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Client Alert

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Court of Appeal Overturns Decision of the High Court and Resolves Ambiguity In Employment Contract In Favour of the Employer

In a recent judgment,[1] the Singapore Court of Appeal ("**CA**") overturned a decision of the Singapore High Court ("**HC**")[2] and held that the ambiguity in certain contractual terms, which concerned the payment of incentive compensation to an ex-employee, was to be construed in favour of the employer. Importantly, the CA provided guidance on various fundamental issues regarding the nature of contractual ambiguity as well as the application of the *contra proferentem* rule.

Facts

Corinna Chin (the "**Employee**") was employed by Hewlett-Packard Singapore (Sales) Pte Ltd (the "**Company**") as a product sales specialist from January 2005 until June 2012, when she was retrenched. In the course of her employment, the Employee had helped the Company to clinch a S$5.38m contract with NETS (the "**NETS Contract**"). NETS had been using the Company's servers to support its e-payment system until late 2010, when the Company's servers became due for replacement.

NETS rejected the Company's proposal for a new system and instead entered into a contract with IBM for the purchase and installation of its servers. The migration process was expected to take 18 months. During this time, the Company continued to supply maintenance services to NETS under a maintenance contract and NETS continued to pay software licence charges to the Company. Eventually, problems with the migration began to surface and IBM was unable to provide NETS with a satisfactory system. The Employee, who had been working to convince NETS to abandon the migration from the outset, successfully persuaded it to purchase the Company's new system. The NETS Contract was accordingly entered into.

A dispute arose between the Employee and the Company as to whether the NETS Contract amounted to "new business" pursuant to the Company's New Business Metric Guidelines (the "**Guidelines**"). If so, the Employee would have been entitled to additional incentive compensation pursuant to the Guidelines. Unsurprisingly, the Company took the position that the NETS Contract did not amount to "new business" under the Guidelines.

The Employee commenced legal proceedings for the incentive compensation allegedly owed to her (the "**NBM Claim**"). The Employee also alleged that her final incentive compensation on retrenchment should have been calculated on a *pro rata* basis rather than based on full-year targets (the "**Pro-Rated Quota Claim**"). Following a trial of the matter, the HC held that the Employee was

[1] *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] SGCA 19

[2] *Corinna Chin Shu Hwa v. Hewlett-Packard Singapore (Sales) Pte Ltd* [2015] SGHC 204

entitled to the full sum being claimed. For more details regarding the decision at first instance, please refer to our earlier client alert.

Issues

The Company appealed the decision of the HC on the following issues, namely:

(a) in respect of the NBM Claim, whether the NETS Contract satisfied the definition of "new business" pursuant to the Guidelines such that the Employee was entitled to the full incentive compensation claimed; and

(b) in respect of the Pro-Rated Quota Claim, whether the Employee's final incentive compensation pay on retrenchment should have been calculated with reference to full-year targets or *pro rata* targets.

Decision

Contractual Ambiguity and the Contra Proferentem Rule

As a matter of principle, the CA held that, in construing a contract, the court had to take an objective interpretation of the terms (i.e. looking at the entire agreement, the words which were used and the circumstances in which they were used) and ask what a reasonable person in the position of the respective parties would have intended.[3] If, following the objective inquiry, the court concluded that the term was ambiguous, the application of the *contra proferentem* rule could then be justified.

The CA emphasised that the rule could not apply where there was no evidence of ambiguity existing within the terms of the contract itself, and warned that the court should not create an ambiguity where none had existed before.

The NBM Claim

The CA analysed the issues on appeal in respect of the NBM Claim in the following manner:

First, the CA disagreed that the term "new end-user consumer" was so objectively ambiguous as to render it unclear if the phrase was meant to include a former customer who had returned to the Company to purchase its new servers (i.e. a "win-back" customer in the Employee's parlance). The CA held that, although NETS had entered into a separate contract with IBM with a view to leaving the Company, it nevertheless continued in a contractual relationship with the Company and such a contractual relationship was never terminated.

On the facts, NETS was still heavily dependent on the maintenance services provided by the Company during the migration period, and continued to be viewed as a customer of the Company that sales representatives could potentially retain, notwithstanding that it had signed a separate contract with IBM. Accordingly, there was no ambiguity as to whether NETS could be considered a "new end-user customer".

Second, the CA disagreed that further evidence of ambiguity could be found based on the fact that queries by the Employee to one of the Company's directors ("**Sandeep**") on whether the NETS Contract qualified as "new business" were only answered after a long delay of more than seven months. The CA held that there had to be an ambiguity which *could not* be resolved, and not merely ambiguity that was *difficult* to resolve.

In addition, the difficulties of applying a contractual term could not be conflated with the ambiguity of the term itself. The CA suggested that the lack

[3] *Bromarin AB and another v IMD Investments Ltd* [1999] STC 301 at [310]

of a definitive response from Sandeep was more likely due to the fact that the concept of a "win-back" customer was so remote in the business that it had not been factored in when the Company drafted the Guidelines, and Sandeep therefore needed time to consult with others before making a decision.

The CA also noted that there was a further difficulty in respect of the reliance on Sandeep's delayed response as such evidence comprised post-contractual conduct. Although the courts have not hitherto imposed a blanket prohibition on construing a contract based on reference to subsequent conduct, the consideration of such conduct would introduce a great degree of subjectivity to the objective exercise of interpretation. The CA noted that the question of admissibility of subsequent conduct remained an open one that should be decided on a more appropriate occasion,[4] and reiterated that any such evidence would have to satisfy the requirements of relevancy, reasonable availability and clear and obvious context, before it may be admitted to interpret a contract.[5]

Third, the CA also did not accept the Employee's argument that the NETS Contract qualified as "new business" because, on the facts, the application that ran on the new servers was the same application that ran on the old servers. The new servers were used in relation to the same area, namely to support the NETS e-payment system.

For these reasons, the CA allowed the Company's appeal against the HC's decision.

The Pro-Rated Quota Claim

In respect of the Pro-Rated Quota Claim, the HC had held that it was ambiguous as to whether the terms of the Company's Global Sales Compensation Policy (the "**GSC Policy**") (which provided for an employee's final incentive pay to be calculated on an aggregate basis) applied to voluntary or involuntary termination. The HC therefore construed the term *contra proferentem* against the Company, holding that it applied only to voluntary termination.

However, the CA observed that the GSC Policy's terms differed for *performance level pay advances* only, and no such distinction was drawn for *incentive payments*. Accordingly, the CA held that the Company must have intended for incentive payments to be paid on an aggregate basis regardless of the nature of the termination. For this reason, the CA also allowed the Company's appeal against the HC's decision.

Comment

This case provides useful guidance on the application of the *contra proferentem* rule which many companies may welcome. The CA's approach is especially germane to companies that implement incentive and compensation policies without much prior negotiation with their employees. In those circumstances, the rule would apply against employers, who may then be faced with unintended financial consequences.

Companies should in any event continue to ensure that the provisions in their incentive and compensation policies are clearly drafted. While the CA has clarified the limitations of the application of the *contra proferentem* rule, it has not been rendered otiose and may well apply where there is irresolvable

[4] *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [62]

[5] *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [132(d)]

ambiguity. Companies should therefore continue to be cautious when devising their incentive and compensation policies.

In any event, certain observations may be made of the CA's guidance on what is “objectively ambiguous”. First, the CA has set a high threshold (namely, ambiguity which *cannot* be resolved, rather than ambiguity which is merely *difficult* to resolve). However, can it truly be said that a term is unambiguous when its meaning is only definitively ascertained after a period of inordinate delay? In addition, the CA appears to have made a distinction between a contractual term *itself* and the *application* of that term. It is difficult to argue that the ambiguity arising in the latter cannot be attributed to the ambiguity of the former, especially since one cannot apply a term without first considering its meaning. It would be interesting to see how the CA's approach may be applied in analogous cases in future.