Cheo Ming Shen *v* Tiah Ewe Tiam
[2018] SGHC 199

Case Number : Suit No 244 of 2017

Decision Date : 14 September 2018

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Yuen Djia Chiang Jonathan, Francis Chan Wei Wen and Louisa Leow (Rajah & Tann Singapore LLP) for the plaintiff; Pillai Pradeep G and Simren Kaur Sandhu (PRP Law LLC) for the defendant.

Parties : Cheo Ming Shen — Tiah Ewe Tiam

Contract – Breach

[LawNet Editorial Note: The plaintiff's appeal in Civil Appeal No 192 of 2018 was dismissed by the Court of Appeal on 19 July 2019 with no written grounds of decision rendered. The Court of Appeal agreed with the decision and reasoning of the High Court.]

14 September 2018 Judgment reserved.

Choo Han Teck J:

1 The plaintiff and defendant were the co-founders of a company called "Netccentric Pte Ltd" in which they each held equal shares from the day it was founded, namely, 18 August 2006. Netccentric was listed on the Australian Securities Exchange on 6 July 2015 and is now referred to as "NCL". It is the parent company of Nuffnang Pte Ltd, and other companies such as "Churp", "Sashimi", "Reelity.tv", and "RippleWerkz", that carry on the business of online marketing and social media.

2 NCL has a board of five directors namely Kevin Tsai, Pierre Pang, Martyn Thomas, Cheo Ming Shen (the plaintiff), and Tiah Ewe Tiam (the defendant). The plaintiff was appointed NCL's Chief Executive Officer, and the defendant its Chief Operating Officer.

3 The NCL group of companies appear to be carrying on a very digital-age kind of business in which the operatives, such as Wendy Cheng Yan Yan (PW3), refer to themselves as "bloggers and influencers". These names describe people who are partly advertising agents, part slogan writers, part reporters and part salespeople. Although one well-known "influencer", known in the blogosphere as "Xiaxue" (PW3), testified in this trial, her evidence and the business of NCL are largely not relevant to the issues before the court, and therefore, had no impact on the outcome of this case.

4 With two young, ambitious men in a very modern business dealing in public influence, each having an equal number of shares in their company, it was only a matter of time before one of them (the defendant) declares that "one mountain cannot have two tigers" and the other (the plaintiff) promptly saying, "I agree". That time was 29 September 2016.

5 In spite of the rift, the plaintiff and defendant retained sufficient amiability to agree terms for one of the 'tigers' to leave the mountain. These terms are set out in paragraph 57 of the plaintiff's AEIC as follows –

1) This initiative was suggested by you, on the basis that there should be a clear management direction, and no distraction for the current management team to achieve our aims over the next 3 years.

2) Following discussions with Pierre and yourself, we have fine-tuned some of the salient points.

3) The restructuring exercise will lead to your relinquishing all your executive functions, and role as Chief Operating Officer of NCL.

4) You will be retired as an Executive Director, but take on the function of Director. Your annual directors fee will be $30,000 AUD per annum as per the IDs currently, and adjustments will follow their lead.

5) You will be appointed as a Netccentric Advisor to facilitate smooth relationships with some of our key stakeholders (Talents/Clients), in Malaysia, Thailand, Indonesia and Philippines. You will not be the executive point of contact, but a facilitator/mentor to the executive team. For this role, you will be paid a monthly salary of $3500 AUD. This will be a contract position guaranteed for a period of 3 years.

6) For your years of service, and as part of your redundancy package for 3), you will be paid 2 months per year of service. With your 9 years of service, this amounts to 18 months of your salary. This will be disbursed to you WEF from your departure.

7) As a condition of this payment, should you return to C-Level management of the company within 3 years of the date of your departure, you will have to reimburse the company to the tune of your redundancy package as stated in 6) plus the interest rate we are achieving on our fixed deposits in Australia.

8) You will craft out an email to related parties such as your Uncle, and Father, relating to the plan above.

9) We will jointly craft out a release to the Public, and also one to the staff, and I will be there with you in Malaysia to ensure a smooth transition.

10) Whilst I will not be obligated to purchase any of your shares as part of this deal, I would like to place on record, that I have intention to do so, pursuant to my personal abilities to do so, and upon mutual agreement of terms.

11) Should you wish to sell shares, you must first offer them to the Directors, with the same terms, giving them a period of 14 days to complete, failing which, you can proceed (Right of first refusal)

6 The above terms were set out in an email sent by the plaintiff to the defendant on 6 October 2016 at 3.35pm. The defendant replied at 4.33pm in three words, "OK sure done". The terms set out in the plaintiff's email was prefaced with this important sentence: "As part of the exit process, a simple agreement will be drafted, with all material points covered." True to their word, a written agreement, dated 1 November 2016, was subsequently presented to the defendant for his assent. That written agreement covered all the terms set out in the email except that the first clause in the email of 6 October was not incorporated. That is the clause that has the words:

> This initiative was suggested by you, on the basis that there should be a clear management direction, and no distraction for the current management team to achieve our aims over the next 3 years.

7 The defendant signed the written agreement of 1 November 2016, and the plaintiff also signed it, but he (the plaintiff) did so "[f]or and on behalf of [NCL]". The defendant, in due course, collected his money and relinquished his executive position as the COO in NCL. Then comes the twist in the plot. On 27 January 2017, the plaintiff tendered his resignation as the CEO of NCL. The minutes of the Board meeting that took place two days previously recorded that:

> [the plaintiff's] resignation was not a decision that [the plaintiff] came to by himself. If choice was given he would have stayed on to be accountable for the 2016's bad numbers, and to recover from it.

The minutes also recorded that:

> as [the plaintiff] has lost the support of substantial shareholders, namely, [the defendant] and his uncle, Datuk Tony, he has been left with no choice but to resign, and will respect their decision.

8 On 16 March 2017 the plaintiff commenced this action against the defendant. In this action the plaintiff pleaded two causes of action. The first was for "legitimate expectation", a claim that Mr Jonathan Yuen, counsel for the plaintiff, withdrew at trial. The second was for the breach of an "over-arching agreement", and that formed the crux of this trial. The law of contract governs all actions for a breach of contract, but there is not yet any law of "over-arching contracts". I must hold at once, that despite the plaintiff's grand description, an 'over-arching' contract is, really, just a contract. For an action under a contract, the plaintiff must show what terms under that contract had been breached. What then was the contract between the plaintiff and the defendant?

9 To answer that question here, the plaintiff referred this court to a conversation he had with the defendant prior to the plaintiff's email of 6 October 2016. The plaintiff claims that in that conversation, the defendant said that if he were to get sufficient compensation, he would resign as the COO. According to the plaintiff, he (the plaintiff agreed) on the condition that he (the plaintiff) remained as NCL's CEO for three years. The defendant denies this conversation, at least not that specific term. The plaintiff's email of 6 October 2016 does not refer to it either, so the plaintiff relies on the first term set out in the 6 October email, namely:

> This initiative was suggested by you, on the basis that there should be a clear management direction, and no distraction for the current management team to achieve our aims over the next three years.

The plaintiff now says that this passage ought to be interpreted as giving the plaintiff a tenure of three years as NCL's CEO and that this forms the basis for his present action and claim for damages, including loss of his transport allowances. The plaintiff here claims a transport allowance of $3,000 a month. This claim is disputed by the defendant. More crucially, this transport allowance is the subject matter of an action brought by NCL in a separate suit for the recovery by NCL of the very same transport allowance that the plaintiff is claiming as part of his damages in this action. It will be a mess when two courts are making a finding of fact on the same issues, and this state of affairs should never have been allowed to reach this point.

10 I shall deal with the more important matter concerning the plaintiff's cause of action in this suit

before me. The evidence and the chronology shows that after the plaintiff and defendant could no longer work together, they had a discussion that ended with the terms on which the defendant would resign as the COO of NCL. The plaintiff quickly set out the terms in the 6 October email and sent it to the defendant. The defendant agreed, not just to those terms, but also the entire email which says that the material terms would be drafted into an agreement. That was done after the plaintiff sent to the NCL board of directors the 6 October email and the defendant's acceptance. That led to NCL's lawyers TSMP drafting the agreement of 1 November 2016.

11 The sequence of events is found in the plaintiff's own evidence and in his amended Statement of Claim where the idea of "an over-arching agreement" was pleaded as the cause of action. It must have become clear to the plaintiff's counsel, after the trial commenced, that there is no cause of action for a breach of "an over-arching contract". When a plaintiff pleads a breach of contract, that contract must be clearly identified. Counsel must have realised that a claim drawing on the terms of the oral discussions, the 6 October email and the 1 November agreement is loose and imprecise, and calling it "an over-arching agreement" was not helping. In the closing submissions on behalf of the plaintiff, the plaintiff's case was changed to the breach of a specific contract, namely, the 6 October 2016 contract by email.

12 The problem with this argument is that the 6 October email that is set out above and which the defendant accepted, was clearly contingent, as the email stated, upon an agreement to be signed. That was indeed done, and the agreement signed was that of 1 November 2016.

13 This presents a different problem for the plaintiff in that the agreement of 1 November 2016 was clearly an agreement between NCL and the defendant. Clause 5 of that agreement also provides that the agreement "sets out the entire agreement and understanding between the parties". Clause 7 provides that no third party (that would include the plaintiff) would have any rights to enforce the terms of this agreement. The 1 November agreement was the only signed agreement, and it was the formalisation of the 6 October email, which in turn, was a more detailed stage of the negotiation between the plaintiff and the defendant. Since it seemed to have escape the parties' attention, I shall point out now that the 1 November agreement and all the others prior to it, including the 6 October email, concern the terms for the resignation of NCL's COO, the defendant. It had nothing to do with the plaintiff's entrenchment as NCL's CEO for three years. The 6 October email, like its finalised edition, the 1 November agreement, was sent by the plaintiff in his capacity as CEO and on behalf of NCL. There was no personal agreement or contract, whether on the face of it, or underlying it, or over-arching it in any of these versions — the oral, the email, nor the final version.

14 Mr Yuen ended his final submission by likening his client's case to a situation of two persons driving the same car at the same time. Just as I cannot find any car with two drivers, I also do not find any contract between the plaintiff and the defendant in which the defendant has agreed to let the plaintiff remain as NCL's CEO for three years. There is a grave misunderstanding of corporate law, the division of functions between a company's executives, its directors, and its shareholders. Even if it were true that the defendant threatened to convene an Extraordinary Shareholders' Meeting to have the CEO removed, that had not been done. The defendant's case was that there was no contract. The plaintiff claimed that he had to choose between resigning (which he did) and being forcibly removed. In addition to the plaintiff and the defendant, there were three independent directors on the board of NCL. None of them were called to testify. The plaintiff jumped without being pushed.

15 The plaintiff's case is therefore dismissed with costs.