Tan Hup Thye *v* Refco (Singapore) Pte Ltd (in members' voluntary liquidation) [2010] SGHC 149

Case Number	: Suit No 778 of 2006
Decision Date	: 11 May 2010
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: C R Rajah SC, MK Eusuff Ali and Lavinia Rajah (Tan Rajah & Cheah) for the plaintiff; William Ong, Eunice Chew and Ramesh Kumar (Allen & Gledhill LLP) for the defendant.
Parties	: Tan Hup Thye — Refco (Singapore) Pte Ltd (in members' voluntary liquidation)

Companies – Directors – Duties

11 May 2010 Judgment reserved.

Judith Prakash J:

Introduction

1 The defendant company, Refco (Singapore) Pte Ltd, was incorporated in February 1984 and went into members' voluntary liquidation on 30 November 2006. The plaintiff, Tan Hup Thye, was an employee of the defendant from the time of its incorporation up to 4 December 2005. Starting out as an executive vice president, the plaintiff became managing director of the defendant in November 1986, a position that he held up to 4 December 2005. Thereafter, he remained a director of the defendant until the liquidation proceedings started. The defendant was part of a group of companies which I shall call "the Refco Group". Its immediate holding company was Refco Global Holdings LLC but its ultimate shareholder was Refco Inc.

2 On 4 December 2005, the defendant's business was transferred to Man Financial (Singapore) Pte Ltd ("Man (S)") as part of a sale and transfer of some of the businesses belonging to companies in the Refco Group. Pursuant to the sale and transfer of the defendant's business, the plaintiff was offered and accepted employment with Man (S) on 5 December 2005. This employment was, however, terminated on the same day pursuant to a termination agreement which also contained a generous termination package for the plaintiff.

3 The plaintiff's claim herein is for bonus entitlements from the defendant which he alleges that he is entitled to in respect of his employment with the defendant from 1 March 2005 (the beginning of the defendant's financial year) to 4 December 2005. The claim is for a total sum of $1,460,442.03. This sum is made up as follows:

(a) a sum of $1,412,759.00 for the seven months from 1 March 2005 to 30 September 2005; and

(b) a sum of $47,683.03 for the months of October and November 2005.

4 The plaintiff has put forward two bases for his claim. They are:

(a) The claim for the sum of $1,412,759 is based on the specific sum approved and declared as the plaintiff's bonus in a Board of Directors' resolution passed on 3 December 2005 ("the December Resolution"); and

(b) The bonus sum of $1,412,759 is also allegedly a contractual entitlement of the plaintiff. This contractual entitlement extends to the further sum of $47,683.03 for the months of October and November 2005. The plaintiff says that the bonus payable to him is from bonus accrued in the defendant's accounts in the course of the defendant's financial year. Allegedly, the bonus was accrued based on a bonus formula of 30% of net profits before tax adjusted for cost of capital ("the Bonus Formula").

5 The defendant's position is that the plaintiff is not entitled to the moneys he is claiming. This is on the basis that first, the plaintiff has no contractual rights to the sums he is claiming and second, that he is not entitled to claim bonuses on the basis of the December Resolution because the resolution is allegedly invalid or, alternatively, the declaration of bonuses under the December Resolution was in breach of the plaintiff's fiduciary duties owed to the defendant. Further, the defendant is also, by way of a counterclaim, claiming damages and/or an indemnity against the plaintiff for losses arising out of the plaintiff's breach of fiduciary duties.

Background

6 At all material times, the defendant was in the business of providing securities dealing services and broking services in financial futures contracts, foreign exchange and commodities.

7 As of August 2005, the board of directors of the defendant comprised:

(a) Mr Philip Roger Bennett ("Mr Bennett");

(b) the plaintiff;

(c) Mr Santo Charles Maggio ("Mr Maggio"); and

(d) Mr Keith Tay Ah Kee ("Mr Tay").

Mr Maggio held the position of Chief Executive Officer of two other companies in the Refco Group while Mr Bennett was the Chairman and a director of the defendant from April 1984. Until 1998, Mr Bennett was the chief financial officer of Refco Group Ltd (another company in Refco Group) and from then, he held the post of president and chief executive officer of Refco Group Ltd. Mr Tay was an independent director who had been appointed in 1999.

8 In August 2005, the Refco Group was restructured and a company called Refco Inc was listed on the New York Stock Exchange. In October 2005, Refco Inc announced that it had discovered a receivable of about US$430m owing to it which Mr Bennett had not disclosed. Mr Bennett and Mr Maggio were subsequently charged in the United States for securities fraud. As a consequence of the announcement, Refco Inc's share price fell and on 17 October 2005, Refco Inc filed for and

secured bankruptcy protection in the United States.

9 Later in October 2005, AlixPartners LLC was retained by Refco Inc to, *inter alia*, assist with the potential sale of Refco Inc's businesses, including the defendant. AlixPartners LLC appointed KordaMentha, an Australian firm, to oversee the Refco Group of companies' subsidiaries in Asia, including the defendant. As regards the defendant, David Winterbottom ("Mr Winterbottom), Cameron Duncan and John Mouwad were appointed by KordaMentha to oversee it.

10 On 16 November 2005, Robert Dangremond ("Mr Dangremond") was appointed interim CEO of Refco Inc.

11 On 13 November 2005, it was agreed that Man Financial Inc would acquire the business of the Refco Group, including the defendant, pursuant to the terms of an acquisition agreement ("the Acquisition Agreement") of that date made between Man Financial Inc as the buyer and various members of the Refco Group, including the defendant, as sellers. As regards the defendant, it was agreed that the defendant's assets and business operations were to be taken over by Man (S) on 5 December 2005.

12 In the meantime, the plaintiff had informed Mr Winterbottom of his intention to make bonus payments to the defendant's employees, at the very latest by 26 October 2005. The next month, the defendant's board sought a legal opinion from the defendant's lawyers, Messrs Rajah & Tann LLP ("RT"), as to whether its employees were legally entitled to be paid bonuses prior to and as part of the orderly winding down of the business of the defendant. The legal opinion was issued on 18 November 2005 and the plaintiff considered that it supported the view that the defendant was entitled to pay the staff bonuses prior to and as part of an orderly transfer of the defendant's business to Man (S) as long as the employees satisfied the bonus criteria.

13 On 21 November 2005, a board meeting was held. The plaintiff attended the meeting in person and Mr Tay attended it via teleconference. Two other employees of the defendant were in attendance. At this meeting, a resolution was passed ("the November resolution"), approving the payment of bonus to the defendant's employees totalling $6,485,094. Later that same day, the plaintiff received an e-mail from Refco Inc's general counsel, Dennis Klejna, telling him not to make any bonus payment without the approval of the Refco Inc board. On 22 November 2005, other representatives from Refco Inc, including Mr Dangremond, told the plaintiff not to make the bonus payments.

14 On 3 December 2005, the defendant's board of directors held a meeting ("the December meeting") at which they, *inter alia*, passed a resolution ("the December Resolution") approving the allocation of bonuses to individual employees as per a detailed bonus list. This list set out the amount of bonus payable to each of the defendant's employees including the plaintiff.

15 On 4 December 2005, Laurence O'Connell ("Mr O'Connell") from Man (S) informed the plaintiff that he should not communicate the November and December Board Resolutions to the employees of the defendant. The plaintiff suggested that Man (S) provide a specific assurance in its letters to the employees that Man Financial Inc would honour applicable bonus entitlements. Mr O'Connell agreed to this suggestion.

16 On 5 December 2005, Man (S) took over the business of the defendant and subsumed it within its own business. Pursuant to the Acquisition Agreement, a transfer agreement was entered into and the defendant's employees were transferred to Man (S). On the same day, the employment of the plaintiff and some of the senior members of his management team was terminated by Man (S).

The issues

17 The main issues as framed by the plaintiff are:

(a) whether the plaintiff is entitled to his bonus payments pursuant to the December Resolution;

(b) whether, in the alternative, the plaintiff is contractually entitled to his bonus payments; and

(c) whether the plaintiff was in breach of his fiduciary duties and duties of fidelity owed to the defendant and therefore liable for payments made by the defendant pursuant to settlement agreements with its ex-employees.

Claim under the December Resolution

18 The plaintiff's position is that the December Resolution approved the specific bonus payments to each of the defendant's employees as set out in a bonus list presented to the board. The plaintiff says that notice of the December meeting was duly given to all directors and the meeting was attended by the plaintiff and Mr Tay who formed a quorum and passed the December Resolution. The December meeting was duly minuted and the minutes are evidence of what was decided at the meeting. Accordingly, the defendant has an obligation to pay the plaintiff his bonus as contained in the bonus list and approved by the board in the December Resolution.

19 The defendant's position is that the plaintiff is not entitled to rely on the December Resolution because:

(a) there was no quorum at the December meeting; and

(b) the December Resolution was not in the best interests of the defendant and the plaintiff had therefore acted in breach of his fiduciary duties when he passed the December Resolution.

20 Section 6.0 of the minutes of the December meeting reads as follows:

> **6.0 DECLARATION OF BONUS**
>
> David Yeow explained to the Board that there were case law precedents in the UK that bonus payment was not discretionary but was a contractual entitlement although the employee's contract said that it was discretionary. Such case law should be taken into account due to the statutory provision that case law precedents in the United Kingdom would form part of the laws of England.
>
> The Board having reviewed the legal opinion received from Rajah & Tann (Exhibit 1) and noting that in their view bonus payment was a contractual obligation on the part of the Company but that the Company needed to determine the quantum of bonus on a reasonable basis, after also noting and confirming that the e-mail explanatory note of 23 November 2005 and 29 November 2005 to the Interim Chief Executive Officer of the Company's ultimate parent (Exhibit 2) received no response objecting to what was proposed therein; the board resolved that consistently with past practice and the performance criteria applied bonus be paid to the employees of the Company as at 3 December 2005 based on the profits earned by the Company (combined with profits earned by Refco Investment Services Pte Ltd) for

the period 1 March 2005 to 30 September 2005.

The Board also resolved:

That the specific bonus payable to each employee set out in Exhibit 3 be notified to the liquidators of the Company (following its voluntary member's winding up after the sale and completion of its transfer of business to Man Financial (S) Pte Ltd) for the liquidators [*sic*] follow up action.

Was the December Resolution invalid by reason of conflict of interest and insufficient quorum?

21 The defendant pointed out that as a director of the defendant, the plaintiff was statutorily required to act honestly at all times and to use reasonable diligence in the discharge of his duties. He also owed the defendant fiduciary duties to act *bona fide* in its interest, not to place himself in a position of conflict *vis-à-vis* the defendant and to exercise his powers for their proper purposes. The submission was that in approving the December Resolution which provided for bonus to be paid to himself as well as to other employees, the plaintiff had breached these duties and had placed himself in a position of conflict.

22 The defendant relied on Article 83 of its Articles of Association ("the Articles") which states that:

> A director shall not vote in respect of any contract or proposed contract with the company in which he is interested, or any matter arising thereout, and if he does so vote his vote shall not be counted.

It submitted that as the issue of bonus payments was a matter arising out of or related to the plaintiff's contract of employment, he was prohibited from voting on his own bonus. The defendant cited *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 and *Furs Ltd v Tomkies* 54 CLR 583 ("*Furs Ltd*") in support of the proposition that the law does not allow a director to make use of his position to obtain a profit for himself. In *Furs Ltd*, the Australian High Court had stated that a director shall not obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and the shareholders approve such profit.

23 In the present case, the defendant submitted, the plaintiff had used his position as the managing director of the defendant to cause the passing of the December Resolution which declared that the plaintiff was to be paid the sum of $1,412,759 in bonus. Refco Inc, the defendant's ultimate shareholder, had hitherto expressly instructed the plaintiff that no bonuses were to be paid out. Thus, if the plaintiff were allowed to rely on the December Resolution to claim bonus, he would have made use of his fiduciary position to secure an unauthorised gain for himself. Further, there was no quorum at the meeting. Since the Articles required two directors to be present and the plaintiff's attendance could not be counted in the quorum since under Article 83, he was not entitled to vote. In this respect, the defendant relied on *In re Greymouth Point Elizabeth Railway and Coal Company Limited* [1904] 1 Ch 32 (*"In re Greymouth"*) where it was held that a quorum of directors meant a quorum competent to transact and vote on the business before the board.

24 Dealing with the issue of conflict of interest, the plaintiff submitted that the no conflict rule was only relevant if he had placed himself in a position where there was an actual or substantial possibility of a conflict between his personal interest and his duty to act in the interest of the company. The test to be applied was whether a reasonable man looking at the relevant facts and

circumstances would think there was a real and sensible possibility of conflict. In this case, the plaintiff had been a director and managing director of the defendant for more than 20 years and had constantly been fine-tuning the remuneration structure and policy of the defendant. Under the remuneration policy introduced for the financial year ending 1996, the plaintiff determined the bonus payable to individual employees including the plaintiff himself. The plaintiff had made decisions on bonus payments throughout the period for all staff members and he could not be in a position of conflict simply because the management decision that he was making also benefited him. The plaintiff had testified that the December Resolution had benefited more than 200 employees of the defendant and since it was a vote in relation to an existing contractual relationship, it did not create a new contract or new entitlement. To him, it was a vote in the normal course of business.

25 The plaintiff also submitted that Article 83 was not applicable because:

(a) Article 83 did not prevent a director from voting in respect of a matter in which he had an interest but only in respect of a contract or proposed contract in which he was interested. The decision of the board to quantify the specific amount of bonus to be paid to the defendant's employees could not be a contract or proposed contract with the defendant;

(b) During cross-examination, Mr Winterbottom had taken the position that the contract mentioned in Article 83 would be "the contract constituted by the resolution". This position was inconsistent with the defendant's case that there was no contractual obligation to pay its employees bonuses. Also, the resolution could not be a contract because there was no offer and acceptance;

(c) While the plaintiff had an interest in the November and December Resolutions, this was also the case for all decisions taken by the plaintiff in respect of the defendant's employment matters as the plaintiff was himself an employee. If the defendant was right then all decisions taken by the board in which the plaintiff participated concerning the defendant's employees over the previous 20 years would be called into question;

(d) Based on the past practices of the defendant, it could not be refuted that the board had vested the plaintiff with the authority to allocate the bonus payments to the employees. No resolutions had been passed prior to 2005 to approve the bonus payments and therefore it was illogical to say that if the same issue was placed before the board in a formal meeting, the plaintiff could not vote on it because of Article 83. By vesting the authority in the plaintiff, the board had accepted that the plaintiff could decide on the bonus allocation of all employees including himself; and

(e) The fact that the plaintiff was also receiving the bonus under the December Resolution was disclosed to the board.

26 I take a different view on Article 83 from that of the plaintiff. The article prevents a director of a company from voting on a contract or proposed contract with the company or "any matter arising thereout" if he is interested in the same. The addition of the words "any matter arising thereout" makes it plain that the prohibition does not relate only to contracts or proposed contracts which are currently before the board but also relates to matters which arise from pre-existing contracts. As the plaintiff was an employee of the defendant, there was a contractual relationship between him and the defendant which governed his employment and one of the terms of this contractual relationship concerned the remuneration to which the plaintiff was entitled from time to time. Looked at from this perspective, the question of whether a bonus was payable to the plaintiff for the period from March to September 2003 and if so what the amount of the same should be, would plainly be a matter

arising out of a contract in which the plaintiff had an interest. Accordingly, *prima facie*, the plaintiff was prohibited from voting on his bonus and, since in the event, he did vote, that vote should not have been counted.

27 It should also be emphasised that the plaintiff's bonus entitlement was not simply an incidental part of the bonus declaration. The bonus list provided for a total sum of $6,485,097 to be distributed as bonus among more than 180 employees in the defendant's offices in Singapore and elsewhere. Of this amount, the plaintiff was to receive $1,412,759.

28 In the case of *In re Greymouth* cited in [23] above, Farwell J was faced with a situation where a board meeting attended by three directors had approved the issue of debentures to two of them. The company's articles were very similar to those before me in that they provided for a quorum of two and that directors could not vote on matters relating to "contract, operation, business, or office" in which they were interested and if they did so vote the vote should not be counted. The judge held (at [34]) that the meaning of the article relating to quorum was that the two directors to form the quorum for the despatch of business had to be two directors who were capable of voting on the business before the board; otherwise the article would be idle. As two of the three directors who purportedly attended the meeting were not capable of voting on the question of giving security to themselves, there was no quorum and no valid resolution for the issue of the debentures to them. The case has stood for the proposition that directors who are not capable of voting on any question before the board cannot be counted as part of the quorum of the board for that purpose for more than 100 years. Although it is a first instance decision, I think that it is correct in principle since allowing directors with an interest in a proposed contract to form part of the quorum of a meeting even though they cannot vote on the issue before the meeting would permit the purpose of articles like Article 83 to be negated or undermined. If the articles specify a certain quorum for a meeting, that means that the basic element for the constitution of the meeting is the attendance of that specified number of persons being persons who are able to discuss and vote on the issues before the meeting. Otherwise there would be no point in specifying a quorum at all. It is worth pointing out that a company is free to decide how to regulate itself and the articles of the defendant could very well have provided that a director may vote in matters in which he is interested. In this case, however, Article 83 did not take that path.

29 The plaintiff's argument that there was no breach of Article 83 because Mr Winterbottom had testified that the "contract" referred to in Article 83 was the "contract constituted by the resolution" cannot be sustained. Mr Winterbottom as a lay person was not in the position to interpret the legal meaning of "contract" in Article 83. The interpretation of Article 83 is a question of law not fact and I agree with the defendant's submission that the plain and ordinary meaning of the words "contract … with the company" must include a director's contract of employment with the company. Article 83 was designed to prevent a director (as a fiduciary) from breaching the rule against self-dealing. In the English case of *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] 1 Ch 274 ("*Neptune*"), Lightman J stated the law thus at 279:

> A director of a company owes a fiduciary duty to the company to act bona fide in the best interests of the company and to prefer its interests to his own where they conflict. If a director on behalf of the company enters into any arrangement or transaction with himself or with a company or firm in which he is interested, that arrangement or transaction may be set aside without inquiry as to whether the company has suffered thereby ("the self-dealing rule"); but it is a defence to such a claim that the shareholders of the company have consented to the transaction, and if the articles of association of the company provide that a director may vote in matters in which he is interested the self-dealing rule is excluded.

Clearly, the plaintiff was interested in a bonus arrangement under which he would gain substantial extra remuneration.

30 The plaintiff argued that it could not be refuted that the defendant's board had vested the plaintiff with the authority to allocate the bonus payments for its employees. Prior to 2005, no resolutions had ever been passed to approve the bonus payment. It therefore did not stand to reason that if the same issue was placed before the board in a formal meeting, the plaintiff could not vote on it because of Article 83. By vesting the authority in the plaintiff, the board had accepted that he could decide on the bonus allocation of all employees, himself included.

31 The plaintiff cited the case of *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR(R) 940 for the proposition that where articles are silent it may be possible to invoke past practices to "fill in the gaps" (at [46]). He submitted that where:

(a) a director has been authorised to carry out a certain act on behalf of the company in which he has an interest;

(b) the director's interest is known to the Board and its shareholders; and

(c) the director has been carrying out the act for many years;

these factors constitute relevant past practices which should be taken into account when determining the applicability of Article 83. The plaintiff had been allocated his bonus under the remuneration policy in force since 1996 and it would be wrong to ignore this fact now and rely on an excessively literal interpretation of Article 83.

32 The evidence, however, showed that the question of bonus had not gone to the board prior to 2005 because during the preceding years, the plaintiff had always consulted with Mr Bennett on the bonus to be allocated to the employees and had only proceeded with such allocation after he obtained Mr Bennett's approval. There was no precedent for the December Resolution and the defendant had not established a practice which ignored the provisions of Article 83 and permitted the plaintiff to vote in favour of his own bonus payment. The plaintiff during cross-examination admitted that during the period from 1996 to 2005, he had consistently sought approval from the defendant's shareholders to pay bonuses for those years. The documentary evidence showed that at the end of each financial year, the plaintiff would write to Mr Bennett seeking his approval before the specific bonus amounts were paid out. The plaintiff also agreed that when he sought Mr Bennett's approval for the bonus formula, he had consulted Mr Bennett in his capacity as a shareholder.

33 The passage from *Neptune* cited at [29] above states plainly that the shareholders can exempt an officer of the company from compliance with the rule against self-dealing. During the years when the plaintiff consulted with Mr Bennett on the bonus allocation, this is what happened. The applicability of Article 83 did not need to be considered. It was only after Mr Bennett was no longer able to represent the shareholders and Mr Dangremond as the shareholders' representative instructed him not to pay bonus that the plaintiff had to consider a different route for approval of bonus payments. That was when the December Resolution was passed and Article 83 came into play. I find therefore that there was no practice in the defendant that provided for the strict terms of Article 83 to be ignored if a director's resolution had to be passed to approve a bonus payment.

Was the December Resolution in the defendant's best interests?

34 Assuming that I am wrong in concluding that Article 83 applied to the December Resolution, I

must consider whether that resolution should be invalidated on the basis that the plaintiff acted in breach of fiduciary duties when he passed it. The main question to determine here is whether the December Resolution was passed in the best interests of the defendant. As stated earlier, the defendant's shareholders had not consented to any payment of bonus. In fact, on 22 November 2005, the plaintiff had written to Mr Dangremond to seek the consent and approval of Refco Inc "as the Manager of our holding company Refco Global Holdings LLC" to make bonus payments to the employees for the period 1 March 2005 to 30 September 2005. On 23 November 2005, Mr Dangremond instructed the plaintiff that he was not to make any payment of bonus and that there was "no room" to discuss the issue as the Refco Inc board would not approve the payment.

35 The defendant argued that when a company is solvent, the interests of the shareholders of the company should, generally, be regarded as the interests of the company. Where the company is to be sold, the interests of the company would even more acutely reflect the interests of the shareholders, particularly where the shareholders are in financial trouble. This is because the very purpose of the sale would be to ensure that the assets to be distributed to and among the shareholders are maximised. Accordingly, it submitted that Refco Inc's interests were at all material times representative of the defendant's interests and that when the plaintiff failed to follow Refco Inc's directions that no bonuses were to be paid, he failed to act in the best interests of the defendant.

36 In the case of a private company like the defendant, which has been set up for commercial purposes, what are in its bests interests must generally be assessed with regard to what actions would enable the company to carry on its business efficiently, profitably and legally. Such actions would generally include paying adequate remuneration, including bonus, to capable staff. The conclusion of the Acquisition Agreement changed the situation in relation to the defendant because the purpose of that agreement was for the defendant to sell its business to Man Financial. Thereafter the actions that would be in the best interests of the defendant were those actions that would promote the smooth conclusion of the sale and assist the defendant in meeting its legal obligations under the Acquisition Agreement. There would be no need to pay bonus to retain staff unless doing so would further the sale or avoid unprofitable litigation. In the absence of such a need, the defendant's main interest would lie in procuring that after the completion of the sale it would have as much cash in its account as possible to be available to its shareholders on its voluntary winding up.

37 The Acquisition Agreement provided in s 8.1(d) that each of the parties would not "make any commitments to pay on or after the Closing Date any bonuses or other benefits to employees of the Business other than in the ordinary course of business". The defendant was thereby under a contractual obligation not to pay bonuses to its employees except in the ordinary course of business. The December Resolution was not passed in the ordinary course of business as the general policy of the defendant was to declare and pay bonuses only after the end of its financial year. At the time of the December Resolution, the 2005/2006 financial year had not ended yet. Thus, the passing of the resolution, if it created an obligation to pay bonuses to the employees of the defendant, would cause the defendant to be in breach of the Acquisition Agreement.

38 The plaintiff argued that the objection as to timing was misconceived and that the December Resolution did not authorise the payment of any bonuses before the end of the financial year. The December Resolution had provided that the bonus was to be notified to the liquidators of the defendant for the liquidators' follow up action. The defendant was placed in members' voluntary winding-up on 30 November 2006 and this date was well after the end of the defendant's financial year on 28 February 2006. Based on the December Resolution, the defendant would only need to pay the bonuses after 30 November 2006. The plaintiff's argument misses the point because, as noted above, the defendant in the ordinary course of events decided whether to declare a bonus (and if so how much) after the end of the financial year. The ordinary practice of the defendant was that if it

decided to declare a bonus, it would do so for the entire financial year unlike the December Resolution which accelerated the bonus payment and declared bonuses only for seven months. Further, the plaintiff could not have believed that the bonuses declared by the December Resolution were payable only after the end of the financial year because, in his claim herein, he had prayed for interest to be paid to him on the amount of his bonus "from 4 December 2005 until payment". There was no basis to make a claim for interest from 4 December 2005 if, in the plaintiff's opinion, the bonus was only payable after 28 February 2006.

39 When Man Financial learnt about the December Resolution, its Mr O'Connell informed the plaintiff that he should not notify the employees of the defendant of the December Resolution and warned him:

> Please be advised that we are insistent that you must not take this action, and, that if you do take such action you are acting in breach of the obligations of Refco under the Agreement, against the interests of the Refco estate and Man Financial. Further, by taking this action you will put in serious jeapardy [*sic*] the intention to close the Singapore transaction to-day as intended …

40 It is therefore my view, that by procuring the passing of the December Resolution, the plaintiff *prima facie* put the defendant in breach of the Acquisition Agreement and this was an action that could not be in the interests of the defendant. I must immediately add a caveat to the foregoing opinion. If the defendant was contractually obliged to pay its employees bonuses, then it would be highly arguable whether it was in the defendant's interests to take action to fulfil that obligation even though it caused a breach of the Acquisition Agreement because otherwise the defendant would have been in breach of its contracts with its employees and open to suit by them. I have to consider whether there was such a contractual obligation. If there was, it would be difficult to state categorically that the passing of the December Resolution was not in the defendant's best interests. The issue of contractual liability is also important as it is the second basis of the plaintiff's claim.

41 Before I leave this point, I should avert to the plaintiff's reasons for passing the December Resolution. In his affidavit of evidence in chief, the plaintiff stated several bases for passing the December Resolution:

> (a) The Acquisition Agreement "imposed an obligation to preserve the current business organisation of the Defendant" (at para 79);
>
> (b) "[N]early all employees were unhappy, restive and apprehensive about the takeover" of the defendant by Man (S) (at para 78);
>
> (c) He "strongly felt that the Defendant's management had a duty and obligation to honour the salary and bonus entitlements due to the employees who had worked hard to produce the record performance for the year 2005" (at para 79(1)); and
>
> (d) The legal opinion of the defendant's then solicitors, RT, was that "the employees of the Defendant are entitled to be paid bonus[es] so long as they satisfy the bonus criteria, the Defendant was entitled to pay the bonus[es] prior to and as part of an orderly transfer of its business to Man [(S)]" (at para 80(1)(ii)).

42 The points made by the plaintiff, except for the last, do not establish that the December Resolution was in the best interests of the defendant. First, whilst there was a general obligation under the Acquisition Agreement to preserve the current business organisation of the defendant, this

could not be read to allow a flouting of the obligation not to pay bonuses. Second, the plaintiff did not bring any evidence to show that nearly all the employees were "unhappy, restive and apprehensive" about the takeover of the defendant or how the passing of the December Resolution would have made any difference to this. Sections 8.17(a) and (b) of the Acquisition Agreement imposed an obligation on Man Financial to make a general offer of employment to the defendant's employees on terms of remuneration and other benefits that were comparable to the same enjoyed by such employees prior to the closing. The apprehension which the defendant's employees were feeling could have been dealt with to some extent at least by publicising this obligation on the part of the purchaser. The plaintiff in fact did this and he himself testified as to the steps he had taken to get Man (S) to reassure the staff of the defendant regarding bonus payments if they remained in Man (S)'s employ.

43 Apart from the plaintiff's own efforts, the evidence showed that Man (S) had, prior to the passing of the December Resolution, assured the defendant's employees that it would honour its obligations under sections 8.17(a) and (b) of the Acquisition Agreement. On 28 November 2005, Man (S) sent an e-mail to all the defendant's employees stating that Man Financial wanted to put their minds at rest over the issue of bonuses and assured them that it would honour "all applicable bonus entitlements in the normal course at the relevant time of year". I note that, in the event, this promise was kept in the case of all employees who remained with Man (S) after the end of the 2006 financial year.

44 As for the plaintiff's feelings regarding the duties of the defendant's management, those were irrelevant to a consideration of whether bonus payment would be in the defendant's best interests. The final point regarding the legal opinion of RT is something that I will consider below.

Plaintiff's contractual entitlement to bonus

45 I will first set out the plaintiff's case on this issue. It was common ground that the plaintiff did not have a written employment contract with the defendant. His pleaded case was that the defendant's employees, himself included, were entitled to bonus payments by reason of "the Defendant's policy, practice and/or conduct" and that this was an "express and/or implied term of the employment contracts of the Defendant's employees, including the Plaintiff". He therefore relied on evidence of the practice of the defendant as represented by its bonus payments over the years and by various correspondence and memoranda to show that it was a term of his contract that he was entitled to be paid bonuses on the basis of a profit sharing policy which was always part of his employment contract.

46 The plaintiff stated that the remuneration policy of the defendant was as follows:

(a) The defendant's remuneration policy was based on the principle of revenue and profit sharing;

(b) The policy was fine-tuned from one based purely on commission payouts to one where commission payouts were combined with low base salaries; and

(c) Even under the old remuneration policy based on commission payouts, the employees of the defendant had an in-principle entitlement to the total commission payouts but it was the management (represented by the plaintiff) who had the discretion to decide how to allocate the total commission payable among the various employees.

47 In 1996, the defendant adopted a bonus formula ("the Bonus Formula") based on 30% of pre-

tax profits adjusted for cost of capital. The Bonus Formula was announced to all employees of the defendant in a memorandum dated 23 January 1996 issued by the plaintiff. This memorandum stated, *inter alia*:

> Bonus distribution, consequent upon the new remuneration system will henceforth be on a financial year basis. The company will make an Advance Bonus payment in January of every year and a Final Bonus payment around end May after the final results of the financial year have been determined. *A profit sharing formula has been agreed with shareholders whereby a fixed percentage of the pre-tax profits of the company will be distributed as bonuses to all staff, the quantum of distribution to individual staff will be dependent on departmental profits where applicable and individual staff performance*.
>
> ...
>
> … *Staff assessments will be principally done by department heads who will take into account and consider the feedback performance reviews received from other staff or third party customers. Bonuses for sales and service staff will be highly depend[e]nt on the profit performance of their department and section* although they will receive some benefits from the profits of other departments if they do not do as well. I will be reviewing the current criterias [*sic*] for staff evaluation with your department heads with a view to improving the evaluation process.
>
> [Emphasis added]

The plaintiff also referred to various correspondence between himself and Mr Bennett and the chief financial officer ("CFO") of Refco Inc to establish the existence of the Bonus Formula. He noted that the bonus payments to the defendant's employees for the financial year ended 2003 which was based on the Bonus Formula were not challenged by the defendant during cross-examination. In the plaintiff's e-mail of 2 November 2001 to the CFO, the plaintiff had stated:

> Year end bonuses for Refco Singapore (RSPL) and Refco Investments Pte Ltd (RIS) including operations in India, Tokyo are based upon actual results (after audit) and payable to staff around May of each year. *They are paid out of RSPL and the provision for the company is based on 30% of pre tax profit, adjusted for a 5% return on shareholders funds. Head office does not determine any bonus here, but the bonus list is normally approved by Bennett before payment*.
>
> *I just want to point out that my own bonus also comes out of this bonus provisions. What I recommend for myself is in the bonus list approved by Bennett*.
>
> [Emphasis added]

48 The plaintiff relied on evidence from two witnesses, Mr David Low, the defendant's head of finance and treasury, and Ms Tan Hwee Chin ("Ms Tan"), its finance manager, that bonus based on the Bonus Formula accrued in the accounts of the defendant on a monthly basis. He noted that Mr Winterbottom had agreed that an accrual would mean that the company treated the item as a legal obligation. Ms Tan had also confirmed that in the defendant's quarterly filings with the Monetary Authority of Singapore and the monthly filings with the Singapore Exchange, the bonuses were treated as liabilities and declared as such. Ms Tan stated too that during her employment with the defendant, the bonus declared by the company was consistent with the bonus policy told to her by the plaintiff.

49 The plaintiff said that his right to share in profits of the defendant was also expressly

incorporated in Article 94 of the defendant's Articles of Association which reads:

> 94. A managing director shall, subject to the terms of any agreement entered into in any particular case, receive such remuneration (whether by way of salary, commission, or participation in profits, or partly in one way and partly in another) as the directors may determine.

50 After the introduction of the Bonus Formula in the financial year beginning 1 March 1996, the plaintiff received the following bonus payments:

Calendar Year	Salary	Bonus	Benefits in kind	Total	Bonus as a percentage of total income
1997	$320,000	$97,495	$25,278	$442,773	22.1%
1998	$324,000	$455,000	$75,531	$612,163	53.2%
1999	$324,000	$308,397	$31,645	$664,042	46.4%
2000	$324,000	$480,000	$44,677	$848,968	56.5%
2001	$324,000	$350,000	$8,373	$682,373	51.3%
2002	$352,973	$218,674	$40,516	$612,163	35.6%
2003	$324,000	$477,000	$95,561	$896,561	53.2%
2004	$324,000	$922,164	$29,308	$1,275,472	72.3%
2005	$299,455	$1,584,190	$30,239	$1,913,884	82.8%

51 The plaintiff emphasised that the table showed that bonus payments formed a significant component of his remuneration. The bonus component went up to a high of 82.8% in 2005 including the bonus paid for the defendant's financial year ended 28 February 2005, because the defendant was particularly profitable in that year. The plaintiff argued that the table made it apparent that bonus had to be an integral part of his annual remuneration as excluding bonus would render such remuneration to be not commensurate with his position and responsibility.

52 The plaintiff also called various former employees of the defendant to testify in relation to the plaintiff's case on the contractual entitlement to bonus. Among these were Mr Jeremy Ang who had been employed by the defendant from 1984 to 2005 ending up as head of commodity derivatives and also executive vice president. He stated that while he worked with the defendant, it had always paid bonus on the principle of revenue and profit sharing. In the mid 1990s, the Bonus Formula was introduced. Of the 30% of the profits allocated to bonus, 20% was allocated to the front office while ten percent was allocated to the back office. The Bonus Formula was a minimum formula and the defendant had, on numerous occasions, paid its employees bonuses which exceeded the allocated sum based on the 30% formula. All employees of the defendant had an expectation that bonus would be paid and bonus was in fact paid every year except for 2005 when the defendant was taken over by Man (S).

53 Ms Sheila Krishnan, head of audit and compliance, who worked for the defendant from 2001 to 2006 testified that the defendant's remuneration policy was based on the principle of profit sharing

which was a characteristic of the broking business. During her employment, she received bonus payments in April or May each year after the end of the defendant's previous financial year in February. Her understanding of the defendant's remuneration policy was that the employees were entitled to bonus payments so long as the company made profits for that year but the quantum of the bonus paid was dependent on the performance of the individual employee and his/her department. Ms Ang Yang Noi Judy, the human resource manager of the defendant from 1987 to 2005, gave evidence as to how the bonus was arrived at. The amount of bonus payable to each employee would be decided by the plaintiff in consultation with the department heads using a bonus worksheet prepared by Ms Ang. When the bonus payment had been finalised, she would prepare two documents: the bonus listings and the bonus summary sheet setting out the proposed bonus payable to each employee. These documents were then sent to Mr Bennett.

54 The plaintiff also considered it significant that various officers of Man Financial had in November and December 2005 informed the defendant's staff that Man Financial would honour applicable bonus entitlements. For example, Mr Daniel Yeo, managing director of Man Financial, had informed the defendant's ex-employees on 8 December 2005 that:

> Any *applicable bonus entitlements* that would have been due to you at the relevant time after Refco's year end if you had remained an employee of Refco will be computed using the same methodology as used by Refco in previous years and payable in April 2006 in accordance with the normal course of your employment with Refco.
>
> [Plaintiff's emphasis]

Ms Ang, who stayed on after the takeover, confirmed that she was paid bonus in April 2006 by Man (S) as were other ex-employees of the defendant who continued to be employed by Man (S). The bonus that was paid by Man (S) was the same amount as per the bonus summary sheet and bonus listing for the seven months ending 2005 which Ms Ang had prepared on the plaintiff's instructions while still working for the defendant.

55 The plaintiff submitted that the actions of Man Financial and Man (S) showed that they recognised the bonus entitlements of the defendant's employees and the defendant's obligation to pay such bonus.

56 The defendant's position was that there was no contractual entitlement to bonus because:

(a) Where written employment contracts were issued by the defendant, those contracts stated expressly that bonuses were discretionary;

(b) From 1 April 2005, the terms of the defendant's Employee Policy and Practice Manual ("the Manual") were incorporated as part of the defendant's employees' terms of employment and the Manual stated that the defendant's wage policy regarding bonuses was that they were discretionary. The defendant cited the following passage from the Manual:

> Refco pays employees on the basis of the market value for the job based on the employee's qualifications, experience and expected performance. In addition, employees receive annual discretionary bonus and/or profit sharing bonuses determined on the basis of the performance of the employee and his/her business unit.

(c) Contrary to the plaintiff's position that the defendant's employees had a contractual entitlement to a guaranteed bonus on the basis of the defendant's previous "policy, practice

and/or conduct", the actual policy, practice and conduct of the defendant showed that bonuses had been paid on a discretionary basis.

57 The plaintiff was not able to establish an express contractual entitlement to bonus. The documentation produced showed that the defendant did not want to be tied down on bonus entitlements. In fact, the defendant was able to show that in many instances, it had employed personnel on the basis that bonus payments were discretionary. The plaintiff himself had signed off on letters of appointment that stated expressly that bonus payments would be discretionary. For example, on 20 April 2001, the defendant issued a letter of appointment to one Ms Chan Hien Leng Dorothy and in that letter it was specifically provided that "[d]epending on the company's performance, any bonus payment will be at the discretion of the company". Another letter of appointment, this one issued on 29 October 2003 to Mr Chua Chiam Siang Jordan, stated that he would be able to participate in "any discretionary bonus" arrangement that may thereafter be in force. Both these letters were signed by the plaintiff. The express terms of the letters showed that when it came to bonus entitlements, the defendant was not willing to confer such entitlements in black and white. As the managing director of the defendant, the plaintiff was careful to ensure that the letters of appointment did not contradict the defendant's intentions.

58 The Manual was consistent with the policy disclosed in the letters of appointment referred to above. As cited above at [56], it referred expressly to the "annual discretionary bonus". Although the Manual was introduced only in April 2005, it formed part of the conditions under which all employees (including the plaintiff) were employed by the defendant. Indeed, it is clearly stated in the Foreword to the Manual that:

> All employees will be required to adopt and adhere to the contents of the manual as company policy. You will sign off and acknowledge on a separate acknowledgement letter as having read, understood and agreeing to abide by the contents of the manual.

The plaintiff was obviously aware of the contents of the Manual although in court he tried to play down his understanding of the same.

59 The documentary evidence in the form of the Manual and the letters of appointment being so clearly against the express provision of contractual bonus, it is not surprising that the plaintiff's submissions on this issue concentrated on establishing that the "policy, practice and/or conduct" of the defendant was completely contrary to what had been written and established a contractual entitlement that the documents sought (ineffectually, from the plaintiff's viewpoint) to deny. There are, however, a number of difficulties in relation to the argument that the defendant's policy, practice and/or conduct was that the employees enjoyed a contractual entitlement to bonus payments according to the Bonus Formula.

60 The witnesses called by the plaintiff supported his position that the defendant had shared its profits with its employees through its Bonus Formula. As the defendant pointed out, however, the principle of an employer's sharing of profits with its employees does not, in itself, lead to the conclusion that these employees are contractually entitled to these payments. An employer can exercise its discretion annually to pay out good bonuses in a competitive industry year after year, but that does not transform such payments into a contractual entitlement, whether as to the granting of the bonuses or the quantum. The plaintiff's own actions in sending out letters of appointment to new employees which specifically indicated the discretionary nature of the bonus payments must indicate his own awareness that a practice cannot be so easily transformed into a contractual entitlement.

61 The heart of the plaintiff's case on the contractual entitlement basis is that there was an

agreed formula, the Bonus Formula, which governed the bonus payouts. He pleaded that by a fax dated 26 December 1995 he had proposed the Bonus Formula to Mr Bennett and by his reply of 4 January 1996, Mr Bennett had agreed to the same. However, the language of the 4 January 1996 letter indicates that Mr Bennett's agreement to the use of the Bonus Formula was only for the financial year ended 1996. Mr Bennett said, *inter alia*:

> Thank you for your telephone call today. In confirmation of our discussions you may proceed to pay an additional S$255,000 in respect of the bonus pool for the year ending February 28, 1995.
>
> *As far as the current year arrangements are concerned*, we agree that the bonus pool shall equal 30% of adjusted pre-tax profits. …
>
> [Emphasis added]

From the evidence it could also be gathered that rather than the bonus each year being determined by the Bonus Formula, it was determined by Mr Bennett. The first example is that given above. In addition to what he said in January 1996, on 17 April 1996, in relation to the same bonus, Mr Bennett stated that "we [meaning the shareholders] retain the right to adjust this formula (and reduce the pool)" and also said that nothing could be confirmed unless "we have formally agreed on the numbers and advised this to you". The plaintiff himself cited another example of Mr Bennett's overriding discretion in relation to the bonuses paid out for the financial year ended February 2005. In November 2004, Mr Bennett had written to him and asked that the bonus payable to the Forex department be reduced and in the event the bonus paid to that department was reduced from 30% to 20%.

62 The evidence also showed that whilst there may have been a policy to generally aim to pay out 30% of profits in bonus, this was not cast in stone since the bonus payments sometimes varied. During the trial, the plaintiff confirmed that the bonus paid by the defendant for the financial years ended February 2004 and February 2005 was less than 30% of the defendant's adjusted pre-tax profits. In the case of the financial year ended February 2004, the bonus paid out was 28.98% of the profits whilst the following year, bonus amounted to 24.08% of the profits. It would therefore appear that the Bonus Formula was a guideline by which provisions were made by the defendant for bonus payments at the end of its financial year, should it exercise its discretion to make such payments. The defendant was financially prudent in making such provisions but the act of doing so did not mandate payment out of the entirety of the sums that had been provided.

63 The plaintiff contended that bonus accrued monthly because the defendant's management accounts recorded bonus provisions on a monthly basis. During cross-examination, however, the plaintiff agreed that for the year ended February 2005, there was a variance between what was provided for as bonus in the management accounts and what was eventually paid out. It was put to him that the amounts which he said accrued on a monthly basis as bonus payments to the defendant's employees were not necessarily what was paid out to them in total and he agreed. The fact that bonus did not accrue monthly was also shown by the fact that bonus was always paid after the end of the financial year and would not ordinarily be paid out to an employee who left the defendant's employment before the end of any financial year. This was admitted by the plaintiff who conceded that payment of bonus to employees who left during the financial year was only made on a case-by-case basis and was a matter for him as managing director to decide in his discretion.

64 The evidence also showed that far from simply determining what bonus was payable according to the Bonus Formula and paying that sum out after the end of each financial year, the plaintiff invariably sought Mr Bennett's approval. At trial, the plaintiff admitted that he sought such approval from Mr Bennett in the latter's capacity as the representative of Refco Inc. At the end of each

financial year, the plaintiff would write to Mr Bennett seeking his approval before the specific bonus amounts were paid out. The plaintiff also admitted that over the period from 1996 to 2005, he had consistently sought approval from the defendant's shareholders to pay bonus. If the plaintiff and the other employees of the defendant had been contractually entitled to bonus, there would have been no need to seek approval for payment of the same. This evidence also established that the amount of bonus to be paid by the defendant had to be approved, ultimately, by Mr Bennett; it was not fixed by the Bonus Formula.

65 Regarding the submission that Man Financial recognised the bonus entitlements of the defendant's employees, the evidence does not support the same. The language used by Man Financial to the employees was "applicable bonus entitlements". That was a neutral phrase and did not indicate that Man Financial had agreed that there was a contractual obligation to pay bonus.

66 The plaintiff raised a further argument for me to take into consideration if I was to find that the bonus payment was a discretionary matter. He argued that even if such was the case, such discretion had to be exercised in a reasonable manner and not capriciously, irrationally or in bad faith. In support of this proposition, the plaintiff cited three first instance English cases *viz*, *Clark v BET Plc Ltd and another* [1997] IRLR 348 ("*BET*"); *Clark v Nomura International plc* [2000] IRLR 766 ("*Nomura*") and *Horkulak v Cantor Fitzgerald International* [2003] IRLR 756 ("*Horkulak*").

67 In *BET*, in the context of a term which provided that the employee's salary "shall be reviewed annually and be increased by such amount if any as the board shall in its absolute discretion decide", the court held (at [10]) that this created a contractual obligation to provide an annual upward adjustment in salary and (at [11]) "if the board had capriciously or in bad faith exercised its discretion so as to determine the increase at nil and therefore to pay Mr Clark [the employee claimant] no increase at all, that would have been a breach of contract".

68 In *Nomura*, the plaintiff was a senior equities trader who had been dismissed by the defendant employer. The plaintiff claimed his bonus under a discretionary bonus scheme which was based on individual performance. The plaintiff was not awarded any bonus during the three-month notice period while other senior employees were awarded substantial bonuses. The court held, *inter alia*, that the employer was in breach of contract for not awarding the plaintiff a discretionary bonus for the nine-month period prior to his dismissal during which he had earned profits for the company, notwithstanding that the contract provided for a discretionary scheme. The court proceeded to hold (at [80]) that the employer's decision to award a nil bonus to an employee who had earned substantial profits for the company was plainly perverse and irrational and did not comply with the terms of the employer's discretion. In *Horkulak*, the perverse and irrational test was rejected and when considering whether an employee who had been, in effect, wrongfully dismissed, was entitled to recover a discretionary bonus, the court held that the right approach was that the employer had to exercise its discretion reasonably and in good faith. In a judgment that reversed the decision at first instance only in terms of quantum of damages, *Horkulak v Cantor Fitzgerald International* [2004] 1 RLR 942, the Court of Appeal held (at [30]) that there would be an implied term that there should be genuine and rational exercise of such discretion.

69 These three English cases show that the English position is not yet settled since there is still a difference of opinion as to the correct test to be applied. The English authorities do, however, appear to be leaning in favour of regulating the way in which an employer exercises his discretion in relation to the payment of bonus and against holding that the discretion is an absolute one. The position in Singapore, however, is not the same as the English one. In *Latham v Credit Suisse First Boston* [2000] 2 SLR(R) 30, the Court of Appeal set out the principles that must guide me.

70 In that case, the appellant, Latham, had brought an action against the respondent company claiming, amongst other things, that he was wrongfully dismissed and that the respondent owed him a guaranteed bonus of almost US$2m. Latham's case was premised primarily on the argument that the company had promised him a guaranteed bonus during negotiations prior to his employment. Latham's appeal against the dismissal of his claim was unsuccessful. On the facts, the Court of Appeal considered that it was unlikely that the company's representative had promised him such a bonus. The Court of Appeal went on to discuss whether Latham would have been entitled to a discretionary bonus if he had not been dismissed from the company. The relevant clause of Latham's employment contract stated that "a bonus may be paid to you at the end of each calendar year, based on Company profitability and your performance during the year".

71 The Court opined that in the circumstances a bonus payment would be entirely discretionary. Even if Latham had continued to be employed at the company, he would not have had a legal right to claim a bonus from the company. At [71] – [72] the Court stated:

> 71 In our view, it would be wrong to allow an employee in Latham's position to lay claim to a discretionary bonus on a proper construction of his employment contract when his services were terminated even before his bonus was properly declared. In both *Walz v Barings Services Ltd*, a preliminary hearing before the English Industrial Tribunal, and *Bajor v Citibank International plc* (Queen's Bench Division, 19 February 1998, unreported), the plaintiffs were employed in an industry in which the employees operated within a 'bonus culture' in which bonuses were very commonly and even invariably paid. However, both plaintiffs were held not to be entitled to claim the bonus as a matter of contractual obligation after being dismissed, even if they were wrongfully dismissed as in the case of *Bajor v Citibank International plc*. In *Walz v Barings Services Ltd*, this was so even though the bonus had already been announced by the respondents. It was held there that, as the bonus was totally discretionary, there was simply no obligation to pay. Announcing it did not convert the payment of the bonus into a contractual obligation.
>
> 72 Latham's situation was akin to the plaintiffs in these two cases. Unless the bonus had been expressed to be guaranteed, an employee in Latham's position could not claim to be legally entitled to a bonus, the granting and quantum of which are entirely at the discretion of the employer. While he might have hoped for a bonus if he had indeed remained in the employ of CSFB, the fact remained that, even then, he would not have been able to claim to be entitled to a bonus as of right as it was entirely at the discretion of CSFB.

72 I find that the plaintiff had no contractual right to bonus because:

> (a) his employment contract did not contain any term guaranteeing bonus payments;
>
> (b) the evidence did not support the plaintiff's assertion that the defendant's policy, practice and/or conduct was that bonuses were guaranteed and calculated based on the Bonus Formula; and
>
> (c) the discretion vested in the defendant as to whether to pay bonus or not was an absolute discretion not fettered in any way.

The counterclaim

73 The issue to be considered in relation to the defendant's counterclaim is whether the plaintiff was in breach of his fiduciary duties and duties of fidelity and is therefore liable for the payments

made by the defendant under settlement agreements with its ex-employees.

74 The defendant's case in this regard is that there was no basis for the December Resolution to have been passed as:

(a) the defendant's employees, including the plaintiff, had no contractual entitlement to guaranteed bonus payments;

(b) the defendant's shareholders had expressly instructed the plaintiff not to make bonus payments;

(c) the Acquisition Agreement only allowed payment of bonuses in the ordinary course of business;

(d) there was no evidence of any risk that the defendant's employees would not transfer over to Man (S) on the closing date; and

(e) the legal opinion relied upon by the plaintiff was premised on insufficient facts.

The first four of the above points have already been discussed and I have found that they have been established.

75 I now turn to the legal opinion which was issued by RT. The plaintiff sought to rely on this to justify the declaration of bonuses pursuant to the December Resolution. This legal opinion was given on the basis of instructions which Ms Sheila Krishnan gave to RT. In so doing, Ms Krishnan relied on facts conveyed to her by the plaintiff. In her testimony, Ms Krishnan confirmed that RT had not been advised that:

(a) the bonus provision in the management accounts was not always the same as the amounts eventually paid out at the end of the financial year; and

(b) the defendant's shareholder's approval was always sought before bonus was declared at the end of the financial year.

The above facts were critical to the formation of an opinion on whether the bonus was contractual or discretionary. As RT did not have a chance to consider the impact of these facts on the legal position regarding bonus, its opinion was based on insufficient facts and could not be used to justify the passing of the December Resolution.

76 The opinion was dated 18 November 2005. A few days later, on 25 November 2005, RT wrote to the plaintiff and gave him further advice as follows:

> [The plaintiff] should be reminded that while it is *arguable* (on the basis of the reasoning set out) that the employees are entitled to bonus, *the actual quantum may still be discretionary*, although it is also arguable that that discretion needs to be exercised reasonably and in accordance with agreed bonus payment criteria (if any). To the extent that such criteria *(sic)* exists and *is known and agreed by all parties (particularly if it forms part of their respective employment contracts)* I believe that the case for bonus entitlement and scope of entitlement (i.e. quantum) will be strengthened. However to the extent that the bonus payments are patently higher than normal or higher than need be, then the good faith of [the plaintiff] and the board will be called into question jeopardising the entirety of any decision to give and pay out

bonus.

So long as the company is solvent and will not be rendered insolvent by the payment of bonuses, *the only party capable of complaint is the shareholders, and then only if they can show that the board and [the plaintiff] acted contrary to their fiduciary duties as directors. Reasonableness and good faith are critical*. If there is doubt as to whether a higher or lower sum should be paid [to] an employee, prudence and law dictates payment of the lower sum in the exercise of the discretion as to quantum determination.

[Emphasis added]

77 From the above, it can be seen that RT were qualifying their original opinion and indicating that it was arguable that the bonus payment was an entitlement. They were also saying that discretion to determine the quantum of bonus had to be exercised reasonably and the board had to act in accordance with its fiduciary duties in making the payments and the determination of quantum. The board therefore had to act in good faith as regards any decision to make interim bonus payments. RT had indicated that the case for an entitlement to bonus would be strengthened to the extent that fixed criteria for the determination of bonuses existed and were known and agreed to by all the parties. The lawyers were not informed that there were no fixed criteria.

78 In all the circumstances of the case, bearing in mind the basis on which the opinion of 18 November 2005 was issued and the qualification which followed on 25 November 2005, I agree with the defendant's submission that the plaintiff was not entitled to rely on the legal opinion to justify his decision to proceed to pass the December Resolution. As I have found, the plaintiff knew that there was no contractual entitlement to bonus much less an entitlement to a bonus payment before the end of the financial year, no matter how novel the circumstances. In this situation, it was against the defendant's interests for the plaintiff to pass a resolution which conferred bonus entitlements that did not exist otherwise on the defendant's staff. The defendant thus became liable to make payments which it would not otherwise have had to pay.

79 I conclude that the plaintiff was in breach of his fiduciary duties when he procured the passing of the December Resolution. I note that the other director, Mr Keith Tay, testified that he was not informed of Mr Dangremond's e-mail instruction of 23 November 2005 to the plaintiff that he was not to make any bonus payments. Instead the plaintiff had only shown him the plaintiff's own e-mail of 28 November 2005 which stated that he had not received a substantive response to his earlier letter to Mr Dangremond.

80 As a result of the passing of the December Resolution, the defendant became liable to claims for bonus from various employees. To date, it has paid out $769,900.80 to these employees. The defendant says that it has also incurred other expenses as a result of these claims. It is entitled to be indemnified by the plaintiff against all loss proved.

Conclusion

81 For the reasons given above, I dismiss the plaintiff's claim and give judgment to the defendant on its counterclaim for damages to be assessed. The plaintiff shall bear the defendant's costs of the claim and counterclaim.