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

[2024] SGHC 206

Suit No 1052 of 2021

Between

(1) BGC Partners (Singapore) Limited
(2) GFI Group Pte Ltd

… *Plaintiffs*

And

Sumit Grover

… *Defendant*

JUDGMENT

[Contract — Mistake — Non est factum]
[Contract — Contractual terms]
[Employment Law — Termination]
[Employment Law — Employers' duties]

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BGC Partners (Singapore) Ltd and another
v
Sumit Grover

[2024] SGHC 206

General Division of the High Court — Suit No 1052 of 2021
Wong Li Kok, Alex JC
4–8 March, 29 April 2024

13 August 2024 Judgment reserved.

Wong Li Kok, Alex JC:

Introduction

1 This case tracks the ambitions of the defendant – a former server at a restaurant – who was plucked from his service to trade financial products at a brokerage. In little more than half a decade, the defendant became the "star striker" of Indian Rupee non-deliverable forwards ("NDFs") in Singapore.[1] The defendant's success attracted the attention of rival brokerages, and he was lured to take his skills to newer pastures. In one such move, the defendant found himself in the service of the plaintiffs. The defendant was lavished with loans in the form of a signing-on bonus and funds to resolve a dispute with a previous employer. This move emerged to be the wrong fit for both sides and the relationship soured. The defendant's employment was terminated. The plaintiffs

[1] Transcript dated 8 March 2024 ("Day 5 Transcript") at p 79, line 5 and p 80, lines 5–9.

claim repayment of the loans. The defendant alleges wrongful termination and the payment of bonuses denied to him because of that termination.

Facts

The parties

2 The plaintiffs are Singapore-incorporated companies and are part of the BGC group of companies (the "BGC Group") headquartered in New York and London.[2] The plaintiffs are in the business of inter-dealer broking for various financial products including currency swaps, equities, interest rate swaps and energy products.[3]

3 The defendant is Mr Sumit Grover, a former employee of the plaintiffs. The defendant was employed as a broker specialising in a financial product known as NDF based on the Indian Rupee.[4]

Background to the dispute

4 The defendant started his broking career at M/s Nittan Capital Pte Ltd ("Nittan"), where he was employed from 1 August 2011 to 5 January 2017.[5] He then moved to another brokerage institution M/s Tradition Singapore Pte Ltd ("Tradition"), where he was a senior manager from 8 May 2017 to 30 September 2017.[6]

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2 Affidavit of Sumit Grover dated 5 January 2024 ("Mr Grover's AEIC") at paras 5–6.

3 Mr Grover's AEIC at paras 5–6.

4 Affidavit of Bradley Mitchell Howell dated 30 November 2023 ("Mr Howell's AEIC") at para 13.

5 Mr Grover's AEIC at para 21.

6 Mr Grover's AEIC at para 22(b).

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5 In or around July or August 2017, the defendant was approached by the second plaintiff ("GFI") to join as a broker for Indian Rupee NDFs.[7] During this period, there were ongoing litigation proceedings between Nittan and Tradition regarding the defendant's contract for the renewal of his employment with Nittan.[8]

6 On 9 November 2017, the defendant entered into the following three written agreements with GFI:

(a) a letter of employment dated 8 November 2017 (the "Employment Agreement");[9]

(b) a Loan Agreement and Promissory Note under which GFI granted the defendant loans amounting to S$1,569,210.20 (the "1st Loan Agreement");[10] and

(c) a Loan Agreement and Promissory Note under which GFI granted the defendant loans amounting to S$980,000.00 (the "2nd Loan Agreement").[11]

7 On or around 15 November 2017, GFI paid out a sum of S$1,569,210.20 under the 1st Loan Agreement as an advance payment to the defendant. This sum was to be paid to Nittan and Tradition to settle the prospective mediated settlement agreements between Nittan and Tradition regarding the dispute (at

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7 Mr Grover's AEIC at para 31.

8 Mr Grover's AEIC at paras 26, 28 and 30.

9 Employment Agreement, Core Bundle of Documents ("CBOD") vol 1 at pp 10–23.

10 CBOD vol 1 at pp 24–26.

11 CBOD vol 1 at pp 27–29.

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[5] above).[12] On 28 February 2018, 28 September 2018 and 1 April 2020, GFI paid out a sum of S$180,000.00, S$400,000.00 and S$200,000.00 respectively to the defendant under the 2nd Loan Agreement as a sign-on bonus.[13]

8 On 21 February 2018, the defendant commenced his employment as a broker with GFI pursuant to the Employment Agreement.

9 In or around 7 May 2019, the defendant became a partner of BGC Holdings, L.P. ("BGC Holdings"), a limited partnership formed in the State of Delaware in the United States of America.[14]

10 Following a merger between the plaintiffs,[15] the defendant's employment with GFI was to be transferred to the first plaintiff ("BGC"). The defendant was given notice of this transfer *via* a letter dated 30 April 2020 (the "Notice of Transfer").[16] The defendant accepted this transfer *via* his e-mail dated 18 May 2020.[17] It is undisputed that this amounted to a valid novation of the Employment Agreement from GFI to BGC.

11 When the defendant's employment was transferred from GFI to BGC, the first tranche of the 2nd Loan Agreement, *ie*, the sum of S$180,000.00 at [7] above (the "first instalment") was assigned from GFI to BGC through a loan assignment dated 1 May 2020.[18]

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12 Mr Grover's AEIC at para 32(b).

13 Statement of Claim dated 24 December 2021 ("SOC") at para 17.

14 CBOD vol 1 at pp 185–193.

15 Mr Grover's AEIC at para 8.

16 CBOD vol 1 at p 198.

17 Mr Grover's AEIC at para 12; CBOD vol 1 at pp 205–206.

18 Mr Howell's AEIC at para 40.

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12 On 22 September 2021, BGC terminated the defendant's employment by way of a termination letter.[19] This was allegedly due to the defendant's failure to meet his performance ratio of 2.5:1 as defined under the Employment Agreement (the "Performance Ratio") for the months of June 2021 to August 2021.[20]

13 On 24 December 2021, the plaintiffs commenced the present suit to claim from the defendant the unpaid loan and contractual interest under the 1st and 2nd Loan Agreements (collectively, the "Loan Agreements"). GFI claims the amount of US$1,879,981.45, and BGC claims the amount of US$158,765.97.[21] I note that the defendant has not challenged the claims being framed in US$, notwithstanding that the loans were disbursed in S$. A breakdown of these sums is set out in the table below:[22]

Amount owed to GFI (US$)	
1st Loan Agreement	1,153,237.46
Interest on the 1st Loan Agreement	233,971.31
2nd Loan Agreement (excluding the first instalment)	435,819.47
Interest on the 2nd Loan Agreement (excluding the first instalment)	56,953.21
Total	1,879,981.45

19 Mr Howell's AEIC at para 67.

20 Mr Howell's AEIC at para 68.

21 SOC at para 25.

22 SOC at para 25.

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Amount owed to BGC (US$)	
The first instalment of the 2nd Loan Agreement	137,478.04
Interest on the first instalment of the 2nd Loan Agreement	25,788.28
Net partnership distributions applied to the first instalment of the 2nd Loan Agreement	- 4500.35
Total	158,765.97

14 The defendant counterclaims for (a) damages for unlawful termination of his employment; and (b) the unpaid contractual bonus for the months of January 2021 to March 2021.[23] The defendant has withdrawn his counterclaim for outstanding salary in lieu of notice.[24]

The parties' cases

15 The plaintiffs' case is that the Employment Agreement is the binding contract between the parties, not the purported oral agreement between the defendant and Mr Chan Chong San ("Mr Chan") allegedly acting on behalf of GFI (the "Alleged Oral Employment Agreement").[25] It follows that the defendant was bound by the Performance Ratio under the Employment Agreement, and his failure to meet this ratio entitled BGC to terminate the defendant's employment.[26] The plaintiffs argue that upon termination of the

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23 Defence and Counterclaim (Amendment No 2) dated 25 January 2024 ("Defence") at pp 16–17.

24 Mr Grover's AEIC at para 4(e)(i).

25 Plaintiffs' Opening Statement ("POS") at para 12.

26 POS at paras 9(b)–(c); Plaintiffs' Closing Submissions ("PCS") at paras 8–9.

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defendant's employment, the defendant ceased to be a partner of BGC Holdings.[27] Consequently, the unpaid amounts under the Loan Agreements then became immediately payable.[28]

16 As to the defendant's counterclaim, the plaintiffs argue that the termination of the defendant was lawful. Hence, no damages for wrongful termination arises. On bonuses, the plaintiffs argue that BGC had exercised its discretion lawfully in deciding not to pay any bonuses to the defendant.[29]

17 The defendant's case is that the Employment Agreement is void by virtue of *non est factum*. According to the defendant, the contract that is binding between the parties is the Alleged Oral Employment Agreement, which does not include a performance ratio clause.[30] Alternatively, even if the Performance Ratio was binding on him, the defendant argues that BGC's termination constitutes a breach of the employer's implied duties of mutual trust and confidence and/or good faith and fidelity.[31] In that regard, the defendant counterclaims for damages for wrongful termination.[32]

18 The defendant also alleges that BGC had unlawfully withheld his bonuses for the months of January 2021 to March 2021.[33] It is argued that his

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27 POS at para 9(d).

28 POS at para 9(e); PCS at para 10; Plaintiffs' Reply Submissions ("PRS") at para 52.

29 PCS at para 11.

30 Defendant's Opening Statement ("DOS") at para 11.

31 DOS at para 19.

32 Defendant's Closing Submissions ("DCS") at para 71.

33 DCS at para 22(b); Defendant's Reply Submissions ("DRS") at para 5(e).

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bonuses were guaranteed, and that BGC's failure to pay is a breach of its implied duty of mutual trust and confidence allegedly owed to the defendant.[34]

Issues to be determined

19 The main issues to be determined are as follows:

(a) whether the plaintiffs are entitled to recover the unpaid loan and contractual interest under the Loan Agreements; and

(b) whether the defendant is entitled to his unpaid bonuses for the period of January 2021 to March 2021.

Issue 1: The plaintiffs are entitled to recover the unpaid loan and contractual interest from the defendant

20 Whether the plaintiffs are entitled to recover the unpaid loan and contractual interest under the Loan Agreements turns on the following three sub-issues:

(a) first, whether the Employment Agreement (and hence the Performance Ratio) was binding on the defendant;

(b) second, whether it was lawful for BGC to terminate the defendant's employment on the basis that the Performance Ratio was not met; and

(c) third, whether the unpaid loan became due and payable under the Loan Agreements.

21 I address each sub-issue in turn.

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[34] DCS at paras 66 and 68.

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The Employment Agreement was binding on the defendant

22 The plaintiffs argue that the defendant's employment with GFI (up to 30 April 2020) and with BGC (from 1 May 2020) are contained solely in the Employment Agreement, not the Alleged Oral Employment Agreement.[35] The defendant argues that the binding contract is the Alleged Oral Employment Agreement, and that the Employment Agreement is void by virtue of *non est factum*.[36]

There was no binding Alleged Oral Employment Agreement

23 The defendant argues that in or around August 2017, the Alleged Oral Employment Agreement was made between him and Mr Chan,[37] acting on behalf of GFI as the then-Managing Director and Chief Executive Officer ("CEO") of GFI.[38] According to the defendant, the terms of the Alleged Oral Employment Agreement are as follows:[39]

(a) The defendant would be employed by GFI on a 72-month contract to broker the Indian Rupee NDF.

(b) GFI would make a loan of S$1,569,210.20 to the defendant. This is so that the defendant can pay Nittan and Tradition pursuant to the prospective mediated settlement agreements between them.

(c) GFI would also make a loan of S$980,000.00 to the defendant as a signing-on bonus. This sum would be paid in intervals.

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35 POS at paras 9(a) and 18.

36 DOS at para 11.

37 Mr Grover's AEIC at para 32; Defence at para 5(c).

38 Transcript dated 7 March 2024 ("Day 4 Transcript") at p 93 lines 20–21.

39 Mr Grover's AEIC at para 32; Defence at para 5(c).

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(d) Both loans would be amortised over a 72-month employment period.

(e) The defendant would be subject to a minimum monthly target of S$150,000.00 on average (computed by GFI based on the defendant's employment costs as well as amortised costs of the loans) for the duration of the 72-month employment period.

(f) If the average monthly target of S$150,000.00 was satisfied, the defendant would be entitled to a bonus.

(g) The defendant's monthly salary would be S$45,000.00.

The defendant alleges that there was no discussion or agreement on any performance ratio with Mr Chan.[40] The Employment Agreement is said to be a mere formality based on the Alleged Oral Employment Agreement.[41]

24 I find that there was no binding and enforceable Alleged Oral Employment Agreement.

25 It is trite that a valid contract requires an intention to create legal relations (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [46]). This requirement is not satisfied on the facts.

(a) According to Mr Chan, there were only discussions and "in-principle" agreement on areas such as salary and the defendant's role

40 DOS at para 9.

41 DOS at para 10.

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as an NDF broker.[42] Other areas of employment, such as the performance ratio, were not discussed.[43]

(b) Mr Chan gave evidence that any oral agreement had to be approved by GFI's London office before it could be binding on the parties.[44] In fact, the defendant's own evidence is that Mr Chan had informed him that the employment contract would be drawn up by GFI's London office, and that it would be necessary to formally execute that written employment contract.[45]

(c) Further, Mr Chan testified that despite the Alleged Oral Employment Agreement, the defendant "anticipat[ed] a written contract to come from London".[46] In other words, the defendant knew that there would be a final contract to document the employment terms.

(d) As the plaintiffs point out, Mr Chan conceded that he had no authority to bind GFI to the Alleged Oral Employment Agreement.[47]

The evidence above suggests that the consensus reached between the defendant and Mr Chan amounted only to a non-binding, in-principle agreement. The defendant knew that these in-principle terms had to be reduced into contractual form to be binding.

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42 Day 5 Transcript at p 54, lines 8–16.

43 Day 5 Transcript at p 54 line 17 to p 56 line 1.

44 Day 5 Transcript at p 56 line 18 to p 59 line 6.

45 Mr Grover's AEIC at para 33.

46 Day 5 Transcript at p 67, lines 9–13.

47 PCS at para 24.

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26 This is sufficient to dispose of the defendant's argument that there was a binding Alleged Oral Employment Agreement.

The entire agreement clause precludes reliance on the earlier Alleged Oral Employment Agreement

27 For completeness, even if the Alleged Oral Employment Agreement existed, I agree with the plaintiffs that it would be devoid of legal effect by virtue of the entire agreement clause.[48]

28 The entire agreement clause can be found in cl 18 of the Employment Agreement:[49]

> The terms contained in this letter and those terms contained in the Company Handbook which are contractual *embody the entire understanding of the parties in respect of your employment* and these documents are in substitution for and *shall supersede all previous agreements or understandings (including promises and representations) whether express or implied, oral or written* between you and the Company or any Associated Company, all of which agreements and understandings shall be *deemed to have been terminated by mutual consent* as from the date of this Agreement.
>
> [emphasis added]

29 In *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"), the Court of Appeal considered the extent to which an entire agreement clause precludes a party's reliance on an earlier oral collateral contract allegedly made in the course of negotiations. The Court of Appeal held as follows (*Lee Chee Wei* at [25] and [35]):

> 25 *… The effect of each clause is essentially a matter of contractual interpretation and will necessarily depend upon its precise wording and context. …*

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48 PCS at para 25.

49 Clause 18 of the Employment Agreement, CBOD vol 1 at p 22.

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> …
>
> 35 … [A]n appropriately worded provision would be acknowledged and upheld if it clearly purports to deprive any pre-contractual or collateral agreement of legal effect, whether from the perspective of evidential admissibility or contractual invalidation. Ultimately, whether the agreement in its final form is *intended* to constitute the entire agreement, thereby superseding and replacing all representations that might have inspired and culminated in such an agreement in the first place, but which were never actually incorporated in the written agreement, is a matter of construction. From a policy perspective, it should be reiterated that the courts will strive to give effect to the parties' *expressed* intent and their legitimate expectations. The courts seek to honour the legitimate expectations that the parties hold when they enter into a contract.
>
> [emphasis in original]

30 In the present case, the entire agreement clause expressly states that the terms of the Employment Agreement and the Company Handbook "shall supersede all previous agreements or understandings" between GFI and the defendant. The clause also states that such previous agreements or understandings are "deemed to have been terminated by mutual consent" from the date of the Employment Agreement. It is clear that the parties intended that any pre-contractual oral agreement would not have any legal effect. The Employment Agreement superseded the earlier Alleged Oral Employment Agreement.

31 As such, even if the parties concluded the Alleged Oral Employment Agreement with the plaintiffs, it was devoid of any legal effect.

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The defence of non est factum fails

32 The defence of *non est factum* is the crux of the defendant's case. The plaintiffs contend that the defendant cannot rely on *non est factum* to render the Employment Agreement void.[50]

33 It is undisputed that the defendant had signed the Employment Agreement with GFI.[51] The general rule is that a signature to a document by a person of full age and understanding binds that party, whether or not he has read or understood it (*Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2023) at para 80.169). Thus, the default position is that the defendant is deemed to have understood and agreed to the obligations of the Employment Agreement (including the Performance Ratio) when he signed it (*Oversea-Chinese Banking Corp Ltd v Yeo Hui Keng (Tan Peng Chin LLC, third party)* [2019] 5 SLR 172 ("*Yeo Hui Keng*") at [50]). However, the doctrine of *non est factum* operates as an exception to this general rule to render the signed document void (*Mahidon Nichiar bte Mohad Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 ("*Mahidon*") at [119]).

34 As the Court of Appeal in *Mahidon* explained, the doctrine of *non est factum* is a specific category of mistake (at [119]). It is a "narrow" doctrine and applies only in "exceptional" cases to rectify injustice and unfairness (*Mahidon* at [123]; *Yeo Hui Keng* at [51] and [53]). As cautioned by this court in *Yeo Hui Keng*, the sanctity of contract and the certainty to business and commerce would be undermined if this doctrine is allowed to be invoked liberally (at [51]).

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50 POS at para 27.

51 Mr Grover's AEIC at para 39.

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35 The requirements for the defence of *non est factum* are two-fold: first, there must be a radical difference between what was actually signed and what was thought by the signatory to have been signed; and second, the signatory must show that he had taken care in signing the relevant document and was not negligent (*Mahidon* at [119]).

(1) There is no radical difference between the Employment Agreement and the Alleged Oral Employment Agreement

36 The defendant submits that the Performance Ratio in the Employment Agreement is radically different from the terms of the Alleged Oral Employment Agreement. More specifically, the defendant alleges that, on 9 November 2017, Mr Chan had told him that the Employment Agreement contains the terms of the Alleged Oral Employment Agreement (see [23] above), along with other boilerplate clauses.[52] According to the defendant, he believed the boilerplate clauses pertained to matters such as his place of work, working hours and the number of days of medical leave and annual leave, but *not* the Performance Ratio.[53] It is argued that these terms are thus radically different from the Performance Ratio clause in the Employment Agreement.

37 Clauses 4.2 to 4.4 of the Employment Agreement concern the Performance Ratio and provide as follows:[54]

> Performance Ratio
>
> 4.2 You acknowledge and agree by signing this Agreement that if at any time during your employment with the Company, your Performance Ratio falls below *a ratio of 2.5:1 over such period as the Company may assess (such*

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52 DCS at para 22(a); Mr Grover's AEIC at paras 35–38.

53 Transcript dated 6 March 2024 ("Day 3 Transcript") at p 107 lines 17–24.

54 Clauses 4.2 and 4.3 of the Employment Agreement, CBOD vol 1 at p 13.

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> *period to be not less than three months)* (the "Assessment Period"), the Company may in its sole discretion:
>
> 4.2.1 reduce your salary with effect from the end of the Assessment Period to a level which would reflect a 2.5:1 Performance Ratio for that period; or
>
> 4.2.2 terminate your employment by giving you the statutory minimum notice, in writing.
>
> For the avoidance of doubt, your Performance Ratio may be monitored by the Company as from the Commencement Date.
>
> 4.3 Performance Ratio means the *ratio of Individual Net Revenue generated personally by you as compared to your Direct Employment Costs*. …
>
> 4.4 Individual Net Revenue is defined as gross revenue personally generated by you (as determined in accordance with the Company accounting practices from time to time) less other adjustments which may include credits and adjustments, discounts, clearing, execution and settlement fees, difference payments, bad and doubtful debts.
>
> 4.5 Direct Employment Costs are defined as the direct costs of your employment and employment benefits, including those amounts paid to you in respect of your total annual remuneration, employee benefits, local employment taxes and other statutory deductions incurred as part of your employment (if any), guaranteed bonus (if any), 'upfront' or sign on payments or Forgivable Loans (if any), Deferred Cash payments (if any), the value of any housing or housing allowance and your travel and entertainment costs.
>
> [emphasis added]

38 The test for the requirement of radical difference was summarised in *Yeo Hui Keng* as follows (at [68] and [71]):

> 68 … The guiding principle as to what is merely different as compared to what is "radically" different is to see whether what the signor thought she signed and what she actually signed were "completely distinct matters that bore no correlation to one another".
>
> …

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> 71 [T]he focus has to be on the nature or type of the perceived and actual documents rather than on the actual consequences of these documents which may or may not be radical as it will have to depend on many imponderables and the circumstances of each case …

39 On the facts of *Yeo Hui Keng*, this court found that (a) an all-moneys mortgage to secure banking facilities and (b) a mortgage to secure banking facilities limited to a property (which the defendant thought he was entering into) were not radically different in nature. This was because they were both commercial instruments dealing with the same subject matter (*Yeo Hui Keng* at [69]). They were both mortgages, albeit of different types, offered by the plaintiff to their mortgagors to secure banking facilities (*Yeo Hui Keng* at [72]). By contrast, it was held in *Mahidon* that there was a radical difference between (a) the renunciation of the three siblings' rights to be co-administrators of their father's estate and (b) the renunciation of the three siblings' beneficial interests in the estate. They were "completely distinct matters that bore no correlation to one another" (*Mahidon* at [121]).

40 In the present case, both the Alleged Oral Employment Agreement (without a Performance Ratio clause) and the Employment Agreement (with a Performance Ratio clause) concerned the same subject matter, *ie*, the defendant's scope of employment at GFI. The "nature or type of the perceived and actual [agreements]" was essentially the same (*Yeo Hui Keng* at [71]). While the consequence is that the defendant is subject to an additional obligation to satisfy the Performance Ratio under the Employment Agreement, the test of radical difference focuses on the nature of the agreements, not "the actual consequences" of the two different agreements.

41 Further, the high threshold of "radical" difference is not satisfied. In the defence, the defendant's own words are that the Alleged Oral Employment

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Agreement contained a term that "a minimum monthly average target would be set at S$150,000.00 (computed by [GFI] *based on the Defendant's employment costs as well as amortised costs of the loans*)" [emphasis added].[55] The references to "employment costs" and "amortised costs of the loans" allude to the Direct Employment Costs used to calculate the Performance Ratio. As noted above at [37], cl 4.3 of the Employment Agreement defines the Performance Ratio as the "ratio of Individual Net Revenue generated personally by [the defendant] as compared to [the defendant's] Direct Employment Costs". Direct Employment Costs are in turn defined in cl 4.5 as "the direct costs of [the defendant's] employment and employment benefits, including … 'upfront' or sign on payments or Forgivable Loans", including loans under the Loan Agreements.[56] The Alleged Oral Employment Agreement makes no explicit reference to any performance ratio. But even on the defendant's own case, his monthly target was subject to some form of calculation that took into account the costs of the defendant's employment.[57] I also note that the defendant's case is that the Alleged Oral Employment Agreement is simply silent on the Performance Ratio.[58] In other words, the defendant's case is not that the Alleged Oral Employment Agreement contained a term which *excluded* him from the Performance Ratio. The Employment Agreement was not *radically* different from the Alleged Oral Employment Agreement containing a monthly average target "computed … based on the Defendant's employment costs as well as amortised costs of the loans".

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55 Defence para 5(c)(iv).

56 DRS at para 31.

57 Defence para 5(c)(iv).

58 Defence para 5(c)(iv).

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42 Further, I find it hard to believe that the defendant genuinely thought that his employment with GFI would not include the Performance Ratio clause.

43 First, as the plaintiffs allege,[59] the defendant was more likely than not bound by a performance ratio at his prior employment. During cross-examination, the defendant stated that he could not remember if there was a performance ratio clause in his Nittan employment contract, or if he was bound by such a ratio at Nittan.[60] By contrast, Mr Chan testified that the Performance Ratio in the Employment Agreement was similar to the performance ratio clause in Nittan's standard employment contract.[61] Mr Chan further stated that the defendant would have been bound by a performance ratio in Nittan,[62] and would have known that he was subject to such a ratio.[63] I see no reason to doubt the evidence provided by Mr Chan, who was the one who had recruited the defendant at Nittan. Relatedly, I note that the defendant did not produce his employment contract with Nittan. This is despite his concession on the stand that if he had requested it from Nittan, Nittan would have provided it to him.[64] The defendant's unforthcoming stance further casts doubt on his assertion that he did not know if there was a performance ratio clause in his Nittan employment contract.

44 Second, the evidence suggests that performance ratios are common in the broking industry and that an experienced broker like the defendant would have known of its prevalence. Mr Chan testified that, during the pre-contractual

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59 PCS at paras 37 and 63; PRS at paras 9 and 10.

60 Day 3 Transcript at p 48 lines 21–25 and p 49 lines 13–21.

61 Day 5 Transcript at p 50 lines 3–23.

62 Day 5 Transcript at p 50 lines 18–23.

63 Day 5 Transcript at p 51 lines 12–14.

64 Day 3 Transcript at p 56 line 17 to p 57 line 3.

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negotiations with the defendant, there were no discussions on the Performance Ratio or any agreement that the defendant would be exempted from it.[65] There was no need to discuss the Performance Ratio because, according to Mr Chan, it is a "standard" matter in the broking industry.[66] He even stated that every broker would know that some form of performance ratio would be applicable to him/her.[67]

45 During re-examination, Mr Chan clarified that he was merely making an "assumption" that the defendant would be aware of the performance ratio clauses at Nittan.[68] He also clarified that he had "never" had a conversation about performance ratio with the defendant, be it at Nittan or GFI.[69] Notwithstanding these clarifications by Mr Chan, I find that it is more likely than not that the defendant knew about the performance ratio and that it would apply to him at GFI.

46 First, all the factual witnesses save for the defendant – namely, Mr Bradley Mitchell Howell ("Mr Howell"),[70] Mr Prasad KK Viswambharan ("Mr Prasad"),[71] Mr Ashley Walsh ("Mr Walsh")[72] and even Mr Chan – gave evidence that a performance ratio clause is commonly included in brokering contracts. I note that the plaintiffs did not call any expert witness to give

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65 Day 5 Transcript at p 54 lines 17–21 and p 55 line 23 to p 56 line 3.

66 Day 5 Transcript at p 55 line 24 to p 56 line 17.

67 Day 5 Transcript at p 56 lines 10–13.

68 Day 5 Transcript at p 87 lines 14–27.

69 Day 5 Transcript at p 87 lines 19–23.

70 Mr Howell's AEIC at paras 9–10.

71 Affidavit of Mr Prasad KK Viswambharan dated 30 November 2023 ("Mr Prasad's AEIC") at paras 9–11.

72 Affidavit of Ashley Walsh dated 5 February 2024 ("Mr Walsh's AEIC") at para 24.

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evidence that a performance ratio clause is a standard contractual clause in a broker's employment agreement. However, I consider it relevant that all these factual witnesses are experienced professionals in the broking industry. Mr Howell has spent over 30 years working in the brokerage industry and has been the CEO of GFI since March 2018 and the CEO for the BGC Group, Asia Pacific since January 2020.[73] Mr Prasad has nearly 40 years of experience in the brokerage industry, having been a broker for over 20 years and currently serving as the Managing Director of BGC.[74] Mr Walsh has been in the broking industry since 2008,[75] having been a line manager in charge of a group of brokers,[76] and currently the CEO of BGC Partners (Australia) Pty Limited (which is part of the BGC Group).[77] Finally, Mr Chan has been in the broking industry since 2005, starting out as a broker himself.[78] They unanimously gave evidence as to the prevalence of performance ratio clauses in brokers' employment contracts.

47 For completeness, no weight is placed on the case of *Tullett Prebon (Australia) Pty Ltd v Purcell* [2009] NSWSC 1079 ("*Tullett*") relied on by the plaintiffs.[79] In *Tullett*, the New South Wales Supreme Court observed that "[t]here was some evidence to the effect that the standard practice in the broking industry [is] that brokers are expected to generate revenue at double their salary calculation" (at [119]). However, this was a finding made based on the evidence

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73 Mr Howell's AEIC at paras 4 and 5.

74 Mr Prasad's AEIC at para 4.

75 Transcript dated 4 March 2024 ("Day 1 Transcript") at p 12 lines 7–11.

76 Day 1 Transcript at p 10 lines 15–18.

77 Mr Walsh's AEIC at para 1.

78 Day 4 Transcript at p 94 lines 4–11.

79 POS at para 28.

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before the New South Wales Supreme Court, and I agree with the defendant that this factual finding has no authoritative weight on this court.[80]

48 Second, as the plaintiffs point out, the defendant had been a broker for around six years at two different brokerage firms (Nittan and Tradition) by the time he signed the Employment Agreement.[81] It is difficult to accept that an experienced and well-performing broker like the defendant did not know about the performance ratios at all, particularly bearing in mind that performance ratios have a direct correlation to remuneration.

49 Third, during cross-examination, the defendant was unwilling to answer the plaintiffs' counsel's repeated question as to whether the Performance Ratio clause was a clause that the defendant was familiar with.[82] The defendant's reluctant and evasive response to this question also leans in favour of the finding that the defendant knew about the performance ratio.

50 For the above reasons, I doubt the veracity of the defendant's assertion that he did not know he would be bound by the Performance Ratio clause when he was signing the Employment Agreement. In any event, even if the defendant was genuinely ignorant of the Performance Ratio, a person who is ignorant of what he is signing cannot rely on the defence of *non est factum* (*Oversea-Chinese Banking Corp Ltd v Frankel Motor Pte Ltd and others* [2009] 3 SLR(R) 623 at [25]).

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80 DRS at para 12(a)

81 PRS at para 9.

82 Day 3 Transcript at p 63 line 13 to p 65 line 8.

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(2) The defendant was negligent or careless in signing the Employment Agreement

51 For completeness, I address the second requirement of *non est factum*, which is that the signatory must not have been careless in signing the document. The test is what a reasonable person, possessing the qualities of the defendant, should have done when faced with the Employment Agreement (*Yeo Hui Keng* at [95], citing *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd and others* [1992] 3 SLR(R) 855 ("*Lee Siew Chun*") at [61]).

52 The defendant contends that he was not careless in executing the Employment Agreement. He gives two supporting reasons: first, the defendant had relied on Mr Chan out of their long-standing relationship of trust and confidence; and second, the defendant had quickly looked through the Employment Agreement prior to signing it.[83]

53 I start with the first reason given by the defendant. The evidence on the history of the defendant's relationship with Mr Chan is undisputed. The defendant first met Mr Chan at a pub where the defendant was employed as a floor staff.[84] Mr Chan considered the defendant a suitable talent and introduced the defendant to the broking industry. Subsequently, Mr Chan offered the defendant his first brokerage job at Nittan.[85] Mr Chan was the defendant's mentor and superior at Nittan during his employment from 1 August 2011 to 5 January 2017,[86] and at GFI from 18 February 2018 to 30 April 2020.[87] In the

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83 DOS at para 11(b).

84 Mr Grover's AEIC at para 20.

85 Mr Grover's AEIC at para 21.

86 Mr Grover's AEIC at para 21.

87 Mr Grover's AEIC at para 15(b).

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defendant's own words, Mr Chan "taught [him] the ropes of being an NDF Broker", and there is "a relationship of friendship, trust and confidence" between him and Mr Chan.[88] Mr Chan also confirmed that the defendant had relied on him when it came to the defendant's employment contract in Nittan, and likewise for the Employment Agreement with GFI.[89]

54 Based on the above evidence, I do not doubt that there is a strong relationship of trust between the defendant and Mr Chan. However, this does not excuse the defendant from reading and understanding his own Employment Agreement. I emphasise that the document was an employment contract, which is an important legal document that sets out the terms and conditions of the defendant's employment.

55 In *Mahidon*, the Court of Appeal held that it was "not at all unreasonable" for the three siblings to have relied on their solicitors in signing the deed (at [122]). The nature of the transaction and the level of the client's sophistication were relevant factors. In that case, the three siblings were "a group of lay and unsophisticated clients" involved in a "complicated" transaction (*Mahidon* at [122]–[123]). The present case comes nothing close to the facts of *Mahidon*. The defendant was an experienced broker who had been employed in two other brokerage institutions prior to GFI. I also note the Court of Appeal's clarification in *Mahidon* that lay clients cannot rely on their solicitors unthinkingly, and that signing documents in the presence of their solicitors does not relieve them of the duty of basic care (at [123]). If a lay person's reliance on his solicitors does not automatically relieve him of his duty

88 Mr Grover's AEIC at para 23.

89 Day 5 Transcript at p 6 line 21 to p 7 line 5, p 92 lines 20–25.

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of care, then it follows that an experienced broker's reliance on his supervisor regarding the terms of his own employment contract cannot excuse him either.

56 Further, a similar argument was raised and rejected in *Yeo Hui Keng*. The defendant in that case argued that she did not read the terms of the mortgage because she trusted her late husband. This court held that such an argument "work[ed] against her" (*Yeo Hui Keng* at [106]). It was relevant that she was not under any pressure to sign the documents, and that no one prevented her from reading them (*Yeo Hui Keng* at [106]).

57 In the present case, the defendant initially asserted on the stand that Mr Chan had told him to "sign it [*ie*, the Employment Agreement] right here, right now" on 9 November 2017.[90] But when pressed further, the defendant accepted that the deadline was 15 November 2017, which was the deadline for payment to Nittan.[91] This is consistent with Mr Chan's evidence. Mr Chan explained that he was "racing with the clock" in getting the Employment Agreement approved by GFI's London office, as the deadline for payment to Nittan was looming.[92] According to Mr Chan, the defendant had "probably less than five working days" to sign the Employment Agreement.[93] However, Mr Chan accepted that he did not request the defendant to return the signed Employment Agreement within a few hours or a day.[94] Mr Chan also accepted that he would not have prevented the defendant from taking his time to read the Employment Agreement or to seek legal advice.[95]

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90 Day 3 Transcript at p 91 lines 14–15.

91 Day 3 Transcript at p 102 lines 6–14.

92 Day 4 Transcript at p 137 lines 5–8 and Day 5 Transcript at p 7 lines 10–17.

93 Day 5 Transcript at p 7 lines 18–19.

94 Day 5 Transcript at p 66 lines 9–12.

95 Day 5 Transcript at p 65 lines 7–24.

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58 Based on the evidence from the defendant and Mr Chan, I accept the defendant's point that there was considerable time pressure to get the Employment Agreement approved by GFI's London office. Nevertheless, this does not detract from the fact that even on the defendant's own case, he still had several days to read through the Employment Agreement, which was only 13 pages long. He could even have sought legal advice if he deemed it necessary. I thus agree with the plaintiffs that if the defendant chose to rely *solely* on Mr Chan's representations (regarding the terms of his employment) out of trust for Mr Chan, the defendant would have failed to exercise reasonable care.[96]

59 Relatedly, the defendant argues that he had to rely heavily on Mr Chan due to his lack of proficiency in English.[97] The plaintiffs object to the defendant's alleged handicap in English. They point out that, amongst other examples, (a) the defendant did not require an interpreter for a pre-trial mediation conducted entirely in English; (b) the defendant testified directly in English on some matters, even reciting his confidentiality obligations under the Employment Agreement in English; and (c) during the trial, the defendant even corrected the interpreter's translation several times.[98] I accept the plaintiffs' submission that these examples put in doubt the defendant's assertion that his English is weak. I also note the documentary evidence before me which includes various e-mails written by the defendant in English.[99] They suggest that the defendant's averment on his level of English is exaggerated. This is sufficient

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96 PRS at para 19.

97 DCS at paras 43–44.

98 PCS at paras 17(1) and 64(3).

99 CBOD vol 1 at pp 194–195, 244, 247 and 254–257.

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to dismiss the defendant's argument that his lack of proficiency in English rendered his reliance on Mr Chan non-negligent.

60 I now turn to the defendant's second argument that he had looked through the documents quickly before signing them. Even on the defendant's own case, he had read the Employment Agreement "quickly". This does not assist his case. I have found above (at [58]) that, notwithstanding the time pressure, the defendant still had several days to look through the Employment Agreement carefully. There is no convincing explanation for why that was not done. According to the defendant, after receiving a copy of the Employment Agreement in mid-2019,[100] he had allegedly told Mr Chan that the terms – such as the Performance Ratio clause – appeared radically different from his understanding of the terms of employment.[101] As the plaintiffs argue, if the defendant could spot the Performance Ratio clause and point out the discrepancy in mid-2019, then the defendant should have been able to do the same prior to signing the Employment Agreement.[102] Had the defendant taken the time to go through the Employment Agreement, he would have come across the Performance Ratio clause. If he did not understand why such a clause was present or what that clause meant, he could have sought clarification from Mr Chan, just as he had in mid-2019. Having chosen to only glance over the Employment Agreement, the defendant cannot claim that he had exercised reasonable care.

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100 Mr Grover's AEIC at para 48.

101 Mr Grover's AEIC at para 50.

102 PCS at para 68.

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61 For the above reasons, I find that the defendant was careless in signing the Employment Agreement. As the defence of *non est factum* fails, the defendant remains bound by the Employment Agreement.

(3) The defendant's conduct demonstrates that he knew he was bound by the Employment Agreement

62 The defendant's own conduct following the execution of the Employment Agreement buttresses my finding that the defendant is bound by its terms. In *Walsh Terence William v Peregrine Systems Pte Ltd* [2003] SGHC 117 ("*Walsh*"), the plaintiff-employee alleged that there was a mistake regarding the tenure of his employment. In rejecting this argument, this court considered the plaintiff's conduct subsequent to him receiving the employment contract (*Walsh* at [39]–[51]). I find that there is overwhelming evidence which suggests that the defendant knew he was bound by the Employment Agreement and the Performance Ratio therein.

63 First, according to the defendant, there was a review of "every clause" of the Employment Agreement in August 2019.[103] This review was done with Mr Walsh, who was then the Chief Operating Officer of a group of companies including GFI.[104] It is alleged that Mr Walsh had read out every term of the Employment Agreement during this meeting.[105] This is consistent with the evidence given by Mr Walsh.[106] The defendant asserts that it was only during this clause-by-clause review that he realised the terms of the Employment Agreement were radically different from the Alleged Oral Employment

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103 Mr Grover's AEIC at para 53.

104 Mr Walsh's AEIC at para 3.

105 DOS at para 13.

106 Mr Walsh's AEIC at para 21.

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Agreement.[107] For the first time, the defendant also asserted during cross-examination that he had informed Mr Walsh of this discrepancy during the meeting.[108] This contradicts Mr Walsh's evidence that the defendant did not raise any issue as to the Performance Ratio during that meeting.[109] I accept Mr Walsh's evidence on this point. The defendant's evidence was inconsistent and contradictory. He did not state in his affidavit that he raised the discrepancy to Mr Walsh. Accepting Mr Walsh's account of the events, it is curious to say the least that the defendant chose to stay silent throughout the meeting, despite discovering, allegedly for the first time, that he was bound by the Performance Ratio clause.

64 Second, the defendant claimed that after the meeting with Mr Walsh in August 2019, he had conveyed the alleged mistake regarding the Performance Ratio to Mr Chan. According to the defendant, Mr Chan assured him not to worry unnecessarily.[110] The defendant took no further action because he believed Mr Chan "would keep his word".[111] I find the defendant's continued inaction during the novation process for the Employment Agreement baffling.

65 I reproduce below the Notice of Transfer provided by GFI to the defendant:[112]

> I write in connection with *the contract of employment made between you and GFI Group Pte Ltd (the "Company") dated 8 November 2017* [*ie*, the Employment Agreement].

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107 Mr Grover's AEIC at para 53.

108 Day 4 Transcript at p 9 line 21 to p 10 line 2.

109 Mr Walsh's AEIC at para 25.

110 Mr Grover's AEIC at para 55.

111 Mr Grover's AEIC at para 55.

112 CBOD vol 1 at p 198.

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> This letter confirms the parties' agreement that, with effect from 1 May 2020, your employment will transfer to another group entity. All references in the [Employment Agreement] to "GFI Group Pte Ltd" shall be deemed to be references to "BGC Partners (Singapore) Limited" and BGC Partners (Singapore) Limited shall bear the burden and receive the benefit of all respective rights and obligations contained in the [Employment Agreement].
>
> … *All other terms and conditions relating to your employment remain unchanged.*
>
> [emphasis added]

The Notice of Transfer makes explicit reference to the written "contract of employment … dated 8 November 2017" (*ie*, the Employment Agreement) and states that the terms of the defendant's employment with BGC would "remain unchanged".

66 On 18 May 2020, the defendant replied *via* e-mail, confirming the terms of the Notice of Transfer:[113]

> Hello all,
>
> Thanks ROB, much APPRECIATED.
>
> I accept the Transfer agreement sen[t] to me on 1 [M]ay 2020, and will handover the signed agreement to HR.
>
> I also request you to provide me all the side letters I have signed in relation to my bonus before.
>
> Thanks

67 As the plaintiffs point out, the defendant in the above e-mail made no mention of the Alleged Oral Employment Agreement and accepted the terms of the Notice of Transfer without any qualification.[114] Taking the defendant's case at its highest, he knew that he was bound by the Performance Ratio clause

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113 CBOD vol 1 at p 205.

114 POS at paras 16 and 44; PCS at para 28; PRS at para 13.

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during the meeting with Mr Walsh in August 2019. By the time of the novation, the defendant would also have known that Mr Chan had decided he would not be joining BGC. Given that his mentor would not be going to BGC with him, the defendant ought to have been even more careful about the terms of the novated employment contract. Despite this, the defendant said nothing about the Performance Ratio in his acceptance e-mail. The defendant's purported belief that the Performance Ratio was not binding on him, is inconsistent with his unqualified acceptance of the terms of the novation and his *continued silence* throughout his employment with BGC.

68 Third, the plaintiffs direct me to the defendant's e-mail to Mr Howell and Mr Prasad on 10 September 2021.[115] For context, by that time, BGC had offered two roles to the defendant – one relating to Gooch Capital (which is a new brand under BGC) and one relating to the Sing IRS product – as alternatives to termination (see [86] below). I reproduce the defendant's e-mail on 10 September 2021 below:[116]

> For me to be in a position to make a decision as to accept this proposed role or not [*ie*, developing Gooch Capital's NDF business or trading the Sing IRS under BGC], kindly provide me with some clarifications on the following …:
>
> …
>
> f. Given that Gooch Capital is a new entity and the Sing IRS is a new product for me to broker, *whether I would be provided with an assurance in writing that Clause 4.2.1 of my [Employment Agreement] (which provides for a reduction of my salary if my Performance Ratio falls below a ratio of 2.5:1) will not apply for one year* while I am to work to develop Gooch Capital's business during that period of time.
>
> [emphasis added]

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115 PRS at para 23.

116 CBOD vol 1 at p 244.

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I accept the plaintiffs' submission that the above e-mail clearly demonstrates the defendant's acknowledgment that the Performance Ratio was binding on him.[117] Had the defendant believed that he was excluded from the Performance Ratio, there would not have been any reason for the defendant to request for a temporary exemption from it.

69 Finally, I note that the defendant's alleged entitlement to unpaid bonuses is premised upon the Employment Agreement. The defendant's email on 19 September 2021 to Mr Howell and Mr Prasad states that "BGC by unreasonably withholding unpaid bonuses owed to [him] is in breach of Clause 5.1 of the [Employment Agreement]".[118] The defendant's counterclaim in this suit for the unpaid bonuses is also premised upon cl 5 of the Employment Agreement (see [109] below). That being the case, the defendant cannot cherry-pick the favourable parts of the Employment Agreement to enforce.

70 I find that all the evidence above points towards the fact that the defendant had unequivocally accepted the terms of the Employment Agreement by conduct and/or knew he was bound by it.

The defendant's employment was validly terminated

71 As a preliminary point, it is undisputed that the Notice of Transfer and the defendant's acceptance of its terms (see [65]–[66]) above) amounted to a valid novation of the Employment Agreement from GFI to BGC. The effect of this novation is two-fold. First, the Employment Agreement as between GFI and the defendant is "*discharged through mutual consent*" [emphasis in original] (*Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal*

117 PRS at para 24.

118 CBOD vol 1 at p 255.

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[2014] 2 SLR 318 ("*Fairview*") at [46]). Second, there is a new employment contract between the new parties (*ie*, BGC and the defendant) on the same terms as the Employment Agreement (*Fairview* at [46]).

BGC was entitled to terminate the defendant for his failure to meet the Performance Ratio

72 I now turn to the main issue of whether BGC had wrongfully terminated the defendant. Pursuant to the novation, the terms of the Employment Agreement, which included the Performance Ratio clause (see [37] above), were binding on BGC and the defendant. In essence, under the Performance Ratio clause, the ratio of the defendant's Individual Net Revenue as against his Direct Employment Costs over the relevant assessment period (of no less than three months) could not fall below 2.5:1. I note that the Performance Ratio clause refers simply to "period … not less than three months". I adopt the plain meaning of these words, which is that the three months refer to any rolling period of three months (*cf*, fixed quarters as per BGC's financial year). If the Performance Ratio was not satisfied, BGC was entitled to, "in its sole discretion … terminate [the defendant's] employment by giving [him] the statutory minimum notice, in writing" under cl 4.2.2 of the Employment Agreement.

73 The plaintiffs' evidence is that from June 2021 to August 2021, the defendant's Individual Net Revenue was US$287,173, while his Direct Employment Costs was US$175,248, yielding a Performance Ratio of 1.64:1.[119] The defendant does not dispute these figures.[120]

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119 Mr Howell's AEIC at para 41.

120 DOS at para 18.

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74 The plaintiffs argue that an employer's right of termination is unqualified.[121] According to the plaintiffs, there is a distinction between an employer's right to terminate an employment agreement and an employer's discretion in other areas of the employment relationship (such as payment of bonuses).[122] In other words, it is argued that BGC is not subject to any duty of reasonableness in exercising its right to terminate.[123]

75 The plaintiffs' position is supported by the *obiter* remarks in *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2022] 1 SLR 1318 ("*Dong Wei*"). The Appellate Division of High Court rejected the appellant's argument that an employer's express contractual right to terminate an employee without cause should be subject to a prohibition against arbitrariness, capriciousness and bad faith (*Dong Wei* at [84]). The appellant in that case relied on *Leiman, Ricardo and another v Noble Resources Ltd and another* [2018] SGHC 166 ("*Leiman*"), which in turn relied on the UK Supreme Court's decision in *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661 ("*Braganza*") and this court's earlier decision in *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 ("*MGA*") (see [115]–[116] below). In *Leiman*, this court held that there was an implied term that the employer will not exercise its contractual discretion to award benefits such as bonuses, shares and share options arbitrarily, capriciously or in bad faith (*Leiman* at [114] and [117]).

76 Turning back to *Dong Wei*, the Appellate Division emphasised that the facts of *Braganza*, *MGA* and *Leiman* concerned contractual discretions relating

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121 PCS at para 32.

122 PCS at para 32.

123 PCS at para 93.

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to "rights subsisting *within* the contours of their respective contracts", not the "right to bring … contracts *to an end*" [emphasis in original] (at [91]). Restrictions imposed in former situations served to ensure that a party's exercise of discretion does not deprive the counterparty of its contractual rights or warp the parties' bargain (*Dong Wei* at [91]). This was distinguishable from a situation concerning the termination of a contract (*Dong Wei* at [92]):

> Where the termination of a contract is concerned, *especially where there is an express clause permitting termination by way of notice, considerations of the parties' freedom of contract (and conversely, to exit contracts) come into play*. … Furthermore, in the case of employment contracts, the right to terminate with notice or pay in lieu of notice tends to cut both ways. … Thus, if the restrictions in *Braganza* are applied to limit an employer's right to terminate, it is difficult to see why the employee's contractual discretion to quit would not likewise be limited. That, however, would seem to be a particularly unpalatable proposition in the field of employment law, where it is trite that *employers cannot be compelled to hire or retain, but more importantly, that employees cannot be forced to work*.
>
> [emphasis added]

77 I agree with and adopt the above *obiter* expressed in *Dong Wei*. The parties' freedom of contract should not be limited by restricting the employer's right to terminate. In fact, as the plaintiffs point out,[124] the present case falls squarely within the situation described in *Dong Wei* where freedom of contract comes into play – the defendant was terminated pursuant to "an express clause [in the Employment Agreement] permitting termination by way of notice".

78 As the defendant had failed to meet the Performance Ratio for the assessment period of June 2021 to August 2021, BGC was entitled to terminate the defendant's employment on that ground. Having determined that the

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124 PRS at para 33.

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defendant's termination was valid, the defendant's counterclaim on damages for wrongful termination falls away.

Assuming that the implied duty of mutual trust and confidence applies, BGC did not breach this duty in terminating the defendant

79 The defendant also submits that a term of mutual trust and confidence is implied by law into all employment contracts under Singapore law.[125] According to the defendant, BGC has breached this implied duty by wrongfully terminating the defendant's employment. The plaintiffs contend that the defendant's case, being premised on an implication of a duty of trust and confidence, is legally unsustainable.[126]

80 It is an open question as to whether employment contracts contain an implied term of mutual trust and confidence under Singapore law.

81 The defendant relies on *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 ("*Cheah Peng Hock*"), where this court expressly held that "an implied term of mutual trust and confidence, and fidelity, is implied by law into a contract of employment under Singapore law" (at [59]). However, more recently in *Dong Wei*, the Appellate Division looked at the cases on this area of law and noted that the law remains unsettled (at [69]). In particular, the Appellate Division observed that while this implied term was accepted by this court in various cases, the Court of Appeal in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 ("*Wee Kim San*") did not formally endorse this implied term (*Dong Wei* at [73]–[74]). In that regard, the defendant also accepts that *Dong Wei* had confined the

125 DCS at para 55.

126 PRS at para 35.

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ruling in *Wee Kim San* to the facts of that case.[127] Further, the Court of Appeal in *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 expressly noted that *Wee Kim San* left open the status of the implied term of mutual trust and confidence in employment contracts (at [44]).

82 As the court in *Dong Wei* had left this question for the Court of Appeal to resolve in a more appropriate case (at [80]), I say nothing further on this legal issue. In any event, it is unnecessary to resolve this legal issue on the facts of this case. Even if such an implied duty applies to the present case, for reasons I will explain below, BGC had not breached the implied duty of mutual trust and confidence in terminating the defendant.

83 The defendant alleges that BGC acted out of line with the industry practice adopted by employers in terminating their brokers. It is argued that employers would usually first (a) speak to the broker to understand what had caused a drop in performance; (b) reduce his/her salary; and/or (c) adjust any performance ratio.[128] However, this argument could not stand, as the defendant did not call any expert witness to provide evidence on this alleged industry practice.

84 Based on the evidence before me, I find that BGC had acted in good faith and with reasonableness in the process leading up to the defendant's termination. Before I explain my reasons, I first address the defendant's allegation relating to Mr Prasad's evidence. Mr Prasad gave evidence that in July 2021, he had spoken with the defendant about the drop in the latter's

127 DCS at para 60.

128 DOS at para 12.

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performance[129] and advised the defendant to "continue to do [his] performance ratio".[130] The defendant throws doubt on Mr Prasad's testimony.[131] The defendant points to Mr Howell's evidence that it takes about six weeks to two months for a broker to know his monthly Direct Employment Costs.[132] According to the defendant, this means that Mr Prasad could only have accessed the defendant's Direct Employment Costs for May 2021 or June 2021, and could not have known that the defendant may fall below the Performance Ratio for July 2021.[133]

85 I do not agree with the defendant's interpretation of Mr Prasad's testimony. Mr Prasad's evidence is that he spoke with the defendant in July 2021 because he saw the defendant's "revenues dipping" and "was concerned".[134] Mr Prasad had simply encouraged the defendant not to "put [his] tools down".[135] It is irrelevant that Mr Prasad may not have had access to the defendant's Direct Employment Costs for June 2021 or July 2021. All that Mr Prasad's evidence suggests is that he had spoken to the defendant about his performance in July 2021. Accordingly, I fail to see how casting doubt on Mr Prasad's evidence on this point advances the defendant's case that BGC had breached its implied duty of mutual trust and confidence.

86 I turn to the defendant's main allegation that the implied duty was breached because BGC had only given two options to the defendant as

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129 Transcript dated 5 March 2024 ("Day 2 Transcript") at p 76 lines 11–13.

130 Day 2 Transcript at p 77 lines 12–16.

131 DCS at para 52.

132 DCS at para 51.

133 DCS at para 52.

134 Day 2 Transcript at p 77 lines 1–3.

135 Day 2 Transcript at p 77 lines 12 and 13.

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alternatives to termination. It is undisputed that BGC had presented the following options to the defendant by 17 September 2021, when the right of termination arose under cl 4.2 of the Employment Agreement:[136]

(a) The defendant would lead an online NDF agency platform in Gooch Capital under the same employment terms, including the Performance Ratio (the "Gooch Capital option").

(b) The defendant would work on the Sing IRS product (instead of the NDF) at a reduced salary, while still being subject to the Performance Ratio (the "Sing IRS option").

(c) The defendant's employment with BGC would be terminated.

87 The defendant's response to the Gooch capital option and Sing IRS option is set out in his e-mail to Mr Howell and Mr Prasad on 19 September 2021. In essence, the defendant stated that there is "no clarity" on the Gooch Capital and Sing IRS options.[137] Further, it was alleged that these options seem to have been presented to him "only cursorily with a view towards sidelining [him]" from his initial role as an NDF broker.[138] The defendant expressed his desire to resume his role as NDF broker under BGC, or to proceed with either the Gooch Capital option or the Sing IRS option, "in the event that clarity of structure is provided to [him]".[139] The defendant was terminated three days after this e-mail.

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136 DOS at para 18; Mr Prasad's AEIC at paras 39–53.

137 CBOD vol 1 at p 255.

138 CBOD vol 1 at p 255.

139 CBOD vol 1 at p 256.

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88 The defendant contends that the Gooch Capital option was unacceptable. The defendant emphasises that the Indian Rupee NDF operates primarily on "voice-broking", which is not feasible on the Gooch Capital platform, an online electronic NDF platform.[140] According to the defendant, at least three to four major clients of BGC were reluctant to work with the Gooch Capital.[141] The Gooch Capital option was thus "bound to fail".[142]

89 However, Mr Howell's e-mail to the defendant dated 16 September 2021 suggests that BGC was forthcoming in addressing the defendant's concerns regarding the Gooch Capital option:[143]

> … Your feedback was that these customers did not think [Gooch Capital] was a viable model as they were concerned about you speaking to the buyside and also about onboarding and brokerage agreements with Gooch.
>
> I explained that Gooch Capital is just a brand name and not an entity. The customers would be dealing through and relying on their existing brokerage agreements with BGC Singapore Pte Ltd as they are doing now. … we could appease [the clients'] concerns around speaking to the buyside by committing to limit our client base to interbank clients only under Gooch on NDF, the same as we do in BGC and previously in GFI.
>
> Jordan asked you to set up meetings with 4-6 of the key clients so he could explain the model and our willingness to alter our approach to the client base to address their concerns. You agreed to set up these meetings this week.
>
> Could you provide us an update on the scheduling of these meetings?

BGC was willing to meet with the concerned customers directly and explain Gooch Capital's business model to allay their concerns. I also do not doubt Mr

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140 DOS at para 18(a).

141 DOS at para 18(a); DCS at para 65; Day 4 Transcript at p 69 line 7 to p 74 line 7.

142 DOS at para 18(a); DCS at para 65; Day 4 Transcript at p 69 line 7 to p 74 line 7.

143 CBOD vol 1 at pp 251–252.

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Howell and Mr Prasad's belief that transferring the defendant to Gooch Capital would provide a valuable "rebranding opportunity" for him.[144] It is also relevant that the above e-mail from Mr Howell came after several meetings between the defendant and Mr Howell and/or Mr Prasad (including on 1 September, 6 September and 14 September 2021) over the Gooch Capital option.[145] During these meetings, Mr Howell and/or Mr Prasad explained the Gooch Capital option to the defendant and tried to address the defendant's concerns.[146] These actions are consistent with Mr Howell's testimony that he "could see an unfolding train wreck" and was hence "trying to find solutions to a problem that was unfolding".[147] I accept that these actions as BGC's genuine attempts to retain the defendant and demonstrate good faith on BGC's part.

90 As for the Sing IRS option, the defendant contends that Sing IRS was an entirely new product from the NDF (which the defendant had been working with) and concerned different clients and different markets.[148] The plaintiffs argue that the Sing IRS option would not have posed issues to the defendant, as he was able to adapt to the current position of India IRS desk head at Tradition within a few months.[149] However, I agree with the defendant and do not place weight on the defendant's current role at Tradition in considering whether the Sing IRS option was a reasonable one at the material time.[150]

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144 Mr Prasad's AEIC at para 49.

145 Mr Prasad's AEIC at paras 43 and 50.

146 Mr Prasad's AEIC at paras 43 and 50.

147 Day 2 Transcript at p 193 lines 8–16.

148 DOS at para 18(b); DRS at para 25.

149 PCS at para 90(2).

150 DRS at para 25.

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91 I note that the Sing IRS option was presented to the defendant on 17 September 2021 because he was unwilling to accept the Gooch Capital option which would have allowed him to broker the same NDF product.[151] Considering this context, rather than being unreasonable, the offer of the Sing IRS option reflects BGC's attempt to present yet another alternative that may be acceptable to the defendant. I disagree with the defendant that the reduced salary under the Sing IRS option was unfair and unacceptable.[152] The Performance Ratio is the ratio of revenue (generated by the defendant) to expenses (incurred by the defendant, including salary). As such, as the plaintiffs argue, a reduced salary would mean reduced expenses, thereby providing lower revenue performance targets for the defendant.[153] Considering that the Sing IRS is a new product to the defendant, I find this proposal of lower salary (and the corresponding lower revenue target) reasonable.

92 Having offered two reasonable alternatives which were rejected by the defendant, I find that BGC was not in breach of any implied duty of mutual trust and confidence in terminating the defendant's employment. Mr Prasad's and Mr Howell's actions demonstrate genuine and personal attempts to help the defendant find solutions to his predicament.

93 For completeness, I address the defendant's remaining arguments relating to the validity of his termination.

94 First, the defendant pleaded that there were "extraneous factors" in July 2021 and August 2021 which prevented him from meeting the Performance

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151 Mr Prasad's AEIC at para 52.

152 DCS at para 65.

153 PCS at para 90(2).

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Ratio.[154] However, no particulars were pleaded. It was only in the closing submissions that the defendant identified these extraneous factors as "illness, bereavement [and] change in personnel in a broker's … clients".[155] Further, the only evidence in support of this point is the defendant's bare assertion at cross-examination that he was ill at the material time.[156] In contrast, Mr Prasad[157] and Mr Howell[158] provided consistent evidence that the defendant had "downed [his] tools", was demotivated, and "simply stopped trying". In the absence of other evidence before me, I dismiss the defendant's argument.

95 The defendant's second argument concerns garden leave, which is provided in cl 16 of the Employment Agreement.[159] Clause 16 states that at any time during the defendant's employment (including following the service of notice of termination), BGC "may by written notice require [the defendant] not to perform any services (or to perform only specified services) … for such period as [BGC] shall in its absolute discretion think fit".[160] The defendant accepts that this clause does not require every terminated employee to be placed on garden leave.[161] Instead, the defendant relies on Mr Prasad's oral testimony that it is a standard practice for BGC brokers served with a notice of termination to be put on garden leave.[162] It is argued the termination was *mala fide* because he was not placed on garden leave. I reject this argument. As the plaintiffs

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154 Defence at para 9(f).

155 DRS at para 5(c).

156 Day 4 Transcript at p 65 lines 12–14 and p 67 lines 18–24.

157 Day 2 Transcript at p 79 line 12 to p 80 line 15 and p 125 line 5–12.

158 Mr Howell's AEIC at para 48; Day 2 Transcript at p 190 lines 7–22.

159 DCS at para 64(a) and (d).

160 Clause 16 of the Employment Agreement, CBOD vol 1 at p 20.

161 DCS at para 64(a).

162 Day 1 Transcript at p 152 line 21 to p 153 line 10.

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contend, this point on garden leave was not pleaded.[163] Further, Mr Prasad did not have an opportunity to answer this new allegation that failure to place the defendant on garden leave rendered his termination *mala fide*.[164] In any event, whether an employee should be placed on garden leave is a matter within BGC's sole discretion. There was no obligation for BGC to place the defendant on garden leave or to follow the alleged standard practice.

96 Finally, it is alleged that Mr Anthony Warner ("Mr Warner") had made an offer to the defendant in or around March 2022 to re-join BGC. Mr Warner was then BGC Group's Executive Director Co-Head of Global Broking, and the defendant's indirect boss.[165] The defendant argues that Mr Warner's offer indicates that the earlier termination in September 2021 was *mala fide*.[166] This point was not pleaded nor raised in the defendant's affidavit of evidence in chief but only opportunistically alluded to in the course of the defendant's own cross-examination at trial.[167] I thus disregard this argument completely.

97 In sum, BGC had validly exercised its unqualified right to terminate the defendant's employment. Even if the implied duty of mutual trust and confidence applied to the present case, BGC was not in breach of such duty.

The loan became immediately due and payable upon the defendant's termination as a partner

98 Having determined that the defendant was validly terminated, the next issue is whether the loan became due and payable under the Loan Agreements.

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163 PRS at para 49.

164 PRS at para 49.

165 Mr Howell's AEIC at para 22.

166 DCS at paras 26 and 64(e).

167 Day 4 Transcript at p 77 line 23 to p 82 line 22.

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99 Clause 2 of both Loan Agreements govern the circumstances under which the loans become immediately repayable in their entirety on demand. The applicable clauses are cll 2(b) of the Loan Agreements. They provide that the loans are "immediately due and payable to the Lender … if [the defendant] cease[s] to be a partner" prior to the dissolution of BGC Holdings.[168]

100 The circumstances in which the defendant ceases to be a partner of BGC Holdings are addressed under the BGC Holdings Partnership Agreement (the "Partnership Agreement"). The term "Termination" is defined under cl 1.01 of the Partnership Agreement as follows:[169]

> "Termination" … means, with respect to any … Working Partner [including the defendant] … (i) the actual termination of the employment of or services provided by such Partner, such that such Partner is no longer an employee of … any Affiliated Entities [including BGC], for any reason whatsoever, including termination by the employer … with or without cause … [the] Partner shall be considered to be Terminated immediately upon the occurrence of the events described above …

Clause 12.02(d)(ii) of the Partnership Agreement is also relevant. It provides that upon the termination of a partner, "the entire legal and beneficial ownership of such Units owned by such Partner shall be automatically vested in [BGC Holdings] and such Partner shall cease to be entitled to claim … any status or rights as a … Partner". Further, the terminated partner "shall have the status solely of a creditor of [BGC Holdings] for payment of the price for such Units so purchased by [BGC Holdings] at the price established pursuant to [the Partnership] Agreement".[170]

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168 Clause 2(b) of the 1st Loan Agreement, CBOD vol 1 at p 24; clause 2(b) of the 2nd Loan Agreement, CBOD vol 1 at p 28.

169 Clause 1.01 of the Partnership Agreement, CBOD vol 1 at pp 63–64.

170 Clause 12.02(d)(ii) of the Partnership Agreement, CBOD vol 1 at pp 132–133.

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101 As stated in cl 13.13 of the Partnership Agreement, this agreement is governed by Delaware law. In that regard, the plaintiffs called Mr David A. Harris ("Mr Harris"), a Delaware law expert,[171] to provide expert opinion on: (a) whether the termination of the defendant's partnership at BGC Holdings is a matter of Delaware law; and (b) the basis of the defendant's termination of partnership under the Partnership Agreement.[172]

102 On the first issue, Mr Harris provided unchallenged evidence that whether the defendant was terminated as a partner of BGC Holdings is controlled by the terms of the Partnership Agreement.[173] It is therefore a matter of Delaware law, as provided in the governing law clause in the Partnership Agreement.[174] On the second issue, Mr Harris opined that upon termination of the defendant's employment at BGC, the defendant was no longer an employee of any "Affiliated Entities". This, in turn, triggered the termination of the defendant as a partner of BGC Holdings under the relevant clauses of the Partnership Agreement above.[175] Relatedly, Mr Harris further opined that all units of a partner are automatically assigned to BGC Holdings upon "Termination", and that upon such assignment, the partner immediately ceases to be a partner of BGC Holdings.[176]

103 I accept Mr Harris' unchallenged expert evidence on the two issues. In sum, upon the termination of the defendant's employment with BGC, his

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171 Affidavit of Mr David A. Harris dated 30 November 2023 at para 1.

172 Para 25 of the Expert Witness Report on the Law in the State of Delaware, the United States of America dated 30 November 2023 ("Expert Report"), CBOD vol 1 at p 267.

173 Para 27 of the Expert Report, CBOD vol 1 at p 267.

174 Para 27 of the Expert Report, CBOD vol 1 at p 267.

175 Para 30 of the Expert Report, CBOD vol 1 at p 268.

176 Para 29 of the Expert Report, CBOD vol 1 at p 268.

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partnership with BGC Holdings was also terminated. Upon the defendant "ceas[ing] to be a partner", the loans became "immediately due and payable" under cll 2(b) of the Loan Agreements. I thus find that the plaintiffs are entitled to the unpaid loan and contractual interests from the defendant as set out in [13] above.

104 For completeness, I note the defendant's unpleaded submission that cl 2 of the 1st Loan Agreement, providing for a full *in toto* repayment of cash advances, is an unenforceable penalty clause.[177] During the oral closing submissions, the defendant's counsel submitted that I can still consider this unpleaded point because it is a legal issue arising from the construction of the 1st Loan Agreement. I reject this submission. As the Court of Appeal held in *Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] 2 SLR 23, the issue of whether a contractual clause is a penalty is a question of fact and law and thus had to be specifically pleaded (at [46]). In *Beihai Zingong Property Development Co and another v Ng Choon Meng* [1999] 1 SLR(R) 527, the party's failure to plead the defence of penalty precluded that party from raising it at trial (at [17]). Similarly, the defendant cannot rely on the unpleaded defence of penalty.

105 In any event, the defendant's case on penalty is without any merit. It is trite that the doctrine of penalty only applies to secondary obligations triggered by a breach of contract (*Ethoz Capital Ltd v Im8ex Pte Ltd and others* [2023] 1 SLR 922 ("*Ethoz Capital*") at [33]). In the present case, it is clear that the obligation to repay the loans under the Loan Agreements is a primary obligation. The loans become repayable upon the occurrence of the stipulated events, including the event that the defendant ceases to be a partner. The

177 DRS at para 5(b).

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cessation of the defendant's partnership is a condition that triggers the repayment, not a breach of a primary obligation that in turn triggers a secondary obligation to repay the loans.

106 For the above reasons, the plaintiffs are each entitled to recover from the defendant the unpaid loan and interests as set out in [13] above.

Issue 2: The defendant is not entitled to any bonuses from BGC

107 As a preliminary point, the plaintiffs highlight that the defendant's counterclaim for unpaid bonuses for the period of January 2021 to March 2021 is unpleaded.[178] It is argued that the defendant pleaded in the Defence & Counterclaim (Amendment No 2) for "[o]utstanding commissions accrued and owing to the Defendant pursuant to Clause 5 of the [Employment Agreement]",[179] and not for bonuses.[180] However, as the defendant's counsel clarified during the oral closing submissions, parties have used the terms "commissions" and "bonuses" interchangeably. In fact, the plaintiffs' own Reply & Defence to Counterclaim (Amendment No 2) states that "commissions" refer to "bonuses", as set out in the Employment Agreement.[181] I agree with the defendant's arguments and dismiss the plaintiffs' argument that the counterclaim for bonuses should be disregarded.

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178 PRS at para 57.

179 Defence at para 19b.

180 PRS at para 57.

181 Reply & Defence to Counterclaim (Amendment No 2) dated 31 January 2024 ("Reply") at para 7.

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Bonuses were not guaranteed as of right

108 Whether an employee is entitled to bonus under an employment agreement turns on the construction of the bonus clause in question (*Leong Hin Chuee v Citra Group Pte Ltd and others* [2015] 2 SLR 603 ("*Leong Hin Chuee*" at [132] and [145]). There is no absolute rule that all contractual bonuses are discretionary in nature (*Leong Hin Chuee* at [146]). Even where the contract expressly states that bonus is "discretionary" or that the employer reserves an "absolute right" to declare bonuses, the court will look at all relevant circumstances to ascertain the parties' true intention (*Leong Hin Chuee* at [147] and [150]). This means that how the parties label the nature of a bonus is not definitive. The court will take a contextual approach in interpreting a bonus clause.

109 Clause 5 of the Employment Agreement sets out the provision in relation to bonuses. I reproduce the relevant parts below:[182]

> 5. Bonuses
>
> 5.1 Individual bonus (1)
>
> You will be eligible for an individual bonus which shall be calculated as follows
>
> [The Payout Rate x Individual Net Revenue] LESS Expenses.
>
> …
>
> If awarded, the individual bonus will be paid six monthly, 90 days in arrears, that is in September each year for the bonus period 1 January to 30 June inclusive …
>
> …
>
> 5.2 For the avoidance of doubt, the entitlement to the bonus will only arise, when and if a bonus is paid to you.

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182 Clauses 5.1–5.2 of the Employment Agreement, CBOD vol 1 at pp 14–15.

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110 Based on a holistic reading of cl 5, I find that entitlement to bonus payment is discretionary. As the plaintiffs point out, cl 5.1 only states that the defendant "will be eligible" for a bonus, not that the defendant will be "entitle[d]" to it (as stated in cl 5.2).[183] Clause 5.1 also goes on to state that "*If* awarded, the individual bonus will be paid six monthly, 90 days in arrears" [emphasis added], specifying when the bonus payment would be made *in the hypothetical event that* the bonus is awarded. Finally, cl 5.2 expressly clarifies that the "entitlement" to a bonus only arises "when and *if* a bonus is paid" [emphasis added]. It cannot be clearer that bonus payment is conditional and not as of right.

111 The defendant submits that, based on a contextual approach to contractual interpretation, surrounding factors must be considered. According to the defendant, it is thus relevant to consider that the bonus provision was a key concern in negotiating the Employment Agreement.[184] The defendant points to Mr Chan's testimony that the pre-contractual discussion with the defendant focused solely on bonuses,[185] and that it was agreed that the defendant would get a "guaranteed bonus".[186]

112 Extrinsic evidence in the form of prior negotiations may be admissible to aid in contractual interpretation if it is relevant, reasonably available to all the contracting parties, and relates to a clear or obvious context (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132(d)]). The presence of an

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183 PCS at para 78(1).

184 DCS at para 67.

185 DCS at para 38(b).

186 Day 4 Transcript at p 134 lines 7–9.

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entire agreement clause does not prevent the court from considering extrinsic evidence and taking a contextual approach to contractual interpretation (*Lee Chee Wei* at [41]). In the present case, however, it is unclear how this extrinsic evidence will "go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon" (*Zurich Insurance* at [132(d)]). The defendant's and Mr Chan's subjective intent that the bonus would be guaranteed is irrelevant. Further, it appears that the defendant is seeking to rely on this extrinsic evidence to contradict or vary the clear meaning of cl 5, rather than to aid in the interpretation. As emphasised in *Zurich Insurance*, "in interpreting a contract, extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it" (at [122]). As such, I do not consider the evidence of pre-contractual negotiations relevant to interpreting cl 5 of the Employment Agreement.

113 For the above reasons, I find that the parties' objective intention was for BGC to award bonuses to the defendant on a discretionary basis.

BGC's decision to withhold the bonuses was lawful

There is an implied duty to exercise contractual discretion reasonably

114 It is trite that contractual discretions need to be exercised within reasonable boundaries (*Maybank Singapore Ltd v Synergy Global Resources Pte Ltd* [2024] 3 SLR 1316 ("*Synergy Global*") at [23]). The rationale behind such limitation is that where a contractual party confers a discretion on its counterparty, courts will not allow the former to be subjected to the latter's uninhibited whim (*Synergy Global* at [24]). One of the ways through which courts limit a party's exercise of contractual discretion is to imply a term that contractual discretion will be exercised objectively reasonably, or that

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contractual discretion will not be exercised arbitrarily, capriciously or irrationally (*Synergy Global* at [23(b)]).

115 Specifically in the context of employment contracts, the UK Supreme Court in *Braganza* held that there is an implied term "that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose" (at [30]). However, the UK Supreme Court did not rule on the precise extent to which this implied contractual term would differ from the principles applicable to judicial review of an administrative action (*Braganza* at [32]).

116 Similar principles have been accepted by this court. *MGA* concerned a contracting party's discretion to decide its own remuneration and commission for the provision of trade financing services. This court noted that there is an implied term that a decision-maker's discretion will be limited "by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality" (at [104], citing with approval *Socimer Bank Ltd v Standard Bank Ltd* [2008] All ER (D) 331 at [66]). In *Brader Daniel John and others v Commerzbank AG* [2014] 2 SLR 81, this court approved in *obiter* (at [102]) the following passage from *Clark v Nomura International plc* [2000] IRLR 766 at [40]: "the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) *ie* that no reasonable employer would have exercised his discretion in this way". More recently in *Leiman*, this court cited *Braganza* and *MGA* with approval and found a similar implied term (see [75] above).

117 While the employer's discretion is subject to the above limitations, courts will not intervene in the exercise of such discretion lightly. Judicial intervention would be warranted only if the exercise of contractual discretion is

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"so outrageous in its defiance of reason that it can be properly categorised as perverse" (*Dong Wei* at [90], citing *MGA* at [106]).

118 In the present case, the plaintiffs accept that BGC was subject to a duty of reasonableness in exercising its discretion to withhold bonus payments to the defendant.[187] Given that the applicability of this duty is not disputed, I turn to the issue of whether this discretion was exercised reasonably. For completeness, I note the defendant's argument that pursuant to *Leong Hin Chuee*, BGC's non-payment of bonuses is a breach of its implied term of mutual trust and confidence.[188] I dismiss this argument for reasons explained at [81]–[82] above.

BGC exercised its discretion to withhold bonuses reasonably

119 The plaintiffs submit that BGC had exercised its discretion to withhold bonuses reasonably.[189] The following alleged misconduct by the defendant (the "Alleged Misconduct") were pleaded as reasons for withholding the bonuses:[190]

(a) the defendant's alleged refusal to share information and prices with his colleagues;

(b) the defendant's alleged failure to encourage clients to use BGC's new electronic trading platform called the "Fenics";

(c) the defendant's alleged unwillingness to distribute customer lines with his colleagues; and

187 PCS at para 33.

188 DCS at para 68.

189 PCS at para 33.

190 Reply at para 9(8).

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(d) the defendant's alleged absence from work without leave or reasonable excuse.

120 The defendant contends that the evidence adduced by the plaintiffs to prove the Alleged Misconduct is inadmissible hearsay.[191] According to the defendant, Mr Walsh, Mr Howell and Mr Prasad have no first-hand knowledge of any of the Alleged Misconduct by the defendant.[192] None of them were the defendant's superior or individuals to whom he had reported to during his time at BGC.[193] Mr Warner and Mr Stephen Pledger ("Mr Pledger"), the then Global Head of Asian NDFs of the BGC Group,[194] were his direct supervisors.[195] In particular, Mr Warner had the authority to deny bonus payment to the defendant.[196] However, the plaintiffs did not call them as witnesses to give evidence.

121 As defined in the Court of Appeal case of *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 ("*Soon Peck Wah*"), hearsay evidence refers to "assertions of persons made out of court whether orally or in documentary form or in the form of conduct tendered to prove the facts which they refer to (*ie* facts in issue and relevant facts)" (at [26]). The reason why hearsay evidence is inadmissible is that "the witness cannot verify the truth of the facts of which he has no personal knowledge" (*Soon Peck Wah* at [27]). Where the person who has personal knowledge of the facts is not present before the court, the accuracy of his perception and veracity cannot be tested in cross-examination, thereby

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191 DCS at para 30.

192 DCS at para 27(c).

193 DCS at para 27(b).

194 Mr Howell's AEIC at para 22.

195 DCS at para 12.

196 DCS at para 69.

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rendering such evidence unreliable (*Soon Peck Wah* at [27]). As such, "even where there is an agreed bundle of documents, the *truth* of the contents" [emphasis in original] of such documents remains subject to objections to inadmissible hearsay (*Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 at [76]).

122 In the present case, any evidence given by Mr Walsh on the defendant's Alleged Misconduct is inadmissible. Mr Walsh admitted on the stand that he had no first-hand knowledge of these allegations.[197] Instead, he was informed of these allegations by Mr Pledger or Mr Warner. Since neither of the defendant's two superiors were called as a witness, the veracity of Mr Walsh's assertions on the Alleged Misconduct cannot be tested before this court. It was thus inadmissible hearsay evidence.

123 In relation to Mr Howell, the plaintiffs refer to an e-mail dated 22 July 2021, whereby the defendant "demand[ed] some strong answers from [Mr Howell]" regarding the non-payment of bonuses.[198] The plaintiffs rely on Mr Howell's reply e-mail on 23 July 2021, which listed the following reasons:[199]

> Some strong answers:
>
> 1. All bonuses are at the sole discretion of the company.
>
> 2. We are trying to build a global and integrated NDF business that will endure for the long run. This requires our senior brokers/desk heads to fully collaborate and share information / prices across centres.
>
> 3. Technology is our future. EBS have already eaten our lunch on 1 month NDF, and if we don't pull out all the stops and use all of our relationship capital to strongly encourage our clients

197 Day 1 Transcript at p 144, lines 5–25.

198 CBOD vol 1 at pp 233–234.

199 CBOD vol 1 at p 233.

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> to support our own platforms we will continue to lose more of our business to E competitors.
>
> 4. Expenses need to be reasonable, proportionate and comply with all internal policies and guidelines.
>
> If your bonus is not forthcoming, I suggest the answer lies somewhere across points 2-4. And again ALL bonuses are at the sole discretion of the company.

The plaintiffs submit that the above e-mail indicates that the reasons why BGC withheld bonuses from the defendant were well within Mr Howell's personal knowledge.[200]

124 I find that Mr Howell's e-mail at [123] above is also inadmissible hearsay evidence. When cross-examined on this e-mail, Mr Howell explained that he "was aware of … points 2, 3 and 4, being issues that had been discussed with [Mr] Warner and [Mr] Pledger" and "raised to [him] by [the both of them]".[201] Similar to Mr Walsh, Mr Howell was informed of these issues through Mr Warner and Mr Pledger. For instance, on the defendant's allegedly excessive expenditure, Mr Howell stated during cross-examination that he has no "first hand" knowledge but "recall[s] … both [Mr] Pledger and [Mr] Warner were concerned" about the amount of expenses spent by the defendant.[202] Mr Howell also stated that he was "not sure of the exact reason [for non-payment]",[203] as the decision to withhold bonuses "wasn't [his] decision",[204] and the defendant "wasn't in [his] direct line of sight".[205]

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200 PCS at para 83.

201 Day 2 Transcript at p 186, lines 5–11.

202 Day 2 Transcript at p 182, lines 2–5 and 8–11.

203 Day 2 Transcript at p 183, lines 11–19.

204 Day 2 Transcript at p 186, lines 1–3.

205 Day 2 Transcript at p 184, lines 20–23.

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125 These responses by Mr Howell reveal that his e-mail contains, *in substance*, reasons for non-payment of bonuses as told to him by Mr Pledger and Mr Warner. Mr Howell's e-mail can only be admitted for the purposes of proving the fact that Mr Howell had conveyed the possible reasons for non-payment of bonuses to the defendant. However, the plaintiffs cannot rely on Mr Pledger and Mr Warner's out-of-court statements (in Mr Howell's e-mail) to prove the alleged fact that the defendant was non-cooperative and over-spending.

126 I turn to other evidence adduced by the plaintiffs on the Alleged Misconduct. In relation to the defendant's alleged non-sharing of prices and information (see [119(a)] above), the plaintiffs adduced messages exchanged between Mr Pledger and the defendant. The relevant parts are reproduced below:[206]

> STEPHEN PLEDGER
>
> 06:32:27 can you put your liquidity pxs [*ie*, prices] you aare [*sic*] quoting on the screen
>
> 06:32:47 what do you have real inr [*ie*, Indian Rupees] fix ?
>
> SUMIT GROVER
>
> 06:33:14 Real inr fix ?
>
> 06:33:20 Don't have any real inr fix
>
> …
>
> STEPHEN PLEDGER
>
> 06:37:03 at this juncture in the morning when [London] gets in even if you dont [*sic*] have dealable pxs [I] just need some colour so [not] blind . You have been in for 8 hours , [I] dont think [it's] too much to ask . we do the same for [New York] when they come in and all other currencies in [Asia] do for us
>
> 06:37:10 [it's] called teamwork

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206 CBOD vol 1 at pp 208–209.

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> 06:37:27 be appreciated if we could get a run through going forward rather than an [argument]
>
> 06:37:31 thanks very much
>
> SUMIT GROVER
>
> 06:40:19 Ya same way when I have tired of asking
>
> when u guys leave just put the last inr prices or levels u have or jus[t] put some color
>
> …
>
> [it's] been more than worst 6[]months .. Not even a single thing u have put or updated
>
> teamwork works both way ..

127 When cross-examined on the above messages, Mr Howell testified that he is certain he has had conversations with the defendant on this issue. According to Mr Howell, the defendant had expressed his lack of trust for the BGC London office and how the latter was similarly unwilling to share prices and information.[207] If it is true that the defendant was not withholding prices and information unilaterally, that may weaken the plaintiffs' case that the withholding of bonuses was reasonable. However, as Mr Pledger was not called as a witness, the truth of the allegations levelled at BGC London office (*ie*, that it was also reluctant to share prices and information) cannot be tested. I also note that it was only during cross-examination that Mr Howell alleged having had conversations with the defendant on this issue. I thus disregard the messages between Mr Pledger and the defendant. Consequently, the plaintiffs cannot prove that the defendant's refusal to share prices and information was a reasonable basis to withhold the bonuses.

128 As to the alleged non-use of the Fenics platform (see [119(b)] above), the plaintiffs refer to an e-mail thread dated 21 June 2020. Mr Pledger sent an

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[207] Day 2 Transcript at p 210, lines 18–20.

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e-mail to the brokers at the Asian desk, stating that "nobody in Asia is logged in to Fenics NDF" and reminded them to do so as soon as possible.[208] In response, the defendant replied that "it's extremely difficult" for voice traders like himself, though "[they] are pushing [their] best".[209] He added that "to be able to make [the] move over to FENICS is a paradigm shift and not just an over the night resolve of the issue".[210] The defendant had forwarded these e-mails to Mr Howell to keep him in the loop.[211]

129 When questioned on the stand, Mr Howell explained that "according to [Mr] Pledger and [Mr] Warner", the defendant's actions did not align with his statement in the e-mail that he was trying his best to push for the use of the Fenics platform.[212] However, the above e-mail is also an inadmissible hearsay. That Mr Howell was kept in the loop (as the e-mail was forwarded to him) does not detract from the fact that he had no personal knowledge as to whether the defendant was indeed being non-cooperative. Mr Howell also admitted on the stand that he did not have any first-hand knowledge on this allegation.[213]

130 There is no other evidence adduced to prove that the defendant was not encouraging the clients to utilise the Fenics platform. As such, the plaintiffs cannot rely on this allegation to advance their case that the withholding of the bonuses was reasonable.

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208 CBOD vol 1 at p 229.

209 CBOD vol 1 at p 229.

210 CBOD vol 1 at p 229.

211 CBOD vol 1 at p 228.

212 Day 2 Transcript at p 179, lines 16–18.

213 Day 2 Transcript at p 179, lines 19–21 and p 211, lines 8–11.

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131 I turn to the defendant's alleged unwillingness to share customer lines (see [119(c)] above). Mr Prasad testified that "it was evident from the revenue sheet that [the defendant] was holding on to quite a lot of line",[214] which is "not [a] common practice" and "not encouraged" at BGC.[215] More specifically, the defendant was holding about "eight or above" lines, while the usual practice is for one broker to hold about two to four lines.[216] Mr Prasad's evidence that the defendant was unwilling to share his lines was not challenged by the defendant.

132 I also accept Mr Prasad's testimony on the importance of sharing lines within the team, given his wealth of experience in this industry and his position as the Managing Director of BGC.[217] Mr Prasad explained on the stand the implication of a broker's unwillingness to share his lines as follows:[218]

> There is an offer, there is a bid, someone is shown that offer and bid, and someone improves on the offer. That's a process in which -- that what you call, the life cycle. The cycle of a trade.
>
> …
>
> But if you are sitting with two clients engaging in a trade, that nobody else knows about it, that's not fair to the clients, and to the other brokers. I think that's what is referred to as a lone wolf. It's not about how many lines you hold, but you must hold lines in a manner that every client gets to see the prices in a speedy manner.
>
> …
>
> By virtue of the fact if you hold too many lines you are not able to disseminate the price in a timely manner, and therefore it would affect your ability to transmit the prices in a timely manner.

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214 Day 2 Transcript at p 38, lines 19–22.

215 Day 2 Transcript at p 40, lines 15–16.

216 Day 2 Transcript at p 39, lines 22–25.

217 Mr Prasad's AEIC at para 4.

218 Day 2 Transcript at p 43 line 8 to p 46 line 7.

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In essence, brokers are encouraged to share their lines within their team so that prices can be disseminated to all clients in a timely manner at the same time.

133 From BGC's perspective, the defendant's behaviour would have been perceived as a potential jeopardy to equal client treatment, and a failure by the defendant to demonstrate teamwork reasonably expected of him. Mr Prasad testified that the defendant would have had free rein to work in a way that suited him at previous organisations where Mr Chan was his direct boss.[219] Mr Prasad added that this was not the case at BGC which was a larger organisation, where the monitoring of work was stricter,[220] and the defendant had a direct reporting line to Mr Pledger. In my judgment, this was the tension that soured the relationship. The defendant's preferred way of working could not be aligned with BGC's plans and strategies. Ultimately, BGC was the employer, and the defendant's behaviour was a legitimate concern for a brokerage firm like BGC. I find that it was reasonable for BGC to withhold bonuses on the basis that the defendant had refused to share his lines.

134 Finally, it is alleged that the defendant was absent from work without valid reasons (see [119(d)] above). In support of this, the plaintiffs adduced a table labelled "Access Card Absence".[221] It reflects that the defendant had failed to "tap-in" to his office using his electronic access card system for over 70 days from January 2021 to August 2021. I accept Mr Prasad's evidence that BGC's practice is for the bonuses for January to March to be paid around end June.[222] This is consistent with the defendant's evidence that his bonus "should have

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219 Day 2 Transcript at p 28 lines 14–18.

220 Day 2 Transcript at p 28 lines 19–20.

221 CBOD vol 1 at p 240.

222 Day 2 Transcript at p 76 lines 6–9.

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been paid by end of June 2021".[223] I thus consider only the period of January 2021 to June 2021 in the "Access Card Absence" table. The table shows that the defendant did not tap in on 27 days from January 2021 to 15 May 2021. There is also evidence in the form of Mr Prasad's email dated 29 July 2021 to Mr Howell, stating that the defendant had worked from home during the COVID-19 lock-down period from 16 May 2021 to 11 July 2021.[224]

135 I note that the Employment Agreement contains a clear contractual obligation regarding physical attendance. Clause 3.1 specifies that the defendant's "normal place of work will be at the Company's offices … or such other location in Singapore or abroad as the Company may from time to time require".[225] Despite this, the defendant did not come into the office for at least 27 days without providing any legitimate reason. Taking together his unapproved absence and his unwillingness to share customer lines, I find that BGC's decision to withhold the bonuses was not arbitrary, capricious or irrational. I emphasise that courts would not interfere with a party's exercise of contractual discretion unless it is "so outrageous in its defiance of reason that it can be properly categorised as perverse" (see [117] above). This very high threshold is not crossed in this case.

136 For completeness, I make two additional points in relation to the defendant's case. First, I place no weight on Mr Chan's oral testimony that he did not come across a situation, during his time at GFI and Nittan, where the employers withheld bonus payment to a star employee.[226] As Mr Chan himself

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223 CBOD vol 1 at p 231.

224 CBOD vol 1 at p 236.

225 Clause 3.1 of the Employment Agreement, CBOD vol 1 at p 12.

226 Day 5 Transcript at p 79, lines 2–20.

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acknowledged, he is not in a position to speak for how *BGC* administers its bonus policies.[227] Mr Chan's prior experience is irrelevant as it does not relate to BGC. Second, I do not place any significant weight on the fact that BGC had failed to communicate the precise reason(s) for the non-payment of bonuses. Bonuses are at the sole discretion of BGC (see [113] above). There is also no contractual obligation for BGC to provide reasons for withholding discretionary bonuses. In fact, Mr Howell's e-mail at [123] above indicates that BGC was acting in good faith by trying to provide possible reasons for non-payment of bonuses to the defendant.

137 For the above reasons, the defendant is not entitled to any unpaid bonuses for the period of January 2021 to March 2021.

Conclusion

138 I summarise my findings below:

(a) The Employment Agreement was validly terminated, and the unpaid loan became immediately due and payable upon the defendant's termination as a partner. The plaintiffs are thus entitled to recover the unpaid loan and contractual interest from the defendant. GFI is entitled to the amount of US$1,879,981.45, and BGC is entitled to the amount of US$158,765.97 (see [13] above).

(b) The defendant is not entitled to damages for unlawful termination of his employment. The defendant is also not entitled to any bonuses from BGC. The bonuses were not guaranteed as of right, and BGC's decision to withhold them was lawful.

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227 Day 5 Transcript at p 79, line 21 to p 80 line 1.

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139 I have not received submissions on the question of further interest under cl 3 of both Loan Agreements, although this is the subject of prayers at para 27(3) of the statement of claim. I will hear the parties' submissions on such further interest if that remains in contention.

140 On costs, I note that the plaintiffs have made an offer of settlement to the defendant on 1 June 2022 on a without prejudice basis. The defendant rejected this offer. The plaintiffs submit that if they are successful in this suit, they should be entitled to indemnity costs from 1 June 2022 to date.[228] Unless agreed, I will hear the parties separately on costs.

141 Given the time that we dedicate to our careers over the course of our lives, the employment contract is likely the single most important document governing our working life, if not our lives as a whole. This case presents a cautionary tale of the importance of reading and understanding that contract and not putting our careers into someone else's hands. The court will be reluctant to help those who do not help themselves. Whilst this is a difficult lesson for the defendant, this judgment does not lessen what he has achieved from a disadvantaged start, nor does it impact his obvious skills as a trader. I hope this is an episode that he takes in his stride and he moves his career forward with the same aplomb of which he is clearly capable.

Wong Li Kok, Alex
Judicial Commissioner

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228 PRS at para 72.

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