Aliev Firoudin *v* Kon Yin Tong & another
[2013] SGHC 128

Case Number : Originating Summons No 1015 of 2011

Decision Date : 09 July 2013

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Deborah Evaline Barker SC and Ang Keng Ling (KhattarWong LLP) for the plaintiff; Ng Lip Chih (NLC Law Asia LLP) for the defendants.

Parties : Aliev Firoudin — Kon Yin Tong & another

Insolvency – Winding up – Liquidator

9 July 2013 Judgment reserved.

Judith Prakash J:

1 This originating summons was commenced by the plaintiff, Mr Firoudin Aliev, against the liquidators of his former employer, Agrosin Private Limited ("Agrosin"). The defendants are Mr Kon Yin Tong and Mr Aw Eng Hai (collectively, "the Liquidators"). They were appointed on 5 February 2010 by the court order that compulsorily wound up Agrosin.

2 By the application, the plaintiff seeks to:

(a) set aside the Notice of Rejection of Proof of Debt dated 4 November 2011 ("Notice of Rejection") issued by the Liquidators and have his claim as set out in his Proof of Debt dated 9 March 2010 ("the Proof of Debt") in the sum of $1,126,468.88 accepted by the Liquidators; or alternatively,

(b) have the Liquidators vary their decision as set out in the Notice of Rejection.

Facts

Background

3 Agrosin was a Singapore incorporated company that traded in fertiliser and chemical products. It started out as a joint venture between Russian and Singaporean parties but subsequently the Singaporeans divested their shares. Most of the executives in Agrosin were Russians and, at all material times, the managing director was one Mr Konstantin Khalimov ("Mr Khalimov"). However, during the material period, one Mr Nikolay Lukyanov ("Mr Lukyanov") (his last name is also spelt "Loukianov" in many of the documents), who also had an interest in about 30% of the shares of Agrosin, wielded considerable power. Mr Lukyanov had been one of the persons who was instrumental in setting up Agrosin in the early 1990s and he was managing director of the company from 1992 to 2000 and its chairman from 2001 to 2007. Thereafter, although he left the board, he continued to give instructions to officers of Agrosin from time to time and generally these instructions were complied with.

4 The plaintiff was first employed by Agrosin as its executive director cum general manager in

January 1993 at a generous monthly salary and with considerable fringe benefits. His area of responsibility was to bring new businesses and new products to Agrosin and to develop new markets. By January 2006, the plaintiff's monthly salary was $21,850. This figure comprised the monthly salary of $20,650 based on a letter dated 20 July 2005 plus an additional $1,200 per month in lieu of Central Provident Fund contributions. The Liquidators do not dispute this quantum.

5 From about 2005 onwards, Agrosin faced severe financial problems. As a consequence, at a board meeting held on 13 January 2006, the directors resolved to adopt various cost cutting measures. These included the following:

(a) suspension of the payment of the salaries of expatriate employees pending the "stabilisation" of Agrosin;

(b) that from 2005 onwards no bonus would be paid; and

(c) the expatriate employees would bear their own rental and utility bills.

6 Shortly thereafter, on 20 January 2006, Mr Khalimov sent out a memorandum to all the staff of Agrosin informing them of the tight cash flow situation and that all benefits like gasoline, parking etc would be cancelled. The memorandum said that Agrosin had incurred a loss for the financial year 2005 and there would be no bonus payments in 2006. It was further stated that the stringent measures would take effect from 1 January 2006 but that staff benefits would be restored when better times returned.

7 From January 2006, Agrosin stopped paying the plaintiff his monthly salary. He, however, remained in its employment and attended at the office as usual. On 1 August 2007, Agrosin served a notice of termination (the "2007 termination notice") on the plaintiff giving him notice that, in accordance with the two month notice requirement in his contract, his employment would end on 30 September 2007. According to the plaintiff, in September 2007, Agrosin retracted the 2007 termination notice. In this regard, the plaintiff relies on a letter dated 1 September 2007 signed by Mr Khalimov and purportedly from Agrosin ("the September 2007 letter"). The Liquidators dispute the validity of the September 2007 letter. As will be seen below (see [24]–[25]), the plaintiff continued to be involved with the affairs of Agrosin after September 2007.

8 On 14 August 2009, a second letter of termination ("the 2009 termination notice") was purportedly issued by Agrosin to the plaintiff terminating his employment with immediate effect. The Liquidators dispute the validity of this letter as well whilst the plaintiff says that his employment was again reinstated by Mr Khalimov and he continued to work till 18 September 2009 at which time he was denied access to Agrosin's premises.

9 In the meantime, it had been discovered that one of the causes of Agrosin's difficulties was the defalcations of one of its former directors, one Mr Igor Martynov ("Mr Martynov"), who was a director between March 1993 and February 2007. Agrosin sued Mr Martynov in the High Court and was eventually granted interlocutory judgment for damages to be assessed. The plaintiff stated that he spent much of his time after August 2007 assisting Agrosin prosecute its legal action against Mr Martynov.

10 The plaintiff complained that apart from failing to make payment of his salary from January 2006 onwards, Agrosin also failed to pay him his annual wage supplements ("AWS") for the years 2005, 2006, 2007 and 2008. Further, it failed to make full reimbursement of expenses incurred by the plaintiff which it was obliged to pay for pursuant to the terms of his employment contract dated 2

January 1993.

11 The plaintiff started this action in November 2011. Various affidavits were filed in support of the plaintiff's case as well as the Liquidators' defence. Due to factual disputes that were revealed by the affidavits, an order for cross-examination of the deponents was made. In October 2012, the following persons were cross-examined:

(a) the plaintiff;

(b) Mr Wong Kok Leong (Agrosin's Financial Controller from 22 June 1992 to 14 August 2009) ("Mr Wong");

(c) the second defendant; and

(d) Mr Loh Boon Tan (also known as Peter Loh – Agrosin's Executive Director from 1992 to 5 February 2010) ("Mr Loh").

The Proof of Debt and the Notice of Rejection

12 The plaintiff signed the Proof of Debt on 9 March 2010 and submitted it to the liquidators the following day. He gave the following particulars of his total claim of $1,126,468.88:

Date Debt Incurred	**Details of Debt**	**Amount ($)**
January 2006 to September 2009	(i) Unpaid Salary (2006, 2007, 2008 and January to September 2009	983,250.00
December 2005 to December 2008	(ii) 1 month bonus for the years 2005 to 2008	87,400.00
30 September 2009	(iii) Bonus for the period 1 January to 30 September 2009 (S$21,850.00 x 9/12)	16,388.00
18 September 2009	(iv) Payment in lieu of unconsumed Annual Leave [For the period October to December 2007 (S$21,850.00 x 12/260 days x 6 days = S$6,042.00 For the year 2008 (S$21,850.00 x 12/260 days x 24 days – S$24,203.00) For January to September 2009 (S$21,850.00 x 12/260 x 18 days = S$18,152.00)]	48,406.00
February 2006 to October 2009	(v) Apartment rentals, utility bills and petrol charges paid on behalf of the Company	37,353.85

May 2006 to September 2009	(vi) Car insurance premium, road tax, car services/repair and etc paid on behalf of the Company	5,870.68
February 2006 to June 2009	(vii) Administrative expenses and fees paid on behalf of the Company (business travel visas, new passports, Work pass, driving licence)	1,321.00
February 2006 to September 2009	(viii) Miscellaneous and medical bills	2,017.72
14 August 2009	(ix) Salary in lieu of notice (as set out in Writ of Summons in respect of MC Suit No 36983 of 2009/Y	43,700.00
September 2009	(x) Amount due and owing under the Company's Corporate Credit Card (Credit Card Account No. [xxx])	7,679.33
23 December 2009	(xi) Legal costs	46,082.30
(Various dates)	(xii) (Less payments received) [Note: A copy of the creditor's Contract of Employment, letters from the Debtor showing the creditor's salary increments from 1995 to 2005, supporting documents in respect of the expenses claimed above, the Writ of Summons in MC Suit No 36983 of 2009/Y and a copy of the bill from KhattarWong dated 29 January 2010 in respect of legal costs are enclosed]	(153,000.00)
Total amount of debt claimed (in Figures):		1,126,468.88

13 The Notice of Rejection rejected the plaintiff's claim to the extent of $1,076,460.61. The Liquidators admitted only the sum of $458,850 being the plaintiff's unpaid salary for the period from January 2006 to September 2007. The grounds for rejecting the remaining claims were stated to be as follows:

Claim(s) for	**Amount (SGD)**	**Grounds for Rejection**
Unpaid salary from October 2007 to September 2009 (24 months)	524,400	Based on the reconciliations of the Company's records, your employment with the Company was terminated on 1 August 2007 and your last day of service was 30 September 2007.
Bonus for 2009	16,388.00	As above.

Payment in lieu of unconsumed annual leave for the period October 2007 to September 2009	48,406.00	As above.
Salary in lieu of notice	43,700.00	As above.
Amount owing under the Company's credit card	7,679.33	As above.
Apartment rental, utility bills and petrol charges paid on behalf of the Company	37,353.85	Based on the Company's records, the Company shall not be bearing expenses such as apartment rentals, utilities, petrol charges, car insurance premiums, road tax, etc. on your behalf from February 2006 onwards. Further, based on the reconciliations of the Company's records, your last day of employment with the Company was 30 September 2007 and all expenses incurred after this date should be borne by you personally.
Car insurance premium, road tax, car services/repair and etc paid on behalf of the Company	5,870.68	As above.
Administrative expenses and fees paid on behalf of the Company	1,321.00	As above.
Miscellaneous and medical bills	2,017.72	As above.
Legal costs	46,082.30	There are no contractual provisions and/or justification for the Company to bear the legal costs.
Bonus for 2005 to 2008	87,400.00	Under the terms of your employment contract, any bonus payment is entirely at the Company's discretion. Based on the Company's records, there is no evidence that the Company had declared any bonus for 2005 to 2008. Further, your last day of employment with the Company was 30 September 2007 and you are therefore not entitled to any bonus that may be declared by the Company after that date.
	255,841.73	Setting off the expenses paid on your behalf by the Company (See attached schedule)

Total	**1,076,460.61**	

14 Apart from rejecting a major portion of the plaintiff's claims, in the Notice of Rejection, the Liquidators also stated that Agrosin was entitled to set off the sum of $255,841.73 being expenses which it had paid on the plaintiff's behalf during the period from 2 June 2006 to 8 September 2009. These expenses included airfare for the plaintiff's wife, rental and utility charges for his apartment, petrol charges and his credit card bills.

Issues

15 On the basis of the reasons that the Liquidators gave for rejecting substantial portions of the Proof of Debt, the following questions arise:

(a) whether the plaintiff's employment with Agrosin was terminated by the 2007 termination notice so that his last day of service was 30 September 2007;

(b) whether from February 2006 onwards, Agrosin was no longer liable to pay expenses such as rental charges, utility bills, petrol charges, car insurance premiums and road tax etc on behalf of the plaintiff notwithstanding the terms of his employment contract and his continued employment with Agrosin;

(c) whether Agrosin was liable to pay legal costs incurred by the plaintiff;

(d) whether the plaintiff was entitled to bonus for the period between 2005 and 2008 or, at least, up to 30 September 2007; and

(e) whether the sum of $255,841.73 could be set off against the plaintiff's claims.

16 In their closing submissions, the Liquidators stated that the three main issues to be determined were:

(a) whether the plaintiff's employment contract with Agrosin dated 2 January 1993 supported the plaintiff's claims under the Proof of Debt;

(b) whether the plaintiff had agreed to and accepted the cost cutting measures set out in Agrosin's 14th Annual Report; and

(c) whether the plaintiff's employment with Agrosin had ceased on 30 September 2007 or on 14 August 2009.

Apart from the second issue, these issues appeared clearly from the Notice of Rejection as well. The issues put forward by the plaintiff were similar to those above except that the plaintiff also made an issue of whether the Liquidators' adjudication of the Proof of Debt had been objective and/or unjust. In view of the way that I have dealt with the other issues, I do not think it necessary to deal with this last issue.

My decision

When did the plaintiff's employment end?

17 The matter which affects the rest of the issues and therefore needs to be determined first is the length of the plaintiff's employment. In his first affidavit, the plaintiff maintained that the 2007 termination notice had been retracted by the September 2007 letter. This letter was signed by Mr Khalimov and it stated, *inter alia*, that in order to recognise the plaintiff's sacrifices and efforts which he had made and would be making, Agrosin was committed to pay him on demand "the accumulated salaries in arrear due to [him] as well as other forms of compensation which [Agrosin] deems fair and justifiable". The final paragraph read:

> In view of the above given assurance, the company hopes that you will continue to carry out your normal duties until such time as the company shall decide. Following from this, the notice of your termination as per our letter of 1st August 2007 shall now be revoked.

18 The plaintiff also said that by the 2009 termination notice, Agrosin had terminated his employment with immediate effect without giving him any payment in lieu of notice despite the fact that his employment contract provided for two months' notice in writing of intended termination. The 2009 termination notice was also signed by Mr Khalimov and it referred to the September 2007 letter and said that Agrosin would "honour its commitments" pursuant to that letter to pay the plaintiff his "salaries in arrear as well as other forms of compensation which the company deems fair and justifiable". It would be noted that this language tracked that of the September 2007 letter.

19 In his second affidavit, the plaintiff asserted that in September 2007, Mr Khalimov gave the plaintiff his personal assurance that the 2007 termination would be retracted and his employment with Agrosin would be reinstated. To that end, Mr Khalimov instructed the finance department that all payment of salary and benefits due to the plaintiff would continue to accrue and that Agrosin was to continue to bear his expenses and maintain a corporate credit card in his name. Thereafter, Mr Khalimov personally handed the September 2007 letter to the plaintiff. It was clear from this evidence and evidence subsequently given by Mr Wong that the September 2007 letter was not issued contemporaneously with Mr Khalimov's alleged oral retraction of the termination of the plaintiff's employment.

20 It should be noted that the plaintiff, a Russian national, had been working in Singapore on the basis of an employment pass issued by the Singapore authorities that named Agrosin as the plaintiff's employer. This employment pass was cancelled with effect from 1 October 2007. At that time, an application was made for a new employment pass to be issued to the plaintiff with the employer being Agrosin International Pte Ltd ("AIPL"), a Singapore company which was jointly owned by Agrosin and a company named Noble Coal Limited which was incorporated in the Isle of Man. The plaintiff said that when he was given the September 2007 letter, the "in-principle" approval letter for this change had not been issued by the Singapore authorities. However, Mr Khalimov personally assured him that he would continue to work for Agrosin even after his employment pass was transferred to AIPL. Eventually, in March 2008, he obtained a new employment pass which stated his employer to be AIPL.

21 The plaintiff argued that if his employment had ended in September 2007, Agrosin would not have issued the 2009 termination notice to terminate his employment for a second time. Further, it was clear that Agrosin continued to treat him as its employee after 30 September 2007 because:

> (a) during the years 2006 to 2009, payments totalling $153,000 were made by Agrosin to the plaintiff towards part payment of his salary for the said years, the last payment being made on 15 September 2009;
>
> (b) the plaintiff was provided with a set of keys to the premises of Agrosin when the locks were changed on 15 September 2009;

(c) the corporate credit card provided to the plaintiff by Agrosin was cancelled only in September 2009; and

(d) up to September 2009, Agrosin provided and paid for a rented car for the plaintiff and also paid the medical expenses of himself and his family and for his accommodation.

22 In relation to his employment status, the plaintiff argued that the fact that after October 2007 his employment pass showed AIPL to be his employer should not be considered as conclusive. He pointed out that in September 2009, Mr Loh had written to the Ministry of Manpower requesting that the plaintiff's employment pass and his wife's dependent pass issued under AIPL should be cancelled. In the plaintiff's view, if Agrosin did not consider the plaintiff its employee as at September 2009, there would have been no need for Mr Loh who was a director of Agrosin but not of AIPL to seek cancellation of the employment pass.

23 The plaintiff also relied on the case of *Mah Wand Hew v Ong Yew Huat and another* [2003] 1 SLR(R) 859. The question before the High Court in that case was whether the plaintiff there was employed by the defendant company for work done at the Guangzhou Hotel Equatorial which was owned by a Chinese entity known as Guangzhou International Investment Mansion. The defendant company had issued a letter offering the plaintiff a job as an accounts assistant at "Guangzhou Equatorial Hotel". The plaintiff accepted the offer. Lai Kew Chai J observed (at [24]) that:

> The plaintiff was recruited by the defendant company. She was paid, in effect, by the defendant company for her work in Guangzhou Equatorial Hotel. She was directed and controlled in respect of her work by higher officers of the defendant company. She often took instructions from the managing director of the defendant company. The fact of control and direction was highlighted by the Court of Appeal in *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd* [1997] 2 SLR(R) 746. In my judgment, she was the employee of the defendant company.

24 The plaintiff's position was that he continued to carry out work for and provide services to Agrosin even after the transfer of his employment pass to AIPL. He reported for work at Agrosin's offices, continued with his duties in Agrosin in close co-operation with Mr Khalimov, and received directions from the latter. He took part in management and staff meetings of Agrosin as well as in meeting with Agrosin's solicitors in Singapore and Moscow concerning Agrosin's affairs. He also attended Agrosin's extraordinary general meeting ("EGM") in Moscow on or about 20 October 2009 together with Mr Khalimov and Mr Loh. Applying the test of direction and control, it was undeniable that it was Agrosin that directed and controlled the plaintiff.

25 I should point out that after September 2007, most of the work that the plaintiff did for Agrosin involved assisting Mr Khalimov in obtaining evidence for the prosecution of Agrosin's claim against Mr Martynov and in dealing with the court proceedings. In court, the plaintiff maintained that from 1 October 2007 onwards he still persevered in his old duties of trying to develop new businesses and bring new products to Agrosin. However, on further questioning he stated that the company had not managed to conclude any transactions because of difficulties with financing. In my view, the plaintiff's presence in Agrosin's office after September 2007 was neutral since that was also the office of AIPL. Also the fact that the plaintiff who had definitely ceased to be an employee in September 2009 could attend an EGM in October 2009 indicated that his activities in Agrosin's office between October 2007 and September 2009 were not necessarily consistent only with employment.

26 The Liquidators' response covered several points. I will deal with these in turn and assess their strength.

27 First, the Liquidators emphasised certain parts of the plaintiff's evidence on the termination given during cross-examination. The plaintiff had said that on the same day as he received the 2007 termination notice, Mr Khalimov came to his room and made a joke about hoping that the plaintiff would not shoot himself. The two men exchanged a couple of jokes and Mr Khalimov then left. The plaintiff agreed that the termination of his employment was Agrosin's response to an email which he had sent on 31 July 2007 (the day before he was terminated) to Mr Khalimov in which he complained about the fact that salaries of Russian employees had been withheld for two years and that, as he had informed Mr Khalimov several times previously, his personal financial means and savings had been exhausted and yet the management found it more appropriate to give "first place" to the needs of other parties involved in dealings with Agrosin. He went on to denounce the 50% salary cut announced by the management contending that the management had not fulfilled its obligations and had not taken timely and effective measures to investigate and prosecute the parties at fault and recover the company's money. Despite agreeing that the termination had been an answer to his complaints, the plaintiff asserted that it was unexpected and that to his mind, it was Mr Lukyanov who had instructed Mr Khalimov to issue the termination notice. The plaintiff agreed that in July 2007 he was not on good terms with Mr Lukyanov.

28 The Liquidators challenged the authenticity of the September 2007 letter. They referred to the plaintiff's evidence that after 1 August 2007, the next time he had a chance to talk to Mr Khalimov about his employment in Agrosin was in September 2007 and that was when he received assurances from Mr Khalimov that everything would be back to normal and he would be reinstated. When asked why he believed these assurances, the plaintiff's response was "he is managing director, why not". It was then pointed out that Mr Khalimov had not managed to do anything for the plaintiff until then. The plaintiff's reply was:

> Witness: Things actually were changing quite fast with this, er, Martynov's case development, a lot of facts was coming out and, er, er, I think he came to some understanding as well of the nature of these, er, wrongdoings and who was involved because it's not --- it was not Martynov by himself. He would --- he could not do it without knowledge of other people. It was impossible in our company. And that became clear to everyone at the end of the day. And that, er, Khalimov later on informed all the shareholders about these facts and facts came out. When the episodes of, er, wrongdoings came out, it was not only Martynov.

This reply was somewhat incoherent but in the middle of it, there was an implication that apart from Mr Martynov, other directors were guilty of wrongdoing and perhaps some indication that Mr Lukyanov was one of them. However, the reply did not indicate when it was that this fact that Mr Lukyanov may have been involved in wrongdoing came to light. Certainly, it could not have been in September 2007 that Mr Khalimov informed all the other shareholders "about these facts and facts came out". The evidence was clear that in February 2008, Mr Lukyanov was still actively involved in Agrosin's affairs and the plaintiff's own testimony was that Mr Lukyanov controlled Agrosin until late 2009. In fact, the plaintiff said that one Mr Nigel Malpass who was appointed a director in about August 2009 had come to Singapore in September 2009 on Mr Lukyanov's behalf to close up the Agrosin office.

29 The Liquidators submitted that there was no reason for the plaintiff to accept or believe Mr Khalimov's assurances because it was the plaintiff's own position that:

(a) Mr Lukyanov was in full control of Agrosin between 1 October 2007 and 13 August 2009 (as Agrosin was fully dependent on funding by Mr Lukyanov for its activities) and that Mr

Khalimov had to follow Mr Lukyanov's instructions with regard to Agrosin's affairs otherwise the funding would have been cut off.

(b) From "his understanding", Mr Khalimov was pressurised by Mr Lukyanov into issuing the 4 October 2006 Interoffice Memorandum to the plaintiff which demanded that the plaintiff reimburse Agrosin for expenses incurred on his behalf.

(c) It was Mr Lukyanov who had instructed Mr Khalimov to issue the 2007 termination notice.

30 Since on the plaintiff's own evidence Mr Khalimov had to follow Mr Lukyanov's instructions with regard to the affairs of Agrosin, the Liquidators submitted that the plaintiff could not have believed or accepted Mr Khalimov's assurances with regard to the continuation of his employment with Agrosin. In their view, the irresistible inference was that Mr Khalimov did not assure the plaintiff of continued employment in September 2007 or any time thereafter.

31 The plaintiff responded by arguing that whilst Mr Lukyanov had influence with regard to the affairs of Agrosin, Mr Khalimov was the managing director appointed by the company's Russian shareholders and Mr Lukyanov's effort in November 2009 to remove Mr Khalimov as a director at an EGM was unsuccessful. There may have been a power struggle between Mr Khalimov and Mr Lukyanov but this did not negate Mr Khalimov's authority as managing director. Further, the second defendant had conceded that, in most cases, a managing director should have the power to employ anyone as an employee of the company and had further agreed that if the general position applied, Mr Khalimov had authority to reinstate the plaintiff in April 2008 and to provide him with a letter confirming the verbal agreement to reinstate him in September 2007.

32 There is no doubt that Mr Khalimov did sign the September 2007 letter. The second defendant accepted that the signature appearing on the September 2007 letter was genuinely that of Mr Khalimov. The initial impression that the plaintiff gave, however, was that this letter was given to him in September 2007 shortly after the verbal agreement to reinstate his employment. In fact, the evidence showed that the letter was not written until February 2008 and was given to the plaintiff in March or April 2008. The issue therefore arises as to whether Mr Khalimov actually gave the plaintiff verbal assurances in September 2007 or whether the September 2007 letter was simply an attempt to bolster the plaintiff's position with regards to a subsequent claim against Agrosin.

33 Having considered the evidence, I have come to the conclusion that, on a balance of probabilities, the plaintiff's employment was terminated in August 2007 and he was not reinstated thereafter. Mr Khalimov was his friend and was trying to help him, perhaps because of the assistance the plaintiff rendered in relation to the case involving Mr Martynov, or, perhaps because he needed allies in his power struggle with Mr Lukyanov. It bears mention that after the company went into liquidation, both Mr Lukyanov and Mr Khalimov wrote to the Liquidators making serious allegations of breach of fiduciary duty and financial impropriety against each other. In any case although theoretically, as managing director, Mr Khalimov had the power to re-employ the plaintiff, the facts that no proper re-employment letter was sent out in September 2007 and Agrosin failed to reinstate the plaintiff's employment pass indicate that Mr Khalimov could not unilaterally disregard Mr Lukyanov's behind-the-scenes instruction to terminate the plaintiff's employment.

34 The plaintiff cannot rely on the ostensible authority of a managing director when he was fully aware at the material time of the limits of Mr Khalimov's powers. During re-examination, the plaintiff was asked who controlled Agrosin between 1 October 2007 and 13 August 2009. His answer was that "actually, the whole period, company was controlled by Mr Lukyanov". It was then put to him that Mr Khalimov was the managing director and his response was:

> Er, he was managing director but he is, er, er, he --- the company was fully dependent on Lukyanov's, er, so-called funding of (indistinct) and activities, so Mr Khalimov did not have much choice. Just to follow his instructions, otherwise the funding would be cut off and, er, we would have to close all the activities of the company.

35 On the issue of the employment pass, the plaintiff said that Mr Khalimov had assured him in September 2007 that he would continue to work for Agrosin even after his employment pass was transferred to AIPL. He continued that, given the dire financial situation that Agrosin was in at that time and the possibility that Agrosin would go into liquidation, he agreed to have his employment pass and his wife's dependent's pass transferred to AIPL.

36 During cross-examination, the plaintiff was asked many questions about the circumstances of the cancellation of the Agrosin employment pass and the issue of the AIPL employment pass. He said that when he received the 2007 termination notice, his initial reaction was to shift to AIPL in order to maintain his position in Singapore as AIPL was doing practically the same business as Agrosin. He applied for an employment pass under AIPL's name in August 2007 and this application was approved by both Mr Lukyanov and Mr Khalimov. The plaintiff had called Mr Lukyanov after receiving the 2007 termination notice and Mr Lukyanov told him that the termination was due to the difficulties that Agrosin was in and that Agrosin would be liquidated sooner or later. Mr Lukyanov then suggested that the plaintiff move to AIPL and try to revive that company and develop its business. The plaintiff agreed and it was Mr Lukyanov who signed the necessary application forms for the plaintiff to receive an AIPL employment pass.

37 On 19 September 2007, the Ministry of Manpower informed AIPL that it had given in-principle approval (valid for six months) for the plaintiff's employment with AIPL. In view of this evidence, the plaintiff was asked whether when he had the discussion with Mr Khalimov in September 2007 about reinstatement, they had talked about AIPL and if he was still to develop that company's business. His reply was "not actually". When they had the discussion, the plaintiff realised that he was to stay with Agrosin and therefore he ignored the Ministry of Manpower's letter of 19 September 2007. Eventually, he received the employment pass in March 2008. This was because, due to certain actions of Mr Loh at that time, the plaintiff realised that he had "no choice but to replace my employment pass" and so he went ahead with the application under AIPL.

38 It appears to me to be clear from the foregoing evidence that Mr Lukyanov was determined that the plaintiff's employment with Agrosin should end. He offered the plaintiff an alternative which would allow him to stay in Singapore and this was agreed to by Mr Khalimov. The cancellation of the plaintiff's employment pass with Agrosin took effect on 1 October 2007. If Mr Khalimov had indeed had the power and intention to openly reinstate the plaintiff in September 2007, he could and would have withdrawn the application for an employment pass under AIPL and either withdrawn the cancellation of the plaintiff's Agrosin employment pass or made an application for a new employment pass in Agrosin's name. He did no such thing. The plaintiff's evidence was that when he was told that his employment was reinstated, he did not tell anybody else in the office about the reinstatement. Whatever discussions may have taken place between the plaintiff and Mr Khalimov in September 2007, they were a rather havey-cavey affair and did not in my view lead to a legal reinstatement of the plaintiff's employment that was binding upon Agrosin.

39 Further evidence supporting my view comes from Mr Loh's testimony that Mr Khalimov did not inform him at any time that the plaintiff's employment had been reinstated. Further, Mr Wong testified that Mr Khalimov only told him sometime after 11 February 2008 that the plaintiff's employment had been reinstated. This happened because in February 2008, Mr Lukyanov had asked Mr Wong to give him an account of the salaries that were outstanding and due to Agrosin's Russian employees. In his

reply of 11 February 2008, Mr Wong recorded that the plaintiff's employment with Agrosin had ceased on 30 September 2007 and gave Mr Lukyanov the amount of the plaintiff's salary outstanding up to that date.

40 In his affidavit, Mr Wong tried to explain away the implications of his 11 February 2008 email. He said there was never any doubt that the plaintiff was working for Agrosin after 30 September 2007. Secondly, he had sent out the email based on Agrosin's documents available to him and did not take into account any verbal arrangement between the plaintiff and Mr Khalimov. It was shortly after the email was sent out that Mr Khalimov told him that the plaintiff was still an employee. Then, at the request of Mr Khalimov, he drafted the September 2007 letter and other letters of assurance for other employees of Agrosin. In relation to the plaintiff's letter, Mr Khalimov asked him to amend it to include a statement that the plaintiff's employment had been reinstated.

41 When Mr Wong was cross-examined, he said that the termination of the plaintiff's employment by the 2007 termination notice was "flimsy" (meaning that he was not sure whether the plaintiff remained an employee after that notice). Although one of his responsibilities was to process the payroll for Agrosin's employees, he was not able to recall whether he had specifically asked Mr Khalimov whether the plaintiff was still an employee of Agrosin when the plaintiff continued to show up for work despite the termination notice.

42 Mr Wong was also asked why, after Mr Khalimov had confirmed the plaintiff's re-employment, he had not sent a follow-up email to Mr Lukyanov to inform him that the plaintiff's outstanding salary as indicated in the 11 February 2008 email was wrong. Mr Wong's reply that he did not do so because it did not occur to him and also because Mr Khalimov did not give him such instructions is difficult to credit. A flavour of his evidence can be obtained from the following extract:

> Q Did you then send an email to Mr Lukyanov saying that, "Oh, by the way, my calculation for Mr Aliev is incorrect"?
>
> A No, I didn't.
>
> Q Oh, why not? It's incorrect.
>
> A To me, that is simply, er, for Mr Lukyanov information. I don't --- I --- I simply, the --- that time just simply didn't apply to me, you know, to --- to --- to have it, er, corrected because Mr Khalimov did not ask me to resend another --- another, er, er, email to --- to him.
>
> Q ... so you are saying Mr Khalimov --- Khalimov didn't ask you to resend?
>
> A No.
>
> ...
>
> Q And you didn't think you should also send an email to Mr Lukyanov correcting the information, since now ---
>
> A No, I didn't send any to --- to correct that.
>
> ...
>
> Q ... any reason for ... not correcting the information which you know obviously is wrong?

A To me, ultimately, you see, there are the a --- a --- a --- affairs which I think I should not interfere. It's between Mr Khalimov and Mr Lukyanov. If he find that's er, I should send another email, then he should instruct me to send another email to correct the position, but he didn't, despite telling me that it's --- it was wrong.

After some further questioning on this issue, it was put to Mr Wong that he did not send a clarification email because he knew that the information about the plaintiff's salary that was in the email of 11 February 2008 was correct. Mr Wong disagreed.

43 I find Mr Wong's evidence in regard to the plaintiff's employment to be unbelievable. It is interesting that he also testified that Mr Khalimov had given various employees a verbal assurance regarding their employment in September 2007 but that it was only towards the end of 2007 or the beginning of 2008 that, based on Mr Khalimov's instructions, Mr Wong had drafted the letter of assurance. If he knew about Mr Khalimov's assurances in September 2007, it is not believable that he would have told Mr Lukyanov in February 2008 that the plaintiff's employment ceased on 30 September 2007. There is also an interesting difference between the last paragraph of the letter of assurance given to Mr Khalimov and Mr Wong and the September 2007 letter given to the plaintiff. In Mr Wong's and Mr Khalimov's letter, the last paragraph reads:

> In view of the above given assurances, the company hopes that you will continue to carry out your normal duties until such time as the company shall decide.

In the September 2007 letter, however, the last paragraph reads:

> In view of the above given assurance, the company hopes that you will continue to carry out your normal duties until such time as the company shall decide. Following from this, the notice of your termination as per our letter of 1st August 2007 shall now be revoked.

44 It appears to me that any assurances given by Mr Khalimov in September 2007 were only to existing employees of Agrosin like Mr Wong who would have been concerned about their continued employment in the light of the company's continuing financial problems and the termination of the plaintiff's employment. Mr Khalimov wanted to assure these employees that if they continued to work for Agrosin, their dedication would be recognised. Subsequently, Mr Khalimov decided to assist the plaintiff and therefore directed Mr Wong to draft a letter of assurance for him and amend it to include a statement of revocation of notice of termination. This was five months after the plaintiff's employment had officially ceased and when the plaintiff had no employment pass. The decision to re-employ the plaintiff if indeed it was made was hidden from Mr Lukyanov and the plaintiff must have known this.

45 Another reason to doubt that the plaintiff was re-employed by Agrosin in September 2007 is the suspicious nature of the 2009 termination notice. The Liquidators take the view that this is not a genuine document. The plaintiff said that shortly after the 2009 termination notice, Mr Khalimov approached him and asked him to stay on with Agrosin. Mr Khalimov allegedly assured the plaintiff that he would be paid his salary and benefits for the period after the 2009 termination letter if Agrosin managed to recover money from its legal action against Mr Martynov.

46 I agree with the Liquidators that the plaintiff's evidence in this regard is inherently incredible. If Mr Khalimov was prepared to assure the plaintiff that he would be paid salary and benefits even after the issue of the 2009 termination notice and the plaintiff was prepared to accept this, why was there a need to terminate the plaintiff's employment by that notice? The parties could have let matters be. The plaintiff's evidence regarding his conversation with Mr Khalimov in August 2009 is improbably akin

to the conversation he allegedly had with Mr Khalimov in September 2007 regarding his alleged reinstatement then.

47 Further, Mr Loh testified that he was not informed at any time that the plaintiff's employment had been terminated for a second time on 14 August 2009. He was not given a copy of the 2009 termination notice although the procedure within Agrosin was that he would receive a copy of each notice of termination issued to an employee. He did in fact get a copy of the 2007 termination notice. It was also interesting that the 2009 termination notice was written on the an old letterhead of Agrosin bearing Agrosin's previous address at 7 Temasek Boulevard whilst other correspondence issued by Agrosin in 2009 were issued on a letterhead bearing Agrosin's then current address at 20 Harbour Drive. All in all, I am satisfied that the 2009 termination notice was simply issued to bolster the plaintiff's position that he had been re-employed after 30 September 2007, and that it is not a genuine document.

48 For the reasons given above, I find that the plaintiff's employment with Agrosin terminated on 30 September 2007 and that he is not entitled to be paid any salary or any other benefits for any period after that date.

Is the plaintiff bound by the cost cutting measures?

49 As stated above, the plaintiff's contract of employment provided for Agrosin to pay certain of the plaintiff's expenses including his rental, telephone charges, utility bills, petrol costs, car insurance, premium, parking fees and other expenses related to his car. As can be seen from [12] above, the plaintiff included in the Proof of Debt various sums relating to his expenses which Agrosin had failed to pay. The total amount of these expenses is $46,563.25 and the breakdown of the same can be seen in [12]. The period covered by the plaintiff's claim is from February 2006 to September 2009. Apart from this amount claimed by the plaintiff, the Liquidators sought to set off from the amounts owing to him the sum of $255,841.73 which included amounts representing some of his expenses during the period between June 2006 and May 2007 and which Agrosin had paid on the plaintiff's behalf. The issue to be determined in this section of the judgment is whether after January 2006 Agrosin was still liable to pay such expenses for the plaintiff.

50 The plaintiff's position is that the payment of these expenses resulted from a contractual obligation on the part of Agrosin contained in his employment contract and that obligation continued for as long as he was employed by Agrosin. The plaintiff submitted that he had never at any time agreed to a variation of his employment contract permitting Agrosin to withdraw these benefits. He said it was not open to Agrosin to unilaterally purport to vary the terms of the employment contract or to unilaterally impose changes in its obligations to the plaintiff without the plaintiff's consent.

51 The Liquidators argued that the plaintiff had agreed to the cost cutting measures which Agrosin adopted in January 2006 and therefore he could no longer rely on the term stated in the employment contract. The Liquidators relied on the following:

(a) The plaintiff's presence at the Agrosin board meeting of 13 January 2006 at which the cost cutting measures were resolved upon.

(b) The plaintiff's receipt of the office memorandum dated 20 January 2006 in which Agrosin informed its employees of the cost cutting measures and stated that this would take effect from 1 January 2006.

(c) The plaintiff's decision not to leave Agrosin when the cost cutting measures were

implemented but to stay on and try to revive the company.

(d) The fact that the plaintiff initially complied with the cost cutting measures by reimbursing Agrosin for expenses like his rental.

(e) On 4 October 2006, Agrosin sent the plaintiff a memorandum stating that the plaintiff had failed to observe the cost cutting measures because he had not reimbursed Agrosin for certain expenses and demanded such reimbursement within three days. It was the plaintiff's evidence that Mr Lukyanov had pressured Mr Khalimov to issue this demand and that Mr Khalimov remained sympathetic to the plaintiff's objections but the Liquidators submitted that this was not credible in the light of the memorandum.

52 The Liquidators' submission is based on the premise that an employer may, at any time, make unilateral changes in its employment contracts with its employees and without the employees' consent. Their proposition is that if the employee continues in his employment despite the imposition of such changes, the employee is deemed to have accepted the same. This proposition is not, however, supported by the law. As the plaintiff submitted, under basic contractual principles, a party who attempts to unilaterally change the terms of the contract without the consent of the other party, is in clear repudiatory breach of the contract. The innocent party is entitled to either accept the breach and treat the contract as having come to an end, or to treat the contract as continuing (in its original form), carry out his obligations under the contract and claim damages from the party in breach. I agree that the plaintiff was entitled to refuse to accept the cost cutting measures without having to leave his employment. He was legally entitled to continue in his employment with Agrosin after the purported implementation of these measures and opt to seek damages from Agrosin in relation to the benefits he had not received.

53 The second part of the Liquidators' argument is based on the alleged consent of the plaintiff to the cost cutting measures. However, in this case, the evidence does not support the inference that the plaintiff consented to the measures. The plaintiff testified that he objected to the cost cutting measures at the board meeting on 13 January 2006 but that his objections carried no weight since he was not a member of the board. During cross-examination, the plaintiff gave evidence that he repeatedly raised objections to the cost cutting measures to both Mr Lukyanov and Mr Khalimov. It was the plaintiff's written objections in his email of 31 July 2007 to Mr Khalimov that resulted in the 2007 termination notice. The plaintiff explained that his reason for reimbursing these expenses to Agrosin was to show support for the company but he had only been able to make a few such payments in 2006. Thereafter, the company had continued to make payment to him in respect of his claims for expenses and had also paid for certain of his benefits in accordance with his employment contract. The fact that the Liquidators sought to set off such a substantial sum of money against the Proof of Debt was an indication of how much Agrosin had contributed to the plaintiff's expenses after February 2006. The fact that Agrosin continued to meet certain of the plaintiff's contractual expenses during the period from February 2006 to September 2007 also supported the plaintiff's assertion that Mr Khalimov was sympathetic to the plaintiff's position on the cost cutting measures.

54 The second defendant's own evidence was that the Liquidators had not found any evidence that the plaintiff had consented to the cost cutting measures. One of these cost cutting measures was to cut the salaries of the Russian employees by 50%. The Liquidators had, however, disregarded that: when they adjudicated the Proof of Debt, they had computed the amount to be allowed on the basis of the plaintiff's full last drawn salary rather than at a 50% pay cut. The plaintiff submitted, and I agree, that this adjudication was inconsistent with the Liquidators' submission to me that the plaintiff had agreed to or accepted the cost cutting measures. It should be noted that Agrosin had asked its employees to sign letters confirming their agreement to the 50% reduction in their salaries.

Whilst Mr Loh signed such a letter, the plaintiff never did.

55 On balance, I find that the plaintiff never at any time agreed to or accepted the cost cutting measures as being applicable to him. As Agrosin did not have the power to unilaterally alter the terms of the plaintiff's contract of employment, the plaintiff continued to be entitled to all benefits provided in his employment contract during the subsistence of his employment, and the Liquidators were not entitled to set off against the plaintiff's claim any amount of contractual expenses that Agrosin paid in respect of the period up to 30 September 2007. Insofar as the plaintiff's claim of $46,563.25 covers amounts incurred before 30 September 2007, he is entitled to recover the same from Agrosin to the extent that it represents expenses which the employment contract provided for Agrosin to pay.

Is the plaintiff entitled to other payments?

Annual Wage Supplements

56 Clause 6 of the plaintiff's employment contract provided that the plaintiff would be entitled to receive annual bonuses at the end of each year, the amount of the same being entirely at Agrosin's discretion. The plaintiff's evidence was that Agrosin's practice was to give its employees an AWS of one month in addition to any other bonus which they might have been awarded. Agrosin, however, failed to pay the plaintiff this AWS for the years from 2005 to 2008 (both dates inclusive) and for the period 1 January 2009 to 30 September 2009. The plaintiff claimed $103,788 in respect of this supplement.

57 Based on the decision I made above, the outstanding issue is whether the plaintiff is legally entitled to a claim for AWS for the years 2005 to 2006 (both dates inclusive) and for the period 1 January 2007 to 30 September 2007.

58 The Liquidators rejected the plaintiff's claim for an AWS from 2005 to 2008 on the basis that under the terms of his employment contract, any bonus payment was entirely at the company's discretion. Based on Agrosin's records, there was no evidence that Agrosin had declared any bonus for the years 2005 to 2008. Further, the plaintiff's last day of employment was 30 September 2007 and he was therefore not entitled to any bonus that might have been declared by Agrosin after that date.

59 In their submissions, the Liquidators pointed out that Mr Wong had agreed in court that it was not compulsory for Agrosin to pay its employees an AWS and that Agrosin did not declare or agree to pay such supplement to its expatriate staff for the years 2006 to 2008. They also relied on the case of *Loh Siok Wah v American International Assurance Co Ltd* [1998] 2 SLR(R) 245 ("*Loh Siok Wah*") where an employee claimed against his ex-employer for redundancy payments based on the ex-employer's past practice. The court held (at [43]) that retrenchment benefits paid in the absence of any contractual or statutory provision were given on ex-gratia basis and did not give rise to a legal obligation on the part of the employer to pay retrenchment benefits in all cases. The employee failed in his claim. The Liquidators submitted that Agrosin's practice of paying an AWS in some situations did not give rise to a legal obligation on its part to pay an AWS to the plaintiff.

60 The issue here is whether the payment of an AWS was simply a practice followed by Agrosin or whether it had become a term of the contract that such supplement would be paid to the plaintiff. Supporting the Liquidators' argument is the fact that the plaintiff had a written contract which did not contain an express provision for payment of AWS. Further, it stated expressly that bonus would be paid at Agrosin's discretion. In favour of the plaintiff's position is the fact that every year of the plaintiff's employment up to 2005 (a total of 18 years), he was paid an AWS and his evidence and

that of Mr Wong and Mr Loh was that Agrosin paid an AWS regardless of its performance. Mr Wong's evidence was also that no specific decision was taken that an AWS would not be paid to the expatriates and that it was paid to local employees up to 2009. The local employees did not receive an AWS for 2009 because they were locked out before such payment could be made.

61 I accept the plaintiff's submission that Agrosin had a firm practice of paying an AWS to all employees. It is significant that despite the absence of records disclosing declaration of bonus for the years 2005 to 2008, an AWS was paid to local employees for each of those years. The non-payment of an AWS to the plaintiff from 2005 was attributable to the company's lack of funds and did not, in my view, indicate that the company took a decision not to pay an AWS to the expatriates. It chose to pay an AWS to the local employees ahead of the expatriates in view of its financial position. Such decision when Agrosin could easily have justified not paying any AWS to any employee, on account of its precarious financial situation, indicates that Agrosin took the view that the AWS was part of its employees' entitlement. In the circumstances of this case, I agree that payment of an AWS was an implied term of the plaintiff's employment contract. Accordingly, he should be able to recover one month's salary as AWS for 2005 and 2006 and on a pro-rated basis up to 30 September 2007 for 2007.

62 The case of *Loh Siok Wah* is not applicable in this situation. The proposition established in that case is that there is no legal obligation to pay retrenchment benefits to an employee who has been retrenched unless there are contractual provisions obliging the employer to do so. The court found in favour of the employer in this regard for the following reasons:

(a) The employer had never committed itself to the payment of retrenchment benefits even to its unionised employees.

(b) It was not possible to imply a term in the employment contract that retrenchment benefits were payable because in the circumstances of the case, it was reasonably clear that both parties could not be said to have had obviously intended to include that retrenchment term in the employment contract. Moreover, even if such a term could be implied, the quantum of retrenchment benefits could not be implied.

(c) There was no evidence of a general custom of employers paying retrenchment benefits in Singapore.

63 The reasons given in *Loh Siok Wah* do not apply in the present case. From Agrosin's conduct from the start of the plaintiff's employment, it appears that although payment of AWS was not written into the contract, the intention of Agrosin was that the plaintiff and all other employees would receive such payment every year. The quantum of the AWS was fixed at one month's salary, unlike retrenchment benefits which had no fixed quantum. There is a general custom of employers paying AWS in Singapore and Agrosin obviously adopted and implemented this practice as part of its obligations to its staff, recognising it as an implied term of each employment contract.

Unconsumed annual leave

64 Under cl 19 of his employment contract, the plaintiff was entitled to 24 working days' paid leave each year. Clause 19 also provided that should the employment contract be terminated by either party prior to the expiration of 12 months, the plaintiff would be entitled to payment in lieu of leave calculated on a pro-rata basis. The plaintiff's case was that as of September 2009, he had unconsumed leave for the period October to December 2007, for the year 2008 and for nine months from January 2009 to September 2009. The plaintiff claimed the sum of $48,406 in respect of this

leave. As I have found that the plaintiff's employment with Agrosin terminated on 30 September 2007, he is not entitled to any leave pay for any period after that date.

Administrative expenses

65 The plaintiff included in the Proof of Debt a claim of $1,321 being administrative expenses and fees paid on behalf of Agrosin. This claim included a sum of $150 which the plaintiff had paid to obtain a new passport for his wife. The Liquidators objected to this item in their closing submissions on the basis that the plaintiff had admitted that his employment contract did not expressly provide for reimbursement of his wife's passport charges. I accept this objection. This amount shall be disallowed. The Liquidators did not put forward any basis for objecting to the rest of the claim and therefore insofar as the items therein were expended before 30 September 2007, I rule that the plaintiff is entitled to recover them.

Legal expenses

66 The plaintiff included a claim for $46,082.30 being legal costs incurred by him. In his first affidavit, he stated that these costs were incurred by him as a consequence of Agrosin's breaches of the employment contract and its directors' attempts at dissipating its asset. In the Notice of Rejection, the Liquidators denied this claim on the basis that there was no costs order in place for the payment of such costs.

67 On 23 December 2009, the plaintiff filed a writ against Agrosin in Suit 1079/2009 ("Suit 1079"). In this action, he claimed a sum of $1,072,707.25 being unpaid salary, salary in lieu of notice, AWS, expenses and a sum of $7,679.33 which UOB Bank had claimed from him as being due under his corporate credit card. The plaintiff's position was that Agrosin was obliged to pay all charges incurred on that card. The plaintiff was concerned that Agrosin was attempting to dissipate its assets and upon issue of the writ, he instructed his solicitors to apply for a worldwide mareva injunction against Agrosin. This was granted on 24 December 2009. Subsequently, the proceedings did not continue because Agrosin was wound up by order of court on 5 February 2010. The plaintiff incurred $46,082.30 in legal costs in relation to Suit 1079 and it is this amount that he tried to recover under the Proof of Debt.

68 In my judgment, there is no basis for the plaintiff to have included this amount under the Proof of Debt since it was not supported by any costs order awarded by the court. If the plaintiff had obtained a costs order in his favour against Agrosin and had taxed his bill, he would have been able to claim this amount. In the absence of such an order, the amount cannot be claimed under the Proof of Debt.

Conclusion

69 For the reasons given above, I allow the plaintiff's claim to the extent indicated. I set aside the Notice of Rejection as issued and direct the defendants to issue a varied Notice of Rejection which reflects my findings herein. The plaintiff shall have the costs of these proceedings as taxed or agreed.