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Tadjudin

and

Bank of America, National Association

(Court of First Instance)

(High Court Action No 322 of 2008)

Carlye Chu J in Chambers

16 January, 13 July 2009

Employment law — contract of employment — whether possible to imply term that employer's express power to terminate must not be exercised in order to deprive employee of benefit conferred by contract — Employment Ordinance (Cap.57) provided limited protection, limited to requirement of giving notice, and employers could terminate without cause — unlike England no general statutory regime of unfair dismissal — inappropriate to imply term running counter to intention of Legislature and which cut down statutory right of termination without cause

僱傭法 — 僱傭合約 — 是否可能以隱含的方式，使條款令僱主不能運用其明確權力終止合約，以剝奪合約授予僱員的福利 — 《僱傭條例》(第57章) 提供有限保障，只限在要求給予通知方面提供保障，僱主亦能在沒有提出因由的情況下終止合約 — 不像英格蘭，一般的法定制度沒有不公平解僱 — 以隱含的方式，使條款抵觸立法原意，使在沒有提出因由的情況下終止合約的法定權利受到削弱，做法並不恰當

P was employed by D as a vice-president in its Distressed Debt Trading Group. It was an express term of the employment agreement that P: would be eligible for consideration of a performance bonus under D's performance incentive programme (the PIP) subject to her being employed by D at the time of payment (cl.1); and either party could terminate the employment by giving notice or paying salary *in lieu of* notice (cl.3). D terminated P's employment with effect on 28 August 2007 by payment of wages *in lieu of* one month's notice. P was not paid the 2007 performance bonus under the PIP, which would have been payable in February 2008. P brought a claim against D for breach of implied terms, namely not to exercise its right to terminate her employment pursuant to cl.3 "in order to avoid P being eligible for the PIP" (the implied anti-avoidance term). P sought to rely on English authorities that recognised it was possible to imply into an employment contract a term that an employer's express power to terminate or dismiss must

not be exercised in order to deprive an employee of a benefit expressly conferred by contract. A Master held that the implied anti-avoidance term was not legally sustainable and struck it out. P appealed.

Held, dismissing the appeal, that:

(1) The implied anti-avoidance term had been rightly struck out. The Employment Ordinance (Cap.57) provided limited protection and remedies for wrongful dismissal or termination of employment. Unlike England, there was no statutory regime of unfair dismissal, and Pt.VIA was only directed at unfair dismissal in certain circumstances. The Ordinance was not concerned with the wrongness or rightness of the dismissal or termination. Employers, and also employees, were entitled to terminate the employment relationship without cause. The extent of the statutory protection was limited to the requirement to give notice of termination: ss.6 and 7. It was therefore clear from ss.6 and 7, and also Pt.VIA, that the Legislature did not intend to provide remedies for loss flowing from the manner in which an employee was dismissed. Accordingly, it was inappropriate for the courts to construct a common law remedy based on the anti-avoidance term, which ran counter to the evident intention of the Legislature. Doing so, would also cut down the clear statutory right of termination without cause under ss.6 and 7 (*Johnson v Unisys Ltd* [2003] 1 AC 518, *Sun Zhongguo v BOC Group Ltd* [2003] 2 HKC 239 applied; *Jenvey v Australian Broadcasting Corp* [2003] ICR 79, *Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877, *Reda v Flag Ltd* [2002] IRLR 747 distinguished). (See paras.19–22.)

(2) In any event, as a matter of construction, there was no room to imply the anti-avoidance term as it was inconsistent with the express and unrestricted right of termination without cause under cl.3 and the express condition for eligibility for consideration under the PIP under cl.1. Under cl.1, P had no accrued benefit or right to a bonus for 2007 under the PIP, with the bonus only becoming payable in February 2008 and the bonus not being guaranteed but discretionary (*Jenvey v Australian Broadcasting Corp* [2003] ICR 79, *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, *Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877 distinguished). (See paras.30–32.)

Appeal

This was an appeal by the plaintiff-employee against the order of a Master striking out her statement of claim and dismissing her action

for breach of alleged implied terms against the defendant-employer. The facts are set out in the judgment.

Mr Ashley Burns SC, instructed by Horvath & Giles (William KW Leung & Co since 24 April 2009), for the plaintiff.
Mr John Scott SC and Mr John Hui, instructed by JSM, for the defendant.

Legislation mentioned in the judgment
Employment Ordinance (Cap.57) ss.6, 7, Part VIA
Rules of the High Court (Cap.4A, Sub.Leg.) O.14A, O.14A r.1(1)(b), O.18 r.19
Sex Discrimination Ordinance (Cap.480) ss.75, 76(3)

Cases cited in the judgment
Commerzbank AG v Keen [2007] IRLR 132
Horkulak v Cantor Fitzgerald International [2004] EWCA Civ 1287, [2005] ICR 402, [2004] IRLR 942
Jenvey v Australian Broadcasting Corp [2002] EWHC 927 (QB), [2003] ICR 79, [2002] IRLR 520
Johnson v Unisys Ltd [2001] UKHL 13, [2003] 1 AC 518, [2001] 2 WLR 1076, [2001] 2 All ER 801
Reda v Flag Ltd [2002] UKPC 38, [2002] IRLR 747
Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd (2003) 6 HKCFAR 222, [2003] 3 HKLRD 62
Sun Zhongguo v BOC Group Ltd [2003] 2 HKC 239
Takacs v Barclays Services Jersey Ltd [2006] IRLR 877

Other materials mentioned in the judgment
Cabrelli, "Discretion, Power and the Rationalisation of Implied Terms", *Industrial Law Journal* Vol.36, No 2, June 2007, p.194
Hong Kong Civil Procedure 2009 Vol.1, p.218 para.14A/2/4

Carlye Chu J

1. This is the plaintiff's appeal against the order of the Master dated 28 October 2008 to strike out para.5(1)–(4) of the statement of claim and to dismiss the plaintiff's claim with costs.

2. The order stems from the defendant's summons dated 11 June 2008 applying for:

(1) Striking out of the statement of claim pursuant to O.18 r.19 of the Rules of the High Court (Cap.4A, Sub.Leg.) (RHC) and dismissal of the action against the defendant; and
(2) Determination under O.14A of the RHC of two questions of law as follows:

(i) Whether, on proper construction of the plaintiff's employment contract with the defendant, the terms set out in para.5(1)–(4) of the statement of claim can be implied into the terms therein; and

(ii) If the answer to the above question is yes, whether the implied terms set out in para.5(1)–(4) of the statement of claim are capable of overriding the effect of the express terms in the plaintiff's employment contract with the defendant.

(3) Dismissal of the action if the Court finds on the above questions of law that the plaintiff has no basis for her claim.

The plaintiff's claim

3. The plaintiff was employed by the defendant as a vice-president in its Distressed Debt Trading Group (subsequently renamed International Special Situation Group) between 5 June 2000 and 27 August 2007. The terms of the employment agreement were contained in a letter of appointment dated 19 April 2000, which was accepted and signed by the plaintiff on 25 April 2000 (the Employment Agreement).

4. By a letter of termination to the plaintiff dated 30 August 2007, the defendant terminated the plaintiff's employment with effect on 28 August 2007 by payment of wages *in lieu of* one month's notice.

5. The Employment Agreement contains the following express terms that are relevant for the present purpose:

> **1. Remuneration**
>
> ...
>
> You will be eligible for consideration under the bank's performance incentive program and it will subject to you being employed by the Bank at the time of payment.
>
> ...
>
> **3. Termination Notice**
>
> ... After the probationary period, either party may terminate the employment by giving a minimum of one month's notice in writing or by paying one month's salary in lieu of notice.

6. The plaintiff had been paid the wages *in lieu of* notice and other employment entitlements. She was however not paid the performance bonus under the performance incentive program for the year 2007 or any part thereof. The plaintiff's present claim is in relation to the performance bonus for the year 2007, which was payable in February 2008. She brought the claim in the Labour

Tribunal, from where it was ordered to be transferred to the Court of First Instance.

Paragraph 5 of the statement of claim

7. The plaintiff's claim is premised on a breach of implied terms, which are particularized in para.5 of the statement of claim. The paragraph reads:

> As legal incidents of the employment relationship between the plaintiff and defendant there were implied into the Employment Agreement contractual duties on the defendant:
>
> (1) not to commit any unlawful act of discrimination against the plaintiff;
> (2) not to exercise its right to terminate the plaintiff's employment by giving one month's notice in writing or by paying one month's salary in lieu of notice in order to avoid the plaintiff's being eligible for the defendant's performance incentive program;
> (3) not to implement its performance evaluations in respect of the plaintiff in an irrational, perverse or arbitrary manner or in a manner that was not *bona fide*; and
> (4) not to administer its performance incentive program in respect of the plaintiff in an irrational, perverse or arbitrary manner or in a manner that was not *bona fide*.

8. The plaintiff says there is a discriminatory pro-male bias at the managerial level in the Global Special Situations Group (ex-US) in the defendant and this accounted for the recommendation and decision to terminate her employment. It is her case that but for the termination of her employment, which amounted to breach of the implied terms in para.5(1)–(3) of the statement of claim, she would have been employed by the defendant at the time of the payment of performance bonus for the year 2007 and she would be eligible for it. The defendant's decision not to award performance bonus to the plaintiff for the year 2007 was a breach of the implied terms under para.5(3) and 5(4) of the statement of claim. The plaintiff claims damages for the breach, represented by a loss of performance bonus in the amount of no less than $10,913,760.

The Master's decision

9. In striking out para.5(1) of the statement of claim, the Master took the view that the claim founded on the breach of it, is by reason of ss.75 and 76(3) of the Sex Discrimination Ordinance (Cap.480), within the exclusive jurisdiction of the District Court.

Mr Burns SC who appears for the plaintiff in this appeal, does not seek to appeal against this part of the Master's holdings and order.

10. The Master also took the view that the implied terms pleaded in the rest of para.5 of the statement of claim is not legally sustainable and the paragraph is liable to be struck out. Having reached the conclusion, the Master considered it was not necessary to determine the O.14A application, but indicated that if she had to, she would determine both questions in the negative.

The issue

11. The issue in this appeal is whether the implied terms pleaded in para.5(2)–(4) of the statement of claim can be implied into the Employment Agreement. Specifically, it involves two questions: First, whether the implied terms contended for is part of our common law; and second, whether as a matter of proper construction, the implied terms can be implied into the Employment Agreement.

Implied anti-avoidance term

12. Although para.5(2)–(4) of the statement of claim contains three implied terms, the crucial one is that set out in para.5(2), which is what has been termed implied anti-avoidance term. It is Mr Burns SC's submission that the other implied terms should stand and fall with this anti-avoidance term.

13. The anti-avoidance term is to the effect that an employer is bound not to engage in tactics which evade the operation of an express term that confers a certain or conditional benefit upon the employee: Cabrelli, "Discretion, Power and the Rationalisation of Implied Terms", *Industrial Law Journal*, Vol.36, No 2, June 2007, p.194 at pp.198–199. There is support for the implied term in two English authorities: *Jenvey v Australian Broadcasting Corp* [2003] ICR 79 and *Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877.

14. In *Jenvey v Australian Broadcasting Corp*, the employee was employed under a series of fixed-term contracts that entitled him to enhanced redundancy compensation in the event of redundancy. The employer gave notice that his contract would not be renewed upon its expiration. Upon the Employment Tribunal finding there was a redundancy situation, the plaintiff brought proceedings in the High Court, claiming that the employer was in breach of the obligations under the contractual redundancy scheme. Elias J found for the employee, holding that the employment contract was not lawfully terminated simply by giving the requisite notice. Drawing analogy from long-term sickness cases, Elias J considered that in redundancy situations where the employer had promised to

cater for the particular circumstances by conferring a benefit on the employee according to an established scheme, it would be contrary to the functioning of the redundancy scheme to permit the employer to exercise his contractual powers so as to deny the employee the very benefits which the scheme envisages will be paid. He therefore upheld the employee's argument that there is an implied term in an employment contract that once an employer has determined that an employee will be dismissed by reason of redundancy, such that his dismissal for any other reason will defeat the employee's right to contractual benefits which accrue when the dismissal is by reason of redundancy, the employer may not lawfully dismiss the employee for any reason other than redundancy, unless the dismissal is for good cause.

15. In *Takacs v Barclays Services Jersey Ltd*, the employment contract allowed the employer to terminate the contract at any time on four weeks' notice. It further provided for the payment to the employee of a minimum guaranteed bonus, but this was subject to the employee being in the employment and not working out a period of notice at the time the award was due. The plaintiff was dismissed on notice. He brought a claim for the bonus accrued prior to his termination. As part of his claim, the plaintiff alleged that there was an implied term that the employer would not terminate his employment in order to avoid the obligation to make the guaranteed bonus payment. Upon the defendant's application to strike out the claim, Master Fontaine held, *inter alia*, that the plaintiff was entitled to pursue this part of his claim and that there was a real prospect of successfully arguing that such an implied term would supplement, rather than be inconsistent with, the express termination provision in the contract. Among other matters, the Master considered that in the light of *Jenvey v Australian Broadcasting Corp*, *Johnson v Unisys Ltd* [2003] 1 AC 518 and *Reda v Flag Ltd* [2002] IRLR 747, this is a developing area of the law and it would be inappropriate to make a final determination of the claim at an interlocutory stage.

16. I accept that these cases demonstrate that the UK courts recognize that it is possible to imply into an employment contract a term to the effect that an employer's express power to terminate or to dismiss must not be exercised in order to deprive an employee of a benefit expressly conferred by the contract. In the present case, however, the question is whether such an implied term is capable of being part of the common law in Hong Kong. This brings me to the case of *Johnson v Unisys Ltd*.

The position in Hong Kong

17. *Johnson v Unisys Ltd* is an appeal from a striking-out application. The issue is whether the employee could have an arguable common law claim for damages arising out of the manner of dismissal based upon the implied term of trust and confidence. The House of Lords (Lord Steyn dissenting) held that although it was possible to conceive of an implied term to allow an employee to recover damages for loss arising from the manner of his dismissal, it would be an improper exercise of the judicial function to take such a step in light of the evident intention of Parliament (as expressed in Part X of the Employment Rights Act 1966) that there should be a common law remedy for unfair circumstances attending dismissal, but that it should be limited in application and extent. Both Lord Hoffmann and Lord Millett stressed that for an implied term to apply, it must be consistent with legislative policy as expressed in the statutes.

18. Mr Burns SC submitted that given that there is in Hong Kong, no comparable statutory regime to that of the UK unfair dismissal legislation, the concern of the House of Lords does not apply and there is no impediment to the Hong Kong courts developing the common law to accommodate the implied terms contended for. I cannot agree.

19. The Employment Ordinance, which regulates the general conditions of employment, provides limited protection and remedy in terms of dismissal and termination of employment. The Ordinance is not concerned with the wrongness or rightness of the dismissal or termination itself. Employers, and also employees, are entitled to terminate the employment relationship without cause. The statutory protection is against wrongful dismissal or termination by reason of the failing to give the dismissed employee the notice of termination as agreed in his contract or required by the statue: ss.6 and 7 of the Ordinance. The extent of the protection is therefore limited; there are only provisions for awarding damages based on the period of notice that should have been given.

20. As to the protection under Part VIA of the Employment Ordinance, it is not intended to strike at unfair dismissal generally, but only at unfair dismissal in circumstances where the employer dismisses the employee with the intention of extinguishing or reducing the right, benefit or protection conferred upon the employee by the Ordinance. As Mr Scott SC submitted, Part VIA may be perceived as providing a limited form of anti-avoidance legislation.

21. In my view, it is evident from ss.6 and 7 and also Part VIA of the Ordinance that our Legislature does not intend to provide remedies for loss flowing from the manner in which an employee is dismissed. This being the case, it is inappropriate that the courts

should construct a common law remedy based on the implied anti-avoidance term, which goes contrary to the evident intention of the Legislature. In this regard, the reasoning of the majority of the House of Lords in *Johnson v Unisys Ltd* in refusing to extend the implied term of trust and confidence to the manner of dismissal applies with full force. I am also in agreement with Mr Scott SC's argument that employee protection involves complex policy issues that should be debated and decided by the Legislature.

22. There is at the same time no justification for allowing an implied term that could have the effect of cutting down the clear statutory right of termination without cause as conferred by ss.6 and 7 of the Employment Ordinance as illustrated in the decision of *Sun Zhongguo v BOC Group Ltd* [2003] 2 HKC 239. In that case, the employee sought to imply into the employment contract the implied term of mutual trust and confidence and argued that the employer was obliged not to exercise its rights under ss.6 and 7 of the Employment Ordinance to terminate the employment without cause. In dismissing the employee's appeal from the Master's decision striking out this part of the claim, Recorder Edward Chan SC held that although it was not disputed there was an implied term of mutual trust and confidence between employer and employee, there was no basis for the implied term that would have the effect of cutting down the clear right given by the legislation. The Recorder was of the view that just as no term could be implied which could work contrarily to an express term, there was no justification to imply a term that could cut down or modify a statutory right.

23. In short, I am of the view that it is, to say the least, highly doubtful that the implied anti-avoidance term contended for is capable of being part of our common law.

The construction issue

24. Even assuming that our common law can and should be developed to accommodate the implied term, it is still necessary to consider whether the implied term can arise in the present case. For the plaintiff, it was said that the implied term could not be incorporated into the Employment Agreement as it was directly contrary to the express terms that the employment may be terminated by notice (cl.3) and that the plaintiff's eligibility for consideration under the performance incentive program was subject to her being employed at the time of payment (cl.3). Reliance was placed on the Privy Council's decision in *Reda v Flag Ltd.*

25. In *Reda v Flag Ltd*, the employment contract provided that the employer was entitled to terminate for misconduct, unsatisfactory performance or without cause, giving rise to different consequences.

The employer dismissed the employee without cause. The employee sought to argue that the employer was in breach of the implied term of trust and confidence because the dismissal was for a collateral purpose of avoiding granting him the benefit of a stock option plan about to be introduced. The Privy Council rejected the argument, holding that the employer's express and unrestricted power of dismissal without cause was not qualified, whether by reference to the implied term of trust and confidence or otherwise.

26. In *Johnson v Unisys Ltd* (at paras.37 and 79), the House of Lords also made the point that any term which the court implies into a contract must be consistent with and cannot override the express terms.

27. In advancing the present appeal, Mr Burns SC argued that the implied anti-avoidance term did not contradict, but complemented, the express terms of the Employment Agreement; accordingly, *Reda v Flag Ltd* has no application. Alternatively, it was argued that the case was distinguishable. Specifically, it was said that in *Reda v Flag Ltd*, the issue was whether the termination was *ultra vires* by reason of the implied term of trust and confidence and the fact that the right of termination was exercised for a collateral purpose, and that the contractual provision had expressly stated that the employer could terminate the employment "without cause". I do not accept the case can be validly distinguished on these bases. Although it was said that the plaintiff is not challenging the effectiveness of the termination and is basing the claim for breach of implied term on the motive to avoid bonus payment, this is not borne out by the pleading. In fact, para.42 of the statement of claim clearly pleads that the termination of the plaintiff's employment by the defendant was a breach of the implied terms under para.5. Further, despite that cl.3 did not contain the words "without cause", it is clearly giving the defendant as well as the plaintiff a right to terminate the employment relationship without cause.

28. It was also said that in *Reda v Flag Ltd*, the Privy Council did not have occasion to consider whether the express term was qualified by the implied anti-avoidance term as the stock option plan was not in place when the employment was terminated. This is unlike the present case and also the cases of *Takacs v Barclays Services Jersey Ltd* and *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, where the relevant benefit scheme was already in operation before the termination such that the employee had a reasonable expectation of benefiting from it.

29. *Horkulak v Cantor Fitzgerald International* is about the exercise of contractual discretion by an employer. In that case, the employee was entitled under the employment contract to, among others, an annual discretionary bonus, the payment of which was subject to him working for the employer on the date the bonus was

due to be paid. He resigned from his employment and brought proceedings for wrongful dismissal, claiming that the conduct of the employer's chief executive amounted to breach of the implied term of trust and confidence. The employer argued unsuccessfully that no damages should be awarded in respect of unpaid discretionary bonus. The English Court of Appeal dismissed the employer's appeal, holding that where the employee would have received payments under a discretionary bonus scheme of which he was already a potential beneficiary, the contractual discretion was subject to an implied term that it would be exercised genuinely and rationally. *Horkulak v Cantor Fitzgerald International* is therefore not concerned with the interplay between an express power to terminate without cause and the implied anti-avoidance term.

30. As for the case of *Takacs v Barclays Services Jersey Ltd* (and also *Jenvey v Australian Broadcasting Corp*), it is important to note that the employee in the case had an accrued or pre-existing right to the contractual benefit. By contrast, the plaintiff in the present case was only eligible to be considered for bonus payment under the performance incentive program. This is an important distinction. In *Jenvey v Australian Broadcasting Corp*, Elias J expressly reserved his position with regard to a situation where the employee's benefit or right is in the course of accruing (para.29). In *Commerzbank AG v Keen* [2007] IRLR 132, the English Court of Appeal held that the implied term that the employer's discretion should not be exercised in an irrational or perverse manner did not extend to entitle the employee to *pro rata* discretionary bonus when he was terminated in the course of the bonus year. This was because the employee was not entitled to bonus on the date of payment as he was no longer employed by the bank (at p.136 para.74). Mr Cabrelli in his article also recognised the importance of the bonus in *Takacs v Barclays Services Jersey Ltd* being guaranteed rather than discretionary, hence a benefit already accrued or in existence at the time of termination: at p.199. An employee can only be properly regarded as having a legitimate or reasonable expectation of receiving the contractual benefits if the right or benefit has already accrued to him when the employment relationship was terminated.

31. In the present case, the plaintiff had no accrued benefit or right to bonus payment under the performance incentive program when her employment was terminated in August 2007. As at February 2008 when bonus for 2007 came to be payable, the plaintiff was no longer in the defendant's employment, thus under cl.3 of the Employment Agreement was not eligible for consideration under the program. She could not be said to have a reasonable expectation to be paid bonus for the year 2007. The plaintiff's position is therefore different from the employees in *Takacs v Barclays Services Jersey Ltd* and *Jenvey v Australian Broadcasting Corp*. It cannot be

argued, on the basis of *Horkulak v Cantor Fitzgerald International* that it may be implied into the Employment Agreement a term obliging the defendant not to exercise the contractual discretion irrationally or perversely, such that the plaintiff enjoyed a reasonable expectation of bonus payment. Even though pay for performance is an emphasized part of the remuneration structure of the defendant's employees, it remains a fact that bonus payment for 2007 did not arise for consideration in August 2007 when the employment was terminated. There is thus no room for the application of the implied term of rationality and good faith.

32. Accordingly, notwithstanding the cases of *Jenvey v Australian Broadcasting Corp*, *Takacs v Barclays Services Jersey Ltd* and *Horkulak v Cantor Fitzgerald International*, the implied term pleaded in para.5(2) of the statement of claim is inconsistent with the express and unrestricted right of termination without cause (by giving notice) under cl.3 of the Employment Agreement and also contradicts the express condition for eligibility for consideration under the performance incentive program as provided for in cl.1. As such, it is incapable of being incorporated into the Employment Agreement.

33. The plaintiff also sought to argue a case of antecedent breach, on the basis that there was a motive to prevent the plaintiff from getting bonus payment which amounts to breach of the implied term of rationality and good faith. It was pleaded in para.44 of the statement of claim that the defendant's decision to award a zero performance bonus to the plaintiff for the year of 2007, as notified to her by a letter from the defendant's solicitors dated 3 October 2007, amounts to a breach of the implied terms pleaded in para.5(3) and 5(4) of the statement of claim. Mr Scott SC said that the plaintiff had misread the letter dated 3 October 2007. I agree. It is clear from the chronology given in the letter that the two "Does Not Meet" assessments relate to the plaintiff's performance in 2006. There is also no support for the plaintiff's belief that the appraisal was made in March 2007. There is no evidential basis for saying that the determination to award zero performance bonus was made before the termination in August 2007.

34. For the reasons set out above, para.5(2)–(4) of the statement of claim are plainly and obviously unarguable and had been rightly struck out by the Master.

Order 14A determination

35. Having regard to my conclusion on the striking-out application, it would not be necessary to decide on the O.14A determination application.

36. I need only deal briefly with the argument that this is not a suitable case for invoking O.14A. Although Mr Burns SC said that the facts of the case had to be looked at, he made it plain that he was not saying that the point of law was fact sensitive. The reason for his argument that O.14A is inappropriate is that the determination might not conclude the case if the determination was against the defendant.

37. However, O.14A r.1(1)(b) of the RHC provides that the procedure may be invoked if it appears to the court that the determination of the question of law or construction of document will finally determine "the entire cause or matter or any claim or issue in the proceedings". An issue in the proceedings refers to "a disputed point of fact or law relied on by way of claim or defence": *Hong Kong Civil Procedure 2009*, Vol.1, p.218 para.14A/2/4. In *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd* (2003) 6 HKCFAR 222, the Court of Final Appeal confirmed that O.14A can be invoked not only in respect of questions which finally determine the entire cause or matter, but also questions which finally determine any claim or issue.

38. Accordingly, the questions of whether the implied terms contended for can be implied into the Employment Agreement, both as a matter of law and as a matter of construction of contract, are apt for an O.14A determination.

39. Had it been necessary to decide on the O.14A application, I would have determined the questions in favour of the defendant.

Conclusion

40. In conclusion, the plaintiff's appeal is dismissed. There is an order *nisi* that the plaintiff pays the defendant the costs of the appeal to be taxed if not agreed.

Reported by Shin Su Wen