IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 87

Suit No 148 of 1994

Between

Lai Chong Meng

… *Plaintiff*

And

Chong Lee Leong Seng
Company Limited

… *Defendant*

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Lai Chong Meng v Chong Lee Leong Seng Company Limited

[1997] SGHC 87

Suit No 148 of 1994
Lai Kew Chai J
08 April 1997

Judgment:

Cur Adv Vult

J U D G M E N T

This action concerns disputes arising out of the termination of a service agreement under which the plaintiff was employed as the Managing Director of the defendants. Three main issues remained "live" at the end of the trial. They are: (i) whether it was the plaintiff or the defendants who terminated the service agreement, and the date of such termination; (ii) whether the defendants have paid the plaintiff his full incentive bonus under the service agreement for the defendants' financial year ended 31 December 1992; and (iii) whether the defendants have paid the plaintiff his full incentive bonus and salary in lieu of leave pro- rated for the defendants' financial year ended 31 December 1993. As will be seen, what the plaintiff is entitled for year 1993 depends on the date of the termination and on the construction of clause 7 of the service agreement. Under the second main issue, several subsidiary issues arise for determination.

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The facts

2 The defendants engage in investment holdings, trading and servicing of diesel and gasoline engines, generating sets, pipes and meters. It has several subsidiary and associate companies (collectively referred to as "the Group"). The plaintiff was first employed by the defendants on 21 August 1989 as a Group Executive Director. His salary at that time was $12,000.00 per month on a 13- month basis. He was entitled to normal and exceptional bonuses. His terms of employment were revised and improved after about 18 months of service. By the service agreement dated 1 February 1991 ("the agreement") the defendants employed the plaintiff as Managing Director of the defendants as well as Group Executive Director of the Group. The appointment was deemed to have commenced on 1 August 1990.

3 For the purposes of this action, the following clauses in the agreement are relevant:-

Clause 4(B)

The Appointee shall be entitled without loss of remuneration to 20 days leave in each year (exclusive of Saturdays, Sundays and official public holidays) to be taken at such time or times as may be approved by the Board and such approval shall not be unreasonably withheld.

Clause 4(C)

The Appointee shall also be entitled to the following:-

(i) The Company undertakes to give the Appointee a Corporate golfing membership with the Tanah Merah Country Club. In this regard, the Appointee

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shall be the Company's nominee only. The Company shall bear the subscription fees thereof.

(ii) The Company shall provide the Appointee with a 2-litre Mercedes-Benz and all running costs and maintenance of the car will be borne by the Company.

(iii) The Company shall pay for the Appointee's subscription fees with the Tanglin Club.

(iv) On all business-related travel, the Appointee will be entitled to executive/business class.

(v) The Company will cover the Appointee, his wife and children under medical and hospitalisation benefits. This coverage shall come in the form of clinical reimbursements as well as hospitalisation insurance in accordance with the Company's policy as determined by the Board from time to time. The clinical reimbursements shall be limited to $5,000 per annum.

(vi) The Company will cover the Appointee under personal accident insurance of not less than S$1.0 million and a sum of no less than S$0.5 million under a term life insurance.

Clause 5(A)

In addition but subject to the Company having a profit balance for each financial year there shall be paid to the Appointee in respect of each relevant financial year of the Company during the continuance of his employment an incentive bonus equivalent to the higher of the following 2 possibilities (i) an amount arrived at based on the applicable percentage (as hereinafter defined) of the

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distributable profits (as hereinafter defined) for such financial year or (ii) 4 month salary for that financial year.

Clause 5(B)

The following expressions shall have the following meanings:-

(i) The expression "the applicable percentage" shall mean, in respect of each financial year 5% (per cent) on every dollar of distributable profit for the 1st million Singapore dollars of distributable profits; thereafter 6% (per cent) on the next and every dollar of distributable profit over and above the 1st million Singapore dollars of available distributable profits for the 2nd million Singapore dollars of distributable profits; thereafter 7% (per cent) on the next and every dollar of distributable profit over and above the 1st two million Singapore dollars of distributable profits for the 3rd million Singapore dollars of distributable profits; thereafter 8% (per cent) on the next and every dollar of distributable profits over and above the 1st three million Singapore dollars of distributable profits for the 4th million Singapore dollars of distributable profits; thereafter 9% (per cent) on the next and every dollar of distributable profits over and above the 1st four million Singapore dollars of distributable for the 5th million dollars of distributable profits and thereafter 10% (per cent) on the next and every subsequent dollar of distributable profits.

(ii) The expression "distributable profits" shall mean the consolidated audited net profits less the minority interests before tax of the Company, its subsidiaries and associated companies inclusive of extraordinary items less the amount equivalent to ten per cent of the total shareholders' funds as stated in the previous financial year's consolidated balance sheet, inclusive of reserves but excluding the minority interests.

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Clause 5(C)

The incentive bonus shall be payable not later than ninety days after the Accounts for the relevant financial year have been made up and audited by the Company's Auditors. The certificates of the Auditors as to the amount of the said incentive bonus for any financial year shall be final, conclusive and binding upon the Company and the Appointee.

Clause 6

This Agreement shall be subject to termination in the following manner:-

(i) by not less than sixty (60) days' notice given at any time by the Company while the appointee is incapacitated by reason of ill-health or accident from performing his duties hereunder and shall have been so incapacitated for a total period of 180 consecutive days or for a total period of 270 days (whether or not consecutive) in the preceding 12 months;

(ii) by summary notice of the Company (which shall be effective upon the expiration of 24 hours after the receipt of the said notice) if the Appointee shall have committed any serious breach or have repeated or have continued (after warning) any material breach of his obligations hereunder (if any) or shall have been guilty of conduct tending to bring himself or the Company or any of the companies within the group into disrepute or shall have committed an act of bankruptcy or compounded with his creditors generally or becomes of unsound mind or is found guilty of any offence which imputes on the Appointee any lack of honesty or moral turpitude.

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(iii) by either party giving to the other not less than ninety (90) days' previous notice in writing of the termination or the corresponding salary in lieu of notice thereof.

Clause 7

If the Appointee were to be terminated by the Company, the Appointee shall in addition to his salary for the relevant period be entitled to a pro- rated part of the incentive bonus calculated in accordance with Clause 5(A) herein. The Appointee shall also be entitled to a pro-rated salary in lieu of leave referred to in Clause 4(B) herein. For the avoidance of doubt, the Appointee shall not be entitled to any other benefits save for the benefits referred to in this clause and in the circumstances herein. The Company shall make payments to the Appointee within fourteen (14) days of termination except for the pro-rated part of the incentive bonus which shall be paid within ninety days after the Accounts for the relevant financial year have been made up and audited by the Company's Auditors.

Clause 8

Upon the termination of this Agreement howsoever arising the Appointee shall:-

.....

(ii) forthwith return and deliver to the Board all the property belonging to the Company or companies within the group which are in the Appointee's possession or under his charge, including but not limiting the generality of the aforesaid the Corporate Golfing membership with the Tanah Merah Country Club and the 2-litre Mercedes-Benz referred to in Clause 5(C) herein.

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Clause 10

In this Agreement:-

.....

(iii) "financial year" means any year or other period for which accounts of the Company are made up and audited;

4 By the end of May 1993, it became highly likely that the service agreement had to come to an end. On 28 May 1993 there was an informal meeting among the directors of the defendants other than the plaintiff and Madam Kuah Eng Hua ("Madam Kuah"). Madam Kuah was more or less the finance director of the defendants and her evidence was most helpful and fair. At that meeting, those present resolved to terminate the services of the plaintiff with immediate effect. A resolution was circulated and those of the directors present signed it. Madam Kuah abstained from signing it. On the same afternoon, the plaintiff saw Madam Kuah at her office and asked if he was going to be fired. She did not give him a definite answer as the matter was to be dealt with by the Chairman, Mr Lau Kiat Bin. Over the weekend, the plaintiff made the same enquiry of Madam Kuah over the telephone. She again declined to give him any definite answers. On 31 May 1993 the plaintiff sent a telex to the defendants at 6.30 am in these terms:-

"In accordance with Clause 6(iii) of my service agreement with the company, I hereby tender my resignation from the company as well as all its group of companies. My notice period is nine (9) months with effect from 31 May 1993, my last day of service being 28 February 1994, or any other mutually date."

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This was followed by the plaintiff's letter delivered on 31 May 1993 where the plaintiff gave a 9 months' notice period with effect from 31 May 1993 and he stated that his last day of service was 28 February 1994 "or any other mutually acceptable date".

5 On 31 May 1993 Mr Lau Kiat Bin handed to the plaintiff a notice of termination and, through his secretary, two cheques amounting to $59,254.86, being the plaintiff's salary for 90 days in lieu of the notice and for his "untaken leave". The amount was computed as follows:

Salary for 90 days $45,000.00 (S$15,000 x 3 months)

Salary for untaken leave

Brought forward from 1992 21 days

1993 leave entitlement 8.5 days (20 x 5) months/12)

Less: Leave taken during 1993 (3) days 26.5 days

Salary: 26.5 x 12 x $15,000.00 $18,275.86 261

Less: CPF at 22% ($4,021.00)

Total $59,254.86

6 By the notice of termination, the defendants informed the plaintiff that he would be entitled to a pro-rated bonus when the accounts for the relevant financial year (ie 1993) were duly audited. Initially, the plaintiff refused to accept the notice and insisted that he was entitled to a 9 months' notice period.

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His solicitors' letter asserted that the notice was "inconsequential, invalid and of no effect" and that until the notice period of 9 months had expired, the plaintiff would continue to be entitled to exercise, benefit and use all the rights and privileges set out in the agreement and, in particular, those under the several paragraphs in clauses 4 and 5.

7 These opposing points of view prompted Mr Lau Kiat Bin to convene a board meeting on 2 June 1993. The plaintiff was present. The following resolution was passed at the meeting:

It is HEREBY RESOLVED THAT the Directors of the Company take note:-

that a letter of termination dated 31 May 1993 from the Company to Mr Lai Chong Meng ("LCM") was handed by KB Lau to LCM at 10.28 a.m. on 31 May 1993;

LCM has purported not to accept the termination of his employment as Managing Director of the Company and as Group Executive Director by the letter of 31 May 1993;

LCM has purported to give nine (9) months notice of termination of his employment as Managing Director of the Company and as Group Executive Director by way of a telex sent at 0638 hours and letter dated 31 May 1993 from LCM to KB Lau.

It is HEREBY FURTHER RESOLVED THAT:-

For any avoidance of any doubt, the termination of the employment of LCM as Managing Director of the Company and as Group Executive Director pursuant to Clause 6(iii) of the Service Agreement dated 1 February 1991 between the

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Company and LCM by way of the letter of termination dated 31 May 1993 from the Company to LCM be approved and ratified;

Alternatively, if for any reason the termination of the employment of LCM as Managing Director of the Company and as Group Executive Director by way of the letter dated 31 May 1993 whatsoever, then the said employment of LCM be terminated pursuant to Clause 6(iii) of the Service Agreement by way of a fresh letter of termination in terms of the draft annexed thereto as Annexure A;

The nine (9) months notice of termination given by LCM be rejected.

8 As this resolution was passed on 2 June 1993 the defendants took the view that, in fairness, the plaintiff should be paid the salary for 1st and 2nd June 1993. Mr Lau Kiat Bin handed the plaintiff a cheque for $1,063.64. The defendants' solicitors by their letter of 2 June 1993 continued to reject the plaintiff's 9 months' notice and continued to assert that the plaintiff's employment was terminated and that all benefits, rights or privileges previously exercised or enjoyed by him were at an end on 2 June 1993. The response from the plaintiff's solicitors was an apparent concession but in effect and in substance the plaintiff maintained his assertion that the effective date of the termination of the agreement was 31 August 1993 and that the plaintiff was therefore entitled to his privileges and benefits up to 31 August 1993. This stance is not reflected at all in the reliefs which the plaintiff eventually seek, in which accounts and enquiries were sought instead of a declaration to those effect. At any rate, by the time this action came up for trial, the plaintiff had conceded that he is only entitled to a notice period of 90 days or salary in lieu thereof. The plaintiff has been paid the salary in lieu of the 90 days' notice period.

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9 In order to understand the matters in issue arising in connection with the plaintiff's claims to the incentive bonus for the financial year ended 31 December 1992, I have to set out what had happened earlier which would affect the amount of the "distributable profits", particularly in relation to (i) the accounting period of the defendants and the Group; (ii) the write- off of a debt known as the "MPSI debt"; (iii) the obligation to deduct the directors' bonuses, as the plaintiff asserts; and (iv) the adjustment of the profits from Yasindo and CLLSE.

10 Prior to 1992, the defendants and some of their subsidiaries and associated companies had their financial year ending on 31 July of each year. Two of the subsidiaries, Yasindo Private Ltd ("Yasindo") and Chong Lee Leong Seng Enterprise (M) Sdn Bhd (CLLSE") had their financial year ends on 31 December. Section 200(1)(b) of the Companies Act requires directors of every holding company to take "such steps as are necessary to ensure that...within two years after any corporation becomes a subsidiary of the holding company, the financial year of that corporation coincides with the financial year of the holding company".

11 After the defendants became a subsidiary of Chong Lee Company Pte Ltd ("Chong Lee"), their Board of Directors resolved on 5 November 1992 to change the financial year ends of themselves and all its subsidiaries and associated companies to the 31 December of each year. Following this decision, the accounts of the defendants and its subsidiaries and associated (save for Yasindo and CLLSE) were audited over 17 months. The accounts of Yasindo and CLLSE were audited over 24 months. The defendants' audited accounts for the year ended 31 December 1992 were completed on 7 June 1993.

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12 By a certificate dated 9 September 1993 ("the Auditors' Certificate"), the defendants' previous auditors certified the incentive bonus payable to the plaintiff for the year ended 31 December 1992 as $159,984.00. After the necessary deductions for CPF, the amount owing to the plaintiff was $140,613.00. A cheque for this amount, plus the interest for late payment, was sent to the plaintiff's solicitors on 14 September 1993. The defendants' computation was not accepted by the plaintiff because they had split the accounting period into two periods. The defendants abandoned this and in November 1994 they sent a cheque for $22,056.37 in payment of the plaintiff's incentive bonus on the basis of the accounts over a single period of 17 months.

The Issues

13 The first question is whether it was the plaintiff or the defendants who had terminated the service agreement and the date of such termination. The relevant provision is clause 6(iii) as set out above. The plaintiff's letter of 31 May 1993 gave a notice period of 9 months "or any other mutually acceptable date." The next development, as mentioned earlier, was the decision of the defendants to and they did tender 90 days' salary in lieu of notice which, on any view, took effect on 2 June 1993. It was submitted on behalf of the plaintiff that clause 6(iii) allowed the parties to agree on a longer notice period, while it provided a minimum notice period of 90 days. The plaintiff had given valid notice of termination as they complied with clause 6(iii) which required "not less than" 90 days' notice. In this context, counsel for the plaintiff described the defendants' responses on 31 May 1993 and 2 Jun3 1993 as indicating their disagreement to any period longer than 90 days and, on this view, clause 6(iii) was kicked into operation to impose the 90 days' notice period. Counsel went on to submit that the operative notice was that sent by the plaintiff. It followed, so it was contended, that the plaintiff was entitled to a pro-rated incentive bonus

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and salary in lieu of leave, where the relevant period included the 90 days' notice period. Counsel relied on clause 7 or on an implied term to that effect.

14 In response, counsel for the defendants contended that, on a correct analysis, the defendants had elected to terminate the service agreement by paying the plaintiff 90 days' salary in lieu of notice and that the service agreement came to an end immediately upon such payment on 2 June 1993. In my view, it is a basic proposition of law that where there is a provision in a service agreement for payment in lieu of notice the employment terminates when payment is duly made. The defendants' submissions are plainly right.

15 The next broad question relates to the incentive bonus due to the plaintiff for the financial year ended 31 December 1992. This broad issue requires the resolution of 4 "live" subsidiary questions, to which I now turn in seriatim.

16 In making the relevant calculation for this item, the defendants took the figure stated in the "previous financial year's consolidated balance sheet" and increased it by multiplying it by 17/12. The relevant provision is in clause 5(B)(ii) as set out above. The nett effect was to reduce the plaintiff's bonus as it represented a deduction in the formula. In justifying this approach, the plaintiff took the view that having obtained the "benefit" of having the plaintiff's bonus computed over 17 months it must follow that the deduction for shareholders' funds be assessed over a 17 month period as well. This approach, in my view, does not give effect to the contractual provision which requires the deduction to be based on the previous financial year's shareholders' funds which are made up of the share capital (which most of the time remain constant) and the retained or accumulated profits. Further, this approach gets one into the calculations of the subsequent year. Any benefit that the plaintiff has received from the longer accounting period in 1992 is counter-balanced by the higher deduction (based

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on 1992 figures) in computing his bonus in 1993. I therefore accept the plaintiff's submissions on this issue.

17 The next sub-issue has to do with the pro-rating of profits from CLLSE and Yasindo. Clause 5(B)(ii) governs the matter. The defendants assert that 7 months of the profit figures of both CLLSE and Yasindo should not be taken into the assessment. I do not agree. The reference in the clause is simply to the "consolidated audit net profits". The defendants' contention would have the effect that the 7 months' profits for both companies would not be taken into account in the bonus of 1993; this could not have been the intention of both parties, particularly the plaintiff.

18 The third sub-issue arose out of what was agreed and done in 1991. For the year ended 31 July 1991, it was agreed between the plaintiff and the defendants that part of the directors' bonuses was treated as not deductible. They had used a formula, details of which I need not go into. The rationale, which was common ground, was that the plaintiff as the "outsider" employee, the defendants being essentially a "family" company, wanted to safeguard his bonus from being eroded by the other "family" directors declaring huge bonuses to themselves, thereby having the nett effect of reducing his bonus. I do not think that it was an implied term that the same formula would be adopted when computing the plaintiff's bonuses for 1992 and 1993; that would not have been the answer of the "officious bystander".

19.1 The final sub-issue concerns the writing off of the "MPSI debt", which was done, and which had the effect of reducing the Net Profit and hence the incentive bonus payable to the plaintiff. I have to describe briefly the background facts.

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19.2 Malaysian Purse Seiner Industries Sdn Bhd ("MPSI") entered into a ship-building contract with ship-builders Malaysian Shipyard & Engineering Sdn Bhd ("MSE"). The defendants single most important principal, Yanmar, a Japanese company which produces ship machineries, entered into an agreement with MSPI. The defendants was a party to the agreement. Under the tri-partite agreement the defendants agreed to pay MPSI a "consultancy fee" of RM2 million, equivalent to S$1,282,400.00, if MPSI could procure MSE to purchase from the defendants machineries supplied by Yanmar through the distributorship of the defendants. Though the fee was payable upon purchase and payment, the defendants agreed to advance the fee as a loan before receiving the purchase price from MSE. The defendants' principal, Yanmar, gave a guarantee to the defendants. The sale to MSE fell through. The loan was not repaid and MPSI was wound up. The defendants wrote-off the debt and did not pursue Yanmar who did not pay under the guarantee because of internal differences of opinion in their Head Office. I was satisfied on the evidence that there was sound commercial reason why the defendants did not enforce the guarantee. The defendants prospered over many years as distributors and agents of Yanmar. Any action to enforce the guarantee, which was also not free from legal difficulties, would seriously jeopardise the commercial interest of the defendants. In my view, this was a proper write-off which reflected a true and fair view of the financial state of the defendants. It might not be tax deductible but the non-deductibility did not make it any less legitimate when the overall interest of the company was taken into account. I therefore accept the submissions advanced on behalf of the defendants.

20 The final substantive issue relates to the 1993 entitlements of the plaintiff. Under this issue, the plaintiff claims that his last day of employment was the

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end of August 1993. That was not correct. It ended on 2 June 1993 for the reasons I gave when I considered the first principal issue.

21 There will, accordingly, be judgment for the defendants and the plaintiff in terms of the decisions announced in this judgment. They are to settle the draft judgment, failing which they are to submit their respective drafts to me for my approval. The parties are to file written submissions on the question of costs and are at liberty to raise any other issue which has to be dealt with.

Sgd: LAI KEW CHAI

Judge

Singapore, 8 April 1997.

Lai Kew Chai J

Alvin Yeo and Lena Chan [Wong Partnership] for the plaintiff
Indranee Rajah and Hri Kumar [Drew & Napier] for the defendants

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