# Johannes Budisutrisno Kotjo v Ng Wei Teck Michael and Others
# [2001] SGHC 227

**Case Number** : Suit 984/2000

**Decision Date** : 17 August 2001

**Tribunal/Court** : High Court

**Coram** : Choo Han Teck JC

**Counsel Name(s)** : Desmond Ong and Intekhab Khan (J Koh & Co) for the plaintiff/appellant; Ashok Kumar and Eugene Thuraisingam (Allen & Gledhill) for the defendants/respondents

**Parties** : Johannes Budisutrisno Kotjo — Ng Wei Teck Michael

*Civil Procedure – Striking out – Termination of appellant's employment – Claim for compensation for unused leave – Whether respondents can strike out claim on ground that it discloses no reasonable cause of action – O 18 r 19 Rules of Court*

*Companies – Receiver and manager – Judicial managers – Whether respondents proper party to action – ss 227I(1)(b), 227(2) &227(3) Companies Act (Cap 50, 1994 Ed)*

## JUDGMENT:

1. The appellant was the executive chairman of Van Der Horst Ltd ("the company") which was placed under judicial management on 11 February 2000. The three respondents were the judicial managers. By a letter dated 17 August 2000 the judicial managers terminated the employment of the appellant.

2. A dispute arose between them as to the entitlement of compensation and other payments upon that termination. Consequently, the appellant sued the judicial managers in Suit 984 of 2000.

3. Part of the claim has been settled by the parties but a sum of $60,000 representing six monthly housing allowance of $10,000 each will be proceeding for trial in order to determine whether the $10,000 housing allowance was part of the appellant's salary.

4. The appeal before me concerned a separate head of the appellant's claim for compensation for 79 days of unconsumed leave amounting to $109,384.62 and $13,126.15 being the employer's contribution of Central Provident Fund payment. The respondents applied under O 18 r 19 of the Rules of Court to strike out the appellant's claim on the ground that it disclosed no reasonable cause of action. The assistant registrar accepted the respondents' application and struck out the appellant's claim for compensation for unconsumed leave. Against that decision the appellant appealed before me.

5. The underlying issue here is whether the appellant was entitled to compensation for unconsumed annual leave but the key question is whether the respondents are entitled to strike out this claim now. Mr. Ong submitted on behalf of the appellant that he was entitled at common law to such payment. Counsel pointed out that the letter of termination did not set out the grounds for termination, but on the basis that the appellant was paid six months salary, it was natural to conclude that the termination was made under cl 6(a) of the employment contract dated 1 October 1994. That provision reads as follows:

> "(a) This Agreement may be terminated by six (6) months' notice in writing given by either party to the other or by payment of six (6) months salary in lieu thereof."

6. Counsel drew a distinction between a termination under paragraph (a) above and paragraph (b) which provided for termination without notice. His point was that a termination under paragraph (a) preserved all the employee's rights at common law. Neither Mr. Ong nor Mr. Kumar – who appeared on behalf of the respondents – were able to draw my attention to any direct authority to the effect that at common law an employee is entitled to compensation for unconsumed leave. In this regard, I am of the view that if the common law is of any assistance to the appellant it must be by reason of the application of an implied term. There is no dispute that the contract of employment is silent as to the payment of unconsumed leave save for cl 6(d) which provides as follows:

> "(d) In the event that the Company terminates this Agreement forthwith as a result of shareholder action (other than in accordance with clause 6(b), without prejudice to either party's rights, the Director shall have the option of monetary compensation based on his salary for any period of annual leave which has not been consumed, and the Company shall pay any such amounts calculated accordingly."

7. Mr. Ong takes the view that this provision supports his case in alternative ways. First, he says that this provision like cl 6(b) concerns the termination of an employee "forthwith" and has no application where an employee was terminated with notice under cl 6(a). Clause 6(d) must, therefore, according to Mr. Ong, be disregarded. I do not agree. If the parties have specified an instance when compensation is payable for unconsumed leave, the natural inference is that compensation will not be payable in other instances. Secondly, and in the alternative, he argued that a termination by the judicial managers is akin to a termination by shareholder action under cl 6(d) and, accordingly, compensation must be paid. I need only say straightaway that this alternative argument is untenable because there are no grounds to suggest that the term "shareholder action" is substituted by "judicial manager action" when the company comes under judicial management. The two entities are not only separate but are as distinct as can be. The judicial manager is a statutory manager. A shareholder has equity.

8. In my view, therefore, cl 6(d) is a straightforward provision which contemplates the situation where the appellant's contract of employment is terminated by a shareholder action (provided that such termination was not made under cl 6(b)). There is no room to infer or imply that the appellant would be entitled to compensation for unconsumed leave in any other situation than those under cl 6(d) and the assistant registrar was correct in coming to that conclusion.

9. The appellant's claim for unconsumed leave was pleaded as follows:

> "c. Monetary compensation in respect of unconsumed leave – pursuant to clause 5(d) of the Employment Contract (and the variation of the same) read with clause 6(d), or alternatively at common law, the [appellant] avers that he is entitled to be paid in respect of his remaining unconsumed leave of 79 days up to the date of termination, amounting to S$109,384.62 (not inclusive of the company's CPF contribution of S$13,126.15 as 12% of the [appellant's] leave pay)."

10. Mr. Ong referred to *Pacific Internet Ltd v Catcha.Com Pte Ltd* [2000] 3 SLR 26 for the proposition in law that to succeed, the respondents here must show that there is "an answer immediately destructive" of the appellant's claim. In the *Pacific Internet* case, reference was made to the *Hunt v Carey Canada Inc,* Sup Ct Canada, 1990, Lexis 155 in which Wilson J was of the opinion that

> "the fact that a pleading reveals 'an arguable, difficult or important point of law'

> cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to evolve to meet the legal challenges that might arise in our modern industrial society."

The principle stated in the two cases above are not challenged by Mr. Ashok Kumar. It is also not disputed that striking out may only be made in a plain and obvious case.

11. On the face of it, the appellant's pleading which I have set out above appears to disclose a cause of action based on contract. However, in my analysis of the contract and the law, it seems clear to me that the claim was misconceived and is doomed to fail. But, does this all add up to a justifiable striking out of the appellant's case at this stage, or as Mr. Ong puts it, should the appellant be permitted to his day in court? If the sole argument that will sustain his claim is based on a question of law, then this day in court before me is as good a day as any other, subject, of course, to an appeal to the Court of Appeal which the appellant would be entitled to in any event. Mr. Kumar made an oral application before me to consider this appeal on the alternative basis of O 14 r 12 to have the issue disposed of as a point of law. There was no opposition by Mr. Ong to that application. In my view, a disposal under O 14 r 12 in this case would be a more appropriate way although on the case as presented, I am satisfied that the assistant registrar's decision in striking out this part of the appellant's case under O 18 r 19 achieved the same result. I shall, therefore, not disturb the orders made by her.

12. For completeness, I think that I should address one other matter raised by Mr. Ong. He says that the appellant is entitled to challenge the respondents at trial as to why other employees were paid compensation for unconsumed leave but not himself. I was not shown the contracts of employment for the other employees that Mr. Ong spoke about, but in any event, even if their contracts were identical with that of the appellant, the gratuitous payments by the company in those cases do not bind the company contractually to make the same provision for the appellant. Furthermore, the case as pleaded by the appellant does not admit of this submission at all.

13. Finally, I come to the second aspect of this appeal although my decision above renders this part academic. Nonetheless, the point was raised and argued here and below and is of some importance by reason of its relative novelty. The question is whether the judicial managers were the proper defendants to this action. The corollary to this is whether their disclaimer of liability on 17 August 2000 was effective in law to absolve them of liability for the unconsumed leave of the appellant, should he succeed in his claim, and if so, to what extent.

14. I must say at the outset that the assistant registrar Miss Thian Yee Sze had meticulously traced the history of the related provisions in the UK Insolvency Acts of 1986 and 1994. I find myself indebted to her for that, as well as her analysis of *Powdrill v Watson* [1995] 2 AC 395, and which I gratefully adopt. Briefly, a straightforward reading of s 227I(1)(b) of the Companies Act, Ch 50 applied to the undisputed facts leads one to the inescapable conclusion that the judicial managers had adopted the contract of employment after 28 days of the appointment of the judicial managers.

15. Section 227I(3) provides:

> "For the purposes of this section, the judicial manager is not to be taken to have adopted a contract entered into by the company by reason of anything done or omitted to be done within 28 days after the making of the judicial management order."

This brings us to the next point which is whether the contract so adopted by the judicial managers is binding on them and to what extent. The respondents accept Miss Thian's finding that their disclaimer operated at best from the date it was given, namely 17 August 2000. That was given in the same letter that terminated the appellant's employment with the company. In this regard, Miss Thian held:

> "… Counsel for the defendants [respondents] argued that s 227I(2) does not impose on the judicial managers a time limit by which they have to disclaim personal liability. With that submission, I agree. However, once the contract is adopted after the 28-day "gestation" period and up to the point in time when the notice of disclaimer is given to the other side, the fact remains that the judicial managers remain personally liable for liabilities on the contract during the period when the company is in their judicial management. They will only be able to disclaim that liability from the time the notice is given and only for future liabilities incurred on the contract *after* the notice of disclaimer. They remain personally liable for liabilities incurred during their term of office as judicial managers up to the point in time when they so disclaim their personal liability under s 227I(2). If one were to hold the view that the judicial manages could, at any time after the 28-day period, disclaim personal liability and at the same time have the disclaimer operate retrospectively to the time of the adoption of the contract, then judicial managers will, without impunity, be able to avoid personal liability altogether. This will lead to an undesirable situation whereby the inequitable state of affairs brought about by *Nicoll v Cutts* will still remain and with respect, Parliament's intention with the enactment of s 227I will be circumvented. It could also not have been Parliament's intention that the employee should continue his employment with the company with the uncertainty that the judicial manager would one day, be it 10 days, 10 months or perhaps even a few years down the road, send him a notice disclaiming all personal liability for all the judicial managers' acts, past, present and future. The interest of the judicial managers not to be unduly saddled with the potential adverse monetary consequences of personal liability has to be balanced against the protection of the parties whom the judicial managers have contractual relations with."

Mr. Ong submitted on behalf of the appellant that liability attaches to the contract even for the period before the appointment of the respondents as judicial managers. I am of the view, however, that the liability that attaches to the judicial managers upon their adoption of the contract in question must be confined to liability on the contract during the tenure of the judicial managers. Otherwise, it would be imposing liability for acts or omissions over which the judicial managers may not have knowledge or control. In such circumstances, it can scarcely be fair to expect a judicial manager to carry out his duties competently and with confidence. It was reasonable, therefore, for the assistant registrar to hold that the liability of the judicial managers on the contract arose from the time they adopted the contract to the time they disclaimed liability.

16. For the reasons above, the appeal is dismissed. I shall hear arguments on the question of costs if the parties are unable to agree between themselves.

Sgd:

Choo Han Teck

Judicial Commissioner