Marken Limited (Singapore Branch)
v
Scott Ohanesian

[2017] SGHC 227

High Court — Suit No 478 of 2015
Foo Chee Hock JC
31 July, 1–4, 10 –11, 23 August 2017; 26 September 2017

Employment Law — Contract of Service — Breach — Termination without notice

Contract —Contractual terms —Rules of construction — Parol evidence rule

20 October 2017

Foo Chee Hock JC:

1 The defendant, Scott Ohanesian ("Scott") was a "star employee"[1] of Marken LLP (a US entity) and the plaintiff, Marken

[1] Transcript dated 2 August 2017 at p 109.

Limited (Singapore Branch) ("Marken Singapore"), the Singapore branch office of Marken Limited (a UK-incorporated company) ("Marken UK"). At the material time, Scott was employed under an employment agreement entered into between Marken Singapore and Scott in July 2012 ("the Employment Agreement").[2] He held the position of Vice-President, Commercial Operations, Asia Pacific Region ("VP APAC"). His direct superior was Ariette van Strien ("Ariette"), the Chief Commercial Officer of the Marken group, which comprised Marken Singapore, Marken LLP as well as Marken UK.[3] The Marken group provided logistics services to pharmaceutical and life sciences companies worldwide.[4]

2 The dispute centred on a purported breach of the Employment Agreement. Marken Singapore alleged that Scott had prematurely terminated his employment.[5] The effective date stipulated on the Employment Agreement was 1 June 2012 (even though it was only signed on 19 and 20 July 2012).[6] In addition, Marken Singapore and Scott signed a subsequent agreement dated 5 November 2012 ("the Amendment Agreement") on or about 27 November 2012. The

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2 Agreed Bundle ("AB") at p 656.

3 Ariette's affidavit at paras 4 and 7.

4 Ariette's affidavit at para 9.

5 Defendant's Written Submissions ("DWS") at para 2.

6 AB at pp 656 and 671.

effect of this Amendment Agreement – specifically, whether it amended the effective date of the Employment Agreement – was a critical point on which both parties took diametrically opposed positions.

3 Another key aspect of the Employment Agreement was its provision for an "international assignment" to Singapore ("International Assignment"). Under clause 1 of the Employment Agreement, the International Assignment was to last for a period of two years.[7] Many of the clauses in the Employment Agreement catered for an overseas stint. For instance, there were provisions for relocation and set-up allowance (clause 7), flights home (clause 9), and travel allowance (clause 5).[8] Reference was also made to payment in Singapore dollars (clauses 3, 4, 5 and 8), public holidays in Singapore (clauses 2 and 11), insurance covering healthcare and dental treatment in Singapore (clause 13) and Singapore legislation (clause 25).[9] I will revisit the significance of some of these below.

4 Marken Singapore's case, in a nutshell, was that Scott had breached the Employment Agreement by prematurely terminating

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7 AB at p 656.

8 AB at p 657.

9 AB at pp 656, 657, 658 and 660.

the agreement without first giving the requisite six months' notice.[10] For Scott's purported breach of the Employment Agreement, Marken Singapore claimed for loss of profits of approximately US$1,643,014 and/or damages arising from Marken Singapore's "deprivation of the opportunity to negotiate payment in exchange for releasing Scott from his notice period".[11] On a broader level, there were two parts to the present case – first, the question of breach; and second, if breach was established, the question of remedies. I will deal with them in turn.

5 It would be helpful to set out a few background facts at the outset. The following provisions within the Employment Agreement were relevant:

> This Employment Agreement ("Agreement") is effective **June 1, 2012**, and supersedes any previous employment agreement with any entity within the Marken Group …
>
> …
>
> **1. Definition of appointment**
>
> …
>
> Your appointment with Marken commenced on March 7, 2011 and will count as continuous service. Your transfer to the Singapore office will commence on Jun 1, 2012 and your international assignment will be for a period of two (2) years. It is understood,

10 PWS at para 92.

11 Statement of Claim (Amendment No 2) at pp 21–22.

> however, that you may be required to work at other Marken locations overseas during this international assignment.
>
> …
>
> **25. End of International Assignment**
>
> At the end of the international assignment, the Company will discuss career opportunities with you. The company will pay for your repatriation to the US or relocation to another location and cover relocation fees up to USD $10,000. If you are to remain in Singapore, the Company will transfer you to a standard Singaporean employment contract. All options will be discussed with you at the end of your assignment.

6 The Amendment Agreement dated 5 November 2012 was intended to amend the Employment Agreement, the question being whether it amended the effective date of the Employment Agreement (see [2] above).[12] The relevant portions of it were as follows:

> This letter amends the terms of your employment contract and forms an integral part thereof. The amendments are as follows:
>
> **Effective Date**
>
> The effective date of the agreement is November 1, 2012.
>
> **3. Basic Pay and Cost of Living Allowance (COLA)**
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> The midpoint exchange rate used will change to November 1, 2012.

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12 AB at p 672.

> …
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> **4. Cost of Living Allowance**
>
> The midpoint exchange rate used will change to November 1, 2012.
>
> …
>
> **23. Tax equalisation**
>
> Your tax residency for the purposes of equalisation will be …….
>
> Please sign below to confirm your acceptance of the above changes to your employment contract of June 1, 2012.

7 It was undisputed that Scott left Marken Singapore's employ on 1 June 2014.[13] The question to be determined, therefore, was whether Scott was entitled to terminate his employment under the Employment Agreement on that date. The parties had different views of what the Employment Agreement entailed. Marken Singapore mounted two alternative arguments. First, the Employment Agreement contemplated that the International Assignment was a separate and standalone "component" of the Employment Agreement.[14] Hence, while the International Assignment would last for two years, Scott's employment was to

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13 Scott's AEIC at para 50.

14 Plaintiff's Written Submissions ("PWS") at para 46.

last for an indefinite period – until and unless the option to terminate by giving six months' notice was exercised.[15] Second, even if the Employment Agreement and the International Assignment were one and the same, the Amendment Agreement would have amended their effective dates to 1 November 2012.[16]

8 Scott's position, however, was that the "purpose of the Employment Agreement was for the international assignment and nothing else";[17] further, Scott's role as VP APAC was Scott's International Assignment.[18] The effective date of the Employment Agreement as well as the date on which Scott began his International Assignment and role as VP APAC was 1 June 2012.[19] As for the Amendment Agreement, Scott's primary position was that it only sought to set out the effective date for the clauses mentioned within the Amendment Agreement itself (clauses 3, 4 and 23) and did not amend the effective date of the Employment Agreement.[20]

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15 PWS at paras 89 and 92; Transcript dated 23 August 2017 at p 64.

16 PWS at para 77.

17 DWS at para 23(a).

18 DWS at para 23(b).

19 DWS at para 23.

20 DWS at para 42.

9 Ultimately, the issues raised had to be determined through an exercise of contractual interpretation informed by the relevant factual matrix as found by the court. In my judgment, Scott's position was the correct one. The effective date of the Employment Agreement was 1 June 2012, and the employment term was to last for two years therefrom. This effective date was not amended by the Amendment Agreement. I now set out my reasons for finding that Scott had not breached the Employment Agreement.

10 The principles of contractual interpretation were recently set out by the Court of Appeal in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On"*) and *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Y.E.S. F&B Group*"). In essence, a two-step contextual approach was to be employed (see *Yap Son On* at [28]):

> The contextual approach to contractual interpretation in Singapore requires the court to proceed in two broad steps …
>
> (a) The first step requires consideration of whether the extrinsic evidence sought to be adduced in aid of interpretation is admissible. This is a matter governed by the procedural rules of the law of evidence, which governs what and how facts may be proved.
>
> (b) The second step is the task of interpretation itself, which involves

> ascertaining the meaning of expressions used in a contract, taking into account the admissible evidence. The rules which govern this process may be found in the substantive law of contract.

11 Under the first step, it was settled law that even where there was no ambiguity, extrinsic evidence of circumstances surrounding a contract would be admissible to interpret it (and not contradict, vary, add to or subtract from its terms) pursuant to s 94(*f*) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"). This general permissive approach was subject to the following restrictions (see *Yap Son On* at [41]–[42]):

(a) The requirement that the nature and effect of the extrinsic evidence must be pleaded with sufficient specificity;

(b) The requirement that the extrinsic evidence sought to be admitted must be (i) relevant; (ii) reasonably available to all the contracting parties; and (iii) relate to a clear or obvious context (the criteria set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") ("*Zurich* criteria"));

(c) Sections 95 and 96 of the Evidence Act, which were absolute bars to evidence falling within these provisions; and

(d) The bar against the admissibility of parol evidence of the drafters' subjective intentions at the time of the conclusion of the contract unless there was latent ambiguity.

12 Besides these restrictions, the issue of pre-contractual negotiations merited further elaboration. The blanket prohibition on such evidence had been removed in *Zurich Insurance* (see *Zurich Insurance* at [132(d)]), but the *Zurich* criteria would have to be fulfilled before such evidence could be admitted (see *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*") at [63]–[69]; *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 at [50]). It should also be pointed out that the Court of Appeal had commented in *Xia Zhengyan* that the contours of this rule of admissibility remained an "open question" and that limits and safeguards might have to be put in place (see *Xia Zhengyan* at [69]). Unfortunately, while both parties in the present action pleaded and led evidence on the pre-contractual negotiations leading to the Employment Agreement and the Amendment Agreement, neither side addressed, as a matter of law, the admissibility of such evidence for the purposes of interpretation (as was the case in *Xia Zhengyan*: see [62]). In any case, I found that the *Zurich* criteria were satisfied in respect of the pre-contractual negotiations (see [15]–[16] and [33] below) and I admitted them as evidence so that they could be used to shed light on what the contract

meant (as was done in *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Limited) v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)* [2017] SGHC 22 at [92]–[93]).

13 As for the second step (the task of interpretation), it was "the objectively ascertained intentions of the parties that is relevant, and not their subjective intentions" (see *Yap Son On* at [30]). Further, both the text and context must be considered, and although "the text of [the parties'] agreement would [usually] be of first importance", if the text was ambiguous then the "relevant *context* will *generally* be *of the first importance*" (see *Yap Son On* at [30]; *Y.E.S. F&B Group* at [34]). A holistic approach should be taken: the agreement should be construed as a whole and courts should not be fixating on any particular word or phrase (see *Zurich Insurance* at [131]).

14 I turn to consider the present facts and issues arising in the light of the above principles. At the outset, I agreed with Mr Chew (who represented Scott) that clause 1 of the Employment Agreement was "clear and unambiguous" in conveying the meaning that the "transfer to the Singapore office" ***was the International Assignment***, which would last for two years starting 1 June 2012.[21] I also found that Marken Singapore's argument that the International

21 DWS at paras 26–27.

Assignment was a separate component of the Employment Agreement was an *ex post facto* rationalisation. Indeed, Ms Ang (who represented Marken Singapore) could not point to any provision within the contract that expressly and unambiguously made a distinction between the International Assignment and the Employment Agreement. It seemed absurd that the Marken group, a large entity with access to legal advice, would leave such an important distinction unexpressed and be content with relying on an alleged common understanding that the International Assignment could begin only when Scott was "consistently on the ground"[22] to manage his team.

15 On the relevant context, the terms of the Employment Agreement were the subject of negotiations up until mid-July 2012. On 14 July 2012, a draft of the Employment Agreement was circulated to Scott and this draft sought to amend the effective date of the Employment Agreement to 1 August 2012.[23] But as of 1 June 2012, Scott had already begun to perform the role and responsibilities of VP APAC (and this was not disputed by Marken Singapore). It was for this reason that Scott sent an email reply on 17 July 2012, requesting for the Employment Agreement to reflect

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22 Transcript dated 2 August 2017 at pp 76–77.

23 AB at p 131.

1 June 2012 as "the start date of the assignment".[24] In the same email, Scott also offered to extend the period of employment under the Employment Agreement such that the contract would run from 1 June 2012 to 31 August 2014.

16 What occurred after this email was telling. In an internal email dated 17 July 2012, Ariette emailed Ms Doaa Fathallah ("Doaa"), the General Counsel and Chief Administrative Officer of Marken UK, commenting that "Scott started indeed in June".[25] It should be noted that Ariette was responding to Scott's email where he requested for the Employment Agreement to reflect 1 June 2012 as "the start date of the *assignment*" [emphasis added]. Although Ariette said that Scott meant his "assignment as VP commercial operations",[26] I found that her comment (to Doaa) was an acknowledgement that the International Assignment had indeed started in June 2012. In any case, one would have expected Doaa in her reply dated 19 July 2012[27] to make it clear that the 1 June 2012 start date was only for the role of VP APAC and not the International Assignment. The bigger point however was that Ariette's stark

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24 AB at p 144.

25 AB at p 147.

26 Transcript dated 3 August 2017 at p 18.

27 AB at p 151.

distinction between VP APAC and the International Assignment was in the end unconvincing, especially in the light of her earlier evidence that the role of VP APAC was "inseparable" from the International Assignment.[28]

17 Ms Ang argued that the International Assignment would only begin when Scott had obtained his employment pass and moved to Singapore ("boots on ground" argument),[29] and that Scott's offer (to extend the term of the employment: see [15] above) was indicative of his appreciation of this. According to Ms Ang, end August 2012 was when Scott contemplated that he would arrive in Singapore. On the other hand, Mr Chew submitted that Scott's offer was a bid to finalise the contract as soon as possible.[30] This was supported by the oral evidence of Scott when he was cross-examined by Ms Ang.[31]

18 I adopted Mr Chew's submission and rejected Ms Ang's suggestion. Scott's offer to extend the period of employment demonstrated his understanding that if the effective date was 1 June 2012, the employment term would have ended two years later, the last day being 31 May 2014, barring a further amendment to extend

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28 Transcript dated 3 August 2017 at p 13.

29 PWS at para 27(a); Transcript dated 23 August 2017 at p 58.

30 DWS at para 23(f).

31 Transcript dated 10 August 2017 at pp 76–79.

the period of the employment. If it was Scott's understanding that under the earlier draft agreement (see [15] above) circulated on 14 July 2012, the two-year International Assignment would only commence after Scott had obtained his employment pass and moved to Singapore, then it would have been unnecessary for Scott to make the offer in the 17 July 2012 email. It should be recapitulated that in this later email, Scott had asked for "the start date of the assignment" to be reflected as 1 June 2012; on an objective ascertainment of the parties' intentions, I found that Scott had offered ***to extend the duration of the International Assignment*** (which had already started at that time). This offer was not taken up by Marken Singapore.

19 Besides having regard to the parties' negotiations, the court had to undertake a holistic interpretation of the Employment Agreement. This entailed the following considerations.

20 To begin, it was most telling that the ***parties*** to the Employment Agreement, which was governed by Singapore law (clause 25), were Scott and ***Marken Singapore***.[32] Previously, Scott had been employed by Marken LLP.[33] Notably, the Employment

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32 AB at pp 656 and 662.

33 Scott's AEIC at para 9.

Agreement superseded all previous contracts (see the recital of the Employment Agreement) between Scott and the Marken group,[34] and was also the ***same contract*** that governed Scott's employment after he obtained his work permit and moved to Singapore.

21 It was significant that clause 25 of the Employment Agreement (set out above at [5]) provided that there would be discussions on Scott's career opportunities ***at the end of the International Assignment***, and that the options on the table included repatriation back to the US, relocation to another place, and a continuation of his stay in Singapore. All of these options would require a new employment contract. Indeed, clause 25 did not impose any legal obligation on Marken Singapore to retain Scott's services at the end of the two years.[35]

22 The first two options (repatriation or relocation) would necessarily have required Scott to enter into a new employment contract. This was because there were numerous provisions in the Employment Agreement that would only be suitable for a stint in Singapore (see above at [3]). For instance, clause 2 (labelled as "Hours of work") provided that Scott might have to work on

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34 AB at p 656.

35 Transcript dated 23 August 2017 at p 11.

"Singaporean Public Holidays",[36] and clause 11 provided that Scott would be granted 25 days of holiday "[i]n addition to Singaporean Public Holidays".[37] Clause 7, which related to relocation and set-up allowance, stipulated that Marken Singapore would provide Scott with a "one bedroom flat in a suitable area of Singapore" or reimburse him for rent expenses.[38] Clause 13 provided that Marken Singapore would provide Scott with insurance covering healthcare and dental treatment in Singapore.[39] ***Even if Scott stayed on in Singapore*** (the third option), it was envisaged that a new contract would be required – clause 25 provided that Marken Singapore would transfer Scott to a "standard Singaporean employment contract" if he chose to remain.[40]

23 Next, Ariette conceded during cross-examination that upon the conclusion of the International Assignment, major "amendments" to most of the clauses in the Employment Agreement would have been required, though it would be more accurate to say – as Mr Chew framed it – "a new contract in essence" was required.[41]

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36 AB at p 656.

37 AB at p 658.

38 AB at p 657.

39 AB at p 658.

40 AB at p 662.

41 Transcript dated 2 August 2017 at pp 102–108.

It was therefore not open to Marken Singapore to insist that the International Assignment was merely a component of the Employment Agreement. To the contrary, the Employment Agreement was coterminous with the International Assignment. Its effective date was 1 June 2012 and its term expired two years later.

24 It was necessary to consider clause 10 of the Employment Agreement, another factor that Ms Ang relied on for the "boots on ground" argument (see [17] above). Clause 10 provided that "[e]ngagement in an international assignment is *contingent* on successful attainment of a visa to work in the host country" [emphasis added]. It was undisputed that Scott had only obtained his employment pass on 24 October 2012.[42] On this basis, Ms Ang submitted that Scott's International Assignment could only have started on 1 November 2012.[43] With respect, I could not agree. I start by noting that clause 10 was at odds with the bulk of the Employment Agreement. This clause, whose primary purpose was obviously to protect Marken Singapore by ensuring that local laws would not be breached, appeared to be a standard term[44], and was left out of the negotiations leading to the Employment Agreement

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42 AB at p 225.

43 PWS at para 49.

44 Transcript dated 23 August 2017 at pp 16–17.

between Marken Singapore and Scott. Given that specially agreed provisions would trump inconsistent standard terms that had not been specifically negotiated (see *Zurich Insurance* at [131]), the effective date of the Employment Agreement, being the subject of focused negotiations, would override any inconsistency that clause 10 could give rise to. In my view, therefore, Ms Ang could not justifiably latch onto clause 10 to ground the distinction between the Employment Agreement and International Assignment.

25 Even if clause 1 did not override the effect of clause 10, I agreed with Mr Chew's submission that clause 10 should be construed as a stipulation that whilst the Employment Agreement and the International Assignment had commenced, the Employment Agreement would have to be relooked at if Scott subsequently failed to obtain his work visa.[45] Mr Chew submitted that this was in line with how Marken Singapore expected the visa application process to take place without a hitch. Indeed, there was nothing to cater to the possibility that the visa application would be unsuccessful. In fact, Simon Golan ("Simon"), a Senior Director of Tax & Corporate Affairs of Marken UK, had in an email dated 16 May 2012, raised

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[45] DWS at para 35.

this concern to Doaa, but no amendments were made to address such a possibility.[46]

26 At trial, Ariette insisted that "contingent" in clause 10 did not, as Mr Chew contended, mean "provided that", but meant "dependent on".[47] Interpretation, however, was not merely a question of dictionary definitions; the court was entitled to depart from the plain and ordinary meaning conveyed by a word or expression, and the interpretation Mr Chew put forward was certainly one that the word could reasonably bear (see *Yap Son On* at [31]).

27 Another factor that detracted from Marken Singapore's submission was Scott's proposal that he sent to Ariette on 9 December 2011.[48] In this document, Scott set out a rough plan of how he intended to carry out his role as VP APAC over the two-year period. It was apparent that Marken Singapore did not wish to put much weight on the proposal. Whatever could be said about the proposal, it clearly debunked the notion that residence in Singapore was contemplated to be a necessary condition of the International Assignment since only eight out of the 24 months would be spent in

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46 DWS at para 36; AB at p 74.

47 Transcript dated 2 August 2017 at p 92; DWS at para 35.

48 DWS at para 22(b); AB at p 39.

Singapore.[49] In the premises, I rejected the "boots on ground" argument and Marken Singapore's primary position.

28 For the foregoing reasons, I found that the transfer to the Singapore office was Scott's International Assignment; the Employment Agreement's sole purpose was to cater for Scott's International Assignment in Singapore; and Scott's term of employment under the Employment Agreement, the International Assignment and his role as VP APAC commenced from 1 June 2012 and lasted for 2 years thereafter.

29 Turning next to Marken Singapore's alternative submission, I took the view that the Amendment Agreement only amended the effective date of the three clauses (3, 4 and 23) referred to therein.

30 At the outset, I should address Ms Ang's attempt, during closing submissions, to rely on an ***internal email*** between Simon and one Marion Abascal ("Email").[50] The Email was also copied to Doaa and two others. I agreed with Mr Chew's objection to the admissibility of the Email. The Email was clearly evidence of Marken Singapore's subjective intention,[51] and even if there was

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49 Transcript dated 11 August 2017 at pp 96–97.

50 AB at p 235.

51 Transcript dated 23 August 2017 at p 93.

latent ambiguity in the present case (see [32] below), the Email was not pleaded with sufficient specificity (see [11(a)] above). In fact, it was nowhere to be found in Marken Singapore's pleadings. In *Yap Son On*, the Court of Appeal explained that one of the "critical benefits" that adherence to the pleading requirement would bring was "procedural fairness and substantive justice", the concern being that no party or the court should be "taken by surprise at the trial" (see *Yap Son On* at [49(b)]). This concern weighed heavily in the present case as Simon (the drafter of the Email) had neither given evidence nor been cross-examined on the Email or for that matter, on the Amendment Agreement. More importantly, Scott was deprived of any opportunity to address the meaning of the Email. Despite the timeous objections by Scott, Ms Ang only adduced the Email and attempted to justify its admissibility in her closing submissions.[52]

31 The Email also failed to satisfy the *Zurich* criteria (see [11(b)] above) because it was not reasonably available to all the contracting parties and it did not relate to a clear or obvious context. As regards the requirement of reasonable availability, the Court of Appeal had held that the terms of a contract "could only be interpreted by reference to material which *all* the parties to the agreement would

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[52] Transcript dated 23 August 2017 at p 93.

reasonably have had access to" at the time of the contract (see *Yap Son On* at [53(b)]; *Zurich Insurance* at [125(b)]). However, Ms Ang did not show that it was available to Scott at the time of contract.[53] As regards the requirement of a clear or obvious context, the Court of Appeal had held that the evidence sought to be admitted must allow the court to "objectively ascertain a clearly defined or definable intention held by both parties" (see *Yap Son On* at [53(c)]). In the present case, the Email standing on its own served no clarificatory purpose. I therefore decided not to admit the Email as evidence.

32 Turning to the second stage of interpreting the Amendment Agreement (see above at [6]), the central issue concerned the meaning of the word "agreement" in the sentence "[t]he effective date of the agreement is November 1, 2012".

33 As a matter of context, it was significant that the only discussions carried out prior to the Amendment Agreement were between Simon and Scott. It must be emphasised that Simon's role was primarily tax-related and the negotiations between the two of them pertained solely to the applicable exchange rate and tax.[54]

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53 Transcript dated 23 August 2017 at p 97.

54 Transcript dated 3 August 2017 at p 47.

There were no discussions as to the changes that had to be made to the effective date of the Employment Agreement or the International Assignment.[55] It was also material that Ariette was not part of the discussions leading up to the Amendment Agreement and claimed to have no personal knowledge of what had actually transpired,[56] whereas she had previously been actively engaged in pre-contractual negotiations resulting in the Employment Agreement in July 2012. As it stood, the Amendment Agreement was an agreement that Scott and Marken Singapore entered into after Scott had partaken in negotiations related to the applicable exchange rate and tax with Simon, a "tax guy".[57] In the light of the fact that there were negotiations amongst Scott, Doaa and Ariette focusing on the effective date stipulated in the Employment Agreement, I found it improbable that having regard to the workings of the Marken group, this date could be reset by the "tax guy" after discussions that focused on tax and exchange rate matters.

34 In respect of the construction of the Amendment Agreement, Ms Ang submitted that the purpose of the Amendment Agreement

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55 DWS at para 39(f); Scott's AEIC at para 44; Defence and Counterclaim (Amendment No 2) at para 28.

56 Transcript dated 2 August 2017 at p 99.

57 Transcript dated 10 August 2017 at p 66.

was to reflect the fact that Scott effectively remained in the employ of Marken LLP up until 1 November 2012. This was also why Scott had continued to be paid his salary by Marken LLP up until that point,[58] and had indicated in his tax filings that the commencement date of his employment with Marken Singapore began on 1 November 2012.[59]

35 These arguments were misconceived. The Employment Agreement was the ***only contract*** that governed Scott's employment with any entity belonging to the Marken Group ***from 1 June 2012*** onwards. As the recital of the Employment Agreement stated, the Employment Agreement would "[supersede] any previous employment agreement with any entity within the Marken Group".[60] It should also be noted that Ariette's evidence was consistently that the Amendment Agreement had been meant to "finalise" the start date of the International Assignment, and not to reflect Scott's transfer of employment from Marken LLP to Marken Singapore.[61] How Scott was remunerated for his services was a payroll matter

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58 AB at p 226.

59 AB at p 631.

60 AB at p 656; Transcript dated 2 August 2017 at p 102; Transcript dated 23 August 2017 at pp 5–6.

61 Ariette's AEIC at paras 28 and 44; Transcript dated 2 August 2017 at p 77.

that the Marken group had the flexibility to deal with. The fact remained that the only binding agreement that Scott was under from 1 June 2012 was the Employment Agreement. One should also not read too much into Scott's indication of 1 November 2012 as the start date of employment in his tax filings. Instead, the date was stated as such for the computation of tax payable to the Singapore authorities,[62] and did not undermine the effect of the recital of the Employment Agreement.

36 In the event, I found that as regards the Amendment Agreement, the common intention of the parties was for the amendment of the date to 1 November 2012 to apply only to clauses 3, 4 and 23. To be sure, the fact that clauses 3 and 4 referenced a midpoint exchange rate of 1 November 2012 did not render the amendment of date redundant. In the Employment Agreement, it could be seen from clause 3 that even though there was a date on which the midpoint exchange rate was to be determined, the parties to the Employment Agreement had nonetheless set an effective date for clause 3.[63]

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62 Transcript dated 10 August 2017 at pp 13–15.

63 AB at p 656.

37 For the foregoing reasons, Scott did not breach the Employment Agreement by leaving Marken Singapore's employment on 1 June 2014 (his last day being 31 May 2014).[64] It is appropriate at this point to make an observation about how Marken Singapore ran its case. As stated above at [7], two primary submissions were made by Marken Singapore, and they were arguments made in the alternative. In my view, however, the plaintiff's arguments on the Amendment Agreement were inconsistent with and struck at the heart of their primary position that the International Assignment was a standalone component of the Employment Agreement and both were not coterminous. If the parties' common understanding was truly that the International Assignment would commence only when Scott obtained his employment pass and moved to Singapore, it would not have been necessary to "reset" the effective date of the Employment Agreement by entering into the Amendment Agreement.[65] Marken Singapore could simply have made the necessary administrative records or notifications to reflect the start of the International Assignment.

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64 DWS at para 3.

65 DWS at para 50(d).

38 Based on my finding that Scott did not breach the Employment Agreement, the issue of remedies was no longer live. Be that as it may, it was my view that both heads of damages as pleaded were not sustainable. In respect of the loss particularised in its amended Statement of Claim,[66] Marken Singapore had failed to satisfy me that its methodology of determining loss (of profits) (*ie*, essentially, a linear extrapolation of the contracts that Scott had won in the preceding months of 2014) would allow the court to assess the quantum of the loss suffered by Marken Singapore. While I acknowledged that the analysis, capably presented and supported by Ariette, may be accepted in a corporate boardroom, it was neither permissible nor apt in proving losses in a courtroom, which also had its own rules on causation and remoteness.

39 Even assuming *arguendo* that Marken suffered the loss of profits they were claiming for (though I did not accept this), Marken Singapore's claim for loss of profits would also have failed for lack of causation and because it was too remote. As regards causation, it should be noted that customer relationships were forged between Marken Singapore – not Scott alone – and their respective clients. Scott was one of the many employees handling Marken Singapore's client relationships. These employees included staff involved in day-

66 Statement of Claim (Amendment No 2) at pp 15–21.

to-day customer service, regulatory staff, quality control staff and other business development representatives.[67] Notwithstanding that Scott was a "star employee", I could not conclude from the evidence adduced that he was the "effective" or "dominant" cause for any loss (see *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [60]). As for remoteness, I found that Marken would have faced insurmountable difficulties in proving imputed or actual knowledge under either limb of *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145 (see *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 ("*Out of the Box*") at [17]–[18]) such that he could foresee the type of loss ***as pleaded and argued*** by Marken Singapore. In this regard, it was important to bear in mind the proposition in *Out of the Box* that it would be "simplistic and ultimately unhelpful to argue that a given head of loss is not too remote simply because it could semantically be packaged within a broader category of loss that was foreseeable by the contract breaker" (see *Out of the Box* at [44]). The "special facts that pertain to the type and scale" (see *Out of the Box* at [44]) of loss – like in the present case – must also be taken into account.

40 For completeness, I should add that Marken Singapore's claim as regards the lost opportunity to negotiate (as pleaded and

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67 DWS at para 81(a); Transcript dated 4 August 2017 at pp 53–54 and 56.

argued before me) was misconceived. The juridical basis of *Wrotham Park* damages – whether it was compensatory or restitutionary – had been a vexed question (see, *eg*, Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 14-030). Recently, the Court of Appeal in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 clarified at [80] that "*Wrotham Park* damages [were] largely accepted to be *compensatory* in nature, although they are different, in substance, from a traditional award of compensatory damages". The Court of Appeal went on to explain at [82] that although *Wrotham Park* damages were "a departure from the traditional loss-based measure of damages, their primary purpose [could] still be said to be compensatory, in that they protect a plaintiff's interest in contractual performance." Leggatt J in *Marathon Asset Management LLP v James Seddon* [2017] EWHC 300 (Comm) ("*Marathon Asset*") explained that *Wrotham Park* damages were "compensatory" in the broad sense that it was a "remedy which [was] awarded as a response to a wrong done to the claimant", though he also found that such damages were "restitutionary" in the loose sense that it referred to an award of money that was assessed by valuing a gain by the defendant (at [199]–[200]). In *Marathon Asset*, Leggatt J also cautioned that a finding that a claimant had failed to prove loss was "tantamount to a finding that the claimant has not suffered loss, and the same legal

consequence should follow"; *Wrotham Park* damages would be a "just response" only where compensatory damages were an "*inherently* inadequate remedy" (at [214]–[215]). In the present case, while Marken Singapore had claimed for *Wrotham Park* damages, it appeared to be just another way to dress up their claim for ***loss of profits***[68] – plainly a "traditional loss-based measure of damages". Indeed, Marken Singapore did not plead or prove that Scott had made gains pursuant to his breach of contract. Further, Marken Singapore failed to convince me that this was a case where compensatory damages were "inherently inadequate". Instead, I found that this was a case where Marken Singapore had not proven loss suffered as a result of the alleged breach. All said, Ms Ang's repeated appeals to the "justice of the case"[69] could not make up for Marken Singapore's failure to establish a principled basis or satisfy the necessary requirements for *Wrotham Park* damages.

41 I therefore dismissed Marken Singapore's claim in its entirety. After hearing the parties on costs, I ordered Marken Singapore to pay costs agreed or taxed on the standard basis to Scott.

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68 PWS at para 165.

69 Transcript dated 23 August 2017 at pp 113–115, 119.

Foo Chee Hock

Judicial Commissioner

Celeste Ang, Sheik Umar, Lavania Rengarajoo and Omar Muzhaffar (Wong & Leow LLC) for the plaintiff;
Chew Kei-Jin and Stephanie Tan (Ascendant Legal LLC) for the defendant.