Mohamed Bassatne and Others v Rifaat El Gohary and Others
[2004] SGHC 63

Case Number : Suit 1134/2001/D

Decision Date : 29 March 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Cavinder Bull, Low Sze Gin and Chia Voon Jiet (Drew and Napier) for plaintiffs; Kenneth Tan SC and Foo Jien Huei (Kenneth Tan Partnership) for defendants

Parties : Mohamed Bassatne; Bahaeddine Bassatne; Walid Bassatne — Rifaat El Gohary; Bakri International Energy Co Ltd; Bakri Trading Company Inc.

Contract – Collateral contracts – Whether parties' liability conditional on execution of sale and purchase agreement.

Contract – Formalities – Whether plaintiffs have locus standi to bring claim.

Contract – Intention to create legal relations – Whether MOU was an enforceable agreement.

Contract – Privity of contract – Whether second and third defendants were parties to MOU.

Contract – Variation – Effect of addenda on MOU.

29 March 2004

Judgment reserved.

Lai Siu Chiu J:

Introduction

1 Mohamed Bassatne (the first plaintiff) is the son of Bahaeddine Bassatne (the second plaintiff) and the nephew of Walid Bassatne (the third plaintiff) who is the younger brother of the second plaintiff. The Bassatnes are a Lebanese family from Syria. All three plaintiffs are shareholders and directors of a Singapore company known as BB Energy (Asia) Pte Ltd ("BBEA") which was incorporated on 14 January 1989 under its former name, Virginia Oil Trading Pte Ltd. The first plaintiff is the managing director of BBEA. He is also the major shareholder of BBEA and presently holds 63.5% of the issued shares. BBEA trades in crude oil and petroleum products. The company is in fact an approved oil trader registered with the Trade Development Board, which status allows it to enjoy certain tax benefits.

2 BBEA is related to or associated with, a group of companies which come under the umbrella of BB Energy Holdings NV ("BBENV"), a company incorporated in Curacao, Netherlands Antilles. The BB Energy group of companies ("BBE Group") is controlled by the Bassatne family, directly or indirectly. The group includes BB Energy (UK) incorporated in England as well as a Panamanian company called BBE Management SA, based in Athens, Greece, of which the third plaintiff is the president. Prior to being posted to BBEA, the first plaintiff was based in London working for BB Energy (UK).

3 Rifaat El Gohary (the first defendant) is an Egyptian national who worked as an oil trader for BBEA between 1975 and 1995, before he left to join another oil trading company, Vitol Asia Pte Ltd ("Vitol"). He was the managing director (as well as a director) of BBEA when he left the company, and his post was taken over by the first plaintiff. The first defendant (according to the plaintiffs) was

retrenched from Vitol in March 1998, rejoined BBEA in April 1998 but left the company for the second time in August 1999. As at the date of this trial, the first defendant works for Bakri Trading Asia Pte Ltd ("Bakri Asia") which company was incorporated on 27 March 1999, with the first defendant and Mohammed Hani Bakri as the initial directors. The first defendant is currently a shareholder and the managing director of Bakri Asia.

4 The major shareholder of Bakri Asia is Bakri Trading Company Inc (the third defendant), a company registered in Saudi Arabia. Bakri International Energy Co Ltd (the second defendant) is another company in the Bakri group whose shareholders are all members of the Bakri family from Saudi Arabia. The two companies carry on oil trading and related activities. The Bakri group of companies is managed by five brothers, namely Mohammed Hani ("Hani"); his elder brother Ghassan; another older brother Dr Zohair ("Zohair"), who is a medical doctor by training; Raad, an accountant by training; and Waleed, an architect by training. Both Hani and Zohair are directors of the second and third defendants. Their father, Sheikh Abdul Kader Al Bakri, is the chairman of the second and third defendants as well as of the Bakri holding company. Hereinafter, both Hani and Zohair will be referred to collectively as "the Bakri brothers". The Bakris are a formidable family, as will become apparent later in my judgment.

The facts

5 On or about 16 March 1998, an oil conference was held at Dubai. The plaintiffs, the first defendant and the Bakri brothers attended the conference. The plaintiffs were introduced to Hani and Zohair by the first defendant. The parties had several discussions during which Zohair expressed an interest in BBEA's operations as, at the time, the Bakri group did not have any presence in the Far East in oil trading.

6 The first defendant and Zohair proposed a joint venture between the Bassatne and Bakri families using BBEA as the vehicle. The joint venture would allow the two families to co-operate not only in BBEA but also in certain geographical areas.

7 Consequent on the discussions, the first plaintiff wrote on 2 April 1998 ("the proposal letter") to Zohair proposing a joint venture. The salient points in the proposal letter are as follows:

(a) the Bakris or new investors would purchase 35% of BBEA's shares from the existing shareholders;

(b) the purchase price would be used as working capital for the company;

(c) all existing credit lines with BBEA's banks in Singapore would be passed on to the joint venture, guaranteed by the shareholders in accordance with their percentages of shareholdings.

8 The Bakris were interested in the above proposals and between 16 and 19 April 1998, the plaintiffs met at Jeddah, Saudi Arabia, with the first defendant and the Bakri brothers, to negotiate the terms of the joint venture. The negotiations culminated in the signing of a memorandum of understanding (drafted by the first plaintiff) on 19 April 1998 ("the MOU") by all six persons. The second and third plaintiffs signed the MOU not in their personal capacities but "as representatives of different shareholders in BBEA, hereinafter referred to as 'BBEA' and representing BBEBV, hereinafter referred to as 'BBEBV' [another company owned by the Bassatnes]", while the Bakri brothers signed the MOU as "representing Bakri Group of Companies Jeddah, Saudi Arabia, hereinafter referred to as BG". As at 19 April 1998, the first plaintiff held 51% whilst the second and third plaintiffs were beneficial owners of 29% and 20% respectively, of the issued shares in BBEA. The shares of the

second plaintiff were held in trust for him by Haytham Sioufi whilst the shares of the third plaintiff were held by Jeremy Deverson and Tarek Hafez. All three trustees were/are employees of BBEBV or other companies within the BBE group.

9 The MOU contained, *inter alia*, the following terms:

(a) The first defendant would purchase 5% (25,000) of the shares in BBEA for US$257,142.85 from the plaintiffs while the Bakris would purchase 30% (150,000) at US$1,542,857.10. The two sums would be paid into BBEA as additional capital within three years of the completed transfer of shares and subject to the plaintiffs not selling an additional 10% of their shareholdings.

(b) The first defendant and the Bakri group would pay an additional US$2m to the plaintiffs if BBEA achieved within four years from 1 May 1998 a maximum net cumulative profit of 100% or more on the revised theoretical value of US$5.8m. If BBEA achieved less than 100% accumulative net profit and more than 37.5% cumulative net profit within the four years, the amount to be paid would be prorated according to the exact accumulative net profit percentage. If BBEA achieved less than 37.5% net profit on the revised theoretical value within the four years, no payment would be made.

(c) The first defendant and the Bakri group would provide guarantees to Societe Generale and Credit Lyonnais in respect of facilities of US$30m and US$20m respectively granted by the two banks.

(d) The first defendant would be the executive director as well as one of the resident directors of BBEA.

(e) A finance and administrative committee would be formed consisting of Hani, the first and the third plaintiffs (cl 5).

(f) A trading committee would be formed consisting of Zohair, the first defendant and the third plaintiff (cl 5).

(g) The finance and administrative committee would agree on a budget for the expenditure of and the maximum number of employees for BBEA (cl 6).

(h) The share transfer forms would be executed by 1 July 1998 (cl 9).

(i) The original shareholders of BBEA would indemnify the new shareholders against any claims and losses arising from all commitments and contracts and activities executed by BBEA prior to the transfer of shares (cl 2).

(j) The MOU would be governed by and construed in accordance with Singapore law (cl 11).

10 An (undated) addendum ("the First Addendum") was signed by all the parties later that same day; it states:

Pursuant to the Memorandum of Understanding as dated 19 April 1998 and signed by representatives of all new shareholders, it is agreed that the new venture will begin operation effective May 1, 1998.

For the period between May 1 1998 and the final execution of the sale and purchase agreement, all expenses and relevant profit and loss will be for the account of the new shareholders of BBEA.

Although the statement of claim (para 8) put the date of execution of the First Addendum as 21 April 1998, the plaintiffs testified that this was incorrect since by that date, the first plaintiff (accompanied by the first defendant) had left Jeddah for Singapore while the other two had gone back to Beirut. This testimony was supported by entries from the first plaintiff's passport which showed his dates of arrival from and departure to Jeddah as 15 and 20 April 1998, respectively.

11 Pursuant to the terms of the MOU and the First Addendum, the first defendant (according to the plaintiffs) joined BBEA on or about 20 April 1998. In May 1998 the first plaintiff was informed by Hani (who denied it) that the first defendant would represent the second, third defendants as well as the Bakri group in all matters relating to BBEA.

12 Subsequently, according to the plaintiffs, they and the Bakri brothers set about forming the Financial and Administrative Committees stipulated under cl 5 of the MOU. The plaintiffs sent to BBEA's office one Elie Farran ("Farran"), who is the head of accounts at BBENV, to prepare documents requested by the Bakris. The documents were then forwarded to Raad in Jeddah

13 Meanwhile, both sides approached Wong Partnership ("the law firm") to draft the sale and purchase agreement for the shares. Meetings took place in that regard at the office of the law firm, attended by the first plaintiff, the first defendant and Hani.

14 As drafting and finalisation of the sale and purchase agreement took longer than anticipated, the transfer of shares in BBEA from the plaintiffs to the first defendant and the Bakris did not take place as scheduled (on 1 July 1998). Consequently, by another addendum executed on or about 7 July 1998 ("the Second Addendum"), the plaintiffs, the first defendant and the Bakri brothers agreed that the date in cl 9 of the MOU (for the transfer of shares) would be extended to 1 September 1998. The same six persons executed a third addendum on or about 10 September 1998 ("the Third Addendum") to the MOU when the sale and purchase agreement was not signed by 1 September 1998. By the Third Addendum, the parties agreed to further extend the share transfer date to 1 November 1998.

15 Although drafting and finalisation of the sale and purchase agreement was still on-going, it was the plaintiffs' case (which the defendants denied) that the defendants had, to all intents and purposes, performed the MOU in that the first defendant was appointed (unofficially) BBEA's executive director and he traded actively for the company, both on "paper" and in physical cargo. In addition, pursuant to the terms of the joint venture, the Bakris contributed to BBEA's business by developing their own business in Asia – the Bakris supplied oil to BBEA which on-sold to other parties. Any profit arising therefrom was shared between them. Sometimes, BBEA sold oil on behalf of the Bakris.

16 Despite the extension provided in the Third Addendum, the transfer of shares did not take place on 1 November 1998. The plaintiffs blamed the Bakri brothers for the delay, alleging that the latter made (repeated) changes to the various draft agreements prepared by the law firm.

17 In a letter dated 11 January 1999 to the second plaintiff from Hani (written on the letterhead of the second defendant as its vice president, finance and investments), after Hani's visit to BBEA's office, the following points were raised:

(a) the financial position of BEA was worrying especially its losses of 1997 and reduced banking facilities;

(b) the Bakris did not want the first plaintiff but the first defendant to be the managing director of BBEA;

(c) the staff salaries in BBEA were too high and should be capped at US$1m for the first two years;

(d) BBEA's existing bank credit facilities were inadequate and needed to be increased;

(e) a strict trading control system had to be implemented for swaps, paper trades and hedging.

In their closing submissions, the plaintiffs contended that the above points were excuses contrived by the defendants to renege on the joint venture.

18 The second plaintiff replied to Hani's above letter by a letter dated 19 January 1999 wherein he:

(a) rejected the replacement of the first plaintiff by the first defendant as managing director as it went against the terms of the MOU, which stated the latter would be appointed BBEA's executive director;

(b) assured Hani staff cost reductions would be implemented although the first defendant himself opposed the measure;

(c) expressed surprise on the issue of inadequate credit lines, as at Jeddah, he had informed the Bakri brothers of the 1997 trading losses (in excess of US$1m). In any case, the company's credit line of US$40m from Credit Lyonnais remained;

(d) agreed that a trading control system would be put in place.

19 In a letter dated 20 February 1999, again on the second defendant's letterhead, Hani reiterated the points in his earlier letter dated 11 January 1999 and asked for a decision from the plaintiffs by 8 March 1999.

20 The third plaintiff replied to Hani on 4 March 1999 stating that the plaintiffs could not accept any deviations from the MOU in the appointment of the first defendant as the managing director of BBEA in place of the first plaintiff. On the other points raised by Hani, he said the plaintiffs were willing to meet the Bakris for a discussion. The third plaintiff proposed that the parties meet in Beirut or Saudi Arabia between 10 and 15 March 1999 and asked for confirmation of the date. Otherwise, and in the event that the Bakris did not feel ready to meet with the Bassatnes, the third plaintiff indicated that the plaintiffs would implement the wishes of the Bakris that the joint venture be terminated on 8 March 1999.

21 The reply from Hani dated 8 March 1999 turned down the third plaintiff's proposal. Whilst he thanked the third plaintiff for finalising the accounts from 1 May 1998 to 8 March 1999, Hani said he treated the MOU as having expired. This was then followed by another letter from Hani (on the letterhead of the second defendant) dated 8 May 1999, this time to the first and second plaintiffs, giving notice that Bakri Asia had been set up in Singapore for oil trading activities in the Far East. Hani invited the two plaintiffs *and all parties of the MOU* to participate with the Bakri group in such new arrangement if they so desired. In their closing submissions, the plaintiffs stated it was no coincidence that Bakri Asia was incorporated just 19 days after Hani had repudiated the MOU. They

alleged that it explained why the plaintiffs found it increasingly more difficult over the months leading up 8 March 1999, to deal with the Bakri brothers. The Bakri family had their own agenda – to compete with BBEA.

22 In response, the third plaintiff by his letter dated 10 May 1999 to Hani, agreed to the termination and enclosed the profit and loss accounts of BBEA for the period from 1 May 1998 to 8 March 1999 (the joint venture accounts) prepared jointly by Farran and BBEA's finance and operations manager Imad Nasr. If there were no comments on the same from the Bakris, the third plaintiff requested a remittance of US$513,029.40 to the Rotterdam bank account of BBENV, being the Bakris' 30% share of the total losses (US$1,710,098) incurred during the period. I should point out that the figure was subsequently reduced to US$1,525,654.40 in the plaintiffs' statement of claim and correspondingly, the defendants' 35% share was also reduced to US$533,979.02.

23 The Bakris did not pay the sum of US$513,029.40 or any other sum to BBENV, BBEA or to the plaintiffs. Instead, in subsequent correspondence in May 1999, Hani requested the plaintiffs for copies of documents to support the accounts he had received. The plaintiffs invited the Bakri brothers to send their auditor or accountant to Singapore to check all related documents, pointing out that the same could not be sent to Jeddah as they were confidential company documents. This suggestion was not accepted by Hani who said he could not justify payment without supporting documents. In a letter dated 25 May 1999 to BBE Management SA and the third plaintiff, the first defendant supported the stand taken by Hani stating it was the "entire right of a joint-venture partner to ask for detailed documents to be made available to all the parties involved", and to go through such documents and satisfy himself with whatever clarifications the joint venture partner required.

24 Eventually, by his letter dated 29 May 1999 to the first plaintiff and the first defendant, Hani agreed to engage an external auditor to review the accounts of BBEA. The plaintiffs did not object but asked for the auditor's appointment to be expedited. PricewaterhouseCoopers Singapore ("PWC") were appointed subsequently, at the behest of their Saudi associates Al Juraid & Company ("Al Juraid").

25 On or about 21 June 1999, officers of PWC visited the office of BBEA where they were briefed by Imad Nasr. In July 1999, the first plaintiff wrote to Zubir and Hani requesting their decision on the following matters:

(a) nomination of auditors to complete the auditing no later than 1 August 1999;

(b) sharing of auditing fees;

(c) acceptance of the statement of BBEA's "outside" auditors.

26 Hani did not accept the above proposal, stating in his letter (on the second defendant's letterhead) dated 11 July 1999, that all partners in a joint venture have the right to have an auditor go through the accounts of the company or venture and give a report to each partner. He repeated his previous request for accounting documents.

27 PWC commenced their review of the joint venture accounts in October 1999. Thereafter, a dispute arose between the parties relating to the audit by PWC. Al Juraid advised Hani that PWC had reported back to them that the plaintiffs were unable or unwilling to furnish documents which PWC had requested, in order to audit the joint venture accounts. Further correspondence between the parties from November 1999 onwards did not resolve the impasse. The Bakri brothers (particularly Hani) maintained their stand on access to and inspection of BBEA's accounting documents whilst the

third plaintiff contended that BBEA's office had delivered to PWC all documents save for those which were to be shown directly to the Bakri brothers or their representative(s). Hani did not accept the second plaintiff's invitation to meet to resolve their differences. Neither the first defendant nor the Bakri brothers nor any entity in the Bakri group paid their share of the losses demanded by the plaintiffs.

28 In the event, no formal report was produced by PWC either. However, in the course of discovery for these proceedings, the plaintiffs saw (for the first time) a draft report prepared by PWC which stated that the joint venture sustained losses of US$1,648,979, which draft report had been forwarded to Hani on 24 January 2000. Further documents obtained by the plaintiffs in the course of discovery revealed that Hani did not approve of PWC's draft report as he wanted to further reduce their figure for the loss, which figure PWC were awaiting his confirmation on, before releasing their final report. PWC's figure included a loss of US$254,503 which Imad Nasr had omitted or overlooked.

29 The law firm did not finalise the terms of the sale and purchase agreement either. For their services in preparing the aborted shareholders' agreement however, the law firm rendered three bills, the first being on 30 September 1998, addressed to the first defendant, the first plaintiff and the Bakri group. In their letter dated 6 October 2000 to BBEA, the law firm requested payment of the balance ($18,166.27) outstanding on their three invoices, stating that 35% thereof had already been paid by Bakri Asia "being their share of the bill". I note from the law firm's first bill dated 30 September 1998, that they were initially instructed on 28 April 1998 by the first defendant and the first plaintiff.

30 On 21 September 2000, the plaintiffs' English solicitors Clyde & Co (through their Singapore branch) sent a letter of demand to the first defendant, requiring him to pay his 5% share of the loss incurred by the joint venture. In his reply dated 2 October 2000, the first defendant did not deny liability. Instead, he stated that his liability if any, would only be determined when the audit by PWC had been satisfactorily completed. A similar reply was given by Hani to Clyde & Co's letter of demand dated 5 October 2000 addressed to the second defendant. Clyde & Co's letter of demand to the third defendant was forwarded to Bakri Asia and drew a response from the first defendant dated 10 October 2000 wherein he pointed out that the MOU was signed by the Bakri brothers, not by Bakri Asia. The first defendant requested that all future correspondence on the subject be directed to the Bakri brothers in Jeddah. In their closing submissions, the plaintiffs argued that the defendants' replies to Clyde & Co's letters of demand were admissions of liability and that the defences they had raised in this suit were afterthoughts.

The pleadings

31 This writ was filed by the plaintiffs on 7 September 2001. In the statement of claim, the plaintiffs (after referring to the MOU and the various addenda) alleged that it was the common intention at the time the First Addendum was executed, that if the defendants decided not to execute a sale and purchase agreement for the BBEA shares, they would be responsible for all expenses and profit and loss incurred for the period 1 May 1998 to 8 March 1999. The plaintiffs alleged that the defendants were in repudiatory breach of the agreement when they purportedly terminated the agreement by a letter dated 8 March 1999 from Hani to the third plaintiff. They alleged that they accepted the repudiatory breach and took steps to establish what the profit or loss was, for the period 1 May 1998 to 8 March 1999. As BBEA suffered a loss of US$1,525,654.40 during that period, it claimed from the first defendant the sum of US$76,282.70 and from the second and third defendants the sum of US$457,696.32, in proportion to the defendants' shareholdings in BBEA of 5% and 30% respectively.

32 The first defendant filed a defence and counterclaim wherein he:

(a) alleged that the second and third plaintiffs represented themselves to be the beneficial shareholders of the shares in BBEA, then held by Haytham Sioufi, Jeremy Deverson and Tarek Hafez;

(b) denied the existence of any legal entity known as "Bakri Group of Companies";

(c) contended that the MOU was executed by the parties to facilitate the potential investment by the first defendant in BBEA, that it set out terms and conditions upon which he intended to subscribe for shares in BBEA and would only be applicable if and when shares in BBEA were transferred in accordance with cl 9 thereof;

(d) averred that it was the common intention of the parties that he, as a potential new shareholder in BBEA, would not be liable for any commitments or liabilities prior to the execution of the agreement to transfer shares and this was expressed in cl 2;

(e) alleged he contributed his time and expertise to BBEA by engaging in oil trading on its behalf;

(f) averred that the First Addendum was intended to provide for the sharing of administrative costs legitimately arising from the joint venture which could not be covered by the profits of BBEA and would only apply in the event there was a share transfer;

(g) averred that as the plaintiffs were unable to execute the share transfer by 1 November 1998 pursuant to the Third Addendum, he was not and never became a shareholder of BBEA; and

(h) consequently, he was not liable to the plaintiffs.

33 The first defendant alleged the plaintiffs made representations to him which turned out to be false, namely that BBEA had "clean" credit lines when it did not. Consequently he contended he was entitled to rescind the MOU. He counterclaimed for rescission of the MOU and for damages for breach of contract.

34 On the first day of trial, counsel for the defendants applied to amend (which application was granted) the first defendant's defence and counterclaim. In the result, the first defendant (but not the second or third defendants) no longer admitted paras 1 and 2 of the statement of claim. It had been there pleaded that the first plaintiff at the material time owned 51% of the shares in BBEA, that the second plaintiff was the beneficial owner of the shares (29%) held by Haytham Sioufi, and that the third plaintiff's 20% shareholding was held in trust for him by Jeremy Deverson and Tarek Hafez.

35 In their defence and counterclaim, the second and third defendants repeated the first defendant's contention that the MOU and the addenda were not binding agreements but were only documents to facilitate further discussions and negotiations on the potential investment by a Bakri-related company into BBEA. They further denied that the Bakri brothers had acted on their behalf in negotiations and in signing the MOU and the addenda. Only if negotiations were successful would the Bakri brothers have nominated a specific Bakri-related company to contract with BBEA.

36 As the second and third defendants were not privy to the MOU and its addenda or any other contract pertaining to the sale and purchase of BBEA shares, they asserted they were not liable for any losses, commitments or liabilities. The second and third defendants repeated the first defendant's contention that they had no liability before the transfer of shares. If they were indeed liable, then their liability was limited to legitimate expenses and administrative costs not covered by BBEA's

profits, incurred between 1 May 1998 and the date of the final execution of the sale and purchase agreement. Their liability was also subject to fulfilment of cll 5 and 6 of the MOU which were not carried out.

37 The second and third defendants denied that Hani had informed the plaintiffs that the first defendant would be their agent and/or representative and/or liaison or of any other Bakri-related company, in dealing with matters relating to BBEA. However they admitted that Hani terminated the negotiations and confirmed the expiry of the MOU by his letter dated 8 March 1999 to the third plaintiff.

38 The second and third defendants added that the plaintiffs have no *locus standi* to sue in respect of BBEA's losses and expenses. They made the same counterclaim against the plaintiffs as the first defendant.

The evidence

The plaintiffs' case

39 When the first plaintiff (PW1) was cross-examined, he explained that by his reference to the "Bakri Group of Companies" in his proposal letter to Zohair and in the MOU, he meant the group of trading companies belonging to the Bakri family. When he referred to the BBE Group in the proposal letter in relation to the giving of an indemnity, he meant any company or shareholder that would be relevant at that time to give an indemnity. Pressed to clarify his statement, the first plaintiff explained that as the proposal letter was his first to the Bakri family, he could not specify a particular company within the BBE Group, for example BBE Management SA, as Zohair may object if the latter found out it was a $2 paid-up company. The first plaintiff referred to the BBE Group generally so that the Bakris would be comfortable that it entailed one or more companies or even persons or shareholders within the group, which were creditworthy, furnishing the indemnity.

40 It bears mentioning at this juncture that in the various draft agreements prepared by the law firm, no entity in the Bakri group was identified as the purchaser of the plaintiffs' shares. It was also the first plaintiff's testimony that until the date of termination (8 March 1999) of the joint venture, the plaintiffs were not told by the Bakri brothers which entity would be their nominee to hold shares in BBEA.

41 The first plaintiff said that at the Jeddah meeting, there was no great discussion on who held or how the shares in BBEA were held. In fact, in relation to the shares of his father and uncle, the first plaintiff recalled there was discussion that their shares were held in trust for them in the same manner that the first defendant used to hold shares in BBEA, before he left the company. There was no discussion on which plaintiff would transfer what shares to which buyer. I should point out that in schedule 1 of the first draft agreement dated 21 July 1998, the existing shareholders of BBEA were listed as the first plaintiff, Haytham Sioufi, Jeremy Deverson and Tarek Hafez. However by the date of the last draft agreement (31 December 1998), the shareholding structure in schedule 1 was only a blank space. Although the first draft agreement stated that the first plaintiff would transfer only 89,250 of his own shares to the buyer with the balance 85,750 coming from other shareholders, the first plaintiff said he held enough shares then (51%) so as to be able to transfer all 35% (175,000 shares) to the three defendants. Between the first and last draft agreements, there was a change in the description of the document from "Investment Agreement" to "Shareholders' Agreement". Another observation I would make is that there was no reference to the MOU, *before* 15 November 1998, in the draft agreements.

42 The first plaintiff revealed that although he was the author of the MOU, Hani was extensively involved in amending his draft agreement. After every draft agreement was presented, all parties looked at it and made further changes, although the first plaintiff could not recall the number of times the document was amended. The first plaintiff said all parties had agreed, when the MOU was signed, that it would be the final agreement. There was no discussion of a sale and purchase agreement. Otherwise, cl 2 of the First Addendum would have been worded differently. Notwithstanding that the sale and purchase agreement was never finalised, the first plaintiff opined that the sale from the plaintiffs to the defendants was concluded. It was also his view that the various addenda to the MOU superseded the latter document.

43 Although the First Addendum talked of the joint venture starting from 1 May 1998, the first plaintiff said in reality it started earlier, as the first defendant joined BBEA on 20 April 1998 and each side paid half his salary (US$10,000) for the ten days he worked that month. There was already discussion on when the first defendant would join BBEA prior to the signing of the MOU at Jeddah. In this connection, it is noteworthy that by the dates (3 and 31 December 1998) of the last two draft agreements, there was reference to the First Addendum in the following clause:

> 2.3 Each of the Existing Shareholders (who were represented by Mr Bahaeddine Bassatne, Mr Walid Bassatne and Mr Mohammed Bassatne, BG [Bakri group] (who was represented by Dr Zohair A K Bakri and Mr Hani A K Bakri) and RG [the first defendant] agrees and acknowledges that in accordance with the MOU, they have commenced their commercial co-operation in relation to the Company [BBEA] as of 1 May 1998 and that the Company has been treated as a joint venture partner amongst them since then notwithstanding that BG and RG do not hold shares prior to the Completion Date. Each of the Existing Shareholders, BG and RG agree that the profit and/or loss of the Company for the period 1 May 1998 to the date of this Agreement or the date when this Agreement is rescinded in accordance with clause 3.2 (the Co-operation Period) shall be for the account of each of them respectively …

However, there was no evidence as to who requested the insertion of the clause.

44 The first plaintiff testified that at the Jeddah meeting, the plaintiffs had shown to the Bakri brothers and the first defendant the running expenses of BBEA. As proof, he referred to a letter written by Raad to the second plaintiff dated 27 May 1998[1] which opening words stated, "… Hani asked me to review your budget schedule sent to us back on April 16th". The first plaintiff contended that the running expenses were accepted by the Bakri brothers (with the inclusion of the first defendant's salary) and that it had been agreed that the existing budget would continue to apply until further discussions.

45 The first plaintiff also disputed the defendants' contention that no finance, administrative and trading committees were established pursuant to cll 5 and 6 of the MOU. He disagreed with the defendants' contention that if indeed there was a finance and trading committee, there should have been minutes of meetings, which there were not. The first plaintiff said it was not necessary for the committee members to meet face to face for committees to be considered set up. He said the three committee members had many discussions on finance and administrative matters. In any case, cll 5 and 6 were not conditions precedent to the purchase of shares in BBEA by the defendants. Amongst the voluminous documents produced in court is a memorandum from the second plaintiff to the first plaintiff, the first defendant and the Bakri brothers, which indicated he would be attending an oil conference in Kuala Lumpur on 1–2 June 1998. The note added:

> I suggest to have a meeting with one of you there to start implementing rules and regulations for trading (physical, paper, speculation, Simex, IPE, tenders, strategies etc) and financial activities

(banks, L/Cs, L/Gs, exposures, P & L, office cost etc).

46 The first (and second) plaintiffs denied that there was an understanding that the joint venture between the plaintiffs and the Bakris was subject to the prior approval of the father (and brothers) of Hani and Zohair; he said he was not aware of nor was he told about the internal decision-making process in the Bakri family.

47 The second plaintiff is the prime mover behind the BBE Group. During his father's lifetime in the 1960s, the Bassatne family was involved in commodity trading which he and the third plaintiff gradually expanded to include oil trading. The second plaintiff revealed that BBEA was not part of the BBENV group of companies as at 19 April 1998 (date of the MOU) but all the shares in BBEA were/are beneficially owned by the plaintiffs. The second plaintiff explained he was persuaded by the first defendant to go into the joint venture (which was a departure from the policy of the Bassatnes of not allowing employees or strangers to come into their family businesses). A joint venture between the two families would have created a synergy as the Bassatnes had been trading in the Far East since 1980 but were no longer involved in shipping, whereas the Bakris were strong in shipping and in other areas but had no presence in Singapore or the Far East. It was stated in Hani's affidavit that Zohair and the first defendant were keen to commence oil trading in the Far East. Hani deposed that entering into a joint venture with the Bassatnes, who were familiar with the region and controlled BBEA in Singapore, would be more expeditious than setting up a new entity from scratch, which process would take at least six months.

48 The second plaintiff said he had known the first defendant (and the latter's father) for over 25 years; he treated the first defendant as a son. Before the first defendant came to work for BBEA, the second plaintiff had posted him to Egypt to look after the interests of the Bassatne family. After the graduation of the first defendant's younger brother (Amir), the second plaintiff put the first defendant in charge of BBENV's London office in order to train Amir as a trader. Thereafter, Amir took over charge of the Egypt office from the first defendant who was then posted to Singapore. After the first defendant left the services of BBEA to work for Vitol and even after his retrenchment from Vitol, he maintained his contacts with the plaintiffs.

49 It was the second plaintiff's (as well as the third plaintiff's) practice to issue directives or memoranda from the Athens' management office, for distribution to companies in the BBE Group (including BBEA), related (albeit not exclusively) to limits on physical and paper trading in oil. Copies of such directives were amongst the voluminous documents produced in court by the plaintiffs. Even though the second plaintiff had no direct role in the management of BBEA (which task he left to the first plaintiff), he testified he held meetings with his son and the first defendant concerning the running of BBEA. However, where banking facilities for BBEA were concerned, the second plaintiff testified he had negotiated personally with the head offices of Credit Lyonnais and Societe-Generale. At a later date, when Credit Lyonnais withdrew their facilities, the second plaintiff obtained fresh facilities for BBEA from the London branches of Banque Indo-Suez and Credit Agricole. In the interval between the two events, BBENV used its own line of credit to enable BBEA to continue trading without interruption.

50 In support of his claim that his 29% shareholding (and his brother's 20%) in BBEA were held on trust for them by Haytham Sioufi, Jeremy Deverson and Tarek Hafez respectively, the second plaintiff produced the original share transfer deeds[2] signed in blank by the three gentlemen. On 31 December 1996, BBENV had transferred 145,000 shares in BBEA to Haytham Sioufi at the second plaintiff's request. Subsequently, Haytham Sioufi transferred all 145,000 shares to him. As for the third plaintiff's shares, there was a share transfer form from BBENV for 62,500 shares in favour of Jeremy Deverson, with a separate transfer form for 37,500 shares in favour of Tarek Hafez. Later, the third

plaintiff arranged for Jeremy Deverson to transfer the latter's 62,500 shares to the first plaintiff and for the 37,500 shares held by Tarek Hafez to be transferred to the second plaintiff. Thereafter, the second plaintiff transferred 18.25% of the shares held by Haytham Sioufi in trust for him to the third plaintiff. Copies of the share certificates issued to the three trustees of, as well as to, the plaintiffs were also produced.[3]

51 When it was put to him by counsel for the defendants that without the execution of a formal sale and purchase agreement, there would be no issue of shares in BBEA and no sharing of profit and loss thereon by the defendants, the second plaintiff raised a pertinent point – why would the plaintiffs allow the first defendant to sit in and run the office of BBEA and to trade in oil if he was not appointed under the terms of the MOU and the First Addendum? Although not officially appointed as such, to all intents and purposes, the first plaintiff acted and conducted himself as BBEA's executive director. He even gave himself that title in the business cards which he distributed at conferences and in Singapore.

52 The third plaintiff was at the material time mainly in charge of personnel in the Middle East and in all other offices of the BBE Group. Nothing much turns on his evidence as essentially he corroborated the testimony of his nephew and elder brother. I should point out however that he was the author of the letter dated 17 November 1999 to Hani, where he refuted PWC's complaint that BBEA and Imad Nasr, in particular, had failed to furnish all relevant documents to PWC for auditing purposes. In that letter, the third plaintiff reminded Hani that for off-shore payments, he had already been advised that the documents could not be given to any local firm in Singapore but would be shown in detail to Hani personally and/or to Hani's representatives outside Singapore. Hani was further reminded that such off-shore payments had been conveyed to him at the parties' first meeting in Jeddah, followed by a fax to him with full details on 21 May 1998, followed further by original documents being mailed to Raad on 29 May 1998.

53 The plaintiffs called Farran and Imad Nasr ("Nasr") to testify. Farran (PW4), a qualified accountant, is presently based in Beirut although he takes charge of the accounts of BBENV which office is situated at Rotterdam, the Netherlands. Prior to June 1998, Farran was based in Athens. Farran testified he also oversaw the accounts of BBEA for general accounting purposes and would question Nasr from time to time on behalf of his management.

54 At the request of the second plaintiff, Farran visited Singapore in May 1998 for ten days to prepare the relevant documents and information Hani had requested. This included a budget which detailed salaries and staff benefits. Farran revealed that the first defendant gave his input on the budget, on what would be acceptable to the Bakri brothers within the scope of the discussions and the MOU. Besides preparing the budget, Farran also took charge of making payments to the staff of BBEA for the period 1 May 1998 to 8 March 1999. Farran had also written to the second and third defendants on behalf of the second plaintiff with regards to the accounts, *inter alia*, to answer queries raised by Hani and or PWC.

55 Cross-examined, Farran explained that he calculated the projected expenses of BBEA for 1998 based on the profit and loss statements for 1996–1997, save for the exclusion of expenses which would no longer be incurred.

56 Prior to Farran's arrival in Singapore, the second plaintiff had himself written to Hani (on 21 May 1998) to give notice of Farran's visit and its purpose. The second plaintiff had also forwarded therewith nine enclosures to Hani which included, *inter alia*, a list of BBEA's employees, projected expenses of the company for January–December 1998, car and equipment financing, rental agreements (including accommodation) and motor vehicle expenses.

57 Nasr (PW5) was the plaintiffs' last witness. Prior to October 1997, he worked in Athens and London for other companies of the Bassatne family, where he oversaw the companies' banking relationships and produced financial reports for shipping and oil trading facilities. I should point out that unlike Farran, Nasr is not a qualified accountant but a chemistry graduate. However, he undertook business and accounting courses when he was an undergraduate, has completed most of the professional studies required by the Institute of Chartered Accountants and his experience includes four years with the accounting firm Peat Marwick Mitchell & Co in London and Beirut, in the areas of auditing and preparation of financial statements.

58 In his written testimony, Nasr affirmed the second plaintiff's evidence that although the first defendant was not officially appointed to the post, he acted as the executive director of BBEA besides trading actively in oil. As the *de facto* executive director of the company, the first defendant took charge of paper trade activities, was involved in physical trades (mainly related to the Bakris), participated in all management discussions related to physical trades as well as day-to-day administrative matters. Contrary to the defendants' pleaded case, Nasr deposed that the first defendant represented the Bakri family in BBEA in all aspects and co-ordinated all matters with them, particularly with regards to sale and purchase contracts between BBEA and the second and third defendants during and after the joint venture period, until his resignation from the company. Nasr deposed that he assisted the first plaintiff to compile information pertaining to BBEA's business, which he then gave to the first defendant to pass on to the second and third defendants.

59 Nasr stated that the Bakri family contributed to the joint venture by supplying oil to BBEA (against letters of credit) which the company then on-sold to its own customers. Consequently, the volume of BBEA's transactions (for physical cargoes) increased after the joint venture, 50% of which was with the Bakri group.

60 After he was informed (on or about 8 March 1999) that the defendants had decided to terminate the joint venture, Nasr prepared the profit and loss statement for the period from 1 May 1998 to 8 March 1999 at the request of the first plaintiff and the first defendant. He understood (from the plaintiffs) that the joint venture was between shareholders and *not* between BBEA and the Bakri group. He held discussions with the first plaintiff and the first defendant on whether the following three items should be included in the accounts, namely:

(a) a shipment of fuel oil on the *MT Hawaiian Monarch* under a bill of lading dated 15 January 1999;

(b) a joint deal made between BBEA and the third plaintiff relating to a gas oil cargo on the *MT Leon*;

(c) "open" paper swaps (trades) as at 8 March 1999.

He was told by them to omit items (a) and (b) which he did. As for item (c), he understood that the "open" positions would be closed out at the best prices possible before the accounts were finalised. Nasr said he was not surprised that his computation of the accounts showed a loss ($1.7m) as the income of BBEA was insufficient to cover the company's expenses. Neither were losses unusual for an oil trading company.

61 Nasr was told about PWC's appointment on or about 14 June 1999. He met and briefed Andrea Lee, an auditor from PWC, on 21 June 1999 but it was only on 18 October 1999 that representatives of PWC visited BBEA's office to commence their audit of the accounts, which they completed in early November 1999. During the audit, Nasr was PWC's main point of contact and made

available to them all accounts and related documents. Consequently, he was very surprised to receive Hani's letter dated 14 November 1999 quoting PWC as complaining that BBEA had not made available records and supporting documents promptly. Nasr was unable to verify the complaint as Hani did not forward to him a copy of PWC's letter nor give the date of PWC's complaint. Nasr passed Hani's letter onto the third plaintiff, after giving his comments. (The third plaintiff's reply has been referred to earlier in [52].) Nasr deposed that he realised from the discovery process against the defendants in these proceedings, that Hani had quoted PWC completely out of context. Apparently, Hani was referring to an e-mail from PWC dated 26 October 1998. This was a few days after PWC had commenced their audit. As at that date Nasr acknowledged he was still trying to retrieve documents for PWC. That was certainly not the position as at the date of Hani's letter.

62 Contrary to the earlier instructions he had received from the first defendant, Nasr was told by the second plaintiff subsequently that Hani had asked for the inclusion of the shipments on *MT Hawaiian Monarch* in the joint venture accounts. In his written testimony, Nasr dealt at length with the shipment on this vessel, which was in two parts. The first shipment (purchased in November 1998 and sold in January 1999) resulted in a profit of US$340,000. However, due to a lack of demand for fuel oil, BBEA would have faced a huge loss had the second shipment been made as scheduled in March 1999 from their Bahrain supplier (Banoco) to their Malaysian buyer (Petco). Consequently, there was no question that the profit from the first shipment would have to be used to set off the anticipated loss to be incurred on the second shipment. After a few postponements, the cargo was eventually shipped in September 1999 on another vessel (*MT Israa*), resulting in a net profit of US$21,187 as the market price had improved by then.

63 Nasr received a letter dated 11 January 2000 from PWC wherein they proposed to remove from the joint venture accounts all expenses incurred after 8 March 1999. Nasr refused as some of those expenses related back to the joint venture period. In February 2000, PWC proposed to reduce the joint venture's loss by US$315,622 so that Nasr's figure of US$1.7m for the loss would have been reduced to US$1,394,476. Nasr agreed with some but disagreed with other adjustments made by PWC.

64 Eventually, by his letter dated 28 February 2000 to PWC after his telephone discussion with Amy Loh, Nasr enclosed a list of the adjustments he had agreed to, in the total sum of US$184,443.52 against PWC's figure of US$315,622. Despite his subsequent telephone conversations and reminders to PWC in March 2000, Nasr said he never received PWC's confirmation of his adjustments. Instead, Hani wrote to him on 2 April 2000 stating that he did not think PWC's report needed any changes.

65 When he took the stand, Nasr revealed that Hani had visited BBEA's office twice or thrice in 1998–1999. In one of those visits, Hani told Nasr that he (Hani) would use the first defendant to co-ordinate whatever information Hani received from BBEA. It was also known to everyone in the office that the first defendant was there to represent not only his own but also the Bakris' interests. Asked by the court to explain his statement that the first defendant also represented the second and third defendants, Nasr clarified that it was his conclusion based on letters received from the two companies. He had never seen any personal letters issued by Hani or Zohair, save for e-mails.

66 I had informed parties at the outset that I would only be determining liability for the trial. Hence, much of the evidence adduced from Nasr during cross-examination is not relevant for my purpose, as it focused on the figures in the profit and loss accounts he had prepared for the joint venture.

67 However, there was one aspect of Nasr's cross-examination which is relevant to my

determination on liability. An allegation common to the defendants in their pleadings was that BBEA did not have "clean" banking facilities with Credit Lyonnais ("CL") and Societe Generale ("SG"), as was represented to the Bakri brothers by the plaintiffs. In their letter dated 22 September 1997, CL offered BBEA a facility of US$20m secured by:

(a) joint and several guarantees of BBENV, BBEBV;

(b) a registered General Charge of Receivables and Contract Rights deed of debenture; and

(c) the personal guarantees of the first and third plaintiffs.

Cross-examined, Nasr explained that although BBEA had executed CL's standard charge form, the company had exchanged letters with CL in which the bank had clarified that its charge was over receivables which it actually financed and was not a general charge. CL's facility included back- to-back trust receipt financing and stand-by letters for credit relating to "oil swap" activities with a limit of US$500,000.

68 Nasr testified that BBEA used US$18m of CL's US$20m facility to finance the company's shipments up to October 1998. Thereafter, he was informed by CL's management that they had been instructed by their head office to slow down on trade finance. Indeed, CL eventually ceased trade financing operations altogether in Singapore. Nasr agreed with CL that BBEA would not renew with CL but would look for alternative trading facilities. BBEA subsequently secured such facilities from Banque Indo-Suez and SG. Nasr pointed out that almost all foreign banks in Singapore, at the time, withdrew their credit lines on instructions from their head offices as they faced a financial crisis in Asia. Consequently, there was nothing alarming about CL's withdrawal of its credit line to BBEA after December 1999.

69 As for SG, Nasr explained that its facilities of US$40m to BBEA were made pursuant to the bank's letter of offer dated 16 March 1998[4] which facilities were secured, *inter alia*, by corporate guarantees (of BB Naft Trading SA and BBENV), a general charge over receivables, contract rights and trust receipts. SG's facility also included back-to-back trust receipt financing. As in the case with CL, Nasr said there was an understanding reached with SG that its general charge would be restricted to receivables which SG actually financed. He confirmed that neither CL nor SG held a charge over the assets of BBEA. In re-examination, counsel drew Nasr's attention to the fact that the charge documentation of CL actually contained some restrictions on the meaning of *sale contract*, *purchase contract* and *receivables,* thus supporting Nasr's testimony.

The defendants' case

70 I turn next to the evidence of the defendants' witnesses. Hani was their first and main witness. I assessed him to be an astute and experienced businessman who came to court fully prepared, judging by his frequent references to the written testimony of other witnesses (particularly the plaintiffs') as well as to the voluminous documents before the court. Hani was in the stand for three days (13–15 October 2003), largely because he had the habit of giving inordinately (and unnecessarily) lengthy replies in cross-examination, without (quite often) actually answering counsel's questions, even when the response only called for a "yes" or a "no". On many occasions, he used the excuse "I have no recollection" to avoid giving an outright answer to counsel's questions. Although he claimed English was his second language, Hani's testimony did not suffer from any language impediment. Indeed, he was hardly ever at a loss for words and when he did not wish to answer, Hani parried counsel's questions with all the skill of a seasoned fencer. I cite one example in this connection: when his attention was drawn to the usage of such words as *agreement* in cl 9 of the

MOU, Hani's ready answer was, "it was a mistake", the word was "taken out of context" and in any case, he did not draft the document. However, Hani did not rebut the first defendant's testimony that he was responsible for making extensive amendments to the first plaintiffs' draft(s).

71 In his written testimony, Hani explained that he used the letterheads of the second and third defendants for his correspondence precisely because a specific contracting party had not been decided upon and nominated by him and Zohair to contract with the plaintiffs. Invariably, he would use the letterhead of either company in writing to the plaintiffs, depending on which of the two companies he was doing work for, at the time of drafting. Hence, PWC assumed the second defendant had appointed them, only because he happened to use the letterhead of the second defendant in writing to them and Al Juraid. He asserted it was a gross leap in reasoning for the plaintiffs to thereby bring this suit against the second and third defendants when neither he nor Zohair had made any representation or given any indication that either company, much less both companies, would be nominated to contract with the plaintiffs.

72 Although he admitted that the first defendant was eager to begin his oil trading activities and wanted to commence employment with BBEA on 1 May 1998, Hani denied he had told the plaintiffs that the first defendant would act, and that the first defendant did act, as agent or representative for himself or Zohair or any Bakri-related entity. He maintained his stand even when counsel for the plaintiffs drew his attention to the fact that correspondence from the law firm to the Bakri group was addressed care of the first defendant. Hani also denied he and Zohair had agreed that any Bakri entity would share in trading losses incurred by BBEA. Consequently, apart from the fact that the second and third defendants were never parties to the MOU or addenda, neither company could be liable for any sharing of administrative expenses and relevant profits and losses. He was of the view that the date of 1 May 1998 in the First Addendum was *arbitrary*.

73 Hani asserted there could be no agreement for a Bakri-nominated entity to buy shares in BBEA until the following issues:

(a) a working budget for BBEA;

(b) the number and designation of staff and management of BBEA upon the involvement of the Bakri-nominated entity;

(c) implementation of rules and regulations, trading limits and controls for BBEA's operations

were resolved, as part of the negotiations and due diligence process required, before any conclusive agreement could be reached on the joint venture. Another reason why the MOU was not an enforceable or valid agreement was the non-implementation of cll 5 and 6 relating to the setting-up of a finance/administrative and trading committees. Hani denied he was a member of the finance/administrative committee, contending it was never formed.

74 Hani claimed the MOU and addenda were provided to the law firm as an outline to reflect the understanding reached by both sides as to some particular concerns, pointing out that some of the concepts in the MOU were refined and modified in the process. One instance was the structure of the capital and manner of investment in BBEA by the incoming investor. He therefore viewed the MOU as an expression of intention of what the parties wanted to do and how they would go about doing it, and not as a binding contract. Further, the articles of association of BBEA needed to be amended, which would involve separate discussions. Indeed, it was the law firm that advised the parties to conclude their negotiations and reach agreement on all the terms, before the law firm drew up a document to reflect the parties' agreement.

75 Hani explained (in para 57 of his affidavit of evidence-in-chief) that it was to maintain good relations with the plaintiffs that he was willing to discuss on a without prejudice basis, after 8 March 1999, outstanding issues on demurrage, expenses and profit and loss on *ad hoc* oil cargo joint ventures between Bakri-related entities and BBEA. He asserted he never admitted any liability personally or on Zohair's part, or on the part of any Bakri-related entity, thereby to share in the expenses or in the profits and losses for the relevant period. He further claimed it was part of an effort on his and Zohair's part to preserve amicable relations with the plaintiffs that they agreed to bear the cost of the audit by PWC, provided PWC were granted full access to all relevant information, documents and accounts of BBEA for the relevant period, and provided the parties then conclusively and finally resolve all outstanding issues.

76 Besides the shipments on the *MT Hawaiian Monarch*, Hani alleged a shipment on another vessel, the *MT Leon*, was improperly excluded by the plaintiffs from the joint venture accounts. In this instance, the third defendant sold a cargo of gas oil to BBEA which then on-sold the same to the Vietnamese market. This joint venture, according to the third defendant's calculations, yielded a net profit of US$249,377.13, half of which should have been added to the final profit and loss of BBEA for the relevant period. Coupled with a profit of US$302,225.87 (according to his calculations) for the shipments on the *Hawaiian Monarch*, Hani alleged that BBEA should not have sustained any losses but should instead have made a profit of at least US$200,000 during the ten months and eight days of the joint venture. Consequently he concluded, the losses of US$1.7m shown in the profit and loss accounts prepared for the plaintiffs were highly suspect.

77 As the other aspects of Hani's written testimony were essentially a rehash and elaboration of the other defences pleaded by the second and third defendants, I will focus on the more significant evidence that was adduced from him during cross-examination.

78 I deal first with the allegation that the plaintiffs did not furnish a budget of BBEA to the first defendant and the Bakri brothers at the Jeddah meeting. When Hani's attention was drawn to Raad's letters, both dated 27 May 1998,[5] clearly admitting the receipt of a budget and schedules from the plaintiffs, Hani explained that what was given to him and Zohair at Jeddah was very brief and there was no discussion on staff salaries. He could only recall the plaintiffs giving a rough figure of $2.2m to $2.4m as expenses (which currency he was not even certain). Hence, he was awaiting more details from the plaintiffs as requested in Raad's letter. I note however that by 29 June 1998,[6] Raad (bearing in mind he is an accountant) was able to revert to the second plaintiff with a revised (lower) budget by fax which he said was "adequate for the new operation". Cross-examined on whether "new operation" meant the joint venture, Hani said it had no meaning and "no relevance" as Raad was not at the Jeddah meetings, was not a signatory to the MOU or addenda and Raad's English was poorer than his, judging from the spelling mistakes (only one) in Raad's letter. On my part, I cannot see how Raad could have come up with a revised budget unless he had first received a budget from the plaintiffs.

79 On the legal niceties of what was meant by the "Bakri Group", Hani testified that it was the first plaintiff who first used that term in his proposal letter, not he nor his brother. Secondly, he disassociated himself from the letter dated 16 December 1999 from his legal department to BBEA, where the word "Bakri" was used to refer to the third defendants. He himself normally did not use the word but would refer to a specific company by name. The words were never used in contract documents. Neither could he comment on why the law firm chose to address letters to the first defendant, the first plaintiff and the "Bakri Group". He did not, and never nominated, any entity for the law firm to insert in their draft agreements as the discussions were not conclusive. Where the law firm addressed letters to the second defendant (as by fax on 11 November 1999), it was because they were replying to his letters where he used the second defendant's letterhead.

80 Although he acknowledged that the requirement of his father's approval to the joint venture was not stated in the MOU and was not part of the defence of the second and third defendants, Hani said he had mentioned it to the plaintiffs and had included it in his affidavit.[7] He pleaded ignorance of the law on the basis that he was not legally qualified (although in his affidavit he had deposed that he was in charge of finance and legal matters in the Bakri companies).

81 When it was pointed out to him by plaintiffs' counsel that the First Addendum did not state "all expenses and relevant profit and loss *not covered by the profits* will be for the account of the new shareholders of BBEA" [emphasis added], Hani opined that the drafting was inaccurate, but that was what was intended. In any case the clause would only apply after a Bakri entity had become a shareholder of BBEA, not before. He was fortified in his view by cl 2 of the MOU where the plaintiffs, as the existing shareholders, gave an indemnity to the new shareholders against any claims and losses arising from all commitments and contracts and activities executed by BBEA prior to the transfer of the shares. However, he disagreed with counsel that cl 2 meant the Bakri family did not have to do due diligence prior to executing the transfer of shares from the plaintiffs. Indeed, besides due diligence, the Bakri family wanted warranties and undertakings to the fullest extent. He had informed the law firm he wanted due diligence but it was not done because they became engulfed in details of the shareholders' agreement and the lawyers' attention was diverted.

82 Hani claimed that the first time he was aware of the plaintiffs' differing interpretation of the First Addendum was when he received the third plaintiff's letter dated 10 May 1999 with a request that the Bakri group pay 30% of the losses shown in the profit and loss accounts. He maintained his stand even though counsel pointed out that in the law firm's fax dated 31 December 1998 (attaching a revised draft agreement) to him, the first defendant and the first plaintiff, cl 2.3 therein stated;

> Each of the existing shareholders ... BG [Bakri group] and RG [the first defendant] agrees and acknowledges that in accordance with the MOU, they have commenced their commercial co-operation in relation to the Company [BBEA] as of 1 May 1998 and that the Company has been treated as a joint venture amongst them since then …

whilst cl 3.2 stated:

> … Subject to clause 2.3 and the addendum to the MOU dated 1 August 1998 (and any agreement entered into for the purpose of implementing the same), in the event that any party elects to rescind the Agreement pursuant to this clause, such party shall not be liable for any losses which may be incurred by any other party.

83 Hani said he had *no recollection* of any discussion relating to the above clauses, pointing out that the plaintiffs had the advantage of being in Singapore and would have had greater interaction with the law firm. Further, he had never agreed to the law firm's draft agreement dated 31 December 1998, citing his letter dated 11 January 1999 to the second plaintiff wherein he had stated that the salaries were too high for a re-emerging company like BBEA. When counsel pointed out that his letter made no reference to cl 2.3 of the draft agreement, Hani said he did not refer to it "in express terms" as his intention was to resolve the major issues which were "of profound concern" to him. In any case, it was then Ramadan (the Muslim fasting month), "a very slow month for all [of them]", he did not go through the documents and, cl 2.3 conflicted with the indemnity clause in the MOU.

84 With respect, I fail to see any connection between Ramadan and Hani's failure to address cl 2.3 of the draft agreement if he did not agree with the law firm's drafting, particularly when their earlier draft dated 3 December 1998 *already* incorporated the clause. Hani's omission is even more significant given that (by his own admission), he was in Singapore on 3 December 1998. Hani's claim

that he did not comment on the draft is incredible. I note that, in relation to the law firm's earlier draft (dated 21 July 1998), Hani's letter dated 11 October 1998[8] contained *clause by clause* comments (51) as well as general comments (6). It was this letter and the third plaintiff's equally lengthy reply dated 5 November 1998[9] that prompted the law firm to inform the third plaintiff (who informed Hani in turn) on 7 November 1998[10] that they would refrain from further amending the agreement until the final wording and clauses were agreed between the parties, for which the third plaintiff suggested a meeting.

85 One of the *profound concerns* of the Bakri family (according to Hani) was the first plaintiff's directorship of a company namely BB Naft Trading SA, which he claimed traded in India. Under cl 4 of the MOU, India was meant to be the exclusive trading territory of the joint venture. Hani claimed this issue was another breaking point in the negotiations between the parties although it was not referred to in his affidavit. The information on the first plaintiff's directorship was told to Hani in the third plaintiff's fax of 7 November 1998.

86 In support of his contention that there was no joint venture in operation, Hani referred to various trading memoranda which the second and third plaintiffs addressed to BBEA and BB Energy offices in Athens, Beirut and London to the exclusion of the Bakris, as proof that the plaintiffs treated BBEA as their own company, not a joint venture. Questioned as to why he then sent to the second plaintiff (on 21 May 1998) the Bakri companies' standard rules and regulations for eight departments of work including Finance and Investment Affairs, Hani explained it was for information only, not because he too regarded the joint venture as on-going.

87 Hani denied that in late 1998 when BBEA started making losses, the Bakri group decided to renege on the agreement reached in Jeddah. He claimed he was not aware of BBEA's financial position then and would not have known of its losses. He further denied that he then commenced making demands which were inconsistent with the terms of the MOU (including the appointment of the first defendant as managing director of BBEA). He insisted his requests were reasonable, arising out of matters that evolved from the sketchy information he had learnt about the company during the limited due diligence conducted at that time. He could have but did not renegotiate the value of the shares the Bakri family intended to buy. Rather, he only asked that the plaintiffs work with the Bakri family to put BBEA into a strong position, even though he realised the representations made to him at Jeddah on the company's banking facilities were untrue.

88 In regard to his demands for "clean" banking facilities stated in para 4 of his letter dated 11 January 1999,[11] Hani claimed he held discussions with the first plaintiff, the first defendant and Nasr in December 1998 and "they came up with what I stated here". It was apparent to him that the facilities mentioned in the MOU did not exist In fact, in the second plaintiff's reply dated 19 January 1999 to his aforesaid letter, the former revealed that one of the banking facilities had been withdrawn. Hani further claimed he never sighted the facilities of BBEA until this trial. It was his view that "clean" facilities were a prerequisite for an oil trading company to thrive and grow, comparing BBEA's facilities unfavourably with those of the second and third defendants. He considered back-to-back facilities a *hindrance* as it meant one could not pre-sell cargo at the time of receipt.

89 Whenever he was confronted with documents which showed he and/or the second or third defendants implicitly accepted the existence of the joint venture, Hani's constant refrain throughout his testimony was that he always acted in good faith in a candid and frank manner, he wanted to be cordial and he wished to maintain good relationships with the plaintiffs. Another common fall-back answer from Hani, whenever it was pointed out to him that he did not disagree with the contents of letters was, "not disagreeing did not mean I did not object".

90 On one occasion, in relation to his letter dated 8 March 1999 (on the second defendants' letterhead) where he said, "We would therefore consider that the MOU now expires in all its terms as of 8 March 1999", Hani went one step further. He said he was merely repeating the words used in the third plaintiff's letter to him dated 4 March 1999.[12] Another letter dated 18 May 1999[13] which appeared incriminating by his use of the words "I will not be able to justify payment without supports" was explained away by Hani as being a reference to physical cargoes sold jointly by the Bakris and BBEA; it had nothing to do with the joint venture and was not an admission of liability. Counsel then drew Hani's attention to his letter dated 11 July 1999[14] addressed to the second plaintiff, of which para 1 stated otherwise:

> Thank you for your letter dated July 6 1999 please note that this venture is more complicated than a simple JV for a number of cargoes, and in any company or venture, it is my view that all partners have the right to have an Auditor to go through the accounts of the company or the venture to give a report to each partner.

Hani explained he did not sign the letter drafted by his secretary as he did not agree with the above paragraph. When told by counsel that his letters (from February 2000 onwards) to the plaintiffs did not dispute liability but only the amounts in the joint venture accounts, Hani's blithe explanation was that he did not admit liability either. Neither did he see any contradiction with his stand that there was no contractual commitment, by his request to PWC in December 1999 for a report, as he was responding to PWC's request for payment.

91 As for his earlier letter dated 15 May 1999 to the third plaintiff (on the second defendant's letterhead) where he asked for six categories of documents in order to go through the accounts of BBEA, Hani explained it was again an act of good faith on his part to maintain good relationship with the plaintiffs, in order to complete an audit of the books of account of the company. It was not an admission of liability even though the letter was not marked "without prejudice". Hani explained it was only where he considered there was a binding contract with the addressee(s) and he wanted to resolve matters amicably, that he would mark his letters "without prejudice".

92 In regard to the termination date of 8 March 1999 for the joint venture, Hani testified he took the cue from the second plaintiff's reply to him dated 19 January 1999 ([88] *supra*). He sensed the second plaintiff wanted a final answer. Hence, after consulting his father, Hani offered 8 March 1999 as the cut-off date, which the second plaintiff agreed to.

93 Questioned whether his family's termination of the joint venture was prompted by their desire to set up their own company, Hani denied the suggestion. He said the Bakris had made no secret of the fact that they intended to invest in Singapore since the beginning of 1998. Had the Bakris not become shareholders of BBEA, they would have incorporated their own set-up in any event.

94 When it was put to Hani by counsel that, contrary to Al Juraid's allegation, there was no delay or unwillingness on the part of the plaintiffs, to give all the relevant documents to PWC for a proper auditing, he claimed he was not referring to delays by the plaintiffs but by the auditors. I should point out that this testimony contradicted his affidavit of evidence-in-chief, where Hani had stated unequivocally[15] that PWC were unable to complete their audit as the plaintiffs had withheld information, particularly information on the salaries and staff benefits and on the calculation of the *Hawaiian Monarch* trade. Hani then blamed Nasr for taking leave on 8 July 1999 when the latter should have stayed back to assist PWC, bearing in mind it was Nasr who requested PWC to start their audit on 5 July 1999. However, he refused to take any blame for taking leave himself and returning to work in the first week of September 1999.

95 As an aside, there was, amongst the many documents produced in court, an e-mail from Graham Lee (a director of PWC) to Al Juraid dated 26 April 2002[16] stating that PWC's draft report had been reviewed by Hani in Singapore and, "it is not possible for PWC to issue a report with caveats of the nature that Hani Bakri is suggesting". Interestingly enough, the defendants chose not to call anyone from PWC to testify. Instead, they intended to call Daryl Andrew Kennedy from another accounting firm (Ernst & Young) as their expert witness to ascertain whether the administrative expenses of US$1,989,863 incurred by BBEA during the period 1 May 1998 to 8 March 1999 were adequately substantiated by supporting documentation (according to Kennedy's brief as stated in his report). As I will only determine liability for this case, I dispensed with this expert's testimony.

96 Zohair was in the witness box for a considerably shorter time than Hani. He is an oil trader dealing in physical cargoes, whose responsibility he says is to identify and explore business opportunities for Bakri-related entities. Zohair was instrumental in contacting the first defendant after the latter's retrenchment from Vitol, and at the suggestion of the first defendant, he met the first and second plaintiffs at the Dubai oil conference.

97 Very little turns on Zohair's written testimony, as he essentially repeated and/or aligned himself with his younger brother's testimony. Although he acknowledged that he was in regular contact and communication with the first defendant after the MOU, Zohair explained that it was due to the numerous oil cargo joint ventures between Bakri entities and BBEA, and not because the first defendant was reporting to him about BBEA's day-to-day affairs. In para 21 of his affidavit, Zohair set out at length his own understanding of the term "joint venture" as used in the oil trade. Zohair deposed he had nothing to do with "paper" trades and there was therefore no reason for the first defendant to report to him on such trades by BBEA. He dismissed a fax dated 13 May 1998 from the first defendant to him (and Hani) reporting on such "paper" trades as "a one day snapshot of positions in paper trades"; he was not consulted when those positions were initiated nor did he provide any input. Another fax to him dated 17 June 1998, this time from the second plaintiff, passing on the results of May 1998 "paper" trades in BBEA, was described by Zohair as an *ad hoc* report – not regular nor timely – and provided to him without reason.

98 Zohair denied the plaintiffs' allegation that the first defendant acted as the Bakris' agent or representative in BBEA. He deposed that there was never any discussion between the parties as to what would happen if parties failed to reach a conclusive agreement on the proposed joint venture and the sale and purchase of shares, let alone that the parties to the MOU would share in any of the expenses and losses of BBEA from 1 May 1998 onwards. He claimed it was never intended that the First Addendum would override cl 2 of the MOU.

99 Zohair's testimony in cross-examination was also a repetition of Hani's evidence – he had *no recollection* of any discussion at Dubai on valuation of the shares in BBEA or of figures being mentioned, despite a reference being made in the (first plaintiff's) proposal letter to him that the Bakri group had put a value of US$5m on the company as opposed to the plaintiffs' valuation of US$7m. On the subject of staff, Zohair could only recall discussions concerning the first plaintiff and the first defendant. He would not admit that lengthy discussions on the joint venture took place at his office at Bakri building in Jeddah, only conceding that "the plaintiffs dropped into our office on one occasion for a very short while", asserting meetings were held at the second plaintiff's suite at The Sheraton Hotel instead. Zohair echoed his brother's testimony on how he interpreted the MOU and the three addenda. He reiterated that the documents were only meant to be expressions of interest, reflecting preliminary discussions which would form the basis for further discussions; they were not detailed negotiations. Zohair repeated that due diligence by the Bakri family was a prerequisite to any joint venture with the Bassatnes, so too was his father's approval and in the case of the second and third defendants, approval was required from their board of directors.

100 Questioned on his letter dated 24 July 1999 to the second plaintiff, where he confirmed that the Bakris would appoint external auditors to examine "joint venture accounts", Zohair explained he meant physical cargoes and demurrage of individual cargo joint ventures between the two families, not the joint venture under the MOU. Moreover, it was written pursuant to a telephone request from the second plaintiff that the external auditors expedite their work.

101 At this juncture, it is noteworthy that PWC's letter dated 20 October 1999[17] addressed to the second defendant (marked for Hani's attention) stated that they had been "requested to carry out an agreed upon procedures examination to verify recorded revenue earned, costs and expenses incurred by [BBEA] during the period 1 May 1998 to 8 March 1999". When counsel observed that PWC's brief went *beyond* reviewing the accounts of individual cargoes, Zohair side-stepped the question with the comment that Hani, not he, instructed PWC.

102 I move next to the testimony of the first defendant (DW3), who was the defendants' last witness. The first defendant has always worked as an oil trader or in the oil industry since graduating in 1974. In fact, he helped set up the first oil conference in Singapore in 1985. It was while he was working for Vitol (from whose employment he claimed he left voluntarily and was not retrenched) that the first defendant became acquainted with Zohair and the second and third defendants, in the course of business dealings.

103 Not surprisingly, the evidence-in-chief of the first defendant echoed that of Hani and Zohair save for the additional testimony he proffered on his working experience with BBEA. He described BBEA as "being run like a family business, with the Bassatne family members having more privileges, remuneration and authority regardless of their position, experience and contribution to the company".[18] Even so, the first defendant said he had a strong emotional attachment to the plaintiffs and BBEA, having worked in the company for 20 years and having intimate ties with the Bassatne family. He deposed he was keen to work with Zohair as he knew the Bakri family to be reputable in the oil trading industry with a history of sound business practices, considerable goodwill and success. With the best of intentions, therefore, he introduced the Bakri brothers to the plaintiffs, as a joint venture between them meant he could work for both families.

104 The first defendant explained why it was important to him (and Hani) that BBEA must have clean credit lines. He recalled when he met the second plaintiff in London in or about March or April 1998, he was told that BBEA had lost about US$4m from its trading activities. For that reason too, he and the Bakri brothers required an indemnity from the existing shareholders of BBEA, which term was incorporated in cl 2 of the MOU.

105 The first defendant explained the reason behind the First Addendum. He was eager to resume his oil trading activities and it was therefore decided he would begin employment with BBEA on 1 May 1998; he denied he was a joint venture partner. Although he was designated "executive director", he claimed he was not involved (and neither were the Bakri brothers) in the management of the company. Although he (and the first plaintiff) spoke regularly to Zohair after 1 May 1998, it was in relation to the many joint venture cargoes which Bakri entities sold to BBEA for on-sales to third parties, not as a representative of the Bakris. The discussions were on demurrage claims for the oil cargoes as well as on further business opportunities.

106 The first defendant questioned the losses incurred by BBEA of US$318,955 arising from "paper trades" during the period between 1 May 1998 and 8 March 1999, largely attributed (according to him) to one trader Eng Wang Moi ("Eng"). The first defendant criticised the plaintiffs for not controlling Eng's trading activities and not subjecting the same to proper guidelines, limits and controls. He contended that the absence of supervision of Eng's trading activities proved that no

trading committee was set up. As I am only determining liability, this aspect of the first defendant's testimony is not relevant for my purpose.

107 As with the testimony of the other two witnesses, it is the evidence adduced from the first defendant during cross-examination which is of greater significance. Questions which had been put to Hani and Zohair evoked a similar if not the same response from the first defendant, even to the extent of his saying (like Hani) that English was not his first language, not to mention his constant reference to acting in good faith. To other questions not asked previously of the other two witnesses, the first defendant:

(a) agreed that when he worked for the company, BBEA had rules and guidelines pertaining to trading (although they could still be overruled by the management);

(b) revealed that although there were trading limits imposed in those guidelines, sometimes the limits were exceeded (by himself too);

(c) professed he had no knowledge of nor was he was concerned with who owned the shares in BBEA; it was for the plaintiffs to prove they owned the shares in the manner described in the MOU, not for him to verify;

(d) denied he never asked for due diligence to be done, as alleged by the defendants, because he knew BBEA inside out;

(e) denied he had instructed his (former) solicitors to plead in his defence and counterclaim[19] that the First Addendum was an agreement but claimed he had *no idea* who did that;

(f) claimed he did not know what BBEBV in cl 3 of the MOU meant. When warned by the court he was going on a very dangerous line, the first defendant changed his evidence and said he did not know under which capacity BBEBV operated and whether it was a holding company;

(g) acknowledged he knew BBEA did not have clean credit lines when he worked for the company but added that things could have changed after his departure;

(h) denied his letter dated 25 May 1999 addressed to the second defendant and to the third plaintiff at BBE Management SA where he said, "it is the entire right of a joint-venture partner to ask for detailed documents to be made available to all the parties involved" meant he recognised that the joint venture existed;

(i) admitted his trades from 1 May 1998 to 8 March 1999 were booked under "Asia 1" and from 9 March 1999 onwards under a new trading book called "Asia 3";

(j) denied he started working at BBEA before 1 May 1998 as the plaintiffs alleged;

(k) admitted he became a director of Bakri Asia while he was still employed by BBEA.

108 When re-examined, the first defendant revealed that when he returned to BBEA, he felt he was still being treated as an employee and not as a shareholder – it was always the Bakris and the Bassatnes going to the law firm not he, so he continued working as an employee only. He was considerably distressed at one stage and broke down, pointing out that just as the second plaintiff treated him like a son, he treated the first plaintiff as a younger brother. Because of his long

association with the Bassatnes, he maintained this was not a case of people ripping other people off, but a case where people did not deliver what they promised.

The issues

109 The main issues which arise for determination in this case are:

(a) Is the MOU an enforceable agreement?

(b) Is liability conditional on the execution of a sale and purchase agreement?

(c) Are the second and third defendants parties to the contract?

(d) Do the plaintiffs have *locus standi* to sue?

(e) How did the addenda affect the MOU?

The findings

Is the MOU an enforceable agreement?

110 Relying on *Sia Siew Hong v Lim Gim Chian* [1995] 3 MLJ 141, the plaintiffs submitted that in determining the legal effect of the MOU, the emphasis should be on the language used and the surrounding evidence, not on the label attached to the document itself. Consequently, although the document was described as a MOU, it was of little consequence, as the words used in the document clearly showed it was intended to be a binding agreement. The clauses contained therein were specific and detailed, including a jurisdiction clause (cl 11).

111 The defendants argued that the MOU was only intended to facilitate further discussions; it was as described – a memorandum of understanding – and not a binding agreement. They said it marked the first stage in negotiations between the two families and this was underscored by the uncertainty of the parties who signed the MOU. Further, there was uncertainty as to who would actually sell the shares in BBEA. They relied on *Cendeka Candranegara Tjiang v Yin Kum Choy* [2002] 4 SLR 48 and *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy* [1996] 3 MLJ 385 for this submission.

112 I note from the MOU that details spelt out included: (a) the price of the shares which was set at US$51,428.57 for 1% of BBEA (which the plaintiffs described in their closing submissions as an amazingly precise figure) and (b) a jurisdiction clause. Although it could have been better drafted legally (in which case this litigation may have been avoided), I am of the view that the intention from the language used by the first plaintiff in the MOU is clear. The document was meant to be a binding contract, contrary to the defendants' denials. The fact that the MOU envisaged the signing of sale and purchase agreement for shares as a follow-up (which did not materialise) did not make the MOU any less binding. What is of greater significance is that there was performance by the parties of the MOU.

113 I am reinforced in my findings by a number of undisputed facts. Firstly, at no time prior to this suit, did the first defendant or the Bakri brothers deny that the MOU was not a binding agreement. Indeed, they gave the opposite impression – they treated the document as enforceable, even in the replies they rendered to Clyde & Co's letters of demand. Secondly, the first defendant's pleadings stated that the parties *agreed* by the MOU to perform a number of acts. Thirdly, the whole tenor of

the correspondence and behaviour of the parties belies the defendants' contention that there was no joint venture as of 1 May 1998, until it was mutually terminated on 8 March 1999. Finally, why did the first defendant commence trading under a different or new account (Asia 3) with effect from 8 March 1999, if not to distinguish from his previous trades for the joint venture under the Asia 1 account? He could not give any, let alone a satisfactory, explanation for the change (which he initially denied).

114 Based on the documentary and oral evidence adduced in court, these are my findings:

(a) Some of the negotiations leading to the MOU did take place at Bakri Building in Jeddah (apart from the Sheraton Hotel), where the offices of the second and third defendants are located.

(b) The Bakri brothers were indeed told by the plaintiffs at Jeddah who held, or how their shares in BBEA were held.

(c) The Bakri brothers were furnished with the (historical) accounts of BBEA at Jeddah. Otherwise it would not have been possible to come up with the figures and percentages set out in the second last paragraph of cl 1 of the MOU, let alone for Raad to come up with a revised budget for the continued running of the company.

(d) It was not the plaintiffs but the first defendant who asked for the date of the joint venture to be put forward, prompting the execution of the First Addendum.

(e) The difference between the First Addendum and the later addenda was, the former accelerated the commencement date of the joint venture whereas the subsequent addenda amended cl 9 of the MOU on the *date* of execution of the share transfer.

(f) The First Addendum was drafted by the first plaintiff, the Second Addendum was drafted by Raad whilst the Third Addendum merely followed the wording of the Second Addendum.

(g) I disbelieve Hani's assertion that the plaintiffs had more to do with instructing the law firm than the Bakri family. It was the first defendant who recommended the services of the law firm by his fax to the third defendant dated 22 April 1998.

(h) The first defendant did represent the interests of the Bakri family. It is not of "no significance" as Hani sought to explain away, that the law firm addressed correspondence to the Bakri group *care of* the first defendant.

(i) The allegation that the banking facilities of BBEA were not "clean" was an excuse by the first defendant and the Bakri brothers to renege on the joint venture. The plaintiffs made no representations to them in this regard. In this day and age, if indeed the second and third defendants conduct their business on "clean" and not on back-to-back credit facilities as Hani claimed, I would say that is the exception rather than the rule. The two companies must be extremely cash rich.

(j) The allegation that the first plaintiff's interest in BB Naft Trading SA amounted to a conflict of interest which was of "profound concern" to the Bakris was another excuse and is in any case unfounded.

(k) The joint venture accounts prepared by Nasr (and Farran) did not include those for the

ad hoc cargo joint ventures. Indeed, according to Nasr's testimony which I accept, the joint venture accounts specifically *excluded* the cargoes on the *MT Hawaiian Monarch* and *MT Leon*, which the Bakri brothers claimed formed the bases of the auditing exercise by PWC.

(l) There was no withholding of documents from PWC by the plaintiffs nor refusal on their part to co-operate with the accounting firm. PWC did not finalise their report because of Hani's refusal to accept their findings, it had nothing to do with the plaintiffs. That was just another excuse invented by the defendants.

(m) I disbelieve the Bakri brothers' claim that their father's approval was a pre-requisite to entering into the joint venture. That claim was a late afterthought not supported by any evidence before the court.

(n) The requirement of due diligence was yet another afterthought of the defendants.

115 I further find there was performance of the joint venture as follows:

(a) The first defendant was employed by BBEA pursuant to cl 5(b) of the MOU, as varied by the First Addendum. Although not formally appointed as such, he acted as the company's executive director to all intents and purposes and was paid US$350,000 per year.

(b) Although finance, trading and administrative committees were not formally established, in reality such committees did exist.

(c) As envisaged under cl 9 of the MOU, parties consulted the law firm with a view to preparing and signing a sale and purchase agreement for shares in BBEA.

(d) The plaintiffs kept the Bakri brothers posted on *all* trades conducted by BBEA, both "paper" and physical cargoes, and particularly on the former.

(e) The Bakri family paid (through Bakri Asia) 35% of the law firm's invoices, being its share (30%) as well as the first defendant's share (5%), for preparing the aborted sale and purchase agreement, which are the percentages of the shareholdings in BBEA they had agreed to purchase, under cl 1 of the MOU.

116 I disagree with the defendants' submission that the court cannot look at the parties' subsequent conduct to determine whether the MOU is a binding contract. That is not the position at law. A passage from *Chitty on Contracts* vol 1 (28th Ed, 1999) at para 2-115, cited by the plaintiffs, is helpful in this context:

> There is yet no clear authority on the legal effect of the practice whereby the parties to a transaction exchange "letters of intent" on which they act pending the preparation of formal contracts. The terms of such letters may, of course, negative contractual intention. … On the other hand, where the language of such a document does not negative contractual intention, it is open to the courts to hold the parties bound by the document; and they will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it.

117 I note that the plaintiffs have pleaded estoppel by convention (in para 12 of their statement of claim). They submitted it means the court can look at subsequent conduct as proof. The defendants however submitted that the conduct of the Bakri brothers fell far short of establishing any

estoppel by convention such as to preclude them from relying on the plain words of the MOU and the First Addendum. Further, their conduct could not be equated with the conduct of the second and third defendants who were not contracting parties.

118 It would be appropriate at this juncture to look at the law relating to estoppel by convention. I can do no worse than refer to the authoritative textbook *Chitty on Contracts* and the following passage relied on by the defendants at para 3-100:

> Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law the assumption being either shared by both or acquiesced in by the other." The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it.

The following passage from *Halsbury's Laws of England* vol 16 (4th Ed reissue, 1992) at para 1070 is also illuminating:

> There can be no estoppel by convention where, although both parties are labouring under a common mistaken apprehension, it cannot be said that they have acted on the basis of that apprehension.

119 Applying the above legal principles to our facts, there can be no doubt that the plaintiffs believed and acted on the basis that the MOU and addenda were operative. The Bakri brothers not only did not dispel that belief but, from their correspondence to the former, showed they shared and acted on the same belief. I need only cite as examples:

> (a) Hani's letter to the second plaintiff dated 20 February 1999 on the second defendant's letterhead, asking for a final decision by 8 March 1999 failing which the Bakris would "not be liable to share or commit to profits/losses on businesses transactions that are executed beyond that date";
>
> (b) Hani's termination letter dated 8 March 1999 in which he confirmed that the "MOU now expires in all its terms as of 8 March 1999";
>
> (c) Hani's letter dated 18 May 1999 to the third plaintiff (on the issue of getting accounting documents) stating that as partners, they should not only have access to but also have copies of the documents. Otherwise, he "will not be able to justify payment without supports".

Why write the above letters in the manner he did if indeed Hani did not consider a valid agreement existed? Any reader of his letters would form the same view as the plaintiffs: there was an agreement in effect which the Bakri family wished to and did terminate. Earlier ([23] *supra*), I had alluded to the first defendant's letter dated 25 May 1999 referring to the joint venture as a *fait accompli*. Without question, estoppel by convention applies to the first defendant's conduct as well as to that of the Bakri brothers.

120 In their closing submissions, the defendants pounced on the second plaintiff's e-mail to BBEA (the first defendant was one of the addressees) dated 28 October 1998, as evidence that the second plaintiff himself was aware that the MOU and the addenda were not binding. In that e-mail the second plaintiff stated:

> I would like to draw your attention that if we look carefully into their proposal, the company financial situation has dramatically changed by the losses during that period and my feeling,

hopefully not, they will not come into the deal.

I read the e-mail as merely expressing the second plaintiff's fears (which were proven right) that the Bakris would back out of the deal, and nothing more.

121 As for the cases relied on by the defendants, the first, *Cendekia Candranegara Tjiang v Yin Kum Choy*, is distinguishable on the facts. There, the Indonesian plaintiff had entered into a memorandum of understanding ("the memorandum") to purchase shares in a company (YGBM) of which the defendant was the judicial manager. The document contained a clause that "[the plaintiff] shall enter into the relevant agreements with [the defendant] and with the directors of the respective company in the Group [*ie* YGBM and its associated companies]". The plaintiff subsequently fell out with some of the directors in YGBM. The defendant forwarded eight draft agreements to the plaintiff between April and July 2000, which was after the deadline of 1 December 1999 prescribed in the schedule of the memorandum for execution of the formal agreements. The drafts contained many new and significant terms which had not been mentioned in the memorandum. The plaintiff brought an action to recover the earnest money he had paid the defendant after signing the memorandum. The court in allowing the plaintiff's claim held that there was no binding contract, one reason being the defendant's admission that the drafts were sent to the plaintiff for the purposes of negotiations.

122 In the Malaysian case of *Abdul Rahim v Ramakrishnan Kandasamy*, the memorandum of understanding was not even signed by the vendor in relation to the property which the plaintiff intended to purchase. Consequently, it was not surprising that the court declined to grant the plaintiff's application for specific performance of the memorandum.

123 In this case, the MOU was signed by all the relevant persons. I say this, subject to the determination of the second issue as to who are the contracting parties. For the moment, it suffices for me to say that the various draft agreements prepared by the law firm did not depart or differ from the terms of the MOU, but elaborated on what was stated in the MOU or added terms to give effect to the MOU. In fact, the last three drafts prepared by the law firm referred to the MOU while the last two made references to the First Addendum.

124 The defendants made much of the fact that the plaintiffs' statement of claim and further and better particulars rendered thereto pleaded that the First Addendum was signed on 21 April 1998 whereas the plaintiffs testified it was signed on 19 April 1998. I reject the submission that this was a material departure from the plaintiffs' pleadings. Granted, the plaintiffs could have been more careful in their pleadings, particularly in their further and better particulars, but I view the discrepancy between their pleadings and their testimony as an honest mistake due to imperfect recollection of events, proven by the production of the first plaintiff's passport entries.

125 Earlier, I had devoted a considerable portion of my judgment to reviewing the testimony of the first plaintiff and Hani as they were the principal witnesses for the plaintiffs and the defendants respectively. In that connection, I have made certain observations on the testimony of the defendants' witnesses but none on the plaintiffs' evidence, which I now do. I found the testimony of the plaintiffs to be consistent with the documents produced in court, unlike the evidence of the defendants' witnesses, which was totally unreliable. In the light of the first defendant's criticism of the management style of the plaintiffs in running BBEA, which he gave as the reason for his leaving the company in 1995 (after 20 years' service) I ask myself this question: Why would he rejoin the company in 1998 if not for the joint venture, so that he could work for the Bakri family whom he greatly admired?

126 In addition to my earlier comments on his evidence, I would add that Hani's explanations for

admissions, weaknesses or deficiencies that came to light in the defendants' case were unconvincing, despite his ready answers.

127 Without casting any aspersions on their business acumen, the plaintiffs were no match for the shrewd Hani, not even the feisty second plaintiff. The plaintiffs had acted in good faith, trusting the Bakri brothers and believing that both sides would carry out their respective part of the bargain envisaged under the MOU. The Bakri brothers however, made use of the plaintiffs to further their own ends, namely, to get a foothold in the Far East, in particular Singapore, for their family's oil business. It is not an insignificant factor nor is it a coincidence that Bakri Asia was incorporated on 27 March 1999, two weeks *after* Hani terminated the joint venture, and the first defendant is one of the two (initial) directors (and shareholders) as well as its managing director. It speaks volumes of the first defendant's integrity that he did not reveal his interest in Bakri Asia to any of the plaintiffs before and even after his departure from BBEA in August 1999. The plaintiffs found out about it much later, through searches conducted by their counsel on Bakri Asia in the Registry of Companies. The first defendant is beholden to the Bakri brothers as their employee. It does not surprise me at all that his evidence was closely aligned with that of the Bakri brothers.

128 It was a common defence of all three defendants that the First Addendum was intended to provide for the sharing of administrative costs legitimately arising from the joint venture which could not be covered by the profits of BBEA and would only apply where there was a share transfer. Firstly, this disingenuous argument goes against the clear wording in para 2 of the First Addendum that "*for the period between May 1 1998 and the final execution of the sale and purchase agreement*, all expenses and relevant profit and loss will be for the account of the new shareholders of BBEA" [emphasis added]. The provision was meant to cover the parties' position *before* the transfer of shares. Secondly, in their closing submissions,[20] the plaintiffs pointed out that such an interpretation is inherently illogical because expenses are part and parcel of profits; I agree. Profit means income less expenses. To speak of expenses which are not covered by profits makes no sense at all.

129 Yet another prong in the defendants' attack was their reliance on the indemnity provided in cl 2 of the MOU to say that they cannot be liable before they become shareholders of BBEA; this argument is also misconceived. The clause reads in full:

> The original shareholders of BBEA will indemnify the new shareholders against any claims and losses arising from all commitments and contracts and activities executed by BBEA prior to the transfer of shares. Such indemnity will not apply to administrative costs which are defined as office expense, employees contracts beyond the date of the transfer of shares, (excluding pension contribution), telephone and communication expenses and other non-material administrative costs.
>
> The current shareholders of BBEA represented to the best of their knowledge that the company has no material outstanding court cases, arbitration cases or claims, debts against it that have not been settled or declared.

Clause 2 does not apply to the plaintiffs' claim for the *losses* arising from the operation of the short-lived joint venture, as agreed under the First Addendum. It also bears mentioning that those losses included not only trading losses but factored in administrative overheads of BBEA which, in any case, are not covered by the indemnity. The second paragraph of cl 2 clarifies the type of claims to which the indemnity would apply.

130 Both in his cross-examination of the second defendant and in his closing submission, counsel

for the defendants referred to the case of *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433 in which the second and third plaintiffs were the defendants. With respect, I do not see the relevance of that case to this suit, nor should it influence my findings, that the second and third plaintiffs conducted their business secretively, through a network of family companies. After all, the Bakri family adopted the same *modus operandi* of family companies to conduct their businesses.

131 Another red herring was the issue of the budget of the Singapore office, which expenses the Bakri brothers complained were too high and should be, but was not, capped at US$1m a year. The plaintiffs' response was that this was impossible considering that the annual salaries of the first defendant and the first plaintiff were US$350,000 each, leaving a balance of US$300,000 to run the office. The first plaintiff had testified that the first defendant himself would not have agreed to reduce the budget as demanded by the Bakri brothers, as it would have meant a cut in the first defendant's salary.

132 It is telling that the defendants did not call Andrea Lee, or Amy Loh or Graham Lee or anyone else from PWC (or even Al Juraid) to testify. Consequently, their allegation that the plaintiffs were obstructive and withheld documents from PWC is not proven. In any case, the allegation was rebutted by Nasr's testimony.

Is liability conditional on the execution of a sale and purchase agreement?

133 There is no evidence to suggest that a shareholder's agreement must be signed before the parties are obliged to share in the profits and losses of the joint venture. Clause 9 of the MOU which refers to the execution of a sale and purchase agreement, does not make it a condition precedent or a condition subsequent. In any event, the MOU was varied by the First Addendum which does not qualify the parties' liabilities. I do not think it is necessary, as was submitted by the plaintiffs (and pleaded in para 11 of the statement of claim), to import an implied term into the MOU to the effect that the parties would share in the profits and losses of the joint venture in proportion to their intended shareholdings.

Are the second and third defendants parties to the MOU?

134 Having made the findings of facts, I turn now to address the second issue. Counsel for the plaintiffs urged the court to follow authorities such as *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85 and look at extrinsic evidence to determine who were the true contracting parties, in particular the meaning of the words "the Bakri Group of Companies, Jeddah, Saudi Arabia". As in *M'Laren v Baxter* (1867) LR 2 CP 559, he submitted that the court should find that the expression meant all the companies which bear the Bakri name, set up by the Bakri family and based in Jeddah, relying on the confirmation from the Bakri brothers under cross-examination. Indeed, the second and third defendants themselves used the phrase "the Bakri Group of Companies" in their defence and counterclaim although it is not a legal entity. The law firm also used the words "the Bakri group" in their correspondence with all parties to the MOU as well as in the various draft agreements they prepared. Bakri Asia, which is part of "the Bakri group", paid the defendants' share of the law firm's bill. Therefore, the phrase "the Bakri group" or "the Bakri Group of Companies" is sufficient to establish contractual relations.

135 Counsel also cited from the textbook *The Interpretation of Contracts* (2nd Ed, 1997) by Kim Lewison the following passages at paras 9.06 and 9.07:

> The parties to a contract need not be named at all provided that the class to which they belong is named.

Extrinsic evidence is admissible for the purpose of identifying the parties to a contract.

for his proposition that courts are prepared to look beyond the words of a contract in order to resolve any ambiguity. In any case, if the Bakri brothers chose to describe themselves as representing the "Bakri group", it can only be interpreted they did so as agents on behalf of undisclosed principals.

136 Consequently counsel submitted, the plaintiffs could choose to sue any of the legal entities within the "Bakri group". In fact, all the companies within the "Bakri group" are jointly and severally liable under the MOU. However, they elected to sue the second and third defendants because:

(a) some of the negotiations in Jeddah were held in the offices of the second and third defendants;

(b) the Bakri brothers signed the MOU and addenda as directors of the two entities;

(c) the Bakri brothers corresponded with the plaintiffs on the letterheads of the two entities;

(d) the letter of 8 March 1999 terminating the joint venture was written by Hani on the letterhead of the second defendant;

(e) it was the second defendant which appointed PWC to do an audit of the joint venture's profit and loss; and

(f) Bakri Asia's letter dated 24 January 2000 to the second defendant enclosing the draft report of PWC was headed "JV between Bakri International Energy Co Ltd and BB Energy (Asia) Pte Ltd".

The defendants' short counter-submission was, the second and third defendants were not named parties, they were not parties to the MOU and therefore not liable.

137 At this juncture, I need to digress to consider the counterclaim filed by the second and third defendants. In that pleading, the two defendants repeated paras 9 to 11 of their defence wherein they had denied there was any agreement in the MOU and the addenda as to the Bakri group's investment and the purchase of shares in BBEA by a Bakri-related company. They averred that if there was any agreement reached in those documents (which they denied), their liability would only extend to expenses and administrative costs not covered by BBEA's profits, and was conditional on the execution of a sale and purchase agreement and share transfer.

138 The counterclaim of the second and third defendants was premised on the alleged presentations made by the plaintiffs that BBEA had "clean" banking facilities, which turned out to be false and which induced the Bakri brothers to sign the MOU and the addenda. They further alleged that they suffered loss and damage by reason of the plaintiffs' repudiatory breaches of contract. In short, if they were found to be liable by this court on the MOU and addenda, the second and third defendants said they were entitled to their counterclaim against the plaintiffs.

139 Hani had claimed, when cross-examined, that he used the letterhead of the second and third defendants in his correspondence by mere chance as he happened to be doing work for these two companies at the material time. I am rather sceptical of his explanation given the fact (or at least I formed the impression) that the Bakri family has a myriad of companies. It cannot be the case that every time Hani wrote to the plaintiffs or BBEA, he happened to be in the offices of the second or

third defendant. If that is true, why would the internal memorandum from Bakri Asia to the second defendant dated 24 January 2000 refer to the latter's joint venture with BBEA? I would point out that not only the plaintiffs, but even PWC and Al Juriad, shared the same belief that the second defendant was the party that instructed them to audit the accounts of the joint venture. Why would the second defendant (and not some other entity in the Bakri group of companies) instruct PWC to audit the joint venture accounts if the company was not intending to be the party partnering the plaintiffs in the joint venture?

140 In his reply dated 28 October 2000 to Clyde & Co's letter of demand addressed to the second defendant, Hani used the plural pronoun "we" throughout and in the very first paragraph, he said:

> In reference to your letters regarding BBEA (ref …), please note that we have agreed with your clients that a proper audit for the period should be conducted.

Hani added that any liability in respect of any alleged loss or profit during the period between 1 May 1998 and 8 March 1999 would only be determined when an audit had been satisfactorily concluded. He then countered that BBEA owed them certain invoices which exceeded, by far, the sum allegedly due to the plaintiffs. Although he concluded his reply with the caveat that the letter should not be construed as an admission of liability on their part, Hani made no attempt to disassociate the second defendant from the dispute. I note from the letter that Hani not only referred to outstanding documents he had requested pertaining to the *MT Hawaiian Monarch* shipments but also "complete documentation in reference to the staff entitlement". This statement contradicts Zohair's contention that the accounts the Bakri brothers requested were for individual joint venture cargoes, relating to claims for demurrage. The reference to staff entitlement can only be to the staffing costs for BBEA under the MOU, on which both sides were trying to reach an agreement. It is equally obvious that the Bakri brothers wanted the joint venture accounts to include those for *MT Hawaiian Monarch* and *MT Leon* because those shipments generated profits and would have reduced the losses incurred, and thereby the Bakri family's share of those losses.

141 Hani did not render a reply on the third defendant's letterhead to Clyde & Co's letter of demand addressed to the third defendant. I note from documents incorporated into the agreed bundles that demurrage claims for cargo shipments (presumably under the *ad hoc* joint ventures) were made on the letterhead of the third defendant.

142 In the light of my observations, it is my view that the second, but not the third defendant, is liable under the MOU and the First Addendum for 30% of the losses arising from the joint venture. There can be no dispute that the first defendant is liable for his own share (5%) of those losses. The defendants' counterclaim is completely unmeritorious.

Do the plaintiffs have the locus standi to sue?

143 A common defence by the defendants raised was that the plaintiffs could not sue in respect of the losses and expenses of BBEA. This defence is misconceived. The plaintiffs' claim is based on their status as shareholders and not made on behalf of BBEA. An ancillary issue in this regard is, who would be selling shares to the defendants? All three witnesses of the defendants disclaimed knowledge of the fact that the shares of the second and third plaintiffs were held in trust for them by Haytham Sioufi and Jeremy Deverson/Tarek Hafez respectively. Earlier, I had found this allegation to be untrue, particularly as regards the first defendant, in the light of his admission that during his tenure with BBEA as its managing director, he held shares as trustee for the Bassatnes.

How did the addenda affect the MOU?

144 This final issue can be easily disposed of. It was the first plaintiff's evidence that the MOU was superseded by the addenda; that is not quite correct as the latter documents only amended and/or varied the terms of the former in two respects: (a) putting forward the operational date of the joint venture to accommodate the first defendant's eagerness to start work with BBEA and (b) extending the completion date for the share transfer.

Conclusion

145 Accordingly, there will be interlocutory judgment with costs for the plaintiffs against the first and second defendants. The Registrar is directed to assess the quantum of the losses of BBEA and thereby the total 35% liability of the first and second defendants. The plaintiffs' claim against the third defendant is dismissed with costs, without prejudice to the claim or counterclaim as the case may be of BBEA, in relation to the *ad hoc* joint ventures for cargoes with the third defendants. The defendants' counterclaim against the plaintiffs is also dismissed with costs.

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[1] See 1AB496

[2] Exhibit P2

[3] Exhibit P3

[4] 1AB419

[5] 1AB496-7

[6] 1AB589

[7] Para 16

[8] 1AB727

[9] 1AB739

[10] 1AB755

[11] 1AB1051

[12] 1AB1094

[13] 1AB1119

[14] 1AB1179

[15] In para 72

[16] 1AB1593

[17] 1AB1277

[18] Para 8 of his affidavit

[19] Para 5[5]

[20] Para 242