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

[2022] SGHC 9

Suit No 1295 of 2019

Between

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

… Plaintiffs

And

(1) Hook, Laurence
(2) Lau Mei Ning

… *Defendants*

JUDGMENT

[Contract — Contractual terms — Express terms — Entire agreement clauses]

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Terigi, Morgan Bernard Jean and others
v
Hook, Laurence and another

[2022] SGHC 9

General Division of the High Court — Suit No 1295 of 2019
Andre Maniam J
30, 31 August, 1, 2 September, 17 November 2021

25 January 2022 Judgment reserved.

Andre Maniam J:

Introduction

1 When parties enter into successive contracts relating to the same subject matter, each with an "entire agreement" clause, what is the "entire agreement" between the parties? Both contracts? Or just the later contract?

2 In the present case, I found the later contact to be the "entire agreement" between the parties: it had superseded the earlier contract.

Background

The parties

3 The first plaintiff ("Mr Terigi"), the second plaintiff ("Mr Kouchnirenko"), and the first defendant ("Mr Hook") were the founders

of the third plaintiff company ("Incomlend"). The second defendant ("Mdm Lau") is Mr Hook's wife.

The Agreements

4 The founders entered into the following contracts relating to Incomlend ("the Agreements") in which they were referred to as the "Founders":

(a) a Shareholders Deed dated 29 August 2016 ("SD1");[1]

(b) a Founders Agreement dated 21 April 2017;[2] and

(c) a second Shareholders Deed dated 30 June 2017 ("SD2").[3]

5 The parties to the Agreements were as follows:

(a) SD1 – between Incomlend and its 17 shareholders then: the three Founders and 14 Investors;

(b) the Founders Agreement – only between the Founders; and

(c) SD2 – between Incomlend and its 44 shareholders then: the three Founders, the 14 Investors who were parties to SD1, and another 27 other Investors.

Mr Hook's shares in Incomlend

6 Mr Hook held 32,578 shares in Incomlend. On 13 February 2018, those shares were transferred equally to Mr Terigi and Mr Kouchnirenko, with

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1 1 Agreed Bundle ("AB") 317–345.

2 1AB 349–352.

3 1AB 374–411.

payment of US$29,000 to Mr Hook. Mr Hook says he had not agreed to this transfer, and that his shares were worth far more.

7 The plaintiffs say that Mr Hook's shares were validly transferred away from him. They say this was justified by Mr Hook's breaches of the Agreements.

8 In particular, the plaintiffs say that the Agreements obliged Mr Hook to leave his employment with HSBC Hong Kong ("HSBC HK"), and take up full-time employment with Incomlend in Singapore. Things came to a head in late 2017 when Mr Hook told Mr Kouchnirenko "I'm not resigning [from HSBC HK] when we have no biz plan or cash projection showing we not going bankrupt."[4] The plaintiffs then accused Mr Hook of various breaches of the Agreements, as a precursor to them transferring his shares away from him, which they did in February 2018.

Procedural history

9 The plaintiffs sued Mr Hook and his wife in December 2019. They seek declarations that Mr Hook breached the Agreements, and that they were entitled to procure the transfer of Mr Hook's shares by reason of those breaches. Incomlend also seeks damages from Mr Hook, in respect of certain information technology ("IT") issues. Further, Incomlend seeks restitution by Mdm Lau of the sum of US$48,000, which had been paid to her as Mr Hook's salary from Incomlend.

10 Mr Hook and his wife defended the action. Mr Hook also counterclaimed damages for the loss of his shares. By consent, the trial was

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4 Mr Kouchnirenko's Affidavit of Evidence-in-Chief ("AEIC") para 25.

bifurcated such that issues of damages in relation to Mr Hook's counterclaim are deferred to a later stage, if necessary.

The "entire agreement" clauses

SD1

11 Recital (D) of SD1 states: "The Parties desire and wish to enter into this Deed to regulate the affairs of the Company and the relationship between the Founder and the Investors as Shareholders of the Company."

12 SD1 contains clauses on management of the company (Clause 4), the board of directors (Clause 5), and the transfer of shares (in particular, Clauses 3.2, 9, and 17).

13 Clause 23.2 of SD1 is the following "entire agreement" clause:

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

SD2

14 Recital (B) of SD2 is identical to Recital (D) of SD1 (quoted at [11] above).

15 Like SD1, SD2 contains clauses on management of the company (Clause 4), the board of directors (Clause 5), and the transfer of shares (in particular, Clauses 3.2, 9, and 17). There are, however, significant differences between the management and directorship provisions in SD1, and those in SD2, which I will discuss at [64]–[80] below.

16 The "entire agreement" clause in SD2 (Clause 23.2) is identical to that in SD1 (quoted at [13] above). Thus, SD1 said that *it* was the entire agreement between the parties, but thereafter SD2 said that *it* was the entire agreement between the parties.

The effect of the "entire agreement" clause in SD2

17 All of the 17 shareholders who were parties to SD1 were also parties to SD2; they were joined as parties to SD2 by 27 new shareholders.

18 SD2 made no reference to SD1, and as such the phrase "[t]his Deed, and the documents referred to in it" in the "entire agreement" clause of SD2 (see the text at [13] above) would not include SD1.

19 Indeed, the 27 new shareholders who are only parties to SD2 might not even know of the existence of SD1, and no evidence was led to show that any of them knew. As far as those 27 new shareholders were concerned, the "entire agreement" between them and the 17 earlier shareholders would comprise only SD2 and the documents referred to in it (which did not include SD1).

20 The plaintiffs, however, suggested that for those who were parties to both SD1 and SD2, the "entire agreement" between them was SD1 *and* SD2 (and any documents referred to in both deeds). I do not accept this.

21 In particular (and crucial in the present case), Clause 3.2 of SD2 provides that: "Each Shareholder undertakes with the other Shareholders and the Company that it shall procure and ensure that no issue or transfer of Shares shall be effected unless such issue or transfer is effected as permitted by and in accordance with the provisions of this Deed."

22 If a transfer of shares were permitted by some agreement other than SD2, but not by SD2, then effecting that transfer would be a breach of SD2. Specifically, if the plaintiffs' transfer of Mr Hook's shares were permitted by SD1, but not by SD2, then effecting that transfer would be a breach of SD2. Likewise, if the plaintiffs' transfer of Mr Hook's shares were permitted by the Founders Agreement, but not by SD2, then effecting that transfer would be a breach of SD2.

23 Even if the 17 earlier shareholders who were parties to both SD1 and SD2 agreed amongst themselves that transfers permitted by SD1 could still be effected, though in breach of SD2, that could not bind those who were parties only to SD2.

24 I do not accept that the 17 earlier shareholders, or the Founders alone, intended to have inconsistent (or potentially inconsistent) share transfer regimes: one under SD2, one under SD1, and another under the Founders Agreement. Rather, the 17 earlier shareholders who were parties to SD1 agreed – by entering into SD2 – that, henceforth, only transfers permitted by SD2 (the latest agreement) would be allowed.

25 I find that all 44 shareholders of Incomlend intended that SD2 (and the documents referred to in it) would be the "entire agreement" going forward:

(a) The 27 new shareholders who were parties only to SD2 could have had no other intention.

(b) The 17 earlier shareholders who were parties to both SD1 and SD2 could not have intended their relationship *inter se* to be governed by both SD1 and SD2, but their relationship with the 27 new shareholders to be governed only by SD2. This would be a messy state

of affairs, and (as illustrated above in relation to share transfers) inconsistencies between the agreements would create problems.

(c) Incomlend would have intended just one Shareholders Deed to regulate its relationship with all of its shareholders, that being SD2.

26 Clause 27.1(d) of SD1 provides: "This Deed shall remain in full force and effect as between all the parties until the earlier to occur of … (d) agreement of all the parties that it be terminated." I find that, by entering into SD2, Incomlend and all the 17 shareholders who were parties to SD1 agreed to terminate SD1 and replace it with SD2. That is what it means for SD2 to state – without reference to SD1 – that SD2 is the "entire agreement" that regulates the affairs of the company and the relationship between the shareholders of the company.

27 In the specific context of share transfers, any inconsistent regime in SD1 or the Founders Agreement would not survive SD2 coming into force. It follows that whether the plaintiffs can justify the transfer of Mr Hook's shares rests on SD2. For completeness, I will nevertheless also consider the position under SD1 and the Founders Agreement.

Was the transfer of Mr Hook's shares justified?

Was the transfer justified under SD2?

Plaintiffs' contentions

28 The plaintiffs sought to justify the transfer of Mr Hook's shares as follows:

(a) Mr Hook had breached SD2;

(b) on 12 January 2018, Mr Terigi had given Mr Hook notice to remedy his breaches (the "Cure Notice")[5] but Mr Hook did not remedy his breaches;

(c) Mr Hook had committed an Event of Default under Clause 17.1, specifically, a material breach of SD2 which he had failed to remedy within 14 days of notice to do so being given to him;

(d) under Clause 17.2, upon an Event of Default the other shareholders could give Mr Hook notice that Mr Hook was deemed to have made an offer in accordance with Clause 9.1 to transfer his shares to the other shareholders in his group (in his case, the other Founders, pursuant to Clauses 9.2 and 3.4);

(e) on 2 February 2018, Mr Terigi gave Mr Hook notice pursuant to Clause 17.2 of SD2 deeming that he had offered his shares to the other Founders;[6] and

(f) on the same day, Mr Terigi (on behalf of himself and Mr Kouchnirenko) accepted that deemed offer for Mr Hook's shares;[7] the transfer was then effected.

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5 4AB 1472.

6 4AB 1474.

7 4AB 1475.

Alleged breaches of SD2

29 The Cure Notice[8] stated that Mr Hook had breached Clauses 5.1 and 16.1 of SD2, together with four clauses of SD1, and two clauses of the Founders Agreement.

30 Clause 5.1 of SD2 concerned directorship:

> The Board of Directors shall initially comprise the Founders. Each Director can appoint an alternate director who shall be an existing Director. The appointment or removal of any Director who is a Founder shall only be undertaken with (A) the approval of the Majority of the Directors entitled to vote and (B) such number of Shareholders (who are not Founders) holding in aggregate at least a majority of the Shares held by Shareholders (who are not Founders) present in person or by proxy and entitled to vote at a general meeting. The appointment or removal of any Director who is not a Founder shall only be undertaken with the approval of such number of Shareholders holding in aggregate at least a majority of the Shares held by Shareholders present in person or by proxy and entitled to vote at a general meeting.

31 Clause 16.1 of SD2 was the following restrictive covenant:

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

32 The plaintiffs acknowledged, in para 6 of their solicitors' letter of 17 November 2021, that "breach of Clause 5.1 of the 1st Shareholders' Deed

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8 4AB 1472.

does not form part of the Plaintiffs' pleaded case". To that, I would add that breach of Clause 5.1 of SD2 also does not form part of the plaintiffs' pleaded case, and the plaintiffs made no submissions that Clause 5.1 of SD2 had been breached. The focus was thus on Clause 16.1 of SD2 instead.

33 In the plaintiffs' Statement of Claim, they pleaded that "the 1st Defendant persistently refused to assume full-time employment with the 3rd Plaintiff, and to relocate to Singapore for that purpose. The 1st Defendant also persistently refused to leave his employment at HSBC."[9]

34 The plaintiffs did not say that it was a breach of either SD2 or SD1, for Mr Hook not to have become a director of Incomlend. Instead, the plaintiffs acknowledged that Mr Terigi and Mr Kouchnirenko agreed that instead of Mr Hook himself becoming a director, he could nominate his father, Mr Ray Hook to be a director; and Mr Ray Hook was appointed a director accordingly.

35 Moreover, the Cure Notice did not call upon Mr Hook to become a director to remedy his breaches. Instead, he was asked to remedy his breaches by "immediately tendering [his] notice of resignation at HSBC and confirming that [he] will take on full time employment with Incomlend in Singapore by 29th January 2018". The focus was on employment, not directorship.

36 As for Clause 16.1 of SD2, it was asserted in the Cure Notice that Mr Hook "continue[d] to work at HSBC Hong Kong, a bank which engages in similar business activity to Incomlend", and he was asked to resign from HSBC HK immediately.

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9 Statement of Claim ("SOC"), para 17.

37 I accept that, for the purposes of Clause 16.1 of SD2, HSBC HK's business was a "Competing Business", defined in Clause 1 of SD2 as "the provision of trade financing brokerage & financial services or such business that is the same or substantially similar to the Business". Clause 1 also defines "Business" to mean "principal activity of the Company [Incomlend] and its related corporations, being trade financing brokerage & financial services through the Incomlend online platform and any ancillary activities related thereto, or any other business as the Shareholders may from time to time resolve in general meeting."

38 However, I accept Mr Hook's defence that his employment with HSBC HK falls within the proviso at the end of Clause 16.1 of SD2, *ie*, "activities existing as at the date of this Deed … and disclosed in writing to the Directors of the Company."

39 Mr Terigi and Mr Kouchnirenko were the initial directors of Incomlend, and it was disclosed to them in writing, prior to SD1 and SD2 (indeed, prior to the incorporation of Incomlend) that Mr Hook was employed with HSBC HK.

40 Mr Hook provided his written *curriculum vitae* ("CV")[10] to Mr Terigi, in which he described his career from "May 2011 – present" as being with HSBC HK, and from "May 2014 – present" as Capital Programme Manager APAC. On 12 November 2015, Mr Terigi in turn sent Mr Hook's CV to Mr Kouchnirenko and one other person, copying in Mr Hook.[11]

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10 4AB 1428.

11 4AB 1426.

41 Mr Hook's employment with HSBC HK was thus disclosed in writing to both Mr Terigi and Mr Kouchnirenko as of 12 November 2015. Mr Hook then continued to be employed by HSBC HK through:

(a) the incorporation of Incomlend on 14 January 2016,[12]

(b) Mr Terigi becoming a director on 14 January 2016;

(c) SD1 (dated 29 August 2016);

(d) Mr Kouchnirenko becoming a director on 14 December 2016;

(e) the Founders Agreement (dated 21 April 2017); and

(f) SD2 (dated 30 June 2017).

42 The plaintiffs' contention is that Mr Hook's CV (which both Mr Terigi and Mr Kouchnirenko had, by 12 November 2015) does not constitute disclosure of Mr Hook's employment with HSBC HK to the directors of Incomlend, for the purposes of Clause 16.1 of SD2, for:

(a) Incomlend had yet to be incorporated; and

(b) Mr Terigi and Mr Kouchnirenko had yet to become directors of Incomlend.

43 These objections would presumably fall away if only Mr Hook had sent his CV again to Mr Terigi and Mr Kouchnirenko (after Incomlend had been incorporated, and they had become directors of it), but Mr Hook never did so. In effect, it is the plaintiffs' case that Mr Hook was in breach of Clause 16.1 of

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12 Incomlend's business profile, 1AB 19.

SD1 from inception, and thereafter also in breach of the identical Clause 16.1 of SD2 from inception, all because he did not resend his CV to Mr Terigi and Mr Kouchnirenko (both of whom already had it).

44 I rejected these attempts to get around the fact that Mr Terigi and Mr Kouchnirenko were informed in writing of Mr Hook's employment with HSBC HK. That disclosure, by way of Mr Hook's CV, suffices for Clause 16.1 of SD2 (and SD1). Nothing in Clause 16.1 of SD2 (or SD1) indicates that disclosure made pre-incorporation of Incomlend would not count, or that disclosure to the directors before they became directors would not count.

45 The proviso to Clause 16.1 of SD2 allowed the directors of Incomlend to decide whether they were agreeable to the person in question continuing with the disclosed activities, whilst also being a shareholder of Incomlend. If the directors were not agreeable, they could simply decide not to accept the person as a shareholder of Incomlend. Disclosure pre-incorporation of Incomlend, to Mr Terigi and Mr Kouchnirenko before they were appointed directors, is entirely consonant with that.

46 I also note that in the Cure Notice, Mr Hook was not asked to re-send his CV (which on the plaintiffs' case would have cured the breach of Clause 16.1); he was simply asked to resign from HSBC HK. The crux of the plaintiffs' unhappiness with Mr Hook was not that he was involved in a Competing Business (which they had known about all along); it was that Mr Hook declined to resign from HSBC HK and take up full-time employment with Incomlend in Singapore, when first Mr Terigi and then Mr Kouchnirenko had done so.

47 This is clear from the Cure Notice where Mr Terigi said:

> When we started Incomlend, us 3 founders clearly envisioned that we would eventually move to Singapore to take up full-time roles as the business was identified as being a Singapore business to start. Dimitri and I have both fulfilled our side of the bargain, we have been for quite some time full time with employment contracts and EP in Singapore for Incomlend Pte Ltd. But you still have not …
>
> Dimitri and I have reached out to you on numerous occasions urging you to do right by what was agreed amongst us founders and come down with us here in Singapore. In return, you have given all types of excuses to avoid doing so. We have now reached a stage in Incomlend's development where we need your complete and unreserved commitment and cooperation to the business.
>
> As such, pursuant to Clause 17.1(a) of both Shareholders Deeds, I am giving you a final opportunity to make good your breaches under the Shareholders Deeds and Founders Agreement, by immediately tendering your notice of resignation at HSBC and confirming that you will take on full time employment with Incomlend in Singapore by 29th January 2018 …

48 When Mr Terigi said the "founders clearly envisioned that we would eventually move to Singapore to take up full-time roles", and called upon Mr Hook "to do right by what was agreed amongst us founders", what was Mr Terigi referring to?

49 Nothing in SD2 obliged Mr Hook to take up full-time employment with Incomlend in Singapore. In particular, that was not required by either Clause 5.1 or Clause 16.1 of SD2, the only two clauses of SD2 that the Cure Notice said Mr Hook had breached.

50 If Mr Terigi were referring to some agreement outside SD2, whether SD1, the Founders Agreement, or some other agreement altogether, that would run counter to the "entire agreement" Clause in SD2 (Clause 23.2). Moreover, on the terms of Clause 17.1, a Cure Notice under SD2 could only relate to a breach of SD2.

51 If, for instance, Mr Hook had resigned from HSBC HK, and become a director of Incomlend, but nevertheless declined to take up full-time employment with Incomlend in Singapore, he would have cured any breach of SD2's Clause 5.1 (by becoming a director) and Clause 16.1 (by leaving HSBC HK).

52 That would, however, still not satisfy Mr Terigi and Mr Kouchnirenko, who were insistent that Mr Hook take up full-time employment with Incomlend in Singapore. But Mr Hook would nevertheless not be in breach (let alone material breach) of SD2, if he did not take up full-time employment with Incomlend.

Restrictions on transfer

53 Absent a breach of SD2 by Mr Hook, if the plaintiffs were to transfer Mr Hook's shares away from him, they would breach Clause 3.2 of SD2, where each shareholder undertook with the other shareholders and Incomlend that "it shall procure and ensure that no issue or transfer of Shares shall be effected unless such issue or transfer is effected as permitted by and in accordance with the provisions of this Deed."

54 Clause 9.1 of SD2 stipulates: "Subject to Clauses 9.8 and 17.2, no Shareholder shall sell or transfer any of his Shares for a period of two (2) years commencing from the date of this Deed." The transfer of Mr Hook's shares took place on 13 February 2018, within that two-year period commencing from 30 June 2017 (the date of SD2).

55 Clause 9.8 of SD2 did not apply, and the plaintiffs do not contend it did. The plaintiffs sought to justify the transfer pursuant to Clause 17.2 which

prescribes the consequences of an event of default by a shareholder. However, that does not work unless Mr Hook had breached SD2.

56 I find that Mr Hook had not breached Clause 5.1 or Clause 16.1 of SD2 (the only clauses of SD2 which the Cure Notice asked him to remedy). It follows that he was not in material breach of SD2 for not remedying breaches, following the Cure Notice. Consequently, there was no Event of Default under Clause 17.1, and the plaintiffs could not invoke Clause 17.2 to justify the transfer of Mr Hook's shares.

57 I thus find that the plaintiffs breached SD2 by transferring Mr Hook's shares as they did.

58 The above analysis is premised on SD2 (and the documents referred to in it) being the "entire agreement" between the parties, with SD2 having superseded SD1 (either wholly, or at least in relation to share transfers). I will nevertheless go on to consider the position under SD1 and the Founders Agreement.

The position under SD1

Notices

59 In these proceedings, the plaintiffs sought to justify the transfer of Mr Hook's shares on the basis that he had breached not only SD2, but also SD1 and the Founders Agreement. However, the notices which they issued contemporaneously to deem an offer having been made by Mr Hook to transfer his shares, and to accept that offer, were only issued pursuant to SD2, not SD1 or the Founders Agreement.

60 Preceding those notices, the Cure Notice[13] had asserted that Mr Hook had breached not only Clauses 5.1 and 16.1 of SD2, but also Clauses 4.4, 4.5, 5.1 and 16.1 of SD1, and Clauses 1.2(b) and 4 of the Founders Agreement. However, the Cure Notice purported to be issued pursuant to Clause 17.1(a) of SD1 and SD2, not any clause in the Founders Agreement. In particular, it did not purport to be issued pursuant to Clause 1.2(b) of the Founders Agreement.

61 A cure notice under SD1 could only relate to breaches of SD1, and a cure notice under SD2 could only relate to breaches of SD2. The plaintiffs did not purport to issue a cure notice under the Founders Agreement, but they did allege breaches of that agreement.

62 Compounding this, the notice of 2 February 2018 purporting to inform Mr Hook that he was deemed to have offered his shares to the other Founders,[14] was said to be issued pursuant to Clause 17.2 of SD2. It did not cite SD1 or the Founders Agreement. Likewise, the notice given on the same day purporting to accept that deemed offer[15] only cited Clause 9.2(b) of SD2, not SD1 or the Founders Agreement.

63 Thus, if any notices under SD1 or the Founders Agreement were necessary to deem an offer having been made by Mr Hook to transfer his shares, and to accept that offer, the plaintiffs had not purported to issue any such notices.

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13 4AB 1472.

14 4AB 1474.

15 4AB 1475.

Alleged breaches of SD1

64 SD1 is materially different from SD2 in at least two respects:

(a) Clauses 4.4–4.5 of SD1 provide that (by stipulated dates) the Founders were to enter into employment agreements with Incomlend, but there are no equivalent clauses in SD2; and

(b) Clause 5.1 of SD1 provides that "a Founder shall only be appointed as a Director after he has signed an Employment Agreement with the Company", but there is no equivalent restriction in SD2.

65 Clauses 4.4–4.5 of SD1 read as follows:

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

66 In line with Clauses 4.4–4.5 of SD1, Clause 4.6 states:

> The Founders *will be* employees of the Company and shall be entitled to market rate salary. [emphasis added]

67 The equivalent of Clause 4.6 of SD1 is Clause 4.2 of SD2 which states:

> The Founders *who are* employees of the Company and shall be entitled to market rate salary. [emphasis added]

68 There is a significant difference in wording between Clause 4.6 of SD1 ("The Founders *will be* employees …") and Clause 4.2 of SD2 ("The Founders *who are* employees …") [emphasis added]. Clauses 4.4, 4.5 and 4.6 of SD1 stipulated that the Founders "will be" employees, but there is no such stipulation in SD2. Instead, Clause 4.6 of SD2 provides in neutral fashion that the Founders "who are" employees shall be entitled to market rate salary. That contemplates that there might be Founders who are not employees, in which case those Founders would have no entitlement to market rate salary under Clause 4.2 of SD2.

69 On a related note, Clause 5.1 of SD1 provides as follows:

> The Board of Directors shall initially comprise the Founders provided that a Founder shall only be appointed as a Director after he has signed an Employment Agreement with the Company …

70 Clause 5.1 of SD2, however, simply provides:

> The Board of Directors shall initially comprise the Founders …

71 Unlike Clause 5.1 of SD1, Clause 5.1 of SD2 did not make it a pre-condition of directorship, that a Founder be an employee of Incomlend. This difference is in line with the differences between Clause 4 of SD1 and Clause 4 of SD2, noted at [68] above. In any event, instead of Mr Hook himself being a director, Mr Hook was allowed to nominate his father, Mr Ray Hook, who was appointed as a director: see [34] above.

72 I note also that SD1 was dated 29 August 2016. The Founders were supposed to have signed their respective employment agreements before that date (as stipulated in Clauses 4.4–4.5 of SD1: see [65] above). In particular, Mr Kouchnirenko and Mr Hook were supposed to have signed their employment agreements by 1 August 2016, but neither had done so. On the face

of SD1, they were both in breach of Clauses 4.4–4.5, and for that breach Clause 4.4 stipulated that they as defaulting Founders "shall transfer all [their] Shares to the other Shareholders at no cost". This stipulation in Clause 4.4 of SD1 was never invoked – it would have led to Mr Kouchnirenko and Mr Hook losing all their shares, which would be transferred to Mr Terigi and the other shareholders. Taking this to the extreme, it might be said that even if Mr Kouchnirenko and Mr Hook belatedly signed their employment agreements, they had not done so by 1 August 2016 and so they were still liable to lose their shares.

73 The plaintiffs instead sought to invoke SD2 (which was entered into on 30 June 2017, some ten months after SD1) such that Mr Hook's shares would go to just Mr Kouchnirenko and Mr Terigi (with Mr Kouchnirenko by then having entered into an employment agreement with Incomlend), rather than to all the shareholders in SD1 other than Mr Hook himself.

74 Unlike SD1, however, SD2 had no stipulation requiring the Founders to be employees of Incomlend. It was thus not a breach of SD2 for Mr Hook to have continued in employment with HSBC HK, instead of leaving for full-time employment with Incomlend.

75 Under SD2, the fact that Mr Hook had not signed an employment agreement with Incomlend could not be used to justify acquiring his shares: that was not a breach under SD2. This brings the sting of the Cure Notice into sharp focus: the plaintiffs were fixated on Clauses 4.4, 4.5, 5.1 and 16.1 of SD1 (and in particular, the requirement that Mr Hook be an employee of Incomlend), rather than Clauses 5.1 and 16.1 of SD2.

76 Even if Mr Hook were in breach of SD1 in the period between SD1 and SD2, once SD2 came into force and superseded SD1, the fact that he was not a

full-time employee of Incomlend could not be regarded as a breach of contract as between him and the parties to SD2, which included all those who were parties to SD1. The plaintiffs could no longer treat this as a breach, for by entering into SD2 they agreed that SD2 (and the documents referred to in it) would be the "entire agreement" between Incomlend and its shareholders, that regulated the affairs of Incomlend and the relationship between its shareholders.

77 Clause 27.3 of SD1 on consequences of termination stipulates that "[t]ermination of this Deed shall be without prejudice to any accrued rights or obligations of the parties up to the date of termination", and various provisions were said to remain in full force and effect notwithstanding termination. Those provisions did not, however, include Clauses 3, 9 and 17 on the transfer of shares.

78 Even if Clause 27.3 of SD1 preserved liability for breaches of SD1 in the period between SD1 and SD2 (such that Mr Hook remained in breach of SD1 for not signing his employment agreement, and the other parties to SD1 could seek relief for that breach), the plaintiffs did not seek to claim any damages from Mr Hook for breach of SD1, they only sought to justify their transfer of his shares.

79 However, SD2 did not permit Mr Hook's shares to be transferred for breach of SD1, and the regime for the transfer of shares under SD2 superseded that under SD1. Moreover, when the parties to SD1 entered into SD2, they agreed that the Founders would not need to be employees of Incomlend. That too superseded the position under SD1.

80 For these reasons, I find that SD1 did not justify the transfer of Mr Hook's shares.

The position under the Founders Agreement

Notices

81 As I noted above (at [59]–[63]), the Cure Notice did not purport to be issued pursuant to the Founders Agreement. Likewise, the notices deeming an offer to have been made for the transfer of Mr Hook's shares, and purporting to accept that offer, did not purport to be issued pursuant to the Founders Agreement. The Cure Notice did however allege that Mr Hook had breached Clauses 1.2(b) and 4 of the Founders Agreement, and I consider this below.

Alleged breaches of the Founders Agreement

82 Clause 1.2 of the Founders Agreement was a list of Trigger Events. Clause 1.1 provides that if any of the Trigger Events in Clause 1.2 are committed by or occur in respect of a Founder, that Founder shall offer his Relevant Shares in Incomlend to the other parties in accordance with Clause 2. "Relevant Shares" are defined in Clause 1.3 as various percentages of the Founder's shares, depending on when the Trigger Event occurs.

83 The Trigger Event in Clause 1.2(b) of the Founders Agreement is: "when a Party has committed a material breach of under [*sic*] this Agreement not having been remedied within ten (10) business days from the receipt of a notice of said violation addressed in writing by any of the Company or any of the Parties to the relevant Party in breach".

84 The reference to Clause 1.2(b) of the Founders Agreement begs the question: what material breach of the Founders Agreement had Mr Hook committed, that he was expected to remedy?

85 The other clause of the Founders Agreement cited in the Cure Notice was Clause 4, but that did not impose any obligation on Mr Hook that he could breach. It provided that, without prejudice to Clauses 1 and 2, additional shares would be transferred by Mr Terigi and Mr Kouchnirenko to Mr Hook "if (i) Laurence Hook is free from all other work commitments and dedicates himself fulltime to the Company on or prior to June 1st 2017 with full time presence in Incomlend including presence in Singapore office when setting up may be needed and permanently present in Singapore from mid November 2017 onwards and (ii) none of the Trigger Events is committed by or occurs in respect of Laurence Hook on or prior to June 1 2017".

86 Under cross-examination, Mr Terigi conceded that Clause 4 of the Founders Agreement did not impose an obligation on Mr Hook that he could breach; in particular, it did not impose an obligation on Mr Hook to take up full-time employment with Incomlend.[16] As for Mr Kouchnirenko, he could not say what in the Founders Agreement required Mr Hook to take up full-time employment with Incomlend.[17]

87 The Founders Agreement did not reinforce the draconian consequences of a breach of Clauses 4.4–4.5 of SD1, pursuant to which Mr Hook was at risk of *losing his shares* from the inception of SD1 on 29 August 2016 because he had not signed his employment agreement by 1 August 2016. Instead, Clause 4 of the Founders Agreement allowed Mr Hook to *receive more shares* (by way of transfer from Mr Terigi and Mr Kouchnirenko) *if* he took up full-time employment with Incomlend on or prior to 1 June 2017, and was permanently present in Singapore from mid-November 2017. That did not happen, but that

16 Transcript, 30 August 2021, page 52 line 11 to 53 line 11.

17 Transcript, 31 August 2021, page 43 line 16 to 46 line 4.

does not mean Mr Hook "breached" Clause 4 of the Founders Agreement: he simply gave up getting more shares from Mr Terigi and Kouchnirenko. Indeed, the word "if" in Clause 4 of the Founders Agreement recognised, in a neutral fashion, that Mr Hook might or might not take up full-time employment with Incomlend by 1 June 2017: it provided an incentive for him to do so, but it was not a breach if he did not.

88 The plaintiffs submitted that Clause 4 did impose an obligation on Mr Hook to take up full-time employment with Incomlend on or before 1 June 2017 and relocate to Singapore by November 2017. I do not agree. That is not what Clause 4 says, and it also goes against the concessions of Mr Terigi and Mr Kouchnirenko as noted at [86] above. Using Clause 4 of the Founders Agreement to impose such an obligation would be superfluous, for Clauses 4.4–4.5 of SD1 already imposed an obligation on Mr Hook to have signed his employment agreement by 1 August 2016, and he had not done so; moreover, under SD1 Mr Hook stood to lose *all* his shares, whereas under the Founders Agreement, he only stood to lose 50% of them (at the relevant time).

89 At trial, the plaintiffs sought to rely on Clause 1.2(d) rather than Clause 1.2(b) of the Founders Agreement. Clause 1.2(d) is also a Trigger Event, but it was not mentioned in the Cure Notice. Clause 1.2(d) applies: "When a Party is no longer willing to perform its duties within the Company". The evidence does not support a finding that Mr Hook was no longer willing to perform his duties within Incomlend, and the point was not pursued in closing submissions.[18]

90 There are no breaches of the Founders Agreement by Mr Hook, let alone breaches that might lead to him losing his shares.

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[18] Paras 158 to 162 of the plaintiffs' closing submissions on breach of the Founders Agreement only deals with clause 4, not clause 1.2(d), or 1.2(b).

91 In any event, the plaintiffs recognise that even if the Founders Agreement applied, it would only justify a transfer of 50% of Mr Hook's shares,[19] but the plaintiffs purported to take away *all* of Mr Hook's shares.

92 In any event, SD2 still gets in the way of the plaintiffs.

93 By entering into the Founders Agreement, the Founders sought to make provision for transfers *inter se*, alongside the transfer provisions in SD1 and later SD2. However, if a particular transfer was not permitted by SD1 (which was in force when the Founders Agreement was entered into), effecting that transfer would be a breach of Clause 3.2 of SD1. Then, when SD2 came into force (after the Founders Agreement), if a transfer pursuant to the Founders Agreement was not permitted by SD2, effecting that transfer would be a breach of Clause 3.2 of SD2.

94 I consider that the Founders Agreement operates together with SD1 and then SD2 as follows: the Founders could only effect a transfer pursuant to the Founders Agreement if it would not offend SD1 or SD2 (as the case may be). As things stand, it is ultimately SD2 that controlled whether the particular transfer in the present case was proper, and it was not.

95 I find that the Founders Agreement did not justify the transfer of any of Mr Hook's shares.

The IT key man dependency issue

96 The plaintiffs say that in or around January to February 2018, Mr Hook denied them access to various software platforms used by Incomlend, and

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[19] Plaintiffs' closing submissions, para 164.

refused to disclose passwords for, or transfer access and administrative privileges to, Incomlend's software platforms when asked to do so.[20] Incomlend pleaded that it suffered loss as follows:

(a) S$13,283.60 incurred in appointing a dedicated IT provider to assist with a full access reconfiguration on multiple systems;

(b) significant amounts of time were expended by Incomlend's staff; and

(c) Mr Hook's actions placed major strain on Incomlend's business operations, causing it to suffer loss and damage.[21]

97 By the time of closing submissions, however, Incomlend's claim was for just S$12,024.13 incurred to appoint a new IT service provider.[22]

98 On 24 November 2017, Mr Kouchnirenko had raised with Mr Hook the issue of whether Incomlend had a key man dependency issue in that Mr Hook controlled Incomlend's IT systems.[23] On 12 January 2018, Mr Kouchnirenko asked Mr Hook for administrator access to Incomlend's systems.[24] That was also the day the Cure Notice was sent.

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20 SOC, para 22.

21 SOC, para 22.

22 Plaintiffs' closing submissions, para 174, 176.

23 Mr Kouchnirenko's AEIC, para 43.

24 Mr Kouchnirenko's AEIC, para 47 and page 159.

99 On 13 January 2018 (a Saturday) Mr Hook agreed to prepare a folder of administrative passwords by that weekend, to be used for emergency access only.[25] Mr Hook's message to Mr Kouchnirenko shows how he felt about this:[26]

> ill prepare a zip of admin to the services this weekend. But if anyone starts messing with the config and breaks something then im not going to fix it. it should be for break glass emergency access only.
>
> will this manufactured drama and the time it has consumed be the excuse when this months sales are low again?

100 The next day, Sunday 14 January 2018, Mr Kouchnirenko asked Mr Hook "when do you think you can have that break glass thing in place?" and Mr Hook responded: "do i now also work nights to repair damage from MT [Mr Terigi] changing pwds and then weekends preparing break glass packs ... all for free ..."[27] There was tension then about Mr Hook not getting any salary payments after the last payment on 31 October 2017.

101 Mr Kouchnirenko did not ask Mr Hook again for the zip folder of admin passwords. Not having received the passwords for some days, the plaintiffs proceeded to appoint a new IT service provider on 26 January 2018 (which was also 14 days from the Cure Notice). The same day, Mr Hook protested by email[28] that certain passwords had been changed and so he was locked out from the system. He said this was dangerous. He also said, "I am happy to share access to the '1Password Vault' but I will need undertaking from you guys that it will be used for "emergency break glass access" only. An emergency being for example that I am unable to deal with a problem directly. Our systems have

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25 Mr Kouchnirenko's AEIC, para 48 and page 161.

26 Mr Kouchnirenko's AEIC, page 161.

27 Mr Kouchnirenko's AEIC, page 162.

28 4AB 1473.

operated without incident only because of the strict change control process I put in place." The plaintiffs did not follow up with Mr Hook on this.

102 Although it had been some days since Mr Hook first said he would provide a zip folder of admin passwords, that did not justify the plaintiffs in thinking that Mr Hook *would not* provide the passwords. At the very least, they should have asked him again, and told him that if he did not provide the passwords Incomlend would incur expense appointing a new IT service provider. After all, Mr Hook had on various earlier occasions provided passwords and/or access to Mr Kouchnirenko, without incident.[29]

103 I do not find Mr Hook to have been in breach of his duties to Incomlend, just because some days had passed and he had yet to provide the folder of passwords. In the circumstances, I do not consider Mr Hook liable to Incomlend for the expense of S$12,024.13. The evidence indicates that the plaintiffs wished to take over control of Incomlend's system from Mr Hook, to whom the Cure Notice had already been sent. If the plaintiffs were going to take away Mr Hook's shares, and would not pay for his work, they would need a new IT service provider. Incomlend, not Mr Hook, should bear the expense of appointing that new IT service provider.

Mr Hook's salary

104 Mdm Lau received a sum of US$48,000 that was meant as salary for Mr Hook (6 months' worth, at US$8,000). The first payment was made on 4 July 2017, the last on 31 October 2017.

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[29] See: 2AB 515–516 and transcript, 31 August 2021, page 96, lines 12–25; 4AB 1452 and transcript, 31 August 2021, page 98, line 1 to page 99, line 7; 2AB562 and transcript, 31 August 2021, page 99, lines 8–24.

105 As Mr Hook was still an employee with HSBC HK, whilst also working for Incomlend, the Founders and Incomlend agreed that Mr Hook's salary would be paid to Mdm Lau, rather than to Mr Hook directly.

106 Incomlend sought to recover the US$48,000. It claimed that it had paid Mr Hook in reliance on his representations that he would leave HSBC HK, and take up full-time employment with Incomlend in Singapore; Incomlend said those were *misrepresentations* by Mr Hook.

107 Incomlend also claimed that Mdm Lau was *unjustly enriched* by the sum: there was a total failure of consideration, and the payments were made under a mistake of fact.

108 While the plaintiffs had pleaded misrepresentation on the part of Mr Hook,[30] their prayers for relief specifically sought the US$48,000 from Mdm Lau, and not also from Mr Hook: "that the 2nd Defendant make restitution of the sum of US$48,000 to the 3rd Plaintiff".[31] That was however a "further or alternative" claim and there was a general prayer for "[d]amages to the 3rd Plaintiff, to be assessed". The damages prayer nevertheless appeared to relate more to the allegations that Mr Hook had breached his duties to Incomlend in relation to the IT passwords. Indeed, the only "damages" sought from Mr Hook in the plaintiffs' closing submissions, are damages of S$12,024.13 for appointing a new IT service provider.[32]

109 In the plaintiffs' solicitors' letter of 17 November 2021, they acknowledged that the legal principles relating to a misrepresentation claim

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30 SOC, paras 32–33.

31 SOC, para 34.

32 Plaintiffs' closing submissions, para 176.

"were not explicitly addressed" in the plaintiffs' closing submissions, although they said that the factual basis of the misrepresentation was dealt with.

110 The section in the plaintiffs' closing submissions about the US$48,000 salary payment to Mdm Lau[33] is captioned: "the 2nd defendant has been unjustly enriched by the payments from the 3rd plaintiff". In that section, recovery of the US$48,000 is only sought from Mdm Lau, and not also from Mr Hook; and nothing is said about any misrepresentation by Mr Hook.

111 By the time of the first salary payment on 4 July 2017, it would be quite clear that Mr Hook had not taken up full-time employment with Incomlend by 1 June 2017 (which would otherwise have entitled him to more shares pursuant to Clause 4 of the Founders Agreement). Moreover, that first payment was made after SD2 was entered into (on 30 June 2017), and SD2 does not oblige Mr Hook to become a full-time employee of Incomlend, in contrast with SD1.

112 On the evidence, I do not accept that at the time the salary payments were made, Mr Hook had represented that he would take up full-time employment with Incomlend. I also do not accept that the salary payments were made in reliance on any such representation. An obligation to sign an employment agreement was stated in Clauses 4.4 and 4.5 of SD1, but as of 30 June 2017 that was superseded by SD2.

113 As the plaintiffs say, "[it] is undisputed that each of the Founders were entitled to US$8,000 per month as salary for the work that they were doing for the 3rd Plaintiff."[34]

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33 Plaintiffs' closing submissions, paras 177–190.

34 Plaintiffs' closing submissions, para 177.

114 In June 2017, Mr Hook went on annual leave and then sabbatical leave from HSBC HK. He worked for Incomlend, although he was not a full-time employee. The plaintiffs do not dispute that Mr Hook did work for Incomlend in the relevant period. Instead, they say that because he never became a full-time employee, there was a total failure of consideration for the salary payments, or those payments were made under a mistake of fact. These assertions are unfounded:

(a) There was no total failure of consideration: the salary payments were made because Mr Hook was working for Incomlend, whilst he was still employed by HSBC HK. Mr Hook is described in the plaintiffs' closing submissions as "Incomlend's *de facto* Chief Technology Officer ("CTO") and Chief Operations Officer ("COO"). He was in charge of IT Operations, Platform Operations, Business Change Management, Human Resources …"[35]

(b) There was no mistake of fact: at all material times the plaintiffs knew that Mr Hook was not a full-time employee of Incomlend, and that he was still employed by HSBC HK whilst working for Incomlend. Indeed, that is precisely why Mr Hook's salary was paid to Mdm Lau rather than to Mr Hook directly.

115 In the circumstances, there is no basis for Incomlend to recover the salary payments from Mdm Lau, or from Mr Hook.

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35 Plaintiffs' closing submissions, para 8.

Conclusion

116 For the above reasons, I find that the plaintiffs had wrongly transferred Mr Hook's shares in Incomlend away from him.

117 The operative agreement is SD2, and the transfer was not permitted under SD2. In particular, the plaintiffs had not established any breaches of SD2 by Mr Hook so as to justify taking away his shares.

118 Likewise, Mr Hook had not breached the Founders Agreement.

119 As for SD1, it was superseded by SD2, and specifically a transfer of shares that was not permitted by SD2 could not be effected even if it had been permitted by SD1. In the circumstances, it would serve no useful purpose to make any declaration as to the position under SD1.

120 Incomlend's claims to recover the salary paid to Mr Hook, and for alleged IT-related breaches, are not established.

121 I thus dismiss the plaintiffs' claims, and I grant Mr Hook's counterclaim and award him judgment against the plaintiffs for damages to be assessed. The issue of interest is likewise reserved for further determination in conjunction with that assessment. I will deal with costs separately.

Andre Maniam
Judge of the High Court

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