IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 90

Suit No 62 of 2021

Between

Kelington Engineering (S) Pte Ltd

… *Plaintiff*

And

Gan Cheng Chuan

… *Defendant*

JUDGMENT

[Contract — Contractual terms — Parol evidence rule]
[Contract — Contractual terms — Ascertaining terms based on extrinsic evidence]
[Damages — Liquidated damages or penalty]

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v
Gan Cheng Chuan

[2022] SGHC 90

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25–27 January, 7 March 2022

26 April 2022 Judgment reserved.

Andre Maniam J:

Introduction

1 What a difference a date makes.

2 This case involves an employment agreement between the plaintiff company, Kelington Engineering (S) Pte Ltd ("Kelington"), and the defendant, Mr Gan Cheng Chuan ("Mr Gan"). It was common ground between the parties that:

(a) sometime between October and early December 2020, Mr Gan contractually agreed to be employed by Kelington, and the parties signed a letter of appointment (the "LOA");[1]

[1] Plaintiff's Closing Submissions ("PCS"), paras 26-27; Defendant's Closing Submissions ("DCS"), paras 5, 10 and 14; Notes of Evidence ("NE"), 26 January 2022, page 88, lines 11–16.

(b) on 19 December 2020 Mr Gan repudiated that contract;[2] and

(c) Kelington accepted that repudiation on 22 December 2020.[3]

3 Mr Gan accepted that he was liable to compensate Kelington for his breach of contract, but how much was he liable for?

4 Kelington's position is:

(a) the agreed commencement date of Mr Gan's three-year term of employment was *1 December 2020*;[4]

(b) Mr Gan's term of employment had already commenced when he purportedly quit on 19 December 2020;

(c) on the terms of clause 1.5 of the LOA,[5] Mr Gan was liable to compensate Kelington the amount equivalent to his salary for the balance of the three-year term (after 22 December 2020 when Kelington accepted Mr Gan's repudiation); and

(d) Kelington was therefore entitled to RM1,453,565.22 after offsetting salary for the period of 1–22 December 2020 during which it considered Mr Gan to be an employee.[6]

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2 PCS, para 35; DCS, Mr Gan Cheng Chuan's Affidavit of Evidence-in-Chief dated 24 November 2021 ("Mr Gan's AEIC"), para 17 (Bundle of Affidavits of Evidence-in-Chief ("BAEIC"), pages 333–334).

3 PCS, para 35; Mr Gan's AEIC, para 18 (BAEIC, page 334).

4 PCS, paras 40–50.

5 Agreed Bundle of Documents Volume I ("AB1"), page 77, clauses 1.3 and 1.5.

6 Statement of Claim ("SOC"), paras 8–10 (Set Down Bundle ("SDB"), pages 5–6).

5 Mr Gan's position is:

(a) on 19 December 2020, when he had changed his mind about joining Kelington and informed Kelington's representative, Mr Lim Seng Chuan ("Mr Lim") of the same, he had not commenced his term of employment yet;[7]

(b) the agreement/understanding between him and Kelington, was that the commencement date of Mr Gan's employment term was *1 January 2021* (as he had to serve notice with his existing employer until the end of December 2020);[8]

(c) clause 9.4 of the LOA (which pertained to termination before commencement of employment) provides that the party initiating termination "shall be bound to pay 1 (one) month's basic salary in lieu as compensation";[9] and

(d) as it was clause 9.4 that applied, Mr Gan was only liable to compensate Kelington one month's basic salary, amounting to RM24,000 – much less than what Kelington was claiming from him.[10]

6 At the hearing of Kelington's summary judgment application, a consent judgment was entered for the sum of RM24,000,[11] which Mr Gan paid shortly

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7 Defence (Amendment No. 1), para 3 (SDB, page 21); Mr Gan's AEIC, paras 17–19 (BAEIC, pages 333–334).

8 DCS, paras 5–7.

9 AB1 81, clause 9.4.

10 Defence (Amendment No. 1), para 7 (SDB, pages 24–25); DCS, para 17.

11 HC/ORC 3042/2021 made on 25 May 2021, filed on 2 June 2021.

thereafter.[12] Mr Gan was granted unconditional leave to defend the rest of Kelington's claims, which proceeded to trial.

Issues

7 The *main issue* is thus: what was the agreement/understanding between the parties as to the commencement date of Mr Gan's employment with Kelington? Was the commencement date 1 December 2020 (according to Kelington), or 1 January 2021 (according to Mr Gan)? More specifically, had Mr Gan unconditionally agreed to commence employment with Kelington on 1 December 2020, regardless of whether he might still be serving notice with his existing employer?

8 In the event that I find that the commencement date was 1 December 2020, there are two *subsidiary issues*:

(a) Is clause 1.5 of the LOA (which requires Mr Gan to compensate Kelington the amount equivalent to his salary for the balance of his three-year term of employment) an unenforceable penalty clause?

(b) Does the consent judgment in the sum of RM24,000 limit Kelington to recovering only that sum (which Mr Gan has already paid)?

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12 DCS, para 23.

Main Issue: what was the agreement/understanding as to the commencement date of Mr Gan's employment with Kelington?

Background facts

9 Kelington and Kelington Engineering (Shanghai) Co Ltd ("KESH") are both wholly owned subsidiaries of Kelington Group Berhad, a company listed on the stock exchange of Malaysia. In or around August 2020, Kelington had begun searching for a replacement Country Manager for KESH and, for this purpose, communicated with Mr Gan.[13] In or around October 2020, Mr Gan agreed to be employed by Kelington as the Country Manager (China) for KESH.

10 At the end of September 2020, Mr Gan communicated to Mr Lim that he would be resigning from his existing employment.[14] He was, however, contractually obliged to serve three months' notice.[15] This meant that unless his employer agreed to an early release, he could only commence employment with Kelington Singapore in January 2021, or he would breach his existing employment contract. Indeed, for him to have two employers at the same time would also be a breach of his contract with Kelington.[16]

11 Mr Gan's LOA from Kelington,[17] however, stated that his appointment as Country Manager (China) for KESH "shall commence on 1st December 2020". Mr Gan signed and returned a copy of the LOA in October 2020.

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13 Mr Lim Seng Chuan's Affidavit of Evidence-in-Chief dated 12 November 2021 ("Mr Lim's AEIC"), paras 7, 8, 13 and 14.

14 AB1, pages 95–96;

15 Mr Gan's AEIC, para 5; NE, 26 January 2022, page 70, lines 24–32.

16 AB1, page 77, clauses 11.1 and 11.2.

17 AB1, page 77.

Parties' contentions

12 Kelington's case is that by signing the LOA, Mr Gan had unconditionally agreed to all its terms, including the commencement date of 1 December 2020.[18] If he was still serving notice with his existing employer as at that date, that was Mr Gan's problem: he would be in breach of his contractual obligations owed to Kelington if he did not commence employment with Kelington on 1 December 2020 as he had contracted to.

13 Mr Gan, on the other hand, says that he had made it clear to Kelington, both before and after he signed the LOA, that Kelington's suggested commencement date of 1 December 2020 was only "tentative" – he could only commence employment with Kelington after serving out his notice with his existing employer, unless he were given an early release.[19] In that regard, he had mentioned the date of 1 January 2021 (or more generally January 2021) to Kelington on several occasions, and he believed Kelington was agreeable to that.

The parol evidence rule

14 Kelington relies on the parol evidence rule as enacted in ss 93 and 94 of the Evidence Act 1893 (2020 Rev Ed) (formerly Cap 97, 1997 Rev Ed) (the "Evidence Act"). It contends that the terms of Mr Gan's contract of employment were reduced to the form of a document (the LOA), and accordingly no extrinsic evidence can be admitted to contradict, vary, add to, or subtract from the terms in the LOA. Specifically, Kelington contends that since the commencement date

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18 PCS, paras 40–45; Mr Lim's AEIC, paras 41–43.

19 Mr Gan's AEIC, paras 5, 8, 11, 13 and 14 (BAEIC at pages 330–333); NE, 26 January 2022, page 70, lines 23–32 and page 62, lines 12–31.

stated in the LOA (at clause 1.3) is 1 December 2020, that cannot be contradicted (or even qualified) by any evidence outside of the LOA.[20]

15 However, the parol evidence rule only applies when it is proved that the document was intended by the parties to contain all the terms of the contract. The court must therefore first determine whether in fact the LOA was intended to contain all the terms of the parties' agreement. In doing so, the court may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [40] and [110]; *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at paras 06.027–06.028. Having done so, the court may well conclude that the LOA was not intended by the parties to contain all the terms of their contract – the contract might instead be partly written and partly oral. If so, the court can consider extrinsic evidence to establish what the terms of the contract are, even, as a logical extension, where the oral evidence contradicts the written document: *The Law of Contract in Singapore* at para 06.040.

16 There are thus two questions to be dealt with: the anterior question of whether the LOA was intended by Kelington and Mr Gan to contain all the terms of their agreement; and, if it was not so intended, the subsequent question of what the terms of the agreement between the parties were (having regard to

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[20] PCS, paras 39–45.

extrinsic evidence). However, as the facts pertaining to both questions overlap substantially, I will deal with them in the round.

The nature of the LOA

17 The LOA appeared to be complete on its face. In particular, clause 1.3 stated the commencement date of Mr Gan's employment with Kelington as 1 December 2020.[21] This gave rise to a rebuttable presumption that the LOA was intended to contain all the terms of the parties' agreement, including the commencement date of 1 December 2020.

18 However, it remains open to Mr Gan to rebut that presumption by showing that the parties' agreement/understanding was that the commencement date would be 1 January 2021, not 1 December 2020. It is also open to Mr Gan to show that even if the commencement date were 1 December 2020, it was nevertheless tentative, in that it was subject to him being released early from his existing employment by that date.

The negotiations between the parties

19 Mr Gan's discussions were principally with Kelington's representative, Mr Lim. Mr Gan provided his resume to Mr Lim on 11 August 2020,[22] and Mr Lim conducted an interview with him on 13 August 2020.[23] Mr Gan's evidence is that during the interview, he told Mr Lim that he would need to serve three months' notice with his existing employer.

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21 AB1, page 77, clause 1.3.

22 AB1, page 21.

23 Mr Lim's AEIC, para 14 (BAEIC, page 10); Mr Gan's AEIC, para 5 (BAIEC, page 330).

20 Following the interview, Mr Lim told Mr Gan that Kelington was keen for him to come on board as KESH's Country Manager (China),[24] and on 10 September 2020 Mr Gan indicated that he was willing to be appointed to that position by informing Mr Lee via a WhatsApp message that he was "on board".[25]

21 On 14 September 2020, Mr Lim sent Mr Gan a WhatsApp message asking, "… Commencement date 1 Dec 2020 ok for you?" Mr Gan replied on the same day, "Tentative".[26] Mr Gan's evidence is that he had indicated that the commencement date was "tentative" because he had yet to tender his resignation from his existing employment; [27] even if he had done so right away, it was already mid-September 2020, and his three-month notice period would go past 1 December 2020.

22 The parties then negotiated other terms of Mr Gan's prospective employment with Kelington. On 15 September 2020, Mr Lim forwarded a draft LOA to Mr Gan.[28] Clause 1.3 of the draft stated the commencement date of Mr Gan's employment with Kelington as 1 December 2020,[29] although there had been no further discussion on the commencement date after Mr Gan had said it was "tentative".

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24 Mr Lim's AEIC, para 16 (BAEIC, page 11).

25 AB1, page 92.

26 AB1, page 92.

27 Mr Gan's AEIC, para 5 (BAEIC, page 330); NE, 26 January 2022, page 70, lines 23–32 and page 76, lines 1–9.

28 AB1, page 31.

29 AB1, page 32A, clause 1.3.

23 Clause 1.5 of the draft LOA provided that either party could terminate Mr Gan's employment by giving six months' written notice, or by paying six months' basic salary in lieu of notice.[30]

24 Mr Gan responded on 21 September 2020, highlighting certain clauses in the draft LOA that he was not comfortable with.[31]

25 On 23 September 2020, Mr Lim sent Mr Gan a revised draft of the LOA.[32] Mr Gan asked to negotiate clause 1.5 further: he wanted a guaranteed three-year term, to be compensated with the amount equivalent to his salary for the balance of the three-year term if Kelington should terminate his employment before the three years were up. Mr Lim proposed that this apply mutually: if Mr Gan should choose to leave Kelington before three years were up, he would have to pay Kelington the amount equivalent to his salary for the balance of the three years. Mr Gan agreed to this, and so clause 1.5 was drafted as it now appears.[33]

26 On 29 September 2020, Mr Gan sent Mr Lim a WhatsApp message to say, "Speaking to my boss today. Will sign off [the LOA]".[34] Mr Gan then proceeded to tender his resignation. With his three-month notice period, he thus could not commence employment with Kelington on 1 December 2020 as stated

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30 AB1, page 32A, clause 1.5.

31 AB1, pages 33–43.

32 AB1, pages 44 and 55–63.

33 Mr Lim's AEIC, paras 29–31 (BAEIC, pages 16–17); NE, 26 January 2022, page 83 line 14–page 85 line 3.

34 AB1, pages 95–96.

in the draft LOA, unless his existing employer agreed to waive his notice and release him early.

27 On 1 October 2020 Mr Gan sent Mr Lim a WhatsApp message to say that he would send the LOA back that day. Shortly after, though, he sent further messages to say, "The boss have not accepted my resignation" and, "I will continue to speak with him."[35] Thus, at or around the end of September 2020, Mr Gan had told his boss he was resigning, but his boss had not agreed to an early release.

28 Although Mr Gan had not highlighted clause 1.3 of the draft LOA as one of the clauses that he was not comfortable with whilst he was negotiating the terms of the LOA with Mr Lim (see [22]–[25] above), he had earlier told Mr Lim that Mr Lim's suggested commencement date of 1 December 2020 was "tentative". Nevertheless, Mr Lim inserted that date in the draft LOA. I accept that Mr Lim knew that Mr Gan had to serve notice with his existing employer, and as such, could only commence employment with Kelington on 1 December 2020 *if* his existing employer agreed to an early release. Otherwise, he could only commence employment with Kelington after he had finished serving notice. As his notice period ran till the end of December 2020, that meant that he could only start employment with Kelington on 1 January 2021.

The execution of the LOA

29 At 8.30am on 2 October 2020, Mr Gan sent Mr Lim a signed copy of the execution page of the LOA (a photo sent by WhatsApp).[36] Mr Gan thereby

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35 AB1, page 96.

36 AB1, pages 86 and 96.

stated: "I … hereby acknowledge and confirm that I understand and accept the appointment offered to me subject to the above mentioned terms and conditions of contract. In addition, I consent to the payment of my monthly salary and other payments due to me by direct credit through Company's appointed Bank."

30 Mr Gan signed in the space provided for his signature, but he did not date the execution page in the space provided for that.

31 In response, Mr Lim asked, "The date?" (Mr Lim's message of 2 October 2020, 9.32am).[37] I accept Mr Lim's evidence that his query was a reference to the missing date in the space for it on the execution page.[38]

32 But that is not how Mr Gan understood Mr Lim's query – Mr Gan responded right away: "Have to be 1st Jan" (at 9.32am) and "But you may send me works to analyse" (at 9.33am). Mr Lim did not respond to that, and their next WhatsApp correspondence was on 9 October 2020.[39]

33 Mr Lim says he thought Mr Gan was saying that his signature had to be dated "1st Jan",[40] which Mr Lim thought did not make sense. However, Mr Lim claims that if there had been "any errors to the signature date", he preferred to only correct Mr Gan when he received the executed copy (which he received on 9 October 2020). On the stand, he maintained that he had wondered why

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37 AB1, pages 86 and 96.

38 Mr Lim's AEIC, para 41 (BAEIC, page 21); NE, 25 January 2021, page 37, line 10–page 38, line 21.

39 AB1, page 86.

40 Mr Lim's AEIC, para 41 (BAEIC, page 21).

Mr Gan would want his signature to be dated "1st Jan", but he did not clarify this with Mr Gan.[41]

34 Mr Lim's explanation is artificial, and I do not accept it – if Mr Lim thought it would be an "error" for Mr Gan to date the execution page 1 January 2021 (which is what he says he thought Mr Gan meant to do),[42] he would have said so rather than to wait a week to correct the error, if Mr Gan did proceed to date the execution page "1st Jan".

35 Likewise, if the date of "1st Jan" did not make sense to Mr Lim, he would have asked Mr Gan to clarify the matter. This is especially since the LOA, which Kelington had dated 15 September 2020, also provided that Mr Gan was to "knowledge [*sic*] [his] understanding and acceptance" of the LOA by signing and returning a copy "*immediately from the date hereof*, failing which [Kelington] shall treat the offer as lapsed" [emphasis added].[43] It would not be consistent with that for Mr Gan to purport to only accept the LOA on 1 January 2021.

36 I find that an objective, reasonable person in Mr Lim's position would have known that "1st Jan", as mentioned by Mr Gan in his WhatsApp message on 2 October 2020, was a reference to the commencement date of his employment with Kelington:

(a) First, Mr Gan did not simply say "1st Jan"; he said: "*Have to be* 1st Jan" [emphasis added]. There is no reason why Mr Gan *had to* date

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41 NE, 25 January 2022, page 77, line 32–page 78, line 14; page 79, lines 17–23.

42 Mr Lim's AEIC, para 41.

43 AB1, pages 77 and 85.

the execution page "1st Jan", and indeed, that did not make sense to Mr Lim. Rather, the date in question *had to be* 1 January 2021 because of Mr Gan's notice period, *ie*, it was a reference to his commencement date.

(b) Second, Mr Gan did not merely say "Have to be 1st Jan"; he went on to say, "But you may send me works to analyse". That only makes sense if "1st Jan" were a reference to his commencement date – Mr Gan was saying that although he could only commence employment with Kelington on 1 January 2021, Kelington could nevertheless "send [him] works to analyse" prior to that date, *ie*, he could take preparatory steps in advance of his prospective employment with Kelington. If "1st Jan" were a reference to the date to be filled in on the execution page, Mr Gan's subsequent statement, "But you may send me works to analyse", would not make sense.

(c) Third, Mr Gan had to serve notice with his existing employer, and he had just told Mr Lim that his existing employer had not accepted his resignation. It follows that Mr Gan had not obtained an early release, and would have to serve out his notice. That takes one back to Mr Gan's remark to Mr Lim on 14 September 2020 that the commencement date of 1 December 2020 initially proposed by Mr Lim was merely "tentative" (see [21] above). In that context, when Mr Gan said, "Have to be 1st Jan", that was a reference to the commencement date.

37 The above conclusion is reinforced by Mr Lim's response (or lack thereof) when Mr Gan sent over a complete copy of the LOA on 9 October 2020, with the date *1 October 2020* inserted on the execution page.[44] Mr Lim did not

[44] AB1, pages 87, 96 and 77–85.

ask Mr Gan why he had done so, even though Mr Lim claims to have understood Mr Gan's message a week earlier ("Have to be 1st Jan") to mean that Mr Gan wanted to date the execution page *1 January 2021*. The evidence suggests that Mr Lim never thought Mr Gan was referring to the date to be inserted on the execution page; rather, Mr Lim knew that "1st Jan" was Mr Gan's intended commencement date of his employment with Kelington.

38 One other notable piece of evidence is a message which KESH's then Country Manager (China), Mr Wan Siew Chuan ("Mr Wan"), received from Mr Steven Ong ("Mr Ong") (Mr Wan's supervisor and the Chief Operating Officer of Kelington Group Berhad)[45] on 6 October 2020:[46]

> Gan CC [Cheng Chuan] has finally confirmed joining yesterday but ***he can only come to SH [Shanghai] on 1 Jan 2021***. Now they are talking to him ***to ask him to quit earlier if possible***. However, ***let's assume that he cannot make it***, so your handover target is still KH [Kevin Hu] … [emphasis added in bold italics]

39 Mr Ong's message evinces his understanding that Mr Gan could only commence his employment with Kelington on 1 January 2021 because of his existing employment, and that attempts were being made to ask him to "quit earlier" (*ie*, to obtain an early release from his existing employment). However, absent any confirmation that Mr Gan could obtain an early release, Kelington Group Berhad was operating under the assumption that he "cannot make it" (*ie*, that he would not be able to commence his employment with Kelington earlier than 1 January 2021). On the evidence, as of 6 October 2020, Mr Lim was the only person with whom Mr Gan had discussed his commencement date. The

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45 NE, 27 January 2022, page 34, lines 16–18; AB1, pages 513–516.

46 APB2, NE 27 January 2022, page 38 line 25–page 39 line 10.

inference to be drawn is therefore that Mr Lim understood Mr Gan's message, "Have to be 1st Jan", as a reference to his commencement date (and not the date to be inserted on the execution page), and had communicated the same to Mr Ong.

40 Kelington seeks to draw a distinction between when Mr Gan could physically travel to Shanghai (1 January 2021), and when he could commence employment (1 December 2020). There is, however, nothing in the evidence that indicates that if Mr Gan could commence employment on 1 December 2020, he would nevertheless be unable to travel to Shanghai until 1 January 2020. In particular, Mr Lim did not say that Mr Gan's reference to "1st Jan" in his message of 2 October 2021, meant that that was the earliest date Mr Gan could travel to Shanghai – Mr Lim said he thought that was just about dating the execution page of the LOA.[47]

41 Mr Wan says he understood that Mr Gan would only be joining Kelington in January 2021,[48] and not that Mr Gan would be joining Kelington earlier (on 1 December 2020) but could only travel to Shanghai on 1 January 2021.[49] Kelington's suggestion that 1 January 2021 was only Mr Gan's travel date would mean that Mr Wan was never informed when his successor, Mr Gan, would be joining Kelington as an employee, which is an unlikely scenario.

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47 Mr Lim's AEIC, para 41 (BAEIC, page 21).

48 Mr Wan Siew Chuan's Affidavit of Evidence-in-Chief dated 26 November 2021 ("Mr Wan's AEIC"), para 6 (BAEIC, page 524).

49 NE, 27 January 2022, page 40 lines 8–13, page 55 lines 18–20.

Mr Gan's communications with Kelington's human resource department

42 From 13 October 2020 through 8 December 2020, Mr Gan liaised with Ms Joan Au ("Joan") from Kelington's human resource ("HR") department.[50] She asked him for details of a bank account into which his salary could be credited, and their subsequent messages on 13 October 2020 read as follows [with times stamps added]:

> Mr Gan: I don't have a Chinese bank acct [11:27am]
>
> Joan: I see… your official join date to KESH will be from 1 Dec 2020. For salary payment, we will tt to your China bank account [11.28am]
>
> Joan: Or you preferred bank to your m'sia account directly? [11.29am]
>
> Mr Gan: Pls confirm with [Mr Lim] Seng Chuan that my official start date is 1st Jan [11.29am]
>
> Joan: The LOA that I received was stated 1 Dec 2020. No prob. Will reconfirm with him. [11.31am]
>
> Mr Gan: I don't mind if you pay Dec salary in Dec for the work I don't perform ☺ [11.32am]
>
> Joan: Let me know which bank account shd we bank in the salary after you have joined Thanks. [11.32am]
>
> Joan: 😅 [11.33am]

43 Mr Gan consistently maintained that his commencement date was 1 January 2021 – he even joked with Joan about the possibility of Kelington paying him salary for the month of December 2020 for the work he would not have performed. Joan pointed out that the LOA stated the commencement date as 1 December 2020, but she said she would reconfirm that with Mr Lim. She never got back to Mr Gan on this, however, even though they continued to correspond on various other HR matters from 19 October 2020 until

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[50] AB1, pages 107–110.

12 November 2020. There was then a break before the next (and last) message from Joan, which was on 8 December 2020.

44 I note the following:

(a) There was no communication from Kelington's HR department (or, apparently, anyone else in Kelington) to Mr Gan on 1 December 2020 – when, according to Kelington, Mr Gan had become an employee. Nor was there any announcement within Kelington (or the Kelington group of companies) that Mr Gan had joined Kelington that day.

(b) Although Joan had asked Mr Gan to provide his bank account details for salary crediting purposes "after [he had] joined" (at 11.32am), Mr Gan never provided his bank account details, and Joan did not follow up on this even after 1 December 2020 came and went. Kelington did not pay Mr Gan salary in December – instead, Kelington purported to offset an amount representing salary for 1–22 December 2020, against its damages claim.[51]

45 Mr Gan's communications with Joan are consistent with his commencement date being 1 January 2021, rather than 1 December 2020.

Preparatory steps

46 From 22 October 2020, Kelington provided Mr Gan with information, and involved him in discussions. I regard these in the nature of preparatory steps in advance of Mr Gan commencing employment with Kelington. I accept that by 22 October 2020, Mr Gan had committed to joining Kelington, which

[51] SOC, para 10b (SDB, page 5).

explains his involvement in such matters from then. But that does not point towards 1 December 2020 being his commencement date rather than 1 January 2021.

47 Mr Wan was the Country Manager (China) of KESH until the end of December 2020, and his evidence was that "all managerial and/or executive decisions [were] well within [his] power and authority" during that period as he was "still the person in charge and/or the Country Manager [(China)] until December 2020".[52] Mr Gan made no such decisions as the Country Manager (China) of KESH, because Mr Gan never became the Country Manager (China) of KESH, whether from 1 December 2020, or ever. On a related note, Mr Wan said that he understood Mr Gan's participation in discussions (from October into December 2020) to be as an observer only.[53]

48 A transition plan was circulated by Mr Wan on 4 November 2020.[54] Item 3 on the action list is "Announcement", both external to customers, suppliers, and contractors, and internal to the Kelington group of companies. The stated date for Item 3 was 1 December 2020, but in the event, no announcement was made on that date. Instead, an announcement was made on 8 December 2020 which I discuss later (at [59]–[60]).

49 Item 4 on the action list is "Change of constitution and legal rep", for which the stated date was 17 December 2020, and for which the following elaboration was provided: "Legal Rep - George Gan". However, no evidence

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52 Mr Wan's AEIC, para 8 (BAEIC, pages 524–545).

53 Mr Wan's AEIC, para 8 (BAEIC, page 524), NE 27 January 2022, page 55 lines 2–10.

54 AB1 at pages 124 and 316.

was led to show that Mr Gan was appointed as a legal representative for KESH, or any other company in the Kelington group, by that date.

50 Nothing in the transition plan states that Mr Gan would become a Kelington employee on 1 December 2020. What was stated under the "Note" section was: "George Gan go Shanghai at 1 Jan 2021 and be able to work from mid of Jan 2021."

51 The transition plan – and what was done (or not done) pursuant to it – does not support Kelington's contention that the commencement date of Mr Gan's employment was 1 December 2020.

Further discussions between Mr Lim and Mr Gan about shortening the notice period with his existing employer

52 Between 19 and 21 October 2020, Mr Lim and Mr Gan discussed the possibility of Mr Gan shortening his notice period with his existing employer. The messages they exchanged are as follows [with date and time stamps added]:[55]

> Mr Lim: Good Morning George, is it possible for you to come earlier? [19 October 2020, 10.55am]
>
> Mr Gan: Hi Seng Chuan. My release date is end Dec as of now. Seems difficult to come earlier [19 October 2020, 11.11am]
>
> Mr Lim: Due to work requirement? If by contract, can we pay to release earlier? [19 October 2020, 11.13am]
>
> Mr Gan: Due to work requirements. [19 October 2020, 11.14am]
>
> Mr Gan: I can negotiate again [19 October 2020, 11.14am]
>
> Mr Lim: Pls do so and better to go earlier by early Dec. Kevin is buying his ticket to China now. [19 October 2020, 11.15am]

[55] AB1, page 97.

> Mr Gan: Will let you know [19 October 2020, 11.16am]
>
> Mr Lim: Good morning, how? Can come earlier? [21 October 2020, 9.32am]
>
> Mr Gan: Cannot le [21 October 2020, 9.34am]
>
> Mr Gan: Still Jan [21 October 2020, 9.34am]
>
> Mr Lim: It will be hard for you then. Wan could not extend for 1-2 months. [21 October 2020, 10.26am]
>
> Mr Lim: Try to clear your leave [21 October 2020, 10.26am]
>
> Mr Gan: Not many leave days left [21 October 2020, 10.34am]
>
> Mr Lim: We can pay off [21 October 2020, 10.34am]
>
> Mr Gan: Cannot [21 October 2020, 11.07am]

53 Mr Lim says that in asking Mr Gan to "come earlier" (*ie*, commence his employment with Kelington earlier), Mr Lim meant earlier than 1 December 2020, so that Mr Gan could travel to China before 1 January 2021.[56] I do not accept that – it is not borne out by the messages, and it is also not what Mr Gan understood. Mr Gan's response to whether he could "come earlier" was that his release date was "end Dec", and it seemed difficult to come earlier than that. In response, Mr Lim did not clarify that he was asking about Mr Gan commencing his employment with Kelington even earlier than 1 December 2020, rather than earlier than January 2021 as Mr Gan was referring to (see Mr Gan's messages of 19 October 2020, 11.11am and 21 October 2020, 9.34am). Instead, Mr Lim simply said it would be better for Mr Gan "to go [to China] earlier by early Dec" (his message of 19 October 2020, 11.15am).

54 The evidence does not bear out that Mr Gan could only go to China by early December 2020 if he commenced his employment with Kelington earlier

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[56] Mr Lim's AEIC, para 47 (BAEIC, page 24), NE, 25 January 2022, page 39, lines 27–31 and page 81, lines 1–18.

than 1 December 2020. I find that the discussions about whether he could "come earlier" were about him joining Kelington earlier than 1 January 2021, which was what his commencement date would otherwise be.

55 Conspicuously, Mr Lim never told Mr Gan in the course of those messages that he considered Mr Gan to have contracted unconditionally to commence employment with Kelington on 1 December 2020. If Mr Lim truly believed that Mr Gan had contractually agreed to commence employment with Kelington on 1 December 2020, it would only have been natural for him to mention this, upon seeing Mr Gan's messages that he could not "come earlier" than January 2021. Mr Lim says he did not wish to raise that as an issue as that might create tension with Mr Gan right from the start.[57] I consider that a lame excuse.

56 Mr Lim went so far as to tell Mr Gan that Kelington could pay off Mr Gan's notice period to secure an early release,[58] which is inconsistent with Kelington's position that it was Mr Gan's obligation to join Kelington on 1 December 2020 come what may.

Events in December 2020

57 Kelington's case is that Mr Gan became an employee on 1 December 2020. But on that date, Mr Gan did not report anywhere, or to anyone, for his first day of work. It does not appear that anyone even contacted him that day. There was no announcement to his colleagues, to the Kelington group of

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57 Mr Lim's AEIC, para 48 (BAEIC, page 24).

58 AB1, page 97.

companies, or to customers, suppliers and contractors, that Mr Gan had joined Kelington as of 1 December 2020.

58 Clause 1.1 of the LOA states that Kelington appoints Mr Gan and Mr Gan agrees to serve as Country Manager (China) for KESH; clause 1.3 states that the appointment shall commence on 1 December 2020.[59] In fact, however, Mr Gan was not appointed Country Manager (China) for KESH on 1 December 2020, or ever – Mr Wan continued to be Country Manager (China) till the end of December 2020 (see above at [47]). If, as Kelington contends, clause 1.3 reflected the agreement/understanding between the parties on the commencement date, then Kelington acted contrary to it by not appointing Mr Gan as Country Manager (China) for KESH with effect from 1 December 2020. The true position is: Mr Gan's commencement date was 1 January 2021, and that is why Kelington did not appoint him Country Manager (China) for KESH with effect from 1 December 2020.

59 On 6 December 2021, Mr Lim sent Mr Gan a draft announcement which contained the following sentence: "We are very pleased to announce the hiring of Mr. Gan Cheng Chuan (George) as Country Manager for KE Shanghai, China, effective 1st Jan 2021."[60] That sentence was retained in the finalised announcement (save that the date was reflected as "01st Jan 2021" and "Mr." was omitted), which was made as a staff announcement on 8 December 2020 by the Chief Executive Officer of Kelington Group Berhad.[61] The announcement did not say that Mr Gan had already joined Kelington as of that

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59 AB1, page 77.

60 AB1, page 98.

61 AB1, page 478.

date; instead, it announced "the hiring" of Mr Gan as Country Manager (China) for KESH "effective 01st Jan 2021". This too is consistent with Mr Gan's commencement date being 1 January 2021, not 1 December 2020.

60 Mr Gan was forwarded the staff announcement on 8 December 2020 by Mr Soh Tong Hwa, a non-executive director of Kelington Group Berhad, with a "thumbs up" emoji: 👍.[62] That bolstered the impression on Mr Gan's part, that there was consensus on 1 January 2021 being his commencement date.

61 Mr Gan had, however, begun to waver in his resolve to join Kelington. He told Mr Lim on 7 December 2020 at 9.10am that his existing employer had called and made a "counter offer for [him] to stay".[63] Again, Mr Gan's language is consistent with his position: he had yet to leave his existing employer or join Kelington – so it was about him *staying* with his existing employer. In response, Mr Lim did not protest that Mr Gan was already a Kelington employee as of 1 December 2020. Instead, Mr Lim simply said "Stay firm with us" (7 December 2020, 9.24am), and "Announcement is already made by Raymond Gan. Let's move together and make life better." (7 December 2020, 9.33am).

62 Mr Lim's subsequent message of 10 December 2020, 5.31pm is even more telling: "If not because of this opportunity to join [Kelington], and [you have] committed to join us, would he make counter offer?"[64] Again, Mr Lim did not say that Mr Gan was already a Kelington employee as of 1 December 2020. Instead, he spoke of "this opportunity to join [Kelington]", which Mr Gan had

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62 AB1, page 157.

63 AB1, page 99.

64 AB1, page 99.

committed to. That too is consistent with Mr Gan's position that he had yet to commence his employment with Kelington, but had merely committed to doing so.

63 On 19 December 2020, Mr Gan messaged Mr Lim to say, "… I have decided to stay with the existing company. Sorry for all the troubles caused".[65] Mr Lim's reply was simply, "Sad to hear that." He did not contradict Mr Gan's assertion that he would be *staying* with his existing company; he did not say that Mr Gan was already a Kelington employee.

64 On 22 December 2020, Kelington sent Mr Gan a letter of demand,[66] in which it purported to characterise Mr Gan's communication to Mr Lim on 19 December 2020 as "notice that [Mr Gan] will not be continuing with [his] employment with [Kelington]", which Kelington accepted. The letter further purported to end Mr Gan's employment on 22 December 2020. This was an attempt to rewrite history.

65 Mr Gan's pithy response on 26 December 2020 was that it was clause 9.4 of the LOA that applied, for he had terminated the contract before the commencement of his employment.[67]

Conclusion on the Main Issue

66 For the above reasons, I find that Mr Gan has rebutted the presumption that the LOA was intended to contain all the terms of the parties' agreement.

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65 AB1, page 99.

66 AB1, pages 480–481.

67 AB 482.

Specifically, the commencement date of Mr Gan's employment term was the subject of an agreement/understanding between Mr Lim and Mr Gan, outside the LOA. The terms of the contract were not reduced to the form of a document (the LOA). As such, the parol evidence rule does not apply to prevent Mr Gan from relying on extrinsic evidence to prove the parties' agreement/understanding as to the commencement date.

67 I find that the agreement/understanding between the parties was that the commencement date of Mr Gan's employment with Kelington was 1 January 2021, not 1 December 2020. When Mr Gan repudiated the contract on 19 December 2020, and Kelington treated the contract as terminated on 22 December 2020, Mr Gan was not an employee of Kelington. Accordingly, it is clause 9.4 of the LOA that applies, not clause 1.5. It follows that Mr Gan's liability to Kelington was only in the sum of RM24,000, for which consent judgment was entered, and which he has already paid to Kelington.

68 Further, even if the parol evidence rule applied, s 94(*c*) of the Evidence Act provides that "the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved". Thus, it was always open to Mr Gan to prove (as he has) that it was a condition precedent to the commencement of his employment with Kelington, that he be freed of his existing employment.

69 If at all Mr Gan agreed to 1 December 2020 being the commencement date, that was just "tentative" (as he put it) – it was always subject to him being freed of his existing employment by then. However, his employer had not agreed to an early release; and while he was still serving notice, Mr Gan decided

to stay on with his employer and not join Kelington after all. A conditional agreement to 1 December 2020 as the commencement date does not work for Kelington's claim under clause 1.5. If Mr Gan did not obtain an early release by 1 December 2020, he was not obliged to commence his employment with Kelington on that date. Thereafter, he terminated the contract prior to the commencement of his employment with Kelington, and as such, clause 1.5 does not apply.

Subsidiary Issue (1): was clause 1.5 of the LOA an unenforceable penalty clause?

70 As stated at [67] above, I find that it is clause 9.4 of the LOA, not clause 1.5, that applies. I go on to consider whether, if clause 1.5 had applied, Kelington's claims would nevertheless have failed on account of clause 1.5 being an unenforceable penalty clause.

71 In determining whether clause 1.5 of the LOA is an unenforceable penalty clause, the focus is whether it provides a genuine pre-estimate of the likely loss *at the time of contracting*: *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka*") at [152] and [185]. The court will consider whether the sum stipulated is so extravagant, having regard to the range of damages which the innocent party was likely to suffer, that it was not a genuine estimate of the damages that the innocent party could have suffered: *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [67]. Clause 1.5 of the LOA would be a penalty clause if the sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from Mr Gan's breach of the LOA: *Denka* at [254].

Parties' positions, and evidence

72 Mr Gan contended that a clause requiring him to pay Kelington an amount equivalent to his salary for the balance of the three-year term was an unenforceable penalty clause,[68] whereas Kelington contended that this was a genuine pre-estimate of its loss from Mr Gan leaving during the three-year term.[69]

73 The stipulation in question was inserted by Kelington in response to Mr Gan's request for three years' worth of salary to be guaranteed, should Kelington terminate the employment within the three-year term (other than for cause under clauses 9.2 or 9.6 of the LOA). Kelington's position was that Mr Gan should similarly be required to compensate Kelington if he were to terminate the employment during the three-year term.[70]

74 If not for Mr Gan asking to be assured of three years' worth of salary, Kelington was content to contract on the basis that either party could terminate the employment with six months' notice or six months' basic salary in lieu of notice (clause 1.5 of the first draft LOA).[71] Moreover, both in the first draft LOA and in the executed LOA, clause 9.4 provided that for termination before commencement of employment, the party that initiated the termination would only have to pay one month's basic salary in lieu as compensation.

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68 DCS, paras 34–41.

69 PCS, paras 72–79; Mr Lim's, AEIC paras 32–35.

70 Mr Lim's AEIC, paras 29–31 (BAEIC, pages 16–17); NE, 26 January 2022, page 83 line 20–page 85, line 3.

71 AB1, page 46.

75 Kelington's contention that up to three years' worth of Mr Gan's salary was a genuine pre-estimate of its loss should Mr Gan decide to leave, must be viewed against that backdrop.

76 Kelington's case on this point is constructed on two planks:[72]

(a) it would not be able to replace Mr Gan for the whole of the three-year term, and so it would lose the benefit of his service (or that of someone comparable) till the end of the three-year term; and

(b) Kelington's target of 30% increase in profits each year (from 2021 to 2024) would be achieved with Mr Gan, but would not be achieved without him.

77 Mr Lim asserted that the role of Country Manager (China) was critical to the growth of KESH, and the loss of Mr Gan in the midst of the three-year term would bring major disruption to the management team and seriously affect the performance of KESH. He said it would likely result in KESH not being able to meet its financial target of 30% increase in profits each year, and could potentially cause KESH to fail to maintain its previous year's revenue. He put forward a total estimated loss to KESH over the three-year term of Mr Gan's employment should Mr Gan leave, in the sum of RMB17.5 million. However, this was expressly stated to be on the *assumption* that "KESH's performance in 2021 [remained] stagnant and the same as 2020", and that it did not improve at all in 2022, or 2023 either.[73]

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72 PCS, paras 72–73.

73 Mr Lim's AEIC, paras 32–33 (BAEIC, pages 18–19).

78 Mr Gan disputes Kelington's assertions. He says:

(a) If he left after being with KESH for only a short while, there would not be a huge impact.[74]

(b) It was not the sole responsibility of the Country Manager (China) to achieve the target of 30% increase in profits each year; it depended on the collective action of the whole company.[75]

(c) The target was a very ambitious one, which he could not guarantee would be achieved – there was a risk of the target not being achieved, which explains why there was a performance bonus in place to incentivise employees to achieve the target.[76]

79 Mr Wan's evidence is to similar effect. He did not agree that without its Country Manager (China), KESH would not be able to achieve its target of 30% growth – he said that was just "an assumption".[77]

80 I find Mr Lim's assertions (summarised at [77] above) to be exaggerated – an attempt to justify Kelington's claim for just under three years' worth of Mr Gan's salary, for him having left after 22 days.

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74 NE, 27 January 2022, page 7 lines 11–17, page 11 lines 19–23.

75 NE, 27 January 2022, page 7 lines 3–8.

76 NE, 27 January 2022, page 12 lines 1–6.

77 NE, 27 January 2022, page 53 lines 10–12.

Time required to replace Mr Gan

81 I am not convinced that at the time Kelington agreed terms with Mr Gan, it thought Mr Gan was irreplaceable (by a comparable candidate) for the whole of the three-year term. If Kelington could replace Mr Gan at any time before the three years were up, that would brighten up the dismal picture it paints. The fact that Kelington itself had, in clause 1.5 of the first draft LOA,[78] proposed a mere six-month notice period (or pay in lieu thereof) is an indicator that it did not think it would need up to three years to replace Mr Gan. Moreover, on the terms of clause 9.4 of the LOA (also proposed by Kelington),[79] Kelington was prepared to accept just one month's worth of Mr Gan's salary as compensation if he should terminate the contract before commencing employment.

82 The difference is stark: if the day before his commencement date, Mr Gan decided he would not join Kelington after all, he would only have to pay Kelington one month's worth of his salary (pursuant to clause 9.4 of the LOA). However, if he commenced employment and then decided to quit on his first day of work, he would have to pay Kelington some three years' worth of his salary – an amount exceeding RM1.4m (pursuant to clause 1.5 of the LOA). In terms of impact to Kelington, there is little difference between the two scenarios, but in terms of the financial consequences to Mr Gan under clause 9.4 as compared to clause 1.5, there is a huge difference.

83 Mr Lim says that from 28 December 2020 to June 2021, Kelington tried but could not find a replacement for the position of Country Manager (China)

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78 AB1, page 46.

79 AB1, page 81.

of KESH.[80] I nevertheless remain unconvinced that at the time Kelington contracted with Mr Gan, Kelington expected that it would need up to three years to replace him.

84 A sliding scale of compensation proportionate to the balance of Mr Gan's term of employment does not bear any relation to the time Kelington would need to replace him, unless Kelington could only find a suitable replacement three years from Mr Gan's commencement date. I do not accept that Kelington would require that much time (or that Kelington thought it would, at the time of contracting with Mr Gan).

85 Accordingly, clause 1.5 cannot be justified as a genuine pre-estimate of the likely loss flowing from Mr Gan's breach, in terms of Kelington having to replace him.

Disruption to KESH

86 In terms of the disruption to KESH caused by Mr Gan's departure, requiring Mr Gan to pay a large sum if he only assumed the role of Country Manager (China) for a short period of time does not make sense. I accept Mr Gan's evidence that if he only joined KESH for a short while, the disruption caused to KESH by his departure would be less than if he had joined for quite a while; yet he would have to pay more despite having caused less disruption. For instance, it would generally be more disruptive if Mr Gan left after one and a half years (midway through the three-year term), than if he left after his first day of work; yet he would have to pay double in the latter scenario, as compared to the former.

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[80] Mr Lim's AEIC, para 72 (BAEIC, pages 34–35).

87 A sliding scale of compensation proportionate to the balance of Mr Gan's term of employment does not bear any relation to the disruption which Mr Gan's departure would cause, and as a necessary consequence, does not provide a genuine pre-estimate of the likely loss (in terms of disruption to KESH) which may flow from Mr Gan's breach.

Impact of KESH not having a Country Manager (China)

88 I prefer the evidence of Mr Gan and Mr Wan, to that of Mr Lim, as to the impact of KESH not having a Country Manager (China) on its target profits.

89 There was no real evidence that the target of 30% increase in profits each year for 2021, 2022 and 2023 was likely to be achieved with Mr Gan as Country Manager (China) of KESH. Nor was there any evidence that it was likely not to be achieved if Mr Gan terminated his employment. Indeed, there was no real evidence of what Kelington thought about this.

90 Mr Lim took a target, applied an assumption to it, added assertions, and arrived at a huge "total estimated loss". However, Mr Lim's own language lacked conviction: he used uncertain and qualified phrases like "*would likely* result in", "*could potentially* cause"; "KESH *might not* be able to achieve its 30% growth target"; and "*Assuming* KESH's performance in 2021 remains stagnant" [emphasis added].[81]

91 The fact that 30% growth each year was expressed as a *target* suggests that it was something to aspire to, rather than something which Kelington considered likely to be achieved.

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[81] Mr Lim's AEIC, paras 32–33 (BAEIC, page 18).

92 I accept Mr Gan's description of the target as a very ambitious one, which he could not be sure of achieving even if he took on the job. I also accept that both Mr Gan and Mr Wan viewed the target as being in the nature of an *assumption* rather than a certainty.

93 The maximum amount payable by Mr Gan under clause 1.5 is some three years' worth of his salary (over RM1.4m), if Mr Gan were to leave on his first day of work. Kelington has not shown that Mr Gan's departure in those circumstances, or indeed at any point during the three-year term, would likely cause it loss of such magnitude. I find that the sum of over RM1.4m is extravagant or unconscionable in amount compared with the greatest possible loss that could conceivably be proved to have followed from the breach, and that attracts the application of the penalty rule (*Denka* at [254]).

Significance of clause 1.5 being a negotiated clause

94 Kelington says that its entitlement to compensation under clause 1.5 was part of the bargain between the parties,[82] but the same may be said of any contractual stipulation which is attacked as a penalty clause. I do accept it is relevant that clause 1.5 was a negotiated clause, and that it was meant to apply mutually to Kelington and Mr Gan (who wanted three years' worth of salary to be guaranteed). However, this does not mean that clause 1.5 is immune from challenge as a penalty clause. Rather, if clause 1.5 were found to be a penalty clause insofar as it operates in favour of Kelington, the consequence may well be that Mr Gan too cannot enforce clause 1.5 to obtain three years' worth of salary in any event.

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82 PCS, para 71.

95 On a related note, Kelington contends that clause 1.5 should be upheld because the parties were of equal bargaining power.[83] While the comparable bargaining positions of the parties is a relevant consideration, there need not be any disparity of power between the contracting parties for the penalty rule to operate (*Denka* at [174]). In considering factors such as the relative bargaining power of the parties, the focus remains on whether the clause concerned is a genuine pre-estimate of the likely loss (*Denka* at [153]). A negotiated clause between parties of comparable bargaining power may nevertheless be found to be a penalty clause (*Denka* at [254]).

Conclusion on Subsidiary Issue (1)

96 For the above reasons, I conclude that clause 1.5 is an unreasonable penalty clause: requiring Mr Gan to compensate Kelington the amount equivalent to his salary for the balance of the three-year term did not provide a genuine pre-estimate of the likely damage that would be caused by Mr Gan's breach, whether in terms of the time it would take to replace Mr Gan, the disruption to KESH, or the impact of Mr Gan's absence on KESH's target profits. As such, even if the commencement date were 1 December 2020, and that was not subject to the condition precedent of Mr Gan being freed of his existing employment, Kelington's claims based on clause 1.5 would fail for clause 1.5 being an unenforceable penalty clause.

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83 PCS, paras 60–70.

Subsidiary Issue (2): does the consent judgment for RM 24,000 preclude Kelington from claiming a higher sum?

97 Counsel for Mr Gan argued that because Kelington agreed to a consent judgment for RM24,000 (which has since been paid), it cannot claim anything more from Mr Gan.[84]

98 Pursuant to the doctrine of merger, when a judgment has been given on a cause of action, the cause of action merges with the judgment of the court and ceases to have an independent existence: *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [14]–[15].

99 Here, the only cause of action Kelington pursues against Mr Gan is breach of contract. Kelington's case is that Mr Gan is liable to compensate it RM1,453,565.22 for breaching the LOA; Mr Gan's case is that he is only liable for RM24,000. A consent judgment was previously entered for RM24,000 in HC/ORC 3042/2021 ("the Court Order") as Mr Gan had accepted liability under clause 9.4 of the LOA.[85]

100 At first blush, it would appear that Kelington's cause of action had merged with that judgment, and it could no longer pursue that cause of action at trial.

101 That was, however, not the tenor of the Court Order in which the consent judgment was embodied.[86] Paragraph 1 of the Court Order recorded the consent judgment in favour of Kelington for RM24,000. However, paragraph 2 of the

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84 DCS, para 23.

85 HC/SUM 1350/2021, Minute Sheet, 25 May 2021, pages 6 and 8.

86 HC/ORC 3042/2021 made on 25 May 2021, filed on 2 June 2021.

Court Order stated that Mr Gan was granted unconditional leave to defend *the rest of* Kelington's claims, and paragraph 3 of the Court Order stated that costs shall be in the cause, fixed at $4,000 (all in). It is implicit in paragraphs 2 and 3 that Kelington still had claims to pursue at trial.

102 Kelington, though, only had one cause of action, rather than several causes of action out of which judgment had only been entered for one. If Kelington's sole cause of action had merged with the consent judgment for RM24,000, it could no longer continue with that cause of action to recover the balance of the RM1,453,565.22 that it had claimed.

103 At the summary judgment hearing, it was not contended that the consent judgment would have that effect. Instead, it appears to have been common ground that Kelington could treat the RM24,000 as merely satisfying its claims in part, and continue to trial for the rest of what it was claiming.

104 Compounding the matter, one possible outcome of the trial was a finding that the commencement date of Mr Gan's employment term was 1 December 2020 but that clause 1.5 of the LOA was an unenforceable penalty clause. In that scenario, Kelington's claim for RM1,453,565.22 pursuant to clause 1.5 would fail. In principle, Kelington would still be entitled to damages for breach of contract (nominal or otherwise), but those damages would not necessarily be as much as the sum of RM24,000 in the consent judgment. If the court found that Kelington was only entitled to a sum less than RM24,000, that would then contradict the consent judgment.

105 In its statement of claim, Kelington had sought the sum of RM1,453,565.22 "or such other sum as this Honourable Court deems fit".[87] However, Kelington adduced no evidence to prove what loss Mr Gan's breach of contract had actually caused it; instead, Kelington simply claimed on the basis that Mr Gan was liable to pay the balance of three years' worth of his salary (after offsetting the salary due to Mr Gan for his employment from 1 to 22 December 2020), pursuant to clause 1.5. If that claim failed because clause 1.5 was an unenforceable penalty clause, then Kelington would only have received nominal damages, for which I would not have awarded as much as RM24,000.

106 As such, when the consent judgment was entered, the parties could not be sure that Mr Gan would be liable to Kelington for RM24,000 in any event. It would have been better to order the sum of RM24,000 as an interim payment, rather than to enter a consent judgment – in the case of an interim payment, there can be an adjustment, if necessary, at the time of final judgment.

107 In the awkward situation which has arisen, I would interpret the consent judgment in the context of the whole Court Order, *ie*, the consent judgment for RM24,000 was awarded on the premise that Kelington could continue with its claims at trial for the balance of the RM1,453,565.22 which it had originally claimed, as well as for interest and costs. Kelington's cause of action merges with that consent judgment, but its right to continue pursuing the balance of its claim is preserved by the same order of court. I regard the consent judgment as being in the nature of an interlocutory judgment on liability, with the trial being

87 SOC (SDB, page 6)

to determine what, if anything, Kelington was still entitled to recover, besides the sum of RM24,000.

108 The consent judgment would still have conflicted with a potential finding that Kelington was only entitled to a sum less than RM24,000, but that is not the finding I have made. In any event, it appears that Mr Gan was content to pay Kelington RM24,000 regardless of the outcome of the trial – he did not indicate that he would seek any adjustment to that sum.

109 On Subsidiary Issue (2), I thus find that the consent judgment does not preclude Kelington from seeking a higher sum at trial.

Conclusion

110 For the above reasons, save for the consent judgment for RM24,000 which has already been satisfied by Mr Gan (and which I do not disturb), I dismiss all of Kelington's claims against Mr Gan.

111 Unless the parties are able to agree on costs, they are to file costs submissions, limited to 8 pages (excluding any schedule of disbursements), within 14 days.

Andre Maniam
Judge of the High Court

Lee Ee Yang, Wong En Hui Charis (Covenant Chambers LLC) for the plaintiff;
Gopalakrishnan Dinagaran, Lawrence Tan (Prestige Legal LLP) for the defendant.
