MGA International Pte Ltd *v* Wajilam Exports (Singapore) Pte Ltd [2010] SGHC 319

Case Number : Suit No 545 of 2008

Decision Date : 29 October 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : John Seow and Vellayappan Balasubramaniyam (Rajah & Tann LLP) for the plaintiff; Wendy Tan and Charmaine Fu (Stamford Law Corporation) for the defendant.

Parties : MGA International Pte Ltd — Wajilam Exports (Singapore) Pte Ltd

Contract

29 October 2010 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, MGA International Pte Ltd ("MGA"), is a Singapore-incorporated company whose principal activity is log trading. The plaintiff's Chairman and Managing Director, Gupta Mukesh ("Mukesh"), owns 30% of MGA's issued capital and the remaining 70% is held indirectly by Mukesh and his wife through an Indian company called Shipra Ocean Trade Private Limited. The defendant, Wajilam Exports (Singapore) Pte Ltd ("Wajilam"), is in the business of wholesale trading in spices. It also trades in logs and provides trade financing to other log traders. Wajilam's Managing Director is Tarun Chamanlal Mehta ("Tarun").

2 Typically, MGA would finance its purchases of round logs by arranging for Wajilam, a third party, to use its bank facilities to apply for letters of credit. For present purposes, the action concerns and turns on the basis upon which Wajilam provided trade finance to MGA for its purchase of PNG round logs shipped onboard the "*Marina I*". Counsel for both sides confirmed on the sixth day of the trial on 18 January 2010 that the narrow issue before the court relates to the quantum of Wajilam's commission: the question of whether the commission should be the sum of US$376,477.67 or US$70,170.19 depends on what was the commission term upon which Wajilam provided trade finance to MGA. However, if the court rejects the opposing views of the parties, MGA's argument is that a reasonable sum is to be paid as commission. I should mention that Wajilam does not object to the use of the word "commission" to refer to the remuneration for its services to MGA. [note: 1] Wajilam's objection was to being called a "commission agent", which Wajilam insisted it was not. Therefore, in this judgment, for convenience, the word "commission" or "remuneration" is used interchangeably.

Overview

3 The plaintiff company, MGA, was incorporated in 2003 after Mukesh relocated to Singapore and became a permanent resident. As early as 1987, Mukesh imported logs from Malaysia to sell to buyers in India. According to Mukesh, Indian financial institutions generally issued "usance" letters of credit which would pose a problem for Muksesh as log suppliers in Malaysia wanted their sale to be based on

"sight" letters of credit. To resolve this documentary credit mismatch, Mukesh would arrange for a third party to apply to its bank for letters of credit to finance his company's purchases. In return, Mukesh would reimburse the third party for the value of the letter of credit, bank charges and, in addition, pay a commission for its finance services.

4 From 1987 until 2000, Mukesh would finance its purchases in the way described by arranging for either Trusha Impex Pte Ltd ("Trusha"), Tat Hin Timber Pte Ltd ("Tat Hin"), or Wajilam to open letters of credit in favour of his suppliers. During that time, besides Malaysian suppliers, Mukesh bought logs from suppliers in other regions like Africa, Solomon Islands, New Zealand, Russia, and Alaska. After 2003, Mukesh also obtained logs from Guyana and Papua New Guinea ("PNG").

5 Between June 2006 and November 2007, MGA financed its purchases of round logs by arranging with Wajilam to apply to its bank(s) for letters of credits to be opened in favour of MGA's suppliers (hereafter referred to as "the trade finance services"). The letters of credits opened in favour of suppliers named by MGA are hereafter referred to as "the import letters of credit" or "the import letter of credit" as the case maybe. It is common ground that the parties treated each and every finance transaction according to shipments as distinct and separate. Most of the shipments were for round logs of Sarawak origin while three other separate shipments were for logs from Guyana. The *Marina I* shipment was the only one involving round logs from PNG. MGA on its part, agreed to name Wajilam as beneficiary of the letters of credit or other documentary credits opened by its buyers in the India ("the export letters of credit" or "the export letter of credit" as the case maybe). In addition, any cash advances received by MGA from its Indian buyers would be directed to Wajilam. In providing the trade finance services to MGA, Wajilam would be able to discount the bills of exchange; and where necessary, Wajilam would have recourse against MGA as well as the buyers in India as acceptors of the bills of exchange. MGA on its part had also agreed to reimburse the amount of the import letter of credit and expenses connected with the opening of the import letter of credit including late payment interest at the rate of 12% per annum.

6 Although not expressly discussed, it was also understood that at the end of the finance transaction, Wajilam would prepare what was known as a "transaction statement", setting out in detail, amongst other things, the following matters:

(i) the cash portion and the proceeds received by Wajilam under the export letter of credit;

(ii) the amount paid under the import letter of credit;

(iii) the expenses and disbursements that Wajilam had paid out in the course of the finance transaction which MGA was required to reimburse Wajilam; and

(iv) the commission payable to Wajilam.

7 A typical transaction statement would enable both parties to reconcile their accounts after the completion of the transaction in order to determine who should pay whom and the exact amount to be paid.

8 It is common ground that the purchases of round logs were duly shipped and paid for by MGA under the respective import letters of credit. Hence, to clarify, this case is not about non payment of bills of exchange, documents against acceptance or other forms of documentary credit that had fallen due and went unpaid in respect of the export letters of credit.

9 Both sides understood, and there is no dispute, that Wajilam would be paid a commission for

providing trade finance services to MGA. The present dispute is limited to the amount of commission to be paid (hereafter referred to as "the contractual claim"). MGA's pleaded case is that commission was calculated by reference to the quantity of the logs bought and resold (*ie*, 14,034.038 cubic metres ("cbm") which was in fact the actual quantity of logs shipped), and, based on the parties' prior dealings, the rate of commission applicable to the subject transaction was US$5 per cbm. In response, counsel for Wajilam, Ms Wendy Tan ("Ms Tan") argued that there was no agreed rate of commission as pleaded by MGA. Instead, it was an implied term of the contract between the parties that Wajilam had absolute discretion to decide its own remuneration or commission for providing trade finance services (this alleged term will hereafter be referred to as "the discretionary commission term"), and that was the basis upon which Wajilam had provided trade finance services. I noted that the evidence on the key issues as described was primarily oral. The persons involved in the negotiations for the financing of MGA's purchases of round logs, in so far as it may be relevant, were Mukesh (on behalf of MGA) and Tarun (on behalf of Wajilam). The conversations between the two protagonists were *not* documented and much will turn on the oral testimony of both men. One additional thing to note is that, in this judgment, I have not referred to a large part of the evidence that was adduced before me because that evidence has no bearing upon the issues to be decided in this action.

The *Marina I* shipment of PNG round logs

10 The facts concerning the purchase of PNG round logs, which were shipped onboard the *Marina I*, are straightforward. In or about early June 2007, Mukesh spoke to Tarun about MGA's purchase of 14,034.038 cbm of round logs of PNG origin from a Hong Kong company called Borion Enterprise Limited ("Borion"). The sale was initially on FOB terms and MGA as FOB buyer chartered the *Marina 1* to carry the logs from PNG to India. The freight was approximately US$1.2m. According to Mukesh, MGA managed to raise only US$400,000 for the freight. Mukesh therefore began negotiations with Borion to change the terms of sale from FOB to CNF terms (with a corresponding increase of the price) so that Borion would bear the freight upfront. Borion eventually acceded to Mukesh's request to sell the PNG round logs on CNF terms. As such, the purchase price for the PNG round logs was increased from US$4,882,275.16 to US$5,674,115.84 (which sum took into account the US$400,000 advance freight made to Borion). I note that there is no documented evidence before the court as to who paid the freight of US$400,000. Each party claimed to have paid US$400,000 freight to Borion. There is no dispute that the CNF letter of credit value is US$5,832,000.

11 As usual, Wajilam prepared the consolidated statement dated 14 November 2007 (the "sixth consolidated statement") and sent it to MGA on the same date. Attached to it was a cash flow statement dated 6 November 2007 for the *Marina 1* finance transaction. It showed to MGA's credit, a cash surplus of US$998,500.18. This sum was derived from the proceeds of the export letter of credit in Wajilam's favour. The consolidated statement showed the running account balance as of 11 September 2007 as being US$11,730.64 in favour of MGA. This figure of US$11,730.64 was arrived at after deducting from the cash surplus of US$998,500.18, (a) US$892,700.92 being the previous balance in favour of Wajilam, and (b) two other sums of US$78,000 (for a payment made on behalf of MGA by Wajilam on 15 August 2007) and US$16,068.62 (interest on the running balance from 19 July until 11 September 2007). Notably, there was no entry showing Wajilam's commission for the *Marina 1* finance transaction in the sixth consolidated statement.

12 Two weeks later, on 28 November 2007, Agarwal Soham Ghanshyam ("Soham") (he is now the Assistant Vice-President of MGA), sent Wajilam an e-mail with a consolidated statement (the "seventh consolidated statement") attached to it. (At the material time, Soham was the person handling MGA's accounts and he was responsible for checking MGA's accounts with Wajilam.) This time around, unlike the previous occasions, it was MGA, instead of Wajilam, who prepared the

consolidated statement. The title heading for the seventh consolidated statement was "Wajilam Account 15/07/2007 to 28/11/2007 – ROUGH" and it included entries pertaining to the *Marina 1* shipment as well as one other MGA purchase of Guyana logs which the parties had referred to as "the Barama container shipment" (see [34] below for details). Also in the statement was an entry described as "Marina-1 Commission (14,034.038 cbm @ USD 5)" with the corresponding figure of US$70,170.19. In the seventh consolidated statement (based on MGA's computation), the running account balance as at 28 November 2007 was US$477,424.11 in favour of MGA.

13 Even though Tarun received Soham's e-mail and its attachment, he did not respond to it, in particular, the rate of commission at US$5 per cbm of the quantity of round logs shipped onboard the *Marina I*. Eventually, MGA learnt that Wajilam had taken 50% of the net profit as its commission. That worked out to be US$376,477.67 as compared to MGA's figure of US$70,170.19 which was based on the rate of US$5 per cbm of the actual quantity of round logs shipped. I now turn to the rival arguments.

MGA's case on commission

14 MGA's pleaded case is that Wajilam was engaged as its commission agent to provide trade finance services on the terms set out in paragraphs 3 to 15 of the Statement of Claim (Amendment No 1). As already mentioned in brief at [9] above, it was specifically pleaded (at paragraph 5) that the commission was calculated by reference to the quantity of the logs bought and resold (*ie*, 14,034.038 cbm which was in fact the actual quantity of logs shipped), and, based on the parties' prior dealings, the rate of commission applicable to the subject transaction was US$5 per cbm. It was not disputed by Wajilam that for round logs from Sarawak, Wajilam would receive commission at the rate of US$3 per cbm of the quantity of logs shipped, and for round logs from Guyana, Wajilam would receive commission at the rate of US$5 per cbm of the quantity of logs shipped. In his written testimony at paragraph 34, Mukesh recounted his understanding with Tarun on the matter of commission as follows:

> ...If there was going to be any variation to the arrangements [*ie* US$3 per cbm or US$5 per cbm], my understanding was that [the] parties would discuss it specifically beforehand and agree upon it. [Wajilam] had clearly exhibited that it shared a similar understanding insofar as it had:
>
> (a) Charged a commission of USD3 per cubic metre for transactions from Sarawak and USD5 per cubic metre for transactions to Guyana ...; and
>
> (b) Confirmed the terms as to commission, being either USD3 per cubic metre or USD 5 per cubic metre, by paragraph 9 of [its] letter to MGA dated 25 July 2007, which I annex hereto and marked "GM-5".

15 The relevant part of Wajilam's letter of 25 July 2007 ("the 25 July letter") is at paragraph 9, where Tarun wrote:

> 9. Finally, to broadly recap our agreement in respect of various transactions:
>
> a) Guyana shipments:
>
> i) Wajilam [gets] USD5/- per CBM
>
> ii) Insurance at actual on [MGA] a/c

iii) LC opening and negotiation charges at actual on [Wajilam] a/c

iv) Discounting interest and short-receipt of export documents on [MGA] a/c

b) Sarawak shipments:

i) Wajilam [gets] USD3/-per CBM, except where vessel was chartered by [Wajilam]

ii) For the rest, same terms apply as for Guyana shipments.

c) All cash a/c payments accrue interest at 12% (not discussed earlier).

d) All cash flow affected beyond the payment of T/R's by corresponding sales accrues interest at 12%. This was not discussed earlier, but common sense must be applied. Obviously, the bank's TR rate cannot apply, and hence a rate of 12% to compensate for our O/D interest as well as the huge inconvenience.

16 Mukesh confirmed that the rate or amount of commission was not specifically discussed with Tarun when they spoke to arrange the opening of the import letter of credit for MGA's purchase of the PNG logs from Borion. However, MGA never expected to pay anything more than US$5 per cbm of the quantity of logs shipped given that the sea voyage from PNG to India is shorter than the sailing time from Guyana to India. To elaborate, Mukesh's evidence was that the commission to be paid to Wajilam was to compensate it for the risks involved in utilising its banking lines to open the import letter of credit before the export letter of credit was opened in its favour. [note: 2] (Usually, the import letter of credit is opened well before the export letter of credit, which is typically opened only when the vessel is near or has arrived at the discharge port.) As the sea voyage from PNG to India would take an average of about 20 to 25 days (as compared to 12 to 14 days for a sea voyage from Sarawak to India, and 40 to 45 days for a sea voyage from Guyana to India), Mukesh reckoned that the rate of commission would, at most, be US$5 per cbm of the quantity of logs shipped, and not as much as US$26.82 per cbm that was charged (taking US$376,477.67 ÷ 14,034.038 cbm of logs shipped). Mukesh's point as explained by MGA's counsel, Mr John Seow ("Mr Seow") in his closing submissions was that the factor to look at was the turnaround time needed to free the credit line that was utilised and committed to a particular transaction. [note: 3] Elaborating, Mr Seow said: [note: 4]

> ...the commission payable is a function of that period or the time frame between the opening of the [import] LC and the export LC so that's how the ...commission rate [is] arrived at. That ...is a point I am making here.

17 Simply put, MGA's case was that the formula explained at [16] above had been used in the past dealings between the parties, which had involved logs from either Sarawak or Guyana, to determine the commission to be paid to Wajilam. Although the *Marina I* shipment involved logs of PNG origin, the formula by which the commission was determined was the same and constituted a contractual term incorporated by the parties' previous course of dealings (hereafter referred to as "MGA's incorporated term"). Applying MGA's incorporated term argument, Wajilam's remuneration or commission would be US$5 per cbm of the quantity of logs shipped onboard the *Marina I*. MGA's fallback argument is that a reasonable sum is to be paid as commission. On the evidence before the court, Mr Seow submitted that the reasonable rate of commission on a *quantum meruit* basis should also be no more than US$5 per cbm. [note: 5] In summary, MGA's position was that commission should either be US$70,170.19, or a reasonable sum calculated on a *quantum meruit* basis.

Wajilam's case on commission

18 Counsel for Wajilam, Ms Tan, contended that there was no implied contractual term for Wajilam to be remunerated at the rate of US$5 per cbm of the quantity of PNG logs shipped onboard the *Marina I*. Rather, it was an implied term of the parties' contract that Wajilam would be paid commission at a rate or amount as Wajilam deemed fit and/or reasonable. (I earlier referred to this term as the "discretionary commission term" at [9] above.) Ms Tan submitted that the discretionary commission term was a term (a) implied by conduct; or (b) implied to give effect to business efficacy to the parties' agreement; or (c) incorporated in the agreement based on the parties' previous course of dealings. In this regard, Ms Tan sought to examine the conduct of the parties throughout their relationship to support Wajilam's case that on each and every occasion when Wajilam had provided trade finance services to MGA, Mukesh had left the rate or amount of commission to be determined by Tarun. Ms Tan sought to use that *modus operandi* as the basis for implying or incorporating a term that the commission rate or amount for the *Marina 1* shipment would be at a rate or an amount which Wajilam deemed to be fit and/or reasonable *in its absolute discretion*. In the circumstances, Wajilam was exercising its contractual discretion when it charged 50% of the net profit (*ie*, US$376,477.67) as its commission for that shipment. Accordingly, MGA's action should be dismissed.

Outline of this judgment

19 The main question to be decided in the action is: what was the basis upon which Wajilam was to be paid commission? There are two opposing positions: (a) MGA's position is that it was an incorporated term of the contract that Wajilam would be paid commission at the rate of US$5 per cbm of the quantity of the logs shipped, and (b) Wajilam's position is that the contract has an implied or incorporated term that Wajilam has absolute discretion to decide the amount of commission to be paid. Ms Tan submitted that the opposing views are different sides of the same coin, and as such, she would only need to deal with issue (b) which is Wajilam's case on contractual discretion. I agree with Ms Tan's submissions only to the extent that if Wajilam manages to prove the existence of the discretionary commission term, then obviously MGA's incorporated term in issue (a) cannot stand. However, it does not follow that MGA's incorporated term in issue (a) is proven if Wajilam cannot prove issue (b). From this perspective, the parties' opposing views on the term governing commission rate are *not* different sides of the same coin, and a third outcome is possible, where the court rejects the opposing views because neither view is tenable. In the event, the court can hold that there was a valid contract by implying a term in fact that a reasonable sum was to be paid as commission. The discussions below will follow the sequence of the various permutations outlined here.

20 Wajilam's case on contractual discretion involves a consideration of two matters: First, whether the discretionary commission was a term allegedly agreed orally at the discussion between Mukesh and Tarun way back in June 2006 when Mukesh approached Tarun to finance MGA's Guyana log purchases (hereafter referred to as "the First Transaction" and see [22] – [25] below). Second, if the answer to the first inquiry is in the affirmative, the next consideration is whether the discretionary commission term was incorporated by a prior course of dealing(s) into the agreement to provide trade finance services for MGA's purchase of PNG logs in June 2007. In my view and judging from the facts in evidence, the straightforward analysis that relies on a course of dealing to enable the Wajilam to rely on the discretionary commission as an incorporated term of the contract is the correct way of putting Wajilam's case. Its alternative case for implication of a term (*ie*, the discretionary commission) by the conduct of the parties, or implied to give business efficacy to the contract is completely misconceived. Conceptual difficulties make the alternative case for implication of the term hopeless, and quite apart from this, there is no need for a term on discretionary commission to be implied into the agreement for business efficacy. I say no more about that misguided assertion.

21 Both sides relied on prior dealings to imply or incorporate the commission term. In the circumstances, to consider the main question, it is necessary to now set out the past transactions in some detail.

The history of the parties' relationship

The Vinashin Sun/Royal transaction ("the First Transaction")

22 Sometime in June 2006, Mukesh approached Tarun to procure Wajilam's assistance to open an import letter of credit in favour of a company in Guyana by the name of Barama Company Ltd ("Barama"). Mukesh had successfully negotiated, on behalf of MGA, the purchase of Guyana round logs, and needed financing. At that time, MGA had credit facilities with the following three banks: Bank of East Asia, United Overseas Bank, and Oversea Chinese Banking Corporation ("OCBC Bank"); and the credit limits from those bank facilities were S$1m, approximately S$1.5m, and US$2.5m respectively. [note: 6] At the material time, MGA's credit line with OCBC Bank was frozen (to use Mr Seow's terminology) on account of some problems with earlier shipments involving the vessels *Annie Sierra* and *Trinity Sierra*. In June 2007, at the time of the *Marina I* transaction, MGA's bank facility with the OCBC Bank was US$6m. [note: 7]

23 It was at this meeting in June 2006 that Tarun and Mukesh agreed to the following arrangement:

(i) Wajilam would open the import letter of credit in favour of Barama and also pay the freight and insurance premium for the shipment of the logs from Guyana to India.

(ii) MGA would arrange for its Indian buyers to open export letter of credit in favour of Wajilam. Any cash advance from the Indian buyers would be directed to Wajilam.

(iii) Wajilam would then deduct, utilising the receipts from the export letter of credit, the following items: (a) the expenses that would be borne by MGA, and (b) Wajilam's commission.

(iv) Wajilam would return the balance receipts, if any, to MGA.

24 Since MGA was buying the round logs from Barama on FOB terms and subsequently on-selling them to its Indian buyers on CIF terms, MGA, as the party responsible for chartering the vessel to ship the logs, had the opportunity to make additional profits over and above its trading profits if it managed to secure cheaper freight rates. MGA initially signed a fixture note for the *Vinashin Sun* in May 2006, but as it turned out, the vessel was delayed and MGA had to ship the logs on another vessel, the *Royal*. Later on, MGA decided to purchase more logs from Barama, and this time they were shipped onboard the *Vinashin Sun*. In all, the two shipments of logs from Guyana to the Indian ports of Kandla and Tuticorin came up to approximately 16,516.2806 cbm of round logs.

25 Wajilam's commission was agreed at the rate of US$5 per cbm of the quantity of logs shipped. The dispute is as to how the rate was arrived at, and I will come to this aspect of the dispute later. More importantly, both sides conceded that, at that point in time, the arrangement between them in respect of the First Transaction was contemplated as a one-off transaction.

The Dynasty finance transaction

26 Shortly after the First Transaction was agreed by the parties, MGA and Wajilam entered into a second trade finance transaction in June 2006 ("the *Dynasty* finance transaction"). This time, MGA

had purchased 2,202.3228 cbm of Sarawak round logs from a Malaysian company, Kayuneka Sdn Bhd ("Kayuneka"), on FOB terms for the price of US$400,000. The Sarawak logs were to be shipped on the vessel *Dynasty* around mid-2006 for carriage to India. Since MGA had already paid for the freight, Wajilam was only required to open the import letter of credit in favour of Kayuneka and to pay the insurance premium for the shipment. Other than that, the same arrangement that was agreed for the First Transaction applied to the *Dynasty* finance transaction as well. Wajilam opened the import letter of credit in June 2006.

27 On the matter of commission, Mukesh testified that he and Tarun discussed the rate of commission at a meeting in June 2006, and it was agreed that commission was to be at the rate of US$3 per cbm for the quantity of Sarawak logs shipped. [note: 8] Mukesh's testimony was rejected by Tarun who denied any such discussion or agreement. [note: 9]

28 Eventually, Wajilam did not charge any commission for the *Dynasty* finance transaction. Tarun claimed that since MGA made a loss on the *Dynasty* shipment, Wajilam decided not to charge any commission. [note: 10] Simply put, it was Wajilam's case that since MGA had left it to Wajilam to decide on its own remuneration as Wajilam deemed it fit and/or reasonable, it was Wajilam's prerogative not to charge any commission. By contrast, Mukesh testified that the commission rate had earlier been agreed at US$3 per cbm, and the commission, which amounted to about US$6600, was a small sum to forego and he interpreted the accommodation as a goodwill gesture on the part of Wajilam to promote a newly developed business relationship for future gains. [note: 11]

The four Sawarak shipments

29 On or about August 2006, Wajilam opened letters of credit in respect of MGA's purchases of 2,118.9149 cbm and 1,870.9054 cbm of Malaysian round logs of Sarawak origin, which were shipped on the vessel *Success* (v4/06) and the vessel *Seletar* (v6/06) respectively. The import letters of credit in question were opened by Wajilam on 18 August 2006. There were two further letters of credit opened by Wajilam for MGA's purchases of 4,539.7389 cbm and 3,928.1249 cbm of Sarawak logs, which were shipped onboard the vessel *Asean Unity* (v6/06) and the vessel *Asean Victory* (v8/06) respectively. The import letter of credit for the *Asean Unity* (v6/06) shipment was opened on 18 August 2006, and the import letter of credit for the *Asean Victory* (v8/06) shipment was opened on 19 September 2006. Wajilam's commission for each of the four Sarawak shipments was based on the rate of US$3 per cbm of the quantity of logs shipped. Tarun maintained that US$3 per cbm was the rate which he had deemed it fit and/or reasonable to charge as its commission. Mukesh disagreed, arguing that it had nothing to do with the alleged oral term on discretionary commission. I took him as adopting the evidence in paragraph 30 of his written testimony (see [16] above).

The Royal Crystal transaction

30 The next shipment that followed was for 19,863.7594 cbm of Sarawak logs. After MGA had secured the supplier and Indian buyers for the shipment, Mukesh approached Glory Ship Management Pte Ltd to enquire about freight rates. After he learned that the freight rate would be in the region of US$53 to US$55 per cbm, Mukesh decided to approach Wajilam in the hope of obtaining cheaper freight. Subsequently, Tarun succeeded in chartering the *Royal Crystal* at a cheaper freight rate. The import letter of credit for this shipment was opened by Wajilam on 8 November 2006. MGA paid Wajilam 50% of the profit earned as commission instead of the usual US$3 per cbm for Sarawak logs. This transaction was viewed as an exception by Mukesh since Tarun had chartered the vessel "*Royal Crystal*". [note: 12] He also stated in his written testimony that it was specifically agreed with Tarun, and this agreement was reached in "late October 2006, or early November 2004, or shortly after", to

pay Wajilam a commission of 50% of the profit derived from the transaction. [note: 13] Tarun subscribed to the opposite view arguing that Wajilam was exercising its contractual discretion when it charged 50% of the profit as its commission.

The Dana Muheiddine transaction

31 The following transaction concerned logs of Guyana origin and shipped onboard the vessel *Dana Muheiddine*. The import letter of credit for this purchase was subsequently opened by Wajilam on 21 November 2006. [note: 14] Before that, in or about October 2006, MGA had separately purchased from Wajilam, on CFR terms, a cargo of Ghanaian teak round logs which were to be shipped from Takoradi, Ghana to Kandla, India, also onboard the vessel *Dana Muheiddine*. Wajilam then entered into the fixture of the vessel for this transaction instead of MGA. Tarun deposed that there were no discussions or negotiations on the rate of commission as the amount of commission was left to Wajilam to decide. He followed the First Transaction as Guyana logs were involved and adopted the same rate of US$5 per cbm of the quantity of logs shipped. Mukesh agreed that the rate of commission was US$5 per cbm for Guyana logs but disagreed that the rate had anything to do with the alleged contractual discretion.

The seven Sarawak shipments

32 After the *Dana Muheiddine* transaction, there were a total of seven shipments of Sarawak logs to India: the vessels were the *Seletar* (v2/07), *Oriental Glory* (v3/07), *Asean Unity* (v3/07), *Seletar* (v3/07), *Success* (v5/07), *Asean Victory* (v4/07), and *Asean Mariner* (v4/07). Again at Mukesh's request, Wajilam opened import letters of credit for MGA's purchases. The import letters of credit were opened in March 2007, April 2007 and May 2007. Tarun maintained that US$3 per cbm was the rate which he had deemed it fit and/or reasonable to charge as Wajilam's commission. Mukesh disagreed. As Sarawak logs were involved, the applicable rate was US$3 per cbm. It had nothing to do with the alleged contractual discretion.

The Marina 1 transaction

33 As stated in [10] above, in early June 2007, Mukesh spoke to Tarun about MGA's purchase of 14,034.038 cbm of logs of PNG origin from Borion. Subsequently, two import letters of credit were opened by Wajilam: the first was on 22 June 2007, and the second one was on 2 July 2007. [note: 15] Wajilam argues that it was exercising its contractual discretion when it charged 50% of the net profit as its commission. This contention was rejected by MGA.

The Barama shipment in containers

34 This purchase of Guyana sawn timber was after the *Marine I* finance transaction, but the import letter of credit was opened by Wajilam in July 2007. The import letter of credit was for 10,551.038 cbm of sawn timber of Guyana origin and it was, as mentioned, opened in July 2007. The purchase of the Guyana sawn timber was from the company Barama, and as usual, the purchase was for on-sale in India. The consignment of sawn timber was shipped in containers. The parties have referred to this transaction as "the Barama container shipment". Again there was no discussion or negotiation on the rate or amount of Wajilam's commission. Wajilam maintained that the rate or amount of commission was left to it to decide, and that it was exercising its contractual discretion when it charged the rate of US$5 per cbm as its commission. This contention was rejected by MGA. I should state here that on the sixth day of trial on 18 January 2010, Mr Seow informed the court that MGA had studied the accounts for this shipment and was no longer seeking production of the accounts, but the issue of costs remains.

The Oriental Glory (v9/07) transaction

35 This was the last transaction between the parties. The shipment was for logs of Sarawak origin which were shipped onboard the vessel *Oriental Glory* (v9/07). Wajilam opened the import letter of credit in November 2007. Again there was no discussion or negotiation on the rate or amount of Wajilam's commission. Wajilam maintained that commission was left to it to decide, and that it was exercising its contractual discretion when it charged the rate of US$3 per cbm as its commission. Again, this contention was rejected by MGA.

The running account and the account statements

36 After the successful conclusion of the first few shipments, the parties began, out of convenience, to maintain a running account between them. This was largely because there would be a new trade finance agreed to before the previous one was completed. The amounts due in the running account would be updated from time to time in what was referred to as "consolidated statements", which were prepared by Wajilam and sent to MGA for verification and acceptance. It was Soham's responsibility to verify the statements from Wajilam.

The first consolidated statement

37 The first consolidated statement was dated 24 November 2006, and it reflected the running account balance as US$1,602,784.98 in favour of Wajilam as at that date. The first consolidated statements covered the shipments on the following vessels:

(i) the Vinashin Sun/Royal;

(ii) the Dynasty; and

(iii) the four Sarawak shipments (see [29] above).

Attached to the first consolidated statement were the individual transaction statements concerned.

38 There was one transaction statement for the *Vinashin Sun* shipment, and another for the *Royal* shipment. In the *Vinashin Sun* transaction statement, an entry described as "Commission to Wajilam Exports at USD 5/- per cbm" can be found with the corresponding figure of US$35,777.20. In the *Royal* transaction statement, there was also an entry for Wajilam's commission at the rate of US$5 per cbm with the figure of US$47,004.21 stated.

39 For the four Sarawak shipments, each and every one of the transaction statements had an entry described as "Commission to Wajilam Exports at USD3/- per cbm" and the following figures: US$16,562.18 for the *Success* (v4/06) transaction statement; US$5,612.72 for the *Seletar* (v6/06) transaction statement; US$13,619.22 for the *Asean Unity* (v6/06) transaction statement; and US$11,784.37 for the *Asean Victory* (v8/06) transaction statement.

40 In contrast, there was *no* entry for commission in the *Dynasty* transaction statement.

The second consolidated statement

41 The second consolidated statement was dated 31 January 2007 and the amount due from MGA to Wajilam was updated to US$988,068.27. The finance transactions involving the vessels listed

below were included in the consolidated statement:

(i) the Dana Muheiddin; and

(ii) the Royal Crystal.

42 In the transaction statement for the *Dana Muheiddin*, Wajilam's commission was US$45,919.47 based on US$5 per cbm. Although there was no entry for Wajilam's commission in the *Royal Crystal* transaction statement, MGA was given credit for only 50% of the profit derived from the *Royal Crystal* shipment.

The third consolidated statement

43 The third consolidated statement was in fact two statements in one and it reflected the amounts due from MGA to Wajilam on two different dates. As of 31 March 2007, the amount due from MGA to Wajilam was shown as US$907,133.44 whereas as of 30 April 2007, the amount due, after taking into account the *Oriental Glory* (v3/07) shipment, the amount due from MGA was reduced to US$741,739.44. Soham confirmed the correctness of this figure of US$741,739.44 in an e-mail dated 17 May 2007.

44 Attached to the third consolidated statement were two transaction statements. In the *Seletar* (v2/07) transaction statement, Wajilam's commission rate and commission amount were reflected as US$3 per cbm and US$8,496.16 respectively. The commission rate and commission amount reflected in the *Oriental Glory* (v3/07) transaction statement were US$3 per cbm and US$9,036.79 respectively.

The fourth consolidated statement

45 Although the fourth consolidated statement was dated 9 May 2007, it did not update the running account balance, but merely supplied the supporting accounts for the period of time between the second and third consolidated statements (31 March and 30 April 2007). The running account balance in the fourth consolidated statement was reflected as US$790,986.67. That was in fact used as the *opening figure* in the third consolidated statement. Therefore, the running account balance as of 9 May 2007 remained the same as the amount in the third consolidated statement: the sum of US$741,739.44 in favour of Wajilam.

The fifth consolidated statement and the 25 July letter

46 The fifth consolidated statement was dated 19 July 2007, and it was sent to MGA as an attachment to a letter dated 25 July 2007 (*ie*, the 25 July letter). By then, the running account balance due from MGA to Wajilam had increased to US$892,700.92. The following statements were included with the fifth consolidated statement:

(i) the "interest calculation statement" for the Barama container shipment;

(ii) the "interest calculation statement" for the *Vinashin Sun/Royal* shipments;

(iii) the "interest calculation statement" for cash advances and other finance transactions;

(iv) five transaction statements for five of the Sarawak shipments, namely, *Asean Unity* (v3/07), *Seletar* (v3/07), Success (v5/07), *Asean Victory* (v4/07), and *Asean Mariner* (v4/07);

(v) the "cash difference statement" for five of the Sarawak shipments;

(vi) the "bank charges and interest statement"; and

(vii) a consolidated statements for five of the Sarawak shipments.

The text of paragraph 9 of the 25 July letter is already set out in [15] above.

The sixth consolidated statement

47 I have already mentioned in detail the sixth consolidated statement dated 14 November 2007 in [11] above. Notably, there was no entry of Wajilam's commission for the *Marina 1* finance transaction in the sixth consolidated statement.

48 It was undisputed that MGA had received all six of the abovementioned consolidated statements.

The seventh consolidated statement from MGA

49 I have also mentioned in detail the seventh consolidated statement in [12] above, and will not cover the same material here.

50 Tarun admitted to receiving Soham's e-mail and the seventh consolidated statement as an attachment but did not respond to it. [note: 16]

The genesis of the dispute in this action

The e-mails from MGA asking for the accounts

51 In December 2007, Mukesh began e-mailing Tarun for what he had termed "the old account". In an e-mail dated 21 December 2007, Mukesh wrote: [note: 17]

> TARUN BHAI, CAN U PLS FWD ME THE OLD A/C. I REALLY WANTS [sic] TO CLOSE THE OLD A/C. I HAVE TO PAY BACK MONEY TO MY BANK...

52 Around two weeks later, Mukesh wrote to Tarun again on 5 January 2008: [note: 18]

> TARUN BHAI, SOHAM IS LEAVING TO [sic] OVERSEA ON MONDAY. I RQT U PLS FWD THE OLD A/C SO THAT HE CAN COMPLETE THE A/C BEFORE HE GOES. I REALY [sic] NEED THE FUNDS TO PAY BACK TO MY BANK. THKS.

53 Tarun replied e-mail on the same day as follows:

> As soon as the balance of Oriental Glory is received, there is [sic] definitely dues in your favour. Old a/cs are almost ready to the point of payment of D/A bills by your buyers.
>
> You will agree for obvious reasons d/a bills payment has to come as they are now classified as overdue in our bank ie Indian bank.
>
> So please expedite the payment.

54 To that, Mukesh responded, also on the same day: [note: 19]

> TARUN, D/A BILL WE R PUSHING N HOPE WILL RECVD NEXT WEEK. O GLORY PAYMENY [sic] WILL COME TO YR ON MONDAY. MY RQT TO U TO FWD THE A/C AT THE EARLIEST. THKS

55 More than a week later, on 17 January 2008, Mukesh sent an e-mail chaser: [note: 20]

> TARUN BHAI,I RQT U PLS SEND ME THE OLD A/C AS DISCUSSED LAST WEEK. THKS

56 Tarun's replied as follows: [note: 21]

> I will be quite busy till Tuesday next week.
>
> All of us are stuck with Audit enquiries which is just not getting over.
>
> The biggest hurdle we crossed yesterday was MGF a/c in our books.
>
> Will give u the story when we talk on the phone.
>
> Please bear with me until then.
>
> As for a/cs, only Barama a/cs are pending. Rest all a/cs are given.
>
> Barama a/c is waiting for completion due to unpaid d/a bills.
>
> You get that paid and all is complete.

57 Mukesh's response was as follows: [note: 22]

> Tarun bhai noted, any way u complete yr work first then u fwd me the a/c. u can show the d/a bill outstanding in the a/c once u recvd the payment then credit to me. i wants [sic] to clear the all old a/c's asap.

58 Mukesh wrote to Tarun twice, on 24 and 28 January 2008 repeating his request for "the old a/c".

59 Finally, on 18 February 2008, Tarun wrote to Mukesh to notify him that the accounts would be finalised soon and acknowledged the delay in producing the accounts: [note: 23]

> Good news. We have received payments of some of your d/a bills. There is still about usd 64K d/a payment but we can now tie up YOUR a/cs latest by close of tomorrow.
>
> Sorry about this delay. But the payment of these bills HAD to come before we could sort of close your a/cs.

60 The next day, on 19 February 2008, it was Soham's turn to write to Tarun, asking him to "finalise [MGA's] account" and to give them the balance after deducting any outstanding "DA bills". [note: 24]

61 Three days later, on 21 February 2008, Mukesh wrote to Tarun asking for payment: [note: 25]

DEAR TARUN BHAI, I RQT U TO ISSUE THE CHEQUE FOR THE BALANCE AMT TO US.IT IS VERY VERY URGENT.

THKS

62 The following day, on 22 February 2008, Soham again wrote to Tarun with the same request. [note: 26]

63 Subsequently, MGA's solicitors issued Wajilam a letter of demand on 11 April 2008 [note: 27] demanding a sum of US$512,594.35, which was the sum total of US$477,424.11 (the running account balance in favour of MGA as of 28 November 2007 according to the seventh consolidated statement: see [12] above) and US$35,170.24 (the interest from 22 August 2007 until 31 March 2008 at 12% per annum).

Discussions and decision on the contractual claim for commission

64 The material facts that are not in dispute are:

(i) Each and every one of the 18 finance transactions was a separate and different contract. Both sides conceded that the arrangement between them in respect of the First Transaction was contemplated as a one-off transaction.

(ii) The agreement to provide trade finance services for the *Marina I* shipment was concluded orally between Mukesh and Tarun. Both representatives did not discuss the rate or amount of the commission at all. Even though an important point like remuneration was not discussed, both sides understood that Wajilam would be paid a commission.

65 Neither party is taking the position that there was *no* contract even though remuneration was not actually discussed at the time Tarun agreed to provide trade finance services to MGA for its purchase of PNG logs. Both sides relied on prior dealings to imply or incorporate the commission term.

MGA's incorporated term

66 MGA's incorporated term depended on the formula explained at [16] as the basis upon which Wajilam was "engaged" to provide trade finance services. Mr Seow conceded that his argument on MGA's incorporated term would only succeed if the court accepts Mukesh's evidence on the formula at [16]. [note: 28] In my view, Mr Seow's argument on MGA's incorporated term is not made out due to a number of inconsistencies contained in MGA's own pleadings and evidence. First, nowhere in MGA's pleaded case was there any mention of the formula explained at [16]. The assertion that the commission rate per cbm was dependent on the duration of the sea voyage only surfaced as a factor in Mukesh's written evidence (see [16] above). Second, not only was the alleged formula not pleaded, the formula is inconsistent with the position taken in the pleadings. The pleaded case is that the terms of MGA's "engagement" of Wajilam's services are those set out at paragraphs 3 to 15 of the Statement of Claim (Amendment No 1), of which paragraph 5 deals specifically with commission, and how it was to be calculated by reference to the actual quantity of the logs shipped and the rate per cbm was dependent on the *origin* of the logs. Third, the inherent inconsistencies in Mukesh's written testimony militate against the veracity of the MGA's incorporated term. Inconsistencies can be found by comparing different parts of Mukesh's own written testimony. In particular, Mukesh claimed in

paragraph 34 of his written testimony that the rate of US$5 per cbm was specifically intended for Guyana logs, and that the parties were expected to negotiate the rate or amount of commission if the origins of the logs were not Sarawak and Guyana (see [14] above). Since it was common ground that the *Marina I* shipment was the first trade finance transaction involving PNG logs, and if paragraph 34 of Mukesh's testimony is to be believed, parties would have had to *expressly* agree on the rate of commission for the *Marina I* shipment because it involved a new source of logs. Hence, on the one hand, MGA was claiming that the remuneration for *Marina I* had to be expressly agreed because it involved a new source of logs, and on the other, it was arguing that the term of remuneration was incorporated through the parties' previous course of dealings in transactions that did not involve PNG logs. Finally, even MGA's own witness, Ngui Ing Chuang ("Mr Ngui") did not support Mukesh's testimony on the vital point that voyage duration was a factor. Mr Ngui testified that, in his experience, the length of sea voyage was never a consideration in determining commission in trade finance.

Wajilam's discretionary commission term

67 It must be remembered that there was no actual discussion between Tarun and Mukesh as to the commission payable to Wajilam for financing the *Marina I* shipment of PNG logs. According to Wajilam's pleaded case, it had contractual discretion to decide on its own remuneration or commission. This *carte blanche* authority was given at the First Transaction, and repeated in subsequent shipments on the same basis. In the premises, for the trade finance services provided to MGA for the purchase of the PNG logs, Wajilam had deemed it fit to fix its remuneration at 50% of the net profit.

68 I will first decide whether the discretionary commission term was allegedly agreed orally in the First Transaction. Consideration of Wajilam's case as to incorporation which rests on a prior course of dealing only arises if there is a finding that there was an agreement on discretionary commission.

69 I begin with Wajilam's pleaded case. The plea in the Defence (Amendment No 1) is that the discretion on remuneration or commission was agreed between Tarun and Mukesh when they discussed the First Transaction in June 2006. The relevant part of paragraph 4 of the Defence (Amendment No 1) reads:

> ... *In or about June 2006, Mukesh approached Tarun and orally requested the Defendant's assistance to open a letter of credit in the Defendant's name under its own bank lines for the Plaintiff's purchase from its supplier, Barama Co Ltd of Guyana round logs ("the First Transaction") as it did not have the financial ability to do so*. The Plaintiff informed the Defendant that it had buyers, to whom the Plaintiff would be on-selling the said cargo of logs at a higher price and that it would instruct the buyers to open export letters of credit in favour of the Defendant if the Defendant were to agree to the Plaintiff's request. The Plaintiff also requested the Defendant to pay freight charges, marine insurance premium and other incidental expenses for the shipment, all of which including expenses accrued in relation to the opening of the letter of credit such as bank interest and bank charges would be covered by the sale vale of the cargo. Further, *the Plaintiff's Mukesh proposed to the Defendant's Tarun that the Defendant remunerate itself for its services at such rate or amount as the Defendant deemed fit and/or reasonable*. [emphasis added]

70 On the question of remuneration, Tarun recounted his June 2006 conversation with Mukesh in paragraph 15 of his written testimony as follows:

> Mukesh therefore told me that the Defendant could remunerate itself for its services and/or

financial assistance provided to the Plaintiff at such rate or amount as I deemed fit and/or reasonable. For the First Transaction, I thought it fit and/or reasonable for the Defendant to be remunerated at US$5 per cubic metre of the logs and told Mukesh so at the meeting. He accepted it. He left after thanking me for agreeing to help him out.

71 In contrast, MGA's case is that there was some discussion on the amount of commission payable to Wajilam for providing trade finance services in respect of the First Transaction but not in the way recounted by Tarun. I interpret Mukesh's evidence as denouncing as absurd the grant of absolute discretion to Wajilam to decide on Wajilam's commission as it would be tantamount to giving Wajilam a blank cheque to fill in whatever figure it wanted. He pointed out in his testimony that no businessman would take an open position without first knowing the numbers. [note: 29] In my judgment, Mukesh's account of the facts seemed more probable than Tarun's version.

72 Mukesh explained the sequence of the discussion as follows: [note: 30]

I had, in the first instance, proposed that the commission to be based on 2% of the value of the purchase price from Barama Company Limited (inclusive of freight charges). This was in line with the terms on which I had previously engaged Trusha, Tat Hin, Batavai, Paragan and the defendant. Mr Tarun Metha's proposal, however was to base the commission on the volume of cargo involved in the transaction. In this regard, he proposed he proposed the figure of US$5 per cubic metre of timber.

73 Explaining further, Mukesh said: [note: 31]

I agreed to the proposal for the defendant to charge US$5 per cubic metre as their commission. I recall that I did my sums and came to the conclusion that there was not much of a difference between the two bases for calculating the commission payable to the defendant. Under the 2% basis of calculation, the commission payable to the defendant would have been about US$71,000. This is derived by aggregating the value of the purchase price from Barama Company Limited of about USD2,010,000 and the approximate freight charges of about USD1,533,000 and taking 2% of the result. Under the USD5 per cubic metre basis of calculation, the commission payable to the Defendant would have been USD83,000. This is derived by multiplying the total volume of timber purchased from Barama Company Limited, which is 16,600 cubic metres, by USD5. Also, there were different types of timber in Guyana which attracted different prices. Calculating the defendant's commission by volume of the cargo, instead of the price of the same, would benefit the Plaintiff (in future transaction with the Defendant) if the cargo comprised high quality timber which was very expensive.

74 Ms Tan's submissions focussed on the manner in which the parties dealt with each other to support her contention that it was not so commercially implausible to have given *carte blanche* authority to Wajilam to decide on its own remuneration. She relied on Tarun's evidence that (a) Tarun and Mukesh were close friends and that Mukesh trusted Tarun to be fair and reasonable in deciding Wajilam's commission; [note: 32] (b) MGA was in financial difficulties on account of two troublesome shipments involving the vessels, *Annie Sierra* and *Trinity Serra* in June 2006. Against this factual matrix, and being "cash strapped" as Tarun puts it in his written testimony, [note: 33] MGA was in no position to dictate terms. [note: 34] Evidence of the state of MGA's banking facilities was put before the court. In addition, the pattern of past conduct and previous course of dealings were said to bear out the existence of the oral term on discretionary commission. Needless to say, Mukesh rejects the evidence as completely untrue, and in any case maintained that the notion of discretionary commission was commercially implausible and illogical. I will now discuss the various arguments in turn.

75 Wajilam's submission that MGA was in no position to dictate terms and would have willingly agreed the term as to discretionary commission in order to secure financial assistance for the First Transaction breaks down at the outset. On Tarun's testimony, the discretionary commission was *not* a term that Tarun had insisted on leaving Mukesh with no choice but to give in to Tarun. I refer back to Mukesh's explanation on why he was comfortable with the rate of US$5 per cbm and he took it (see [73] above).

76 Wajilam's claim that Mukesh and Tarun were close friends was not borne out by the evidence before me. I was equally not persuaded that the evidence bear out the degree or level of trust, or dire financial dependence on Wajilam so that MGA was willing to grant Wajilam absolute discretion to determine its own remuneration. There was no clear evidence that MGA was entirely dependent on Wajilam financially. During the opening stages of cross-examining of Mukesh, Ms Tan attempted to show that MGA's bank credit lines had been fully utilised around the period of June 2006 so that MGA had no choice but to look to Wajilam for financial assistance for its business operations. However, MGA was able to produce at the trial, evidence that, at the relevant time, it still had access to its other banks' credit lines and log traders (like Tat Hin) to finance its purchases from June 2006, and that it was not as financially dependent on Wajilam as the latter wanted the court to believe. [note: 35] Mukesh's reason for obtaining financial assistance from Wajilam was because MGA's business was growing very fast, and he had wanted to take advantage of the opportunities to do *more* business. [note: 36]

77 Whilst Tarun accepted that the rate of US$5 per cbm was raised by him and accepted by Mukesh, his spurious answer to Mr Seow's question as to how that particular rate was arrived at left me with a negative impression that he was trying to preserve the myth of the discretionary commission term. Tarun's evidence was unsatisfactory as it lacked business sense. To elaborate, Tarun said that the discretion did not require him to justify the rate of US$5 per cbm. He claimed that the rate of US$5 per cbm was an arbitrary figure that he had plucked out of the air. [note: 37] His answer was the same when questioned on the rate of US$3 per cbm for the Sarawak logs.

78 Evidence of the sequence of the discussion may plausibly be interpreted as negotiations towards an agreement: an offer from Mukesh based on 2% of the purchase price of the quantity of the logs shipped followed by Tarun's counter offer of US$5 per cbm, and finally Mukesh's acceptance or acquiescence of the rate of US$5 per cbm. Alternatively, even on Tarun's testimony that it was he who had asked for US$5 per cbm and Mukesh had not counter proposed anything, the fact of the matter was that Mukesh did not reject the rate of US$5 per cbm for the reasons explained in [73], and he quietly accepted Tarun's proposal. Mukesh's evidence is that he found the rate acceptable after doing some mental calculations. I prefer Mukesh's evidence as it was not improbable for a trader of his experience to know the business, and to quickly make a business decision on whether the proposed rate of US$5 per cbm was tolerable for him. Either analysis as explained yields the same answer, and I so find, that a commission or remuneration at the rate of US$5 per cbm was a term that was mutually agreed orally in June 2006 between Tarun and Mukesh at the time of the agreement for the First Transaction.

79 Ms Tan had relied on the subsequent conduct of the parties after the First Transaction to further support her contention that *carte blanche* authority was given to Wajilam to decide on its own remuneration. Ms Tan pointed to several examples to demonstrate the exercise of discretion. Broadly speaking, Ms Tan maintained that in each and every finance transaction, Mukesh had left the amount of remuneration to be determined by Tarun, and that pattern of conduct was consistent with the existence of the oral term on discretionary commission. Typically, the amount of the remuneration

determined by Tarun was made known in the transaction statement which Ms Tan claimed Mukesh had accepted without question or discussion until the *Marina I*. She also cited as examples the commission structure Wajilam charged for the *Royal Crystal* shipment; the *Dynasty* where commission was waived, and the unilateral imposition of late payment interest by Wajilam. I will now comment on the examples cited by Ms Tan.

80 Ms Tan cited the *Royal Crystal* financial transaction as evidence to support Wajilam's contention. In that case, the commission was 50% of the profit and MGA accepted it. Mukesh disagreed with the slant of Tarun's evidence. He said that the rate there was specifically agreed before shipment (see [30] above): it was agreed because Tarun had secured the vessel at a freight rate lower than the prevailing market rate and that enabled additional profits to be derived from the freight differential (about US$3.80 per cbm). In the circumstances, Mukesh did not object to the remuneration at 50% of the profit even though commission for Sarawak logs would ordinarily be US$3 per cbm. In my judgment, the overall evidence point to Mukesh agreeing to pay the extra remuneration. Even at 50% of the profit, which translated to a rate of US$5.10 per cbm, Mukesh said he still enjoyed a savings in freight albeit a smaller sum of about US$1.70 per cbm. That led to Wajilam being remunerated differently from the other shipments of Sarawak logs. I refer to my comments at [84] below which are relevant to my finding in favour of Mukesh's evidence.

81 The other example relied upon by Ms Tan as evidence of the existence of the discretionary commission was the *Dynasty* shipment where trade finance services were similarly provided by Wajilam. The import letter of credit was for US$400,000. As already mentioned at [28] above, MGA did not earn any profits from the on-sale in India, and Wajilam did not charge commission for the trade finance services provided. Mukesh confirmed that he was alerted by Soham that Wajilam had not charged commission for the *Dynasty* transaction. He did not raise it with Tarun but instead interpreted the omission as a gesture of goodwill in the interest of future business seeing that the *Dynasty* was the second deal, so to speak. It did not appear to me that Tarun's decision to forego remuneration was a point decidedly in favour of Wajilam's contention. I should mention that I agree with Mr Seow that it would have been more probable that the parties would have discussed commission for this second transaction as both parties conceded that the First Transaction was one-off in that at that time no further or future transactions were contemplated by the parties. Mukesh said that the parties agreed to the commission rate of US$3 per cbm of the quantity of Sarawak logs shipped. Tarun's version is that there was no discussion on commission for the *Dynasty* transaction; commission was left to Wajilam to decide and the rate of US$3 per cbm was an arbitrary figure he had plucked out of the air (see [77] above).

82 Ms Tan also drew attention to the fact that Wajilam had imposed interest on the outstanding balance in the running account at 12% per annum and MGA had accepted it without objection thereby demonstrating that MGA were willing to accept any term imposed by Wajilam. According to Ms Tan, late payment interest of 12% per annum was first imposed in November 2006. At that time, the balance due to Tarun was $1.6m from the First Transaction. Mukesh's evidence was that he had accepted the 12% interest because it was a relatively small amount compared to the volume of business that was coming in at that time. [note: 38] I saw that as an example of another charge that was mutually acceptable to both sides, and I do not accept the slant given to the evidence by Wajilam.

83 Ms Tan also suggested that the commission stated in the transaction statements submitted to MGA were final and conclusive so as to constitute evidence of Wajilam's unfettered authority to charge whatever commission it fancied. In my view, the contention is untenable. Returning to the First Transaction, the commission there was discussed and agreed by the parties. Mukesh said the same thing happened for the *Dynasty* and *Royal Crystal* finance transactions but this was disputed by

Tarun. Leaving aside for a moment the First Transaction as well as the finance transactions involving the *Dynasty* and the *Royal Crystal*, it is common ground that for the other subsequent transactions, commission was not discussed before the agreement to provide trade finance services, but it was understood (and this is common ground) that commission would be paid. For those transactions, typically, the commission or remuneration would be stated on the transaction statement. However, MGA was not bound by the transaction statement. MGA was entitled to review, verify and revise the figures submitted in the transaction statement. It was not a case where MGA was *not* entitled to open up or revise the figures there. I find that the individual statements and consolidated statements submitted to MGA were capable of verification and acceptance by MGA. Indeed paragraph 1 of the 25 July letter is consistent with this finding. It reads:

> We have prepared the accounts exactly as agreed between us. I will also recap for you below, the broad basis on which the accounts are drawn up. If you think there is an account that is made up differently from what was originally discussed between us, you are welcome to point it out. *The amount as presented needs your perusal and confirmation by the end of this month*.
>
> [emphasis added]

84 Of significance is paragraph 9 of Wajilam's 25 July letter that recapitulated the agreed rates for logs from Sarawak and Guyana, and recognised, at the same time, that if Wajilam had chartered the vessel as was the case for the *Royal Crystal*, the commission rate of US$3 per cbm for Sarawak logs would not apply. By implication, this meant that the rate would have to be separately agreed and this point corroborates Mukesh's evidence outlined in [30] above. The same rates of commission contained in the 25 July letter were used for the *Barama* container shipment (completed after 25 July 2007) and the *Oriental Glory*.

85 Notably, by 25 July 2007, Wajilam had financed a total of 17 shipments of logs originating from Sarawak and Guyana and destined for India. The 17 shipments were financed over a period of 13 months from June 2006 to July 2007 (including the Barama Container shipment). I am satisfied that the letter of 25 July was written at a time when the trade finance relationship had settled down and the parties were content with the existing arrangements. In view of this, the alleged discretionary term, if it ever existed, was supplanted by the 25 July letter. In addition, since PNG logs had never been financed before the *Marina I* shipment, the alleged discretionary term, if it existed since the First Transaction, could not have been applicable to PNG logs. Quite naturally, paragraph 9 of the 25 July letter did not mention PNG logs from the commercial relationship recorded in the letter.

86 I disbelieve Tarun's evidence on the discretionary commission term for another reason. It was quite clear that MGA financed the purchase of the PNG logs by arranging with Wajilam to open the import letters of credit using its banking facilities. Wajilam's expectation was to be repaid the value of the import letters of credit opened on MGA's behalf ("the principal sum"), expenses incurred by Wajilam in relation to this advance, and late payment interest at the rate of 12% per annum. In addition to all that, MGA was expected to pay a commission to Wajilam who assisted in the finance of the purchase of the PNG logs. Based on the arrangement, Wajilam played the role of a financier, and not that of an investor. However, Tarun used words like "invested" and "equity participation" in cross-examination to explain why in his discretion it was fit to charge 50% of the net profit for the *Marina I* finance transaction. It became obvious that the true reason for Wajilam's decision to charge 50% of the net profit as its commission was that he had regarded Wajilam as being an *equal equity partner* in the *Marina 1* finance transaction and he had simply wanted a share in the profits for making the transaction possible. The relevant portions of his oral evidence are set out here: [note: 39]

Q Right. So now you are using based on the pleaded case, you are using the Royal Crystal as---for chartering 50% of the profits under the Marina 1 transaction based on the cost of dealing as you said, agree? I've taken you through your pleaded---your---your---your particulars of your pleaded case, do you agree?

A Yes.

Q Now but do you agree with me that for the Marina 1, you did not charter the vessel, yes or no?

A That is---that is---that is correct.

Q And you a moment ago gave evidence that you charged 50% on of the profit for the Royal Crystal because of the added service you have undertaken to look for a vessel, was that not your evidence?

A Counsel, you are---you are---you are twisting the answer that I have given to you on Royal Crystal. ***The---the---the value that I have provided to the plaintiff in terms of Marina 1 transaction far outweighs the value that I've provided to him in any of the transactions*** . This---this, if you see the exposure at the time when plaintiff approached to me for opening the LC on Marina 1, plaintiff was in---your Honour, plaintiff was in---in the cash flow, deficit of almost anything from 740,000 as I have stated. I think we---we understated there could have been $1 million add to it, the---the value that I provided by opening the LCs, committing to open the LCs for almost $5.7 million, the total exposure, clean exposure of almost 6.7 to $7 million is---is---is---

Q Yes, as I hear you. I---I understand where you are coming from, yes. Mr Tarun, yes, I---I---I knew what you are saying.

A Counsel, I'll just finish. It won't be long. Er, I'm not used to making long speeches. It's just that it's a huge thing in terms of clean exposure which was allowed to the plaintiff.

Q All right.

A ***My---the single contribution of this made this transaction possible*** .

...

Q Now so you make about US$600,000 from the plaintiff by providing the services for a brief period of 1½ years. Don't you think that is a substantial amount of money you have made during that period?

A ***Counsel, that's a substantial amount of investment that we provided*** .

Q ***It's a service, it's not an investment, Mr Tarun*** .

A ***It's---it's---it's equity participation*** , counsel.

Court: Sorry, say that again?

Witness: ***It's a eq---equity participation in a transaction*** , your Honour. The---the one single catalyst

Q But---

Witness: ***---to make this business possible is LC and cash flow. Without this, your Honour, this log trade is absolutely not possible*** .

[emphasis in bold added]

87 In my judgment, there is no evidence that the parties were to share equally in the profits. Tarun maintained without any basis that what Wajilam did should be equated to having invested capital in the business. As I said, this was not the arrangement. There was no agreement or common understanding between Tarun and Mukesh to the effect that Wajilam and MGA were equal parties in the *Marina I* venture. Crucially, the charge of 50% of the net profit is plainly equivalent to a payment on a participation basis. The discretionary commission as an implied term argued for by Ms Tan seeks to give Wajilam a right to equal participation when it was never agreed. The alleged implied term would have the effect of making Wajilam equal parties in the venture and serve only to replace Wajilam's agreed role as financer (which was akin to a bank giving credit facilities) with that of an investor.

Conclusion on the opposing positions

88 In summary, the overall evidence do not bear out Wajilam's assertions that the trade finance services were consistently provided by Wajliam based on a rate or amount of commission that was left to the absolute discretion of Tarun. In my judgment, Wajilam's assertion on discretionary commission fails. Equally, the evidence militates against MGA's incorporated term that the rate of commission was US$5 per cbm of the quantity of PNG logs shipped onboard the *Marina I*. For the same reasons set out above, I find that there was no agreed rate or amount of commission payable to Wajilam in respect of the trade finance services provided to MGA for its purchase of PNG logs shipped onboard the *Marina I*. In other words, there was no agreed basis upon which Wajilam was to be paid commission on either of the opposing views.

89 Now that the opposing views have been rejected as completely untenable, the legal position on the facts in evidence is that the court will imply a term that a reasonable sum is to be paid as commission. It is not disputed that commission was payable by MGA to Wajilam. What was not expressly mentioned was the rate or amount of the commission. In the circumstances, the court will imply that a reasonable sum would be paid as commission. I will be assessing the quantum of the commission in another part of the Judgment (see [112 – 126]). In the meantime, I digress to address, for completeness, two related sub-issues in Wajilam's case on contractual discretion. The sub-issues are: (a) incorporation by prior dealings, and (b) unfettered discretion.

Incorporation of an oral term by prior course of dealing

90 Wajilam's case as to incorporation rests on a prior course of dealing. The question is whether the discretionary commission term (assuming it existed for the purpose of the discussion here) was incorporated by a prior course of dealing into the *Marina I* finance transaction.

91 The cases on incorporation usually concern the making of contracts and the incorporation of one party's written terms of business. There are cases where there was a course of dealing and the other party knew that the plaintiff intended to deal on the terms of its delivery notes or invoices with standard terms printed on the reverse side (*eg Circle Freight International Limited v Medeast Gulf Exports Limited* [1988] 2 Lloyd's Rep 427 ("*Circle Freight*"). In other words, prior course of dealing was relied upon as importing one party's standard terms and conditions into the contract.

92 It is not controversial that incorporation of terms by prior course of dealing is an objective one. The factors to consider for incorporation of terms by prior dealing is succinctly summarised in the

case of *Capes (Hatherden) Ltd v Western Arable Services Ltd* [2010] 1 Lloyd's Rep 477 ("*Capes (Hatherden) Ltd v Western Arable Services Ltd*") at [35] in the following manner:

> Incorporation of terms by prior course of dealing is a question of fact and degree. It depends on the number of previous contracts, how recent they are, and their similarity in terms of subject-matter and the manner in which they were concluded.

93 Similarly, E. Peel, *Treitel: The Law of Contract* (London: Sweet & Maxwell, 12th Ed., 2007) states the consideration as follows (at p 244):

> Of course the terms will not apply if the transaction in question was not part of a *consistent* course of dealing; if the transactions were spread over a long period of time and their number was so small that they could not be said to give rise to a course of dealing; if the steps necessary to incorporate the clause had never been taken at any stage of the dealings between the parties or if the terms of each transaction in the series had been separately negotiated and expressly agreed between the parties.

94 In *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, the plaintiff's car was repaired by the defendant on three or four occasions over a period of five years. On two occasions, the plaintiff had been asked to sign a form excluding liability for damage caused by fire to the customer's car on the premises. On the occasion which was the subject of claim, there had been an oral contract to repair the car without being asked to sign a form excluding liability. The Court of Appeal held that the exclusion of liability in the defendant's standard form was not incorporated into the oral contract. Salmon LJ held that three or four transactions over five years were not a sufficient course of dealing. One other ground that could have been relied upon (but was not) was the fact that the pattern of previous dealing between the parties had not been consistent.

95 The course of dealing in the *Circle Freight* case consisted of 11 contracts in the previous six months (between March and August 1983). On each occasion, the contract had been made orally by telephone but the invoice for the carriage charges sent at a later date had stated that all business was transacted by the carrier under the conditions of the Institute of Freight Forwarders ("ITF"). The Court of Appeal held that the ITF conditions were incorporated into the contract.

96 Returning to the pleaded case Wajilam states at paragraph 7 of the Defence (Amendment No 1) that:

> In addition to the First Transaction (which consisted of shipments onboard two vessels, MV "Royal" and MV "Vinashin Sun", as stated in paragraph 6 of the Defence herein), there were altogether a total of 17 other transactions and/or requests made by MGA of Wajilam. The said transactions were effected pursuant to distinct and separate agreements between the parties. It was a term of each agreement between the parties for each of these 17 transactions that the remuneration to Wajilam would be at a rate or amount as Wajilam deemed fit and/or reasonable. This term was implied by conduct and/or implied so as to give effect to business efficacy and/or intention of the parties. Further or alternatively, this term was incorporated by a course of dealings between the parties.

97 The authorities above concern the incorporation of written terms into the contract. On this occasion, Wajilam is seeking to incorporate an oral term into an oral agreement. Ms Tan did not refer me to any cases where the term to be incorporated into an oral agreement was an oral term. Be that as it may, the test to be satisfied "is not what the parties actually thought were their rights and liabilities but what each by his words and conduct led the other party to believe were the liabilities

which he was accepting and the concomitant rights which he was granting" (per HHJ Havelock-Allan QC, sitting as a High Court Judge in *Capes (Hatherden) v Western Arable* at p 484). In that regard, where there is a course of dealing between parties the court must examine the whole of it to see what the position is. In this case, even if, for the sake of argument, there was as pleaded such an oral term on discretionary commission at the outset of the First Transaction, the discretion on commission would have been supplanted by the 25 July letter which negated any intention of incorporation in the future.

98 That is not all. To succeed, not only must the pattern of previous dealing between the parties have to be consistent, there must be evidence that MGA knew that whenever Wajilam provided trade finance services, it would be on the basis of the discretionary commission. Apart from the one occasion in June 2006 where it was alleged that Mukesh left it to the discretion of Tarun to decide on its own remuneration (*ie*, the First Transaction), Tarun's evidence, as I recall, is that commission was never discussed in subsequent transactions. That brings to focus the absence of continuous notice of such a term which is a factor against incorporation. In addition, Wajilam had not financed PNG logs for MGA before June 2007. In June 2006, at the time the First Transaction was discussed, Tarun and Mukesh did not contemplate other future transactions. In the circumstances, it is not reasonable to hold that when Wajilam agreed to open an import letter of credit for MGA's purchases in June 2006 (*ie*, the First Transaction), Wajilam had done so on the basis that for future purchases (including PNG logs) its remuneration would be left to Wajilam to decide.

99 On the related point as to whether there was a consistent course of dealing, the evidence is conflicting on the aspect of Wajilam's role. For instance, in paragraph 9 of Mukesh's written testimony, he explained the role of the third party who made available its letter of credit facilities to Mukesh as follows:

> For the sake of good order, I should explain that even though I was using the services of the three companies to procure the issuance of documentary letters of credit to my suppliers in Malaysia, this was where their involvement with my business started and ended. I had the sole responsibility of sourcing for suppliers and buyers in Malaysia and India respectively and negotiating the terms of the transaction with them. I also bore the risk and losses (if any) for each of the transactions.

100 In earlier transactions, Tarun accepted Wajilam's role as financer. However, when it came to the *Marina I*, Tarun claimed a bigger role which was not discussed and agreed to in the *Marina I* finance transaction (see [86] – [87] above).

101 Mukesh and Tarun's idea of Wajilam's role was quite different and, hence, there was no consistency in their prior dealing and the *Marina I*. In the circumstances, I am not persuaded by Wajilam's plea that the discretion to determine the rate or amount of commission was to be implied from the previous course of dealing.

A subsidiary point: unfettered discretion

102 I will briefly comment on Ms Tan's submission that Wajilam's discretion was absolute and there was no requirement for Wajilam to justify at all its decision to charge 50% of the net profit as its commission.

103 A contractual discretion is not usually as unfettered as Ms Tan would like this court to believe. The authorities on contractual discretion recognise that there is a corresponding expectation that the discretion would be exercised fairly and rationally. Guidance can be drawn from *Horkulak v Cantor*

Fitzgerald International [2005] ICR 402 ("*Horkulak*"), an employment case, on the court's approach to contractual discretion at [30]:

> ... while, in any such situation, the parties are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion, it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion. Thus the courts impose an implied term of the nature and to the extent described.

104 Rix LJ in *Socimer Bank Ltd v Standard Bank Ltd* [2008] 1 Lloyd's Rep 558 (`"*Socimer*") summarised the position in relation to exercise of contractual discretion as follows (at [66]):

> It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also not concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria.

105 In *JML Direct v Freesat UK Ltd* [2009] EWHC 616, Blackburn J referred to *Socimer* and *Horkulak* as authority for the proposition that discretion conferred on one party by the other is not wholly unfettered contractual discretion. As Rix LJ observed in *Socimer*, the concern is that the discretion is not abused. Hence, the courts will impose an implied term that the discretion should be exercised in good faith and not arbitrarily, capriciously or irrationally. "Irrationally" in this connection, (Blackburn J accepts the explanation in *Socimer*) is not an objective test of reasonableness but is used in an analogous sense to the *Wednesbury* unreasonableness (see *Socimer* at [66]).

106 The courts will not intervene so long as the contractual "discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can be properly categorised as perverse" (see *Ludgate Insurance Co Ltd v Citibank* [1998] Lloyd's Rep IP 221 at [35] summarising the principles drawn from cases like *Weinberger v Inglis* [1919] AC 606; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896; *Docker v Hymans* [1969] 1 Ll R 487; and *Abu Dhabi National Tanker Company v Product Star Shipping Company Limited* [1993] 1 Lloyd's Rep 397).

107 With these principles in mind, I turn to Tarun's evidence on this matter. Both sides have confirmed through counsel that a commission of US$376,477.67 is equivalent to a rate of US$26.82 per cbm of the quantity of logs shipped (*viz*, 14,034.038 cbm). This rate at US$26.82 per cbm was more than five times the highest rate of US$5 per cbm that was experienced in their commercial relationship. Was Wajilam's decision to fix an amount that was five times more than what MGA had previously paid as commission made honestly and in good faith such that it can be said that the exercise of discretion was not capricious, arbitrary, or irrational?

108 Wajilam's case was that it was not required to justify the exercise of its absolute discretion. Tarun nevertheless gave the following reasons for charging 50% of the net profit as commission for

the *Marina 1* finance transaction: [note: 40]

(i) Wajilam had effectively paid for the freight as the cargo was purchased on CNF terms;

(ii) the total amount of the import letters of credit was approximately US$5,832,000 ;

(iii) the export letters of credit for the Marina 1 transaction were usance letters of credit for 180 to 270 days, in contrast to the typical usance period for the Sarawak shipments of 90 to 120 days, and 120 to 180 days for the Guyana shipments; and

(iv) the running account, at that time, showed that MGA owed Wajilam an amount somewhere between US$741,739.44 and US$892,700.92 (see the third and fifth consolidated statements at [43]-[44] and [46] above).

109 I did not believe that the matters listed above contained the real reasons. First, the fact that Wajilam had financed the purchase on CNF terms was in effect no different from other trade financing where the freight component of the transaction was on, the facts, a common feature of all the previous transactions, with the single exception of the *Dynasty* transaction (see [26]-[28] above). Second, while Wajilam had asserted that factors (ii) and (iii) listed above had increased the period of its financial exposure and, therefore, justified an increased remuneration rate, this argument was simply not borne out by the evidence: except for minor interest payments and charges, the *Marina 1* transaction, was completed within two months after the import letters of credits were opened (when the last export bill was discounted). It was one of the fastest transactions completed. (Ms Tan confirmed in her closing submissions on 15 March 2010 at p 8 that discounting of usance bills took place between 27 August 2007 to 11 September 2007.) Furthermore, the fact that the running account balance was in favour of Wajilam did not in itself provide justification for charging a rate of more than five times the usual rates, especially when Wajilam was *already* charging interest at 12% per annum for late payments.

110 Simply put and adopting Mukesh's expression, MGA earned "handsome" profits from the *Marina I* shipment and Wajilam wanted a share of the profits. I repeat the two separate occasions during cross-examination which gave an insight into Tarun's reasons for charging such a high commission: (a) Wajilam was an *equal equity partner* in the *Marina 1* finance transaction and (b) it was Wajilam's financial support which was the single contribution that made the transaction possible.

111 At the risk of repetition, Wajilam was never an equity partner as that was not the arrangement. In my view, and I find that it was on account of this desire to share the "handsome" profits that that the discretionary commission was invented. MGA made substantial profits for the *Marina I* shipment and the Barama container shipment. The receipts from both transactions were sufficient to clear the deficit in the running account as well as pay Wajilam 50% of the profit as commission for the *Marina I* finance transaction. Wajilam was unilaterally cast as an equity party who had contributed financially to make the transaction possible. However, this was clearly not permissible for the reasons stated (see [86] – [87] above). There was no evidence that the parties were to share equally in the profits from the *Marina I* shipment. As a result of these findings, I concluded that Wajilam was not entitled to charge the remuneration sum of US$376,477.67 for the *Marina 1* shipment.

Contractual Quantum Meruit

112 Wajilam did not advance an alternative claim for *quantum meruit*. However, MGA's pleaded case is that Wajilam was entitled to be paid a reasonable sum as commission since it was envisaged

that Wajilam would be paid for providing trade finance services (*ie*, remunerated fairly).

113 A *quantum meruit* claim may be based in contract or in restitution (what the older cases term as quasi-contract). In the High Court decision of *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655, Prakash J described the two types of claims (at [123]):

> It would be noted from the above that two types of *quantum meruit* exist *viz* contractual *quantum meruit* and, secondly, restitutionary *quantum meruit*. Where there is an express or implied contract which is silent on the quantum of remuneration or *where there is a contract which states that there should be remuneration but does not fix the quantum, the claim in quantum meruit will be contractual in nature*. Where, however, the basis of the claim is to correct the otherwise unjust enrichment of the defendant, it is restitutionary in nature. It is also relevant that there cannot be a claim in *quantum meruit* if there exists a contract for an agreed sum and there cannot be a claim in restitution parallel to an inconsistent contractual promise between the parties. [emphasis added]

114 After considering the evidence, Prakash J went on to find that, despite the parties failure to specifically discuss remuneration terms, there was an implied term, on the facts, that the plaintiff would be remunerated at a reasonable sum for her management services (at [125]-[126]).

> ... The oral agreement was rather general and vague. Besides agreeing on the profit split, the remuneration for the work done was not specifically discussed. The manner in which the defendant characterised the claim *viz* the distribution of the profits was unduly narrow as the two are not mutually exclusive. They are inversely related. One decides the expenses prior to calculating the profit.
>
> 126 From the beginning of the venture, the defendant was riding on the plaintiff's expertise in choosing suitable properties for investment, purchasing and sprucing them up and sometimes engaging in their maintenance and management. The venture was attractive to him because of this expertise of the plaintiff and because he knew that she would be on the ground in London to do all this work and it would not be left to a stranger. It should also be remembered that the parties were contemplating acquiring a number of properties not just one or two. The plaintiff asserted 50 whilst the defendant maintained they were only thinking of 20. Even that latter number is a big one, however, and sourcing, renovating and managing 20 properties even if not all 20 needed to be worked on at the same time could reasonably be envisaged to require a substantial amount of time and energy. When the parties divided the responsibilities under the venture, they expressly agreed that these duties would be carried out by the plaintiff. *It is not inconsistent with that term to imply a term that the plaintiff should be remunerated for such work on a reasonable sum basis*. If the parties had both carried out this portion of the venture or some of it through a stranger, they would definitely have had to pay fees and those fees would have been chargeable as part of the expenses of the venture before the profit calculations took place. I therefore find that there is a contractual basis in this case for a claim in *quantum meruit*.
>
> [emphasis added]

115 Similarly, in *Gold Coin Ltd v Tay Kim Wee* [1985-1986] SLR(R) 575 ("*Gold Coin Ltd*") the Court of Appeal upheld the lower judge's finding that an implied promise to pay a reasonable commission is to be treated as an implied term in contract (at [10]):

> In considering this ground of appeal, it seems to us important to point the exact nature of the

claim to a *quantum meruit* by Mr Tay. It is contractual in nature, in contrast to another type of *quantum meruit* claim which is quasi-contractual: for the distinctions, see *Halsbury's Laws of England*, vol 9 (Butterworths, 4th Ed) para 692. The implied promise to pay a reasonable commission, as found by the learned trial judge, is and should properly be treated in the same way as other implied terms in the law of contract. We are satisfied that the learned trial judge had, contrary to the submissions advanced on behalf of the employers, properly applied the principles adumbrated in *Way v Latilla* [1937] 3 All ER 759.

116 The question whether a court should imply a term that a reasonable sum is to be paid, even though no price had been specifically agreed, is a matter of construction and depends on the objective intention of the parties (*British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504):

> This is plain from the familiar trilogy of cases which show that no hard and fast rule can be laid down but that the question in each case is whether, on a true construction of the relevant transaction, it was consistent with the intention of the parties that even though no price had been agreed a reasonable price should be paid (*May & Butcher Ltd v R* (1929) [1934] 2 KB 17, [1929] All ER Rep 679, *W N Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, [1932] All ER Rep 494 and *Foley v Classique Coaches Ltd* [1934] 2 KB 1, [1934] All ER Rep 88).

117 Since MGA's pleaded case is that Wajilam was entitled to commission as it was envisaged that Wajilam would be paid for providing trade finance services (*ie*, remunerated fairly), a term that Wajilam would be remunerated at a reasonable sum is to be implied in fact into the *Marina I* arrangement.

118 This leaves open for determination one question: what is reasonable or fair remuneration for the trade finance services provided by Wajilam for MGA's purchase of PNG logs. The amount of recompense depends on what Wajilam did and what is reasonable. Normally, it is the claimant who has the burden of adducing evidence to support what is a reasonable recompense. There is evidence of what Wajilam did but there is no evidence from Wajilam as to what a reasonable fee would be for a transaction of this sort. It can be argued that while in principle Wajilam might be entitled to a reasonable remuneration, there was no evidence from Wajilam on which I can determine what that remuneration is. Wajilam has not even as a precautionary measure adduced any evidence to address, in the alternative, a *quantum meruit* payment. On the other hand, MGA tried to lead evidence on what this reasonable remuneration might be to assess the amount due to Wajilam by way of *quantum meruit* for the trade finance services provided to MGA for the purchase of PNG logs.

119 MGA called as its witness Mr Ngui whom MGA put forward as an "expert" witness. Mr Ngui gave evidence, which I accept, that there is no known "market rate" in business. There is no universal practice, nor any "market custom" which would be adhered to where some matters had not been expressed between parties dealing in log trade financing of the sort that took place. In the circumstances, there was no place or need for so-called "expert" evidence. However, from Mr Ngui's own experience, it appears that commissions for log trade financing are usually agreed and fact-sensitive depending on the particular transaction. The rates are usually fairly low because of the very thin profit margins in the log and timber trade. (In the case of the *Marina I*, MGA was able to make additional profits from the freight rates which were over and above its trading profits.) It is quite clear that there is no practice that is applied invariably if nothing is stipulated by the parties.

120 MGA has pleaded that Wajilam was entitled to be remunerated at a reasonable rate in accordance with "market rate". In my view, the absence of a "market rate" is not fatal so long as there is evidence before me on which I can determine what a reasonable commission is.

121 On the issue of what would be a reasonable rate or amount of remuneration on a *quantum meruit* basis for the trade finance services provided by Wajilam, I accept that that is a question of fact but a decision as to a reasonable rate of remuneration involves not merely fact but the application of judgment by the court in determining reasonableness. I will now examine what evidence is available to assist the court to arrive at a reasonable rate of commission or remuneration. Wajilam led no evidence but that is not the end of the inquiry. I have to form the best view I can on the best evidence available in the present case.

122 Mr Seow has helpfully referred me to the case of *Way v Latilla* [1937] 2 All ER 759 for the approach that the court could take. For instance, the court may look at evidence of the value each party placed on the relevant services as observed by Lord Atkin (at 764):

> But, if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargainings between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services. *If the discussion had ranged between 3 per cent on the one side and 5 per cent on the other, all else being agreed, the court would not be likely to depart from somewhere about those figures, and would be wrong in ignoring them altogether and fixing remuneration on an entirely different basis, upon which, possibly, the services would never have been rendered at all. That, in fixing a salary basis, the court may pay regard to the previous conversation of the parties was decided by the Court of Exchequer in 1869, in Scarisbrick v Parkinson, where the terms of an agreement, invalid under the Statute of Frauds, were held to be admissible as evidence in a quantum meruit. This seems to me to be good law, and to give effect to a principle which has been adopted regularly by the courts not only in fixing remuneration for services but also in fixing prices, sums due for use and occupation, and, indeed, in all cases where the court has to determine what is a reasonable reward for the consideration given by the claimant*. [emphasis added]

123 Although it is not entirely clear from the written judgment whether *Way v Latilla* was a case where a term for reasonable remuneration was implied into an employment contract (contractual *quantum meruit*) or a case where no contract came into existence because the arrangement between the parties was too uncertain (restitutionary *quantum meruit*), the Court of Appeal in *Gold Coin Ltd* seemed to prefer the view that *Way v Latilla* was a case of contractual *quantum meruit* and was thus applicable to the appeal before it (see [116] above). The Court of Appeal went on to determine that the assessment of reasonable commission for the respondent's services was to be calculated at the commission rate at which the appellant itself would have paid its other salesmen (at [16]):

> We now turn to the appeal against the learned trial judge's assessment of $80,000 and the imposition of interest at $20,000. It is clear to us that the parties had agreed to give Mr Tay an incentive for his contributions to the profitability of the Hatchery Division which over the six years totalled $1.4m after tax. Mr Tay's role in the performance was crucial. The salesmen of the employers used to get commission which, for example, for 1981 was $13,000. Mr Arnet thought that $4,000 per year as the commission or incentive was reasonable, which would have amounted to $24,000 over the six years. On the other hand, Mr Tay had claimed $162,369.10 on the basis of the number of chicks sold at two-cents-per-chick commission. Half of this claim based on one-cent-per-chick commission *which was paid to the salesmen of the employers* would throw up the figure of some $81,000. We would ourselves therefore agree that $80,000 is a reasonable assessment in all the circumstances. We also think that the $20,000 interest is also fair. [emphasis added]

124 MGA subpoenaed one Dolly Ng Lay Kuan, an employee of Tat Hin, to testify on the trade finance that Tat Hin had provided to MGA for its purchase of PNG logs. She confirmed that MGA had to pay as commission the rate of 1.5% of the CNF value of the logs from PNG in the year 2004 ("the Tat Hin transaction"). In monetary terms, the commission there was US$23,879.32 (equivalent to the rate of 1.5% of the CNF value). Mr Seow submitted that, based on the quantity of logs actually shipped for that transaction, the figure of US$23,879.32 can be translated into a remuneration rate of around US$5.10 per cbm. Ms Tan pointed out that the logs from PNG were transhipped at Port Klang and the witness was not asked whether the freight component in the Tat Hin transaction was only for freight from Port Klang to India, or whether it included freight from PNG to Port Klang. As the witness was not asked to clarify her evidence, Ms Tan submitted that her testimony was unreliable.

125 The Tat Hin transaction was in 2004 and MGA had paid commission based on 1.5% of the CNF value. There is evidence that in June 2006, MGA had placed a value on Wajilam's services, based on Mukesh's own testimony, at 2% of the CNF value which he claimed was in line with his own experience with Trusha, Tat Hin, Batavai, Paragan and even Wajilam (see his explanation at [72] above). That is all the best evidence available before me to help arrive at a reasonable rate of remuneration or commission for financing a shipment of PNG logs to India. As already mentioned by Mukesh, the use of the price of the quantity shipped as a method to calculate commission would benefit Wajilam if the logs were of a better quality (see [73] above), which would be the case for PNG logs (Ms Tan confirmed in her closing submissions that PNG logs have a relatively high value). In the circumstances, the best view is to take the rate at the highest possible end of the bracket. Wajilam can scarcely complain having not adduced any evidence on the matter.

126 I, therefore, find that a reasonable commission for Wajilam's services for the *Marina I* is 2% of the CNF value of the PNG logs shipped. However, I have difficulty in determining the CNF value as there is no documented evidence as to who paid the US$400,000 as freight (see [10] above). Hence, I will adopt the undisputed figure of US$5,832,000 (being the CNF letter of credit value) as the CNF value of the PNG logs shipped. Accordingly, Wajilam is to refund the over deduction with interest thereon at the agreed rate of 12% per annum from 5 June 2008 (the day immediately after expiry of the e-mail demand of 4 June 2008) to the date of payment.

Miscellaneous matters

127 An issue that arose at the trial concerned a payment which Wajilam made to MGA's buyers in India, K R Patel. The complaint was that MGA was not told about the buyer's dispute, and as such the purported payment to K R Patel was unauthorised. This complaint was not part of MGA's pleaded case, and leave to amend the pleadings was not sought in order to introduce and give particulars of this additional dispute. Besides, there is no evidence before the court to explain the K R Patel matter. In the circumstances, I need not deal with this matter, and say no more about it.

Conclusion

128 In the result:-

(a) The remuneration due to Wajilam for the *Marina I* transaction is US$116,646.00 being 2% of US$5,832,000.

(b) MGA is entitled to the repayment of US$259,837.67 (US$376,477.67 – US$116,646.00). Accordingly, there be judgment for MGA on its action in the sum of US$259,837.67 with

interest thereon at the agreed rate of 12% per annum from the 5 June 2008 until date of payment.

129 I will hear parties on costs.

[note: 1] Transcripts of Evidence dated 18 January 2010 at pp 84-85

[note: 2] Mukesh's AEIC at para 30

[note: 3] Transcripts of Evidence dated 31 March 2010 at pp24-25

[note: 4] Transcripts of Evidence dated 31 March 2010 at pp56-57

[note: 5] Transcripts of Evidence dated 31 March 2010 at pp 64-65

[note: 6] 4AB 275, 278 and 282

[note: 7] Transcript of Evidence dated 31 March 2010 at pp 47-49 and Exhibit P2

[note: 8] Mukesh's AEIC at paras 29 and 30

[note: 9] Transcripts of Evidence dated 15 January 2010 at pp 95 and 96

[note: 10] Tarun's AEIC at para 34

[note: 11] Mukesh's AEIC at para 31

[note: 12] Mukesh's AEIC at para 36

[note: 13] Mukesh's AEIC at paras 36 & 37

[note: 14] Tarun's AEIC at para 44

[note: 15] Exhibit D2

[note: 16] Transcripts of Evidence dated 18 January 2010 at p 54

[note: 17] 2AB 632

[note: 18] 2AB 635

[note: 19] 2AB 635

[note: 20] 2AB 644

[note: 21] 2AB 643

[note: 22] 2AB 643

[note: 23] 2AB 645

[note: 24] 2AB 654

[note: 25] 2AB 648

[note: 26] 2AB 654

[note: 27] 3AB 225

[note: 28] Transcripts of Evidence dated 31 March 2010 at p 58

[note: 29] Transcripts of Evidence dated 13 January 2010 at p 45

[note: 30] Mukesh's AEIC at para 23

[note: 31] Mukesh's AEIC at para 24

[note: 32] Transcript of Evidence dated 15 March 2010 at pp 3-4

[note: 33] Tarun's AEIC at para 16

[note: 34] Tarun's AEIC at para 13

[note: 35] Transcript of Evidence dated 15 January 2010 p 3; Exhibit P2

[note: 36] Transcript of Evidence dated 12 January 2010 p 76

[note: 37] Transcript of Evidence dated 15 January 2010 p 87

[note: 38] Transcript of Evidence dated 12 January 2010 p 103

[note: 39] Transcript of Evidence dated 18 January 2010 pp 20-21 and pp 88-89

[note: 40] Defendant's written closing submissions pp 2-3

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