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

[2024] SGHC 260

Originating Claim No 124 of 2022

Between

Dabbs, Matthew Edward

… *Claimant*

And

AAM Advisory Pte Ltd

… *Defendant*

JUDGMENT

[Contract — Breach]
[Contract — Contractual terms]
[Contract — Illegality and public policy]
[Contract — Termination]
[Employment Law — Termination]
[Employment Law — Employers' duties]
[Equity — Remedies — Account]
[Civil Procedure — Pleadings]
[Debt and Recovery — Right of set-off]

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Dabbs, Matthew Edward
v
AAM Advisory Pte Ltd

[2024] SGHC 260

General Division of the High Court — Originating Claim No 124 of 2022
Wong Li Kok, Alex JC
12–15, 21–22, 25–26 March, 22 July 2024

14 October 2024 Judgment reserved.

Wong Li Kok, Alex JC:

Introduction

1 The claimant initiated this claim based on the alleged wrongful termination of his employment by the defendant. That termination led to a number of other alleged breaches of the employment relationship, including unpaid commissions. The claimant seeks to recover damages arising out of the purported wrongful termination as well as unpaid amounts owing to him following that termination. The defendant insists that it was entitled to summarily dismiss the claimant based on his conduct and behaviour. It also takes the position that there are no unpaid commissions owing to the claimant. In fact, the defendant alleges in its counterclaim that the claimant had been overpaid prior to the summary dismissal and that overpayment should be returned. At the heart of this case is whether the claimant's behaviour amounted to conduct which justified a summary dismissal.

Facts

2 The claimant was a former financial advisor, an Executive Director and a Chief Executive Officer ("CEO") of the defendant, a Singapore-incorporated company in the business of providing wealth management and financial advisory services.[1]

3 The claimant's employment as a financial advisor was governed by the Advisor Agreement entered between the parties on 8 December 2015 (the "AA"). The claimant's employment as Executive Director was governed by the Executive Service Agreement entered between the parties on 4 March 2016 (the "ESA"). The ESA was signed after the defendant was acquired by Old Mutual International Holdings Limited ("OMI"),[2] later re-branded as "Quilter".[3]

4 Under the AA, the claimant was entitled to a monthly salary of $13,500 and commissions to be calculated in the manner set out in Annex B of the AA. The commission payable was the gross commission (calculated based on a specified percentage or "banding") less the basic salary. The AA also provided that 10% of the claimant's gross commission would be retained in a lapsed reserve account (the "Lapsed Reserve Account").

5 Following the claimant's request for an increase in remuneration, the parties engaged in discussions to adjust the claimant's remuneration package. On 17 October 2017, the claimant received a draft CEO performance scorecard

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1 Claimant's Lead Counsel's Statement dated 31 January 2024 ("C's Lead Counsel Statement") at Part III, S/N 1–2; Defendant's Lead Counsel's Statement dated 22 March 2024 ("D's Lead Counsel Statement") at Part III, S/N 1–2.

2 Affidavit of Evidence-in-Chief of Mr Matthew Edward Dabbs dated 24 January 2024 ("Mr Dabbs' AEIC") at para 6.

3 Mr Dabbs' AEIC at para 6.

by way of an e-mail.[4] It is common ground that the only difference between this performance scorecard and the finalised CEO performance scorecard annexed to a letter dated 19 October 2017 (the "Performance Scorecard") from the defendant to the claimant is the inclusion of the word "CONFIDENTIAL" at the bottom of the document.[5]

6 In or around May 2019, the defendant heard rumours that the claimant was plotting to engineer a team move to St James's Place (Singapore) Private Limited ("St James's Place"), the defendant's competitor. The defendant thus commenced an internal investigation against the claimant,[6] which led to the following findings:[7]

(a) the claimant had sent documents containing confidential client information to his personal e-mail account;

(b) the claimant had sent an employment contract of the defendant's former director, Mr Nicholas Anderson ("Mr Anderson"), to a lawyer; and

(c) the claimant had sent several derogatory, vulgar and sexually offensive e-mails to the defendant's staff.

7 In view of the investigation findings above, on 24 June 2019, Ms Donna Louise Beresford ("Ms Beresford"), Quilter's Head of Human Resources

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4 C's Lead Counsel Statement at Part III, S/N 6; D's Lead Counsel Statement at Part III, S/N 6.

5 C's Lead Counsel Statement at Part III, S/N 6; D's Lead Counsel Statement at Part III, S/N 6.

6 First affidavit of Ms Donna Louise Beresford dated 24 January 2024 ("Ms Beresford's AEIC") at para 16.

7 Ms Beresford's AEIC at para 27.

("HR"), emailed and invited the claimant to attend a disciplinary hearing on 26 June 2019 at 3.30pm (the "Disciplinary Hearing").[8] On 25 June 2019, the defendant replied to this e-mail with a letter of resignation and informed Ms Beresford that he was unavailable to attend the Disciplinary Hearing.[9]

8 The Disciplinary Hearing took place on 26 June 2019 in the absence of the claimant.[10] The disciplinary panel consisted of the following individuals: (a) Mr Joly Scott Adam Hemuss ("Mr Hemuss"), a director of the defendant; (b) Ms Sarah Lloyd ("Ms Lloyd"), the "HR Business Partner" of the defendant; and (c) Mr Brendan Dolan ("Mr Dolan"), OMI's sales director. The disciplinary panel concluded during the hearing that the claimant should be summarily dismissed.[11]

9 On 4 July 2019, the claimant appealed against the outcome of the Disciplinary Hearing.[12] The claimant's appeal hearing took place on 17 July 2019 (the "Appeal Hearing").[13] The appeal panel concluded that the claimant's gross misconduct justified his summary dismissal.[14]

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8 Agreed Chronology of Key Events at S/N 33.

9 C's Lead Counsel Statement at Part III, S/N 12; D's Lead Counsel Statement at Part III, S/N 12.

10 C's Lead Counsel Statement at Part III, S/N 14; D's Lead Counsel Statement at Part III, S/N 14.

11 C's Lead Counsel Statement at Part III, S/N 16; D's Lead Counsel Statement at Part III, S/N 16.

12 C's Lead Counsel Statement at Part III, S/N 17; D's Lead Counsel Statement at Part III, S/N 17.

13 C's Lead Counsel Statement at Part III, S/N 17; D's Lead Counsel Statement at Part III, S/N 17.

14 C's Lead Counsel Statement at Part III, S/N 18; D's Lead Counsel Statement at Part III, S/N 18.

10 The claimant's employment was summarily terminated on 25 July 2019.[15]

The parties' cases

11 The heart of the claimant's case is that his summary dismissal was wrongful. In this connection, the claimant raises the following arguments: (a) the allegations relied on by the defendant are either not proven or do not justify the summary dismissal;[16] and (b) the manner in which he was summarily dismissed was also wrongful, being in breach of the implied term of mutual trust and confidence and the rules of natural justice.[17] The claimant also argues that the defendant is in breach of cll 9.3 and 7A.1 of the ESA, which concern, respectively, the defendant's consent to the claimant's solicitation of his own contacts and the defendant's option to require the claimant to sell his client bank to the defendant.[18]

12 The claimant seeks the following reliefs in this suit:[19]

(a) a declaration that the ESA was wrongfully terminated;

(b) an order for payment by the defendant of three months' salary (from 27 June 2019 to 26 September 2019) amounting to $40,500;

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15 Agreed Chronology of Key Events at S/N 48.

16 Claimant's Closing Submissions dated 7 June 2024 ("CCS") at Part II(A).

17 CCS at Part II(B).

18 CCS at Part II(E)–(F).

19 Statement of Claim (Amendment No. 1) dated 2 December 2022 ("SOC (Amd No 1)") at para 45 and p 25.

(c) an order for payment by the defendant of commissions from July 2019 to September 2019 that could have been payable but for the summary dismissal;

(d) an account of all commissions due from the defendant to the claimant, including sums in the claimant's Lapsed Reserve Account and the outstanding commissions from April 2019 to June 2019, and an order for payment of such sums from the defendant to the claimant; and

(e) as an alternative to the reliefs sought in sub-paragraphs (b) and (c) above, an order for payment of three months' base salary and commission earned prior to the commencement of the garden leave period but payable during such garden leave period.

13 The claimant also argues that the defendant's counterclaim must fail for the following reasons: (a) the defendant's pleadings are inadequate;[20] and/or (b) the claims are barred by the doctrine of illegality.[21]

14 The defendant's case is that it was entitled to terminate the claimant's employment pursuant to an express termination clause in cl 7.3 of the ESA. The claimant circulated confidential client information;[22] engaged in behaviour which was unbefitting of a CEO and a senior manager;[23] and stored illicit materials and conducted sexually inappropriate searches on his work desktop.[24]

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20 CCS at Part III(A).

21 CCS at Part III(B).

22 Defendant's Closing Submissions dated 4 June 2024 ("DCS") at Part IV(A)(i).

23 DCS at Part IV(A)(ii).

24 DCS at Part IV(B).

Further, the manner in which the Disciplinary Hearing and the Appeal Hearing were carried out was appropriate.[25]

15 The defendant argues that it did not withhold consent under cl 9.3 of the ESA and that it had not acted in breach of cl 7A.1 of the ESA.[26] The claimant is also not entitled to an order for account, as there is no legal basis for such an order in this case.[27]

16 The defendant also brings a counterclaim for the following:[28]

(a) a declaration that the claimant's employment was terminated pursuant to cl 7.3 of the ESA, or in the alternative, a declaration that the claimant resigned on 25 June 2019;

(b) a sum of $73,757, being the difference between the discretionary bonus paid to the claimant and the amount actually payable based on the final result of the claimant's performance in the Performance Scorecard (the "Excess Bonus");

(c) a sum of $6,572.21 under the unpaid invoice dated 20 June 2019 for the costs of the claimant's personal assistant; and

(d) a sum of $75,219.01, being the overpaid commissions paid by the defendant to the claimant for the bonus period of 1 January 2019 to 25 July 2019 (the "Overpaid Commissions").

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25 DCS at Part III(A)–(B).

26 DCS at Parts VI–VII.

27 DCS at Part V(B).

28 Defence and Counterclaim (Amendment No. 2) dated 17 August 2023 ("Defence (Amd No 2)") at pp 27–29.

Issues to be determined

17 There are eight key issues to be determined:

(a) whether the termination of the claimant's employment by the defendant was wrongful;

(b) whether the claimant is entitled to an account of all sums due from the defendant to the claimant;

(c) whether the defendant has breached cl 9.3 of the ESA by withholding its consent for the claimant to solicit or deal with customers who became customers of the defendant solely through the claimant's introduction;

(d) whether the defendant has breached cl 7A.1 of the ESA by failing to require the claimant to sell his client bank to the defendant;

(e) whether the claimant is liable to pay the Excess Bonus to the defendant;

(f) whether the claimant is liable to pay the costs of his personal assistant to the defendant;

(g) whether the claimant is liable to pay the Overpaid Commissions to the defendant; and

(h) whether the defendant is entitled to set off the sum in the Lapsed Reserve Account against the sums due from the claimant to the defendant, or to deduct the said sum pursuant to cl 7.4 of the ESA.

Issue 1: The claimant's employment was validly terminated by the defendant

18 The first and key issue is whether the claimant's summary dismissal was valid.

19 The defendant's case is that the claimant's employment was validly terminated under cl 7.3 of the ESA.[29] I set out cl 7.3 below:[30]

> 7.3 **Summary Termination.** The Company (or OMIHL on its behalf) shall only be entitled to terminate the Employment by summary termination if the Executive:
>
> 7.3.1. is guilty of any gross default or misconduct in connection with or affecting the business of the Company or any Group Company, including any fraud or material dishonesty, or conducts himself in a manner materially prejudicial to any member of the Group or is guilty of conduct tending to bring himself, the Company or any Group Company into serious disrepute;
>
> 7.3.2. commits any serious or persistent breach of his obligations under this Agreement and fails to remedy such breach within 14 days from the Company's written notification of such breach or unreasonably refuses or neglects to comply with any lawful order or direction given to him by the Board or the Board of OMIHL such that the Company and/or any Group Company suffers material prejudice;
>
> 7.3.3. is in serious breach of the rules and regulations of any applicable Regulator; and
>
> 7.3.4. becomes prohibited by law or applicable regulation from being a director of any Group Company or from carrying out the Executive's duties under this Agreement;
>
> whereupon the Executive shall have no claim against the Company for damages or otherwise by reason of such

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29 Defence (Amd No 2) at para 37(b)(iv); Defendant's Opening Statement dated 5 March 2024 at para 45(a)(i); Minute Sheet dated 22 July 2024.

30 Core Bundle at p 113, cl 7.3.

> termination. Any delay by the Company in exercising such right to terminate shall not constitute a waiver thereof. The Executive shall be deemed to be a Bad Leaver for the purposes of the SPA [*ie*, the Share Purchase Agreement between the Executive, OMIHL and other executives of the Company] if dismissed pursuant to this clause 7.3 and the relevant provisions of the SPA shall apply.

The law

20 An innocent party is entitled to terminate the contract where the contract "clearly and unambiguously" provides for such a right "in the event of a certain event or events occurring" (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [91]). In the present case, cl 7.3.1 of the ESA clearly and unambiguously provides that the defendant is entitled to terminate the claimant's employment for "gross default or misconduct in connection with or affecting the business of the [defendant]" or "conduct tending to bring himself … into serious disrepute".

21 Though the ESA itself is silent as to what amounts to "gross default or misconduct", the defendant points to Appendix A of the defendant's handbook titled "Disciplinary Procedure & Guidelines". Appendix A provides that "[a]ny misconduct of a sufficiently serious nature may be deemed to be gross misconduct" and sets out a list of non-exhaustive examples of gross misconduct.[31]

22 But the Disciplinary Procedure & Guidelines lack binding effect. Express terms of an employment contract can emanate from notices, staff handbooks, company websites and company rules and regulations through incorporation (Ravi Chandran, *Employment Law in Singapore* (LexisNexis, 6th Ed, 2019) ("*Employment Law in Singapore*") at paras 3.2–3.3). One such

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[31] Core Bundle at p 125, Appendix A.

example is where the letter of appointment expressly incorporates these documents by reference, through stating that the contract is subject to the company's rules and regulations (*Employment Law in Singapore* at para 3.3). As explained below (see [69]–[71]), I find that the Disciplinary Procedure & Guidelines are not incorporated into the employment contract between the claimant and the defendant. Nevertheless, the Disciplinary Procedure & Guidelines are relevant extrinsic materials to aid in the contractual interpretation of the phrase "gross misconduct" in the ESA.

23 I note that the ESA contains an entire agreement clause.[32] As such, the parol evidence rule applies to prevent the admission of any extrinsic evidence to contradict, vary, add to, or subtract from the terms of the contract (see s 94 of the Evidence Act 1893 (2020 Rev Ed) (the "Evidence Act")). However, s 94(*f*) of the Evidence Act allows extrinsic evidence to be admitted if it is to be used merely to aid in interpreting a term in the contract. Extrinsic evidence sought to be admitted for the purpose of contractual interpretation must be relevant, reasonably available to all the contracting parties, and relate to a clear or obvious context (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [128], [129] and [132(d)]). As the Disciplinary Procedure & Guidelines meet these requirements, I have referred to these guidelines in my discussion below on interpreting the meaning of "gross misconduct" under the ESA (see [73] below).

24 Finally, to the extent that the Disciplinary Procedure & Guidelines do not have binding force, the principles in *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 ("*Phosagro*") are relevant. There, the employment contract entitled the employer to summarily terminate its employee's

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[32] Core Bundle at p 134, cl 10.2.

employment for "serious misconduct". Considering that the contract was silent as to what "serious misconduct" entailed, the Court of Appeal in *Phosagro* held that the most principled approach would be to look to the common law principles relating to repudiatory breach as set out in *RDC Concrete* (at [49]). Putting aside the situation where the contract contains an express termination clause (Situation 1 of *RDC Concrete*), there are three other situations which give rise to a repudiatory breach:

(a) Situation 2, where a party, by his words or conduct, simply renounces his contract inasmuch as he clearly conveys to the other party to the contract that he will not perform his contractual obligations at all (*RDC Concrete* at [93]);

(b) Situation 3(a), where the intention of the parties to the contract was to designate that term as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract (*RDC Concrete* at [97]); and

(c) Situation 3(b), where the breach in question gives rise to an event which deprives the innocent party of substantially the whole benefit which it had intended that he should obtain from the contract (*RDC Concrete* at [99]).

There were sufficient grounds for the claimant's summary dismissal

25 The defendant raises the following reasons to justify the claimant's summary dismissal:

(a) The claimant stored illicit materials on his work desktop.

(b) The claimant conducted sexually inappropriate searches on his work desktop.

(c) The claimant sent offensive and inappropriate e-mails to his colleagues.

(d) The claimant breached the confidentiality obligations owed to the defendant.

26 I address each of the reasons given by the defendant in turn.

The claimant stored illicit materials on his work desktop

27 First, the defendant alleges that the claimant stored illicit materials on his work desktop.[33]

28 The preliminary issue is whether the defendant is allowed to raise this allegation, notwithstanding that the defendant did *not* rely on it to summarily dismiss the claimant at the material time.

29 As held in *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch D 339, where an ex-employee brings a claim against his employer for wrongful dismissal, the employer is entitled to invoke the employee's wrongful conduct as a defence to the wrongful dismissal claim, even if the employer did not rely on that misconduct at the time of the dismissal because he did not know about it (the "*Boston Deep Sea Fishing* principle") (see *Phosagro* at [42]). However, it is unclear if the *Boston Deep Sea Fishing* principle applies where the employer *knew* about the misconduct but did not rely on it to dismiss the employee (*Phosagro* at [42]).

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[33] DCS at para 58.

30 In the present case, the defendant relies on the *Boston Deep Sea Fishing* principle to argue that the alleged storage of illicit materials on work desktop justifies the claimant's summary dismissal, notwithstanding that it was not raised as the basis for the claimant's summary dismissal at the time of the dismissal.[34] I find that the *Boston Deep Sea Fishing* principle is applicable, as it appears that the defendant had knowledge of the claimant's alleged storage of illicit materials only after commencing this suit. I also note that the claimant's objection to the defendant advancing this new allegation is *not* that the defendant had knowledge of this allegation at the time of the dismissal.

31 Turning to the claimant's objection, the claimant submits that the *Boston Deep Sea Fishing* principle does not apply if the breaching party (*ie*, the claimant in this case) could have rectified the situation had it been afforded the opportunity to do so.[35] According to the claimant, the alleged storage of illicit materials on his work desktop could have been easily rectified by deleting those materials "through the click of a button had [the claimant] been offered an opportunity to do so".[36]

32 This objection is without merit. In *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 ("*Alliance Concrete*"), the Court of Appeal held that an innocent party will not be entitled to rely on a ground not raised at the time of termination if the party in breach could have rectified the situation had it been afforded the opportunity to do so (at [67]). But one of the qualifications to this principle is that "the promisor must be in a position to put itself right without breaching the contract" (*Alliance Concrete* at

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34 DCS at para 58.

35 CCS at para 10.

36 CCS at para 10.

[67]), citing J W Carter, "Panchaud Frères Explained" (1999) 14 JCL 239 at 241). In other words, the qualification to the *Boston Deep Sea Fishing* principle applies "only to anticipatory breaches" or to situations where "steps could have been taken to avoid the party being in breach altogether, either by giving it an opportunity to perform its obligation in time or by enabling it to perform in some other valid way" (*C&S Associates UK Ltd v Enterprise Insurance Company plc* [2015] EWHC 3757 (Comm) at [93]).

33 The breach in question is not an anticipatory one. Neither would the opportunity to delete the illicit files "avoid the [claimant] being in breach altogether". The breach had been committed by the act of storing the illicit files, and this breach is incurable. I thus accept the defendant's submission that the defendant remains entitled to rely on this allegation as a ground that justified summary dismissal.

34 I now turn to consider whether the claimant had in fact stored illicit materials on his work desktop.

35 The defendant relies on forensic evidence to advance the allegation that the claimant stored 159 illicit files such as sexually explicit photographs, pornographic movies and pirated videos on his work desktop.[37] According to the defendant, such storage amounts to gross misconduct under cl 7.3 of the ESA (see [19] above).[38] In particular, this is a "[m]isuse of [the defendant's] facilities", which falls within the non-exhaustive examples of misconduct under Appendix A of the Disciplinary Procedure & Guidelines.[39] The clamant denies

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37 DCS at para 59.

38 DCS at para 60.

39 DCS at para 60.

this allegation and points out the forensic expert's concession on the stand that he is "unable to tell who had actually uploaded these [illicit] files onto [the claimant's] work computer".[40]

36 I do not accept the claimant's denial of this allegation.

37 During cross-examination, the claimant admitted that he recognised some of the illicit materials stored on the work desktop,[41] namely photographs from a hen party of his ex-wife's best friend.[42] The claimant also admitted that he has seen pornography through e-mail attachments sent from his colleagues, and that it is possible that the illicit materials stored on his work desktop could have been sent by his colleagues.[43] The claimant's admission that he did recognise some of the illicit materials and that they belonged to him, suffice to establish that illicit materials *were* in fact stored on his work desktop.

38 I also accept the unchallenged expert opinion that the illicit materials, as well as other business-related documents and files, originated from an external hard drive "Matt D Work Backup 18.11.15".[44] Such business-related documents included the claimant's e-mail archives,[45] which the claimant accepts must be his.[46] That illicit materials stored on the claimant's work desktop originated from the same external hard drive, which identifies the claimant as the owner,

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40 CCS at para 26(d).

41 Transcript dated 14 March 2024 at p 41 lines 2–3.

42 Transcript dated 14 March 2024 at p 41 lines 4–5.

43 Transcript dated 14 March 2024 at p 42 lines 25 to p 43 line 3.

44 Transcript dated 26 March 2024 at p 17 lines 23–29 and p 20 lines 11–32.

45 First affidavit of Mr Gino Jose Bello dated 23 February 2024 ("Mr Bello's AEIC") at p 21, para 8.1.8.

46 CCS at para 28(b).

as the business-related files (some of which were admitted by the claimant as belonging to his), lends strong support to the defendant's case that the illicit materials belong to the claimant. In light of this forensic evidence, I reject the evidence of Mr Kelso William Beggs ("Mr Beggs"), the defendant's former Chief Operating Officer, that the claimant's personal assistant may have gained access to the claimant's computer and used it without his knowledge.[47] Mr Beggs' evidence is a bare assertion unsupported by any objective evidence.

39 Finally, the claimant explained that his work desktop was used for both work and personal matters, such that the illicit materials accidentally ended up on his work desktop when he had used the office "communal hard drives" to back up his desktop.[48] But the key point is that this does not detract from my finding that there *were* at least some of the illicit materials stored on the claimant's work desktop, as conceded by the claimant (see [37] above). Even if these illicit materials found their way to the claimant's work desktop accidentally, any employee, and the CEO in particular, must take particular care in not mixing the contents of his personal life with his working life. This is particularly the case when it comes to offensive and illicit materials. In his personal life, it is the claimant's business what he wants to have possession of, as he takes personal responsibility for those decisions. But when these materials are stored on a work computer, they become an issue for the business. Any business would take care to ensure that illicit materials are not part of its working systems because of the offence and reputational harm that those materials will project and create. By being indifferent to the materials stored in

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47 Affidavit of Evidence-in-Chief of Mr Kelso William Beggs dated 25 January 2024 ("Mr Beggs' AEIC") at para 13.

48 Transcript dated 14 March 2024 at p 38 line 1 to p 39 line 2.

his work computer, the claimant has put his employer into a position of embarrassment and disrepute.

40 I thus find that it is more likely than not that the claimant stored illicit materials on his work desktop. The defendant points out that the claimant's possession of "obscene films" is against the law (see s 30 of the Films Act (Cap 107, 1998 Rev Ed) and would give rise to questions as to his fitness and proprietary under the Monetary Authority of Singapore's Guidelines on Fit and Proper Criteria (Guideline No FSG-G01).[49] The claimant was careless and inattentive as to allow such illicit materials to be transferred to his work desktop. Such conduct brings the claimant and the defendant "into serious disrepute" and hence warrants summary dismissal under cl 7.3.1 of the ESA.

The claimant conducted sexually inappropriate searches on his work desktop

41 Second, the defendant alleges that the claimant conducted sexually inappropriate searches on his work desktop.[50] The claimant raises two objections to this allegation. The first is that this was not pleaded in the defendant's defence.[51] The second is that even if the defendant is allowed to rely on this allegation, it is not established.

42 Starting with the first objection, I find that the defendant's pleadings are sufficient. The general rule is that parties are bound by their pleadings, and the court is precluded from deciding on a matter that the parties have not put into issue (*V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422

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49 DCS at para 61.

50 DCS at para 58.

51 Claimant's Reply Submissions dated 15 July 2024 ("CRS") at para 5.

("*V Nithia*") at [38]). But the court is not required to adopt "an overly formalistic and inflexibly rule-bound approach" even when doing so may lead to "an unjust result" (*V Nithia* at [39]). Hence, the general rule may be departed from "where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so" (*V Nithia* at [40]).

43 In Defence (Amendment No 2), the defendant pleaded that the claimant's summary dismissal was justified due to (a) the claimant's breach of confidentiality and data protection obligations;[52] (b) the claimant's behaviour that demeaned women;[53] and (c) the claimant's storage of illicit materials on the work desktop.[54] Defence (Amendment No 2) does not expressly plead that the defendant conducted illicit searches, and pleads only that "[t]here were proper grounds for the [c]laimant's dismissal".[55] However, the defendant explicitly stated that it "will rely on" its letter setting out the outcome of the Appeal Hearing.[56] This letter explicitly refers to a report of the claimant's browsing history on 28 May 2019 which shows that he had carried out inappropriate searches.[57] I agree with the defendant that this sufficiently apprises the claimant of the factual allegations of misconduct.[58]

44 Further, I do not find that there would be an "unjust result" or that the claimant would be prejudiced by allowing the defendant to raise this allegation against him. The claimant addressed this allegation in his affidavit of evidence

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52 Defence (Amd No 2) at para 33(a).

53 Defence (Amd No 2) at para 33(b).

54 Defence (Amd No 2) at para 33A.

55 Defence (Amd No 2) at para 37(b).

56 Defence (Amd No 2) at para 37(b).

57 Core Bundle at p 587.

58 Defendant's Reply Closing Submissions dated 15 July 2024 ("DRS") at para 8.

in chief, during cross-examination, and in the written closing submissions in great detail. As such, it cannot be said that the claimant was taken by surprise.

45 I now turn to the claimant's denial of the allegation that he conducted illicit searches on his work desktop. The claimant's bare denial[59] does not hold up against the unchallenged forensic evidence. The analysis of the Internet browsing activity on the claimant's work desktop led the expert to conclude that "the evidence suggests that the claimant had visited the websites set out in the [b]rowsing [h]istory [r]eport.[60] In an attempt to challenge the forensic evidence, the claimant points out that the forensic expert stated on the stand that "the username associated with the claimant is under that [browsing] history" but that he cannot confirm that the claimant himself carried out the sexually inappropriate searches.[61] This argument is without merit.

46 Based on the browsing history report, the following searches were carried out on the claimant's work desktop on 28 May 2019 between 12.09pm to 12.14pm: "how many inches can a woman take comfortably",[62] "[p]erson who is aa [*sic*] peeping tom"[63] and "[s]tudy of vaginas".[64] Significantly, the claimant accepted that he was the one who had conducted searches on his work desktop[65] from 11.47pm to 12.07pm on matters such as "Google Nest",[66]

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59 Mr Dabbs' AEIC at para 116(b); Transcript dated 14 March 2024 at p 33 line 14.

60 Mr Bello's AEIC at p 25, para 8.4.12.

61 CCS at para 23(b).

62 Mr Bello's AEIC at p 176, Appendix J.

63 Mr Bello's AEIC at p 206, Appendix J.

64 Mr Bello's AEIC at p 218, Appendix J.

65 Transcript dated 14 March 2024 at p 35 lines 4–31.

66 Mr Bello's AEIC at p 119, Appendix J.

"someone who studies fungi",[67] "6 bedroom detached house for sale in Llangedwyn, Oswestry, Shropshire, SY10",[68] and "burger and lobster".[69] But for the sexually obscene searches between 12.09pm to 12.14pm, the claimant alleges that a colleague accessed his computer and conducted those searches while he was away looking for directions to the lunch place at Burgers & Lobsters.[70]

47 I accept the defendant's submission that it is inherently unbelievable that another person would have come to the claimant's workstation and conducted the inappropriate searches *just two minutes* after the claimant was at his workstation.[71] The claimant also does not identify who that colleague might have been. In fact, in the claimant's own words, the only other person who knew the password to his work desktop was his personal assistant, whom he does not believe was the one who had carried out the inappropriate searches.[72]

48 In light of the above, I find that it is more likely than not that the claimant carried out the sexually inappropriate searches using his work desktop. This in itself does not amount to gross misconduct that would lead to summary dismissal. The searches, if carried out on the claimant's personal devices, would be a matter of his own personal conduct. However, as the defendant submits, when carried out on work devices, these searches clearly constitute "[m]isuse of [I]nternet … and [the defendant's] facilities", which amounts to misconduct

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67 Mr Bello's AEIC at p 119, Appendix J.

68 Mr Bello's AEIC at p 119, Appendix J.

69 Mr Bello's AEIC at p 119, Appendix J.

70 Transcript dated 14 March 2024 at p 35 line 31 to p 36 line 9.

71 DCS at para 64.

72 Transcript dated 14 March 2024 at p 33 line 20 to p 34 line 1.

per Appendix A of the Disciplinary Procedure & Guidelines.[73] In that regard, the claimant's inappropriate searches buttress my overall finding that the claimant is guilty of gross misconduct.

The claimant sent offensive and inappropriate e-mails to his colleagues

49 Third, the defendant argues that the claimant sent various inappropriate e-mails to his colleagues, thereby engaging in behaviour which was derogatory, damaging to the defendant's reputation, and unbefitting of a CEO and Executive Director.[74]

50 The defendant relies on the following e-mails to advance its case:[75]

(a) On 8 January 2019, the claimant forwarded to a junior employee, Mr Alex Konarski ("Mr Konarski"), an e-mail thread between the claimant and Mr Konarski's direct boss, Mr Ian Koss ("Mr Koss"). The claimant added a comment, "[f]or shits and giggles", in this e-mail to Mr Konarski.[76] The e-mail thread between the claimant and Mr Koss pertained to a report drafted by Mr Koss' administrative teams, which suggested to the claimant that the latter team had "poor" attitude and lacked appreciation of "how the business works".[77] The defendant argues that the claimant, by forwarding this thread to Mr Konarski, was seeking to undermine Mr Koss' authority.[78]

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73 Core Bundle at p 125.

74 DCS at para 53.

75 DCS at paras 53–54.

76 Core Bundle at p 206.

77 Core Bundle at pp 206–213.

78 DCS at para 53(a).

(b) On 15 February 2019, the claimant forwarded to Mr Konarski an e-mail from another colleague containing a link to an article titled, "The 16 best ways to sabotage your organization's productivity, from a CIA manual published in 1944".[79] The claimant commented that "OMI have a lot of these covered".[80] According to the defendant, it was inappropriate for the claimant, given his position as the senior leader, to criticise OMI in this manner to a junior.[81]

(c) On 15 June 2017, Mr Konarski sent an e-mail to the claimant containing OMI's international leadership organisation structure to congratulate the claimant for joining the leadership team as the CEO of the defendant.[82] The claimant replied to this e-mail with a sexually graphic and offensive image of a woman with ejaculate on her face and holding a sign that reads, "Tim. I can cheat Too". The defendant argues that the claimant, in analogising himself to women who achieved career progression by sexual acts, engaged in conduct demeaning of women.[83]

(d) On 29 September 2017, the claimant sent an e-mail to seven of his colleagues with a sexually explicit GIF with words stating "Congratulations! You have won an award for this outstanding achievement".[84] As the claimant explained in cross-examination, the animated emoji was created by him and was intended to show the male

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79 Core Bundle at pp 227–228 and 939–944.

80 Core Bundle at p 227.

81 DCS at para 53(b).

82 Core Bundle at p 140.

83 DCS at para 54(a).

84 Core Bundle at pp 143–147.

> appendage and scrota and the appendage ejaculating.[85] The claimant sent this GIF in response to his colleague receiving a reminder from Ms Lloyd, for failing the clean desk audit. According to the defendant, it is clear from the context of the e-mail that the claimant was undermining HR's efforts in enforcing the defendant's clean desk policy.[86]

The claimant does not deny sending the above e-mails to his colleagues.

51 I start with the e-mails in which the claimant purportedly poked fun at Mr Koss (see [50(a)] above) and tried to undermine OMI (see [50(b)] above) (the "Inappropriate Emails").

52 The claimant raises a preliminary point that they were not addressed in the defendant's defence.[87] I find that the lack of explicit reference to the Inappropriate Emails does not preclude the defendant from relying on these e-mails. In Defence (Amendment No 2), the defendant explicitly stated that it "will rely on" its letter setting out the outcome of the Disciplinary Hearing.[88] That letter expressly refers to the contents of the Inappropriate Emails and how they amount to unprofessional behaviour of a CEO.[89] In any event, as explained at [44] above, the claimant is not prejudiced by the defendant relying on the Inappropriate Emails for its defence.

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85 Transcript dated 14 March 2024 at p 13 line 9 to p 14 line 11.

86 DCS at para 54(b).

87 CCS at para 9.

88 Defence (Amd No 2) at para 37(b).

89 Core Bundle at p 529.

53 The Inappropriate Emails do not, on their own, constitute gross misconduct. However, they indicate behaviour that falls below what is expected from a CEO of the company and a senior leader.

(a) The claimant explains that the e-mail relating to Mr Koss (see [50(a)] above) was *only* intended to convey to Mr Konarski that "there was sometimes a disconnect between the front-facing sales team and the backend administrative team".[90] Reading the e-mail thread as a whole, it appears that the claimant was not satisfied with the report produced by Mr Koss' teams. The claimant was critical of Mr Koss' ability and communicated this view to Mr Koss' direct subordinate by forwarding the e-mail thread to Mr Konarski. Even if I take the claimant's case at its highest, *ie*, that the e-mail was sent "for no particular reason except for amusement",[91] that too, would amount to inappropriate behaviour.

(b) As to the e-mail thread containing an article on workplace productivity practices (see [50(b)] above), I find that the e-mail thread conveys the claimant's critical and sceptical view towards the defendant's productivity practices. The claimant explained that he had sent this e-mail to Mr Konarski "in jest and good humour".[92] Although the act of forwarding such e-mail does not, on its own, amount to gross misconduct, it demonstrates, again, inappropriate behaviour on the part of the claimant in his capacity as CEO.

It was inappropriate for the claimant, who, as CEO, ought to have fostered a supportive and positive workplace environment, to engage in "amusement" with

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90 Mr Dabbs' AEIC at para 111.

91 CCS at para 11.

92 Transcript dated 13 March 2024 at p 65 line 5.

Mr Koss' subordinate behind Mr Koss' back, or to send an e-mail that expressed critical and demeaning views of his own company to a junior colleague. The Inappropriate Emails thus support my finding of the claimant's gross misconduct.

54 I turn to the lewd content sent to Mr Konarski (at [50(c)] above) and other colleagues (at [50(d)] above) (the "Explicit Emails").

(a) In the claimant's own words, the image sent to Mr Konarski was "vulgar in nature" and "did not belong in a respectful, professional environment".[93] The claimant's explanation is that his intention was not to demean women but to convey that "it was not beneath [him] to demean [himself] and please the higher-ups, so as to achieve career progression".[94] This does not excuse the claimant's behaviour.

(b) As to the sexually explicit GIF, the claimant argues that it was intended as humour and was not directed at Ms Lloyd, the HR department or its policies.[95] Mr Beggs also gave evidence that he interpreted the GIF as "sarcasm" towards his fellow colleague for failing the clean desk audit.[96] I accept that the claimant did not intend to humiliate Ms Lloyd or the HR department, and shared that GIF with his colleagues as a joke. But this does not excuse his conduct.

Regardless of the claimant's intention in sending the Explicit Emails (*ie*, to make a joke), sending vulgar sexual content using his work e-mail to his

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93 Mr Dabbs' AEIC at para 115.

94 Mr Dabbs' AEIC at para 115.

95 CCS at para 17.

96 Transcript dated 15 March 2024 at p 23 lines 4–19.

colleagues is unbefitting of a CEO and a senior leader. In my judgment, his conduct crosses the boundary of acceptable humour in a modern work environment.

55 The claimant makes the point that what constitutes appropriate office banter is context-specific and depends on the actual office culture.[97] Indeed, it is not the court's role to set expectations and standards of what amounts to appropriate humour in an office environment. However, in the context of determining appropriate behaviour for the purposes of summary dismissal, there is a line to be drawn. The claimant's conduct with respect to the Explicit Emails has no place in today's work environment. The e-mails are crude and offensive to whoever receives them. A person in the position of CEO should know better. I find that the Explicit Emails are sufficiently offensive to conclude that the claimant is "guilty of conduct tending to bring himself … into serious disrepute" under cl 7.3.1 of the ESA and summary termination pursuant to that clause was thus justified.

The claimant breached his confidentiality obligations

56 Finally, the defendant argues that the claimant circulated confidential information belonging to the defendant, in breach of his confidentiality obligations.[98]

57 Specifically, the defendant makes the following allegations:[99]

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97 CCS at para 20(a).

98 DCS at para 48.

99 DCS at para 48.

(a) On 3 January 2019, the claimant forwarded the employment contract of Mr Anderson to the defendant's company lawyer, Mr Winston Seow ("Mr Seow").[100] I note the defendant's initial allegation that Mr Seow was acting as the claimant's lawyer,[101] but it appears to me that based on the defendant's reply written submissions the defendant impliedly accepts the claimant's case that the defendant had relied on Mr Seow for legal services.[102]

(b) On 3 May 2019, the claimant sent to his personal Gmail account an Excel spreadsheet containing the names of 1,763 clients (of which only 22 related to the claimant), their policy numbers, and other details (the "Lodgement Report").[103]

(c) On 15 May 2019, the claimant forwarded to his personal Gmail account an e-mail titled "FW: Leader board 2019 – Apr". The e-mail attached an Excel spreadsheet that contained confidential client information and commissions earned by each financial advisor (the "Leaderboard").[104]

58 I agree with the defendant that the above conduct was in breach of cl 6 of the ESA. Clause 6 provides as follows:[105]

> **6. CONFIDENTIALITY**
>
> 6.1 The Executive will not divulge or communicate to any person (other than with the authority of the Company) any

100 Core Bundle at pp 171–197.

101 DCS at para 48(a); Ms Beresford's AEIC at para 27(a)(i).

102 DRS at para 15(a).

103 Core Bundle at pp 277–431.

104 Core Bundle at pp 435–438.

105 Core Bundle at p 112, cl 6.

> confidential information of the Company or clients which he may have … received while in the service of the Company. …
>
> 6.2 During the Employment the Executive *shall not make (other than for the benefit of the Company) any record* (whether on paper, computer memory, disc or otherwise) relating to any matter within the scope of the business of the Company or any Group Company (or their customers and suppliers) or concerning its or their dealings or affairs or (either during the Employment or afterwards) *use such records* (or allow them to be used) *other than for the benefit of the Company or any Group Company*. …
>
> [emphasis added]

59 The Lodgement Report contains all the policies purchased by each client, the terms, the status and the duration of those policies, the commission payable to the advisor, and the defendant's profits from each policy.[106] As the claimant admitted on the stand, the Lodgement Report contains "inherently highly confidential personal data".[107] I find that the Leaderboard is also confidential information as it contains sensitive compensation details of the financial advisors working for the defendant. In the claimant's own words, he used the Lodgement Report and the Leaderboard to "look[] for … what was owed to [him]" by his client.[108] I accept the defendant's submission that this is not believable because these documents do not aid the claimant in calculating the actual commissions due to him. The more relevant documents would have been the claimant's commission statements.[109] Even if I were to believe that the claimant forwarded the confidential documents to calculate the amounts due to

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106 Transcript dated 13 March 2024 at p 85 line 23 to p 86 line 24.

107 Transcript dated 13 March 2024 at p 83 line 30 to p 84 line 1.

108 Transcript dated 13 March 2024 at p 92 lines 11–12.

109 DRS at para 15(b).

him, he admitted that this was done "only … for [himself]",[110] and that such use was not for the benefit of the company.[111]

60 In light of these concessions, the claimant is clearly in breach of cl 6.2 of the ESA in "mak[ing] … [a] record" of "matter[s] within the scope of the business of the [defendant]" and "us[ing] such records", all of which were for his own benefit and not for "the benefit of the [defendant]". The claimant argues that if the mere breach of confidentiality obligations (without any regard for the actual consequences) suffices to justify summary dismissal, then cl 6 must amount to a condition (under Situation 3(a) of *RDC Concrete*), which has never been asserted by the defendant.[112] The claimant further submits that he has never forwarded or disseminated the Lodgement Report or the Leaderboard to anyone and that he has deleted all copies of the documents.[113]

61 I do not accept the claimant's argument. The defendant relies on Situation 1 of *RDC Concrete*, *ie*, the presence of an express termination clause, to justify the claimant's summary dismissal. The issue is not whether cl 6 of the ESA is a condition, but whether a breach of it amounts to "gross default or misconduct" or conduct bringing him into "serious disrepute" that triggers cl 7.3.1 of the ESA.

62 In that regard, I note that Appendix A of the Disciplinary Procedure & Guidelines expressly identifies "Breach of Confidence – serious and/or persistent breaches of confidence" as "gross misconduct" which would entitle

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110 Transcript dated 13 March 2024 at p 91 line 14.

111 Transcript dated 13 March 2024 at p 92 lines 14–16.

112 CRS at para 8.

113 CCS at para 14.

the defendant to summarily dismiss the employee.[114] As the defendant submits, the breach of confidence in the present case is especially serious, considering that the information in the Lodgement Report and the Leaderboard would be highly useful to the defendant's competitors not only to attract potential clients but also to poach financial advisors.[115] The claimant's argument that there is "no basis for [this] bare assertion"[116] does not assist the claimant. It is abundantly clear that confidential information relating to the defendant's clients, products and financial advisors would be of value to the defendant's competitor. The defendant was justified with its concerns that such sensitive information was circulated outside of its office network.

63 In relation to Mr Anderson's contract, I consider the terms of his employment contract as "confidential information" falling within the meaning of cl 6 of the ESA. The claimant explained, albeit for the first time during cross-examination, that he had forwarded the contract to Mr Seow to help Mr Anderson, given the latter's query on the consequences of his resignation as a director and whether a legal opinion from Mr Seow was necessary.[117] I do not accept this explanation. As an employee and CEO of the defendant, the claimant ought to have ensured the confidentiality of the terms of Mr Anderson's employment contract from the defendant's perspective. Even if the claimant was acting with the best of intentions (whether to smooth out an issue for Mr Anderson and/or the defendant), the claimant should have checked with the defendant's legal team whether he would be allowed to disclose that contract before doing so. For example, even if Mr Seow was the defendant's lawyer for

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114 Core Bundle at p 125.

115 DCS at para 50.

116 CRCS at para 10.

117 Transcript dated 14 March 2024 at p 7 line 18 to p 8 line 22.

other matters, there may have been conflicts issues for this particular matter which should have been checked before any disclosure was made. As such, the claimant's conduct in sending Mr Anderson's employment contract to Mr Seow was also in breach of the claimant's confidentiality obligations.

64 For the above reasons, I find that the claimant had breached his confidentiality obligations to the defendant, which amounted to gross misconduct justifying his summary dismissal.

The claimant's conduct as a whole amounted to "gross misconduct" or conduct tending to bring himself into "serious disrepute"

65 Looking at the claimant's conduct in the round, I find that the summary dismissal was justified. The claimant was in breach of his confidentiality obligations under cl 6 of the ESA, sent inappropriate and derogatory e-mails to his colleagues, stored illicit materials and carried out sexually inappropriate searches on his work desktop. As such, the claimant's conduct amounted to "conduct tending to bring himself [or the defendant] into serious disrepute" under cl 7.3.1 of the ESA. To the extent that the defendant also alleges that such conduct amounted to "gross misconduct", I take guidance from the Disciplinary Procedure & Guidelines to interpret the meaning of that phrase. Although Appendix A of the Disciplinary Procedure & Guidelines does not form part of the contract, as noted above at [23], it is a relevant and key document to consider in interpreting what amounts to gross misconduct. I find that each of the claimant's conduct amounted to either "misconduct" or "gross misconduct" as explained in the Disciplinary Procedure & Guidelines, and collectively amounted to "gross default or misconduct".

66 For completeness, I note that the Disciplinary Hearing raised the allegation that the claimant was engineering a team move to St James's Place,

the defendant's competitor. It is not clear from the defendant's pleadings and written submissions that the defendant is relying on this ground to justify the summary dismissal.[118] In any event, I accept the claimant's argument that this is a "factually vacuous" allegation.[119] There is insufficient evidence that the claimant facilitated such a move. I thus give no weight to this allegation.

The common law principles on repudiatory breach are secondary to the express termination clause in the ESA

67 Finally, I turn to the claimant's argument that pursuant to *Phosagro* (see [24] above), the common law principles on repudiatory breach as set out in *RDC Concrete* are relevant in determining what "gross misconduct" entailed under cl 7.3.1 of the ESA. According to the claimant, it is necessary to resort to the common law principles on repudiatory breach as the ESA is silent as to what "gross misconduct" entails.[120] The claimant also submits that there is no "gross misconduct" in the present case because his alleged misconduct did not fall under Situation 2, 3(a) or 3(b) of *RDC Concrete*.[121]

68 As a preliminary point, I note that the claimant's case is inconsistent. On one hand, the claimant submits that his employment contracts are silent on the definition of "gross misconduct". But on the other hand, the claimant submits that the Disciplinary Procedure & Guidelines (which define "gross misconduct") were expressly incorporated into the AA and the ESA. I find that the claimant's employment contracts are silent on what "gross misconduct"

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118 DRCS at paras 20–21.

119 CCS at para 21.

120 CCS at para 6.

121 CCS at para 8.

entails, as the Disciplinary Procedure & Guidelines were not incorporated into these contracts.

69 In *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722, the court found that the disciplinary procedures and the group discipline policy were incorporated into the employment contract pursuant to a clause in the Letter of Offer which provided that "Other Terms and Conditions" are "laid down in the Bank's ScyBernet, Human Resources Homepage, the terms of which may be amended from time to time" (at [99]). By contrast, in *Kallivalap Praveen Nair v Glaxosmithkline Consumer Healthcare Pte Ltd* [2023] 3 SLR 922 ("*Kallivalap*"), the letter of appointment which stated that the defendant "shall comply with all existing policies of the Company … which are applicable to [him] in the course of [his] employment" was interpreted as a clause obliging the *employee* to comply with the company's policies (at [14]). The clause, however, "[did] not oblige … the employer, to comply with the [p]olicies" (*Kallivalap* at [14]).

70 The claimant, in arguing that the Disciplinary Procedure & Guidelines were expressly incorporated into the AA and the ESA,[122] relies on cl 9(iv) of the AA which provides that the claimant must "comply with any rules, regulations, policies and procedures of or issued by the Company or any Group Company from time to time".[123] The claimant also cites cl 3.2.4 of the ESA which requires the claimant to "comply with all rules and regulations issued by the Company or by the Old Mutual group and expressed to apply to the Company and/or its employees".

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122 CCS at para 35.

123 Core Bundle at p 4.

71 However, as stated under the heading of "Introduction", the Disciplinary Procedure & Guidelines are meant to provide "a framework for dealing with instances where employees are alleged not to have met the required standards of conduct".[124] As such, the Disciplinary Procedure & Guidelines do not appear to fall within the phrase "rules and regulations". Although they are undoubtedly "procedures of or issued by the [defendant]", I find that the present case is analogous to the clause in *Kallivalap*, which imposed obligations only on the employee. The clauses do not suggest that the Disciplinary Procedure & Guidelines are to form part of the contract between the claimant and the defendant. I accept the defendant's submission that clauses relied on by the claimant in the AA and the ESA impose compliance obligations only on the claimant.[125]

72 As such, the common law principles in *Phosagro* are relevant. Based on *Phosagro*, there would be "gross misconduct" justifying summary dismissal under the ESA where the claimant's conduct amounts to a repudiatory breach (at [49]). I accept the claimant's submission that the defendant has not identified any conduct amounting to renunciation (for the purposes of Situation 2 of *RDC Concrete*) or any term amounting to a condition (under Situation 3(a) of *RDC Concrete*).[126] Under Situation 3(b) of *RDC Concrete*, I find that the claimant's breach does not deprive the defendant of substantially the whole benefit which it had intended it he should obtain from the contract. Specifically, the only clause that the claimant is alleged to have breached is cl 6 of the ESA. But the consequences of breaching this clause do not "go to the root of the contract" (*RDC Concrete* at [99]). Notwithstanding the breach of cl 6, the claimant carried

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124 Core Bundle at p 121.

125 DCS at para 21.

126 CCS at para 8.

out his duties and exercised his powers as the CEO of the company. Thus, it cannot be said that the defendant has been deprived of substantially the whole benefit it had intended to obtain from the ESA.

73 Nevertheless, I accept the defendant's submission that the resort to the common law principles on repudiatory breach was necessary in *Phosagro* as there was no guidance as to what "serious misconduct" amounted to under the employment contract.[127] As noted at [65] above, the claimant's conduct amounted to "conduct tending to bring himself [or the defendant] into serious disrepute" under cl 7.3.1 of the ESA. But to the extent that the defendant also alleges that such conduct amounted to "gross misconduct", Appendix A of the Disciplinary Procedure & Guidelines is relevant. I find that notwithstanding that there is no misconduct amounting to a breach that gives rise to a right to terminate under Situation 2, 3(a) or 3(b) of *RDC Concrete*, the defendant was justified in terminating the claimant's employment. There was "gross default or misconduct", in addition to conduct that brought the claimant or the defendant into "serious disrepute", thereby triggering the defendant's right to terminate the ESA pursuant to cl 7.3.1 of the ESA.

74 For all of the reasons above, I find that there were sufficient grounds for the claimant's summary dismissal.

The manner in which the claimant's summary dismissal was carried out was justified

75 Having disposed of the claimant's argument that the grounds for summary dismissal were wrongful, I turn to the claimant's next submission. The claimant submits that the manner in which his summary dismissal was carried

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127 DRS at para 7(a).

out was wrongful, thereby amounting to a repudiation of the claimant's employment on the part of the defendant.[128] The claimant argues that the defendant has breached the rules of natural justice, the Disciplinary Procedure & Guidelines, and the implied duty of mutual trust and confidence in its process of terminating the claimant's employment.[129] The claimant argues, amongst other reasons, that the defendant refused the claimant's request to postpone the Disciplinary Hearing by a day and proceeded in his absence, notwithstanding his explanation that he had to attend his daughter's graduation that day.[130]

76 For reasons explained below, I find that the manner in which the claimant's employment was terminated was proper.

77 As a preliminary point, I have found above that the Disciplinary Procedure & Guidelines do not form part of the AA or the ESA (see [71]). This suffices to dispose of the claimant's argument that the defendant has breached those guidelines in proceeding with the Disciplinary Hearing in his absence.

78 The claimant's submission raises two sub-issues for my determination:

(a) first, whether, in the absence of an express provision in the contract, the rules of natural justice apply to privately conducted disciplinary hearings; and

(b) second, whether there is an implied duty of mutual trust and confidence on the part of the defendant.

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128 CCS at para 39.

129 Claimant's Opening Statement dated 11 March 2024 ("COS") at para 15.

130 Mr Dabbs' AEIC at paras 86–87.

The rules of natural justice do not apply to privately conducted disciplinary hearings

79 I start with the first sub-issue. Under Singapore law, an employee does not have a common law right to a hearing prior to the termination of his employment. As noted in *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 ("*Leiman*") (at [125]–[126]):

> 125 … [A]n employer could terminate an employment contract at any time, and for any reason or for none, and … *any right to a hearing could only arise if provided for in the employment contract*…
>
> 126 [I]n contracts of employment, absent a term in the contract to the contrary, there is no basis for finding that an employer is obliged to accord to an employee the right to any particular process before undertaking any action, including even contractually wrongful action. In the latter scenario, the employer may be liable in damages, but there is simply no reason to import any process-related obligations or rights beyond anything that is specifically provided for in the contract. …
>
> [emphasis in original]

80 It follows that there is no automatic right in an employment relationship for the employee to be given adequate notice and opportunity to be heard on dismissal (*Vasudevan Pillai and another v City Council of Singapore* [1968-1970] SLR(R) 100 at [17], followed in *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2002] 2 SLR(R) 924 at [50] and *Lai Swee Lin Linda v Attorney-General* [2010] SGHC 345 at [41]).

81 The claimant has not pointed to any specific clause in the AA or the ESA to support its case that the rules of natural justice apply to the Disciplinary Hearing and the Appeal Hearing. Given this, the claimant's argument that the defendant has breached the rules of natural justice fall away.

82 I accept the claimant's argument that the defendant gave short notice of the Disciplinary Hearing. It is undisputed that Ms Beresford informed the claimant of the Disciplinary Hearing scheduled for 26 June 2019 at 3.30pm only on 24 June 2019 at 4.08pm.[131] The defendant also rejected the claimant's request to postpone the Disciplinary Hearing by a day, as he had to attend his daughter's high school graduation ceremony.[132] Even taking into account the defendant's argument that the claimant was inconsistent as to the date of the claimant's graduation ceremony,[133] I find that the notice for the Disciplinary Hearing was still too short and it would have been reasonable for the defendant to have postponed the hearing by a day.

83 The defendant also submits that the claimant was available to attend the Disciplinary Hearing notwithstanding his daughter's graduation ceremony, and hence chose not to be heard.[134] The evidence of the private investigator is that: (a) the claimant, his wife and their two daughters left the school after the graduation ceremony at 1pm;[135] (b) they went to the Tanglin Mall at around 1.18pm;[136] (c) the claimant left the mall alone at 2.02pm;[137] (d) the claimant entered his home at home at 2.09pm and did not leave his house until the end of the surveillance period at 9.30pm.[138] According to the defendant, this evidence shows that the claimant was available at the relevant time, *ie*, on 26 June 2019

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131 Core Bundle at pp 470–473.

132 Core Bundle at p 481.

133 DCS at para 33.

134 DCS at para 35.

135 First affidavit of Lee Jun Hao Benjamin dated 24 January 2024 ("Mr Lee's AEIC") at para 8.

136 Mr Lee's AEIC at para 10.

137 Mr Lee's AEIC at para 13.

138 Mr Lee's AEIC at paras 13 and 16.

at 3.30pm,[139] but still chose not to be heard.[140] I also note that the claimant accepted on the stand that he is unable to account for where he was at on 26 June 2019 at 3.30pm.[141] I do not place any significant weight on the Grab e-receipt which shows that the claimant took a taxi back from Tanglin Club to his residence at 11.54pm that day. As the defendant points out, the claimant could have gone to the Tanglin after the private investigator had left the claimant's residence at 9.30pm.[142] The e-receipt does not prove that the claimant was unavailable at 3.30pm.

84 Based on the above, I find that it is more likely than not that the claimant was available and could have attended the Disciplinary Hearing. Although the claimant asserted that he had "blocked in [the graduation] in [his work] calendar weeks prior",[143] he had not taken any leave that day.[144] As such, notwithstanding the short notice given to the claimant and his daughter's graduation ceremony that day, evidence suggests that he could have attended the Disciplinary Hearing.

85 I conclude that, notwithstanding the short notice, the defendant was entitled to insist that the claimant attend the Disciplinary Hearing on that day. However, I pause to comment that even though the defendant had acted within the letter of the law, if it is painting itself as a modern employer that takes equitable and holistic views of employment practices (bearing in mind its views on the claimant's behaviour), it has not followed the spirit of those practices by

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139 DCS at para 36.

140 DCS at para 37.

141 Transcript dated 12 March 2024 at p 118 lines 17–23.

142 DRS at para 30(d).

143 Mr Dabbs' AEIC at para 71(d).

144 Ms Beresford's AEIC at para 23.

insisting on a critical hearing on such short notice and on the day which the claimant had clearly indicated was an important family occasion. Nonetheless, the defendant was legally entitled to do so and thus nothing turned on the defendant's behaviour in this regard.

86 Ultimately, I have to consider the disciplinary and termination process as a whole to determine if the manner in which the summary dismissal was carried out was wrongful. In that regard, the claimant had the opportunity to be heard during the Appeal Hearing. Given that the panel for the Appeal Hearing had the power to overturn the results of the Disciplinary Hearing, the two hearings are part of a single process, and they should be viewed together as a whole (and not in isolation) when determining whether the summary dismissal was wrongful. I disagree with the claimant's argument during oral closing submissions that a negative finding on the Disciplinary Hearing should result in a finding of repudiatory breach against the defendant. During cross-examination, the claimant accepted unequivocally that he had been "given the opportunity to attend [the Appeal Hearing] and present [his] defence".[145] The claimant also accepted that he had the opportunity to respond to all the key allegations and evidence of misconduct made against him during the Appeal Hearing.[146]

87 For the above reasons, I find that the rules of natural justice are not applicable to this case. I dismiss the claimant's argument that the defendant has breached the rules of natural justice,

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145 Transcript dated 13 March 2024 at p 30 lines 6–10.

146 Transcript dated 13 March 2024 at p 39 line 5 to p 40 line 15.

There is no implied duty of mutual trust and confidence

88 The next preliminary issue is whether there is an implied duty of mutual trust and confidence in this employment relationship. The claimant argues that this duty is implied by virtue of the correspondence between the parties and the defendant's own constant reference to duties of trust.

89 As I observed in *BGC Partners (Singapore) Ltd and another v Sumit Grover* [2024] SGHC 206, it remains unsettled law whether employment contracts contain an implied term of mutual trust and confidence under Singapore law. In particular, the Appellate Division in *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2022] 1 SLR 1318 ("*Dong Wei*") observed that while this implied term was accepted by this court in various cases, the Court of Appeal in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 did not formally endorse this implied term (see *Dong Wei* at [73]–[74]). The court in *Dong Wei* had left this question for the Court of Appeal to resolve in a more appropriate case (at [80]), and I am not minded to conclude that there is an implied duty of mutual trust and confidence in employment contracts as a matter of Singapore law.

90 For completeness, I accept the defendant's submissions that the implied duty of mutual trust and confidence should not be imported into the local employment context:[147]

> (a) A term implied in law is concerned with "considerations of *fairness and policy*" [emphasis in original] and should amount to "a necessary incident of a definable category of contractual relationship" (*Chua Choon Cheng and others v Allgreen Properties Ltd and another*

147 DCS at para 11.

appeal [2009] 3 SLR(R) 724 at [68]). The claimant has not established how the duty of trust and mutual confidence is integral to all employer-employee relationships and justified on the basis of fairness and policy.

(b) The Appellate Division in *Dong Wei* was "very mindful of the specific context" in which this implied term was developed in the UK (at [76]). Specifically, this term arose within the UK's legislative employment framework, which is different from the legislative framework in Singapore (*Dong Wei* at [80]). I am also mindful that the implication of such a term may be "a step beyond the legitimate law-making function of the courts" (*Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356 at [1]).

(c) As this court noted in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577, the content of the implied term of mutual trust and confidence is "not … capable of precise definition" and can "vary greatly depending on the facts in each case" (at [58] and [60]). The lack of clarity as to what this duty encompasses would engender significant uncertainty in employment relationships. It bears emphasis that once implied, such terms would be implied in *all* future contracts of that particular type (*Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [42]).

These non-exhaustive reasons militate against the implication at law of the duty of mutual trust and confidence in employment contracts under Singapore law.

91 As the claimant has failed to establish that there is an implied duty of mutual trust and confidence at law, the argument that the defendant has breached such a duty cannot stand. I now turn to whether a duty of mutual trust and confidence should be implied in fact.

92 It is unclear if the claimant is relying on an implication of a term in fact. But to the extent that he is, I dismiss that argument. This was not pleaded and, in any event, was without merit. It is trite that the first step in the implication of terms in fact is that there must be a true gap in the contract because the parties did not contemplate that gap in the contract (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193). The claimant did not make any submissions on how and why there is an uncontemplated gap in the ESA or the AA.

93 I also dismiss the claimant's argument that the defendant is "precluded from denying that there was an implied duty of mutual trust and confidence".[148] The claimant relies on two documents to support this argument. The first is the defendant's letter dated 24 June 2019, inviting the claimant to attend the Disciplinary Hearing as he "has breached an implied duty of mutual trust and confidence".[149] The second is the defendant's letter dated 27 June 2019, setting out the outcome of the Disciplinary Hearing. The letter states that the claimant "has breached an implied duty of mutual trust and confidence".[150]

94 But whether a duty of mutual trust and confidence is implied into an employment contract in fact, is a legal issue for the court's determination. That the defendant referred to the claimant's alleged "implied duty of mutual trust and confidence" is an insufficient basis to conclude that this duty was implied into the claimant's employment contract in fact. Further, to the extent that the claimant relies on estoppel, it is unclear what form of estoppel the claimant seeks to rely on to argue that the defendant is precluded from denying the

148 CCS at para 37.

149 Core Bundle at p 473.

150 Core Bundle at p 528.

existence of the implied duty of mutual trust and confidence, and how the requirements of an estoppel have been satisfied.

95 Having concluded that the claimant's employment was rightfully terminated, it is unnecessary to deal with the defendant's prayer for a declaration as to termination pursuant to cl 7.3 of the ESA or its alternative prayer for a declaration that the claimant resigned on 25 June 2019. It also follows that the claimant's claims for losses suffered by virtue of wrongful termination and commissions that would have been payable from July 2019 to September 2019 are dismissed.

Issue 2: The claimant is not entitled to an account of sums due from the defendant to the claimant

96 The next issue is whether the claimant is entitled to an account of all sums due from the defendant to the claimant in respect of the alleged commissions due to the claimant, including in the claimant's Lapsed Reserve Account. The defendant's case is that there is no legal basis to ground the claimant's claim for an account.[151]

97 As the Court of Appeal explained in *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 ("*Chng Weng Wah*"), where a party has custody of a fund which it is obliged to administer for the benefit of another (*eg*, a trust), equity policies the due administration of the funds by holding the fiduciary to account (at [21]). There are two types of accounting of funds: (a) common accounts, where no misconduct is alleged; and (b) accounts on the footing of wilful default, which involves a breach of duty on the part of the fiduciary (*Chng Weng Wah* at [21]). In the present case, the claimant has not specified whether

151 DRS at para 35.

he is seeking a common account or an account on a wilful default basis. The claimant has also not explained how the present circumstances give rise to a fiduciary relationship. It is trite that the essence of the employment relationship is a contractual one and "is not typically fiduciary at all" (*Nottingham University v Fishel* [2000] IRLR 471, cited in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [52]).

98 Indeed, "the taking of accounts arises generally in custodial fiduciary relationships, such as *vis-à-vis* trustees, executors, or custodial agents" (*Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 at [26]). Even though the claimant emphasises the word "generally",[152] the claimant does not explain when the taking of accounts arises outside custodial fiduciary relationships and why the present case falls under the exception.

99 Even on the assumption that the claimant is relying on a common account (which does not require the claimant to establish that there is a breach of duty), the claimant must still first establish that it has a right to an account (*Chng Weng Wah* at [23]). In determining this, the court will first look at "whether the defendant has received property in circumstances sufficient to import an equitable obligation to handle the property for the benefit of another" (*Chng Weng Wah* at [23]). The burden is on the claimant to prove this (*Chng Weng Wah* at [23]).

100 Here, the claimant has not even asserted that the defendant has an equitable obligation to handle the funds in the Lapsed Reserve Account for the claimant's benefit. In fact, rather than holding the funds in the Lapsed Reserve Account "for the benefit of [the claimant]", I find that the defendant was holding

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152 CCS at para 49.

those funds for its own benefit. Annex B of the AA sets out the relevant provision regarding the Lapsed Reserve Account. In particular, it provides that:[153]

> Lapsed Reserve Account (LRA)
>
> This is applicable to commissions received by the Company from Products which pay commission on an indemnified basis and/or when the Advisor resigns from the Company ("Indemnified Business Commission"). Product Providers may under certain circumstances recover or "clawback" Indemnified Business Commission paid to the Company for [*sic*] ("Clawback"). If Clawback occurs, the Advisor shall return Gross Commission earned by the Advisor from relevant Indemnified Business Commission[.]

101 In other words, the claimant is contractually obliged to pay to the defendant the amount of clawback that the product providers recouped from the defendant (if any). Where the clawback by the product providers occurs during the claimant's employment and the claimant fails to repay the clawback amount to the defendant, "the [defendant] shall be entitled to automatically deduct such Clawback from the [claimant's] LRA".[154] This suggests that the defendant was holding the claimant's commissions in the Lapsed Reserve Account as some sort of security (in the loose sense) for itself, rather than for the benefit of the claimant.

102 I turn to the claimant's reliance on *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2012] SGHC 136 ("*eSys Technologies*"). This case does not assist the claimant. As the defendant rightly pointed out during the oral closing submissions, *eSys Technologies* was a case on implied contractual terms. The court explicitly stated that "[w]hether or not the plaintiff is entitled to an Account would depend on whether a relevant term can be implied in the

153 Core Bundle at p 10.

154 Core Bundle at p 10.

[parties' contract]" (*eSys Technologies* at [27]). It was in this context that the court took into account the admission by the defendant consultancy firm that it had a "minimum obligation" to explain to clients how time costs are calculated (*eSys Technologies* at [31]). This admission was relevant in determining "whether the term that the defendant be liable to render an Account was of such necessity that both parties intended for its inclusion in the [contract]", thus supporting the plaintiff's case for an implied term (*eSys Technologies* at [31]).

103 Here, the claimant does not rely on any implied term under the AA or the ESA which obliged the defendant to render an account. That being the case, I do not accept the claimant's submission that the present case is analogous to *eSys Technologies*[155] in that Mr Hemuss admitted that the defendant "has a duty to account to [the claimant] the commissions that are due to him" and "has a duty to account to [the claimant] the amount in his LRA".[156] Mr Hemuss' admission is irrelevant. As the defendant submits, he is not trained in law.[157] Whether the present circumstances give rise to the taking of accounts is a legal issue for the court's determination.

104 For all the above reasons, I accept the defendant's submission that the claimant has not shown any legal basis to be granted an order for an account.[158]

105 For completeness, to the extent that the claimant relies on a "common law action of account",[159] the defendant rightly points out that it is now

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155 CRS at para 23.

156 Transcript dated 25 March 2024 at p 80 lines 9–15.

157 DRS at para 35.

158 DCS at para 70.

159 CCS at para 49.

obsolete.[160] In any event, the claimant makes no proper submissions on this point and merely asserts that the common law action of account developed before the equitable account.[161]

Issue 3: The defendant is not in breach of cl 9.3 of the ESA by failing to provide consent to the claimant

106 The claimant argues that he has suffered loss because the defendant unreasonably withheld consent under cl 9.3 of the ESA. That clause allowed the defendant to solicit or deal with customers who became customers of the defendant solely through the claimant's introduction.[162] The claimant also argues that the defendant has wrongfully solicited his clients, such as Ms Kathiona Lie.[163]

107 I reproduce cl 9.3 of the ESA below:[164]

> The covenants in Clause 9.2.2 and 9.2.3 [*ie*, non-solicitation and non-competition clauses] are subject to any prior written consent being given by the Company to the Executive to solicit or deal with any particular Customers. Such consent will not be unreasonably withheld with respect to any Customers who became clients of the Company solely through the Executive's introduction.

108 The claimant has not adduced any evidence to supports his allegation that the defendant has unreasonably withheld consent under cl 9.3. I accept the

160 DRS at para 35.

161 CCS at para 49.

162 CCS at para 55.

163 CCS at para 56.

164 Core Bundle at p 116.

defendant's submission that the claimant has not adduced evidence to prove that he had sought proper consent from the defendant:[165]

(a) In the claimant's resignation letter dated 25 June 2019, the claimant stated that he "would … like to discuss the operation of [cl] 9.3 of the ESA … shortly".[166] But as the claimant accepted during cross-examination, he did not seek any consent from the defendant pursuant to cl 9.3.[167]

(b) In the claimant's letter dated 4 July 2019 to appeal against the outcome of the Disciplinary Hearing, the claimant "repeat[ed] [his] invitation to have a discussion with [the defendant] as to the operation of clause 9.3 of the ESA at a mutually convenient time".[168] The claimant also accepted on the stand that he was not seeking any consent from the defendant in this letter.[169]

(c) The claimant accepted that the first time that he had raised the issue of unreasonable withholding of consent under cl 9.3 was in the letter by the claimant's solicitor dated 3 February 2020.[170] But even in this letter, the claimant did not specify the "particular Customers" (see cl 9.3 at [107] above) for which he wished to seek consent.[171]

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165 DCS at para 75.

166 Core Bundle at p 483.

167 Transcript dated 14 March 2024 at p 57 lines 14–20.

168 Core Bundle at p 547.

169 Transcript dated 14 March 2024 at p 57 lines 24–27.

170 Transcript dated 14 March 2024 at p 57 lines 28–31.

171 Core Bundle at p 601.

As the defendant also points out,[172] there is no evidence of any loss suffered by the claimant resulting from this alleged breach.

109 The claimant's allegation that the defendant has wrongfully solicited his client is misplaced. Clause 9 of the ESA imposes non-solicitation and non-competition obligations on the *claimant*. It is unclear how the defendant's alleged solicitation of the claimant's clients could amount to a breach under cl 9.3. The claimant argues that his "(bare) assertion" of wrongful solicitation should stand because his allegation was never challenged by the defendant in cross-examination.[173] But this argument cannot assist the claimant when the non-solicitation clause under the ESA does not impose any obligation on the *defendant*.

110 As the claimant has not established that he had sought consent from the defendant pursuant to cl 9.3 of the ESA, I dismiss his argument that the defendant is in breach of cl 9.3 of the ESA in unreasonably withholding consent.

Issue 4: The defendant is not in breach of cl 7A.1 of the ESA by failing to buy the claimant's client bank

111 The next issue is whether the defendant is in breach of cl 7A.1. The claimant argues that he has suffered loss because the defendant failed, refused and/or neglected to exercise its option under cl 7A.1 of the ESA to require the claimant to sell his client bank to the defendant.[174]

112 Clause 7A.1 of the ESA provides as follows:[175]

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172 DCS at para 76.

173 CRCS at para 24.

174 CCS at para 56.

175 Core Bundle at p 114.

> **7A. CALL OPTION OVER CLIENT BANK**
>
> 7A.1 In the event the Executive ceases to be employed by the Company, whether by termination in accordance with this Agreement or otherwise, the Executive hereby irrevocably grants to the Company the option to require the Executive to sell his Client Bank to the Company in accordance with the terms of a Practice Buy-Out Agreement on terms to be agreed between the parties.

113 It is clear that cl 7A.1 of the ESA "grants to the [defendant] the option" to require the claimant to sell his client bank. This is an option and a right that the defendant is entitled to *choose* to exercise. As the claimant himself admitted on the stand,[176] there is no obligation imposed on the defendant to exercise this option. In the present case, the defendant chose not to, and it cannot be faulted for making that choice.

114 Even taking the claimant's case at its highest that it is "customary" for the defendant to exercise such options,[177] the claimant's case fails. As the defendant submits,[178] the claimant has not adduced any evidence of this alleged custom nor any evidence to substantiate the alleged losses suffered from the alleged breach other than a bare assertion that his client bank is valued at "between 3x to 4x the annual management fee of those clients' investment portfolios".[179]

115 For the above reasons, I dismiss the claimant's claim for losses arising from the defendant's breach of cl 7A.1 of the ESA.

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176 Transcript dated 14 March 2024 at p 61 lines 4–15.

177 CCS at para 56.

178 DCS at paras 79 and 81.

179 CCS at para 56.

Issue 5: The claimant is liable to pay the Excess Bonus to the defendant

116 I turn to whether the claimant is liable to pay the Excess Bonus to the defendant.

The defendant has sufficiently pleaded this counterclaim

117 As a preliminary point, the claimant argues that this counterclaim is not pleaded in the defendant's defence.[180] I disagree. In Defence (Amendment No 2), the defendant expressly pleaded that it is claiming "the difference between the discretionary bonus advanced to the [c]laimant, and the amount actually payable based on the final result of the [c]laimant's achievement on specific performance metrics in the [P]erformance [S]corecard".[181] The defendant also pleaded the material facts, such as (a) the allegation that the sum of $375,000 "was the [c]laimant's total maximum discretionary bonus" based on the Performance Scorecard for 1 July 2017 to 31 December 2018;[182] and (b) the allegation that the final result of the claimant's performance under the Performance Scorecard amounted only to $169,243.[183]

The claimant agreed to be bound by the Performance Scorecard

118 Having determined that the defendant's counterclaim for the Excess Bonus is sufficiently pleaded, I turn to the parties' arguments.

119 The claimant argues that there was an agreement between the parties in or around early October 2017 for the claimant to receive the sum of $375,000

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180 COS at para 27.

181 Defence (Amendment No 2) at p 27.

182 Defence (Amendment No 2) at para 16(b).

183 Defence (Amendment No 2) at para 22.

for the period of 1 July 2017 to 31 December 2018 in addition to his existing remuneration package (the "Fixed Sum Agreement").[184] It is further alleged that the non-deduction of the claimant's monthly salary of $13,500 from his gross commissions during that period was due to the Fixed Sum Agreement. The defendant's case is that the sum of $375,000 was a discretionary bonus given pursuant to the Performance Scorecard.[185] The Performance Scorecard was devised as a discretionary performance incentive in response to the claimant's request for higher remuneration,[186] and applied to the claimant's bonus for 1 July 2017 to 31 December 2018.

120 I set out the Performance Scorecard in full below:[187]

184 CCS at para 57.

185 DCS at para 85.

186 First affidavit of Mr Joly Scott Adam Hemuss dated 24 January 2024 ("Mr Hemuss' AEIC") at para 14; Ms Beresford's AEIC at para 10.

187 Core Bundle at p 149.

MATTHEW DABBS
CEO, AAM ADVISORY

PERFORMANCE SCORECARD

Performance Period: **1 July 2017 – 31 December 2018**
Maximum Bonus: **SGD375,000** (paid via not deducting SDG13.5k "minimum salary" from commission income with effect from 1 July 2017 and top up payment / recovery to be paid in March 2019 salary)

Financial/Quantitative KPIs			
Profit[1]	**30%**	**Increase in Advisers Earning ≥ SGD 300k total income [2]**	**20%**
Threshold	Maximum	Threshold	Maximum
SGD2,000,000	SGD3,500,000+	15%	35%+
There is straight-line interpolation between threshold and maximum. Below threshold the outcome is nil.			
Non-Financial KPIs			
Risk & Customer	**20%**	**Operating Model & Leadership**	**30%**
• Address all audit and compliance issues to agreed timescales, improving the robustness of the control environment and risk maturity across the business. To be measured through feedback from staff and OMI CRO • Foster a customer-centric advice and sales culture across all representatives, focussed on delivering strong customer outcomes, including: o Understanding client needs o Suitability of product recommendations o Adequacy of information disclosure o High standards of conduct and professionalism		• Fully embed shared adviser support teams to generate business efficiencies, improving the quality and depth of support for advisors and ultimately the end customer experience To be measured through ensuring all 15 advisors that earned over SGD500k gross income in the year ended 31/12/16 have had their books administered by the shared function by 31/12/18 for six months prior to the end of that year • Demonstrate OMW's values – Pioneering, Dependable and Stronger Together – through behaviours and decisions to drive the right business and customer outcomes	

[1] Cumulative Pre-tax IFRS AOP 2017 & 2018 after the following adjustments:
1. SGD100,000 added back in 2017 and SGD200,000 added back in 2018 for MD bonus/salary increase
2. SGD300,000 added back in 2017 and SGD315,000 added back in 2018 for staff bonus

[2] Increase in percentage of advisers over those in the year ended 31/12/16 earning over SGD300k gross income, measured in the year ended 31/12/2018

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121 The claimant has not established on a balance of probabilities that the parties entered into the Fixed Sum Agreement. There is no evidence, other than the claimant's bare assertion in his affidavit of evidence in chief and during cross-examination,[188] which supports the existence of such an agreement. The claimant asserted on the stand that there was an e-mail from Ms Lloyd confirming that the figure was a fixed salary.[189] But as the defendant points out,[190] this was never adduced as evidence before me, so I give no weight to the claimant's bare assertion.

122 By contrast, there is objective evidence supporting the defendant's case that the claimant agreed to be bound by the Performance Scorecard.

188 Mr Dabbs' AEIC at para 22(a); Transcript dated 12 March 2024 at p 52 lines 2–3 and p 65 line 32 to p 66 line 12.

189 Transcript dated 12 March 2024 at p 43 lines 12–20.

190 DCS at para 86(d).

(a) The Performance Scorecard itself states that the "Performance Period" is "1 July 2017 – 31 December 2018" (see [120] above). Contrary to the claimant's evidence in his affidavit that he had only received a draft version of the Performance Scorecard,[191] the claimant admitted during cross-examination that he had in fact received the (finalised) Performance Scorecard.[192] Even though the claimant disputes the authenticity of the Performance Scorecard, the claimant does not dispute the authenticity of the draft version which he had received via e-mail on 17 October 2017.[193] As such, the claimant must have known that the metrics set out in the draft scorecard, which are the same as those in the Performance Scorecard, were applicable during the stated "Performance Period".

(b) On 4 October 2018, the claimant sent an e-mail to Mr Hemuss, attaching the Performance Scorecard and describing his performance on the "Financial KPI[s]", namely "Profitability" and "Increase in adviser earnings", and his performance on "Non-financial KPI[s]", comprising "Risk and customer" and "Operating Model and Leadership".[194] These metrics correspond to the Performance Scorecard at [120] above. As the defendant highlights, the claimant titled this e-mail, "My bonus/targets etc".[195] This shows that the claimant not only knew that the Performance Scorecard applied to him but also took steps to measure his performance against the scorecard.

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191 Mr Dabbs' AEIC at para 39(b).

192 Transcript dated 12 March 2024 at p 45 lines 5–9.

193 Transcript dated 12 March 2024 at p 44 lines 8–18.

194 Core Bundle at p 153.

195 Core Bundle at p 153.

(c) On 3 December 2018, Mr Hemuss sent an e-mail to the claimant, asking for "the metrics to show where [he] [is] re[garding] [his] bonus for this year [*ie*, 2018]".[196] On 3 December 2018, the claimant replied to Mr Hemuss, asking if he is referring to the Performance Scorecard and reiterating that he "need[s] some form of compensation to cover [his] reduced advisor earnings" since stepping into the CEO role.[197] Mr Hemuss then e-mailed Mr Dolan regarding "what needs to be done for the appraisal of [the claimant]'s bonus payment for the 18 months to 31 December 2018", based on the "4 elements as shown in the scorecard attached [*ie*, the Performance Scorecard]".[198] The claimant was copied on this e-mail.

(d) The claimant accepted during cross-examination that he only raised his grievances against the Performance Scorecard on 4 April 2019.[199] This was after 13 March 2019, which was when the claimant appears to have discovered that he had not satisfied the bonus thresholds under the Performance Scorecard.[200] This suggests that the claimant was initially willing to accept the Performance Scorecard because he felt that the targets stated therein were achievable, but subsequently changed his mind when he realised that he may not be entitled to the bonus.

In light of the evidence above, I find that the claimant agreed to be bound by the Performance Scorecard by conduct. There was no agreement that the sum of $375,000 was a fixed remuneration.

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196 Core Bundle at p 199.

197 Core Bundle at p 198.

198 Core Bundle at p 198.

199 Transcript dated 12 March 2024 at p 87 line 30 to p 88 line 1.

200 DCS at para 85(c).

The doctrine of illegality does not apply

123 The claimant also argues that the defendant's counterclaim to recover the Excess Bonus is barred by illegality.[201] In determining whether a contract is tainted with illegality, the first question is whether the contract is prohibited under a statutory provision and/or under one of the established heads of common law public policy (*Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 at [64]).

124 The claimant's submission is based on statutory illegality. More specifically, the entry into the Performance Scorecard is allegedly prohibited by reg 18(1) of the Financial Advisers Regulations (2004 Rev Ed) (the "FAR"). Regulation 18(1) of the FAR provides that:

> **Unsecured advances, unsecured loans and unsecured credit facilities**
>
> **18.**—(1) No licensed financial adviser shall grant any unsecured advance, unsecured loan or unsecured credit facility —
>
> (a) to a director of the licensed financial adviser who is not an employee of the licensed financial adviser; or
>
> (b) to any other officer or an employee of the licensed financial adviser (including a director who is its employee) or any of its representatives,
>
> which in the aggregate and outstanding at any one time, exceeds $3,000.

125 According to the claimant, the defendant (as a licensed financial advisor), would have granted to the claimant (a director and an employee), an "unsecured advance, unsecured loan or unsecured credit facility" which in the aggregate and outstanding at any one time exceeded $3,000.[202]

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201 CCS at para 59.

202 CCS at para 59.

126 I note that reg 18(2) of the FAR defines "unsecured advance", "unsecured loan" or "unsecured credit facility" broadly to include "any advance or loan made without security". But even if the sum of $243,000 paid to the claimant under the Performance Scorecard falls within reg 18(2) of the FAR, s 39(1) of the Financial Advisers Act 2001 (2020 Rev Ed), read with s 39(3) of the same, provides that subject to any express provision to the contrary in the FAA or the FAR, any contravention of the FAA or the FAR "does not affect the validity or enforceability of any agreement, transaction or arrangement". There is no express provision in the FAA or the FAR which states that the validity of an unsecured advance, loan or credit facility under reg 18(2) of the FAR is affected. As such, s 39(1) of the FAA does not preclude AAM from seeking recovery of the sum paid to the claimant pursuant to a valid transaction.

127 For the above reasons, I dismiss the claimant's assertion that the defendant is barred by illegality from clawing back the Excess Bonus.

The claimant is not entitled to keep the Excess Bonus as he has not satisfied the conditions under the Performance Scorecard

128 Having determined that the defendant's counterclaim is not barred by illegality, the final issue is whether all the conditions are satisfied such that the claimant is entitled to keep the full amount of the Excess Bonus.

129 Annex B of the AA provides that commissions "earned and payable to the Advisor is computed as follows: Total Gross Commission minus Total Salary" and that "there will be no Commission if Total Salary is more than Total Gross Commission at any time during the term of employment".[203] However, under the Performance Scorecard, a bonus is paid by "not deducting S[$]13.5k

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203 Core Bundle at p 10.

'minimum [monthly] salary' from commission income with effect from 1 July 2017". As such, the total salary amounting to $243,000 ($13,500 x 18) from 1 July 2017 to 31 December 2018 was not deducted. The sum of $243,000 was instead advanced as a discretionary bonus, which could be "recover[ed] … in March 2019 salary" depending on the claimant's final performance under the Performance Scorecard.

130 The defendant relies on Mr Dolan's e-mail to the claimant dated 23 May 2019, in which Mr Dolan attached the claimant's final performance under the Performance Scorecard.[204] The assessment of the claimant's performance was conducted by Mr Hemuss, Ms Beresford, Mr Dolan, OMI's managing director Mr Peter Kenny, and the then-Chief Financial Officer of the defendant, Mr Eryk Lee ("Mr Lee"). They concluded that the claimant was entitled to a discretionary bonus amounting to $169,243 under the Performance Scorecard.[205] The claimant did not challenge this assessment in his submissions or during cross-examination.

131 I have also found above that the claimant agreed to be bound by this discretionary bonus arrangement in accordance with the Performance Scorecard. It follows that the claimant is not entitled to retain the Excess Bonus, *ie*, the amount of $73,757 representing the difference between $243,000 (the advance payment of the bonus) and $169,243 (the actual bonus to which the claimant is entitled).

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204 Core Bundle at p 439.

205 Core Bundle at p 440.

Issue 6: The claimant is not liable for the costs of his personal assistant to the defendant

132 I turn to the issue of whether the claimant is liable to pay the costs of his personal assistant to the defendant.

133 As a preliminary point, the claimant argues that this counterclaim is not pleaded in the defendant's defence.[206] I disagree. Defence (Amendment No 2) pleads that the "[c]laimant is … liable to the [d]efendant for expenses incurred by him" as stated in the "unpaid" invoice dated 20 June 2019 (see [134] below).[207] The defendant has also pleaded that this action is premised upon an addendum to the AA and the ESA.[208] As such, the claimant's objection of inadequate pleading is without merit.

134 I turn to the addendum to the AA and the ESA dated 17 June 2019 (the "Addendum"), which the defendant relies on for this counterclaim. Pursuant to the Addendum, from 1 June 2019, the claimant is responsible for "[a]ny costs associated to [his] business and [his] team", including the costs of engaging a personal assistant.[209] It is undisputed that the costs incurred for the engagement of the claimant's personal assistant for June 2019 amount to $6,572.21.[210] This is reflected in the invoice dated 20 June 2019 billed by the defendant to the claimant.[211]

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206 COS at para 27.

207 Defence (Amd No 2) at p 27.

208 Defence (Amd No 2) at para 26.

209 Core Bundle at p 465.

210 Transcript dated 14 March 2024 at p 70 lines 24–28.

211 Core Bundle at p 468.

135 The claimant's objection is that he has "never signed or agreed to the Addendum" such that there is no basis for this counterclaim.[212]

136 As the Court of Appeal noted in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318, "unless there is a specific provision which permits it, a party cannot unilaterally vary the terms of a contract" (at [75], citing Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation and Estoppel* (Oxford University Press, 3rd Ed, 2012) at para 2.14). In the present case, cl 27 of the AA provides that the defendant has "the right to amend, modify or vary any provision of [the claimant's] employment at any time for any reason that the [defendant] deems fit and necessary", and a written notice of the same "shall be communicated to [the claimant] within fourteen (14) days of such amendments, modifications or variation".[213] I find that cl 27 of the AA grants the defendant a unilateral right to vary the terms of the parties' contract.

137 As such, the defendant is entitled to recover $6,572.21 from the claimant. However, this sum has already been deducted from the claimant's Lapsed Reserve Account. There is an entry stating "Deduct Invoice: 19000159 [PA Biling]" of "6,572.21" in the Lapsed Reserve Account.[214] Mr Hemuss accepted, during cross-examination, that this entry shows that the sum of $6,572.21 had been deducted against the credit balances in the claimant's Lapsed Reserve Account (see [153] below).[215] The defendant is not entitled to a double recovery.

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212 Mr Dabbs' AEIC at para 139.

213 Core Bundle at p 8.

214 Core Bundle at p 732.

215 Transcript dated 25 March 2024 p 73 at lines 19–20.

138 For the above reasons, I dismiss the defendant's counterclaim in relation to the costs of the claimant's personal assistant.

Issue 7: The claimant is liable to pay the Overpaid Commissions to the defendant

139 The next issue is whether the claimant is liable to pay the Overpaid Commissions to the defendant.

The defendant has sufficiently pleaded this counterclaim

140 As a preliminary point, the claimant argues that the defendant failed to plead the cause of action properly.[216] According to the claimant, the defendant appears to be relying on "some variant of unjust enrichment" or a presumed resulting trust, both of which are unpleaded.[217]

141 I dismiss this argument. The defendant has pleaded in Defence (Amendment No 2) that the sum of $75,219 amounts to overpaid commissions for 1 January 2019 to 25 July 2019.[218] It is sufficiently clear that the defendant has pleaded a debt due to the defendant under the contract between the parties.

The doctrine of illegality is inapplicable

142 I also dismiss the claimant's argument that the defence of illegality applies to the defendant's action to recover the Overpaid Commissions.[219]. I repeat my analysis at [126] above.

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216 COS at para 27.

217 CRS at para 26.

218 Defence (Amd No 2) at p 28.

219 CCS at para 59.

The claimant agreed that the Overpaid Commissions may be recouped by the defendant

143 The AA governs the claimant's entitlement to commissions. The claimant does not challenge this and does not point towards any agreement that governs the claimant's remuneration in 2019. Under Annex B of the AA, the claimant's commissions are calculated by deducting the total salary from the total gross commissions.[220]

144 According to Mr Hemuss, the claimant's total gross commissions for the period of 1 January 2019 to 25 June 2019 (*ie*, the date that the claimant resigned) was $97,390.25.[221] The claimant disagrees. I set out the differences in the parties' calculations below:[222]

Month (2019)	**Gross commissions at wrong banding (S$)**	**Gross commissions at correct banding calculated by claimant (S$)**	**Gross commissions at correct banding calculated by defendant (S$)**
February	488.33	553.4435	553.44
	1,203.46	1,588.81	
	4,496.81	5,938.635	5,938.60
March	2,066.10	2,341.5715	2,341.58
	1,112.63	1,324.63	
	4,215.16	5,551.7775	5,568.61
April	18.339.13	18,556.6305	18,556.62

220 Core Bundle at p 10.

221 Mr Hemuss' AEIC at para 30.

222 Mr Hemuss' AEIC at pp 205–206; CCS at para 54.

	14,861.86	16,843.44	
	4,636.77	6,128.5275	6,128.52
May	22,926.82	26,936.041	26,111.11
	498.97	589.06	
	4,075.49	6,036.0825	5,794.64
	1,122.29	3,065.525	2,650.25
	413.26	487.883	470.66
June	-	3,459.347	2,930.28
Total	80,457.08	99,401.40	97,390.25

145 I accept the figures provided by the defendant. It is significant that the claimant's objection is that a wrong banding was used to calculate the commissions, not that the basis on which those commissions were calculated (*eg*, the commission statements) was flawed. In that regard, the initial gross commissions (*ie*, those calculated on the wrong banding) were supported by detailed commission sheets prepared by the defendant. For example, the figure of $488.33 is based on a document titled "Jan Recurring 2019 (2019)", which contains a list of commissions payable for each product for that period, together with other details such as the product provider, policy number, product type and client name.[223] Similarly, the sum of $1,203.46 is based on a document titled "Matthew Dabbs (End Feb Comm 2019)", reflecting the commissions payable and adjustments made to take into account relevant indemnities.[224] Although the defendant did not provide calculations to show how it arrived at the figures

223 Core Bundle at p 1226.

224 Core Bundle at p 1227.

using the correct banding, I am satisfied that the adjusted figures reflect the correct figures, bearing in mind that there is substantial evidence of the basis for the defendant's calculation of the commissions under the original banding. I also accept Mr Hemuss' evidence that the calculation of an advisor's gross commission varies depending on the type of commissions and the applicable rates, which differ for each fund.[225] The claimant raised the above figures for the first time in his closing written submissions. In the absence of any explanation as to why the claimant disagrees with the adjusted figures provided by the defendant, I accept the defendant's numbers as the correct figures.

146 Based on the formula in Annex B of the AA, the claimant's commissions for that same period were $5,238.08, calculated by deducting the total basic salary of $92,152.17 from the total gross commissions of $97,390.25.[226] That the claimant's total basic salary amounted to $92,152.17 is evidenced by a copy of the claimant's tax return filed in 2019.[227]

147 But the defendant did not carry out the relevant deduction (*ie*, deducting the total basic salary from the total gross commissions) and paid the amount of $80,329.94 to the claimant.[228] According to the defendant, the non-deducted salary could be recouped from the claimant after finalising discussions on the claimant's remuneration package for 2019. This is supported by Mr Hemuss' e-mail to the claimant on 17 January 2019, copying Mr Lee, Ms Beresford and Mr Dolan:[229]

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225 Transcript dated 26 March 2024 at p 5 line 23 to p 6 line 19.

226 Mr Hemuss' AEIC at para 32.

227 Mr Hemuss' AEIC at p 248.

228 Mr Hemuss' AEIC at para 33.

229 Core Bundle at p 218.

> Spoke to Brendan and Donna and we think the best cause of action ***given that we are still agreeing bonus /rem[uneration]*** for 2019 is that ***we should continue to not deduct your salary*** whilst we agree 2019[.] We will ***recoup this*** *advance* off whatever is agreed for 2019 or future salary/other payments if needed.
>
> …
>
> Please confirm this is acceptable[.]
>
> [emphasis in original in italics; emphasis added in bold italics]

The claimant responded to the above e-mail on the same day, stating, amongst other things, "Appreciated".[230] This indicates that the parties were in agreement that the non-deducted salary from the claimant's commissions may be adjusted and recouped depending on the eventual remuneration package for 2019.

148 As no remuneration package was agreed between the parties, the defendant is entitled to recoup the Overpaid Commissions of $75,219, being $80,329.94[231] (amount paid) + $127.14 (expenses owing from the claimant to the defendant) – $5,238.08 (actual commissions that the claimant is entitled to).[232] In particular, although there is no documentary evidence to support the sum of $127.14, I accept this sum as the claimant has not challenged it.

Issue 8: The defendant is entitled to set off the sums in the Lapsed Reserve Account against the Excess Bonus and Overpaid Commissions

149 Having determined that the claimant is liable to pay the Excess Bonus and Overpaid Commissions to the defendant, the next issue is whether the defendant is entitled to set off the sum in the Lapsed Reserve Account against those sums, or to deduct them pursuant to cl 7.4 of the ESA.

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230 Core Bundle at p 217.

231 Mr Hemuss' AEIC at pp 235–245.

232 Mr Hemuss' AEIC at para 34.

150 A defendant is entitled to rely on its claim both as a defence of set-off against the claimant's claim as well as a counterclaim, provided that the claim relates to "debts or liquidated demands due between the same parties in the same right" (*Inzign Pte Ltd v Associated Spring Asia Pte Ltd* [2018] SGHC 147 at [70]).

151 The claimant raises a preliminary objection that the defendant has not pleaded nor proved that the sums sought to be set off are debts or liquidated demands due to the defendant.[233] I dismiss this argument. As noted above, the defendant has pleaded that the Excess Bonus and the Overpaid Commissions amount to debts due from the claimant to the defendant (at [117] and [141]). The defendant has also explicitly pleaded that it is "entitled to set off the [c]laimant's claim against the sums due from the [c]laimant to the [d]efendant as set out [in] the [c]ounterclaim".[234] I thus dismiss the claimant's objection of inadequate pleadings.

152 I now turn to the amount of commissions retained in the Lapsed Reserve Account and the amount of unpaid and due commissions.

The amount due to the claimant under the Lapsed Reserve Account is $63,472.32

153 According to the defendant, the amount that is due to the claimant under the Lapsed Reserve Account is $20,678.76.[235] This is calculated by adding the balance in the Lapsed Reserve Account as of 25 June 2019 (amounting to $12,508.83) and the additional amounts paid into the Lapsed Reserve Account

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233 CCS at para 58.

234 Defence (Amd No 2) at para 45.

235 DCS at para 94.

after 25 June 2019 (amounting to $53,893.77), and deducting the settlement fees paid to the claimant's former clients (amounting to $42,793.56) and the June 2019 commission of $2,930.28 (which has already been accounted for in calculating the claimant's total gross commissions).[236]

154 The figures of $12,508.83[237] and $53,893.77[238] are supported by the commission statements relating to the claimant and have not been challenged by the claimant. However, the claimant argues that the amount should be at least $42,793.56 more than the sum of $20,678.76, as the defendant has wrongfully deducted $42,793.56 which had purportedly been paid to the claimant's former clients.[239] The sum of $42,793.56 is broken down as follows:

(a) $3,157.90 deducted in August 2019 pursuant to an alleged complaint by Mr Jonathon Greville and Ms Cherie Lehman;[240]

(b) $25,635.66 deducted in November 2020 pursuant to an alleged complaint by Mr Alexander James Connors and Ms Jill Susan;[241] and

(c) $14,000 deducted in June 2023 pursuant to an alleged complaint by Mr Douglas Farquhar.[242]

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236 Mr Hemuss' AEIC at para 42.

237 Mr Hemuss' AEIC at pp 254–283.

238 Mr Hemuss' AEIC at pp 284–312.

239 CCS at para 50.

240 Core Bundle at p 1262.

241 Core Bundle at p 1277.

242 Core Bundle at p 707.

155 Annex B of the AA contains the relevant provision on the Lapsed Reserve Account:[243]

> This is applicable to commissions received by the Company from Products which pay commission on an indemnified basis and/or when the Advisor resigns from the Company ("Indemnified Business Commission"). Product Providers may under certain circumstances recover or "clawback" Indemnified Business Commission paid to the Company for ("Clawback"). If Clawback occurs, the Advisor shall return Gross Commission earned by the Advisor from relevant Indemnified Business Commission[.]

156 According to Mr Hemuss, the amounts retained in the Lapsed Reserve Account were also meant to cover the defendant's loss from financial settlements following complaints about an advisor's conduct by the advisor's former clients.[244] The clawback was to be effected by deducting the relevant sum from the Lapsed Reserve Account, unless the advisor repaid the amount separately.[245] But I note that the provision relating to the Lapsed Reserve Account is silent on this. As the claimant pointed out, it appears that the defendant was entitled to a clawback of moneys only in limited circumstances where the product providers recover or recoup indemnified business commissions paid to the defendant.[246] I also note that the claimant accepted during cross-examination that the defendant would be entitled to deduct a sum from the Lapsed Reserve Account to address financial settlements following complaints from an advisor's former client, but only "if the advisor is spoken to about it and agrees to it".[247]

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243 Core Bundle at p 10.

244 Mr Hemuss' AEIC at para 8.

245 Mr Hemuss' AEIC at para 9.

246 CCS at para 50.

247 Transcript dated 14 March 2024 at p 73 lines 19–26.

157 I find that the defendant has not adduced sufficient evidence to show that it was entitled to deduct $42,793.56 from the Lapsed Reserve Account on the basis of complaints from the client's former clients.

(a) Mr Hemuss admitted on the stand that the defendant has not adduced any documents to show the nature of the complaints made by the five clients.[248]

(b) As to the sum of $3,157.90, the document that the defendant relies on to support this deduction in fact indicates that $3,157.90 is "Commission Payable" to the claimant.[249] When cross-examined on this point, Mr Hemuss gave an unconvincing response that it is "[m]aybe … a template" that he used.[250] It is unclear why a template for a commission statement would have been used to reflect a deduction to be made against the Lapsed Reserve Account.

(c) As to the deduction of $25,635.66, the claimant adduced an e-mail from Mr Beggs to the claimant dated 13 October 2020 regarding the two clients' complaints and their request for compensation.[251] The claimant responded on 16 October 2020, stating that he believed he had not breached any obligation.[252] As the claimant points out, if the clients were still dissatisfied by the claimant's response, they could have brought the matter to the Financial Industry Disputes Resolution Centre Ltd ("FIDReC"), and the claimant would have been prepared to defend

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248 Transcript dated 25 March 2024 at p 80 lines 20–24.

249 Core Bundle at p 1262.

250 Transcript dated 25 March 2024 at p 80 line 31 to p 81 line 1.

251 Core Bundle at p 615D.

252 Core Bundle at p 615D.

his position.[253] Despite this, the defendant chose to reach a settlement with these clients and deducted a sum from the claimant's Lapsed Reserve Account. There was no basis for the defendant to do so.

(d) For the sum of $14,000, the client made a complaint to FIDReC, to which the defendant filed a response without including the claimant's response to the complaint.[254] The defendant also proceeded to deduct the settlement sum from the claimant's Lapsed Reserve Account despite the claimant's disagreement. In fact, as the claimant points out, the sole documentary evidence that the defendant relies on is a tax invoice from the defendant to the claimant for the sum of $14,000.[255] There is no evidence that the defendant has paid the settlement sum to the client.

For the above reasons, I find that the defendant was not entitled to deduct the sum of $42,793.56 from the Lapsed Reserve Account. As such, the amount owed by the defendant to the claimant under the Lapsed Reserve Account is $63,472.32 ($42,793.56 + $20,678.76).

253 Transcript dated 25 March 2024 at p 83 lines 17–24.

254 Core Bundle at p 706J.

255 CCS at para 53.

The amount payable by the claimant to the defendant after the set-off is $85,503.69

158 The defendant is entitled to set off the sums in the Lapsed Reserve Account of $63,472.32 (see [157] above) against the Excess Bonus of $73,757 (see [131] above) and Overpaid Commissions of $75,219.01 (see [148] above). The amount payable by the claimant to the defendant after the set-off is thus $85,503.69 ($73,757 + $75,219.01 - $63,472.32).

Conclusion

159 I summarise my findings below:

(a) The defendant validly terminated the claimant's employment under cl 7.3.1 of the ESA. There were sufficient grounds for the claimant's summary dismissal, and the manner in which the claimant's summary dismissal was carried out was justified.

(b) The claimant is not entitled to an account of sums due from the defendant to the claimant.

(c) The defendant is not in breach of cl 9.3 of the ESA by failing to provide consent to the claimant.

(d) The defendant is not in breach of cl 7A.1 of the ESA by failing to buy the claimant's client bank.

(e) The claimant is liable to pay the Excess Bonus to the defendant.

(f) The claimant is not liable for the costs of his personal assistant to the defendant.

(g) The claimant is liable to pay the Overpaid Commissions to the defendant.

(h) The defendant is entitled to set off the sums in the Lapsed Reserve Account against the Excess Bonus and Overpaid Commissions. The amount the claimant shall pay the defendant is $85,503.69.

160 Unless agreed, I will hear the parties on costs.

Wong Li Kok, Alex
Judicial Commissioner

Nicholas Jeyaraj s/o Narayanan (Nicholas & Tan Partnership LLP) for the claimant;
Tan Whei Mien Joy, Ho Wei Jie (He Weijie), Thio Li Fong Michelle Theresa, Kong Pek Yoke (Jiang Biyu) (WongPartnership LLP) for the defendant.