of "18" (the minimum order being just 1 trailer load) for a minimum term of two years, and that the expenses were part of an excessive and speculative brand building exercise. As such, the advertising expenses claimed should rightly fall under the "second rule" in *Hadley v Baxendale*. In determining what was within parties' reasonable contemplation, the defendant submitted that the court must examine the parties' intention in the context of the commercial reality of the transaction. The defendant alleged that it had not assumed financial responsibility for the plaintiff's branding exercise as it had no obligation under the contract to help build the "18" brand. It contended that the Assistant Registrar did not examine the true "bargain" between the contracting parties and instead committed the error of re-writing the contract between the parties.

14 At the outset, it is to be noted that the Court of Appeal in *MFM Restaurants* declined to follow Lord Hoffmann's approach based on assumption of responsibility in *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61, "except to the extent that the learned law lord's reliance on the concept of assumption of responsibility by the defendant is already incorporated or embodied in both limbs in *Hadley* itself." Thus, the principles laid down in *Hadley v Baxendale* are entirely consistent with the essence of the contract as an agreement (*MFM Restaurants* at [108]). Had the parties in the current case given thought about the issue, they would in all likelihood, as reasonable parties, have agreed that the defendant should be liable for the advertising expenses as "ordinary" damage in the event of a breach.

15 The argument that the defendant did not assume responsibility for building the "18" brand is unsound, given that it certainly had a duty not to undermine the brand. While the nature and circumstances of the contract can shed light on what was within the reasonable contemplation of the parties, they did not suggest to me that the amounts presently claimed were "unusual damage" not flowing naturally from the breach. It is obvious that "18", being a new product in the competitive sports drink market, would need to be promoted aggressively. The defendant must have known, or it must be reasonably imputed to the defendant, that the plaintiff would incur expenses in advertising and promoting "18", and that those expenses would be wasted should the brand be jeopardized. Furthermore, since advertising expenses as a whole must have been in the reasonable contemplation of the parties, such loss should be recoverable regardless of its quantum. However, as *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) vol 1 mentions at [26-058], while the precise details of the loss need not be contemplated by the parties, the application of the test for remoteness to given facts depends largely on the judicial discretion to categorise losses in various ways. For example in *Victoria Laundry*, the court distinguished between loss of profits generally and loss of profits from especially lucrative contracts. In this case, I agree with the Assistant Registrar that there is a qualitative difference between expenses incurred in nationwide advertising and expenses incurred in regional or international advertising. The former but not the latter should be in the reasonable contemplation of the parties as there had been no reference anywhere in the contract or communications between the parties of the prospect of "18" branching out overseas. Furthermore, I accept the Assistant Registrar's estimate of $40,000 as the premium charged by Catalyst because of the reasonable possibility of "18" becoming an international product. I therefore reduce the damages with regard to these expenses by $40,000.

16 Finally, a plaintiff should only be entitled to recover its wasted expenditure to the extent that such expenses could have been recouped if the contract had been performed (see *C.C.C Films* at 32). In the present case, the defendant's breach in supplying defective "18" was a direct cause of the termination of the brand after less than four months of sales, making it impossible for the plaintiff to prove with any kind of certainty the profits it would otherwise have made. Thus, with regard to the Groovy and Catalyst expenses, the onus of proving that the plaintiff would not recoup its expenditure will fall upon the defendant as a contract breaker. The defendant argued that the sums incurred (in excess of $200,000 excluding the amounts claimed for Act Media and Clear Channel) would not, on a balance of probabilities, have been recovered within the two year contract period of the Agreement.

The defendant alleged that the plaintiff's failure to prepare any sales projection for "18" indicated that it had no expectation that the costs would be recouped. This was compounded by evidence that sales of "18" were modest at best. Revenue generated was only $22,000 from October 2008 to January 2009. Furthermore, the defendant asserted that the Assistant Registrar erred in making the assumption that the parties would have extended the Agreement beyond the minimum term of two years stipulated in the Agreement. The defendant relied on the Court of Appeal's proposition in *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 that the *Hadley v Baxendale* principle should not be used to extend the potential amount of damages to circumstances in which the party at fault had no legal obligations, such as in *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) ALJR 123 ("*Amann Aviation*"). Nonetheless, I am persuaded that it must have been within the parties' reasonable contemplation that "18" would be sold for a potentially longer period than two years. That assumption did not, however, amount to conferring damages for loss of a benefit not the subject of legal obligation. Even if the defendant did not renew the supply contract, this would not necessarily have meant that "18" would be discontinued. I do not see why the plaintiff could not simply have found another supplier in replacement. This case is to be distinguished from *Amann Aviation* where any prospect of the plaintiff recouping its expenditure was entirely dependent on whether or not it secured a renewal of its contract with the defendant. Thus, there is no logical basis in the present case for requiring the plaintiff to recoup its expenditure within the strict time interval of two years. Therefore, bearing in mind the prospective growth in sales over time as "18" gained marketing exposure, as well as the initial possibility of the brand being in circulation for a number of years, I am of the view that there was insufficient evidence that the plaintiff would have been unable to recoup its expenditure in due course.

17 For the above reasons, I award the plaintiff the following sums as damages:

(a) $1,000 as nominal damages for the Clear Channel expenses;

(b) $1,000 as nominal damages for the Act Media expenses;

(c) $50,000 for the Groovy expenses; and

(d) $164,369.87 for the Catalyst expenses.

I also uphold the Assistant Registrar's awards for the following expenses:

(e) $1,637.10 for the Procolor expenses;

(f) $3,210 for the Big Bulb expenses;

(g) $26,373.09 for the Raffles Digital expenses;

(h) $4,638.95 for the miscellaneous advertising expenses;

(i) $39,648.90 for the payments for drinks and bottle moulds;

(j) $36,241.82 for warehouse and forklift expenses;

(k) $7,549.29 for expenses incurred as a result of recall; and

(l) $15,657.19 for the fridge and vending machine expenses.

After deducting the $22,071.91 of sales revenue, the damages awarded amount to $329,254.30. I will hear the question of costs on another date if parties are unable to agree on a sum.