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

[2021] SGHC 266

Suit No 814 of 2018

Between

Tan Kian Seng

… Plaintiff

And

Venture Corporation Limited

… Defendant

JUDGMENT

[Contract] — [Contractual terms] — [Breach] — [Damages]
[Contract] — [Mistake]
[Misrepresentation] — [Fraudulent] — [Remedies]
[Misrepresentation] — [Negligent]
[Employment Law] — [Contract of service] — [Breach]
[Restitution] — [Unjust enrichment]

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Tan Kian Seng
v
Venture Corporation Limited

[2021] SGHC 266

General Division of the High Court — Suit No 814 of 2018
Audrey Lim J
10–12 March, 18–21, 24, 28 May, 27 September, 26 October 2021

25 November 2021 Judgment reserved

Audrey Lim J:

1 The plaintiff ("Tan") commenced this Suit ("the Suit") against the defendant ("Venture"), a public listed company, for breach of his employment contract pertaining to share benefits which he claims he is entitled to; alternatively, there were representations made by Venture to that effect. Venture denies Tan's claims, and counterclaims essentially that Tan had defrauded it by making false representations to induce it to issue shares to Tan.

Background

2 Tan was employed by Venture since April 2001 and was its President ("President") from 16 August 2011 to 31 January 2016. He became Advisor to the Chief Executive Officer ("Advisor") for a three-year period from 1 February 2016, but he ended his employment with Venture on 31 January 2017.

3 Tan was eligible to participate in Venture's share benefit schemes,

particularly the Executives' Share Option Scheme ("ESOS") and the Restricted Share Plan ("RSP") (collectively the "Share Schemes"), which are governed by the ESOS Rules and RSP Rules respectively. Although there are two versions of the ESOS Rules (2004 and 2015), parties agree that there is no material difference between them for the purposes of the Suit, and I will thus refer to the 2004 version.[1] A Remuneration Committee ("RC") comprising Venture's directors administers the Share Schemes.

4 Under the ESOS, the RC may grant to an employee ("the grantee") an option, *ie*, the right to subscribe to shares granted to the employee pursuant to the ESOS ("share option"). The grantee who wishes to subscribe to the shares must accept the option within the stipulated time and exercise the option by submitting a Form of Exercise of Option ("Option Form"). Any unexercised option would lapse upon certain events under rules 7.2 and 7.3 of the ESOS Rules, but the RC may, pursuant to rule 7.3, determine that an option does not lapse upon those events. Under the RSP, the RC may grant an award of shares to a grantee ("share award") which will only be released to him after the vesting period. To the extent that the share award is not yet released, it will lapse upon certain events under rule 6.2 or 6.3 of the RSP Rules, subject to the RC making a determination otherwise.[2] I will refer to the share options and share awards collectively as "share benefits".

5 Before Tan stepped down as President, he was given the following share options ("Share Options") and share awards ("Share Awards") (collectively, "Share Benefits"):

Grant	**Share Options**	**No. of**	**Expiry Date of**

[1] 1AB 72–88; 138–159, 235–252; 12/3/21 NE 24.

[2] 10/3/21 NE 80–81; 12/3/21 NE 89–93 19/5/21 NE 54–55.

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No.	Grant Date	Options	Share Options
8	14 September 2012	50,000	13 September 2017
9	16 September 2013	60,000	15 September 2018
10	3 April 2014	60,000	2 April 2019
G1	16 June 2015	60,000	15 June 2020

Grant	Share Awards Grant Date	No. of Shares	Release Schedule
RSP	18 May 2012	30,000	18 May 2017
RSP	15 May 2013	20,000	15 May 2018
RSP	26 May 2014	20,000	26 May 2019
RSP	5 June 2015	20,000	5 June 2020

6 Tan claims that he retired and ceased to be employed by Venture when he stepped down as President and was then re-employed as Advisor. Upon cessation of his employment in January 2016, the Share Benefits lapsed by virtue of rule 7.2(b) of ESOS Rules and rule 6.2(b) of RSP Rules; however the terms of his re-employment as Advisor contained in a document ("SB Letter"), which Tan claims supplements his contract as Advisor ("Advisor Contract"), provided for the restoration of his Share Benefits.[3] Venture claims Tan did not retire or cease employment when he ceased to be President but continued in Venture's employ in the role of Advisor, and the Share Benefits continued to accrue to him. Venture also disputes that Tan can rely on the SB Letter.[4]

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3 10/3/21 NE 112; 12/3/21 NE 69–71; 20/5/21 NE 1–2.

4 10/3/21 NE 69, 71–72, 99; 12/3/21 NE 68; 18/5/21 NE 16–17, 25, 27, 30, 37; 19/5/21 NE 56, 58–59; Defence & Counterclaim (Amendment No. 1) ("Defence") at [11(j)].

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7 On 20 January 2016, Wong Ngit Liong ("Wong"), Venture's Chairman and Chief Executive Officer ("CEO"), handed Tan the Advisor Contract dated 20 January 2016 signed by Wong. Tan claims that at the same time he was handed the SB Letter dated 20 January 2016 and which was signed by Sita Lim ("Sita"), the head (or "CHRO") of the human resource department ("HR"). Venture claims that the SB Letter only came into existence in February 2016.

8 The Advisor Contract states as follows:[5]

> This is to confirm your retirement from the post of President of [Venture] as of 31 January 2016.
>
> As discussed, you are eligible and wish for re-employment after your said retirement.
>
> …
>
> Based on our several discussions, I would like to appoint you as Advisor to the CEO … This appointment is for a period of 3 years (with effect from 1 Feb 2016) …

The Advisor Contract further states that the terms and conditions are set out in an Addendum attached to it ("the Addendum"). The Addendum states that Tan "continue[s] to be eligible" to "share benefits" and is "[e]ligible to participate in … the [ESOS], subject to the terms and conditions of the … Scheme."

9 The SB Letter states as follows:[6]

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5 2AB 636–638.

6 2AB 639–640.

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> We refer to the share options which have been granted to you under the [ESOS and RSP].
>
> We further refer to our discussions about your retirement from employment with [Venture] on **31 January 2016** and re-employment from **1 February 2016**.
>
> The terms of the [ESOS] provide that unexercised share options shall lapse upon the retirement of the employee. Similarly, under the terms of the RSP, the Awards which have yet to vest and be settled, shall also lapse upon the employee's retirement.
>
> The [RC] administering the [ESOS and RSP] may however determine otherwise and has assented to (i) permitting the share options granted to be exercised by you with the respective Exercise Periods (as defined in the terms of the [ESOS]); and (ii) the Awards vesting and being settled according to the Release Schedule (as defined in the terms of the [RSP]). This is however subject to your entering into the [Advisor Contract] dated 20 January 2016 offered to you and this letter is supplemental to the terms of the [Advisor Contract]. ***This determination shall prevail even upon the cessation of the Re-employment contract except in the event of dismissal for misconduct.*** The unexercised share options granted and Awards made to you are attached as Appendix A.
>
> …
>
> [emphasis in original in bold; emphasis added in bold italics]

The SB Letter sets out the Share Benefits (as per the tables at [5] above). I will refer to the paragraph on the RC's determination as "Para 4 of the SB Letter", the sentence in bold in that paragraph as the "Clause in the SB Letter", and the RC's determination in that Clause as the "Purported Determination".

10 On 1 August 2016, Tan tendered his resignation ("Resignation Notice") as Advisor and left Venture on 31 January 2017. It is undisputed that this was a termination by him of his employment and not a "retirement".[7] Tan then exercised the Share Option under Grant 8 for 50,000 shares in two tranches of

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7 10/3/21 NE 164–165.

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25,000 shares each around 28 September 2016 and 9 January 2017, and received the shares around 6 October 2016 and 16 January 2017 respectively.[8] On 23 January 2017, Tan was informed that the RC had decided not to allow him to retain the Share Benefits. Nevertheless, on 28 March 2017, Tan proceeded to exercise the Share Option for 25,000 of the 60,000 shares under Grant 9 but this was rejected by Venture.[9] Tan then commenced the Suit to claim the remaining Share Benefits.

Plaintiff's case

11 Tan attested as follows. As President of Venture, Tan had oversight of all units/departments including HR, finance, legal ("Legal") and corporate secretarial. He reported to Wong. One Angeline Khoo ("Angeline") was head of Legal. Whilst Sita and Angeline officially reported to Tan as President, they principally took instructions from Wong; in particular, the CHRO reported directly to Wong regarding share benefits.[10]

12 In September 2015, Wong and Tan discussed Tan's re-employment as Advisor after his retirement. Wong assured Tan that his current terms of employment including his share benefits would not change and told Tan to speak to Sita about the share benefits. Tan then informed Sita that Wong had said that he could retain his share benefits upon his retirement and re-employment. Sita said that he would speak to Angeline on how to effect this.[11]

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8 Statement of Claim (Amendment No. 1) ("SOC") at [19]; Tan's AEIC at [57], [95]–[98]; Rosalind Lee's AEIC at [26] and [32]; Table on ESOS Share Options and RSP Awards dated 24 May 2021 ("ESOS and RSP Table"); 10/3/21 NE 116; 12/3/21 NE 3–4; 2AB 772–774, 779–781.

9 SOC at [20]; Tan's AEIC at [61]–[62]; ESOS and RSP Table.

10 Tan's AEIC at [19]–[20].

11 Tan's AEIC at [47]–[48].

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13 On 20 January 2016, Tan met Wong and Sita at Venture's conference room ("20/1/16 Meeting"). Tan was handed both the Advisor Contract and SB Letter as comprising his re-employment terms. Tan signed the Advisor Contract and returned it to Wong on 21 January 2016. He only signed the SB Letter in duplicate, and handed a copy to Sita, on 15 February 2016.[12]

14 After Tan exercised the Share Option under Grant 8 and received 50,000 shares, Sita informed him on 23 January 2017 that his share entitlement had been discussed at an RC meeting and the RC was not in favour of allowing him to exercise the remaining Share Options or retain his entitlement to the unreleased Share Awards. Tan was upset as it contradicted the SB Letter.[13] When Tan attempted to exercise his Share Option under Grant 9 for 25,000 shares, Sita informed him that Venture would reject this exercise and asked him to appeal to Wong. On 6 April 2017, Tan wrote to Sita for the 25,000 shares to be issued to him and refuted the need to appeal as the RC had agreed to allow him to exercise the Share Options as per the SB Letter ("Tan's 6/4/17 Letter").[14]

15 Tan then met Wong and Koh Lee Boon ("Koh") on 24 May 2017 ("24/5/17 Meeting"). Koh is the RC Chairman and an independent non-executive director of Venture. Tan informed them that he had acted based on the SB Letter. Wong and Koh said that they would discuss the matter and give him a reply. On 24 July 2017, Koh emailed Tan to state that at the 24/5/17 Meeting, he and Wong had concluded that Venture had no authority to vary the ESOS and RSP Rules, hence, it was unable to consider an appeal on Tan's part that would breach the Rules ("Koh's 24/7/17 Email"). Koh stated that Venture

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12 Tan's AEIC at [53], [56].

13 Tan's AEIC at [61].

14 Tan's AEIC at [62]–[63] and pp 675–677.

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was prepared to receive a proposal from Tan that would not breach the Rules.[15] On 18 August 2017, Tan emailed Koh to ask that his case be reconsidered ("Tan's 18/8/17 Email"). On 8 September 2017, Wong emailed Tan to repeat Venture's earlier position and that it was unable to consider his appeal as that would result in a breach of the ESOS and RSP Rules.[16]

16 Tan's lawyers ("TRC") then issued a letter of demand on 5 March 2018 to Venture ("Demand Letter"). On 13 April 2018, Venture's then lawyers ("WongP") replied to say that: (a) Tan received the SB Letter on 15 February 2016 and that it was falsely backdated to 20 January 2016; (b) the remaining Share Benefits lapsed when Tan tendered the Resignation Notice; (c) the RC had not made the Purported Determination; and (d) Tan had exercised the Share Option under Grant 8 by falsely representing to Venture that it had not lapsed.[17]

Defendant's case

17 Venture's factual witnesses were Wong, Koh, Sita and Rosalind Lee who is the manager of HR ("Rosalind"). I will deal with Rosalind's testimony in my findings and set out the testimony of the other witnesses here.

Testimony of Wong and Koh

18 Tan, as President of Venture, reported to Wong who is the Chairman of Venture's board of directors and its CEO.

19 Wong attested that around end 2015, he offered to re-employ Tan as Advisor. At the 20/1/16 Meeting, Wong handed Tan the Advisor Contact to

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15 Tan's AEIC at [72] and p 733.

16 Tan's AEIC at [72], [74]–[75] and pp 734–735.

17 Tan's AEIC at [77]–[78]; 3AB 829–833; 851–853.

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define Tan's role as Advisor and which included the terms and conditions of his continued employment. Tan accepted the offer by signing the Advisor Contract in Wong's presence on 21 January 2016 and returning it to Wong. Tan's re-employment terms as Advisor were contained in the Advisor Contract. At that time, the SB Letter did not exist and Tan did not mention it.[18]

20 On 23 February 2016, the RC met and Koh, Wong and Angeline (who was also the company secretary) were present ("23/2/16 RC Meeting"). Koh attested that the RC was updated on employees (including Tan) who had reached retirement age but continued in Venture's employ and who would be permitted to enjoy their share benefits. That Tan continued to be entitled to his Share Benefits was reflected in the Advisor Contract.[19]

21 Wong stated that when Tan tendered the Resignation Notice, his Share Benefits lapsed immediately under the ESOS and RSP Rules. On 23 January 2017, the RC deliberated on Tan's entitlement to his Share Benefits ("23/1/17 RC Meeting") and decided that share benefits granted to an employee would lapse on the date of his resignation notice. Koh stated that the RC did not exercise its discretion to make an exception in Tan's case.[20] The RC and Venture had no power to determine that Tan could continue to be entitled to his Share Benefits even if he resigned, by virtue of rule 7.2(b) of the ESOS Rules and rule 6.2(b) of the RSP Rules. The ESOS and RSP Rules also provide that the Rules and the ESOS and RSP terms cannot be altered to a participant's advantage

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18 Wong's AEIC at [85]–[86], [88], [97], [110]–[113].

19 Koh's AEIC at [22]–[25].

20 Wong's AEIC at [98]–[99]; Koh's AEIC at [33]–[35].

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except with shareholders' prior approval. Hence, Tan would have known that his Share Benefits lapsed when he tendered the Resignation Notice.[21]

22 Wong stated that after that meeting, Sita told Wong that he had informed Tan of the RC's decision. Hence, Tan would have known then that the RC had regarded all his Share Benefits as lapsed at the date of the Resignation Notice.[22]

23 Wong first found out about the SB Letter on 6 April 2017, when Sita handed him a note to explain Tan's attempt to exercise his share options ("Sita's Note"). Sita's Note attached Tan's 6/4/17 Letter and the SB Letter.[23] Koh first had sight of the SB Letter only around April 2017 when Wong showed it to him. Koh then approached other RC members who confirmed that they had never seen the SB Letter. Koh stated that the RC never made the Purported Determination as it would have been contrary to the ESOS and RSP Rules.[24]

24 Koh explained that the 24/5/17 Meeting was a result of Wong's suggestion to Koh to meet Tan to find out more about the SB Letter and Tan's request to exercise the Share Option under Grant 9.[25] At the meeting, Tan requested to be allowed to exercise his unexercised Share Options. Wong and Koh informed Tan that Venture did not have the authority to vary the ESOS and RSP Rules and was unable to consider Tan's appeal that would breach the Rules. Koh's 24/7/17 Email subsequently noted what transpired at this meeting.

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21 Koh's AEIC at [26]–[32] and [57].

22 Wong's AEIC at [100]–[102].

23 Wong's AEIC at [105]–[106]; 18/5/21 NE 145, 158.

24 Koh's AEIC at [36]–[41]; 19/5/21 NE 138.

25 Koh's AEIC at [49]–[51]; 19/5/21 NE 135–136.

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25 Koh then received Tan's 18/8/17 Email where Tan asked to be allowed to exercise his unexercised Share Options and to keep the 50,000 shares under Grant 8, but Tan did not ask for the Share Awards which had not vested when he resigned. Hence, Tan knew that the SB Letter had no effect and that he could not keep the Share Benefits which lapsed when he resigned. In August 2017, the RC and Wong discovered that Venture had issued Tan 50,000 shares pursuant to Tan's exercise of the share option that should not have been done.[26]

26 In May 2019, Venture terminated Angeline's employment for her involvement in the preparation of the SB Letter. Angeline would have known that the RC did not make the Purported Determination as she was the company secretary who took minutes of all RC meetings.[27]

Sita's testimony

27 Sita joined Venture as the CHRO on 1 September 2014. He reported to and took instructions from Tan when Tan was the President.[28]

28 In January 2016, Wong informed Sita that Tan would continue to work for Venture as Advisor to the CEO, and that Tan's terms of employment would otherwise remain the same. Wong would prepare the letter regarding Tan's re-employment (the Advisor Contract) and instructed Sita to prepare the Addendum to it which Sita did.[29]

29 On 21 January 2016, Wong's personal assistant handed Sita a copy of

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26 Koh's AEIC at [52]–[56]; Wong's AEIC at [139]–[142].

27 Wong's AEIC at [154]–[155].

28 Sita's AEIC at [4], [19]–[22]; Wong's AEIC at [57].

29 Sita's AEIC at [33]–[37].

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the Advisor Contract which had been signed by Wong and Tan. On 25 January 2016, Wong and Sita signed a spreadsheet which set out Tan's entitlement to the Share Benefits ("PB1"). On 25 January 2016, after signing PB1, Sita asked Rosalind to prepare a letter to inform Tan of the share benefits that he would continue to be entitled to after 31 January 2016. As Tan was the first employee to work past retirement age who had been granted share awards under the RSP, Sita asked Rosalind to check with Angeline on the suitable language to address Tan's Share Awards.[30]

30 On 27 January 2016, Rosalind emailed a draft letter to Angeline on the restoration of Tan's Share Benefits ("Rosalind's Draft") and asked Angeline to review the draft and to include and deal with Tan's accrued Share Awards. Angeline emailed a revised draft to Rosalind on the same day ("Angeline's Draft"). Both drafts were dated 25 January 2016 and the title of Angeline's emails was "Tan Kian Seng_normal expiry date_".[31] Angeline's Draft was worded differently from Rosalind's Draft, and was very similar to what would become the SB Letter. Pertinently, Angeline's Draft included what was essentially Para 4 of the SB Letter, but without the Clause. Sita attested that this was the first time the phrasing of Para 4 of the SB Letter came about. Sita did not question Angeline on whether the RC had assented to the matters as reflected in Angeline's Draft. This would have been within her knowledge given that she attended RC meetings and took minutes as the company secretary.[32]

31 Around 27 or 28 January 2016, Sita handed a copy of Angeline's Draft

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30 Sita's AEIC at [40]–[46]; Plaintiff's Bundle of Documents (Disputed as to Authenticity by the Plaintiff) ("PB") – PB 1.

31 Sita's AEIC at [47]–[49] and exhibits SL-41 and SL-42; PB 4, 8.

32 21/5/21 NE 56; Sita's AEIC at [55]–[56].

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to Tan. Tan asked Sita what would happen to his Share Benefits if he resigned as Advisor, as Angeline's Draft did not deal with this. Sita said that they would lapse. Tan disagreed with this position and informed Sita that he should be allowed to keep his Share Benefits even if he left Venture completely as with past practice, and told Sita to check with Angeline on this position. Sita accepted Tan's word as Tan had been with Venture for many years and in charge of HR. Tan was also a member of Venture's Executive Committee which recommends to the RC on employees who should be granted share benefits.[33]

32 Sita then told Angeline what Tan had said. Angeline replied that she would reply to him with a re-draft of the letter. When Sita did not hear from Angeline, he emailed Rosalind on 2 February 2016 to ask if the letter for Tan was ready ("Sita's 2/2/16 Email"). In that email, Sita said, "Letter done? Don't want to owe [Tan] on this."[34] Rosalind then informed Sita that Angeline had not replied with a revised draft. On 12 February 2016, Rosalind again informed Sita that Angeline had not given her a revised draft whereupon Sita called Angeline and informed her that to move matters forward, she could dictate the amendments to be made to Angeline's Draft. Whilst on the phone, Angeline dictated the amendments, namely the addition of the Clause in the SB Letter, which Sita typed into Angeline's Draft at Rosalind's computer.[35]

33 On 12 February 2016, Sita finalised the SB Letter and backdated it to 20 January 2016 to follow the date of the Advisor Contract. On Monday, 15 February 2016, Sita signed two copies of the SB Letter, then called Tan to hand them to him whereupon Tan signed the two copies, dated them 15 February

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33 Sita's AEIC at [13], [57]–[61]; 21/5/21 NE 8.

34 Sita's AEIC at [64]–[66] and exhibit SL-43; PB 31; 21/5/21 NE 14.

35 Sita's AEIC at [67]–[73]; 21/5/21 NE 14.

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2016, and handed one copy to Sita.[36]

34 At the 23/1/17 RC Meeting, Sita updated the RC on employees who had been allowed to continue to enjoy their share benefits in 2016 which included Tan. Tan's Share Benefits had lapsed when he tendered the Resignation Notice. The RC decided that Tan should not be allowed to keep his unexercised Share Benefits. After that meeting, Wong told Sita to inform Tan of the RC's decision. At that time, Sita did not inform the RC or Wong about the SB Letter or that Tan had exercised the Share Option for 50,000 shares.[37]

35 Sita then called Tan to inform him that his Share Benefits had lapsed given his resignation. He also told Tan that if the SB Letter suggested otherwise, it was incorrect and he should not have given that document to Tan. Tan disagreed with Sita. On 28 March 2017, Tan tried to exercise his Share Option by submitting an Option Form. Sita brought the matter to Wong's attention, but again did not inform him about the SB Letter. Sita then called Tan and apologised to him as he had made a gross mistake in giving him the SB Letter. He further told Tan that as his Share Benefits had lapsed, he should consider appealing to Wong or the RC.[38]

36 On the same day Sita received Tan's 6/4/17 Letter, he prepared Sita's Note to inform Wong about the SB Letter. Sita also called Tan again to say that he had made a gross mistake in issuing the SB Letter and that Tan should ask the RC to allow him to keep the Share Benefits. He did not hear from Tan

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36 Sita's AEIC at [75]–[79].

37 Sita's AEIC at [84]–[89].

38 Sita's AEIC at [90]–[96].

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thereafter.[39]

37 Essentially Sita had only created the SB Letter on 12 February 2016. He did not have the authority to make any representations contained in the SB Letter (in particular, the Clause in the SB Letter) – Tan knew of this as he was responsible for overseeing HR and also knew that Sita did not have authority to override the ESOS and RSP Rules. Sita admitted to his mistake in not having checked with Wong on the Clause in the SB Letter at the material time.[40]

Parties' respective causes of action

38 Tan claims that Venture has breached his re-employment contract (which comprised the Advisor Contract and SB Letter) by failing to confer on him the Share Benefits. The RC had made the Purported Determination that Tan would retain the Share Benefits accrued to him, before he stepped down as President, even on cessation of his re-employment as Advisor (save for a dismissal for misconduct).[41]Alternatively, Venture (through Sita) had represented to Tan his entitlement to the Share Benefits by the Clause in the SB Letter and he was induced to enter into the re-employment contract based on this representation and duly signed the Advisor Contract and SB Letter.[42]

39 Venture claims that Tan's re-employment was governed by the Advisor Contract alone and the SB Letter did not exist on 20 January 2016. Even if Tan received the SB Letter on 15 February 2016, it could not constitute further terms of his re-employment. All the terms of re-employment had been agreed between

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39 Sita's AEIC at [97]–[101], and pp 121–138.

40 Sita's AEIC at [104]–[106]; 21/5/21 NE 31–32.

41 Tan's AEIC at [38]; 10/3/21 NE 59.

42 SOC at [25] read with [16].

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Wong and Tan and set out in the Advisor Contract. Tan did not give any consideration for the SB Letter as he commenced work as Advisor before accepting the SB Letter. Further, Sita had no authority to decide on Tan's re-employment terms and Tan would have known that the RC had not made the Purported Determination. Hence, the SB Letter was void or voidable (including on the ground of mistake) and unenforceable and there were no representations from Venture that Tan could have relied on.[43]

40 Venture asserts that Tan had made false representations and defrauded it. By signing the SB Letter, Tan knowingly participated in the creation of a false document. By purporting to exercise the lapsed Share Options, Tan had falsely misrepresented that he was still entitled to them. Venture was thus induced by his representations into issuing 50,000 shares to him. It claims against Tan for fraudulent misrepresentation, breach of contract and unjust enrichment as Tan had benefitted from the issued shares, and also that Tan had breached his fiduciary duties and his duty to act in good faith and of fidelity.[44]

Preliminary issues

41 I begin with some preliminary issues.

42 Contrary to Tan's claim that Legal and HR reported directly to Wong, I find that all the departments reported to Tan and was under his charge when he was Venture's President. This was attested to by Wong, which I accept. As President, Tan was first among equals and the most senior executive just below Wong.[45] Venture's public announcement in 2011 of Tan's appointment as

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43 Defence at [11]–[15]; Wong's AEIC at [111]–[116], [120]–[121]; Koh's AEIC at [43].

44 Defence at [40]–[50], [54]–[57]; Wong's AEIC at [135]; Koh's AEIC at [45]–[47].

45 Wong's AEIC at [55]–[58]; 10/3/21 NE 37.

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President stated that Tan would have oversight of Venture's corporate and administrative support services including HR. In court, Tan admitted on numerous occasions that, as President, the heads of HR and Legal in fact reported to him and he had oversight of the departments.[46] Sita likewise stated that he reported to Tan whilst Tan was President, and this was reflected in his employment contract as CHRO which Tan signed.[47]

43 Next, it is undisputed that the RC is responsible for administering the Share Schemes, including determining the share benefits to be conferred on an eligible employee; and that the CHRO or Sita had no such authority or power. Where any accrued share benefit of an employee lapses under the circumstances mentioned in the ESOS or RSP Rules, the RC has the discretion whether to preserve the benefit for the employee and it must exercise its powers within the confines of the Rules.[48] Tan was familiar with, and knew that his entitlement to share benefits was subject to, the ESOS and RSP Rules.[49]

44 Finally, by a resolution dated 23 April 2015 ("the Resolution"), the RC had delegated its function to the CEO and CHRO jointly to review and exercise the RC's discretion under rules 7.3(aa) and 7.3(bb) of the ESOS Rules in a case where an employee "ceases" to be employed by reason of: (a) ill health, injury, accident or disability; (b) redundancy; or (c) "retirement at or after [Venture's] retirement age".[50] Tan's resignation from Venture (as Advisor) did not engage the Resolution, as it was not a cessation of employment in any of those

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46 1AB 175; 10/3/21 NE 16–18, 25, 30–31, 137, 146–147; 11/3/21 NE 111.

47 Sita's AEIC at [19]–[22]; 1AB 265–268.

48 Tan's AEIC at [33]; 10/3/21 NE 50–51; 18/5/21 NE 66–68.

49 10/3/21 NE 12, 19–20, 43–56, 140; 11/3/21 NE 111–112.

50 2AB 495–496; Koh's AEIC at [57].

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circumstances. Tan "retired" after Venture's retirement age when he stepped down *as President*; there was no further "retirement" as such when he ceased to be *Advisor*. Hence, the CEO and CHRO could not exercise their powers under the Resolution pertaining to the Share Options when Tan tendered the Resignation Notice. The Resolution also does not apply to share awards.

Agreement between Wong and Tan on Tan's re-employment as Advisor

45 It is undisputed that there were discussions between Wong and Tan before 20 January 2016, pertaining to Tan's future after he stepped down as President.[51] In this regard, I use the term "re-employ" and "re-employment" to describe Tan stepping down as President and assuming the role of Advisor. Whether Tan's retirement as President on 31 January 2016 constituted a "cessation" of employment in Venture such as to engage the ESOS and RSP Rules (which provides for the automatic lapsing of accrued share benefits unless the RC determines otherwise) will be determined later.

46 Tan agreed that his terms of employment, and re-employment as Advisor, could only be decided and were determined by Wong, even if the details were to be sorted out by someone else such as HR; and that Sita/CHRO had no authority to determine Tan's re-employment terms including his benefits. As President, Tan was the most senior executive below Wong; and Tan agreed that from the time he was employed as general manager of Venture Malaysia in 2001 to his promotion as CFO and then President of Venture, Wong dealt with his employment terms.[52] Wong similarly attested that he hired Tan as Advisor and set out all the terms for this role in the Advisor Contract; and there

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51 Tan's AEIC at [47]; Wong's AEIC at [85]; 18/5/21 NE 5–6, 11, 103–104; 19/5/21 NE 75–76.

52 10/3/21 NE 10, 14–15, 113–114; 11/3/21 NE 22, 60–61; 2AB 666–668.

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was no delegation or the need for further negotiations with Sita who was then a relatively new employee and junior person in the corporate management rank.[53]

47 Next, it is common ground that Wong agreed that Tan would retain his Share Benefits already accrued when Tan *continued to be in Venture's employ* as Advisor. Wong explained that as Tan did not cease employment with Venture as he would continue in the role of Advisor, there was no change to Tan's Share Benefits. The Addendum to the Advisor Contract which Wong showed to Tan in January 2016 set out Tan's continuing entitlement to his accrued Share Benefits and Wong had informed Tan to obtain the details of these benefits from Sita as the records were kept with HR.[54]

48 Importantly, Tan agreed that there was no discussion with Wong let alone any agreement by Wong, that Tan would retain the Share Benefits after his *cessation of re-employment* with Venture.[55] In his affidavit of evidence-in-chief ("AEIC"), Tan merely stated that Wong had told him that he would be allowed to retain his Share Benefits upon his retirement and *re-employment* (as Advisor).[56] Tan admitted that what was agreed with Wong upon his re-employment was that he would retain the same employment benefits as when he was President, and not that he would receive more or better benefits or that his Share Benefits would continue to accrue even after he *ceased* to be Advisor or to be employed by Venture completely. In effect, even as President, there

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53 Wong's AEIC at [90].

54 Tan's AEIC at [47(d)]–[48]; 11/3/21 NE 7–8, 93; 12/3/21 NE 70; 18/5/21 NE 6–14.

55 11/3/21 NE 95.

56 Tan's AEIC at [48].

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was no term of employment that any outstanding share benefits would accrue even when Tan ceased to be in Venture's employ completely.[57]

49 Tan admitted that he had separately informed Sita and Angeline that he wanted his Share Benefits to continue to accrue even after cessation of re-employment as Advisor, which was *beyond* what was agreed by Wong; and that he conveyed to Sita and Angeline a different message from his conversation with Wong.[58] In a summary judgment application for the Suit, Tan attested that after the negotiations with Wong on his re-employment, he told Sita that he wanted his re-employment contract to include a term for him to continue to exercise any unexercised Share Options and to receive any unvested Share Awards "even after the cessation of" his re-employment contract, but he did not inform Sita as to whether Wong had agreed to such a term.[59]

50 In effect, Tan agreed that the term as encapsulated in the Clause in the SB Letter was never discussed between him and Wong or agreed to by Wong.[60]

Whether Tan ceased employment on 31 January 2016

51 I next deal with whether there was a cessation of employment for the purposes of engaging the ESOS and RSP Rules when Tan stepped down as President. It is undisputed that the retirement age in Venture is 62 years old and

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57 11/3/21 NE 95, 101–103.

58 11/3/21 NE 95–96.

59 Tan's affidavit dated 1 November 2018 at [31(b)] (Plaintiff's Bundle of Cause Papers, Vol 1 ("BCP1"), Tab 2); 11/3/21 NE 97–99; 12/3/21 NE 103–104.

60 12/3/21 NE 86–88.

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Tan reached that age in November 2015, but he did not then retire but remained as President until 31 January 2016.[61]

52 Mr Rajah SC submits that there was a "cessation" of employment on 31 January 2016; this is important to show that the SB Letter was given to Tan with the Advisor Contract to restore his accrued Share Benefits when he was re-employed (as per the agreement with Wong), as the Advisor Contract was silent on this and he would have lost his entitlement to the Share Benefits upon the cessation of employment.[62] If Tan did not cease employment when he changed roles from President to Advisor, the RC did not have to make a determination to restore his Share Benefits as they would not have lapsed.

53 On balance, I find that Venture had in fact treated Tan as having ceased employment on 31 January 2016 when he stepped down as President, and he was then re-hired on 1 February 2016 as Advisor.

54 First, Tan was given a new contract of re-employment, although his terms and benefits would remain the same as when he was President. The Advisor Contract was clear that Tan was "eligible and wish for re-employment" after his retirement. Wong's explanation, that there is no cessation of employment if an employee is re-hired,[63] does not make sense – an employee would only have to be *re*-hired if he had first ceased to be hired.

55 Second, Wong claimed that as Tan did not cease to work for Venture when he stepped down as President, his Share Benefits continued to accrue to

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61 10/3/21 NE 70.

62 10/3/21 NE 72; 18/5/21 NE 66; 20/5/21 NE 1–2.

63 18/5/21 NE 49.

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him *automatically without any action required* on Venture's or the RC's part to restore them to him. Koh confirmed the same.[64] But the evidence showed otherwise.

56 A few days after the Advisor Contract was signed, Wong and Sita signed PB1 to approve Tan's Share Benefits be "restore[d]". PB1 stated that Tan's "reason for leaving" was his retirement. It also stated that his "official last day of employment" was 31 January 2016 and that this was an "event" under rule 7.3 of the ESOS Rules which must, in Tan's case, be an event either under rule 7.3(b) as Tan "ceases" to be employed by Venture, or under rule 7.3(d) as "any other event approved by the [RC]".

57 In approving the restoration of Tan's Share Benefits (upon Tan becoming Advisor), I find that Wong and Sita had partly relied on their authority under the Resolution (which pertained to share options), which is engaged only where an employee "ceases" to be in Venture's employ (see [44] above). I disbelieve that Wong did not sign PB1 pursuant to the Resolution, or that he signed it because Tan wanted to know his outstanding share benefits and Sita needed Wong's approval to release the information to Tan. As Tan was Venture's President and HR reported to him, he could have checked directly with HR or Sita. Indeed, Wong admitted that it was unnecessary to obtain his approval to release the information to Tan, and that he signed PB1 to approve the Share Benefits to continue to accrue to Tan.[65] Sita also attested that he had informed Wong that PB1 was to restore the Share Benefits, and that this process was followed for past cases where an employee retired and was re-employed.[66]

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64 18/5/21 NE 37–38, 52–53; 19/5/21 NE 106.

65 18/5/21 NE 75–77, 80, 82, 91–92.

66 21/5/21 NE 32–35.

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58 Then, at the 23/2/16 RC Meeting, Sita updated the RC on employees who had "ceased" employment due to retirement but whose share benefits would be restored as they "had been rehired under the re-hiring plan for those aged 62 and above". Sita presented a table of these employees, which included Tan whose Share Benefits were mentioned and which were stated to have been "restored" with the "reason for restoration" being Tan's "retirement". These were recorded in the minutes of meeting under the heading "Exceptions granted under [Venture's] share schemes". Koh attested that the decision as recorded in the Minutes was pursuant to the Resolution.[67]

59 Sita further explained that he had at the material time treated all such "retirement" cases as a "cessation" of employment, which meant that any outstanding share benefits would automatically lapse; and his standard process was to prepare a share benefit restoration letter to enable the benefits to continue to accrue when the employee was re-hired. This was similar for two other employees, Edward Kow ("Kow") and Han Jok Kwang ("Han"), who were also re-hired the day after they retired.[68]

60 Hence, Venture had treated Tan's retirement as President as a cessation of employment, and Tan then entered into a re-employment contract (the Advisor Contract) to be re-hired as Advisor. By virtue of rule 7.2 of the ESOS Rules and rule 6.2 of the RSP Rules, Tan's Share Benefits had lapsed automatically and that was why Venture had to and did take a considered decision to restore them when Tan was re-employed as Advisor. That there was no break in the day of work when Tan changed roles is neutral.

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67 PB 122, 167; 19/5/21 NE 115.

68 20/5/21 NE 10–12, 56–57, 62.

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When the SB Letter was handed to Tan

61 Next, Tan claims that the SB Letter was handed to him on 20 January 2016 because: (a) the Advisor Contract and SB Letter constituted all his terms of re-employment; and (b) his claim for the Share Benefits is based on the Clause in the SB Letter.[69] I find on the totality of the evidence that the SB Letter did not exist then and that it was handed to Tan only on 15 February 2016.

Tan's evidence on how he obtained the SB Letter and what he did with it

62 I turn first to Tan's own evidence and conduct, which showed Tan to have been less than honest about how the SB Letter came to be handed to him.

63 First, Tan was strangely silent, up until when he was cross-examined at trial, as to *who* had *handed* to him the SB Letter on 20 January 2016. This was not mentioned in his pleadings or further and better particulars – Tan had merely stated that it was the "Defendant" who had issued or provided the SB Letter to him on that day although it was signed by Sita.[70] Tan stated in his AEIC that he was shown the SB Letter at the 20/1/16 Meeting without mentioning *who* had shown it to him then. In addressing Venture's assertion that the SB Letter did not exist before 20 January 2016, Tan stated that he saw it before signing the Advisor Contract but did not further assert that Sita had given it to him on that day.[71] Likewise, Tan's Opening Statement for the trial and his affidavits filed in summary judgment applications did not mention that Sita had handed him the

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69 Tan's AEIC at [56].

70 SOC at [12(a)]; Further and Better Particulars by Tan dated 7 June 2019 at Request 2(d) and Answer thereto; Reply & Defence to Counterclaim (Amendment No. 1) ("Reply") at [4(a)] and [6].

71 Tan's AEIC at [51], [56], [106]–[107].

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SB Letter on 20 January 2016.[72] Whilst Tan stated in an affidavit that the SB Letter was "issued" by Sita on 20 January 2016, he did not say that Sita had *given it to him* on that day.[73] All these is despite the fact that Tan already knew by 13 April 2018 from WongP (see [16] above) of Venture's position that the SB Letter was only handed to him in February 2016, and that Sita had attested in the summary judgment applications that it was created after Tan had signed the Advisor Contract.[74] Indeed, TRC's reply to WongP on 19 April 2018 did not state that the SB Letter was given to Tan on 20 January 2016 or by Sita. When queried on this omission in TRC's letter, Tan could merely say that the letter was drafted by his lawyers.[75]

64 Even in Tan's 6/4/17 Letter, Tan did not remind Sita that it was Sita who gave him the SB Letter, or that it was given to him on 20 January 2016, and which constituted Sita's representation on Venture's behalf regarding the Share Benefits. Again, during the 24/5/17 Meeting, subsequent correspondence between Tan and Wong/Koh in July to September 2017, and even in the Demand Letter in March 2018, Tan did not say that the SB Letter was handed to him by Sita or on 20 January 2016.[76] One would have thought that, to reinforce his rights under the SB Letter, Tan would have taken the opportunity to remind Wong that Tan had received the SB Letter with the Advisor Contract

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72 Tan's affidavit dated 1 November 2018 at [31] (BCP1 Tab 2); Tan's affidavit dated 4 January 2019 at [11] (BCP1 Tab 6); Tan's affidavit dated 4 December 2018 at [10], [14]–[15] (BCP1 Tab 10).

73 Tan's affidavit dated 4 January 2019 at [13(c)] (BCP1 Tab 6).

74 3AB 851–853; Tan's affidavit dated 14 December 2018 at [14] and [15] (BCP1 Tab 10); Sita's affidavit dated 13 December 2018 at [14] (BCP1 Tab 4); Sita's affidavit dated 1 November 2018 at [23]–[24] (BCP1 Tab 9).

75 11/3/21 NE 53–54; 3AB 829–833, 851–853, 860–861.

76 Tan's AEIC at [72]; 3AB 819–827.

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on 20 January 2016 and that Wong would have known of the SB Letter then because he, Tan and Sita were in the conference room together.

65 It was only in cross-examination that Tan claimed Sita had handed him the SB Letter on 20 January 2016.[77] I inferred that Tan had kept silent on who had handed him the SB Letter on 20 January 2016 because Sita only gave it to him on a later date; and that Tan did not raise the SB Letter at the 24/5/17 Meeting because he knew that Wong did not know of its existence on 20 January 2016.

66 Second, Tan pleaded two versions of *when* the SB Letter was given to him. He first pleaded that it was on 20 January 2016, and some 18 months later he pleaded in the alternative that even if he received it on 15 February 2016, it would still constitute the terms of his re-employment.[78] Either Tan received the SB Letter on 20 January 2016 or on another date; because it was never his case that he could not recall when he received the SB Letter. He had consistently claimed to have received it on 20 January 2016, and he relied on it and the Advisor Contract as constituting all the terms of re-employment and to commence work as Advisor as he claimed to have obtained them together.

67 Third, it was strange that Tan only signed the SB Letter, and returned it to Sita, on 15 February 2016, although he purportedly received it with the Advisor Contract on 20 January 2016. Tan claimed that he read both documents on 20 January and was happy with all the terms and conditions therein.[79] He was quick to sign and return the Advisor Contract the very next day but omitted to

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77 11/3/21 NE 18.

78 SOC at [12(a)] and [12(b)].

79 11/3/21 NE 39.

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do the same with the SB Letter which he *signed* some *three weeks later* on 15 February and only because he was "reminded" by Sita (as he claimed). Tan could not satisfactorily explain why he did not even *sign* the SB Letter until 15 February 2016, merely claiming that he could not recall and it "[did not] strike [him] at that time". This was despite Tan being very concerned about his accrued Share Benefits during negotiations with Wong on his re-employment, so much so that he had separate conversations with HR (Sita) and Legal (Angeline) pertaining to them, and he claimed that the Advisor Contract was "not complete" as it did not deal with the retention of his Share Benefits.[80] I thus find that Tan signed the SB Letter only on 15 February 2016 because, as Sita attested, it was given to Tan on that date, and it did not exist on 20 January 2016.

68 In fact, Tan took inconsistent positions. In court, he claimed that Sita signed the SB Letter on 15 February 2016 (which cohered with Sita's testimony). However, in an affidavit filed for a summary judgment application, he claimed to have received on 20 January 2016 a copy signed by Sita – by making this assertion, I find that Tan was attempting to give the impression that he had received the SB Letter on that day.[81] Tan's change of position in court supports my finding that the SB Letter was not in existence on 20 January 2016. It would have been odd for Sita to hand to Tan an unsigned copy of the SB Letter on 20 January 2016, if that was Venture's offer (and representation) to Tan regarding the Share Benefits.

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80 11/3/21 NE 9, 40, 42–43; Tan's AEIC at [58]; Tan's affidavit dated 4 January 2019 at [12(a)] (BCP1 Tab 6).

81 11/3/21 NE 68–69; Tan's affidavit dated 1 November 2018, at [31(b)] (BCP1 Tab 2).

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Contents of SB Letter

69 Next, the contents of the SB Letter suggest that it could not have been handed to Tan on *20* January 2016, as it set out a table showing his entitlement to the Share Benefits accrued "as of *25* January 2016". I accept Sita's explanation that the letter was created only after 25 January 2016, because on 20 January 2016 no one could have predicted Tan's accrued share benefits on a future date, and that Tan could in the interim (between 20 and 25 January) exercise part of his entitlement which would have made the table in the SB Letter inaccurate.[82] I thus accept that Sita had initiated the preparation of a document on 25 January 2016 to set out Tan's entitlement to his accrued Share Benefits, after he had obtained Wong's approval on the same day via PB1 to restore them. This is corroborated by Rosalind who attested that she had extracted the information on Tan's Share Benefits as she prepared the draft on 25 January 2016.[83] Hence, Tan's Share Benefits in the SB Letter were stated to be "as of 25 January 2016".

Preparation of the SB Letter

70 Venture's employees also testified on the preparation of the SB Letter. I accept Sita's explanation as to how it came about and that the final version was handed to Tan on 15 February 2016 (see [29]–[33] above). I find Sita to be an honest and a credible witness. He readily admitted that he was wrong to have issued the SB Letter with the Clause in the SB Letter; and he explained that he was then a fairly new employee in Venture and he trusted Angeline who had drafted the wording of Para 4 of the SB Letter and the Clause as she was the

82 Sita's AEIC at [28]–[31].

83 Rosalind's AEIC at [12].

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head of Legal and the company secretary who attended the RC meetings.[84] I accept that the Clause in the SB Letter came about after Sita showed Tan an initial draft around 27 or 28 January 2016; and as Tan wanted to retain his Share Benefits even if he left Venture completely, the Clause was inserted to give effect to his directions. It is not disputed that Sita was not involved in the discussions between Wong and Tan on Tan's re-employment terms. Sita had acted on Tan's instructions because, even in January 2016, Tan was his boss.[85]

71 Whilst I am cognisant that Sita is Venture's employee, his testimony is supported by the documentary evidence. Various internal emails (particularly from HR and Legal), with the subject matter of the emails being "*Tan Kian Seng*", showed that there were *reiterations of drafts (of what would eventually be the SB Letter) even after* 20 January 2016 and in early February 2016, and before the final version was signed by Tan. This included Sita's 2/2/16 Email to ask Rosalind whether the SB Letter was ready because Sita "did not want to owe [Tan] on this" (see [30]–[32] above). I accept that these reiterations were done as a result of Sita's conversations with Tan and with Angeline, and Sita wanted to close the loop on the matter.[86] There would have been no reason for Venture to produce reiterations of a draft SB Letter after 20 January 2016 pertaining to "Tan Kian Seng", and for Sita's 2/2/16 Email, if Tan had received the SB Letter on 20 January 2016.

72 Further, there was no evidence that Para 4 of the SB Letter, in its final form, existed before 20 January 2016. Instead, the first time the draft SB Letter

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84 20/5/21 NE 23–26; 21/5/21 NE 31–32; Sita's AEIC at [56].

85 Sita's AEIC at [38]; 20/5/21 NE 70–71.

86 21/5/21 NE 52.

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came about, in a form very similar to what Tan signed (save that it did not contain the Clause), was in Angeline's Draft (see [30] above).

(a) Sita explained that the wording in Rosalind's Draft was lifted from a template used for Kow, when he retired on 5 December 2015 and was re-employed the next day.[87] On 6 December 2015, Venture issued Kow a letter ("Kow's Letter"), to allow him to continue to exercise his unexpired share options which would have lapsed automatically when he retired but for his re-employment. The phrasing of Kow's Letter was substantially the same as Rosalind's Draft, except that the latter included Tan's unreleased share awards under the RSP which Kow did not have.

(b) Angeline's Draft was worded substantially differently from Rosalind's Draft,[88] and was similar to the final SB Letter except that it did not contain the Clause in the SB Letter. As Sita attested, the Clause was inserted after Angeline dictated it to him over the phone.

(c) Subsequently, Sita used the final phrasing of Para 4 of the SB Letter (in Tan's SB Letter) in a letter of 17 February 2016 to restore Han's share options accrued when he retired on 31 March 2016 and was re-employed on 1 April 2016 ("Han's Letter").[89]

73 Rosalind corroborated Sita's evidence on how the SB Letter came about and cohered with Sita's evidence at [29] to [30] above as to what she did. She stated that around 27 January 2016, at Sita's instructions, she printed two copies of Angeline's Draft which Sita told her that he would sign and give to Tan, but

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87 21/5/21 NE 54–55; 2PB 15–17; PB 4–7 (also in Sita's AEIC at Exhibit SL-41).

88 24/5/21 NE 46.

89 21/5/21 NE 45, 58; 2PB 25–26.

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later that day, Sita informed her that Tan had rejected Angeline's Draft and further informed her that he would ask Angeline to send her a revised draft.[90] After Rosalind received Sita's 2/2/16 Email, she told Sita that she had not received a revised draft from Angeline whereupon she saved a copy of Angeline's Draft on her computer. The metadata of the document shows the creation of a version on 2 February 2016.[91] Rosalind then had another conversation with Sita on 12 February 2016 (see [32] above) and he informed her that the letter for Tan was long overdue. Sita then sat at her desk, called Angeline and amended the draft SB Letter there and then, and Rosalind then printed two copies and gave them to him. On 15 February 2016, Sita handed to Rosalind a signed copy of the SB Letter.[92] The images of documents extracted from Venture's computers showed a draft of the SB Letter was on 12 February modified and saved under "rosalind.lee".[93]

74 Likewise, whilst Rosalind is Venture's employee, I find her to be a credible witness. Even if, as Mr Rajah SC suggests (and which I do not accept), that it was Rosalind who had amended Angeline's Draft,[94] it is unlikely that she would have done so, or added the Clause in the SB Letter, on her own accord. More likely than not, it was Legal rather than HR who had given input on the wording of the SB Letter, including Para 4 of the SB Letter.

75 Pertinently, Sita's evidence as to how the final version of Tan's SB Letter came about was corroborated by Tan who admitted to having a separate

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90 Rosalind's AEIC at [9]–[17].

91 Rosalind's AEIC at [18]–[19]; PB 185.

92 Rosalind's AEIC at [20]–[23].

93 Gino Bello's first AEIC at exhibit GB-2 (Gino Bello's report at [17(e)]); PB 183–185.

94 21/5/21 NE 63.

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conversation with Sita and Angeline to extend his entitlement to his outstanding share benefits even after his cessation of re-employment with Venture, and which Tan admitted was never agreed to by Wong (see [48]–[50] above).

Events after Tan was told that he could not keep the Share Benefits

76 Next, Tan's conduct after he was informed on 23 January 2017 that the RC would not allow him to keep his Share Benefits is telling. Despite knowing the RC's decision, Tan did not at that time raise the matter with Wong or the RC although he claimed he had been wronged. Even when his attempt to exercise the Share Option under Grant 9 was rejected in March 2017, and Sita told Tan that he had made a gross mistake in issuing the SB Letter and that Tan should appeal to Wong, Tan did not approach Wong or the RC, but instead chose to write to *Sita* (via Tan's 6/4/17 Letter).[95]

77 I disbelieve that Tan had acted in that manner because he had always dealt with Sita pertaining to his Share Benefits and he did not see the need to appeal. He knew how the ESOS and RSP Rules worked, that only Wong could decide on his terms of re-employment including share benefits and that Sita could not override Wong's or the RC's determination. He also knew that when Sita told him to appeal to Wong, Sita was communicating Wong's message to him; that it was the RC (or where appropriate, its delegated authority) who had the discretion to decide whether share benefits that have lapsed could be restored; and that he could appeal to the RC on its decision.[96]

78 I agree with Mr Singh SC that Tan was reluctant to raise the matter directly with Wong or the RC, even to clarify his entitlement to the Share

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95 12/3/21 NE 14, 20, 26, 31–32.

96 12/3/21 NE 21, 30–40.

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Benefits *under the SB Letter*, because he wanted to avoid surfacing the SB Letter with them.[97] I inferred that this was because Tan knew that Wong did not know of the SB Letter as at 20 January 2016 (because it did not then exist and Tan knew that no such copy was handed to him on that date); knew that a draft of the SB Letter came about only after he had signed the Advisor Contract (see [31] above); and knew that the RC had never made the Purported Determination (see further at [80] to [81] below). I find that Tan had attempted to deal with Sita hoping that Sita/CHRO could resolve the matter, knowing that what was stated in the Clause in the SB Letter was never agreed with Wong as a term of his re-employment and he had on his own told Sita to include such a term.

79 My above finding is reinforced by Tan's conduct after the 24/5/17 Meeting. Apart from the email from Tan to Koh on 18 July 2017 that showed that Tan had mentioned the SB Letter to Koh and Wong at the 24/5/17 Meeting, Tan was careful not to raise the SB Letter in subsequent correspondence with them. Instead, on 4 August 2017 and in Tan's 18/8/17 Email, Tan chose to rely on the fact that he was still Venture's representative in China to appeal to Venture to reconsider its position on his Share Benefits.[98] Tan's explanation that he was attempting to take a "conciliatory" approach by not mentioning the SB Letter and wanting to avoid legal proceedings is unconvincing – it is unclear why he could not have reminded Wong and Koh of the SB Letter as part of his conciliatory approach, if the basis of his entitlement to the Share Benefits rests on Para 4 of the SB Letter. By this time, he was already being advised by lawyers.[99]

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97 12/3/21 NE 28, 50.

98 12/3/21 NE 50–53; 3AB 824–826; Tan's AEIC at [40].

99 12/3/21 NE 49–50, 53.

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Whether the RC had made the Purported Determination

80 I next deal with whether the RC had made the Purported Determination. I accept Koh's testimony that the RC itself did not, and that Koh and Wong did not know of the SB Letter until around April 2017. I also accept Sita's testimony that the RC was not aware of the SB Letter or its contents when it was prepared for Tan to sign.[100] At the 23/2/16 RC Meeting, the RC had only been updated of the CEO/CHRO's approval to restore Tan's accrued Share Benefits when he became Advisor (see [58] above). The Resolution was also not engaged when Tan ceased to be in Venture's employ by reason of his Resignation Notice, and PB1 did not go so far as to approve Tan's Share Benefits to accrue even after he resigned as Advisor and ceased employment with Venture completely.

81 I further find that Tan knew that the RC did not make the Purported Determination and he also could not rely on the Resolution for this purpose. Tan had informed Sita that Wong said he could retain his share benefits upon retirement and re-employment (see [12] above). As Sita attested, when he handed to Tan Angeline's Draft, he informed Tan that his Share Benefits would lapse when he resigned as Advisor. Hence, Tan knew at that time that the RC had not made any determination for Tan to retain his Share Benefits if he ceased to be Advisor and left Venture. Tan thus rejected Angeline's Draft. As I had found, Tan then unilaterally instructed Sita to include a term in his re-employment contract for his Share Benefits to continue to accrue even after he ceased re-employment as Advisor. In effect, it was Tan who procured from his subordinates (Sita and Angeline) the insertion of a term as reflected in the Clause in the SB Letter, contrary to his agreement with Wong on his re-employment terms. That Tan knew, when he signed the SB Letter, that the RC

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100 20/5/21 NE 69, 72.

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had not made the Purported Determination, is reinforced by his subsequent conduct of attempting to deal with Sita (rather than with Wong or Koh) to resolve the matter; his reluctance to raise the SB Letter with Wong and Koh when he was told that he could not keep the accrued Share Benefits upon his resignation; and his reluctance to state (until late in the day) that it was Sita who had purportedly handed the SB Letter to him on 20 January 2016.

Miscellaneous issues

82 I deal with some miscellaneous issues raised in relation to when the SB Letter was handed to Tan.

83 Whilst both parties had called digital forensics experts to opine on when the SB Letter could have first been created, I found their evidence unhelpful. Mr David Charles Rule (Tan's expert) could not conclusively determine when the SB Letter was created, although he opined that a draft was prepared based on a template.[101] Whilst Mr Gino Bello (Venture's expert) opined that the first time a draft of an SB Letter (quite similar to the version that Tan signed) could have been created was on 27 January 2016, he agreed that if some other earlier drafts of an SB Letter were provided to him, it could have affected his conclusion.[102] In any event, the experts could not opine positively that the SB Letter was created on or before 20 January 2016. In the absence of conclusive proof, my finding remains that the SB Letter did not exist as of 20 January 2016.

84 Next, I address various arguments that Mr Rajah SC raised to show that the SB Letter must have been given to Tan on 20 January 2016 and constituted part and parcel of Tan's terms of re-employment as Advisor.

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101 David Charles Rule's 1st AEIC at [6(c)], [6(d)] and [6(e)].

102 24/5/21 NE 32, 34, 82–84; PB 178–181.

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85 First, Mr Rajah SC submits that it made no sense for the SB Letter to state that the terms in Para 4 of the SB Letter was conditional on Tan entering into the Advisor Contract, if the SB Letter was only issued to Tan after 20 January 2016.[103] Also, the SB Letter bore the same date as the Advisor Contract. I find these to be neutral. As Sita stated (and which I accept), the SB Letter was backdated.[104] Pertinently, Tan only signed it on 15 February 2016. This is unlike Han who signed *both* his re-employment contract and Han's Letter on the same day, which was also the date on which he was issued both documents.

86 Second, Mr Rajah SC argues that the SB Letter was given to Tan together with the Advisor Contract as the former was intended to deal with Tan's Share Benefits which the latter was silent on, similar to Kow's and Han's cases where they were issued re-employment contracts and separate share benefit letters.[105] Even if Venture issued a separate document to deal with Tan's accrued Share Benefits upon his re-employment, it did not mean that it must have been given to Tan together with the Advisor Contract.

87 I accept Wong's position that the Addendum to the Advisor Contract (see [8] above), covered his agreement with Tan that Tan would retain his accrued Share Benefits when he became Advisor,[106] as the Addendum could be read in this manner. The Advisor Contract states that by signing the contract, Tan accepted "the terms and conditions as set out herein and in the Addendum". Wong had acted on his agreement as he signed PB1 shortly after Tan signed the Advisor Contract; and Sita followed through with an update at the 23/2/16 RC

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103 Plaintiff's Closing Submissions dated 2 August 2021 ("PCS") at [77(a)].

104 PCS at [81(c)].

105 PCS at [80]–[82].

106 18/5/21 NE 98–100, 104–106; Tan's AEIC at [48].

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Meeting of the decision to restore Tan's Share Benefits. Whilst it is arguable that Wong and Sita were not empowered under the Resolution to deal with share *awards*, Venture had adopted this position of restoring Tan's Share Benefits by its conduct (via Wong's agreement with Tan, by Wong signing PB1, and then an update to the RC which the RC did not dispute). Hence, it was not necessarily the case that the SB Letter must have been given to Tan with the Advisor Contract to supplement his re-employment terms pertaining to the Share Benefits. Even without the SB Letter, Venture has maintained that Tan's Share Benefits continued to accrue to him when he became Advisor. On the contrary, the Clause in the SB Letter went beyond what Wong had agreed with Tan for his re-employment and was procured by Tan on his own volition without Wong's knowledge or agreement.

88 Further, if Tan had received the SB Letter on 20 January 2016 with the RC having made the determinations as in Para 4 of the SB Letter, it would have been unnecessary for Wong and Sita to *subsequently* and *additionally* sign PB1 to restore Tan's Share Benefits on his re-employment.

89 Kow's and Han's cases do not support that Tan must have received the SB Letter together with the Advisor Contract. Kow's Letter was issued to Kow in December 2015, *after* he had accepted the re-employment contract in November 2015.[107] Pertinently, Kow's Letter did not contain a term similar to the Clause in the SB Letter. As for Han, he had signed his re-employment contract and Han's Letter on the same day, unlike Tan.

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[107] 2PB 1–14; 2PB 15–17; 20/5/21 NE 45–50.

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90 Whilst Sita agreed with Mr Rajah SC that Kow's Letter was "necessary" for Kow's share options to be restored when he was re-employed,[108] I find that Sita had misunderstood the effect of such a document. The restoration of an employee's outstanding share benefits can only be done by the RC or its delegated authority (*eg*, by the Resolution), and a document such as Kow's Letter or the SB Letter does not equate to such a determination made by the RC. As Sita explained, that Kow's Letter was issued only after Kow had signed his re-employment letter did not affect the restoration of his outstanding share benefits.[109] However, such a document may represent Venture's offer to confer to an employee a benefit pursuant to a determination that it has made. I will return to the issue of representation by the contents of the SB Letter later.

91 Sita explained that he prepared a document such as Kow's Letter, Han's Letter or Tan's SB Letter as a standard process when an employee is allowed to retain his accrued share benefits upon re-employment.[110] His evidence taken as whole showed that he had a standard operating procedure, namely, that the share restoration would first be approved by the relevant authority, then he would prepare a document such as Kow's Letter for the employee, and he would thereafter update the RC on any such restoration at an RC meeting.

92 As for Han's Letter, it does not show that Venture had *in fact* agreed to a term as in the Clause in the SB Letter. Sita had used the template from Tan's SB Letter to prepare Han's Letter (see [72] above) and thus Han's Letter contained a clause similar to the Clause in the SB Letter. Sita admitted that this was a mistake as no determination as stated therein was made by the RC; hence,

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108 20/5/21 NE 49; PCS at [81].

109 20/5/21 NE 50.

110 20/5/21 NE 54–55, 62.

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Han was issued a subsequent letter to correct the mistake and to supersede Han's Letter, which Han accepted.[111]

Tan's claims

93 Having made the above factual findings, I turn then to Tan's claims.

Breach of contract

94 Tan pleaded that both the Advisor Contract and SB Letter constituted his re-employment contract as he received them on 20 January 2016. Thus, Venture had breached his re-employment contract by failing to confer to him his remaining Share Benefits.[112] As I have found that the SB Letter was not given to Tan on 20 January 2016 or even before he commenced in his role as Advisor, his claim in this regard fails. Tan cannot rely on the Clause in the SB Letter to claim his Share Benefits when he tendered the Resignation Notice. Rule 7.2 of the ESOS Rules and rule 6.2 of the RSP Rules state that an employee is deemed to have ceased to be employed as of the date of notice of termination tendered by or given to him and any share option or award, to the extent unexercised or unreleased, would immediately lapse. This is reiterated in the Option Form such as the ones that Tan submitted when he exercised the Share Option under Grant 8 and which term Tan was cognisant of.[113]

95 Tan pleaded alternatively that even if he received the SB Letter on 15 February 2016, it constituted his contract of re-employment as Advisor; and that there was consideration given for the SB Letter as it was issued as part of a

111 2PB 27–28; 20/5/21 NE 63–64.

112 SOC at [12(a)], [19]–[24].

113 2AB 772–774; 2AB 779–781; 12/3/21 NE 3–5; 27/9/21 NE 1–2.

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"single contemporaneous transaction" (citing *Offshoreworks Global (L) Ltd v POSH Semco Pte Ltd* [2021] 1 SLR 27 ("*Offshoreworks*")).[114] Venture claims that the SB Letter is unenforceable as no consideration was provided for it.[115]

96 Even if Tan could maintain an alternative claim as such, I find that it fails. Tan started work as Advisor before he received the SB Letter and thus no consideration was given for the benefit (as per the Purported Determination and Clause in the SB Letter). In *Offshoreworks*, the Court of Appeal (at [40]) held:

> … what is crucial is the nexus between the act said to be consideration and the promise, and that the later act must be causally linked to the earlier promise. Therefore, the court's inquiry is whether, at the time of the earlier act, a later promise was contemplated or required. If so, that connects the earlier act to the subsequent promise and establishes that they are part of the same transaction … the courts look to the substance rather than the form of the transaction. Hence, what looks at first blush like past consideration will still pass legal muster if there is, in effect, a single (contemporaneous) transaction (the common understanding of the parties being that consideration would indeed be furnished at the time the promisor made his or her promise to the promisee) …

97 There was no such nexus here. There was no contemplation by Venture or Tan of any other promise to Tan, when Tan signed the Advisor Contract and commenced work as Advisor, particularly that his Share Benefits would continue to accrue *when he ceased to be Advisor or ceased employment with Venture completely*. This is clear even from Tan's evidence of what was agreed with Wong for Tan's re-employment, and which agreement was finalised before Tan received the Advisor Contract. Indeed, there is no evidence that *such a term (as per the Clause in the SB Letter) was a term of Tan's contract even as*

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114 SOC at [12(b)]; Plaintiff's Opening Statement at [18]; PCS at [137]–[139].

115 Defence at [13]; Defendant's Closing Submissions dated 5 August 2021 ("DCS") at [174]–[176].

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President (see [48] above). When Tan signed the Advisor Contract, there was no contemplation of an additional document to be prepared to set out any other contractual term or promise pertaining to Tan's Share Benefits. Wong stated that all the terms of Tan's re-employment including the retention of his Share Benefits were encapsulated in the Advisor Contract and Addendum, and which I had accepted. I reiterate my findings at [87] above.

98 Hence, even if Tan received the SB Letter after he started work as Advisor, it and particularly the Clause in the SB Letter would be unenforceable for lack of consideration. I reiterate that Kow's and Han's cases do not assist Tan. Kow's Letter did not contain any term over and beyond what Venture had agreed to. Han's Letter was superseded by another letter where Sita informed Han that the representation that his share benefits would continue to accrue on cessation of his re-employment was incorrect, and which Han had accepted.

99 Likewise, the case of *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 which Tan relies on,[116] does not assist him. The court found (at [59] and [63]) that both parties had contemplated that the basic terms of various email confirmations would be supplemented by a further set of standard terms; and that it was improbable given the size and scope of the subject matter of the contract that the parties would have expected to contract purely on the "bare bones" of the email confirmations. The court stated (at [51]) that whether a subsequent document could be incorporated as part of the contract can be ascertained by the parties' objective intentions. But this is not the case here, as I have explained at [48], [87] and [97] above.

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116 PCS at [105]–[108].

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Misrepresentation and negligent misstatement

100 I turn to Tan's alternative claims essentially under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act")[117] and negligent misstatement. Tan claims that the Clause in the SB Letter and Purported Determination were Venture's representation that his Share Benefits would continue to accrue even after he ceases to be Advisor ("the Representation") and claims that he was induced by the Representation to enter into the re-employment contract.[118]

101 Under s 2(1) of the Misrepresentation Act, the plaintiff has to show that the false representation made by the defendant has induced the plaintiff to enter into a contract with the defendant, and the plaintiff suffered a loss as a result thereof. As for the tort of negligent misstatement, the plaintiff must show the existence of a duty of care, and for such a duty of care to arise, it is necessary to show a special relationship between the parties (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [215]).

102 To reiterate, I found that Wong and the RC did not make the Representation at any time, and Tan knew this. Further, for there to be ostensible authority, there must be a representation by the principal (Venture) to Tan as to Sita's authority (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [48]; *Armagas Ltd v Mundogas SA* [1986] 1 AC 717 at 777). Venture did not authorise Sita to represent to Tan that the Share Benefits would continue to accrue even after cessation of his re-employment as Advisor, nor

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117 PCS at [158].

118 SOC at [16], [25], [27].

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represent to Tan that Sita had authority to make such representation. I also find that Tan would have known this and would have known that Sita had no such authority to do so. Tan agreed that Sita had no authority of his own to decide or inform Tan of what share benefits Tan was entitled to. Tan agreed that only Wong could determine his terms of re-employment. Tan claimed that he merely assumed that Sita was "probably verbally instructed" by Wong to issue the SB Letter containing the Representation, which I disbelieve.[119] As I had found, it was *Tan* who had procured from his subordinates (Sita and Angeline) the insertion of a term as reflected in the Clause in the SB Letter, and I reiterate my findings at [80] to [81] above. It must be remembered that Tan was Venture's President, and he was familiar with the ESOS and RSP Rules and with the scope of authority and responsibilities of Sita/CHRO.

103 Further, Tan knew that what was conveyed in the Clause in the SB Letter or the Representation was untrue, because it was Tan who had procured that representation by instructing his subordinates to insert such a term of benefit in the SB Letter. Hence, Tan could not be said to have relied on the representation *of Venture or Sita* in relation to the contents of the Clause in the SB Letter. It follows that Tan cannot be said to have been induced to enter into the re-employment contract by Venture's representation.

104 I also reject Tan's alternative case that the Representation was intended by Venture to influence Tan into entering his re-employment contract as Advisor,[120] as I had found that Tan had started work as Advisor before he received the SB Letter. Mr Rajah SC concedes that if the SB Letter was not provided to Tan before he signed the Advisor Contract on 21 January 2016, Tan

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119 11/3/21 NE 60.

120 SOC at [25(b)], [27(e)] and [27(g)].

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would not have been induced by the specific representations in the SB Letter.[121] Whilst he claims that Tan could nevertheless have been induced to enter into the Advisor Contract by Venture's representations made prior to 20 January 2016, there is no evidence of what other representations were made prior to this date to the effect that Tan's Share Benefits would continue to accrue even when he ceases to be Advisor or to be employed by Venture completely.

105 As such, Tan's claims in misrepresentation and in negligent misstatement (which contains a similar requirement of reliance as in misrepresentation – see *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [22]) are not made out.

Venture's defence of mistake

106 I deal here with Venture's defence that the SB Letter was void for unilateral mistake or voidable on the ground of equitable unilateral mistake and should be rescinded. Venture also pleads that if the Option Forms constituted a contract in which the 50,000 shares pursuant to Grant 8 were issued to Tan, then it was also void or voidable on the same grounds.[122]

107 For a claim in unilateral mistake to succeed, it must be proved that: (a) one party has made a mistake; (b) the mistake is a sufficiently important or fundamental mistake as to a term; and (c) the non-mistaken party has actual knowledge of the mistaken party's mistake. In a claim for equitable unilateral mistake, constructive knowledge with an element of impropriety ("sharp practice" or "unconscionable conduct") as opposed to actual knowledge is

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121 PCS at [140].

122 Defence at [15], [23] and [26]; DCS at [217]–[220].

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sufficient. (See *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [42] and [44].)

108 On the facts, I find the SB Letter to be void on the ground of unilateral mistake. Sita had issued the SB Letter containing the Purported Determination, when the RC had not made the Purported Determination. This was a sufficiently important or fundamental mistake as to a term dealing with a Purported Determination made on Tan's Share Benefits. Tan knew of this mistake, because he had instructed Sita to insert a term to enable him to retain his Share Benefits even when he ceased to be Advisor. He had conveyed to Sita and Angeline something different from what was agreed with Wong, and he knew that the CHRO/Sita had no authority of his own to come up with additional terms of his re-employment as Advisor (see *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [35]). Thus, when he submitted the Option Forms for the Share Option under Grant 8, he knew he was not entitled to the shares, and Venture's employees had relied on the Option Forms to release the shares to Tan in the mistaken belief that he was so entitled.

109 Even if Tan did not have actual knowledge of Venture's mistake, I find that a claim in equitable unilateral mistake is made out, as Tan would have had constructive knowledge and had acted unconscionably. He instructed Sita to add in a term to the SB Letter to retain his Share Benefits even when he ceased to be Advisor, well-knowing that this was never agreed with Wong. He did not bring to Venture's attention that the Clause in the SB Letter was a mistake when he knew that what was contained therein was not correct. Instead, he took advantage of the mistake by exercising the Share Option under Grant 8.

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110 Tan claimed that Venture has lost its right to rescind the SB Letter because of undue delay or affirmation on its part.[123] Mr Rajah SC also submits that at the 24/5/17 Meeting, Koh and Wong did not inform Tan that he had no basis to claim the Share Benefits because the SB Letter was not authorised; instead they told Tan that Venture could not vary the ESOS and RSP Rules and asked him to consider other options. Mr Rajah SC submits that it was only in its pleadings that Venture alleged that Sita had acted on a frolic of his own in issuing the SB Letter. Hence, Venture's defence in the Suit is an afterthought.[124]

111 I do not find there to be undue delay or affirmation on Venture's part or that its defence is an afterthought. Wong and Koh only discovered the SB Letter in April 2017 from Sita's Note, *after* Tan had obtained the 50,000 shares under Grant 8. At that time, Wong and Koh were not fully aware of how the SB Letter had come about, and Koh then went to check with the RC members on whether they had ever seen the document. Shortly after, they had the 24/5/17 Meeting to find out from Tan more about the SB Letter and his request to exercise the Share Option under Grant 9. At that meeting they informed Tan that Venture could not consider his appeal to retain his Share Benefits where it would breach the ESOS and RSP Rules and reiterated that position in subsequent correspondence.

112 The correspondence between Wong/Koh and Tan showed that Venture attempted to resolve the matter amicably with Tan, but it did not mean that Venture had accepted Tan's position in relation to the Clause in the SB Letter or the veracity of the SB Letter. On the contrary, Wong and Koh had consistently maintained that Venture could not accede to Tan's request to keep his Share Benefits after they had lapsed by virtue of Tan's resignation and where

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123 Reply at [4A] and [9A].

124 PCS at [49]–[50], [133] and Annex A.

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the RC had not made a determination otherwise. This position was maintained by Venture even in *January 2017* and conveyed to Tan then (see [14], [21] and [34] above), even *before* Wong and Koh first knew of Tan's SB Letter in April 2017. WongP's letter in April 2018, in response to the Demand Letter, had given Tan notice that he was not entitled to the 50,000 shares under Grant 8 and which Venture would be entitled to seek redress. Hence, in the early stages when the SB Letter was surfaced to Wong and Koh, it cannot be said that they had sufficient knowledge to affirm the SB Letter (which in any event they did not) nor did they communicate as such to Tan.

113 If at all, it is Tan who has been evasive and reluctant to reveal how the SB Letter, and particularly the Clause in the SB Letter, came about, although he was involved in procuring the final version of the SB Letter, whereas Wong and Koh were unaware of it until after the fact.

Venture's counterclaims

114 I turn to Venture's counterclaims.

Breach of contract

115 In response to Tan's claim of breach of contract by Venture, Venture pleads that Tan was not entitled to exercise the lapsed Share Options and that his exercise by signing the Option Forms for the Share Option under Grant 8 was a breach by Tan of his contract. Hence, Tan was not entitled to the 50,000 shares.[125] Venture submits that the contract for the issuance of the 50,000 shares to Tan was "contained in and/or evidenced by the [Option Forms] that [Tan] signed when he purported to exercise the 50,000 lapsed share options". Venture

[125] Defence at [11]–[12], [22]–[23], [45]–[47].

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relies on the Option Forms as the contractual document or as evidencing the contractual terms pertaining to the 50,000 shares, and which Tan also pleads as the agreement between him and Venture.[126]

116 I find that Tan's entitlement to exercise any Share Options (which mode of exercise was by submitting an Option Form) was premised on the terms of his re-employment contract (the Advisor Contract) which set out his entitlement to the Share Benefits so long as he remained employed as Advisor. Nevertheless, I find that Venture had sufficiently pleaded reliance on the Advisor Contract as constituting Tan's re-employment terms and pleaded that the SB Letter did not constitute any further terms of Tan's re-employment.

117 Given my earlier findings, particularly that the Share Benefits had lapsed by virtue of the Resignation Notice and that Tan could not rely on the SB Letter to show otherwise, Tan would have breached his re-employment contract when he exercised the Share Option for Grant 8. Even if the Option Forms constituted a separate agreement, Tan would have breached that agreement because he could not exercise the share options after tendering the Resignation Notice.

Fraudulent misrepresentation

118 Next, Venture claimed that Tan had defrauded it when he exercised the Share Option for Grant 8 and obtained 50,000 shares therein, knowing that his entitlement to the Share Benefits had lapsed by his resignation.[127] The elements of fraudulent misrepresentation are: (a) there must be a representation of fact; (b) the representation must be made with the intention that it should be acted on by the plaintiff; (c) the plaintiff had acted upon the false statement and suffered

126 DCS at [235]; Reply at [19].

127 Defence at [40]–[44]; DCS at [238].

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damage by so doing; and (d) the representation was made with the knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true: see *Panatron* at [14]. I find that the claim in fraudulent misrepresentation is made out.

119 Tan knew that his entitlement to any share benefits was subject to the ESOS and RSP Rules. He had falsely misrepresented to Venture that he was entitled to exercise the Share Option for 50,000 shares under Grant 8 when he submitted the Option Forms, knowing that his Share Benefits had lapsed on tendering the Resignation Notice. The "Note" in the Option Form clearly stated rule 7.2(b) of the ESOS Rules and that any share option granted would lapse and cannot be exercised if the employee ceased to be employed by Venture with such cessation taking place when he gives notice of resignation. Based on my earlier findings, Tan could not rely on the Clause in the SB Letter, knowing that Venture never made the Representation and that it was he who had procured a term as found in that Clause. Hence, Tan could not have honestly or genuinely believed in the truth of his representation to Venture that he was entitled to exercise the Share Option under Grant 8.

120 Mr Rajah SC submits that Venture did not issue the 50,000 shares in reliance on Tan's representations as they did not play a real or substantial part in the mind of Venture's employees when Venture issued the shares. Instead, Venture issued the shares after checking its own records that Tan was entitled to exercise the option. Rosalind attested that she had checked a spreadsheet pertaining to Tan's share benefits to see if they existed and were valid before she forwarded the Option Forms to Sita to check and approve the Forms.[128]

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128 PCS at [117], [188(c)]; 21/5/21 NE 65–66 and 68.

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121 A misrepresentation is actionable if it played a real and substantial part in the representee's decision to enter the contract. In *Panatron*, the Court of Appeal held at [23] that:

> The misrepresentations need not be the sole inducement … so long as they had played a real and substantial part and operated in [the representees'] minds, no matter how strong or how many were the other matters which played their part in inducing them to act and invest in Panatron …

Although the test for inducement only requires the representee to show that the misrepresentation was *an* (and not *the*) inducing cause, he has to prove that the misrepresentation was "actively present to his mind" (*Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [192]). The question of inducement is approached from the representor's perspective, whilst the question of reliance is approached from the representee's perspective (*Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [43]).

122 I find that Tan's representation by submitting the Option Forms, played a real and substantial part in Venture's decision to release the 50,000 shares to Tan and that Venture had relied on Tan's misrepresentation in this regard. Venture's employees would have relied on the Option Forms that Tan submitted, which Forms contained the "Note" (see [119] above) and a clause stating that the employee agrees to subscribe to the shares subject to the terms of Venture's offer letter and the ESOS, and which Tan had signed off on. Venture's employees would have been induced by Tan's representation as such even if it was not the only inducing cause.

123 Whilst Rosalind stated that she had checked a spreadsheet to verify whether Tan's share benefits existed and were valid, it is unclear what spreadsheet she was referring to. If it was PB1 (as Sita attested that Rosalind

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prepared that spreadsheet),[129] it merely shows the share benefits that accrued to Tan when he was re-employed and no more. In fact, Tan agreed that Rosalind would have acted on the basis of his representations made in the Option Forms that he was entitled to exercise the share options.[130] Hence, Rosalind would have relied on Tan's representation even if she had checked the spreadsheet.

124 Further, whilst Rosalind stated (in cross-examination) that after she handed the Option Forms to Sita, Sita had to "check it and approve it", it is unclear what Sita had checked against or whether he had to approve the Option Forms given that Mr Rajah SC did not raise this in Sita's cross-examination. Likewise, more likely than not, Sita had relied on the Option Forms that Tan submitted, and with knowledge of the Clause in the SB Letter in mind (which Clause was procured by Tan). When Tan submitted the Option Forms for the 50,000 shares, the veracity of the SB Letter was not yet in question because Wong/Koh did not then know of its existence and the RC had yet to meet and determine that Tan's Share Benefits that had lapsed (by virtue of the Resignation Notice) would not be restored.

125 Finally, I find that Venture had suffered damage when it released the 50,000 shares to Tan. When an employee exercises a share option, Venture would have to obtain the shares from somewhere and at its cost. As Wong attested, Venture has been deprived of the 50,000 shares that Tan wrongfully took, and if they are returned, Venture would keep them in the treasury which it could use to award to other employees under the RSP.[131]

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129 21/5/21 NE 32, 65, 68.

130 12/3/21 NE 9.

131 Wong's AEIC at [134].

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Unjust enrichment

126 Venture also claims restitution from Tan who has been unjustly enriched. Essentially Venture relies on mistake and failure of consideration as the unjust factors.[132] In a claim for unjust enrichment, the following elements have to be satisfied: (a) the defendant has been benefitted or been enriched; (b) the enrichment was at the claimant's expense; (c) the enrichment was unjust; and (d) there are no applicable defences (*Anna Wee* at [98]–[99]). Further, the Court of Appeal in *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 at [48] clarified that "consideration" or "basis" in the law of unjust enrichment refers to either: (a) the performance of a counter-promise, as distinguished from the counter-promise itself; or (b) a non-promissory contingent condition, *ie*, an expected event or state of affairs which neither party is responsible for bringing about. Hence, the inquiry of the unjust factor of failure of consideration or basis has two parts: first, what was the basis for the transfer in respect of which restitution is sought; and second, whether that basis has failed (*Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [48]–[49]).

127 I find that Venture succeeds in its claim for unjust enrichment. Based on my earlier findings, Venture released the 50,000 shares under Grant 8 to Tan on the mistaken premise that Tan was entitled to them. Further, Tan's entitlement to exercise his share option is premised on Tan not having resigned. When he tendered the Resignation Notice, the Share Benefits lapsed and Tan could not rely on the Clause in the SB Letter to show otherwise. I find also that there are no applicable defences that Tan can rely on. Contrary to Mr Rajah SC's

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132 Defence at [50]–[52] read with [12]–[30]; DCS at [257].

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submission that Tan did not know that he was not entitled to his unexercised share options after he resigned,[133] I had found that Tan did know this.

Summary of Venture's counterclaims

128 In the round, I find that Venture has made out a case for breach of contract, fraudulent misrepresentation, mistake and unjust enrichment. It is unnecessary for me to consider Venture's claim under s 2(1) of the Misrepresentation Act or for Tan's breaches of duties. Mr Singh SC submits that the loss suffered by Venture for a claim under s 2(1) of the Misrepresentation Act and for breaches of duty of good faith and fidelity are the same as the losses being claimed for breach of contract and fraudulent misrepresentation; and the damages it claims for Tan's breach of fiduciary duties are essentially the same as those for its claim for unjust enrichment.[134]

Remedies

129 Venture claims that based on Tan's breach of contract, fraudulent misrepresentation or mistake, Venture's loss is the cost to Venture of buying the 50,000 shares at their prevailing market rate, less the price that Tan paid for them. Venture submits that the market price should be what it would have to pay to buy it at any time within 30 days of the court's determination on the matter. As Tan has been unjustly enriched, Venture is also entitled to restitution of the benefits obtained by Tan, which further includes the profits of $74,035.30 that he made from selling 35,000 of the 50,000 shares.[135]

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133 PCS at [199].

134 DCS at [268]–[270]; 27/9/21 NE 15, 18–19.

135 DCS at [265]–[269]; Wong's AEIC at [134]; 27/9/21 NE 15–17; Defendant's Further Submisisons (21 October 2021) at [2].

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130 Mr Rajah SC submits that the date of assessment of damages in relation to fraudulent misrepresentation should be the market price at which Venture could have sold the shares at the time the shares were issued to Tan, less the price paid by Tan to Venture for them, citing *Platt v Platt* [1999] 2 BCLC 745 ("*Platt v Platt*").[136] Mr Ali (Tan's counsel) agrees that if there is unjust enrichment, Venture is entitled to the profit that Tan made on selling off the 35,000 shares, but this should take into account what Tan had paid as taxes (of $18,087.20) on acquiring the 50,000 shares from Venture.[137] Venture, submits that the taxes paid by Tan for the purchase of the 50,000 shares should be disregarded. As restitution focuses on the benefit that Tan obtained, Venture should be entitled to the restitution of all the benefits he had obtained.[138] Tan further confirmed that he still has 15,000 of the 50,000 shares issued to him and if Venture succeeds in its counterclaim, Tan will return the 15,000 shares subject to Venture returning the amount Tan paid for those shares.[139]

131 The object of damages for breach of contract is to put the victim so far as money can do it, in the same situation as if the contract had been performed, and the victim is entitled to be compensated for the loss of his bargain. Alternatively, he can elect to recover reliance loss, to put him in a position as if the contract had never been entered into in the first place. Both measures of damages are compensatory and based on the victim's loss. The purpose of damages for tortious misrepresentation is to put the victim into a position in which he would have been if the misrepresentation had not been made. In this regard, damages for fraudulent misrepresentation would include all losses

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136 TRC's letter dated 11 October 2021 at [10].

137 27/9/21 NE 20, 27; TRC's Letter dated 11 October 2021 at [5]–[6].

138 Defendant's Further Submissions dated 11 October 2021 at [4]–[5].

139 TRC's Letter dated 11 October 2021 at [4].

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flowing directly from the entry into the transaction, regardless of whether the loss is foreseeable and this would include all consequential losses suffered by the claimant. (See *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [123]–[126]; *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [21] and [28].)

132 I deal first with whether the damages should take into account the tax that Tan paid for acquiring the 50,000 shares from Venture. In my view, this should be disregarded. In so far as the claim to set off the tax against damages to be awarded to Venture for breach of contract or misrepresentation, the object of damages is to compensate the victim and focuses on the *victim's loss*. Further, the tax was not paid to Venture; if it was, then Venture would have to account for it in the damages awarded to it. In so far as the claim to set off the tax against Venture's claim for unjust enrichment, it cannot be said to be a case of change of position, which in any event was not pleaded by Tan nor attested to by him for this purpose and which Mr Rajah SC has confirmed Tan is not relying on.[140] Tan did not pay tax on the profits that he made by selling the 35,000 shares; rather, the tax was paid by Tan in acquiring the 50,000 shares and which he acquired based on his misrepresentation to Venture that he was entitled to them. In fact, Tan did not plead, nor rely on the fact that he had paid tax on the 50,000 shares, in relation to damages pertaining to any of Venture's counterclaims. He had mentioned it only to support his claim that Venture had taken the position that he was entitled to the Share Benefits.[141]

133 Next, Venture now claims in its further closing submissions that it had paid dividends on the 50,000 shares and should be compensated by Tan for

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140 Plaintiff's Further Submissions dated 21 October 2021 at [10].

141 Tan's AEIC at [104].

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this.[142] Venture did not plead nor attest to any such dividends, let alone the quantum of the dividends, that were paid. The payment of dividends by Venture is within Venture's knowledge. As such I would disregard this submission.

134 I turn to deal with the valuation date of the shares. The date of the transaction is the *prima facie* date of valuation, as the measure of the loss that is suffered, but this rule can be departed from to give effect to the overriding compensatory rule (see *Smith New Court Securities Ltd v Citibank N.A.* [1997] AC 254 at 284, in relation to a case for fraudulent misrepresentation). I accept that if damages were assessed based on the time when the wrongful act occurred, this may not adequately compensate Venture for the loss it has suffered ***if*** Venture had to subsequently acquire substitute shares from the market at the prevailing market rate. In *Platt v Platt*, the court preferred to value the shares at the transaction date given the evidential difficulties in using a later date and that the shares no longer existed. There is no such difficulty in the present case as Venture is a public-listed company whose share price is transparent.

135 Here, had Tan not made the representations, Venture would have had the 50,000 shares. The losses (including consequential losses) incurred by Venture would include the price it has to pay to acquire a similar number of shares in the market, *provided this is what Venture intends to do or has to do*. In such a situation, the prevailing market rate for the shares would be most appropriate to allow Venture to be fully compensated for its loss. But it is unclear that Venture intends or has to acquire replacement shares. Wong did not state that Venture will buy replacement shares, or even that Venture has to replace back into the company the shares transferred to Tan.[143] It is for Venture

142 Mr Singh SC's letter dated 21 October 2021 at [11].

143 Wong's AEIC at [134].

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to prove what its loss is and the quantum of such loss and I find that it has not shown that the loss is the value of the shares at today's market rate.

136 Indeed, Mr Singh SC has now submitted that the court cannot order a transfer of the remaining 15,000 shares from Tan to Venture because this would contravene s 76(1A) of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA") as that section provides that, except where expressly provided by the CA, a company cannot acquire shares in the company. Mr Singh SC also submits that Venture cannot hold the shares as treasury shares save in the circumstances under ss 76B to 76G of the CA which he submits Venture does not fall within, and hence, any transfer of shares to Venture would render the shares valueless as it cannot use them as treasury shares.[144] By these submissions where Mr Singh SC is suggesting that a transfer of shares back to Venture would not be possible or feasible, it shows that Venture does not intend to acquire or would not be acquiring shares let alone from the market.

137 Given the above, I thus accept Mr Rajah SC's submission that the date of assessing damages of loss to Venture in relation to the shares should be at the market price at which Venture could have sold the shares at the time they were issued to Tan. I see no reason to depart from the transaction date for valuation (*ie*, the date when the 50,000 shares were transferred to Tan) in favour of the date on which I make the determination in the Suit. Even if Venture had succeeded on its claim for any breach of duties, this would not change how the damages (or any claim for equitable compensation as prayed for by Venture) would be assessed (see also [128] above). This is also given that I will in any event award Venture the profits that Tan had made from selling 35,000 shares, namely $74,035.30 for its claim in unjust enrichment.

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144 Mr Singh SC's Letter dated 21 October 2021 at [4]–[8].

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138 Further, I do not see any impediment to making an order for Tan to return 15,000 shares to Venture. There is no evidence that such an order would render the shares returned to Venture to be valueless. Section 76(8)(*h*) of the CA provides that nothing in s 76(1A) prohibits the purchase by a company of shares in the company *pursuant to a court order*. Section 76B(10) further provides that "Nothing in [sections 76B] to 76G shall be construed so as to limit or affect an order of the Court made under any section that requires a company to purchase or acquire its own shares." Indeed, Wong attested that if Tan were to return the shares, Venture would keep them in the treasury until it is time to give them to other employees as share awards under the RSP. Pertinently, this is what Venture had pleaded and initially asked for, namely the return of the 50,000 shares and where any of them have been sold, that there should be an account of profits or damages on the shares that were sold.[145]

139 Given the above, I make the following orders:

(a) Tan is to transfer 15,000 shares (which he has) to Venture within 30 days subject to Venture returning the amount that Tan paid for them. Venture had pleaded for the return of all or any of the shares and Tan had also agreed to do so in relation to any unsold shares. This would sufficiently compensate Venture for the loss of 15,000 (out of 50,000) shares that were wrongly transferred to Tan.

(b) As for the remaining 35,000 shares that Tan no longer has, the damages are to be based on the market price of the shares at the time of release to Tan, after deducting the amount that he paid to Venture. I accept the valuation on the market price based on a table submitted by

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145 Wong's AEIC at [134]; Defence at para 7 of the reliefs.

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Mr Rajah SC on 11 October 2021, as the best evidence tendered to the court.[146] As Tan exercised the share option for 50,000 shares in two tranches of 25,000 shares each, I ascribe the following market price:[147]

(i) For 25,000 shares, at $9.40 per share (based on the market price at about 7 October 2016, when Tan exercised the Share Option under Grant 8 in the first tranche). Tan had sold off all 25,000 shares (in November 2016) that he obtained in the first tranche (in October 2016), and these are the shares that can no longer be returned.[148]

(ii) For another 10,000 shares, at $9.76 per share (based on the closing market price on around 16 January 2017, when Tan exercised the Share Option under Grant 8 in the second tranche).

(c) Additionally, Tan is to pay Venture $74,035.30 being the profits he made on the sale of the 35,000 shares.

(d) Where parties are unable to agree to the calculation of the quantum of damages, that they are at liberty to apply, within one month, to the court for directions.

Conclusion

140 In conclusion, I dismiss Tan's claims against Venture, and I allow Venture's counterclaims against Tan as above. I will hear parties on costs.

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146 TRC's Letter dated 11 October 2021 at [14].

147 AB 778 and AB 1128.

148 Tan's AEIC at [105].

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Audrey Lim
Judge of the High Court

Chelva Retnam Rajah SC, Eusuff Ali s/o N B M Mohamed Kassim and Joseph Tham Chee Ming (Tan Rajah & Cheah) for the plaintiff; Davinder Singh s/o Amar Singh SC, Pardeep Singh Khosa, Stanley Tan Jun Hao and Jaspreet Singh Sachdev (Davinder Singh Chambers LLC) for the defendant.

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