Cousins Scott William *v* The Royal Bank of Scotland plc
[2010] SGHC 73

Case Number : Suit No 548 of 2009

Decision Date : 10 March 2010

Tribunal/Court : High Court

Coram : Steven Chong JC

Counsel Name(s) : Kevin Lim (Wee Swee Teow & Co) for the plaintiff; Edwin Tong and Lee Bik Wei (Allen & Gledhill LLP)for the defendant.

Parties : Cousins Scott William — The Royal Bank of Scotland plc

Contract – Breach

10 March 2010 Judgment reserved.

Steven Chong JC:

Introduction

1 Can an employee be summarily dismissed after having been made redundant? Can a breach of a confidentiality obligation deprive the employee of all his benefits under a separate/subsequent redundancy agreement even if the breach did not cause any loss to the employer? Can the employer treat a repudiatory breach of the employment contract as a repudiatory breach of the redundancy agreement? These are some of the interesting issues posed by this dispute. In the final analysis, these issues have to be resolved by reference to the nature and gravity of the breach and the terms of the governing contract.

Facts

Background

2 The plaintiff, Mr Scott William Cousins ("the plaintiff") was employed by the defendant, The Royal Bank of Scotland plc ("the defendant") as their Chief Trader from 28 August 2008 to 9 April 2009 and thereafter as a Senior Trader until 11 May 2009. The plaintiff's employment with the defendant was expressly governed by the defendant's letter of offer dated 22 May 2008, the Standard Terms and Conditions of Employment, the Declaration of Secrecy dated 21 August 2008, the Employee Handbook and the Group's Policies and Procedures ("the employment contract").

3 Under the terms of his employment contract, the plaintiff was bound to comply with the Banking Act (Cap 19, 2008 Rev Ed) and to observe various secrecy and confidentiality obligations. These obligations were further reinforced by the plaintiff's execution of the Declaration of Secrecy.

4 Sometime in April 2009, the plaintiff requested the defendant to either make him redundant or to demote him. This request arose after an altercation with a colleague. The defendant agreed and the plaintiff was demoted from his position of Chief Trader to Senior Trader on 9 April 2009.

The Redundancy Agreement

5 After the plaintiff was demoted to Senior Trader, he continued his request to be made redundant. Finally, on 11 May 2009, the defendant acceded to the plaintiff's request. The terms of his redundancy were offered to him at 8.00 am on 11 May. After the terms were explained by the defendant's Human Resource Consultant, Ms Sharyn Porter ("Ms Porter"), the plaintiff signed the agreement ("the Redundancy Agreement") at about 8.30 am on 11 May.

6 The Redundancy Agreement offered by the defendant entitled the plaintiff to the following sums:

(a)	Accrued salary for May up to 11 May 2009	$15,653.85
(b)	Immediate stock buyout payments which were otherwise payable only in January 2010, 2011 and 2012	$348,793.00
(c)	CPF allowance	$653.00
(d)	Compensation for loss of office	$22,500.00
(e)	Payment in lieu of 3 months' notice	$67,500.00
(f)	Benefits deduction	($14.46)
	Total	**$455,085.39**

As can be seen, the plaintiff was given a sum of S$348,793.00 for various stock buyout payments. These payments were meant to compensate the plaintiff for the loss of his stock options when he left his previous employment. The Redundancy Agreement accelerated all the stock buyout payments that were payable to the plaintiff under the employment contract. In this respect, there can be no doubt that the Redundancy Agreement offered by the defendant to the plaintiff was a very generous one indeed.

7 In return for the above payments, the plaintiff agreed to:

(a) drop all claims that he had or may have against the defendant;

(b) return all property, loans and outstanding monies due to the defendant;

(c) undertake not to make, publish or issue any detrimental statements concerning the defendant or its employees; and

(d) observe the obligation of secrecy and confidentiality ("the confidentiality obligation") which he undertook when he joined the defendant.

Breach of Redundancy Agreement

8 After signing the Redundancy Agreement, the plaintiff returned to his desk to clear out his desk and to settle some personal matters. He then proceeded to forward some emails from his workstation to his personal email account ("the gmail account").

9 The first email was sent by the plaintiff at 9.29 am. It contained several MS Excel spreadsheets of profit and loss information relating to the defendant's foreign exchange business in Asia (the "P&L information"). The P&L information contained a breakdown of trading sales as well as the profit and

loss data based on different products and different traders.

10 The second email was sent by the plaintiff at 9.31 am. It contained a power point presentation, marked "Confidential", of the defendant's business plan in relation to its foreign exchange business in Asia (the "Spot FX Presentation"). The Spot FX Presentation contained information on how the defendant planned to grow its foreign exchange business, identified the defendant's top twenty customers, as well as the revenue stream and volume of business generated from each of these customers. The emails containing the P&L information and the Spot FX Presentation are hereinafter collectively referred to as "the two emails". The information set out in the two emails was clearly very confidential in nature.

11 The other emails forwarded by the plaintiff were of a personal nature and have no bearing on the present dispute.

The Defendant's discovery of the forwarded emails

12 The plaintiff left the defendant's office at about 10 am. Shortly after that, Mr Christopher de la Hoyde, who was the head of Spot Foreign Exchange trading in the defendant ("Mr de la Hoyde"), discovered what the plaintiff had done and immediately informed Ms Porter about this development. At about 10.30 am, Mr de la Hoyde called the plaintiff and informed him to delete the emails containing the P&L Information and the Spot FX Presentation. The plaintiff duly complied with Mr de la Hoyde's instructions and deleted the two emails.

The plaintiff's summary dismissal

13 On 13 May 2009, Mr de la Hoyde and Ms Porter held a teleconference with other officers of the defendant to discuss the plaintiff's conduct in transmitting the two emails. After the teleconference, they informed Mr Alan Goodyear ("Mr Goodyear"), the defendant's Country Executive for Singapore, of the situation and asked him for his opinion whether the plaintiff's actions constituted gross misconduct and whether his employment should be terminated and the Redundancy Agreement withdrawn.

14 On 14 May 2009, Mr Goodyear sent an email to Mr de la Hoyde, Ms Porter and other officers of the defendant informing them that based on the information available to him, he agreed that the plaintiff's actions amounted to gross misconduct. He further agreed that the Redundancy Agreement was to be withdrawn, and that the plaintiff was to be dismissed instead.

15 On 18 May 2009, Mr Goodyear wrote a letter to the plaintiff to inform him that his action constituted a serious breach of both his employment contract and the Redundancy Agreement. In the letter, Mr Goodyear requested the plaintiff to submit a written explanation for his conduct within 48 hours and to make a statutory declaration confirming that:

(a) he had deleted and/or returned and/or destroyed the emails relating to the P&L information and the Spot FX Presentation;

(b) he had not made any copies of the two emails;

(c) he had not transmitted the P&L information and the Spot FX Presentation to any other email account and/or any party; and

(d) he had not caused other information relating to the defendant to be transmitted to himself or any other party.

16 The plaintiff replied to the defendant on 20 May 2009. In his letter, the plaintiff admitted that he did send the P&L information to himself to obtain some proof that he was not made redundant because he had lost money for the defendant. With regard to the Spot FX Presentation, the plaintiff explained that he did not recall sending that email, and if he did, it must have been sent by mistake. This letter was accompanied by the statutory declaration which the defendant had required the plaintiff to make.

17 On 22 May 2009, the defendant wrote to the plaintiff to inform him that his actions were in breach of the employment contract and the Redundancy Agreement. Furthermore, his acts constituted gross misconduct which justified his summary dismissal. In the circumstances, the defendant informed the plaintiff that he was no longer entitled to the benefits under the Redundancy Agreement and all offers made to him under the Redundancy Agreement were thereby rescinded.

Commencement of the present action

18 Following the defendant's decision to summarily dismiss the plaintiff and to rescind the Redundancy Agreement, the plaintiff commenced the present action against the defendant on 15 June 2009 to recover the sum of $455,085.39 due to him under the Redundancy Agreement.

19 On its part, the defendant denied all liability on the grounds that the plaintiff had breached both the employment contract and the Redundancy Agreement and that he had been summarily dismissed for gross misconduct. In addition, the defendant brought a counterclaim against the plaintiff to recover the sum of $218,599 which was paid in January 2009 as part of his stock buyout payments. Under the terms of the employment contract, the plaintiff was required to repay any stock buyout payments he received within a period of 6 months prior to his dismissal, if such dismissal was not by reason of redundancy. The defendant claimed that since the plaintiff was dismissed in May 2009, barely four months after receiving the January stock buyout payment, he was therefore required to repay it.

Relevance, if any, of the Summary dismissal to the claim under the Redundancy Agreement

20 It is important to highlight at the outset that the plaintiff's claim is founded on the Redundancy Agreement, specifically the sums payable thereunder. Therefore, whether the plaintiff breached the employment contract, and whether such a breach justified summary dismissal, is strictly irrelevant.

21 During the trial, much attention was unnecessarily devoted to the question whether the conduct of the plaintiff in sending the two emails containing P&L information and the Spot FX Presentation constituted gross misconduct to justify summary dismissal. As I have just observed, the employment contract and the Redundancy Agreement were separate agreements. In fact, they were mutually exclusive in their scope of operation: the Redundancy Agreement effectively brought an end to the employment contract. This was entirely consistent with the defendant's own submission at para 110 of its Closing Submissions "that the effect of the Redundancy Agreement was to terminate the employment agreement".

Can the plaintiff be summarily dismissed after having been made redundant

22 It is common ground that the plaintiff and the defendant entered into the Redundancy Agreement on 11 May 2009. After the defendant discovered that the plaintiff had forwarded the two emails to his personal gmail account, the defendant conducted its own internal investigations. After completing its investigations, the defendant wrote to the plaintiff on 22 May 2009 to inform him that

"by reason of the above we have decided that you are hereby dismissed". I agree with the plaintiff's submission that the language of the letter, in particular the words "hereby dismissed" was to dismiss the plaintiff effective from 22 May 2009. During closing submissions, the defendant's counsel also conceded that the dismissal took effect on 22 May 2009:

> COURT: The letter says in clear terms:
>
> > "By reason of the above", meaning, after having done this investigation, "we have decided", meaning today, "that you are hereby dismissed."
> >
> > What does that tell you? When is he dismissed?
>
> MR TONG: As of the date of the letter.

23 Accordingly there is no issue whether the dismissal was intended to take effect retroactively from 11 May 2009 or whether the dismissal could have retroactive effect. On the basis of this dismissal, the defendant informed the plaintiff that he was no longer entitled to the benefits of the Redundancy Agreement.

24 It is also common ground between the parties that the Redundancy Agreement was signed at about 8.30 am on 11 May 2009. It is not disputed that the two emails were forwarded between 9.29 am to 9.31 am on 11 May 2009. The parties, however, disagreed as to whether the plaintiff was still an employee at the time when the two emails were forwarded.

25 The defendant submitted that the plaintiff was still an employee because under the Redundancy Agreement, he was paid until 11 May 2009. Therefore when the two emails were sent between 9.29 am to 9.31 am, the plaintiff was still in the employ of the defendant. However, in my view, the payment of the plaintiff's salary up till 11 May 2009 was not determinative of this issue. It would necessarily depend on the intention of the parties, in particular the defendant's intention as the employer. In this regard, the evidence of Mr de la Hoyde was helpful to clarify this point. Mr de la Hoyde was the Head of the Spot FX Trading of the defendant at the material time. The plaintiff reported to him. Under cross-examination, Mr de la Hoyde agreed that the plaintiff ceased to be an employee of the defendant as soon as he had signed the Redundancy Agreement. By his evidence, it is clear that the plaintiff was no longer an employee of the defendant when the two emails were forwarded:

> Q. Right. And once the employee has left the office, after having signed the Redundancy Agreement, from a trading floor perspective, what is he to you?
>
> A. What does he do?
>
> Q. No. I mean say I'm the employee, I've been made redundant, I've said my goodbyes, sent out my email, what am I to you?
>
> A. An ex-employee, from my perspective.
>
> Q. An ex-employee?
>
> A. Yes.
>
> Q. Okay.

A. *But I would also say, if I can, that when he signed the redundancy paper at 8.30 in the morning, to me he was an ex-employee because he can no longer take a position or he can no longer quote a client or perform the usual duties that he had*. Not just when he walks out the doors; when he signed that document, from a trading floor perspective, other than tidying up his desk, saying his goodbyes and leaving, he is no longer working for me, if you like.

Q. So from your perspective, the moment he signed the Redundancy Agreement, he was no longer an employee and – I won't say on sufferance but he had been given licence to go back to his desk, clean up his effects?

A. Correct.

[emphasis added]

26 Mr de la Hoyde was not re-examined on this point. The defendant did not adduce any evidence from the other witnesses to explain or contradict Mr de la Hoyde's evidence. In closing, the defendant submitted that his evidence should be construed from the trading perspective in that the plaintiff ceased to have any function on the trading floor after accepting the Redundancy Agreement. In my view, Mr de la Hoyde's evidence on this point was indeed very relevant. It cannot be overlooked that the plaintiff was employed as a trader and he reported directly to Mr de la Hoyde. Furthermore, Mr de la Hoyde was the direct party whom the plaintiff dealt with on the Redundancy Agreement and therefore was clearly in a position to know the effect of the Redundancy Agreement on the employment contract. Accordingly, I accept Mr de la Hoyde's evidence that the plaintiff had ceased to be an employee upon signing the Redundancy Agreement.

27 In any event, taking the defendant's case at its highest, the plaintiff had undoubtedly ceased to be an employee by the close of business on 11 May 2009. The dismissal of a person, whether summarily or otherwise, necessarily pre-supposes that the person was still in employment at the material time. One cannot dismiss an ex-employee. On 22 May 2009, the defendant purported to dismiss the plaintiff. As I had observed earlier, it is clear from the language of the letter that the termination was to take effect from 22 May 2009. However by that date, he was no longer an employee, having been made redundant on 11 May 2009. Accordingly, I find that the summary dismissal of the plaintiff by the defendant on 22 May 2009 had no legal significance since the plaintiff was no longer an employee at the material time.

28 As there is no claim by the plaintiff for wrongful dismissal, this finding is strictly irrelevant to the plaintiff's claim under the Redundancy Agreement. It is however relevant to the defendant's counterclaim which is for the repayment of the stock buyout paid by the defendant to the plaintiff in January 2009. Under clause 8 of the employment contract, the plaintiff would be obliged to repay the full amount of any stock buyout payment if his employment was terminated without notice other than by reason of redundancy within six months from the date of such payment. Clearly for clause 8 to apply, the plaintiff would have to remain an employee when his employment was purportedly terminated without notice.

Breach of the confidentiality obligation

29 The plaintiff's confidentiality obligation was expressly set out in the various documents which governed his employment:

(a) the Standard Terms and Conditions of Employment

18. Confidentiality

In accepting the employment terms set out in this letter, *you agree to retain in confidence, treat as a secret and not disclose to others or use for your own purposes or those of others, both during your employment and at any time after its termination, information relating to our business and operations which you will acquire during the course of your employment*. You are required to conform to the rules and regulations of the Group and to comply with any other instructions which may be issued from time to time.

(b) the Declaration of Secrecy

I, Scott William Cousins [i.e. the Plaintiff], do hereby agree and declare that I will at all times observe secrecy in respect of all the affairs of The Royal Bank of Scotland plc, its parent, subsidiary and associated companies (called "the Bank") and in particular *I will keep confidential*:-

(a) *all details of customers accounts and all the actual or proposed transactions of the Bank with its customers, suppliers, advisers*, and other business connections; and

(b) *all data belonging to, or held by, the Bank* whether stored electronically or otherwise and all details of the Bank's premises, information, assets, internal communications, intellectual property, technical systems, projects, operating procedures, finance, share price sensitive information, negotiating positions and forward planning or any other similar information.

And I further agree and declare that I will not at any time disclose, reveal, cause the publication of or otherwise make use of such confidential information whether for my personal gain or otherwise. In making this declaration of secrecy I fully understand that:-

(1) maintaining absolute confidentiality is crucial to the Bank whose business depends upon the discretion of its employees and contracted personnel;

(2) *a breach of this undertaking of confidentiality may lead to my dismissal/termination of my contract and/or criminal proceedings*;

(3) this obligation of secrecy will apply to the Bank's business both within Singapore and overseas and will remain in full force and effect even after I have left the service of, or ceased working at the Bank;

(4) *this obligation of secrecy will apply unless I have express consent from the Bank to disclose the confidential information or I am required to do so by law;* and

(5) I am fully aware of and subject to the provisions of Section 47 or *(sic)* the Singapore Banking Act ("Act") which states that customer information shall not be disclosed by a bank or one of its officers to any other person except as expressly provided by the Act.

... This undertaking shall form part of my contract of employment (or contract for services) with the Bank and that *any breach of this undertaking will be considered as grounds for disciplinary action, including dismissal for gross misconduct*.

(c) the Employee Handbook

SECURITY

SECRECY

> Observance of Section 47 of The Banking Act is a pre-requisite of all employees of the Branch [i.e. the Bank's Singapore Branch]. In this connection, all employees must sign a Declaration of Secrecy at the commencement of their employment and any breach of Section 47 will be severely dealt with by Management and may result in immediate termination of employment without notice.
>
> CLEAR DESK POLICY
>
> Employees are responsible to safeguard all confidential information...
>
> INTERNET & EMAIL POLICY
>
> ...
>
> Employees should be aware of the following, in using the Internet or email:
>
> ...
>
> º *All users should not send RBS propriety (sic) information across the Internet unless approval is obtained from Compliance Department*.

[emphasis added]

30 The confidentiality obligation under the employment contract has some relevance under the Redundancy Agreement. It is to be recalled that one of the terms of the Redundancy Agreement was that the plaintiff acknowledged that he would observe the confidentiality obligation which he undertook when he joined the defendant, *ie* under the employment contract.

31 The defendant claimed that the plaintiff had breached the confidentiality obligation when he forwarded the two emails containing the P&L information and the Spot FX Presentation to his gmail account.

32 It is pertinent to highlight that under the employment contract, a breach of the confidentiality obligation would entitle the defendant to summarily dismiss the plaintiff:

(a) Under the Declaration of Secrecy signed by the plaintiff, breach of the confidentiality obligation would be considered gross misconduct to justify summarily dismissal and termination without notice.

(b) Under the defendant's disciplinary procedure, gross misconduct would justify dismissal without notice and without previous warnings. Under the defendant's disciplinary procedure, gross misconduct would include misappropriating or withholding, even temporarily, any document or record belonging to the defendant.

33 Therefore under the employment contract, the defendant was expressly entitled to terminate the plaintiff's employment contract summarily and without notice for a breach of the confidentiality obligation. There was, however, no such express right of termination under the Redundancy Agreement. This distinction is crucial because the defendant tried to equate a repudiatory breach of the employment contract as equivalent to a repudiatory breach of the Redundancy Agreement. This distinction will be further elaborated below.

34 Returning to the question whether the plaintiff had breached the confidentiality obligation, it is not disputed that the plaintiff did forward the two emails to his gmail account without proper

authorisation from the defendant.

35 For the email containing the P&L information, the plaintiff did not dispute that it was deliberately and intentionally forwarded to his gmail account. He admitted under cross-examination that his intention was to show the P&L information to his prospective employers:

Q. You see Mr Cousins, the intention that was formed in your mind when you sent those documents to your wife's email address and as demonstrated *by what you say here at paragraph 16 was for you to intend to use the material after you left RBS's employment?*

A. *The P&L I thought at that very moment, that perhaps further down the line, if I really need to, I could use it as some kind of a stop gap*.

Q. *You would use it by showing it to prospective employers?*

A. *At that point in time but, as I said, after thinking about it, it's not something that I would do*.

Q. Well, leave aside what you have now come to realise since these proceedings have started. *Just focus on what you were planning to use it for, which paragraph 16 of your affidavit makes very clear. You were going to use it to show prospective employers and the only way you would be able to show prospective employers is to present the PL& statement to them?*

A. *Potentially*.

[emphasis added]

36 The plaintiff submitted that, since he was only planning to use the information specific to himself and not the other traders found in the P&L information and since the defendant would have agreed to provide such information to the plaintiff on his request, the forwarding of the P&L information email could not be regarded as gross misconduct. This submission is plainly misconceived:

(a) The plaintiff's explanation that he had intended only to use the information specific to himself was self-serving to say the least. If that was his ostensible reason, there was no reason for him to have forwarded the entire P&L information email to himself.

(b) When he was asked by his own counsel how he would have shown only the information specific to himself, he responded "I really don't know." His own answer completely undermined his explanation.

(c) Further he also tried to show that it was not in his interest to show the entire P&L information to his prospective employers because it would reveal that he was one of its worst performers. The defendant's concern was that the P&L information which listed out the trading performances of every trader in its Asia FX business would render its best traders susceptible to being poached. As the plaintiff had forwarded the email with the entire P&L information, the risk of full disclosure cannot be ruled out.

(d) Finally even if the forwarding of the P&L information did not amount to gross misconduct, it was nonetheless a breach of the confidentiality obligation.

37 As regards the email containing the Spot FX Presentation, the plaintiff claimed that it was forwarded by mistake. To prove his point, the plaintiff's counsel conducted a live demonstration to

show how easy it was to forward an email by mistake. However, the experiment revealed that forwarding of an email would entail at least the following steps:

(a) First, the email to be forwarded has to be identified and located in the inbox;

(b) Secondly, the "forward" button has to be clicked;

(c) Thirdly, the sender would need to type the intended addressee's email address; and

(d) Finally, the "send" button has to be clicked.

38 I cannot see how the experiment could assist the plaintiff's case that the forwarding of the two emails was sent by mistake. The mere fact that the forwarding of an email is a simple task does not inexorably lead to the conclusion that it was therefore sent by mistake. In fact, the experiment showed that the process still required four deliberate steps to be taken. It was pointed out by the defendant's counsel that the Spot FX Presentation email was not located next to the P&L information email. In fact, the two emails were dated about one month apart from each other and there were several emails in between them. In other words, the plaintiff had to trawl through his email inbox to specifically identify the email containing the Spot FX Presentation. More significantly, the plaintiff failed to explain how and why the mistake was made other than to say that it was mistakenly forwarded. No explanation was provided by the plaintiff that he had intended to forward a different email but wrongly forwarded the Spot FX Presentation email instead. On the evidence before me, I reject the plaintiff's explanation that the email containing the Spot FX Presentation was forwarded by mistake. I find that the Spot FX Presentation email was intentionally forwarded by the plaintiff to his gmail account.

39 Even if the Spot FX Presentation email was sent by mistake (which is plainly unsupported by the evidence), the plaintiff was nonetheless in breach of his confidentiality obligation since there is no dispute that the P&L information email was intentionally forwarded by him to show the information to his prospective employers.

40 The parties disputed whether the forwarding of these two emails constituted gross misconduct to justify summary dismissal. This point is however irrelevant for the following reasons:

(a) The plaintiff could not have been summarily dismissed on 22 May 2009 as he had already been made redundant earlier, on 11 May 2009.

(b) Whether the forwarding of the two mails constituted gross misconduct to justify summary dismissal under the employment conduct is strictly irrelevant to determine whether there was a repudiatory breach of the Redundancy Agreement.

(c) Ultimately the breach of the confidentiality obligation by the plaintiff must be determined by reference to the terms of the Redundancy Agreement and not under the terms of the employment contract. Dismissal and redundancy simply cannot sit together.

Alleged breach of the defendant's disciplinary procedure

41 After the close of the defendant's case, the plaintiff applied to amend his statement of claim to allege that his summary dismissal was in breach of the defendant's disciplinary procedure. This allegation was raised in the plaintiff's Affidavit of Evidence-in-Chief ("AEIC") and alluded to in his opening statement. However, it was not specifically pleaded. After the plaintiff's opening statement, I

enquired whether the plaintiff was pursuing the point that it was mandatory for the defendant to strictly comply with the disciplinary procedure. The plaintiff's counsel confirmed that he was not taking the point. The plaintiff's application to amend his statement of claim to plead that the summary dismissal was in breach of the defendant's disciplinary procedure was therefore in direct contradiction to his earlier confirmation that he was not pursuing the point. After hearing submissions from both parties, I dismissed the plaintiff's application for the following reasons:

(a) Even if the plaintiff was right that the disciplinary procedure was not followed, it could not alter the fact that the forwarding of the two emails still constituted a breach of the confidentiality obligation. In other words, the failure, if any, to follow the disciplinary procedure cannot "sanitise" the breach.

(b) The disciplinary procedure is not immutable. Under the terms of the disciplinary procedure, the defendant has the discretion to depart from the requirement for a formal hearing having regard to the seriousness of the offence or length of service of the employee. It is undeniable that the plaintiff was provided with an opportunity to explain his conduct. By letter dated 20 May 2009, the plaintiff admitted that he did forward the two emails to his gmail account. He also provided his explanation for his conduct.

(c) The plaintiff also admitted under cross-examination that everything which he would have said had the disciplinary hearing been held were set out in his letter of 20 May 2009 to the defendant and that he had no other ground on which he would have attempted to excuse himself:

Q. And I'll show it to you. It's at page 90 of the same bundle. In essence, what this letter contains is an admission by you that you did send the emails. In respect of the P&L, you are saying that you wanted to show it to prospective employers?

A. Potentially.

Q. And in respect of the presentation, you said you had no recollection and that you did not intend to cause the bank any harm, and that you hoped that this would satisfactorily explain the facts and circumstances of your conduct. And you apologised for any errors that you may have made. That's the letter?

A. Yes.

Q. *Would I be correct to say that these are all the reasons that you would have wanted to give for the explanation – for the conduct you were being accused of?*

A, *Yes*.

Q. *And those reasons find themselves in the affidavit of evidence-in-chief that you have filed in court today as well?*

A. *Yes*.

Q. *Isn't that right? There are no other grounds on which you would try to excuse yourself from those allegations; am I right?*

A. *Yes*.

[emphasis added]

42 The plaintiff's attempt to include an additional allegation that the summary dismissal was wrongful because the disciplinary procedure was not followed was a mere afterthought. This point, like the defendant's argument about how it was justified in summarily dismissing the plaintiff for gross misconduct under the employment contract, is entirely irrelevant to the pivotal question of whether the plaintiff had committed a repudiatory breach of the Redundancy Agreement.

Was the plaintiff in repudiatory breach of the Redundancy Agreement

43 The defendant submitted that the plaintiff had "engineered" the Redundancy Agreement. Whatever may have been the plaintiff's motivation, it is clear that on 11 May 2009, the defendant willingly concluded the Redundancy Agreement with the plaintiff.

44 Under the terms of the Redundancy Agreement, the plaintiff was to be paid the sum of $455,085.39 subject to the following terms:

(a) The payment was in full and final settlement of all and any claims that the plaintiff may have against the defendant.

(b) The plaintiff would return all loans and liabilities due and owing by the plaintiff to the defendant as well as all of the defendant's property including but not limited to all documents, computer hardware and all software including original computer disks and all copies thereof in whatever format.

(c) The plaintiff undertook not to publish or otherwise issue any detrimental or derogatory statements concerning the defendant or any of its officers, directors or employees.

(d) The plaintiff acknowledged that he would observe the confidentiality obligation which he undertook upon entering into the defendant's service and that he would keep secure and confidential all information relating to the affairs of the defendant during and after his service with the defendant.

It is not disputed that the plaintiff did not breach terms (a), (b) and (c) of the Redundancy Agreement. The only term which the plaintiff breached was the confidentiality obligation.

45 Accordingly, the pivotal issue before me is whether the forwarding of the two emails which constituted a breach of the plaintiff's confidentiality obligation amounted to a repudiatory breach of the Redundancy Agreement such that the defendant was no longer obliged to pay the monies due thereunder.

The law

46 It was unfortunate that both the plaintiff and the defendant devoted little attention to this issue in their pleadings and during the trial. The Defence and Counterclaim did not plead specifically that the plaintiff had committed a repudiatory breach of the Redundancy Agreement. It merely pleaded that the plaintiff had breached both the employment contract and the Redundancy Agreement and therefore the defendant was no longer obliged to pay any further sums to the plaintiff. In the same vein, the plaintiff spent most of his Reply explaining how his sending of the emails did not amount to gross misconduct under the employment contract. This misplaced emphasis on the question of whether the plaintiff had breached the employment contract persisted throughout the entire trial. Be that as it may, the parties' inadequate reference to the Redundancy Agreement in their pleadings and during the trial does not impair my ability to decide the crucial question of whether

the plaintiff had committed a repudiatory breach of the Redundancy Agreement, and it is this question that I now turn my attention to. I should add that this issue was addressed by both counsel during their closing submissions before me.

47 The law relating to repudiatory breach was succinctly set out in the seminal decision of the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete Pte Ltd*"). The Court of Appeal held at [113] that the right of termination accrues to the innocent party in the following situations:

(a) When there is an express reference to the right to terminate under the contract. (Situation 1)

(b) If there is no such express right to terminate:

(i) where the party in breach renounces the contract by clearly conveying to the innocent party that it will not perform its contractual obligation *at all*; (Situation 2)

(ii) where the obligation which is breached is a condition of the contract; (Situation 3(a))

(iii) if the obligation is not a condition, the innocent party will be entitled to terminate if the breach has deprived the innocent party of substantially the whole benefit of the contract. (Situation 3(b))

These principles were revisited and reaffirmed by the recent decision of the Court of Appeal in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883.

48 The defendant recognised that, to succeed in its defence, it was essential to establish that the plaintiff's conduct in forwarding the two emails amounted to a repudiatory breach of the Redundancy Agreement. However, the defendant adopted an interesting route in its attempt to establish this point. It first sought to establish that the forwarding of the two emails constituted a breach of the plaintiff's confidentiality obligation. Secondly, the defendant submitted that such a breach constituted gross misconduct which was itself a repudiatory breach of the employment contract, thereby justifying the summary dismissal. On the strength of this argument, the defendant submitted that "by the same token" the plaintiff's conduct also constituted a repudiatory breach of the Redundancy Agreement.

49 I found the defendant's approach to be flawed:

(a) A repudiatory breach of the employment contract does not necessarily translate into a repudiatory breach of the Redundancy Agreement. Both contracts were governed by different terms. Accordingly, the issue whether there was a repudiatory breach of the Redundancy Agreement must be examined by reference to the terms of the Redundancy Agreement.

(b) It cannot be ignored that under the terms of the employment contract, gross misconduct expressly entitled the defendant to terminate the employment contract without notice. By contrast, the Redundancy Agreement had no such express right of termination. I should hasten to add that it is also the defendant's case that the express right to terminate, though not apparent on the face of the Redundancy Agreement, was incorporated by reference to the employment contract. I will deal with this point separately below.

(c) The essence of an employment contract is the trust and confidence in an ongoing relationship between the employer and the employee. Therefore if the employee should breach the confidentiality obligation, that would usually amount to a fundamental breach of the employment contract. The same logic does not apply as regards the Redundancy Agreement whose principal purpose was to bring an end to the employment contract on the terms set out therein. Therefore, a breach of trust and confidence by a party to a redundancy agreement does not necessarily have the same effect as a similar breach by an employee in a subsisting employment relationship.

50 In its closing submissions, the defendant made a brief reference to *RDC Concrete Pte Ltd*. It was not clear from the submissions which situation(s) the defendant was relying on to justify the termination. During the oral closing submissions, counsel for the defendant clarified that the defendant was only relying on Situations 2 and 3(b) of *RDC Concrete Pte Ltd*. However, after concluding its closing submissions, counsel for the defendant sought to rely also on Situations 1 and 3(a) of *RDC Concrete Pte Ltd* as well. Therefore the defendant has sought to rely on all four situations in *RDC Concrete Pte Ltd* to justify the termination. This is quite unusual since some of the situations are by their nature mutually exclusive.

51 I shall deal with each of the four situations relied on by the defendant to justify the termination.

Situation 1 – whether the contract expressly provides for right of termination

52 It is apparent that the Redundancy Agreement does not expressly stipulate such a right of termination in the event of a breach of any of the four terms. Initially the defendant's counsel accepted that Situation 1 would not apply to the present dispute. Thereafter it was raised belatedly after conclusion of his closing submissions. He submitted that because the Redundancy Agreement referred to the confidentiality obligation under the employment contract, it must follow that the right of termination under the employment contract would likewise be incorporated into the Redundancy Agreement. There is considerable difficulty with such a construction:

(a) This point was admittedly not pleaded. This was hardly surprising since it was only raised for the first time after the closing submissions.

(b) The Redundancy Agreement did not incorporate all the terms of the employment contract. Instead, the plaintiff merely acknowledged that he would continue to observe the same confidentiality obligation which he agreed to when he first joined the defendant.

(c) While the breach of the confidentiality obligation may entitle the defendant to terminate the employment contract (because such a right was expressly provided for), the same cannot be said under the Redundancy Agreement. In order to arrive at the same result, I must read the words "dismiss/termination" under the employment contract as equivalent to the right of termination under the Redundancy Agreement. This would indeed be a very strained and erroneous construction of the acknowledgement of the confidentiality obligation.

(d) If a party wishes to rely on a term of another contract by incorporation, the burden must be on such a party to prove that it has been clearly and explicitly incorporated into the other contract. There was no such clear and explicit incorporation of the right of termination under the employment contract into the Redundancy Agreement.

53 In the circumstances, I find that there was no express right to terminate under the Redundancy

Agreement for breach of the confidentiality obligation. Accordingly, Situation 1 does not assist the defendant.

Situation 2 – whether the party in breach renounces the contract

54 Situation 2 would only apply if the plaintiff had renounced the Redundancy Agreement by conveying to the defendant that he would not perform his contractual obligations *at all*. In this connection, there can be no doubt that the plaintiff had complied with three of the terms of the Redundancy Agreement. At this juncture, it is perhaps useful to mention that the defendant does not deny that the primary purpose of the Redundancy Agreement was to seek a separation of the parties and to terminate the employment contract:

> COURT: Let me ask you this, Mr Tong: what is the primary purpose of the Redundancy Agreement?
>
> MR TONG: It is to seek a separation of the parties and to terminate the employment contract.

The only term which the plaintiff breached was the confidentiality obligation. However when confronted by the defendant, he deleted the two emails within the same morning. Furthermore, he confirmed by way of a Statutory Declaration that he did not disclose the contents of the two emails to any other party and that he would continue to observe the confidentiality obligation. In the circumstances, it cannot be suggested that the plaintiff had renounced the Redundancy Agreement.

Situation 3(a) – whether the party has breached a condition of the contract

55 To rely on this ground, the defendant must first establish that the plaintiff's acknowledgement of the confidentiality obligation was a condition of the Redundancy Agreement. This ground was also only raised after the defendant had completed its closing submissions.

56 In *RDC Concrete Pte Ltd*, the Court of Appeal held at [97] that in determining whether a term is a condition, the intention of the parties is relevant:

> (III) SITUATION 3(A) – CONDITION/ WARRANTY APPROACH
>
> In the second situation (Situation 3(a)), the focus is on the *nature of the term* breached and, in particular, whether the *intention of the parties* to the contract was *to designate that term* as one that is *so important* that *any* breach, *regardless* of the *actual consequences* of such a breach, would *entitle* the innocent party to *terminate* the contract (this is, however, not to say that the consequences of breach are irrelevant inasmuch as the parties have, *ex hypothesi*, envisaged, in advance, and *hypothetically, serious* consequences that could ensue in the event of the breach of that particular term). In traditional legal terminology, such a term would be termed a "*condition*".

57 In *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663, the Court of Appeal helpfully identified a few non-exhaustive factors to assist in ascertaining whether a contractual term is to be treated as a condition:

> (a) whether it is statutorily classified as a condition;

(b) whether it is expressly stated as a condition;

(c) whether there is any prior precedent treating a similar term as a condition; and

(d) whether certainty and predictability of the term is essential in the context of mercantile transactions such as timing.

58 It is apparent from a review of the above factors that none of them are applicable on the facts of this case. I will therefore have to determine this issue by reference to the nature, purpose and terms of the Redundancy Agreement.

59 Counsel for the defendant rightly accepted that the confidentiality obligation under the employment contract would survive even after the plaintiff was made redundant on 11 May 2009. In other words, even if there was no express acknowledgment in the Redundancy Agreement that he would continue to observe the confidentiality obligation, he was nevertheless bound to do so. As such, the acknowledgment did not add any new or fresh obligation on the part of the plaintiff.

60 It is clear that the intention of the parties, in particular the defendant, under the Redundancy Agreement was to secure the termination of the employment contract and the plaintiff's confirmation that he has no further claims arising from the termination of his employment with the defendant. This was also made clear in the defendant's covering letter of 11 May 2005 enclosing the Redundancy Agreement. In the letter, the defendant expressly stipulated that the payment of the sums under the Redundancy Agreement was subject to the plaintiff's acceptance that the payment was in full and final settlement of all and any claims that he may have against the defendant. Conspicuously there was no reference whatsoever to any confidentiality obligation in the covering letter. In the present case, the acknowledgement of the confidentiality obligation could hardly be characterised as a condition. I therefore reject the defendant's submission that the acknowledgement of the confidentiality obligation was a condition of the Redundancy Agreement.

Situation 3(b) – where the breach has deprived the innocent party of substantially the whole benefit of the contract

61 This ground is a non-starter. In determining whether the breach had deprived the defendant of the substantial benefit of the Redundancy Agreement, counsel for the defendant accepted that the inquiry is focussed not on the potential loss of the breach but the actual loss, if any. The parties have to "wait and see" what the nature and consequences of the breach actually are. See *RDC Concrete Pte Ltd* at [99] to [110].

62 It is indisputable that the plaintiff did not substantially breach the Redundancy Agreement. Although he initially breached the confidentiality obligation in forwarding the two emails, he subsequently deleted them on the same day when he was instructed to do so by the defendant. There is no dispute that the breach did not cause any loss whatsoever to the defendant. Thereafter the plaintiff, at the request of the defendant, reinforced his confidentiality obligation by executing a Statutory Declaration.

63 On the evidence, I find that the plaintiff's breach did not deprive the defendant of substantially the whole benefit of the Redundancy Agreement. On the contrary, I find that the defendant did in fact receive substantially the whole benefit of the Redundancy Agreement.

64 In the circumstances, I find that while the plaintiff did breach his confidentiality obligation, the breach was not repudiatory in nature so as to entitle the defendant to terminate the Redundancy Agreement. Such a breach merely entitles the defendant to a claim in damages. However as the defendant has not suffered any loss arising from the forwarding of the two emails, I will only award nominal damages to the defendant on account of this breach. Accordingly, I find that the sum of $455,085.39 payable by the defendant under the Redundancy Agreement is due and owing to the plaintiff.

65 In coming to this decision, I must stress that I am not suggesting that a breach of a confidentiality clause in a redundancy agreement can never amount to a repudiatory breach. This was a submission which the plaintiff made in his closing. In my opinion, the question of whether a breach of a confidentiality clause can amount to a repudiatory breach of a redundancy agreement can only be answered by reference to the terms of the agreement and the effect of the breach. I have no doubt that an employer can, with appropriately robust drafting, achieve the result that has eluded the defendant in this case.

The Counterclaim

66 The defendant's counterclaim is to recover the sum of $218,599 that was paid to the plaintiff in January 2009 pursuant to clause 8 of the employment contract which provides as follows:

> To compensate you for the loss of existing stock entitlements with your current employer, we will match your current entitlements using the RBS Group method of valuation subject to your providing proof of such entitlement. You will be paid the following amounts*, which was valued as of 15 May 2007, in accordance with the following schedule:
>
> Jan 2009 S$218,599
>
> Jan 2010 S$175,707
>
> Jan 2011 S$86,543
>
> Jan 2012 S$86,543
>
> *Note: The stock value may vary based on the final stock cancellation statement.
>
> The Group reserves the right to withhold payment of the Stock Buy Out payment pending the outcome of any disciplinary procedures for conduct or performance which the Group could treat as grounds for dismissal, and refuse payment if you are subsequently dismissed.
>
> *If you give or receive notice of termination of your employment (other than by reason of redundancy) or your employment is terminated without notice (other than by reason of redundancy) within six months of the date of payment of the stock buyout payment you will be responsible for repaying the full amount of the Stock Buy Out to the Group within 14 days of the date of termination of your employment*.
>
> [emphasis added]

67 The January 2009 payment was subject to the condition that if the plaintiff's employment was terminated without notice other than by redundancy within six months from the payment, the plaintiff would be required to repay the sum. The defendant submitted that since the plaintiff's employment

was terminated without notice by letter dated 22 May 2009, the sum is repayable as it was paid within less than six months of the termination.

68 As I have already found that the plaintiff's employment was terminated by reason of the Redundancy Agreement and that he had ceased to be an employee when the defendant purported to dismiss him on 22 May 2009, the obligation by the plaintiff to repay the stock buyout paid in January 2009 does not arise.

Conclusion

69 In the result, the plaintiff's claim for the sum of $455,085.39 is allowed together with interest at 5.33% per annum from the date of the writ to the date of this judgment. The defendant's counterclaim is also dismissed. I will only allow one set of costs to the plaintiff to be taxed on a standard basis if not agreed.

70 Although the plaintiff succeeded in his claim, I should make a few observations about the conduct of the defendant. There is no doubt that the defendant was extremely generous in offering the terms of the Redundancy Agreement to the plaintiff. Even the plaintiff candidly accepted that it was so. The defendant treated the breach of the confidentiality obligation very seriously and in my view rightly so. It was clear to me that the defendant genuinely believed that it was contractually entitled to summarily dismiss the plaintiff on account of his misconduct. The defendant conducted its investigation fairly and provided the plaintiff which sufficient opportunities to explain his conduct. It was the defendant's own fortuitous discovery of the breach which prevented use of the two emails by the plaintiff. Ironically, the defendant "saved" the plaintiff from a claim in damages by their timely intervention. I should add that even if the plaintiff did use the two emails to the detriment of the defendant, it would not have changed the outcome of my decision that there was no repudiatory breach of the Redundancy Agreement. The only difference is that I would have awarded the defendant damages for the breach to be assessed which may well be in excess of the sums payable under the Redundancy Agreement.