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Tadjudin
and
Bank of America National Association

(Court of Appeal)
(Civil Appeal No 173 of 2009)

Yuen JA, Stone and Suffiad JJ
7 May, 2 June 2010

Employment law — contract of employment — Employment Ordinance (Cap.57) not current high watermark of employee protection, but irreducible minimum — did not necessarily preclude development of common law, if appropriate, via implied terms

Civil procedure — striking-out — seemed inappropriate, when emergent legal principle was at stake, to favourably entertain striking-out or summary judgment application — Rules of the High Court (Cap.4A, Sub.Leg.)

僱傭法 — 僱傭合約 — 目前《僱傭條例》（第57章）在保護僱員方面不屬高標準，但已是最低限度，不可再減 — 不一定妨礙普通法的發展，若恰當，可通過隱含條款的含義

民事訴訟程序 — 剔除 — 新興的法律原則受到威脅時，積極受理剔除或簡易判決的申請似乎不恰當 —《高等法院規則》（第4A章，附屬法例）

P was employed as a vice-president in D's Distressed Debt Trading Group. It was an express term of the employment agreement (the 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 (the Termination). P was not paid the 2007 performance bonus under the PIP (the Bonus), 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 of termination pursuant to cl.3 "in order to avoid P being eligible for [the] PIP" (the Implied Term). P argued that on English authorities, it was possible to imply into an employment agreement 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. Such an implied term would not cut down the statutory right of termination, since the termination could be effective in all other respects, save only that it would not have the effect of avoiding contractual liability for the benefit. The Judge struck out P's claim, holding that: (a) the courts should not construct a common law remedy based on the Implied Term, as it was contrary to the legislative intention as expressed in ss.6 and 7 and Part VIA of the Employment Ordinance (Cap.57) (the Ordinance) not to provide remedies for loss flowing from the manner in which an employee was dismissed; and (b) it could not be incorporated into the Agreement, as it was inconsistent with the express and unrestricted right of termination without cause (by giving notice) under cl.3 and the express condition for eligibility for consideration under the PIP under cl.1. P appealed.

Held, allowing the appeal, that:

(Per Stone J, Yuen JA and Suffiad J agreeing)

(1) In principle, it seemed inappropriate, where an "emergent" legal principle was at stake, favourably to entertain an interlocutory application — whether in the guise of a strike-out or under O.14A of the Rules of the High Court (Cap.4A, Sub.Leg.) — which would effectively negate full argument on the point when advanced on the facts as established on the evidence led at trial. (See para.7.)

(2) The Ordinance did not represent the current high watermark of employee protection. Rather, it constituted an "irreducible minimum" and its terms did not necessarily preclude development of the common law, if ultimately thought appropriate, via implication of the implied terms contended for by P. As a matter of public policy, the statute itself could not constitute, nor be invoked as, a barrier in excess of the protection afforded by the express terms of the Ordinance. (See paras.11–14.)

(Per Suffiad J, Yuen JA and Stone J agreeing)

(3) Whether anti-avoidance terms could be implied into employment agreements was an area of law in the process of developing and it would be far too sweeping at this interlocutory stage to say, as the Judge did, that the implied terms contended for were inconsistent with legislative policies by looking solely at the four corners of the Ordinance. The court had resorted to the common law to develop the law because justice and fair play so required, at times when existing statutory provisions were found to be inadequate or insufficient to meet the requirement of justice (*Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877 applied). (See paras.55–57.)

(4) Accordingly, this was not a plain and obvious case for striking-out. The case should go to trial given the fact-sensitive issues (*Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877 applied). (See paras.64–65.)

(5) The Implied Term did not contradict the express right of termination under cl.3 and could co-exist with and supplement express contractual terms: it only protected against tactics *calculated* to avoid the payment of the Bonus, and was not protective of the employee's interest in remaining employed (*Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877 applied; *Johnson v Unisys Ltd* [2001] 1 AC 518 distinguished). (See paras.58–59.)

(6) As for cl.1, given its wording, D had a valid point that it did not apply because P's claim related to the Bonus, which was payable after the Termination. Equally, P's argument that cl.1 must be read subject to the Implied Term, particularly if it was found that P was terminated by D so as to avoid the Bonus, could not be dismissed out of hand. (See para.62.)

Appeal

This was an appeal by the plaintiff-employee against the decision of Carlye Chu J on 13 July 2009 (see [2009] 4 HKLRD 662) dismissing her appeal against the striking-out of her statement of claim and dismissal of her action for breach of alleged implied terms against the defendant-employer by a master. The facts are set out in the judgment.

Mr Philip Dykes SC and Mr Timothy Parker, instructed by William KW Leung & Co, for the plaintiff (appellant).

Mr John Scott SC and Mr John Hui, instructed by Mayer Brown JSM, for the defendant (respondent).

Legislation mentioned in the judgment

Employment Ordinance (Cap.57) ss.6, 7, Pt.VIA

Rules of the High Court (Cap.4A, Sub.Leg.) O.14A, O.18 r.19, 19(1)(a)

Sex Discrimination Ordinance (Cap.480) ss.75, 76(3)

Cases cited in the judgment

Aspden v Webbs Poultry & Meat Group (Holdings) Ltd [1996] IRLR 521

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

Sun Zhongguo v BOC Group Ltd [2003] 2 HKC 239

Takacs v Barclays Services Jersey Ltd [2006] IRLR 877

Yuen JA

1. I agree with the judgment of Suffiad J.

Stone J

2. I have had the advantage of reading in draft the judgment of Suffiad J.

3. For the reasons he gives, I too would allow this appeal.

4. In deference to a most interesting argument, I should like to make some brief observations of my own.

5. With great respect to the learned Judge below, who has written an analytical discourse with economy and clarity, in a developing area of the law such as this I do not consider that, save for the exceptional (and wholly obvious) case, the party invoking the implied term contended for should be driven from the judgment seat by means of an interlocutory strike-out.

6. In so saying, it may be that the decision to allow this appeal ultimately may not redound to the advantage of the plaintiff, since I know not the merits of her allegations, but that is nothing to the immediate point.

7. In principle it seems to me to be inappropriate, in a case wherein an "emergent" legal principle is at stake, favourably to entertain an interlocutory application — whether in the guise of a strike-out or pursuant to O.14A — which would have the effect of negating full argument on the point when advanced in face of the facts as established on the evidence led at trial.

8. As a forensic tactic, I suspect it was precisely because of such potential "fact sensitivity" that the decision was made by the defendant to try to nip this case in the bud, and to launch this application in order to preclude the airing of the adverse allegations as now are levelled against it by the plaintiff.

9. The second comment I wish to make revolves around what I perceived to be the "bull point" in the argument of Mr Scott SC on behalf of the defendant — an argument which found favour in the court below — which broadly was to the effect that Pt.VIA of the Employment Ordinance (Cap.57), which was added to the statute in 1997 specifically to target the practice of dismissing employees with the aim of reducing or extinguishing statutory rights and benefits, *ex hypothesi* was "as far as the legislature was prepared to go" in order to attack such avoidance measures as may be adopted by employers.

10. Against such a statutory backdrop, it must therefore follow, said Mr Scott, that absent an express contractual term that thus would restrict the power of dismissal, if the "anti-avoidance" term

as now pleaded in this case was permitted to be implied as a matter of law, the right of dismissal enjoyed by employers generally under the Ordinance would be "eroded and restricted", and that it was "not for the Judiciary to trespass upon the legislature's arena and to rewrite the Ordinance", which itself represented the product of the determination by the Legislature of complex policy issues and, as he put it, "the finely balanced rights and duties of employers and employees in Hong Kong".

11. Whilst initially attractive, I take issue with that submission, and indeed with its underlying premise, which is, in effect, that the Employment Ordinance represents the current high watermark of employee protection, beyond which courts should not venture.

12. To the contrary, in my view, the statute represents that which, for want of a better term, constitutes an "irreducible minimum" in terms of employee protection, and I fail to see why its terms necessarily preclude development of the common law, if ultimately thought appropriate, *via* implication of the potential implied terms contended for by the plaintiff.

13. To put the issue another way, in my judgment it cannot properly be said that the plaintiff's case as pleaded is demurrable on its face, with the consequence that the Judge who tries this action — and trial there now must be — will be in a position to consider (and to accept or to reject) the arguments put up by either side in favour of, and against, the terms as now sought by the plaintiff to be implied into this employment contract.

14. Accordingly, it strikes me that in his persuasive response to this point Mr Dykes SC was entirely correct in the submission that the Employment Ordinance constituted no more than the "lowest common denominator", and that as a matter of public policy the statute itself neither could constitute, nor be invoked as, a barrier in excess of the protection afforded by the express terms of that Ordinance.

Suffiad J

15. This is the plaintiff's appeal against the decision of Chu J given on 13 July 2009 in a written judgment in which the Judge dismissed the plaintiff's appeal from a decision of Master Levy whereby the Master struck out paras.5(1)–5(4) of the statement of claim and dismissed the plaintiff's action herein.

Background

16. The plaintiff was employed by the defendant as a vice-president between 5 June 2000 and 27 August 2007 in the defendant's Distressed Debt Trading Group. The Distressed Debt Trading Group

of the defendant was subsequently renamed the International Special Situation Group.

17. The terms of that employment were contained in a letter of appointment dated 19 April 2000 signed and accepted by the plaintiff on 25 April 2000 (the Employment Agreement).

18. The terms relevant to the issue now in dispute and contained in the Employment Agreement are as follows:

> 1. Remuneration:
> ... You will be eligible for consideration under the Bank's performance incentive program and it will be 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.

19. By a letter of termination to the plaintiff dated 27 August 2007, the defendant terminated the plaintiff's employment effective from 28 August 2007 by payment of wages *in lieu of* one month's notice and other benefits which she was entitled to.

20. The plaintiff was, however, not paid any performance bonus under the performance incentive program for the year 2007.

The plaintiff's claim

21. The plaintiff's claim is in relation to the performance bonus for the year 2007, which was payable in February 2008, at which time the plaintiff's employment with the defendant had already been terminated.

22. Initially, the plaintiff brought the claim in the Labour Tribunal. From there, it was ordered to be transferred to the Court of First Instance.

23. There can be no dispute that the plaintiff's claim is wholly premised on a breach of the implied terms pleaded and particularised in para.5 of the statement of claim.

24. The relevant parts of the pleading in para.5 read as follows:

> As legal incidents of the employment relationship between the Plaintiff and Defendant there were implied into the Employment Agreement contractual duties on the Defendant:
>
> (a) not to commit any unlawful act of discrimination against the Plaintiff;

(b) 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;

(c) 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

(d) 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*.

25. It is also the pleaded case of the plaintiff (contained in paras.6–45 of the statement of claim) that one John Liptak, initially a colleague of hers in the defendant's bank, but who was appointed as head of the Distressed Sales & Trading and Desk Analysts for Asia in the Global Special Situations Group some time in February 2007 thereby becoming the plaintiff's manager, had made certain allegations against the plaintiff which the plaintiff denies were true, and had made up certain reasons which were also untrue upon which he had recommended or decided to terminate the plaintiff's employment with the defendant. It was also pleaded by the plaintiff that that was done by Liptak with a view to avoid the performance bonus to the plaintiff for 2007 and thus achieving a higher performance bonus for himself.

26. It is therefore in this context that the plaintiff relies on the implied term pleaded in para.5(b) of the statement of claim particularly with respect to the words "in order to avoid" pleaded therein since the plaintiff's case was that her employment was terminated by the defendant with the view to avoid paying her the performance bonus under cl.1 of the Employment Agreement.

Defendant's application for striking-out

27. The striking-out application was taken out by the defendant by summons dated 11 June 2008.

28. By that summons, which was issued under both O.18 r.19 as well as under O.14A of the Rules of the High Court (Cap.4A, Sub.Leg.), the defendant sought to strike out the statement of claim and dismissal of the action against the defendant.

29. In the alternative it sought determination of the following questions of law, namely:

(a) The question whether, as a matter of law, the plaintiff has any basis for bringing her claim before this Court be determined,

and, for this purpose there be determined the following questions of law, namely:

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

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

(b) If the said question, namely whether, as a matter of law, the plaintiff has any basis for bringing her claim before this Court, be answered in the negative then this action against the defendant be dismissed.

30. In deciding the matter, the Master struck out para.5(a) of the statement of claim on the basis that the claim founded on a breach of para.5(a) of the statement of claim was, by reason of ss.75 and 76(3) of the Sex Discrimination Ordinance (Cap.480), within the exclusive jurisdiction of the District Court. This part of the Master's decision was not appealed against by the plaintiff in her appeal to the Judge.

31. The Master also struck out paras.5(b)–(d) of the statement of claim on the basis that such implied terms were not legally sustainable by the plaintiff. Accordingly, the Master dismissed the plaintiff's claim herein.

32. The appeal to the Judge in chambers from the Master's decision only related to the striking-out of paras.5(b)–(d) of the statement of claim.

33. Therefore, the appeal from the decision of the Judge to this Court is only concerned with the implied terms pleaded in paras.5(b)–(d) of the statement of claim.

The approach of the Judge

34. In her judgment, the Judge stated the issue in dispute between the parties to be whether the implied term pleaded in paras.5(b)–(d) of the statement of claim can be implied into the Employment Agreement. In this respect, the Judge identified that issue as involving two questions, the first, whether the implied terms contended for are part of our common law, and secondly, whether as a matter of proper construction, the implied terms can be implied into the Employment Agreement.

35. On the first question, after analysing and considering the decisions in *Jenvey v Australian Broadcasting Corp* [2002] IRLR 520 and also *Takacs v Barclays Services Jersey Ltd* [2006] IRLR 877, as well as the position in Hong Kong, in particular Pt.VIA of the Employment Ordinance, the Judge came to the conclusion that it was highly doubtful that the implied anti-avoidance term contended for was capable of being part of our common law (para.23 of the judgment refers).

36. The Judge reached that conclusion in the following way.

37. The Judge started off by acknowledging that both *Jenvey v Australian Broadcasting Corp* and *Takacs v Barclays Services Jersey Ltd* lend support to the fact 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.

38. She then considered the legislative position in Hong Kong, in particular the provisions under Pt.VIA of the Employment Ordinance as providing a limited form of anti-avoidance legislation.

39. By applying the reasoning of the majority of the House of Lords in the case of *Johnson v Unisys Ltd* [2001] 1 AC 518 to the effect that for an implied term to apply, it must be consistent with legislative policy as expressed in the statute, the Judge came to the conclusion that it was evident from ss.6 and 7 coupled with Pt.VIA of the Employment Ordinance that our Legislature did not intend to provide remedies for loss flowing from the manner in which an employee is dismissed. Therefore, it was 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.

40. The Judge further took into account that the decision of Recorder Chan SC in *Sun Zhongguo v BOC Group Ltd* [2003] 2 HKC 239 illustrated that there was no justification in allowing an implied term which could have the effect of cutting down the clear statutory right of termination without cause as provided for by ss.6 and 7 of the Employment Ordinance.

41. On the second question, the Judge held that the implied term pleaded in para.5(b) was inconsistent with the express and unrestricted right of termination without cause (by giving notice) under cl.3 of the Employment Agreement and also contradicted the express condition for eligibility for consideration under the performance incentive program as provided for in cl.1. Thus it was incapable of being incorporated into the Employment Agreement (para.32 of the judgment refers).

42. On that basis, the Judge upheld the decision of the Master in its entirety and dismissed the plaintiff's claim.

43. Furthermore, the Judge took the view that it was not necessary for her to consider the application under O.14A, but if she had to, would have arrived at the same decision.

This appeal

44. In this appeal, it was submitted by the plaintiff that the Judge was wrong to have taken the view that the implied term contended for could not co-exist with the statutory regime in Hong Kong as provided for by the Employment Ordinance. In this respect, it was submitted that the Employment Ordinance functions as the lowest common denominator for the protection given to employees.

45. It was also submitted that the Judge was wrong to have held that the anti-avoidance term relied on by the plaintiff was inconsistent with the express right of termination set out in cl.3 of the Employment Agreement by relying on the case of *Johnson v Unisys Ltd* since that case is distinguishable from the present in that the effect of the implied term contended for is different.

46. It was also submitted by the plaintiff that while the defendant's case was that the performance bonus set out in cl.1 of the Employment Agreement was a "discretionary" bonus, it is the plaintiff's contention that the true nature of the bonus effectively was "certain" in that it was based on performance such that invariably it produced predictable results through application of known principles and practices. Therefore, the true construction of cl.1 was not suitable for summary determination. In any event, given the nature of this application the Judge ought to have taken disputed facts in favour of the plaintiff, but had failed to do so.

47. Reliance was also placed on the case of *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521 where it was held that an anti-avoidance term protects interference with "accruing or accrued" benefits.

48. On the other hand, it was submitted by the defendant that the implied term sought to be relied on by the plaintiff is inconsistent and contrary to the express term of termination under cl.3 of the Employment Agreement. It was also argued that the implied term is inconsistent with the provisions of the Employment Ordinance in that the implied terms sought by the plaintiff go much further than the restrictions imposed by that Ordinance affecting the right of dismissal by employers.

49. It was also argued by the defendant that the implied terms sought were not necessary or obvious to give business efficacy to the Employment Agreement.

50. The defendant further contends that although the words "without cause" are not expressly stated in cl.3 of the Employment Agreement, the effect of cl.3 is in fact a right to dismiss without

cause, by simply giving the requisite notice of termination or wages *in lieu* thereof.

51. Finally, it was submitted by the defendant that the performance bonus now claimed by the plaintiff under cl.1 of the Employment Agreement, is not something which the plaintiff was eligible to be even considered for since by February 2008, the time for payment, the plaintiff was no longer in the employ of the defendant having been dismissed.

Decision

52. This is an application to strike out and dismiss the plaintiff's claim. Mr Scott SC accepts that the striking-out was made on the basis of O.18 r.19(1)(a), namely, that it disclosed no reasonable cause of action. This is so despite the fact that in the summons all the four bases for striking-out were stated.

53. As with any application to strike out a claim for disclosing no reasonable cause of action, it is only in plain and obvious cases that a claim would be struck out and dismissed and disputed facts would be taken in favour of the party sought to be struck out.

54. If those facts as pleaded by the plaintiff in paras.6–45 of the statement of claim are taken in favour of the plaintiff, the question that needs to be answered at this interlocutory stage would be whether, at the end of the day, it is possible for the implied terms contended for by the plaintiff to be implied into the Employment Agreement.

55. In this respect, I note first that implied anti-avoidance terms is an area of the law which is in the process of developing as was said in *Takacs v Barclays Services Jersey Ltd* at para.58:

> It is also clear from the many authorities that I have been referred to in the course of the hearing, only some of which I have referred to in the course of this judgment, that this is an area of the law which is in the process of developing. The vast majority of the cases have been heard during the last five to six years. It would not, in my judgment, be appropriate to determine this claim at a summary hearing, so that there is also some other compelling reason for the claim to proceed to trial.

56. This area of the law being in the process of developing, it would be far too sweeping a statement at this interlocutory stage to say, as the Judge did, that the implied terms contended for are inconsistent with our legislative policies by looking solely at the four corners of the Employment Ordinance.

57. All too often, the common law has to be resorted to by the court to develop the law because justice and fair play so requires,

at times when existing statutory provisions are found to be inadequate or insufficient to meet the requirement of justice.

58. Second, although it was submitted by the defendant that an implied term must not contradict other express terms in a contract, and in the present case, it is said that the implied term contended for by the plaintiff is inconsistent with the express right of termination set out in cl.3 of the Employment Agreement, this argument of the defendant is met by the response of the plaintiff that the plaintiff does not dispute the defendant's right to terminate her employment by notice under cl.3, or the validity of that dismissal. The anti-avoidance term only protects against tactics *calculated* to avoid the payment of the performance bonus. In that sense therefore it is not inconsistent with or contradicts the express term in cl.3. In this respect, therefore, the present case can be distinguished from *Johnson v Unisys Ltd* where the implied term contended for was said to be protective of the employee's interest in remaining employed.

59. Furthermore, as was said in the judgment in *Takacs v Barclays Services Jersey Ltd*, in which there was in the contract an express provision allowing the employers to terminate the contract at any time on four weeks' notice at para.78:

> I accept the claimant's submissions that the alleged implied term could co-exist with the express termination provision in the contract and that the present circumstances are distinguishable from *Johnson v Unisys* It is further, in my view, distinguishable from *Reda v Flag* because in that case there was a clear and unambiguous express right to terminate the contract at any time without cause. There is, I conclude, a real prospect of successfully arguing that such an implied term would supplement, rather than be inconsistent with, the express terms of the contract ...

60. Third, even with the performance incentive programme set out in cl.1 of the Employment Agreement, the proper construction of that clause is not without difficulties as there are disputed factual matters between the parties. One such dispute is whether that was a discretionary bonus. While the defendant contends that it was "discretionary", that is not the stance taken by the plaintiff. The true construction of cl.1 therefore can only be properly ascertained by going into the defendant's compensation structure and performance evaluation system. The documentary guidelines relating to the defendant's performance incentive scheme make no mention of the word "discretionary" but it seemingly is based on actual performance.

61. Even if it was a "discretionary" bonus in the true sense, the further argument by the plaintiff was that such discretion must be exercised in good faith, not perversely nor irrationally nor arbitrarily.

Thus reliance on the further implied terms pleaded in paras.5(c) and 5(d) of the statement of claim.

62. Fourth, there is also the defendant's submission that cl.1 of the Employment Agreement can have no application in this case since the claim of the plaintiff is in relation to the 2007 performance bonus which was payable in February 2008, by which time the plaintiff was no longer in the defendant's employment. Looking only at the wording of cl.1, the defendant may have a valid point in their favour.

63. On the other hand, it was argued by the plaintiff that cl.1 of the Employment Agreement has to be read subject to the implied term contended for by the plaintiff, particularly if it be found on the facts that her employment *was* terminated by the defendant with a view to avoiding her performance bonus for 2007, even if *pro rata* for that year, since the plaintiff's termination was at the end of August 2007. This argument put forward by the plaintiff cannot be dismissed offhand. There is also the plaintiff's argument that the requirement that she remain employed at the time of payment was to encourage loyalty on the part of employees, not to enable the employer to avoid paying the bonus.

64. In the final analysis, I take the view that whether or not the implied terms contended for by the plaintiff will or will not be implied greatly depends on the factual matrix in this case relating to the proper construction of the relevant clauses in the Employment Agreement, and whether on the facts as found at trial, the plaintiff can make out a case that the termination was carried out with a view by the defendant to avoid the performance bonus the subject of this dispute between the parties.

65. For my part, I would conclude that, for all the reasons given above, this is not such a "plain and obvious" case for striking-out and dismissing the plaintiff's claim outright, but that it should go to trial since there are issues in dispute which clearly are fact-sensitive.

66. Accordingly, I would allow the appeal by the plaintiff and set aside the order of the Judge below.

67. I should also add that for the same reasons given, I would have come to the same decision even if the matter was decided on the O.14A application.

Yuen JA

68. Mr Dykes and Mr Scott have agreed that the costs of the appeal should follow the event with certificate for two counsel. Accordingly, the appeal is allowed, the Judge's order set aside, and there will be an order that the costs of the summons below and the

appeal be paid by the defendant to the plaintiff, with certificate for two counsel on the appeal.

Reported by Shin Su Wen