

Tay Kian Hua v Kah Motor Company Sdn Bhd
[2000] SGHC 187

Case Number : Suit 1411/1999
Decision Date : 13 September 2000
Tribunal/Court : High Court
Coram : Lim Teong Qwee JC
Counsel Name(s) : David De Souza and Goh Kok Yeow (De Souza Tay & Goh) for the plaintiff; Eric Low Eng Wan and Patrick Yeo (Khattar Wong & Partners) for the defendant
Parties : Tay Kian Hua — Kah Motor Company Sdn Bhd

JUDGMENT:

Grounds of Judgment

1. This is a claim for accounts under an agreement for the employment of the plaintiff ("Mr Tay") by the defendant ("Kah Motor Co" or "Company"). On 8 March 2000 I intimated that there would be judgment for Mr Tay and that I would see counsel in Chambers as to the reliefs claimed. I subsequently heard further arguments and on 22 May 2000 gave judgment for Mr Tay for certain accounts to be taken. Kah Motor Co has given notice of appeal and these are my written grounds.

2. Kah Motor Co is a Malaysian company which carries on in Singapore the business of dealing in cars. It is the local distributor of Honda cars. As its general manager Ms Tan Kheng Hwee said in her first affidavit some time in mid 1996 it decided to start a trade-in/used car department to promote the sales of new Honda cars by providing an in-house trade-in service for used Honda cars for its customers.

3. Mr Tay was employed by the Company in 1979 as one of its sales representatives. He remained in that position until July 1996. For the period 1991 to July 1996 his remuneration comprised a fixed monthly salary of \$200 and a commission in respect of cars sold through him. He also received an annual bonus at the discretion of the Company. In all he earned about \$29,000 a year in that period working for Kah Motor Co. He said under cross-examination that in addition he received a commission from finance companies and insurers and also from used car dealers for business he introduced to them. He said that he earned about \$100,000 a year from these outside sources in the same period.

4. On or about 8 July 1996 Ms Tan spoke to him. She told him that Kah Motor Co intended to set up a used car department and that she required someone to run it. She asked if he was interested. This was not totally unexpected by Mr Tay. About a month earlier he had learned about Ms Tan's plans from Mr Say the assistant marketing manager and that Mr Say would recommend him to Ms Tan as the person to take charge of the used car department.

5. Mr Tay said in his second affidavit that he initially refused to be recommended for the position because among other reasons he would be "depriving the Company's sales representatives of the income that they received as commissions and kickbacks from dealers" but I think he was more concerned about his own loss of income. I have no reason to doubt that he was earning about \$100,000 a year from these outside sources as he said and all this could be lost on the setting up of a used car department and his promotion.

6. Mr Tay must have expressed some interest though as he was further interviewed by Ms Tan on more than one occasion. He said in his second affidavit that it was on the occasion of one of these interviews on or about 11 July 1996 that he was told by Ms Tan that he would be promoted to the position of senior executive in the used car department. He said he was also told that he would be receiving a fixed monthly salary of \$3,000 and in addition certain benefits under a "profit sharing scheme" and a "sales volume incentive scheme" and a year end performance bonus. He did not say when he was to start work as a senior executive but he continued to turn up for work and on an occasion a few days later he was directed by Ms Tan to check the prices of used Honda cars.

7. It is not disputed that Mr Tay was promoted. By letter dated 1 August 1996 Kah Motor Co said that with immediate effect he was promoted to the position of senior executive in the trade-in department reporting directly to Ms Tan. The expressions "trade-in department" and "used car department" or "used car division" have been used by the parties interchangeably and I shall refer to it as "UCD" for convenience. Mr Tay said that he received this letter in the beginning of the fourth week of July 1996. Nothing turns on the precise date when he received it except that it was given to him quite close to the date of the letter if not on the day itself. The letter mentions the fixed monthly salary of \$3,000 and the year end performance bonus but is silent as regards either of the two schemes. \$3,000 a month or \$36,000 a year would be substantially less than what he was receiving or had received from the outside sources alone.

8. On 7 August 1996 Mr Tay saw Ms Tan on two occasions. The first was in the morning and the second in the early evening. On the first occasion Ms Tan produced a memorandum which was in two pages. "KH Tan 7 Aug 96" was printed at the top of each page. Ms Tan said under cross-examination that she did not hand this to Mr Tay. She had it on the table when she saw him and he must have taken it. She said she did not give him permission to do so but if he had asked she would have.

9. The memorandum is an agreed document. Ms Tan was the author. Her name and the date of the memorandum are printed on it. It sets out details of a profit sharing scheme. She produced it at the interview. The scheme was what she said she discussed with Mr Tay. Mr Tay said it was given to him but the scheme was not discussed apart from his saying that it had to be revised. I think it was intended to be delivered to Mr Tay and it was in fact taken by him. It does not matter how it was delivered to him. It was clearly a memorandum from Ms Tan to him.

10. On the second occasion in the early evening the same day when Mr Tay saw Ms Tan she produced another memorandum. I shall refer to this as the "second memorandum" and the document delivered earlier as the "first memorandum". The second memorandum was in five pages and again "KH Tan 7 Aug 96" was printed at the top of each page. It is also an agreed document. It deals with the profit sharing scheme but in greater detail than the first memorandum and in addition it also deals with the sales volume incentive scheme. Ms Tan said under cross-examination that Mr Tay "must have taken it" at the end of the interview and that she did not "specifically" give him permission to do so. I think it was intended to be delivered to Mr Tay and it was in fact taken by him and it was clearly a memorandum from Ms Tan to Mr Tay.

11. The UCD was set up in due course and by late August or early September 1996 it had put through the first of the transactions in the new business. What the Company did in this business was to buy a used Honda car from a customer at a price that was attractive to him and at the same time sell him a new Honda car. The Company would then sell the used car to a used car dealer or another customer. Mr Tay continued to be employed as the senior sales executive in the UCD and he was paid his increased monthly salary of \$3,000 but only until December 1996. From January 1997 he was promoted to assistant manager of the UCD with a further increase in his monthly salary to \$3,300. He was also paid his benefits under the sales volume incentive scheme but only until December 1996. He was not paid anything at all under the profit sharing scheme.

12. On 4 February 1999 Kah Motor Co gave Mr Tay a letter terminating his employment. He was given a month's salary in lieu of notice. No reasons were given for the termination. He instructed solicitors and not having received any satisfactory response to his demands he commenced this action.

13. When Mr De Souza opened the case for Mr Tay para 3 of the statement of claim alleged that it was orally agreed between Mr Tay and Ms Tan for Kah Motor Co that Mr Tay would be paid under two incentive schemes:

(a) sales volume incentive scheme under which he would be paid \$40 for each new car sold over and above 140 new cars each month;

(b) profit sharing scheme under which he would be paid certain percentages of "over-trade savings" the percentage varying with the number of new cars sold each quarter;

and that the agreement was contained in the second memorandum. Particulars of the over-trade savings were given. It was also alleged that the oral agreement was made on or about 11 July 1996. At the close of the case I allowed an amendment to allege in

the alternative that the oral agreement was made on or about 7 August 1996.

14. In its defence Kah Motor Co denies that any agreement was made on or about 11 July 1996 to pay Mr Tay under the sales volume incentive scheme or the profit sharing scheme as alleged. As regards the sales volume incentive scheme it says that this was only discussed between Mr Tay and Ms Tan on or about 7 August 1996 and "was subsequently implemented" in respect of the period August to December 1996. Mr Low said that the Company's case was that there was a contract for Mr Tay to be paid in accordance with the sales volume incentive scheme and that such scheme was only for the period ended 31 December 1996 and that the contract was orally made between Mr Tay and Ms Tan on or about 12 August 1996. As regards the profit sharing scheme Kah Motor Co says that on 7 August 1996 Ms Tan had only "raised the possibility of introducing that scheme" in her discussion with Mr Tay. It says in the alternative that the scheme as alleged was unenforceable as its terms were "too uncertain". Finally it is alleged that "[Mr Tay] is estopped from relying on the alleged breach by reason of his waiver thereof in continuing in his employment with [Kah Motor Co] without demanding performance of the alleged agreement".

Agreement

15. Mr Tay said in his second affidavit:

"24. On or about 11 July 1996, Ms Tan called me to her office at Ubi Centre. She told me that I would be promoted to the position of senior executive in the UCD. She further told me as follows:-

24.1 I would receive the following remuneration:-

- (a) a basic salary of \$3,000 per month;
- (b) \$40 for each new car sold by the Company and registered with the Land Transport Authority ('LTA') in excess of 140 cars a month;
- (c) a percentage of the over-trade allowance that I would manage in my discretion and which were not utilised;
- (d) year end performance bonus.

25. Ms Tan also said that if the remuneration that I would be receiving was 'not enough', she would look into other ways to remunerate me. I told her that I was already receiving a lot and did not need anything more. I also said that my English was not good and I would appreciate it if she could put in writing the remuneration that I would be receiving. She said she would do so."

He produced his diary which had an entry for 11 July 1996 with a brief record of his having seen Ms Tan that day. He did not say what Ms Tan said as regards the "over-trade allowance" or the "percentage" or how his remuneration would be ascertained in this respect.

16. Under cross-examination Mr Tay said:

"Q: Tay (2). Para 24. As of 11/7/96 defendant's plan for UCD at very preliminary stage?

A: Yes

Q: 11/7/96. Discussions between you and Ms Tan concerning your remuneration also in preliminary stage? Discussions on or about 11/7/96?

A: Yes. Still in initial stage.

....

Q: Tay (2). Para 29. AT-4. Ms Tan handed to you?

A: Yes.

Q: Draft?

A: Should be because not in detail. Only stated over-trade amount in respect of Honda Civic."

AT-4 is the first memorandum dated 7 August 1996.

17. Ms Tan did not say in any of her affidavits if she interviewed Mr Tay on or about 11 July 1996 or what transpired between them if she did but under cross-examination she said that prior to 7 August 1996 she had not discussed any "incentives" with him and had only discussed his salary. By "incentives" she said she meant the sales volume incentive scheme and the profit sharing scheme as described in the second memorandum.

18. I think Ms Tan did see Mr Tay on 11 July 1996 and I think incentives were mentioned. Mr Tay knew that his income from the outside sources would be quite seriously affected or even lost altogether. If Ms Tan had not brought up the subject herself Mr Tay would have raised it. I think in the course of the interview Ms Tan would have mentioned that in addition to the fixed monthly salary there would be other benefits. Mr Tay's remuneration package at that time already included a commission on sales and Ms Tan had interviewed Mr Tay to take charge of the UCD only a few days earlier.

19. However on Mr Tay's evidence alone I would have thought that what the parties did at that interview did not go beyond merely discussing benefits other than the fixed salary. These benefits were not fully developed. The terms lacked certainty particularly in regard to the "percentage of the over-trade allowance that [he] would manage in [his] discretion and which were not utilised". This was a substantial part of the total remuneration package for Mr Tay to consider to make up for what he could lose on the income from the outside sources. The discussions were only at a preliminary stage as he said and it was only on 7 August 1996 that a draft was produced. In my judgment no agreement was made on or about 11 July 1996 to pay him under the sales volume incentive scheme or the profit sharing scheme.

20. On or about 1 August 1996 the Company gave Mr Tay a letter which says that he was promoted senior executive in the trade-in department (or UCD) with a monthly salary of \$3,000. Until then he was only a \$200 a month sales representative. He was now to be a senior executive in a newly established department reporting directly to the general manager. He would have different duties. He would have been told what these were and I think in the course of the interviews in July 1996 Ms Tan would have spoken to him about these matters. The letter does not call for an acceptance and there is no evidence that Mr Tay accepted the promotion on the terms stated in the letter at the time when it was given to him.

21. Mr Tay knew or was told what he was expected to do as senior executive in the UCD and he knew as I have found that his income from the outside sources would be adversely affected or lost altogether and the increase in the fixed salary would not cover the loss of such income. I think he would have been expecting something more than the promotion letter or what is stated in it. He said in his second affidavit that when he saw Ms Tan on or about 11 July 1996 he asked Ms Tan "if she could put in writing" and she agreed to do so and I think Ms Tan did agree to do so. She agreed to put down in writing the incentives that she had mentioned. These incentives were not in the promotion letter. Mr Tay also said that when he was given the promotion letter Ms Tan told him she was still working out his remuneration package. In her second affidavit she agreed that she was still working out the incentives then.

22. Ms Tan did put something down in writing. On 7 August 1996 she called Mr Tay up and produced the first memorandum. It was given to him. He said in his affidavit that he told her it would need to be revised and that she agreed. She did revise it. Later the same day she called him up again and she produced the second memorandum. As in the case of the first memorandum it was not signed by her or by anyone else but it was nevertheless a memorandum to him from her as I have found and she was clearly

writing on behalf of the Company.

23. The second memorandum is headed "Kah Motor Trade-in Scheme" and is in 10 parts which with the assistance of counsel I have numbered Parts 1 to 10. Parts 1 to 5 give a description of the "Maximum OT Allowable" in respect of 5 models of Honda cars listed according to the dates of registration. "OT" stands for "over-trade". In a trade-in transaction the UCD would buy-in a used car from a customer and sell him a new car. The Company would sell-out the used car to a used car dealer or another customer. The sell-out price would be determined by agreement between the used car dealer or that other customer and the Company. To make the trade-in terms attractive to the customer the Company was willing to buy-in at a price in excess of the sell-out price. The excess was the "over-trade" and the "Maximum OT Allowable" was the limit of the excess for the particular model for the particular date of registration.

24. Part 6 is a statement of the objective of the scheme which was "to attract buyers of new cars by offering excellent prices for customer's current used car". Part 7 states:

"IMPORTANT

Main objective is to sell as many cars as we can with excellent customer service. Save on overtrade if we can but if we need to give the maximum to close a sale, we must do so.

Our sales goal for 1996 is to be No. 2 after Toyota. We must be at least No. 3. If we do not achieve at least No. 3 position, the whole exercise will be considered a failure."

25. Part 8 describes the method of operation. All sales representatives had to show Mr Tay the used car for valuation and to propose a sell-out price for his approval. The buy-in price would be negotiated between the sales representative and the customer but if a transaction could not be done unless a buy-in price that would result in the over-trade allowance being exceeded could be agreed then the sales representative would have to refer to Mr Tay who had authority to offer such higher price.

26. Part 9 states:

"Profit Sharing Scheme for [Mr Tay]:
(Subject to change based on changing market conditions)

.1 If less than the maximum overtrade is used, a share of profits will be paid out.

.2 For example, we take in a 6/93 Civic ESi:

Kah Motor buys from customer at \$73,000
Kah Motor sells to dealer or direct customer at \$71,000
Therefore, overtrade used = \$2,000
Overtrade saved = $$(6,000 - 2,000) = \$4,000$

A profit share based on the saved amount of \$4,000 will be paid out.

.3 Profit sharing will be paid out at the end of the year.

.4 If registration for the quarter (3 mths) is at least ...

300 units Profit share is 1% of overtrade saved

420 units Profit share is 2% of overtrade saved

540 units Profit share is 3% of overtrade saved

660 units Profit share is 4% of overtrade saved

780 units Profit share is 5% of overtrade saved"

"6/93 Civic ESi" is a reference to a Honda Civic ESi registered in June 1993 for which the "Maximum OT Allowable" was \$6,000. The over-trade saved was \$4,000 in the example given and if the number of cars registered in the relevant quarter was 300 but less than 420 Mr Tay would receive 1% or \$40 on the transaction. The following last two paras of this part would be of interest to Mr Tay in regard to his income from outside sources:

".5 All commission on financing and insurance sold with the used cars has to be paid to Kah Motor and will be counted as profit on sale of used cars. Therefore, all parties can enjoy more profit sharing if we get as many financing and insurance bought through us as possible.

.6 No commission from used car dealers should be accepted by [Mr Tay] or any of our sales representatives. Instead of paying commission, used car dealers should offer us higher prices on the used cars they buy from us."

It would be clear to him that he would no longer be able to receive for himself the commission from used car dealers and from finance companies and insurers on used cars as before.

27. Part 10 states:

"Sales Volume Incentive For [Mr Tay]

(Subject to change based on changing market conditions)

If units registered each month exceeds 140 units, \$40 per unit will be paid for each unit above 140.

Therefore, if registration in October is 190 units, 50 multiplied by \$40 will be paid as incentive for the month of October i.e. \$2,000."

The second memorandum does not say that this scheme is to operate until 31 December 1996 only or that it is to come to an end at any other time.

28. Mr Tay said in his second affidavit:

"The only discussions that Ms Tan and I had in the late afternoon of 7 August 1996 with regards to the [second memorandum] only concerned Maximum OT Allowable. My suggestions were accepted by Ms Tan who made her manuscript amendments on the memorandum and she then handed it to me for implementation."

It is not disputed that Ms Tan did make the amendments to the amounts stated as the "Maximum OT Allowable" in respect of Honda Civic cars in three cases. He was not cross-examined as regards the conversation between them.

29. In her first affidavit Ms Tan did not even refer to either of the two occasions on 7 August 1996 when she saw Mr Tay. She gave no account of any conversation she had with him on those occasions. In this affidavit she said:

"During the meetings in the first few weeks of the UCD operations, we discussed many matters concerning the operations. As I had not decided on the incentive scheme to apply to the UCD, I allowed [Mr Tay] to enjoy benefits under the sales volume incentive scheme that was specifically

implemented to ensure that we maintained our number 3 position in the sales figures for 1996. At many of these meetings, I would prepare working drafts or discussion notes or papers to facilitate our discussions during the meetings."

The UCD commenced operations on 1 August 1996. In her second affidavit she said:

"We discussed everything in the so-called 2nd memorandum of 7 August 1996 on 7th August. This was the first time [Mr Tay] heard from me regarding the mechanics of the proposed incentive schemes. When I explained what I had in mind, [Mr Tay] said whatever I decided was fine with him. I told him that I would give it further thought and inform him later."

Only the second memorandum describes the sales volume incentive scheme but both the first memorandum and the second memorandum describe the profit sharing scheme.

30. Under cross-examination Ms Tan said:

Q: Between 1/8/96 and 7/8/96 you had many meetings with Alan Tay?

A: Yes.

Q: Approximately how long each meeting?

A: On average about half an hour.

Q: Prior to 7/8/96 you discussed with Alan Tay his salary and incentives?

A: Yes. Only his salary.

Q: When?

A: About 1/8/96.

Q: What about incentives?

A: No. Did not discuss any incentives before 7/8/96.

Q: Tan (1). Para 16. Sentence 2. "allowed"?

A: Profit sharing scheme had not yet been finalised. Only finalised during week commencing 12/8/96. Therefore I told Alan Tay he would definitely enjoy sales volume incentive scheme up to December 1996.

Q: When told him?

A: Around week beginning 12/8/96.

Q: 12/8/96. You offered sales volume incentive to Alan Tay? On or about 12/8/96?

A: During week beginning 12/8/96 I confirmed with Alan Tay I would pay him according to sales volume incentive up to December 1996.

(To court): I had told him about it before but not confirmed until week beginning 12/8/96.

7/8/96. We had discussion when I showed him draft memo of 7/8/96 and I described profit sharing scheme and sales volume incentive scheme that I was considering implementing for UCD."

The "draft memo of 7/8/96" is the second memorandum. Ms Tan admitted that contrary to what she had said in her affidavit the sales volume incentive scheme under which Mr Tay had been paid for the period ended 31 December 1996 was documented and

was described in the second memorandum.

31. Later Ms Tan said under continued cross-examination:

"Q: What you discussed during [second meeting on 7/8/96]?"

A: Emphasized what is on AB-8 item 7. Our sales goal for 1996. Emphasized whole exercise and whole profit sharing scheme I wanted to implement would be considered failure if we did not achieve No 3 position. Emphasized that was objective. At least No 3 in 1996. Also discussed method of operation and item 8.2 (AB-8) highlighted as something not feasible. Meeting concluded I would give whole method and scheme further thought and would confirm everything after COE results announced on 10/8/96."

AB-8 is the second memorandum and item 7 mentions the sales goal. Item 8.2 is part of the description of the method of operation about sales representatives having to show the used car to Mr Tay. The second memorandum was taken away by Mr Tay. Ms Tan did not "specifically" give him permission to do so but as I have found it was no less a memorandum from Ms Tan to Mr Tay.

32. On 12 August 1996 the Company issued a memorandum to all sales representatives concerning a profit sharing scheme. As in the case of the "Profit Sharing Scheme For [Mr Tay]" described in the second memorandum it was also based on savings of the over-trade but the "Maximum OT Allowable" and the percentages to be paid out were different. Mr Tay would not participate in this scheme as he was to be a senior executive in the UCD and not a sales representative. There is also another difference. The memorandum of 12 August 1996 states:

"Terms and Conditions:

1. Share of the profits will be paid out as a lump sum at the end of 1996."

Part 9 of the second memorandum states that the profit share would be paid "at the end of the year" and not "as a lump sum at the end of 1996".

33. The question is whether any agreement was reached between the parties on the second occasion they met on 7 August 1996 as regards the two benefit schemes. The second memorandum was produced by Ms Tan. It was a revision of the one given to Mr Tay earlier that day. It sets out the two schemes. It was amended and the amendments were written in by Ms Tan. The amendments raised the over-trade limit and would benefit Mr Tay. He would lose out on the income from the outside sources if he accepted the promotion on the terms of the letter of 1 August 1996 without the benefits under the two schemes. When the meeting concluded he took away with him the second memorandum which is a memorandum from the Company to him. The second memorandum does not contain anything to suggest that it is a draft or that the terms in it are subject to confirmation or acceptance.

34. I think Ms Tan must have explained the terms of both the first memorandum and the second memorandum to Mr Tay. His English was not good as he said and they conversed only in simple English. She said she told him that she would give "it" further thought and inform him later. She did not explain what "it" was. It could be anything in the preceding passage in this part of the affidavit but I assume "it" was a reference to what she had in mind. She said under cross-examination that when the meeting concluded she would give the whole method and scheme further thought and would confirm everything but the evidence is not that she *told* Mr Tay she would do so. If what she said under cross-examination reflected what she said in her affidavit then "it" could also refer to the whole method and scheme. There were two occasions on 7 August 1996 when Ms Tan saw Mr Tay and on each occasion a memorandum setting out incentives was produced.

35. Ms Tan referred to the second memorandum and said that it was the first time Mr Tay heard from her regarding the mechanics of the schemes. It could not be. The first time would have been when the "mechanics" of the profit sharing scheme

described in the first memorandum was produced. Mr Tay said in his second affidavit that he wanted it revised and she agreed and it was subsequently revised. In relation to the first memorandum there would have been an occasion for Ms Tan to have said that she would give "it" further thought whether "it" meant what she had in mind or the whole method and scheme.

36. If what Ms Tan said was in relation to the second memorandum then Mr Tay must have already accepted it when according to her he said "whatever [she] decided was fine with him". In that event there would have been no occasion to give "it" further thought and to inform him later unless "it" was a reference to "other ways to remunerate him". Mr Tay said in his second affidavit that during the interview on or about 11 July 1996 she had said that if the remuneration was "not enough" then "she would look into other ways to remunerate [him]". In this case the "other ways" would have to be an improvement for the remuneration to be "enough".

37. If what Ms Tan said was in relation to the second memorandum and not in regard to the "other ways" notwithstanding that there was no occasion to do so then it must be made clear to a reasonable person in the position of Mr Tay and in the surrounding circumstances including what she knew about Mr Tay that she was really saying "No. You cannot say it is fine with you. This is only a draft. It is not to take effect as a proposal until I confirm it." She knew that Mr Tay's English was not good and she conversed with him in simple English. What according to her evidence she said to Mr Tay was I think far removed from it.

38. The second memorandum was amended and if further thought was to be given to it and if it was yet to be confirmed I think Ms Tan and any reasonable person in her position would have taken the second memorandum back or marked it as subject to confirmation or in some other appropriate manner. That would particularly have been the case if he had said it was "fine with him". She wrote the amendments in but she did not take the second memorandum back. She did not mark it in any way consistent with what she said it was.

39. It was not at any time put to Mr Tay that she told him that she would give "it" further thought and inform him later whatever "it" was. At the same time she was not cross-examined to any great extent on what she said to him. Having regard to all the evidence before me and with the advantage of having observed both Mr Tay and Ms Tan and of having read their affidavits and heard their oral testimony I think she did not tell Mr Tay that she would give "it" further thought or that she would inform him later and I find accordingly. She did not tell him that on the occasion when the second memorandum was produced.

40. I ask myself what a reasonable person in Mr Tay's position would have understood the second memorandum to be having regard to all the surrounding circumstances and I can come to no conclusion other than that it was intended to set out the terms of two benefit schemes forming part of the remuneration to be paid to him upon his promotion to the position of senior executive in the UCD in accordance with the Company's letter dated 1 August 1996. He took the second memorandum away with him. He did not say that it should be revised as he did with the first memorandum. Ms Tan did not say that she would give "it" further thought and inform him later as I have found. Even if she did what she said was not sufficient in the circumstances to qualify the second memorandum. Mr Tay said that it was handed to him "for implementation". I think he accepted it and in my judgment an agreement was made on 7 August 1996 for the Company to pay him the benefits under the two schemes as part of his remuneration upon his promotion.

Sales volume incentive scheme

41. As I have observed the second memorandum does not say that the sales volume incentive scheme is to come to an end on 31 December 1996 or at any time at all. When it was given to Mr Tay Ms Tan did not say when the scheme was to come to an end but the Company's case is that on or about 12 August 1996 an oral contract was entered into and under this contract the Company would pay Mr Tay the benefits under the scheme for 1996 only. It is not the Company's case that a contract had been made earlier and that the scheme under such contract was varied in this respect. The scheme is as described in the second memorandum.

42. In her affidavits Ms Tan gave no evidence of any agreement made on or about 12 August 1996. Under cross-examination she said she had told Mr Tay about this scheme on 7 August 1996. That would be on the occasion when the second memorandum was produced. The first memorandum does not mention any such scheme. She said she confirmed it in the week beginning 12 August 1996. I have earlier given the text of the relevant passage of the transcript of her evidence.

43. Mr Tay said under cross-examination:

"Q: Sales volume incentive scheme. Offered to you on or about 12/8/96?

A: No.

Q: Offered to you at some other time?

A: Written in 2nd memo of 7/8/96. Orally on 11/7/96 this was made to me and I accepted that."

His evidence is that it was not *offered* to him on or about 12 August 1996. It was in answer to the question in the way it was put to him. It was not put to him that the incentive was *confirmed* on or about 12 August 1996 or in the week following.

44. I have found that the agreement to pay the benefits under both schemes was made on 7 August 1996. It was not subject to confirmation and there was nothing to be confirmed. That sufficiently disposes of the defence. Kah Motor Co cannot unilaterally vary the agreement made earlier in a manner that adversely affects Mr Tay. That is not even its case. It remains for me to find as I do that Ms Tan did not confirm with Mr Tay that she would pay him according to the sales volume incentive scheme up to December 1996 as she alleged in her evidence.

45. On 12 August 1996 the Company issued a memorandum to all sales representatives describing benefits based on over-trade savings and one of the terms was that the benefits would be "paid out as a lump sum at the end of 1996" suggesting that the scheme operated only for that year. I have earlier referred to this memorandum. The scheme did not apply to Mr Tay. The second memorandum is different in that no date or year is mentioned. There was no memorandum or other written confirmation after 7 August 1996 as to either of the two schemes which did or would have applied to him. There was nothing in writing to confirm that only one of the two schemes was to operate and further that it was to operate only for 1996. In my judgment there was no agreement that the sales volume incentive scheme operated only for 1996.

Profit sharing scheme

46. The Company's case is that the agreement in relation to this scheme is void for uncertainty. I have heard no submission on this but I have read the description of this scheme in the second memorandum and I am unable to see in what way any of its provisions can be said to be void for uncertainty. In my judgment the agreement in relation to the profit sharing scheme as contained in or evidenced by the second memorandum is not void for uncertainty.

Waiver

47. Paragraph 7 of the defence states:

"The defendants deny there was any breach of any agreement as alleged in paragraph 6 of the amended statement of claim or at all. The defendants aver and repeat paragraph 3.1 of the amended defence and say that even if they had breached the agreement, which is denied, the plaintiff is estopped from relying on the alleged breach by reason of his waiver thereof in continuing in his employment with the defendants without demanding performance of the alleged agreement."

Paragraph 3.1 refers to the sales volume incentive scheme and denies that any agreement was made on or about 11 July 1996 and alleges that on or about 7 August 1996 Ms Tan only "discussed offering [Mr Tay] the scheme which was to apply from August 1996 up to December 1996" and that he had been "duly paid his entitlement". Apart from what is alleged in para 7 no particulars of the waiver are given.

48. Mr Low referred to *Chitty on Contracts* (28th Ed, 1999) para 23-039 which has this statement:

"Waiver (in the sense of 'waiver by estoppel' rather than 'waiver by election') may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation."

and para 23-043 which has this statement:

"Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it."

He then referred to Treitel, *The Law of Contract* (10th Ed, 1999) at p 102 which has this statement:

"... failure to object to a known defect or deficiency within a reasonable time of its discovery may be regarded as an unequivocal indication of the injured party's intention not to insist on his strict legal rights."

49. The Company's case is that in March 1997 Mr Tay knew that he had not been paid his benefits under the profit sharing scheme and when he went to see Ms Tan with the intention of bringing this up he was told that the sales volume incentive scheme only operated up to December 1996. He continued in employment without making any claim until after his employment was terminated in February 1999. Mr Low referred to *UMW Toyota (M) Sdn Bhd v Chow Weng Thiem* [1996] 5 MLJ 678.

50. In the *UMW Toyota* case Chow was employed as manager of one of the company's branches. There were, as the learned judge said, two contracts of employment. Under the 1977 contract three months' notice was required to terminate his employment but under the 1984 contract the period of notice was one month. The 1984 contract also conferred on Chow additional benefits and an increase in salary. He was dismissed by the company and he claimed damages for wrongful dismissal to be assessed on the basis of the salary and benefits under the second contract and the requirement of three months' notice under the first contract. Abdul Malik Ishak J said at p 685:

"Having enjoyed the fruits of the second contract for [4 years 10 months 25 days], the respondent had lost the right to repudiate the same. In my judgment, the prolonged delay amounted to an implied affirmation by the respondent of the second contract."

I am unable to see that this case is of any assistance.

51. Mr De Souza referred to *Gold Coin Ltd v Tay Kim Wee* [1986] SLR 68 where Lai Kew Chai J (delivering the judgment of the Court of Appeal) said at p 74:

"... counsel for the employers submitted that if an officious bystander were to have asked the parties whether the contract to pay a quantum meruit was still binding, the parties would have answered in the negative. We do not think so at all. Mr Tay who had not given the matter a moment's thought would probably have said yes. Certainly, the employers would have answered yes. Mr Armet, the Managing Director of the employers, in fact had honestly affirmed that he would have 'done something about it', that is, he would have paid Mr Tay his due, if he had known about it. It has to be

stressed again that Mr Tay was not only totally devoted to his work; he did not much care about his entitlements. On the question of bonuses, he had always left it to Mr Arnet, as the latter frankly admitted in evidence. In these circumstances, it seems to us that the selfless inactivity of one party and the ignorance of the other party are very poor foundation to support any implied consensual variation of the contractual term to pay a quantum meruit."

The "inactivity" was over a period of about 15 years. The defence was variation of the contract and not as in the case before me the equitable defence of waiver by estoppel but there is probably "no essential juridical difference between waiver and variation". See *Banning v Wright (Inspector of Taxes)* [1972] 1 WLR 972 at p 991 per Lord Simon of Glaisdale.

52. In *W J Alan Co Ltd v El Nasr Export and Import Co* [1972] 1 Lloyd's Rep 313 Lord Denning MR said at p 323:

"The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so"

See *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439 at p 448 for the classic statement of Lord Cairns LC on the general principle and see also *Birmingham and District Land Company v London and North Western Railway Company* (1888) 40 Ch D 268 at p 286; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; *Enrico Furst Co v W E Fischer Ltd* [1960] 2 Lloyd's Rep 340.

53. In para 4 of its defence the Company says that a trade-in profit sharing scheme covering the period August 1996 to December 1998 and a prestige division profit sharing scheme covering the period September 1996 to June 1997 applied for the equal benefit of Mr Tay and a Mr Chng and that "these were the two incentive schemes applicable to both [Mr Tay] and [Mr Chng] in the UCD save that by a prior agreement referred to at paragraph 3.1.2 above [Mr Tay] was given an additional incentive scheme which was to apply to him until the end of 1996". Mr Chng was transferred to the UCD in late August 1996 and appointed to his position there on 11 September 1996. The two schemes were based also on savings in the over-trade.

54. Mr Tay admits in his reply that he and Mr Chng participated in the two schemes but he says that they were in addition to the two schemes under which he claims. It is not disputed that there was no inconsistency between either of the two schemes which applied to both Mr Tay and Mr Chng and either of the two schemes which applied to Mr Tay alone and participation in one was not inconsistent with participation in any of the others.

55. Ms Tan said in her first affidavit:

"After [Mr Chng] was transferred to the UCD, I continued to conduct regular meetings with [Mr Chng] and [Mr Tay] on the mechanics of the UCD operations and the scheme of incentives to be paid to the UCD department. It was at one of these meetings that I *decided on* (italics added) the UCD trade-in incentive scheme after discussion with [Mr Tay] and [Mr Chng]."

Under cross-examination she corrected her statement in the affidavit and replaced "decided on" with "confirmed". She also said that the meeting when she confirmed the scheme took place at the end of August 1996. Her evidence was:

"Q: Told them earlier?

A: Yes.

Q: When?

A: Not together. Told Alan Tay around week beginning 12/8/96. Told Ricky Chng would say around mid-August as well. Alan Tay first.

Q: If already told Alan Tay in week commencing 12/8/96 why necessary to confirm at end August 1996?

A: Because I wanted to make sure they knew how their profit sharing was to be calculated.

Q: What you told Alan Tay on 12/8/96 different from what you told Alan Tay and Ricky Chng at end August 1996?

A: No."

The last answer is not likely to be true if as she had testified in the week commencing 12 August 1996 she had confirmed with Mr Tay the sales volume incentive scheme which was applicable to him only.

56. There were four separate schemes of incentives Mr Tay was entitled to. There were the two schemes under which he claims and there were also the two schemes admitted on the pleadings and which applied to him and to Mr Chng. Under the profit sharing scheme payment was to be made at the end of the year. Under the sales volume incentive scheme time for payment was not stated in the second memorandum but by its terms the amount to be paid could only be ascertained at some time after the end of the relevant month. Time for payment under the trade-in profit sharing scheme and prestige division profit sharing scheme was not expressly stipulated. Mr Tay has been paid under the last two schemes. The question is whether he has waived his strict rights under the profit sharing scheme for which he has not been paid at all and under the sales volume incentive scheme under which he has only been paid for the period down to December 1996.

Conduct

57. It is said that for estoppel to be effective for the defence of waiver by estoppel it must be clear and unequivocal. See the passage in *Chitty on Contracts* cited. In *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 Lord Salmon said at p 126:

"To make an unequivocal representation or waiver it is not necessary for the buyers to say, 'We hereby waive it'. It is quite enough if they behave or write in such a way that reasonable sellers would be led to believe that the buyers were waiving any defect there might be in the notice and were accepting it as effectively extending the date for delivery in accordance with the provisions of cl 22."

That was a sale of goods case but I think the principle applies equally to a case between an employer and employee. What was Mr Tay's conduct and in the circumstances would a reasonable employer be led to believe that the employee was waiving the employer's breach of contract in not paying him under the two benefit schemes?

58. Ms Tan produced all the relevant vouchers and a summary of the payments made to Mr Tay. Benefits under the sales volume incentive scheme were paid to Mr Tay with his salary in respect of August and September 1996. For each of the three months from October to December 1996 he was paid about three weeks into the following month. The vouchers describe these benefits as "Commission" or "S/Comm" which presumably is short for "Sales Commission". The first payment under the trade-in profit sharing scheme appears according to the summary to have been made on 29 November 1996 but the voucher describes the benefit as "Sales Commission". The next payment was on 15 April 1997 for part of the benefit for the period to November 1996 and 16 July 1997 for the balance for the period to December 1996. The vouchers describe the earlier payment as "Oct & Nov Partial" and the later payment as "Balance of Oct-Dec 96 Profit Sharing". Subsequent vouchers describe the benefits variously as "Sales Commission", "Comm" and "Profit Sharing". The benefits under the prestige division profit sharing scheme were paid with the February 1997 salary in respect of the period to December 1996 and on 8 August 1997 for the period to June 1997.

59. Mr Tay said in his second affidavit:

"In March 1997 or so, I happened to meet Ms Tan at the 2nd floor of Ubi Centre and I enquired about

the Sales Volume Incentive Scheme and the other remuneration that had been agreed when I had accepted the position of executive in charge of the UCD. She said that the Sales Volume Incentive Scheme was implemented only for 1996. She made no mention of the other benefits. I was shocked at her reply and kept quiet."

Under cross-examination he said:

"Q: Financial controller. You checked with him at any time your AT OT allowance?

A: I have.

Q: When?

A: February or March 1997.

Q: What he told you?

A: Asked me to find out from Ms Tan.

Q: You did so?

A: Yes.

Q: What she told you?

A: (To court): I did not ask her about my AT OT allowance.

(Witness warned).

Q: Why not? About your AT OT allowance?

A: When I went to see her she told me unit incentive scheme had been terminated on 31/12/96. By 'unit incentive scheme' I mean scheme under which I was to get \$40 per unit above 140 units. When I heard that I was very surprised. So I dared not ask her about my AT OT allowance.

Q: When this conversation took place?

A: March 1997.

Q: Question of your AT OT allowance. Never brought up with defendant? Other than reference to financial controller?

A: Agree."

"AT OT allowance" refers to the benefits under the profit sharing scheme described in the second memorandum.

60. Mr Tay did not bring up the matter of his entitlement under the profit sharing scheme with the Company after the occasion in February or March 1997 when he spoke to the financial controller. He did not bring up the matter of his entitlement under the sales volume incentive scheme which Ms Tan told him he would not enjoy after December 1996. He continued to work for the Company. He received his benefits under the trade-in profit sharing scheme and the prestige division profit sharing scheme. He carried on in the employment of the Company in this way until February 1999 when his employment was terminated.

61. Mr Tay was employed by the Company in 1979 and until August 1996 he was only a sales representative earning a monthly salary of \$200. Of course as pointed out above he also received a commission on sales and he received a substantial sum from the outside sources but all the income was tied to his employment. Ms Tan described him as a mediocre sales representative. She interviewed him and she must have thought that he could nevertheless perform as senior executive for \$3,000 a month and later as assistant manager for \$3,300 a month with the benefits under the schemes which applied to him but his employment could be terminated on one month's notice or on payment of only a month's salary as in fact it was. Mr Tay's English was not good and as he said in his second affidavit he needed someone like Mr Chng to assist him in his new position. He had a number

of years of experience in the business of selling cars but there is no evidence that he had any qualifications or skills which could serve him outside of the car sales business. His employment was insecure and if he lost it he was ill equipped for any other employment.

62. In January 1997 Mr Tay received his benefit under the sales volume incentive scheme for December 1996. He did not receive anything under any of the other schemes. In February 1997 he received his benefit under the prestige division profit sharing scheme. He received it with his salary for the month and it would have been at the end of the month as the voucher states. He did not receive anything under the other schemes. He went to see the financial controller and he was told to see Ms Tan. The financial controller would have known whether the accounts were ready for the Company to ascertain the amount to pay him. He said this was in February or March 1997 but I think it would have been after he received his February 1997 salary.

63. Mr Tay said in his second affidavit that when he happened to see Ms Tan at Ubi Centre (where the Company carried on business) he "enquired about the sales volume incentive scheme and the other remuneration that had been agreed when [he] had accepted the position of executive in charge of the UCD" and was told that the sales volume incentive scheme was "implemented only for 1996". Under cross-examination he said he "dared not ask her about [his] AT OT allowance". He was not asked why he dared not. I accept his evidence and I think he would have been very troubled by what he heard about the sales volume incentive scheme. He had only just been promoted to assistant manager. I think he as he said "dared not ask her about [his] AT OT allowance".

64. On 15 April 1997 Mr Tay received \$15,000. This is the payment which the voucher describes as "Oct & Nov Partial". There is a signature on the voucher for acknowledgment of receipt although there is no direct evidence as to its being his. There is no evidence that he was told what it was for or what he thought it was for at the time it was received by him. It is not disputed now that it was for the benefit under the trade-in profit sharing scheme applicable to him and Mr Chng. In the course of the subsequent months down to February 1999 he received his monthly salary and from time to time other sums under the two schemes applicable to him and Mr Chng but again there is no evidence that he knew what each of these other sums was for.

Belief

65. Mr Tay continued in his employment until it was terminated. He turned up for work. He carried on as assistant manager in the UCD to which position he had been promoted from January 1997. There is no evidence of any change in his position. There is no evidence of any change in his duties. There is no evidence that he was given less work to do or that he did less work than in the first few months of 1997 or at any time. He not only continued in his employment but he continued to carry out his duties under the terms of his employment. What he did by continuing in his employment was what he was contractually bound to do under the terms of his employment. It was not different and it was not less. I do not think that a reasonable employer would at any time at all be led by Mr Tay's continuing in his employment in these circumstances to believe that he was waiving any breach by the Company in respect of its failure to pay under the two benefit schemes.

66. This disposes of the case as pleaded but I have heard evidence as to one other matter which has to be considered. Mr Tay took no action to insist on his rights apart from the instances when he raised the matter with the financial controller and with Ms Tan but was there anything that he could do without putting his employment and with it his future at risk? If he made a claim he could lose his job and he would still have to prosecute his claim - the more so if he in fact lost his job. In the event he lost his job and soon after he asked for his benefits. The benefits under the profit sharing scheme were payable at the end of the year. For 1996 he should have been paid in the first few months of 1997. For 1997 and 1998 he should have been paid in 1998 and 1999. There was accordingly no delay in respect of 1998 and a delay of two years and one year in respect of 1996 and 1997. A reasonable employer would not at any time at all be led to believe that Mr Tay was waiving any breach by the Company of its obligations to pay under the two benefit schemes. There was no reason to insist on his rights in the circumstances. There was every reason to hold back on any action that he might have taken.

67. I have taken all the circumstances into consideration. I have considered them separately and I have considered them

together and I have considered them at intervals of time as Mr Tay continued in his employment. In my judgment Mr Tay has not waived any breach by the Company. Although this is sufficient to dispose of the defence of waiver or waiver by estoppel as pleaded I will go on to consider briefly the other requirements for such a defence to succeed.

Act on belief

68. It has to be shown that Mr Tay intended that the Company should act on the belief that the strict rights arising under the benefit schemes would not be insisted upon. His intention can only be gathered from his conduct in the circumstances. He delayed taking any action. There was an explanation for this. He continued in his employment. He was merely doing what he was contractually bound to do. It has also to be shown that the Company did act on the belief. No particulars have been pleaded but on the evidence all that the Company did was to continue to employ Mr Tay and to continue in the breach ie to continue not to pay him under the two benefit schemes. The breach had occurred before the conduct which is relied upon as having led to the belief. It was not a case of waiver of a right to be paid before any breach of the obligation to pay in which case subsequent non-payment would be strong evidence of acting on the belief. In my judgment it has not been shown that Mr Tay had the necessary intention or that the Company acted on the belief.

Inequitable

69. The Company has not paid. It has not altered its position in any way even if it had acted on any belief that the strict rights would not be insisted upon. There is no evidence that acting on the belief it has conducted its affairs in any particular way or that having regard to the way it has acted it would be inequitable for Mr Tay to insist upon his rights. It is true that both benefit schemes are "subject to change based on changing market conditions" but the Company's case as pleaded is that it made no agreement to pay under either of the two benefit schemes and no evidence was adduced as to such changes as the Company might have made. I see no reason for coming to any conclusion that it would be inequitable for Mr Tay to insist upon his strict rights to be paid under the two benefit schemes.

70. At the close of submissions I intimated that there would be judgment for Mr Tay and invited counsel to address me as to the reliefs claimed. Counsel were unable to offer any assistance on the basis of their instructions and in the event I gave judgment for accounts to be taken as prayed for.

Lim Teong Qwee

Judicial Commissioner

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