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

[2023] SGHC(A) 3

Civil Appeal No 24 of 2022

Between

(1) Terigi, Morgan Bernard Jean
(2) Kouchnirenko, Dmitri Vladimirovitch
(3) Incomlend Pte Ltd

… *Appellants*

And

Hook, Laurence

… *Respondent*

JUDGMENT

[Contract — Waiver]
[Contract — Consideration — Estoppel]

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Terigi, Morgan Bernard Jean and others
v
Hook, Laurence

[2023] SGHC(A) 3

Appellate Division of the High Court — Civil Appeal No 24 of 2022
Belinda Ang Saw Ean JCA, Kannan Ramesh JAD and Hoo Sheau Peng J
18 August 2022

26 January 2023 Judgment reserved.

Kannan Ramesh JAD (delivering the judgment of the court):

Introduction

1 Three men start a company, and begin to raise money from investors. They describe themselves as the "Founders". They agree in a shareholders' deed, to which 14 investors are also parties, to become full-time employees of the company, failing which they will transfer to the other shareholders their previously allocated shares. The relevant employment agreements were to be entered into before the date of the shareholders' deed. One of them holds out and does not enter into an employment agreement with the company, but at the same time does not lose his shares. Instead, the three men sign another agreement which will give him more shares in the company if he dedicates himself to it full-time. They then sign yet another shareholders' deed, this time with a further 27 new investors as well as the previous 14 investors, but this deed does not say anything about requiring the holdout to become a full-time

employee of the company. The holdout never becomes a full-time employee of the company, and one day, the two other men transfer his shares to themselves citing this as the reason. Was this transfer lawful? That is the central question in this appeal.

Background

The founding of Incomlend

2 The company is the 3rd Appellant, Incomlend Pte Ltd ("Incomlend"), a Singapore-incorporated company. Its primary business is the operation of an online platform on which users sell and buy discounted invoices – this is a trade often referred to as "factoring".

3 Incomlend was first conceptualised in October 2015 by the 1st Appellant, Mr Morgan Bernard Jean Terigi ("Mr Terigi"), and the 2nd Appellant, Mr Dmitri Vladimirovitch Kouchnirenko ("Mr Kouchnirenko"). The two men agreed that Mr Terigi would take the lead on the financial and legal aspects of the business as well as the invoice-organisation, while Mr Kouchnirenko would be in charge of product development, compliance and marketing. Working together, the two men approached potential shareholders to generate investment interest.

4 As Incomlend was in the financial technology industry, the two men realised that they needed to bring someone who was familiar with information technology ("IT") on board and could build Incomlend's own in-house software. Thus, in or around the end of 2015, Mr Terigi approached the respondent, Mr Laurence Hook ("Mr Hook"), whom he met in Hong Kong, and invited him to come on board. At that time, Mr Hook was working in an IT role

at the Hong Kong office of the Hongkong Shanghai Banking Corporation Ltd ("HSBC").

5 It is undisputed that Mr Terigi and Mr Kouchnirenko knew at the outset that Mr Hook was working for HSBC. On 12 November 2015, Mr Terigi sent an e-mail to Mr Kouchnirenko and another person, introducing Mr Hook as "currently working for HSBC for various IT projects." He also attached Mr Hook's curriculum vitae ("the CV") which stated that at that time, he had been working for HSBC's Hong Kong office since May 2011. The CV had previously been provided to Mr Terigi by Mr Hook.

6 Eventually, Mr Hook agreed to come on board, and in December 2015, Mr Kouchnirenko created a chat group amongst the three men on the messaging application "WhatsApp" where they started discussing how to grow Incomlend's business. Eventually, Incomlend was incorporated on 14 January 2016, and Mr Terigi was appointed its first director on the same day.

7 Mr Terigi, Mr Kouchnirenko and Mr Hook (collectively referred to as "the Founders") got down to work to grow Incomlend. Sometime in February 2016, the Founders agreed that they would become full-time employees *and* shareholders of Incomlend. Subsequently in April 2016, they agreed to relocate to Singapore where Incomlend's offices were and assume full-time employment, which meant that Mr Kouchnirenko and Mr Hook would have to give up their employment with others (see [36] below). Consequently, the Founders received ordinary shares in Incomlend, with Mr Hook receiving 20,000 shares in or around April 2016. It is important to note that Mr Hook started off with fewer shares than the other Founders: by early 2017, Mr Kouchnirenko held 39,672 shares, and Mr Terigi held 39,671 shares. However,

it was agreed that, once Mr Hook left HSBC and moved to Singapore to join Incomlend as a full-time employee, they would all become equal shareholders.

Mr Hook's refusal to become an employee

8 Around the same time, it became apparent to the Founders that they had enough investors from a first round of fundraising. They had 14 investors then ("the Original Investors"). Thus, they began discussing a shareholders' deed ("the 1st Shareholders' Deed") for all shareholders, and a "separate agreement" that concerned only them ("the Founders' Agreement"). The 1st Shareholders' Deed, as the name suggests, was intended to govern the relationship between Incomlend and its first generation of shareholders, *ie*, the Founders and the Original Investors. On the other hand, the purpose of the Founders' Agreement was, *inter alia*, to set a time limit for the Founders to equalise their shareholding, pursuant to the understanding stated above at [7].

9 On 31 July 2016, over a messaging platform called "Slack", Mr Terigi sent a draft of the Founders' Agreement, as well as a draft of the full-time employment agreement with Incomlend to the other Founders. As to this, he told the other Founders that it was "urgent" for them "to sign the employment agreements as per [the 1st Shareholders' Deed]". Mr Hook did not respond to this, instead raising other issues that he saw with Incomlend.

10 The next day, Mr Terigi again reminded the other Founders about their respective employment agreements, stating that they needed to be signed as soon as possible because the 1st Shareholders' Deed was being finalised. Mr Hook asked about the details of the employment agreement before expressing concern over being "caught" by HSBC (as he was still employed by HSBC at that time). A day later, he explained to the other Founders that his

"situation" with HSBC "was ambiguous for maybe [six months]". Mr Hook eventually made his position clear several days later on 4 August 2016, when he explained that he would only receive his bonus from HSBC in March 2017, and that if he resigned and signed a full-time employment agreement with Incomlend, he would be walking away from three months' worth of "free money".

11 Eventually, the 1st Shareholders' Deed was signed on 29 August 2016. This was entered into between Incomlend, the Founders, and the Original Investors. As had been discussed between the Founders, they were obliged by Clause 4.4 of the 1st Shareholders' Deed to become full-time employees of Incomlend by entering employment agreements by dates specified in Clause 4.5. Consistent with Mr Terigi's repeated calls for the employment agreements to be signed before the 1st Shareholders' Deed was executed (see above at [9]–[10]), the dates specified in Clause 4.5 preceded the date of the deed – 1 August 2016 in the case of Mr Hook and Mr Kouchnirenko, and 1 July 2016 in the case of Mr Terigi. In line with the intention that the Founders commit themselves fully to Incomlend and its cause, *per* Clause 4.4, the employment agreement was to include, *inter alia,* terms concerning confidentiality, non-competition, non-solicitation and any other reasonable covenants to protect Incomlend's interest. Importantly, it was provided in Clause 4.4 that, if anyone had not signed their respective employment agreements by the stipulated date, the shares that were previously allocated to the defaulting Founder would be transferred to the other shareholders, *pro-rata* to their respective shareholdings at no cost, and Incomlend would be granted a power of attorney for this purpose by the defaulting Founder which would not be revocable unless there was unanimous consent of all the parties to the 1st Shareholders' Deed. We will refer to this as the "Giveaway Mechanism". Additionally, once the Founders signed their

respective employment agreements, they were to be appointed to and would constitute the Board of Directors of Incomlend, as *per* Clause 5.1.

12 Mr Terigi and Mr Kouchnirenko both executed their respective employment agreements with Incomlend. Mr Kouchnirenko was appointed director on 14 December 2016. But Mr Hook, who was supposed to sign his employment agreement by 1 August 2016, did not do so and remained employed with HSBC in Hong Kong; he also did not become a director of Incomlend. The reasons for this will become apparent later in this judgment (see [20]–[23] below). However, he was involved in the running of Incomlend, doing so remotely from Hong Kong. According to the Appellants, this created difficulties in their workflow and efficiency.

13 As is apparent from the conversations between the Founders, Mr Hook's reluctance to fully dedicate himself to Incomlend became a source of discussion, and eventual tension. During a conversation over Slack on 20 February 2017, Mr Hook brought up the fact that his wife was pregnant and was due in the first week of September 2017. He stated that he would not be able to relocate to Singapore until the baby was a few months old. In response, Mr Terigi stated that it would be "best for [Mr Hook] to come to Singapore to be in the office every month in that case". There was some disagreement between Mr Terigi and Mr Hook over this, with Mr Terigi accusing Mr Hook of "changing the conditions" and stating that he would not sign the Founder's Agreement. Eventually Mr Kouchnirenko stepped in and ended the disagreement.

The Founders' Agreement and the 2nd Shareholders' Deed

14 Two months later, on 21 April 2017, the Founders' Agreement was finalised and signed by the Founders. The Original Investors did not sign this

agreement because, as is made clear from its preamble, its purpose was to "regulate the relationship between [the Founders]." Important to this appeal, the Founders' Agreement contained a section titled "TRANSFER PROCEDURE". Under this section, Clause 4 provided that Mr Hook would receive more shares in Incomlend if, *inter alia*, he (a) dedicated himself to Incomlend full-time "on or prior to [1 June 2017]" and (b) "became permanently present in Singapore from mid November 2017 onwards" (see [44] below). This crystallised the understanding between the Founders that had been discussed earlier (see [7]–[8] above).

15 While Mr Hook did not fulfil the conditions in Clause 4 of the Founders' Agreement, in June 2017, additional shares were nonetheless transferred to him by Mr Terigi and Mr Kouchnirenko. This was done in the expectation that Mr Hook would become a full-time employee of Incomlend as previously agreed, and to signal to any new investors that they were equal stakeholders in Incomlend. As noted above at [7], Mr Terigi originally held 39,671 shares, and Mr Kouchnirenko held 39,672. They each transferred 6,557 shares to Mr Hook, and also transferred a small number of shares to other shareholders, leaving them with 32,578 shares each. After receiving the shares from the other Founders, Mr Hook also transferred a small number of shares to other shareholders, leaving him eventually with 32,578 shares as well ("Mr Hook's shares"). These are the shares that were the subject matter of the action below and the subject matter of this appeal.

16 Shortly thereafter, Incomlend went through a second round of fundraising, bringing in new investors. Pursuant to this, on 30 June 2017, a new shareholders' deed ("the 2nd Shareholders' Deed") was signed. Apart from the Founders and the Original Investors, 27 new investors ("the New Investors")

also signed this deed. By this time, Mr Hook still had not signed his employment agreement with Incomlend.

Arrangements while Mr Hook was on sabbatical leave

17 Mr Hook did not sign his employment agreement with Incomlend even after the 2nd Shareholders' Deed was signed; he also did not become a director. Instead, he remained an employee of HSBC, and took sabbatical leave from 5 July 2017 which was to last until early 2018.

18 During this period, Mr Hook continued work for Incomlend and two arrangements were put into place by the other Founders:

(a) First, Incomlend paid salary to Mr Hook's wife because Mr Hook did not want to receive salary from Incomlend while employed by HSBC. The first payment pursuant to this arrangement was made on 4 July 2017, and the final payment was made on 31 October 2017.

(b) Second, Mr Hook's father was appointed a director of Incomlend on 28 July 2017. Mr Hook requested this because he had "promised not to take employment or directorships while [he was on sabbatical leave from HSBC]" and nominating his father to represent him was an "easy compromise".

Mr Hook refused to take up a full-time role with Incomlend

19 As Mr Hook continued to work for Incomlend without signing his employment agreement, this became a source of tension between the Founders. In a meeting on 27 October 2017, it was "[o]bserved" by the other Founders that Mr Hook was in breach of both the Founders' Agreement, as well as a "[s]hareholder agreement", although it was not specified which Shareholders'

Deed this was a reference to. The minutes of this meeting were circulated amongst the Founders, which led to a terse exchange between Mr Hook and Mr Terigi during which Mr Hook stated that he *would* come to Singapore.

20 In late 2017, the relationship between the Founders started to palpably deteriorate. There was disagreement between Mr Hook and the other Founders regarding the direction of Incomlend. In particular, Mr Hook seemed to express some pessimism over Incomlend's prospects.

21 Given that Mr Hook was dragging his feet in joining Incomlend full-time and showing increasing reluctance to do so, the other Founders thought it was necessary for Mr Hook's wife to at least sign a formal consultancy agreement to justify the payment of salary to her (see [18(a)] above). This was because they were concerned about justifying the payments once Incomlend saw increased investments. To that end, Mr Terigi sent an agreement to Mr Hook on 28 November 2017, and asked him to return a signed copy, but this too went unsigned. Because of this, Mr Terigi did not approve payment to Mr Hook's wife for November 2017. In December 2017, Mr Hook asked for the salary to be paid several times, which led to further arguments between the Founders. Ultimately, the salary was never paid.

22 In addition to the rising tension, around this time, there were also difficulties involving Incomlend's IT systems and passwords. The Appellants allege that Mr Hook refused to disclose passwords or transfer access for Incomlend's software platforms to the other Founders while Mr Hook's position is that he was trying to cooperate with Mr Terigi and Mr Kouchnirenko. But whatever the case may be, it was clear that this further added to the tension.

The Appellants forced a sale of Mr Hook's shares

23 Eventually, the tension boiled over. In a conversation on 16 December 2017, Mr Hook stated that he would not resign from HSBC because the cash flow projections for Incomlend showed that it was in dire straits. There was some discussion on Mr Hook exiting Incomlend amicably but he ultimately did not agree. Then, on 12 January 2018, Mr Terigi sent an e-mail to Mr Hook, alleging that Mr Hook had breached provisions of the 1st Shareholders' Deed, the Founders' Agreement and the 2nd Shareholders' Deed (collectively, "the Agreements"), and demanding that he remedy the breaches by (a) resigning from HSBC, and (b) taking up full-time employment with Incomlend within 14 days. The salient portions of the e-mail are reproduced below:

> Laurence,
>
> … you continue to work at HSBC Hong Kong, a bank which engages in similar business activity to Incomlend. In doing so, you have breached Clauses 4.4, 4.5, 5.1, 16.1 of the Shareholders Deed dated 29 August 2016, Clause 5.1 and 16.1 of the Shareholders Deed dated 30 June 2017, and Clause 1.2(b) and 4 of the Founders Agreement dated 21 April 2017.
>
> …
>
> As such, pursuant to Clause 17.1(a) of both Shareholders Deeds, I am giving you a final opportunity to make good your breaches under the Shareholders Deeds and Founders Agreement, by immediately tendering your notice of resignation at HSBC and confirming that you will take on full time employment with Incomlend in Singapore by 29th January 2018. You have 14 days from today to comply.

24 Mr Hook did not comply, and so on 2 February 2018, Mr Terigi sent another e-mail to Mr Hook stating that *per* the terms of the *2nd Shareholders' Deed*, he was "deemed" to have offered to transfer his shares to them at a price based on the net asset value *per* share. Notably, the e-mail stated that the offer was made *only to Mr Terigi* and *Mr Kouchnirenko* pursuant to *Clause 9.2 of the*

2nd Shareholders' Deed. The salient portions of this e-mail are reproduced below:

> **OFFER TO TRANSFER YOUR SHARES IN INCOMLEND PTE LTD**
>
> 1. We hereby refer to Morgan's email to you dated 12 January 2018.
>
> 2. Although we gave you an opportunity to remedy your material breach, you have failed to do so within 14 days.
>
> 3. In the circumstances, we write to inform you that in accordance with Clause 17.2 of the 2nd shareholders deed, you are deemed to have made an Offer *to the other founders of [Incomlend]* in accordance with Clause 9.2 of the 2nd shareholders deed to transfer all the 32,578 shares that you hold in Incomlend, at a price of the net asset value per share.
>
> 4. Kindly take notice that under Clause 17.2 of the 2nd shareholders deed, we require you not to exercise your rights to attend and vote at general meetings of Incomlend, or execute written resolutions.
>
> [original emphasis in bold; emphasis added in italics]

On the same day, Mr Terigi and Mr Kouchnirenko purported to accept the offer, stating that they would purchase Mr Hook's shares "pro-rata as nearly as possible according to [their] respective shareholding in Incomlend."

25 Finally, on 13 February 2018, the Appellants forced a sale of Mr Hook's shares. The shares were transferred equally to Mr Terigi and Mr Kouchnirenko and they collectively paid Mr Hook US$29,000 for them.

Proceedings below

26 The Appellants commenced the action below against Mr Hook and his wife in December 2019 by way of HC/S 1259/2019. They sought declarations that (a) Mr Hook had breached the Agreements, and (b) they were entitled to procure the transfer of his shares to Mr Terigi and Mr Kouchnirenko as a result

(see [25] above). They also sought damages from Mr Hook for his actions regarding Incomlend's IT platforms, and restitution of the salary that was paid to his wife. Mr Hook and his wife defended the action. Also, Mr Hook brought a counterclaim for damages resulting from the loss of his shares. With regard to Mr Hook's counterclaim, the trial was bifurcated such that if Mr Hook was successful in proving liability, assessment of damages would take place at a later date.

27 The dispute was brought before a judge of the General Division of the High Court ("the Judge"). In a written judgment dated 25 January 2022, the Judge declined to grant the Appellants the declaratory relief they sought, and allowed Mr Hook's counterclaim: see *Terigi, Morgan Bernard Jean and others v Hook, Laurence and another* [2022] SGHC 9. The Judge also dismissed the Appellants' claim for damages and restitution, but since this portion of the Judge's decision has not been appealed against by the Appellants, we do not address it further.

28 On the question of whether the transfer of Mr Hook's shares to Mr Terigi and Mr Kouchnirenko was justified, the Judge first found that the relevant agreement was the 2nd Shareholders' Deed, and not the 1st Shareholders' Deed or the Founders' Agreement. This was in view of Clause 23.2 of the 2nd Shareholders' Deed ("the Entire Agreement Clause") which provided that it was the "entire agreement and understanding between the Parties relating to the subject matter of [the 2nd Shareholders' Deed]." The Judge reasoned that as a result of the Entire Agreement Clause, moving forward, the agreement between the shareholders was encapsulated in and governed by only the 2nd Shareholders' Deed. As a result, the 2nd Shareholders' Deed terminated and replaced the 1st Shareholders' Deed, making the latter not relevant.

29 Having found this, the Judge considered whether the transfer of Mr Hook's shares was justified under the 2nd Shareholders' Deed. The Appellants alleged that Mr Hook had breached Clause 16.1 of the 2nd Shareholders' Deed by remaining employed by HSBC. Clause 16.1 prohibits a shareholder from being involved in a "Competing Business", and the Judge found that HSBC was a "Competing Business". However, the Judge also found that Mr Hook was able to avail himself of an exception in Clause 16.1 as, *inter alia*, he had disclosed his employment with HSBC when he provided the CV to Mr Terigi who had then sent it to Mr Kouchnirenko on 12 November 2015 (see [5] above). Accordingly, there was no breach of Clause 16.1, and therefore no basis for the transfer of his shares under the 2nd Shareholders' Deed.

30 Although he premised his analysis on the 2nd Shareholders' Deed, the Judge nevertheless went on to consider the position under the 1st Shareholders' Deed and the Founders' Agreement.

(a) First, the Judge found that there was no breach of the Founders' Agreement by Mr Hook. He observed that Clause 4 of the Founders' Agreement (see [14] above) was an "incentive" for Mr Hook to join Incomlend full-time, but it would not be a breach if he did not.

(b) Second, the Judge noted that "on the face of [the 1st Shareholders' Deed]", Mr Hook was in breach of Clauses 4.4 and 4.5 of the 1st Shareholders' Deed as he did not sign his employment agreement with Incomlend at any time let alone by 1 August 2016 as provided in Clause 4.5. However, as he had found that the 1st Shareholders' Deed was terminated by the 2nd Shareholders' Deed, he reasoned that it was "superseded" by the latter, and thus the Appellants could no longer rely

on that deed to assert this breach bearing in mind that similar provisions were absent from the 2nd Shareholders' Deed.

31 Accordingly, the Judge disallowed the declaratory relief the Appellants had sought and allowed Mr Hook's counterclaim as regards his shares ordering that damages be assessed.

The present appeal

32 In the present appeal, the Appellants seek to reverse the Judge's decision to: (a) deny the declaratory relief they had sought; and (b) allow Mr Hook's counterclaim. In support, they raise two grounds of appeal.

(a) First, they maintain that there was no disclosure under Clause 16.1 of the 2nd Shareholders' Deed – in particular, they argue that providing the CV did not amount to disclosure for the purpose of the exception stated in Clause 16.1 of the 2nd Shareholders' Deed ("the Disclosure Ground") and thus Mr Hook had breached the said Clause 16.1 by being employed with HSBC. Thus, an event of default had occurred *per* Clause 17.2 of the 2nd Shareholders' Deed as a result of which, they were entitled to deem Mr Hook's shares as being offered to Mr Terigi and Mr Kouchnirenko for purchase as *per* Clause 9.2.

(b) The Appellants' second ground of appeal relates to the undisputed fact that Mr Hook did not sign his employment agreement with Incomlend. The Appellants take the position that this was a breach of Clauses 4.4 and 4.5 of the 1st Shareholders' Deed, which, as noted above, the Judge also agreed with. Accordingly, the Appellants' focus on this ground of appeal is that the Judge was wrong to find that the 1st Shareholders' Deed was terminated, and thus the transfer of

Mr Hook's shares was justified on the basis of Clause 4.4 of the deed ("the Employment Ground").

Our decision

33 It was necessary to set out the background facts in some detail to properly contextualise the *crucial issue* in this appeal, which unfortunately, the parties have missed. While we go on to explain this in further detail later, for present purposes, we observe that the manner in which the Appellants ran their case, both before the Judge and before us, is the primary reason for this. By relying on a mish mash of provisions found in different agreements (*ie*, the Agreements) entered into at different times, the Appellants did not give proper consideration to the inter-relationship between the Agreements. As a result, they failed to correctly identify the specific provision of the relevant agreement that applied to the question of (a) Mr Hook's entitlement to his shares, and (b) the persons who were entitled to them in the event he was not. The resultant quagmire did not assist the court and was the primary source of the lack of clarity in the Appellants' case both below and before us. That said, such lack of clarity is not completely fatal to the Appellants' case, and for the reasons that follow, we allow the appeal in part.

The "state of play" and the Accrued Rights

34 Having considered the material before us, it is clear that shorn of unnecessary detail, the *real* bone of contention between the parties is that Mr Hook never left HSBC to become a full-time employee of Incomlend by signing his employment agreement *per* Clause 4.4 of the 1st Shareholders' Deed. In other words, the real dispute lies in the Employment Ground raised by the Appellants. That this is the case is abundantly clear from the Statement of

Claim which repeats at various times the Appellants' grievance over Mr Hook's failure to take up full-time employment with Incomlend.

(a) First, when setting out the background to the dispute, the Statement of Claim alleges that prior to signing the 1st Shareholders' Deed, Mr Hook represented that he would leave HSBC, relocate to Singapore, and take up full-time employment with Incomlend.

(b) Second, the Statement of Claim sets out several clauses from the Agreements in full and then summarises Mr Hook's obligations as requiring him: (a) "to assume full-time employment with [Incomlend]"; and (b) "not to remain employed with HSBC".

(c) Third, the Statement of Claim asserts that Mr Hook "persistently refused to assume full-time employment with [Incomlend] … to relocate to Singapore for that purpose" and "to leave his employment with HSBC", and that such "conduct amounted to a breach of the Agreements."

35 Consistent with this, in both Mr Terigi's and Mr Kouchnirenko's affidavits of evidence-in-chief, the focus was on the understanding that all the Founders would relocate to Singapore and join Incomlend as full-time employees, and Mr Hook's failure to do so. Finally, in the notice sent to Mr Hook on 12 January 2018, he was asked to remedy his breach by resigning from HSBC and taking up full-time employment with Incomlend. It is readily apparent that the focus of the Appellants' discontent was with Mr Hook's failure to take up full-time employment with Incomlend.

Mr Hook's obligation to become a full-time employee of Incomlend

36 The discontent with Mr Hook began early in Incomlend's history. In late 2015 and early 2016, Incomlend was a "fledgling business" that required *all three* of the Founders to be committed to its growth. Indeed, the evidence shows that early on, that was the intention of all three. Mr Terigi and Mr Kouchnirenko deposed that they, along with Mr Hook, had "discussed the issue of full-time commitment … from the outset", and that by April 2016 they "had agreed that [they] would all relocate to Singapore … and assume full-time employment at Incomlend." Mr Hook, under cross-examination, agreed that he had discussed with the other Founders "the idea of relocating to Singapore" in April 2016, even going as far to ask them questions about accommodation for him and his family. In fact, he agreed that "[t]here was an intention of going to Singapore." In other words, very early on in Incomlend's conception, there was consensus amongst the Founders that they would all move to Singapore to commit themselves to growing its business.

37 This intention manifested itself in the 1st Shareholders' Deed which, as noted above, was signed on 29 August 2016. Specifically, Clauses 4.4 and 4.5 required the Founders to all sign employment agreements with Incomlend by certain dates which preceded the date of the deed, which in the case of Mr Hook, was 1 August 2016. This was consistent with the intention to demonstrate to the investors who were being invited to come on board that all the Founders were fully committed to Incomlend, as evidenced by their execution of their respective employment agreements. Importantly, if the Founders did not demonstrate such unshakeable commitment by signing their respective employment agreements, the Giveaway Mechanism in Clause 4.4 (see [11] above) would be triggered. Clauses 4.4 and 4.5 of the 1st Shareholders' Deed are reproduced in full below:

> 4.4 The Founders shall, by the relevant dates set out in clause 4.5 below, enter into an employment agreement with the Company, which shall include, *inter alia,* confidentiality, non-compete and non-solicitation and customary and reasonable covenants to protect the Company's interest **("Employment Agreement"),** failing which, the defaulting Founder shall transfer all his Shares to the other Shareholders at no cost, pro-rata as nearly as possible according to the respective shareholding of the other Shareholders. In connection with the foregoing, each of the Founder hereby grants the Company a power of attorney for the transfer of his Shares to the other Shareholders, which shall not be revocable except with the unanimous consent of the Shareholders.
>
> 4.5. Dmitri Kouchnirenko shall enter in the Employment Agreement by 1 August 2016. Morgan Terigi shall enter in the Employment Agreement by 1 July 2016. Laurence Hook shall enter in the Employment Agreement by 1 August 2016.
>
> [emphasis in original]

38 As noted earlier at [11], the employment agreements, *per* Clause 4.4, were to contain "confidentiality, non-compete and non-solicitation and customary and reasonable covenants to protect the Company's interest." The inclusion of these covenants made it clear that when the Founders did sign their respective employment agreements, they would be full-time employees fully committed to Incomlend and would not engage in activities that detracted from their efforts to growing its business. The situation under the 1st Shareholders' Deed was therefore binary. If the Founders signed their respective employment agreements, they would keep their shares and continue as Founders. But if they did not, the Giveaway Mechanism would be triggered, and their shares would be transferred *pro rata* to all the other shareholders at no cost. In other words, they would lose all of their shares. In short, *the state of play as regards the Founders was either they were in, or they were out.*

39 But while this was the state of play, as noted above, Mr Hook never became a full-time employee of Incomlend. Thus, he did not comply with Clauses 4.4 and 4.5 of the 1st Shareholders' Deed. Consequently, he was

obliged to give up his shares to all the other shareholders who were party to the deed (*ie*, the other Founders and the Original Investors).

Estoppel

40 As to this, the sole ground pleaded by Mr Hook in his Defence and Counterclaim is that the Appellants are "estopped from claiming that [he] was in breach of the term [*sic*] of the 1st Shareholders' Deed" because the Appellants agreed to (a) him being on sabbatical leave with HSBC from 5 July 2017 to 1 April 2018; (b) appoint his father to Incomlend's board of directors instead of himself in July 2017; and (c) pay his salary to his wife from July 2017 instead of himself (see [17]–[18] above).

41 We have difficulty with Mr Hook's reliance on estoppel. To begin with, estoppel requires a "clear and unequivocal promise" that the promisor will not hold the promisee to their pre-existing contractual obligations: *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 ("*Aero-Gate*") at [37]. Thus, the question is whether the above acts amount to such a promise. In our view, they do not. The acts must be seen in the context of (a) Mr Hook's representations that he would eventually leave HSBC, join Incomlend and move to Singapore (see [10] and [13] above); and (b) the discussions between the Founders where Mr Terigi and Mr Kouchnirenko took issue with Mr Hook's failure to do so (see [13] above). All of this happened prior to the above acts, and given this context, we fail to see how these acts could form a "clear and unequivocal promise" that the Appellants were not holding Mr Hook to his obligation to sign his employment agreement with Incomlend.

42 Furthermore, all three of these acts took place long after Mr Hook had *already* breached Clauses 4.4 and 4.5 of the 1st Shareholders' Deed. All three

acts that Mr Hook relies on took place between mid- and late 2017. Under the 1st Shareholders' Deed, Mr Hook was expressly required to sign his employment contract by 1 August 2016. He did not do so and was in breach when the 1st Shareholders' Deed was executed on 29 August 2016. Evidently, the three acts did nothing to undermine the character of his breach of Clauses 4.4 and 4.5. As a result, rights under Clause 4.4 of the 1st Shareholders' Deed would have accrued on the date of the deed, *ie*, 29 August 2016 ("the Accrued Rights") to the other Founders and the Original Investors. The Accrued Rights were for Mr Hook to transfer his shares in Incomlend through the Giveaway Mechanism. It is difficult to see how Mr Hook can assert an estoppel based on events which occurred after the breach that the Appellants assert against him.

The Accrued Rights were held in abeyance

43 While the Accrued Rights accrued on 29 August 2016, the Giveaway Mechanism was not immediately exercised and Mr Hook's shares were not transferred to the other Founders and the Original Investors. There was a good reason for this: Mr Hook had represented to Mr Terigi and Mr Kouchnirenko that he would eventually sign his employment agreement, *per* Clauses 4.4 of the 1st Shareholders' Deed. Before the 1st Shareholders' Deed was signed, Mr Hook told them on 2 and 4 August 2016 that he would only be able to leave HSBC sometime in mid-2017, and thus could only sign his employment agreement with Incomlend around that time. After the 1st Shareholders' Deed was signed, Mr Hook told Mr Terigi and Mr Kouchnirenko on 20 February 2017 that his wife was pregnant and would give birth in September 2017, and that while this would not change the "big scheme of things" with regard to Incomlend, he would only be able to relocate to Singapore at the end of 2017. Thus, the Accrued Rights were not enforced and held in abeyance.

44 That the Accrued Rights were being held in abeyance because of these representations is consistent with the terms of the Founders' Agreement which was signed on 21 April 2017, nine months after the 1st Shareholders' Deed. As noted above at [14], of relevance is Clause 4, which provides that Mr Hook could receive *more* shares if he dedicated himself to Incomlend full-time from mid-2017, and "became permanently present in Singapore" by late 2017. We reproduce below the salient portions:

> 4. Without prejudice to Clauses 1 and 2 above, if (i) [Mr Hook] is free from all other work commitments and dedicates himself fulltime to [Incomlend] on or prior to June 1st 2017 with full time presence in Incomlend including presence in Singapore office when setting up may be needed and permanently present in Singapore from mid November 2017 onwards and (ii) none of the Trigger Events is committed by or occurs in respect of [Mr Hook] on or prior to June 1 2017:
>
> > 4.1 in the event that none of the Trigger Events is committed by or occurs in respect of [Mr Terigi] and [Mr Kouchnirenko], [Mr Terigi] and [Mr Kouchnirenko] shall each transfer such number of Shares to [Mr Hook] at S$0.5 per Share such that all the Founders will have an equal amount of Shares following the aforesaid transfer; and
> >
> > 4.2 in the event that a Trigger Event is committed by or occurs in respect of either [Mr Terigi] or [Mr Kouchnirenko] ("**Defaulting Founder**") on or prior to 1 June 2017, either [Mr Terigi] or [Mr Kouchnirenko] who is not the Defaulting Shareholder shall transfer such number of Shares to [Mr Hook] at S$0.5 per Share, such that [Mr Hook] and the non-Defaulting Founder will have an equal amount of Shares following the aforesaid transfer.
>
> [emphasis in original]

45 Critically, the dates mentioned in Clause 4 reflect the dates that Mr Hook had told Mr Terigi and Mr Kouchnirenko (see [43] above). Thus, in essence, as observed by the Judge, Clause 4 was an "incentive" for Mr Hook to make good his word that he would leave HSBC, relocate to Singapore, and join Incomlend as a full-time employee, *ie*, comply with Clause 4.4 of the 1st Shareholders'

Deed. It is therefore clear from the Founders' Agreement that Mr Terigi and Mr Kouchnirenko continued to expect Mr Hook to perform his obligation under Clause 4.4 of the 1st Shareholders' Deed and become a full-time employee of Incomlend by signing his employment agreement and remain a Founder. This would obviate the exercise of the Accrued Rights which were held *in abeyance* to give Mr Hook time to comply. As explained below, neither the grant of time to accommodate Mr Hook nor the execution of the 2nd Shareholders' Deed prejudiced the Accrued Rights and the appellants' right to exercise the Accrued Rights at a subsequent date.

The Accrued Rights were not extinguished

46 Thus, it is clear that the Accrued Rights were held in abeyance from accrual on 29 August 2016. But there is some dispute between the parties as to what happened to them as a consequence of the execution of the 2nd Shareholders' Deed. Specifically, the issue is whether this extinguished the Accrued Rights. We turn to consider this next.

Effect of the 1st Shareholders' Deed's termination

47 As noted above (see [30]), the Judge reasoned that once the 2nd Shareholders' Deed came into force, it "superseded" the 1st Shareholders' Deed which was terminated as a result, and thus Mr Hook's failure to sign his employment agreement *per* Clause 4.4 of the 1st Shareholders' Deed could not be treated as a breach. Although the Judge did not address the issue of the Accrued Rights, he seemed to have implicitly accepted they were extinguished once the 1st Shareholders' Deed was terminated and superseded by the 2nd Shareholders' Deed. Accordingly, Mr Terigi and Mr Kouchnirenko (and indeed on this analysis the Original Investors as well) could not avail themselves of the Accrued Rights.

48 In our view, the Judge was correct to find that the 1st Shareholders' Deed was terminated when the 2nd Shareholders' Deed came into force. There are two reasons that support this conclusion. First, the 1st Shareholders' Deed was implicitly discharged by agreement in that a new contractual framework represented by the 2nd Shareholders' Deed was entered into to govern the relationship amongst *all* shareholders (*ie*, the Founders, the Original Investors and the New Investors) and Incomlend, thus replacing the 1st Shareholders' Deed. To elaborate, first, the Founders and the Original Investors were also parties to the 2nd Shareholders' Deed. Despite this, the terms of both shareholders' deeds were not identical. To illustrate, Clauses 4.4 and 4.5 of the 1st Shareholders' Deed were absent from the 2nd Shareholders' Deed. As reasoned by the Judge, the Founders and the Original Investors could not have "intended to have inconsistent (or potentially inconsistent) share transfer regimes". Second and more significantly, as noted above, the Founders and the Original Investors executed the 2nd Shareholders' Deed with the New Investors who were admitted as new shareholders of Incomlend. In such circumstances, it cannot be said that the Founders and the Original Investors continued to regard themselves as bound by the terms of the 1st Shareholders' Deed as well as the terms of the 2nd Shareholders' Deed. Thus, the 2nd Shareholders' Deed was implemented to replace the 1st Shareholders' Deed.

49 However, although we agree with the Judge that the 1st Shareholders' Deed was superseded by the 2nd Shareholders' Deed, it does not follow that the Accrued Rights were extinguished as a result. With respect, in ruling as he did, the Judge conflated the issue of termination of the 1st Shareholders' Deed with the issue of the extinguishment of accrued rights thereunder, ignoring the "well-established principle that the termination of a contract does not affect rights which have been accrued before termination": *LW Infrastructure Pte Ltd v Lim*

Chin San Contractors Pte Ltd [2011] 4 SLR 477 at [15]. Here, as we have noted above at [42], the Accrued Rights came into existence on *29 August 2016*. Termination of the 1st Shareholders' Deed by the subsequent execution of the 2nd Shareholders' Deed in *June 2017* would not have extinguished those rights.

50 Furthermore, there are provisions in the 1st Shareholders' Deed that made it clear that the Accrued Rights were not affected by its termination. First, Clause 27.3 provided that termination of the 1st Shareholders' Deed "shall be without prejudice to any accrued rights or obligations of the parties up to the date of termination", thus making it clear that the Accrued Rights survived its termination. Second, Clause 19 stated that no failure or delay in exercising any right under the 1st Shareholders' Deed would operate as a waiver of those rights, and further, no "single or partial exercise of any right" would preclude any other or further exercise of that right. It therefore follows that the Accrued Rights survived the termination or discharge of the 1st Shareholders' Deed.

Were the Accrued Rights waived?

51 That the Accrued Rights survived the termination of the 1st Shareholders' Deed was not addressed by either party in written submissions. Hence, during the hearing of this appeal, we raised this issue with the parties. In response, Mr Hook's counsel submitted that the Appellants had "lost" the Accrued Rights because they had "waived" the Accrued Rights when they entered the 2nd Shareholders' Deed. Specifically, he suggested that there was an "election" when the Appellants and Mr Hook entered the 2nd Shareholders' Deed. In other words, he was invoking the doctrine of waiver by election.

52 To begin with, we could not accept this argument as Mr Hook never pleaded that the Accrued Rights were waived by election. His failure to plead

is fatal to the argument. But even if we put this omission to one side, in our view, waiver of the Accrued Rights by election is not established on the evidence before us.

53 First, it must be remembered that the Accrued Rights belonged to *all the other shareholders* under the 1st Shareholders' Deed, *ie*, not just Mr Terigi and Mr Kouchnirenko, but *also* the Original Investors. Under the Giveaway Mechanism, Mr Hook was to transfer his shares to the other Founders and the Original Investors. Pursuant to this transfer, Incomlend was to be granted a power of attorney which was not "revocable except with the unanimous consent of the [s]hareholders." This makes it abundantly clear that any rights accruing from a breach of Clause 4.4 belonged not only to the other Founders, but also the Original Investors. Thus, any conduct amounting to waiver of the Accrued Rights must have come from the other Founders *and* the Original Investors. As the point was not pleaded, this issue was not explored in evidence as none of the Original Investors were made parties to the action or called as witnesses.

54 In any event, the evidence that was adduced suggests that the Original Investors were *not aware* of the Accrued Rights. As such, waiver on their part would not have been established: *Aero-Gate* at [42]. In a conversation amongst the Founders regarding Mr Hook not signing his employment agreement, Mr Hook referred to it as paperwork in the background that "no one sees". Mr Terigi explained that the Original Investors were expecting the Founders to all be fully on board with Incomlend, and that they were "lying enough". This suggests that Mr Hook's failure to take up full-time employment with Incomlend was not known to the Original Investors. They would therefore also not have been aware of the Accrued Rights. Accordingly, it could not be said that they had elected to waive those rights.

55 Second, the evidence does not show any election on the part of Mr Terigi and Mr Kouchnirenko. Waiver by election is established "where a party has a choice between two inconsistent rights", and if he "elects not to exercise one of those rights" he "will be held to have abandoned that right if he has communicated his election in *clear and unequivocal* terms to the other party" [emphasis added]: *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [54].

56 Here, there was no "clear and unequivocal" communication from Mr Terigi and Mr Kouchnirenko that they were abandoning the Accrued Rights. As noted above, after the Accrued Rights came into existence, they were held in abeyance on the understanding that Mr Hook *would* eventually sign his employment agreement with Incomlend (see [43]–[45] above). In other words, the state of play – that all the Founders, including Mr Hook, would become full-time employees failing which they would lose their shares (see [38] above) – did not change. That this was the case would have been abundantly clear to Mr Hook: at no point in his communications with Mr Terigi and Mr Kouchnirenko did they indicate to him that they no longer required him to become a full-time employee of Incomlend. The contrary was in fact true: their expectation was that he would, and he was fully aware of this as evidenced by his representations that he would (a) leave HSBC and become a full-time employee of Incomlend by mid-2017 (see [10] above); and (b) move to Singapore by the end of 2017 (see [13] above). It would therefore have been evident to Mr Hook that the reason why the Accrued Rights were not being enforced through the Giveaway Mechanism was because of this. We therefore fail to see how it may be said that there was any "clear and unequivocal" communication that the Accrued Rights were being abandoned. Indeed, the contrary appears to be true.

The effect of the Entire Agreement Clause in the 2nd Shareholders' Deed

57 Apart from an argument premised on waiver, Mr Hook's counsel also contended during oral submissions that the Entire Agreement Clause meant that the Accrued Rights could no longer be "enforced". What this submission meant was not immediately clear, but Mr Hook's counsel eventually clarified his position to be that "there [were] no accrued rights" after the execution of the 2nd Shareholders' Deed. In other words, this was a submission that the Entire Agreement Clause had the effect of *extinguishing* the Accrued Rights. The Entire Agreement Clause, which was the primary basis upon which the Judge did not allow the declaratory relief sought by the Appellants (see [28] above), is found in Clause 23.2 of the 2nd Shareholders' Deed and provides that the four corners of the 2nd Shareholders' Deed "constitutes the entire agreement and understanding" between the parties relating to the 2nd Shareholders' Deed's "subject matter".

> 23.2. This Deed, and the documents referred to in it, constitutes the entire agreement and understanding between the Parties relating to the subject matter of this Deed and neither Party has entered into this Deed in reliance upon any representation, warranty or undertaking of the other Party which is not set out or referred to in this Deed. Nothing in this Clause 23.2 shall however operate to limit or exclude liability for fraud.

As to the "subject matter" of the 2nd Shareholders' Deed, Mr Hook's counsel brought our attention to the preamble, which states that the 2nd Shareholders' Deed is to "regulate the affairs of [Incomlend] and the relationship between the Founder [*sic*] and the Investors as Shareholders of [Incomlend]."

58 From this, Mr Hook's counsel reasoned that the Accrued Rights *also* related to the affairs of Incomlend and the relationship between its shareholders, and since the Accrued Rights were not provided for within the four corners of

the 2nd Shareholders' Deed, the Entire Agreement Clause meant that they were extinguished.

59 This, in our view, is a challenging argument. Fundamentally, on a conceptual level, it is difficult to accept that the Entire Agreement Clause would have the effect of extinguishing the Accrued Rights. Critically, the Entire Agreement Clause is forward looking in nature; it seeks to define the rights and obligations of the parties that arise from the 2nd Shareholders' Deed on and from the effective date of the deed, *ie*, 30 June 2017. Indeed, it has been observed that the purpose of an entire agreement clause is to "preclude a party to a written agreement from … finding, in the course of negotiations, some … remark or statement … on which to found a claim.": *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") at [26], citing *Inntrepneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 at 614. It is clear from this that entire agreement clauses are generally more concerned with parties attempting to incorporate or imply terms in an agreement; they are *not* usually concerned with rights that have accrued under other agreements.

60 That said, we do recognise that the effect of an entire agreement clause will depend much on its "precise wording and context": *Lee Chee Wei* at [25]. Here, in our view, as drafted, the Entire Agreement Clause does not operate to extinguish the Accrued Rights. To begin with, nowhere in the Entire Agreement Clause does it say this. More importantly, the Entire Agreement Clause must be interpreted against the backdrop of the 1st Shareholders' Deed. As we have noted above at [50], Clause 27.3 of *the 1st Shareholders' Deed* expressly provides that accrued rights will not be affected by its termination. The 2nd Shareholders' Deed was executed on the back of the 1st Shareholders' Deed, which was terminated as a result. This being the case, absent express language, the other Founders and the Original Investors could not have agreed to have the

Accrued Rights extinguished by the Entire Agreement Clause. In fact, if the Original Investors were not even aware of the Accrued Rights (see [54] above), it cannot be concluded that they intended this outcome by the Entire Agreement Clause. As for Mr Terigi and Mr Kouchnirenko, their insistence that Mr Hook enter into a full-time employment agreement with Incomlend as *per* the terms of the 1st Shareholders' Deed (see [43]–[45]; [56] above) is critical as it points to the conclusion that if Mr Hook did not perform as expected, the rights that had accrued, *ie*, the Accrued Rights would be enforced. It cannot therefore be said that the execution of the 2nd Shareholders' Deed with the Entire Agreement Clause would result in the Accrued Rights being extinguished. That could not have been their intention. It is important to note that it was not put to Mr Terigi or Mr Kouchnirenko by Mr Hook in cross-examination that they intended this outcome by executing the 2nd Shareholders' Deed.

The relevance of the 2nd Shareholders' Deed

61 Having concluded that the Accrued Rights were not extinguished or waived, it follows that the Appellants succeed on their second ground of appeal, the Employment Ground (see [32(b)] above), to the extent that Mr Hook breached Clauses 4.4 and 4.5 of the 1st Shareholders' Deed. But whether this justified the transfer of Mr Hook's shares is a different issue that we consider below at [72]–[75]. For now, we consider the Appellants' other ground of appeal, the Disclosure Ground (see [32(a)] above).

62 This ground relies on Clause 16.1 of the 2nd Shareholders' Deed which sets out a general prohibition on shareholders being involved in a "Competing Business", such business being one that is "the same or substantially similar" to the "principal activity" of Incomlend. The Appellants rely on the undisputed fact that at all times, Mr Hook was an employee of HSBC, which – as is also

undisputed – falls under the definition of a "Competing Business". However, Clause 16.1 allows a shareholder to be involved in a "Competing Business", as long as (a) such involvement existed prior to their shareholding, and (b) they had disclosed it in writing to the directors of Incomlend.

> 16. 1. Each of the Shareholders covenants and procures that as long as he is a Shareholder and for an additional period of one (1) year after he ceases to hold Shares of the Company, he and his Connected Persons will not carry out either on his own account or in conjunction with or on behalf of any third party, or be engaged, concern ed or interested, directly or indirectly, whether as shareholder, director, agent or otherwise, in any Competing Business. *Notwithstanding the foregoing, Shareholders shall not be prohibited from engaging in activities existing as at the date of this Deed or the Deed of Ratification and Accession (as the case may be) and disclosed in writing to the Directors of the Company.*
>
> [emphasis added]

63 Below, there was no dispute that Mr Hook's involvement with HSBC pre-dated the 2nd Shareholders' Deed. Thus, the key dispute was whether he had disclosed this involvement in writing. Mr Hook argued that he had done so when he sent the CV to Mr Terigi, which contained the fact that he was employed by HSBC. The Judge accepted that this was disclosure in writing to the directors of Incomlend for the purpose of Clause 16.1 of the 2nd Shareholders' Deed and found that there was no breach of Clause 16.1.

64 The Appellants argue that the Judge erred in accepting this argument. Their main submission is that Mr Hook did not make disclosure by sending the CV as it did not contain sufficient information to qualify as disclosure under Clause 16.1 of the 2nd Shareholders' Deed. They submit, for example, that any such disclosure should refer to Clause 16.1, or that the disclosing shareholder must tell the directors of Incomlend that he or she intends to continue his or her involvement in the "Competing Business" even after becoming a shareholder in

Incomlend. They point out that nothing in the CV reflected any of this, and that "the mere disclosure of [Mr Hook's] CV would have been insufficient to inform Incomlend's directors that [he] was making a disclosure under Clause 16.1."

65 Before we turn to consider the Appellants' argument, we make a preliminary observation on the Judge's use of the CV for the purpose of the disclosure exception in Clause 16.1 of the 2nd Shareholders' Deed. With respect, we are of the view that the Judge erred in this regard. It is important to remember that the CV preceded the 1st Shareholders' Deed which has an identical Clause 16.1. It is apparent from the state of play outlined above at [38] that the Founders were meant to be full-time employees of Incomlend under the 1st Shareholders' Deed. If they were, they would not compete with Incomlend, making the disclosure exception moot. If they were not, they would cease to be shareholders thereby making the disclosure exception again moot. Thus, the fact that Mr Hook provided the CV could not have been disclosure for the purpose of the disclosure exception in Clause 16.1 of *the 1st Shareholders' Deed.* It is difficult to therefore understand how that document could be treated as disclosure for the purpose of the disclosure exception in Clause 16.1 of *the 2nd Shareholders' Deed,* as the Judge had found. Similarly, it is contrived for Mr Hook to assert this as he does.

66 We now return to the Appellants' arguments which we have some difficulty with, because it appears to read in requirements that are not present in the text of Clause 16.1 of the 2nd Shareholders' Deed. But it is not necessary for us to deal with this because, in our view, the issue of breach of Clause 16.1 of the 2nd Shareholders' Deed does not arise because of the Accrued Rights.

67 The Accrued Rights were held in abeyance pending Mr Hook signing his employment agreement; if he did not, this would trigger the Giveaway

Mechanism (see [11] above), and his shares would be divested. In other words, the provision that concerns the divestment of Mr Hook's shares was Clause 4.4 of the 1st Shareholders' Deed, which was triggered by his failure to *sign his employment agreement*. This being the case, it cannot be that Mr Hook's shares could *also* be divested pursuant to a mechanism found in *another* agreement (the 2nd Shareholders' Deed) triggered by the breach of a provision (Clause 16.1) which was *moot and irrelevant* because Mr Hook would no longer be a shareholder as a result of the enforcement of the Accrued Rights.

68 Importantly, the two transfer mechanisms are markedly different. Divestment under Clause 4.4 of the 1st Shareholders' Deed (*ie*, the Giveaway Mechanism) and divestment for breach of Clause 16.1 of the 2nd Shareholders' Deed operate quite differently. The latter, which we refer to as the "Sale Mechanism", begins with Clause 17.2 which provides that it will only be triggered by an "Event of Default". Clause 17.1 defines an "Event of Default" to include a "material breach" of the 2nd Shareholders' Deed which is not satisfactorily remedied within 14 days (the material breach here being Mr Hook's alleged breach of Clause 16.1). Once an "Event of Default" is established, the defaulting shareholder will be "deemed to have made an Offer in accordance with Clause 9.2 to transfer all [of their shares]". Clause 9.2 provides that, before the shareholders can transfer their shares, they must first offer the shares to the other shareholders in their group, *ie*, the other Founders or the Investors as defined in Clause 3.4 of the 2nd Shareholders' Deed. The shareholders in the relevant group would then have a "right of first refusal" to acquire the shares.

69 It is clear from the above that the Giveaway Mechanism is completely at odds with the Sale Mechanism. In the former, Mr Hook essentially gives away his shares to the other Founders and the Original Investors *for free*; in the

latter, Mr Hook's shares would be offered up to the other Founders first *for sale* who could then buy them before any of the other shareholders could. This being the case, it cannot be that *both* regimes were meant to be able to apply to Mr Hook's shares – it had to be one or the other.

70 In our view, it could *not* be the Sale Mechanism under the 2nd Shareholders' Deed as this would ignore the continued existence of the Accrued Rights. The only way that the Sale Mechanism under the 2nd Shareholders' Deed could apply would be if the Accrued Rights were waived or extinguished. But as we have noted above: (a) waiver was not argued by either party and was not borne out by the evidence (see [51]–[56] above); and (b) the Entire Agreement Clause in the 2nd Shareholders' Deed had no effect on the Accrued Rights (see [57]–[60] above).

71 To be clear, Clause 16.1 of the 2nd Shareholders' Deed *would* be relevant if Mr Hook *had* signed his employment agreement with Incomlend. In that case, Mr Hook would have been entitled to keep his shares in Incomlend. Clause 16.1 of both agreements would prohibit Mr Hook, *qua* shareholder, from being involved in a "Competing Business", while his employment agreement would prohibit him *qua* employee from being involved in any competitive behaviour through the non-compete and non-solicitation clauses therein. But this was not what happened and thus, it remains that Clause 16.1 of the 2nd Shareholders' Deed does not apply.

Relief sought by the Appellants

72 This conclusion – that any supposed breach of Clause 16.1 of the 2nd Shareholders' Deed is irrelevant – raises issues with regard to the relief sought in this matter. The Appellants seek two declarations: (a) that Mr Hook breached

the provisions of the Shareholders' Deeds and Founders' Agreement ("the Breach Declaration"); and (b) that the Appellants were entitled to procure the transfer of Mr Hook's shares to them by reason of the breaches ("the Transfer Declaration").

73 We grant the Breach Declaration, but only to the extent that there was non-compliance with *the 1st Shareholders' Deed*. Mr Hook did not comply with Clauses 4.4 and 4.5 of the 1st Shareholders' Deed as he did not sign his employment agreement with Incomlend. As for the Appellants' assertion that Mr Hook had also breached Clause 16.1 of the 2nd Shareholders' Deed, this is not established because as we have noted above, the question of a breach of this provision does not arise on the facts.

74 It follows from the granting of the Breach Declaration as described that Mr Hook was not entitled to keep his shares, as a breach of Clauses 4.4 and 4.5 of the 1st Shareholders' Deed triggered the Giveaway Mechanism. As the shares are not Mr Hook's to keep, it follows that Mr Hook's counterclaim for damages arising out of the loss of his shares must fail.

75 However, the Transfer Declaration cannot be granted. As framed, it seeks a declaration that Mr Terigi and Mr Kouchnirenko were entitled to procure the transfer of Mr Hook's shares to *themselves.* In essence, the Transfer Declaration seeks to legitimise the transfer of Mr Hook's shares pursuant to *the Sale Mechanism*. This is not permissible and the Transfer Declaration on its terms cannot be granted for the simple reason that it is not coterminous with the Breach Declaration granted by this court. To repeat, by operation of the *Giveaway Mechanism*, the *Original Investors* not just Mr Terigi and Mr Kouchnirenko would receive Mr Hook's shares. However, that was not what

happened as the transfer was to *Mr Terigi and Mr Kouchnirenko only* pursuant to the *Sale Mechanism*.

Conclusion

76 In conclusion:

(a) We grant the Breach Declaration: Mr Hook breached the 1st Shareholders' Deed, specifically, Clauses 4.4 and 4.5, when he refused to enter an employment agreement with Incomlend. It follows from the Breach Declaration that Mr Hook is not entitled to his shares in Incomlend, and for that reason, his counterclaim must also fail. We leave the question of the payment of US$29,000 that was made by Mr Terigi and Mr Kouchnirenko to Mr Hook for his shares open as that is not before us.

(b) We do not grant the Transfer Declaration as the transfer of Mr Hook's shares should have taken place via the Giveaway Mechanism. That said, this appeal is not the forum to address and resolve the fate of the shares acquired pursuant to *the Sale Mechanism* under the 2nd Shareholders' Deed, as that is a matter, at the very least, between Mr Terigi and Mr Kouchnirenko (as Founders) and the Original Investors.

77 As for costs of the appeal, parties agree that costs of S$50,000 are appropriate. But since the Appellants have only been partially successful, we award them only S$30,000 inclusive of disbursements in costs. The usual consequential orders shall apply.

Belinda Ang Saw Ean
Judge of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Hoo Sheau Peng
Judge of the High Court

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