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

[2021] SGHC 279

Suit No 478 of 2017

Between

BGC Partners (Singapore) Limited

… *Plaintiff*

And

(1) Yap Yuk Hee
(2) John Lawrence G Sun
(3) ICAP (Singapore) Pte Ltd (formerly known as ICAP AP (Singapore) Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Contract] — [Formation] — [Acceptance] — [Communication of acceptance to offeror]
[Contract] — [Breach] — [Inducing breach of contract]
[Damages] — [Measure of damages] — [Contract]

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v
Yap Yuk Hee and others

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3 December 2021

See Kee Oon J:

1 These proceedings concern claims brought by BGC Partners (Singapore) Ltd ("BGC") against Yap Yuk Hee ("Yap") and John Lawrence G Sun ("Sun") for breach of contract, and against ICAP (Singapore) Pte Ltd ("ICAP") for having induced Yap and Sun to commit their respective breaches of contract. I dismissed BGC's claims in their entirety. In these grounds of decision, I set out the full reasons for my decision, incorporating the oral remarks I had delivered previously on 6 September 2021.

Background Facts

2 The plaintiff (BGC) and the third Defendant (ICAP) are rival companies incorporated in Singapore who are in the business of providing inter-dealer brokerage services to, *inter alia*, major financial institutions.

3 The first and second Defendants are Yap and Sun. They were, at the material time and presently, brokers employed by ICAP working on the Peso Non-Deliverable Forwards ("Peso NDF") desk since September 2010.[1] At that time, and presently, ICAP ran a very successful Peso NDF Desk which was headed by Sun,[2] and was reputed to be the dominant market leader in Singapore.[3]

4 Non-Deliverable Forwards ("NDF") markets are typically established in international financial centres (such as Singapore) outside countries with illiquid currency exchanges.[4] The dealers which are usually major international investment or commercial banks, would take part in deals with one another on the likely path of the underlying currency markets and interest rates, at a particular contracted rate. The profit or loss would then be calculated at a set date (*ie*, settlement date) by comparing the positions the dealers had taken with that of an independent index, and the difference would be paid between parties.[5] As an illustration, dealer A might agree with dealer B to purchase 100 Pesos for 2 USD, and at the settlement date if the value of Peso falls by half, dealer A would pay dealer B the difference of 1 USD.

5 As brokers, Yap and Sun would assist the dealers to identify and help negotiate trades with other dealers. Brokers would be typically organised into desks, to be able to cover as many dealers as possible in order to broker

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1 Statement of Claim (Amendment No. 2) at [2] – [3].

2 AEIC of John Lawrence G Sun (dated 7 January 2019) at [10].

3 Affidavit of Evidence in Chief ("AEIC") of Anthony Warner at [8]; AEIC of Yap Yuk Hee (dated 7 January 2019) at [18]; AEIC of John Lawrence G Sun (dated 7 January 2019) at [20].

4 AEIC of Daniel Corrigan (dated 15 January 2021) at [16] – [21].

5 AEIC of Daniel Corrigan (dated 15 January 2021) at [22] – [25].

successful deals.[6] Both ICAP and BGC, as major inter-dealer brokerages, served the same dealers, and were direct competitors in the industry.[7] Thus, it would appear that the strength of the relationships that individual brokers cultivated with the dealers would have had an impact on the trades they could help broker.[8]

The contracts

6 Mr Anthony Warner ("Warner") was previously ICAP's Senior Managing Director/Chief Executive Officer ("CEO") from October 2010 to September 2014.[9] Thereafter, he moved to BGC and was employed as Senior Managing Director (Asia Pacific).[10] Sometime in June 2015, Warner approached Sun to join BGC to start a Peso NDF Desk.[11] As part of their discussions, Sun informed Warner that he was not prepared to move to BGC alone, and requested for his team members, including Yap, to be offered contracts with BGC.[12] Warner agreed to this.[13]

7 A series of discussions followed regarding the remuneration packages of Sun and his team members. Subsequently, Sun met Warner on 24 June 2015, and signed an employment agreement in the form of a "broker's contract" with BGC, in addition to a partnership agreement, cash advance distribution

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6 AEIC of John Lawrence G Sun (dated 7 January 2019) at [13] – [14].

7 AEIC of Cheung Wai Yin at [15].

8 AEIC of Anthony Warner at [88].

9 AEIC of Anthony Warner at [5].

10 AEIC of Anthony Warner at [4].

11 AEIC of Anthony Warner at [9] – [10].

12 AEIC of John Lawrence G Sun at [26].

13 AEIC of Anthony Warner at [17].

agreement, and promissory note.[14] It was not disputed by Warner that the documents signed by Sun were left undated and unexecuted by BGC,[15] but were subsequently dated 21 July 2015.

8 On 29 June 2015, Warner contacted Yap to discuss his proposed employment with BGC.[16] After a period of negotiation, Warner met Yap on 7 July 2015, when Yap signed an identical set of documents as Sun.[17] Similarly, it was not disputed by Warner that the documents signed by Yap were neither dated nor executed on the day Yap signed them,[18] but were subsequently dated 27 July 2015.

9 The agreements were known as "forward contracts" in the brokering industry, meaning that Yap and Sun were not expected to immediately commence employment with BGC upon resigning from ICAP. According to Yap and Sun, they did not read the full terms of the agreements when they signed them. Both agreements were signed by Yap and Sun on the same day that Warner met them respectively. Yap and Sun did not ask for and were not given any copies of the agreements. Hereinafter I refer to the agreements interchangeably as "the contracts" as well.

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14 AEIC of Anthony Warner at [30]; AEIC of John Lawrence G Sun (dated 7 January 2019) at [38].

15 Notes of Evidence ("NE") Day 1, p 158, lines 12 – 19; AEIC of John Lawrence G Sun (dated 7 January 2019) at [41].

16 AEIC of Yap Yuk Hee (dated 7 January 2019) at [21] – [22].

17 AEIC of Yap Yuk Hee (dated 7 January 2019) at [30].

18 NE, Day 2, p 68, lines 1 – 5.

10 On 25 June 2015, Sun gave notice of his resignation to ICAP.[19] Yap tendered his resignation to ICAP on 23 July 2015.[20] ICAP (through its CEO Cheung Wai Yin ("ICAP's CEO") and Managing Director George Dranganoudis) then entered into discussions with Yap and Sun to persuade them not to leave. Having renegotiated their employment terms, ICAP succeeded in retaining them. On 21 September 2015, both Yap[21] and Sun[22] decided to remain at ICAP and received letters of indemnity from ICAP. On 23 September 2015, Sun signed a new five year contract with ICAP,[23] and Yap signed a new three year contract with ICAP.[24]

11 In late September 2015, Yap[25] and Sun[26] separately informed Warner that they had decided to stay at ICAP and would not be joining BGC. They also confirmed their respective positions in writing to BGC on 16 October 2015.[27] BGC subsequently conveyed copies of the employment agreements to Yap and Sun only on 19 October and 22 October, which were signed by BGC's designated representative (*ie*, Mr Shaun Lynn ("Shaun Lynn"), who was the president of BGC) and dated.

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19 AEIC of John Lawrence G Sun (dated 7 January 2019) at [46].

20 AEIC of Yap Yuk Hee (dated 7 January 2019) at [39].

21 AEIC of Yap Yuk Hee (dated 7 January 2019) at [43]; Agreed Bundle of Documents Vol 2 (2AB) at Tab 108.

22 AEIC of John Lawrence G Sun at [50]; 2AB at Tab 107.

23 2AB at Tab 110.

24 2AB at Tab 111.

25 AEIC of Yap Yuk Hee (dated 7 January 2019) at [45].

26 AEIC of John Lawrence G Sun (dated 7 January 2019) at [51].

27 AEIC of John Lawrence G Sun (dated 7 January 2019) at [53]; AEIC of Yap Yuk Hee (dated 7 January 2019) at [46].

The parties' cases

Summary of BGC's case

12 In this suit, BGC asserted that there were valid and binding employment agreements in existence. By refusing to join BGC, Yap and Sun had repudiated[28] and breached their obligations under the respective agreements and BGC had suffered loss and damage as a result.[29] BGC further asserted that ICAP had wrongfully induced Yap and Sun to breach their employment agreements with BGC, and BGC had thereby suffered loss and damage.

13 BGC's main argument was premised on Yap and Sun having signed the agreements to indicate their assent to the terms therein. Thus, on the "orthodox" analysis of offer and acceptance, an offer from BGC for employment had been made through Warner and Yap and Sun had accepted those offers.[30] After the agreements were signed, the subsequent communications between Warner and Yap and Sun and their conduct showed that they treated the agreements as binding.[31] On Yap and Sun's part, they had tendered their resignations to ICAP as contemplated by the terms of those agreements.[32] They would not have done so if they had not understood that they had secured jobs at BGC and felt bound by the agreements.[33] Moreover, when ICAP renegotiated their terms, Yap and

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28 Statement of Claim (Amendment 2) at [20].

29 Statement of Claim (Amendment 2) at [27].

30 Plaintiff's Closing Submissions at [131] and [137].

31 Plaintiff's Closing Submissions at [165] – [166].

32 Plaintiff's Closing Submissions at [169].

33 Plaintiff's Closing Submissions at [169(c)].

Sun were given indemnities to cover their potential liabilities under their BGC agreements.[34]

14 BGC argued that there were difficulties with the Defendants' reliance on the "alternative" analysis of offer and acceptance, which was premised on Yap and Sun having made an offer to be employed by BGC instead, given that Yap and Sun did not alter any of the terms of the BGC agreements and had simply signed them.[35] In any case, BGC argued that Clause 6(c) of the broker's contract ("Clause 6(c)") which required BGC's representative to execute the contract was intended solely for BGC's benefit and had been waived by BGC.[36] Obtaining the signature of BGC's designated representative (Shaun Lynn) was merely a contingent condition precedent to the operation and performance of the agreements.[37] Alternatively, BGC had complied with Clause 6(c) in due course by procuring Shaun Lynn's signature and had communicated its acceptance of the agreements to Yap and Sun by conduct, in the form of Warner's subsequent Facebook messages to Sun.[38]

15 BGC's primary claim for damages as pleaded was for liquidated damages under certain liquidated damages ("LD") provisions in the respective employment agreements.[39] In the alternative, BGC claimed for damages to be assessed in accordance with the formula set out in the LD provisions of the respective employment agreements or by reference to *inter alia* (i) additional

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34 Plaintiff's Closing Submissions at [169(e)(i)].

35 Plaintiff's Closing Submissions at [179] – [180].

36 Plaintiff's Closing Submissions at [188].

37 Plaintiff's Closing Submissions at [153] – [154].

38 Plaintiff's Closing Submissions at [162] – [165].

39 Statement of Claim (Amendment 2) at [27(1)] – [27(2)].

costs and expenses to be incurred in hiring an employee to replace Yap and Sun and/or (ii) loss or shortfall in profits that would have been earned from Yap and Sun's employment with BGC.[40]

Summary of the Defendants' case

16 The Defendants submitted that the correct contractual analysis was to treat Yap and Sun as having made offers to BGC to employ them, which BGC had to signify acceptance of before any valid and binding contracts came into existence. The Defendants pointed to Clause 6(c) which required execution of the broker's contract by BGC's representative to constitute a binding and enforceable agreement. It was not disputed that the agreements Warner gave to Yap and Sun to sign were undated and unsigned by BGC's designated representative.[41] The Defendants therefore submitted that taking this fact together with Clause 6(c) of the agreements, BGC had not made an offer of employment to Yap and Sun by way of presenting them the agreements for their signature. Rather, by appending their signatures, Yap and Sun had indicated their offers to be employed by BGC, which would have to be formally accepted by BGC by the operation of Clause 6(c) which prescribed a specific mode of acceptance by BGC, before the agreements could be valid and binding.[42]

17 The Defendants maintained that no binding agreement was reached between Yap and Sun with BGC.[43] They averred that copies of the respective employment agreements, which were eventually executed and dated, were only

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40 Statement of Claim (Amendment 2) at [27(4)].

41 Plaintiff's Closing Submissions at [141]; NE Day 1, p 158, lines 12 – 19, Day 2, p 68, lines 1 – 5; AEIC of John Lawrence G Sun (dated 7 January 2019) at [41].

42 1st and 2nd Defendant's Closing Submissions at [37].

43 Defence of the 1st and 2nd Defendants (Amendment 3) at [4] and [8]; Defence of the 3rd Defendant (Amendment 1) at [5], [10] and [18].

provided to Yap and Sun on or around 19 October 2015 and 22 October 2015 respectively, after they had informed BGC that they would not be joining them.[44] As there was no legally binding agreement in force between BGC and Yap and Sun respectively, ICAP did not and could not have induced and/or procured any breach and/or anticipatory breach of the employment agreements.[45] Hence, their primary position was that BGC was not entitled to any damages sought.

18 In the alternative, if valid and binding agreements were found to have existed and to have been breached, the Defendants contended that in respect of Sun, BGC did not accept Sun's alleged repudiatory breach(es) in September or October 2015 and the employment agreements therefore continued to subsist. BGC (through Mr Mark Webster's words and conduct) breached an implied term of mutual trust and confidence during a meeting with Sun in or around December 2015, which breach was accepted by Sun at the material time or by 31 December 2015 at the latest, thereby bringing the employment agreement to an end that day.[46]

19 With regard to the LD provisions, the Defendants submitted that the formula provided does not set out a genuine pre-estimate of the losses suffered by BGC and/or was a penalty;[47] that even if the LD provisions were found to be unenforceable, BGC's calculations did not accord with the LD provisions;[48] that

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44 1st and 2nd Defendant's Closing Submissions at [16] – [17]; 3rd Defendant's Closing Submissions at [41(c)].

45 Defence of the 3rd Defendant (Amendment 1) at [18].

46 1st and 2nd Defendant's Closing Submissions at [107] – [108].

47 1st and 2nd Defendant's Closing Submissions at [132]; 3rd Defendant's Closing Submissions at [188].

48 1st and 2nd Defendant's Closing Submissions at [146]; 3rd Defendant's Closing Submissions at [220] – [235].

Yap and Sun had not made any representations of their potential revenue to Warner;[49] that BGC was not entitled to advance a claim for loss and damages based on certain clauses in the employment agreements; and, BGC's claim for additional costs and expenses and loss or shortfall in profits was duplicitous and not maintainable at law.[50]

Issues to be determined

20 The parties were *ad idem* in relation to the main issues to be determined. At its core, the dispute centred on whether there was a valid and binding agreement between BGC and Yap and Sun by virtue of the brokers having signed the agreements in June and July 2015. BGC's claim against ICAP was predicated upon a finding that the signed agreements were valid and binding as at the dates Yap and Sun sought to resile from them. If the signed agreements are not found to have been valid and binding, ICAP cannot be liable to BGC for having allegedly wrongfully induced a breach of the agreements with BGC.

21 The issues that I had to address in this case were:

(a) Whether there were valid and binding agreements;

(b) Whether ICAP had wrongfully induced breaches of the agreements;

(c) Whether BGC had breached an implied term of mutual trust and confidence;

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49 1st and 2nd Defendant's Closing Submissions at [171]; 3rd Defendant's Closing Submissions at [220] – [235].

50 1st and 2nd Defendant's Reply Submissions at [169] – [176]; 3rd Defendant's Closing Submissions at [149] – [165]; 3rd Defendant's Reply Submissions at [151] – [159].

(d) Whether BGC had proved its loss and damages.

Issue (a): Whether there were valid and binding agreements

22 To recapitulate, BGC's primary argument was that the contracts signed by Yap and Sun were offers made by BGC,[51] and that Warner had the authority to make the offers and even if he did not, his authority was ratified subsequently (see *Bolton Partners v Lambert* (1889) 41 Ch.D. 295 ("*Bolton*")). In BGC's analysis, the requirement for Shaun Lynn's signature under Clause 6(c) was a condition precedent which was fulfilled subsequently, hence making the contracts binding.[52] Furthermore, BGC contended that Warner's messages to Yap and Sun had "effectively communicated" to them that the contracts were binding,[53] and that acceptance of the contracts on its part had been communicated by conduct.[54]

23 Yap and Sun argued that BGC had taken contradictory positions on when the contracts came into effect based on its alternative cases (*ie*, whether there was a waiver or condition precedent).[55] Yap and Sun also argued that Clause 6(c) was for the benefit of *all* parties to the contracts, and not only for the benefit of BGC;[56] accordingly it could only be waived if all parties had agreed to do so.[57] However, on the facts, there was no evidence of waiver.[58] Yap

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51 Plaintiff's Closing Submissions at [131] and [137].

52 Plaintiff's Closing Submissions at [153] – [154].

53 Plaintiff's Closing Submissions at [165].

54 Plaintiff's Reply Submissions at [112].

55 1st and 2nd Defendant's Closing Submissions at [45].

56 1st and 2nd Defendant's Closing Submissions at [71(b)].

57 1st and 2nd Defendant's Closing Submissions at [71(c)].

58 1st and 2nd Defendant's Closing Submissions at [75].

and Sun further argued that even if the contracts were executed by Shaun Lynn, this was not communicated to either Sun or Yap, which was "integral" to the finding of a valid and binding contract.[59]

24 The full text of Clause 6(c) as found in BGC's contractual terms is as follows:[60]

> This Agreement constitutes a contract between you and [BGC] save that it shall not be binding and enforceable unless or until executed by the representative of [BGC] set out below.

25 As indicated above at [11], Shaun Lynn was the designated representative of BGC. There are two distinct but closely intertwined issues crucial to the finding of whether there were valid and binding contracts between BGC and Yap and/or Sun. The first issue was that of acceptance, and the second related issue was whether the acceptance (on the part of BGC vis-à-vis Shaun Lynn's execution of the contracts) was effectively communicated to the brokers. The general rule is that communication of acceptance is required for a valid and binding contract to exist, as stated in *Chitty on Contracts* (H G Beale gen ed) (Sweet and Maxwell, 33rd Ed, 2018) ("*Chitty*") at 2-044:

> **General requirement of communication** The general rule is that an acceptance has no legal effect until it is communicated to the offeror. Accordingly, no contract is concluded by: a person who writes an acceptance on a piece of paper which he simply keeps; a company that resolves to accept an application for shares but does not communicate the resolution to the applicant; a person who decides to accept an offer to sell goods to him and instructs his bank to pay the offeror but neither he nor the bank gives notice of this fact to the offeror; and a person who communicates the acceptance only to his own agent. *The main reason for the rule is that it would be unfair to bind the offeror before he knows that his offer had been accepted. So long as the offeror knows of the acceptance, a contract may be*

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59 1st and 2nd Defendant's Closing Submissions at [80].

60 Agreed Bundle of Documents Vol 1 (1AB) 256; 2AB 326.

> *concluded even though the acceptance was not brought to his notice by the offeree. However, there will be no contract if the communication is made by a third party without the offeree's authority in circumstances indicating that the offeree's decision to accept was not yet regarded by him as irrevocable.*
>
> [emphasis added]

Acceptance

26 As noted by the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [47], at its core, acceptance "is a final and unqualified expression of assent to the terms of an offer", citing Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 2-015. While a less mechanistic or dogmatic application of the concepts of offer and acceptance should be adopted, the traditional method of analysis of examining each "shot" fired by the respective parties to determine conclusion of an agreement upon a *final and unqualified* acceptance continues to apply (see *Gay Choon Ing* at [63]).

27 In my view, Clause 6(c) was not merely a formality as BGC had attempted to suggest. It is specific in unequivocally stipulating that while the agreement "constitutes a contract" between the parties, "it shall not be binding and enforceable unless and until executed" by the designated representative (*ie*, Shaun Lynn). While BGC argued that Warner's authority to contract with Yap and Sun was ratified retrospectively by BGC,[61] the alleged act of ratification referred to by BGC was Shaun Lynn's signing of the agreements. This did not in any way confirm or affirm the actions or communication emanating from Warner, and was in fact the very act of BGC complying with Clause 6(c) itself. BGC relied on the case of *Bolton* as its sole authority on the point of ratification.

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[61] Plaintiff's Closing Submissions at [144].

As the Defendants rightly pointed out, *Bolton* is highly controversial and has been criticised (*eg*, in *Fleming v Bank of New Zealand* [1900] AC 577 at 587; *Davison v Vickery's Motors Limited* (1925) 37 CLR 1 at 18–19; *Hughes v NM Superannuation Pty Limited* (1993) 11 ACLC 923 at 930). Leaving aside the controversies surrounding *Bolton*, I was unable to see how BGC's subsequent procurement of Shaun Lynn's signature would amount to a form of ratification of Warner's purported "offer" of employment on BGC's behalf.

28 Having regard to Clause 6(c), the agreements properly construed and implemented would require Shaun Lynn's endorsement to signify BGC's *final and unqualified* approval, and not merely by way of rubberstamping Warner's "offer" of employment. The fact that the endorsement was only procured *after* Yap and Sun had signed in both instances would point strongly to the conclusion that when Yap and Sun appended their signatures, they were the ones making the offer to BGC, as the Defendants had contended.

29 I emphasise that this conclusion is not as "unorthodox" as BGC had made it out to be. Neither does it fail to accord with a common-sense commercial view or with the "reasonable expectations of … honest sensible business people", adopting the language that BGC had drawn on from *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443 ("*Reveille*") at [53]. It is entirely reasonable and indeed to be expected that BGC should have taken care to act in accordance with the terms of its own contractual documents and to have made offers to contract in a manner compliant and consistent with those terms.

30 Clause 6(c) was also not a contingent condition precedent. It is artificial for BGC to suggest that a contract may have been entered into but can be dissected or made "severable" so to speak to two stages, according to when it is

"valid" first and thereafter "binding and enforceable". A contract that is validly made should ordinarily also be binding at the same time. It hardly makes sense to speak of a contract that is valid but not yet binding, although I accept that in certain specific circumstances, it may be contemplated that the parties intend for enforceability to be contingent on some other event or action. Unless the parties' intentions in agreeing to such a form of severance are clearly and unambiguously set out in writing, the court should be slow to infer or impute such an intention.

31 On a plain construction, Clause 6(c) speaks of both the "binding and enforceable" nature of the contract becoming operative only when executed by the designated representative. It plainly sets out what BGC ought to have done for firm agreements to be concluded – the agreement(s) had to be executed by its designated representative. Notably, the agreements were both unsigned and undated at the time Yap and Sun signed them. The more reasonable inference is that these constituted Yap's and Sun's offers to be employed by BGC, which would have to be accepted by BGC through the requisite execution by Shaun Lynn. On my construction of Clause 6(c), this was BGC's prescribed mode of acceptance. Unexecuted agreements were presented to Yap and Sun as prospective employees who were asked to append their signatures first. This construction is bolstered by the last paragraph of the agreements, which specify that "one copy of each [*ie*, the Contract and the attached Terms & Conditions] will be returned to [them] after signature of the Contract on behalf of the [BGC] …".[62]

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62 1AB 256; 2AB 326.

32 From Warner's own evidence under cross-examination, it was clear that Warner knew that BGC had to follow up to obtain Shaun Lynn's signatures for both agreements:[63]

> …The contract was then drafted in my role, in the position that I am in, my job, for want of a better word, is to provide the documents for the candidate for the candidate to sign. I then return the documents to my HR, whichever location I am in. At this time it would have been Singapore. And those documents then go through the process of -- the same process that we do with hundreds and thousands of other hires where they go forwards for signing by whoever is the signature that can sign it at that time, which in this example I think was Shaun Lynn.

33 In this connection, Warner's explanation that this step was merely a formality or part of BGC's internal HR process conveniently glosses over Clause 6(c) entirely.[64] If Warner's explanation was to be believed, it would appear that he was either not familiar with BGC's own documented terms or had blithely chosen to ignore them, and had erroneously assumed that he had full actual or apparent authority to hire brokers on BGC's behalf, without needing to comply with Clause 6(c). This is not consistent with the clear language of Clause 6(c), which affirms that Yap's and Sun's signatures and handshakes with Warner would not suffice in and of themselves to seal the contracts. Clause 6(c) does not contemplate that contracts will be formed through such means.

34 Accordingly, I found that the Defendants were justified in submitting that BGC itself regarded Shaun Lynn's signature as a prescribed mode of acceptance before any valid, binding and enforceable contracts could be said to exist. On the facts, it appeared from the available documentary evidence that

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63 NE, Day 2, p 22, line 19 to p 23, line 5.

64 NE, Day 2, p 22, line 19 to p 23, line 5; NE, Day 2, p 63, line 16 to p 64, line 22; NE, Day 2, p 69, lines 1 to 5.

the contracts signed by Yap and Sun were sent for Shaun Lynn's signature (and execution) on 15 July 2015[65] and 21 July 2015[66] respectively. Apart from a brief exchange between counsel for Yap and Sun and Warner about whether the signatures on the respective documents were indeed Shaun Lynn's signatures,[67] it was not seriously pursued by either counsel for each of the Defendants at trial or in submissions that Shaun Lynn had not in fact signed and executed the contracts before they were returned to the brokers, after they had made known their intention not to join BGC. I was thus of the view that on a balance of probabilities, the contracts would have to be accepted as per the prescribed mode of acceptance as set out in Clause 6(c), and were in fact accepted by BGC (albeit not at the time when Yap and Sun had signed the agreement(s)).

35 At this juncture, I turn to address BGC's argument that "a contract can be formed by agreement of parties even if parties do not sign."[68] BGC cites the case of *Reveille* for this proposition. In *Reveille*, Anotech which was a company marketing home cookware and Reveille, a corporation producing television programmes (such as MasterChef US), had engaged in discussions to feature Anotech's cookware on MasterChef US. In the course of negotiations, Reveille had sent a contract to Anotech on Reveille's standard form, with one of the terms stating that the contract "shall not be binding on Reveille until executed by both Licensee [*ie*, Anotech] and Reveille". What ensued was what would conventionally be described as a battle of forms, as well as some concerns over the use of the phrase "The Master Chef" by Gordon Ramsay who was the main presenter of the show. Eventually, Anotech's director had signed the contract

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65 1AB, Tab 52.

66 2AB, Tab 55.

67 NE, Day 2, p 65, lines 10-13; p 67, lines 2 – 9.

68 Plaintiff's Closing Submissions at [33].

and returned a copy to Reveille, however Reveille did not sign on the said contract. Notwithstanding its failure to sign the contract, Reveille proceeded to feature Anotech's products on MasterChef US and billed Anotech. When Anotech failed to pay, Reveille repudiated the contract, but Anotech raised the argument that the contract was not binding as Reveille had failed to sign it. Mr Justice Cranston, delivering the judgment of the court, held that as the clause setting out the prescribed mode of acceptance was for Reveille's benefit it could waive it, provided that there was no prejudice to Anotech. It was also held that "there were clear and unequivocal acts on Reveille's part, which Anotech knew about, to constitute acceptance by conduct…[c]onduct after 12 March 2011 does not go to acceptance by Reveille of Anotech's offer but is evidence that the parties believed that there was a binding contract in place" (at [45] –[47]).

36 In my view, *Reveille* is distinguishable from the present case and was of no assistance to BGC. First, in *Reveille* at [45], it was found that even though Reveille had failed to sign the contract as stipulated, Reveille had demonstrated clear and unequivocal acts towards the fulfilment of the contract which would show actual acceptance by conduct. I was not persuaded that there was such communication by conduct as submitted by BGC, simply because Warner had sent Sun some Facebook messages to "effectively" convey to him the allegedly binding effect of the agreements. Second, while the court in *Reveille* had found that the signature requirement was waived by Reveille, as I will explain below at [48], a waiver as to the prescribed mode of acceptance only deals with the formality of complying with that specific mode, and acceptance still has to be communicated to the offeror in order for a binding contract to be in place.

Effective communication of acceptance

37 As stated at [25] above, in order for acceptance to have legal effect, it must have been effectively communicated to the counterparty. Interestingly, the case of *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 ("*Robophone*"), which was referred to as authority in a case cited by BGC in relation to its argument on penalties,[69] actually concerned facts which were analogous to those in the present case. In *Robophone*, the plaintiff, a distributor of a telephone answering machine, offered a machine on hire-purchase to Mr Blank, the defendant. The rental agreement included a clause stating that the agreement would only become binding on acceptance by signature on the part of the plaintiff. The rental agreement was signed by the defendant and the plaintiff only signed it sometime thereafter, although the plaintiff's representative did call the defendant to fill in additional forms applying for consent to install the machine. On appeal, the majority decision comprising Lord Diplock and Lord Harman found that a binding contract had subsisted even though the plaintiff had failed to comply with the acceptance clause, as the issue of failure to communicate acceptance was not raised in the defendant's pleadings, and in any event it was held that the plaintiff's representative's call to the defendant had to signify to the defendant that the contract was accepted (*Robophone* at 1438 and 1441). However, Lord Denning in his dissent stated at 1432:

> It is clear that that document, although called an agreement, was only an offer. It could be revoked by Mr. Blank at any time before it was accepted by the plaintiffs: see *Financings Ltd. v. Stimson*. In order to become binding, someone duly authorised would have to sign it as accepted on behalf of the plaintiffs: and, moreover, their acceptance would have to be communicated to Mr. Blank. The general rule undoubtedly is that, when an offer is made, it is necessary, in order to make a binding contract, not only that it should be accepted but that the acceptance should be notified: see *Carlill v. Carbolic Smoke Ball Co.*,

69 Plaintiff's Closing Submissions at [654].

> per Lindley L.J.; *Entores Ltd. v. Miles Far East Corporation*, per Parker L.J. Clause 14 does not dispense with the necessity of notification. *Signing without notification is not enough. It would be deplorable if it were. The plaintiffs would be able to keep the form in their office unsigned, and then play fast and loose as they pleased.* Mr. Blank would not know whether or not there was a contract binding them to supply or him to take. Just as mental acceptance is not enough: *Felthouse v. Bindley*, nor is internal acceptance within the company's office. In this very case we know that the plaintiffs signed it sometime or other (for it was produced at the trial complete with signature), but we do not know when the plaintiffs signed it. No evidence was given on the point. In the circumstances I think that until the plaintiffs notified Mr. Blank of their acceptance, the agreement was not complete. It was, in the words of Mr. Blank himself, provisional.
>
> [emphasis added]

38 In my view, Lord Denning's remarks as highlighted above were but an alternate expression of the commercial uncertainty which would prejudice the offeror who would not be able to know for certain if he was or was not bound by the agreement. For completeness, I note that the court in *Reveille* at [44] had acknowledged this possible outcome, although it was clear in that case from the subsequent conduct of the parties in performing the contract (*ie*, by Reveille featuring Anotech's cookware on the show, and Reveille asking Anotech where to post the invoices) that the acceptance had already been effectively communicated by Reveille to Anotech.

39 In the present case, it did not appear from the evidence that there was any effective communication whatsoever of BGC's acceptance. It was undisputed that no copies of the fully executed and dated agreements were conveyed to Yap and Sun until after they had informed BGC that they would be remaining at ICAP. BGC further contended that since Clause 6(c) merely laid down a condition precedent, no further express communication was in fact necessary. I was not persuaded by this contention. As noted at [31] above, the

last paragraph of the employment agreements *expressly* required that BGC would return them copies after the designated representative's signature on behalf of BGC had been obtained. For reasons which were not fully articulated and explained at trial, BGC did not do so until shortly after Yap and Sun informed BGC that they would not be joining them. It was not open to BGC to argue that Yap and Sun themselves could and should have ascertained whether the alleged condition precedent in Clause 6(c) had been fulfilled. Equally, BGC could not maintain that no communication of its fulfilment was necessary.

40 Warner was the only person from BGC in contact with Yap and Sun until they received letters from BGC's solicitors. He admitted that he did not know if the agreements were in fact signed by Shaun Lynn, when they would have been signed, and if the agreements were in fact returned to either Yap or Sun after they were signed.[70] Warner could not have communicated to Yap or Sun that BGC was treating the agreements as binding when he did not even know if the agreements were even signed or accepted in accordance with Clause 6(c), or if they were binding on BGC for that matter. The fact that ICAP gave Yap and Sun indemnities against potential liability was a neutral point; it did not point unequivocally to the Defendants' acknowledgment that valid and binding agreements were in place and were potentially being breached.

41 Accordingly, I held that BGC had *not* effectively communicated its acceptance of Yap's and Sun's offers, even though Shaun Lynn may have signed at some subsequent point to signify acceptance. Hence there were no valid and binding contracts in place in late September 2015 when Yap and Sun informed Warner that they would not be joining BGC. This would also explain why Sun was continuing to negotiate his remuneration package with Warner

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70 NE, Day 1, p 158, line 12 to p 160, line 11.

even after signing the agreement on 24 June 2015. If Warner had genuinely thought that Sun was "joking"[71] or just "being humorous"[72] in renegotiating his package, he certainly did not tell him so or express any incredulity in responding to Sun's messages. In addition, as I have already noted above at [39], the contracts also stipulated a requirement for effective communication of the acceptance by BGC.

Waiver

(1) BGC's inconsistent positions on the effect of Clause 6(c)

42 On a preliminary note, before I address the issue of waiver, I observe that BGC had submitted two alternative arguments regarding the effect of Clause 6(c). The first was that Clause 6(c) was a condition precedent which had been fulfilled when Shaun Lynn's signature was procured. In the alternative, Clause 6(c) was waived by BGC (*ie*, no signature was required on BGC's part).

43 In this regard, the Court of Appeal in *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [36] has stated that "while a party has the right to plead inconsistent rights in the alternative, the alternatives cannot offend common sense and justice". This was recently affirmed by the Court of Appeal in *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 ("*Liberty Sky*") at [28].

44 I accepted the Defendants' submission that BGC could not rely on these as alternative arguments. They are binary propositions with different factual premises. A waiver would simply mean that there was no requirement to follow

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71 NE, Day 1, p 153, line 10.

72 NE, Day 1, p 155, lines 15 – 19.

up with compliance with Clause 6(c). It would follow that if BGC's waiver argument was to be accepted, one would expect that there would be no execution of the documents in compliance with Clause 6(c). But on the objective evidence, there was in fact no waiver since Shaun Lynn proceeded to execute the documents by signing in accordance with Clause 6(c). This fact would be more consistent with BGC allegedly having treated Clause 6(c) as a condition precedent (although I have rejected this argument at [30] above). As such, I did not see how the alternative arguments could be countenanced given that BGC was relying on facts in support of either argument that were plainly contradictory. Whilst the court will afford a party the maximum latitude to state its case, there are limits to the extent two inconsistent cases can be run, such as when the party has *actual* knowledge of which alternative is true (*Liberty Sky* at [28]).

(2) Could BGC have waived Clause 6(c) unilaterally?

45 BGC argued that, in the alternative, Clause 6(c), which was for its sole benefit, could have been and was waived by BGC.[73] In any event, BGC took the position that Yap and Sun could not rely on Clause 6(c) as they were not aware of its existence.[74] In response, Yap and Sun relied on the case of *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm) for the proposition that if the clause in question was for the benefit of both parties, it must be clear that both parties have waived it in order for any waiver to have been effective.[75] Alternatively, they argued that any waiver was neither

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73 Plaintiff's Closing Submissions at [188] – [190].

74 Plaintiff's Closing Submissions at [177].

75 1st and 2nd Defendant's Closing Submissions at [68] and [71].

communicated[76] nor made out by conduct,[77] and Warner had no authority to waive any provision in the contracts.[78]

46 First, I did not accept that BGC could have unilaterally waived Clause 6(c) as the term does not exist solely for BGC's benefit. Rather, it ought to be construed as a term that affects both parties and is open to both parties to rely upon for a definitive understanding of when the agreements would be regarded as "binding and enforceable". As stated by the UK Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 at [50], "the governing criterion [of contract formation] is the reasonable expectations of honest sensible businessmen" (see also *Reveille* at [42]). In other words, whether a term is construed to exist solely for the benefit of one party or both parties has to be considered in light of what would have been commercially sensible. In my view, in light of the not insignificant remuneration terms, Clause 6(c) would have allowed BGC the leeway to confirm that it indeed wanted to hire the brokers on those stated terms, and would also have signalled to the brokers that their hiring on those terms had been approved and they were no longer allowed to "bargain" for better terms with BGC or ICAP for that matter (see [54] – [55] below). This would have been the reasonable expectation of both parties; to regard Clause 6(c) as being for the sole benefit of BGC would be prejudicial to Yap and Sun's ability to know when their employment with BGC was confirmed. In this regard, I would also make the observation that while employer-employee relationships often involve a disparity in bargaining power (see *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan*

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76 1st and 2nd Defendant's Closing Submissions at [76].

77 1st and 2nd Defendant's Closing Submissions at [77].

78 1st and 2nd Defendant's Closing Submissions at [78].

David [2008] 1 SLR(R) 663 at [48]; *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [20]), neither Yap nor Sun raised the argument that there was such a disparity. In the present analysis, I had proceeded on the presumption that parties were on an equal footing when negotiating the respective employment offers.

47 Second, it was not disputed that the executed agreements were undated when BGC received them with Shaun Lynn's signatures. BGC had provided no clarity on exactly when or by whom they were dated. Clause 1(a) stipulates that the provisions of the agreement come into effect on "the date hereof" but Warner had "no idea when, by who" the dates were filled in.[79] I agreed with the Defendants that in the circumstances, an adverse inference should be drawn against BGC to the effect that the dates were more likely only filled in *after* BGC realised its failure to follow up on the documentation with Yap and Sun *ie* after BGC was informed that Yap and Sun would not be joining them.

48 Third, even if Clause 6(c), properly construed, was for the sole benefit of BGC, any waiver of the clause would not in itself have constituted acceptance of the contracts. As stated in *Reveille* at [41], "where signature as the prescribed mode of acceptance is intended for the benefit of the offeree, *and the offeree accepts in some other way*, that should be treated as effective unless it can be shown that the failure to sign has prejudiced the offeror" [emphasis added]. In other words, even if BGC had waived the requirement of Shaun Lynn's signature, it needed to show both Yap and Sun that it had accepted the contract. Such acceptance can be in the form of the offeree's conduct, as in the case of *Reveille* (see above at [38]).

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79 NE, Day 2, p 17, lines 3 – 5.

49 Fourth, following from my views as stated at [38] above on the commercial uncertainty arising from the offeror not knowing when he would or would not be bound, I was of the view that allowing BGC to unilaterally waive Clause 6(c) without more would also be considered prejudicial to both Yap and Sun.

50 Fifth, I should add that if BGC could unilaterally waive Clause 6(c) and did waive it, the purported waiver was invalid. BGC had not complied with Clause 18.3 of BGC's standard terms and conditions (as incorporated into the contracts) which provides that any waiver of the employment agreement must be "in writing signed by the waiving party". While BGC argued that a no-oral modification clause only raises a rebuttable presumption that in the absence of an agreement in writing there would be no variation (see *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [89] – [90]; *Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] 2 SLR 153 ("*Charles Lim*") at [60] –[61]), it relied solely on the conduct of Warner as evidence that such waiver had occurred.[80] As I had found at [33] above, Warner did not in fact have the authority to hire the brokers without compliance with Clause 6(c), much less to independently vary BGC's need to comply with it. As a consequence, I found that the presumption that no variation of Clause 6(c) had taken place in the absence of an agreement in writing remained unrebutted.

Yap and Sun's reliance on Clause 6(c)

51 It is a well-established principle that in the absence of fraud or misrepresentation, a party is bound by all the terms of a contract that it signs, even if that party did not read or understand those terms (see *Bintai Kindenko*

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80 Reply (Amendment No. 5) at [8] and [15].

Pte Ltd v Samsung C&T Corp and another [2019] 2 SLR 295 at [58]). In *Chitty* at 3-049, it is similarly stated that a "party of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not", although this is subject to the doctrine of *non est factum*. In this regard, the Court of Appeal in *Charles Lim* had also clearly held at [60] that "in the absence of a plea of *non est factum*, parties should be held to have read and agreed to all terms in an agreement signed by them." It would follow that if a party can be bound by the terms he did not understand or read when he signed an agreement, *a fortiori* he should able to rely on a term that he did not know about at the time he had signed it but which was later brought to his attention.

52 Yap and Sun's reliance on Clause 6(c) in these proceedings was of course *ex post* and were obvious afterthoughts. Notwithstanding Clause 6(e) which acknowledges that they had "carefully read and had the opportunity to obtain legal advice" in relation to the agreements, they candidly conceded that they had not read the agreements carefully and they did not bother to seek legal advice before they signed the agreements.[81] Perhaps the package Warner presented was just too tempting to refuse at the time.

53 Nevertheless, this is ultimately of no consequence in the present proceedings. The documents were BGC's to begin with, and BGC would have had to ensure compliance with its own terms. Whether and when contracts were entered into and what the parties intended at the time of contracting are questions of fact to be objectively determined, and the effect of written contractual terms must be construed as a matter of law in the given factual context.

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[81] NE, Day 5, p 238, lines 11 – 13; AEIC of Lawrence G Sun (dated 7 January 2019) at [42]; AEIC of Yap Yuk Hee (dated 7 January 2019) at [34].

Yap's and Sun's resignations from ICAP

54 As for Yap and Sun having duly tendered their resignations, I accepted that they had given plausible explanations for doing so. They were savvy, high-performing and experienced brokers. There was no reason to reject their explanations that tendering resignations was a common strategy amongst brokers looking to renegotiate terms with their employers and obtain leverage for better terms.[82] Their evidence that this was a common industry practice was also not challenged.

55 Furthermore, I would be slow to draw any inferences from the tendering of resignations by Yap and Sun. These acts were undoubtedly subsequent conduct, which has not been definitively accepted as being admissible in Singapore for the purpose of showing the existence of a contractual agreement (see *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 at [18] – [21]; *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 at [175]).

Summary

56 In summary, I found that there were no valid and binding agreements in existence in late September 2015, as BGC had not communicated any acceptance of Yap's and Sun's offers until after mid-October 2015. It would follow that when Yap and Sun informed BGC in late September 2015 that they would not be joining them, they had revoked their offers. Even if the offers had been accepted by July 2015 through Shaun Lynn's signatures, this made no

[82] NE, Day 5, p 149, line 19 to p 150, line 17; NE, Day 6, p 80, lines 19 – 22; AEIC of Cheung Wai Yin at [18].

difference to my analysis since the acceptance was not effectively communicated to Yap and Sun.

57 BGC only had itself to blame for apparently having given short shrift to Clause 6(c) of its own terms and neglecting to follow up altogether with Yap and Sun until after it was told that Yap and Sun had changed their plans. On any reasonable analysis of offer and acceptance, it was too late for BGC to accept offers which had been revoked.

Issue (b): Whether ICAP had wrongfully induced breaches of the agreements

58 Following my finding above that there were no valid and binding agreements in place, BGC's entire case failed and it was not strictly necessary for me to address the arguments pertaining to the remaining issues raised at trial. Nevertheless, I make some brief observations for completeness.

59 BGC argued that ICAP had wrongfully induced Yap and Sun to breach their agreements, and that ICAP knew about the contracts even if ICAP did not know the precise terms of the contracts.[83] ICAP also had the means to ascertain if the contracts were binding, and by failing to do so ICAP had deliberately turned a blind eye to the possibility that the contracts were valid.[84] The combination of ICAP's attempts at convincing Yap and Sun to stay, ICAP's revised contractual offers, and also the provision of indemnities effectively induced Yap and Sun to breach the contracts.[85]

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83 Plaintiff's Closing Submissions at [224] – [228]

84 Plaintiff's Closing Submissions at [241].

85 Plaintiff's Closing Submissions at [265] and [278].

60 In its defence, ICAP argued that the contracts were not binding,[86] and even if binding ICAP did not have the requisite knowledge of any valid and binding contracts.[87] With regard to the issue of whether ICAP had turned a blind eye to the existence of binding contracts, ICAP submitted that in the civil and commercial context, the law does not impose a duty on ICAP to inquire beyond what was clear and obvious,[88] and that what ICAP had done was reasonable in the circumstances.[89] It was also argued by ICAP that the indemnities offered were merely to assuage Yap and Sun as BGC had a propensity for litigation.[90]

61 In order to establish a case of inducing breach of contract, having regard to *M+W Singapore Pte Ltd v Leow Tet Sin and another* [2015] 2 SLR 271 at [88], it must be shown that):

(a) ICAP knew of the contract and intended for it to be breached;

(b) ICAP induced the breach; and

(c) the contract was breached and damage was suffered.

62 I accepted ICAP's defence that there was no wrongful inducement in its efforts to persuade Yap and Sun to remain at ICAP. Even assuming that valid and binding agreements did exist, ICAP was not aware of their existence or of their full terms. Based on what ICAP understood from Yap and Sun, no firm

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86 3rd Defendant's Closing Submissions at [31].

87 3rd Defendant's Closing Submissions at [34] and [43].

88 3rd Defendant's Closing Submissions at [76].

89 3rd Defendant's Closing Submissions at [77].

90 3rd Defendant's Closing Submissions at [131].

agreements had been concluded yet.[91] In any event, neither Yap nor Sun knew the details of the agreements they had signed, and they did not have any copies of duly-executed agreements for ICAP to peruse.[92] Objectively assessed along these lines, it could not be said that ICAP should be deemed to have known that there were concluded agreements in existence.

Issue (c): Whether BGC had breached an implied term of mutual trust and confidence

63 The Defendants submitted that if the agreements are found to have been valid and subsisting, BGC had breached an implied term of mutual trust and confidence when Mr Mark Webster ("Webster") met with Sun in December 2015 and allegedly threatened Sun with litigation and to impound Sun's passport.[93] Webster denied these allegations.

64 In *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 ("*Wee Kim San*") at [24], the Court of Appeal had implicitly endorsed the implication of a term of mutual trust and confidence into employments contracts, to the effect that an "employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee". As can be observed from *Malik v Bank of*

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91 AEIC of Cheung Wai Yin at [28] – [29], [35] – [36]; AEIC of George Dranganoudis at [22] – [23], [30] – [31]; NE, Day 8, p 66, lines 3 – 6; NE, Day 8, p 71, lines 10 – 23; NE, Day 8, p 114, lines 20 – 24; NE, Day 9, p 137, lines 11 – 23; NE, Day 9, p 144, lines 6 –7; NE, Day 9, p 150, lines 2 – 25; NE, Day 9, p 153, lines 1 – 10, 19 - 22; NE, Day 9, p 162, lines 1 – 11.

92 AEIC of John Lawrence G Sun (dated 7 January 2019) at [41]; AEIC of Yap Yuk Hee (dated 7 January 2019) at [34]; NE, Day 5, p 221, lines 13 – 19; NE, Day 6, p 120, lines 2 – 7.

93 1st and 2nd Defendant's Closing Submissions at [108]; 3rd Defendant's Reply Submissions at [31].

Credit and Commerce International SA (in compulsory liquidation) [1998] AC 20 at 47, the ambit of the term is very wide and "[t]he implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

65 I pause here to add a caveat: there is at best only *implicit* acceptance in *Wee Kim San* of the applicability of the implied term of mutual trust and confidence. Whether the principle will be definitively endorsed as being applicable in Singapore remains to be seen, as the issue has not yet arisen squarely for determination by the Court of Appeal. The parties' submissions before me proceeded on the common ground that it has been accepted to be part of Singapore law, at least on the basis of High Court decisions such as *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577, and I assumed that to be the case for present purposes in making the following observations *obiter*.

66 I did not think that there was any repudiatory breach of an implied term of mutual trust and confidence on BGC's part as alleged by the Defendants. Sun said he was taken aback by what Webster had allegedly said and he felt "upset" and "pretty pissed off". In the same breath, Sun also claimed that he felt "threatened".[94] These are differing reactions running a fair gamut of emotions. Even if the statements were made, notwithstanding Webster's denials, it did not seem credible that Sun had genuinely felt threatened. It would appear that he felt more irate than intimidated. At any rate, he did not feel compelled to accede to Webster's alleged threats. He stood his ground and told Webster at the end of the meeting that he would not join BGC.[95]

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94 NE, Day 5, p 107, lines 2 – 9.

95 AEIC of John Lawrence G Sun (dated 12 January 2021) at [30] – [31].

67 In addition, the Defendants sought to characterise Webster's alleged threats in December 2015 as a breach of mutual trust and confidence while recognising that Yap and Sun had claimed to no longer be bound by their agreements by late September 2015. Such a position was untenable. Assuming that there were valid and binding agreements in place, in deciding not to join BGC, Yap and Sun themselves could already be said to have been in repudiatory breach, tantamount to a breach of mutual trust and confidence on their part. Irrespective of whether BGC had accepted their breach, it was not logical to assert that Webster subsequently was guilty of another breach of mutual trust and confidence, when the substratum of trust and confidence no longer remained. For there to be a breach of mutual trust and confidence, there must be *no reasonable cause or proper cause* for the employer act in the way it did. If the employer's act was a proportionate response to the employee's own anterior breach, then there would have been a reasonable cause for the employer to have acted the way it did.

Issue (d): Proof of BGC's loss and damages

68 As I had found that there was no valid or binding contract between BGC and Yap and/or Sun, the issue of damages was moot. Nonetheless, I shall also set out my views as to what might have been the appropriate quantum of damages assuming that the agreements had been in existence.

BGC's position on quantification of loss

69 Notwithstanding that a claim for liquidated damages was its primary pleaded case, BGC argued that it could elect to claim for actual damages,[96] and

[96] Plaintiff's Closing Submissions at [650] and [712].

that its claim for 48 months of damages which was pleaded as an alternative claim,[97] would not have prejudiced the Defendants or taken them by surprise.[98]

70 ICAP took objection to BGC's apparent change in its position on damages.[99] It argued that the causal connection between Yap and Sun's failure to join BGC and the loss BGC was claiming was highly speculative and unsupported by evidence.[100] ICAP also took the position that BGC's claim was not commercially realistic and did not account for the actual revenues the brokers made at ICAP.[101]

71 In my view, BGC's position on quantification of loss had been shifting and uncertain. Up until the trial, there was no indication from the pleadings or elsewhere that BGC would be claiming damages pegged to 48 months of "lost" employment due to Yap and Sun's failure to join them. Their primary pleaded claim was based on the LD clause. However, by the time the trial commenced, BGC appeared to concede that the LD clause was not operative and the LD formula which formed the basis of BGC's primary pleaded case on damages was unworkable, since BGC had no Peso NDF desk at the material time to peg as a benchmark.

72 While I accepted that BGC had not completely omitted mention of this alternative claim in the lead-up to the trial, its belated attempt to re-pivot the case would constitute a surprise to the Defendants, although it could not be said

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[97] Plaintiff's Closing Submissions at [392].

[98] Plaintiff's Closing Submissions at [396].

[99] 3rd Defendant's Closing Submissions at [160].

[100] 3rd Defendant's Closing Submissions at [173].

[101] 3rd Defendant's Closing Submissions at [185].

that this would have resulted in injustice or irreparable prejudice that cannot be compensated by costs (see *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]). That being said, I turn next to consider both the LD clause as well as BGC's alternative claim for actual damages.

The LD clause

73 The relevant LD clauses found at Clause 12.2 read with Clause 12.3 and Clause 12.5.1 of BGC's standard terms and conditions state:[102]

> 12.2 Where you leave the employment of [BGC] without the consent of [BGC]prior to the expiry of the term of your employment contract or you fail to join [BGC] in accordance with the terms of your employment contract (other than because of your death or because of termination of your employment by [BGC], except where such termination is as a result of your gross misconduct) (each an "Event"), then you accept and agree that, subject to paragraph 12.3, the following will constitute a genuine pre-estimate of the losses that [BGC]will suffer arising from your departure or failure to join (the "Liquidated Damages"):
>
> > 12.2.1 where an Event occurs when there are 18 months or more to run on the term of your employment contract, a sum equal to 25% of the Monthly Gross Revenue (as defined below) multiplied by 18; or
> >
> > 12.2.2 where an Event occurs when there are less than 18 months but more than 4 months to run on the term of your employment contract, 30% of the Monthly Gross Revenue multiplied by the number of whole months remaining of the term; or
> >
> > 12.2.3 where an Event occurs when there are four months or less to run on the term of your employment contract, 10% of the Monthly Gross Revenue multiplied by the number of whole months remaining in the term.
>
> 12.3 Where the Event is that you fail to commence working for [BGC] you acknowledge that the Monthly Gross Revenues are calculated on the average revenues of the Desk prior to your joining and that you are intended to increase those average

[102] 1AB 262 – 263.

> revenues. Accordingly, the percentages at paragraph 12.2.1 and 12.2.2 shall be increased to 45% and 40% respectively.
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> …
>
> 12.5 For the purposes of paragraph 12:
>
> 12.5.1 "Gross Revenue" means the amount of gross revenue generated during the Calculation Period:
>
> 12.5.1.1 personally by you; or
>
> 12.5.1.2 where you have not worked for [BGC] throughout a whole Calculation Period or where you have failed to join [BGC]in accordance with the terms of your employment contract or these terms and conditions, or where revenues are not allocated to you personally, the total amount of the gross revenue generated by the Desk (as defined in your employment contract) during the Calculation Period divided by the total number of brokers (who are not trainee brokers) on the Desk throughout the whole period of the Calculation Period.
>
> …
>
> 12.5.3 "Monthly Gross Revenue" means Gross Revenue divided by six.

74 Therefore, in the situation where a broker fails to join the desk for which he/she is recruited for, under Clause 12.2.1 read with Clauses 12.3 and 12.5.3, the LD sum would be calculated according to the following formula:

> Monthly Gross Revenue (*ie*, Gross Revenue divided by 6) x 45% x 18

75 Gross Revenue is defined under Clause 12.5.1.2 to be "the total amount of the gross revenue generated by the Desk (as defined in [the] employment contract) during the Calculation Period divided by the total number of brokers (who are not trainee brokers) on the Desk throughout the whole period of the Calculation Period." In turn, according to Clause 2(a) of the BGC employment

contract, the desk that Yap and Sun were contracted to join was the "Peso NDF Desk".[103]

76 Taking the LD clauses as they are, the Monthly Gross Revenue is to be derived with reference to the revenue generated by the Peso NDF Desk. In order for BGC to argue that the projected revenues are to be substituted into the formula as set out at paragraph [74] above, BGC would have had to show that such a term can be implied into the contract in the first place. The test for implication of terms has been set out by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [101]:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

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103 1AB 253.

77 At the first step, it was held in *Sembcorp Marine* at [96] that where the parties had contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it, a "true" gap in the contract would not arise for the court to imply a term. This would apply even where only one party had expressly contemplated an issue (see *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [74] – [76]). On the facts, it appeared that while BGC's contract had contemplated the situation that a broker would be joining the desk without having worked for BGC prior, it clearly failed to provide for the situation where a broker would be *starting up* a new desk that was never previously in existence. Accordingly, on BGC's own pleaded case, this would not be a situation where a "true" gap in the contract had arisen.

78 At the second step, the court considers whether it is necessary to imply a term. In this case, it would be arguable that such a clause could be necessary in order to give the agreement efficacy.

79 At the third step, the court considers the specific term to be implied, with regard to the need for business efficacy. In this regard, I am not persuaded that Yap and Sun would have readily accepted a specific LD term using the projected revenue. Had such a term been put to them at the time of contract, I doubt that they would have given a clear affirmative response. From their evidence, it is clear that while Sun had felt that the targets set out in the contract request forms were attainable, these would have been in the context of a "good market".[104] As for Yap, he was adamant that he would not have been able to meet performance

[104] NE, Day 4, p 91, lines 10 – 12; NE, Day 4, p 132, lines 9 -14.

targets set in BGC's contract request forms.[105] In fact, neither Yap nor Sun reached those targets even after they stayed on at ICAP.

80 In addition, it would appear that neither Yap nor Sun was aware of what their full employment costs ("FEC") would have been at BGC,[106] even if they should be taken to have been aware that they had to attain a revenue target of two times that FEC under Clause 3(b) of the contracts.[107] Accordingly, the implication of a term using the projected revenue (two times of FEC) as a proxy would also not have satisfied the officious bystander criterion.

81 In summary, from the foregoing analysis, the gap in the LD clause would persist, rendering it unworkable.

Actual damages

82 In *Tembusu Growth Fund Ltd v ACTAtek, Inc and others* [2018] 4 SLR 1213 at [59], the court had occasion to consider the issues raised in relation to the quantum of damages in anticipatory breaches:

> …The usual rule for assessing loss caused by performance breach is that damages are assessed at the time of the breach…the plaintiff comes under a duty to mitigate from the time he accepts the repudiatory breach and terminates the contract, not from the time in the future fixed for performance of the obligation which has been repudiated: *Bunge* [*SA v Nidera BV* [2015] 3 All ER 1082 ("*Bunge*")] at [12]. And to achieve a fair assessment of the losses suffered as a result of the repudiation, those losses ought to be assessed as at the time fixed for performance, where the plaintiff would have obtained what he had bargained for: *Robinson v Harman* (1848) 1 Exch 850 at 855. The compensatory principle and the duty to mitigate thus

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105 NE, Day 6, p 66, line 18 to p 67, line 15.

106 NE, Day 4, p 56, lines 21 – 22; NE, Day 6, p 49, lines 7 – 13.

107 NE, Day 4, p 73, line 18 to p 74, line 1; NE, Day 6, p 53, line 5 to p 54, line 1.

> work together justly to give the plaintiff what he bargained for less the losses he could reasonably have avoided**.**

83 Notwithstanding the general rule that damages are to be assessed at the time of the breach, it was held in a recent decision of the Court of Appeal in *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2021] SGCA 97 ("*iVenture*") that events post-dating the breach can be considered in assessment. The Court went so far as to opine that it could consider events which occur "after the evidential tranche, during the written closing submissions and before the trial judge delivered judgment, if such events would have falsified some basic assumptions common to both sides or it would have affronted common sense or a sense of justice if the court had failed to take cognizance of them" (see *iVenture* at [152]).

84 While the decision in *iVenture* post-dated my decision which was delivered on 6 September 2021, the principles espoused had already been canvassed in *The "STX Mumbai" and another matter* [2015] 5 SLR 1 (citing *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 ("*The Golden Victory*") at [69]:

> … on a practical level, even in the situation of an anticipatory breach, by the time the court hears the case, the *actual* nature and consequences of that breach might, in any event, be *known, given the passage of time between the date of the breach and the date(s) of the trial itself* (*cf* also [E Tabachnik, "Anticipatory Breach of Contract" [1972] Current Legal Problems 149, especially at 153 as well as [Henry Winthrop Ballantine, "Anticipatory Breach and the Enforcement of Contractual Duties" (1924) 22 Michigan L Rev 329] at 340). And, as was made clear by a majority of the House of Lords in *The Golden Victory*… (whose opinions were recently affirmed by the UK Supreme Court in *Bunge* at [23]), there is no principled reason why the court should be precluded from taking into account such events which occur subsequent to a breach of contract in assessing the actual nature and consequences of the breach (although, it should be mentioned, that these

> observations were made in the specific context of the quantification of damages)….
>
> [emphasis in original]

85 Applying the law to the present case, on the assumption that an anticipatory breach of a valid and binding contract on the part of the brokers was accepted by BGC, the losses were to be assessed with reference to the time when the contracted-for performance was to have been performed (see also *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 22.009). The non-breaching party (*ie*, BGC) was expected to have taken reasonable steps to mitigate its losses on the date that it accepts the repudiation. Consequently, this would also mean that events that occurred after Yap's and Sun's notices to BGC that they were repudiating the contract ought to be taken into account.

86 From the evidence, it appeared that BGC was unlikely to have made a significant profit which could be attributed to Yap and Sun, even if they had joined BGC. First, as stated by ICAP's CEO on the stand, there was the possibility that Yap and Sun would have been placed on different desks or have their existing ICAP lines transferred to other brokers to minimise the impact of their departure.[108] Second, it was clear that Yap and Sun were part of an effective team, which may or may not ultimately have joined BGC *en masse*.[109] Third, Yap and Sun were engaged to start up a Peso NDF Desk at BGC where none had existed before, which would have required mobilisation of significant resources by BGC.[110] Although it was submitted by BGC that it had the

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108 NE, Day 8, p 157, line 25 to p 158, line 10.

109 NE, Day 9, p 50, line 4 – 16.

110 NE, Day 15, p 117, line 16 to p 118, line 3; AEIC of Daniel Corrigan (dated 15 January 2021) at [59] – [62].

necessary resources to build up a dedicated Peso NDF Desk to rival that of ICAP's,[111] this would likely have been accomplished only with a sizable outlay on BGC's part. Fourth, the fact that BGC offered Yap and Sun performance holidays indicated that there was uncertainty as to whether they would have been able to meet their performance targets while starting up a new desk at BGC. Fifth, there is an appreciable distinction between talented brokers joining an existing desk and talented brokers expected to establish a desk at BGC where none had existed before. Sixth, BGC did not rebut Yap and Sun's evidence that market conditions were unfavourable in 2016,[112] and that their salaries were reduced as a result.[113]

87 Accordingly, I found no basis in BGC's submissions that the projected revenue of the brokers should be utilised to assess damages where actual information about the revenue they generated (albeit at ICAP) is available.

88 As to the expert evidence tendered at trial, I found the evidence of Mr Daniel Corrigan ("Daniel Corrigan") to have been rather more objective in contrast to the evidence of either Mr Brian Wood, who testified as Yap and Sun's expert, or Mr Richard Harris, who testified as BGC's expert. Daniel Corrigan provided the court with useful insight into the factors that would have determined the success of a new desk being set up at BGC. In particular, the list of assumptions laid out by Daniel Corrigan enumerated several factors which were useful in informing an assessment of damages.[114] These included, *inter alia*, the following:

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111 Plaintiff's Closing Submissions at [534].

112 AEIC of John Lawrence G Sun (dated 7 January 2019) at [75]; AEIC of Yap Yuk Hee (dated 7 January 2019) at [72].

113 2AB 566 – 567.

114 AEIC of Daniel Corrigan (dated 15 January 2021) at [46].

(a) ICAP would do little to nothing to defend its business, revenues and market share;

(b) The new Peso NDF brokering desk at BGC would be established and become functioning quickly;

(c) The market volume stays the same or grows;

(d) Volatility in Peso NDF rates would remain the same or increase therefore maintaining or increasing trading volumes.

89 Under cross-examination, the evidence of Daniel Corrigan was not seriously challenged by counsel for BGC. This reinforced my view that BGC was seeking to resort to various alternative methodologies to quantify the alleged loss at the maximum possible amount of projected profits, premised on various assumptions which may not hold true and which called for considerable speculation. In addition, it was not helpful that different methodologies had been raised at different junctures, even as late as in the midst of trial itself.

90 I was also not persuaded that BGC had acted reasonably in mitigation to source for replacement brokers. Their new hires, Mr Richard Ong and Ms Sun Moon Hwa, who were brought in ostensibly to fill the gap caused by Yap and Sun's failure to join BGC, were not even exclusively working on Peso NDF trades.[115]

91 Had BGC been able to prove that valid and binding agreements had been made, I would have been inclined to only award nominal damages given its inability to prove the loss allegedly suffered with sufficient specificity.

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115 NE, Day 8, p 169, lines 12 – 16.

Conclusion

92 In summary, I found that there were no valid and binding agreements in existence, as BGC had not effectively communicated any acceptance of Yap's and Sun's offers to them, before they had revoked their offers. BGC's claims against the Defendants were therefore dismissed.

93 The parties had duly filed their costs schedules but subsequently agreed that submissions on costs would be deferred until after the conclusion of BGC's appeal. As such, the question of costs remains pending.

See Kee Oon
Judge of the High Court

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