

HCA 2378/2018
[2021] HKCFI 1420

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 2378 OF 2018

BETWEEN

QNET LIMITED

1st Plaintiff

QUEST ION IT (HK) LIMITED

2nd Plaintiff

EB SERVICES LIMITED

3rd Plaintiff

and

CHENG MAN YEE

Defendant

Before: Master Norman Nip in Court

Date of Hearing: 4 February 2021

Date of Written Closing Submissions: 9 March 2021

Date of Judgment: 3 June 2021

J U D G M E N T

A

B *INTRODUCTION*

C

D 1. This is the hearing for assessment of damages suffered by the
E Plaintiffs.

F 2. By an interlocutory judgment dated 9 June 2020
G (“**Interlocutory Judgment**”), judgment was entered against the Defendant
H with damages to be assessed and costs on liability to the Plaintiffs upon the
I default of the Defendant in filing and serving her defence pursuant to an
J unless order.

K 3. The Defendant did not attend the hearing for assessment of
L damages before me on 4 February 2021 (“**Hearing**”). She has been
M unrepresented since Messrs Cheung & Co ceased to act for her on
N 18 December 2019.

O 4. Upon reading the affirmation of service provided by the
P Plaintiffs, I was satisfied that the Defendant was notified of the present
Q proceedings. Thus, the Hearing proceeded in her absence.

R *BACKGROUND*

S

T 5. The 1st Plaintiff, the 2nd Plaintiff and the 3rd Plaintiff (together
U “**Plaintiffs**” or “**Qi Group**”) are closely affiliated Hong Kong incorporated
V companies with common shareholders. In particular:

- (a) The 1st Plaintiff carries on business as a retailer on e-commerce platforms.
- (b) The 2nd Plaintiff carries on the business of managing IT projects and provides IT support to the 1st Plaintiff and the 3rd Plaintiff.
- (c) The 3rd Plaintiff provides human resources and administrative support to the 1st Plaintiff and the 2nd Plaintiff.

6. On 31 May 2017, the 3rd Plaintiff entered into an employment contract (“**Employment Contract**”) with the Defendant for the role of Administrative Supervisor in the Human Resources and Administration Department.

7. The Employment Contract imposed, inter alia, the following obligations on the Defendant:

- (a) Clause 15: “Obligation to the company”:

“Unless prevented by incapacity, you shall devote the whole time, attention and skill to perform duties. You shall not engage in any other business or have an interest in any other business of a similar nature to or competitive with that carried on by the Company or its associates. You shall abide by the Company policies, rules, and regulations including but not limited to the Employee’s Handbook as amended from time to time, which are currently imposed and promulgated.”

- (b) Clause 20: “Whole Time”

“a) You shall devote yourself exclusively to the affairs and business of the Company.

b) You shall not make any personal profit arising out of, or in the course of, your employment with the Company, and shall not in any circumstances either directly or indirectly receive, or permit your staff to receive from any person supplying goods to, or dealing with the Company, any gifts, bonus or commission.”

8. The Employee’s Handbook referred to in Clause 15 of the Employment Contract in turn set out, inter alia, the following duties and obligations owing by the Defendant to the 3rd Plaintiff:

(a) Under Section One – Introduction:

“This Manual is designed to inform employees about QI Ltd and its Group of Companies (hereinafter referred to as QI Ltd) policies relating to work at QI Ltd and use of company resources...This information contained in this Manual applies to all employees of QI Ltd.”

(b) Under Section Two – Employee’s Duties and Obligations:

“Obligations...Being Truthful in all dealings with other employees, customers, suppliers and authorities.”

(c) Under Section Four – Employment Practices – Employee Disciplinary Guidelines:

“gross violations...Theft involving company assets and property and the property of other employees...Fraud or wilful breach by the employee of the trust reposed in him by the Company of duly authorized representative; falsifying documents...misappropriation of Company funds...Commission of a crime or offense by the employee against the person of the Company or any immediate member of the Company’s board members’ family or its duly authorized representative.”

(d) Under Section Five – Standards of Conduct – Code of Conduct:

“examples of prohibited personal use of company assets include removal of Company property for personal use...any act...that involves theft, fraud, unauthorized disclosure, embezzlement, or misappropriation of any property...”

(e) Under Section Five – Standards of Conduct – Conflicts of Interest:

“It is essential that every QI Ltd employee avoid any situation or interest which might interfere with, or which might be perceived as interfering with, his or her judgment or objectivity with respect to matters involving or affecting the Company.”

9. Whilst the Defendant was employed by the 3rd Plaintiff, she served the entire Qi Group, including the handling of Qi Group’s employment contracts, payroll, office management and administration.

10. During the course of her employment, the Defendant committed, inter alia, the following misconduct:

Unauthorised CSL Contracts

(a) The Defendant forged the signatures of authorised persons and wrongfully entered into:

- i. 38 telecom contracts or subscriptions with CSL Mobile Limited (“CSL”) purportedly in the name of the 1st Plaintiff for an amount totalling HK\$558,384;
- ii. 75 telecom contracts or subscriptions with CSL purportedly in the name of the 2nd Plaintiff for an amount totalling HK\$1,276,428;

iii. 260 telecom contracts or subscriptions with CSL purportedly in the name of the 3rd Plaintiff for an amount totalling HK\$3,544,604.40.

(collectively, the “**Unauthorised CSL Contracts**”).

(b) Pursuant to these 373 Unauthorised CSL Contracts totalling for the amount of HK\$5,379,416.40, CSL issued 373 mobile handsets without the knowledge, consent or approval of Qi Group.

(c) After receiving invoices from CSL issued pursuant to the Unauthorised CSL Contracts, the Defendant then forged the signatures of authorised persons and drew 2 cheques from the 1st Plaintiff and 4 cheques from the 2nd Plaintiff in favour of CSL. Out of these 6 cheques, 4 were stopped shortly after the fraud was discovered but 2 cheques, namely, Cheque No 000849 dated 19 May 2018 drawn by the 2nd Plaintiff for HK\$397,815.22 and Cheque No 000146 dated 27 September 2018 drawn by the 1st Plaintiff for HK\$376,656.54 from their DBS bank accounts, were sent to CSL and cleared by it.

(d) The Defendant then took the 373 mobile handsets from CSL and wrongfully sold them to a third party retailer for a personal profit.

Unauthorised SmarTone Contracts

(e) The Defendant also wrongfully entered into various sales and services agreements with SmarTone Mobile

Communications Limited ("**SmarTone**") for a total of 211 mobile telecom contracts or subscriptions, purportedly in the name of the 3rd Plaintiff ("**Unauthorised SmarTone Contracts**").

(f) Pursuant to these Unauthorised SmarTone Contracts, SmarTone issued 211 mobile handsets without the knowledge, consent or approval of the 3rd Plaintiff totalling HK\$2,262,400.62.

(g) The Defendant then took the 211 mobile handsets from SmarTone and wrongfully sold them to a third party retailer for a personal profit.

Unauthorised Booking of Trips

(h) During the second half of 2018, the Defendant booked 3 trips for herself and her family via the 3rd Plaintiff's corporate account held with Corporate Travel Management Limited ("**Corporate Travel**") for the sum of HK\$72,284 without authorisation.

(i) The 3rd Plaintiff received 3 invoices dated between July and September 2018 from Corporate Travel totalling HK\$72,284. Upon the Plaintiffs' discovery of these invoices, the 3rd Plaintiff immediately cancelled the flight bookings. However, Corporate Travel still charged the 3rd Plaintiff for the cancellation cost of the flight bookings.

11. On 9 October 2018, the Defendant admitted her misconduct in a meeting held with the Plaintiffs' representatives.

12. The Defendant further admitted her misconduct in a written statement dated 12 October 2018 ("**Defendant's Written Statement**").

13. The 3rd Plaintiff summarily dismissed the Defendant on 12 October 2018.

14. The Plaintiffs commenced this action against the Defendant to seek various reliefs against the Defendant for her misconduct including, inter alia, declarations that she had no authority to enter into the Unauthorised CSL Contracts and the Unauthorised SmartTone Contracts and that she holds a total sum of HK\$10,143,520.78 or such other sum on constructive trust for the Plaintiffs, an order for disgorgement of profits made by the Defendant and all consequential directions, accounts or inquiries, as well as damages suffered by the Plaintiffs.

15. In the witness statement of Mr Cheung Tze Fat Alfred ("**Mr Cheung**"), Senior Legal Counsel of the 3rd Plaintiff, filed on behalf of the Plaintiffs for the purpose of this Hearing, he confirmed that the Plaintiffs would only seek loss and damage against the Defendant in the total sum of HK\$1,910,202.51 as well as interest and costs.

LEGAL PRINCIPLES

16. A principal duty imposed on an employee is the duty to serve his or her employer with fidelity and good faith: *Employment Law and Practice in Hong Kong* (2nd edn, 2016) at §§3.028 and 3.039.

17. An employer may recover damages for breach of an express or implied term of the contract of employment. The general principle for the measure of damages under a breach of contract applies. See *Chitty on Contracts – Hong Kong Specific Contracts* (6th edn, 2019) at §12-178.

18. It is also trite that a defendant is only liable for the losses caused by his/her breach which are not too remote. The plaintiff also has to duty to mitigate his/her losses. See *Ho & Hall's Hong Kong Contract Law* (4th ed, 2017) at §§19-104, 19-134.

19. In addition, Ms Athena Wong, Counsel for the Plaintiffs, also reminded me that even where a company does not directly employ a person, that person may nonetheless owe fiduciary duties towards that company, since a fiduciary relationship may arise in situations where a person has undertaken to act for or on behalf of another in circumstances which give rise to a relationship of trust and confidence or which give rise to a legitimate expectation that the fiduciary will not utilise his/her position in such a way which is adverse to the interest of the principal (see *Igal Dafni v CMA CGM SA* (unrep, HCA 1429/2012, 10 Feb 2014) at §56 per Recorder H Wong SC).

20. Accordingly, Ms Wong contends in the present case that the Defendant not only owed fiduciary duties to the 3rd Plaintiff as her

employer, she also owed such duties to the other members of the Qi Group, namely the 1st and 2nd Plaintiffs. However, as will be apparent from the discussions below, since Mr Cheung confirmed at the Hearing that all of the liabilities incurred by the 1st and 2nd Plaintiffs were accrued as losses to the 3rd Plaintiff by way of internal accounting treatment within the Qi Group, it is not strictly necessary for the purpose of this assessment exercise to decide whether the Defendant owed any fiduciary duties to the 1st and 2nd Plaintiffs.

21. As for remedies, it is trite that a principal may claim equitable compensation for the losses caused by a breach of fiduciary duty: *Snell's Equity* (34th edn, 2019) at §§7-058, 7-059.

22. With the above in mind, I now turn to the assessment exercise.

UNAUTHORISED CSL CONTRACTS

Claims 1 and 2: HK\$397,815.22 (Cheque No 000849) & HK\$376,656.54 (Cheque No 000146)

23. The Plaintiffs' Claims 1 and 2 relate to the sums of HK\$397,815.22 and HK\$376,656.54 paid to CSL for the Unauthorised CSL Contracts.

24. As confirmed by Mr Cheung in his witness statement (which was adopted as his evidence at the Hearing), these 2 sums were paid to

CSL by the Defendant forging the signatures of authorised persons on Cheque No 000849 and Cheque No 000146 respectively.

25. In paragraphs 11 and 12 of the Defendant's Written Statement, she admitted to removing the cheques from the locker of Mr Raymond Ng, Assistant Accountant of the 3rd Plaintiff, and signing them without authority:

"11. The signatures on the DBS cheques which were cleared by the bank were signed by directly by me without any permission or authority or knowledge of anyone namely:

(a) DBS cheque no. 000849 in the amount of HK\$397,815.22 issued by Quest ION IT (HK) Limited in favor of CSL Mobile Limited; and

(b) DBS cheque no. 000146 in the amount of HK\$376,656.54 issued by QNet Limited in favor of CSL Mobile Limited

12. I removed the cheques from Raymond's locked drawer in the morning without anyone knowing at around 7:30 on a normal working day as I had the key to the drawer."

26. Although the 2 cheques in question were drawn from the DBS bank accounts of the 1st and the 2nd Plaintiffs respectively, Mr Cheung confirmed in his testimony at the Hearing that there were internal accounting treatments within the Qi Group such that the losses incurred by the 1st and 2nd Plaintiffs would be accrued as losses to the 3rd Plaintiff (which did not maintain any bank account at all material times).

27. In my judgment, the Defendant's misconduct clearly constituted breaches of the contractual and fiduciary duties owed to the 3rd Plaintiff as her employer and that such misconduct resulted in losses to

the 3rd Plaintiff represented by the sums paid to CSL under the 2 cheques, namely, HK\$397,815.22 and HK\$376,656.54.

28. I therefore assess the damages suffered by the 3rd Plaintiff in respect of Claim 1 (Cheque No 000849) and Claim 2 (Cheque No 000146) to be HK\$397,815.22 and HK\$376,656.54 respectively.

Claim 3: Settlement Payment to CSL

29. As a result of the Defendant's misconduct in causing the Plaintiffs to enter into the Unauthorised CSL Contracts totalling an amount of HK\$5,379,416.40, the Plaintiffs incurred liability to CSL for the said sum.

30. In an effort to mitigate the loss, the Plaintiffs conducted lengthy negotiations with CSL in good faith.

31. On 20 January 2020, the Plaintiffs entered into a written settlement agreement with CSL ("**CSL Settlement Agreement**") whereby the parties agreed to settle the dispute by the Plaintiffs making a payment of HK\$550,000 to CSL ("**CSL Settlement Sum**").

32. On 6 February 2020, Mr Cheung issued a letter to CSL enclosing a cheque for HK\$550,000 drawn by the 2nd Plaintiff in favour of CSL as payment for the Settlement Sum.

33. At the Hearing, Mr Cheung confirmed that:

(a) The HK\$550,000 CSL Settlement Sum paid by the 2nd Plaintiff was internally accounted for as a loss to the 3rd Plaintiff.

(b) The sums of HK\$397,815.22 and HK\$376,656.54 paid to CSL under Claims 1 and 2 above fell outside the scope of the settlement reached with CSL under the CSL Settlement Agreement.

34. In my judgment, the Defendant's breaches of the contractual and fiduciary duties owed to the 3rd Plaintiff have caused the 3rd Plaintiff's loss. As a result of the 3rd Plaintiff's efforts in mitigation by entering into the CSL Settlement Agreement, that loss was eventually limited to HK\$550,000.

35. I therefore assess the damages suffered by the 3rd Plaintiff in respect of this Claim 3 concerning the CSL Settlement Sum to be HK\$550,000.

UNAUTHORISED SMARTONE CONTRACTS

Claim 4: Settlement Payment to SmarTone

36. As a result of the Defendant wrongfully entering into the 211 Unauthorised SmarTone Contracts, the 3rd Plaintiff became liable to SmarTone in the total amount of HK\$2,262,400.62.

37. With a view to mitigate its loss, the 3rd Plaintiff conducted negotiations with SmarTone from October to November 2018 with a view

to resolve the liability issue under the Unauthorised SmarTone Contracts. As no settlement was reached, SmarTone commenced legal proceedings against the 3rd Plaintiff in DCCJ 139/2019 (“**DCCJ Proceedings**”) for the recovery of the HK\$2,262,400 sum in January 2019.

38. Nevertheless, the 3rd Plaintiff continued its efforts to negotiate with SmarTone in order to mitigate its loss. Eventually, on 16 September 2019, the 3rd Plaintiff reached a settlement with SmarTone in respect of the DCCJ Proceedings by agreeing to make a payment of HK\$380,000 to SmarTone (“**SmarTone Settlement Sum**”).

39. On 23 September 2019, EP Services Ltd drew a cheque for HK\$380,000 in favour of SmarTone as payment for the SmarTone Settlement Sum. At the Hearing, Mr Cheung confirmed that this HK\$380,000 was accrued as a loss to the 3rd Plaintiff via internal accounting treatment.

40. In my judgment, the Defendant’s breaches of the contractual and fiduciary duties owed to the 3rd Plaintiff have caused loss to it. As a result of the 3rd Plaintiff’s efforts in mitigation by settling the DCCJ Proceedings, that loss was eventually limited to HK\$380,000.

41. I therefore assess the damages suffered by the 3rd Plaintiff in respect of this Claim 4 concerning the SmarTone Settlement Sum to be HK\$380,000.

Claim 5: DCCJ Proceedings Legal Costs

42. In defending the DCCJ Proceedings commenced by SmarTone, the 3rd Plaintiff incurred legal costs totalling HK\$196,640.75.

43. Mr Cheung confirmed in his evidence that the 3rd Plaintiff had taken all reasonable steps to reach a settlement with SmarTone and that the legal costs incurred in defending the 3rd Plaintiff in the DCCJ Proceedings were necessary, reasonable and proportional.

44. Having reviewed the invoices issued by the 3rd Plaintiff's solicitors, I find that the legal costs incurred were necessary and reasonable and that they resulted from the Defendant's breaches of her contractual and fiduciary duties owed to the 3rd Plaintiff.

45. I therefore assess the damages suffered by the 3rd Plaintiff in respect of this Claim 5 concerning the legal costs incurred in defending the DCCJ Proceedings to be HK\$196,640.75.

UNAUTHORISED BOOKING OF TRIPS

Claim 6: Settlement Payment to Corporate Travel

46. As mentioned in paragraph 10(h) above, the Defendant booked personal trips via the 3rd Plaintiff's corporate account held with Corporate Travel without authorisation.

47. On 9 October 2018, upon discovery of the Corporate Travel invoices, the 3rd Plaintiff immediately cancelled the flight bookings. However, Corporate Travel still charged the 3rd Plaintiff for the cancellation cost of the flight bookings.

48. In this regard, Corporate Travel instituted a monetary claim for HK\$22,727 in the Small Claims Tribunal under Claim No SCTC052553/18 (**“Small Claims Tribunal Proceedings”**).

49. In an effort to mitigate the loss, the 3rd Plaintiff reached a settlement with Corporate Travel on 25 January 2019 in respect of the Small Claims Tribunal Proceedings by agreeing to pay HK\$9,090 to Corporate Travel (**“Corporate Travel Settlement Sum”**).

50. On 30 January 2019, the 3rd Plaintiff paid the Corporate Travel Settlement Sum to Corporate Travel by providing the latter with a cheque drawn by the 2nd Plaintiff for the amount of HK\$9,090. At the Hearing, Mr Cheung confirmed that this HK\$9,090 was accrued as a loss to the 3rd Plaintiff via internal accounting treatment.

51. In my judgment, the Defendant’s breaches of the contractual and fiduciary duties owed to the 3rd Plaintiff have caused loss to it. As a result of the 3rd Plaintiff’s efforts in mitigation by settling the Small Claims Tribunal Proceedings, that loss was eventually limited to HK\$9,090.

52. I therefore assess the damages suffered by the 3rd Plaintiff in respect of this Claim 6 concerning the Corporate Travel Settlement Sum to be HK\$9,090.

CONCLUSION ON QUANTUM OF DAMAGES ASSESSED

53. In the circumstances, I assess the total aggregate sum of damages suffered by the 3rd Plaintiff in respect of Claims 1 – 6 to be HK\$1,910,202.51.

COSTS

54. Insofar as costs are concerned, the Plaintiffs' costs incurred up to 9 June 2020 have already been determined by the Interlocutory Judgment. This Court has no jurisdiction to make another costs order covering the same period.

55. As to the costs after 9 June 2020 (including the costs of and incidental to the assessment of damages), I agree with Ms Wong that the Plaintiffs should also have their costs with certificate for counsel.

56. Ms Wong on behalf of the Plaintiffs have sought summary assessment of such costs incurred. In this regard, the Plaintiffs have submitted a statement of costs seeking a total sum of HK\$300,253.

57. Having examined the items in the statement of costs, I am of the view that the Counsel's fees claimed for HK\$92,000 are reasonable and

I would allow them in full. However, some of the other items in the statement of costs concerning the work undertaken by the Plaintiffs' solicitors are slightly excessive. Taking a broad-brush approach, I would summarily assess the costs after 9 June 2020 (including the costs of and incidental to the assessment of damages) at HK\$230,000.

INTEREST

58. The Plaintiffs have claimed interest against the Defendant in their Statement of Claim.

59. As for pre-judgment interest, Ms Wong indicated in her written closing submissions that the Plaintiffs would only seek pre-judgment interest in respect of Claims 1 and 2 but not Claims 3 to 6.

60. As for the pre-judgment interest rate, the Plaintiffs seek the usual rate of 1% above the HSBC Best Lending Rate. I do not see any reason for departing from this conventional rate in this case: see *Waddington Ltd v Chan Chun Hoo Thomas* (unrep, CACV 10/2014, 20 May 2016) at §§171-185.

61. In relation to the applicable period of pre-judgment interest, although the causes of action for Claims 1 and 2 accrued on the dates when the cheques were drawn and the monies were paid to CSL (ie on 19 May 2018 for Claim 1 and on 27 September 2018 for Claim 2), Ms Wong indicated in her written closing submissions that the Plaintiffs are prepared to accept the later date of 9 October 2018, being the date of the Writ of

Summons, to be the applicable commencement date for the calculation of pre-judgment interest. I accordingly rule that pre-judgment interest for Claims 1 and 2 should run from 9 October 2018 to the date of this judgment.

62. As for post-judgment interest, I will follow the usual rule of awarding interest at judgment rate from the date of this judgment until full payment.

ORDERS

63. Based on the matters aforesaid, I make the following Orders:

(a) The Defendant do pay the 3rd Plaintiff the sum of HK\$1,910,202.51 as damages suffered by the 3rd Plaintiff.

(b) The Defendant shall pay the 3rd Plaintiff pre-judgment interest on the sums of HK\$397,815.22 and HK\$376,656.54 mentioned in paragraph 28 above at 1% above HSBC's Best Lending Rate from 9 October 2018 to the date of this judgment.

(c) The Defendant shall pay the 3rd Plaintiff post-judgment interest on the sum of HK\$1,910,202.51 mentioned in paragraph 53 above from the date of this judgment until payment in full at judgment rate.

(d) The Defendant shall pay the Plaintiffs' costs incurred after 9 June 2020 (including the costs of and incidental

to the assessment of damages), with certificate for
Counsel, summarily assessed at HK\$230,000.

64. I thank Ms Wong for her assistance.

(Norman Nip)
Master of the High Court

Ms Athena Wong, instructed by Payne Clermont Velasco, for the 1st, 2nd
and 3rd Plaintiffs

The Defendant was not represented and did not appear