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

[2021] SGHC 24

Suit No 163 of 2018

Between

Wong Sung Boon

… *Plaintiff*

And

(1) Fuji Xerox Singapore Pte Ltd
(2) Fuji Xerox Asia Pacific Pte Ltd

… *Defendants*

JUDGMENT

[Employment Law] — [Contract of service] — [Breach]
[Tort] — [Conspiracy]
[Tort] — [Inducement of breach of contract]
[Companies] — [Directors] — [Duties]

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v
Fuji Xerox Singapore Pte Ltd and another

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2 February 2021 Judgment reserved.

Audrey Lim J:

Introduction

1 The plaintiff Wong Sung Boon ("Wong"), the former Senior Managing Director ("Senior MD") of the first defendant Fuji Xerox Singapore Pte Ltd ("FXS"), commenced this action against FXS for having been summarily dismissed without cause and in breach of his employment contract. He also claims that FXS and the second defendant (Fuji Xerox Asia Pacific Pte Ltd or "FXAP") conspired to injure him by dismissing him, and alternatively that FXAP wrongfully induced FXS to breach his employment contract by summarily dismissing him. Conversely, FXS claims that Wong's dismissal was lawful and counterclaims against him for losses caused to it as a result of his breach of fiduciary duties and obligations under his employment contract. I will refer to FXS and FXAP collectively as "the Defendants", where appropriate.

Background

2 FXS is owned by FXAP, the latter in turn owned by Fuji Xerox Co Ltd ("FX"). FX is jointly owned by Xerox Limited ("Xerox") and Fujifilm Holdings Corporation ("Fujifilm"). FXAP's primary purpose is to provide oversight and direction, and coordinate and consolidate the operations of various operating companies of FX and Fujifilm.

3 Wong was FXS' Senior MD and Chief Executive Officer from 1 April 2011 until he was issued a termination notice on 21 December 2017 ("Termination Notice"). His appointment as Senior MD was last governed by a Letter of Appointment dated 1 April 2016 ("Employment Contract"), which was renewed, with his latest employment period from 1 April 2017 to 31 March 2018.[1]

4 From April to June 2017, an Independent Investigation Committee ("IIC") established by Fujifilm conducted an investigation into the accounting practices in Fuji Xerox Australia ("FXA") and Fuji Xerox New Zealand ("FXNZ"), subsidiaries of FXAP. The investigation revealed accounting irregularities that caused losses to the entities. The IIC then released its report with recommendations to prevent recurrence of such practices.[2]

5 In September 2017, FXS commissioned Deloitte & Touche Financial Advisory Services Pte Ltd ("Deloitte") to conduct an audit investigation ("Audit

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1 Reply (Amendment No 2) ("Reply") at [1B]; Agreed Bundle of Documents Vol 1 ("1AB") 620; Agreed Bundle of Documents Vol 3 ("3AB") 252; 4/8/20 Notes of Evidence ("NE") 218–219; 7/8/20 NE 84.

2 Statement of Claim (Amendment No 2) ("SOC") at [12A]; Defence (Amendment No 2) ("Defence") at [16] and [18]; Reply at [6C].

Investigation"). Katsumi Kizaki ("Kizaki"), then FXAP's General Manager of the Legal Department, testified that the Investigation pertained to allegations of serious misconduct by Wong, which were made in an anonymous whistle-blower letter. The Audit Investigation was expected to take place between 13 and 29 September 2017. About the same time, Fujifilm's Global Audit Division ("GAD") also commenced investigations into the allegations. On 19 October 2017, FXS suspended Wong with full pay pending the outcome of the Audit Investigation.[3]

6 As part of the Audit Investigation, Deloitte held a teleconference with Wong on 30 October 2017 and, on 30 November 2017, Wong met Deloitte ("30 Nov 2017 Meeting").[4] Due to his health condition, Wong claimed that he told Richard Robert Batten ("Batten"), Deloitte's representative, at the meeting that he was on medication and Batten informed him that he could leave anytime if he was unwell. Wong claimed that he stayed as he wanted to assist in the investigation, and that he gave a short discourse on his concerns on the Audit Investigation process. Wong averred that as Deloitte did not have any queries for him, he asked to leave as he felt unwell. FXS denied that Deloitte did not have any questions for Wong and claimed that before Deloitte could raise numerous irregularities that it had identified from its Audit Investigation for Wong to respond to, Wong said he felt unwell and asked to leave the meeting.[5]

7 Meanwhile, Deloitte issued a report dated 8 November 2017 ("Deloitte Report") with its findings on the Audit Investigation which Kizaki claimed

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3 Kizaki's Affidavit of Evidence-in-Chief ("AEIC") at [17]–[18], [21]; SOC at [13] and [21]; Defence at [26] and [29].

4 SOC at [25]–[40]; Defence at [30]–[34]; Kizaki's AEIC at [23].

5 SOC at [40]; Defence at [34]; Kizaki's AEIC at [27].

revealed irregularities in FXS' past transactions with I-Connect Interactive Pte Ltd, now known as I-Comtech Interactive Pte Ltd ("I-Connect"), and Supreme Lion Holding Pte Ltd ("Supreme Lion"). Kizaki stated that the Deloitte Report was finalised after the 30 Nov 2017 Meeting and represented Deloitte's final findings from the Audit Investigation. Separately, the GAD presented its special audit report dated 7 December 2017 ("SA Report"), which Kizaki stated highlighted irregularities in FXS' transactions with I-Connect, Supreme Lion and one M.O.S. Marine Offshore Services Pte Ltd ("MOS").[6] Kizaki stated that the SA Report was received on 10 December 2017.

Wong's dismissal and clause 10 of Employment Contract

8 On 21 December 2017, Wong was issued the Termination Notice summarily dismissing him from that date.[7] The relevant paragraphs of the Termination Notice stated as follows:

> 2. As you know, [FXS] has been looking into your actions in relation to and your handling of several past transactions for [FXS], including but not limited to the [I-Connect] Project and the [MOS] transaction.
>
> 3. [FXS] finds that your actions and/or conduct gives rise to grounds for termination of the Employment Contract with immediate effect pursuant to Clause 10(b), 10(h) and/or 10(i) … [FXS] hereby summarily dismisses you immediately, without notice, without payment in lieu of notice of compensation, and without any entitlement to the End of Term Payment …
>
> 4. Further and/or in the alternative, you are in repudiatory breach of your employment and/or director's duties owed to [FXS] in law, and our client accepts your breach on an immediate basis.

9 FXS relied on cll 10(b), (h) and (i) of the Employment Contract to

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6 Kizaki's AEIC at [24], [28], [30] and exhibits KK-20 and KK-21; 3AB 234–249.

7 Kizaki's AEIC at [31]–[32] and exhibit KK-22; 3AB 252–253.

summarily dismiss Wong without notice and without payment in lieu of notice. The relevant paragraphs of cl 10 provide as follows:

> [FXS] reserves the right to summarily dismiss you without notice, payment in lieu of notice or compensation if you:
>
> …
>
> (b) cause material damage to [FXS] whether intentionally or through your negligence;
>
> …
>
> (h) are, in the reasonable opinion of the [President of Asia Pacific Operations] and/or Board of Directors of [FXS] guilty of gross default or misconduct in connection with or affecting the business of [FXS]; or
>
> (i) otherwise act in a manner grossly incompatible with the due and faithful discharge of your duties.

10 Apart from the Termination Notice, Wong was not given any reasons for his dismissal until he commenced the present suit ("the Suit") and the Defendants filed their defence and counterclaim.[8] Wong claims that there was no basis for him to be summarily dismissed, and in any event, FXS had failed to follow its internal procedure for dismissing an employee. Wong further claims, among other things, that the Defendants had conspired to injure him and that FXAP had induced FXS to breach its contract with him.

11 The Defendants claim that they were entitled to summarily dismiss Wong as he had breached his fiduciary duties, FXS' company policies and cll 10(b), (h) and (i) of the Employment Contract. They claim that the breaches pertain to transactions that FXS entered into with I-Connect, MOS and Supreme Lion ("the Transactions"), which had caused FXS to suffer loss of some $2,880,385.78. They deny Wong's other claims.

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[8] 4/8/20 NE 211; 6/8/20 NE 94–95; 2/9/20 NE 46–47.

Preliminary points

12 Before dealing with the parties' claims, I make the following observations.

Defendants' witnesses

13 The Defendants called Hiroyuki Ino ("Ino"), FXAP's Senior General Manager of Human Resources, and Kizaki. Ino's affidavit of evidence-in-chief ("AEIC") mainly dealt with the quantification of damages and dismissal of executives of FX's entities. The Defendants rely mainly on Kizaki's evidence concerning the Transactions. However, neither of them has ever been in FXS and do not have first-hand knowledge about the Transactions, and Kizaki's involvement in FXAP only began around July 2016 after the Transactions had been executed.[9] This limited the Defendants' ability to controvert Wong and his witnesses' evidence.

FXS' scope of business

14 I set out some background on FXS' scope of business at the time of the Transactions, as the Defendants allege that Wong had caused FXS to enter into transactions outside the scope of its business.

15 Wong explained that FXS' business initially centred around wholesale, repair and maintenance of office equipment ("Print Products") but diversified to include providing financing, infrastructural support and project management, and selling products manufactured by third parties and non-FX-related entities ("TP Products"). In particular, FXS, leveraging its experience in handling

9 Ino's AEIC at [6]; Kizaki's AEIC at [7(3)].

complex and large-scale projects, began offering project management services ("Project Management") around 2001 to 2002. This involved planning a project before commencement, sourcing for and approaching vendors or suppliers ("Suppliers") and liaising with them, structuring contracts, coordinating with Suppliers and FXS' customers on the project, and monitoring milestones to ensure the project was completed within timelines. A Project Management transaction might include the sale of FXS products or TP Products.[10]

16 Wong stated that FXAP issued directions requiring him to increase FXS' revenue and expand its scope of business by all means possible due to market saturation and competition, and FX continually sought to enter new industries. A media release in April 2014 stated that FXS would offer "one-stop financial solutions for businesses" and a "full suite of financial solutions including Hire Purchase/Leasing, Sales and Leaseback Scheme, Credit Control Outsourcing Services, Litigation Services and more". In other articles and media releases, FXS and its Innovation Office in Singapore were described to be a "consultancy business", "building analytics", and expanding into "[w]earable technology, telepresence, artificial intelligence, and even a cloud-based audio tour guide service". Hence, Wong claimed, FXS or FX was not averse to exploring new markets, products, technologies and services, even if they were unrelated to Print Products. Until the Suit was commenced, FXAP and FX were fully aware and had not objected to FXS entering into Project Management transactions and had encouraged the expansion of its scope of business to new business areas.[11]

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10 SOC at [1]–[2]; Wong's AEIC at [139]–[142], [153]–[155], [163]; 4/8/20 NE 48–54.

11 Wong's AEIC at [165]–[173]; 1 AB 323, 575.

17 Gladys Toh ("Toh"), a former general manager of FXS' Finance Management and Operations and who was Wong's witness, explained that in a Project Management transaction, FXS did not need to have highly specialised knowledge of the industry to which the project related, as the project deliverables which FXS had to achieve in the transaction involved generic skills which transcended the subject matter of the project. If any specific knowledge was required, relevant parties such as the customer would be engaged to obtain the relevant information.[12]

18 I find that there were no internal company restrictions on FXS' scope of business and Wong could cause FXS to undertake a form of business as long as he complied with his duties owed to FXS. I accept Wong's evidence, supported by Toh's, that FXS was mandated to expand its scope of business. Kizaki also agreed that it was likely that Wong was mandated to grow the business. In addition, Wong's terms of appointment as Managing Director ("MD") and subsequently Senior MD required him to "devote [his] best efforts to promote, develop and extend the business of [FXS] in Singapore".[13]

19 The Defendants admit that there is no document stating what constitutes the experience or ordinary business of FXS. They did not inform Wong what FXS' ordinary business, core business, expertise or experience was or that he could not carry out activities that did not fall within that scope.[14] Whilst there was no express restriction to the types of industry that FXS could manage as projects, I accept the Defendants' assertion that Wong had to exercise his

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12 Toh's AEIC at [27]–[32]; [38]–[41].

13 3/9/20 NE 22; 1AB 59 and 621.

14 Plaintiff's Bundle of Interrogatories ("PBOI") at pp 29–30, 54–56, 66–69 and 132–135; 4/8/20 NE 224–226; 1/9/20 NE 20–22.

judgment on whether to do so,[15] as he owes contractual and fiduciary duties to FXS. Although Kizaki claims that Project Management services for the supply of TP Products had to be in connection with or arise from products and services developed by FX or its subsidiaries ("FX Products"), and also fall within FXS' ordinary business, experience and expertise,[16] he did not adduce evidence to support this, and also contradicts the Defendants' admission that there was no express restriction to the types of industry that FXS could manage as projects.

20 Hence, even if FXS had entered areas of business that were not then its core business, this was permissible as long as Wong complied with his duties owed to FXS and relevant internal procedures. These will be discussed below.

Credit evaluation process

21 Next, the Defendants allege that Wong failed to comply with the credit evaluation process ("CE Process"), which FXS undertakes to assess the creditworthiness of a potential customer and whether to transact with him, when he proceeded with various transactions.

22 The CE Process would commence with a sales representative filling up a credit evaluation form ("CE Form") containing the prospective customer's details and brief details of the proposed transaction. The sales representative would generally enclose with the CE Form: (a) the prospective customer's bank statements for the past three months and his latest audited financials; and (b) the latest income tax assessment or IR8A form of personal guarantors ("PGs") if there were PGs (collectively the "Listed Documents"). The CE Form states that

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15 PBOI at pp 54–56, 66–69 and 132–135; 5/8/20 NE 46–47; 1/9/20 NE 21–22.

16 Kizaki's AEIC at [36(1)], [44], [48(1)], [65(1)], [70], [71], [101]; 1/9/20 NE 21–22.

"[c]redit application[s] will be processed only with full submission of [the Listed Documents]".[17]

23 I accept Wong's testimony that it was not mandatory for all of the Listed Documents to be obtained before a credit application could or would be processed, and that the CE staff could carry out the CE Process so long as it could obtain comparable or supplementary information, such as FXS' internal records if the prospective customer was an existing customer, publicly available information, or slightly older audited financial statements, bank statements or income tax assessments ("Alternative Documents"). Wong explained that neither the Listed Documents nor the Alternative Documents were mandatory, as ultimately the CE staff has to fill up a CE Scorecard to generate a CE Score, and the prospective customer would be credit-approved by the approving authority if the CE Score was sufficiently high.[18] The CE Score would be sent to the approving authority sometimes with a more detailed CE Report (collectively "CE Pack"). Wong's testimony was corroborated by Toh and one Wong Yuanjun ("Yuanjun"), a former credit management officer with FXS' Finance Department.[19] They testified from personal knowledge as they were involved in the CE Process. In contrast, Kizaki has not attested on the CE Process, given that he was never in FXS or involved in any CE Process.

24 In addition, it is undisputed that FXS was not required to secure a PG in respect of any transaction at the material time, and it had only set out its formalised requirements in its 2015 Operating Procedure Manual which was

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17 Wong's AEIC at [200]–[204].

18 Wong's AEIC at [200]–[205], [210]–[211].

19 Toh's AEIC at [52]–[53], [60], [63]–[64]; 6/8/20 NE 99, 145, 147; Yuanjun's AEIC at [16]–[23].

nevertheless silent on the requirement for PGs.[20] If there was no requirement to secure a PG, it follows that the requirement to obtain the latest income tax assessment or IR8A form of a PG as part of the Listed Documents could not have been mandatory. Further, I accept Toh's and Yuanjun's explanations that in some cases the potential customer is a company exempted from the statutory requirements of auditing its accounts and may not have audited financial statements, or is a government entity or statutory body that would unlikely provide its bank statements.[21] Hence, the absence of the Listed Documents did not mean that a customer's creditworthiness could not have been assessed or that a transaction could not have been concluded.

I-Connect transactions

25 I turn to the transactions pertaining to I-Connect. FXS entered into the following agreements with I-Connect ("IC Contracts"):[22]

(a) A Master Services Agreement dated 11 October 2011 for FXS to supply, construct, install and commission Base Transceiver Station ("BTS") equipment and facilities to I-Connect for a satellite infrastructure project in Indonesia for about $4.3 million ("IC1 Contract").

(b) A Master Services Agreement dated 16 March 2012 for FXS to supply, construct and install a Fiber Optic Infrastructure ("FOI") to I-

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20 Wong's AEIC at [223]–[224]; Toh's AEIC at [54]; Agreed List of Issues dated 11 September 2020 at s/n A(6); 5/8/20 NE 80–81; 7/8/20 NE 68; 2/9/20 NE 85.

21 6/8/20 NE 145–146; 7/8/20 NE 56–57.

22 Kizaki's AEIC at [35]; [38] and [39]; 1AB 101–117 and 144–157.

Connect for a satellite infrastructure project in Indonesia for about $5.59 million ("IC2 Contract").

Defendants' case

26 FXS procured the supply of the BTS products/services from PT Tsalasa Indonesia ("Tsalasa"). It is unknown whom FXS procured the FOI products/services from as Kizaki claimed that the contract could not be found.[23] FXS pleads that the following were a breach of Wong's Employment Contract and fiduciary duties.[24]

27 First, Wong had caused FXS to be unreasonably and unnecessarily exposed to liability by entering into the IC Contracts to supply products and services which it was not in the ordinary business of supplying and did not have the relevant expertise, experience or capability ("Relevant EEC") for. FXS also did not have the Relevant EEC to ensure that the products/services complied with the specifications under the IC Contracts. Further, Wong did not obtain approval from the President of Asia Pacific Operations ("APO President", previously known as IBG President) as required under FXS' 2006 Communication Matrix ("2006 Comm Matrix") before FXS entered into business activities abroad.[25] Second, Wong failed to procure appropriate PGs before the IC Contracts were executed.[26] Subsequently I-Connect defaulted on some payments under the IC2 Contract of $557,921.50 ("IC Debt"), which could not be recovered from I-Connect or the PGs. Third, Wong had authorised

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23 Kizaki's AEIC at [38] and [41].

24 Defence at [39]–[43].

25 Kizaki's AEIC at [36(1)], [40], [42], [43] and [49].

26 Kizaki's AEIC at [36(3)], [52]–[58].

the write-off of the IC Debt without obtaining approval from the APO President, in breach of the 2013 Communication Matrix ("2013 Comm Matrix").[27] By reason of Wong's breaches, FXS had suffered loss of $557,921.50.

Wong's case

28 Wong denies the Defendants' claims and attested as follows. I-Connect, FXS' existing customer, required assistance to manage a project to construct and commission a BTS. FXS entered into the IC1 Contract after Wong had discussed with his staff and assessed that FXS was capable of providing Project Management for the BTS project. Under the IC1 Contract FXS would provide Project Management to facilitate the BTS project between I-Connect and Suppliers. FXS was essentially a coordinator between the Suppliers and I-Connect, to ensure that the system would be installed within I-Connect's timelines and to its specifications. It did not have to carry out any construction, installation or commissioning works and was not required to have the requisite technical know-how or capability to perform those services. The TP Products that FXS procured for I-Connect were relatively simple network-based products which FXS had experience with, and the procurement of TP Products was part and parcel of Project Management which was its usual business.[28]

29 Similarly, FXS entered into the IC2 Contract after internal deliberations to assess its ability to provide Project Management to I-Connect. The IC2 Contract was likewise to provide I-Connect with Project Management involving the installation of fibre optic cables, and the structure and substance of the IC2 Contract was similar to the IC1 Contract. Wong had also informed Katsuhiko

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27 Kizaki's AEIC at [59]–[61] and exhibit KK-36.

28 Wong's AEIC at [360]–[363], [365]–[368].

Yanagawa ("Yanagawa"), then APO President, President of FXAP and a director of FXS, that FXS had entered into the IC1 Contract and that it intended to enter into the IC2 Contract. Yanagawa did not object and said "ok".

30 Next, there was no requirement to provide a PG. As for writing off the IC Debt, Wong stated that the 2006 Comm Matrix applied and that he had complied with it. He had also orally raised the potential writing-off of the IC Debt to Masashi Honda ("Honda"), then APO and FXAP President (and a director of FXS), and Honda had said "okay".[29]

Whether the IC Contracts were to provide Project Management

31 The Defendants assert that the IC Contracts were *not* Project Management but were merely contracts for FXS to supply satellite products and services. Wong claims they were agreements by FXS to provide Project Management to I-Connect.[30]

32 I accept that FXS provided Project Management pursuant to the IC1 Contract (as described at [15] and [28] above), which included the supply of products that it sourced from Suppliers such as Tsalasa and which it entered back-to-back contracts with.[31] Under the IC1 Contract,[32] FXS' role included the supply of "IT and Infrastructure products and services" and "development, management and consultancy work" pertaining to BTS equipment and facilities and based on a listed scope of works. FXS' services to I-Connect included

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29 Wong's AEIC at [392]–[395].

30 Defendants' Closing Submissions ("DCS") at [17]; Wong's AEIC at [365] and [384].

31 1AB 120–132; 1AB 101.

32 1AB 104; 1AB 101–118.

mobilisation and coordination based on a schedule of works. Wong stated that the services were provided by the Suppliers and FXS had staff in Indonesia and a project manager to manage the project, and the IC1 Contract reflected that services had to be performed over 60 sites.[33] There is no evidence to the contrary. Whilst Wong did not provide documents to support his assertions, this was because he did not have access to FXS' records. Toh also attested that FXS provided Project Management in the IC1 Contract and that FXS' project manager visited the site in Indonesia a few times. I see no reason to disbelieve Toh, who was involved in the IC1 Contract and the CE Process.[34]

33 Likewise, I accept that the IC2 Contract, which was similar to the IC1 Contract, was an agreement to provide Project Management by FXS to I-Connect for the installation of fibre optic cables. Toh had also attested as such.[35]

34 FXS' Legal Department had also signed on the IC1 Contract[36] and did not then raise any issues concerning FXS' mandate or ability to enter into such a transaction. Hence, even if the market that FXS entered was not its usual market, that in itself did not mean that it could not undertake such transactions, for the reasons set out at [18] to [20] above. Likewise, even if the products were TP Products, this did not mean that the substance of the IC1 Contract did not fall within FXS' ordinary business or that FXS could not enter into such a transaction. Project Management was then part of FXS' ordinary business, and was, as Wong and Toh attested, a generic skill portable across different industries. FXS was not carrying out the construction or installation works and

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33 5/8/20 NE 30–31; 1AB 117.

34 Toh's AEIC at [9], [29], [43]–[44] and [77]; 6/8/20 NE 173–175.

35 Toh's AEIC at [85].

36 Wong's AEIC at [376]; 1AB 101–118.

hence did not require highly specialised knowledge of the industry to which the project was related, given that it had engaged relevant Suppliers on this.[37]

Whether FXS was unreasonably and unnecessarily exposed to liability by entering the IC Contracts

35 The more fundamental question is whether Wong had breached his fiduciary duties to act for a proper purpose, *bona fide* in FXS' interest and with reasonable diligence, as the Defendants argue that Wong had caused FXS, in entering the IC Contracts, to be unreasonably and unnecessarily exposed to liability *to I-Connect*.[38] Under the IC Contracts, FXS: (a) undertook that the service it delivered would conform to the contract requirements; (b) warranted that it would exercise all reasonable skill, care and diligence in carrying out its obligations and provide the services in accordance with the contract; and (c) warranted that it would perform the services in a timely and professional manner and that the service would achieve the acceptable industry service levels. Kizaki alleged that Wong did not take reasonable steps to mitigate FXS' exposure to liability, such as to ensure: (a) that the Suppliers had the Relevant EEC to supply the products/services; (b) that FXS entered into appropriate back-to-back contracts with the Suppliers; (c) that due diligence was conducted on the Suppliers; and (d) that the Suppliers would provide an indemnity to FXS in the event FXS was liable for breach of the IC Contracts to I-Connect.

36 I find that the Defendants had failed to show that Wong had caused FXS to be unreasonably and unnecessarily exposed to liability to I-Connect, and hence that he did not breach his duty of reasonable diligence. This duty requires

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37 Wong's AEIC at [365]–[366]; Toh's AEIC at [31], [32], [77], [78]; 4/8/20 NE 225.

38 Defence at [39(1)] and [39(2)]; Kizaki's AEIC at [40], [45]–[47].

a director to exercise the same degree of care and diligence as a reasonable director in his position (*Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Scintronix*") at [42]).

37 First, I accept that Wong had consulted the relevant departments within FXS to understand the nature and scope of the IC Contracts and the risks involved prior to approving FXS' venture with I-Connect.[39] Second, Kizaki admitted that there was no requirement for FXS to enter into back-to-back contracts with Suppliers or that (other than his own "understanding") FXS had to conduct due diligence on its Suppliers.[40]

38 In any event, the contract between FXS and Tsalasa ("Tsalasa Contract") provided sufficient safeguards for FXS. For instance, cl 2.2 required Tsalasa to supply the products and services according to the terms of the IC1 Contract and any directions of FXS or I-Connect. By cl 8.1, Tsalasa undertook and warranted that the products would be of new manufacture and that services would be conducted with due diligence and according to industry best practice. Pertinently, the Tsalasa Contract exhibited by FXS was missing cl 8.2, which must likely have contained further warranties as cl 8 was titled "WARRANTIES AND UNDERTAKING".[41] Kizaki admitted that he made his allegations (at [35] above) based on a review of an *incomplete* copy of the Tsalasa Contract.[42] As the Defendants were making the assertion and the documents would have been in their possession, it was incumbent on them to examine and produce a complete copy to support their case. It is likely that the missing cl 8.2 would

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39 Wong's AEIC at [370(a)] and [385(a)].

40 2/9/20 NE 75, 81–82, 102–103.

41 1AB 120–132; 2/9/20 NE 76–78.

42 Kizaki's AEIC at [47(2)]; 2/9/20 NE 79–80.

have included further and sufficient warranties to protect FXS' exposure of liability to I-Connect pursuant to the IC1 Contract.

39 Likewise, such warranties were likely present in the contract between FXS and the Supplier for the IC2 Contract, which Kizaki claimed could not be found. It was incumbent on the Defendants to produce evidence (*eg*, the contractual documents between FXS and the Suppliers) pertaining to the IC2 Contract to support their allegations that Wong had caused FXS to be unnecessarily and unreasonably exposed to liability to I-Connect by failing to take measures to protect FXS vis-à-vis I-Connect. This they failed to do.

40 I also accept Wong's evidence that I-Connect was heavily involved in selecting the Suppliers and inspecting the products even before FXS took delivery, as well as certifying that the products/works were satisfactory before FXS made payment for them.[43] This mitigated the risk of I-Connect being dissatisfied with the products. Pertinently, there is no evidence that the Suppliers had failed to comply with their obligations vis-à-vis FXS. FXS had also performed its obligations under the IC Contracts, and I-Connect has not alleged any breaches of the IC Contracts.[44] Wong's conduct hence did not cause FXS to be unreasonably and unnecessarily exposed to liability to I-Connect.

41 Next, I find that Wong did not fail to act *bona fide* in FXS' interest or for a proper purpose. There is no evidence that the IC Contracts were not objectively in FXS' best interest such as to lead to an inference that Wong had not acted for a proper purpose (*Scintronix* at [38] and [40]). If the transactions were not in FXS' interest, it was unlikely that Yanagawa (the APO President)

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43 Wong's AEIC at [369]; 5/8/20 NE 35.

44 5/8/20 NE 193–194; 3/9/20 NE 23.

would have approved of them (see further [45] below). It is also not a case in which Wong had, by causing FXS to enter into the IC Contracts, mainly intended to benefit himself or place his interest above FXS.

42 Although I-Connect subsequently owed the IC Debt under the IC2 Contract, this did not therefore mean that Wong had failed to use reasonable diligence in carrying out his duties, or that he had not acted *bona fide* or for a proper purpose. The court will be slow to interfere with commercial decisions of directors which have been made honestly even if they turn out, on hindsight, to be financially detrimental (*Scintronix* at [37]).

Whether Wong failed to obtain approval before entering the IC Contracts

43 The Defendants assert that Wong did not seek the APO President's approval pursuant to cl C(1) of the 2006 Comm Matrix before FXS entered into "[b]usiness activities outside the territory", namely, the supply of products/ services for construction works in Indonesia. Wong claimed that cl C(1) applies only to the supply of an FX Product to another territory, as the purpose of that clause was to prevent an entity within the FX group from cannibalising the market of another entity of the group.[45] The products under the IC Contracts were not FX Products.

44 Whilst cl C(1) states that "[b]usiness activities outside the territory" required the APO President's concurrence, it also states that "[p]rior notification to [the APO President] [is] required when end-user(s) desire to export outside

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45 6/8/20 NE 20–22.

the territory their Xerox product(s) for their own use."[46] Clause C(1) hence suggests that the APO President's approval is required only for FX Products.

45 In any case, even if the APO President's approval is required pertaining to TP Products so long as it relates to a business activity abroad, I accept Wong's evidence, corroborated by Toh, that he had obtained the subsequent approval of Yanagawa (then the APO President[47]) in early 2012 (when they attended a Business Review Meeting ("BRM")) after informing the latter that FXS had entered into the IC1 Contract, and that Wong had also informed Yanagawa then that FXS intended to enter into the IC2 Contract. Wong attested that he had outlined the IC Contracts to Yanagawa who did not object and replied "ok". Toh corroborated that at that BRM Wong had informed Yanagawa and shared details of the IC Contracts including FXS' role and scope of works and that they involved projects in Indonesia, and that Yanagawa did not object to them.[48] In cross-examination, Wong added that Yanagawa's approval was recorded in FXS' minutes, although FXS was unable to locate the minutes.[49] I give Wong the benefit of the doubt. His testimony was corroborated by Toh whereas FXS did not call anyone who was present at the BRM to attest to the contrary.

46 Kizaki agreed that the Comm Matrix would no longer be an issue if Yanagawa had given his oral approval for the IC Contracts, and if Yanagawa (who was both President of FXAP and a director of FXS) had approved FXS

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46 1AB 35.

47 2/9/20 NE 71.

48 Wong's AEIC at [378]–[385]; Toh's AEIC at [88]–[91]; 5/8/20 NE 52–53; 6/8/20 NE 23.

49 5/8/20 NE 52–53.

entering a type of transaction then FXS would be permitted to do so.[50] I hence find that there was no breach of the Comm Matrix, or even if there had been a breach, it would have had been rectified by Yanagawa's subsequent approval.

Whether Wong caused FXS to enter into the IC Contracts without appropriate PGs

47 Next, the Defendants plead that Wong had breached his Employment Contract and duties by causing FXS to enter into the IC Contracts without securing appropriate PGs. In this regard, the Defendants claim that FXS had executed the IC Contracts even before the CE Forms were approved in breach of its standard operating procedure ("SOP"); the Listed Documents were not provided; and Wong had approved the CE Forms without conducting a proper credit evaluation and due diligence of I-Connect and its PGs.[51]

When the IC Contracts were entered into

48 Kizaki stated that the CE Form for the IC Contract was submitted on 19 October 2011 whereas the IC1 Contract was executed on 11 October 2011 as stated on the date printed on the cover page of the contract which he claimed was also the effective date of the contract.[52] Wong claimed that FXS entered into the IC1 Contract on 1 November 2011, after all the relevant departments including the Legal Department had cleared the contract.[53]

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50 2/9/20 NE 68–70 and 84.

51 Defence at [40].

52 Kizaki's AEIC at [53]; 2/9/20 NE 93–94.

53 Wong's AEIC at [375]–[376].

49 I accept Wong's evidence as Kizaki was not involved in the IC1 Contract. I-Connect's director, Raden, had signed the IC1 Contract on 20 October 2011 and that FXS' Legal Department had signed and dated it as 1 November 2011.[54] It is undisputed that the CE evaluation was completed before that date, as evidenced from the CE Form, the Contracts Approval Form (which showed the commencement date of the contract as 1 November 2011) and Toh's testimony.[55] The contract would come into effect only *if* and when both parties had executed it, regardless of the date on its cover page and even if the contract stated it to be "made effective" as of 1 October 2011, as the contract can be backdated. Hence, the Defendants' allegation that Wong had approved the IC1 Contract before the CE Form was submitted and approved is not made out.

50 Likewise, the Defendants claim that the IC2 Contract was entered into on 16 March 2012 (as per its cover page) but the CE Form was submitted only on 29 March 2012.[56] Wong attested that the parties signed it on 1 April 2012, after the credit evaluation was completed and he had reviewed the CE Pack on 29 March 2012, and that FXS would formally enter into a contract only after all the relevant departments had cleared the contract.[57] I give Wong the benefit of doubt that the IC2 Contract was executed on 1 April 2012. He was involved in the process and it was unlikely that he would have taken the risk and caused FXS to execute the contract before the credit evaluation was completed. FXS also did not call any witness with first-hand knowledge to disprove this.

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54 5/8/20 NE 196; 6/8/20 NE 69.

55 Toh's AEIC at [80] and exhibit TJP-4; Wong's AEIC at [374(g)]; 1AB 133.

56 Defence at [40(2)]; Kizaki's AEIC at [53].

57 Wong's AEIC at [388]–[390]; 6/8/20 NE 73.

Failure to secure appropriate PGs

51 The Defendants plead that Wong had breached the Employment Contract and his duties to FXS because he caused FXS to enter into the IC Contracts without securing the appropriate PGs or security, including obtaining the latest income tax assessment or IR8A form of the PGs as part of the Listed Documents. I find that this claim is not made out.

52 First, there was no requirement for FXS to secure a PG for any transaction, hence the requirement to obtain the latest IR8A form of a potential PG (as per the Listed Documents) was not mandatory (see [24] above). Despite this, three PGs were obtained for each IC Contract, two of whom were directors and shareholders of I-Connect (including Raden). Second, I find that the PGs obtained by Wong were reasonable in the circumstances. The Defendants, who allege that the PGs obtained were inappropriate or unsatisfactory, did not show what would have amounted to a satisfactory baseline. Mr Lee, the Defendant's counsel, agreed that it is common to obtain personal guarantees from directors of a company involved in the material transaction, as Wong had done.[58]

53 Further, Wong and Toh attested that prior to the IC1 Contract, I-Connect was an existing customer; FXS was aware of its past records, having reviewed its payment history, place of business and whether there was any pending litigation against it; and FXS had conducted an ACRA Business Profile Search, amongst other checks.[59] Wong attested that based on the information obtained and the CE Scorecard, I-Connect was already credit-approved and there was no need to obtain any PG. Further, FXS' Legal Department did not raise issues

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58 5/8/20 NE 84.

59 Wong's AEIC at [374], [387]–[388]; Toh's AEIC at [80]; 5/8/20 NE 104.

regarding the credit evaluation of the IC Contracts although it could have done so.[60] Pertinently, the Defendants have not alleged that FXS had suffered loss on the IC1 Contract, whether or not PGs or appropriate PGs were procured; hence, even if there had been an alleged breach of duty, it did not cause material damage to FXS.

54 Although the IC Debt was incurred pertaining to the IC2 Contract, there is no evidence to show that this was caused by Wong's failure to exercise reasonable diligence or to act *bona fide*. Wong and Toh attested that prior to entering the IC2 Contract, FXS had conducted a credit-history check and I-Connect had been making prompt and substantial payments of more than three-quarters of the total bill for the IC1 Contract.[61] There was nothing to alert Wong that I-Connect would subsequently default as it had done.

55 In sum I find that Wong had fulfilled his duty of reasonable diligence. and that it was reasonable for a director in Wong's position to have acted in the manner that he did.

56 The Defendants argue that Wong had not acted with due diligence because the PGs were not sufficiently creditworthy as their registered addresses were Housing and Development Board ("HDB") flats; and searches showed that Raden was driving a taxi and another PG ("Suleman") had a bankruptcy application filed against him.[62] I reject this argument. FXS was not obliged to obtain PGs in the first place and the Defendants have not shown what would have amounted to a satisfactory baseline; indeed the PGs obtained were added

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60 2/9/20 NE 60.

61 Wong's AEIC at [388]; Toh's AEIC at [81].

62 DCS at [29]–[34]; Kizaki's AEIC at [57]; 1AB 209–213, 362.

security. Further, the search on Suleman was made in August 2013, after letters of demand had been sent to I-Connect and the directors/shareholders on the IC Debt,[63] and showed the bankruptcy application against Suleman was filed only in July 2013. As for Raden driving a taxi for a living, the result of this search would seem to have been made known to Wong only in June 2014, after FXS had chased for the IC Debt and Wong was approving its write off.[64] Hence, the Defendants' reliance on the searches (made to determine recoverability of the IC Debt) to show Suleman's and Raden's unsuitability to be PGs at the time of executing the IC Contracts is misconceived.

Whether write-off of IC Debt authorised without the requisite approval

57 Finally, the Defendants plead that Wong had breached his Employment Contract and his duties because he authorised the write-off of the IC Debt without seeking the requisite approval.[65] Clause D(5) of the 2013 Comm Matrix required the APO President's concurrence to write off a debt of JPY 10 million or more, and the IC Debt exceeded this sum. Wong claims that he did not have sight of the 2013 Comm Matrix until 2016, and argues that the 2006 Comm Matrix applied, under which he did not need to seek any approvals.

58 I accept that the 2013 Comm Matrix applied as the write-off of the IC Debt was in 2014 and thus the APO President's concurrence had to be obtained for the write-off. I find that Wong was aware of the 2013 Comm Matrix at the material time and not only in 2016. At trial, the Defendants produced an email

63 1AB 197–200.

64 6/8/20 NE 39–43.

65 Defence at [42].

sent on 2 December 2013 to various persons including Wong, which attached and informed about the 2013 Comm Matrix. When given an opportunity to recall Wong to explain whether he had received the 2013 Comm Matrix at the material time, Mr Wendell Wong (Wong's counsel) declined to do so.[66] I cannot but infer that Wong knew of the 2013 Comm Matrix at the material time.

59 Even if Wong had no knowledge of the 2013 Comm Matrix at the material time, the APO President's concurrence for the write-off of the IC Debt would still have been required under the 2006 Comm Matrix. Clause D(5) of the 2006 Comm Matrix states that a write-off of bad debt of JPY 10 million or more required the APO President's concurrence, except that no approval was required in the case of "bankruptcy and reorganization and other official legal proceeding" provided the write-off was not more than JPY 100 million ("Exclusion Clause").[67]

60 Wong claimed that when he approved the write-off in June 2014, he was informed that I-Connect had "ceased operations" which he took to mean that it was "bankrupt".[68] I do not find his explanation to be credible. Whilst it is unclear whether "bankruptcy" in the 2006 Comm Matrix applies to companies (rather than only to individuals) Wong conceded that a company can cease to operate for reasons other than bankruptcy. In any event, I-Connect had not been wound up even at the time of trial. There were also no legal proceedings pending against I-Connect when Wong approved the write-off.[69] As such, the Exclusion

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66 5/8/20 NE 126–127, 134; 1/9/20 NE 2–3, 9–11; 3/9/20 NE 64–65; 1st Defendant's Bundle of Documents 66–89.

67 1AB 35.

68 5/8/20 NE 135; 1AB 362.

69 5/8/20 NE 114–117, 119; 6/8/20 NE 33–34, 38, 42; 1AB 217–223.

Clause did not apply and even under the 2006 Comm Matrix, Wong had to obtain the APO President's concurrence to write off the IC Debt.

61 Although Wong had not obtained the necessary approval at the time he wrote off the IC Debt, I accept that he had subsequently obtained the approval of Honda (the then APO President) for this. About two weeks before the AGM to approve FXS' 2014 audited accounts, Wong had sent the accounts to Honda and the board of directors. The accounts reflected the IC Debt having been written off, and even highlighted the name of I-Connect, for them to take note that this was a change. At the AGM, Wong then highlighted the IC Debt to Honda who stated that he had no objections, and Honda signed off the audited accounts.[70] Wong's account is supported by Toh who attested that at the AGM, Wong had presented FXS' 2014 audited accounts to its Board of Directors and shareholders and had specifically raised to Honda the IC Debt that had been written off. Toh testified that Honda and other senior officials of FXAP did not raise any objections to the writing-off of the IC Debt. There is a discrepancy about the year of the AGM as Wong referred to the AGM as being held in 2014, while Toh claimed it was in 2015. It is likely that Wong was simply mistaken as the 2014 audited accounts (which was for FXS' financial year from April 2014 to March 2015) would have been presented in 2015, as attested to by Toh.[71]

62 Hence, whilst Wong had breached the 2006 or 2013 Comm Matrix, this had been rectified. Kizaki stated that if Honda had given his verbal approval for the write-off of the IC Debt, there would be no breach of the Comm Matrix.[72] In this case, Honda, the board of directors and the shareholders were

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70 5/8/20 NE 132–135.

71 5/8/20 NE 198; 6/8/20 NE 27–29, 158, 162, 179; Toh's AEIC at [114]–[119].

72 2/9/20 NE 96.

subsequently made aware of the IC Debt and write-off and did not object; Honda had even approved it (see [30] above).

Conclusion on IC Contracts

63 In the circumstances, the Defendants have failed to prove their claims pertaining to the IC Contracts. Wong's failure to obtain approval before entering into the IC1 Contract involving business activities abroad and before writing off the IC Debt may amount to a breach of the duty of reasonable diligence to comply with the Comm Matrix, as a reasonable person in Wong's position would have obtained approval before making these decisions. However, both decisions were subsequently approved and hence rectified. As such, according to Kizaki, there would no longer be a breach of the relevant Comm Matrix.

64 That being the case, I do not find that the Defendants were justified in summarily dismissing Wong pursuant to cl 10(b), (h) or (i) of the Employment Contract in relation to the IC Contracts. These breaches did not amount to acting in a manner grossly incompatible with the due and faithful discharge of Wong's duties, neither have they caused material damage to FXS (see [67] below).

65 In *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 ("*Phosagro*") at [49], the court had to interpret a clause in an employment contract which allowed the employer to terminate the employee's employment if he was guilty of "serious misconduct". The Court of Appeal held that "serious misconduct" must be a breach "that is so serious that it would justify [the employer] in terminating [the employee's] employment without more", and that principles relating to discharge by a repudiatory breach as set out in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 would be relevant to determine the issue of "serious misconduct". I find these principles

equally applicable to determining what amounts to "gross default or misconduct" under cl 10 of the Employment Contract.

66 As a starting point, cl 4 of the Employment Contract states that Wong must "strictly comply with" FXS' work regulations, rules, orders and policy directions of FXS for performing work. But this in itself does not mean that all clauses in the Comm Matrix constitute "conditions" such that a breach of the Comm Matrix would entitle FXS to treat the contract as repudiated or allow FXS to summarily dismiss Wong. Clause 10(c) of the Employment Contract (which is not being relied on) suggests that a mere breach of the Comm Matrix does not invoke termination, unless it is a "serious case" or a previous warning had been given and the violation repeated within a year.

67 Hence, the nature and effect of the breach on the employer-employee relationship should be examined (*Phosagro* at [50] and [53]). The failure to obtain approval under the 2006 Comm Matrix before entering the IC1 Contract did not cause loss to FXS, and Yanagawa (then President of FXAP and APO President) had subsequently approved the transaction. Likewise, the failure to obtain approval before writing off the IC Debt did not cause loss to FXS as the audited accounts had yet to be signed and the write-off could have been reversed if Honda had not agreed to it. As such, there was no material damage caused by Wong to FXS and it cannot be said that he had acted in a manner grossly incompatible with the due and faithful discharge of his duties (under cl 10(b) or (i) of the Employment Contract). In addition, it is not reasonable for the APO President to now be of the opinion that Wong was guilty of gross default or misconduct (under cl 10(h) of the Employment Contract) if the APO President at the material times had approved the IC Contracts and IC Debt write-off.

MOS transactions

68 I next deal with the transactions pertaining to MOS. FXS had entered into the following agreements with MOS:[73]

(a) A sales agreement dated 5 March 2014 where FXS would supply offshore diving equipment and provide testing, commissioning and installation services for $1 million ("MOS1 Contract"). This contract is not the subject of dispute in the Suit.

(b) A sales agreement dated 1 December 2014 where FXS would sell diving equipment to MOS and repair, refurbish and test a "transformer and capacitor load bank" for $2 million ("MOS2 Contract").

(c) A rental agreement dated 28 August 2015 where FXS would lease diving equipment, and provide testing, commissioning and installation services, to MOS for $1 million ("MOS3 Contract").

(d) A rental agreement dated 4 November 2015 where FXS would lease diving equipment and provide repair and reconditioning work on a "transformer and capacitor load bank unit" to MOS for $1,007,496 ("MOS4 Contract").

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73 1AB 276, 384, 559, 578.

Parties' respective cases

69 The Defendants plead that Wong had breached his Employment Contract and duties to act for proper purpose and *bona fide* in FXS' interest, amongst others, in the following manner.[74]

70 First, Wong had authorised the structuring of the MOS2 Contract as a sale agreement and the MOS3 and MOS4 Contracts as rental agreements, when they were in fact agreements to provide commercial financing to MOS. Second, Wong had caused FXS to be unreasonably and unnecessarily exposed to liability by entering the above three contracts (collectively the "MOS Contracts") to supply products/services which fell outside the scope of FXS' business and which it did not have the Relevant EEC for. In this regard, the requisite approval should have been obtained under the 2013 Comm Matrix before entering into the MOS Contracts. Third, FXS had entered into the MOS Contracts without securing appropriate PGs beforehand. Subsequently MOS defaulted on payments under the MOS Contracts, amounting to $2,322,464.28, which was a result of Wong's breach of duties and FXS counterclaims that amount.

71 Wong pleads that all four contracts were instalment sale agreements, although he later stated that the MOS3 and MOS4 Contracts were rental agreements – a discrepancy which I will return to later. Hence, the entire contract price was rightly recognised as revenue to FXS. Wong also claimed that the MOS Contracts fell within FXS' scope of ordinary business, expertise and experience. FXS was not launching a new business activity or product but extending Project Management services albeit in a new market (*ie*, the oil and

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74 Defence at [47]–[51]; Kizaki's AEIC at [65], [75]–[81]; DCS at [54]; 4/8/20 NE 90–91.

energy market). In any event, prior to transacting with MOS, Wong had informed Honda (then APO President) that FXS was considering transacting with MOS on a project relating to diving equipment, and Honda did not object. Finally, the CE Process was carried out properly and appropriate PGs obtained although there was no requirement to procure PGs.[75]

Nature of MOS2 Contract

72 The nub of the Defendants' complaint is that Wong had caused the MOS Contracts to be couched as a sale or rental agreement, when it was in fact an agreement to provide commercial financing, and this resulted in FXS' revenue being artificially inflated as the sale/rental price was booked in as revenue, instead of only the interest element. The Defendants clarified that "commercial financing" in the context of their claim meant a "pure loan", *ie*, that FXS was lending money without any accompanying supply of goods or services by it to its customer and that the customer could use the money for any purpose.[76] However, Wong claims that the MOS2 Contract was an instalment sale agreement with Project Management services for the concurrent acquisition of services and products.[77] It is not disputed that FXS was in the business of providing commercial financing including pure loans at the material time.[78]

73 On balance, I accept that the MOS2 Contract was an instalment sale agreement, as this is supported by the contract and underlying documents.

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75 Reply at [42]–[43A], [46]–[47]; Wong's AEIC at [401]–[404], [410], [426], [436].

76 6/8/20 NE 109–110, 129; 3/9/20 NE 16, 45.

77 Reply at [42]–[43] and [46]; Wong's AEIC at [407]–[408]; 4/8/20 NE 68, 145–146.

78 6/8/20 NE 13–14.

74 The CE Report reflected FXS as financing the construction material for diving equipment, with the financed amount at $1 million at the interest rate of 3.5% and a monthly payment of $86,250 spread over 12 months.[79] Wong explained that the initial proposal, reflected in the CE Report, was for a part-sale and part-financing of asset, but that this manner of contracting was revised as MOS wanted a higher financing amount. Hence, he suggested that FXS take over the financing and building of the diving equipment and increase the value of the proposed contract with MOS to $2 million. This was on the basis that FXS' cost to procure the equipment from Suppliers would be $1,930,000 and FXS would add a mark-up of $70,000 to its contract with MOS. Hence, FXS entered into a sale transaction with MOS with a gross profit margin of $70,000 (3.5% of the contract price of $2 million).[80]

75 I accept Wong's explanation that FXS subsequently entered into a sale arrangement with MOS to supply diving equipment and MOS would pay FXS in monthly instalments, and that the CE Process did not define the nature of the ultimate transaction between FXS and MOS, as the CE Process was to evaluate the feasibility of entering into the transaction and to assess MOS' creditworthiness.[81]

76 The MOS2 Contract provided that FXS would supply products and/or services according to the contract, with the products specified as the fabrication and installation works of diving equipment, and for $2 million to be paid in 12 monthly instalments.[82] It is undisputed that goods or services were supplied to

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79 1AB 460; 4/8/20 NE 107.

80 4/8/20 NE 110, 112, 131; Wong's AEIC at [423(g)].

81 4/8/20 NE 111 and 118.

82 1AB 384–392.

MOS, that it was FXS that contracted with the Suppliers and had paid its Suppliers $1,930,000, and that MOS had no direct contractual relationship with the Suppliers.[83] There were quotations issued by the Suppliers (such as Serve Tech Container Specialist Pte Ltd ("Serve Tech")) to FXS, purchase orders issued by FXS to Serve Tech, and quotations and delivery orders issued by FXS to MOS, among others.[84] Even if the goods were delivered by a Supplier directly to MOS, this did not therefore show that the MOS2 Contract was a loan. FXS (and not its Suppliers) was obliged to MOS to supply the underlying goods to MOS and, under the contract, FXS had given MOS warranties and implied terms pertaining to the supply. It was unlikely that FXS would have given MOS a pure loan and yet subject itself to additional obligations and responsibilities pertaining to the goods/services when it could simply have left MOS to contract directly with the Suppliers.

77 FXS' Manual Costing Sheet, prepared shortly after the date of the MOS2 Contract, supports Wong's case that the cost to FXS for that transaction was $1,930,000 with the total revenue at $2 million based on the mark-up or "gross profit" to FXS at $70,000 ($70,000 is 3.5% of $2 million).[85] On the contrary, Kizaki's assertion that FXS provided a pure loan of $1,930,000 at an interest of 3.5% of the loan sum (*ie*, $67,550) [86] would not have added up to $2 million.

78 In addition, Toh, who reviewed the CE Pack before the MOS2 Contract was signed, corroborated Wong's account, namely, that the transaction was an

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83 4/8/20 NE 96, 121–122; 3/9/20 NE 47.

84 Transaction Table dated 13 November 2020 – Part B (s/n 2, 3, 22, 23, 29, 30, 32–38, 40–44).

85 1AB 377; 4/8/20 NE 114–115.

86 Kizaki's AEIC at [81].

asset sale by instalment payment. She explained that the term "financing" used in the CE Form was a loose term to represent the actual credit or risk exposure to FXS and could also refer to a sale transaction with payment on credit terms or by instalments.[87] Yuanjun, whose role was to assess MOS' creditworthiness and FXS' potential exposure under the intended contract, explained that he had used the term "interest rate" instead of "profit margin" in the credit evaluation for the MOS2 Contract as he was previously employed by a bank and was not familiar with FXS' practice of how to term the mark-up element in a contract. He also corroborated that FXS was not disbursing a pure loan.[88]

79 I accept Wong's, Toh's and Yuanjun's evidence. The Defendants' argument, that the MOS2 Contract was a pure loan just because FXS had supplied the goods/services upfront to MOS without contemporaneous payment and that FXS was paying the Supplier for the goods with MOS paying FXS subsequently by instalments and interest,[89] defied logic. By the Defendants' reasoning, every transaction of goods on credit terms would amount to a "pure loan". There was no evidence that FXS had financed a purchase of goods in which *MOS had contracted directly with a Supplier*. It should also be noted that the MOS2 Contract was prior to its execution cleared by FXS' Legal Department (as evidenced on the face of the contract).[90]

80 Mr Lee submitted in closing submissions that the dates of the delivery orders issued by FXS to MOS preceded the date of the delivery orders issued by Serve Tech to FXS for the same equipment and this showed that the MOS2

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87 6/8/20 NE 98–99, 104–107, 110–111, 120.

88 Yuanjun's AEIC at [58]; 7/8/20 NE 10, 13, 14, 17, 22, 27–32, 36.

89 4/8/20 NE 178–181.

90 4/8/20 NE 130.

Contract was fabricated to create the false impression that it was a sale transaction. The same submission was made in relation to the MOS3 and MOS4 Contracts.[91] However, this assertion (in relation to all the MOS Contracts) was not pleaded by the Defendants nor was such allegation raised by their witnesses (such as Kizaki), and Wong was not cross-examined on this point.

81 Hence, I reject the Defendants' claim that the MOS2 Contract was in substance a pure loan. I find there was no mischaracterising of the MOS2 Contract which would amount to a breach of Wong's obligations.

Nature of MOS3 and MOS4 Contracts

82 I deal with the MOS3 and MOS4 Contracts together as they, on their face, are in the same form of a "Rental Agreement" and provide for FXS to "rent to" MOS diving equipment. Under the MOS3 Contract, MOS would pay FXS $1 million in 10 monthly instalments of $100,000 and under the MOS4 Contract, MOS would pay $1,007,496 in 18 monthly instalments of $55,972.[92]

83 Wong pleads and maintains in his AEIC that the MOS3 and MOS4 Contracts were instalment sale agreements to provide Project Management services.[93] He explained that FXS' Accounts Department was increasingly overwhelmed by the amount of administrative billing work and sought to automate the billing process using a software system ("Abacus System"). However, the Abacus System had limitations in that the description for a particular transaction had to be chosen from a drop-down box and there was no

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91 DCS at [83].

92 1AB 559–561, 578–582.

93 Reply at [43]; Wong's AEIC at [408] and [426]–[429]; 4/8/20 NE 162.

description corresponding to an instalment sale agreement. As MOS would make periodic payments under the MOS3 and MOS4 Contracts, the Accounts Department decided that the closest description and option available in the drop-down box was "Rental Agreement", and the contracts were structured as such.

84 In court, Wong prevaricated on whether the MOS3 and MOS4 Contracts were in substance instalment sale or rental agreements.[94] Wong stated that the MOS3 and MOS4 Contracts had an element of interest charged over and above the mark-up/profit margin on the price of the goods/services which FXS obtained from its Supplier, to take into account that MOS was paying by instalments. Wong also explained that FXS did not charge MOS such interest on the MOS1 and MOS2 Contracts as it was a concession given to MOS when they first transacted.[95] Wong subsequently stated, and maintained in closing submissions, that the MOS3 and MOS4 Contracts were rental agreements.[96]

85 I find that the MOS3 and MOS4 Contracts were in fact intended as sale agreements, and they were structured as rental agreements to fit into the new Abacus System that FXS adopted. I also find that although there was an element of financing in the contracts, this did not therefore make them pure loans.

86 Toh had attested that the MOS3 Contract was an asset sale transaction with services and explained that it had been classified as a rental agreement because of the constraints in the Abacus System, and that FXS had purchased the products from its Supplier and sold them to MOS. Toh stated that she was involved in the internal meetings and monitored the timelines and delivery

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94 4/8/20 NE 153, 156, 162–163, 166, 168–171, 174–175.

95 4/8/20 NE 151, 198; 6/8/20 NE 17–18.

96 5/8/20 NE 204; 19/10/20 NE 51, 54; Plaintiff's Closing Submissions ("PCS") at [111].

schedule as she had to track the costs and revenue for FXS.[97] Her position was consistent with Wong's pleaded case which he maintained in his AEIC (see [83] above). Wong also reiterated in court that the rental agreement format was used due to the Abacus System.[98] I accept Toh's evidence and I do not see any reason for her to lie. Although she was informed by Mr Lee that Wong had in court testified the MOS3 Contract to be a rental agreement, she had maintained that it was a sale agreement and did not attempt to align her evidence with Wong's.[99]

87 Further, the Document Submission to FXS' Integrated Enterprises Solutions & Services Department pertaining to the MOS3 Contract shows that FXS had in April and June 2015 (before executing the contract) intended for the MOS3 Contract to be a "sales agreement".[100] Wong and Toh testified (and as reflected in the Manual Costing Sheet) that the "cost" to FXS was $965,000 (*ie*, what FXS paid its Supplier). When it sold the goods to MOS, FXS had marked up that cost to earn a gross profit of around 2.7% (or $26,735), and added a further interest component onto the $991,735 (which comprised the $965,000 and $26,735) because MOS was paying by instalments, to bring the total contract sum to $1 million. I also accept Wong's explanation for the MOS4 Contract, consistent with the Manual Costing Sheet, that the goods were sold to MOS at $992,606, comprising around 3.7% as gross profit/mark-up of $37,126 and around 96.3% being the cost price to FXS of $955,480. An interest of 1% per annum was added over and above the sale price, again to charge MOS for

97 6/8/20 NE 116–117, 120, 122–124, 126.

98 Wong's AEIC at [429]; 4/8/20 NE 169; 6/8/20 NE 124.

99 6/8/20 NE 119.

100 1AB 508 and 538; 6/8/20 NE 170–171.

paying in instalments, bringing the total contract sum to $1,007,496 (an increment of close to 1.5% as the payment period was one and a half years).[101]

88 That the MOS3 and MOS4 Contracts were more likely than not sale rather than rental agreements would also accord with the MOS1 and MOS2 Contracts, which were sale contracts. Toh had attested as such.[102] FXS had contracted with MOS since the MOS1 Contract for diving equipment and it was more likely than not that all four business transactions were intended to be of the same nature.

89 Whilst no one has explained why MOS had accepted the MOS3 and MOS4 Contracts being labelled as rental agreements, and even if they were not sale but rental agreements, I find that the Defendants have not shown that they were pure loans.[103] The Defendants' assertion that the MOS3 and MOS4 Contracts were pure loans because FXS was paying the Supplier for the goods is likewise rejected for the same reasons as for the MOS2 Contract (see [79] above). *Indeed, no one, who was involved at the material time, has come to testify that the MOS Contracts were pure loans disguised as something else.* Again, the documents showed that FXS (and not MOS) contracted with the Suppliers, even if the goods were delivered to MOS directly, and Toh attested that FXS bought the goods from the Suppliers and sold them to MOS.[104] As with the MOS2 Contract, it was unlikely that FXS would have given MOS a pure

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101 1AB 507, 592; 4/8/20 NE 187–188, 202; 6/8/20 NE 61–64, 119.

102 6/8/20 NE 120, 136.

103 4/8/20 NE 181, 209.

104 4/8/20 NE 182, 192–193; 6/8/20 NE 126; Transaction Table dated 13 November 2020 – Part B (s/n 48–53, 59–62, 68).

loan and yet subject itself to obligations for the diving equipment vis-à-vis MOS when it could simply have left MOS to contract directly with the Suppliers.

90 The Manual Costing Sheets for the MOS3 and MOS4 Contracts also refute Kizaki's claim that FXS was providing a pure loan at certain specified interest rates. Kizaki claims that under the MOS3 Contract and MOS4 Contract, FXS provided a loan to MOS of around $965,000 with interest at 2.7% and of $955,480 at 3.7% interest respectively.[105] However, these do not add up to the contract sum of $1 million and $1,007,492 under those Contracts respectively. I hence reject Kizaki's explanations.

91 As for Yuanjun using the terms "interest" and "purpose of loan" in the CE Form for the MOS4 Contract, this does not assist the Defendants' case and I accept that he continued to use these terms as he had "cut and paste" from the template of a CE Form for the previous MOS contracts and did not pay attention to such details as his focus in the CE Process was to evaluate the customer.[106]

92 Hence, I find that the MOS3 and MOS4 Contracts were not "pure loans", and, as Wong and Toh attested, the total contract sum (whether they were sale or rental agreements) would be recognised as revenue to FXS. Kizaki also agreed that the revenue would have been correctly recognised in FXS' books if the MOS Contracts were sale or rental agreements.[107] As such, the Defendants' claim that Wong had caused FXS to overstate its revenues in its accounts is not made out. I should add that whilst Wong had allowed the MOS3 and MOS4 Contracts to be structured as rental agreements, this did not mean that there was

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105 Kizaki's AEIC at [85(3)] and [86(3)].

106 7/8/20 NE 44–45.

107 4/8/20 NE 61, 63, 171, 213; 6/8/20 NE 11–12, 131, 165–166; 3/9/20 NE 19–20.

a sham contract such that Wong cannot objectively be said to be acting *bona fide* in FXS' interest. In this case, unlike *Scintronix* (at [36] above), underlying goods/services were provided by FXS with payments to be made by MOS to FXS, and Wong was not attempting to secure an economic benefit for FXS by corruption. The use of rental agreements was to facilitate keying the data into the Abacus System.

Whether MOS Contracts were transactions within FXS' scope of business, expertise or experience

93 The Defendants claim that Wong had caused FXS to be unreasonably and unnecessarily exposed to liability by entering into the MOS Contracts to supply products/services which FXS did not have the Relevant EEC for.[108] Wong and Toh, however, attested that the MOS Contracts were to provide Project Management services including structuring the relevant contracts with Suppliers and coordinating with them to ensure the product was delivered.[109]

94 I find that apart from being involved in sourcing for and liaising with Suppliers and coordinating with the customer (MOS) for the supply of the diving equipment, there was little else in terms of Project Management. Regardless, the material question is whether the requisite approval should have been obtained under the Comm Matrix before entering into the MOS transactions, and whether by entering these transactions FXS was unreasonably and unnecessarily exposed to liability.

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108 Kizaki's AEIC at [67]–[74].

109 Wong's AEIC at [155], [407]–[409], [426], [436]; 5/8/20 NE 16–17; Toh's AEIC at [140].

Whether approval required and obtained to enter into MOS Contracts

95 The Defendants argue that as the supply of the diving equipment fell outside the scope of FXS' ordinary business, Wong was required to obtain the APO President's concurrence before entering into the MOS Contracts, as required under cl C(3) of the 2013 Comm Matrix to start a new business activity and under cl C(13) to launch a unique product or service. However, such approvals were not obtained.

96 Wong stated that in early 2014 at a BRM, he had informed Honda (then APO President) that he was considering transacting with MOS and had outlined to Honda the work to be carried out under the proposed MOS transaction. Wong stated that at the BRM, he gave a presentation to the Defendants' senior management and this was recorded. Honda did not have any objections to this and had given his written consent to the MOS1 Contract. Wong further asserted that it was the 2006 Comm Matrix that he had sight of at the material time, and which thus applied. The MOS1 and MOS Contracts did not pertain to starting a new business activity or launching of "OpCo-unique Products" which required approval under cll C(3) and C(13) respectively of the 2006 Comm Matrix.[110]

97 The 2013 Comm Matrix is applicable as I had earlier found that Wong had sight of it in 2013, although there is no material difference between the 2006 and 2013 Comm Matrix in relation to this issue. Assuming that the MOS1 and MOS Contracts constituted a new business activity, I accept that Wong had informed Honda, prior to entering the MOS1 Contract, about transacting with MOS and that Honda had given his approval. I also accept that Wong's presentation to the Defendants' senior management was recorded. Whilst Wong

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110 1AB 35; Wong's AEIC at [401]–[404]; 5/8/20 NE 54–56, 200–201; 6/8/20 NE 25.

did not show documentary evidence of this, such as Honda's written consent or the BRM minutes, Wong is no longer in FXS' employ and the documents would be within the Defendants' possession. In any event, Kizaki agreed that any agreement or concurrence under the 2013 Comm Matrix can be verbal.[111] As such, I accept Wong's uncontroverted testimony that Honda had given approval, given that Kizaki was never involved in the MOS transactions and was not at the BRM. Thus, even if the transactions with MOS was a new type of business that required the APO President's approval, this had been obtained.

Whether FXS was unreasonably and unnecessarily exposed to liability

98 Next, the Defendants plead that by entering the MOS Contracts to supply products and services that fell outside the scope of FXS' business and which it did not have the Relevant EEC for, FXS was unreasonably and unnecessarily exposed to liability to MOS (arising from warranties provided by FXS to MOS). Kizaki claimed that Wong did not: (a) take reasonable steps to mitigate or remove FXS' exposure to liability to MOS by ensuring that the Suppliers had the necessary experience or capability to supply the diving equipment; and (b) ensure that FXS entered into appropriate back-to-back contracts with the Suppliers. Kizaki also claimed that FXS had undertaken obligations to supply products based on certain specifications and standards when it did not have the ability to ensure such compliance as it did not have the Relevant EEC in relation to diving equipment.[112]

99 I find that the Defendants' claim that Wong had caused FXS to be unreasonably and unnecessarily exposed to liability to MOS is not made out and

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111 1/9/20 NE 56.

112 Defence at [50(1)]; Kizaki's AEIC at [67]–[74].

that in any event FXS had taken steps to mitigate its exposure to liability to MOS.

100 I accept that prior to entering the MOS1 Contract, Wong had internal discussions with his staff to determine if FXS had the capability to manage the project. FXS had also involved MOS in selecting the relevant Suppliers, inspecting the products before they were delivered, and certifying that the works were satisfactory before FXS made payment to the Suppliers.[113] These mitigated the risk of the products being unsatisfactory. Next, Kizaki agreed that there was no requirement for FXS to enter into back-to-back contracts with Suppliers and, in any event, it is unclear what amounts to an appropriate back-to-back contract. FXS did issue purchase orders to its Suppliers with the description of the goods to be supplied.[114]

101 Moreover, FXS had obtained warranties and indemnities from its Suppliers as evidenced from the purchase orders issued to the latter, and which helped mitigate the risks to FXS. For instance, a purchase order dated 19 December 2014 issued by FXS to Serve Tech pertaining to the MOS2 Contract stated that the purchase order "is subject to the terms and conditions appearing overleaf", and other purchase orders were subject to the terms and conditions stated on FXS' website.[115] Whilst the purchase orders produced in the Suit were incomplete as they did not include the pages where the terms and conditions could be found, and FXS did not produce the website reference, I accept Wong's evidence that there were warranty and indemnity clauses attached to FXS'

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113 Wong's AEIC at [400] and [409].

114 1AB 396–409.

115 1AB 423 and 395.

purchase orders to its Suppliers.[116] Kizaki agreed that the purchase orders disclosed by the Defendants were incomplete, that there were terms and conditions governing FXS and its Suppliers, and that FXS had a standard template for terms and conditions in purchase orders.[117] As there was a standard template, it is reasonable to infer that the terms and conditions in the purchase orders relating to the MOS Contracts were the same present in other purchase orders. For example, the purchase orders relating to the MOS1 Contract and the Supreme Lion transaction (which I will deal with later) contain terms, warranties and indemnities that: (a) the goods would be in accordance with the description and be of merchantable quality and fit for purpose; (b) the Supplier would indemnify FXS for any loss, injury, damage or costs sustained by reason of any defect in the goods supplied; and (c) the goods may be rejected if they do not comply with the contractual requirements.[118]

102 Finally, there is no evidence that the Suppliers had failed to deliver the goods or services in conformity with the MOS Contracts and MOS did not make any complaints or allege any breach against FXS.

Causing FXS to enter into the MOS Contracts without appropriate PGs

103 The Defendants then claim that Wong had caused FXS to enter into the MOS Contracts without securing appropriate PGs and complying with the SOP for the CE Process by ensuring that the intended PGs were sufficiently creditworthy and obtaining supporting information such as the latest income tax

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116 5/8/20 NE 19–21, 25–26; 6/8/20 NE 74; 2/9/20 NE 104; 3/9/20 NE 2–3.

117 3/9/20 NE 3–4, 7.

118 1AB 263–264, 360–361.

assessment from them. Hence, when MOS defaulted on its payment obligations under the MOS Contracts, FXS could not recover the sums from the PGs.[119]

104 I find that the Defendants have failed to show that Wong had breached his fiduciary duties to act *bona fide* in FXS' interest, failed to use reasonable diligence in carrying out his duties, or breached FXS' internal policy, in relation to securing PGs for the MOS Contracts.

105 I had earlier found that was no requirement to secure any PG. Nevertheless, FXS had procured three PGs for the MOS2 Contract, namely Samuel Yeo ("Samuel", the shareholder and director of MOS), Rachael Yeo ("Rachael") and Elizabeth Lee ("Elizabeth"), and four PGs for the MOS3 and MOS4 Contracts, namely Samuel, Rachael, Elizabeth and Adrian Lim ("Adrian").[120] Elizabeth is Samuel's wife, whilst Rachael and Adrian are related to Samuel and were the chief financial officer and procurement manager respectively of MOS.

106 Kizaki alleged that the PGs were not creditworthy as Samuel did not own any property and Rachael merely owned an HDB flat. However, Elizabeth owned a bungalow and Adrian co-owned a private apartment.[121] Wong explained that when the value of the proposed MOS2 Contract was raised to $2 million, he required an additional PG to mitigate the risk and Elizabeth was added. Yuanjun testified likewise, and added that Elizabeth owned a freehold property valued upwards of $3 million which was more than enough to cover

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119 Defence at [51]–[52].

120 Table of Personal Guarantors dated 21 August 2020; DCS at [109].

121 5/8/20 NE 69, 76–78; 1AB 474–475.

the entire credit risk associated with the MOS2 Contract.[122] Additionally, the CE Form showed that, based on the income tax assessments, Samuel's and Rachael's combined annual income at the material time was about $675,000. Toh also explained that whilst Samuel and Rachael did not appear to have assets that could be enforced against them, the PGs were evaluated based on their earning capabilities and the notices of assessments produced.[123] Subsequently, when FXS executed the MOS3 Contract, it procured Adrian as the fourth PG, and when FXS executed the MOS4 Contract, the CE Form showed Samuel's and Rachael's combined annual income based on the income tax assessments had increased to about $1.46 million, which was not insubstantial.[124]

107 Furthermore, prior to entering the MOS2 Contract, FXS had done a financial analysis of MOS (as evidenced from the CE Report) which showed that MOS was making profits; and Wong testified that MOS had already paid to FXS more than 96% of the total contract price of the MOS1 Contract. Wong stated that before the MOS3 Contract was entered into, MOS had also been making prompt payments to FXS under the MOS2 Contract then amounting to 70% of the contract price; and when the MOS4 Contract was executed, MOS had already fully paid up on the MOS1 Contract and had been making prompt payments under the MOS3 Contract then amounting to 40% of the contract price.[125] These were also attested to by Yuanjun, who gave an account on the detailed credit analysis FXS did prior to entering the MOS2 Contract.[126]

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122 Wong's AEIC at [421(d)]; 4/8/20 NE 110; Yuanjun's AEIC at [80]–[81].

123 6/8/20 NE 150.

124 1AB 584; 5/8/20 NE 88; Yuanjun's AEIC at [118].

125 Wong's AEIC at [423(c)], [433(c)] and [450(c)]; 1AB 460–464.

126 Yuanjun's AEIC at [60]–[75], [99(c)] and [126(c)].

108 Next, Wong attested that the CE Process including obtaining PGs and assessing their creditworthiness was a joint effort with the CE team and a detailed CE Report, although not required, was prepared for the MOS2 Contract. Indeed, FXS prepared two CE Reports for the MOS4 Contract because the first report did not have the latest income tax assessments for the PGs, and this was then updated in the second report (pertaining to Samuel and Rachel) which also enclosed a more detailed analysis of MOS's financial position.[127]

109 The evidence thus showed that Wong had exercised reasonable diligence before entering the MOS transactions. He had considered the CE Forms and Reports and took steps to ensure the sufficiency of the PGs and increased the number of PGs due to the value of the transactions. He had examined MOS' payment history and creditworthiness before FXS entered into the next transaction with MOS. There were no guidelines as to what constituted a sufficient or an appropriate PG, and Mr Lee has not shown that his suggestion that the PGs must have assets at least equivalent to the transaction value[128] is a general commercial practice. In fact, obtaining a PG for a commercial transaction is only one aspect of risk mitigation and has to be considered together with other factors such as the financial state of the customer.

Conclusion on MOS Contracts

110 In the circumstances, I am not satisfied that the Defendants' claim pertaining to the MOS Contracts are made out. MOS did not complain against FXS in relation to the MOS Contracts and Kizaki agreed that FXS' Legal Department could have raised issues regarding the credit evaluation of the MOS

127 Wong's AEIC at [443]–[447]; 1AB 583–588.

128 7/8/20 NE 63.

Contracts at the material time but it did not. Indeed, the Deloitte Report did not mention MOS or the MOS Contracts.[129] Whilst the SA Report referred to one MOS transaction which was alleged to be a loan disguised as a sale transaction or allegedly a fictitious transaction, the report also stated that the evidence that the transactions were "fictitious" could not be confirmed.[130] There are no known elaborations on this point as FXS had chosen to redact this report in the Suit.

Supreme Lion transaction

111 FXS had entered into a sale agreement dated 6 December 2013 with Supreme Lion ("SL Contract") to supply products and services for the installation, testing and commissioning of power control units for woodwork machinery systems ("Woodwork Products/Services"), being TP Products.[131]

112 The Defendants plead that Wong had breached his fiduciary duties, failed to use reasonable diligence and breached FXS' policies by causing FXS to be unreasonably and unnecessarily exposed to liability by entering into the SL Contract to supply products and services that it did not have the Relevant EEC for. Kizaki claimed that the following also caused FXS to be unreasonably and unnecessarily exposed to liability to Supreme Lion: (a) the SL Contract provided that FXS would be liable to Supreme Lion if the Woodwork Products/Services did not comply with the specifications and standards prescribed in the SL Contract; and (b) Wong did not take reasonable steps to mitigate FXS' exposure to liability under the SL Contract by ensuring that the Supplier, Hyper Marketing (Singapore) Pte Ltd ("HM"), had the necessary

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129 1/9/20 NE 88; 3/9/20 NE 23.

130 3AB 238.

131 1AB 229; Defence at [54]; Wong's AEIC at [462]–[466].

experience and capability to supply the Woodwork Products/Services, by inspecting the products/services which were delivered directly to SL, or by ensuring that FXS entered into appropriate back-to-back contracts with HM.[132]

113 Wong admitted that the SL Contract was drafted as a sales agreement but claimed that the SL Contract was to provide Project Management services.[133]

114 I find that apart from being involved in sourcing for and liaising with the Supplier and coordinating with the customer (Supreme Lion) for the supply of the woodwork machinery system,[134] there was little in terms of Project Management. Nevertheless, the question is whether by entering the transaction, pertinently by supplying a type of TP Product that did not fall within FXS' ordinary business at the material time, FXS was unreasonably and unnecessarily exposed to liability. In my view, this is not made out.

115 I accept that Wong had, prior to entering the SL Contract, consulted the relevant departments within FXS to understand the nature and scope of the transaction and risks involved. He had also mitigated the risks of transacting with Supreme Lion by getting its involvement in selecting the relevant Supplier and in certifying that the goods/services were in accordance with its requirements before FXS took delivery of the same and made payment for them.[135] There is no evidence to the contrary. Next, the purchase order between FXS and HM contained a warranty and indemnity which bound HM and

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132 Kizaki's AEIC at [98]–[103]; 5/8/20 NE 38–39.

133 Wong's AEIC at [466].

134 Wong's AEIC at [464(c)].

135 Wong's AEIC at [465].

protected FXS (see [101] above).[136] Hence, I am not satisfied that there is sufficient evidence to show that Wong had not acted *bona fide* in FXS' interest, had acted improperly, or failed to use reasonable diligence.

116 Kizaki asserted that HM did not have the necessary capability and expertise to supply the Woodwork Products/Services because an ACRA Business Profile Search of HM did not expressly show that HM was in the business of supplying such products/services.[137] However I do not find this assertion to be made out as the ACRA Business Profile Search was done in 2017, long after the SL Contract had been executed and completed; in any event, it may not have been exhaustive of HM's business activities. The Defendants, having made the assertion, did not call anyone from HM to testify on the scope of its business. On the contrary, it is undisputed that HM did deliver the products/services pursuant to the SL Contract. Supreme Lion had also paid FXS pursuant to the SL Contract and FXS had not suffered any loss.[138]

117 In conclusion, I find that the Defendants' case against Wong for breaches of his duties or of FXS' company policy (which they have not elaborated on) are not made out. As such, I find that there were no grounds for summarily dismissing Wong under cl 10(b), (h) or (i) of the Employment Contract, in relation to the SL Contract.

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136 1AB 263–264; 3/9/20 NE 9–10, 31.

137 Kizaki's AEIC at [98] and [103(1)] and exhibit KK-53.

138 Defence at [56]; Kizaki's AEIC at [105]; 5/8/20 NE 49, 51.

Conclusion on the Transactions

118 Given the above, I dismiss FXS' counterclaim against Wong for some $2,880,385.78 (comprising the IC Debt and outstanding amounts that MOS owed to FXS under the MOS Contracts) and further find that FXS was not entitled to summarily dismiss Wong pursuant to cl 10(b), (h) or (i) of the Employment Contract.

Damages for unlawful dismissal

119 Having found that FXS should not have terminated Wong's employment summarily, Wong's entitlement to damages (if proved) should be calculated on the basis that his employment, which was terminated on 21 December 2017 by the Termination Notice, could have been terminated then by giving three months' salary in lieu of notice pursuant to cl 8.1 of the Employment Contract (*ie*, what both parties call the "Situation 2" scenario).[139]

120 The Court of Appeal in *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin and another appeal* [1992] 3 SLR(R) 933 at [13] endorsed what is the known as the minimum legal obligation rule in *Gunton v Richmond-upon-Thames London Borough Council* [1980] ICR 755 at 772 that:

> Where a servant has been wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. The date the contract came to an end must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he could properly do so …

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139 PCS at [228]–[229]; DCS at [259].

121 Essentially, the minimum legal obligation rule seeks to limit the recovery of damages by assessing it in a manner which is the least costly or most beneficial to the employer. However, it is not enough that the employer *could* have done so in the least costly manner to him, but that it must also be shown that he *would* have done so in that manner (*Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 at [78]–[79] and [81]). Regardless of who bears the burden of proving whether the employer *would* have chosen the most advantageous method of performing or terminating the employment contract, I find that FXS would have chosen to terminate the contract in that manner. This is in light of the findings of the Deloitte Report and SA Report which provided some basis for the Defendants to believe that there were irregularities pertaining to transactions in FXS and which Wong might have been involved in or appraised of, and as shown by the fact that FXS had indeed terminated Wong's employment a few weeks after the SA Report was released. Wong himself also claim that the Defendants wanted to dismiss him even before the two Reports were released.[140]

122 In addition, FXS would have given Wong three months' salary in lieu of notice and terminated him immediately on 21 December 2017 pursuant to cl 8.1 of the Employment Contract, as this was the least costly method to FXS, rather than give him three months' notice and retaining him until 21 March 2018 (called the "Situation 1" scenario by parties), or by simply waiting until the contract expired on 31 March 2018. On the basis that damages should be assessed based on Situation 2, the parties agreed that the heads of claims to be considered are whether Wong is entitled to: (a) three months of salary in lieu of

140 PCS at [211].

notice; (b) an end of term payment; (c) loss of variable bonus; and (d) salary in lieu of accrued leave.[141]

Three months' salary in lieu of notice

123 Clause 8.1 of the Employment Contract states expressly that FXS may pay three months' "basic salary" in lieu of notice. Contrary to Wong's claim that this refers to "base salary", cl 6 of the Employment Contract clearly distinguishes the two, and provided that Wong's "annual base salary" would be $407,498, which comprised his "[m]onthly basic salary" of $29,107 multiplied by 14 months. There is no evidence to suggest that Wong's "basic salary" comprised other components. Wong has to prove his claim and he has failed to show that basic salary is synonymous with base salary.

124 Hence, I award this head of claim at $87,321, calculated by multiplying the monthly basic salary of $29,107 by three months.

End of term payment

125 Clause 8.2(a) of the Employment Contract states that if Wong's employment is terminated for any reason other than under cl 10, FXS would pay him an end of term payment ("EOT Payment") calculated based on one month "base salary" for each year of service and pro-rated for any year of service. Wong submits that the "base salary" per month is to be calculated based on the annual base salary of $407,498 divided by 12 months (ie, $33,958.17). The

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141 Agreed List of Issues dated 11 September 2020, Table 2; PCS at [265]–[270]; DCS at [262]–[275].

Defendants submit that the "1 month base salary" in cl 8.2 refers to one month "basic salary".[142]

126 I accept Wong's submission in this regard. The term "1 month base salary" in cl 8.2(a) and "3 months' basic salary" in cl 8.1, read with "annual base salary" and "monthly basic salary" in cl 6 of the Employment Contract shows that FXS made a distinction between "base" and "basic" salary (see also [123] above). The EOT Payment is meant in recognition of the employee's length of service and the "1 month base salary" per year of service should be computed based on what Wong would have been minimally entitled to for the year, *ie*, the annual base salary of $407,498. Ino agreed, in court, that Wong's monthly pay package was based on his annual base salary of $407,498 divided into 12 monthly payments.[143]

127 Hence, one month of base salary would be $33,958.17 (*ie*, $407,498 divided by 12). Mr Wendell Wong submits that Wong has been employed for 37.9 years, which is not disputed by Mr Lee.[144] As such, Wong is entitled to an EOT Payment of $1,287,014.64 (*ie*, $33,958.17 multiplied by 37.9).

Variable bonus

128 Clause 7 of the Employment Contract provides that whether or not Wong is entitled to a variable bonus is dependent on him achieving certain performance targets.

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142 DCS at [268]–[269].

143 Ino's AEIC at [16(1)]; 11/8/20 NE 49.

144 PCS at [265]; DCS at [268(2)].

129 Wong claimed that he was entitled to a variable bonus of up to $122,250 per year as per cl 7, and this covered the periods of assessment from 1 April to 31 October and from 1 November to 31 March. Wong stated that if he had met the various key performance indicators ("KPIs") set out in FXS' bonus plan, he would have been entitled to the full amount of $122,250. Wong claimed that for the period of 1 April to 31 October 2017, he had "to the best of [his] knowledge" met the KPI and FXAP did not inform him that either he or FXS was underperforming, and in all his years as MD or Senior MD of FXS he had always met the KPI and had been awarded the highest variable bonus. As such, he claimed that he should be awarded $61,125 for that six-month period, pro-rated from the highest ceiling of $122,250 per year.[145]

130 The Defendants denied that Wong was entitled to any amount, as variable bonus is paid at FXS' discretion and FXS' APO Regional Senior Management Reward Plan for April to September 2017 stated that Wong was only eligible for a pay-out if he was in service as of 31 March 2018. The Defendants submitted that alternatively, Wong was entitled only to $33,013.45, calculated by taking the half year target variable bonus ($61,124.70) multiplied by the achievement ratio of the KPI set out in Wong's FY 2017 Reward Plan ("Reward Plan"), which Ino testified to be 54.01%.[146] A perusal of the Reward Plan showed the target bonus amount as $61,125 (for April to September 2017), but it is unclear how Ino came to the ratio of 54.01%.

131 In my view, cl 7 of the Employment Contract provides that if certain targets are met, Wong would be entitled to a variable bonus up to a maximum

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145 Wong's AEIC at [521]–[523].

146 Ino's AEIC at [16(2)] and exhibit HI-1; DCS at [271]–[272].

of $122,250 in a year; and the target bonus in the Reward Plan at $61,125 for a six-month period would accord with the figure in cl 7. Although Wong was not in service as of 31 March 2018, this was because he had been summarily dismissed by FXS. Nevertheless, Wong has failed to show any evidence to support his bare assertion that he had met the various KPI and was thus entitled to the maximum amount of bonus (pro-rated to six months). Given that Ino had attested to 54.01% as the achievement ratio of the KPI, and this was uncontroverted, I would accept that as the best evidence available and award Wong $33,013.61.

Salary in lieu of accrued leave

132 Parties agree that under Situation 2, Wong would have had 18 days of unconsumed leave as at 21 December 2017.[147] The Defendants submit that Wong is not contractually entitled to encash his unconsumed leave, and hence not entitled to damages for loss of salary in lieu of accrued leave; alternatively if Wong were entitled to encash his unconsumed leave, this sum should be computed using his gross monthly salary of $32,607 (comprising his monthly basic salary of $29,107, gratuity allowance of $1,500 and market differential allowance of $2,000).[148] Wong submits that his salary in lieu of accrued leave should be calculated using the annual base salary of $407,498.

133 The Employment Contract is silent on the treatment of unconsumed leave. I find that as Wong had been wrongfully dismissed, he would have suffered loss in his unconsumed leave and should be compensated for it. For comparison, if Wong had been given three months' notice of termination of

147 PCS at [270]; DCS at [274].

148 DCS at [274(2)]–[275].

employment, cll 4.7.1.1 and 4.7.1.2 of FXS' Annual Leave Policy (referred to by both parties) would have enabled him to consume his leave or encash it.[149]

134 On the basis that Wong's base annual salary is $407,498, and parties agree that it should be computed based on 260 working days a year,[150] I award Wong $28,211.40 for 18 days of unconsumed leave ($407,498 x 18/260).

Wong's other claims

135 Having found that FXS had unlawfully dismissed Wong and assessed the loss payable to him, it is not necessary to make findings pertaining to Wong's other claims such as FXS' failure to follow the procedure for dismissal or breaches of obligations of mutual trust and confidence owed to him. Wong has not adduced evidence of what further loss he would have suffered from such breaches (if any), given that the trial is not bifurcated. As for the claims of conspiracy and inducement of breach of contract, I am of the view that they are not made out and even if they were, Wong has similarly not adduced evidence of what further loss he would have suffered.

136 I just deal briefly with the claim for conspiracy (whether by lawful or unlawful means) for completeness. Pertinently, I am not satisfied that there was any agreement between the Defendants to do certain acts such as conducting the audit of FXS as a guise or pretext to dismiss Wong and with the intention or predominant purpose to cause damage or injury to Wong by such acts.[151]

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149 Ino's AEIC at exhibit HI-3; Wong's AEIC at [102]–[103] and exhibit WSB-9.

150 PCS at [264]; DCS at [274].

151 PCS at [204]–[206].

137 Wong asserts that even before the commencement of the Audit Investigation in September 2017, Fujifilm had decided to carry out a "company-wide reorganisation" of FX including making personnel changes to "clear the deck" in view of the widespread scandal pertaining to accounting irregularities revealed by the IIC pertaining to FXA and FXNZ (see [4] above) and which was why he (among other MDs) in the FX entities was summarily dismissed. Wong relied on a series of emails dated 1 November 2017 (the "**Emails**") to show that Fujifilm had decided to dismiss him even before the results of the Audit Investigation were released or any allegations of wrongdoing against him crystallised, and that the Deloitte Report and SA Report were merely facades which the Defendants had no genuine intention to rely on.[152]

138 I find that Wong's assertion, that he was dismissed regardless of whether he was culpable just because Fujifilm wanted to clear the deck and show that changes were being made to rebuild the trust of its stakeholders, to be baseless and unsupported by concrete evidence. Whilst Wong had named seven key executives in various FX entities who had left their employ, there is no evidence that they were dismissed unlawfully and without basis. Instead, Ino had explained that some had retired when their contract ended, receiving retirement benefits; and others had been summarily dismissed following disciplinary proceedings brought against them. Additionally, Ino stated that a significant number of key executives in other FX entities had remained in their respective employ even long after audits had been done, which points against any allegation of an indiscriminate mass dismissal of FX executives.[153] It is also unclear how the reliance on various documents such as IIC's report or various

152 PCS at [208]–[213].

153 Ino's AEIC at [13]–[14].

announcements and presentation materials of Fujifilm showed that Fujifilm intended to show its stakeholders that it was cleaning up its act by terminating various key executives such as Wong without basis. The focus of the IIC's report was on achieving a more robust framework for compliance systems and internal controls, and the announcements and presentation materials do not refer to nor contemplate the removal of Wong as Senior MD of FXS.[154]

139 Next, I turn to the Emails, which Mr Wendell Wong submitted showed that as of 1 November 2017 one Masaru Yoshizawa ("Yoshizawa") had given a "decree" for Wong to be dismissed, even before Deloitte held any meeting with Wong and before the SA Report was published, and that this set into motion a "top-down orchestration of" Wong's summary dismissal.[155] Two of the Emails emanated from Yoshizawa who, on 1 November 2017, stated that he wanted to "impose the severest disciplinary action possible" on Wong and to "take disciplinary action in the form of dismissal against [Wong]".[156] Yoshizawa was then a director of FXAP and Fujifilm and Executive Vice-President of FX.

140 I find the above claim to be without merit and in any event did not support a claim in conspiracy between the Defendants.

141 Although the Emails show that Yoshizawa wanted to take a certain course of action, Mr Wendell Wong himself stated that Yoshizawa did not act for, and was not the key decision-maker in, FXS or FXAP.[157] The Emails were

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154 Agreed Bundle of Documents Vol 2 102; 5/8/20 NE 154–155; 2/9/20 NE 6–7; 3AB 92 and 104.

155 5/8/20 NE 164; PCS at [208]–[211].

156 3AB 158–160.

157 PCS at [212].

also not addressed to any person from the Defendants and there was no evidence that FXS' board of directors or the APO President had at that time agreed with Yoshizawa's view and proceeded to act on that basis. Wong was not issued the Termination Notice until 21 December 2017, after the Deloitte Report and SA Report were prepared and after Wong had met Deloitte's representative at the 30 Nov 2017 Meeting. Kizaki attested that it was only after the SA Report was received on 10 December, that he spoke to Isamu Sekine (then President of FXAP and APO President) the next day and the latter requested him to prepare the Termination Notice to dismiss Wong.[158] This supported the likelihood that the relevant personnel had discussed the matter, taking into account the audit reports, before determining that Wong's employment should be terminated.

142 Mr Wendell Wong submitted that the conspiracy to dismiss Wong was evident as there was no face-to-face interview with Wong, there was a rush to complete the SA Report to fulfil Yoshizawa's instruction to dismiss Wong, and the SA Report was put up to "create some sort of fault on [Wong]" to justify his dismissal.[159] Again, I find that this is not made out. There were various attempts to arrange a physical meeting with Wong, including three separate occasions in November 2017 (after the Emails) and Wong did not attend (save for the 30 Nov 2017 Meeting) because of his own medical condition.[160] If the Defendants had already decided to dismiss Wong on 1 November 2017 pursuant to the Emails, Deloitte would not have attempted to arrange the meetings. Further, Wong did attend the 30 Nov 2017 Meeting and raised his concerns then (see [6] above). I disbelieve Wong's claim that at the 30 Nov 2017 Meeting, Deloitte's

158 1/9/20 NE 68.

159 2/9/20 NE 32, 37–39.

160 Wong's AEIC at [295]–[308]; DCS at [229].

representative had no queries for him, given the numerous attempts to schedule a meeting with him previously. There is also no evidence that the SA Report was expedited to fulfil Yoshizawa's instructions to dismiss Wong. Further, the GAD had already commenced its audit around 4 September 2017, two months prior to the Emails, and Mr Wendell Wong claimed that Yoshizawa did not act for and was not a key decision-maker in either FXS or FXAP. Mr Wendell Wong's submission that the SA Report was a façade to mask the Defendants' prior decision to dismiss Wong is also contradicted by the Report which stated that FX was "reviewing" with APO on imposing a heavier punishment on Wong, and thus shows that at that time the decision had not been taken yet.

143 In the circumstances, it is unlikely that FX or the Defendants would have taken the trouble to commission investigations culminating in the Deloitte and SA Reports and for the auditors to attempt to schedule meetings with Wong to give him an opportunity to be heard, just to put up a façade to justify the Defendants' alleged prior decision to terminate Wong's employment. It bears noting that the audits were triggered by an anonymous whistle-blower letter which mentioned Wong, and which led to the audit investigations culminating in the Deloitte and SA Reports. These provided some basis for the Defendants or their parent entity to perceive or believe that there were irregularities or lapses pertaining to transactions in FXS, which Wong might have been involved in or appraised of and which led FXS to believe that it was justified in dismissing Wong. Even if the two Reports did not refer to certain of the Transactions or allegations as ultimately raised in the Suit, this did not necessarily lend to a conspiracy by the Defendants to dismiss Wong with the intention or predominant purpose to cause damage or injury to him.

144 For the same reasons, I find that Wong's claim that FXAP had induced FXS to summarily dismiss Wong in breach of the Employment Contract is not

made out as there is no evidence to show inducement by FXAP on FXS which led FXS to breach the Employment Contract with Wong.

Conclusion

145 In conclusion, I allow Wong's claim against FXS for unlawful dismissal and award Wong a total of $1,435,560.65 comprising: (a) $87,321 for three months' salary in lieu of notice; (b) $1,287,014.64 as EOT Payment; (c) $33,013.61 for loss of variable bonus; and (d) $28,211.40 for loss of his unconsumed leave. I dismiss Wong's claim against FXS and/or FXAP (as the case may be) for conspiracy and inducement of breach of contract as I find that the claims are not made out; in any event, Wong has failed to show what additional loss he had suffered as a result of the claims.

146 I will hear parties on costs.

Audrey Lim
Judge of the High Court

Wendell Wong, Jared Chen, Andrew Chua and Chua Shu Ying
(Drew & Napier LLC) for the plaintiff;
Aaron Lee, Toh Jia Yi and Marc Malone (Allen & Gledhill LLP) for
the defendants.