

**IN THE GENERAL DIVISION OF THE HIGH COURT OF THE
REPUBLIC OF SINGAPORE**

[2022] SGHC 22

Suit No 115 of 2018

Between

Ice Messaging Pte Ltd

... Plaintiff

And

Ng Chee Heung

... Defendant

Suit No 117 of 2018

Between

Ice Messaging Pte Ltd

... Plaintiff

And

Wong Thai Hian

... Defendant

JUDGMENT

Restitution — Unjust Enrichment — Payments by company to ex-employees of associated company — Whether there was basis or authorization for payments made — Whether payments procured dishonestly, fraudulently or by illicit arrangements — Whether ex-employees unjustly enriched

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Ice Messaging Pte Ltd
v
Ng Chee Heung and another suit

[2022] SGHC 22

General Division of the High Court — Suit Nos 115 and 117 of 2018
Lai Siu Chiu SJ
1–4 December 2020, 25–26 March 2021; 18 May 2021, 31 August 2021

28 January 2022

Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 These suits, namely Suit No 115 of 2018 (the “First Suit”) and Suit No 117 of 2018 (“the Second Suit”) involved Ice Messaging Pte Ltd (“the Plaintiff” or “the Company”) suing two persons Ng Chee Heung (“Ng” who is also known as “Shawn”) and Wong Tai Hian (“Wong” who is also known as “Jerald”) respectively, for monies had and received by them from the Plaintiff, in the alternative for unjust enrichment by the sums claimed. In the First Suit, the Plaintiff’s claim is for the return of \$174,988.34 from Ng whilst in the Second Suit, the Plaintiff claims \$133,495.90 from Wong. Where the context calls for it, Ng and Wong will be referred to collectively as “the Defendants”. The Defendants are Malaysians and reside in Kuala Lumpur.

The facts

2 The Plaintiff was incorporated in Singapore on 6 September 2010 and its primary purpose was/is the provision of mobile messaging services. The Plaintiff’s shareholders are Skantek Limited (“Skantek”), a British Virgin Islands Corporation and Bakel AG, a Swedish corporation (“Bakel”).

3 Skantek and Bakel are also shareholders of a Malaysian entity called Ice Mobile Sdn Bhd (“Ice Mobile”) which prior to 4 August 2010 was known as Radius-ED Sdn Bhd (“Radius”).

4 Ng was employed by Radius as a key account manager with effect from 2 January 2008, pursuant to a letter of appointment dated 26 October 2007.¹

5 In early 2001, Radius was acquired by a US company known as Intelligent Communications Enterprise Corporation Inc (“Ice Corp”)² after which Radius changed its name to Ice Mobile.

6 Ng resigned from Ice Mobile’s services on 11 August 2015 by which time he was holding the position of business development director.

7 While he was employed first by Radius and then by Ice Mobile, it was Ng’s case that he was part of a sales team that was tasked to carry out sales for Ice Mobile as well as for the Plaintiff, as both companies had common shareholders in Skantek and Bakel. In addition to his monthly salary, Ng

¹ See 1AB45–48

² See Laszlo Karoly Kadar’s AEIC at para 9

claimed he was paid commission for the sales he generated for Ice Mobile and the Plaintiff.

8 In Wong’s case, he was offered employment as a systems engineer by a letter dated 22 July 2004 from Radius, which offer he accepted on 23 July 2004.³ Wong was promoted several times whilst employed by Radius until he attained the position of general manager of business development by the time he resigned on 20 May 2015.

9 Like Ng, Wong claimed he was also part of the sales team employed to carry out sales for Ice Mobile as well as the Plaintiff. Similarly, Wong was paid his monthly salary and from 10 May 2006 onwards whilst he was still with Radius, Wong also received his sales commission as well.

10 While Ng and Wong were still in the employment of Ice Mobile, one Suresh Kumar (“Kumar”) was appointed a director as well as Chief Executive Officer (“CEO”) of the Plaintiff and Ice Mobile on or about 29 October 2013, when the previous CEO resigned.

11 A month before October 2013, Kumar had been appointed by Loganathan Ravishankar (“Logan”), a director of the Plaintiff, as an independent consultant to conduct due diligence on the operations of both the Plaintiff and Ice Mobile. In the course of his appointment as director and CEO, Kumar discovered that Ng had been paid by the Plaintiff \$133,495.90 (“Ng’s sales commission”) allegedly for commission earned between 28 January 2011 and 28 October 2014, even though Ng was not an employee of the Plaintiff.

³ 2AB41

12 Kumar similarly discovered that Wong was also paid sales commission by the Plaintiff of \$174,988.34 (“Wong’s sales commission”) for the same period as Ng when he too was not an employee of the Plaintiff. Henceforth, the two sums will be referred to collectively as “the unauthorised commissions”.

13 In his Affidavit of Evidence in Chief (“AEIC”) Kumar deposed⁴ that Ng’s employment contract contained a clause that explicitly stated that any disputes in the calculation of sales commission would be resolved at the sole discretion of Ice Mobile and there was another clause that stated that the sales commission scheme did not apply to sales personnel who resigned.

14 Kumar added that Ng was under Ice Mobile’s Sales Incentive Scheme (“SIS”), On-Target Earning Commission Scheme (“OTE”) and Sales Commission Scheme (“SCS”) and any commission due to him under those schemes would have been paid out to him in full. The Plaintiff had no role in the commission pay-outs.

15 Kumar alleged that the unauthorised commissions were an illicit arrangement between Ng and Wong with Balamurali Balasubramaniam (“Bala”) the then CEO of Ice Mobile, who was also a director of the Plaintiff. Kumar deposed that Bala himself was a salaried employee of Ice Mobile with no commission entitlements. Yet, Bala paid himself US\$512,000 (which approximated S\$698,419.20) as “consultancy” fees over and above his salary. Bala had initially joined Ice Mobile as a consultant in 2009 pending its takeover by Ice Corp. It was Bala who came up with a formula to pay the Defendants their commission.

⁴ Kumar’s AEIC at para 22

16 Kumar identified another person as being involved in the unauthorised commissions paid to both Defendants. That person was Cindy Soh (“Cindy”), the Human Resources & Finance Manager of Ice Mobile. She was neither an employee nor director of the Plaintiff, but was apparently a director of Radius for about 6 months in 2006.⁵ Cindy reported to Bala and took his instructions as the CEO of Ice Mobile. Such instructions included keying into a Microsoft excel sheet the sales revenue figures in order to compute commission due to the Defendants.

17 Kumar deposed that the unauthorised commissions were never sanctioned by the board of directors of Ice Mobile or the Plaintiff. He alleged that the Defendants had acted fraudulently, dishonestly and wrongfully in procuring the unauthorised commissions to themselves.

18 In 2016, Ng instituted proceedings against Ice Mobile in the Malaysian Industrial Arbitration Court (“the MIAC”) in Case No. 4/4/(21)-1002/16 (“Ng’s IAC proceedings”). In the course of cross-examination on 7 September 2017, Ng admitted⁶ that there was no basis for him to receive commission from the Plaintiff. On 3 January 2018 Ng applied by email to withdraw Ng’s arbitration proceedings and on 5 January 2018, the MIAC made an order dismissing his case.⁷

19 Ng then sued Ice Mobile in the Sessions Court in Malaysia in 2018 (“Ng’s Malaysian suit”) for outstanding sales commission amounting to

⁵ Cross-examination of Kumar on 1 December 2020 at p 76

⁶ 1AB569

⁷ 1AB639

RM214,990.81 (“Ng’s claim”). In a judgment given on 29 January 2020, the Sessions Court ruled in favour of Ng’s claim. Ice Mobile appealed to the Kuala Lumpur High Court against the decision of the Sessions Court. On 8 October 2020, the High Court allowed Ice Mobile’s appeal, set aside the judgment of the Session Court and dismissed Ng’s claim with costs. The grounds of judgment dated 31 July 2021 (“the High Court judgment”) were received by the Plaintiff in August 2021. Ng has filed an appeal with the Malaysian Court of Appeal against the High Court judgment.

20 On his part, Wong commenced proceedings on or about 14 April 2016 against Ice Mobile in the MIAC in Case No. 27(21)/4-623/16 (“Wong’s IAC proceedings”) alleging that he was constructively dismissed by Ice Mobile’s letter of termination dated 20 May 2015. Wong requested to be reinstated to his former post of senior manager of business development. In an Award dated 11 July 2019,⁸ the MIAC dismissed Wong’s IAC proceedings, finding that in failing to return to work on 27 May 2015 to serve out his three months’ notice period, Wong had disobeyed a lawful order of his superior, which act was tantamount to insubordination. Wong’s insubordination constituted a breach of contract on his part which went to the root of his contract of employment and amounted to a repudiatory breach thereof⁹.

21 Further, the MIAC found¹⁰ that Wong failed to meet his sales targets for the years 2011–2014 and he would not in any case have qualified for any sales commission payments.

⁸ Award at 2AB1708-1745

⁹ Award at [91]; 2AB1743-1744

¹⁰ MIAC [59]–[74]

22 It was disclosed by the Plaintiff’s counsel¹¹ in court that the Defendants are now in direct competition with the Plaintiff doing the same exact same business.

The pleadings

23 Kumar’s AEIC for both Suits mirrored the allegations pleaded in the Plaintiff’s (amended) Statement of Claim (“SOC”) almost verbatim. There is no necessity therefore to repeat the Plaintiff’s pleaded allegations save to add that there were alternative claims based on unjust enrichment and monies had and received against both Defendants. For both Defendants, the unauthorised commissions commenced on 28 January 2011 and ended on 28 October 2014.

24 In both Suits, the Plaintiff averred that certain findings were made in Wong’s IAC proceedings and his claim there was dismissed. The Plaintiff quoted extracts from the findings made by the MIAC to support its pleaded case that the principles of issue estoppel and/or *res judicata* applied and those findings of facts cannot be retried in these proceedings.¹²

25 The Defendants filed almost identical defences in the two Suits. In the First Suit, Ng averred¹³ that although he was employed by Ice Mobile, he had carried out work in the form of sale of bulk messaging services for both Ice Mobile and the Plaintiff. Ng admitted that Ice Mobile and the Plaintiff are separate entities, but it was the sales team of Ice Mobile of which Ng was a part

¹¹ Transcripts at p 52 on 1 Dec 2020

¹² [137] *infra*

¹³ Defence (Amendment No 2) paras 8 - 9

that procured the sales for both entities serving the Malaysian clients of Ice Mobile and non-Malaysian clients of the Plaintiff.

26 Ng added that since the Plaintiff's incorporation, he had received payment of any and all commission from the Plaintiff through his Maybank account in Singapore, regardless of whether the sales he procured were through Ice Mobile's clients or the Plaintiff's. Ng put the Plaintiff to strict proof of all the allegations made against him. He pleaded that Wong's IAC proceedings only related to the Second Suit and not to the First Suit.

27 Other than the fact that the Plaintiff's claim against Wong in the Second Suit was for a different sum, Wong's defence was a mirror image of that filed by Ng.

28 In relation to Wong's IAC proceedings, Wong's defence accepted that the MIAC made the findings the Plaintiff had quoted¹⁴ but he contended that the MIAC focused on his failure to meet annual sales targets whereas the commission he received throughout his employment was not solely based on meeting his annual sales targets. He was also entitled to receive monthly commission based on his satisfying the monthly threshold targets set for him which he did.¹⁵

29 Wong averred that the MIAC's findings that he did not meet his annual sales target related to a sale commission scheme that took effect from July 2014. He contended he never received commission pursuant to the July 2014 scheme.

¹⁴ Wong's Defence (Amendment No 2) para 18A

¹⁵ Wong's Defence (Amendment No 2) paras 18B–18F

He pointed out that the MIAC did not make findings in respect of his performance against sales targets set for him under previous commission schemes that he was placed under. He added that he has applied for a judicial review of the MIAC's findings.

30 Like Ng, Wong put the Plaintiff to strict proof of its many allegations against him. Very little turns on the Replies filed by the Plaintiff in the two Suits and the court will refer to those documents only in passing in relation to Ng's testimony.

31 On the application of the Defendants and with the Plaintiff's consent, the two Suits were consolidated by order of court dated 28 February 2020 and tried before this court.

The evidence

32 The Plaintiff called three witnesses for its case. Besides Kumar, the Plaintiff's other witnesses were Fredrik Jan Olof Ramen ("Ramen") and Logan.

33 Apart from Ng and Wong, the Defendants' other witnesses were Bala and Laszlo Karoly Kadar ("Laszlo") who is also known as Thomas Kesser, a witness called at the eleventh hour by the Defendants and who claimed to be the Plaintiff's shareholder. Although they indicated to the court they intended to, the Defendants eventually did not call Cindy as their witness.

34 In cross-examination of Kumar, the Defendant's counsel then tried to suggest that Cindy would have supported the Defendants' case if she had been called as the Plaintiff's witness, which this court views as an unmeritorious suggestion. The court pointed out that it would have been more appropriate for

the Defendants to call her to testify since it was their contention that she would have supported their case.¹⁶ It is trite law that he who alleges must prove.

35 During Kumar’s cross-examination,¹⁷ he had in any event disagreed that Cindy was part of Ice Mobile’s senior management. In re-examination, he explained that Cindy was nothing more than Ice Mobile’s bookkeeper, albeit she was the head of her department. Her monthly salary was about RM9,800 as compared with Bala’s salary of S\$15,000 from the Plaintiff which approximated RM45,000 per month.¹⁸

36 On the first day of the scheduled trial, the Defendants applied to vacate the trial dates by way of Summonses Nos 5189 of 2021 and 5190 of 2020 respectively in the First and Second Suits (“the two Summonses”) due to their intention to call Laszlo as a last-minute witness as well as their intention to file a supplementary AEIC by Bala.

37 The court heard and dismissed both Summonses as regards vacating the trial dates but allowed the Defendants to file a supplementary AEIC by Bala. Trial was postponed by half a day to allow the Defendants more time to prepare for their case.

38 I should add as an aside that Logan and Laszlo are embroiled in another set of proceedings in Suit 1180 of 2019 (“Suit 1180”) in which Laszlo as the second plaintiff and a medical doctor as the first plaintiff, sued Logan and

¹⁶ Transcripts on 1 December 2020 at p 77

¹⁷ Transcripts on 1 Dec 2020 at p 76

¹⁸ Transcripts on 2 Dec 2020 at p 14

Logan’s brother-in-law Gunaratnam Sakunthar Raj (“Raj”). The trial was before another court which dismissed the plaintiffs’ claim in a judgment dated 22 October 2021 (see *Metupalle Vasanthan & Anor v Loganathan Ravishankar & Anor* [2021] SGHC 238) and awarded judgment of US\$388,281.22 instead on Logan’s counterclaim against the first plaintiff.

39 The Plaintiff has also sued Bala in Suit No 1118 of 2020 (“Suit 1118”) for *inter alia* the return of the sum of US\$512,000¹⁹ which action is still pending.

The Plaintiff’s case

40 Kumar was the first to testify for the Plaintiff. In his AEIC, Kumar referred to Ng’s Malaysian suit and Wong’s IAC proceedings. His testimony as stated earlier (see [23]) mirrored the Plaintiff’s SOC and was uncontroversial. Kumar was cross-examined on Ice Mobile’s Employee Handbook (“the Handbook”) which took effect on 1 January 2015. He had drafted the comprehensive document which totalled 47 pages which copy was received and acknowledged by Ng on 22 January 2014 and by Wong on 2 March 2015.²⁰

41 At issue were the following clauses in the Handbook:

1.3 Updates, changes and relevance

Your employment contract comprises your appointment letter, the policies and procedures, guidelines and benefits as detailed in the Employment Handbook, circulars or written communication sent to you from time to time. The policies and procedures may change or evolve over time, through norms and practices and shall be documented if relevant.

¹⁹ Writ of summons and SOC at 2AB3663-3679

²⁰ 2AB59

The Company reserves the right to amend the policies and procedures whenever it deemed necessary to adhere to local laws and regulations, to be equitable to the employment market, and to meet its overall business objectives. The Company will endeavour to ensure all reasonable effort be made to inform you of any changes to work policies before they are implemented.

...

5.12 Sales Commission Scheme – Terms and Conditions

5.12(a) Sales Commission Scheme is applicable to Sales Personnel who manages the customer account and generate sales revenue for the Company.

5.12(b) The eligibility for the sales commission will be made in writing together with sales targets and commission scheme calculation. Sales Commission Scheme will change from time to time according to the sales target. However the terms and conditions of the Sales Commission payable will remain the same.

5.12(c) The Company reserves the right to amend in part or in total the Sales Commission Scheme whenever it deemed necessary to meet its overall business objectives.

5.12(d) Sales Commission Scheme will no longer be applicable to Sales Personnel who had tendered his/her resignation letter. Any dues or future sales commission shall cease to be paid to the resignee.

5.12(e) Any dispute in the calculation of Sales Commission will be resolved at the sole discretion of the Company.

42 During cross-examination,²¹ Kumar disclosed that the earning targets for sales employees were actually set by Ng himself as at the material time, since he was the head of sales at Ice Mobile, Ng came up with the sales commission scheme which Kumar then approved and implemented.

²¹ Transcripts on 1 Dec 2020 at p 52

43 Kumar was also cross-examined and re-examined on eight HSBC telegraphic transfer documents²² which he signed for remittances to Ng in Singapore dollars. Kumar testified²³ that he did note Ng was paid commission regardless of the fact that the sales team did not meet its OTE targets. For 2013, the Plaintiff was short of its on-target sales by almost \$6m and \$7m in 2014. However, after consulting Logan, Kumar was told not to “rock the boat” and Logan instructed Kumar to approve the payments as part of Ng’s OTE (see [14]), until Kumar had more time to look into the documents to find out if the OTE scheme actually existed in the first place.²⁴ This was before the new sales commission scheme that Kumar devised was implemented later in 2014.

44 Kumar explained that after its peak in December 2011 to January 2012, the Plaintiff’s business went into a steady decline from a monthly revenue of RM3.5m to RM1.5m. He attributed the decline in revenue to the sales team’s attitude of not taking responsibility. The team was more interested in travelling overseas and chasing for payment of their commission than in increasing sales and collection of payments. It was a bad corporate culture that permeated throughout the entire organisation from the top, a recipe for disaster in any business. After the Defendants’ resignations, things did not improve as they set up rival businesses to compete with Ice Mobile.

45 The court turns next to Logan’s evidence. He is a trained pilot who has become a successful investor and businessman in various ventures in a number of countries including the charter, sale and purchase of private jets and

²² 1AB124, 128, 132 & 137 and 2AB178, 182, 186 & 191

²³ Transcripts on 2 Dec 2020, p 11

²⁴ *Ibid* p 71 and transcripts on 2 Dec 2020 at p 12

organising corporate tours for governments. Logan's investments in Skantek, Ice Mobile and the Plaintiff were just some of his many business ventures. Unfortunately, due to the current Covid-19 pandemic, the business of his private jet company as well as that of his cancer treatment centre in the Philippines have been adversely affected.

46 In his AEIC and in court, Logan said he considered Bala a close family friend. It was Bala who first introduced Radius to him in 2009 of which Bala was then a consultant. Logan invested in Radius in 2013. He deposed²⁵ he was not directly involved in the day-to-day running of the business of Ice Mobile and/or the Plaintiff as he left that to Bala. However, he and Bala would meet once a week and Bala would discuss and propose various ideas he had. However, not once did Bala discuss with Logan anything regarding schemes for payment of sales commissions to employees of either company. Logan was only aware that Ice Mobile had employees who were paid fixed salaries under their respective contracts of employment.

47 Logan deposed²⁶ that in or about April 2013, he noticed that the business and profits of Ice Mobile and the Plaintiff had been going down steadily over a period of time and that Bala had taken several business trips which did not result in any new business for either company. Such trips on business class airfare were to play golf overseas.²⁷ In one year alone, Logan discovered that Bala visited Bali five times but the Plaintiff had no messaging business there²⁸. As a

²⁵ Logan's AEIC para 10

²⁶ Logan's AEIC para 11

²⁷ Transcripts on 2 Dec 2020 at p 39

²⁸ Transcripts on 3 Dec 2020 at p 15

result, Logan requested Bala to resign as CEO which Bala did on 29 October 2013 shortly after Kumar was appointed (see [10]). He said Kumar's appointment to conduct a due diligence exercise was done after consultation with Ramen in September 2013.

48 Believing from Kumar's preliminary findings that the businesses of Ice Mobile and the Plaintiff were being mismanaged, Logan then ordered a full investigation of both companies. He discovered therefrom the unauthorised commissions paid to the Defendants by Bala and the sum of US\$512,000 that Bala paid himself. He deposed that Bala's undocumented commission scheme in effect guaranteed preposterous amounts of money to the Defendants even where the Plaintiff was not doing well. Those payments were never sanctioned by the board of directors of either Ice Mobile or the Plaintiff. Hence, the Plaintiff was entitled to recover them.

49 Logan surmised that Bala had a hand in the new competing businesses set up by Ng and Wong. He further suspected Bala of being instrumental in the Defendants' incorporation of an offshore shell company. He opined that Bala protected the Defendants by paying them the unauthorised commissions and then took them away to create the new business they now have. Indeed, he thought the three persons were setting up companies on the side while working for and being paid by Ice Mobile.²⁹

50 Logan alleged that Bala told him Bala expected to procure business from companies like Singtel in Singapore and the Tata group in India, but it was just

²⁹Logan's cross-examination at transcripts 3 Dec 2020 at p 10

talk and no deals materialised. Logan opined that Bala had abused his and Ramen's trust.

51 The court notes that in Logan's affidavit filed on 27 October 2020 to oppose the Defendants' two summonses (see [36]) for leave to file Bala's supplemental AEICs, he had deposed that his brother in-law Raj held shares in Skantek on trust for him. In that affidavit, Logan vigorously denied Bala's allegation that Laszlo owned Skantek.³⁰ Logan alleged that Bala introduced Laszlo to him and Ramen as someone who could broker business arrangements for Ice Mobile and the Plaintiff. Over time however, he and Ramen came to realise that Laszlo was a conman and a fraudster who foisted scams on them and caused Ramen to lose US\$2.4m in the process. Logan further alleged that Laszlo operated under multiple names, passports and aliases.

52 The Plaintiff's last witness was Ramen who is a non-resident director of the Plaintiff, based in Belgium. In his AEIC, Ramen deposed he holds 92.61% of the shares in Bakel which in turn holds 30% of the shares in the Plaintiff as well as Ice Mobile. Like Logan, Ramen is involved in numerous businesses as an investor. He had also resided in Singapore previously and managed companies here for 7 years³¹ and those in other countries in the Asia region; these included the Swedish multinational supplier of household appliances known as Electrolux.³² Ramen is a board member of the Plaintiff but not of Ice Mobile.

³⁰ [98] *infra*

³¹ Transcripts on 2 Dec 2020 at p 80

³² *Ibid* p 125

53 Like Kumar, Ramen deposed that there was no justification for payment of commission by the Plaintiff on behalf of Ice Mobile to the Defendants as the payments were not sanctioned by the board of directors of the Plaintiff or Ice Mobile. Cindy could not have authorised the payments as she was not an employee of the Plaintiff but of Ice Mobile where she reported to Bala and took his instructions as he was the CEO.

54 Ramen deposed that Bala did not communicate with him or Logan nor seek their approval regarding any scheme for payment of sales commissions to any employees of the Plaintiff. He only became aware of the unauthorised commissions paid to the Defendants by Bala and Bala's payment of US\$512,000.00 to himself when told by Kumar in Sweden where they met in October 2015. Ramen testified in board meetings he attended with Bala, the latter never brought up the issue of commissions nor was it a subject matter on the agenda. He was emphatic that he never heard from Bala anything about commissions, never saw any plans for commissions nor seen any calculations³³ as regards achievements related to those plans.

55 As far as Ramen was aware, the Plaintiff employed Bala as its CEO and one other person Allyce Kwong who was a sales representative.³⁴ Ramen testified he had met the Defendants and was aware they did sales for Ice Mobile³⁵.

³³ Ramen's cross-examination on 2 Dec 2020 at p 98

³⁴ Transcripts on 2 Dec 2020 at p 100

³⁵ *Ibid* p 99

The Defendants' case

56 The AEICs of Ng and Wong were almost identical save for their different employment histories. The Defendants' AEICs³⁶ contained the following common paragraphs:

In or around April 2010, my fellow sales colleagues and I were instructed by one Cindy Soh Lian Poh ("Cindy") to open a Singapore savings account with Maybank and I had done this through a branch in Malaysia.

I was informed by Cindy that the purpose of opening the Singapore bank account was for me to be able to receive all my commissions through this account. I did not think much of it as it did not matter to me as to how I was getting paid.

I was only concerned that I was paid whatever was due to me for my efforts as an employee [Wong's AEIC]

The only important thing was that I was paid whatever was due to me from my efforts as an employee [Ng's AEIC]

Henceforth the Defendants' Maybank accounts will be referred to collectively as "the Singapore accounts". The Defendants added that after they opened the Singapore accounts, all payments of commission that they were entitled to were only paid into those accounts. The only form of payment which they continued to receive through their Malaysian bank accounts (which was also with Maybank) was their salaries.

57 The Defendants deposed that the Plaintiff had no sales staff and all its sales were done by the sales teams in Ice Mobile of which they were a part. Both claimed to have sourced for clients for the Plaintiff from a non-exhaustive list of countries which included Singapore, United Kingdom, Sweden, Croatia, France, India, South Africa, Egypt, Philippines, China and Hong Kong.

³⁶ Ng's AEIC at paras 24-25 and Wong's AEIC at paras 20-21

58 The Defendants also deposed that their sales commission paid between 2009 and 2013/2014 was structured in accordance with the OTE scheme implemented by the previous management of Ice Mobile when it was known as Radius and its CEO was Dr Bruno Sorrentino (“Dr Sorrentino”) who ran the company with his wife Sherri Goh (“Goh”). The defendant added that throughout their employment, they were never told in writing or otherwise, that they were not entitled to be paid commission.

59 Although they did not go to the extent that Bala did in alleging Cindy³⁷ was the party primarily if not solely responsible for the unauthorised commissions they received, the Defendants’ AEICs emphasised Cindy’s role in those transactions. They suggested that Cindy was the person who requested them to set up the Singapore accounts in order for them to receive the payments. Indeed, during cross-examination,³⁸ Ng described Cindy as “high management”.

60 Ng filed a supplementary AEIC (“Ng’s supplementary AEIC”) after leave was granted by the court. Ng’s supplementary AEIC addressed the Plaintiff’s SOC (Amendment No 1) and Reply (Amendment No 2). The Plaintiff’s amended SOC had referred to the dismissal of Wong’s IAC proceedings and in the Plaintiff’s amended Reply, it averred that the outcome of Wong’s IAC proceedings applied to Ng.

61 Ng disagreed with the Plaintiff’s above position pointing out that Wong’s IAC proceedings only involved Wong and Ice Mobile and he was not

³⁷ [98] *infra*

³⁸ At transcripts on 3 Dec 2020 at p 97

a party. Hence, the findings of the MIAC in Wong’s IAC proceedings did not apply to and were not relevant to him. Ng added that the Plaintiff’s attempt to rely on Wong’s IAC proceedings was a prejudice to him.

62 Ng’s supplemental AEIC then referred to Ng’s Malaysian proceedings. He deposed that the Sessions court had awarded him judgment for his claim for commission from Ice Mobile as the court accepted his testimony of having made sales both for Ice Mobile and the Plaintiff and the two companies had an internal agreement for the Plaintiff to pay all his commission.

63 Ng was cross-examined on the sales targets that were set for him by the previous management³⁹ in 2008 and 2009. He agreed that in order to earn his commission based on OTE, he had to achieve the sales set by Sorrentino. Apparently, the previous management would in December of each year, set sales targets that Ng must meet for the following year.

64 Ng was questioned on Bala’s email to him dated 6 April 2011⁴⁰ which attached therewith Ice Mobile’s OTE targets for 2011. The email there referred to Bala’s earlier email addressed to the Defendants dated 17 March 2011 (“the 17 March email”). As the 17 March email featured prominently in the Plaintiff’s closing submissions and the Defendants relied on it for their defence, the court sets out below its full text:

Guys.

I have made the following adjustments following your recent feedback. Sorry for the delay...

³⁹ [57] *infra*

⁴⁰ 1AB215

1 The OTE split between base protection and growth has been set at 50%:50% (previously 40%:60%)

2 Both of you will now have the same base to protect and I have take Shawn's proposed number RM1,010,000 per month as that figure. This is significantly lower than what Jerald has been delivering in the last 6 months. However I agree to this subject to the 3 month review that we have agreed. All calculations will remain on a cumulative basis as before.

3 Your proposed growth amount for the year was only providing a 17.5% growth – this is way short of what we need to deliver as a company. So I have revised the annual growth target down to 25% from my previously proposed 35%. Which means for me to meet the company's annual growth target I NEED to hire additional sales people – so I will be very grateful if you guys can help me with that.

4 You didn't want the margin target – I have removed it.

5 I have also removed the accelerator – ie the maximum you will earn under THIS scheme is your OTE even if you exceed your target.

HOWEVER, I have included a new target buster incentive.

Exceed your revenue target, and you will receive 10% of all margins in excess of 22.5% of you (sic) annual total revenue target, i.e the revised gross revenue target for each of you is RM15,150,000 for the year. The target buster margin threshold is 3,408.750 for each of you. You will earn 10% of every dollar of margin that exceeds this amount so if you achieve 3,800,000 margin then your target buster bonus amount will be RM39,125 (3,800,000 – 3,408,750 X 10%).

I have done what I can to fit in your requirements and that of the company. I will send out the revised OTE sheets shortly.

Thanks for your continued contributions.

Bala

65 The Plaintiff's stand was that no firm contract was concluded on the Defendants' commission based on the above email as the Defendants were unable to produce any document which showed their acceptance of Bala's

terms. Ng had referred to his email to Bala dated 27 April 2012 (more than a year later)⁴¹ titled “Final Numbers” where he stated:

Hi Bala,

Good Day and thank you for your careful consideration towards my earlier proposals.

After reviewing the final numbers, realised that my reasonable proposals were only met half-way as below:

- 1 “OTE Base vs OTE Growth” is amended to “50:50” (Proposed “60:40” from initial “40:60”)
- 2 Basic salary of RM12,500 instead of RM13,000

This would be accepted gracefully, but would seek for this current OTE to be effective for only 6 months of 2012 and to be reviewed again in June 2012.

This is in lieu of all the changes that we have been discussing on recently.

As noted above, the email could not have been a response to Bala’s email of 6 April 2011 at [64]. In fact, it was a reply to Bala’s email dated 24 April 2012⁴² titled Final Numbers wherein Bala had reviewed Ice Mobile’s requirements, past performance and projected plans for 2012.

66 There was a change in the commission structure for the Defendants in 2013 as part of their commissions became guaranteed. This can be seen in Bala’s email dated 29 March 2013⁴³ addressed to Ng (of which Wong was also a recipient) and which was copied to Cindy where Bala *inter alia* said:

...

My rationale for the discussion last week is as follows:

⁴¹ 1AB218

⁴² 1AB218

⁴³ 1AB631 (Index page 203 Vol 1 part 2)

- 1 If I hear your comments and that of Jerald in recent times, it is clear that the market has been difficult since April last year. After the [Malaysian Communication & Multimedia Commission (“MCMC”)] ruling. And all indications are that things will not go back to what it used to be.
- 2 In the meanwhile I am keenly pursuing new revenues from
 - new customers
 - new products (VSO/OneLink)
 - new markets (Indonesia)
- 3 However, the incentive program right now incentivises you guys to only deliver just the Bulk and Premium SMS – only targeted slightly differently based on the levels of margin.
- 4 Besides all of this, I also had to make the decision to delay any pay/performance reviews to June/July period...

There are expectations from the changes that I am proposing.

A We need to hire another sales/BD person who can focus on the new business...

B we need to drive hard for more direct customer deals...

C We need to turn Indonesia into profits.

So my idea to re-arrange the commission scheme is to enable you to be able to spread your (sic) attention to items A-C above as well as the bulk and Premium SMS Business.

So the revised scheme will have the following structure:

 - 1 Basic Pay – No change to last year
 - 2 Total commission quantum – no change from last year
 - 3 However in order for you to focus also on matters that I have listed above in addition to Bulk and Premium SMS, I will adjust part of your commission amount (35%-50%) to be a

guaranteed payment that you receive almost like
basic pay.

Neither Ng nor Wong responded to the above email. Indeed, Ng’s testimony⁴⁴ that there would have been a subsequent email response from him in relation to the commission scheme Bala proposed was not substantiated.

67 Cross-examined on the 17 March email, Ng disagreed it did not constitute a formal agreement.⁴⁵ However, he did agree that his email set out at [65] was a counterproposal to Bala’s proposals set out at [64].

68 Ng further disagreed that guaranteed commissions is hardly a practice in almost every industry⁴⁶. Ng explained that the SMS market became very challenging at end-2012 as the government regulatory authority, the MCMC, prevented Ice Mobile from achieving its targets. In his case, the target set for him was RM22–23m in sales which he could not possibly achieve. Ng informed Bala that the sales commission was what motivated his sales. Bala then decided to change the commission structure such that Ng would receive 45% of his commission as part of his basic pay.

69 Notwithstanding that para 4 of Bala’s email in [66] clearly stated that the offer would expire on 30 June 2012 after which it would be reviewed, Ng insisted that he accepted the offer for the whole of 2012.

⁴⁴ Transcripts on 3 Dec 2020 at p 60

⁴⁵ Transcripts 3 Dec 2020 at p 75

⁴⁶ *Ibid* at p 72

70 Counsel for the Plaintiff drew Ng’s attention to Kumar’s letter dated 18 August 2014 addressed to him⁴⁷ relating to the SCS scheme in 2014, as an example of a formal commission agreement which Ng countersigned to indicate his acceptance. Ng disagreed stating it was not necessarily how an agreement is documented⁴⁸.

71 On 12 May 2015, Ng tendered his letter of resignation⁴⁹ as business development director to Kumar. He disclosed during cross-examination⁵⁰ he was prompted to do so because (i) Kumar terminated the services of three of his sales staff (including Wong) allegedly for non-performance without informing him and (ii) his sales commission had been outstanding for more than a year. Ng tendered a separate letter of resignation also dated 12 May 2015⁵¹ as a director of Ice Mobile. He was replaced by Logan.

72 In answer to the court’s question, Ng agreed⁵² that he did not have an employment contract with the Plaintiff. In fact, according to a letter dated 1 June 2010⁵³ addressed to him by Bala (which Ng countersigned as acceptance), after Radius was acquired by Ice Corp, Ng’s employment contract was transferred to Ice Corp.

⁴⁷ 1AB232

⁴⁸ Transcripts on 3 Dec 2020 at p 83

⁴⁹ 1AB371

⁵⁰ Transcripts on 3 Dec 2020 at p 85-86

⁵¹ 1AB 394

⁵² Transcripts on 3 Dec 2020 at p 104

⁵³ 1AB723

73 It is noteworthy that Bala's email of 17 March 2011 in [64] was not copied to Ramen as a director of the Plaintiff nor even to Cindy despite Ng's contention that she was part of Ice Mobile's high management (see [59]).

74 As for Cindy's role, Ng asserted when questioned by the court⁵⁴ that Cindy was the financial controller and co-signatory of bank documents who kept records in the computer system relating to his and Wong's commission. She had to approve their payments to ensure they were within the company's budget. Ng confirmed Cindy was part of the company's management who gave the final approval for their payments. He added that that was why the Defendants wanted to subpoena her as a witness (but they did not).

75 The court pointed out to Ng that Cindy was not party to relevant emails even though (according to the Defendants) she played such an important role in the unauthorised commissions. Ng agreed with the court's observations but offered no explanation for the omission. Counsel for the Plaintiff also noted that there was no exchange of emails between Bala and Cindy relating to commission calculations and/or payments. Ng sought to explain that as a sales person, he was in no position to decide who is carbon-copied in company emails. He himself had never emailed to either Logan or Ramen. Apart from his own speculation, Ng could not identify any document that showed that Ramen (or Logan) knew of the commission arrangement Bala had agreed with him and Wong.

⁵⁴ Transcripts on 3 Dec 2020 at pgs 108-109

76 Ng had referred to an email from Bala dated 17 December 2011 where the latter indicated he would be discussing with Ramen “our plans for Europe”.⁵⁵ The court questioned Ng⁵⁶ how he could conclude therefrom that Ramen was always kept in the loop when Ramen was not even copied in that email.

77 Unlike the commission that he received from Ice Mobile which he declared to the Malaysian tax authorities, Ng’s cross-examination⁵⁷ revealed that he did not declare as his income, nor did he pay taxes in Malaysia or in Singapore on, the unauthorised commissions. His excuse was that he did not have a chance to do so but would take remedial action.

78 Ng admitted he signed off on the accounts of Ice Mobile as the company’s “secondary” director but added he was “just a sleeping director” and was never involved in any board meetings. Ng pointed out that after Kumar joined Ice Mobile, Kumar paid Ng’s commission earned from previous months. Ng also said that he and Bala never discussed that he would be paid by the Plaintiff.

79 It was during cross-examination that Ng disclosed he works for Fire Mobile Sdn Bhd and is a director of Cookiss Mobile Sdn Bhd which is Wong’s employer. Both companies are in the same business as Ice Mobile and the Plaintiff. Ng and Wong are involved with another company called Trylah Sdn Bhd where their wives Joanne Munis and Allyce Kwong respectively, are directors.

⁵⁵ 1AB776

⁵⁶ Transcripts on 3 Dec 2020 at p 117

⁵⁷ Transcripts on 4 Dec 2020 at pgs 5-7

80 There is no doubt from the documents presented in court that Ng worked hard generally and achieved the sales targets set for him. However, Ng could not refer to a single document to support the Defendants' case that they were paid commission by the Plaintiff for non-Malaysian clients of Ice Mobile by some arrangement agreed between the two companies. It is to be borne in mind that neither Ng nor Wong were employed by the Plaintiff either by an appointment letter, contract of employment or even by way of exchange of emails between themselves and the Plaintiff or, between themselves, Ice Mobile and the Plaintiff. Nor could Ng or Wong point to any correspondence or email from Bala informing them they were also to carry out sales for the Plaintiff.

81 It was during his re-examination⁵⁸ that Ng explained why he disagreed with the Plaintiff's counsel⁵⁹ that guaranteed commission was not an industry practice. Ng disclosed that Bala as Ice Mobile's CEO and director, had from 1 January 2013 onwards decided not to pay Ng and other sales staff a basic salary. Instead, Bala proposed that all sales staff maintain Ice Mobile's 2012 sales targets. However, to incentivise and/or retain the unhappy staff, Bala proposed to convert their commission to guaranteed payments which was what he did. It did not help that the MCMC, the regulatory authority under the Ministry of Communications,⁶⁰ prohibited the messaging industry from conducting its mass messaging business due to many complaints of receiving scam and spam messages by end-users. The prohibition greatly affected and reduced Ice Mobile's revenue by 60–70% and in turn the commission paid to its sales staff.

⁵⁸ Transcripts on 4 Dec 2020 at p 64

⁵⁹ [65] footnote 43 *supra*

⁶⁰ 1AB1881

82 Much time was spent on and by the Defendants during cross-examination and re-examination (as well as in their closing submissions) on the operations of the various commission schemes particularly the OTE. Ng in particular sought to explain/justify the *quantum* of the unauthorised commissions he received from the Plaintiff. Such evidence is irrelevant – it is not the *quantum* that is in issue here but the Plaintiff’s *liability* and the Defendants’ *entitlement* to payment from *the Plaintiff*. Consequently, the Defendants’ closing submissions⁶¹ arguing that the Plaintiff had not discharged the burden in proving anything was illicit about the OTE is with respect, completely off the mark. It was not the OTE that was illicit, but the Defendants’ receipt of payments from the Plaintiff based on the OTE and other commission schemes that was illicit, according to the Plaintiff.

83 The fact that Bala and/or the Defendants treated Ice Mobile and the Plaintiff as one and the same does not detract from the fact that it is no answer to the position at law that the two are separate legal entities with the former a Malaysian and the latter a Singapore, registered company.

84 During Ng’s re-examination,⁶² counsel for the Defendants referred him to a memorandum dated 15 August 2014⁶³ from Bala (as director and CEO of Ice Mobile) addressed to all employees of the sales team where he announced that the SCS would be implemented. Separately on 18 August 2014,⁶⁴ Bala had written to Ng to say the SCS for 2014 would be effective from 1 July 2014 and

⁶¹ First and Second Suits at paras 120 and 128 respectively.

⁶² Transcripts on 4 Dec 2020 at p 67

⁶³ 1AB907

⁶⁴ 1AB908

Ng's sales target was set at RM15,356,500. With respect, the implementation of the SCS in July 2014 of no relevance to the issues before the court.

85 As mentioned at [59], Ng had suggested that Cindy, a middle-management employee of Ice Mobile, had requested for the Defendants to open the Singapore accounts in order for them to receive payments. However, to substantiate his claim, all that Ng could do was to point to the following email exchanges:

- (a) His email to Cindy on 27 April 2010 timed at 22.14.32⁶⁵ which stated:

Subject: Shawn's MBB iSavvy (SG)

Hi Cindy,

Good day,

Ple note that my MBB (SG) account have been activated and the account number is [xxx]

Best regards,

Shawn

- (b) Cindy's reply on 28 April 2010 timed at 6.17am where she said:

I need more info. Eg Bank add, swift code and etc. Make sure u [sic] have the details later.

- (c) His email to her on 28 April 2010 timed at 10.21am where he stated:

Hi Cindy,

⁶⁵ 1AB222

Branch address:
Maybank Main Branch
2 Battery Road
Maybank Tower
Singapore 049907
Swift Code: MBBESGSG
Acc: [xxx]
Name: Ng Chee Heung
Hope the above suffice.

Best regards,

Shawn

Apart from his say so, none of the above emails proved that Cindy was instrumental in Ng's (and Wong's) opening of the Singapore accounts. It bears noting that Cindy's salary and position in Ice Mobile were lower than Ng's. It was absurd of Ng, a director of Ice Mobile, to expect the court to believe his testimony that he reported to Cindy as she was the head of human resources, finance and billing.⁶⁶

86 It was equally absurd for Wong to testify that the idea for the Plaintiff to pay him commission came from Cindy to which proposal Bala as the CEO had no objections and the Defendants went along with the proposal,⁶⁷ let alone that Cindy taught them to open the Singapore accounts.

87 The court turns next to Wong's testimony. It would not be necessary to refer to Wong's AEIC as the facts therein stated were in line with Ng's AEIC. The court has already set out at [56] the identical paragraphs to be found in both

⁶⁶ Transcripts on 4 Dec 2020 at p 89

⁶⁷ *Ibid* at p 100

Defendants' AEICs. As in Ng's case, Wong provided no particulars whatsoever of how Cindy instructed him to open the Singapore accounts in April 2010.

88 In cross-examination, counsel for the Plaintiff (Mr Ari), took Wong through the findings in Wong's IAC proceedings. Questioned on his numerous admissions made in cross-examination therein that his performance was below par as well as the adverse findings made by the MIAC against him, Wong's repeated refrain was that his answers had been taken out of context. Indeed, on the court's inquiry, he went so far as to suggest that the MIAC made incorrect findings of fact.⁶⁸

89 Despite his admissions in Wong's IAC proceedings that he failed to meet the sales targets set for him by Ice Mobile for the years 2011–2014, Wong insisted that his performance was not poor or lacked behind that of his sales colleagues as found by the MIAC. In fact, for 2014, it was found that Wong achieved only 42% of his sales target, which he admitted.⁶⁹ This was despite the fact that Kumar reduced Wong's sales targets whilst those of his colleagues were increased and yet they managed to achieve 70% of their targets. If his sales dropped, Wong blamed it on his customers such as Ericsson IPX who he claimed cut its volume of messaging traffic.⁷⁰

⁶⁸ *Ibid* at p 125

⁶⁹ *Ibid* at p 124

⁷⁰ *Ibid* at p 132

90 In re-examination, Wong sought to show⁷¹ that his sales performance was not below par but matched that if not exceeded, his colleagues'. He pointed out that the sales target for 2014 was only given to him late, in August 2014.

91 Wong was cross-examined on Bala's email to him dated 24 April 2012⁷² with the subject being the 2012 OTE applicable to him. The court has dealt at [65] with Ng's email from Bala which was in similar terms. Wong could not recall if he replied to that email in which Bala made the following offer to him :

If you help set up an Indonesian business that delivers a sustainable monthly gross margin of US\$50,000 in 6 months (31 October 2021) the company will give you a one time bonus of RM15,000 ie If by or before 31 October 2012, we reach a monthly gross margin of US\$50,000 in a sustainable manner. Then on 31 December, in addition to any company wide bonus scheme and any regular commissions that you are entitled to, you will receive this additional bonus for Indonesia.

Hence, Wong could not prove that he accepted Bala's above offer. Neither could he point to any document showing he made a counterproposal to Bala's offer. For Wong to 'deem' Bala's email as an arrangement for him to get his commission⁷³ does not advance his case at all.

92 The 17 March email⁷⁴ (set out at [64] above) was also relied on by Wong as the basis for his entitlement to the unauthorised commissions. The court will not repeat the Plaintiff's position set out at [65]–[66] as to why that email cannot

⁷¹ Transcripts 25 March 2021 at p 46

⁷² 2AB902

⁷³ Transcripts on 25 March 2021 at p 22

⁷⁴ 1AB215 and 2AB888

constitute a contract between the Plaintiff and the Defendants. The court would add that as in Ng's case, Wong agreed in answer to the court's question⁷⁵ that he did not have a contract of employment with the Plaintiff.

93 Wong's evidence in re-examination that he served clients in Singapore⁷⁶ does not overcome the hurdle that he was unable to refer to any supporting documents that entitled him to commission payments from the Plaintiff.

94 Bala was the Defendants' first witness. In his second affidavit filed on 29 November 2020 in support of the Defendants' applications in the two Summonses (see [36]), Bala had deposed⁷⁷ as follows:

It is rather telling that, despite her role amongst which has been described above, the Plaintiff has chosen to not call Cindy as a witness for the trial of the present Suit. This is why the Defendant is intending to make the necessary applications to compel Cindy's attendance as a witness for the trial failing which, this Honourable Court should draw an adverse inference at the trial of the Suit.

95 However, as noted earlier at [34], the Defendants failed to call Cindy to testify. No explanation was offered by the Defendants or their counsel for Cindy's absence from the trial. The court was also not told if any efforts had been made to procure her testimony by video-link from Kuala Lumpur.

96 It should be noted again that the common testimony of the Defendants and Bala was that Cindy was primarily responsible for paying the unauthorised

⁷⁵ Transcripts on 3 Dec 2020 at p 104

⁷⁶ *Ibid* at p 40

⁷⁷ At para 35

commissions. Yet, when the court questioned him,⁷⁸ Bala agreed that Cindy merely did the commission calculations for the Defendants, but it was he who decided their entitlement. In short, he authorised while Cindy implemented the commission payment scheme for the Defendants. This was a far cry from saying (as the Defendants repeatedly alleged), that Cindy was the decision maker when it came to their commission payment.

97 Bala’s explanation for the late filing of the two Summonses was that he only started looking for documentation when he was sued in Suit 1118 in November 2020 by the Plaintiff. He found documents in his old laptop which he initially thought no longer functioned.

98 Bala’s supplementary AEIC⁷⁹ (as well as his affidavit filed for the two Summonses set out at [94]) was revealing. He deposed⁸⁰ therein that Laszlo⁸¹ not Logan is the ultimate beneficial owner of Skantek (up to October 2013). He said Laszlo’s shares in Skantek were held by Raj (Logan’s brother-in-law) on Laszlo’s not Logan’s behalf. Bala added that Laszlo’s status as a shareholder was acknowledged by Ramen in certain emails that Bala exhibited. Bala disclosed that Laszlo sold his shares in Skantek to Logan in or about October 2013, for which Logan did not pay, resulting in Laszlo suing Logan in Suit 1180 (see [38]).

⁷⁸ Transcripts on 25 March 2021 at p 68 & 70

⁷⁹ Filed on 18 January 2021

⁸⁰ Bala’s Supplementary AEIC at para 7

⁸¹ [33] *infra*

99 Since Laszlo owned Skantek, Bala deposed that as the CEO of the Ice Mobile group he reported to Laszlo not and never to Logan -- Laszlo entrusted him to run the group's business as he deemed fit.

100 Bala claimed he did have discussions generally with Ramen on operations of the businesses of the Ice Mobile group which discussions included the finances of the group. He added that Ramen would have known of the commission scheme as it was not a secret. In the Plaintiff's audited accounts for the year 2011, the words "staff commission" appeared as a separate item and Ramen had signed off those accounts. Laszlo would also have seen the annual accounts. Bala said Ramen had not raised objections to him about the commission scheme during his tenure as CEO.

101 The court pointed out to Bala⁸² that staff commission did not equate to sales commission (to which Bala conceded). Anyone looking at the accounts including Ramen would not know it related to any sales incentive scheme. Bala then claimed that in his several meetings with Ramen, they would talk about cashflow statements and which included commissions.

102 Bala testified he was unable to refer to written communication with Laszlo as that was not Laszlo's style of working.

103 During cross-examination, Bala explained his very late reference to Laszlo's ownership of Skantek with the excuse that there was no need to bring it up earlier until Logan claimed to be the rightful owner.

⁸² Transcripts on 25 March 2021 at p 94

104 The court does not doubt that Bala (as he testified) implemented the OTE commission scheme in Ice Mobile. What is relevant for the court's consideration is what was the basis for his implementing the scheme for the Plaintiff to include the Defendants who were not the Plaintiff's employees? The Plaintiff only had two employees namely, Bala himself and Wong's wife Allyce Kwong, whose services were terminated when Kumar became the CEO. It bears remembering that Bala's payment to himself US\$512,000 is the subject of the Plaintiff's action against him in Suit 1118.

105 Laszlo was the Defendants' last witness. His AEIC contradicted Logan's⁸³ in regard to who was the actual owner of Skantek and Ramen's in regard to whether the board of directors of the Plaintiff was aware that the Defendants were being paid sales commission by the Plaintiff as well as by Ice Mobile. Nothing turns on other aspects of Laszlo's AEIC or his oral testimony. His evidence was aligned with the Defendants' and Bala's.

The issues

106 The issues that the court needs to determine in this case are:

- (a) Were the Defendants entitled to receive sales commission from the Plaintiff and retain the unauthorised commissions the Plaintiff seeks to recover?
- (b) Did the Defendants (as the Plaintiff alleged) fraudulently and dishonestly justify the payments of the unauthorised commissions by

⁸³ [51] *supra*

claiming their entitlement was under their respective contracts of employment with Ice Mobile?

(c) Were the payments to the Defendants procured by way of an illicit arrangement which the Defendants had with Bala?

(d) Did the payments to the Defendants require the sanction of the board of directors of the Plaintiff?

(e) Were the Defendants unjustly enriched?

107 It is not within the purview of this court nor is it necessary in the determination of the above issues for this court to decide whether Logan or Laszlo was the rightful owner of Skantek before October 2013.

108 Where necessary the court will, in the course of its findings make reference to the parties' closing submissions and their further submissions. Ng and Wong filed identical submissions save that the paragraphs' numbering differed.

The findings

109 It is common ground that there was no written agreement nor any correspondence or document emanating from the Plaintiff or Ice Mobile that gave the Defendants the right to be paid sales commission by the Plaintiff. Neither can it be disputed that at law, the two companies are separate legal entities. The fact that Bala as the common CEO chose to treat the two companies as one in the Ice Mobile group is not a valid counter to the legal position.

110 The issue turns on whether Bala had the blanket mandate wearing the hat as the common CEO of both companies, to make the Plaintiff pay commission to the Defendants who were not its employees, for bulk sales of messenger services supposedly procured from non-Malaysian customers of the Defendants.

111 Earlier at [72], Ng himself had acknowledged to the court that he did not have an employment contract with the Plaintiff. The court had also at [80] commented on the dearth of documentation in Ng's case and the other shortcomings in the Defendants' case which need not be repeated.

112 As for Wong, the court too at [91]–[93] has referred to the lack of any contractual documentation to support his entitlement to commission from the Plaintiff. The court had also pointed out at [64]–[67], that Ng's and or the Defendants' reliance on certain email exchanges in their defences as evidence of contractual arrangements with the Plaintiff was misconceived.

113 Although they indicated to the court they intended to, the Defendants did not call Cindy to testify. The Defendants had asserted that Cindy would have supported their case.⁸⁴ The burden of proof lies on the person who makes a positive assertion. That the Defendants ultimately chose not to call Cindy as witness is a negative factor that the court takes into consideration – it gives rise to an adverse inference under s 116(g) of the Evidence Act Cap 97, that had Cindy testified, her evidence would not have been favourable to the Defendants.

⁸⁴ Transcripts on 1 December 2020 at p 77

114 As noted earlier at [59], the Defendants tried to suggest that Cindy was primarily responsible for the payment of the unauthorised commissions. However, despite their written and oral testimony, there was not a single document that the Defendants (nor Bala, for that matter) could rely on, which supported their claim that Cindy was the person who requested the Defendants to open the Singapore accounts, let alone that she was primarily responsible for paying the unauthorised commissions. Indeed, the court's observations at [75] and questioning of Bala at [96] showed such a suggestion to be completely baseless. Moreover, the Defendants' failure to procure Cindy as a witness at [95] spoke volumes of the credibility of such a suggestion.

115 In the Plaintiff's closing submissions⁸⁵ for the First Suit, it highlighted the fact that even in Ng's contracts of employment, there was no reference to commission. The omission was noted in Ng's contract with Radius dated 27 October 2007, in his letter of confirmation dated 15 July 2008 and his letter of promotion dated 13 July 2009. The Plaintiff submitted an example of a formal contract would be the letter dated 15 January 2008⁸⁶ addressed to Ng from the then CEO Sorrentino setting out sales revenue target for 2008 which Ng had to achieve and which Ng indicated he agreed to by countersigning the document. Similarly, there was another letter dated 10 September 2009⁸⁷ addressed to Ng from the CEO Goh, setting out the sale revenue targets for 2009, which Ng signed to indicate his acceptance.

⁸⁵ Plaintiff's Closing Submissions at paras 12 & 13

⁸⁶ 1AB206

⁸⁷ 1AB209

116 The Plaintiff pointed out that in all the documents relating to sales incentives prior to 2011, there was also no element of guaranteed commissions. In Ng’s cross-examination,⁸⁸ he had confirmed that there was no guaranteed commission even where there were formal documents relating to his commission entitlement.

117 The court had earlier⁸⁹ set out the full text of the 17 March email from Bala to them which the Defendants contended was the contractual basis of their commission payments from the Plaintiff. The court does not accept the Defendants’ contention – it is quite clear that the 17 March email is not a contract made between the Plaintiff and the Defendants as the requisite elements of offer and acceptance for a contract to be formed were absent. It is also to be noted that neither Ng nor Wong pleaded in their respective defences that there was a contract that governed their payment of commission from the Plaintiff. It is trite law that a party is bound by its pleadings.

118 Moreover, in Ng’s Malaysian suit, he had admitted during cross-examination that there was no basis for him to receive payments from the Plaintiff.⁹⁰

119 The clauses in the Handbook that the Defendants rely on⁹¹ do not help to advance their case further either. The Defendants had relied on the words “written communication” in cl 1.3 to say their employment contract would

⁸⁸ Transcripts on 3 Dec at pp 34, 35 & 39

⁸⁹ [65] *supra*

⁹⁰ Transcripts at 1AB

⁹¹ [41] *supra*

encompass the 17 March email. However, Kumar in his testimony⁹² had explained that an email is a tool of communication and would not bind the Plaintiff and the Defendants to any form of agreement unless the email contained a PDF document which had a contract. As Kumar pointed out, there was no witness to the alleged agreement, no acceptance and no signatures in the 17 March email. Moreover, the Handbook was dated 1 January 2015 and hence was not in effect on 17 March 2011. The Defendants did not produce another handbook that was in effect in March–April 2011.

120 The Plaintiff’s submissions cited several cases for the correct approach to find a contract exists based on a series of correspondence. These included *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 404 (“*Tribune Investment*”), *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 and *Chwee Kin Keong & Ors v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594.

121 The Court of Appeal in *Tribune Investment* held that in the absence of a formal contract,⁹³ the existence of any contract must be inferred from the written correspondence and contemporaneous conduct of the parties at the material time. Further, the question of whether or not there was an intention by the parties to enter into a legally binding contract should be determined objectively. Applying these principles to the Defendants’ case, the court has already observed at [66] that neither Ng nor Wong responded to the 17 March email so as to conclude a contract (if the email could be considered an offer capable of acceptance which the court does not believe to be the case).

⁹² Transcripts on 2 Dec 2020 at p 9

⁹³ At [39]

122 Moreover, as the Plaintiff’s closing submissions pointed out,⁹⁴ the Defendants did not in their defences (or in their AEICs) assert that the court should pierce and lift the corporate veil to find that Ice Mobile and the Plaintiff were one single economic entity (as Bala’s behaviour seemed to suggest) and should accordingly be so treated. The Plaintiff added that the concept of a single economic entity is fraught with difficulties in any case, citing *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832.

(a) Were the Defendants entitled to receive sales commission by the Plaintiff and retain the unauthorised commissions the Plaintiff seeks to recover?

123 In the light of the court’s observations that there was no contractual basis for the Defendants to have received the unauthorised commissions, the court’s answer on the first issue listed at [106] must be “No”.

(b) Did the Defendants (as the Plaintiff alleged) fraudulently and dishonestly justify the payments of the unauthorised commissions by claiming their entitlement was under their respective contracts of employment with Ice Mobile?

124 The court accepts the Defendants’ closing submissions⁹⁵ that the standard of proof for fraud and dishonesty is very high and there must be compelling evidence proving such fraud and dishonesty.

125 The court believes the Defendants’ conduct was dishonest but not fraudulent in the legal sense. The Defendants cannot have assumed (wrongly) that they were entitled to be paid by the Plaintiff when they well knew they were

⁹⁴ At ara 63

⁹⁵ First Suit at para 116 and Second Suit at para 124

not the Plaintiff's employees. The fact that they entrusted Bala to ensure they got paid and left it to him to make the necessary payment arrangements through Cindy does not exonerate them.

(c) Were the payments to the Defendants procured by way of an illicit arrangement which the Defendants had with Bala?

126 The arrangement was illicit in the sense that Ng as a director of Ice Mobile, never made known the arrangement for payment of commission from the Plaintiff to the board of directors of Ice Mobile. Indeed, in answer to the court's question,⁹⁶ Ng agreed that there should have been a company resolution from Ice Mobile approving payment of commission to him from the Plaintiff. There was no documentation either between the two companies to the effect that Ice Mobile and the Plaintiff agreed to the commission arrangement let alone that Ice Mobile would reimburse the Plaintiff for the commissions paid to the Defendants.

127 Bala also did not inform the boards of either Ice Mobile or the Plaintiff of the Defendants' receipt of the unauthorised commissions from the Plaintiff. It is also undisputed that neither Ng nor Wong have paid taxes on or declared the unauthorised commissions to either the Malaysian or Singapore tax authorities. The court disbelieves Ng's claim that he did not get round to declaring the same as his income. It was deliberate concealment by the Defendants to avoid paying income tax in both countries. Bala would have been privy to the Defendants' non-payment of income taxes. Such tax avoidance/evasion on the Defendants' part is reprehensible.

⁹⁶ Transcripts on 4 Dec 2020 at p 12

(d) Did the payments to the Defendants require the sanction of the board of directors of the Plaintiff?

128 It cannot be disputed that the Plaintiff's payment of sums totalling S\$308,484.24 to the Defendants required the sanction of the board of directors of the Plaintiff. Bala may be the Plaintiff's CEO but that did not as he seemed to think, give him a *carte blanche* to pay the Defendants such huge sums without *at least* informing the Plaintiff's other director(s) Ramen and/or Logan, obtaining their approval and passing a board resolution to that effect. This was particularly so when the Plaintiff's revenue/profits along with that of Ice Mobile (according to Kumar)⁹⁷ was steadily declining over the years since 2011-2012.

(e) Were the Defendants unjustly enriched?

129 The Defendants' closing submissions⁹⁸ stated that the following elements are required to found an action for unjust enrichment citing *Singapore Swimming Club v Koh Sin Chong Freddie* [2006] 3 SLR 845 ("Koh Freddie"):

- (a) that the defendant has received a benefit or that an enrichment has been accrued to the defendant;
- (b) that the benefit or enrichment is at the plaintiff's expense; and
- (c) that the defendant's enrichment is unjust.

⁹⁷ [44] *supra*

⁹⁸ First Suit at para 192 and Second Suit at para 206

The Court of Appeal in *Koh Freddie*⁹⁹ cited its decision in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve and Another* [2013] 3 SLR 801 (“*Wee Anna*”) for the above principles. In *Wee Anna*, the Court of Appeal¹⁰⁰ stated that in unjust enrichment, a claimant seeks recovery of the enrichment on the basis that the claimant should not be deprived of the benefit.

130 Applying the three elements to this case, there is no doubt that the Plaintiff fulfils all three criteria.

131 It cannot be disputed that the Plaintiff’s payments to the Defendants were neither sanctioned nor authorised by its board of directors. There was no legal/contractual basis for the payments. Apart from their say so, there was nothing before the court to prove the bulk messaging sales the Defendants purportedly made were concluded on the Plaintiff’s behalf.

132 For the Defendants to submit in their closing submissions¹⁰¹ that there was no lack of consent on the Plaintiff’s part is to completely ignore the evidence adduced from Ramen and Logan.

Other findings

133 The court has no doubt that Bala’s testimony was consistent with the Defendants’ so as to assist them and himself when the time comes for him to defend Suit 1118. Laszlo’s evidence was also tailored to assist the Defendants and Bala. As stated earlier at [36], Laszlo was called as the Defendants’ witness

⁹⁹ At [90]

¹⁰⁰ At [108]

¹⁰¹ First Suit at para 213 and Second Suit at para 227

at the eleventh hour. The Plaintiff's submissions pointed out that¹⁰² Bala and the Defendants put the blame on the absent Cindy as the person responsible for payment of the unauthorised commissions. Yet, at the last minute, instead of calling Cindy they called Laszlo to testify. The Defendants did a *volte face* and Bala then testified that the payments were known to and approved by Laszlo who gave him a *carte blanche* to run the Plaintiff's operations as Bala deems fit. As pointed out earlier at [96], Bala agreed with the court that Cindy took his instructions to pay the Defendant – she did not make the decision.

134 As stated at [19], the High Court judgment dismissing Ng's claim was only received by the Plaintiff in August 2021. Upon receipt of the same, the Plaintiff applied to this court to file further submissions. The court acceded to the request and both parties filed their further submissions on 31 August 2021.

135 The Plaintiff pointed out in its further submissions that the High Court judgment made specific findings of fact and law in respect of the issues in this case which this court should accept/adopt. Amongst the findings made by the Malaysian court were the following:

- (a) the reasons given by Ng for the opening of the Singapore accounts were dismissed as disingenuous – the High Court noted that the Plaintiff was incorporated on 6 September 2010 (see [1]) but the Singapore accounts were opened months earlier in April 2010;
- (b) there was no documentary evidence to support the Sessions court's findings of an internal arrangement between Ice Mobile and the

¹⁰² At para 114

Plaintiff that justified payments by the Plaintiff to Ng. As a director of Ice Mobile, Ng would have been able to produce documents to support the existence of an internal arrangement if the same existed. The Malaysian court opined Ng was not telling the truth;

(c) there were no documents that could show the existence of a sales commission scheme covering the years 2011–2013 and the period January–June 2014;

(d) Ng was not an honest witness. He deliberately avoided treating the Plaintiff's payments as employment income giving rise to a conclusion that he was evading income tax, an offence in both Singapore and Malaysia;

(e) the Sessions court judge failed to appreciate the significance of the civil suit brought by the Plaintiff in Singapore against Ng to recover the sums paid to him on the basis that Ng received the sums fraudulently, dishonestly or wrongfully;

(f) Ng should have brought his claim for RM43,620 by way of a counterclaim in the Singapore action as all previous payments had been made by the Plaintiff and Singapore was the proper forum. His action was suspicious and gave rise to an ulterior motive on the part of Ng.

136 The Plaintiff then went on in its further submissions to cite the law (and cases) on *res judicata*, recognition of a foreign judgment, issue estoppel and cause of action estoppel. In short, the Plaintiff wanted this court to give due weight to the High Court judgment.

137 The Defendants on the other hand urged this court not to give any weight to the High Court judgment and submitted it should not influence the outcome of these proceedings. In brief, the Defendants' reasons were as follows:

- (a) It would be premature to rely on the High Court judgment as it was not final – Ng had appealed against it to the Court of Appeal;
- (b) the subject matter of the Sessions court and High Court Judgments was Ng's claim against Ice Mobile which is separate and distinct from the Plaintiff's claim against him in the First Suit; there are no overlaps;
- (c) Ng's Malaysian suit involved issues of his resignation and his purported failure to collect payments which were matters not pleaded in the First Suit and are not before this court;
- (d) although the subject matter of the First Suit, *ie*, the Plaintiff's claim against Ng, did not form the subject matter of Ng's Malaysian Suit, the Malaysian High Court made a finding that there was no evidence to justify payment of commission by the Plaintiff to Ng between 2011 and 2014;
- (e) the Malaysian High Court took the view that the due diligence exercise undertaken by Kumar was important evidence even though the due diligence report itself was not evidence that was before the Malaysian proceedings; neither was it produced in these proceedings; and

(f) the Malaysian High Court had made adverse findings on Ng's character and credibility even though trial of his claim was conducted before the Sessions Court below.

138 The Defendants submitted that any assessment of the credibility of Ng in these proceedings ought to be made based solely on the trial and evidence that was before this court. They added that no weight should be given to the Malaysian High Court's observations that the Sessions Court judge failed to understand the significance of the Plaintiff's two suits against the Defendants.

139 Since this court finds in favour of the Plaintiff against both Defendants, there is no necessity in any event to rely on Ng's Malaysian Suit or the High Court judgment based on the principles of issue estoppel, *res judicata* and/or the comity of nations.

140 At this juncture, the court needs to address one more issue concerning Logan's *status quo* as the owner of Skantek. In the Defendants' closing submissions,¹⁰³ the Defendants argued that until 2013 Laszlo was the owner of Skantek and in turn the Plaintiff. Laszlo may well have been the owner of Skantek until 2013. What was also in evidence is he did sell his shares to Logan. The fact that Logan may not have paid Laszlo the full purchase price does not make Logan any less the owner. The court in Suit 1180 accepted that Logan owns Skantek and that Raj held the Skantek shares as Logan's trustee.

¹⁰³ Defendant's Closing Submissions for the First Suit at Section V, paras 41-76 and Defendant's Closing Submissions for the Second Suit at Section V, paras 52-87

Conclusion

141 In the light of the findings made earlier, the court awards judgment to the Plaintiff against Ng in the First Suit in the sum of \$174,988.34 and against Wong in the Second Suit in the sum of \$133,495.90 with interest on both sums from the date of the writ of summons (2 February 2018) until payment.

142 As regards costs, the Defendants filed their costs schedule with their first set of submissions while the Plaintiff's costs schedule was filed later, after a reminder from the court. Save for two items, the Defendants' costs estimates were invariably higher than the Plaintiff's. For instance, for work done up to the first set of closing submissions, the Defendants' costs estimates were \$158,000 as against \$140,000 for the Plaintiff.

143 Taking into consideration the parties' costs schedules and the fact that the Defendants estimated their costs up to the close of trial to be \$150,000, the court awards one set of costs for both suits to the Plaintiff in the global sum of \$150,000. That sum does not include the costs for interlocutories where costs in the cause were awarded. These would include costs of:

- (a) The Plaintiff's applications for service outside jurisdiction on Ng and Wong in Summonses No. 660 of 2018 and No 661 of 2018 in the First and Second Suits respectively. The court awards \$1,000 all in for the two applications;
- (b) The Plaintiff's applications for summary judgment against Ng and Wong in Summonses No 2291 of 2018 and No. 2289 of 2018 in the First and Second Suits respectively, for which costs of \$3,000 all in were ordered;

- (c) The Defendants' applications in Summonses Nos. 448 and 449 of 2019 in the First and Second Suits respectively, for consolidation of these proceedings for which costs of \$2,500 all in were ordered.

The above costs total \$6,500 in favour of the Plaintiff.

144 There were other applications where costs were fixed but reserved. These are for:

- (a) The Plaintiff's applications in Summonses No. 3813 and 3814 of 2020 in the First and Second Suits respectively to vacate the hearing dates and for Kumar and Ramen to testify by video-link. Costs were fixed at \$3,000 all in;
- (b) The applications of Ng and Wong in Summonses No. 3847 and No 3848 of 2020 respectively to give evidence by live video or live television link from Selangor, Malaysia, for which costs were fixed at \$2,500 all in;
- (c) The applications of Ng and Wong in the two Summonses at [36] for which costs were fixed at \$2,500 all in.

The three sets of costs total \$8,000 and are awarded to the Plaintiff.

145 There was one set of costs awarded to the Defendants for the Plaintiff's applications in Summonses No. 3982 and 3983 of 2019 in the First and Second Suits respectively, to amend the Plaintiff's pleadings. The costs of \$1,500 all in have yet to be paid to the Defendants.

146 Taking into account the costs awarded to the Plaintiff in [142] to [144] and less the \$1,500 payable to the Defendants in [145], the Plaintiff's costs total \$163,000 ($\$150,000 + \$6,500 + \$8,000 = \$164,500 - \$1,500$). The Plaintiff is further entitled to reasonable disbursements which would include court, filing and hearing fees on a reimbursement basis.

Lai Siu Chiu
Senior Judge

Arivanantham S/O Krishnan, Wong Ze-Eie, Tan Wei Yang (AGP
Law LLC) for the Plaintiff;
Gokulamurali S/O Haridas, Kawal Pal Singh, Adly Rizal Bin Said
(Tito Isaac & Co LLP) for the Defendants.
