Live Scape Sdn Bhd v World Wonder Fest Sdn Bhd [2023] MLJU 96

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MOHD ARIEF EMRAN ARIFIN JC

GUAMAN NO WA-22NCVC-587-08/2019

5 January 2023

R Rishi (with Rachel Tan) (Daljit Singh Partnership) for the plaintiff.
Gavin Jayapal (Gavin Jayapal) for the defendant.

Mohd Arief Emran Arifin JC:

Grounds of JudgmentA. Introduction

[1]The parties' allegations are summarized as follows:-

Plaintiff

1.1 That the Defendant had breached the terms of the agreement by failing to pay the sums required under the terms of the agreement dated 7-3-2019.

1.2 That the Plaintiff had by letter dated 16-8-2019 issued by Messrs. Rishi & Partners to the Defendant's solicitors demanded payment of the sum of RM 3, 217,030.00 to be paid on or before 19-8-2019 and failing which the agreement dated 7-3-2019 is deemed terminated.

1.3 The Defendant is required to pay to the Defendant the sum of RM 3, 217, 030.00 to the Plaintiff being damages incurred by the Plaintiff for the Defendant's breach of the aforesaid agreement.

1.4 The Defendant had allegedly defamed the Plaintiff when the latter had issued on its website on 19-8-2019 statements that allegedly contained libelous statements against the Plaintiff.

Defendant

1.5 The Defendant on the other hand alleges that the Plaintiff had failed to deliver its promises to it and had been negligent in the conduct of the management of the project under the terms of the agreement.

1.6 The Plaintiff is guilty of negligent misrepresentation by failing to deliver the promises/representations relating to the deliverables of the project especially when it relates to the K-Pop concert proposed by the Plaintiff to the Defendant.

1.7 The Plaintiff is guilty of breach of contract by failing to deliver its obligations either express or implied required of the Plaintiff under the terms of the aforesaid agreement.

1.8 The Plaintiff had defamed the Defendant when the email dated 9-8-2019 was wrongfully issued by the Plaintiff's CEO to Hou Yin.

The claim relates to the K-Pop event planned and to be organized by the Plaintiff on behalf of the Defendant which was initially slated to be on 31-82019 but was eventually moved to 30-8-2019.

B. Decision of this Court

[2]After considering the documents, witness statements, evidence and submissions presented by learned counsel for the parties, I make the following orders: -

2.1 The Plaintiff's claim against the Defendant for damages based on the claim for breach of contract against the Defendant is allowed for the following damages: -

(i) Fi Penempahan Artis USD 100,000.00 (RM 419,000.00)

(ii) Kos Reka Bentuk RM 31, 800.00

(iii) Kos Utusan RM 3, 400.00

(iv) Fi Pengurusan USD 150,000.00 (RM 628, 500.00)

(v) Tiket Penerbangan Artis USD 7,000.00 (RM 29, 330.00)

2.2 The Plaintiff's claim for defamation is allowed and the following remedies are ordered against the Defendant: -

(i) General Damages of RM 20,000.00

(ii) An order restraining the Defendant from repeating or republishing the said notice or any such words against the Plaintiff in any form whatsoever.

2.3 The Defendant's claims against the Plaintiff as enumerated earlier are dismissed.

2.4 Defendant pays the costs of RM 20,000.00 to the Plaintiff subject to the required allocator.

[3]My reasons for coming to the above decision are contained in the following paragraphs.
(i) Whether there was valid Termination of the Agreement by the Plaintiff?

[4]I am satisfied that the Plaintiff has shown to me that the Defendant did commit a breach of the terms of the Agreement dated 6-3-2019. The terms of the agreement, in particular clause 5, indicates that the Defendant is required to (a) pay the sum of USD 1,000,000.00 in two tranches of USD 500,000.00 on 8-3-2019 and within 45 days from the date of the agreement, being the artist fees to be paid to the performers of the events, (b) the funds required for the event production costs, event management fees - these were to be paid in 3 tranches as required under item 8 and item 10 of the Schedule to the Agreement and (c) all artists booking fees of 10%. This obligation is provided in clause 5 and items 7, 8, 9 and 10 of the Schedule to the Agreement.

[5]The evidence before me shows that the Defendant had only paid the sum of USD 500,000.00 to the Plaintiff which was then utilized by the Plaintiff to book the K-Pop artists for the events. The Plaintiff then issued reminders to the Defendant to make such payments at various times via informal discussions, WhatsApp communications and emails seeking payment of the said sums.

[6]However, one of the issues before me is whether the Plaintiff had committed an error in failing to comply with clause 10 of the Agreement which is reproduced herein: -

Clause 10.0 Termination

10.1 Events of Default

If any of the Parties

10.1.2 fails to perform or observe any of the other terms and conditions, covenants, undertaking or stipulations herein this Agreement contained, or

10.1.4 has breached the terms and conditions of this Agreement without justifiable cause.

The defaulting party has within 30 days from the date of notice issued by the A/on-*defaulting Party to rectify the said Default, failing which the Non-Defaulting Party may exercise its right to terminate this Agreement by issuing a written Termination Notice and be compensated for the losses and damages suffered and/or incurred.*

10.2 Termination Notice

The Written Termination Notice shall be served to the Defaulting Party business address and upon receipt of the Termination Notice, the Defaulting Party shall within 14 days take necessary steps, to cease the operations and/or execution of its obligations set out under this Agreement, whichever are applicable.

[7]It is apparent to me that the Plaintiff did comply with the said clause when it issued its termination of the said Agreement. This is apparent in the communication exchanged between parties in WhatsApp dated 7-8-2019 to 8-8-2019 where one Iqbal, the representative of the Plaintiff, had notified the Defendant, that if payment was not received within the day itself, then the whole concert will be cancelled, and that the Agreement will be terminated.

[8]This was followed up with the email issued by the Plaintiff to one Hou Yin dated 9-8-2019 informing the latter that the remaining sums due to the paid to the K-Pop artists have not been paid by the Defendant.

[9]The notice was also issued by the Plaintiff's solicitors letter dated 168-2019. In paragraph 6 of the said letter, which was issued in response to the Defendant's solicitors letter dated 13-8-2019, learned counsel for the Plaintiff had provided the Defendant with a time frame of 3 days (19-8-2019) to make payment of the full sum of RM 3,717,030.00 failing which the Agreement was deemed to be terminated.

[10]I agree that the clause did indicate a specific time frame of 30 days for the Defendant to rectify the said default. However, in this case, repeated reminders have been issued by the Plaintiff to the Defendant since April 2019 to pay the said amounts and the Defendant always gave feeble excuses not to pay the sums due under the terms of the agreement.

[11]I am aware that clause 10 of the Agreement does indicate a specific 30 days period before termination could be issued and I am bound by the decision of the Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 CLJ 177 where Zainun AN FCJ held: -

"[70] In our view, the latter interpretation makes more commercial sense. One may well ask why. Well, it is because it is conceivable that matters will begin as "unsatisfactory performance" before they escalate to be matters of "inability to perform services." Since the option is given to the respondent to tackle it at the earlier stage, ***one cannot reasonably understand the contract to mean that the respondent can sit on the "unsatisfactory performance," then roll over and play dead, and then wait for it to escalate so as to deprive the appellant of the opportunity to remedy what is "determined" unsatisfactory. That would not be the way the contract would be understood by the reasonable person, having knowledge of the material facts. Clause 9 would be understood as giving an opportunity to remedy, which would be illusory if the respondent could deprive the appellant of that, simply by waiting***

[71] The respondent submits that there is a "freestanding right" under 8.1 to terminate the contract. The Court of Appeal

agreed with this. It appears that this stems from a misunderstanding of the interpretation of the word “may”. It could be said that the use of the word “may” under cl. 9 confers a discretion upon the respondent who has a choice of whether or not to institute a review. That much may be true. However the word “may” may be contrasted with two words or phrases, namely, “may not” and “must”. It is only when compared with “must” that “may” is understood as being discretionary in the manner that the respondent submits. Preferably and alternatively “may” as contrasted with “may not” merely expresses permissiveness. To take the respondent’s submission to its logical conclusion, then 8.1(b) as a “freestanding right” can easily be used to subvert the purpose of cl. 9. That cannot be the intention of the parties as objectively determined. Being able to terminate whilst the review procedure is ongoing does not sit comfortably with the idea of being given an opportunity to remedy (“may remedy”). Therefore 8.1(b) is hardly a freestanding right and it must be read in context with cl. 9, so that the purpose of cl. 9 in protecting the appellant is not obviated. Clause 9 qualifies 8.1(b) because if they were to be read entirely separately, 8.1(b) could not be effected in the correct way as elucidated above.

[72] It has been contended that if cl. 9 was meant to be invoked before 8.1(b) could be relied on, the contract could have said so. However, the reverse is also true. If the procedure under cl. 9 was not required to have been satisfactorily completed before 8.1 (b) could be relied upon, the contract could have also made it abundantly clear. The question is not what the contract could or could not have said, but what it must mean. We find it difficult to disregard the link that cl. 9.3 makes with cl. 8.1(b). If such a link was being made explicitly in the contract, it is reasonable to conclude, especially having adopted the reasoning in the previous paragraph contrasting “unsatisfactory” and “unable,” and that the set of circumstances that are applicable to cl. 9 will almost always be chronologically prior to that of cl. 8.1(b) and that ought to be borne in mind for the purposes of understanding the contract. To dispel this, cl. 9 could have been drafted to read “without prejudice to the right to terminate under cl. 8.1...,” as such words “without prejudice” in a contract are not mere verbiage and their absence may be indicative of intent. (*Lockland Builders Ltd v. Rickwood* [1995] 77 BLR 38. Instead, as shown, cl. 9.3 provides that the unsatisfactory performance under cl. 9.2 as an event of default, which entitles the State Government to terminate this agreement under cl. 8.1(b).

[83] What can be concluded from the above is that, upon a true construction of the contract, cl. 9 must be invoked and satisfied before termination under cl. 8.1(b) may be validly exercised. This is to ensure that the meaning and purposes of the two clauses are not lost or rendered nugatory by operation of the other.”

[12]I further refer to the decision of the UK House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352,

[13]However, this is not set in stone. As with all general rules, there are always exceptions. This would depend on the facts of each case. This could be seen in the decision of the Court of Appeal in *Lay Hong Food Corporation Sdn Bhd v Tiong Nam Logistics Solutions Sdn Bhd* [2017] 10 CLJ 680. In that case, the Court of Appeal agreed that the notice of termination was effective despite not complying with the six months’ time frame provided under the terms of the agreement, as it would have been impossible to do so as the agreement would have expired a month after the notice was issued by the innocent party.

[14]Therefore, in this case, I find that sufficient notice has been issued by the Plaintiff to the Defendant. The Defendant is aware of its default in its obligation to make payment for the funds necessary to be paid to the artists’ agents and all related fees to enable the Plaintiff to obtain the necessary approvals. The concert should have taken place on 30-8-2019 and it would have been impossible for the Plaintiff to continue with the said event and assist further without receiving the payments due. In the circumstances, I find that the termination of the Agreement is valid, and that the Defendant did commit a material breach of the terms of the Agreement by failing to pay the sums due within the time frame provided in the Agreement. At the very least, the Plaintiff is entitled to terminate the Agreement according to common law principles based on the Defendant’s decision not to pay the sums due as indicated in its solicitor’s letter dated 13-8-2019.

[15]At the very least, I find that the notices issued in the various emails and WhatsApp communications between parties since April 2019 indicate that sufficient notice to make payment of the sums due was given to the Defendant. Therefore, the requirement of 30 days as required in the above-referred clause has been fulfilled. The Defendant has been given the opportunity to make full payment of the sums required to enable the concert to be undertaken and the Korean artists to attend. The failure to pay lies solely with the Defendant. It is incumbent on the Defendant to make payment of the sums required under

the terms of the agreement. I also find that parties did not agree to extend such time or change this obligation as suggested by the Defendant. This obligation is set clearly in the Agreement and the failure by the Defendant constitutes a material breach entitling the Plaintiff to terminate the agreement.

[16]I also find that the decision by the Defendant not to pay the sum due, constitute a fundamental breach that entitles the Plaintiff not to undertake the remainder of the contractual obligations on the part of the Plaintiff. It is wrong for the Defendant to expect the Plaintiff to continue with the concert when the artists booked have not been paid in full due to the failure by the Defendant to honor its contractual obligation. I refer to *N Saraswati Devi Sb v Margaret Fernandez d/o Joseph* [1999] MLJU 320, *Ban Hong Joo Mines v Chen & Yap Ltd* [1969] 2 MLJ 83 ***and*** *Kamil Azman Abdul Razak v Amanah Raya Berhad* [2019] 4 MLJ 726.

[17]The Federal Court in ***Ban Hong Joo Mines v Chen & Yap Ltd (supra)*** held: -

> "It was argued before us by counsel for the appellants that the non-payment by them of the sum of $1,800 did not, *ipso facto,* amount, in law, to repudiation of the contract and did not, in law, entitle the respondents to rescind the contract and to sue to recover a sum of money in respect of work done. In support of this argument he cited a number of authorities, the first three of which relate to contracts for the sale of goods. In **Simpson v Crippin (1872-73) 8 QBD 14** the goods were to be delivered in monthly quantities. It was held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. In *Freeth v Burr* (1873–74) 9 CP 208 there was to be a delivery of goods in parcels at different times. It was held that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach. Lord Coleridge C.J. said (at page 213):"... it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, *viz.* that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."
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> Keating J. said this (at page 214): -
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> > **"It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element."**
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> In *Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434; [1881-51] All ER Rep 365 the goods were to be delivered by instalments. Affirming the decision of the Court of Appeal, the House of Lords held that, upon a true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery, and that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance. The Earl of Selborne L.C. said (at page 438): -
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> > "I am content to take the rule as stated by Lord Coleridge in **Freeth v Burr (1873-74) 9 CP 208**, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other, you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part;"
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> Lord Blackburn said (at page 443): -
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> > "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the

> foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"

In the much later case of *Spettabile v Northumberland Shipbuilding Co Ltd* [1918-19] All ER Reprint 963 968, Atkin L.J., after he had cited definitions of repudiation, added: -

> "They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract."

[18]For purposes of clarity, I also make specific finding that the Plaintiff did not agree that the said sums due are to be paid from the concert tickets or from the proceeds of the event. Parties clearly envisaged that the artists will have to be booked at paid upfront. This will be borne by the Defendant and the said sums are to be paid in the two tranches agreed as specified earlier. This was also repeated by the Plaintiff in the email dated 5-7-2019 where in response to the Defendant's email the Plaintiff stated unequivocally: -

> *"Nevertheless, this is not a good reason for payment to not go through as agreed to these agents. We have booked these artists with good faith from your company to deliver, any reason for delay will cause them to cancel entirely....*
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> *I would like to refrain at this point in regards to ticket sales. We are / have never been responsible for marketing this event We were initially tasked with artist booking and production, and I believe the team has gone out of our way to ensure that we assisting and doing all we can as this was a Livescape show.*
>
> *Event is high risk, high return. That's the nature of this and how it is played.*
>
> *In order for this to happen successfully, payments need to be in. If payment is not in artists will not perform. End of story."*

[19]In response to the aforesaid email, the Defendant's Karrotgold Khairul Anwar replied: *"Thank you for the explanation, Iqbal, will discuss with my team".* This was also followed with a further promise to pay on 28-7-2019 issued by Amirul Hafiz, a representative of the Defendant to the Plaintiff's Clarice Chin, stating that "We *will inform you once the money remitted'.*

[20]The above series of emails when read as a whole point to the truth. I find that the Defendant's defence and counterclaim are mere excuses to justify its failure to pay the sums due to the Plaintiff. The concert failed solely for the failure of the Defendant to pay the sums outstanding. Without the said sums, the Korean artists attendance could not be secured and I cannot blame this on the Plaintiff.

[21]Therefore, I find that the Defendant did commit a material breach of the contract and the Plaintiff is entitled and had correctly terminated the contract.
(ii) Is the Defendant correct in its allegation of wrongdoing against the Plaintiff?

[22]I also find that the Defendant's allegations as contained in its Defence, and Counterclaim are incorrect. I find that the allegations made by the Defendant as to (i) alleged misrepresentation, (ii) negligence and (iii) breach by the Plaintiff are not true and are a mere afterthought on the part of the Defendant to justify its wrongdoing.

[23]As I have found earlier, it is clear to me that the correspondence between the parties at the material time shows that it was the Defendant who had not complied with clause 5 of the Agreement. The Plaintiff had issued its invoices and reminded the Defendant of the need to pay the sums of monies required to ensure that the K-Pop artists' contracts will be secured, that all the works for the said concerts will be undertaken, the approvals for PUSPAL all related authorities are obtained, insurance, withholding taxes paid for the artists and any other such works are done.

[24]I find that the allegation of wrongdoing against the Plaintiff only arose once the Defendant found itself

unable to pay the remaining sums due for the said project. This is clear in the following evidence that I have considered the WhatsApp dated 23-7-2019 to 8-8-2019, where the Defendant continued to promise payment to the Plaintiff and stated that the monies are being held up in Singapore due to an internal issue with the Inland Revenue of Singapore. If indeed that the Defendant was unhappy with the conduct by the Plaintiff and that the said entity did not comply with its obligations surely this would have been clearly stated as the reason for non-payment.

[25]This is also seen in the email exchanged between the parties' representatives that started on 31-5-2019 to 7-8-2019. The Plaintiff had issued invoices and requested that the Defendant to pay the sums that are outstanding according to the terms of the Agreement. The truth is seen in the WhatsApp message issued by one Amirul dated 7-8-2019 which states *"The problem is we, won't have enough budget to get ready including your payment and now we trying to get fund from our investor."* Despite promises being made and excuses given such as blaming third parties (foreign banks in Singapore)"/ *already prepared the money, and already sign and give the bank approval to transfer the money...sadly, because of huge amount, they are acting under AMLA saying that I'm using another account to clear my money"* and errors by the said banks, *"yes preparing now", "just that the bank wrongly put the amount at SGD 678, 400 using the old invoice"* and promising that the payment will be made. These representations by the Defendant persisted many times and, in many WhatsApp, and emails whenever the Plaintiff sought payment from the Defendant.

[26]To me, this indicates that the Defendant did not have sufficient funds to pay as required under the terms of the Agreement and now is seeking an excuse to either delay the whole project until such time it can recoup the funds from the sales of the tickets or back out from the whole project altogether.

[27]I also find that the Defendant's allegation of the alleged negligent misrepresentation, negligence by the Plaintiff and breach of contract by the Plaintiff are inconsistent with the documents before me. I find that the Plaintiff had undertaken all necessary works to secure the artists as agreed between parties and attempted to obtain PUSPAL and all related authorities' approvals for the concerts and other works as required under the terms of the agreement. For the Plaintiff to successfully deliver these works, payments must be made by the Defendant to secure the artists to come to Malaysia, to secure PUSPAL's approval and all related authorities' approvals. For example, before PUSPAL agrees and work permits are secured for the said artists to perform in Malaysia, withholding taxes will have to be paid to the Inland Revenue Board. That payment would have to be made by the Defendant and it would be putting the cart before the horse if one were to expect that the said approvals be obtained before such securities and payments are made. This explanation could be seen in the email, that I referred to earlier, that was carefully worded by one Iqbal to the Defendant's representative, Khairul Anwar, dated 5-7-2019. When this was explained to Khairul, there was no protestation from the Defendant, and the said explanation was accepted. This to me, indicates that the allegations issues raised now and, in the letter, dated 13-8-2019 are mere afterthoughts by Defendant to create a wrong impression of the facts. The same applies to the securing the artists, the event and the other issues raised by the Defendant. It all boils down to the failure by the Defendant to pay the sums outstanding. Without full payment, I find that concert could not have been undertaken as the artists could not be paid and the other work could not be completed. This failure, falls squarely within the shoulders of the Defendant.

[28]With regard specifically to the allegations of negligence, misrepresentation and alleged reliance by the Defendant on the expertise of the Plaintiff, I again find that these allegations are not convincing and reject the same.

[29]Firstly, I have considered that there exists an entire agreement clause as seen in clause 22 of the said Agreement. For ease of reference, the said clause is reproduced herein: -

> *"All the terms of this Agreement between the parties hereto are those set out in this Agreement which supersede any previous agreement or understanding, if any, made or entered into between them in relation to the matters herein"*

[30]Therefore, it is wrong for the Defendant to now add terms and conditions that do not appear in the said Agreement. It is wrong for the Defendant to impose new obligations on the pretext of alleged misrepresentation by the Plaintiff before the contract was entered. I refer to the decision of the Courts in *Macronet Sdn Bhd v. RHB Bank Berhad* [2002] 4 CLJ 729; [2002] 3 MLJ 11, *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh* [2009] 6 CLJ 371 and in *Common Ground TTDI Sdn Bhd v. Ken TTDI Sdn Bhd; Common Ground Works Sdn Bhd & Ors (Third Party)* [2021] 1 LNS 1709.

[31]I also do not find it convincing that the delay and changes to the dates of the concert were attributed solely to the Plaintiff. The Defendant is also responsible for the initial date chosen for the concert, the initial stadium chosen and the change of artists from Indonesia to K-Pop artists and the subsequent changes to the dates as well as changes to the venue. All these decisions were made in consultation and with the agreement of the Defendant.

[32]They were not done solely by the Plaintiff. As an example, as early as 18-4-2019, parties had discussed the change of date due to the religious sensitivity at the material time and the proposed change from Axiata Stadium to Stadium Nasional Bukit Jalil. The change from a smaller avenue to a bigger avenue, i.e., the Stadium Nasional Bukit Jalil, was also undertaken by the Defendant unilaterally without any input from the Plaintiff.

[33]This shows that the Defendant did not rely solely on or even substantially on the Plaintiff but instead could decide on their own as to the date, the type of event, the type of artists that were picked, as well as the size avenue to be chosen for the said concert. The Defendant knew the risk of securing the acts and the risk of undertaking such an event as seen in the following statements: "Yea *bro aku rasa kalau ambik 3 acts buat kat Axiata, PNL tak berapa cantik. Might as well buat kat national stadium, can sell cheaper n attract more crowd."* And when warned that even as early as March 2019 that the acts may not agree and the risk relating to this, the Defendant's representative stated unequivocally, *"Takpe, we go all out for this bro".. "Lets just do it" "We get the acts".. "We'll figure it out n make it work bro".* I also find in the WhatsApp discussions between parties that the Defendant did actively participate in the choice of artists suggested by the Plaintiff. This indicates to me that they were not allegedly novices but were aware of the risk and difficulties in undertaking such events. Not forgetting that from the initial point of the first meeting, the date was chosen by the Defendant and they wanted to go ahead with the said concert within the said period.

[34]For the above reasons, I do not accept the allegations raised by the Defendant in this proceeding. I find that these are mere excuses or afterthought created once the Defendant realize the financial predicament it was in. It is clear to this Court that the Defendant had difficulties raising funds and gave feeble excuses for the failure to transfer the sums despite making promises to the Plaintiff. Once the Defendant ran out of excuses, it then created issues to justify delaying the event and not paying. The Defendant was aware from the outset and even reminded by Iqbal in the said email dated 5-7-2019 of the sequence of how the project would have been undertaken. Having failed to pay, the Defendant cannot now renege on its obligation and create a ruse to justify its failure to pay and its breach of the terms of the Agreement.

[35]One of the main issues pressed by the Defendant concerns the allegations that the Plaintiff had failed to undertake its obligations inter alia, to obtain the required license, failure to promote the event, failure to advice appropriately and allegedly to secure the artists for the said events. These allegations also relate to the Defendant's proposition that they relied substantially on the part of the Plaintiff who had more experience in this area and based on the alleged representations made to the Defendant.

[36]With due respect to the Defendant and his counsel, I reject these allegations in toto against the Plaintiff and I do not find that the Plaintiff had committed any such breach as alleged by the Defendant. I believe based on the agreed timeline between parties, the actions of the Plaintiff were reasonable and were in terms with their contractual obligations. It was the Defendant that had failed to pay the sum promised that led to the failure of the concert. This failure, as I have found earlier, is a material breach of

the contract by the Defendant. These allegations by the Defendant were only raised once it realized that it was unable to pay and could not complete the concert and its contractual obligations within the time frame as agreed. These Defences were an afterthought on the part of the Defendant to justify its own breach of contract.

[37]I also find that the evidence of the Plaintiff's witnesses is consonant with the contemporaneous documents before me. The actions by the Plaintiff clearly show that it wanted to complete the contract and deliver its promises to the Defendant. It had more at stake. The Plaintiff had contracts with the Korean artists and its reputation with these international artists were at play. It was the Defendant who did not make payment. The evidence before me shows that the Defendant were out of depth and did not have sufficient financial backing to complete the contract. Therefore, for the above reasons, I prefer the evidence of the Plaintiff's witnesses.
(iii) Parties' allegations of Libel

[38]I have considered the issues of law relating to claims based on the tort of libel and the defences raised by parties. I refer to the decision of the Federal Court in Raub Australian *Gold Mining Sdn Bhd v Hue Shieh Lee* [2019] 3 CLJ 729 and the Court of Appeal in *Gwee Tong Hiang v Boo Heng Hau* [2016] 6 CLJ 494. I will not repeat the principles of law that are applicable as they are trite.

[39]As I have found that the Defendant did commit a material breach of the terms of the Agreement and that the allegations contained in the defence are a mere afterthought or conjured by the Defendant as in anticipation of the claim by the Plaintiff, I find that the Statements made by the Defendant contained in the statement dated 19-8-2019 were defamatory of the Plaintiff.

[40]I am of the opinion that a reasonable person reading the statements published by the Defendant would have understood that (i) that the Plaintiff, as the party appointed to manage the event and to arrange the booking of artists was, (ii) negligent, (iii) failed to advise appropriately on the management of the event, gave excuses, (iii) failed or delayed to obtain the appropriate approvals within the required timelines and are (iv) bullies or (v) forced the Defendant to agree to the plans. A reasonable person having the essential facts that the Plaintiff was the appointed person would have understood the attack on the capability and professional capacity and capability of the Plaintiff.

[41]As I have found that it was the Defendant who had committed material breaches of the Agreement and that it was the Defendant's failure to pay that had caused the failure of the K-Pop event, I find that the Statement made by the Defendant is defamatory of the Plaintiff. The Defendant has also failed to establish the defence of justification and fair comment pleaded in its Defence and Counterclaim.

[42]Regarding the alleged claim based on the tort of libel alleged against the Plaintiff by the Defendant, I find that the contents of the email dated 9-82019 are true and justified. It was the Defendant who had failed to comply with its obligations under the terms of the Agreement and it was its failure to pay the sums due under the terms of the Agreement. The statement that *"World Wonderfest Sdn Bhd have yet to issue payment to us, Livescape as the event organizer"* is true and correct based on my earlier findings. Therefore, I dismiss the Defendant's claim for libel.
(iv) Damages Against the Defendant

[43]I will now explain my reasoning for the damages ordered against the Defendant.

[44]I have only allowed the following damages for breach of the aforesaid Agreement against the Defendant: -

(i) Fi Penempahan Artis USD 100,000.00 (RM 419,000.00)

(ii) Kos Reka Bentuk RM 31, 800.00

(iii) Kos Utusan RM 3, 400.00

(iv) Fi Pengurusan USD 150,000.00 (RM 628, 500.00)

(v) Tiket Penerbangan Artis USD 7,000.00 (RM 29, 330.00)

[45]I am of the opinion that the Plaintiff is entitled to be compensated for these damages based on the terms of the Agreement, in particular, clause 5 to be read together with Schedule 1 of the said Agreement. The Plaintiff has shown to me sufficient evidence and valid legal arguments that these sums of monies are due to it from the Plaintiff or are based on the actual disbursements incurred by the Plaintiff. I am guided by section 74 of the Contracts Act and the decision of our Superior Courts in *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 4 CLJ 783, *Jambatan Merah Sdn Bhd v Public Bank* [2006] 1 CLJ 811. It is clear to me that the alleged losses suffered by the Plaintiff are damages that "naturally arose in the usual course of thing" from the Defendant's breach and that the Defendant would have known that these losses would have likely arisen because of the breach of the Agreement.

[46]It is sufficient that I reproduce the judgment of the Federal Court in ***Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd*** (supra): -

> "In outline, the victim of a breach of contract is entitled to compensation for any loss which results from the breach and which is neither too 'remote[1] or unlikely, a consequence nor one which he could have avoided by taking reasonable steps in mitigation. He is 'to be placed in the same situation as if the contract had been performed' (*Robinson v. Herman* (1848) 1 Ex 850 at p 855). This involves considering his overall position. ***The damages should compensate him for the performance which he should have received but has not, with deductions for any savings he has or should have made through not having to perform himself or by other action, such as entering a substitute transaction with someone else. Any profit which he is only able to make because of the breach of contract should also be deducted. These deductions are made in accordance with the general principle that an award of damages should not put the victim in a better position than if the contract had been performed; he should recover no more than he has lost..***
>
> (Lihat juga kes *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* (1993) 4 CLJ 476; [1993] 3 MLJ 633): *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2007] 5 CLJ 489; [2007] 6 MLJ 530; *Datuk Mohd All Hi Abdul Maiid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269; [2014] 4 MLJ 465)".

[47]It is in line with the above principle that this Court did not allow the Plaintiff's claim for the remaining 50% of the artists' fees that should have been paid by the Defendant. The artists' contracts that were shown to me indicate that once the payments were not made within the stipulated time, then the contracts to perform would be terminated and the funds paid earlier will be forfeited. The Plaintiff has not shown to this Court any legal action or any form of demand by any of the artists for the remaining sums. It would be wrong to then direct the Defendant to pay the said amount to the Plaintiff as the Plaintiff did not suffer such damage and if the contract had been performed by the Defendant, these sums would have been paid to the artists in any event. It would have been different if the Plaintiff had paid the artists in advance on behalf of the Defendant and is now seeking reimbursement for the said payment. This is not such a case, and I opine that I should not allow such claims against the Defendant as that would be contrary to section 74 of the Contracts Act.

[48]However, as I said earlier, I find that that the all related fees indicated in paragraphs 48 earlier should be paid to the Plaintiff. These are fees chargeable by the Plaintiff or costs incurred by it for the purposes of the performance of its obligation. The Defendant is obliged to pay the said sums to the Plaintiff under section 74 of the Contracts Act and pursuant to the terms agreed between the parties.

[49]As to the damages for defamation sought against the Defendant, I have taken into account the principles of law as laid down in *Dato Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd* [2010] 5 CLJ 301; [2009] 1 LNS 1330; [2010] 2 MLJ 491 and *Nurul Izzah Anwar v. Tan Sri KhalidAbu Bakar* [2018] 7 CLJ 622. Taking into account the gravity of the statement, the extent of publication and the absence of the refusal to apologize, I find that damages to the sum of RM 20,000.00 are reasonable to compensate the Plaintiff for the libelous statements made against it by the Defendant.

[50]As the statements made by the Defendant are not true, it should also be restrained from repeating the same allegations against the Plaintiff in any form whatsoever.

[51]I dismiss the Defendant's claim against the Plaintiff in toto. I find that the Defendant's allegations are mere afterthought and are untrue. I also do not find that the Plaintiff had defamed the Defendant as the statements made by the Plaintiff are true and justified in the circumstances of this case.

[52]I also award costs of RM 20,000.00 to be paid by the Defendant to the Plaintiff. I opine that this is sufficient considering the seniority of counsel, the importance of the subject matter to the client and the complexity of the case.

D. Totality of the Evidence

[53]It would be remiss of me not to mention that after considering all of the documents, WhatsApp communications, emails, the terms of the Agreement, relevant instruments as well as oral testimony of the witnesses, I find that the evidence tendered and shown by the Plaintiff's witnesses were more credible and are consistent with the conduct of parties and contemporaneous documents.

[54]I do not find it credible for the Defendant to only raise the issues of the delays or any alleged errors on the part of the Plaintiff only after it was shown that it was unable to pay the sums of monies due and was only seeking additional time to extend the concert. The Defendant, as seen earlier, made promises to pay and gave excuses to the Plaintiff to enable it to seek further funding to enable the concert to continue later, if any. This shows to me that all these spurious allegations by the Defendant are mere afterthoughts created to justify its failure to comply with its obligations. It is for the aforesaid reasons; I prefer the evidence of the Plaintiff's witnesses to those of the Defendant.

E. Orders of this Court

[55]For the above reasons, I make the following orders: -

(i) Fi Penempahan Artis USD 100,000.00 (RM 419,000.00)

(ii) Kos Reka Bentuk RM 31, 800.00

(iii) Kos Utusan RM 3, 400.00

(iv) Fi Pengurusan USD 150,000.00 (RM 628, 500.00)

(v) Tiket Penerbangan Artis USD 7,000.00 (RM 29, 330.00)

(vi) The claim for defamation against the Plaintiff is allowed with general damages to the sum of RM 20,000.00.

(vii) The Defendant's Counterclaim is dismissed with costs.

(viii) The costs of these proceedings are to be determined at RM 20,000.00 to be paid the Defendant to the Plaintiff subject to the required allocator.

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