Shepherd Andrew v BIL International Ltd
[2003] SGHC 145

Case Number : Suit 373/2002

Decision Date : 08 July 2003

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Alvin Yeo SC, Nish Shetty and Mohamed Gul (Wong Partnership) for the plaintiff; Davinder Singh SC, Cheryl Tan, Eugene Quah and Nicholas Tang (Drew & Napier) for the defendant.

Parties : Shepherd Andrew — BIL International Ltd

Debt and Recovery – Right of set-off – Whether employer can retrospectively rely on employee's breaches of obligation to set-off debt that arose earlier.

Employment Law – Contract of service – Whether terms of employment contract could be transferred to subsidiaries – Whether parent company or subsidiary companies were employers for purposes of severance payments.

Employment Law – Employees' duties – Whether employee owed parent company duties though he was employed by its subsidiaries.

1 Andrew Shepherd (the plaintiff) a British citizen was, at the material time, the group chief financial officer (CFO) of BIL International Ltd (the defendant) and was based in Singapore. Presently, he is employed and resides, in the United Kingdom. The defendant is an international investment company incorporated in Bermuda, and is listed on the Stock Exchange(s) of Singapore (SGX), New Zealand as well as London; it owns more than 100 subsidiaries world-wide. According to the plaintiff, there were more than 400 subsidiaries when he was with the group. The defendant's principal shareholder is Camerlin Group (and its related companies), a Malaysian public company controlled by its chairman Quek Leng Chan (Quek), who also controls the Hong Leong group of companies in Malaysia as well as the Guoco Group in Hong Kong. Amongst the many investments of the group are the Thistle Hotels group of England as well as Air New Zealand; the defendant is a major shareholder in both companies. As at the date of this judgment, Thistle Hotels group has been taken over by the defendant.

The facts

2 By a letter dated 28 October 1999 (the principal employment contract) addressed to the plaintiff, Brierley Investments Limited (BIL) agreed to employ the plaintiff as the group CFO for a term of five (5) years commencing on 1 February 2000. BIL was the former name of the defendant. The terms offered to the plaintiff inter alia included the following:

> 2.1 Annual Salary: An annual salary (specified in appendix B) payable monthly. [As appendix B provided for an annual salary of $750,000, the salary worked out to a monthly sum of $62,500].
>
> 2.3 Annual Bonus:
>
> > (i) the first anniversary of the commencement of your employment the company will pay you a bonus equal to 50% of your annual salary.
> >
> > (ii) In respect of the subsequent years of your employment the company, in its discretion fairly exercised, will pay you a bonus of up to 50% of your annual salary (adjusted pro rata in

respect of the year commencing 1 July 2000 for the period from that date for which you will receive a bonus under (i). In determining the amount of the bonus the company will have regard to your performance during the year and the level of achievement of your key performance achievement targets.

Termination of employment

5.1 Termination by you: At any time during the term of this contract you may terminate your employment by giving the company three months notice in writing. You will be required to work during this period unless the company agrees otherwise.

5.2 Termination by the company: At any time during the term of this contract the company may terminate your employment. If the company terminates your employment under this clause it will pay you the severance payment specified in appendix C.

5.3 Termination for cause: The company may immediately terminate your employment for dishonesty, wilful insubordination or any serious breach of this contract and will not be obliged to give you any period of notice of termination or make any payment to you beyond your salary up to the date of termination.

Appendix C stated as follows:

The higher of the following amounts:

(i) an amount equal to the salary (based on your annual salary at the date of termination) which would otherwise have been paid to you from the date of termination to the expiry of the term of this contract; and

(ii) an amount equal to one half of your annual salary at the date of termination

together with an amount equal to the bonus which you would otherwise have been entitled to in the year of termination.

Appendix B also provided for repatriation expenses to the United Kingdom to be paid when the plaintiff's employment was terminated.

3 By a letter dated 1 February 2001 (the defendant contended the year should have been 2000) to the plaintiff, the defendant's then chief executive officer (CEO) Gregory J Terry (Terry) confirmed that at the defendant's request, the plaintiff had entered into separate contracts with two (2) companies namely (i) with Brierley International Consultants Pte Ltd (BIC) in respect of duties to be carried out by the plaintiff in Singapore and (ii) with BIL Strategic Ltd (BSL) in respect of duties to be carried out by him outside Singapore (hereinafter both contracts will be referred to collectively as 'the regional employment contracts'). The letter (see AB3995) added:

These regional employment contracts are intended to be an extension of your principal employment contract and they do not replace or supercede your principal employment contract, save as provided in the following paragraph.

As requested by Terry, the plaintiff signed and returned a second copy of the above letter to signify his concurrence with the contents. I should point out that besides the plaintiff, other senior executives of the defendant (including Terry), also signed the regional employment contracts. BIC subsequently changed its name to Brierley Management Services Pte Ltd (BMS).

4 By a letter dated 25 February 2002 (the termination letter) signed by Terry as director of the defendant and of BIC, the plaintiff was informed his employment would be terminated with effect from 31 March 2002, in accordance with cl 5.2 of the principal employment contract. The plaintiff was notified that his employment contract with BIC was also terminated.

5 Soon after the termination letter was issued, the defendant alleged it discovered that the plaintiff had committed serious breaches of his obligations within the BIL group. The defendant claimed that had it known of these breaches at the time of termination of his employment on 25 February 2002, the plaintiff could have/would have been summarily dismissed. Indeed, he would have had to compensate the defendant/group for its losses. The defendant required the plaintiff (which he did) to vacate his office by 5pm of 4 March 2002.

6 The plaintiff wrote to the defendant on the same day pointing out that severance payment was due to him under appendix C of the principal employment contract but, that he understood the company did not intend to pay him. The plaintiff required the company's confirmation within two (2) days that it would abide by the terms of appendix C failing which he would have no alternative but to pursue the necessary remedies.

7 In the event, the defendant did not respond by the plaintiffs' deadline of 6 March 2002. Neither did the defendant/BIC/BSL make bonus, severance or repatriation payments to the plaintiff, who consequently commenced these proceedings on 4 April 2002.

The claim

8 In his statement of claim, the plaintiff relied on the principal employment contract for his claim for 34 months salary as severance payment. He alleged that the defendants failed to pay his salary for March 2002 as well as his repatriation expenses to the United Kingdom. The plaintiff prayed for the bonus due to him to be assessed. By the time this suit came to trial, the plaintiff's salary for March 2002 and his repatriation expenses were no longer in issue, the former item of claim having been set-off against his Singapore tax liability; only his claim for severance payment and bonus remained to be determined.

9 Soon after the statement of claim was filed, the plaintiff applied for summary judgment on his claim. However, after the defendant had filed numerous (8) affidavits to resist the same, the plaintiff withdrew his application.

10 In the (re-amended) defence and counterclaim, the defendant pointed out that the principal employment contract contained the following clause:

> 1.1 Position: The company (or wholly owned subsidiary) will employ [the plaintiff] in the position described in appendix A.
>
> In appendix A, the plaintiff was described as the CFO based in Singapore and his position description was as follows:
>
> (i) to be responsible for the management and supervision of all of the financial affairs, financial records and liabilities of the Group;
>
> (ii) to assist the chief executive officer as and when requested by him;

(iii) to act as a member of the senior management team of the company and to make appropriate contributions to overall management, as required;

(iv) ………….

11 The defendant averred that the plaintiff had entered into the regional employment contracts, to which the benefits and termination provisions in the principal employment contract were transferred. The defendant contended that the plaintiff had directed his claim at the wrong party. In their counsel's opening address and in cross-examination, the defendant accused the plaintiff of deliberately choosing to sue the defendant instead of his two(2) employers, because it is a public company with deep pockets. However, by reason of the following paragraph in the letter dated 1 February 2001:-

> Except to the extent that any of the provisions of the primary employment contract have been incorporated in the regional employment contracts (whether separately or read together) or specifically varied therein, the provisions of the principal employment contract shall continue to apply as between you and the company.

the defendant pleaded that the plaintiff continued to owe the company duties and obligations in the principal employment contract.

12 The defendant further averred that the plaintiff, by virtue of being appointed a director of the defendant, BIC, BSL and Molokai Ranch Limited (MRL), a subsidiary of the defendant, had the following duties and obligations:

(i) that he would act honestly and in good faith in the discharge of his duties;

(ii) he would obey the lawful and reasonable orders of the defendant;

(iii) he would exercise reasonable care and skill in the discharge of his duties.

and was also under a fiduciary duty to protect the interests of the defendant and to act honestly and in good faith in relation to the group's affairs.

13 The defendant alleged that the plaintiff breached the aforesaid duties as follows:

(i) he failed to provide a true and accurate profit and loss account to the defendant for its December 2001 half year;

(ii) in order to meet his profit forecast of $5.5m for the half-year 1 July to 31 December 2001, the plaintiff removed a provision of US$1.2m for bonus (paid in October 2001) as an expense from the December 2001 profit and loss account;

(iii) as there was only an unutilised provision of US$359,000 for bonus, the plaintiff had artificially inflated the defendant's profit by US$841,000;

(iv) he made under-provision (US$91,000/-) for audit fees;

(v) in order to meet his profit forecast for the second half of 2001, the plaintiff removed US$180,000 accrual for accounting fees from the December 2001 accounts;

(vi) the plaintiff caused two (2) of the defendant's Australian subsidiaries namely Australia Consolidated Investments Limited and Weeks Resources Pty Ltd to default on credit facilities granted to them thereby causing the defendant to suffer loss and damage;

(vii) the plaintiff misled the defendant in respect of the purchase by its Hawaiian subsidiary MRL of a parcel of land known as Kaluakoi; the plaintiff failed to notify the defendant that its approved purchase price at US$10m excluded the sum of US$5.5m MRL was required to pay in respect of water and sewerage violations in connection with the purchase.

14 The defendant contended that the plaintiff's misdeeds precluded him from claiming any severance payment. The company sought to set-off its counterclaim for damages (to be assessed) against the plaintiff's unpaid salary in extinction or diminution of such sum.

The evidence

15 By way of background, it should be noted that the plaintiff holds a Bachelor of Science degree from Edinburgh University and is also a chartered accountant. His career-path (since he commenced working in September 1980), has been in the fields of accounting and financial services. His previous employers included British Petroleum PLC (BP). By the time he left BP (in February 1989), the plaintiff was the group's finance and commercial manager for part of its North Sea oil operations. Prior to joining the defendant (he was recruited by Terry), the plaintiff spent 11 years with the Jardine Matheson (Jardines) group of Hong Kong where, his last position was as Chief Executive of the Wellcome Supermarket chain. While he was with Jardines, the plaintiff was also the CEO of a company called OneResource group which was a 50/50 joint venture company formed with accounting firm Ernst & Young, to provide financial, accounting and other supporting services to Jardines' Hong Kong-based retail business units. Joining the defendant was for the plaintiff, the culmination of a lifelong ambition to become the CFO of a public listed company. As the defendant's CFO, accountants from the defendant's subsidiaries including its Australian operations, reported to the plaintiff as he was responsible for the group's tax matters.

16 The plaintiff explained how he came to sign the regional employment contracts with BIC and BSL (I should point out that apart from being partly employed by BSL, the plaintiff was also appointed its director [on 5 March 2001]). Soon after he joined the group, Terry had requested the plaintiff to explore the possibility of utilising a dual contract scheme to reduce the tax liability of the senior management of the defendant. The plaintiff accordingly consulted Price Waterhouse Coopers (PWC) who, in due course, recommended that the dual contract structure be implemented although they had reservations that the tax authorities of Singapore (IRAS) may see through the same. The plaintiff said he wanted confirmation that his rights under the principal employment contract would not be watered down by the scheme; he therefore sought and received such assurance, by the letter dated 1 February 2001 from Terry. I should point out that the letter was not exclusive to the plaintiff. According to the defendant, it was a standard letter which the defendant wrote to all other senior management staff who had dual contracts, backdated to the time they commenced their employment. In the plaintiff's case however, he denied the letter of 1 February 2001 should similarly have been backdated to February 2000.

17 Separately, BSL had also addressed a letter to the plaintiff dated 1 February 2000 (see AB3974) setting out his salary ($375,000 per annum), his duties and that the company would reimburse him the cost of all business travel and related accommodation and, entertainment expenses, incurred in the performance of his duties. The letter added that the termination provisions in the principal employment contract would apply. The reason for this emerged during the plaintiff's cross-examination – it was to ensure that severance payments which would be paid offshore, would

not be subject to Singapore's tax provisions.

18 It should also be noted that BIC (under its new name BMS) and the defendant entered into a service agreement dated 26 September 2000 (the service agreement) whereby the former agreed to provide management services to the latter, with effect from 11 November 1999, that being the date of approval by MAS of the transfer of operational headquarters (OHQ) status from the defendant to BIC. I can only assume that it was because of the service agreement that the letterhead of BMS was used for the termination letter to the plaintiff.

19 The plaintiff's task after joining the defendant was to turn the company/group around from its precarious financial position. He said he did this by reducing overheads, by closing the defendant's offices in Australia, New Zealand, Hong Kong and, by terminating the contracts of senior expatriate staff in Singapore.

20 In December 2001, the defendant underwent a further restructuring of its remaining operations with the focus again on cost-cutting. On or about 21 January 2002, it was announced to the defendant's staff in Singapore that the company's senior management would re-locate to Hong Kong and that all other staff would have their services terminated.

21 On or about 1 February 2002, Terry informed the plaintiff that he (Terry) would be leaving the defendant's services to become a consultant to the Guoco Group, based in the United States. Terry offered his post of CEO to the plaintiff who, after giving the matter due consideration, indicated he would accept the position. However, on or about 4 February 2002, the plaintiff was informed there had been a rethinking by the defendant and, the company did not require a CEO.

22 On 5 February 2002, the plaintiff was verbally informed that his services would be terminated. On the same day, the defendant's human resources and administration manager gave the plaintiff a breakdown of the amounts due to him under the terms of his employment. Terry informed the plaintiff that the breakdown was shown to Quek and, Quek was unwilling to pay the plaintiff his full severance pay; Quek was only willing to pay 12 months' salary. The plaintiff indicated he would not accept Quek's proposal as it meant he would receive considerably less than what was contractually due to him.

23 The reasons for the plaintiff's having two (2) regional employment contracts emerged in the course of his cross-examination. The defendant had applied and had been granted, OHQ status in 1999 (for 8 years) by the Monetary Authority of Singapore (MAS). One advantage which the BIL group gained from the status was concessionary tax rates. One of the conditions imposed by MAS (according to their letter dated 17 September 1999) for granting the status was, that the defendant had to provide consultancy and management services to its subsidiaries outside Singapore. Another condition was that the group had to have annual business expenditure in excess of S$17m until 2003, and employ specified numbers of professional and support staff. MAS further stipulated that the defendant's operations in Singapore must not exceed 10% of its global operations in terms of assets.

24 Subsequently, the defendant had a change of heart and decided that the OHQ status should not be given to it but to another company namely BIC, a special purpose company incorporated (on 11 November 1999) to provide global operational headquarter services (including finance and treasury). The defendant planned to move to Bermuda to avoid having its world-wide profits taxed in Singapore. In February 2000, MAS gave its approval to the defendant for the transfer of its OHQ status to BIC, for a period of 10 years. The annual expenditure required by MAS was reduced to $10m whilst the number of professionals employed was fixed at 16.

25 Counsel for the defendant explained that the change of OHQ status from the defendant to BIC was the reason behind cl 1.1 which reads

> Position: The company (or wholly owned subsidiary) will employ you in the position described in appendix A

in the principal employment contract. As at October 1999, the company wanted to keep its options open vis a vis dual contracts for its employees and its OHQ status. The plaintiff however claimed that when he was discussing the terms of his employment with Terry, he was never told that one of the reasons for keeping open the question of who would be his ultimate employer was the OHQ issue. I note there was a fax dated 21 October 1999 to the plaintiff from Mark Horton (the company secretary) in which there was clear reference to the possibility of dual contracts in regard to cl 1.1, although there was no mention of the OHQ issue.

26 The tax savings for the plaintiff by being employed by BSL (a British Virgins Island company incorporated on 22 October 1999), based on half of his annual salary of $750,000 ranged between $93,750 and $97,500 @ 25%-26% rate). It should be pointed out that besides paying the balance (half) of the plaintiff's salary, BIC also paid his housing and other benefits in Singapore and would bear his repatriation expenses. From 1 February 2000, the plaintiff's salary was borne equally by BIC and BSL. Half (½) the plaintiff's salary was inserted in the plaintiff's tax returns submitted by PWC on his behalf to IRAS.

27 I should point out that in his written testimony (para 189), the plaintiff had described BIC and BSL as *worthless entities*. He alleged that BIC is a $2 paid-up company whilst BSL has a postal address in its place of incorporation (British Virgin Islands) with another address in Hong Kong and, it owns the 2 issued shares in BIC. He had also deposed (in para 183 of his affidavit) that *BIC and BSL are effectively nominal companies incorporated by the defendant for tax purposes*, *after* he joined the [defendant]. Cross-examined on whether this statement was correct, the plaintiff said he may have been mistaken in thinking the two (2) companies were incorporated after 1 February 2000. Counsel pointed out that the entire sentence was incorrect as, BSL was incorporated for the tax benefit of employees like the plaintiff, not the defendant.

28 In cross-examination, the plaintiff originally conceded that the severance pay benefits under the principal employment contract were transferred to BSL but later changed his mind and said that the same were borne equally between BIC and BSL. He did not dispute that other executives who had signed dual contracts of employment received their severance payments from either BSL or BIC or from both, but not from the defendant. However and notwithstanding his dual contract status, the plaintiff maintained he still had a contract with the defendant. He asserted it was at the defendant's request that he had entered into subsidiary contracts with the other two(2) companies; in effect he had three (3) employers with the defendant being his principal employer. His view was shared by his expert witness (Kaka Singh) whose evidence I shall refer to later. The plaintiff agreed he owed duties of good faith, due care and diligence to the defendant, notwithstanding the regional employment contracts with the two (2) subsidiaries.

29 I should also point out that the defendant executed an indemnification agreement in the plaintiff's favour dated 12 April 2000, indemnifying him in relation to the numerous directorships he held on behalf of the company's subsidiaries. However, he was never appointed a director of the defendant.

30 I turn now to the evidence adduced in court relating to the defendant's complaints of the plaintiff's alleged misconduct.

(i) default on Australian credit facilities -- the NAB and ACIL covenants

31 When the plaintiff joined the defendant’s group, he was aware that the company had breached its covenants with the National Australia Bank (NAB) in the previous year, on a syndicated facility granted in 1988. It resulted in cross-defaults on other facilities. The plaintiff's responsibilities as CFO included inter alia risk management 羊 to ensure there were no further breaches of bank facilities when he refinanced the group/defendant's debts.

32 One of the allegations in the Counterclaim was that the plaintiff had caused Australian Consolidated Investments Limited (ACIL) and Weeks Resources Pty Ltd (Weeks) to default on credit facilities granted by NAB, pursuant to an agreement dated 7 May 1997 (the facility agreement). The two (2) companies had provided undertakings to NAB by way of negative covenants one of which (cl 9.7 of the facility agreement) was, that its consolidated shareholder funds would not fall below A$500m (the ACIL covenant). Another covenant provided that it would be an event of default under the facility agreement if the value of the group's total capital funds or total equity fell below NZ$3 billion (the BIL covenant).

33 The facilities granted to ACIL were essentially securitised by royalties which it received from the Bass Strait Oil Trust (BSOT) through its acquisition of Weeks, which owned a portion thereof. BSOT issued 44 million unit trusts to the public in Australia of which 20 million were sold. ACIL then entered into an equity swap with NAB whereby the unsold units were transferred to NAB in exchange for a loan of A$100m. In repayment of the loan, NAB was entitled to set-off the principal and interest against the royalty payments based on 20 million units. If ACIL chose to redeem the units, NAB was obliged to return the quantity redeemed. To encourage the public to subscribe to the unit trusts, ACIL promised a guaranteed return on them. In turn, to protect against the possibility of royalties not being able to meet the guaranteed return, ACIL and Weeks obtained an irrevocable standby letter of credit from NAB under the facility agreement.

34 Between March and May 2001, the defendant had sold two (2) assets as part of the restructuring exercise of its Australian operations; these were James Hardie Investments Limited (James Hardie) and Findel PLC (Findel). The sale proceeds amounted to A$610m which the defendant intended to utilise to reduce the debts owed by its foreign subsidiaries to the Australian group. This involved a permanent repatriation of part of the funds from Australia. The defendant also intended to restructure the Australian group and simplify its corporate structure. The law firm of Blake, Dawson Waldron (BDW) was engaged to advise on the tax implications arising in connection with such restructuring.

35 There were several ways the A$610m could have been repatriated from Australia; the plaintiff chose to do so by way of a dividend payment in June/July 2001, in an amount in excess of A$624m. This resulted in the value of ACIL's net assets falling below A$500m and thereby triggered a breach of the ACIL covenant.

36 The plaintiff asserted that the decision to repatriate the sum of A$624m was not made by him alone but was a (senior management) team decision, acting on the advice of BDW, in particular Sandra Lanigan (Lanigan) their tax lawyer. The team included Joe Czyzewski (Joe) and Mark Eaton, the CFO and the company secretary of BIL Australia respectively, as well as Dominic Siu, his then deputy and Group Financial Controller of the defendant. The plaintiff defended the dividend payment (and consequent capital reduction) as the most efficient way of repatriating funds; the defendant/group saved $10m in taxes. Had it been done by way of inter-company loans, it would have been a more expensive exercise due to negative tax implications. The plaintiff's legal expert Tim Neilson (whose written testimony was accepted by the defendant without the need for cross-

examination [V/N615]) confirmed this view. The plaintiff denied the defendant's contention that Terry had instructed him to assume responsibility for transfer of the funds.

37 The plaintiff contended he had requested her to and Lanigan had prepared, a paper dated 28 June but e-mailed to him on 12 July 2001, which outlined the restructuring exercise as well as the repatriation of funds already effected; the clock could not be turned back. He deposed that Lanigan did not suggest to him or to his team that the ACIL covenant had been breached. He maintained that Lanigan was closest to the entire transaction, relying in turn on figures furnished by his deputy (Dominic Siu [V/N 304]). Questioned by the court (V/N 334), the plaintiff confirmed that Lanigan's brief was to provide advice on tax structuring. Counsel for the defendant drew the plaintiff's attention to the shift in his position -- in court (and in his affidavits) the plaintiff put the responsibility on Lanigan and Dominic Siu but, in his opening statement, he blamed Joe.

38 Cross-examined, the plaintiff agreed there was an opportunity loss had NAB sold the 20m unit trusts, but said no harm was done in the event. He asserted the fault/responsibility lay with Joe who had had 30 years' experience with Broken Hill Pty one of if not the biggest, public companies in Australia, on whose competence he was entitled to rely, even though the plaintiff was ultimately responsible as the CFO. The plaintiff pointed out that the BSOT investment produced far more royalties than was required to service the equity swap; hence the letter of credit was never drawn down. BSOT was considered a low risk but one of the defendant's best investments; the plaintiff denied that was why he did not give it appropriate attention. He testified the investment was reported on monthly, always reviewed at management meetings in Singapore and, when he visited Australia (at least once a month) to review the overall situation with Joe. However, there was no specific discussion with Joe on defaults or negative covenants. He said neither he nor Joe were aware at the time, that there was a prior existing default on the NAB facilities; he only found out in February 2002.

39 Apparently, the plaintiff had been under the (wrong) impression that only ACIL was involved with the NAB facilities, not the defendant. Indeed, everyone in Australia including the auditors and chief executive missed the connection. He claimed that the problem was exacerbated by the defendant's move of its accounting records, operations and personnel from New Zealand, Australia and Hong Kong to Singapore in early 2002. In fact, he was paid a bonus for effecting the transfer. Counsel for the defendant on the other hand contended that the plaintiff's bonus was cut due to the accounting mess. (In re-examination, the plaintiff clarified the defendant initially agreed to pay him the maximum bonus equivalent to 50% of his annual salary but, the figure was subsequently reduced by 10%, due to the late issuance of the year-end accounts). The plaintiff defended himself claiming his responsibility was for senior debt at the defendant's level, not subordinated debts, for which he relied on the people in charge at the subsidiary's level, to monitor. He testified that despite working under very difficult conditions, he/his team did their work very thoroughly and properly but a mistake must have been made of which no one was aware (V/N 307).

40 I should point out that the plaintiff's claim of ignorance (until February 2002) of the breach (although he was aware of the ACIL covenant) runs counter to his (amended) Reply and Defence to the Counterclaim. There (see para 4[b] and [e]), he asserted that even if he caused the defendant to breach the facilities (of NAB), he acted honestly and in good faith. Questioned on his omission to plead his professed ignorance, the plaintiff said he did not think it was *relevant* (V/N 284).

41 The consolidated accounts of the defendant's Australian operations (as at 30 June 2001) were prepared in November 2001. They showed that the net assets of ACIL had fallen below A$500m; yet it escaped the notice of the auditors and everyone else who saw the accounts, including the plaintiff. The plaintiff pinned the blame on Joe, as it was Joe who signed those

accounts. In his affidavit for his testimony, the plaintiff had exhibited documents relating to a meeting held on 11 June 2001 which discussed the repatriation of funds and the restructuring of the Australian operations.

42 There were actually two (2) transactions involved. The first was repatriation of A$394.3m of which about A$143.5m was by way of dividend whilst the balance was by way of capital reduction. BIL Australia Pty Limited (BIL Australia) paid the sums to its shareholder Ma Sing Investments Limited (Ma Sing), which company is not a resident of any country with which Australia had negotiated a double-taxation agreement. The second transaction involved dividend payments of A$624m by ACIL to its three (3) shareholders namely, Kyoto Holdings Pty Ltd, Rossington Investments Pty Ltd and Rossington Holdings Pty Ltd. It was the defendant's case (which the plaintiff challenged) that it was not necessary for ACIL to pay A$624m to its aforesaid three (3) shareholders in order to repatriate A$394.3m to Ma Sing; ACIL only needed to pay A$97.3m, and doing so would not have breached the ACIL covenant.

43 The defendant not unexpectedly gave a different version of events from the plaintiff. According to the plaintiff's successor and the group's current CFO (Roch Low), in late February or early March 2002, NAB raised the issue of the earlier breach of the BIL covenant with the defendant and ACIL. Joe met the bank's representatives to negotiate a restructuring of the facility agreement. A compromise was reached whereby NAB agreed not to recall the standby letter of credit facility provided a sum of A$22m was deposited with NAB and there were no further events of default. As part of the negotiations, the defendant furnished ACIL's latest half yearly accounts to NAB. It was from those accounts that NAB discovered the breach of the ACIL covenant in April 2002. (In para 104 (d) of his written testimony, the plaintiff pointed out that the defendant's own action alerted NAB to the antecedent breach leading to the recall of the credit facility).

44 Whereas NAB had previously adopted a conciliatory attitude towards resolving the breach of the BIL covenant, it took a tough stand towards the breach of the ACIL covenant thinking that the group had deliberately concealed the breach from the bank. NAB demanded of the defendant to and it did, make a written admission that an event of default had occurred due to its breach of the ACIL covenant. The bank issued a Notice of Declaration dated 7 May 2002 to ACIL and Weeks, requiring payment by 8 May 2002, of the sum of A$121m outstanding under the facility agreement and letter of credit. Breach of the ACIL breach also led NAB to claim that a cross-default had occurred in relation to the equity swap. Consequently, NAB issued a second Notice of Declaration also dated 8 May 2002 to both ACIL and Weeks, to declare an early termination date on the equity swap. By a notice of calculation dated 4 June 2002, NAB advised ACIL that a sum in excess of A$9.45m (with interest) was payable to NAB as at 6 June 2002. NAB further asserted that as a result of the early termination of the equity swap, it could sell the 20 million ordinary BSOT units and retain the difference between the market value and the residual capital amount of those units. Doing so would result in a loss of A$20m to ACIL because the then market value of the units was about A$70m whereas the residual capital value was about A$50m.

45 After negotiations (from May to September 2002) between NAB, ACIL, Weeks and the defendant's solicitors, a settlement agreement (by way of an Amendment and Restatement deed) was reached wherein the defendants agreed to purchase the 20m BSOT units at an additional cost in excess of A$3.88m, over their residual value of A$50m. The defendant also had to pay a restructuring fee of A$500,000 to NAB and legal fees exceeding A$491,000. The defendant was also saddled with onerous new terms imposed by NAB as well as higher interest charges on the amended facilities. The entire exercise resulted in the defendant incurring additional costs of A$7,268,827. ACIL was also prompted to look for alternative financing. Consequently, the defendant's complaint against the plaintiff was more than with the <u>mode</u> of repatriating funds, as he seemed to suggest in

his affidavit evidence (para 145).

46 In her written testimony, Lanigan (who is currently attached to BDW's London office) deposed that she did not make the decision for ACIL to pay a dividend to its shareholders. The role of her firm was only to advise on Australian taxation and specific corporate law issues (in particular on the ability of companies to pay dividends or reduce share capital under Australian corporate law). Her firm was not instructed, to advise in relation to the obligations of the defendant or its subsidiaries under the group's various banking facilities or, to monitor compliance with such facilities.

47 Lanigan (DW2) deposed in her second affidavit (and which was the defendant's case), that it was not necessary or a prerequisite, for ACIL to pay a dividend of A$624m in order for BIL Australia to repatriate A$394m to Ma Sing. It was only necessary for ACIL to pay a maximum sum of A$97.3m up the corporate chain to facilitate the dividend payment of A$143m by BIL Australia, free of withholding tax to Ma Sing.

(ii) the purchase by MRL of Kaluakoi for US$10m.

48 The defendant through MRL, owned a piece of property in the Hawaiian island of Molokai (the Alpha property); Kaluakoi comprised of a golf course and resort in poor condition which adversely affected the value and potential of the adjacent Alpha property. Securing Kaluakoi gave MRL an opportunity to acquire ocean front land for less than US$5,000 per unit which could enhance the Alpha property and create an opportunity for MRL to generate cash returns, by disposing of subdivided lots with ocean frontage for as much as US$1m each.

49 The defendant/MRL appointed one Robert Riley (Riley) to negotiate the purchase of Kaluakoi from its eccentric Japanese owner. The board of directors of MRL/the defendant had given a mandate to Riley to secure Kaluakoi at not more than US$10m. Scott Whiting (Whiting), the then general counsel (and subsequent President/Chief Executive Officer) of MRL, assisted Riley. I should point out that the plaintiff was a director of MRL (appointed at his own behest) at the material time, it being one of over 60 directorships which he held.

50 In the discussions leading up to MRL's purchase of Kaluakoi, it was discovered there were claims against the property totalling US$3.25m. Whiting put up a draft board paper for the plaintiff dated 8 November 2001 (Whiting's memo) stating inter alia that MRL would be able to secure Kaluakoi for $10m provided the company did not insist on conducting due diligence on the owner and, completed the transaction in early December 2001. Whiting also stated that the owner had agreed that MRL could deduct the known claims of $3.5m from the $10m purchase price, in addition to which MRL would hold back $1.5m for 6 months as a reserve for future claims. The plaintiff relied on Whiting's memo to support his contention that he was unaware of any contingent liabilities against Kaluakoi, which resulted in the defendant/MRL paying more than US$10m for the property. As far as he was concerned, the plaintiff knew as much as other senior management personnel did about the transaction; they included Terry, Whiting and Simon Tuxen (the group's general counsel), relying on the fact that e-mails to him from Riley were copied to these persons.

51 On 9 November 2001, MRL issued a letter of intent to the owner of Kaluakoi, offering to pay US$10m for the property, subject to closing adjustments (the above-mentioned US$5m). The offer was accepted and culminated in a sale and purchase agreement dated 28 November 2001, signed by Whiting on behalf of MRL. The plaintiff said he did not see the document until 20 May 2002, when it was exhibited to an affidavit (of Peter Nicholas) filed by the defendant to resist his O14 application. He was not involved in the negotiations on the terms.

52 What the defendant's investment committee was not told (when the chairman approved the acquisition on 12 November 2001) was, that Kaluakoi's water/sewage infrastructure needed improving and, there were outstanding violations relating to the same, issued by the Hawaiian Department of Health (DOH) in this regard; Kaluakoi's owner had consented to orders (on 31 July 2000) for carrying out the necessary works. MRL as the purchaser (and successor) inherited those obligations which compliance, (according to the experts commissioned by the defendant) would ultimately cause the company to be out-of-pocket by US$5.5m, resulting in the cost of purchase of Kaluakoi being increased 50% to US$15.5m.

53 Cross-examined, the plaintiff maintained his ignorance of contingent liabilities although he acknowledged he was aware that MRL would have to incur expenditure on infrastructure in order to enhance the value of Kaluakoi. He conceded however, that if he had known about the contingent liabilities and failed to draw it to the attention of the defendant's board, he would have been grossly negligent. Even with the extra cost, the plaintiff argued that the purchase was a good investment as Kaluakoi had been valued at US$39m (by the Hallstrom group) on 27 February 2002. In cross-examination however, the plaintiff's attention was drawn to Whiting's evidence where the latter stated that the property would be worth US$39m <u>only if</u> a further US$20m for upgrading/improvement was spent, together with another US$18m to restore the golf-course and clubhouse.

54 The defendant on the other hand contended that the plaintiff knew and failed to inform the defendant (in particular Terry and the chairman), relying on Whiting's evidence. In his written testimony, Whiting (DW3) referred to a meeting in Hawaii on 16 November 2001 which he attended along with the plaintiff and Riley. Whiting's note of the discussion in the form of a cashflow chart (see exhibit SW-3 in his affidavit) showed that the issues of consent orders for water and wastewater treatment on Kaluakoi and the cost of remedying the governmental violations (estimated by Whiting at US$5m and $200,000 respectively for water and sewage) were discussed. It was raised briefly at the board meeting followed by a more detailed discussion (at which the plaintiff was present) after the board meeting, on the mandatory expenditure to be incurred for DOH compliance.

55 Whiting also referred to a subsequent cashflow analysis note (dated 26 November 2001) jointly prepared by Harold Edwards and Don Kawahakui, MRL's senior vice-president and CFO respectively. Reference was made in the analysis note to DOH compliance for water and sewage and a deadline of 5 May 2002 for such compliance. When he was shown this evidence, the plaintiff said (V/N 383) he thought it was for infrastructure expenditure, a discretionary spending which was subject to approval by the defendant's board. I drew the plaintiff's attention to the fact that Whiting and the analysis note referred to *compliance* in relation to DOH obligations and, that the fine for non-compliance was/is US$5,000/- per day. I would add that the plaintiff made no reference to the 16 November 2001 meeting in his evidence-in-chief – he explained it was a very brief meeting which he did not regard as important and, he was on-route to Atlanta, Georgia, for a more important meeting. In a memorandum dated 26 February 2002 (AB6648/9) from a company called Tom Nance Water Engineering Resource to MRL (Harold Edwards), a breakdown was given of improvements costing $5.3m to meet requirements of the Safe Drinking Water Act stipulated by the DOH for Kaluakoi; discretionary water works totalled $4.75m for which a separate breakdown was given. The two (2) figures were included in the budget for fiscal year 2002, presented at the 16 November 2001 meeting attended by the plaintiff. Consequently and contrary to his claim otherwise, the plaintiff must have known about the additional compulsory expenditure required for Kaluakoi.

56 Whiting (who ceased working for MRL on 31 May 2002) testified that after MRL had issued the letter of intent, the company discovered that the previous owner had made union commitments (severance and vacation payments to employees) which had not been honoured. It was Riley who principally negotiated the terms of the sale and purchase agreement and kept Whiting (along with the

lawyers drafting the agreement) informed; Whiting played no role in those negotiations.

57 Counsel for the plaintiff spent considerable time going through (with Whiting) the e-mails exchanged between the various parties from November 2001 onwards. By amended orders (2) of court dated 13 December 2001 and which Whiting signed, MRL obtained an extension of time until 15 September 2004 in which to comply with the requirements which the previous owner of Kaluakoi had agreed with the DOH. Failing compliance by 15 September 2004, Kaluakoi would be subject to a fine of US$5,000 per day plus another penalty of US$125,000 if the new water system constructed did not comply with the department's requirements. In his cross-examination of Whiting, counsel for the plaintiff sought to show that the fines were yet to be imposed and, would only be imposed if no further extensions for compliance were sought and obtained by, MRL. I do not think that is a valid answer/defence to the defendant's complaint at all.

58 Riley would have been a crucial witness on the roles he, the plaintiff and others played in the acquisition of Kaluakoi, yet he was not called to testify. I note from the voluminous documents before the court that Riley appeared to have filed a claim (for his consultancy fees) against the defendant in the Hawaiian district courts which claim was resolved by a settlement agreement dated 21 October 2002 (see AB6660-6666) between the parties; MRL paid Riley a sum of US$89,128.47 without admission of liability and Riley's court claim was dismissed by consent; that may explain his absence from court.

(iii) removal of bonus provision of US$1.2m from the accounts of BIL Australia causing the accounts to be inaccurate

59 In October 2001, the remuneration committee of the defendant had declared a bonus of US$1.2m for senior executives including the plaintiff, for work done for 2001 up to 30 June 2001. The plaintiff recalled that the 2001 accounts for the Australian operations contained a bonus provision (unused) of A$702,000 (equivalent to US$359,000) which could be utilised towards payment of this bonus. Although it existed, Roch Low (Low) had told the plaintiff it could not be found. The plaintiff put it down to Low's unfamiliarity with the accounts as the latter had joined the defendant on 28 October 2001. Consequently, the plaintiff instructed Low to put the figure US$1.2m in a suspense account, until the appropriate accounting entry could be worked out. He asserted this was normal and acceptable accounting practice which view his expert Kaka Singh (an accountant) supported. The plaintiff claimed ignorance when told that the defendant did not have a practice of maintaining suspense accounts.

60 At a later date, Low told the plaintiff that the Australian bonus provision had been removed but Low could not explain why or how. The plaintiff instructed Low to ascertain who had authorised the removal.

61 In or about January 2002, Low informed the plaintiff that there was no documentary evidence of the provision of US$702,000 being reversed out of the accounts. Even after the plaintiff's return from leave (9-17 February 2002), Low could not find the bonus provision; Low eventually found it as US$359,000 in August 2002. The plaintiff said he was vindicated as the fact was conceded by the defendant on 14 August 2002 in the amended pleadings. However, I note that still leaves a shortfall of US$841,000 between the provision of US$359,000 (which Low eventually found) and the bonus declared of US$1.2m. Had the plaintiff attended the audit committee meeting on 1 March 2001, he said he would have explained that Low was still carrying out a review of the accounts, in relation to the bonus provision.

62 When he took the stand, Low (who succeeded the plaintiff on 1 April 2002), gave a different

version from the plaintiff.

63 Soon after he joined the defendant, Low (DW4) was told by the plaintiff (whom he had no reason to disbelieve) there was a provision of about A$1m for bonus meant for the group's team of Australian managers. Low (and his team) were unable to locate any bonus provision or any figure near to A$1m in the books (which were in a mess). Low even inquired of the auditors (Carol Eapen of KPMG) if there was any such provision and he was told (which he conveyed to the plaintiff) that "yes, originally there was but Mr Shepherd told us to take it out". This evidence only emerged in Low's cross-examination, on which counsel spent time in finding out the reasons for what he considered was a significant omission. Low denied it was because the allegation was untrue. Low informed the court the defendant could not call Carol Eapen to testify as she was no longer with KPMG and had emigrated to Australia.

64 Low explained that his unhappiness with the plaintiff was not with the fact of the bonus provision having been reversed out of the accounts (which the plaintiff did not disclose to anyone) but, the fact that the plaintiff knew the provision was insufficient and yet, made no allowance for the shortfall in the books; Low considered such conduct dishonest. Low rebutted the plaintiff's claim that the bonus provision was finally located and he (the plaintiff) was vindicated -- the provision was actually found in the auditors' working papers for the books of BSL, <u>not</u> the defendant's and, it related to Terry's bonus rather than the Australian team's. Even then, Low gave the plaintiff the benefit of the doubt that the provision had been booked into the wrong accounts. Low pointed out that there was no provision of A$702,000 as such nor did US$359,000 <u>actually appear</u> in the accounts but, the figure was a composite of various provisions which his team assumed formed part and parcel of the bonus; the team then added up the provisions to get a dollar value close to the plaintiff's figure of A$702,000, again giving the benefit of the doubt to the plaintiff. Low said he/his team relied on the audit papers as evidence because the rest of the papers/accounts were in a mess; it took his team months to clean up and to confirm the numbers in, the accounts.

65 As far as Low was concerned, figures and accounts had to be as accurate as possible at any particular point in time; the fact that accounts were interim or presented to informal committees such as the BIL Strategic Business Meeting (BSBM) did not lessen the need/ importance of accuracy. Consequently, Low was uncomfortable when, upon his return from leave (on 13 February 2002), he found that the bonus (US$1.2m) and audit/accounting fee (US$400,000) provisions he had included in the accounts for presentation at the BSBM meeting (on 8 February 2002) had been removed by the plaintiff. He queried the plaintiff when the latter returned from leave and gained the impression that the plaintiff's motive was not to look bad (in the eyes of Quek), in not fulfilling his profit forecast (US$5.5m); Low considered the removals as misleading in terms of the profit forecast. Low disagreed with counsel that accounts presented to BSBM committee need not be as accurate as those presented to audit committees, after allowing for such factors as fluctuations in exchange rates and valuations, due to the group's world-wide interests. Low explained that Quek's brother (a member of the BSBM) scrutinised figures in accounts and would question him on the details especially expense items, particularly where figures had been revised (upwards) from those in previous accounts. Low cited another instance where the plaintiff had acted similarly; the plaintiff removed a lease provision of US$1.6m from the New Zealand books, again to avoid revising forecasts to which the plaintiff had committed himself. On such occasions, Low had disagreed with the plaintiff's intention to book the removed items as adjustments against the restructuring provisions.

66 Low explained that when he was instructed by Terry to present the accounts to the board meeting on 1 March 2002 in place of the plaintiff, he merely took the board through and explained, the papers the plaintiff had prepared but avoided mentioning the missing provision of US$1.2m. However, after the meeting, he told Terry's successor (Arun Amarsi) about his reservations and was

advised to inform Terry which Low did; Terry advised Low in turn to inform the board. Hence, on 9 March 2002, Low informed the board of BSBM of the plaintiff's treatment of the bonus provision; the members were furious. Questioned on his omission to do so at the meeting on 1 March 2002, Low said he had never presented accounts to the board of the defendant previously and was nervous/panicky; he agreed on hindsight that he should have informed the board earlier of the plaintiff's removal of the bonus provision. Low denied his failure to object was because there was nothing wrong with the accounts at that time and, his allegation was an afterthought raised for the Defence.

67 It should be noted that Low clarified that although the plaintiff's instruction to Low's staff was to remove the entire US$400,000 from the books, the chief accountant (Lim Yew Si) only removed from the books US$200,000 (the actual figure was US$180,000) provided to cover the shortfall in accounting fees, the balance meant to cover the shortfall in audit fees was left intact. Low said he became aware of this fact only in the course of preparing for this trial (but before filing his affidavit evidence) after checking with Lim Yew Si; this contradicted his affidavits filed to contest the plaintiff's O 14 proceedings, as well as para 11(B)(c) of the (re-amended) Defence. In fact, as at the date of trial, the defendant had since found another unutilised provision of US$109,000 in the accounts. Unlike the plaintiff however, Low readily accepted responsibility for the errors made by his subordinates.

68 Questioned further why he did not correct the accounts if he thought the plaintiff's removal of the provisions for bonus and additional accounting fees was misleading, Low explained that the SGX did not take the defendant to task on the errors as they were not considered material enough to make an impact on investors. His view that the plaintiff's acts were dishonest could not be correlated to what was presented to the public (or regulatory body).

69 As for the breach of the BIL covenant, counsel for the plaintiff had painstakingly taken Low through the e-mail history within the defendant and its group of companies, presumably to show that the defendant had previously breached NAB's covenants, which fact was known to both the defendant and NAB. Counsel sought to show that breach of the BIL covenant (even if the plaintiff was responsible) was not as unforgivable as the defendant had made it out to be. Indeed, it was suggested to Low that the defendant had to comply with NAB's demands (including payment of A$22m) because it 'had no choice'; the defendant did not however have the cash to pay off NAB's entire facilities and hence, gave the impression that breach of the ACIL covenant was critical, blaming the plaintiff for the defendant's alleged losses consequential upon the breach. It was further suggested by counsel that the defendant used the plaintiff as a scapegoat for breaches of the BIL and ACIL covenants because of this action, which suggestion Low denied.

70 It would of course have been helpful to have heard Joe's testimony on this issue. However (according to Low), Joe was retrenched even before the defendant resolved the breaches with NAB. Although Joe received his severance benefits, he did not receive his full entitlement (which he did not pursue) because the defendant felt he had not performed his duties to the company's satisfaction.

71 The defendant's expert witness Chan Ket Teck (Chan) disapproved of the plaintiff's treatment of US$1.2m as a suspense item, disagreeing with the testimony of the plaintiff's expert, Kaka Singh in that regard. Chan (DW5) citing passages from authoritative textbooks, stated that use of suspense accounts should be kept to a minimum and, it should only be used to record items of income or expenditure which are unidentifiable and which for the time being, cannot be properly allocated to a specific expenditure, income, liability or asset code account. He pointed out that in the case of the bonus provision of US$1.2m, there was no uncertainty over which specific account code the same should be classified, only whether or not a provision existed in the accounts. The bonus provision

should properly have been included as an expense in the December 2001 profit and loss accounts.

72 Chan was further of the view that as the bonus provision was for the defendant's senior staff and had no connection with the Australian subsidiary, it was incorrect to set-off an expense of one subsidiary company against any provision made in another subsidiary/parent company for different employees. He opined that the plaintiff's treatment of the bonus payment caused the group's profit for the half year ended 31 December 2001 to be artificially inflated by US$841,000.

73 The plaintiff did not disagree with the textbook commentaries cited in support of Chan's view on suspense accounts but, said it would apply to year-end, not interim accounts. He explained that when he reported to the BSBM on 7 February 2002, he presented only the draft interim accounts. BSBM in any case was/is not a formal committee of the board of the defendant.

74 Kaka Singh (PW4) opined that use of suspense accounts was not uncommon for accountants (for over or under-accruals of provisions) when information on the nature of the account is not readily available or the amount cannot be reasonably determined with some accuracy or, the amount is insignificant.

(iv) the inaccurate profit forecast of US$5.5m

75 The draft interim accounts (with bonus as a suspense item) were presented by the plaintiff to the committee of BSBM on 8 February 2002. Those accounts contained a profit forecast of US$5.5m which the plaintiff said was done by Low. The forecast was the basis for another complaint in the defendant's Counterclaim. The plaintiff also relied on Kaka Singh's opinion for his contention that the incorrect forecast (provided by Low) did not make a significant/material impact on the accounts ending 31 December 2001.

(v) under-provision for audit fees and removal of provision for accounting fees.

76 The plaintiff was under the misconception that there was a provision for US$900,000 as accounting fees for KPMG for financial year 2001. On 29 January 2002, the plaintiff met Paul Ma and Carol Eapen of KPMG to resolve the latter's accounting support services; it was agreed at US$200,000. Carol Eapen also reiterated that the full audit fee of US$900,000 had been provided for in the 2001 accounts.

77 In January 2002, Low told Carol Eapen he had difficulty reconciling the provision made at year-end to the audit fee of US$900,000 approved by the audit committee. As in the case of the bonus provision, the plaintiff told Low to continue looking for the 'missing' item. On reviewing the interim accounts the plaintiff discovered that Low (and Low's assistant Lim Yew Si) had added a figure of US$400,000 in respect of the missing provision for audit fee, as well as the support service fee. The plaintiff said he told Lim Yew Si the provision was premature and instructed Low to reflect this figure as an entry in a suspense holding account, until the appropriate accounting entry could be worked out.

78 Due to time constraints as with the bonus issue, the plaintiff decided to leave the interim accounts as they were, when he reported to the BSBM at the meeting on 7 February 2002. He pointed out that neither Low nor Lim Yew Si disagreed with his decision. In fact, Low presented the half year accounts to both the audit committee and the board of the defendant. If indeed (as he claimed in his affidavit evidence) Low was uncomfortable with the plaintiff's accounting treatment of any items in the accounts, Low did not inform the plaintiff. The accounts were issued on 19 March 2002. Like the provision on the bonus item, the plaintiff noted that the defendant had conceded in

their latest pleadings that the provision existed in the accounts. He denied counsel's suggestion that he had deliberately withheld financial information from the defendant's board of directors in both instances.

79 In the course of his re-examination, the plaintiff clarified his and his deputies' roles. He explained that Dominic Siu (and Low) was responsible for producing the management and consolidated accounts of the group whereas his responsibility extended beyond numbers crunching – he had to look for new investments/projects, source funding for the same and raise debts, improving shareholder value in the process. His view was echoed by Kaka Singh who stated that although the plaintiff would have a fairly 'big picture' responsibility, risk management was not only in the plaintiff's hands but also in those *of everybody in the organisation* (V/N 738). However, Kaka Singh conceded that the plaintiff should know the covenants in a major facility and if there was a breach, it was the fault of the team who was in charge for which the plaintiff was ultimately responsible.

80 In an attempt to resolve the controversy regarding what was said about and whether, the accounts which the plaintiff presented for 2001 gave a true and fair view, the plaintiff called to the stand Reggie Thein (Thein), an independent non-executive director of the defendant. Thein is a retired accountant who is the chairman of the defendant's audit committee.

81 Thein testified he was aware that the audit/accounting fee was going to be substantially higher than what was provided in the 2001 accounts; he was told by the auditors after the audit meeting on 1 March 2001. However, he could not recall being told by anyone of the provision for higher audit fees after 19 March 2001 (contradicting Low who said he had then also informed Thein of the bonus provision) when the half-yearly results (for the second half of 2001) were released to the SGX. When Julie Coyne (PW3) testified, she said she (as the partner of KPMG in charge of the audit) was not told before the accounts were audited, that there was an under-provision by the defendant of the audit fees as well as for the $1.2m bonus. Although it was Thein's view that the higher audit fee (and bonus provision) would have a material effect on the half yearly accounts, he said no attempt was made to correct the same as, the interim accounts were not audited, the error was a *fait accompli* and the inaccurate numbers would be adjusted in the year-end accounts.

82 Thein was unaware and the audit committee was not told, of the breach of either the ACIL or NAB covenants, nor that the plaintiff had caused them, until Low told him and KPMG at a lunch meeting, when it was raised with a view to negotiating a lower audit fee. He thought it was a strong bargaining point as KPMG should have been fully aware of the covenants. As this evidence was not put to Julie Coyne by either party, the court does not have KPMG's views on the matter. However, when he was questioned by both counsel, Thein opined that the ultimate responsibility to ensure there was no breach of the covenants remained with the plaintiff, notwithstanding that the Australian CFO was primarily responsible; the buck stopped with the plaintiff (V/N681). Granted, the plaintiff did not attend the audit committee meeting on 1 March 2001 but, the plaintiff should nevertheless have conveyed his views to the committee on the inadequate provision for both items.

83 Thein had attended the meeting of the defendant's board of directors in Bermuda on 14 December 2001 at which the plaintiff was present. Thein was clear that the board only agreed to a figure of US$10m for the purchase of Kaluakoi, as minuted. He recalled that the board specifically informed the plaintiff no more money would be spent on the acquisition. He was not told about the additional spending of US$5.5m until well after the event. I note that even in the report of KPMG to the audit committee for the year ended 4 September 2002, no mention was made (see AB3095) that the cost of purchase of Kaluakoi was more than US$10m due to mandatory compliance with DOH requirements. I find it extraordinary that besides the plaintiff, so many others (including KPMG Hawaii who went through the books of the defendant and MRL), could have missed these items of

compulsory expenditure.

84 Thein also disapproved of the plaintiff's treatment of the bonus provision and audit fee as suspense account items. As far as Thein was aware, since his appointment to the audit committee, on 2 September 2000, the defendant's books did not provide for a suspense account. This was later confirmed by Julie Coyne of KPMG. One of Thein's primary tasks as a member of the audit committee was to resolve the defendant's accounting records, which he described as in a terrible state. He had insisted that accounting figures must be accurate, citing as an example a discrepancy of over US$50m in foreign exchange alone.

85 The defendant's main witness was Terry (DW1), a qualified lawyer in four (4) jurisdictions namely, Australia (Victoria), England/Wales, Hong Kong and Washington State in America. Terry now runs his own consultancy business (called Eastwood Square) in Seattle. His business acted as a consultant to the Guoco Group identifying investments for Quek for six months, until September 2002. Terry was responsible for recruiting the plaintiff from Jardines (where Terry also worked); he, the plaintiff and Simon Tuxen were close friends for more than 20 years.

86 I should point out that Terry's affidavit of evidence-in-chief was a radical departure from the affidavit which he filed earlier to resist the plaintiff's application for O 14 judgment. In his O 14 affidavit (as with the defendant's original Defence), Terry made no issue of the fact that the plaintiff had sued the wrong party, only that the latter's misconduct disentitled him to severance payments. Much time was spent by counsel in cross-examining Terry on his shift in position. Terry candidly admitted that he (and the defendant's lawyers) had made a mistake in that regard. The reason (according to counsel for the defendant) was attributable to the fact that Terry was not given a copy of the statement of claim (V/N877) or the plaintiff’s O 14 affidavit, when he was asked to affirm an affidavit to resist the application for summary judgment.

87 Considerable time was also spent in cross-examining Terry on the dual employment contract system applicable at the material time to him, the plaintiff and other senior management staff and the reasons therefor. As in the case when the plaintiff was cross-examined, counsel questioned Terry *in extenso* on the terms of the principal employment contract and those in the regional employment contracts, as to which provisions were transferred to the regional employment contracts and which remained with the principal employment contract. Terry’s consistent stand was, the plaintiff’s principal employment contract continued to exist to the extent that it was not covered in the regional employment contracts (V/N893). He pointed out that hiring, firing and paying were the purview of the Remuneration Committee of the defendant, comprising inter alia of Quek and Terry (as the CEO) whilst the mechanics of actual payment were left to the relevant contracting subsidiaries; this would equally apply to severance payments.

88 The conclusion one draws from Terry's testimony is, however one interprets the principal employment contract and whatever may be the terms transferred therefrom to the regional employment contracts, the various scenarios posed by counsel to him in cross-examination could never arise:- that one of the two subsidiaries or only the defendant, would downgrade the plaintiff’s position, terminate his services, renew his contract or otherwise act unilaterally; that could/would never happen. In reality, the defendant as the parent and the two subsidiaries would (indeed they must) act in tandem, on the plaintiff’s employment. Further, all the duties of senior management staff were owed to the group namely the defendant, regardless of which subsidiary or subsidiaries actually signed a contract or contracts of employment with the individuals concerned. The plaintiff was no stranger to such arrangements, whether for tax or other considerations. In fact, the plaintiff had the same employment structure when he was with Jardines. According to Terry, the plaintiff's employer in Jardines was not the parent company although he was uncertain which management company

actually employed the plaintiff. I further note that in an e-mail dated 28 September 2000 from Mark Horton (who succeeded Simon Tuxen as general counsel) to Dominic Siu which was carbon-copied to the plaintiff, it was stated (on the subject of BMS-BIL Service Agreement):

> BIL has no employees and all Sing based people are employed by BMS [BIC].

89 I therefore disagree with the suggestion put by counsel for the plaintiff to Terry that the three-fold contract (as counsel described it) was a deliberate procedure employed by the defendant, with the principal contract remaining with the defendant. Indeed, in his closing submissions (paras 302-305), the plaintiff alleged that the true motive behind the defendant's Defence and Counterclaim was its hope that the plaintiff would not have the financial resources to see the litigation through; the company attempted to dissuade him from his proceedings by such tactics as applying for security for costs (which it obtained).

90 I note however that the plaintiff's terms of employment were not peculiar to him; Terry's employment contracts were in similar terms. Terry too had an employment contract with the defendant dated 1 October 1999 and, according to a letter to him dated 17 January 2000 from the defendant, he also had separate contracts with BIC and BSL (not produced in court). Terry's employment was also terminated as at 31 March 2002, by a letter dated 1 February 2002 (signed by Simon Tuxen) and his severance pay (US$180,000) was borne equally by BIC and BSL. Other senior management staff including John Green (chief operating officer), Richard Reid (general manager), Dominic Siu (the plaintiff's deputy) and Simon Tuxen (general counsel) also had similar contracts. Consequently, there is nothing unusual or sinister about the plaintiff's contract(s) of employment which bear special scrutiny or interpretation different from the others, save that the plaintiff's contract was for five (5) years' validity as against three (3) years for all the rest. Above all, it was the plaintiff who set up the dual contracts structure with the assistance of PWC.

91 I turn next to Terry's testimony on the defendant's allegations against the plaintiff. He learnt of the breaches of the ACIL and NAB covenants and the acquisition cost of Kaluakoi, after he had left the defendant's services; he had effectively handed over to Arun Amarsi on or about 9 March 2002. Prior thereto, Terry was told of the under-provisions in the defendant's consolidated accounts for bonus and audit/accounting fees; he opined that the defendant's board was misled by the consequential increase in the defendant's profitability as reflected in the accounts. Until discovery by the defendant of the shortcomings in the plaintiff’s performance as CFO, Terry testified that the defendant's only reservation was not wanting to pay the plaintiff his full entitlement as severance pay; Quek was willing to pay 12 months' salary in lieu instead. He disagreed that the defendant's subsequent attempts to find fault with the plaintiff was an excuse not to pay the plaintiff his due.

92 It was pointed out by counsel that the defendant did not allege that the plaintiff was negligent with regards to breach of the ACIL/BIL covenants. Terry did not disagree that a CEO or CFO was entitled to rely on competent and experienced subordinates. However, Joe (on whom the plaintiff claimed he reposed absolute faith) was newly appointed, in fact well after the covenants were entered into. Even so, Terry contended that if the issue involved was fundamental to the discharge of a person's duties (as was the case here) and not a minor infraction, then the person was negligent. Terry added (V/N 1038) that he was aware most chief financial officers (apparently the plaintiff too) carried in their pockets a plasticised version of (negative) covenants to remind them, it was a crucial task of the CFO in any company. Indeed, until just before the breaches occurred, the defendant had one staff member whose sole job was to monitor the covenants. When Low was cross-examined on this issue (V/N1462), he too said he had summaries keyed into his laptop and placed on his table, of the major covenants of all the facilities the group had, to ensure compliance.

93 In his affidavit evidence (para 45), Terry pointed out that BDW did not advise the defendant to effect the payment (of the sale proceeds of James Hardie and Findel PLC) by way of a dividend irrespective of the consequences (my emphasis). Had he known of the breach of the two covenants at the time, Terry said he would not have recommended that the plaintiff be paid 50% (later reduced to 40%) of the plaintiff's annual salary as bonus for year 2001, which the plaintiff had relied on as a reflection of how highly the defendant regarded his abilities.

94 When he found out about the breaches (after leaving the group), Terry said he was shocked and deeply disappointed. Had he known at the material time, Terry said he would have felt obliged to offer his resignation as CEO to the defendant, on the basis that the buck stops with the CEO for any major failure by the staff. He had recruited the plaintiff and what happened was a major management mistake for which he was ultimately responsible.

95 Similarly, Terry found out after the inaccuracy of the accounts after he left the defendant's employment. The plaintiff did inform the BSBM committee on 7 February 2002 that the accounts could be inaccurate and Terry only became aware there was a dispute over the figures about a month later.

96 As for the purchase of Kaluakoi, Terry recalled attending a meeting (on 1 February 2002) where Riley made a presentation which covered the expenditure that had been incurred and which would be incurred in future, should the defendant wish to continue with the development. By then, the defendant's board had already decided (on his recommendation) that no further monies would be spent over and above US$10m; it would look for a partner to put in the infrastructure, restore the golf course etc. Because Molokai had a long coastline, Terry explained that it was not the defendant's intention to build houses on Kaluakoi (and the Alpha property) but to sell 250 oceanfront lots at about US$1m per lot, he having personally viewed the site; US$10m was therefore a good price to pay for the property. If the defendant secured the development through a partner especially for the golf course, the book value of US$160m for the property would be enhanced and would be covered by the development.

97 Counsel for the plaintiff sought to show that because the previous owner of Kaluakoi would not allow access for due diligence to be conducted before the sale to MRL, there were high risks involved for the defendant, one example being MRL's management had virtually no knowledge of the state of the existing hotel on the property, which was dilapidated. Counsel referred to a feasibility report prepared at Terry's request by one Martin Darveniza (of Tabua Investment who was also the CEO of the defendant's Fiji operation). Terry pointed out that the management of MRL was not concerned about the state of the hotel (which had already been closed for some time) as it was never the defendant's intention to restore the hotel for use. The defendant was fully aware that the company/MRL must purchase Kaluakoi in order to preserve/enhance the value of the adjacent Alpha property but, it was only prepared to pay US$10m and no more for the acquisition. The defendant was not concerned about actual holding or running costs after the acquisition; additional (discretionary) spending by way of improvements and upgrading were also a different consideration altogether. What the defendant did not want to do but eventually was compelled to, was to pay more (by 50%) than what was intended, to acquire Kaluakoi itself.

The issues

98 Having reviewed the evidence, I set out the issues which require the court's determination:-

> (i) who was the plaintiff's employer for purposes of his claim for severance payments? Was it the defendant (as he contended) or BSL (as the defendant contended) or both?

(ii) did the plaintiff still owe duties as an employee under the principal employment contract (notwithstanding his dual contracts of employment with BIC and BSL) such that the defendant could maintain its Counterclaim against him?

(iii) if the plaintiff did owe duties to the defendant under the principal employment contract, did he breach the duties alleged in the Counterclaim?

(iv) if indeed the plaintiff committed the breaches, can the defendant rely on the same retrospectively so as to deny the plaintiff his severance payments?

(i) Who was the plaintiff's employee for purposes of his claim?

99 It is clear from the documents that the severance payments under the principal employment contract were transferred to the plaintiff's regional employment contract with BSL. BSL's letter dated 1 February 2000 (para 17 *supra*) to the plaintiff stated:-

The termination provisions set out in the employment contract dated 28 October 1999 made between you and Brierley Investments Limited ("Principal Employmen Contract " and "BIL") shall apply to your employment by the Company [BSL] as evidenced by this letter.

Consequently, the plaintiff is precluded from making his claim for severance payments (which form part of the termination provisions in the principal employment contract) against the defendant. In this regard, I reject the plaintiff's submissions (paras 132-137) that the plaintiff's true employer continued to be the defendant, as well as the concept of 'the common employer doctrine' (the defendant's description) prescribed by Canadian cases, which has yet to be imported into our law. Even if I accept that doctrine, there was no ambiguity as to warrant its application in this case; it was clearly spelt out in the above extract from the letter dated 1 February 2000 that, the termination provisions in the principal employment contract would apply. It would be absurd to interpret the words *shall apply* to mean (according to the plaintiff's submissions para 131) that the severance payment obligations were <u>not taken out</u> of the principal employment contract but would (equally) apply to the regional employment contract with BSL. Does that mean both the defendant and BSL were liable for the severance payments to the plaintiff? In any event, that was not his pleaded case; he only sued the defendant.

100 The plaintiff had used the excuse that BSL (as well as BIC) was a *worthless entity* in order to sue the defendant; nothing could be further from the truth. While BSL is indeed registered in the British Virgin Islands and has a postal address there, the defendant is also a foreign company (registered in the Bahamas) and it equally does not have a presence in Singapore. Although he alleged BSL was worthless, the plaintiff had happily accepted payment of half his annual salary (and other benefits) from this subsidiary without question, until his services were terminated. By having BSL as one of his two (2) employers, the plaintiff made substantial Singapore tax savings (see para 26 *supra*). He was also no stranger to the dual contracts system, as he had the same arrangement when he was with Jardines in Hong Kong. Indeed, he was responsible for its set-up by PWC. Consequently, I accept the defendant's submission (para 156) that, having chosen to adopt and to benefit from, the dual contracts, it lies ill in the plaintiff's mouth to say that the benefits had not migrated and that the subsidiaries were not his employers. I further believe the defendant's accusation to be well founded ¾ the plaintiff sued the defendant because it has deep pockets.

(ii) did the plaintiff still owe duties to the defendant under the principal employment contract, notwithstanding not being liable to him for severance payments?

101 One must look again at the documents to answer the second issue. I have earlier set out (in

para 11 *supra*) the relevant paragraph in the defendant's letter dated 1 February 2001 relied upon for the Counterclaim.

102 Further, Terry's testimony in this connection is relevant. He had explained that hiring, firing and fixing remuneration (including bonus) were the purview of the defendant whilst payments were disbursed by the subsidiaries which contractually employed the staff in question. Earlier, I had also pointed to the unlikelihood of the defendant, BIC and BSL acting unilaterally. The truth of the matter is that both subsidiaries employed the plaintiff as the defendant's CFO. Reading the defendant's letter dated 1 February 2001 in its context, I am persuaded by the defendant's arguments; I agree that the plaintiff owed the defendant residual duties, notwithstanding his having signed the regional employment contracts with BIC and BSL. Those duties however did not include fiduciary duties, as he was never appointed a director of the defendant.

(iii) if the plaintiff did owe duties to the defendant under the principal employment contract, did he breach the duties as alleged in the Counterclaim?

103 The defendant's closing submissions criticised the plaintiff's conduct (and testimony) *in extenso*. I turn now to consider whether such criticism is (i) justified and (ii) affords a defence to the plaintiff's claim as well as a basis for the Counterclaim. I do not quarrel with the defendant's submission that there is no fixed rule of law defining the degree of misconduct which justifies dismissal. It is a question of fact in each case, depending on the circumstances, whether the conduct in question is of sufficient gravity as to warrant/justify dismissal.

(i) breach of the NAB and ACIL covenants

104 As I had observed earlier, the material evidence of the much maligned (by the plaintiff) Joe was not before the court. Can the plaintiff (as he contended) be exonerated from blame for overlooking the two (2) covenants, merely because he had appointed an experienced and competent accountant in the person of Joe as CFO for the Australian operations? I think not. As the group CFO, the plaintiff was answerable for the failings of those below him. It bears mentioning that the plaintiff was handsomely paid (in terms of remuneration, bonus and benefits) by the group in the previous year; such income comes with a high degree of responsibility. If indeed the plaintiff carried on his person (according to Terry) condensed versions of major covenants which the defendant/group needed to observe, it was inexcusable for him to have overlooked the undertakings by ACIL and the defendant to NAB, to maintain their assets above certain levels. The fact (according to the plaintiff) that the accountants/auditors (KPMG) and Joe (who signed the consolidated accounts of ACIL as at 30 June 2001) were not alerted by the accounts that the assets of ACIL and the defendant had fallen below the thresholds of A\$500m and NZ\$3 billion respectively, is not a valid defence to the defendant's complaint <u>against him</u>.

105 As the defendant's CFO, the plaintiff (by his own admission) was primarily responsible for tax matters for the entire group; all other CFOs within the group reported to him – hence, his task was non-delegable. Indeed his job description (see para 10 *supra*) in Appendix A (i) of the principal employment contract said as much.. The plaintiff is a chartered accountant with international experience, who had joined the defendant after working with and being headhunted from, another well-known group of companies (Jardines). Of all those in the team who contributed towards the decision to repatriate A\$394.3m from Australia, the plaintiff was the one who should have been most alert to the financial implications involved. The plaintiff had blamed BDW for the resultant breaches of covenants. Lanigan of BDW had rebutted his allegation by pointing out that the brief to her firm was only to advise on specific corporate issues and Australian taxation, not on payment of a dividend to ACIL's shareholders. She had also emphasised that ACIL need not pay a dividend of A\$624m in order

to repatriate A$394m to Ma Sing. It was only necessary for ACIL to pay a maximum dividend of A$97.3m up the corporate chain to facilitate the dividend payment of A$143m by BILA free of withholding tax, to Ma Sing. The plaintiff claimed (which I disbelieve) that he was unaware of this fact. Although he said he challenged this case (when put to him by counsel for the defendant), the plaintiff did not put forward any other alternatives. I am mindful of the plaintiff's rebuttal of Lanigan's testimony (paras 173-179 of his submissions), that she was only referring to the issue of withholding tax; it was pointed out that the defendant would have faced a tax bill of A$10m per annum had the repatriation been done any other way. I agree with the defendant that what is in issue here is <u>not</u> the most tax efficient method (as his legal expert Tim Nielson opined) to repatriate funds permanently from Australia but, whether in <u>choosing the method he did</u>, the plaintiff exposed ACIL, Weeks and ultimately the defendant, to severe financial consequences by triggering breaches of the ACIL and BIL covenants.

106 It bears noting that if indeed (as he claimed) he had read Lanigan's report, the plaintiff would have been reminded of the ACIL covenant from the following paragraph (see AB5743 vol 15):-

> The ACIL sub-group is required to maintain net tangible assets of at least A$500m under the terms of the National Australia Bank letter of credit relating to the Bass Strait Oil Trust (BSOT). As the only investments of value remaining in the ACIL group are bank deposits of around $55m and the BSOT, Wotif.com Pty Limited and English Welsh & Scottish Railways investments, which are collectively valued in the accounts at less than A$500m (although the BSOT assets are likely to be worth more than book value), this covenant can only be satisfied by maintaining a level of intra-group advances made by the ACIL group to the BIL group. This therefore limits the profits which may be distributed by way of dividend from the ACIL group, and accordingly the distributions able to be made up the corporate chain to fund dividends/capital returns to Ma Sing.

Yet he did nothing. I would add that it is not the function of lawyers to work out figures for accountants, be it for tax or other considerations. It is no excuse to say it was the defendant which drew NAB's attention to the breach of the BIL covenant and, that the covenant had been breached in previous years. It was the breach of the ACIL covenant which prompted NAB to issue the Notice of Declaration dated 7 May 2002 to ACIL and Weeks. I am of the view that the plaintiff was grossly negligent in not picking up the breaches; he did not live up to the responsibilities expected of a group CFO of the defendant's stature.

(ii) purchase by MRL of Kaluakoi for US$15.5m instead of US$10m

107 As in the case of the BIL and ACIL covenants, a material witness (Riley) did not testify. It was common ground that Riley was MRL's/the defendant's appointee to negotiate the sale from Kaluakoi's Japanese owners; he was given a mandate to secure the property at US$10m. As Riley was tasked with that responsibility, he not the plaintiff, should have alerted the defendant/MRL to the fact that <u>in addition</u> to the agreed purchase price of US$10m, the property came to them saddled with actual (<u>not contingent</u>) liabilities of another US$5.5m. It would be unfair to pin the blame for Riley's omission entirely on the plaintiff, merely because he was a director of MRL at the material time and, had attended board meetings where DOH compliance requirements were mentioned. Granted, the plaintiff should have been more alert and attentive at discussions where the cost of DOH compliance was raised, especially at the meeting of MRL's board held on 16 November 2001. However, such matters were or should be, the main responsibility of the officers of MRL (including Whiting) who were involved in or privy to, the negotiations leading to the signing of the sale and purchase agreement dated 28 November 2001. Even if the plaintiff failed to mention the sum of US$5.5m to the defendant's board of directors, the fact remains that Riley was in direct communication with the chairman and should have informed Quek that the cost of DOH compliance

would increase the acquisition cost of Kaluakoi to US$15.5m.

(iii) removal of bonus provision from the accounts of BIL Australia

108 There is little doubt in my mind that the plaintiff's deliberate act in putting the bonus provision (US$1.2m) and thereby concealing it, in a suspense account, was in order that he would not look 'bad' in the eyes of the defendant's board, (because it would affect his profit forecast of US$5.5m) so as not to jeopardise his self interests namely, a share of that bonus. The plaintiff's claim that putting the item in a suspense account was proper accounting treatment was discredited as:-

(i) the defendant never maintained a suspense account;

(ii) his expert (Kaka Singh) did not support his stand when cross-examined.

I find that the plaintiff's action fell short of that expected of an accountant; indeed it was unprofessional.

(iv) under-provision for audit fees

109 The comments which I made with regards to the bonus provision would equally apply to the plaintiff's concealment of the audit fee under-provision, which act again was motivated by his desire not to be out of line with his profit forecast

The expert testimony

110 I need to address the evidence adduced from the experts as well as the key witnesses, before I move on to consider the final issue.

111 Kaka Singh's report addressed the issue of strengthening the internal controls in the defendant's organisation, which is not really relevant to the plaintiff's case or the Counterclaim. He (PW4) supported KPMG's recommendations that reporting functions within the group should be segregated and the treasury functions separated. Whilst I agree with Kaka Singh's conclusion that in terms of the size of the defendant as a group, an inaccurate profit forecast of US$5.5m is immaterial and would not have any significant impact on the group's accounts as a whole, that statement with respect, cannot be right nor accepted, when the same included an expense of more than $1m, which amounts to 20% of $5.5m. On whether the shortfall in provision of US$841,000 for bonus and U$400,000 for audit/accounting fees should have been put into a suspense account, Kaka Singh had agreed these were (undisputed) expenses which should accordingly not be put into a suspense account, bearing in mind the industry practice of using suspense accounts. In that regard, there is no divergence of views between him and the defendant's expert Chan.

112 The defendant's (Chan’s) expert testimony was more in point — was the plaintiff's treatment of the bonus provision and additional provision for audit/accounting fee (whatever the amounts) as suspense account items acceptable in the context in which they were transferred; his clear answer was in the negative; I agree with and accept Chan's testimony.

113 Tim Nielson (Nielson), a partner in the Australian firm of Freehills had, in his report dated 3 January 2003 stated that his brief from the plaintiff was *to advise whether the payment of dividends and returning share capital of BIL Australia Pty Ltd (BILA) [in the manner described in his report] was the most efficient method for Australian tax purposes of permanently repatriating funds out of Australia to the rest of the BIL group for use in repaying debt*. Nielson concluded that

> The repatriation of funds using the method proposed by BDW enabled permanent return of funds to Ma Sing without incurring any Australian tax liabilities………
>
> …….Accordingly, the method chosen by BILA represented the most tax effective method of permanently repatriating funds from BILA back to Ma Sing.

With respect, that is not the nub of the issue before this court as I pointed out in para 105 above. It was Terry's testimony that BDW did not advise the defendant (in Lanigan's report) to effect payment of the sale proceeds of James Hardie and Findel PLC, by way of a dividend regardless of the consequences. All financial implications not only tax efficiency, should have been taken into account, which the plaintiff did not.

114 The defendant's legal expert was Stephen Barrie Flynn (Flynn) whose attendance in court was dispensed with by the plaintiff's counsel (V/N 1202). Flynn, a New Zealand barrister and solicitor, touched on breach of the BIL covenant. He had acted for the defendant and some of its subsidiaries previously. Flynn learnt of the breach of this covenant from Simon Tuxen in June 2002. He was asked to and did, assist the defendant/BDW in their negotiations to resolve the matter with NAB. Basically, Flynn corroborated Low's testimony on the negotiations and the terms of settlement reached, between the defendant, ACIL and NAB.

The witnesses

115 There were three (3) key witnesses of fact before the court, namely the plaintiff, Terry and Low. I had earlier (para 103) alluded to the defendant's criticism of the plaintiff who was alleged (para 149 in the defendant's submissions) to have given evidence which bordered on dishonesty. While that may be too harsh a condemnation of the plaintiff, I am of the view that the plaintiff's conduct in the stand did not help his case at all. He lacked candour, was often times evasive in answering questions when cross-examined and, had the tendency to blame everyone else but not himself, as the cause for the defendant's complaints in the Counterclaim.

116 One criticism by the defendant of the plaintiff which I agree with, was his selective reference to and emphasis (in para 8 of his statement of claim) on the words in bold print in the following paras 3 and 4 in the regional employment contracts, but omitting the underlined words:-

> These regional employment contracts are intended to be an extension of your principal employment contract and they do not **replace or supercede your principal employment contract**, <u>save as provided in the following paragraph</u> .
>
> <u>Except to the extent that any of the provisions of the principal employment contract have been incorporated in the regional employment contracts (whether separately or read together) or specifically varied therein</u>, **the provisions of the principal employment contract shall continue to apply** as between you and the company.

The plaintiff's explanation (V/N 101) that he thought (only) the bold printed words were relevant was unconvincing; his omission of the underlined words was deliberate – he well knew those words would not sustain his claim against the defendant. My view is reinforced by the fact that until the defendant amended its defence (on 16 December 2002), the plaintiff made no reference to the regional employment contracts (and to the attendant OHQ issue) in his numerous affidavits filed for the purposes of summary judgment and, to oppose the defendant's application to amend the defence.

117 Terry and Low were the defendant's main witnesses. Unlike the plaintiff, neither of them

sought to excuse themselves from their responsibilities. Low's testimony was at times disjointed but I have no doubt he spoke the truth. He was decent enough to admit his mistake and or the mistakes (see para 67 *supra*) made by his subordinates when confronted.

118 Had Terry still been employed by the defendant when the plaintiff's various misdeeds were discovered, he said he would have offered to resign (para 94 *supra*) which action I consider the mark of a true CEO who would/should accept responsibilities for the mistakes or misdeeds made by his subordinates, particularly someone whom he had personally appointed.

(iv) if the plaintiff did owe the defendant the duties they alleged, could the company rely on his breaches of the same to deny him his severance payments?

119 I had found that the defendant's allegations in the Counterclaim (save on the Kaluakoi issue) were made out. However, before giving my decision, I need to address the last issue and the submissions made by the parties. The defendant argued that the company and BSL could rely on the breaches after they had terminated the plaintiff's employment 'without cause', citing *Boston Deep Sea Fishing & Ice Company v Ansell* (1889) 39 Ch 339. The plaintiff's counsel on the other hand, submitted that the case was distinguishable. It would be useful to look at the facts of the case to determine whose view is correct.

120 In that case, the promoter of the plaintiff company agreed with the defendant that he should be employed as managing director of the intended company for five (5) years at a yearly salary. This was provided for in the articles of association which also stated that the defendant's yearly salary was payable quarterly. Afterwards, the company by a written instrument adopted the agreement between the promoter and the defendant. The defendant, on behalf of the company, contracted for the construction of certain fishing smacks and, unknown to the company, took a commission from the shipbuilders on the contract. Several months later, the company passed a resolution to dismiss the defendant at an extraordinary meeting, on the ground of other alleged acts of misconduct, which they were not able to substantiate in the action; being at that time ignorant of his receipt of the commission from the shipbuilders. The defendant was a shareholder in an ice company and a fish-carrying company, which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing smacks and who employed the companies in supplying ice and in carrying for them. The defendant employed these companies in respect of the plaintiff's smacks, and received bonuses as if the smacks were his own. The plaintiff brought an action against the defendant for an account of commissions and bonuses received by him, and for damages for alleged breaches of duty; the defendant counterclaimed for wrongful dismissal and for the salary for the quarter that had expired before his dismissal.

121 The Court of Appeal (reversing the decision of Kekewich J) held that:-

> (i) the receipt of a commission from the shipbuilding company was good ground for dismissal, although it was not discovered till after the dismissal had taken place and although it happened several months previously, and might have been an isolated act;
>
> (ii) the defendant must account to the plaintiff for the bonuses received from the ice and fish-carrying companies, as they had been paid in respect of the plaintiff's smacks, although the plaintiff could not themselves have received the bonuses, not being shareholders of the company;
>
> (iii) the contract between the plaintiff and the defendant was contained in the agreement between the promoter and the defendant as adopted by the company and was not modified by the articles of association. Consequently, the defendant's salary was payable yearly and not

> quarterly. As the defendant had been dismissed for misconduct, he was not entitled to any part of the unpaid salary for the current year of his services.

122 In the closing submissions tendered for the plaintiff, counsel pointed out that *Deep Sea Fishing* was a case involving wrongful dismissal, whereas the plaintiff's employment was lawfully terminated on 31 March 2002, pursuant to his contract. Granted, *it is an accepted principle of employment law that the apparently wrongful dismissal of an employee can be justified if it is subsequently discovered that that employee had conducted himself in such a way as to make him liable to be dismissed even though the misconduct was not known at the time of the actual dismissal* (per Prakash J in *Goh Kim Hai Eddie v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109 at p 116). That well established principle of law however, has no application to this case.

123 The plaintiff submitted that the rights of the parties had crystallised on 31 March 2002 when the plaintiff's employment was terminated under cl 5.2 of the principal employment contract; the defendant/BSL/BIC did not summarily dismiss the plaintiff under cl 5.3 thereof. The defendant and the two (2) subsidiaries did not purport to terminate the contract for cause <u>even after</u> the contract ended, although they had ample opportunity to do so during the notice period. The plaintiff pointed out that the US$5.5m liabilities on Kaluakoi were known by November/December 2001 and the defendant's board knew by 1 February 2002. The accounting provisions put into the suspense account were discovered in early March 2002, so too was the breach of the BIL covenant. I agree with the plaintiff's submission; the defendant could have notified the plaintiff during the notice period if not earlier, that he would not be given his severance entitlement and the reasons therefor.

124 The defendant relied on another case in the same vein as *Deep Sea Fishing* in its closing submissions, namely *Horcal Ltd v Gatland* [1983] BCLC 60. There, the defendant was the managing-director of the plaintiff building contractors. In June 1978, a Mrs K telephoned the defendant and requested an estimate for work on her home which he agreed to carry out on the plaintiff's behalf. The defendant subsequently appropriated this contract for his own benefit and, although he intended to pay all the expenses of the work himself, this was not done and some of the expenses were billed to the plaintiff. At the time he decided to take the benefit of the contract, the defendant was negotiating to purchase the shares in the plaintiff but this transaction fell through. He then entered into an agreement to terminate his contract of service with the plaintiff with effect from 31 October 1978, in return for payment of £5,000 by way of compensation. The defendant received payment from Mrs K sometime after 24 July 1978 but before he received the £5,000 compensation from the plaintiff. The company brought an action to recover the £5,000 compensation on the grounds that the agreement under which it was paid was void, because of the defendant's failure to disclose his breach of fiduciary duty as a director, in appropriating the benefit of the contract with Mrs K. Glidewell J held that the defendant, not having received any payment from Mrs K when he entered into the agreement with the plaintiff on 24 July 1978, was not in breach of his fiduciary duty and there being nothing to disclose, the plaintiff was not entitled to recover the £5,000. However, the payment of the defendant's salary after 24 July 1978 was made at a time when the company could have dismissed him and accordingly this was recoverable.

125 The plaintiff appealed with respect to its claim on £5,000 whilst the defendant cross-appealed with respect to the order to repay his last month's salary. The Court of Appeal (reported at [1984] BCLC 549) dismissed the plaintiff's appeal and allowed the cross-appeal. The Court held that when the agreement of 24 July 1978 was entered into between the plaintiff and the defendant, the defendant although he may have intended to breach his duty in the future, had not received payment under the contract from Mrs K and so was not at that time in breach of his duty to the plaintiff. Therefore, there was no basis on which the contract could be vitiated and the £5,000 was accordingly not recoverable by the company. As regards the cross-appeal, although the plaintiff

could have terminated the defendant's contract of service, it did not do so and the defendant accordingly was paid his salary pursuant to a binding contract for work done and therefore it was not recoverable.

126 The defendant submitted that the case stood for the proposition that an employee who is a fiduciary is obliged to disclose his breaches and if he suppresses his breaches before the contract is terminated, the employer can later rely on that breach of the employee's fiduciary duty to reject liability. True, but the court (Goff LJ at p 555) also added:-

> ……There was a binding contract for the termination of the plaintiff's services. After the making of that contract there was an undoubted breach of duty committed by the defendant in that he received the cash paid by Mrs Kingbury in respect of the work done by the plaintiff company on her house, and he did not account for that cash to the plaintiff company; furthermore he concealed the existence of the contract with Mrs Kingbury from the plaintiff. There can be no doubt that that was a breach, and a serious breach, of the defendant's contract of service with the plaintiff company and had the plaintiff company become aware of it at the time they would have been entitled then and there to terminate the contract between them and the defendant under which he was continuing to serve the plaintiff as managing-director. But they did not become aware of the defendant's misdoings at that time <u>The defendant's contract of service was worked out in the ordinary way. He continued to serve as managing-director up to 31 October, and he received his salary in respect of that period of his service</u> (emphasis mine).

In those circumstances I myself can see no ground upon which the plaintiff can recover the salary cheque which they paid him. It was paid under a binding contract.

127 The defendant in para 404 of its closing submissions added:

> ……..If one party repudiates a contract and is sued by the other, the first party can rely in his defence on a reason not known, but in existence at the time of repudiation. The question is whether the defendant repudiated the contract. On the plaintiff's own case, the defendant did so. The plaintiff claims that his employment was terminated without his benefits being paid to him. He claims that he is entitled as a matter of contract to those benefits. If he is right, then by not paying, the defendant repudiated its obligations.

The plaintiff (paras 38-45 of his submissions) however pointed out that the above argument was disingenuous as:

(i) repudiation was not pleaded by the defendant;

(ii) the plaintiff was not suing for repudiation or wrongful dismissal and

(iii) no contract subsisted to be repudiated.

128 In para 402 of the defendant's submissions, the following extract from Chitty on Contracts (28th ed Vol.1 para 25-013 p 1229) was relied on:-

> The general rule is well established that, if a party refuses to perform a contract, giving therefor a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal.

I cannot seen how the above passage assists the defendant's case at all; there was no refusal to perform on the part of either party when the plaintiff's employment was terminated. Consequently, the defendant's reliance on the case *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401, a case involving breach/wrongful repudiation of a charterparty, is misconceived. This is apparent from the following passage of Devin J's judgment (p 443) emphasised by the defendant:

> ……It is now well settled that a rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason

129 It would appear from the authorities referred to above, that the defendant cannot rely retrospectively on the plaintiff's misconduct as a defence to his prior claim for severance payments, which debt (the plaintiff submitted) arose earlier; the ex-post facto reasoning by the defendant that it had subsequently repudiated the contract by not paying, is untenable.

Conclusion

130 Consequently, I am dismissing the plaintiff's claim for severance payments of $2,125,000 ($62,500 salary x 34 months) as he has sued the wrong party; his claim for bonus is also dismissed as, it is established case-law (*Latham v Credit Suisse First Boston* [2002] 2 SLR 693) that where bonus payment is stated to be discretionary (as in cl 2.3(ii) of the principal employment contract), an employee is not entitled to it as of right.

131 I am also rejecting the defendant's counterclaim as the plaintiff's services had been lawfully terminated without cause under cl 5.2 of the principal employment contract; he was not dismissed under cl 5.3.

132 As both the claim and counterclaim are dismissed, it would make sense for each party to bears its own costs in these proceedings; the hearing fees shall also be borne by the parties equally. The security for costs furnished by the plaintiff shall be returned to the plaintiff's solicitors.