CAMP 290/2021
[2022] HKCA 720

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
MISCELLANEOUS PROCEEDINGS NO 290 OF 2021
(ON AN INTENDED APPEAL FROM BOARD OF REVIEW'S DECISION D8/20
DATED 21 SEPTEMBER 2020)

BETWEEN

MARK ANDREW WILSON Applicant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Poon CJHC and Chu JA in Court
Date of Written Submissions: 27 July 2021 and 10 August 2021
Date of Judgment: 20 May 2022

J U D G M E N T

The Court:

A. Introduction

1. In its decision dated 21 September 2020 ("Decision"), [1] the Board of Review found that each of Sum A, Sum B and Sum C[2] paid to the applicant by its employer, AIA Company Limited ("the Company"),[3] were chargeable to salaries tax under section 8 of the Inland Revenue Ordinance;[4] and accordingly dismissed the applicant's appeal against the determination by the Deputy Commissioner to that effect. The applicant sought leave to appeal from the Court of First Instance under section 69(1). After a rolled-up

[1] D8/20.
[2] See [11] below for particulars.
[3] Formerly known as American International Assurance Company Limited, a Hong Kong private company held by AIA Group Limited, another Hong Kong private company, which is in turn held by AIG International Group Inc, a public listed company in the USA: see Decision, at [12.1].
[4] Cap 112. Unless otherwise stated, statutory provisions referred to below are those of the Inland Revenue Ordinance.

hearing on 9 June 2021, Anthony Chan J dismissed the application by a judgment handed down on 15 July 2021 ("Judgment").[5]

2. The applicant then made a further application to the Court of Appeal for leave to appeal against the Decision under section 69(4) ("the s.69 Application"). He also applied for leave to appeal against the Decision directly to the Court of Appeal under section 69A(1A) ("the s.69A Application").

3. Under section 69(5)(c)(i), the Court of Appeal consisting of one or more Justices of Appeal may determine a s.69 application without a hearing on the basis of written submissions only. Further, pursuant to section 69(5)(f), if the application is determined by the Court of Appeal on the basis of written submissions only, and the Court of Appeal considers that it is totally without merit, the Court of Appeal may make an order that no party may make a request for reconsideration at a hearing *inter partes* under paragraph (e).

4. However, section 69A contains no such similar provisions for paper disposal of a s.69A application. Such procedure is to be found in Order 59 rule 2A of the Rules of the High Court,[6] which applies pursuant to Order 59 rule 1(1). Accordingly, the Court of Appeal may determine a s.69A application without a hearing on the basis of written submissions only (rule 2A(5)); and if it considers that it is totally without merit may make an order that no party may request a reconsideration at an oral hearing *inter partes* under rule 2A(7) (rule 2A(8)).

5. Having considered the papers, we consider it appropriate to determine both the s.69 and s.69A Applications without an oral hearing on the basis of written submissions only. We now hand down our judgment.

B. Facts

6. The basic facts leading to the Deputy Commissioner's determination were agreed between the parties.[7] The Board made further factual findings in support of the Decision. The applicant did not challenge the Board's findings but relied on them for the purpose of the Applications.[8] The narrative below is taken from the facts as agreed or found by the Board.

7. Pursuant to an employment letter dated 15 September 2006 ("the Employment Letter"), the applicant commenced his employment with the Company as Deputy President on 1 December 2006. He was appointed as Chief Executive Officer in 2009.

8. Under the Employment Letter, the applicant's remuneration package contained, among others, a bonus plan (Clause 3); and equity compensation (Clause 5).

[5] [2021] HKCFI 1950.
[6] Cap 4A.
[7] Set out at [12.1] – [13].
[8] As was the case before the Judge: see Judgment, at [8].

The latter included stock options and restricted stock unit ("RSU") granted as a part of the annual compensation review process. If the applicant's employment was terminated by reasons other than voluntary resignation or summary dismissal or termination with cause, the grant for stock options and RSUs as committed to him but not yet due would be converted to cash equivalent based on the stock value at the date of his termination and formed part of his termination settlement (Clause 5(b)).

9. Further, before the applicant joined the Company, he was the Chief Executive Officer of AXA China Region Limited ("AXA"). He was entitled to a pension which was however forfeited when he left for the Company. The Employment Letter dealt with the issue of the applicant's pension with AXA under Clause 12 by providing that it would be addressed under a separate cover subject to the applicant's submission of written documentation with all the scheme details. As found by the Board, Clause 12 was a term made to induce the applicant to provide services to the Company.[9]

10. At a meeting on 18 July 2010 ("the July Meeting"), the President and Chief Executive Officer of the parent company of the Company told the applicant that his employment would be terminated. He was nevertheless requested to stay on until the end of 2010 for smooth transition to his successor, which he did. And his employment formally ended on 14 January 2011.

11. Following negotiations on the terms of release including a letter issued by Messrs Tanner De Witt dated 6 December 2010 on behalf of the applicant ("the TDW Letter"), the applicant, the Company and its parent company signed an Agreement and Release on 27 January 2011 ("the Release Agreement"). Under the Release Agreement, the applicant was paid various sums including:

(1) a 2010 incentive bonus payment of US$4,280,000 ("Sum A");

(2) a lump sum payment in respect of a pension entitlement of US$520,000 ("Sum B"); and

(3) a lump sum in respect of the variance in the stock valuation of shares options of US$450,000 ("Sum C").

12. In respect of Sum A, the applicant's own evidence was that the 2010 proposal at target for variable cash and variable stock was respectively in the amount of US$2.14 million each, totalling US$4.28 million, to be awarded to him subject to performance in March of 2011.[10] That was also the position of the Company. By a letter dated 7 June 2010 with a computation attached, the Company advised the applicant that the target of the income incentive bonus for the year 2010 was US$4.28 million which would be payable to him in the form of cash and stock in March 2011. Significantly, the bonus was said to be "retroactive January 1, 2010",[11] meaning that the applicant's 2010 bonus

[9] Decision, at [69].
[10] Decision, at [55].
[11] Decision, at [56].

package was effectively retrospectively from 1 January 2010.[12] Finally, in the TDW Letter, it was stated that the applicant met the performance target for the bonus by 30 November 2010 and he was accordingly entitled to the same. It went on to say:

> "In the circumstances, [the applicant] expects to be paid (at a minimum) his full 2010 Incentive Award for US$4,280,000 in cash upon termination of his employment. This award entitlement should be paid in cash because any stock awarded by way of annual compensation but not yet due would need to be paid out in cash in any event under clause 5(b) of [the Employment Letter]."

13. In respect of Sum B, the applicant submitted the necessary documentation required under Clause 12 of the Employment Letter and the pension was assessed at US$520,000. In the TDW Letter, it was stated that the applicant was entitled to it according to Clause 12 and the collateral agreement that he was to be reimbursed the sum equivalent to his pension entitlement prior to his departure from AXA; and that he was contractually entitled to Sum B and he had received a number of assurances from the Company that this sum would be paid.

14. In respect of Sum C, as recorded in Clause 3 of the Release Agreement, in accordance with the terms of the Employment Letter and the underlying plan documents, the applicant would be paid, among others, all fully vested RSUs that were granted to him under the AIG Restricted Stock Agreement in 2010; and the Long-Terms Performance Units that the applicant was awarded in 2010 pursuant to the Long-Terms Performance Units Plan, in the form of cash. Such stock entitlements were included in the applicant's salaries tax assessment for the year 2010/11, which he duly paid without any protest.[13] Sum C represented the variance of valuation of the above stock entitlements after re-adjustment.

C. The Board's reasons

15. Before the Board, the applicant's main contention was that as at the date of the Release Agreement, that is, 27 January 2011, the applicant had no entitlement to claim payment of the Sums under the Employment Letter. Each of the Sums was not income from his employment but was paid in consideration for and for the purpose of (a) restricting him from disrupting the business of the Company as he was not subject to any non-compete or non-solicitation restrictions; (b) securing his consent to its termination; and (c) his waiver of all actual or potential rights of action against the Company, as well as his forbearance from suing it for wrongful dismissal – through the Release Agreement. Further, none of the Sums was paid to the applicant as an inducement or reward in relation to the period between 18 July 2010 when he received the notice of termination and 27 January 2011.[14]

16. In short, the applicant argued that his entitlements to the Sums accrued only upon termination of the employment and not during the subsistence of the employment; and

[12] Decision, at [57].
[13] Decision, at [12.12(iii)], [12.15] – [12.18].
[14] Decision, at [3].

that they were "in the nature of remuneration of profits in respect of the office" and not "in the nature of the sum paid in consideration of the surrender by [him] of his rights in respect of the office": see *CIR v Elliott* [2007] 1 HKLRD 297, at [28].

17. The applicant gave evidence to support his case. But all his assertions germane to his case including the purpose of the payment of the Sums were rejected by the Board.[15] In particular, the Board also rejected his assertions that the Company retained a discretion not to pay Sum A;[16] and that what was stated in the TDW Letter on his entitlement to Sum B was only negotiating position.[17]

18. In determining the purpose of the Sums to see if they were chargeable to salaries tax under section 8, the Board applied the relevant principles enunciated in *Fuchs v CIR* (2011) 14 HKCFAR 74, at [17] – [18]; *CIR v Poon Cho-ming John* (2019) 22 HKCFAR 344, at [14]. It also took into all the circumstances, including the facts agreed by the parties, the Employment Letter, the circumstances of the termination of the employment, the July Meeting, the negotiations including the TDW Letter, and the Release Agreement. The Board came to the conclusion that the applicant's entitlement to each of the Sums were "income from employment" paid pursuant to the terms of the Employment Letter or as an inducement to the applicant for his continual serving as an employee between July 2010 and January 2011.[18] As to the latter, the Board accepted the evidence of the President of the Company. At the July Meeting, the President told the applicant that his employment with the Company would be terminated, and that if he remained in the employment with the Company until the end of 2010, co-operated with the Company during the IPO period, and had a smooth transition of his role to his successor, he would receive the 2010 incentive bonus in full. The Board found that the applicant had done exactly what the president had told him. In the circumstances, the Board concluded that Sum A was a payment to reward the applicant in return for his remaining in employment between 18 July 2010 and the termination on 14 January 2011.[19]

D. Application before the Judge

19. The applicant applied for leave to appeal before the Judge against the Board's determination under section 69(1) in respect of one single question of law ("the Question"):

> "UPON the true construction of:
>
> (a) part 3 of the Ordinance and in particular sections 8(1), 9 and 11B to 11D thereof;
>
> (b) the [applicant's] employment contract; and

[15] Decision, at [31] – [50].
[16] Decision, at [58] – [63].
[17] Decision, at [72] – [74].
[18] Decision, [51] – [77].
[19] Decision, at [65].

> (c) the [applicant's] termination contract
>
> AND UPON the facts agreed and found by the Board, including their findings that the Three Sums (in the Decision: Sum A, Sum B and Sum C) were paid to the [applicant] following the execution of the termination contract after his employment had ceased
>
> DID THE BOARD ERR IN LAW by holding that the [applicant] received all 3 Sums pursuant to accrued contractual entitlements under the employment contract (and they therefore constituted Part 3 "*income*") and not pursuant to contractual entitlements which only accrued upon the execution of the termination contract (which would not constitute Part 3 "*income*")?"

20. In support, Mr Barlow SC, for the applicant,[20] raised a total of 6 grounds of appeal.[21] For the reasons that he gave, the Judge found no substance in the application and accordingly dismissed it with costs.

E. The s.69 Application

21. Before us, Mr Barlow raised the same Question and advanced the same 6 grounds of appeal in support of the s.69 and s.69A Applications. We will first deal with the former.

E1. Threshold of leave to appeal

22. Section 69(4) stipulates:

> "If the Court of First Instance refuses to grant leave to appeal, the applicant may make a further application to the Court of Appeal for leave to appeal against the Board's decision."
>
> Pursuant to section 69(5)(d), section 69(3)(e), which sets the thresholds for leave to appeal to be granted by the Court of First Instance, applies *mutatis mutandis* to the Court of Appeal. It means that leave to appeal must not be granted by the Court of Appeal unless it is satisfied that:
>
> (i) a question of law is involved in the proposed appeal; and
>
> (ii) that –
>
> (A) the proposed appeal has a reasonable prospect of success; or

[20] Who also appeared for the applicant before the Board.

[21] Apparently, the Judge regarded each of [21] – [26] of the Statement filed in support of the application as individual grounds of appeal.

(B) there is some other reason in the interests of justice why the proposed appeal should be heard.

E2. Failing to meet the thresholds

23. For present purpose, the critical question is whether the applicant is able to demonstrate that his proposed appeal has a reasonable prospect of success, which means that it is reasonably arguable and not that it will probably succeed: *China Mobile Hong Kong Co Ltd v Commissioner of Inland Revenue* [2018] 2 HKLRD 146, per Chow J (as he then was) at [16].

24. Section 8(1) provides:

> "Salaries tax shall, subject to the provisions of [the Ordinance], be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –
>
> (a) any office or employment of profit; or
>
> (b) any pension."
>
> Whether the Sums are chargeable under section 8(1) depends on their true purpose, having regard to all the relevant circumstances, including the terms of employment, the nature of the Sums, the circumstances of the termination of employment and the terms of the termination. See *Fuchs*, at [17] – [18]; *Poon Cho-ming John*, at [14].

25. Applying the above approach to the facts agreed or found by the Board as set out in Part B, especially the contemporaneous documentary evidence which is overwhelming, we are firmly of the view that each of the Sum A, Sum B and Sum C plainly stemmed from the applicant's entitlements under the terms of employment and accrued during its subsistence. Any arguments to the contrary are simply untenable. The 6 grounds of appeal raised by Mr Barlow augmented by his submissions are wholly unmeritorious. They can be disposed of very briefly.

26. Grounds 1 and 2 complained that the Board failed to apply sections 11B to 11D. We digress to deal with how they had found their way before us.

27. Before the Board, the applicant did not rely on or otherwise refer to those provisions. Below, the Judge observed that grounds 1 and 2 were not properly formulated points of law or proper particulars in support of the Question; and that in any event they added nothing in substance to grounds 3 to 5 which addressed the Sums specifically. Significantly, he noted that Mr Barlow abandoned the reliance on section 11D. In the circumstances, the Judge found it unnecessary to deal with grounds 1 and 2.[22] Mr Barlow

[22] Judgment, at [25] – [27].

now criticized the Judge for his "dismissive unwillingness" to address grounds 1 and 2. With the greatest respect, such remark is most unfair to the Judge and is entirely unwarranted in light of what transpired below and his observation, which we agree, as to the utility of grounds 1 and 2.

28. The purported reliance on sections 11B to 11D is in any event wholly misplaced.

29. The relevant parts of sections 11B to 11D relied on by Mr Barlow read:

> "**11B. Ascertainment of assessable income**
>
> The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment.
>
> **11C. Office or employment of profit**
>
> For the purpose of section 11B, a person shall be deemed to commence or cease, as the case may be, to derive income from a source whenever and as often as he commences or ceases—
>
> (a) to hold any office or employment of profit; or …
>
> **11D. Receipt of income**
>
> For the purpose of section 11B—
>
> (b) income accrues to a person when he becomes entitled to claim payment thereof:
>
> Provided that—
>
> … (ii) …any payment made by an employer to a person after that person has ceased or been deemed to cease to derive income which, if it had been made on the last day of the period during which he derived income, would have been included in that person's assessable income for the year of assessment in which he ceased or is deemed to cease to derive income from that employment, shall be deemed to have accrued to that person on the last day of that employment."

30. The main thrust of Mr Barlow's submissions is that by applying the above provisions, the Sums accrued pursuant to the Release Agreement after the termination of the employment. However, it seems that Mr Barlow has conflated the time of accrual of entitlement to the Sums with the time of their actual payment. In any event, on the facts before the Board, it was entirely correct for it to find that Sum A accrued when the applicant

met the performance target; that Sum B accrued when it was properly assessed after the applicant submitted the necessary documentation; and that the applicant was entitled to receive Sum C as a result of the re-valuation of the stock salaries which he was entitled to. In short, they were all income from employment accrued during its subsistence within the meaning of sections 11B to 11D. Such legal and factual position did not change merely because the payments were paid later in accordance with the relevant terms in the Release Agreement.

31. Accordingly, the complaint that the Board or for that matter, the Judge, did not deal with grounds 1 and 2 does not take the applicant's case any further.

32. A contention common to grounds 3 to 5 is that each of Sum A, Sum B and Sum C was paid in exchange for all the rights and claims that the applicant might have, the retention of which was condition on his abidance with the bargain of the termination of the employment. However, it cannot possibly stand in light of the Board's rejection of the applicant's evidence on those matters.

33. Ground 3 further contended that the applicant had no accrued legal entitlement to Sum A until the execution of the Release Agreement on 27 January 2011. For the reasons stated at [25] above, this is not arguable. Ground 3 also contended that the Board had found that the entitlement to Sum A could not have accrued before March 2011, as to which date, see [12] above. This is but a mis-reading of the finding by the Board.

34. Ground 4 asserted that the applicant had no accrued entitlement to Sum B until the execution of the Release Agreement because no agreement under Clause 12 of the Employment Letter had been reached. It is plainly untenable because it completely ignored the fact that the applicant did subsequently submit the necessary documentation and the assessment of the sum payable under Clause 12, which all took place during the employment.

35. Ground 5 argued that as Clause 5 of the Employment Letter conferred no legal entitlement on the applicant to be compensated for the valuation variance, he had no accrued entitlement to Sum C on the termination of the employment. This argument defies commercial sense. The applicant was paid his stock entitlements. When there was re-valuation, he was of course entitled to the variance as represented by Sum C. It is also flatly contradicted by the applicant's payment of the salaries tax for the pre-valuation payments with no protest, by which he must have implicitly accepted that such payments were chargeable to salaries tax. How can it be argued, as Mr Barlow sought to do now, that the variance which necessarily arose from the same source of income, is not likewise chargeable? We fail to see any logic in such argument.

36. Ground 6 complained that the Board had failed to understand or apply sections 8, 11B to 11D; and that there were confusions in its approach to various issues and its own findings. It is in substance a repetition of grounds 3 to 5 and does not add any substance to the applicant's case. For the above reasons, it is plainly not arguable.

37. In consequence, we are not satisfied that there is any reasonable prospect of success in the proposed appeal. The Board had made none of errors as complained.

38. Further, we fail to see any other reason in the interest of justice why the proposed appeal should be heard.

39. In consequence, the applicant is unable to meet the thresholds for leave to appeal. The s.69 Application fails.

F. The s.69A Application

40. Under section 69A(1), the appellant or the Commissioner may appeal to the Court of Appeal against the Board's decision only if leave to appeal has already been granted under section 69 in respect of the Board's decision concerned. Only then will the Court next consider if the requirements in section 69A(2) are satisfied. Since the applicant fails in the s.69 Application, the s.69A Application must fail *in limine*.

G. Dispositions

41. We dismiss both the s.69 Application and s.69A Application.

42. As both Applications are entirely without merit, we make an order that no party may request the Court of Appeal to reconsider our determination at a hearing *inter partes*.

43. Costs should follow event. Since the Applications are wholly unmeritorious, we are minded to visit the applicant with indemnity costs. We make an order *nisi* that the applicant do pay the respondent costs on an indemnity basis, to be taxed if not agreed.

(Jeremy Poon)
Chief Judge of the
High Court

(Carlye Chu)
Justice of Appeal

Mr Barrie Barlow SC, instructed by MinterEllison LLP, for the applicant

Ms Diana Cheung, instructed by the Department of Justice, and Ms Jess Chan SGC, of the Department of Justice, for the respondent