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

**[2022] SGHC 296**

Suit No 469 of 2021

Between

Pontus Paal Appelqvist

… *Plaintiff*

And

Eon Reality Pte Ltd

… *Defendant*

AND

Between

(1) Eon Reality Pte Ltd
(2) Eon Reality Inc

… *Plaintiffs-in-Counterclaim*

And

Pontus Paal Appelqvist

… *Defendant-in-Counterclaim*

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# JUDGMENT

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[Contract — Breach — Employment contract]
[Tort — Negligence — Breach of duty to perform due diligence]

Version No 1: 30 Nov 2022 (13:12 hrs)

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# Appelqvist, Pontus Paal
# v
# Eon Reality Pte Ltd

**[2022] SGHC 296**

General Division of the High Court — Suit No 469 of 2021
Choo Han Teck J
9, 12–14 September, 2 November 2022

30 November 2022 Judgment reserved.

**Choo Han Teck J:**

1 The plaintiff, Pontus Paal Appelqvist, a Swedish national, works and resides in Singapore. He was previously the Vice President of Sales for the Asia-Pacific of the defendant, Eon Reality Pte Ltd, a company carrying on the business of the development, sale, and marketing of augmented and virtual reality software solutions. They have diverse customers, in education, government and industry. The defendant is a wholly owned subsidiary of EON Reality, Inc., the second plaintiff in counterclaim, a company incorporated in the United States of America.

2 The defendant terminated the plaintiff's employment on 3 March 2021 with one month's salary in lieu of notice. The plaintiff was then earning a monthly salary of S$19,000. He was involved in the sales of Interactive Digital Centre ("IDC") projects of the defendant. They were long-term projects that included setting up facilities (with various partners). The facilities enable people

to experience and understand the concept of virtual reality. The first stage of an IDC project involves the delivery to the local or joint venture partner, and the installation of equipment. The next stage requires the defendant to work with the partners in the operation of the IDC hub.

3 It is not disputed that the plaintiff's commission and salary are subject to the contract offer dated 13 December 2009 and its subsequent amendments. Nine addendums were made in total to the plaintiff's contract offer (cumulatively, the "Employment Contract"). These addendums incorporated the plaintiff's revised monthly salary, which increased over the years, as well as revised sales targets and commission rates for each year. The plaintiff's remuneration had two components: first, a "fixed salary" which started at S$9,600 when he was employed in 2010 and was gradually increased to S$19,000 in 2021; and second, a "commission" which was based on specified commission rates applicable to "EON Net Sales".

4 The plaintiff was dismissed from his employment on 3 March 2021 and he is now claiming unpaid salary in lieu of notice of five months' salary, amounting to S$95,000 (the "Salary Claim") and outstanding sales commission of S$1,389,100.08 for 18 IDC projects (the "Commission Claim"). On the Salary Claim, the defendant says that the plaintiff was lawfully terminated and given the requisite notice of four weeks, pursuant to s 10(3) of the Employment Act (Cap 91, 2009 Rev Ed) since there was no notice period stated in the defendant's contract. On the Commission Claim, the defendant disputes liability for five of the 18 projects, namely, Deakin (Australia) Ref Q-2225 ("Deakin (Australia)"), AVR (Japan) Ref Q-2578 ("AVR (Japan)"), TXI Partners (Taiwan) Ref Q-2606 ("TXI Partners (Taiwan)"), Jinda (China) Ref Q-2649



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("Jinda (China)") and GVS (Thailand) Ref 2972 ("GVS (Thailand)"). For Deakin (Australia), AVR (Japan) and TXI Partners (Taiwan), the defendant says that these projects are "washout" projects, and that the applicable Sales Policy and Procedures ("SPP") at the relevant times state that commission would not be paid for projects that are deemed "washout". For Jinda (China) and GVS (Thailand), the defendant says that the plaintiff is not entitled to any commission as both projects were non-performing. For the remaining 13 projects, the defendant admits that it is liable for commission, but disputes the quantum of commission due.

5 I shall deal with the Salary Claim first. The plaintiff relies on the 1st Addendum that was made on 23 February 2010, which states the following:

> For clarity the notice period is extended to six (6) months.

There were no other addendums on this point after 23 February 2010. The plaintiff claims that the termination notice period was thus mutually amended to six months, and the defendant breached the Employment Contract when it gave the plaintiff only one month's salary in lieu of notice.

6 The defendant's position is that the plaintiff was employed by EON Reality, Inc (the second plaintiff in counterclaim) and not the defendant. It further says that there was no notice period stated in the contract offer dated 13 December 2009 for the alleged notice period in the 1st Addendum to be extended from. It says, therefore, the plaintiff had been lawfully terminated.

7 It is incontrovertible that the plaintiff was employed by the defendant and not the second plaintiff in counterclaim. Several of the contracts were signed by Mr Sunkad Sridhar Harihar ("Mr Sridhar"), the defendant's Managing



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Director and the plaintiff. The plaintiff's official appointment was also that of "VP Sales of Asia Pacific" with the defendant.

8 I am of the view that the plaintiff is entitled to six months' salary in lieu of notice. Every addendum states that, "[f]urther to the … employment contract … dated Dec 13 2009 and previous amendments to the same". The last addendum was made on 1 February 2020. It is clear that the notice period as stated in the 1st Addendum on 23 February 2010 is still valid and enforceable. I therefore order that the defendant pays the plaintiff six months' salary in lieu of notice less the money already paid so far.

9 I now turn to the Commission Claim. The plaintiff says that throughout the period of his employment with the defendant, the defendant had put in place a process whereby a Sales Commission Report would set out the salient details of the relevant project and calculate the percentage and quantum of commission payable to the defendant's personnel. However, from around 2016, the defendant started to delay the provision of Sales Commission Reports to the plaintiff and also did not pay him some of the commissions he had earned. In particular, on 20 August 2020, he was informed via a letter from the second plaintiff in counterclaim that three projects, Deakin (Australia), AVR (Japan) and TXI Partners (Taiwan) were deemed "washout" and no commission would be released to all parties involved, including the plaintiff.

10 For each commission claim, the defendant's operative SPP provides the following conditions:

> Commissions payable = (EON Net Sales x Commission Percentage) – Commission Advances – Commission Split



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Clause 2 of the defendant's operative SPP further states:

> Net Sales is calculated as Invoice Value minus COGS (Costs of Goods Sold).
>
> Commission is based on Net Sales.

11 As to when the commissions are to be paid out, Mr Sridhar explained under cross-examination that the payments of advance commission before the conclusion of the project were "out of goodwill". However, the plaintiff's Employment Contract expressly states that "[a]ll commissions payable upon receipt of pro-rated payment from customer starting at end of each calendar quarter." Prior to 2020, each iteration of the SPP had a clause for "Commission Payout", stating that where a purchase order is cancelled, an account manager (or salesperson) would "only be eligible for Commission Payout for any pro-rated payments received prior to cancellation as per the Employment Agreement and Sales Policy". I am of the view, that on a reasonable construction, these clauses allow commissions to be paid out on a pro-rated basis, with no requirement that an entire project to be completed or for the full payment from the customer to be made before commissions can be paid.

12 The next question is, whether the plaintiff is entitled to any commission in respect of the projects that were declared by the defendant as "washout". It must first be determined whether the September 2020 SPP (the "2020 SPP"), which introduced a "project washout clause", was validly incorporated. The defendant's position is that three of the Projects, namely, Deakin (Australia), AVR (Japan) and TXI Partners (Taiwan) were deemed to be "washout projects" as per Clause 11 of the 2020 SPP and therefore no commissions were payable to the plaintiff. Clause 11 states:



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> **11. Project washout**
>
> Under circumstances, where the engagement with client turn sour and the client is not in a position to fulfil their obligations, EON Reality has to make a decision to stop bleeding on the project. Once the project is declared wash out, No commissions, incentives are valid to the stakeholders including the sales commission.
>
> Such instances are namely:
>
> 11.1 When the project is beyond the scope of work and time defined and for reasons unknown the delay happens
>
> 11.2 The estimated man days is overrun and the project is a -ve (negative) cash to the company
>
> 11.3 The scope of work is miscalculated

13 The SPP is a document that was first issued in 2012 and was subsequently revised multiple times until 2021. The plaintiff says that he was only made aware via email of the 2020 SPP on 2 September 2020, a day after he was informed that there would be no commission for what had been deemed "washout projects". He further says that he was not given reasonable notice of the 2020 SPP and that he did not agree to the variations to the Employment Contract made by the 2020 SPP. Mr Sridhar testified that the SPPs were made available on to a staff portal which all employees have access to, though only evidence was adduced that the 2019 SPP was uploaded on the staff portal. In my view, the terms of the plaintiff's employment clearly incorporated the most updated SPP in force at the time of the amendment. In every iteration of the plaintiff's Employment Contract, the last clause states: "All other terms as per… Sales Policy Handbook". This clearly is a reference to the relevant SPP in force at the time.

14 The question still remains, however, as to whether the term which the defendant sought to introduce into the 2020 SPP on "washout projects" applies.



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Where there is a signed contract with an explicit incorporating clause, onerous and unusual conditions can be incorporated even if the signing party had not been specifically drawn to them (*Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712).

15 In the present case, it is not disputed that the plaintiff signed the last amendment to the Employment Contract on 1 February 2020. It is also not disputed that the term on "project washout", which significantly affects the plaintiff's commission, was only introduced in a new SPP in September 2020, though that version of the SPP was backdated to 1 January 2020. While the defendant says says that it has "reserved its power to vary the terms of the SPPs at its sole discretion", this is neither apparent from the wording of the Employment Contract nor that of the SPP. There is no indication that the plaintiff and defendant intended that the terms of the SPP could be unilaterally varied to introduce new terms, which significantly changes an employee's commission structure without reasonable notice given. I am thus of the view that the 2020 SPP, which introduced the term of "project washout", has not been incorporated into the Employment Contract. Although the 2020 SPP was not incorporated into the Employment Contract, it is still necessary to consider whether, in light of how commissions are calculated (see [10] above), the plaintiff is entitled to the commission as he claims.

16 The first project that the defendant says the plaintiff is not entitled to any commission is Deakin (Australia). The purchase order was dated 30 November 2015. The value of the Deakin (Australia) agreement was US$6,582,511.00 and S$75,000 had already been paid out as advanced commissions to the plaintiff on 21 December 2015 and 29 January 2016. Mr Sridhar had conceded that



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US$5,850,298.11 had already been paid by the customer under the project. However, he also says that there had been no net sales made as the contract was non-performing and that the IDC Hub was never established. And thus, due to Deakin's failure to fulfil its contractual obligations, the second plaintiff in counterclaim was unable to pay US$254,000 to third-party suppliers. The defendant has adduced a letter from the counsel of Deakin University notifying the defendant of the termination of the master agreement. The defendant says that "[b]y some estimates, the EON group lost more than 18 million in USD".

17 The second project is AVR (Japan). The purchase order was dated 19 September 2017 and the contract value was US$6,692,752. The second plaintiff in counterclaim never received the full payment as per the contract. AVR (Japan) had allegedly made several contractual breaches. The second plaintiff in counterclaim is also involved in a legal dispute with AVR (Japan). As such, the AVR (Japan) agreement was "forfeited, not performed and hence void". As of 31 December 2021, the second plaintiff in counterclaim's financial statements reflect US$6,395,343 in liabilities due to the legal dispute with AVR (Japan).

18 The third project is TXI Partners (Taiwan). The purchase order was dated 9 December 2017 and the contract value was US$6,692,752. The full amount appears to have been paid up by the customer. However, TXI (Partners) did not sell a single license and did not pay the platform fees from customer sales as expected. Mr Dan-Ioan Lejerskar ("Mr Dan"), the director of the first plaintiff in counterclaim and the defendant testified that there were several contractual breaches made on the part of TXI Partners (Taiwan), including theft of software, infringement of copyright and significant reputational damage to



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the second plaintiff in counterclaim. Mr Dan testified that there was no revenue taken from the TXI project and that the second plaintiff in counterclaim suffered the largest financial losses to date from this project.

19 Following from the above, it is clear that the three projects incurred losses, the projects were not completed, and full payment was not made to the defendant. I accept the defendant's submissions that there were no resulting revenues from these long term projects, which incurred more losses than earned revenue. However, there is no requirement for an entire project to be completed or for the full payment from the customer to be made before commissions are paid out (see [11] above). Nonetheless, the SPP provides that the calculation of commission is based on the net sales from each project (see [10] above). These two terms appear to be at odds with each other.

20 Taking into account the business purpose of the provisions, it is more reasonable to find that the commission is dependent on the net sales of the project, and can be paid out on a pro-rated basis so long as the net sales are positive. The commissions were likely intended to be paid out on a pro-rated basis on the basis that IDC projects were typically long-term projects. However, where one such project fails, and the company suffers significant losses as a result, the parties were more likely to have intended that no commission for that project is paid out.

21 I now turn to consider the two projects which the defendant says that the plaintiff is not entitled to commissions for: Jinda (China) and GVS (Thailand). I first consider the Jinda (China) Project. The Purchase Order of this project was US$6,699,880.26 (about S$9,044,838.35). Mr Sridhar testified that the Jinda (China) IDC is still incomplete due to the Covid-19 lockdown in China. The full



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project value thus has not been paid to the defendant. Mr Sridhar further said that as the project is incomplete, the plaintiff is not entitled to commissions for this project. However, as stated above at [11], the plaintiff is entitled to commission pay outs on a pro-rated basis. Under cross-examination, Mr Sridhar has said that about US$6,365,000 (S$8,592,750) has been received from the client, which is substantial. However, he says that the calculations for the Costs of Goods Sold ("COGS") have not been made as the project is still incomplete. The defendant thus adduced no evidence of the COGS' financial data. I agree with the plaintiff that COGS can still be calculated even though the project is not yet complete, as has been done with several other projects. The plaintiff estimates, based on projects of similar size and scope, that he would have been entitled to a commission of about S$298,466.30. I accept the plaintiff's estimation of the COGS based on projects of similar size, but reduce this by 20% to take into account the fact that the project is not yet complete. I thus find that the commission payable to the plaintiff for the Jinda (China) project is S$238,773.04.

22 Second, for the GVS (Thailand) Project. The purchase order was for the price of US$10,105 dated 15 February 2021. The defendant adduced evidence that the purchase order for this project was cancelled by the customer. Given that no net sales were made from this project, I agree with the defendant that the plaintiff is not entitled to any commission.

23 Finally, I now consider how much commission the plaintiff is entitled to for the remaining projects. The defendant accepts that there are still some commissions owing to the plaintiff for 13 other projects. Of the 13, the quantum of S$130,039.11 for the project NTU (Singapore) is undisputed. However, the



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defendant disputes the quantum of commission for the remaining 12 projects. The details and the parties' respective positions are as follows:

| S/n | Project Name | Pf Claim Quantum (S$) | Df Claim Quantum (S$) |
|---|---|---|---|
| 1 | China Merchants (China)<br>Ref: Q-2416 | 96,653.13 | 94,729.52 |
| 2 | SCDF (Singapore)<br>Ref: Q-7229 | 2,281.50 | 137.63 |
| 3 | SUS (Japan)<br>Ref: Q-2809 | 132,540 | 52,429.48 |
| 4 | Swinburne (Australia)<br>Ref: Q-2874 | 1,428.18 | 983.76 |
| 5 | SCDF (Singapore)<br>Ref: Q-2885 | 1,951.97 | 416.33 |
| 6 | GVS (Thailand)<br>Ref: Q-2892 | 111,923.86 | 31,663.10 |
| 7 | AARCOE (Saudi Arabia)<br>Ref: Q-2903 | 6,612.35 | 3,536.45 |
| 8 | GVS (Thailand)<br>Ref: Q-2906 | 123.20 | 0 |
| 9 | OMT (Vietnam)<br>Ref: Q-2920 | 335.64 | 120.90 |
| 10 | NYP (Singapore)<br>Ref: Q-2940 | 3,699.07 | 624.88 |



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| | | | |
|---|---|---|---|
| 11 | OMT (Vietnam)<br>Ref: Q-2889 | 6,007.57 | 684.02 |
| 12 | NYP (Singapore)<br>Ref: Q-2977 | 4,165.17 | 785.28 |

24 For China Merchants (China) (Ref: Q-2416), the discrepancy in the quantum arises because the defendant calculated the remaining sum based on an exchange rate of SGD-USD of 1.365 as of August 2020, which was when the sales commission report was prepared, but the plaintiff calculated the remaining sum based on an exchange rate of SGD-USD of 1.375 as of October 2016, which was the month that the purchase order was made. The defendant says that the commissions were only due at the completion of the project and therefore it was fair and just to calculate the exchange rate as at the date of the completion of the project. I reiterate [11] that according to the Employment Contract, commissions could be paid out on a pro-rated basis and were not necessarily only due at the completion of the project. Further, there is a clause in every iteration of the SPP providing that "the foreign exchange rate is locked on the date of the first invoice for the respective projects". This should similarly apply to the calculating of commissions. I thus accept the plaintiff's claim quantum, which is based on an exchange rate as of August 2020.

25 For SCDF (Singapore) (Ref: Q-2729), the discrepancy in the quantum arises because the defendant and plaintiff relied on two different purchase orders to calculate the quantum owed. The plaintiff relies on a purchase order generated on 24 August 2018 comprising a three-year contract for maintenance services for SCDF. The defendant relies on a later purchase order generated on 7 November 2018 for the same services. The defendant says that the later



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purchase order is the amended and accurate one. I reviewed the two purchase orders and accept that the defendant's purchase order is more up-to-date. Accordingly, I accept the defendant's calculation of the quantum that is owed to the plaintiff.

26 For the remaining projects, the discrepancy in quantum arises because both parties have provided different values of the COGS. I will consider each project in turn.

27 For SUS (Japan) (Ref: Q-2809), it is undisputed that the purchase order for this project was US$2,517,349 (approximately S$3,650,156.05). The defendant claims that the COGS for the project was S$2,107,746.46 whereas the plaintiff claims that the COGS for the project was S$625,556.46. The plaintiff adduced a COGS record that he claims has been prepared by the Product Manager Lim Ming Jie ("Mr Lim"). Mr Lim was not called to give evidence at trial. However, the document that the plaintiff referred to appeared to be a self-prepared excel spreadsheet with no official logo or signature of Mr Lim. I nevertheless agree with the plaintiff that the COGS figures provided by the defendant for SUS (Japan) to be inexplicably high compared to previous projects of even larger scale. I further find that the defendant had included costs which had not yet been incurred – such as travel costs and training costs. I have also looked through the list of actual invoices, which have been mostly accounted for, although a few invoices were not available in evidence. I will use the defendant's COGS estimates but deduct 10% as a general adjustment. I also agree with the plaintiff that the defendant had applied the wrong rate of commission, and as per the 8th Addendum, the applicable commission rate at



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the time was 6% of Net Sales. Accordingly, the amount owed to the plaintiff for SUS (Japan) is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$3,650,156.05 | S$1,896,971.81 | S$1,753,184.24 | **S$105,191.05** |

28 For Swinburne (Australia) (Ref: Q-2874), the discrepancy in the quantum is due to the calculation of the COGS. It is undisputed that the purchase order for this project was US$27,050 (about S$36,517.50) The plaintiff estimates the COGS based on projects of a similar size. In particular, the plaintiff points out that this was a simple maintenance service agreement and that the COGS estimated by the defendant are highly excessive. Further, the Commission Report purports to attribute some S$6,000 for hardware costs, although no such hardware was purchased by the client. The defendant says that the COGS for this project is S$20,121.58. Mr Sridhar however points out that the COGS provided are "projections and have not yet been incurred" and thus the defendant "does not have any invoices and receipts". In this unsatisfactory state of affairs, I accept the plaintiff's argument that the COGS estimated by the defendant is on the high side. Given that the COGS are estimations and that no invoices have been produced, I will use the defendant's COGS estimates but deduct 10% as a general adjustment. Accordingly, the amount owed to the plaintiff for Swinburne (Australia) is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$36,517.50 | S$18,109.42 | S$18,408.08 | **S$1,104.48** |



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29 For SCDF (Singapore) (Ref: Q-2885), the discrepancy in the quantum is due to the calculation of COGS. It is undisputed that the purchase order for this project was S$72,925. The plaintiff says that the defendant's Commission Report and accompanying spreadsheet are highly dubious and the invoices submitted in support include services for Amazon Web Services and Sindhu School Fees, neither of which were part of the purchase order from the SCDF. The defendant says that the COGS of the project is S$65,986.25, resulting in a Net Sales of S$6,938.75, of which S$416.33 is payable to the plaintiff as commission. The invoices largely matched the COGS provided by the defendant, even though not all invoices had been provided. Although there were invoices from Amazon Web Services and, oddly, an invoice of S$9,715.60 for school fees of NPS International School for a student "Sindhu Sunkad", those invoices do not seem to be included in the calculation of the COGS and I will thus disregard them. Given that the project is still ongoing, the COGS estimates are projections and are not final. I accept the defendant's COGS estimates but deduct 10% as a general adjustment. Accordingly, the amount owed to the plaintiff for SCDF (Singapore) is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$72,925.00 | S$59,387.63 | S$13,537.38 | **S$812.24** |

30 For GVS (Thailand) (Ref: Q-2892), the discrepancy in the quantum is due to the calculation of COGS. It is undisputed that the purchase order for this project was US$1,842,368 (about S$2,487,196.80). The plaintiff says that the Commission Report produced by the defendant is highly dubious and unsupported by the documents that the defendant has adduced. The defendant says that the total COGS for this project was S$1,815,978.64. Further, the



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amount that was received from GVS was only S$2,362,836.96. I accept that the defendant only received S$2,362,836.96. However, I agree with the plaintiff that not all the invoices that were adduced in support of this appear to be related to the project and cannot be matched up to the accompanying spreadsheet. As part of the COGS, the defendant claimed a cost of 22% for the Augmented Virtual Reality ("AVR") platform software's value for which there was no explanation or evidence for this cost. Under cross-examination, the defendant's witness, Mr Addagarla Sri Venkata Shiva Rama Krishna Karthik ("Mr Karthik") confirmed that the AVR platform is developed internally and proprietary to EON. I thus see no reason why the AVR platform software would incur such costs. Given that there is no substantiation for this cost incurred, I do not accept this cost. Subject to this, I accept the defendant's COGS estimates but deduct 10% as a general adjustment. Accordingly, the amount owed to the plaintiff for GVS (Thailand) is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$2,362,836.96 | S$965,019.65 | S$1,397,817.31 | **S$83,869.04** |

31 For AARCOE (Saudi Arabia) (Ref: Q-2903), the discrepancy in the quantum is also due to the calculation of COGS. It is not disputed that the purchase order for this project was US$96,040 (about S$129,654). The plaintiff says that there are numerous invoices that do not seem to be related to the project that has been adduced, such as invoices for shipments of other products to Kuwait. Similarly, there is also no justification for claiming the cost of 22% for the AVR platform software's value. The defendant says that the total COGS for this project was S$70,713.19. On an examination of the invoices, I accept that the shipment of products to Kuwait are relevant to this project. But I agree that



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there is little justification for the defendant to include 22% of the AVR platform software's value as part of the COGS. Given that there is no substantiation for this cost incurred, I will deduct this cost from the defendant's COGS. Accordingly, the amount owed to the plaintiff for AARCOE (Saudi Arabia) is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$129,654 | S$42,189.31 | S$87,464.49 | **S$5,247.88** |

32 For GVS (Thailand) (Ref: 2906), the discrepancy in the quantum is similarly due to the calculation of COGS. It is undisputed that the purchase order for this project was US$9,180 (about S$12,393). The defendant says that the net sales of this project was -S$223,86, and since the project had a negative margin, the plaintiff is not entitled to any sales commission. The plaintiff says that there were no supporting documents to justify the high hardware or labour cost listed in the Commission Report. He says that based on projects of similar size and scope, he should have been entitled to a commission of about S$123.20. The defendant did not produce invoices for this project or any other substantiation of the costs in the Commission Report. Under these unsatisfactory circumstances, I will accept the defendant's COGS estimate but adjust it downwards by 10%. Accordingly, the amount owed to the plaintiff is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$12,393 | S$11,355.17 | S$1,037.83 | **S$62.27** |

33 For OMT (Vietnam) (Ref: Q-2920), the discrepancy in the quantum is also due to the calculation of COGS. The purchase order for this project was S$6,095.26. The plaintiff says that the defendant has included direct labour



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costs even though there was no need for such costs since the products were delivered directly to the client. The plaintiff also says that the defendant had claimed a cost of 22% of the AVR platform software's value without providing any evidence for this cost incurred. The defendant says that the COGS for this project was S$4,080.24. I note that the calculation of labour costs included the time requirement for the project manager to liaise with the client and the training of the client and is thus justified. However, I agree with the plaintiff that the cost of 22% of the AVR platform software's value has not been substantiated or explained. I will therefore exclude this cost from the defendant's COGS. Accordingly, the amount owed to the plaintiff is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$6,095.26 | S$2,739.28 | S$3,355.98 | **S$201.36** |

34 For NYP (Singapore) (Ref: Q-2940), the purchase order, dated 10 December 2020, for this project was for S$94,848. The plaintiff says that the direct labour costs, hardware costs and transport costs provided by the defendant are excessive. The defendant says that the COGS for this project was S$34,926.32. The defendant also says that as of the day that the plaintiff was terminated, the defendant had only received the sum of S$47,424 from the client and that the plaintiff is only entitled to a 5% commission. The defendant has adduced evidence that only S$47,424 has been received by the client and I will accept this amount. However, I agree with the plaintiff that the costs as quoted by the defendant is excessive and also not fully substantiated. I thus will use the defendant's COGS estimates but deduct 10%. I also agree with the plaintiff that the 9th Addendum is applicable and therefore the applicable commission percentage is 6%. Accordingly, the amount owed to the plaintiff is:



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| Purchase Order | COGS | Net Sales | Commission (6%) |
|---|---|---|---|
| S$47,424 | S$31,433.69 | S$15,990.31 | **S$959.42** |

35 For OMT (Vietnam) (Ref Q-2889), the defendant says that the client only paid S$67,189.50 although the project value was S$100,669.50. I can find no evidence that the defendant only received S$67,189.50, but there is documentary proof that the client had reduced the project value from S$120,123 to S$100,699.50. As part of the COGS, the defendant also claimed a cost of 22% for the AVR platform software's value for which there was no explanation or evidence for this cost. I will exclude this cost from the defendant's COGS. Accordingly, the amount owed to the plaintiff is:

| Purchase Order | COGS | Net Sales | Commission (6%) |
|---|---|---|---|
| S$100,659.50 | S$31,361.72 | S$69,337.78 | **S$4,160.27** |

36 For NYP (Singapore) (Ref Q-2977), the project value was S$81,670 for NYP's procurement of an AVR platform for three years. The defendant says that as of 3 March 2021, which was the day of the plaintiff's termination, the defendant had received the sum of S$27,224.69 (one-third the sum of the contract). The plaintiff says that this contract just "called for the supply of a software platform" and that there is no evidence to substantiate the high direct labour costs of S$16,500 and the 33 man-days work that is required. While Mr Karthik has adduced an affidavit to explain the labour costs, the defendant has not adduced evidence to show that they had only received one-third the sum of the contract as of 3 March 2021. Further, as with some other projects above, the defendant has also claimed a cost of 22% for the AVR platform software's



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value without providing any evidence for this cost. I will thus take the full sum of the project value but not the cost of 22% for the AVR platform software's value. Accordingly, the amount owed to the plaintiff is:

| **Purchase Order** | **COGS** | **Net Sales** | **Commission (6%)** |
|---|---|---|---|
| S$81,670 | S$24,442.83 | S$57,227.13 | **S$3,433.63** |

37 In total, the plaintiff is owed the following outstanding commissions:

| **S/n** | **Project Name** | **Project ref** | **Outstanding commissions (S$)** |
|---|---|---|---|
| 1 | Deakin (Australia) | Q-2225 | 0 |
| 2 | China Merchants (China) | Q-2416 | 96,653.13 |
| 3 | NTU (Singapore) | Q-2496 | 130,093.11 |
| 4 | AVR (Japan) | Q-2578 | 0 |
| 5 | TXI Partners (Taiwan) | Q-2606 | 0 |
| 6 | SCDF (Singapore) | Q-2729 | 137.63 |
| 7 | SUS (Japan) | Q-2809 | 105,191.05 |
| 8 | Jinda (China) | Q-2649 | 238,773.04 |
| 9 | Swinburne (Australia) | Q-2874 | 1,104.48 |
| 10 | SCDF (Singapore) | Q-2885 | 812.24 |
| 11 | GVS (Thailand) | Q-2892 | 83,869.04 |
| 12 | AARCOE (Saudi Arabia) | Q-2903 | 5,247.88 |
| 13 | GVS (Thailand) | Q-2906 | 62.27 |



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| | | | |
|---|---|---|---|
| 14 | OMT (Vietnam) | Q-2920 | 201.36 |
| 15 | NYP (Singapore) | Q-2940 | 959.42 |
| 16 | OMT (Vietnam) | Q-2889 | 4,160.27 |
| 17 | GVS (Thailand) | Q-2972 | 0 |
| 18 | NYP (Singapore) | Q-2977 | 3,433.63 |
| | Total outstanding commissions | | 670,698.55 |

38 Lastly, I deal with the counterclaim. The plaintiffs in counterclaim say that:

(a) the plaintiff has breached his Employment Contract by failing to achieve his yearly sales target of S$7,000,000 in 2020 (the "Sales Target Claim"); and

(b) the plaintiff has breached his duty of care by failing to properly conduct due diligence for the three washout projects (the "Duty of Care Claim").

39 In respect of the Sales Target Claim, the plaintiff says that the plaintiffs in counterclaim have failed to establish that the purported inability to meet the sales target was a breach of his Employment Contract as there is nothing on the plain reading of the 9th Addendum which stipulates that the sales target is a mandatory one. In respect of the Duty of Care Claim, the plaintiff says that his job scope as a salesperson did not include performing customer due diligence. In any case, no duty of care arises between himself and the second plaintiff in counterclaim (EON Reality, Inc) as he was at all times an employee of the first plaintiff in counterclaim (EON Reality Pte Ltd).



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40 In respect of the Sales Target Claim, I am of the view that the plaintiff did not breach his Employment Contract in failing to achieve his yearly sales target. Such targets are typically used to incentivize salespersons to make more sales. The sales target as stipulated in the contract was not a condition of the contract.

41 In respect of the Duty of Care Claim, I also am of the view that the defendant in counterclaim did not owe a duty to perform customer due diligence. While Mr Dan has, in his affidavit of evidence-in-chief, stated that the plaintiff's job scope involves "conducting the necessary due diligence and verification that the customers and/or partners in foreign countries are financially solid", and that he was to, *inter alia*, "review financial information such as audited financial statements" and "review auditor's report", this was not found in any part of the plaintiff's contract. Instead, the emails show that the responsibility of due diligence fell with the Finance Department, consisting of Mr Nick Bothwell and Mr Vaughn Merrill. While the salespersons were kept in the loop of the due diligence policies, this did not mean that they were required to perform such due diligence, a task normally performed by the legal and accounting departments.

42 The judge, as a finder of fact, has it easy when there is no evidence. Where items claimed are not supported by evidence, they are excluded. However, judicial despair may be provoked by competing and incomplete evidence. For innominate items, such as general expenses, that seem to have been incurred but not supported by proof, the court will usually decide between allowing them in their entirety or dismissing them in their entirety. Where, as in this case, neither option would have yielded a fair result, the court has to make



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some adjustments by way of a discount of what it considers just and fair although there is no means of determining whether this, admittedly arbitrary, exercise achieves a just result because justice implies that each party receives what he deserves. Without evidence, justice can be an illusive gauge. Deciding the general adjustment to be made to the COGS from the point of fairness is no less certain, but is, as in this case, a little more palpable because fairness can be discerned through the approach and application of the solution. It is thus what I have done, for the alternative will be unfair and may be unjust.

43 The plaintiff's claim is thus allowed to the extent mentioned above. The counterclaim is dismissed. For the avoidance of doubt, the amounts payable by the defendant to the plaintiff are as follows: S$95,000 for salary in lieu of notice and S$670,698.55 for outstanding commissions. As such, the total due to the plaintiff is S$765,698.55.

44 I will hear the question of costs at a later date.

- Sgd -
Choo Han Teck
Judge of the High Court

Byron Nicholas Xavier (Xavier & Associates LLC) for the plaintiff and defendant-in-counterclaim;
Cai Enhuai Amos and Tian Keyun (Yuen Law LLC) for the defendant and plaintiffs-in-counterclaim.



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