Premium Automobiles Pte Ltd v Song Gin Puay Ronnie
[2009] SGHC 254

Case Number : DA 22/2009

Decision Date : 11 November 2009

Tribunal/Court : High Court

Coram : Philip Pillai JC

Counsel Name(s) : Adrian Wong and Jansen Chow (Rajah & Tann LLP) for the appellant/plaintiff; Jason Lim Chen Thor (De Souza Lim & Goh) for the respondent/defendant

Parties : Premium Automobiles Pte Ltd — Song Gin Puay Ronnie

Employment Law – Performance bonus entitlement

Employment Law – Variation of employment contract terms by agreement or by estoppel

11 November 2009

Philip Pillai JC:

1 This is an appeal brought by the defendant in DC Suit No 2576 of 2007/L against part of the decision of the District Judge, Mr Joseph Yeo ("the District Judge") delivered on 24 June 2009. The Suit involves a claim by the Respondent against the Appellant for bonus outstanding and payable by the Appellant to the Respondent for the period from September to November 2006. The appeal relates only to this issue, as the District Judge had held that the Respondent was entitled to pro-rated bonus for the period from September to November 2006.

The facts and the action below

(A) The facts

2 The Appellant had decided to replace the Respondent, its Managing Director, with a Mr Marc Singleton ("Mr Singleton") around August 2006. However, the Respondent was, at that time, applying for permanent residency ("PR") in Singapore, so the parties agreed that the Respondent would continue to be employed by the Appellant so as not to jeopardise the Respondent's PR application. Mr Singleton was then recruited as Chief Operating Officer at end August 2006 and thereafter moved into the Respondent's office.

3 The Respondent then went on leave from 31 August to 11 October 2006 and successfully obtained PR on 27 September 2006. On 21 September 2006 the Respondent requested for a breakdown of his bonus entitlement. In reply, the Appellant sent the Respondent an email showing his bonus up to August 2006. On 3 November 2006, the Respondent received and accepted payment of his bonus up to August 2006.

4 He tendered his one month's notice of resignation on 31 October 2006 in which he referred to an "agreement of a one month notice". The Respondent thereafter engaged solicitors and made a claim on 24 May 2007 for payment of his bonus for the remaining employment period. Disputing the claim, the Appellant countered that the parties had agreed that the Respondent would only be entitled for bonus up till August 2006. The Respondent denied that there was such an agreement and claimed for bonus up till November 2006, pursuant to the terms in his employment contract.

(B) The District Judge's decision

5 The District Judge grounds of decision record the following:

> 31. It is the Plaintiff's contention that he was employed by the Defendant until the end of November 2006, he is entitled to bonus up to his last day of employment.
>
> 32. The Defendant's claim is that after Mr Singleton had been appointed as Chief Operating Officer, DWI had informed the Plaintiff that his services were no longer required but had agreed, at the Plaintiff's request, to continue to employ the Plaintiff pending the outcome of the Plaintiff's application for permanent residency. It is the Defendant's claim that the parties had expressly agreed that the Plaintiff would only be entitled to bonus up to August 2006.
>
> 33. The Plaintiff has denied that there was any such agreement. In this regard, I am inclined to agree with the Plaintiff.
>
> 34. Apart from the fact that the Defendant has adduced no contemporaneous documentary evidence in support of the existence of this alleged agreement, DW2 has not, in her evidence, suggested that she was contemporaneously informed of any such agreement.
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> 35. The other points raised by the Defendant regarding the fact that Mr Singleton had clearly taken over from the Plaintiff who no longer had any duties do not detract from the fact that there was in existence between the parties and, in the absence of a variation of the terms of the same or termination of that contract, those terms continued to apply.
>
> 36. In the premises, I find the Defendant to be liable to the Plaintiff for bonus for the period from September 2006 to end November 2006.

6 The Appellant now appeals against the District Judge's decision on the above issue.

The grounds of appeal

7 The Appellant's counsel invokes *Ng Chee Chuan v Ng Ai Tee* (*administratrix of the estate of Yap Yoon Moi, deceased*) [2009] 2 SLR 918 with respect to appellate court's intervention over a trial judge's finding of fact.

> We are well aware, and it is trite law, that an appellate court should be slow to overturn a trial judge's findings of fact, especially where they hinged on the trial judge's assessment of the credibility and veracity of witnesses, unless they can be shown to be plainly wrong or against the weight of evidence. However, quoting Yong Pung How CJ in *Yap Giau Beng* at [24] 'When it comes to inferences of facts to be drawn from the actual findings which have been ascertained, a different approach will be taken. In such cases, it is again trite law that an appellate judge is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case.
>
> Thus intervention by an appellate court is justified where the inference drawn by a trial judge are not supported by the primary or objective evidence on record.'

8 The Appellant's appeal is variously formulated on the legal grounds of (i) implied term; (ii) variation of contract by oral agreement and conduct; (iii) estoppel by convention and estoppel by

representation; and (iv) approbation and reprobation.

9 In each of these submissions the actions and inactions that is relied on to support the submission that August 2006 was the bonus cut-off date are as follows (hereinafter collectively referred to as the "Appellant's Case Facts"):

(i) the Appellant's principal was dissatisfied with the Respondent's work performance and thus sought his replacement;

(ii) when Mr Singleton was recruited to take over the Respondent's functions in August 2006, the Respondent was effectively living on borrowed time;

(iii) the Respondent had to abandon his contention that Mr Singleton was his assistant and only took over some of his functions as managing director;

(iv) the Respondent conceded in cross examination that he held the empty title of managing director after Mr Singleton took over;

(v) if the Respondent's employment was terminated before he obtained PR approval, his application would have been jeopardised;

(vi) during his leave period he asked for his bonus computation for the period from January to August 2006;

(vii) the Respondent's own request for a breakdown of his bonus for January 2006 to August 2006 and the 2 draft computations provided to him pursuant to his request in addition to his being on leave, are crucial pieces of evidence that the District Judge overlooked;

(viii) no protest was raised by the Respondent with regard to the pro-rated period from January 2006 to August 2006 when the 2 computations were forwarded to him during his leave;

(ix) the Respondent did not suggest in his resignation email of 31 October 2006 that he was expecting bonus for the period post August 2006 and accepted payment of S$188,767.00, on 3 November 2006, as his Year 2006 bonus calculated for the period January to August 2006;

(x) the Respondent left the Appellant after accepting the bonus up to August 2006 without any protests, was because he had agreed with Mr Hadi Widjaja Taraga, the sole shareholder and director of the Appellant ("DW1") that he was not entitled to bonus post-August 2006 as Mr Singleton was running the operations for the Appellants after August 2006;

(xi) no reason was provided by the Respondent as to why he did not ask for bonus for September 2006, if not for both September and November 2006, before leaving the Appellant's employment;

(xii) the Respondent pretended in his written testimony that the sum of S$188,767.00 was payment for bonus up till November 2006, which he well knew at the relevant time was not the case as the computations provided to him were clearly for the period January to August 2006;

(xiii) if there was no agreement for bonus to be pro-rated till August 2006, the Respondent would have at the latest sought in January 2007 the interim payment of bonus for the period from September to December 2006, in line with the Appellant's practice of paying interim bonus pending the finalization of accounts in May 2007.

(i) Implied term

10 The Appellant's counsel cites *Attorney General of Belize & Others v Belize Telecom Ltd and Anor* [2009] 1 WLR 1988 for the proposition that:

> [from headnote]
>
> a court had no power to improve upon the instrument which it was called upon to construe but was concerned only to discover what the instrument meant as a whole; that in every case in which it was said that some provision ought to be implied into an instrument, the question for the court was whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean; that it was not necessary that the need for an implied term should be immediately apparent as the need not infrequently arose when the draftsman of a complicated instrument had omitted to make express provision for some event because he had not fully thought, through the contingencies which might arise; that in such circumstances it could be obvious, after careful consideration of the express terms and the background that only an implied term would be consistent with the rest of the instrument;

11 The Appellant's primary argument in implying a term to cut off the bonus computation date to August 2006 was that the Respondent could not be entitled to a "performance bonus" when he had not performed as he was being replaced by Mr Singleton; he effectively had a title but no function after the appointment of Mr Singleton. Effectively, the Respondent had gone on leave and it did not make sense for the Appellant to pay performance bonus to both the Respondent and Mr Singleton for the overlapping period of September to November 2006. It was pointed out to the Appellant's counsel that the performance bonus was not a discretionary one but one expressed to be a straight line entitlement based on the company's profits. He also conceded that the employee was entitled to bonus for the period of his leave during which time he would not have been performing his functions at all.

12 When questioned, counsel for the Appellant was obliged to concede that implying terms into a contract was exceptional and required both careful consideration of the express terms of the contract and that such a term to be implied be consistent with the rest of the contract. The employment contract at issue here is not complex and counsel has offered no cogent submissions on how the implication of a bonus expiry date of August 2006 into a continuing contract with all other terms remaining unchanged would be consistent with the other terms of the employment contract.

(ii) Variation of contract by oral agreement and conduct;

13 The Appellant's counsel next relies on *Cheshire, Fifoot and Furmston's Law of Contract - Second Singapore and Malaysian Edition* (Butterworth Asia, 1998) at [95]:

> Agreement may be inferred from conduct. Whether there has been an acceptance by one party of an offer made to him by the other may be collected from the words or documents that have passed between them or may be inferred from their conduct.

14 The Appellant's counsel submits that the Appellant's Case Facts constitute objective evidence that there was an agreement to limit bonus to August 2006 upon which an appellate court is able to and ought to draw opposite inferences than had been drawn by the District Judge.

15 In particular, counsel submits that whilst the Respondent was on leave, he requested and received on 21 September 2006, the bonus computation; his letter of resignation of 31 October 2006 referring to "agreement of 1 month notice" purportedly indicating the existence of a larger agreement whose terms they argue also included a term that the bonus entitlement would end on 31 August 2006. The Appellant's counsel concedes that there is no evidence on record of the Appellant replying to this email letter of resignation, nor to one which either referred to an oral agreement or to bonus cut off date. The Appellant's counsel submits that when the Respondent resigned in October 2006, any reasonable employee would have asked for an updated bonus computation. His taking the bonus computed to August was also an indication of his acceptance of the August bonus cut off date. The Respondent was a careful man with attention to details, based on his correction of the draft computation; this would lead to the expectation that he would have asked for his bonus computation up to November. In any event, the Appellant's counsel argues, he should have asked for bonus in January 2007, as this was the practice of interim payments.

16 The Respondent's counsel denies that any evidence exists to support an inference of agreement. Once the Respondent resigned, he would not have expected to receive interim bonuses in January which was paid to continuing employees. The Respondent's request for the bonus computation was first made in September and thus naturally based on August management accounts. He sent in his email resignation letter on 30 October and received his bonus payment computed up to August as well as his November salary on 4 November 2006.

17 In response, the Respondent's counsel submits that the onus of proof is on the Appellant to provide that the employment contract had been terminated on 31 August 2006 or that it had been varied such that the Respondent had agreed to waive his bonus entitlement after August 2006. The District Judge found that the Respondent's employment ceased on 30 November 2006 and had not been varied.

18 The Respondent's counsel submits that the evidence to establish that the employment contract had been terminated on 30 November 2006 are: his leave application from 31 August 2006 to 11 October 2006; the Appellant's certification of employment submitted to the Controller of Immigration, ICA and the Respondent's letter of resignation accepted by the Appellant that his last day of employment was 30 November 2006 and the payment of his monthly salary up to 30 November 2006.

19 The Respondent's counsel further submits that there was not a single document to suggest the variation of the employment contract after 31 August 2006 or the waiver of his bonus entitlement after 31 August 2006. He relies on the District Judge's finding that the Appellant's financial controller had not been informed contemporaneously by the Appellant's DW1 of any variation of the employment contract. He disputes the Appellant's counsel's suggestion that the acceptance of the bonus sum of S$188,767.00 calculated from 1 January 2006 to 31 August 2006 paid to him in November 2006 constituted his acceptance of the variation. As bonus payments are subjected to adjustment after audited accounts in April/May of the following year, it would have been reasonable for the

Respondent, in November 2006, to expect final payment to be made to him after the audited accounts in April/May of the following year. The computation on 21 September 2006 was necessarily based on the latest available management accounts as at 31 August 2006.

20 The Appellant's counsel submits that the objective evidence exists with respect to 4 elements of the Appellant's Case Facts *viz*:

(i) the Appellants had effectively replaced the Respondent by August 2006 and the Respondent had gone on his annual leave thereafter from 31 August 2006 to 11 October 2006;

(ii) the Respondent had requested, during his aforesaid leave in September 2006, for his bonus entitlement for 23006 (for the months of January to August 2006) to be computed;

(iii) the Respondent had instructed the Appellants to make payment of his aforesaid bonus entitlement for 2006 (S$188,767.00) on 3 November 2006; and

(iv) the Respondent did not make any claim for any shortfall in his bonus entitlement for 2006 until the letter of demand dated 24 May 2007 from his then solicitors, M/s Michael Khoo & Partners.

These he submits, constitute discrete events in the entire case and must be viewed cumulatively, as being "strands in a rope".

21 Each of the events submitted to be strands in a rope are capable and have been explained otherwise rather than objectively supporting his case of an agreed cut off bonus date of 31 August 2006. They do not either individually or collectively compel the conclusion of a positive clear and unambiguous representation having been made by the Respondent that his contractual bonus entitlement was to be computed up to 31 August 2006 whilst the rest of his employment terms remained unchanged.

22 The 4 principal elements identified by the Appellant's counsel do not, in my view, constitute objective facts upon which an appellate court would necessarily draw a different inference from the trial judge's findings. They do not support an inference that a variation of the contract of employment such that the bonus entitlement was to end on 31 August 2006.

(iii) Estoppel by convention and estoppel by representation

23 The Appellant next relies on estoppel by convention or by representation. To establish estoppel by convention, the following elements must be present:

(a) The parties must have acted on "an assumed and incorrect state of fact or law".

(b) The assumption must be either shared by both parties pursuant to an agreement or something akin to an agreement, or made by one party and acquiesced to by the other.

(c) It must be unjust or unconscionable to allow the parties (or one of them) to go back on that assumption.

24 *Chitty on Contracts* (H G Beale Gen Ed.) (Sweet & Maxwell, 30th Ed, 2008) Vol 1 at para 3-109) further states that:

> … the estoppel 'requires communications to pass across the line between the parties. It is not enough that each of two parties act on an assumption not communicated to the other. Such communication may be effected by the conduct of one party, known to the other'.

25 The Appellant's counsel submits, relying on *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR 258 ("*Midlink*") that where one party to a transaction is labouring under a mistake as to some matter vital to the contract or transaction, the other may come under an obligation to undeceive B, if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In the *Midlink* case, the parties' conduct was established by the issuing of a credit note, the payment of new rental rate without reservation and the extension of airconditioning hours in accordance with the terms of the new but unexecuted tenancy agreement. The Appellant's counsel's attempt to elevate the Respondent's inaction and the circumstances in this case to that of the *Midlink* facts and thus argue that the Respondent, before resigning, was under a duty to "undeceive" the Appellant and to correct the Appellant's mistaken impression that "a clean break had been achieved" has little substance.

26 The Appellant's case is founded entirely on the Respondent's inaction in raising his claim for post August 2006 bonus until May 2007. The Respondent has explained the circumstances between his resignation letter of 31 October 2006 and his waiting until the audit of the year's accounts. There is no evidence to suggest that he knew that the Appellant was working on a wrong assumption or that it would be unjust or unconscionable in the circumstances for him to go back on that assumption.

27 With respect to estoppel by representation, Appellant's counsel relies on *Spirot v Lintern* [1973] 1 WLR 1002 at [1010G]:

> where a man is under a duty- that is, a legal duty-to disclose some fact to another and he does not do so, the other is entitled to assume the non-existence of the fact. In such circumstances the conduct of the first man amounts to a representation by conduct to the second that the fact does not exist ...

28 No legal duty has been identified with respect to the Respondent to disclose whether or not his bonus entitlement continued for the duration of his employment. There is no mistake per se on the part of the Appellant with respect to the contractual bonus entitlement that the Respondent would perceive the Appellant to be under. At best it was not in the mind of either party at the material time. The Respondent's failure to claim the rest of the bonus until May 2007 does not, in the circumstances, amount to a representation, whether of a fact or as a promise.

29 Based on the Appellant's Case Facts, the requirements to establish either estoppel have not been made out.

(iv) Approbation and reprobation

30 The doctrine of approbation and reprobation, relying on the Respondent's agreement that he would not be entitled to bonus post-August 2006 in order for him to remain with the Appellants and to apply for permanent residency, has no application here. The doctrine applies in cases where a party seeks to enjoy some of the benefits under a contract whilst denying being bound by the rest of the contract terms. This has not been the case here, seeing as the term relating to a cut off date for bonus has not been established.

31 I would accordingly dismiss the appeal.