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

[2023] SGHC 4

Suit No 218 of 2018

Between

Patrick Michael Kelly

… *Plaintiff*

And

(1) Clicks2customers Pte Ltd
(2) Incubeta Holdings (Pty) Ltd
(3) Alan Gary Lipschitz
(4) Jonathan Gluckman

… *Defendants*

GROUNDS OF DECISION

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

TABLE OF CONTENTS

Kelly, Patrick Michael
v
Clicks2customers Pte Ltd and others

[2023] SGHC 4

General Division of the High Court — Suit No 218 of 2018
Aedit Abdullah J
6–8, 13–15 July 2021, 12 January, 2 March, 11 April 2022

6 January 2023

Aedit Abdullah J:

1 This dispute centred on the business relationship between the plaintiff and the first and second defendants. It turned on which of the agreements between the parties governed their relationship, and whether they were any breaches of the terms of the agreement.

2 Having considered the parties submissions and evidence, I allowed the plaintiff's claim in part against the defendants and rejected the defendants' counterclaim. Brief remarks were issued on 11 April 2022. The defendants have appealed against my decision. These are the full grounds of my decision.

Background

3 The plaintiff was engaged by the first and second defendants to provide marketing and business development services between 2011 and 2015.[1] The first defendant is a company incorporated in Singapore and is a wholly-owned subsidiary of the second defendant. The first defendant was set up for the purpose of selling the digital marketing services of the second defendant. The second defendant is a company incorporated in South Africa; it owns and controls several corporate vehicles which trade under the "Clicks2Customers" trade mark. The third defendant is a director of the first and second defendants whereas the fourth defendant is a director of the first defendant and the managing director of the second defendant.[2]

4 The business relationship between the plaintiff and the first and second defendants began by way of a telephone call between the plaintiff and the fourth defendant on 30 May 2011. An oral agreement between the first and second defendants and the plaintiff was reached; the plaintiff was to assist in the development of the business of the first and second defendants, and in exchange, he would receive 70% of the gross profits arising from any new client that he introduced to the first defendant ("70/30 Split GP Model"). The 70/30 Split GP Model was to apply from June 2011 to 31 August 2011.[3] This is referred to as the "2011 Oral Agreement".

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1 Statement of Claim (Amendment No 2) ("SOC") at para 1; Defence of the 1st, 2nd and 3rd defendants and counterclaim by the 1st defendant (Amendment No 3) ("Defence") at para 3.

2 SOC at paras 2 to 4A; Defence at paras 4 to 6.

3 SOC at paras 8(c)(i), 11 and 1; Defence at paras 9(4), 11 and 12. See also Bundle of Affidavits of Evidence-in-Chief ("Bundle") at pp 8 to 10 (Affidavit of evidence-in-chief of Patrick Michael Kelly ("PMK") at paras 19 to 22); at p 1391 (Affidavit of evidence-in-chief of Jonathan Gluckman ("JG") at para 10).

5 From July 2011 onwards, the parties began to negotiate a written agreement that would govern their relationship in a more permanent form.[4] While negotiations were ongoing, the plaintiff wrote to the fourth defendant on 5 July 2011 proposing that the 70/30 Split GP Model be retained until other options were formally tabled; the fourth defendant replied on 6 July 2011 noting that "until we finalise something we are on the [70/30 Split GP Model] as initially agreed" ("July 2011 Agreement").[5] Numerous drafts of memorandums of understanding ("MOU") regarding the parties' business relationship were exchanged. This culminated in the signing of an MOU on 8 March 2012 ("8 March MOU") at a physical meeting between the plaintiff and the third defendant in Johannesburg, South Africa.[6] The 8 March MOU was significant for, among other things, altering the calculation of the commission payable to the plaintiff. The 8 March MOU stipulated that the plaintiff was to be paid commission on a "Net Gross Profit" basis, that being, gross profit less various costs (such as time spent on campaign management by campaign managers and account managers). It also imposed a monthly cap of US$40,000 per month on the plaintiff's salary, and provided that commission was payable only if there was "active involvement in that client, whether it is in an acquisition or retention role".[7] This was a change from the 70/30 Split GP Model. At clause 6 of the 8 March MOU, which pertains to the plaintiff's proposed equity in the first defendant, there is a text box on the right-hand side which contains the word "Discussion".

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4 Bundle at p 10 (PMK at paras 24 and 25); p 1392 (JG at para 12).

5 Bundle at p 11 (PMK at para 27); pp 1392 to 1393 (JG at paras 13 to 14).

6 Bundle at p 46 (PMK at para 97); p 1009 (Affidavit of evidence-in-chief of Alan Lipschitz ("AL") at para 25); p 1395 (JG at para 23).

7 Bundle at pp 355 to 358 (PMK at pp 353 to 356); pp 1049 to 1053 (AL at pp 43 to 47).

6 Following the 8 March MOU, discussions between parties continued on various matters, such as whether the second defendant's costs were to be allocated to its subsidiaries.[8] As these discussions went on, the plaintiff received commission payments calculated on a Net Gross Profit Basis, as per the provisions in the 8 March MOU.[9]

7 In 2014, a key client of the second defendant's, the Standard Chartered Bank ("SCB"), raised concerns regarding the performance of the marketing and/or advertising services provided. Discussions between the plaintiff and the third and fourth defendants ensued. By May or June 2014, the plaintiff was removed from the account in respect of SCB.[10]

8 On 28 September 2015, the fourth defendant issued a letter to the plaintiff terminating his services with the first defendant.[11]

Summary of the plaintiff's case

9 Briefly, the plaintiff's principal claim was for damages for breaches of the 2011 Oral Agreement and the July 2011 Agreement. He sought commission to be paid to him on the 70/30 Split GP Model.[12] He further claimed damages for the wrongful termination of the 2011 Oral Agreement and July 2011 Agreement without reasonable notice on 28 September 2015.[13]

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8 Bundle at pp 47, 59 to 62 (PMK at paras 99 and 142 to 152); p 1400 (JG at para 35(d)).

9 Bundle at p 1011 (AL at para 28(c)); p 1397 (JG at paras 27 to 34).

10 Bundle of AEIC at pp 94 to 97 (PMK at paras 271 to 283); p 1403 (JG at paras 42 and 43).

11 Bundle of AEIC at p 124 (PMK at para 376); p 1402 (JG at para 40).

12 Plaintiff's closing submissions ("PCS") at para 2; Plaintiff's reply closing submissions ("PRS") at para 117; SOC at para 83(i).

13 PCS at para 3; SOC at para 83(ii).

10 The plaintiff's secondary case was for damages for breaches of the 8 March MOU, dishonest assistance, indument of breach of contract and lawful and/or unlawful conspiracy.[14] The plaintiff also claimed for unpaid commissions on a Net Gross Profit basis, damages amounting to the value of 35% equity interest in the first defendant, and damages for wrongful termination of the 8 March MOU.[15]

11 The plaintiff's principal claim rested on the July 2011 Agreement being a valid and binding agreement, such that the 70/30 Split GP Model (as first agreed on in the 2011 Oral Agreement) continued to govern the calculation of his commission pending a final and comprehensive agreement between parties.[16] He further argued that the 70/30 Split GP Model was not subject to a long-stop date of 31 August 2011. There was no evidence that the defendants intended for it to be so.[17] There was also no basis for the defendants to suggest that it would have been commercially unviable for the 70/30 Split GP Model to be implemented in the long term; the defendants were agreeable to the 70/30 Split GP Model being implemented on a long-term basis and in any event, the defendants' assertion was not backed by any objective evidence.[18] Since the parties failed to reach an agreement following the July 2011 Agreement, he was entitled to commission on the basis of the 70/30 Split GP Model from 1 September 2011 until his termination on 28 September 2015.[19]

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14 PCS at para 4; PRS at para 120; SOC at para 83(v).

15 PCS at para 4; PRS at para 118; SOC at para 83(v).

16 PCS at paras 42 to 45.

17 PCS at paras 48 to 50.

18 PCS at paras 52 to 70.

19 PCS at para 71.

12 To establish that no binding agreement was reached after the July 2011 Agreement, the plaintiff argued that the 8 March MOU was not legally binding or valid. The 8 March MOU was a framework agreement which outlined terms for further negotiations and agreement.[20] First, there was no intention to create legal relations.[21] This was borne out by, among other things, the distinct header and title of the document as an MOU (as compared to an "Agreement" or "Draft Agreement"). There was a common understanding among parties that the plaintiff's commission payment structure was intricately intertwined with his receipt of equity in the first defendant. Thus, the plaintiff's commission structure must have been subject to further discussions given that his entitlement to equity was, according to the defendants, likewise subject to further discussions.[22] There were also further negotiations between parties regarding the definition of Net Gross Profit, in particular the computation of "time spent on campaign management by campaign managers and account managers + related overheads", which suggested that the 8 March MOU was not final and binding.[23] Finally, the plaintiff's issuance of invoices based on the Net Gross Profit model did not mean that the 8 March MOU was conclusive.[24]

13 Second, the 8 March MOU was not countersigned by the third defendant contemporaneously after the plaintiff had signed the document. The defendants said that the 8 March MOU was signed on 12 March 2012. Yet, this was not borne out by the evidence on the defendants' case. The plaintiff, in turn, submitted that the 8 March MOU was not countersigned until after he

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20 PCS at para 72; PRS at para 14.

21 PCS at para 85.

22 PCS at paras 88 to 115.

23 PCS at paras 130 to 143.

24 PCS at paras 152 to 163; PRS at para 19.

commenced the present suit.[25] To prove that the 8 March MOU was signed on 12 March 2012, the defendants relied on an e-mail thread where the fourth defendant stated that he had left the signed 8 March MOU on the third defendant's desk.[26] When the plaintiff sought the e-mail thread in its native format, the defendants were unable to produce it; the defendants then conceded that they had "typed up" the said e-mail thread.[27] The failure of the defendants to sign the 8 March MOU timeously indicated that they did not regard the 8 March MOU as legally binding.

14 Lastly, the terms of the 8 March MOU were incomplete, uncertain and/or unworkable. There were various typographical errors and undefined terms. Several of the terms were also purportedly objectively unworkable.[28]

15 The plaintiff's secondary case rested on the premise in so far that the the 8 March MOU was valid and binding, it was only so in its entirety or not at all.[29] This meant that the equity component under clause 6 of the 8 March MOU would also be binding. There was no basis for the defendants to suggest that it was subject to further negotiation. The comment bubble beside clause 6.2 with the word "Discussion" did not amount to a "subject to contract" clause, and even if it did, it was appended specifically to clause 6.2, and not clause 6 as a whole.[30] Further, the inextricable link between equity and commission indicated that the 8 March MOU was to be read as a whole and complete agreement. If

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25 PCS at para 178.

26 PCS at paras 187 and 188.

27 PCS at para 190.

28 PCS at paras 219 to 223.

29 PRS at para 56.

30 PCS at paras 239 to 249.

the plaintiff was to be paid on a Net Gross Profit basis, he would have to be given equity, as per clause 6 of the 8 March MOU.[31] This was consistent with the defendants' treatment of the plaintiff as a shareholder of the first defendant.[32]

16 Further to the plaintiff's secondary case, he argued that he was a partner with the first and second defendants in a joint venture.[33] He was not paid any regular salary like an employee; instead, his earnings were commission based and dependent on the profits generated by the first defendant. Pursuant to this, a relationship of trust and confidence existed and consequently, fiduciary duties, such as the duty to act honestly and in good faith, were owed.[34] These duties, however, were breached by the first and second defendants on numerous counts, by the allocation of the second defendant's management fee to the first defendant and the withholding of financial information.[35]

17 The plaintiff advanced two further points which stood apart from his principal and secondary cases. The first was in relation to the defendants' termination of his service on 28 September 2015 without reasonable notice under either the July 2011 Agreement or the 8 March MOU. His dismissal was borne out of commercial considerations and interpersonal conflict as compared to, for instance, gross misconduct.[36] Reasonable notice of three months should have been provided, and damages for wrongful termination should follow. The second was relevant in the event that the plaintiff was not entitled to any claims

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31 PCS at paras 250 to 253.

32 PCS at paras 254 to 260.

33 PRS at para 83.

34 PCS at para 288; PRS at para 85.

35 PCS at paras 289 to 293; PRS at para 92.

36 PCS at paras 294, 300, and 305.

based on the July 2011 Agreement or 8 March MOU. The plaintiff sought a reasonable sum of money for work done on a *quantum meruit* basis, premised on a claim in restitution under unjust enrichment.[37] His course of conduct reflected that he had acted under the assumption that a comprehensive agreement would be finalized but given that it did not, he should be compensated with a reasonable sum of money.

18 In reply to the counterclaim for restitution of a sum of US$128,748.28, the plaintiff averred that it was a "retaliatory afterthought".[38] The defendants relied on a single document known as the "JG-15 Spreadsheet" to claim that there was a mistake giving rise to the plaintiff's unjust enrichment. However, the "JG-15 Spreadsheet" was plagued by various issues. The defendants also failed to demonstrate a causative mistake in making the payments.[39] Moreover, the plaintiff was contractually entitled to receive the payments under the July 2011 Agreement or the 8 March MOU.[40] The defendants' interpretation of clause 5.6 of the 8 March MOU, that the plaintiff had to be actively involved in each and every client he acquired for the first defendant to be paid, was absurd.[41] If the 8 March MOU was binding and the defendant's counterclaim was dismissed, the defendants were then liable to repay the plaintiff the commission for work done in 2015, in the amount quantified by the plaintiff's expert.[42]

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37 PCS at paras 2, 306, 307 and 311. SOC at para 83(iii).

38 PRS at para 98.

39 PCS at paras 325 to 332; PRS at para 101.

40 PCS at paras 342 to 330; PRCS at paras 105 to 115.

41 PRS at paras 107 and 113(b).

42 PCS at paras 352, 398 and 399.

Summary of the defendants' case

19 The defendants argued that the clauses relating to the commission provisions in the 8 March MOU were complete and binding. On an objective approach, the words and conduct of parties pointed to an intention to create legal relations. There was no qualifying language of any kind.[43] The errors in the 8 March MOU were also not fatal to the finding of a complete and binding contract.[44] Pertinently, parties performed their obligations under the 8 March MOU with the plaintiff accepting payments on a Net Gross Profit basis.[45] As for the defendants' supposed failure to countersign the 8 March MOU, this did not advance the plaintiff's case. The 8 March MOU had been produced and inspected by the plaintiff physically.[46] In any event, the lack of a signature was not determinative on the issue of contractual validity.[47]

20 The provisions relating to equity in the 8 March MOU, however, were not complete and binding; they were effectively "subject to contract". The comment bubble with the word "Discussion" referencing clause 6 of the 8 March MOU (which pertains to equity of the plaintiff), as well as the transcript of the relevant meeting, demonstrated parties' intention to continue negotiations on the provision.[48] This was reinforced by the plaintiff's concession that the essential terms concerning his proposed equity (such as the number of shares, the transfer date, *etc*) had not been agreed on, which was why negotiations did

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43 Defendant's closing submissions ("DCS") at paras 4 to 7, and 11 to 14.

44 Defendant's reply closing submissions ("DRS") at paras 12 to 14.

45 DCS at para 9.

46 DCS at para 20.

47 DRS at paras 21 and 23.

48 DCS at paras 26 to 28.

continue after the 8 March MOU was signed.[49] As a fallback, even if the equity provisions were enforceable, there was no reliable evidence on the valuation of the shares. The plaintiff's expert's opinion was grounded on problematic premises, for instance, it relied on a forecasted revenue of the second defendant which was significantly off the mark compared to its actual revenue.[50] The defendants further submitted that the validity of the commission provisions was unaffected by the incomplete equity provisions. While the plaintiff's narrative was that the two were inextricable, this was his subjective view and irrelevant to the interpretation of the 8 March MOU.[51] Instead, it was clear that parties intended for the commission provisions to be binding immediately; contrastingly, the intent underlying the equity provisions was not for plaintiff to become a 35% shareholder immediately but for parties to enter into a subsequent comprehensive agreement.[52]

21 The defendants further argued that the July 2011 Agreement was unenforceable because it lacked certainty and completeness. The July 2011 Agreement was also subject to the long-stop date of 31 August 2011; it could not be construed, as the plaintiff had done, to amount to an indefinite and enforceable promise.[53] Even if the 8 March MOU was not legally binding and valid, it did not mean that parties' relationship was governed by the July 2011 Agreement.[54] Instead, it meant that no agreement was entered into, and the plaintiff's services would have to be assessed on a *quantum meruit* basis. But

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49 DCS at paras 32 to 39.

50 DCS at para 31; DRS at para 67.

51 DCS at para 43; DRS at paras 3 and 4.

52 DRS at paras 16 to 19.

53 DCS at paras 44 to 48.

54 DRS at para 25.

even then, the plaintiff had not provided any suggestion of what a reasonable sum should be. The defendants, in turn, suggested that the services would have been valued at a monthly salary of S$20,000 for a period of 43 months, which would be netted off by the actual amount the plaintiff received (of S$1,903,081.59). This further justified the defendants' counterclaim for overpayment.[55]

22 There was no basis for the plaintiff to allege a breach of the 8 March MOU. Several of the complaints raised by the plaintiff were unfounded and without basis in the 8 March MOU. There was no contractual right for the plaintiff to control the hourly rate on the time of campaign managers; there was also no right of control over the allocation of costs between the first and second defendant; and there was no right to receive information.[56] Further, the plaintiff's conduct evinced an acceptance of the state of affairs.[57] The defendants also argued that there was no implied term on reasonable notice. The plaintiff was not an employee; he was an independent contractor or agent. There was also no undue hardship caused to the plaintiff following the termination of his services.[58] Moreover, the defendants' reasons for termination were immaterial to whether plaintiff was entitled to reasonable notice.[59] For the term to be implied, the court must be satisfied of the usual legal requirements in the implication of a term.

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55 DRS at paras 30 to 32.

56 DCS at paras 72 to 83.

57 DCS at paras 84 to 97.

58 DCS at paras 100 to 102.

59 DRS at para 40.

23 The defendants also disputed that they were in a partnership with the plaintiff, let alone that they owed him any fiduciary duties. The plaintiff sought to be a shareholder in a private limited company (the first defendant), and the plaintiff did not share in the losses of the first defendant.[60] Instead, the relationship was purely contractual. The plaintiff had elected not to become an employee to take advantage of certain tax concessions.[61] In the absence of any fiduciary relationship, the plaintiff was not entitled to an account of profits but only a remedy in damages (if any). It also meant that his claim in dishonest assistance fell away.

24 The defendants argued that their counterclaim for overpayment was based on the plaintiff's diminished involvement in the SCB account from mid-2014 onwards. Based on their interpretation of clause 5.6, the plaintiff was not entitled to these moneys.[62] Notwithstanding his limited involvement, the plaintiff issued invoices for the period from July 2014 to December 2014 totalling S$345,539.95, of which S$259,289.26 was attributed to the SCB account. The full sum was paid to the plaintiff.[63] From January to September 2015, the plaintiff was entitled to commission from non-SCB accounts totalling S$100,900 but not entitled to any commission from the SCB accounts.[64] The defendants thus exercised its self-help right of equitable set-off, leaving a balance of S$158,398.26 owing from the plaintiff to the first defendant.[65] Additionally, the plaintiff's expert's accounting for the commission owing to

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60 DCS at paras 50 to 51.

61 DCS at paras 62 to 63.

62 DCS at paras 106 to 111.

63 DCS at paras 112 to 113.

64 DCS at para 115.

65 DCS at paras 116 to 118.

the plaintiff for 2015 of S$661,478 was erroneous; it was based on the data from January 2015 to August 2015 but the first defendant's largest client, SCB, ceased to engage the first defendant's business from May 2015 onwards. The defendants relied on a relied on a chain of e-mails exchanged between SCB and the fourth defendant between 23 April 2015 and 5 May 2015 ("SCB Termination E-mail"), for this purpose.[66]

Further directions and arguments sought

25 Further arguments were sought as the defendants, as part of their closing reply submissions, relied on the SCB Termination E-mail which was not adduced at trial. The SCB Termination E-mail would have affected the determination of the damages that the plaintiff would be entitled to if he succeeded on liability. Parties were first invited by way of letter dated 29 November 2021 from the Court to state their positions on the appropriate course of action, including possibly: (a) exclusion of the documents relied on by the defendants; (b) admission with the opportunity for the plaintiff's expert to provide a further opinion; (c) reopening of the hearing; or (d) determination of liability being taken separately.[67]

26 Parties attended a case conference on 12 January 2022 to discuss how matters should be taken forward to deal with various matters arising from the points raised by the Court. As it was, the option chosen was to have the documents left in; the defendants were to provide further discovery of documents relating to the "Net Gross Profits" of the SCB account for the period of September 2015 to December 2015, with a supplementary report by the

66 DRS at paras 70 to 73.

67 Letter from Court dated 29 November 2021.

plaintiff's expert dealing with how the additional documents would affect his quantification of the commissions owing to the plaintiff in 2015. Permission was also granted to the defendants to file and serve a reply affidavit limited to the matters raised in the plaintiff's expert's supplementary report. Parties were allowed to tender supplementary written submissions.[68]

27 The defendants, however, adduced additional material in their discovery of documents and made arguments in their further affidavit and submissions founded on evidence beyond what was adduced at the trial and beyond the scope of the directions given by the Court. The defendants disclosed seven documents, among which were documents pertaining to the Net Gross Profit of the first defendant in time periods outside of September 2015 to December 2015.[69] The defendants also introduced evidence concerning the interpretation and application of the Net Gross Profit model. In their written submissions, the defendants made several arguments pertaining to the plaintiff's failure to meet the threshold of "active involvement" as per clause 5.6 of the 8 March MOU in respect of the SCB and non-SCB accounts.[70] They further argued that calculations under the Net Gross Profit model should factor the salary costs of account managers.[71] The plaintiff, in reply, objected to the introduction of fresh evidence unrelated to the issue of the "Net Gross Profits" of the SCB account from September 2015 to December 2015; the plaintiff also objected to the defendants' interpretation of Net Gross Profit to include the salary costs of account managers.[72]

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68 Minute sheet dated 12 January 2022.

69 Defendant's 11th Supplementary List of Documents dated 19 January 2022.

70 Defendant's supplementary submissions ("DSS") at paras 1 to 18.

71 DSS at paras 19 to 27.

72 Plaintiff's supplementary submissions ("PSS") at paras 10 to 14, and paras 17 to 30.

The decision

28 I determined that the agreement was that captured in the 8 March MOU, and that the additional documents and other subsequent new evidence that the defendants adduced should be disregarded. I disallowed the defendants' counterclaim and allowed the plaintiff's claim in respect of his unpaid commissions in 2015 (including the engagement by the SCB).

The governing agreement

29 As no appeal was filed by the plaintiff and these findings are largely in favour of the appellants, *ie*, the defendants, this part of the claim is dealt with relatively briefly.

30 In summary, the plaintiff argued that the relationship was governed by the July 2011 Agreement (which was an extension of the 2011 Oral Agreement), and thus his commission was payable on the 70/30 Split GP Model. The plaintiff's argument was twofold. First, the July 2011 Agreement was legally valid and binding, and provided for a commission structure that was commercially viable. Second, the 8 March MOU was not legally binding or valid. Parties did not have the requisite intention to create legal relations, which was evidenced by, among other things, the failure of the defendants to countersign the 8 March MOU contemporaneously.

31 In contrast, the defendants argued that the 8 March MOU was the governing agreement between parties in respect of the commission provisions, *ie*, payments were to be made on a Net Gross Profit basis. On an objective interpretation, there was a clear intention to create legal relations. Importantly, parties performed their obligations under the 8 March MOU for close to three years. However, the equity provisions in the 8 March MOU did not govern the

parties' relationship. These provisions were effectively marked "subject to contract". Essential details concerning the plaintiff's equity were not finalized and were subject to further discussion between parties.

32 I concluded that the operative agreement was that encapsulated in the 8 March MOU. The required elements for a binding agreement were made out, namely, the intention to create legal relations, consideration, and certainty of terms. In particular, the 8 March MOU, while not perfect, I conclude, was the document intended by the parties to be binding, despite its title. The terms were certain at least to the operative arrangements. There was also sufficient evidence that the plaintiff considered himself bound by the 8 March MOU. Various e-mails had been sent by the plaintiff to the defendants in which he had affirmed that the 8 March MOU was binding and operative. For instance, an e-mail sent to the fourth defendant from the plaintiff on 28 March 2012 stated that "[m]y original arrangement lasted until Feb 29th 2012" and that "[m]y new arrangement commences March 1 2012". When questioned about the e-mail, the plaintiff confirmed that the new arrangement referred to the 8 March MOU.[73]

33 While there were a number of deficiencies, including obvious errors and typographical errors, in the 8 March MOU, these did not ultimately undermine the operation of the agreement. These errors did not impede the finding of a complete and binding contract; they also did not hinder the interpretation of the terms of the agreement. Several of these mistakes were superficial and in the nature of editorial errors. The plaintiff, for example, had complained of the inaccurate reference in clause 4.7 as being a "fundamental" error. Clause 4.7 provided that "[The plaintiff] will earn commission and salary as outlined in 4

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[73] Bundle at pp 367, 433, 813 (PK at pp 365, 431, 811); see also Transcript, 6 July 2021 at p 53 line 21 to p 57 line 12.

below …". The correct reference, as noted by the plaintiff, should have been to clauses 4.7.1 to 4.7.3.[74] What had been described as a "fundamental" error did not hamper the plaintiff's understanding of the clause. It was also clearly not a mistake of such an order to render the 8 March MOU incomprehensible or inoperable.

34 I accepted that the issue of equity as stipulated at clause 6 of the 8 March MOU was not resolved. As noted in the 8 March MOU by the bubble comment containing the text "Discussion", it was to be discussed further. Parties had clearly intended to continue their discussions concerning the essential terms of the plaintiff's proposed equity that were not set down in the 8 March MOU. In the transcript produced by the plaintiff of the meeting where the 8 March MOU was signed, it was made clear that details concerning the equity arrangements were to be confirmed in a further shareholder's agreement.[75] These negotiations, in fact, did occur between 2013 and 2014.

35 In some circumstances, this would have meant that the entire agreement was not operative. However, here, the rest of the terms were certain and independent from the provisions that sought to confer equity on the plaintiff. Given the subsequent conduct of the plaintiff, wherein he accepted commission payments on the Net Gross Profit basis as stipulated in the 8 March MOU (especially keeping in view the relatively thorough verification of these sums by the first defendant and the plaintiff), it was clear to my mind that he did in fact consider himself bound by the terms of the 8 March MOU save for the position as to equity. It was also clear that those terms of the 8 March MOU were operable notwithstanding the plaintiff's subjective view that the

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74 PCS at para 220(c).

75 DCS at para 27; Bundle at p 337 (PK at p 335).

commission provisions were inextricably linked to the provisions relating to equity. There was no evidence of any intention for the suspension of the commission provisions until the equity provisions were agreed upon. The present case was not similar to subject to contract cases generally, since this was just a specific term that was unresolved. As observed in *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 at [27], "parties may conclude a binding contract even though there are some terms yet to be agreed between them; the important question is whether the parties, by their words and conduct objectively ascertained, have demonstrated that they intend to be bound despite the unsettled terms". Presently, the conduct and language of the parties confirmed their intention to be bound by the 8 March MOU save for the provisions relating to equity.

36 The fact that the defendants did not countersign the MOU did not render it inoperative. It is relatively uncontroversial that the acceptance of a contract may be effected by way of conduct. This, the defendants clearly did. There was also no room for the plaintiff to dispute the authenticity of the 8 March MOU. While the plaintiff sought to make the point that there were various versions of the 8 March MOU in play, it remained the case that there was proof by primary evidence of the 8 March MOU, which was produced and inspected physically by the plaintiff. It was on this version of the 8 March MOU that proceedings occurred. While it was unfortunate that the defendants put forward a signed copy of the agreement which was not in fact signed at the time, this was not fatal to their overall credit or credibility. The defendants should not have done so. But this did not militate against my finding that the evidence as a whole showed that the 8 March MOU was indeed agreed between parties and therefore binding.

37 As to the alleged continuing dispute about the calculation of the commission, particularly what were referred to as the "Basecamp" numbers, and other details, this was about the process of determination of the Net Gross Profit under the clause 4.7.1 of the 8 March MOU, rather than uncertainty as to its terms. Perhaps this was not the best mechanism to ascertain the commission payable, but the term was certain, that the time costs as captured in "Basecamp" were to be accounted for.

38 The 8 March MOU thus displaced the earlier arrangements, which did not govern the relationship between the parties. Any breach claimed by the plaintiff would thus have to be of a term of the 8 March MOU. There was no breach as to the allocation of equity, which remained to be negotiated between the parties.

39 Additionally, a number of breaches alleged by the plaintiff were couched in terms of a breach of fiduciary duties. The plaintiff sought to characterize his relationship with the first and second defendants as a partnership, from which certain fiduciary duties were owing from the defendants to the plaintiff. There was however no fiduciary relationship, and there was no partnership at all. The evidence raised by the plaintiff on this count was unpersuasive. As pointed out by the defendants, the plaintiff sought to be a shareholder of a private limited company. In so far as he had shared in the profits of the first defendant, this was a mere starting point that was not sufficient, and was undermined by the fact that he did not share in the losses of the first defendant. There was also no cap as to the profits of his alleged partners (unlike him). The plaintiff's reliance on a letter issued by the fourth defendant referring to him as a "business partner" similarly did not advance his case. It was a standalone and isolated document. In fact, that this was the main and only piece of documentary evidence that was

relied on by the plaintiff in a business relationship spanning several years was telling. The various authorities cited by the plaintiff did not assist.

40 On this issue, I thus found in favour of the defendants, and the plaintiff failed in his various claims on the basis of his supposed equity interest under the 8 March MOU. He also failed in his claim on the purported July 2011 Agreement.

Claim for non-payment of commission and counterclaim for overpayment

41 What is the subject of the appeal is my determination of the plaintiff's claim for non-payment of commissions and the defendants' counterclaim for overpayment.

42 The plaintiff's claim for non-payment of commissions was understood best in light of the defendants' counterclaim. The defendants' counterclaim related to alleged overpayments in respect of the SCB account. The premise of the counterclaim was that the plaintiff ceased to be actively involved in the SCB account from mid-2014 onwards. This meant that he was disentitled to commissions as per clause 5.6 of the 8 March MOU. Because of his diminished involvement with the SCB account, the payment of $259,289.26 to the plaintiff for the period from July 2014 to December 2014 for the SCB account was erroneous. He was also not entitled to commissions payable under the SCB account in January to September 2015. That said, as he was entitled to non-SCB commissions from January 2015 to September 2015 amounting to S$100,900, the defendants exercised its self-help right of an equitable set-off such that S$158,389.26 (by taking off $100,900 from $259,289.26) was owing from the plaintiff to the defendants. In reply, the plaintiff's claim for unpaid commission was for the work done in 2015 (that is, to include his SCB commissions and

non-SCB commissions from January 2015 to September 2015 that the defendants had applied an equitable set-off on). In so far as the counterclaim was rejected, the plaintiff would then be entitled to commission payable in 2015.

43 The entitlement to these payments was governed by clause 5.6 of the 8 March MOU, and was affected by the question of whether and when the engagement with SCB was terminated, and whether notice was required to terminate the relationship between the plaintiff and first defendant. This in turn affected the plaintiff's claim for non-payment of those very same commissions in 2015.

44 Having considered the arguments, I found that the plaintiff's claim should succeed, while the defendants' counterclaim should be rejected. Clause 5.6 of the 8 March MOU governed the plaintiff's entitlements. The period of entitlement should cover a period in lieu of notice as well.

The interpretation of cl 5.6 of the 8 March MOU

45 Clause 5.6 did not bar the plaintiff's claim for commission for the work he did in respect of SCB.

46 The defendants argued that the plaintiff was not entitled to payment in respect of the SCB account for the period in question as cl 5.6 required the plaintiff to be and to remain actively involved in the work for that client, and that the efforts had to result in revenue generated for the defendants.[76] The plaintiff argued that the defendants' approach went against the text of the clause and did not make commercial sense, and importantly, the plaintiff had remained actively involved in the SCB account.

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[76] DCS at para 107.

47 Clause 5.6 of the 8 March MOU reads:

> For the avoidance of doubt, commission paid and attributed to a region is based on active involvement in that client, whether it is in an acquisition or retention role. This is the standard policy of [the second defendant] globally.

The clause required that there be active involvement with respect to the client. But contrary to the defendants' arguments, the plain text did not require active involvement in both acquisition and retention.

48 The defendants' interpretation that there had to be active involvement in continued work on the account was not supported by the language of clause 5.6.[77] "Active involvement" may indeed mean in some contexts being active in each and every way, and being continuously part of the engagement with a client. Here, however, to my mind, the better interpretation was that the clause referred to active involvement in either acquisition or retention. Again, this went back to the plain words of the clause which pointed to that conclusion. The clause states that active involvement encompasses acquisition or retention. In their supplementary submissions, the defendants belatedly sought to nuance their position by characterizing the issue of "active involvement" as one of degree.[78] Apart from this being wholly unwarranted, the reframing of the point added little to the defendants' case in principle. At its pith, the reframing of the issue advanced by the defendants returned to the issue of the plaintiff not continuously working on the SCB account, which, as observed, was not required by the clause.

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77 DCS at para 107.

78 DSS at paras 2 and 3.

49 The defendants also argued that for commission to be payable, there had to be operational involvement, meaning that there had to be involvement in an existing business for a client, or business development leading to a new revenue stream. As noted by the plaintiff's counsel, the defendants' submission seemed to recognise that either acquisition or business development relating to new revenue streams would lead to commission being payable. Again, such an interpretation cohered with the plain language of the clause. It further could not be gainsaid on the evidence before me that the plaintiff's activities leading to SCB becoming a client did not lead to revenue coming in; that was the whole point of the team servicing the SCB account.

50 As for the argument that entitlement to commission was solely premised on actual involvement in the maintaining or continued servicing of the SCB account, this goes against the plain words. The phrase in question did not contain a disjunctive "or", but was emphatically disjunctive: it stated whether in one situation or another. There was no reasonable, or acceptable, construction in favour of the defendants' position that did not do violence to the words of the clause. Any ambiguity would have to be resolved in favour of the plaintiff on the basis of the *contra proferentem* rule. As explained in the controlling authority of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131], the *contra proferentem* rule is a well-established canon of interpretation that states that "where a particular species of transaction, contract, or provision is one-sided or onerous it will be construed strictly against the party seeking to rely on it". As further elaborated in *LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 at [56] and [57], the *contra proferentem* rule involves the identification of an ambiguity in the contract, and, more importantly for present purposes, the person against whose interest the ambiguous term should be read, which could

be either the person who seeks to rely on the term or the person who proposed the term for inclusion in the contract. In so far as the 8 March MOU was the defendants' draft and cl 5.6 was being relied on by the defendants to their benefit, the clause should be construed against them.

51 The circumstances and the work done on the ground pointed against the interpretation put forward by the defendants. What thus sufficed was active involvement in acquisition, and not active involvement in retention and acquisition. As the evidence was clear that the plaintiff was indeed actively involved in obtaining SCB as a client, that was enough. If the defendants wanted to require continued active engagement with a client after acquisition, that could have been easily written into the 8 March MOU.

52 Further, the defendant's own interpretation and application of clause 5.6 was equivocal. They initially took the position that the plaintiff was entitled to the commission on non-SCB accounts from January 2015 to September 2015, and on this basis, exercised their self-help right of an equitable set-off.[79] In doing so, they tacitly accepted that the plaintiff fulfilled the requirements under clause 5.6 in respect of the non-SCB accounts. Yet, in their supplementary submissions, they resiled from this position, stating that the plaintiff should not be awarded the commission for non-SCB accounts from May 2015 to December 2015 on the basis that he had not been actively involved with these clients.[80] For this, they relied on an e-mail sent by the fourth defendant stating so. But this did not sufficiently explain the change in their position given that the e-mail was part of their bundle of documents at trial, which conveyed the impression that

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79 DCS at para 115.

80 DSS at paras 14 to 17.

the defendants, on their own case, had shifted the goalposts in their interpretation and application of clause 5.6.

53 In any event, there were, as noted by the plaintiff, e-mails showing continued involvement by the plaintiff as late as 18 May 2015 in relation to the negotiations between the first defendant and SCB. As further noted by the plaintiff, the SCB accounts consisted of multiple individual accounts (each being the respective local country subsidiaries of the SCB group) and differentiated commission were listed for the SCB accounts. This pointed against the need for the plaintiff's operational involvement.[81]

54 The defendants' counterclaim for overpayment was thus correspondingly not made out.

Reasonable notice

55 The defendants terminated the plaintiff's services from 28 September 2015, when an e-mail was sent to the plaintiff attaching a letter of termination.[82] The letter of termination informed the plaintiff that his services were no longer required and that he was to cease all contact with clients of the first defendant.

56 The plaintiff argued that the defendants failed to terminate the 8 March MOU with reasonable notice and were liable for wrongful termination. This was specifically pleaded by the plaintiff; in the Statement of Claim (Amendment No 2), it was averred that it was an implied term under the 8 March MOU that the plaintiff was entitled to reasonable notice if his services were terminated.[83] In

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81 PRS at para 113.

82 PCS at para 294; Bundle at p 124 (PMK at para 376).

83 SOC (Amendment No 2) at para 79.

reply, the defendants argued that there was no implied term on reasonable notice. The plaintiff was not an employee; he was an independent contractor or agent. There was also no necessity to imply a term of reasonable notice.

57 The defendants did not adduce sufficient evidence to show that termination was for cause, which could possibly have justified the absence of a reasonable period of notice. While there was some allusion to the existence of non-commercial reasons, this was not fleshed out. Furthermore, as pointed out by the plaintiff, the affidavit evidence of the third and fourth defendants was clear that the termination was for what was described as commercial reasons; the fourth defendant stated the termination was "primarily a commercial reason" whereas the third defendant explained that he had concerns about the plaintiff's ability to bring in new clients.[84] This could only mean that the defendants were not relying on termination for cause and should have provided a reasonable period of notice. In the course of the fourth defendant's cross-examination, he conceded the same, that reasonable notice should be given if an employee was terminated for commercial or operational reasons.[85] When he was confronted with his evidence in his affidavit of evidence-in-chief, which expressly stated that the termination of the plaintiff was due to commercial reasons, he sought to renege from that position. The fourth defendant attempted to recharacterize the reasons for the plaintiff's termination, stating that the reason for termination was, in fact, "not a commercial reason".[86] The fourth defendant's belated and obvious disavowals could not be believed.

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84 Bundle at pp 1402 and 1013 (JG-1 at para 41; AGL-1 at para 39).

85 Transcript 13 July 2021 at p 12 lines 8 to 15.

86 Transcript 13 July 2021 at p 69 lines 1 to 8.

58 There was a breach of an implied term of reasonable notice for termination of the contract with the plaintiff. While there was no express clause of termination, such a term would be readily implied by law: *Eng Chiet Shoong and others v Cheong Soh Chin and others and another appeal* [2016] 4 SLR 728 ("*Eng Chiet Shoong*"). The Court of Appeal in *Eng Chiet Shoong* held at [98] that "[w]here a contract is silent as to its manner by termination by the parties, a party may terminate the contract by giving reasonable notice to the other". There was nothing on the present facts to suggest that the proposition in *Eng Chiet Shoong* was inapplicable. Against this, the defendants relied on *Levy v Goldhill* [1917] 2 Ch 297 to suggest that a non-employee is not entitled to reasonable notice.[87] This was a much older case, and not controlling. The defendants, in any event, did not appear to heavily disagree with the proposition in *Eng Chiet Shoong* that a period of reasonable notice would be implied; instead, they focussed on the period of notice as well as the quantification of loss arising from the wrongful termination. Related to this, the defendants argued that as there were no residual matters to be dealt with, there was no reason for notice to be required. I found that the existence of such matters would be supportive, but the notice period was also implied to allow the plaintiff to make other arrangements.

59 A term should thus be implied such that reasonable notice ought to be given. The Court of Appeal in *Eng Chiet Shoong* endorsed the decision of the English High Court in *Hamsard 3147 Limited Trading as "Mini Mode Childrenswear", J S Childrenswear Limited (in liquidation) v Boots UK Ltd* [2013] EWHC 3251 (Pat), which, in turn, held at [64] that what length of notice is reasonable would "depend on the particular facts of the particular case" and

87 DRS at para 43.

that other cases may be of limited assistance. In the absence of other evidence and on the present facts, three months' notice would be a reasonable length of time presently. One month or so would be too short. As the plaintiff was terminated without appropriate notice, he would be entitled to damages representing the loss from being deprived of adequate notice. On the facts therefore, December 2015 should have been the final date of expiry of the notice.

No right to withhold payments

60 The consequence of the above was thus:

(a) The defendants were not entitled to their counterclaim.

(b) The plaintiff was entitled to his claim for non-payment of commissions in 2015.

(c) The defendants were not entitled to exercise their self-help right of equitable set-off.

61 Therefore, the first defendant was not entitled to withhold SCB payments for 2015. There was also no overpayment for July to December 2014. The plaintiff was entitled to commission for work done for the whole of 2015, and this continued to the point of the termination of his contract, which was September 2015. With the three months' implied notice, this brings it to December 2015, and the plaintiff was thus entitled to commission for the whole of the period.

Entitlement to relief

62 The next issue then was the amount to be awarded in respect of the plaintiff's claim. This was to be determined by:

(a) The period for which the plaintiff was entitled to commission.

(b) The profit from the SCB account. What profit was derived was dependent on the calculation methodology adopted, which turned on the evidence before the court.

The plaintiff's expert had prepared calculations based on the factual evidence before him, which was tested in cross-examination by the defendants.

63 The plaintiff's expert report was exhibited to his affidavit of evidence-in-chief. An errata sheet was produced and filed to correct certain calculations in the expert report. The plaintiff's expert report covered three scenarios: first, the plaintiff's entitlements under the 70/30 GP Split Model (*ie*, that the July 2011 agreement was valid and binding); second, the damages equal to the value of 35% of the equity of first defendant (*ie*, that the 8 March MOU, including the equity provisions, was fully binding and valid); and third, the plaintiff's unpaid commission for 2015, which included the interest payable on the sum. Given my findings, only the last area of the expert's report was relevant. On this, the expert opined that the unpaid commission amounted to a sum of S$661,478; this was subsequently revised to a sum of S$679,142 in the expert's supplementary report.[88]

64 I found in favour of the plaintiff on this score. The plaintiff was entitled to commission of $679,142 from January 2015 to December 2015. While the plaintiff's expert's evidence was, particularly as regards the equity issue, founded on suppositions that were not well established, I did find that the evidence concerning the unpaid commission to be sufficiently sound so as to allow me to rely on it.

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88 PRS at para 119; PSS at para 65.

65 The plaintiff had sought, as an alternative claim, a reasonable sum to be determined on a *quantum meruit* basis, in particular, as a claim in restitution under unjust enrichment. This was on the premise that it was determined that the plaintiff was not entitled to his claims under either the 8 March MOU or the July 2011 Agreement, and that there was no binding agreement between parties.[89] In view of the findings made, it was not necessary for me to deal with this claim.

66 It also sufficed to note at this juncture that the defendants' argument that only nominal damages be awarded was rejected. The defendants argued even if the plaintiff was to be entitled to reasonable notice, it was unclear if the plaintiff would have been in the position to introduce new clients.[90] This was not appropriate to my mind: some actual loss had been caused. This was also based on an interpretation of clause 5.6 of the 8 March MOU which I had rejected.

67 The claim for unpaid commission covered the period from January to December 2015, and given when the plaintiff was terminated, the three months' notice would roughly cover up to December 2015.

The period for which commission was earned

68 The plaintiff's expert's calculation was based on the period of January to December 2015. This was arrived at by relying on a document disclosed by the defendants which contained a summary of the first defendant's Net Gross Profit by client from January to August 2015. As for the period of September to December 2015, the plaintiff's expert based his calculations on the Net Gross Profit of the first defendant in the preceding months. The defendants contested

89 PCS at paras 306, 307, 308 and 311.

90 DRS at para 45.

this, arguing in their reply submissions that the plaintiff's expert's calculation was incorrect because SCB had ceased to provide business from May 2015 onwards.[91]

69 The defendants relied on the SCB Termination E-mail to say that the contract with SCB was terminated in around April 2015. This e-mail, however, was not part of the evidence at the trial, and was also not part of the evidence that was given to the plaintiff's expert. No substantive explanation was given for this omission. The defendant's affidavits of evidence-in-chief also did not refer or even allude to the termination of the business with SCB in April or May 2015. These affidavits were exchanged in May 2021, ahead of the trial in July 2021. One would have expected the importance of the e-mail as to SCB's termination to have been clear, and that it would be addressed in evidence. No attempt was made to apply to reopen the taking of evidence either.

70 In the circumstances, while the plaintiff did not ultimately seek to exclude that e-mail, it would not be appropriate for me to give any weight to the SCB Termination E-mail and to conclude that the relationship was entirely terminated on that date in May 2015, and that no business was thereafter generated from the relationship with SCB. It was also equivocal whether the SCB Termination E-mail showed that the SCB account was conclusively terminated and stopped generating any revenue (and thus commissions payable to the plaintiff) after May 2015. In the defendants' disclosure of a spreadsheet of the Net Gross Profit generated by the SCB account from between September to December 2015 ("SCB NGP spreadsheet"), the SCB account appeared to continue to generate revenue and Net Gross Profit for the first defendant. This was even though the SCB account had been purportedly terminated by then. The

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91 DRS at para 70.

SCB Termination E-mail was therefore unhelpful as to when the SCB account stopped generating revenue for the first defendant.

Profit from SCB

71 That left an issue relating to the question of the calculation of the profit from the SCB relationship, for which the documentary evidence was somewhat lacking. The Court laid out various options by way of letter dated 29 November 2021, including the reopening of the hearing with attendant cost consequences or the exclusion of the documents. As it was, the parties discussed and agreed to proceed on the basis of further discovery relating to Net Gross Profits from SCB from September 2015 to December 2015. The plaintiff's expert was to provide a supplemental opinion limited to how these additional documents would affect his quantification, and the defendants were to respond just on this point. The defendants disclosed seven documents, which included the SCB NGP Spreadsheet, documents relating to the gross profit of the SCB account from June 2013 to December 2014, as well as the first defendant's bank account from June 2015 to July 2015. The plaintiff's expert, in turn, provided a revised calculation of the unpaid commission based on the Net Gross Profit of the SCB account in his supplementary report.

72 I agreed with the plaintiff that the defendants went beyond what was directed and attempted to adduce new evidence, which I had rejected. The directions given for further affidavits were for a limited purpose, namely documents about the SCB commissions for a particular period. The documents and evidence in the defendants' affidavit went beyond this. Evidence that went to matters of the interpretation of documents, to the activities relating to the SCB engagement, to how the SCB account was served by individuals and how Net Gross Profit should be calculated was introduced. These were relied on by

the defendants to make various allegations to undermine the plaintiff's quantification, and to advance a fresh point that the plaintiff had received an advance of S$25,000. The defendants even sought to introduce a new calculation approach that was different from what was testified at trial, claiming that the salaries of the account managers should be deducted in the computation of Net Gross Profit. This was not put in evidence at the hearing. The defendants' claim that the plaintiff was paid an advance was also not pleaded. And finally, the defendants sought to recalculate the Net Gross Profit of the SCB account from June 2013 to December 2014. This was not within the time period in question. No explanation or reason of any kind was provided in the affidavit or in their supplementary written submissions, as to why these documents and arguments were drip-fed belatedly to the Court.

73 The reliability of these documents was also doubtful. They were not tested in trial and were not to be accepted into evidence. The SCB NGP Spreadsheet, which was arguably the only relevant document, was bare and unsupported without any further primary documents. As highlighted by the plaintiff, apart from documents in relation to the timekeeping reports of campaign managers, the source documents in relation to the "Revenue" and "Cost of Sales" of the SCB account were not provided.[92] What was left was a self-reported account of the Net Gross Profit of the SCB account from September to December 2015.

Calculation methodology

74 The calculation of Net Gross Profit is governed by clause 4.7.1 of the 8 March MOU. The clause provides as follows:

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92 PSS at para 44.

> Net Gross Profit (netgp) is defined as Gross Profit less time spent on campaign management by campaign managers and account managers + related overheads), captured in basecamp, the internal Clicks2Customers time management system, less dispersals to any third party including salary to [the plaintiff] and expenses in that market to a maximum of $3000 (subject to change)

75 Based on the above, the defendants argued that the computation of the unpaid commission on a Net Gross Profit basis should factor in the account managers' costs and related overheads, specifically the account managers' salary costs. The defendants said that this was borne out by a contextual interpretation of the clause, and that it was no bar that the account managers did not have their time captured in the time keeping software as they were dedicated SCB account managers.[93] This meant that their salary costs could be wholly taken into account.

76 In reply, the plaintiffs argued that even putting aside the fact that this was new evidence that was not raised at any point during the hearing, this new proposed method of calculation was not supported by the 8 March MOU. Requiring the plaintiff to bear the salary cost of account managers, who were employed by the defendants, made no commercial sense. This method of calculation was also self-serving. It resulted mostly in deficits in the calculation of "Net Gross Profits" on the SCB account from January 2015 to December 2015.[94] Further, the defendants' senior finance manager, Ms Carolyn Elizabeth Gardiner ("Ms Gardiner"), had given detailed evidence in her affidavit of evidence-in-chief as to the calculation of the commission payable to the plaintiff but had not mentioned at any point that the salary costs of the account managers

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93 DSS at paras 20 to 25.

94 PSS at para 17.

were to be deducted. The defendants also could not have claimed that these costs came under "related overheads" given that these costs related to the defendants' staff. Finally, given that the calculation of Net Gross Profit had been reviewed extensively by the defendants, it was odd that this was not raised earlier, and even more curious that the defendants had attempted to extend the new calculation outside the period specified by the Court.

77 I did not accept that there was a contractual basis for the defendants' claim that the account managers' salary costs should be deducted from the plaintiff's commissions.

78 Clause 4.7.1 could not be read as giving that contractual basis. The clause did not bear out that interpretation. The clause did not provide for the deduction of the salaries of the account managers, but only for the time spent. That this was how the defendants had interpreted clause was evident from the affidavit of evidence-in-chief of Ms Gardiner, who provided detailed evidence on how Net Gross Profit was calculated. She referred to staff costs as the time costs by staff members in managing the campaign. Exhibited to her affidavit of evidence-in-chief were spreadsheets showing the calculation of Net Gross Profit. No deduction was made of the salary costs of account managers. Unsurprisingly, there was also no mention at the hearing of the same. And further, as submitted by the plaintiff, two of the three persons whose salary costs were to be deducted were not account managers, but account directors, and it remained to be tested whether they had spent all their time on the SCB accounts or on other matters as well. As for the defendants' alternative argument that the salaries of the account managers were "related overheads", this was a plainly strained interpretation of the clause that was to be rejected. It followed that the defendants' recalculation of the Net Gross Profit from June 2013 to December 2014 was to be rejected.

79 Similarly, the claim that there was an advance of S$25,000 was untenable. The bank account relied on by the defendants merely indicated a transaction of that amount on 22 June 2015 but did not, in any way, indicate that it was for an advance to the plaintiff. This was also not pleaded by the defendants.

80 Given the circumstances and the manner in which the defendants proposed the new methodology for the calculation of Net Gross Profit, it was clear to my mind that the positions taken were simply *ex post facto* justifications to attempt to reduce the plaintiff's entitlement. There was simply no explanation proffered to why these came up so late in the day after affidavits and cross-examination in the trial proper.

81 The fact of the matter was that the evidence at trial was that there were no such deductions, whatever the true effect of clause 4.7.1. Based on the evidence at trial, both the defendants and the plaintiff had abided by the calculation of Net Gross Profit under the initial methodology for over three years, and at no point in that period had the defendants disputed that original calculation methodology. There was at the very least to my mind some form of estoppel by convention. There was also no testing of the evidence at trial, and the purported belated realisation of the error by the defendants could not help them put up a better case beyond what was put into play at the trial stage.

82 The Court's directions in relation to the further documents, were narrow. The defendants, in putting forward the new calculation were going into an unauthorised area and were essentially revisiting the trial. If the defendants had wished to do so, there were mechanisms for this and it should have been raised at the case conference on 12 January 2022, where various options were laid out. As it was, the distinct impression left with the Court was that, on the question

of the counterclaim, the defendants were making things up as things went along. These points were not part of the defendants' pleadings either.

83 I must emphasise that options were laid out, including reopening of the trial; but such options had to be accompanied by consequences, including costs. The parties agreed to proceed on the basis of documents being adduced only. Therefore, the findings of the Court could only be made within the confines of such documents, and could not take in other matters adduced by the defendants. If the defendants wanted to proceed on a broader basis, the proper course would have been to apply for the reopening of the trial with proper testing of the evidence through cross-examination. That was not pursued.

Quantification of the relief

84 In light of my rejection of the post-trial evidence which the defendants sought to adduce, the best evidence for the quantified claim was that of the plaintiff's expert. While I had reservations about some other aspects of the expert's evidence relating to the quantification of the plaintiff's claim in relation to his equity in the first defendant, these reservations did not go into undermining the expert's credibility as regards the claim and counterclaim concerning the plaintiff's unpaid commission in 2015.

85 The plaintiff argued that the expert's conclusions in his first report should be maintained. There was a complete dearth of reliable evidence available to determine how much commission was payable to the plaintiff in the relevant period.[95] If the new data was to be incorporated, the original methodology for calculating net gross profit should be used.[96]

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95 PSS at para 57.

96 PSS at para 63.

86 The calculations based on the original methodology in the plaintiff's expert's first report were the only calculations provided on the basis of the acceptable evidence, that is, excluding the additional evidential material and the defendants' inappropriate construction of clause 5.6 of 8 March MOU. These calculations were set out at section 5 of the expert report, which was based in part on a summary of the first defendant's Net Gross Profit by client from January to August 2015 and an extrapolation of the commission payable from September to December 2015 based on the preceding months. In this respect, the expert's evidence was tested in cross-examination solely on the hypothetical that the SCB account was terminated by September 2015 and if an adjustment would be required.[97] This eventually took the form of the SCB Termination E-mail relied on in the defendants' reply submissions that I placed no weight on. The defendants then alleged that the plaintiff's expert's calculation was incorrect on their construction of the formula underlying Net Gross Profit. This, too, I had rejected. This disposed of most of the defendants' objections against the plaintiff's expert's calculation of the unpaid commissions owing to the plaintiff in 2015 based on the original methodology.

87 In the end, I accepted that the total amount that should be awarded on the claim for unpaid commission in 2015 was S$679,142 (comprising S$503,398 and S$175,744 in interest payable), which was the amount ordered in the end.

88 The defendants argued that interest should only be run from the date of the action being commenced.[98] I saw no reason to do so in the circumstances of this case; the plaintiff was entitled to interest from the accrual of his claim, and

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97 Transcript of 8 July 2021 at p 37 line 18 to p 39 line 29.

98 DSS at para 42.

I did not see anything of the nature of an unjustifiable delay as argued by the defendants.

Conclusion

89 My orders were thus that the various claims and counterclaims are dismissed, save that in respect of the termination without notice, for which damages representing the unpaid commission in 2015 and interest totaling $679,142, were ordered in favour of the plaintiff.

Aedit Abdullah
Judge of the High Court

Pillai Pradeep G, Lin Shuling Joycelyn and Tham Kai Lun Josiah (PRP Law LLC) for the plaintiff;
Goh Seow Hui and Sharmaine Chan Sze Min (Bird & Bird ATMD LLP) for the defendants.