IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 133

CA 27/1994

Between

Bethlehem Singapore Pte Ltd

… *Appellant*

And

Ler Hock Seng

… *Respondent*

GROUNDS OF DECISION

Contract — Contractual terms; Contract — Contractual terms — Implied terms; Employment Law — Redundancy payments; Words and Phrases; Words and Phrases

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Bethlehem Singapore Pte Ltd v Ler Hock Seng and Others

[1994] SGCA 133

CA 27/1994
Goh Joon Seng J; Karthigesu JA; L P Thean JA
24 November 1994

1 Cur Adv Vult

2 This is an appeal against the judgment of Warren LH Khoo J (reported as ***Ler Hock Seng & Ors v Bethlehem Singapore Pte Ltd*** [1994] 2 SLR 190), which declared that the respondents are entitled to be paid retrenchment benefits at the rate of one month`s basic wages for each year of service and ordering judgment to be entered for each of them in terms of the amount agreed or ascertained less the amount of $6,250 already paid to each of them including interest at the rate of 6% pa on the net amount from 1 January 1988.

3 The question which arises is whether the respondents, all of whom were employees of the appellants, are entitled to retrenchment pay in excess of the sum of $6,250 each was paid, on being retrenched from the employment of the appellants pursuant to retrenchment notices, dated 1 December 1987, addressed to each respondent individually, the material portions of which read:

> *We regret to inform you that owing to the prolonged and continuing adverse economic environment confronting our company, we are forced to carry out retrenchment and accordingly you are hereby advised that we are giving you one month notice with effect from 1 December 1 1987 terminating*

> *your services with the company. Your last day of service with the company will be 31 December 1987.*

4 ...

5 All employees above three years of service shall be paid half month basic wage per year of service and pro-rated thereof for any incomplete year of service subject to the maximum of five months` basic wages or $6,250 whichever is the lower.

6 The formulation of the respondents` claim was that it was a term of their employment that they would be `entitled to all other benefits` applicable to their employment status `in accordance with the [appellants] current policies and practices and subject to the provisions of any relevant law` and that by reference to the appellants` policies and practices affecting the payment of retrenchment benefits for employees who were non-union members with more than three years` service since 1976, when all such employees were paid a minimum of one month`s salary for every year of service, it was a term of their contract of employment with the appellants that on being retrenched they would be paid one month`s salary for every year of service. Alternatively, they claimed that under the law, it was an implied term of their contract of employment with the appellants that in the event of retrenchment they would be paid a minimum of one month`s salary for every year of service once they had exceeded three years of service with the appellants.

7 The appellants contended that on a true construction of the contracts of employment the respondents had with them, the respondents were entitled to such benefits, including retrenchment benefits, which the appellants in their absolute discretion may from time to time declare to be their current policy.

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8 Accordingly, in the court below the issue was not whether the respondents were entitled to be paid retrenchment benefits but what was the amount of the retrenchment benefits to be paid to the respondents. In other words, what was the formula for computing the retrenchment pay of each of the respondents.

9 We should here set out the historical background leading to this dispute. It is common ground that the appellants were a joint venture company incorporated in Singapore in 1969. The joint venture partners were the Bethlehem Steel International Corp, an American corporation and the Development Bank of Singapore with the former holding the majority of the $15m paid-up capital. The appellants who were engaged in the business of shipbuilding and other marine and related businesses, commenced business in 1970. The respondents, of whom there were 45, were engaged by the appellants on various dates between 1970 and 1985. Thus all of them had been in continuous employment with the appellants for more than three years as at the date of service on them of the retrenchment notices dated 1 December 1987. Most of the appellants` employees were members of the Shipbuilding and Marine Engineering Employees` Union (the union) but the respondents were not. There were several variants to the letters of appointment used by the appellants. Three such letters of appointment were exhibited. We set out the wording of the `other benefits` clause in each of them.

> *8 November 1971* ***Other benefits****: You will accorded [sic] all other benefits applicable to your employment status in accordance with the current company`s policies and practices.*
>
> *12 July 1972* ***Other benefits****: You will be entitled to all other benefits applicable to your employment status in accordance with the company`s current policies and practices and subject to the provisions of any relevant law.*
>
> 12 April 1977 ***Other benefits*** : You will be entitled to all other benefits, including but not limited to retrenchment benefits,

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> applicable to your employment status in accordance with the company`s prevailing policies and practices and subject to provisions of any relevant law.

10 It is agreed by both the appellants and the respondents that the other letters of appointment had similar wording for the `other benefits` clause. Three previous retrenchment notices, two in 1976 and one in 1977, were exhibited. These three retrenchment notices were addressed to ***all employees*** (and not individually as the retrenchment notice dated 1 December 1987 was) informing them that about 100 to 150 employees would be retrenched on the date of each retrenchment notice and exhorting those who were not to `continue diligently` with their duties. The retrenchment benefit offered to those who had been in employment with the appellants for more than three years was `one month`s basic wage for each year of service.` It is, however, agreed by the appellants that in all there were ten retrenchment exercises before the one in question in this appeal and that in each case the benefit offered to those with more than three years` service was `one month`s basic wage for each year of service.` Towards the end of 1987, the appellants decided to close down their operations and with that in view they entered into negotiations with the union regarding the retrenchment benefits that would be paid to their unionized employees with more than three years` service. These negotiations were concluded on 27 October 1987 and a collective agreement was signed dated 3 November 1987 which provided that the unionized employees of the appellants with more than three years` service would be paid by way of retrenchment benefits half a month`s basic wages for each year of service pro-rated for any incomplete year of service, subject to a maximum of five months` basic wages or $6,250, whichever is the less. On 1 December 1987 the appellants sent out their retrenchment notices, individually addressed, to all employees including the respondents which contained the paragraph regarding the payment of retrenchment benefits we have set out at the beginning of this judgment. On 22

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April 1988 the appellants` directors filed a declaration of solvency preparatory to a members` voluntary winding up showing a surplus of $5.2m over liabilities and the appellants were wound up on 11 May 1988. Some of the respondents commenced their action against the appellants on 22 February 1988 and the others on 16 March 1988. The actions were consolidated.

11 The appellants` contention before us, as it was in the court below, is that the words, ` ***in accordance with the company`s current (prevailing) policies and practices*** ` must mean the appellants` actual policy and practice at the present material time, that is to say on the accepted facts of this case, at the time when the appellants offered to pay the respondents the retrenchment benefits, namely, 1 December 1987 and not whatever was the policy and practice before that date. They further contend that on 1 December 1987 there was already a policy in place and they point to the agreement that had been reached with the union on 27 October 1987 in respect of their unionized employees as evidenced by the collective agreement dated 3 November 1987 as being declaratory of their present policy on retrenchment pay. This was to pay their unionized employees half a month`s basic wage for each year of service pro-rated for any incomplete year of service, subject to a maximum of five months` basic wages or $6,250 whichever is the less. Since in the past retrenchment exercises no distinction was drawn between their unionized employees and non-unionized employees, such as the respondents, this new policy was equally applicable to the respondents. There was no need and in fact, having regard to the fact that the payment of retrenchment benefits was purely discretionary on the part of the employer, it would be improper to look for or at any past policy or practice when there was a present policy already in place. The appellants found support for their argument that the payment of retrenchment benefits is purely discretionary on the part of the employer as there is no statutory provision in the Employment

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Act (Cap 91) or in any other written law which compels the employer to pay an employee retrenchment benefits; s 45 of the Employment Act disentitles an employee with less than three years` continuous service with an employer from claiming retrenchment benefits on the ground of redundancy or by reason of the employer`s reorganization. Section 45 cannot be read to imply that in the case of employees with more than three years` continuous service with an employer there is legal compulsion on the employer to pay retrenchment benefits.

12 We find this argument persuasive as any thesaurus or dictionary will show that the words `current` and `prevailing` are synonymous both meaning in relation to time `the present`. The word `current` has also been judicially considered. In , the judicial committee of the Privy Council had to interpret the phrase `supplementary roll for the current year` in the context of an income tax assessor`s power to effect taxation and it held that the words referred to a roll made in the year in which the tax assessor was acting and not the last preceding year. A similar definition was adopted in the local case of, where the court had to consider the meaning of `current rent` as used in the Rent Control Ordinance 1953. The court held that since the expression `current rent` was not defined in the Act, it therefore had its ordinary meaning which was the actual rent at the time of the application.

13 The word `prevailing` does not appear to have been judicially considered.

14 The respondents` riposte is unconvincing. Their argument is that one must look at the immediate past to ascertain what the appellants` current or prevailing policy and practice is for the payment of retrenchment benefits. They contended that looking at the latest payment of retrenchment benefits available there can be no doubt that the appellants` formula for employees who had been

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in employment with them for a continuous period of more than three years was, one month`s wages for every completed of service without any maximum limit and so that is the current or prevailing policy and practice of the appellants for the payment of retrenchment benefits. This argument seems to us to overlook the discretionary aspect of arriving at the amount of the retrenchment benefits to be paid given that the appellants concede that the respondents are contractually entitled to be paid retrenchment benefits. It will be noted how the wording of the `other benefits` clause has evolved to include retrenchment benefits. Compare the three variants of the `other benefits` clause we have set out earlier in this judgment. Conspicuously absent from the last variant of the `other benefits` clause which includes the payment of retrenchment benefits is the formula for arriving at the amount. It seems to us that what the respondents are saying is that the appellants, having consistently, in the past, exercised their discretion in one and the same way for arriving at the amount of the retrenchment benefits they would be paid, are now barred or their discretion is fettered in some way from exercising their discretion in any other way for arriving at the amount of the retrenchment benefits they will pay.

15 The learned judge seems to have accepted both these aspects of the respondents` contentions for he says at p 195:

> *Firstly, I shall attempt to ascertain what was the `prevailing` or `current` practice of the company as of December 1987, when the retrenchment exercise in question took place. I think that the evidence of a consistent practice followed by the company for many years right up to a time, as I find, not long before the December 1987 retrenchment, enables one to say, with reason and a fair degree of confidence, that the `prevailing` or `current` practice of the company, as of December 1987, was to pay those with more than three years` service at the rate of one month`s basic wages for each year of service. This resolves the question purely on the application of the provision in the letters of appointment regarding retrenchment benefits.*

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16 Then at p 197 he says:

> *The company says that under the terms of the contract, it has an unfettered discretion to determine what amount of retrenchment benefits the company should pay. I think that the company at the beginning no doubt had a discretion in this matter. However, having fixed a formula for payment of these benefits and adhered to it consistently in the manner I have stated, I think it ceased to have any discretion at some point of time. In any event, if a contract gives one party to it the right to decide a matter which involves the rights and obligations of the two parties, it surely goes without saying that that party must exercise that right reasonably. In the light of the established practice of the company of paying retrenched employees at the rate I have mentioned, is it reasonable for the company by a stroke of the pen to make such a substantial change to the established rate? Plaintiffs` counsel had calculated the difference in the retrenchment benefits payable to the plaintiffs in the sum of $1.3m. I do not know whether he bases it on the last drawn gross salaries of the plaintiffs or their basic salaries, but the difference on either basis is quite substantial for persons in the plaintiffs` position. To my mind, anything that produces a result like this cannot be an exercise of discretion; it is, without disrespect, more like whim and fancy.*

17 With the greatest respect to the learned judge we are unable to agree. In our judgment the exercise of discretion as to the amount to be paid as retrenchment benefits and the determination of what the appellants` `current` or `prevailing` policy was at the time of the retrenchment exercise in question are inextricably intertwined. We are in no doubt that the words `current` or `prevailing` in the context of the `other benefits` clause must be given their ordinary meaning which as we have said earlier mean the `present`, that is to say that policy applicable at the material present time of the offer to pay the retrenchment benefit contained in the retrenchment notice addressed to each of the respondents individually and dated 1 December 1987 and not to any policy or practice that applied at a time earlier than 1 December 1987. The meaning we have ascribed to the word `current` which is synonymous to `prevailing` is supported by authority. Obviously the appellants realized that in the absence of

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formulating a new policy for the payment of retrenchment benefits in the retrenchment exercise they were about to embark on they would be bound to pay in accordance with their earlier formula and, accordingly, before giving the retrenchment notices dated 1 December 1987 they negotiated with the union a new policy which replaced their earlier policy and practice. What other reason could the appellants have had in negotiating with the union the formula for paying retrenchment benefits to their unionized employees? It seems to us that the agreement reached by the appellants with the union (the collective agreement) was completely overlooked. It is inconceivable that the appellants intended to pay the respondents retrenchment benefits more favourable that what they had negotiated with the union would be the formula for paying their unionized employees. In our view, the appellants having concluded their negotiation with the union and reached agreement on the retrenchment benefits, they had then formulated the `current policy` on the retrenchment benefits.

18 We are also in no doubt that from the wording of the `other benefits` clause the amount of the retrenchment benefits to be paid was discretionary. We know of no rule of law to the effect that once a discretion has been consistently exercised in a certain way it can no longer subsequently be exercised in a different way. We do not think that the appellants` discretion can be fettered in the way the learned judge thought it could. We find some support by analogy for our view in the House of Lords case of . Suffice it to refer to the head-note only which reads:

> *The respondent became a policyholder in the participating branch of an assurance company upon the terms that he would abide by the deed of settlement, bylaws, and regulations of the company. After distributing the profits arising from that branch among the participating policyholders for many years without deduction for a reserve fund the company proposed to alter the practice by devoting part of the profits to a reserve fund and to alter the bylaws accordingly. By the deed of settlement the company had power to make alterations in the bylaws. The*

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> *policyholder having brought an action for an injunction against the company on the ground that he had taken his policy upon the faith of a prospectus which stated the practice.*

19 ***Held*** : that there was no contract between the company and the policyholder not to alter their practice in the distribution of profits, and that the action could not be maintained.

20 The respondents` approach is altogether different from that taken by the appellants. The formulation of the respondents` claim is firstly that it was an express term of their contract of employment that they would be paid retrenchment benefits at the rate of one month`s wages for each year of service completed with the appellants. Alternatively, that it was an implied term of their contract of employment with the appellants that in the event of retrenchment they would be paid a minimum of one month`s wages for each year of service once they had exceeded three years of service with the appellants.

21 The learned judge did not consider `the express term` argument and in our judgment quite rightly too as there was no merit in it to warrant consideration. However, the learned judge acceded to implying the past consistent policy and practice of the appellants paying one month`s wages for every year of completed service on retrenchment as `a term of the contract independently of the provision of the initial letter of appointment.` It is necessary to consider the validity of this approach.

22 The learned judge found support for this approach from para 54 of 16 ***Halsbury`s Laws of England*** (4th Ed) and which he cited at pp 195 and 196 respectively of the report of his judgment. The citation from ***Halsbury*** reads as follows:

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> ***Implication of terms****Given that the employment relationship is explained legally in contractual terms, the ordinary law of contract is applicable. Classically, a term may be implied into a contract either on the `officious bystander` test or the `business efficacy` test; both of these tests are essentially subjective, looking for implied agreement by the parties, with the emphasis against the implication of a term merely because it appears reasonable to the court. These tests may well be applied in cases concerning contracts of employment, but arguably a generally wider approach is justified in this context, not only because the implied term will be more frequently used as a device to impose a particular legal solution or requirement on to contracts of employment as such, but also because historically contracts of employment have left more to be filled in by implied terms than most other types of contract. Moreover, the need to fill such gaps may be more urgent, either to fulfil statutory obligations or simply in order to make legal sense of an employment relationship that clearly exists in practice. Arguably, therefore, orthodox contract law on the implication of terms may need to be stretched in the context of employment, in particular by placing more emphasis on what would be reasonable terms and by allowing the court to look at the parties` behaviour during the employment but subsequent to the entering of the contract of employment.*

23 It is clear to us that the learned editors of ***Halsbury`s Law of England*** were expressing an opinion rather than stating what the law is. Be that so, it is evident to us that the learned editors were themselves advocating caution in applying the `officious bystander` test or the `business efficacy` test as in their own words, `these tests are subjective` and both tests are used when the court is `looking for implied agreement by the parties, with the emphasis against the implication of a term merely because it appears reasonable to the court.` In our respectful opinion before a court seeks to imply a term into a contract, and it does not matter whether the contract is an employment contract or not, the court must, to quote Scrutton LJ in at p 605:

> *... see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties `What will happen*

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> *in such a case?` they would both have replied, `Of course, so and so will happen; we did not trouble to say that; it is too clear.` Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.*

24 This is the test of necessity and was restated by the Law Lords in the House of Lords in .

25 Applying this test to the facts of this case, if the appellants and those employees who were being offered employment by the appellants when the appellants first commenced business in 1970 were asked whether by the `other benefits` clause retrenchment benefits were covered, both would probably have answered, `yes, but the amount would depend on what the appellants` policy is` because retrenchment benefits are normally paid by employers in Singapore. By 1977 there had already been a number of retrenchment exercises and, accordingly, the payment of retrenchment benefits was included in the `other benefits` clause and if now the question was asked by the employees, `since retrenchment benefits are now included in the `other benefits` why don`t you (the appellants) also provide that one month`s wages for every completed year of service would be paid by way of retrenchment benefits as that is your current policy and practice?`, the appellants would probably answer `yes, of course, but the amount will still depend on what the company`s policy is.`

26 In our judgment, para 54 of 16 ***Halsbury`s Law of England*** (4th Ed) did not justify the learned judge implying that one month`s wages would be paid for every completed year of service provided the employee had been in employment with the appellants for more than three years as a term of the contract of employment.

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27 In the applicant (the employee) made an application requiring a reference to be made to an industrial tribunal under s 11 of the Employment Protection (Consolidation) Act 1978 to determine what particulars, particularly with respect to the payment of wages during any period of absence through sickness, ought to have been included or referred to in the written statement of the particulars of the terms of employment to which he was entitled under s 1 of the 1978 Act. It was in this context that Stephenson LJ who delivered the judgment of the court said at p 877 (of the All England Report):

> *I am of the opinion that when, in exercising their statutory jurisdiction under s 11 of the 1978 Act, an industrial tribunal have to imply and insert missing terms, they are not tied to the requirements of the test propounded by Scrutton and MacKinnon LJJ, a test for commercial contracts which goes back to* ***The Moorcock*** *(1889) 14 PD 64, [1886-90] All ER Rep 530, but can and should consider all the facts and circumstances of the relationship between the employer and employee concerned, including the way in which they had worked the particular contract of employment since it was made, in order to imply and determine the missing term which ought to have been particularized by the employer and so to complete the contract.*

28 Stephenson LJ then went on to say at p 878:

> *I have already expressed my view that this agreement was oral but, even if it was partly in writing, we are concerned with the search for a term that was not written down, and there is nothing in those authorities which prevents the court from looking at the way the parties acted for the purpose of ascertaining what that term was. Commonsense suggests that their subsequent conduct is the best evidence of what they had agreed orally but not reduced to writing, though it is not evidence of what any written terms mean.*

29 Then after considering and , Stephenson LJ continued at p 879:

> *... the House of Lords has laid down that there are contracts which establish a relationship, eg of master and servant, landlord and tenant; those contracts demand by their nature and subject matter certain obligations, and those obligations the general law will impose and imply, not as satisfying the business efficacy or officious bystander tests applicable to commercial*

> *contracts where there is no such relationship, but as legal incidents of those other kinds of contractual relationship. In considering what obligations to imply into contracts of these kinds which are not complete, the actions of the parties may properly be considered. But the obligation must be a necessary term, that is, required by their relationship. It is not enough that it would be a reasonable term.*

30 In our judgment, and with the greatest respect to the learned judge, has little or no application in support of implying that one month`s wages would be paid for every completed year of service provided the employee had been in employment with the appellants for more than three years, as a term of the contract of employment, especially since by the express wording of the `other benefits` clause the amount of retrenchment benefits payable was in the discretion of the appellants.

31 For all these reasons we will allow this appeal and set aside the judgment of the learned judge. The appellants are entitled to the costs of this appeal and to the costs below. We so order and direct that the security deposit of appeal be refunded to the appellants.

32 ***Appeal allowed.***

Goh Joon Seng J
Karthigesu JA
L P Thean JA

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Jude Benny and Abbas Ali (Joseph Tan Jude Benny & Co) for the appellants
Harbajan Singh (Daisy Yeo & Co) for the respondents.
