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

[2022] SGHC(A) 32

Civil Appeal No 27 of 2022

Between

(1) SAIS Limited
(2) Kaddra Pte Ltd

… *Appellants*

And

(1) Michael Jon Hardman
(2) Nicolas Jack Leon Finck

… *Respondents*

In the matter of Suit No 651 of 2020

Between

(1) Michael Jon Hardman
(2) Nicolas Jack Leon Finck

… *Plaintiffs*

And

(1) SAIS Limited
(2) Kaddra Pte Ltd

… *Defendants*

JUDGMENT

[Contract — Contractual terms — Express terms]

[Contract — Breach]
[Contract — Remedies — Damages]

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v
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19 August 2022

20 September 2022 Judgment reserved.

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 This appeal arises from a decision of the Judge of the General Division of the High Court (the "Judge") in *Hardman, Michael Jon and another v SAIS Ltd and another* [2022] SGHC 38 (the "Judgment"). In summary, it involves contractual claims for damages resulting from the non-delivery of shares of a company previously listed on the Toronto Stock Exchange Venture Exchange (the "TSX-V"). These shares were granted as part of an employee share incentive scheme in which the respondents were participants. The first appellant, SAIS Limited (previously known as "Sarment Holdings Ltd"), was the company whose shares were being granted and the holding company of the second appellant, Kaddra Pte Ltd (previously known as "Sarment (S) Pte Ltd"), which was – at the material time – the respondents' employer.

2 Given the appellants' change in name, to avoid confusion, we will refer to them throughout this judgment as "A1" and "A2", that is, the "first appellant" and the "second appellant" respectively.

The facts

General background

3 On 28 and 10 August 2017, the respondents, respectively, commenced their employments with a company called Sarment Pte Ltd ("SPL"). SPL is not a party to these proceedings; it is, however, a subsidiary of A1. "Sarment" was a group of companies in the business of wine – selling, event planning, tasting, and so on. Although the respondents' employment contracts were with SPL, their appointments at that point in time were in relation to the group's businesses. The first respondent, Michael Jon Hardman ("Mr Hardman"), was the group's Chief Marketing Officer. The title of the second respondent, Nicolas Jack Leon Finck ("Mr Finck"), was "Head of Partnership".

4 In December 2017, A2 was incorporated to be the group's arm for the development of e-commerce applications; as stated, A2 was also a subsidiary of A1. A2 is a party to these proceedings but SPL is not because, sometime in July 2019, both Mr Hardman and Mr Finck's contracts of employment with SPL were terminated, and they each entered into new employment contracts with A2 to fulfil different roles. Mr Hardman became A2's Chief Creative Officer and Mr Finck became the General Manager in A2 for a project called "Keyyes", a subscription-based application which aimed to provide concierge services for luxury goods, amongst other services.

5 Before Mr Hardman and Mr Finck first joined SPL, they were told by the Sarment group's Chief Executive Officer, one Mr Chiarugi, that there were

plans for A1 to be listed and, pertinently, that employees might be granted shares in the then-listed A1. This plan came to fruition on 21 August 2018 when A1 was listed on the TSX-V. Shortly before its listing, A1 introduced a scheme it called the "Sarment Holding Limited Restricted Share Unit Plan" (the "RSU Plan"). This was an employee share incentive scheme, and there is no dispute that the respondents were placed on this scheme. On 21 September 2018, Mr Finck received a letter informing him that he would be granted 38,260 restricted share units ("units") (the "21 September 2018 Grant"). This letter annexed an agreement form which incorporated the general terms of the RSU Plan. Mr Finck signed the form on 28 February 2019. On 29 March 2019, Mr Hardman, who had been informed earlier that he would be granted 199,619 units, signed a similar form (the "29 March 2019 Grant").

Events leading up to the suit below

6 Around the time Mr Hardman and Mr Finck signed the agreement forms to accept their respective grants, the Sarment group's business was starting to suffer. The Keyyes project was unsuccessful and the group had also lost several distribution contracts. As a result, on 29 May 2019, the senior management of A1 announced that it had been considering selling the group's wine and spirits distribution business that was housed in one of its subsidiaries, Sarment Wines & Spirits Holding Pte Ltd ("Sarment Wines").

7 On 29 July 2019, A1 announced that it had entered into a sale and purchase agreement with three of its shareholders for the sale of Sarment Wines. The consideration was US$20.5 million, which the three shareholders were to provide by assuming liability for that amount of the group's debt. The three shareholders were El Greco International Investments SRI ("El Greco"), the Claude Dauphin Estate ("CDE") and Mark Joseph Irwin ("Mr Irwin"). As part

of this deal, Mr Irwin was to acquire a substantial portion of El Greco and CDE's shares in A1, which would result in him having a 53.5% interest in A1. The sale of Sarment Wines and change in majority shareholding required approval at a general meeting. Thus, one was convened on 30 August 2019 and both the sale as well as Mr Irwin's acquisition of a majority shareholding were approved. At this general meeting, the shareholders also approved a resolution to change A1's name from "Sarment Holdings Ltd" to "SAIS Limited".

8 On 13 September 2019, A1 obtained the TSX-V's approval for the sale of Sarment Wines and, on the same day, it announced the closing of the sale. The change in majority shareholding, however, took another month to complete. It was only on 15 October 2019 that Mr Irwin obtained the shares he was supposed to from El Greco and CDE in connection with the sale of Sarment Wines. On 16 October 2019, A1 announced that Mr Irwin held 53.5% of its shares (see the Judgment at [24]).

9 Slightly before all of these major changes were finalised, Mr Finck was made redundant given the failure of the Keyyes project. On 5 September 2019, he was informed that his employment contract with A2 would be terminated with *immediate* effect. He was also told that he would receive his prorated salary for September 2019, pay in lieu of notice, as well as his outstanding bonus for 2018 over four months by way of instalments (see the Judgment at [25]).

10 Mr Finck was not happy with this arrangement, particularly, with the fact that his employment was being terminated shortly before he was scheduled to receive the benefit of the first tranche of one-third of the 38,260 units (*ie*, 12,753 units) he had been conferred by the 21 September 2018 Grant (see [19(a)] below). The same day, he informed Mr Hardman (to whom he reported in A2) and A1's human resource manager, Ms Bong, of his unhappiness.

Mr Finck asked for all his outstanding salary and bonus to be paid at once, and to be allowed to retain the benefit of those 12,753 units, in other words, to receive 12,753 shares in A1 pursuant to his 21 September 2018 Grant. His request was discussed by senior management and acceded to in a letter dated 6 September 2019 issued on the letterhead of A2 ("Mr Finck's Termination Letter"). This letter also provided that his employment with A2 would come to an end *with immediate effect*. To-date, Mr Finck has not received the 12,753 shares relating to the 12,733 units promised by Mr Finck's Termination Letter, and this fact is not disputed by the appellants (see the Judgment at [36] and [49]).

11 Shortly after Mr Finck was made redundant, Mr Hardman's employment with A2 also came to an end. However, before Mr Hardman was made redundant, three important events took place. First, as stated at [8] above, the sale of Sarment Wines and Mr Irwin's acquisition of 53.5% of A1's shares were completed on 13 September and 15 October 2019 respectively. Second, on 4 October 2019, pursuant to the 29 March 2019 Grant, Mr Hardman received 66,540 shares in A1 (see the Judgment at [43]). This represented one-third of his total allocation under the 29 March 2019 Grant. Third, also in October 2019, Mr Chiarugi asked Mr Hardman if he would be amenable to accepting his bonus for 2018 in the form of bonus units instead of cash. Mr Hardman was told frankly that A2 was short on cash, and, on this basis, Mr Hardman agreed to the substitution. Thus, on 9 December 2019, Mr Hardman executed a further agreement with A1 (the "Bonus Units Agreement") which granted him 72,590 units in lieu of his 2018 cash bonus ("the 72,950 bonus units") (see the Judgment at [28]–[29]).

12 In January 2020, Mr Hardman was informed that he would be made redundant. He asked that he be allowed to resign instead to avoid any prejudice

to future job opportunities. A2 agreed and, on 15 January 2020, Mr Hardman tendered his resignation. On 29 January 2020, A2 issued a letter to Mr Hardman titled "Terms & Conditions of your resignation dated 15 January 2020". This letter stated that the 72,590 bonus units would be "issued and vesting [*sic*] at end February 2020" ("Mr Hardman's Termination Letter") (see the Judgment at [30]–[31]). Mr Hardman countersigned the letter to signify his agreement thereto.

13 However, nothing else was done in respect of those units by the end of February 2020. On 19 February 2020, A1 announced that it had filed an application to delist its shares from the TSX-V. This application was approved on 5 March 2020 and A1's last trading day was 16 March 2020 (see the Judgment at [32]).

14 By June, Mr Hardman still had not received the shares representing the 72,590 bonus units owing under the Bonus Units Agreement. Thus, on 17 June 2020, his solicitors wrote to A2 to state Mr Hardman's view that the delay was a repudiatory breach of the agreement, and, in response, that he was electing to treat the agreement as discharged. In substitution, Mr Hardman demanded his 2018 bonus be paid in cash. There was no response from A2. On 21 September 2020, without prompting from Mr Hardman, A1 then unilaterally issued 205,669 of its shares in Mr Hardman's name, this being the sum of 133,079 outstanding shares in respect of the units granted pursuant to the 29 March 2019 Grant (see [5] above) and the 72,590 shares that he was entitled to under the Bonus Units Agreement. It bears noting that these 205,669 shares were issued after A1 was delisted from TSX-V and the suit below was commenced.

15 As a result of the appellants' failure to provide any shares to Mr Finck (see [10] above) and their failure to provide the 205,669 shares to Mr Hardman in a timely manner, the respondents commenced the suit below on 17 July 2020 primarily to recover damages. As regards the Bonus Units Agreement, Mr Hardman sought his 2018 cash bonus instead of the shares representing the 72,590 bonus units.

Mechanics of the RSU Plan

16 Before we turn to describe the bases on which the respondents founded their claims for damages in the suit below and the Judge's determination of those claims, we will reproduce the salient terms of the RSU Plan and explain their operation. The manner in which the RSU Plan operated was somewhat convoluted and forms the main subject of dispute in the present appeal. It is therefore useful to clarify its mechanics early in this judgment.

General mechanics

17 To begin, a grant of units is made by A1 to an employee of the Sarment group. For example, to Mr Finck on 21 September 2018 and Mr Hardman on 29 March 2019 (see [5] above). As a starting point, it needs to be understood that these units were not shares in and of themselves. The terms of the RSU Plan provided that a unit was an "entry on the books of [A1]" which represented the participating employee's right to receive an equivalent number of fully paid-up shares in A1 at some later point in time (we will turn to this at [20] below), after the units "vested". Clauses 1.1(x) and (kk) provide:

> 1.1 Where used herein, the following terms shall have the following meanings, respectively:
>
> …

> (x) "Restricted Share Unit" means a restricted share unit credited pursuant to Article 3, by means of an entry on the books of [A1], to a Participant, each of which represents the right to receive its equivalent in fully-paid Shares;
>
> …
>
> (kk) "Vested Restricted Share Unit" means any [unit] which has vested in accordance with the terms of the Plan and/or the terms of any applicable Grant Agreement;
>
> …

18 Each date on which the units were to "vest" was a date after their grant. Section 3.1 of the RSU Plan stipulated that the vesting dates for granted units were to be determined at the sole discretion of the board for A1, subject to the restriction that the vesting dates were not to go beyond 15 December of the third year following the year of the grant. For example, given that Mr Hardman's units were granted on 29 March 2019, applying section 3.1, the latest date by which his units were to "vest" would have been 15 December 2022. The salient portions of section 3.1 read:

> 3.1 Subject to the Disclosure, Confidentiality and Insider Trading Policy of [A1] and all applicable laws, *[A1] may from time to time grant [units] to a Participant* in such numbers, at such times and on such terms and conditions, consistent with the [RSU Plan], as the [Board of A1] may in its sole discretion determine; provided, however, that no [unit] will be granted after December 15 of a given calendar year. For greater certainty, the [Board of A1] shall, in its sole discretion, determine any and all conditions to the *vesting of any [unit] granted to a Participant … provided that no such vesting condition for a [unit] granted to a director, officer or employee shall extend beyond December 15 of the third calendar year following the year in which the [units] were granted …*
>
> [emphasis added]

19 We need not concern ourselves with this section too much because, as far as Mr Hardman and Mr Finck were concerned, the vesting dates for their

units were not in dispute. The vesting dates were stated in the form agreements issued by A1 when they were granted their units (see [5] above).

(a) On 21 September 2018, Mr Finck was granted 38,260 units and the agreement form he signed on 28 February 2019 provided that the units were to vest in three tranches (see the Judgment at [10]):

(i) 12,753 on 21 September 2019;

(ii) 12,753 on 21 September 2020; and

(iii) 12,754 on 21 September 2021.

(b) On 29 March 2019, Mr Hardman was granted 199,619 units and his agreement form provided that these units would vest in three tranches (see the Judgment at [13]):

(i) 66,540 on 21 August 2019;

(ii) 66,540 on 21 August 2020; and

(iii) 66,539 on 21 August 2021.

20 After a participating employee's units "vest", A1 then needs to make "payment" on or "settle" the vested units by providing shares in A1 to that employee. The usage of these two terms in the RSU Plan is not consistent and in this judgment, we will use the word "settle" as far as possible. The settlement of shares is governed by section 4.3 of the RSU Plan. First, as regards the method, settlement may be effected by A1 by either purchasing shares from the open market on behalf of the employee, or, alternatively choosing to issue treasury shares to the employee. Second, as regards timing, the language of section 4.3 seems to provide that such payment or settlement shall be made within 15 days of the vesting date:

> 4.3 *On a date (the "RSU Payment Date")* to be selected by the Board following the date a [unit] has become a Vested [unit], *which* date *shall be within fifteen (15) days of the Vesting Date and which* date *shall not, in any event, extend beyond December 15th of the third year following the year of grant for the particular [unit], [A1]*, at its sole and absolute discretion, *shall have the option of settling the Vested [unit] by any of the following methods or by a combination of such methods*, subject to Section 4.5 and Section 4.7 hereof, all applicable laws and the receipt of all necessary approvals of the TSXV and shareholder approval, if required by the TSXV and any applicable laws:
>
> (a) elect to purchase on the open market for the Participant, …; or
>
> (b) elect to issue Treasury Shares, …
>
> [emphasis added]

21 There are, however, two points of disagreement regarding this section.

22 First, the appellants contended at trial (see the Judgment at [72]), and, they maintain in this appeal, that the phrase "December 15th of the third year following the year of grant for the particular [unit]" does not operate as a longstop, but rather, as allowance for the board of A1 to settle units on any date after vesting, so long as that date is before 15 December of the third year following the date of grant. So, using Mr Hardman's grant date of 29 March 2019 as an illustration, the appellants' position is that, after his three tranches of granted units vested on 21 August 2019, 2020 and 2021, respectively, A1 was only obliged to settle these vested units by 15 December 2022.

23 In our view, this interpretation is wrong for two reasons. First of all, textually, reading section 4.3 in this manner renders the first imperative in the section, which prescribes that the RSU Payment Date "shall be within fifteen (15) days of the Vesting Date", entirely otiose. Second, purposively, it is not in dispute that the objective of the RSU Plan was to foster a sense of belonging, incentivise employees to stay with the Sarment group, and to reward them for

their efforts (see the Judgment at [9]). This being the purpose of the RSU Plan, it can be readily understood why it provided for units to vest annually rather than all at once. This served to confer sustained rewards over a period of continued loyalty and contribution to the Sarment group. If units were vested entirely upon being granted, that would scarcely incentivise loyalty. However, conversely, if units vested annually but shares did not need to be settled until the end of the three-year period from the year of the grant, that equally does little to foster a sense of belonging. The middle ground interpretation, that units vested annually and shares had to be issued shortly after the vesting, accords logically with the undisputed purpose of the RSU Plan.

24 We therefore do not accept the appellants' contention that section 4.3 of the RSU Plan allowed A1 to settle vested units at any time after vesting, so long as this was done before 15 December of the third year following the year of the grant of the particular unit. In our judgment, A1 had to effect settlement on these vested units within 15 days of their vesting. The reference in section 4.3 to a date which "shall not, in any event, be beyond December 15th of the third year following the grant of the particular [unit]" was just a longstop. It does not obviate A1's primary obligation to settle vested units within 15 days from the date on which they vest.

25 The second point of disagreement was whether this longstop date (of "December 15th of the third year following the grant of the particular [unit]") refers to the *vesting* date of the units or the RSU *Payment* Date defined in section 4.3 itself. Interpreting the section one way or the other leads to the following practical difference:

(a) If the "December 15th" date refers to the vesting date of units, then, the "RSU Payment Date" would be 15 December of the third year

following the year of the grant, *plus* another 15 days, *ie*, 30 December of that third year.

(b) However, if it refers to the "RSU Payment Date" itself, then the longstop date for vesting under section 3.1 and settlement under section 4.3 would *both* be 15 December of the third year following the year of the grant. Thus, for example, if a unit granted sometime in 2019 is scheduled to vest on the very last day allowable by section 3.1, *ie*, 15 December 2022, this latter reading of section 4.3 would mean that the board of A1 does not have a 15-day window thereafter to arrange for settlement of the vested units. The board would need to make settlement on the same date on which those units vest, *ie*, 15 December 2022.

26 Initially, the appellants appeared to think that the longstop date referred to the settlement date. However, in the hearing before us, they accepted that it referred to the vesting date. While the plain language of section 4.3 could accommodate either interpretation, the position the appellants took at the hearing before us is more consistent with the terms of section 3.1 (see [18] above). Accordingly, the longstop date for settling vested units under section 4.3 should be 15 days thereafter, *ie*, 30 December of the third year and not 15 December of the third year.

27 For completeness, neither interpretation is wholly consistent with section 4.6 of the RSU Plan which states that all "payments" are to be made on or before *31* December, instead of 30 December, of the third calendar year following the year of the grant. Furthermore, under section 4.7, delivery of shares is to be made within 15 business days of the "RSU Payment Date". So, if the longstop date for settlement (though, in the case of section 4.6, the word used is "payment": on this, see [20] above) is 30 December of the third year,

then, pursuant to section 4.7, delivery of shares may be made by 14 January of the next year. It is also not clear what the difference is between the date by which A1 was required to settle vested units and the date on which it was obliged to "deliver" shares to the participating employee. These two sections read:

> 4.6 Notwithstanding any other provision of the [RSU Plan], all amounts payable to, or in respect of, a Participant under Section 4.2, including, without limitation, *the issuance or delivery of Shares and/or Treasury Shares, shall be paid or delivered on or before December 31 of the third calendar year commencing immediately following the year of grant in respect of the particular [unit].*
>
> 4.7 Subject to Section 4.5 above, the Board or the Administrator *will ensure that delivery of the Shares and/or Treasury Shares, is made within fifteen (15) Business Days after the RSU Payment Date.*
>
> [emphasis added]

28 The drafting of these provisions is unsatisfactory. Counsel for the appellants ("Mr Leong") – whose client, A1, was the one who prepared the RSU Plan – also made no meaningful attempt to explain to us how all of these provisions were to be understood as a coherent whole. However, as neither side relied on section 4.6 and section 4.7 in the appeal, we need not say any more about them especially since they do not affect our determination of the matter. Accordingly, we need not discuss when the shares were to be "delivered" after settlement.

29 In summary, based on our interpretation of the foregoing sections of the RSU Plan, it operated as follows (in particular, based on the dates applicable to Mr Hardman and Mr Finck):

> (a) The grant of shares to Mr Hardman and Mr Finck were to vest according to the schedules reproduced above (see [19] above).

(b) A1 was obliged to settle the vested units within 15 days thereafter. For example, in respect of Mr Hardman's first tranche of 66,540 units slated to vest on 21 August 2019, A1 would be obliged to settle by 3 September 2019 (this would be the "RSU Payment Date" referred to in section 4.3).

30 We also highlight a proviso to section 4.3 of the RSU Plan which stated:

> *A holder of RSUs shall not have any right to demand to receive Shares or Treasury Shares in respect of an RSU at any time.* Notwithstanding any election by [A1] to settle a Vested [unit], or portion thereof in Shares or Treasury Shares, [A1] reserves the right to change its election in respect thereof at any time up until payment is actually made, and the holder of such Vested [unit] shall not have the right, at any time to enforce settlement in the form of Shares or Treasury Shares. *The Participant shall not transfer, sell or assign any Shares or Treasury Shares received by the Participant pursuant to the settlement of Vested [units] until six months following the date of* ***settlement*** *of such Vested [units].*
>
> [emphasis added in italics; further emphasis in bold italics]

31 The effect of this proviso is to prevent participating employees from selling off their shares within six months of the date of "settlement". Therefore, using Mr Hardman's first tranche of 66,540 units as an example again, he would be barred from selling the 66,540 shares he received on 3 September 2019 (if that were the date he received them) until 3 March 2020. The parties as well as the Judge referred to this as a "moratorium" and we adopt the same terminology.

Mechanics upon a "Change of Control" event

32 The foregoing sets out how, ordinarily, units granted under the RSU Plan vest, and are settled after vesting. However, the timeframe for the vesting of units and settling of vested units could be accelerated. This was because section 5.3 of the RSU Plan provided for what it referred to as a Change of

Control event as defined in section 1.1(i). Such an event included, for example, the sale of all or substantially all of the assets, rights and properties of A1 and its subsidiaries. Upon a Change of Control event, all units granted under the RSU Plan were deemed as having "vested immediately" prior to the event, irrespective of their scheduled vesting dates, *and*, would also become "payable effective immediately" on the same date.

33 The relevant portions of the RSU Plan, sections 1.1(i) and 5.3, read:

> 1.1 Where used herein, the following terms shall have the following meanings, respectively:
>
> …
>
> (i) "Change of Control" means the occurrence of any one or more of the following events:
>
> (i) …
>
> (ii) *the sale*, lease, exchange or other disposition, in a single transaction or a series of related transactions, *of all or substantially all of the assets, rights or properties of [A1] and its Subsidiaries* on a consolidated basis to any other person or entity, other than transactions among [A1] and its Subsidiaries;
>
> (iii) …
>
> (iv) *any person*, entity or group of persons or entities acting jointly or in concert (an "Acquiror") acquires, or *acquires control* (including, without limitation, the right to vote or direct the voting) of, Voting Securities *of [A1]* which, when added to the Voting Securities owned of record or beneficially by the Acquiror or which the Acquiror controls, would entitle the Acquiror and/or Associates and/or Affiliates of the Acquiror, *to cast* or to direct the casting of *50% or more of the votes attached to all of [A1's] outstanding Voting Securities* which may be cast to elect directors of [A1] or the successor corporation (regardless of whether a meeting has been called to elect directors); or
>
> (v) …
>
> For the purposes of the foregoing definition of Change of Control, "Voting Securities" means Shares and any other shares entitled to vote for the election of directors and, for

> the purposes of calculating the number of securities of [A1] owned or controlled by the Acquiror, it shall include any security, whether or not issued by [A1], which are not shares entitled to vote for the election of directors but are convertible into or exchangeable for shares which are entitled to vote for the election of directors including any options or rights to purchase such shares or securities.
>
> …
>
> 5.3 *In the event of a Change of Control, all [units] shall be deemed to have vested immediately prior to the occurrence of the Change of Control and shall become payable effective immediately on such date* and, to the extent [A1] is involved in a transaction where the occurrence of the Change of Control is dependent on actions to be taken by [A1], *it shall ensure that all entitlements relating to such [units] are paid to Participants concurrently with and as a condition of closing of such Change of Control transaction.*
>
> [emphasis added]

34 To illustrate the manner in which section 5.3 operates, at the trial below, the respondents averred that a Change of Control event took place either on 13 September 2019 or 15 October 2019 (respectively, the date on which the sale of Sarment Wines was completed and the date on which Mr Irwin obtained 53.5% of A1's shares: see [8] above). On this basis, they made two arguments. First, that they were entitled – on either of these dates – to have all of their granted but unvested units vest immediately. Second, upon the immediate "vesting" of the units, A1 was also obliged to immediately settle the vested units. So, as A1 did not provide them the relevant quantities of shares by these dates, the respondents claimed to be entitled to damages valued at the market price of the shares on the same dates.

35 Put another way, the respondents took the view that since section 5.3 had been engaged, the ordinary settlement provision (*ie*, section 4.3 of the RSU Plan: see [20] above) did not apply. Instead, the Change of Control would not only cause the units to *vest* immediately, but also the immediately vested units

would need to be settled immediately. Accordingly, they would then be able to monetise those shares by sale in the open market without any moratorium. This is the interpretation of section 5.3 which the Judge preferred (see the Judgment at [75]–[78]).

36 The appellants disputed at trial that this was the manner in which section 5.3 of the RSU Plan operated, and they maintain this position on appeal. They contend that section 5.3 only caused granted but unvested shares to immediately *vest*. The section did not also have the effect of obliging A1 to immediately settle those vested units. A1's obligation to settle was instead – the appellants submit – still governed by section 4.3 of the RSU Plan. On this basis, they claimed to have been entitled to settle vested units at any time before 15 December of the third year following the year of the grant of the units in question. Further, the appellants also say that it would be "absurd" to expect A1 to ensure that settlement is made on vested units concurrently with a Change of Control event. Such a reading would require A1 to take steps to initiate the process for settlement before the Change of Control event concluded to ensure settlement concurrently with the event. The appellants say that such steps are beyond the control of A1.

37 We reject this interpretation of section 5.3. First of all, the section draws a clear distinction between a unit "vesting" and a unit becoming "payable" (which, as stated at [20] above, we treat as used interchangeably with the word "settleable"). This alone undermines the appellants' reading. A1 drafted the RSU Plan and if it was not its intention that section 5.3 has the effect which its plain words suggest, it would have drafted the provision differently.

38 Second, we do not understand why it would be absurd to require A1 to take steps beforehand to effect settlement immediately upon a Change of

Control event. The appellants argue that the issuance of shares by A1 is subject to external factors outside its control. However, this assumes that the settlement can only be done by the issuance of shares. Instead, the settlement may be done either by issuance of shares or purchase in the open market (as mentioned in section 4.3). In any event, section 5.3 requires A1 to effect settlement as a condition of closing of the transaction which is the Change of Control event. Hence, it was for A1 to ensure compliance with section 5.3. We therefore find the appellants' argument to be contrived and a mere pretext to avoid the clear terms of section 5.3. Finally, even if we accept the appellants' interpretation of section 5.3, given our rejection of their reading of section 4.3 (see [22]–[24] above), the application of section 4.3 would then only grant A1 an additional 15 days to settle the vested units from the date of immediate vesting upon the Change of Control Event and not from 15 December of the third year of the year of grant to Mr Hardman and to Mr Finck respectively.

39 Accordingly, in our view, once it is determined that a Change of Control event occurred on a particular date, section 5.3 has the effect of causing any granted but unvested units to vest immediately, and obliging A1 to effect settlement on the same date. As regards how a Change of Control event is determined to have occurred under section 1.1(i) of the RSU Plan, this is an issue to which we return later.

Effect of terminating a participant's employment

40 Another relevant portion of the RSU Plan which needs to be highlighted is section 5.1. This section provided that if the participating employee ceases his employment with the relevant Sarment company which is his employer – either A1 or its subsidiaries – "any [units] granted [but] which have not become

Vested [units] prior to [the employee's] Termination … shall automatically and immediately terminate".

41 The full, section 1.1(gg) and 5.1 of the RSU Plan read:

> 1.1 Where used herein, the following terms shall have the following meanings, respectively:
>
> …
>
> (gg) "Termination Date" means, in respect of a Participant, *the date that the Participant ceases to be a director of, ceases to be actively employed by, or ceases to provide services as a Consultant to, [A1] or a Subsidiary for any reason*, without regard to any statutory, contractual or common law notice period that may be required by law following the termination of the Participant's employment or consulting relationship in [A1] or Subsidiary. The Board will have sole discretion to determine whether a Participant has ceased active employment or ceased status as a Consultant and the effective date on which the Participant ceased active employment or status of a Consultant. A Participant will be deemed not to have ceased to be an employee of [A1] or a Subsidiary in the case of a transfer of his employment between [A1] and a Subsidiary or a transfer of employment between Subsidiaries;
>
> …
>
> 5.1 Notwithstanding the provisions of Article 4 and *subject to the remaining provisions of this Article 5* and to any express resolution passed by the Board, on a Participant's Termination Date, any [unit] granted to such Participant which have not become Vested [units] prior to the Participant's Termination Date shall automatically and immediately terminate.
>
> [emphasis added]

42 As stated at [10] above, Mr Finck's employment was terminated with immediate effect on 6 September 2019. It will be noted that this was *before* both the completion of the sale of Sarment Wines on 13 September 2019 and the date when Mr Irwin obtained 53.5% of A1's shares on 15 October 2019 (see [8] above). A question which therefore arose at trial was whether section 5.3 had any effect on the units granted to *Mr Finck* by the 21 September 2018 Grant

since his employment had been terminated before either of these potential Change of Control events occurred. The Judge determined this issue in favour of Mr Finck (see the Judgment at [89]–[95]) and the appellants challenge this on appeal. We will therefore address it at [79] below when we turn to consider the appellants' case in respect of Mr Finck's claim.

The suit below

43 In the suit below, Mr Hardman brought two claims. First, he claimed as damages the value of 133,079 shares in A1. This represented the number of outstanding shares he averred was owing to him pursuant to the units granted under the 29 March 2019 Grant. Second, Mr Hardman regarded the Bonus Units Agreement as discharged and sought to claim his 2018 bonus *in cash*.

44 Mr Finck brought two claims in the alternative. His primary claim was for damages representing the full value of all 38,260 shares in A1 that were represented by the units granted to him under the 21 September 2018 Grant. Alternatively, Mr Finck claimed that he was entitled to damages in respect of the appellants' failure to provide him the 12,753 shares in A1 which he had been promised in Mr Finck's Termination Letter (see [10] above).

Mr Hardman's claim in respect of the 29 March 2019 Grant

45 The basis of Mr Hardman's claim for 133,079 shares in relation to the 29 March 2019 Grant was section 5.3 of the RSU Plan (see [32]–[35] above). He alleged that the sale of Sarment Wines completed on 13 September 2019 or Mr Irwin's acquisition of a 53.5% shareholding of A1 on 15 October 2019 amounted to a Change of Control event. Thus, on either of these dates, Mr Hardman claimed that his unvested units became vested immediately, and, that he also became immediately entitled to the settlement of those units. Since

the shares were not provided to him on time (see [14] above), he claimed the damages for their value on the date they were supposed to be settled.

46 The appellants did not deny the quantity of shares which Mr Hardman claimed to be owed. Indeed, at trial, the appellants did not even seriously dispute that the sale of Sarment Wines amounted to a Change of Control event (see the Judgment at [60]–[66]). Instead, their quarrel in respect of this claim was twofold. First, they contended that section 4.3 of the RSU Plan allowed them to provide Mr Hardman these 133,079 shares by any date as long as it was before 15 December of the third year following the year of his grant (*ie*, 15 December 2022). As such, since they did in fact provide him these shares on 21 September 2020, they argued that his claim was wholly extinguished (see the Judgment at [43]–[46]). Second, they relied on the proviso to section 4.3 of the RSU Plan (see [30] above) which seemed to impose a six-month moratorium on the sale shares which participating employees received under the RSU Plan. This latter contention was significant because, on 13 September 2019 (the date on which the sale of Sarment Wines was completed), the value of A1's shares on the TSX-V was CA$2.00. Six months later, on 13 March 2020, it was only CA$0.08. Thus, if the appellants were correct, Mr Hardman's damages assessed on 13 March 2019 would be far lower than if assessed on 13 September 2019.

47 The Judge allowed Mr Hardman's claim and quantified the damages he suffered based on the market price of A1's shares on 13 September 2019. Four findings are pertinent to note. First, the Judge accepted that the sale of Sarment Wines on 13 September 2019 was a Change of Control event under section 1.1(i)(ii) of the RSU Plan (see [33] above). He noted that the wines and spirits distribution business carried on by Sarment Wines had accounted for 95.7% of A1's revenue in the period which ended in March 2019, and, furthermore, that there was an 86% drop in the book value of A1's assets after Sarment Wines

had been sold (see the Judgment at [64]). It could therefore scarcely be doubted that this amounted to a sale of "substantially all" of the assets, rights or properties of A1 and its subsidiaries.

48 Second, the Judge determined that, upon the sale of Sarment Wines, the unvested units under the 29 March 2019 Grant vested immediately, and, importantly, became immediately payable (or settleable). The Judge rejected the appellants' contention that section 5.3 of the RSU Plan only caused the unvested units to *vest*, but did not oblige it to provide the equivalent number of shares to participating employees immediately. Thus, in light of his finding that the Change of Control event (*ie*, the sale of Sarment Wines) occurred on 13 September 2019, Mr Hardman's damages were to be assessed by reference to this date (see the Judgment at [75]–[78]).

49 Third, in respect of the appellants' reliance on the proviso to section 4.3, the Judge took the view that such moratorium only applied in the usual situation where participating employees are provided shares pursuant to the terms of their grant and upon application of section 4.3. By contrast, where a Change of Control event occurs, section 5.3 provides that shares must be provided to the employee "immediately". If the moratorium on sale still applied in such cases, the Judge thought that this would "make a nonsense" of the requirement that the shares be provided immediately. Accordingly, he took the view that the more specific provision of section 5.3 overrode the more general section 4.3, citing *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131] (see the Judgment at [132]).

50 Finally, the Judge found that the appellants had failed to prove that Mr Hardman had accepted the 205,669 shares issued in his name on 21 September 2020. There was some lack of clarity as regards whether Mr Hardman accepted

these shares. On one hand, he seemed to be aware that an electronic share certificate for these shares had been issued in his favour, and he did not take steps to positively reject them. On the other hand, Mr Hardman also did not do anything to suggest that he had accepted these shares. He only received an email prompting him to accept the electronic share certificate, which he ignored. He was also not sent the physical share certificate. When referred to the electronic share certificate at trial, Mr Hardman stated that he was rejecting the document but did not give any explanation as to why he did not take steps earlier to refuse the shares. In light of these uncertainties, the Judge took the view that the appellants had failed to adduce sufficient evidence to establish that Mr Hardman had accepted these shares from A1 as part or full performance, thereby extinguishing his claim (see the Judgment at [110]).

51 On these premises, the Judge found that Mr Hardman was entitled to receive 133,079 shares in A1 on 13 September 2019 and that he would also have been entitled to monetise such shares immediately. As the value of A1's shares on this date was CA$2.00, he determined that Mr Hardman was entitled to be paid CA$266,158.00 in damages (see the Judgment at [130] and [137(a)]).

Mr Hardman's claim in respect of the Bonus Units Agreement

52 The Judge rejected Mr Hardman's claim for his 2018 bonus in cash as Mr Hardman had agreed to vary the terms of his employment by accepting the 2018 bonus in the form of 72,590 shares. Mr Hardman had argued that he was entitled to be discharged from the Bonus Units Agreement as he had accepted A2's repudiatory breach of that agreement. The Judge reasoned that, although A2 failed to take steps to ensure that the 72,590 shares in A1 were issued to Mr Hardman, and that this amounted to a repudiatory breach, the discharge of a breached contract would not restore the parties to their original pre-contractual

position before Mr Hardman agreed to take the 2018 Bonus in the form of shares. The breach simply entitled Mr Hardman to sue for damages (see the Judgment at [104]–[105]).

53 The Judge observed that despite certain earlier changes in position, in the trial before him, it was "common ground … that [Mr Hardman] was to be provided [the shares representing his 2018 bonus] by the end of February 2020" (see the Judgment at [99]). Further, for substantially the same reasons as set out at [49] above, the Judge also took the view that the proviso to section 4.3 of the RSU Plan did not apply to preclude Mr Hardman from monetising these 72,590 shares immediately. The Judge reasoned that this situation was similar to one where section 5.3 applied because the shares needed to be provided by a specific date. Accordingly, the ordinary moratorium imposed by section 4.3 in the usual case would not apply (see the Judgment at [133]).

54 As at 28 February 2020, A1's shares were valued at CA$0.13, and, thus, the Judge awarded Mr Hardman CA$9,436.70 in damages for A2's failure to provide him with 72,590 shares in A1 by this date (see the Judgment at [130] and [137(b)]).

Mr Finck's claim in respect of the 21 September 2018 Grant

55 The basis of Mr Finck's primary claim was, like Mr Hardman's claim in respect of the 29 March 2019 Grant (see [45] above), section 5.3 of the RSU Plan. Relying on section 5.1 (see [41] above), the appellants responded that Mr Finck's claim could not succeed because his employment had been terminated on 6 September 2019, *before* the Change of Control event took place on 13 September 2019. Alternatively, they contended that, even if Mr Finck's claim under section 5.3 could be made out, he had compromised any such claim

when he accepted Mr Finck's Termination Letter which provided that he was entitled to receive 12,753 shares (only). This, the appellants averred, amounted to a full and final settlement of any claims he might have had against them.

56 The Judge did not accept the appellants' contentions and allowed Mr Finck's claim on the basis of section 5.3. The Judge was mindful that the Change of Control event post-dated Mr Finck's termination, and that, section 5.1 might have extinguished his right to receive the benefit from the granted units which remained unvested at the point of his termination. Notwithstanding this possibility, the Judge took the view that section 5.1 did not affect Mr Finck's right to benefit from the operation of section 5.3.

57 The Judge's reasoning began from section 5.1, which states that its operation is subject to the rest of Article 5, including section 5.3 (see the Judgment at [90]). The first question which he sought to answer was when the Change of Control under section 5.3 had been first engaged in this case even though the event (represented by the closing of the transaction) occurred on 13 September 2019. To answer this, he relied on section 1.1(i)(ii), which provides that a Change of Control event could be effected by a "series of related transactions" (see [33] above). From here, the Judge then determined that the first transaction in the series of transactions leading up to the completed sale of Sarment Wines took place on 29 July 2019 which was the date of the agreement to sell the wine business (see the Judgment at [92]). At that time, Mr Finck was still employed by A2. Placing emphasis on the fact that section 1.1(i)(ii) accommodated a series of transactions, the Judge concluded that section 5.3 "was already engaged" on 29 July 2019 (see the Judgment at [93]). Accordingly, although Mr Finck had been terminated before the Change of Control event occurred on 13 September 2019, the Judge reasoned that his "rights to his

awarded but unvested [units] remain[ed] governed by [section] 5.3 of the RSU Plan" (see the Judgment at [95]).

58 The Judge also rejected the appellants' contention that Mr Finck had compromised any claims he had against them for the total number of shares related to the units granted by the 21 September 2018 Grant. He examined Mr Finck's Termination Letter and took the view that it did not indicate that Mr Finck had given up his claim for the balance of his granted units (see the Judgment at [114]).

59 The Judge was also of the view that at the time of Mr Finck's Termination Letter, Mr Finck did not consider whether he was entitled to the balance of the units. Furthermore, Mr Chiarugi had agreed in cross-examination that Mr Finck's Termination Letter did not amount to a compromise by Mr Finck of his claim for the balance (see the Judgment at [115]–[116]).

60 For these reasons, the Judge held that on 13 September 2019, Mr Finck – like Mr Hardman – was entitled to receive the benefit of all the units which he had been granted under the 21 September 2018 Grant, in accordance with section 5.3 of the RSU Plan (see the Judgment at [95]). The Judge thus awarded Mr Finck CA$76,520 in damages calculated using the price of A1's shares on 13 September 2019, *ie*, CA$2.00 per share for 38,260 shares. For completeness, we also note that the Judge's reasoning in respect of the proviso to section 4.3 (see [49] above) applied equally to Mr Finck's claim.

Mr Finck's claim in respect of his Termination Letter

61 In the alternative, the Judge found that – in the event that he was wrong in determining that section 5.3 applied to Mr Finck's situation – Mr Finck's claim for 12,753 shares based on his Termination Letter would have succeeded.

62 The appellants accepted that, by Mr Finck's Termination Letter, it was agreed that he would be entitled to receive 12,753 shares in A1. However, they nevertheless denied liability on the grounds that Mr Finck did not take steps to open a brokerage account, and, as such, the non-delivery of these 12,753 shares was the fault of Mr Finck himself (see the Judgment at [49]). The Judge did not accept this. He accepted that Mr Finck did not in fact open a brokerage account (see the Judgment at [120]). However, there was conflicting evidence as to what was actually required for Mr Finck to receive these shares. One of the appellants' witnesses gave evidence that in order for shares to be issued to Mr Finck, all that was required was his email address and residential address. Further, this witness also eventually conceded that these shares were not issued to Mr Finck because A1 purportedly lacked the shareholders' mandate to issue shares. Given these inconsistencies, the Judge took the view that the appellants were not able to coherently explain why Mr Finck was not issued these shares (see the Judgment at [121]–[122]). Accordingly, if he had been wrong in respect of section 5.3, he would nevertheless have awarded Mr Finck damages representing the value of 12,753 shares in A1 (see the Judgment at [122]). However, the date at which he would have valued them in this alternative is not entirely clear.

The grounds of appeal

63 The appellants' case on appeal relies on the same arguments which they advanced at trial, and which the Judge rejected. We have dealt with some of these arguments from [16]–[42] above, when describing the mechanics of the RSU Plan. The respondents did not bring a cross appeal. Furthermore, Mr Hardman no longer seeks his bonus in cash as such and is content to receive damages for A2's breach of the Bonus Units Agreement.

64 In respect of Mr Hardman's claims, the appellants raise three grounds of appeal. The first two concern his claim in respect of the 29 March 2019 Grant, and the third concerns his claim in respect of the Bonus Units Agreement.

(a) The first ground is the contention which we have stated at [22] above. In essence, that, even upon the occurrence of a Change of Control event, section 4.3 of the RSU Plan governed A1's obligation to settle vested units, and allowed it to settle Mr Hardman's vested units at any time before 15 December 2022. Relying on this, the appellants say that since Mr Hardman has been issued the correct number of shares on 21 September 2020 (see [14] above) within the permissible timeframe provided by section 4.3, his claim is extinguished. Alternatively, the appellants contend that as Mr Hardman remains in possession of these shares, he bears the burden of proving their value and their liability should be set off against the value of such shares to be ascertained in a separate hearing. At the hearing before us, Mr Leong accepted that this contention did not form a part of his clients' pleaded case. The appellants had pleaded that Mr Hardman's claim was *extinguished*, not that they were entitled to a set-off. In any event, before us, the appellants were not relying on extinguishment but a set-off. He argued that there should be a separate hearing to assess the value of the shares which had been issued in Mr Hardman's name.

(b) The second ground of appeal in respect of Mr Hardman's claims concerns the quantum. The appellants submit that, even if they were obliged to issue the 133,079 shares to Mr Hardman on 13 September 2019, the Judge nevertheless erred in selecting this date to value these shares for the purposes of Hardman's claim for damages. This was because section 4.3 imposed a moratorium of six months from receipt

on the sale of shares provided under the RSU Plan for. Thus, six months from 13 September 2019 would have been 13 March 2020, and the market price for the shares on this date was CA$0.08 as compared to the CA$2.00 on 13 September 2019 as determined by the Judge.

(c) The appellants' third ground of appeal does not raise different points. Rather, it makes the same argument as the first ground of appeal, as stated above, to Mr Hardman's claim for damages in respect of the 72,590 units granted under the Bonus Units Agreement. In essence, the appellants' case is that Mr Hardman was entitled to receive 72,590 shares in A1 in accordance with the ordinary timeframe set out in section 4.3 of the RSU Plan (*ie*, by 15 December 2022) and not by "the end of February 2020" as suggested in Mr Hardman's Termination Letter (see [12] above). It bears highlighting that, in so far as these 72,590 shares are concerned, the appellants do not *seem* to rely on the moratorium imposed by section 4.3, though the clarity of their case leaves a little to be desired. Giving them the benefit of doubt, we will nonetheless consider whether the moratorium applies.

65 In respect of Mr Finck's claims, three grounds of appeal are also raised.

(a) First, the appellants argue that Finck had compromised his claims against them, including in relation to the RSU Plan, under a settlement agreement as comprised in or evidenced by Mr Finck's Termination Letter.

(b) Second, the appellants submit that the Judge erred in determining that Mr Finck was entitled to receive the benefit of all 38,260 units he had been granted by the 21 September 2018 Grant. The error, they argue, arises from the fact that Mr Finck was terminated with immediate effect

on 6 September 2019. This was *before* the Change of Control event took place, and, thus, section 5.3 of the RSU Plan was not engaged in Mr Finck's case. On the contrary, they contend that section 5.1 of the RSU Plan applied instead. Section 5.1 provided that, upon the termination of an employee's contract of employment, he was no longer entitled to the benefit of any granted but unvested units (see [41] above). Accordingly, the Judge should have decided that Mr Finck was only entitled to receive 12,753 shares in A1 promised to him by his Termination Letter.

(c) The appellants' third ground of appeal in respect of Mr Finck's claim also concerns the timeframe for delivery permitted by section 4.3 as well as the moratorium imposed by the same section of the RSU Plan. This ground of appeal thus mirrors the first and second grounds of appeal they have raised in respect of Mr Hardman's claims (see [64(a)] and [64(b)] above).

Our decision

66 Before we assess the grounds of appeal, we note that, in raising all of them, the appellants expressly accept that they are not disputing the Judge's finding that the sale of Sarment Wines, completed on 13 September 2019, amounts to a Change of Control event under section 1.1(i)(ii) of the RSU Plan.

Mr Hardman's claim in respect of the 29 March 2019 Grant

67 We begin with the first ground of appeal. The appellants' case in respect of this ground turns on two points. First, how section 4.3 of the RSU Plan should be interpreted, and, second, how its interaction with section 5.3 ought to be understood. We have dealt with the first point at [20]–[29] above and the second

at [36]–[39] above when we dealt with the mechanics of the RSU Plan. We need not repeat our analysis.

68 It suffices to restate our conclusions. First, section 4.3 did not allow A1 to settle vested units at any time it wished, so long as this is done before 15 December of the third year following the year of the relevant grant. The plain language of section 4.3 required A1 to effect settlement within 15 days of the date of vesting. So, this provision does not aid the appellants' case. Second, it is clear to us that section 4.3 did not operate when section 5.3 did. Instead, on the date that section 5.3 was engaged on 13 September 2019, unvested units *immediately* vested, and, A1 also became liable to *immediate* settle those vested units. Finally, the fact that A1 provided 205,669 shares to Mr Hardman on 21 September 2020 therefore does not extinguish Mr Hardman's claim.

69 As regards the appellants' claim that they should, in the alternative, be entitled to a set-off, we reject this. First of all, this was not pleaded. Second, we do not accept that it is Mr Hardman's burden to prove the value of the shares issued in his name. The import of our decision above is that these shares were issued late and it was not argued before the Judge or before us that Mr Hardman was obliged to accept them as a matter of mitigation. Third, it was for the appellants to prove that Mr Hardman had accepted the shares. The Judge found that the appellants failed to adduce sufficient evidence to establish that Mr Hardman had accepted these shares from A1 (see the Judgment at [110]). In the appeal, the appellants have not challenged this conclusion or shown why it was wrong. The most that the appellants could say on appeal was that Mr Hardman did not deny that 205,669 shares had been issued in his favour, and that he had failed to take positive steps to reject the shares. This, however, is not sufficient. Mr Hardman equally did not do anything to suggest that he accepted the shares. In fact, it is not even clear what exactly the appellants brought to Mr Hardman's

attention to make clear to him that the shares had been issued in his favour. The only two relevant emails on record were sent to Mr Hardman on 28 and 30 August 2020, and these only invited him to electronically sign a "Share Application Form … for the issuance of shares". These emails were ignored and there is a lack of clarity as regards whether Mr Hardman was sent the *actual* certificate to these 205,669 shares electronically. Further, the appellants also concede, by a letter sent to court after the hearing, that Mr Hardman was not sent the physical copy of this certificate. On these premises, we affirm the Judge's conclusion that the appellants have not presented enough material on which this court can conclude that Mr Hardman accepted these shares. The import of this is that the appellants are not entitled to any reduction in the damages for which they are liable to Mr Hardman, by way of a set-off. That said, Mr Hardman is not entitled to claim damages *and* "keep" the shares belatedly issued in his name. At the hearing before us, we asked Hardman to elect whether he preferred damages or the shares. Initially, he appeared to want to "keep" the shares *and* claim damages. Eventually, he elected not to "keep" the shares and simply claim damages. Therefore, there is no need to consider the value of these shares. A1 is entitled to revoke or otherwise cancel the 205,669 shares issued in Mr Hardman's name.

70 Having determined that A1 was obliged to provide 133,079 shares to Mr Hardman on 13 September 2019 under the RSU Plan, we turn to the second ground of appeal – that is, whether he was precluded by the moratorium in section 4.3 from monetising these shares until 13 March 2020.

71 In sum, we do not accept the argument that the moratorium in section 4.3 applies in a situation where a Change of Control event takes place. The appellants' central argument in this connection is not textual. Rather, they contend broadly that the absence of such a moratorium would allow employees

to sell their shares immediately upon the Change of Control event, thereby causing great fluctuations in A1's share price which could not have been intended. This, however, is a non-starter since a six-month moratorium does not avoid any such potential price fluctuation. At most, that fluctuation is delayed.

72 In any case, we do not think that section 4.3 applies where section 5.3 is engaged. First, we agree with the Judge that general provisions yield to specific provisions (see the Judgment at [132]). Second, we also agree with the Judge that the very intent of section 5.3 was to allow participating employees to realise their share entitlements in a timely manner. Otherwise, the fact that section 5.3 not only causes unvested units to vest immediately, *but also* obliges immediate settlement of those vested units, would be rendered somewhat otiose. After all, there would be very little point in section 5.3 stipulating that settlement must be made on vested units immediately if the participating employees were precluded for six months from dealing with the shares which they received. We therefore also reject the second ground of appeal.

73 As neither ground of appeal succeeds, we dismiss the appeal against the first of Mr Hardman's claim and affirm the Judge's finding that A1 is liable to pay Mr Hardman – in respect of his claim premised on the 29 March 2019 Grant and section 5.3 of the RSU Plan – CA$266,158.00 in damages. This sum is the value of 133,079 shares in A1 valued at CA$2.00 per share on the date which Mr Hardman was entitled to receive and monetise them (*ie*, 13 September 2019) (see the Judgment at [137(a)]).

Mr Hardman's claim in respect of the Bonus Units Agreement

74 We turn to the third ground of appeal which concerns Mr Hardman's claim premised on the Bonus Units Agreement. As mentioned at [64(c)] above,

the substance of this ground mirrors the appellants' first ground of appeal. It cannot, however, be dismissed for the exact same reasons. This is because these units were not issued pursuant to the general scheme under the RSU Plan, but rather, in substitution of Mr Hardman's 2018 cash bonus. There are different reasons against the appellants' arguments.

75 First, it is *precisely because* these 72,590 bonus units were not granted pursuant to the general scheme under the RSU Plan, but in substitution of Mr Hardman's 2018 cash bonus, that section 4.3 does not apply. In this regard, the appellants argue that Mr Hardman's Termination Letter only stipulates that the bonus units be "issued and vested" at end February 2020. There was no mention that settlement of these vested units needed to be effected by then. On this basis, they say that section 4.3 applies to govern the timeframe for settlement, and repeat their argument on section 4.3 that they were therefore permitted to effect settlement on any date as long as it was before 15 December 2022.

76 We reject this argument. On the correct interpretation of section 4.3 as we have set out at [20]–[29] above, at most, Mr Hardman's Termination Letter would mean that the 72,590 bonus units were to be paid or settled 15 days after end February 2020. However, this is not the appellants' argument. Further, it seems to us that when this Termination Letter was issued to Mr Hardman, A2 did not draw a distinction between the *vesting* of units and the date by which they were to provide shares in settlement of those vested units. This is probably why the letter was silent on the latter. Likewise, Mr Hardman also did not draw such a distinction. Accordingly, we are of the view that parties intended the end of February 2020 to be both the date of vesting of units and the date by which Mr Hardman was to be provided with 72,590 shares. It is unlikely that Mr Hardman would have agreed that A2 had the option to issue the bonus shares as

late as 15 December 2022 particularly when the 2018 cash bonus was payable then and not by 15 December 2022.

77 Second, as regards the section 4.3 moratorium, the Judge observed (see the Judgment at [133]), that A2 had promised to provide the 72,590 shares to Hardman *by a specific date*. Parenthetically, we note that the Judge did not mention that, actually, Mr Hardman's Termination Letter referred to the issuance and vesting of units (not shares). This is understandable as no distinction was drawn between units and shares, as mentioned above. In any event, there also seems to us to be little room in the light of Mr Hardman's Letter, to construe that the section 4.3 moratorium applies to constrain Mr Hardman's dealings with these shares. This is particularly so given that they served as a substitute for his 2018 cash bonus, which would have been at his free disposal then.

78 Accordingly, we dismiss the third ground of appeal. Mr Hardman was entitled at the end of February 2020 to receive 72,590 shares in A1 and was also entitled to monetise such shares immediately. On these premises, we affirm the Judge's finding that A2 is liable to pay Mr Hardman – in respect of his claim premised on the Bonus Units Agreement – CA$9,436.70 in damages. This sum being the value of 72,590 shares in A1 valued at CA$0.13 per share on the date which Mr Hardman was entitled to receive and monetise them (*ie*, 28 February 2020) (see the Judgment at [137(b)]). The Judge used the date of 28 February 2020 because 29 February 2020 was a Saturday and the appellants do not take issue with this.

Mr Finck's claim in respect of 38,260 or 12,753 units

79 In this section, we address *both* of Mr Finck's alternative claims premised on the 21 September 2018 Grant *and* Mr Finck's Termination Letter. We begin with the first ground of appeal (see [65(a)] above).

80 We reject the ground that Mr Finck had compromised any and all claims premised on the 21 September 2018 Grant by accepting the 12,753 units in his Termination Letter dated 6 September 2019. This letter was not couched in the language of compromise. Further, there was no clear evidence of a compromise. For example, there was no suggestion that before the letter was issued, parties had discussed a compromise of a claim by Mr Finck of all the 38,260 units. Indeed, as mentioned (see [59] above), Mr Chiarugi agreed that there was no compromise by Mr Finck as asserted.

81 However, turning to the second ground of appeal, the appellants have raised a valid argument. In our judgment, the Judge erred in his application of sections 1.1(ii), 5.1 and 5.3 of the RSU Plan. The error begins at section 1.1(ii) which defines "Change of Control" to include the sale, "in a single transaction or a series of related transactions" of all or substantially all the assets of A1 and its subsidiaries. As explained at [57] above, referring to this provision, the Judge took the view that because the Change of Control event had been effected through a series of related transactions, section 5.3 was engaged on 29 July 2019. This was the "first transaction" in the series of transactions leading up to the sale of Sarment Wines and, therefore, the Change of Control event on 13 September 2019.

82 However, this was internally inconsistent. The Judge found that the *actual* Change of Control event had taken place on 13 September 2019. This

being the case, it was inconsistent for him to also say that section 5.3 had already been "engaged" on 29 July 2019. We accept that by section 1.1(ii) of the RSU Plan, a Change of Control event may be brought about by a series of transactions. However, this does not mean that the Change of Control *event* itself may take place on more than one date. The series of transactions is but the mode by which a *single* event comes about. Since there is no dispute that the Change of Control event took place on 13 September 2019, this is the date on which section 5.3 would have been engaged for Mr Finck. However, as his employment had been terminated on 6 September 2019, section 5.1 would have precluded him from benefitting from section 5.3. Indeed, pursuant to section 5.1, Mr Finck might have lost the entire benefit of all the units initially granted to him, because of the earlier termination of his employment, but for the fact that his entitlement to 12,753 units was confirmed by his Termination Letter issued by A2 on 6 September 2019. It bears emphasising that the appellants do not, in this appeal, dispute Mr Finck's entitlement to damages in respect of the 12,753 units.

83 The Judge was also of the view that it could not possibly have been the intention of the RSU Plan that A1 or its related companies could unilaterally extinguish an employee's entitlement under the plan by simply terminating his employment before the Change of Control event happened. This would have meant that the employees have no certainty whatsoever of their entitlement which would be plainly inconsistent with the purpose of the plan. This would be an unintended commercially absurd result (see the Judgment at [94]).

84 With respect, we disagree with the Judge on this. There is nothing in the RSU Plan to restrict the right of A1 or its related companies to terminate employment, although we accept that the right must be exercised *bona fide* and not with a view to specifically deprive the participating employee of his benefits

under the RSU Plan. In any event, there is no suggestion that the termination of Mr Finck's employment was done in bad faith, for example, in anticipation of the completion of the sale of the wine business. Indeed, as mentioned above, Mr Finck could have lost all 38,260 units under section 5.1 but for his Termination Letter which allowed him to retain the benefit of 12,753 units.

85 At the hearing before us, counsel for the respondents ("Mr Sharpe") sought to resist this conclusion by distinguish between two "limbs" of section 5.3. The first "limb", he contended, referred to the phrase, "[i]n the event of a Change of Control, all [units] shall be deemed to have vested immediately prior to the occurrence of the Change of Control and shall become payable effective immediately on such date…" The second "limb" referred to the phrase, "and, to the extent [A1] is involved in a transaction where the occurrence of the Change of Control is dependent on actions to be taken by [A1], it shall ensure that all entitlements relating to such [units] are paid to Participants concurrently with and as a condition of closing of such Change of Control transaction." Mr Sharpe stressed first that section 5.1 of the RSU Plan was subject to section 5.3. He then relied on the second "limb" of section 5.3 to advance the argument that, because A1 was "involved in" the sale of Sarment Wines and the Change of Control event was thus dependent on A1's actions, A1 was obliged to ensure that all *entitlements* to units were to be paid concurrently with the closing of the Change of Control transaction. In essence, Mr Sharpe was seeking to give the word "entitlements" a freestanding, enforceable legal character.

86 We have two observations in respect of this argument. First, we note that it was an argument raised in closing submissions by Mr Finck when he was the second plaintiff in the suit below. However, this was not a point addressed in the Judgment. For good order, Mr Sharpe should have sought our leave to raise this point on appeal to support the Judge's conclusion. Indeed, it was not even

a point included in the respondents' case on appeal. However, as this was purely a question of interpretation, we saw no prejudice in allowing the argument to be raised.

87 Second, although we allowed Mr Sharpe to raise this argument at the hearing before us, we are not convinced it has any merit. The argument assumes that Mr Finck is "entitled" to the units prior to his termination. However, given the structure of the RSU Plan, a participating employee can only be said to have an "entitlement" to receive units when his granted units *vest*. In this respect, the second "limb" does not say when the vesting of units takes place in a Change of Control situation. That is found in the first "limb" which states that the units shall be deemed to have vested immediately prior to the Change of Control event, which occurred on 13 September 2019 in this case. However, Finck's employment was already terminated on 6 September 2019. Hence, the acceleration in section 5.3 in the first limb did not assist Mr Finck. Indeed, we have placed the word "limbs" in inverted commas because we do not even regard these as discrete parts of section 5.3. In our view, the "second limb" is a mere clarification of the first "limb". This is why, as we have stated, the second "limb" does not say anything about when an employee becomes "entitled" to the units. The second "limb" was really to specify what was implicit in the first "limb", that is, that where the occurrence of Change of Control was dependent on A1, it was for A1 to take the necessary steps to ensure its shares were provided to the entitled employees concurrently with and as a condition of the closing of the Change of Control transaction. Notwithstanding the conjunction "and" between the two parts of section 5.3, the second "limb" does not vary the first which sets out when vesting occurs upon a Change of Control event.

88 Accordingly, we reject this argument of Mr Sharpe. In our judgment, the Judge erred in finding that Mr Finck was entitled, by section 5.3, to receive the

benefit of all 38,260 units granted by the 21 September 2018 Grant. Mr Finck was only entitled to benefit from 12,753 units, and, thus, receive 12,753 shares.

89 As for the date of valuation of these 12,753 shares, one possible date is 21 September 2019 as that is the date of vesting stipulated in Mr Finck's Termination Letter. We do not think it should *prima facie* be 13 September 2019, which is the date of Change of Control, because Mr Finck's entitlement to these shares is not based on the Change of Control event but rather on his Termination Letter. The Judge applied 13 September 2019 because he was of the view that Mr Finck was entitled to rely on section 5.3 as we have explained. The appellants initially also suggested that 13 September 2019 should apply, despite their underlying contention being that Mr Finck, having been terminated before the Change of Control event, was not entitled to rely on section 5.3. However, in the course of the hearing, Mr Leong suggested that the correct date of assessment should be 21 September 2019 if we were not with him on the application of section 4.3. He also suggested that there should be a separate hearing on the assessment of the value of the shares on 21 September 2019. This was not a point taken below or in the Appellant's Case. Hence, after queries from us, Mr Leong decided to stick to 13 September 2019 as the valuation date, if his argument in respect of section 4.3 was not successful. Mr Sharpe did not object to this, and, in any event, Mr Finck's primary case premised on section 5.3 demonstrates that he is content to proceed on the basis that the date of valuation should be 13 September 2019. Therefore, we also apply that date as the date for valuation of his shares.

90 For completeness, in respect of the appellants' third ground of appeal in respect of Mr Finck (see [65(c)] above) we should also state that the date of 13 September 2019 is not deferred till 15 December 2021 by the appellants' argument based on section 4.3, or to six months after 13 September 2019 by the

moratorium thereunder. We have stated our reasons on these points earlier (see [20]–[29], [68] and [71]–[72] above).

91 Mr Finck's Termination Letter had reaffirmed the vesting date of 21 September 2019 as *per* the initial grant to Mr Finck. The moratorium also does not apply because the letter was issued by A2 knowing that the Change of Control event was to take place soon. Therefore, even though Mr Finck's entitlement does not arise from the Change of Control event as such, the letter in the circumstances shows that the moratorium was not to apply. Otherwise, he would illogically be at a disadvantage compared to employees like Mr Hardman whose employment had not yet been terminated as at 13 September 2019, and for whom the moratorium under section 4.3 would not apply.

Conclusion and costs

92 For the foregoing reasons, the appeal against the Judge's decision as it concerns Mr Hardman's claims is dismissed. We allow the appeal in respect of Mr Finck's claim partially and set aside the Judge's finding at [137(c)] of the Judgment that A1 is liable to pay Mr Finck CA$76,520 for failing to provide him with 38,260 shares on 13 September 2019 under section 5.3 of the RSU Plan. Instead, we find that A1 is liable to pay Mr Finck the sum of CA$25,506, this being the market price of CA$2.00 per share multiplied by 12,753 shares.

93 As an aside, we note that there is some lack of clarity as to whether it is A1 or A2 which is liable to Mr Finck. On one hand, Mr Finck's entitlement to the 12,753 shares arises from the letter of 6 September 2019 issued by A2. This is similar to the situation in respect of Mr Hardman in so far as his claim under the Bonus Units Agreement is concerned. However, on the other hand, it could also be said that A2 was doing no more than confirming what was due to

Mr Finck from A1, under the initial grant of units by the 21 September 2018 Grant. We tentatively think the latter is likely the better view since there is no suggestion that Mr Finck's Termination Letter was intended to amount to a new agreement. Accordingly, the Judge would be correct in holding that A1 was the party properly liable to Mr Finck. In any event, neither A1, A2 nor Mr Finck have raised this as an issue before us and hence we need not reach a decision on it.

94 We turn to the costs of the appeal and of the trial below. Although A1 has succeeded in respect of Mr Finck's claim for 25,507 shares, it failed in respect of its allegation of a compromise by Mr Finck and the application of section 4.3 in respect of the 12,753 shares. In the circumstances, we direct that Mr Finck and the appellants bear their own costs of the appeal. As for Mr Hardman, we direct that the appellants are to pay him costs of the appeal fixed at $31,500 (all-in). As for the costs below, the parties are to agree on the same in the light of our decision, failing which the Judge is to decide what costs order is appropriate. The usual consequential orders apply.

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Kannan Ramesh
Judge of the High Court

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