IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2012] SGHC 160

Originating Summons No 946 of 2011

Between

Alain Monié

... Plaintiff

And

APRIL Management Pte Ltd

... Defendant

JUDGMENT

[Contract] – [Contractual terms]

Alain Monié
v
APRIL Management Pte Ltd

[2012] SGHC 160

High Court — Originating Summons No 946 of 2011
Lee Seiu Kin J
23 February 2012

7 August 2012 Judgment reserved.

Lee Seiu Kin J

Introduction

1 The plaintiff was employed by the defendant pursuant to an employment agreement dated 25 May 2010 ("the Agreement"). The plaintiff's employment with the defendant came to an end on 31 October 2011. In this originating summons, the plaintiff asks for a declaration that he is entitled to be paid by the defendant certain moneys under "Accrued Obligations" in cl XVIII(5)(iii) of the Agreement.

2 At the outset, I must note that the source of the dispute lies in the poor manner in which the Agreement was drafted, the specific instances of which will be pointed out at appropriate junctures in this judgment.

Background facts

3 Save for the reason for the plaintiff's resignation (which is not relevant to the claim before me), all the facts set out below are undisputed.

4 The defendant is a wholly owned subsidiary of Asia Pacific Resources International Limited ("APRIL"), a company incorporated in Bermuda. The APRIL group of companies (the "APRIL Group") is one of the largest manufacturers and marketers of pulp and paper products worldwide.

5 The plaintiff is a citizen of France and a permanent resident of Singapore. He was headhunted for the position of chief executive officer ("CEO") of the APRIL Group and commenced his employment with the defendant on 23 August 2010. As CEO, the plaintiff oversaw the operations of the APRIL Group in multiple jurisdictions, including China and Indonesia. He reported directly to the board of directors of the APRIL Group (the "Board").

6 Under cl V(1) of the Agreement, the plaintiff was paid a gross monthly salary of S$97,500. Clause V(4) of the Agreement also entitled the plaintiff to receive the remuneration outlined in the Addendum to the Agreement.

7 Prior to his appointment with the APRIL Group, the plaintiff was employed at Ingram Micro Inc ("Ingram Micro") as its chief operating officer. The terms of the plaintiff's employment contract with Ingram Micro provided for a retention benefit plan comprising certain unvested stock options, restricted stock units under a long-term incentive plan, and cash retained by Ingram Micro (collectively referred to as "the Ingram Micro Retention Benefits") which would be paid to the plaintiff at stipulated dates in the future, stretching into 2013. Upon resigning from Ingram Micro, the plaintiff would

lose his rights to the stock options and cash that were payable after the date of resignation. The defendant was aware that the plaintiff stood to lose the Ingram Micro Retention Benefits if he left Ingram Micro to join the APRIL Group. The negotiations between the parties resulted in terms set out in the Agreement.

8 The plaintiff tendered his resignation on 4 July 2011. His formal employment with the defendant came to an end on 31 October 2011. The plaintiff was thus in the defendant's employ for a period of some 14 months. As noted above at [3], while the reason for the plaintiff's resignation is disputed, it is not relevant to the claim before me. It is undisputed that, whatever the reason for the plaintiff's termination of his employment, the operative clause of the Agreement in the present case is cl XVIII(5).

Issue before the court

9 Clause XVIII is entitled "Termination of Employment". It envisages six forms of termination in cll XVIII(2) to XVIII(7), which I have respectively termed as follows:

(a) termination for cause (cl XVIII(2));

(b) termination with warning (cl XVIII(3));

(c) termination with notice (cl XVIII(4));

(d) termination for disability (cl XVIII(6));

(e) termination for good reason (cl XVIII(7)); and

(f) termination for any reason (cl XVIII(5)).

10 Clause XVIII(2) relates to the first form, termination for cause, which covers, *inter alia*, the plaintiff's misconduct, material breach of contract and bankruptcy. Under this, the plaintiff is entitled to be paid the Accrued Obligations (see [16] below) and nothing else.

11 Clause XVIII(3) relates to the second form, termination with warning, and provides that, if the plaintiff's performance is below expectation, the defendant may give a written warning to him and if the plaintiff fails to improve, then the defendant may terminate the employment with four months' notice. Under this form of termination, the plaintiff is entitled to receive all the benefits specified under cl XVIII(7) (termination for good reason), including the Accrued Obligations (cl XVIII(7)(i)), but is not entitled to receive the bonus specified in cl XVIII(7)(ii).

12 Clause XVIII(4) relates to the third form, termination with notice, under which either party may terminate with six months' notice to the other. The provision is silent as to the payments that the plaintiff is entitled to upon termination, but see [15] below.

13 Clause XVIII(6) relates to the fourth form, termination for disability which covers death and total permanent disability. Under this, the defendant is liable to pay the plaintiff or his estate the Accrued Obligations and a pro-rated bonus (the "Bonus"). The method of calculating the Bonus is the same as that provided for in cl XVIII(7)(ii).

14 Clause XVIII(7) relates to the fifth form, termination for good reason. The plaintiff is entitled to terminate under this provision if he is not appointed to the Board or removed from it, or when the defendant commits any material breach of its obligations under the Agreement. If the defendant terminates the

plaintiff's employment and such termination does not fall under termination for cause (cl XVIII(2)) or termination for disability (cl XVIII(6)), such termination would also fall under this provision. Under this form of termination, the plaintiff is entitled to:

(a) the Accrued Obligations "payable as and when those amounts would have been payable had [his] employment ... not terminated";

(b) the Bonus; and

(c) his base salary and benefits allowance payable for a period.

15 Clause XVIII(5) relates to the sixth form, termination for any reason. The opening words of the provision read: "In the event that the [plaintiff's] employment with the [defendant] is terminated for *any reason* ..." [emphasis added]. The words "any reason" are wide enough to cover the first five forms of termination (see [10]–[14]). However, and herein is an instance of bad drafting, such an interpretation would contradict the provisions under (a) termination for cause, (b) termination with warning, (d) termination for disability and (e) termination for good reason. Clause XVIII(5) would only be logical if "any reason" meant any reason other than the ones in those four forms of termination. While "any reason" probably covers (c) termination with notice because, as noted earlier at [12], there is no provision in cl XVIII(4) for the consequences of this form of termination, this is not a material issue as the present matter does not involve termination with notice and I therefore need not make any finding on it. The parties are agreed that the plaintiff's termination falls within cl XVIII(5), under which the defendant is required to "satisfy the Accrued Obligations, at such times as such obligations would have been provided if [the plaintiff's] employment had not terminated".

16 I now set out cl XVIII(5) in full:

> In the event that the [plaintiff's] employment with the [defendant] is terminated for any reason, the [defendant] shall satisfy the Accrued Obligations, *at such times as such obligations would have been provided if [the plaintiff's] employment had not terminated.* For purposes of this Agreement, the term "Accrued Obligations" means:
>
> (i) all accrued but unpaid Base Salary through the date on which the [plaintiff's] employment is terminated;
>
> (ii) any unpaid or unreimbursed expenses incurred in accordance with [the defendant] policy ...
>
> (iii) *any accrued but unpaid benefits provided under the [defendant's] employee benefit plans or arrangements, including without limitation any amounts to which the [plaintiff] shall be entitled under the Addendum,* subject to and in accordance with the terms of those plans and the Addendum;
>
> (iv) any awarded but unpaid bonus in respect of any completed fiscal year or other bonus period that has ended on or prior to the end of the [plaintiff's] employment with the [defendant]; and
>
> (v) rights to indemnification by virtue of the [plaintiff's] position as an officer or director of the [defendant] ... and the benefits under any directors' and officers' liability insurance policy ...
>
> [emphasis added]

17 The dispute between the parties centres on an apparent conflict between:

> (a) the main part of cl XVIII(5), *viz*, "at such times as such obligations would have been provided if [the plaintiff's] employment had not terminated" ("the First Limb"); and
>
> (b) subpart (iii) of the definition of Accrued Obligations, *viz*, "any accrued but unpaid benefits ... including ... any amounts to which the [plaintiff] shall be entitled under the Addendum" ("the Second Limb").

The plaintiff's position is that the First Limb requires the defendant to make the payments in Appendix B of the Agreement at the dates set out therein "as ... if ... employment had not terminated". The defendant's position is that the Second Limb evinced the intention that only the sums due, or "accrued" prior to the date of termination would be payable. In view of this, it is necessary to look at the scheme of compensation under the Agreement to determine its true intention in relation to this aspect.

18 The part of the addendum relevant to the dispute is Addendum II. This is entitled "Payment in respect of forfeited Long Term Incentive Compensation". It contains two paragraphs as follows:

> The Company will compensate the [plaintiff] in respect of his unvested stock options, restricted stock, cash retention and cash clawback that were awarded by his previous employer in a cash equivalent amount, *the payment of which will be in the amounts set forth on, and pursuant to the timing established in accordance with, Appendix B* attached to this Addendum II to the Employment Agreement. The [plaintiff] agrees to provide all necessary supporting documentation to verify the number of awarded and outstanding unvested stock options, restricted stock, cash retention and cash clawback provided by his previous employer, unless otherwise required by law.
>
> If the [plaintiff's] employment is terminated by the [defendant] (except for a termination with Cause (as defined in Clause [XVIII(2)] of the Agreement)), if there is a Change in Control (as defined in Addendum III), or if the [plaintiff] resigns for Good Reason (as defined in Clause [XVIII(7)] of the Agreement), the *aggregate unpaid amount set forth on the schedule* shall be paid in full within ten (10) business days of the termination of the [plaintiff's] employment or the effective date of the Change in Control.
>
> [emphasis added]

The first paragraph of Addendum II, read with cl V(4) (see [6] above), sets out the parties' intention that the defendant would compensate the plaintiff in the form of cash equivalents of the Ingram Micro Retention Benefits (see [7]

above) in the course of the plaintiff's employment with the defendant. In other words, the "FORFEITED LONG TERM INCENTIVE COMPENSATION" referred to in the title of Addendum II is the Ingram Micro Retention Benefits. The second paragraph is rather more problematic. The difficulty that I have with the second paragraph is that it refers to a "schedule" but the term is not defined, and more problematically, the term does not appear anywhere else in the Agreement. It could conceivably refer to Appendix B, except that this would conflict with some of the termination provisions in cl XVIII. In view of this, and a number of other manifestations in the Agreement that have been or will be pointed out in this judgment, the conclusion that I am inexorably drawn to is that the Agreement is badly drafted, probably as a result of patching up various boilerplate clauses without a thorough check for consistency. However counsel on both sides did not seem troubled by this and appeared to accept that "schedule" refers to Appendix B. I will thus treat the term "schedule" as referring to Appendix B.

19 Appendix B provides the details and dates for the defendant's payments of the cash equivalents of the Ingram Micro Retention Benefits to the plaintiff as follows:

Payment Date	**Type**	**Amount (in USD)**
2010		
1-Jul	Clawback see note 2) below	1,000,000
1-Aug	Unvested Stock options	85,860
2011		
1-Jan	LTIP	175,500
2-Jan	Unvested Stock options	306,600
2-Mar	LTIP	447,264

1-Apr	Cash Retention	700,000
2012		
2-Mar	LTIP	1,494,736
2-Mar	LTIP	447,264
1-Apr	LTIP	329,904
1-Apr	Retention	1,145,448
2013		
1-Apr	LTIP	989,694
1-Apr	LTIP	154,404
TOTAL		7,526,674
NOTES	1) To be paid within 10 business days of their Payment date to the executive 2) Clawback is shown net of Singapore tax. Total grossed up amount provided to the [plaintiff] will depend on exact Singapore tax.	

20 In another instance of poor drafting, there is an arithmetical error in the figure of US$7,526,674 given as the "Total", as the numbers above it add up to only US$7,276,674. At the time of the plaintiff's termination of employment on 31 October 2011, the plaintiff had collected the sums specified up to 1 April 2011. The dispute concerns the six sums set out commencing on 2 March 2012 and ending on 1 April 2013 (the "six sums"). The total of the six sums amounts to US$4,561,450.

21 As noted earlier, the plaintiff resigned under cl XVIII(5) (termination for any reason). It is worthwhile to set out cl XVIII(5) again to see the intention behind the provision. It provides as follows:

> In the event that the [plaintiff's] employment with the Company is terminated for any reason, the Company shall satisfy the Accrued Obligations, at such times as such obligations would have been provided if [the plaintiff's]

> employment had not terminated. For purposes of this Agreement, the term "Accrued Obligations" means:
>
> (i) all *accrued* but unpaid Base Salary through the date on which the [plaintiff's] employment is terminated;
>
> (ii) any unpaid or unreimbursed expenses incurred in accordance with [the defendant] policy ...
>
> (iii) any *accrued* but unpaid benefits provided under the [defendant's] employee benefit plans or arrangements, including without limitation any amounts to which the [plaintiff] shall be entitled under the Addendum, subject to and in accordance with the terms of those plans and the Addendum;
>
> (iv) any awarded but unpaid bonus in respect of any completed fiscal year or other bonus period that has ended on or prior to the end of the [plaintiff's] employment with the [defendant]; and
>
> (v) rights to indemnification by virtue of the [plaintiff's] position as an officer or director of the [defendant] ... and the benefits under any directors' and officers' liability insurance policy ...
>
> [emphasis added]

22 Clause XVIII(5) defines the term "Accrued Obligations" which comprises subparts (i) to (v). For present purposes the crucial word is "accrued" as found in subparts (i) and (iii) of the definition. The meaning of "accrued" as used in subpart (i) is clear enough. The defendant is obliged to pay the plaintiff all "accrued but unpaid Base Salary" up to the date of termination of employment on 31 October 2011. That must mean that he is entitled to the base salary that he had earned or had become entitled to as a result of his employment up to 31 October 2011. The issue in dispute before me is whether the amounts in Appendix B that would have been paid to him after 31 October 2011 had he remained in the defendant's employment fall within the ambit of "accrued but unpaid benefits" in cl XVIII(5) subpart (iii). Applying the same understanding of "accrued" in subpart (i) to subpart (iii),

"accrued but unpaid benefits" ought to encompass the payments under Appendix B that the plaintiff had been entitled to up to the date of termination, *viz*, 31 October 2011. This interpretation is consistent with the defendant's position. The plaintiff's position is that it was the parties' intention all along that he should be entitled to the *full* amount of the payments under Appendix B, just that his entitlement to be paid those sums only arose at the dates prescribed, hence the words "accrued but unpaid". In other words, the plaintiff's contention is that the full amount of the payments under Appendix B accrued to him from the moment of his employment, but the individual payments were only payable to him on the dates prescribed in Appendix B. Had I been solely concerned with the definition of "Accrued Obligations", I might have found for the defendant, as, on face value, its interpretation of "accrued" appears to cohere better with the wording of the definition in cl XVIII(5).

23 However, upon a close study of the Agreement in its entirety, I am unable to find for the defendant for the following reasons. It is important to note that while cl XVIII(5) contains the definition of "Accrued Obligations", it also has another limb which focuses on the consequences of termination for any reason. Clause XVIII(5) thus has two limbs: the First Limb provides for termination for any reason, and the Second Limb defines "Accrued Obligations". It is the interaction and apparent tension between these two limbs that is critical to the present dispute (see above at [17]). For reasons which I will elaborate on in the following paragraphs, I find that while the First Limb is unique to cl XVIII(5), the Second Limb which provides the definition of "Accrued Obligations" applies to the other subclauses in cl XVIII.

24 Clause XVIII(5) itself provides that the definition of term "Accrued Obligations" is given not for the purposes of cl XVIII(5) alone, but "[f]or the purposes of this Agreement". Therefore, the definition applies to that term wherever it is found in the Agreement. The term "Accrued Obligations" is also found in cll XVIII(2), XVIII(6) and XVIII(7). The fact that the definition of "Accrued Obligations" is lumped up with cl XVIII(5) even though it is applicable to other sub-clauses of cl XVIII, is yet another example of bad drafting and is potentially misleading. It could have been made much clearer had this definition provision been disconnected from cl XVIII(5).

25 Once it is recognised that the definition of "Accrued Obligations" is common to the other sub-clauses in cl XVIII, it becomes clear that the operative words for termination for any reason in cl XVIII(5), *viz*, "the [defendant] shall satisfy the Accrued Obligations, at such times as such obligations would have been provided if the [plaintiff's] employment had not terminated" was intended to provide a *specific* modification of the general definition of "Accrued Obligations" as regards to the payments under Appendix B, by providing that the defendant is obliged to pay the plaintiff all the payments set out therein on the prescribed dates *notwithstanding that his employment has been terminated.* The First Limb of cl XVIII(5) does *not*, however, apply to all subparts of the definition of "Accrued Obligations". Importantly, while it applies to cl XVIII(5) subpart (iii) which refers to the Appendix B payments, it does *not* apply to subpart (i) which deals with the plaintiff's base salary. The reason for this lies in the difference in phrasing between subparts (i) and (iii). Subpart (i) provides that Accrued Obligations include "all accrued but unpaid Base Salary through the date on which the [plaintiff's] employment is terminated". There is no way to read this sensibly with the First Limb of cl XVIII(5) which provides that the Accrued

Obligations are to be satisfied at such times as such obligations would have been provided if the [plaintiff's] employment had not terminated, as the two provisions are in direct conflict. Unlike subpart (i), subpart (iii) makes no express reference to termination, and is thus reasonably capable of being read together with the First Limb of cl XVIII(5).

26 If the defendant's position were taken, no effect would be given to the First Limb of cl XVIII(5). This goes against the key principle of contractual interpretation that the court should be slow to interpret the contract in a way that would render any provision superfluous or void of meaning. The express words of the First Limb are clearly consonant with the plaintiff's argument that the defendant is obliged to pay the plaintiff the six sums, as they are sums that the defendant would have had to pay to the plaintiff "if [his] employment had not terminated". As for the word "accrued" in cl XVIII(5) subpart (iii) of the definition of "Accrued Obligations", I am of the view that it does less damage to the overall construction of the Agreement *in its entirety* to take the plaintiff's position that "accrued but unpaid" refers to all unpaid sums in Appendix B.

27 It remains for me to add that where the particular clauses of the Agreement do not provide for any specific modifications of the definition of "Accrued Obligation" (apart from the First Limb of cl XVIII(5), another instance of modification can be found in cl XVIII(7)(i) which contains words to the same effect, a point to which I will return to at [30]), there will no longer be an entitlement to the total sum of the Appendix B payments and the only payments that can be claimed are those that have accrued as at the date of termination (see above at [22]). For example, under cl XVIII(2), termination for cause, where there are no words of modification of the definition of

"Accrued Obligations", in the event of such termination, the executive would not be entitled to the entirety of the Appendix B payments. This must be right, as, in so far as a "hierarchy" of severity of termination goes, termination for cause must undoubtedly be the most severe reason for termination, with the correspondingly least beneficial severance package.

28 I now turn to the defendant's argument that the plaintiff's position does not make commercial sense. I would only say in the present case, it is virtually impossible to judge whether it makes commercial sense or not. This is because much depends on the bargaining power of the parties. This matter was commenced by originating summons and there is no evidence before me on this aspect. Unless the facts are so absurd that the court can confidently find that it is commercially impossible, the analysis would have to be made on the basis of the terms of the Agreement to which the parties have signed.

29 The issue that remains is when the payment of the six sums has to be made. Under the second paragraph of Addendum II of the Agreement, where:

(a) the plaintiff's employment is terminated by the defendant other than termination for cause under cl XVIII(2);

(b) there is a change of control as defined in Addendum III; or

(c) the plaintiff resigns under cl XVIII(7) (termination for good reason),

then the "aggregate unpaid amount set forth on the schedule" shall be paid to the plaintiff within ten days of the event concerned, which appears to be an accelerated scheme of payment. As the plaintiff's termination of employment was under cl XVIII(5), we are not concerned with the second paragraph of

Addendum II. Pursuant to the First Limb of cl XVIII(5), the dates of the six sums are to be paid "at such times as such obligations would have been provided if the [plaintiff's] employment had not terminated", and these dates are those which are provided in Appendix B.

30 The second paragraph of Addendum II is not directly relevant to this judgment, but it represents one further instance of bad drafting. Firstly, the use of the term "aggregate unpaid amount" suggests that there is no need for the payments to have accrued. It is unclear how this ties in with cl XVIII(5) subpart (iii) of the definition of Accrued Obligations which provides for "accrued but unpaid benefits". Secondly, the accelerated scheme of payment does not sit well with cl XVIII(7)(i), which provides that the Accrued Obligations (pursuant to subpart (iii) of the definition of "Accrued Obligations" read with Addendum II, this includes the Appendix B payments) are to be "payable as and when those amounts would have been payable had the [plaintiff's] employment with the [defendant] not terminated". The phrasing of cl XVIII(7)(i) is similar to the First Limb of cl XVIII(5), and as I have found earlier (see above at [29]), under the First Limb of cl XVIII(5) the dates of payment of the Appendix B are the dates provided in Appendix B itself. The Agreement is silent on whether the accelerated scheme of payment overrides this.

Conclusion

31 For the reasons above, I hold that, arising from the termination of the plaintiff's employment with the defendant on 31 October 2011, the plaintiff is entitled to be paid by the defendant the six sums set out in Appendix B to the Agreement on the dates prescribed therein commencing on 2 March 2012 and ending on 1 April 2013. I therefore order the defendant to make those

payments on the dates specified. The defendant is also ordered to pay the plaintiff interest on any late payment of any of the sums from the date each is due to the date of payment at the usual rate. In addition, the defendant is ordered to pay the plaintiff costs, to be taxed if not agreed.

Lee Seiu Kin
Judge

Tan Chuan Thye, Germaine Chia and Loh Jien Li (Stamford Law Corporation) for the plaintiff;
Chew Kei-Jin and Teo Jun Wei Andre (Tan Rajah & Cheah) for the defendant.

Certified true copy

Private Secretary to Judge
Supreme Court Singapore