IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 126

Suit No 1053 of 2014

Between

Omae Capital Management Pte Ltd

… *Plaintiff*

And

Tetsuya Motomura

… *Defendant*

GROUNDS OF DECISION

[Employment Law] — [Pay] — [Recovery]
[Employment Law] — [Contract of service] — [Termination without notice]
[Legal Profession] — [Discharge of counsel]
[Civil Procedure] — [Vacation of trial dates]
[Civil Procedure] — [Trial] — [Plaintiff refusing to participate]

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v
Tetsuya Motomura

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18 June 2020

Pang Khang Chau J:

Introduction

1 When this case came up for trial, the plaintiff declined to participate in the trial. I proceeded to hear the defendant's evidence in the plaintiff's absence, dismissed the plaintiff's claim and gave judgment for the defendant's counterclaim. The plaintiff has appealed against my decision.

Background

2 The plaintiff is a Singapore-incorporated company that was a Registered Fund Management Company ("RFMC") pursuant to para 5(1)(*i*) read with para 5(7) of the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed), a subsidiary legislation of the Securities and Futures Act (Cap 289, 2006 Rev Ed). To commence business as an RFMC, the plaintiff had, in May 2013, submitted

Form 22A to the Monetary Authority of Singapore to verify that, *inter alia,* the plaintiff, its shareholders, directors and representatives were fit and proper persons in that within the past ten years, none of them had been the subject of disciplinary or criminal proceedings. The plaintiff obtained its RFMC registration in August 2013.[1]

3 The defendant was employed by the plaintiff in March 2013 as the latter's Executive Director and Chief Investment Officer.[2] He had previously been employed as the Managing Director and Head of Global Financial Markets Trading of Centrale Raiffeisen Boerenleenbank BA ("Rabobank") in Tokyo.[3] In 2010, the US Department of Justice began investigations into Rabobank for manipulation of the US dollar and Japanese yen London Interbank Offered Rate.[4] On 13 January 2014, a US Magistrate Judge sitting in the Southern District of New York signed a criminal complaint against the defendant, formally charging him with conspiracy to commit wire fraud and bank fraud.[5]

4 The plaintiff alleged that the defendant deliberately concealed the ongoing Rabobank investigations to obtain a job with the plaintiff, and the plaintiff was thereby deceived into submitting a Form 22A which was untrue.[6] According to the plaintiff, upon being confronted on 14 January 2014 by the plaintiff's Chief Executive Officer, Mr Masao Omae ("Mr Omae"), about the

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1 Statement of Claim (Amendment No 1) ("SOC") at para 1.2.1.

2 SOC at para 1.2.1.a; Tetsuya Motomura's affidavit of evidence-in-chief, filed on 20 June 2019 ("DAEIC"), at para 7.

3 DAEIC, at para 31.

4 SOC at para 2.1.1.a.

5 SOC at para 2.1.1.c.

6 SOC at para 2.1.3.

charge faced by the defendant in the US, the defendant abruptly resigned and left Singapore.[7] The plaintiff claimed that, as a result of the defendant's deceit and abrupt departure, the plaintiff was compelled to cease business as an RFMC.[8] The plaintiff therefore claimed damages from the defendant amounting to $17,593,867.70, which included $750,000 for the initial capital to establish the plaintiff, $5,780,000 for "expectation loss" and $11,000,000 for "reputational loss".[9]

5 According to the defendant, at the time the Form 22A was submitted, he did not know that he was under any investigation. It was only on 11 November 2013 that he found out there was a possibility that he could be charged. He immediately informed Mr Omae, who unexpectedly terminated the defendant's employment on 5 December 2013 without notice.[10] In any case, the plaintiff ceased business as an RFMC not because of the defendant's departure but because the plaintiff had run out of funds and was unable to attract investors, maintain the minimum capital required to operate as an RFMC and attract suitable candidates to replace the defendant.[11] The defendant counterclaimed $93,500 for arrears in salary as well as salary in lieu of notice and $18,030 for reimbursement of expenses.[12]

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7 SOC at para 2.2.1.

8 *Ibid*.

9 SOC at para 3.1.2.

10 Defence and Counterclaim (Amendment No 1) ("D&CC") at para 12.

11 D&CC at paras 15 and 16.

12 D&CC at para 34.

Relevant procedural history

6 At a pre-trial conference ("PTC") before the learned Assistant Registrar Justin Yeo ("the AR") on 11 April 2019, parties were informed that the suit was fixed for trial from 16 to 19 July 2019. Parties were also directed to exchange their affidavits of evidence-in-chief ("AEICs") by 30 May 2019 and set down for trial by 1 July 2019. (The deadline for exchange of AEICs was eventually extended by consent of parties to 18 June 2019, while the deadline for setting down was subsequently extended by me to 8 July 2019.)

7 The plaintiff was calling one witness of fact, Mr Omae, and one expert witness, Ms Katherine Ann Colchester ("Ms Colchester"). The defendant was similarly calling one witness of fact (the defendant himself) and one expert witness, Mr Tan Boon Hoo ("Mr Tan").

8 The AEICs of Mr Omae, Mr Tan and the defendant were filed on 20 June 2019. At the judge PTC ("JPTC") held before me on 24 June 2019, the plaintiff's counsel explained that Ms Colchester's AEIC was delayed because there were logistical difficulties getting her AEIC notarised as she was not located in London but (in the plaintiff's counsel's words) "way out in Suffolk". Ms Colchester's AEIC was eventually filed on 27 June 2019, less than three weeks before the commencement of trial.

Plaintiff missed the deadline for setting down

9 On 8 July 2019, the plaintiff filed a notice for setting down an action for trial without payment of the requisite fees. The notice was not accepted by the Registry for filing pending the payment of the said fees. The plaintiff was therefore deemed to have failed to set down by the 8 July 2019 deadline. On

10 July 2019, the Registry sent a reminder to the plaintiff to complete setting down prior to the PTC scheduled to be held before the AR on 11 July 2019.

10 About an hour after the reminder was sent, the plaintiff's counsel wrote to court to inform that:

> Unforunately [*sic*], the Plaintiff instructs that they [*sic*] unable to reach their expert (who is believed to be in the UK) without whom they are unable to proceed to [*sic*] the trial as fixed. In the premises, the Plaintiff instructs that they require additional time to reach their expert or to find a replacement expert.

The letter added that the plaintiff's counsel had been instructed to bring this development to the AR's attention at the PTC on 11 July 2019. The AR brought this letter to my attention, and I indicated that, if the plaintiff was unable to get in touch with its expert witness in order to bring her to Singapore before the trial commenced, the trial should still proceed on 16 July 2019 with the factual witnesses only. I also offered to see parties urgently for a JPTC on 12 July 2019, if required.

Plaintiff sought vacation of trial dates five days before trial

11 At the PTC on 11 July 2019, the plaintiff's counsel explained that the plaintiff had not set the matter down for trial because the plaintiff's expert was uncontactable and the plaintiff needed additional time to locate the expert. The plaintiff's counsel further sought a vacation of the trial dates, explaining that he needed two to three weeks to ascertain what was going on, and to see whether Ms Colchester was still willing to come forward as the plaintiff's expert witness.

12 The defendant's counsel objected strongly. He explained that the defendant had already incurred tremendous costs in arranging for the attendance of his expert witness, booking the facilities for the defendant to give evidence by video-link from Japan, and arranging for the defendant's Japanese lawyer to

fly to Singapore to observe the trial. (I had, on 29 February 2019, granted leave for the defendant to give evidence by video-link from Japan, as the defendant feared being arrested for extradition to the US to face the charge referred to at [3] above if he were to travel to Singapore to attend trial. In doing so, I declined to follow the High Court's decision in *Anil Singh Gurm v J S Yeh & Co and another* [2018] SGHC 221.)

13 When the AR put to the plaintiff's counsel my suggestion for proceeding first with the factual witnesses as scheduled and then hearing the expert witnesses at a later tranche, the plaintiff's counsel objected that this would not be feasible. He explained that his main witness was in fact the expert witness, as the crux of the plaintiff's case lay in the construction of the various declarations found in Form 22A. The plaintiff's counsel further explained that, as their expert witness had gone missing, they might need to find a new expert, and this might entail adjustments to the evidence of the plaintiff's factual witness.

14 The plaintiff's counsel added that he was not able to prepare for trial without the expert. So if the trial was not vacated he might be placed in a situation where he would have to discharge himself. Finally, the plaintiff's counsel warned that, if he were to discharge himself, the plaintiff would need to find another lawyer as the plaintiff, being a body corporate, could not act without a lawyer.

15 The AR decided to direct parties to attend before me on 12 July 2019. He also indicated to the plaintiff's counsel that if the plaintiff's intention was to vacate the trial, the standard practice was for a summons for vacation of trial dates to be filed.

Plaintiff's counsel applied to discharge himself

16 To my surprise, the plaintiff's counsel turned up at the JPTC on 12 July 2019, not with a summons for vacation of trial dates, but with a summons for discharge of solicitor.[13] Strangely, although the summons for discharge of solicitor was framed as an application by the plaintiff's counsel to discharge himself, the application was supported, not by an affidavit from the plaintiff's counsel, but by an affidavit from Mr Omae on behalf of the plaintiff. The affidavit explained that as the plaintiff had been unable to pay the plaintiff's counsel's fees and related charges, and as the plaintiff did not wish to "unfairly take advantage of their solicitors", the plaintiff had on 11 July 2019 revoked the plaintiff's counsel's warrant to act.

17 I brought the case of *Furniture & Households Square Ltd v Brosco International Pte Ltd* [1997] SGHC 9 ("*Brosco International*") to the plaintiff's counsel's attention and asked to be addressed on how the case might bear on the plaintiff's counsel's application to discharge himself in such circumstances. In that case, on the third day of trial, in the midst of the cross-examination of the plaintiff's second witness, the defendant's counsel applied for an adjournment, as the defendant wished to make an application for the trial judge to recuse himself. Upon the judge disallowing the adjournment, the defendant's counsel applied to be discharged from further acting for the defendant. The plaintiff's counsel pointed out that, if the defendant's counsel were to be discharged, there would be difficulty in carrying on with the hearing as the defendant, being a body corporate, could not carry on any proceedings without a lawyer. The judge dismissed the application, reasoning that allowing the discharge in such circumstances would result in the waste of time allocated for the hearing and

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13 S 1053/2014 – HC/SUM 3501/2019.

also cause inconvenience and expense to the plaintiff. The defendant's pique at not being allowed an adjournment was not sufficient justification for allowing the application for discharge. This was the more so since, if the discharge was allowed, the defendant would have achieved its purpose of adjourning the hearing, which the judge had already disallowed. Upon the dismissal of the application to discharge herself, the defendant's counsel informed the court that she had been instructed not to participate further in the proceedings. The judge then continued hearing the evidence for the plaintiff and gave judgment in favour of the plaintiff.

18 The plaintiff's counsel submitted that *Brosco International* could be distinguished as the application for discharge in that case was made after commencement of trial while the present case had not even been set down. I pointed out that the failure to set down by 8 July 2019 was a breach of the court's directions, and it was not open to the plaintiff to take advantage of its own breach of the court's directions in this way.[14] In any event, I did not consider the difference between an application made during the trial and one made just before the trial to be a relevant distinction. The considerations in both situations should be the same – whether the wastage of time allocated for hearing and the inconvenience and expense caused to the other party if the discharge were allowed could be justified in the circumstances.

19 The plaintiff's counsel then reiterated the difficulties faced by the plaintiff because of the "disappearance of the plaintiff's expert".[15] I reiterated my proposal to hear the factual witnesses first, and for the expert witnesses to

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14 Notes of Argument ("NA"), 12 July 2019, p 2, lines 11 to 17.

15 NA, 12 July 2019, p 2, lines 19 to 20.

be heard in the further tranche, as this would minimise the wastage of allocated hearing days and also avoid wasting the substantial costs already incurred by the defendant.[16]

20 The plaintiff's counsel then submitted that there was a huge overlap between Mr Omae's and Ms Colchester's evidence, and it would be highly prejudicial for Mr Omae to take the stand in such circumstances.[17] I could not understand this submission since Mr Omae was a factual witness and he had already filed an AEIC to state under oath the facts within his knowledge. I explained that, as a witness of fact, Mr Omae could not change his evidence mid-stream depending on whether Ms Colchester would be giving evidence or be replaced by another expert.[18]

21 The plaintiff's counsel also pointed out that none of the trial bundles had been prepared. I noted that I had previously split the responsibilities for preparation of bundles between parties, so the bundle for the defendant's AEICs should be ready. As for the plaintiff's AEICs, since the plaintiff had only two witnesses, I was prepared to go to trial using only the electronic copies already filed in eLitigation.[19]

22 The plaintiff's counsel returned to the issue of the plaintiff's impecuniosity. He submitted that the court could not force the plaintiff's counsel to act for free. Therefore, to safeguard the plaintiff's right to counsel, the court should grant the adjournment in order to give the plaintiff the

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16 NA, 12 July 2019, p 3, lines 1 to 3.

17 NA, 12 July 2019, p 3, lines 9 to 11.

18 NA, 12 July 2019, p4, lines 1 to 2.

19 NA, 12 July 2019, p 5, lines 9 to 15.

opportunity to raise funds to re-engage the plaintiff's counsel to continue acting. I responded that I was not prepared to accede to this on the eve of trial, as any concerns over funding of the action should have been settled well in advance.[20]

Discharge application dismissed

23 At the end of the JPTC, I dismissed the application to discharge solicitor and made an order that unless the plaintiff set the action down for trial by 2.00pm on 15 July 2019, the plaintiff's claim would be struck out and judgment would be entered for the defendant's counterclaim.[21]

24 In the event, the plaintiff complied with the unless order and completed the setting down of the action for trial on 15 July 2019.

Commencement of trial

25 On the first day of trial, Mr Omae, the plaintiff's Chief Executive Officer and sole director, was seated alone at the counsel's table. The plaintiff's counsel was present in court but seated in the public gallery. Mr Omae informed the court that he would like the trial dates to be vacated.[22] His reasons were that the plaintiff no longer had a lawyer and the plaintiff's witness had disappeared in the last minute.[23]

26 In order to help the plaintiff appreciate the possible costs consequences of a vacation of trial dates at that stage of proceedings, I sought from the

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20 NA, 12 July 2019, p 7, line 29 to p 8, line 5.

21 NA, 12 July 2019, p 12, lines 9 to 24.

22 Notes of Evidence ("NE"), 16 July 2019, p 1, line 16.

23 NE, 16 July 2019, p 3, lines 7 to 12.

defendant's counsel an estimate of what the defendant would be claiming for costs thrown away if I were to vacate all four days of trial. Based on the rough estimates provided by the defendant's counsel in court, the costs thrown away which the defendant might claim could be as high as $62,000.[24]

27 I then granted a short stand down for Mr Omae to consider the risk of the plaintiff being ordered to pay the costs thrown away should the trial dates be vacated.[25] Just prior to standing down, I asked Mr Omae, since he had discharged the plaintiff's counsel, whether he was asking the court to allow him to represent the plaintiff until such time as he could find a new lawyer.[26] Mr Omae replied that the plaintiff did not have the authority to appoint anyone, and he was not representing the plaintiff.[27] Puzzled by this answer, I sought and obtained confirmation from Mr Omae that he was indeed a director of the plaintiff.[28] I then explained to Mr Omae that, if his position was that he had no authority to represent the plaintiff, it would also mean that he did not have the authority of the plaintiff to apply for vacation of the trial dates.[29] As Mr Omae hesitated over his answer,[30] I gave Mr Omae time to mull over this issue also during the stand down.[31]

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24 NE, 16 July 2019, p 5, line 8 to p 9, line 4.

25 NE, 16 July 2019, p 9, lines 6 to 8.

26 NE, 16 July 2019, p 9, lines 17 to 22.

27 NE, 16 July 2019, p 9, lines 27 to 28.

28 NE, 16 July 2019, p 9, lines 31 to 32.

29 NE, 16 July 2019, p 11, lines 13 to 16.

30 NE, 16 July 2019, p 11, line 18 to p 12, line 14.

31 NE, 16 July 2019, p 12, lines 25 to 29.

28 When Mr Omae returned to court, he informed that he was not representing the plaintiff. I then asked whether that meant he was no longer making an application for vacation of the trial dates. He responded that the plaintiff was making the application, but he had no authority to do so. I then asked who was in court to speak on behalf of the plaintiff to make the application. Mr Omae responded that the court should speak to the plaintiff directly. Since the plaintiff was not a natural person but a body corporate, I asked Mr Omae how he expected me to speak to the plaintiff directly. Mr Omae responded that it should be done through "[f]ormal writing". I explained that it was the plaintiff's responsibility to send someone to court who could speak on its behalf.[32]

29 I then asked Mr Omae once again whether he was authorised to speak on behalf of the plaintiff to seek a vacation of the trial dates, to which Mr Omae replied that he was not. I then explained that, if there was no one in court authorised to seek a vacation of trial dates on behalf of the plaintiff, it would mean that there was no application for a vacation of trial dates before me.[33]

30 The result was, despite my repeated indication that I was prepared to consider a formal application from the plaintiff for a vacation of trial dates if such an application were to be made by someone with authority to represent the plaintiff, Mr Omae declined to make any such application on behalf of the plaintiff. Given the circumstances, in the absence of any formal application for a vacation of trial dates, I decided to proceed with the trial and, following the

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32 NE, 16 July 2019, p 13, line 22 to p 14, line 4.

33 NE, 16 July 2019, p 16, lines 20 to 29.

defendant's opening statement, invited Mr Omae (who was the only witness of fact who filed an AEIC on behalf of the plaintiff) to take the witness stand.[34]

31 Mr Omae declined to take the stand and walked out of court. I therefore proceeded to hear the defendant's evidence.[35]

Discussion

32 Order 35 r 1(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") provides:

> If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party, or may without trial give judgment or dismiss the action, or make any other order as he thinks fit.

The commentary on this provision in *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2019) ("*Singapore Civil Procedure*") at para 35/1/2 provides:

> … if the plaintiff does not appear, but the defendant does appear at the trial, the defendant is entitled to judgment dismissing the claim, and if he has a counterclaim, he may prove such counterclaim, so far as the burden of proof lies on him. The effect of this judgment is the same as if it were a judgment dismissing the action on the merits, *i.e.* the court will give the whole costs of the action and counterclaim to the defendant (*Armour v. Bate* [1891] 2 Q.B. 233; followed in *Asia Commercial Finance v. Pasadena Properties Development Sdn. Bhd.* [1991] 1 M.L.J. 111).

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34 NE, 16 July 2019, p 19, lines 1 to 14; p 39, line 13.

35 NE, 16 July 2019, p 47, lines 14 to 24.

Plaintiff's claim

33 In respect of the plaintiff's claim against the defendant, having regard to the plaintiff's failure to participate in the trial, I decided to dismiss the plaintiff's claim pursuant to O 35 r 1(2) of the ROC.

Defendant's counterclaim

Whether defendant should be granted judgment in default or judgment on the merits

34 In respect of the defendant's counterclaim, as noted in the passage from *Singapore Civil Procedure* cited at [32] above, where the plaintiff fails to participate in the trial, the defendant who has a counterclaim may proceed to prove such counterclaim and obtain judgment on the merits. I note however that there is a subsequent paragraph in the commentary on O 35 r 1(2) in *Singapore Civil Procedure* which indicates that the court has the discretion to grant a judgment in default of appearance at the trial as opposed to a judgment on the merits if the court is of the view that the evidence before it is incomplete. The authority cited for this proposition is *Su Ah Tee and others v Allister Lim and Thrumurgan (sued as a firm) and another (William Cheng and others, third parties)* [2014] SGHC 159 ("*Su Ah Tee*"). I therefore consulted that case for guidance on the exercise of my discretion whether to grant judgment in default of appearance or judgment on the merits in respect of the defendant's counterclaim.

35 In *Su Ah Tee*, the defendant was a solicitor who represented the plaintiff in the purchase of a property. The plaintiff sued the defendant for professional negligence. The defendant brought third party proceedings against the vendor of the property, the property agent who represented the plaintiff in the transaction, and the property agency at which the said property agent was

employed at the material time. Both the vendor and the property agent participated in the trial. The vendor was found liable for fraudulent misrepresentation while the property agent was found liable for negligent misrepresentation. The property agency filed its defence to the third party proceedings but was neither present nor represented at trial. The only issue in relation to the property agency was its vicarious liability for the property agent's default. Belinda Ang Saw Ean J gave judgment against the property agency in default of its appearance at trial, as she considered that a judgment on the merits against the property agency was inappropriate because the evidence "appeared incomplete", based on the following four grounds (at [226]):

> (a) the property agent was not asked about his relation to the property agency in detail during trial;
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> (b) the defendant's Statement of Claim against the property agency merely stated that the property agency was the property agent's employer and would be responsible and liable in law for the actions and liabilities of the property agent;
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> (c) the defendant relied on an associate agreement signed by the property agent in its Reply to the property agency's Defence, but the property agent was not asked about this document at trial; and
>
> (d) there might have been other documents that might prove to be relevant to the action but were not before the court.

36 In the present case, the plaintiff had participated in the proceedings up to the first day of trial and had filed numerous affidavits and voluminous documentary evidence, not only for the trial but also in respect of numerous interlocutory applications. The defendant's evidence was also supported by

documents provided by the plaintiff. This was certainly not a case where the evidence was "incomplete" in the sense contemplated in *Su Ah Tee.* This was therefore an appropriate case to exercise my discretion to go into the merits of the defendant's counterclaim and render judgment on the merits.

Evaluation of the defendant's case

37 The defendant's counterclaim comprised four heads of claim:

(a) arrears in salary up to the termination of his employment;

(b) three months' salary in lieu of notice;

(c) return of rental deposit; and

(d) payments made to an executive search firm for the defendant's employment pass application as well as the incorporation of a company.

38 In relation to the first head of claim, the defendant gave evidence that he was employed in March 2013 by the plaintiff at a salary of $16,700 per month.[36] For the month of September 2013, the defendant was paid only $6,700, leaving $10,000 of arrears in salary.[37] For the months of October, November and December 2013, the defendant was not paid his salary at all.[38] The defendant was informed by Mr Omae that the plaintiff could not pay the defendant's salary because the plaintiff had run out of funds.[39] The plaintiff was even evicted from

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36 DAEIC, at para 7.

37 DAEIC, at para 73(a).

38 DAEIC, at para 73(b).

39 NE, 18 July 2019, p 8, lines 8 to 11.

its office premises in October 2013 because it could not pay rent.[40] The plaintiff ran out of money because Mr Omae used the plaintiff's money for his personal expenses.[41] Not only did the plaintiff owe the defendant salary, Mr Omae also attempted to borrow money from the defendant.[42]

39 Based on the foregoing evidence, I found it proven on the balance of probabilities that the defendant was paid only part of his salary for September 2013 and was not paid his salary for October and November 2013.

40 In relation to the second head of claim, it was provided in clause 9.2 of the defendant's employment contract with the plaintiff that either side may terminate the defendant's employment by giving three months' notice, while clause 9.3 allowed the plaintiff to terminate the defendant's employment by payment of salary in lieu of notice.[43] The defendant gave evidence that, on or around 11 November 2013, he was informed by his former solicitor that there was a possibility that he would face charges in the US. The defendant immediately informed Mr Omae of this.[44] The defendant also advised Mr Omae that he would need to look for a replacement for the defendant in the event that the defendant was actually charged.[45] On 5 December 2013, Mr Omae told the defendant that his employment was terminated with immediate effect.[46] The

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40 DAEIC, at para 61.

41 NE, 18 July 2019, p 9, lines 19 to 22.

42 DAEIC, at para 59; NE, 18 July 2019, p 8, lines 16 to 18.

43 1st affidavit of Masao Omae, filed on 14 October 2014 for the purpose of S 1053/2014 – HC/SUM 5135/2014, at pp 32 to 33.

44 DAEIC, at paras 13 and 47.

45 DAEIC, at para 48.

46 DAEIC, at paras 14 and 50.

defendant was forced by Mr Omae to send an e-mail of resignation using his company e-mail address on 5 December 2013, after which he returned the company laptop and his e-mail account was terminated.[47]

41 Based on the foregoing evidence, I found it proven on the balance of probabilities that the defendant was dismissed by the plaintiff without notice and was therefore entitled to payment of three months' salary in lieu of notice in accordance with clauses 9.2 and 9.3 of his employment contract.

42 In coming to this view, I had considered the effect of the defendant's evidence that he had been forced to send a resignation e-mail using his office e-mail account on the same day that he was dismissed by the plaintiff without notice. The issue was whether the sending of this resignation e-mail undermined the defendant's claim that he was dismissed by the plaintiff. In my view, the e-mail would not undermine the defendant's claim if the defendant's evidence that he was forced to send the e-mail was to be believed. I found no reason to doubt the veracity of the defendant's evidence on this point having regard to the overall context of the events which had transpired from end 2013 to early 2014.

43 More importantly, the plaintiff did not rely on the 5 December 2013 resignation e-mail sent by the defendant and had not pleaded that the defendant resigned voluntarily *on 5 December 2013*. Instead, para 10 of the plaintiff's Reply and Defence to Counterclaim merely denied the defendant's claim and put the defendant to strict proof, while cross-referencing certain paragraphs in the plaintiff's Statement of Claim ("SOC"). The paragraphs in the SOC so cross-referenced did not mention the 5 December 2013 resignation e-mail from the

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47 DAEIC, at para 53; NE, 18 July 2019, p 7, line 18.

defendant. Instead, reference was made to the defendant's resignation on 14 January 2014.[48] However, the letter of resignation signed by the defendant on 14 January 2014 was for resignation as a *company director* of the plaintiff, and not for resignation as an employee of the plaintiff.[49] Since the defendant's claim pertained to his dismissal as an employee of the plaintiff in his capacity as the Chief Investment Officer and not to the loss of his position as a company director of the plaintiff, the 14 January 2014 resignation was not relevant to the defendant's claim for three months' salary in lieu of notice.

44 I therefore found the defendant's claim for three months' salary in lieu of notice well proven.

45 On the third head of claim, the defendant gave evidence that, prior to his employment with the plaintiff, the defendant was renting an apartment at the monthly rent of $6,700.[50] After the defendant joined the plaintiff, the plaintiff took over the tenancy of the apartment.[51] As part of this arrangement, the plaintiff issued a cheque to the defendant in April 2013 to "replace [the] rental deposit" which the defendant had earlier paid to the landlord.[52] On 3 December 2013, the plaintiff requested the defendant to use the money from the April 2013 cheque (originally meant as reimbursement to the defendant for the rental

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48 SOC at para 2.2.1.b.

49 8th affidavit of Masao Omae, filed on 27 May 2016 for the purpose of S 1053/2014 – HC/SUMs 1372 & 2115/2016, at para 3.5.12 and pp 197 to 198 (also referred to in Masao Omae's affidavit of evidence-in-chief, filed on 20 June 2019, at para 2.4.1).

50 DAEIC, at para 8.

51 NE, 18 July 2019, p 11, lines 6 to 8; 5th affidavit of Masao Omae, filed on 3 August 2015 for the purpose of S 1053/2014 – HC/SUM 3208/2015, at p 23.

52 NE, 18 July 2019, p 10, lines 24 to 29; 5th affidavit of Masao Omae, at p 17.

deposit) to defray the rent for October and November 2013, to which the defendant agreed.[53]

46 Thus the arrangement between the plaintiff and the defendant was that, once the plaintiff agreed to take over the tenancy of the property from the defendant, the rental deposit became the plaintiff's responsibility. Therefore the plaintiff gave a cheque to the defendant to replace the rental deposit which in the end was used to defray the outstanding rent for October and November 2013 instead at the plaintiff's request due to the plaintiff's dire financial situation. As a result of this arrangement, the defendant failed to obtain the return or reimbursement of the rental deposit which he initially paid. I therefore found the plaintiff liable to repay the rental deposit to the defendant.

47 I should note for completeness that there appeared to be a discrepancy between the nature of the claim described in the previous paragraph and that stated in para 76(b)(ii) of the defendant's AEIC. Paragraph 76(b)(ii) appeared to state that the defendant was claiming reimbursement of a security deposit he paid to the landlord for a new tenancy concluded in or after November 2013. As I had difficulty understanding a claim framed in this manner, I sought clarification from the defendant during his oral testimony. The narrative set out in the previous paragraphs reflected the explanations so given, which I found reasonable and satisfactory. I therefore accepted those explanations on the balance of probabilities.

48 In relation to the fourth head of claim, the defendant's evidence was that, upon termination of the defendant's employment with the plaintiff, Mr Omae

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53 NE, 18 July 2019, p 10, line 13 to p 11, line 3; 5th affidavit of Masao Omae, at p 17.

informed the defendant that the plaintiff would be cancelling the defendant's employment pass within five days. As the defendant's children were still studying in Singapore, the defendant decided to incorporate a new company in Singapore and apply for an employment pass under the auspices of this new company to enable his family to continue remaining in Singapore.[54] The costs of establishing this new company and of obtaining an employment pass under the auspices of this new company came to $4,630.[55]

49 I decided to dismiss this head of claim. First, the defendant failed to tender any documentary evidence in support of the claim. Secondly, the claim was not legally sustainable in any event because the defendant's employment contract specifically allowed for the termination of his employment without notice by way of payment of salary in lieu of notice. The costs in question therefore could not be said to have been caused by any breach of contract on the plaintiff's part.

Conclusion

50 For the foregoing reasons, I dismissed the plaintiff's claim and I gave judgment for the defendant's counterclaim for the following amounts:

(a) $43,400 for arrears in salary;

(b) $50,100 for three months' salary in lieu of notice; and

(c) $13,400 for return of the rental deposit.

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54 DAEIC, at para 54.

55 DAEIC, at para 76(a).

Costs

51 As noted in the passage from *Singapore Civil Procedure* quoted at [32] above, the defendant should be awarded the whole costs of the action and counterclaim. The matter was fixed for trial for four days and the trial only took two days due to the plaintiff's last minute decision not to participate in the trial. Having regard to the fact that the defendant had already done all the getting up in preparation for the full four-day trial, I fixed costs at $90,000 and allowed the defendant's claim for disbursements of $56,817.55.

Final observations

52 The plaintiff's expert witness, Ms Colchester, has held senior positions in various financial institutions over the years and currently heads her own business advisory firm. For a person of such professional stature to suddenly become totally "uncontactable" as claimed by the plaintiff is difficult to believe. Ms Colchester is based in Suffolk, UK and not in some remote, difficult-to-reach part of the world. Significantly, there was no affidavit from the plaintiff explaining how it lost contact with Ms Colchester, when they were last in touch, and what efforts had been made to get in touch with her. While the true reason for Ms Colchester's non-availability remains a matter of speculation, the fact was that Ms Colchester's absence (for whatever reason) did not prevent the plaintiff's only factual witness, Mr Omae, from going into the witness stand first to give his evidence.

53 As a witness of fact, Mr Omae's evidence was locked in once he filed his AEIC. His evidence should not change depending on whether the plaintiff's expert was present or absent in court. To suggest, as the plaintiff's counsel had done at [13] above, that Mr Omae's AEIC would need adjustment if the plaintiff were to find a new expert to replace Ms Colchester, was plainly ridiculous. It

amounted to a suggestion by the plaintiff's counsel that Mr Omae was prepared to perjure himself according to which way the expert's opinion went.

54 Had the plaintiff's counsel explained that he would be hampered in the cross-examination of the defendant without the plaintiff's expert sitting behind him in court to advise him, that would have sounded more reasonable. But that was not the submission made by the plaintiff's counsel. In any event, even if that had been the submission, it would afford no answer to why the trial could not proceed, at the minimum, with Mr Omae's evidence first.

55 In the final analysis, whatever may have been the actual merits in favour of vacating the trial dates, no factual foundation to support the vacation was ever placed before me in a sworn affidavit. Instead of seeing me on 12 July 2019 with a summons for vacation of trial dates as suggested by the AR, the plaintiff's counsel turned up with a summons for discharge of solicitor, thereby foregoing all opportunities of placing before me any evidence which may have favoured vacating the trial.

56 Neither the summons for discharge of solicitor nor Mr Omae's affidavit supporting the said summons contained a request to vacate the trial or referred to any reason why the trial should not proceed. It was as though the plaintiff expected that, once the summons for discharge of solicitor was filed, the trial would have to be vacated as a matter of course and there was no further need for the plaintiff to persuade the court that the trial should be vacated. In these circumstances, and especially in the light of what the plaintiff's counsel told the AR at [14] above on the previous day, the filing of the summons for discharge of solicitor should rightly be seen as a cynical attempt to present the court with a *fait accompli*, an attempt to obtain through the back-door what the plaintiff

did not believe it could obtain by an application for vacation of trial dates. This was not a manoeuvre which the court should condone.

Pang Khang Chau
Judge

Arvind Daas Naaidu (Arvind Law LLC) for the plaintiff;
Walter Ferix Silvester (Silvester Legal LLC) for the defendant.
