

Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd
[2014] SGCA 43

Case Number : Civil Appeal No 126 of 2013
Decision Date : 07 August 2014
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s) : Paul Tan (instructed) and Choo Zheng Xi (Peter Low LLC) for the appellant; M K Eusuff Ali, Megan Chia and Lucinda Lim (Tan Rajah & Cheah) for the respondent.
Parties : Wee Kim San Lawrence Bernard — Robinson & Co (Singapore) Pte Ltd

Civil Procedure – Striking Out

Employment Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [\[2014\] 1 SLR 1382.](#)]

7 August 2014

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This appeal arises from an application to strike out a claim for damages for constructive dismissal and, alternatively, breach of the implied term of mutual trust and confidence in a contract of employment. The key issue in this appeal concerns the extent of damages that can theoretically be claimed in such circumstances.

Background facts

2 The appellant in this case is Mr Wee Kim San Lawrence Bernard (“the Appellant”). From 9 October 2006 until the end of August 2012, the Appellant was employed by the respondent, Robinson & Company (Singapore) Pte Ltd (“the Company”), a retailer which operates the “Robinsons” brand of department stores in Singapore.

3 The Appellant resigned from the Company on 24 August 2012. It is not disputed that the Company paid the Appellant four months’ salary in lieu of notice and the appropriate amount in cash for his unconsumed annual leave. This was despite the fact that the Appellant’s contract of employment provided for payment of only two months’ salary in lieu of notice. The relevant provision in the contract was as follows: [\[note: 1\]](#)

4. NOTICE OF TERMINATION

...

After confirmation, written notice of termination from either party will be two (2) calendar months or two (2) calendar months’ salary in lieu of such notice without assigning any reasons whatsoever.

...

4 On 6 December 2012, the Appellant commenced Suit No 1036 of 2012 (“the Suit”) against the Company seeking damages for constructive dismissal. He claimed that he had been forced to resign as a result of persecution and unreasonable bias that had been directed towards him by the Company or its officers. In the alternative, the Appellant claimed that the Company had breached the implied term of mutual trust and confidence in his contract of employment with the Company.

5 On 18 June 2013, the Company filed Summons No 3064 of 2013 (“SUM 3064/2013”) with a supporting affidavit to strike out the Suit. On 15 July 2013, the Appellant filed an affidavit to oppose the Company’s striking-out application. In response, the Company filed Summons No 3969 of 2013 to expunge two paragraphs of the Appellant’s affidavit. The summonses were heard on 6 August 2013 by an assistant registrar (“the AR”), who granted both applications.

6 Thereafter, on 20 August 2013, the Appellant filed Registrar’s Appeal No 286 of 2013 (“RA 286/2013”) against the AR’s decision to strike out his claim and Registrar’s Appeal No 287 of 2013 against the AR’s decision to strike out the two paragraphs of his affidavit. The two appeals were heard together on 9 September 2013 by a High Court judge (“the Judge”), who dismissed both appeals. The Judge’s grounds of decision are reported in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 1 SLR 1382 (“the GD”).

7 The Appellant appealed to this court against the decision of the Judge. Although the Appellant’s notice of appeal stated that the appeal was against the whole of the decision given by the Judge on 9 September 2013, it was subsequently clarified that the appeal was only in respect of the Judge’s decision in RA 286/2013 upholding the AR’s decision to strike out the Appellant’s claim. We shall therefore deal with only SUM 3064/2013 and RA 286/2013 in these grounds of decision.

8 On 29 May 2014, after hearing submissions from counsel, we dismissed the appeal and gave brief grounds. We now give the detailed reasons for our decision. Before that, however, it is essential that we briefly outline and explain the arguments made by the parties at various stages of these proceedings, which in turn shaped the issues that arose for our determination.

The arguments and the proceedings below

The Suit

9 As stated above, the Suit was commenced by the Appellant against the Company for damages for constructive dismissal and, alternatively, breach of the implied term of mutual trust and confidence in his contract of employment with the Company.

10 Pertinently, in relation to the alternative claim for breach of the implied term of mutual trust and confidence, the writ of summons filed by the Appellant stated as follows:

9. Further or in the alternative, the [Appellant’s] claim against the [Company] is for breach of [the] implied term of mutual trust and confidence in the [Appellant’s] employment agreement with the [Company].

PARTICULARS OF CONSTRUCTIVE DISMISSAL

(a) There is an implied term of mutual trust and confidence in relation to the [Appellant’s]

employment agreement with the [Company], which the [Company] profess to uphold in their Fair Employment Practices' tagline "We are proud to be an equal opportunity employer".

(b) It is further clear, in the treatment of the [Appellant], that the [Company] had acted unfairly in the [*sic*] breach of the implied term of mutual trust and confidence, and had, therefore, repudiated the [Appellant's] contract of employment and effected a constructive dismissal[.]

The striking-out application

Before the AR

11 The Company applied in SUM 3064/2013 to strike out the Appellant's claim in the Suit pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") on the ground that it was frivolous, vexatious and an abuse of process. The Company submitted that the Appellant's claim was legally unsustainable because even if the Appellant had been constructively dismissed (which it denied), he would not have been entitled to anything more than two months' salary as stated in his employment contract. As it was, he had already received more than this amount. Moreover, the Company argued, the Appellant's claim was an abuse of process as it had been commenced for the collateral purpose of exerting pressure on the Company to pay him additional sums.

12 The Appellant's argument in response was that his cause of action in constructive dismissal was legally and factually sustainable. Relying on the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 ("*Malik*"), among other case authorities, the Appellant argued that he could mount a claim against the Company for continuing financial loss beyond the contractual notice period stated in his employment contract if the Company had breached the implied term of mutual trust and confidence, resulting in a loss of future employment prospects.

13 The AR granted the Company's striking-out application, noting that the Appellant had not pleaded any special damages for his alleged inability to secure employment following his alleged constructive dismissal by the Company.

Before the Judge

14 In the Appellant's appeal against the AR's decision in SUM 3064/2013 (*ie*, RA 286/2013), the parties' arguments and their respective positions remained largely unchanged. In particular, the Company reiterated its position that although it did not agree that the Appellant had been constructively dismissed, for the purposes of its striking-out application, it would proceed on the assumption that that was indeed the case. On that basis, the Company submitted that since the Appellant had already been paid more than his contractual entitlement of two months' salary in lieu of notice, he was not entitled to any further payments. The Company further submitted that *Malik* was of no relevance since that case related not to a cause of action founded on constructive dismissal, but to a separate cause of action for damages constituted by a loss of future employment prospects.

15 The Judge dismissed RA 286/2013, holding that the Appellant's claim was "doomed to fail" (see the GD at [30]) because even if he had been constructively dismissed, he would only have been entitled to two months' salary in lieu of notice as stated in his employment contract, and he had already received more than that. The Judge also stated that *Malik* did not assist the Appellant since his statement of claim did not disclose any particulars relevant to establishing a breach of the implied term of mutual trust and confidence; neither had the Appellant particularised his claim for "stigma" losses or damages flowing from the alleged breach.

The arguments before this court

16 In his written submissions, the Appellant raised three main arguments as to why the Suit should not be struck out:

- (a) first, there was an arguable case that he was entitled to damages exceeding the amount of salary payable for his contractual notice period if such damages flowed from the breach of the implied term of mutual trust and confidence in his contract of employment with the Company;
- (b) second, he was entitled to seek declaratory relief as to whether there had been a breach of the implied term of mutual trust and confidence that entitled him to resign; and
- (c) third, there was a conflict of evidence as to the nature and purpose of the Company's payment of four months' salary to him.

17 The Appellant's position, especially with regard to his first argument stated above, was clarified in oral submissions by his counsel on appeal, Mr Paul Tan ("Mr Tan"). Mr Tan clarified that the Appellant's claim was neither for loss of future employment prospects as in *Malik*, nor for other types of continuing or post-termination financial losses arising from his dismissal. Instead, the Appellant was only claiming damages in respect of the alleged financial loss arising from the premature termination of his employment with the Company. Mr Tan submitted that the Appellant's claim for damages beyond the amount of salary payable for his contractual notice period was legally sustainable because damages flowing from a breach of the implied term of mutual trust and confidence in a contract of employment had to be assessed in accordance with normal contractual principles. According to Mr Tan, this would be so even if, as in this case, the only consequence of the breach was that it brought the contract of employment to a premature end. In effect, Mr Tan was advocating the proposition (in relation to contracts of employment) that a breach of the implied term of mutual trust and confidence was so different in nature from any other type of breach that the damages in respect of the former type of breach stood to be assessed differently even if it resulted in the identical consequence as the latter type of breach, namely, the premature termination of the employment relationship.

18 According to Mr Tan, where the premature termination of an employment relationship was brought about by the breach of a term other than the implied term of mutual trust and confidence, damages would fall to be assessed by reference to the orthodox rule, that is to say, by reference to the salary payable in respect of the period of notice which had to be given in order to lawfully effect the termination. However, Mr Tan contended, where the premature termination was the consequence of a breach of the implied term of mutual trust and confidence, the employee's loss should be measured by reference to what he would have earned had that breach not occurred. The Appellant's position was that there was no evidence that his employment with the Company would have been terminated if the implied term of mutual trust and confidence had not been breached by the Company. Therefore, he should, in principle, be entitled to claim damages assessed on the basis that he would have remained in the employment of the Company indefinitely, subject to the usual limiting principles of mitigation, remoteness and so on.

19 As against this, the Company maintained that the Appellant's claim was legally unsustainable because he had already received more than his contractual entitlement of two months' salary in lieu of notice, which was the normal measure of damages for constructive dismissal. The Company's position was that any breach of the implied term of mutual trust and confidence, as pleaded in the present case, was relevant only to the issue of repudiation of the employment contract (*ie*, constructive dismissal), and that could not give rise to an entirely separate basis for assessing

damages.

The issues in this appeal

20 The issues that arose for our determination were as follows:

(a) Whether, assuming that the Appellant had been constructively dismissed as a consequence of the Company's breach of the implied term of mutual trust and confidence, his claim for damages beyond the amount of salary payable for the contractual notice period stated in his employment contract was legally sustainable. We refer to this as "the Measure of Damages Issue".

(b) Whether the Appellant's claim should not be struck out because he was entitled to a declaration that the Company had breached the implied term of mutual trust and confidence. We refer to this as "the Declaratory Relief Issue".

(c) Whether the Appellant's claim should not be struck out because there was a conflict of evidence as to the nature and purpose of the Company's payment of four months' salary to him. We refer to this as "the Settlement Agreement Issue".

Our decision

The Measure of Damages Issue

21 The Measure of Damages Issue, which concerns the legal sustainability of the Appellant's claim for damages beyond the amount of salary payable for his contractual notice period, formed the main plank of the Appellant's case. An action would be legally unsustainable if it is clear as a matter of law that even if the party concerned were to succeed eventually in proving all the facts that he has to prove in order to establish his case, he would not be entitled to the remedy sought: see *The "Bunga Melati 5"* [2012] 4 SLR 546 at [39]. This is one of the tests applied to determine whether a party's claim is plainly or obviously unsustainable such that it should be struck out under O 18 r 19(1)(b) of the Rules.

22 In our judgment, the Appellant's claim for damages beyond the amount of salary payable for his contractual notice period was legally unsustainable. Mr Tan's contention that breaches of different types of terms which result in identical consequences can nonetheless give rise to different measures of damages seems suspect to begin with. Damages are compensatory in nature, and where the consequences of breaches of different types of terms are the same, there is no obvious reason to recompense the plaintiff differently based on the particular type of term that has been breached. It is true that a breach of an applicable notice period will generally only have one type of consequence, and that, in contrast, a breach of the implied term of mutual trust and confidence can have one or more of a variety of consequences. A breach of this implied term could give rise, as it allegedly did here, to the premature termination of the employment contract. But, it could also give rise to an altogether separate category of injury or loss such as emotional distress or impairment of future employment prospects. The Appellant's claim was expressly stated by Mr Tan to be only for damages for financial loss arising from the premature termination of his employment with the Company. The claim was not for post-termination losses such as the loss of future employment prospects, or for other types of injury such as mental or emotional distress.

23 The concept of constructive dismissal and the implied term of mutual trust and confidence in an employment contract are distinct but closely related. "Constructive dismissal" refers to the situation

where the employer's repudiatory breach entitles the employee to treat himself as discharged from the employment contract; although it is the employee himself who terminates the contract, he is considered as having been "constructively" dismissed by the employer. It is as though the employer had effectively terminated the contract by manifesting an intention no longer to be bound by the contract, which position is then accepted by the employee. The concept was explained thus by Lord Denning MR in the English Court of Appeal decision of *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 at 769:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

24 The implied term of mutual trust and confidence in employment contracts developed as a means of bringing employee dismissal cases within the scope of the doctrine of constructive dismissal and, therefore, within the reach of the unfair dismissal legislation in England: see *Eastwood and another v Magnox Electric plc* [2005] 1 AC 503 ("*Eastwood*") at [4]–[5]. The developed formulation of the implied term of mutual trust and confidence, as far as the employer is concerned, is that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee: see *Malik* at 45 (*per* Lord Steyn). A breach of the implied term of mutual trust and confidence by the employer would constitute a breach of a fundamental term of the contract of employment, and an employee who accepts this breach as a repudiation of the contract would be treated as though he has been "constructively" dismissed by the employer: see *Eastwood* at [6]. But, a breach of this implied term can also give rise to other consequences, as we shall demonstrate below.

25 Where the breach of the implied term of mutual trust and confidence results in constructive dismissal, as it allegedly did here, it will give rise to a claim for what Lord Nicholls of Birkenhead termed "premature termination losses" (see *Malik* at 36E), *ie*, losses that are causally connected to the premature termination of the employment contract. In such a situation, as a matter of principle, the damages awarded to the employee should be the same as the damages which would have been awarded if the employee had been actually (rather than constructively) dismissed unlawfully. The normal measure of damages in cases of wrongful dismissal is the amount which the employee would have received under the employment contract had the employer lawfully terminated the contract by giving the required notice or paying salary in lieu of notice, subject to mitigation: see *Alexander Proudfoot Productivity Services Co Spore Pte Ltd v Sim Hua Ngee Alvin and another appeal* [1992] 3 SLR(R) 933 ("*Proudfoot*") at [13] and *Teh Guek Ngor Engelin née Tan and others v Chia Ee Lin Evelyn and another* [2005] 3 SLR(R) 22 at [20]. This rule flows from the established principle that the breach in issue having occurred, damages are to be assessed on the basis of the defendant's "least onerous obligation". What this means in this context is that the employee is entitled to be put in the position he would have been in if the employment contract had been brought to an end lawfully. Where the defendant has the option of performing a contract in several ways, damages for his breach of contract must be assessed on the assumption that he will perform the contract in the way that is most beneficial to himself, and not in the way that is most beneficial to the claimant: see Harvey McGregor QC, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at para 8-093 and *Cockburn v Alexander* (1848) 6 CB 791 at 814. Therefore, in a case of wrongful dismissal (including constructive

dismissal), damages should be assessed on the basis that the employer would have exercised any power it might have had to bring the employment contract to an end at the earliest date at which it could lawfully do so: see *Gunton v Richmond-Upon-Thames London Borough Council* [1981] Ch 448 at 469.

26 Where a claim is brought for loss occasioned by premature termination of an employment contract, none of the foregoing analysis is displaced just because the claim is mounted on the back of an alleged breach of the implied term of mutual trust and confidence. While the cases have recognised that a breach of this implied term is capable of giving rise to financial losses of a *different* nature which are to be assessed on a separate footing from that established in the *Proudfoot* line of authorities, this is so only where the consequence of the breach is something *other than* the premature termination of the employment contract. The leading example of this would be the “continuing financial losses” sustained and claimed as damages where the breach has affected an employee’s future employment prospects. This was recognised as a recoverable head of loss by the House of Lords in *Malik*, subject to proof of causation and the limiting principles of remoteness and mitigation: see *Malik* at 37 and 48. In *Malik*, it was held that the employees concerned could prove in the employer’s liquidation for “stigma” damages reflecting the damage to their future employment prospects caused by the corrupt manner in which the employer’s business had been run in breach of the implied term of mutual trust and confidence. Another example would be financial loss flowing from psychiatric or other illness brought about by the employer’s breach of this implied term: see *Eastwood* at [29].

27 Losses of such a nature that flow from a breach of the implied term of mutual trust and confidence are conceptually distinct from those resulting from the premature termination of an employment contract, and are therefore recoverable in principle and liable to be assessed in an appropriate manner. The limits that apply to the assessment of damages for wrongful dismissal have nothing to do with the assessment of those types of damages claims. The decision of the Hong Kong Court of Appeal in *Semana Bachicha v Poon Shiu Man* [2000] 2 HKLRD 833 (“*Bachicha*”) is instructive in this respect. That case concerned a domestic helper who was subjected to an oppressive work regime and, consequently, forced to leave her employment after six months. It was held that the domestic helper was entitled to damages for wrongful dismissal on the usual measure, *as well as* damages for any additional pecuniary loss caused by the employer’s breach of the implied term of mutual trust and confidence which was not too remote: see *Bachicha* at 850E. The court in *Bachicha* stated that a given set of facts might constitute both a breach of the implied term requiring reasonable notice to be given to lawfully terminate the employment contract, as well as a breach of the implied term of mutual trust and confidence, thereby giving rise to simultaneous but separate entitlements to damages (at 848J–849A):

In my view, it follows from the foregoing analysis that a given set of facts may constitute both kinds of breaches giving rise simultaneously to separate entitlements to damages, each independently computed, but subject obviously to the avoidance of any double recovery. The employer’s wrongful conduct might constitute a wrongful dismissal (particularly in the form of a constructive dismissal) and at the same time, a breach of the trust and confidence implied term, the latter causing continuing financial loss not confined by the usual wrongful dismissal measure.

28 The distinction between the damages recoverable for wrongful dismissal and the damages recoverable for an independent breach of the implied term of mutual trust and confidence stems from the different types of consequences that may flow from such a breach. In some cases, as here, the only consequence of the breach of the implied term is that it brings about the premature termination of the employment contract. In such cases, the measure of damages laid down in the *Proudfoot* line of cases would apply. In other instances, the breach might have other consequences. In *Malik*, for

instance, the court recognised “stigma” damages as a recoverable head of loss flowing from the breach of an implied but independently actionable term (see *Johnson v Unisys Ltd* [2003] 1 AC 518 (“*Johnson*”) at [44] *per* Lord Hoffmann and at [77] *per* Lord Millett; see also *Arul Chandran v Gartshore and others* [2000] 1 SLR(R) 436 at [23]). As the Hong Kong Court of Appeal noted in *Bachicha* at 847, *Malik* showed that:

... where the breach does not relate merely to unlawfulness in the termination but involves a breach of *some other obligation* causing the employee loss going beyond the “premature termination losses” that usually flow from a wrongful dismissal, damages may properly be recovered in respect of *such different or further losses*, provided they are causally attributable to the breach and not too remote. [emphasis added]

29 The same is true of the Australian cases relied on by the Appellant. These were similarly instances where the courts were concerned with consequences *other than* premature termination arising from a breach of the implied term of mutual trust and confidence in an employment contract. For instance, in the New South Wales Court of Appeal case of *Shaw v State of New South Wales* (2012) 219 IR 87; [2012] NSWCA 102 (“*Shaw*”), the plaintiff mounted a claim for damages for loss of future earnings and earning capacity arising from a separate and distinct breach of this implied term: see *Shaw* at [108]–[116].

30 In the decision of the Federal Court of Australia in *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 (“*Barker*”), the employer concerned was found to have breached the implied term of mutual trust and confidence in failing to take positive steps to consult the employee about alternative positions and give him the opportunity to apply for such positions before terminating his employment: see *Barker* at [131]–[132]. *Barker* was not concerned with the employee’s dismissal, since what was at issue was the employer’s failure to take steps to secure a suitable alternative position for the employee, which was separate from and anterior to the termination of his employment: see *Barker* at [15]. We note in passing that in *Barker*, there was a strong dissent by Jessup J suggesting that the implied term of mutual trust and confidence should not form part of Australia’s law of contracts of employment; the decision in *Barker* is presently on appeal before the High Court of Australia for this issue to be decided.

31 Reference was also made before us to the decision of the Singapore High Court in *Wong Leong Wei Edward and another v Acclaim Insurance Brokers Pte Ltd and another suit* [2010] SGHC 352 (“*Acclaim Insurance*”), where, on the authority of *Malik*, it was said (at [52]):

... [I]n principle, if it can be shown that the defendant had wrongfully dismissed [the first plaintiff] in a manner that was dishonest or illegitimate which amounted to a breach of the implied term of trust and confidence, and as a direct result of that wrongful dismissal it can be proven that [the first plaintiff] suffered a real and provable financial loss, in my view, [the first plaintiff] would be entitled to claim against the defendant for such loss beyond the contractual notice period.

32 In our judgment, *Acclaim Insurance* does not stand for the proposition that an employee whose *only* complaint is that he has been wrongfully dismissed may nonetheless claim damages beyond his salary for the contractual notice period. The claim by the employee in *Acclaim Insurance* was for damages arising from the handicap which he allegedly suffered in the labour market following his wrongful dismissal. The “financial loss” mentioned in the above passage from *Acclaim Insurance* was directed at the loss of employment prospects arising from a breach of the implied term of mutual trust and confidence (as in *Malik*), and not at the premature termination losses arising from the wrongful dismissal itself: see *Acclaim Insurance* at [48].

33 It should further be noted that decisions such as *Malik* and *Bachicha*, which, in our judgment, stand for the narrower proposition that a breach of the implied term of mutual trust and confidence can give rise to other heads of damage where consequences other than premature termination of the employment contract have flowed, may now have to be read even more restrictively in the light of the decision of the House of Lords in *Johnson* and subsequent cases. *Johnson* held that the implied term of mutual trust and confidence did not apply in wrongful dismissal cases, such that a claim for “stigma” damages could not be made where the basis of the action was wrongful dismissal. This limitation, which has come to be known as “the ‘*Johnson* exclusion’”, has been subsequently reaffirmed in English law: see *Eastwood and Edwards v Chesterfield Royal Hospital NHS Trust* [2012] 2 All ER 278. In *Eastwood*, Lord Nicholls described the boundary lines of the “*Johnson* exclusion” thus (at [31]):

In cases of constructive dismissal a distinction will have to be drawn between loss following from antecedent breaches of the trust and confidence term and loss flowing from the employee’s acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area.

Thus, under English law, claims for damages based on breaches of the implied term of mutual trust and confidence can only be brought if the cause of action in question accrued before and existed independently of the cause of action for wrongful dismissal.

34 No authoritative view has been expressed on the applicability of the “*Johnson* exclusion” in Singapore: see *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 and *Chan Miui Yin v Phillip Morris Singapore Pte Ltd* [2011] SGHC 161. The main rationale underlying the decision in *Johnson* was that to allow an employee to recover damages for loss arising from the manner of his dismissal would be inconsistent with the English statutory scheme for compensation for unfair dismissal. For the purposes of the present appeal, it is unnecessary for us to express a final view on this issue. Regardless of whether or not the “*Johnson* exclusion” applies in the Singapore context, it is clear that where wrongful dismissal is the only consequence of a breach of the implied term of mutual trust and confidence and no other independent consequence flows from such a breach, the only damages recoverable by the employee will be damages for premature termination losses flowing from the employer’s failure to give proper notice or pay salary in lieu of notice.

35 In our judgment, the cases relied on by the Appellant did not stand for the broad (and, in our view, incorrect) proposition that was urged upon us – namely, that the normal measure of damages for wrongful dismissal as stated in the *Proudfoot* line of cases (see [25] above) would not apply to a case of constructive dismissal whenever this arose from a breach of the implied term of mutual trust and confidence.

36 In the present case, it was accepted that the Appellant’s claim was only for financial loss arising from the premature termination of his employment with the Company. As such, there was no reason to apply anything other than the normal measure of damages for wrongful dismissal. The writ of summons filed by the Appellant alleged that the Company had repudiated the contract of employment and effected a constructive dismissal by breaching the implied term of mutual trust and confidence (see [10] above). The Appellant’s pleadings asserted neither an independent breach of the implied term of mutual trust and confidence nor any “continuing financial losses” going beyond the premature termination losses that usually flow from a wrongful dismissal. There was no question of “continuing financial losses” such as those resulting from an impairment of future employment prospects, or separate and distinct injuries such as illness or mental or emotional distress. In truth, the Appellant’s claim was simply one for constructive dismissal, for which compensation for the loss

suffered would, in this case, be confined to two months' salary in lieu of notice as stipulated in the Appellant's employment contract.

37 There were also difficulties with Mr Tan's suggestion that the Appellant's loss should be assessed on the basis that his employment with the Company would have continued indefinitely in the absence of evidence that the Company would have exercised its right to terminate the employment contract at the earliest opportunity. The very essence of a claim for constructive dismissal is that the employer is in repudiatory breach of the employment contract and no longer intends to be bound by it. It is implicit in the nature of such a claim that had the employee not resigned, the employer would have terminated the employment contract at the earliest date at which it could lawfully do so. This, in the end, is another way of making the point that we are driven ultimately to hold the defendant employer to his least onerous obligation (see [25] above).

38 Moreover, if the parties have agreed that the employer has a right to terminate the employment contract upon notice or payment of salary in lieu of notice, it would be inconsistent with that contractual right to say that the employer nevertheless has to pay an employee who has been wrongfully dismissed damages that extend beyond the amount of salary payable for the contractual notice period.

39 In addition, as we pointed out during the hearing of the present appeal, it is a well-established principle that there cannot be specific performance of a contract of employment under the common law: see *Francis v Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411 at 1417–1418, *Lim Tow Peng and another v Singapore Bus Services Ltd* [1974–1976] SLR(R) 673 at [17] and [20], as well as *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2002] 2 SLR(R) 924 at [50]. To accept the proposition that damages for constructive dismissal in the present circumstances should be assessed on the basis that the employment relationship would have continued indefinitely would seem to be incompatible with the principle that there is no right to specific performance of an employment contract, or, to put it another way, no right to require an employer to continue the employment relationship indefinitely. Yet, this must be the implicit premise underlying the contention that the employee is entitled to have his damages assessed on the basis that his employment would have continued indefinitely.

40 Finally, we note that the Appellant's contention – viz, that he was entitled to claim damages assessed on the basis that he would have remained in the employment of the Company – was contradicted by his own pleadings. Paragraph 8(f) of the writ of summons filed by the Appellant stated that: [\[note: 2\]](#)

There were attempts to make the [Appellant] leave the [Company] early, and there were also threats made to the [Appellant] that if the [Appellant] refused to accept salary in lieu of notice until 30 November 2012, the [Company] would serve the [Appellant] a termination letter, and the [Appellant] would only be paid two months' salary in lieu of notice.

This statement clearly recognised that if the Appellant had refused to resign or accept the Company's termination offer, the Company would have exercised its contractual right to terminate his employment by paying him two months' salary in lieu of notice.

41 For all these reasons, we were not with the Appellant on the Measure of Damages Issue.

The Declaratory Relief Issue

42 We now turn to the Declaratory Relief Issue. In our judgment, the Appellant's position on this

issue was likewise without merit. The Appellant's contention was that whatever else might be said, he was entitled to a declaration that the Company had breached the implied term of mutual trust and confidence in his employment contract. There were several difficulties with this argument.

43 At the outset, as the Appellant himself conceded, he did not in his pleadings seek declaratory relief. The argument on declaratory relief was raised for the first time in this appeal. That is a considerable obstacle in and of itself. But, even if the Appellant were to be allowed to seek declaratory relief and this matter were to be tried, the question that must inevitably arise is: to what end? This brings us to the question of whether there remains a "real controversy" between the parties. That there must be a "real controversy" for the court to resolve is one of the basic requirements to establish standing to seek declaratory relief: see *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [14] and *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [72]. The declaration that the Appellant sought in this case would have no consequence at all since, given our holding above in relation to the Measure of Damages Issue, the Appellant had no legally sustainable basis to claim anything more than what he had already received. The Appellant's interest was to be compensated, and on the view we have taken, he had already been compensated. There was, therefore, no "real controversy" left to warrant pursuing any form of declaratory relief.

44 Aside from this, it is evident, for the reasons set out at [45] below, that the parties had agreed on payment in lieu of notice as the means of settling the dispute between them. Having entered into such an agreement and having accepted the payment made by the Company as a consequence, it was impermissible for the Appellant to then seek to pursue a theoretical claim for a declaration.

The Settlement Agreement Issue

45 With regard to the final issue, which is the Settlement Agreement Issue, the Appellant's argument that his claim should not be struck out since there was a conflict of evidence as to the nature and purpose of the Company's payment of four months' salary to him was just as untenable as his position on the other issues. The Appellant's writ of summons itself stated that "[i]t was only after protracted negotiations that the [Company] finally agreed to pay the [Appellant] salary in lieu of notice until 31 December 2012", suggesting that the payment of four months' salary was in consideration of the termination of the Appellant's employment and part of a settlement agreement negotiated between the parties. Moreover, the Appellant did not dispute that this payment of four months' salary was in respect of the amount he would have collected for the period for which he would, pursuant to an alleged agreement with the Company, stay on with the Company after tendering his resignation, *ie*, the period from 24 August 2012 (the date of his resignation) to 31 December 2012 (the date on which it was agreed the Appellant would leave the Company). He could not subsequently assert that the Company remained liable for two months' salary in lieu of notice based on the notice period stated in his contract of employment; that loss has already been more than compensated for by the Company.

Conclusion

46 For all these reasons, we dismissed the appeal. As for costs, we awarded costs to the Company fixed at \$20,000 inclusive of all disbursements. The usual consequential orders will apply. We also clarified during the hearing that the amount of costs that we awarded was inclusive of the Company's costs in Summons No 5520 of 2013, which we ordered on 26 November 2013 to be the Company's costs in the cause for this appeal.

[note: 1] Appellant's Core Bundle ("ACB"), Tab 6 at p 40.

[\[note: 2\]](#) ACB, Tab 2 at pp 19–20.

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