

HONG KONG / JUDGMENT

OCTO3 LTD v. NTT DATA HONG KONG LTD**[2018] HKCA 283****COURT**

Court of Appeal

DECIDED

17 May 2018

CASE / FILE NUMBER

CACV59/2018

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CACV 58/2018 & CACV 59/2018 (Heard Together)

[2018] HKCA 283 CACV 58/2018 IN THE HIGH COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO 58 OF 2018 (ON
APPEAL FROM HCA NO 3446 OF 2016)

BETWEEN NTT DATA HONG KONG LIMITED Plaintiff and OCTO3 LIMITED 1st Defendant
TYRONE SHAUNESSY LYNCH 2nd Defendant

AND CACV 59/2018 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF APPEAL CIVIL APPEAL NO 59 OF 2018 (ON APPEAL FROM HCA NO 44 OF
2017)

BETWEEN OCTO3 LIMITED Plaintiff and NTT DATA HONG KONG LIMITED Defendant

(Heard together) Before : Hon Lam VP and Poon JA in Court Date of Hearing : 26 April 2018 Date
of Judgment : 17 May 2018 J U D G M E N T Hon Poon JA (giving the Judgment of the Court) :

Introduction

By a judgment dated 9 February 2018 ([2018] HKCFI 325) (“Judgment”), M Chan J entered summary judgment against Octo3 Ltd (“Octo”), making a declaration that it was in repudiatory breach of the Agreement (as defined below), ordering it to refund US\$2,350,000.00 to NTT Data Hong Kong Ltd (“NTT”) with interest and costs in HCA 3446/2016 (“2016 Action”), and struck out part of Octo’s claims in HCA 44/2017 (“2017 Action”). On 26 March 2018, we granted leave to Octo to appeal against the Judge’s judgment. We subsequently heard the appeals on 26 April 2018. We

then reserved our judgment, which we now hand down.

Background

The background circumstances leading to the two actions below had been fully set out at [1] – [19] of the Judgment. For present purposes, they may be summarized as follows. In December 2015 Octo granted NTT a license to use Octo’s proprietary products (“Licensed Products”) under the terms of a Software License Agreement dated 3 December 2015 (“Agreement”). Upon signing the Agreement, NTT paid Octo US\$2.35 million (“Upfront Payment”) being half of the license fee of US\$4.7 million (“License Fee”). NTT thereafter requested a postponement for an unspecified period to take delivery of the Licensed Products by reason of the delay in the setting up of its office in Thailand. Octo agreed to withhold delivery and installation for the time being. Tyrone Shaunessy Lynch (“Mr Lynch”), the 2nd Defendant in the 2016 Action, was at the material times the CEO and a director of NTT until 17 September 2016. In October 2016 he joined Octo as its CEO, later becoming a director of Octo in November 2016. Actions Mr Lynch’s departure from NTT and joining Octo prompted NTT to commence the 2016 Action on 30 December 2016. In the 2016 Action, NTT alleged that Octo was in breach of Clause 13 of the Agreement, which provided : “ [NTT] and [Octo] agree not to solicit or engage any employees of the other who have [sic] been engaged in the performance of the other’s obligations under this Agreement and the Attachments without the prior written agreement of the other. This prohibition shall continue for a period of twenty four (24) months from the date of this Agreement or any Attachment whichever is the later.” Under Clause 12 of the Agreement, when either party is in material breach of its obligations thereunder, which is a non-remedial, the other party may terminate the Agreement by written notice. NTT’s case is that by engaging Mr Lynch, Octo was in a material, non-remedial breach of the Agreement, entitling it to terminate the Agreement by written notice on 15 November 2016. NTT sought a declaration that the Agreement had been validly terminated by the said written notice; and that Octo was in repudiatory breach. NTT also sought the refund of the Upfront Payment. In its Defence, Octo denied that there was any material breach of the Agreement on the basis that Mr Lynch was not involved in NTT’s performance under the Agreement; that Octo had not solicited Mr Lynch to join Octo; and that Octo’s engagement of Mr Lynch was regular, proper, at arm’s length and in the ordinary course of business. On 9 January 2017, Octo commenced the 2017 Action, claiming against NTT for payment of the balance of the Licence Fee totaling US\$2,350,000 with damages for NTT’s breach of the Agreement in failing to make payment of the 2nd and 3rd instalments of the Licence Fee. Octo also claimed damages on a quantum meruit basis for professional services rendered under the Agreement. In its defence and counterclaim, NTT repeated its pleaded case in the 2016 Action that Octo was in breach of Clause 13 of the Agreement by appointing Mr Lynch as its director without NTT’s knowledge or approval. It counterclaimed for the same relief that it sought in the 2016 Action. Judgment below By two summonses dated 24 July 2017, NTT applied for (a) summary judgment for its claims in the 2016 Action; (b) summary judgment on its counterclaims and an order of striking out Octo’s statement of claim in the 2017 Action. Octo opposed NTT’s applications. It argued that there were triable issues as to, among other things, whether engaging Mr Lynch was in breach of Clause 13;

and if yes, whether it was a material breach of Clause 12.1. Octo also raised the point that NTT was not entitled to the refund of the Upfront Payment on the ground that it had failed to properly plead such a claim. For the reasons given in the Judgment, the Judge ruled that there were no triable issues on (a) by engaging Mr Lynch, Octo was in breach of Clause 13 and (b) it was a material within the meaning of Clause 12. She also agreed with NTT that the material facts supporting the claim for the refund of the Upfront Payment had been pleaded and that Octo could not possibly say that it had been taken by surprise by NTT's claim for refund on the basis of restitution or unjust enrichment. The Judge therefore allowed NTT's applications. Principal Issues Ms Winnie Tam, SC (with Mr David Chen) for Octo helpfully identified 3 principal issues for our consideration : Whether Octo was in breach of Clause 13 of the Agreement by engaging Mr Lynch; If the answer to (1) above is "yes", whether NTT was entitled to terminate the Agreement under Clause 12 of the Agreement or otherwise; and If NTT validly terminated the Agreement, whether NTT is entitled to a refund of the Upfront Payment. Issue 1 – was Octo in breach of Clause 13? The Judge noted Mr Lynch's involvement in the Agreement and concluded thus : " 33. As CEO of NTT's Payments Business, the key person in charge of the Payment System being developed and implemented by NTT, and the person who had negotiated the Agreement with Octo, Lynch's acts in : (1) signing the cheque for the Upfront Payment of the License Fee, pursuant to Appendix 1 to the Agreement; and (2) his discussion and negotiation with Octo after the signing of the Agreement to agree on the timetable for the delivery of the Licensed Products, all constitute Lynch's engagement in the performance of NTT's obligations under the Agreement, within the meaning of clause 13. To the extent that it is suggested by Octo that clause 13 should be construed to prohibit the employment only of someone from NTT 'who was materially involved in the performance of NTT's obligations under the Agreement', I consider that Lynch was such a person." Whether the Judge was correct depends on a proper construction of Clause 13. The key question is what is the meaning of "performance of [NTT's] obligations under the Agreement" in the context and for the purpose of Clause 13? Ms Tam submitted that properly construed, the commercial purpose of Clause 13 is to prevent significant disruption to the parties' performance of their respective obligations under the Agreement within the first 24 months from execution. Employees involved in the installation of the Licensed Products and their maintenance or updates – all of which were intended to take place within those 24 months – would come within the scope of Clause 13. Those involved merely involved in NTT's payments of Licence Fee and negotiation of the grace period, like Mr Lynch, would not. For present purposes, it is not necessary for us to reach a definite conclusion on the proper construction of Clause 13 and in particular which employees or types of employees of NTT having involvement with the Agreement should be considered as "performing NTT's obligations under the Agreement" within the meaning of Clause 13. It would be sufficient if we are able to come to a view that Ms Tam's construction is reasonably arguable. And having considered the matters and the parties' submissions carefully, we do come to such a view. Since it is our view and the matters pertaining to construction of Clause 13 will have to be resolved at trial, we do not think it is proper for us to express any further view on those matters. We just wish to highlight the fact that the Judge had not analyzed how the period of 24 months would impact on the construction of Clause 13 in its overall context and purpose. In our view, it is certainly arguable that the 24 months' period has a

significant impact on how to read and construe Clause 13 in such a way that is supportive of Ms Tam's construction. Issue 2 – was it a material breach? That being our conclusion on Issue 1, it must follow that Issue 2 is equally reasonably arguable. For the above reasons, NTT is not entitled to the declaratory relief granted by the Judge in the 2016 Action. Nor is it entitled to an order of striking out of Octo's claims in the 2017 Action. What remains is Issue 3. Issue 3 – refund of the Upfront Payment As confirmed by the submissions below and before us, NTT's entitlement to the refund of the Upfront Payment is based on restitution. It is axiomatic that NTT must plead all the facts which, if established, constitute a recognized claim in the law of restitution. And it is trite that absent a proper plea, the court could not have granted NTT summary judgment on refund of the Upfront Payment as a restitution claim. In the amended statement of claim, NTT pleaded : “ 32A. Prior to the termination of the License Agreement, there had been no delivery of any Licensed Products (as defined in Clause 1.8 of the License Agreement) by the 1st Defendant. 33. In light of the 1st Defendant's breach of Clause 13 and/or breach of a condition of the License Agreement, the Plaintiff was entitled to lawfully terminate the same and a refund from the 1st Defendant of the Upfront Payment and/or claim against the 1st Defendant for all loss and damages resulting from the latter's breach of the License Agreement. 33A. Further or alternatively, it is averred that the engagement, employment and/or appointment of the 2nd Defendant as the 1st Defendant's director, and/or CEO and/or employee as pleaded in Paragraph 27 above constituted a repudiatory breach of the License Agreement and that such repudiation had been accepted by the Plaintiff on 15 November 2016 by the Notice or by the issuing of the Writ in these proceedings on 30 December 2016.” In our view and contrary to the Judge's conclusion, NTT has failed to properly plead a restitution claim based on total failure of consideration. There was just a plea of non-delivery of the Licensed Products before termination and no more. There was no plea of total failure of consideration and how the non-delivery of the Licensed Products amounted to total failure of consideration. The plea for the refund of the Upfront Payment has evidently premised on the purported breach of the Agreement and no more. With respect, the Judge also erred in finding that Octo was not taken by surprise by the lack of proper plea. As rightly submitted by Ms Tam, had this restitution claim been properly pleaded, Octo could have raised and adduced evidence to raise a defence to it, such as change of position. As the pleadings now stand, NTT, having failed to proper plead the restitution claim, is not entitled to the refund of the Upfront Payment.

Conclusion

In consequence, we allow Octo's appeals, set aside the judgments made by the Judge in both Actions. We further make an order nisi that NTT do pay Octo costs below and on appeal, with a certificate for two counsel for the appeals, to be taxed if not agreed. (Johnson Lam) (Jeremy Poon) Vice President Justice of Appeal Mr Leo Remedios and Ms Astina Au, instructed by Robert Lee Law Offices, for the plaintiff in CACV 58/2018 & for the defendant in CACV 59/2018 Ms Winnie Tam, SC and Mr David Chen, instructed by Robertsons, for the 1st defendant in CACV 58/2018 & for the plaintiff in CACV 59/2018

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