IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 61

Civil Appeal No 200 of 2015

Between

PHOSAGRO ASIA PTE LTD

… Appellant

And

IOURI PIATTCHANINE

… Respondent

In the matter of Suit No 404 of 2014

Between

IOURI PIATTCHANINE

… Plaintiff

And

PHOSAGRO ASIA PTE LTD

… Defendant

JUDGMENT

[Employment law] – [Contract of service] – [Misconduct]
[Employment law] – [Termination]
[Contract] – [Contractual terms] – [Fundamental breach]

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Phosagro Asia Pte Ltd
v
Piattchanine, Iouri

[2016] SGCA 61

Court of Appeal — Civil Appeal No 200 of 2015
Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
18 August 2016

28 October 2016 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 A seemingly simple legal issue often belies extremely difficult issues of both law as well as application. The present appeal exemplifies this in a very stark manner. The crux of this appeal is the interpretation of just one phrase – "serious misconduct". More specifically, the question which arises is whether the plaintiff-employee ("the Respondent") was guilty of "serious misconduct" within the scope of a particular term of his employment contract ("the Employment Contract"), thus precluding him from claiming benefits from the defendant-employer ("the Appellant") following the termination of his employment pursuant to the term(s) of the Employment Contract itself. The High Court judge ("the Judge") answered this question in the negative, thus resulting in the Respondent succeeding in his claim. The Judge's decision

was reported as *Piattchanine, Iouri v Phosagro Asia Pte Ltd* [2015] 5 SLR 1257 ("the Judgment"), and regard should be had, in particular, to the reasons he gave at [252]–[262] of the Judgment.

2 We observe, parenthetically, that there was another phrase in the same clause (cl 20 of the Employment Contract ("Cl 20")), *viz*, "wilful breach or non-observance" which had to be interpreted by the Judge. The Judge also found in favour of the Respondent on this point and held that his conduct did not amount to wilful breach or non-observance of his obligations under the Employment Contract (see [263]–[265] of the Judgment). As will be apparent, this latter phrase poses relatively fewer difficulties when compared to the former phrase (*viz*, "serious misconduct"). It is noteworthy that the Judge did not appear to be entirely comfortable with his finding that the Respondent had not been guilty of "serious misconduct" under Cl 20. This also serves to underscore the difficult issues of application alluded to right at the outset of this judgment

3 Indeed, as will be explained below, we do not agree wholly with the approach the Judge adopted in his interpretation of Cl 20 in general and the phrase "serious misconduct" (contained therein) in particular. In order to avoid running ahead of the analysis, we will only say at this juncture that whilst the Judge sought to apply what he perceived were the governing principles at common law, he did not, with respect, apply the *full* complement of legal principles that are presently part of the Singapore legal landscape in so far as the issue of discharge by breach is concerned.

4 We should also note that there is the further issue of the Appellant's *counterclaim* against the Respondent which the Judge allowed in part and which we will also deal with in the course of this judgment.

5 By way of a final (albeit subsidiary) observation, we will also demonstrate that some of the legal reasoning leading to the Judge's decision with regard to the Respondent's claim – in particular his endorsement of the English Court of Appeal decision of *Cavenagh v William Evans Ltd* [2013] 1 WLR 238 ("*Cavenagh*") – was not, strictly speaking, necessary. We are loath to add more *obiter dicta* about *obiter dicta* but, because some of the legal principles referred to by the Judge were not only unnecessary but also (and more importantly) not fully explored, we will set out some brief views in a Coda to this judgment in order to flag out some important legal issues that will need to be considered in more detail when they next come before the courts for a definitive ruling.

6 We begin with a summary of the facts and the Judge's decision.

Relevant background facts

7 The facts were set out comprehensively by the Judge at [2]–[29] of the Judgment, and we gratefully adopt them. We will only reproduce the facts which are necessary to provide the context for this appeal.

The incorporation of the Appellant

8 The Appellant, Phosagro Asia Pte Ltd, is a company incorporated in Singapore and is fully owned by Phosint Trading Limited ("Phosint"), a Cyprus-incorporated company. Phosint is, in turn, fully owned by the Phosagro Group, which is based in Russia.

9 On 26 February 2013, Phosint entered into a share purchase agreement ("the SPA") for the purchase of Asiafert Trading Pte Ltd ("Asiafert"). The Respondent was the sole director and shareholder of Asiafert at that time.

After Phosint bought over Asiafert, they renamed it Phosagro Asia Pte Ltd (*ie*, the Appellant). Pursuant to the terms in the SPA, the Respondent's employment as Managing Director of Asiafert was to be continued on mutually agreeable terms.

The Respondent's employment contract

10 On 1 March 2013, the Appellant hired the Respondent as its Managing Director pursuant to the Employment Contract. The draft of the Employment Contract was prepared by the Respondent and he signed his own Employment Contract on behalf of the Appellant. It should be noted the Appellant did not and does not challenge the validity of the salient terms in the Employment Contract.

11 Some of the salient terms of the Employment Contract are as follows:

> 2. Subject as hereinafter provided the employment *shall commence on 1st March, 2013* for the period of three years having the option to be renewed by another term with parties intentions to be decided one year before expiry of the first term unless terminated by either party to the agreement by giving to the other party not less than three months' notice in writing. 100% annual salary as one-off payment to be settled in case contract is terminated before expiry of it's validity.
>
> 3. During the continuance of this agreement, the employee shall, unless prevented by ill-health, devote such of his time and attention to the business of the Company as shall be required for the proper performance of his duties and in all respects conform to and comply with the directions and regulations of the Board of directors of the Company and shall well and faithfully serve the Company in all respects and use his best endeavours to promote the interests of the Company.
> …
>
> 6. The employee shall be entitled to receive annual bonuses as specified from time to time.
>
> …
>
> 14. … Except of any reason stipulated in Point 20 of this Employment Contract, if the employee is terminated or resigns

> prior to the completion of his contractual period, *annual salary as one-off payment* to be settled in full, should the contract is terminated before expiry of its validity. employer shall give employee, or vice versa, three months' notice in writing.
>
> …
>
> 20. If at any time during his employment, hereunder the employee shall be guilty of any serious misconduct or any wilful breach or non-observance of any of the stipulations herein contained and on his part to be observed or performed or shall compound with his creditors generally or shall have a Receiving Order in bankruptcy made against him then and in any such case, the Company may terminate the employee's employment hereunder without any notice or payment in lieu of notice.
>
> [emphasis added]

12 Pursuant to the Employment Contract, the Respondent was entitled to a salary of $40,600 per month from 1 March 2013 to 31 December 2013, and $47,300 per month thereafter. The Respondent was also entitled to receive a guaranteed bonus equal to 50% of his annual remuneration, as well as a discretionary bonus of up to 50% of his annual remuneration. Besides salary and bonuses, the Respondent was also entitled to the following benefits under the Employment Contract:

(a) Clause 7: to have a telephone and to have overseas telephone bills incurred in discharge of his duties paid for by the Appellant.

(b) Clause 8: to have his utility bills paid for by the Appellant.

(c) Clause 9: club membership fees, membership fees in various business clubs which are deemed beneficial to the Appellant's business, as well as fees for language courses, business schools, and seminars would be borne by the Appellant.

(d) Clause 10: the Appellant was to provide a motorcar "of suitable type" for official and private use (all associated expenses including petrol and parking fees were to be paid for by the Appellant).

(e) Clause 11: to be reimbursed for all travelling, hotel and other out-of-pocket expenses incurred during business trips "according to the Company regulations".

(f) Clause 12: to be reimbursed for all entertainment expenses reasonably incurred in discharge of his duties in "accordance with the Company regulations".

(g) Clause 13: to be provided free medical consultations and medicine for him and his family.

(h) Clause 15: his and his family's travelling expenses during annual leave would be borne by the Appellant.

(i) Clause 19: the Appellant was to purchase life and accident insurance policies for the Respondent.

For ease of reference, we will refer to the above expenses which the Respondent was entitled to claim for as "corporate expenses" and we will refer to all other expenses incurred by the Respondent as "personal expenses".

The management of the Appellant

13 The Respondent managed the Appellant with one Maxim Popov ("Popov"), who was an executive director of the Appellant. As Managing Director of the Appellant, the Respondent had wide-ranging powers to run the Appellant's business and entertain actual or potential business partners. The

Respondent did not have to report to anybody when making day-to-day financial decisions and there were no rules relating to the corporate governance of the Appellant imposed by the new owners (*ie*, the Phosagro Group).

14 When it came to the handling of finances, the process in place was that the Respondent would, on a monthly basis, submit his credit card expenses together with supporting receipts to the Appellant's external accountant, Tricor Singapore Pte Ltd ("Tricor"). The Respondent used the credit card primarily for corporate expenses, although he would occasionally use it for personal expenses as well. After submitting the credit card statements, the Respondent would then sign a cheque to himself as reimbursement for his expenses. The same process applied to Popov – that is to say, he would also submit his credit card statements accompanied by the supporting receipts to Tricor at the end of each month for reimbursement – although it was the Respondent who would sign the cheques to Popov. According to the Respondent, at the end of the financial year, Tricor would identify expense claims that the Respondent and Popov were not, or appeared not to be, entitled to and seek reimbursement from them. The Judge and the parties referred to this as the "Expense Accounting Practice". It should be noted that there was no documentary evidence to support the existence of the Expense Accounting Practice and the only evidence on this issue came from the testimony of the Respondent. The Appellant, however, did not dispute the existence of such an accounting practice at the trial below and does not do so either in the appeal.

15 According to the Respondent, the Expense Accounting Practice was carried over from Asiafert, where he was the sole shareholder and director. The Expense Accounting Practice was never directly communicated to the Phosagro Group, although the Appellant's management accounts would be

sent to the Phosagro Group every month with the directors' expenses listed therein. However, a detailed breakdown of the expenses would not be found in those accounts. It should also be noted that the Appellant had no regulations to govern either its accounting practices or the process by which the entertainment and expense claims of the directors were to be processed.

Termination of the Respondent's employment

16 Shortly after the Respondent started work with the Appellant, tensions arose between the Respondent on the one hand, and Popov and the officers from the Phosagro Group on the other. These disagreements related to the direction of the Appellant's business.

17 In February 2014, the Respondent became aware that a director of the Phosagro Group, one Sergey Sereda ("Sereda"), would be appointed to the Appellant's board of directors. The Respondent then sought legal advice from M/s Rajah & Tann LLP ("R&T") on whether there would be a conflict of interest if Sereda were to be both a director of the Appellant as well as a director of the Phosagro Group.

18 In its legal advice, R&T opined that there would likely be a conflict of interest for the same person to act as director of both a parent and subsidiary company. The Respondent forwarded this legal advice to Phosint's solicitors on 26 February 2014.

19 On 27 February 2014, the Respondent received an email from Andre Guryev ("Guryev"), the CEO of the Phosagro Group, which contained only one line: "*What r u doing?*". The Respondent replied to Guryev on the same day, explaining that he had sought the legal advice in the interest of the company and the shareholders. Guryev did not reply.

20 The very next day, on 28 February 2014, the Respondent received a termination letter from the Appellant which was signed by Popov ("the 28 February 2014 Letter"). The material paragraphs of the 28 February 2014 Letter are as follows:

> 1. This letter serves as notice that your employment as a Director of Phosagro Asia Pte. Ltd. (the "Company") is terminated *pursuant to the terms of the employment contract dated 1 March 2013* (the "Employment Contract").
>
> 2. The *termination takes effect immediately*.
>
> 3. Subject to such deductions as the Company is entitled to make, the Company will arrange payment of such monies that may be due to you. In this respect, the Company is looking into the amount, if any, to be paid to you on account of the termination of your employment. Any amount to which you are entitled will in any case be subject to deductions to be determined by the relevant authorities.
>
> …
>
> 6. The Company reserves the right to withhold any payment which may otherwise be due to you on account of any breach of contract and/or any misconduct or non-observance of the Employment Contract and/or breach of any of your fiduciary duties and/or in the event that a claim is to be made against you, whether for misrepresentation or otherwise or in relation to your non-performance / inadequate performance of your duties.
>
> [emphasis added]

21 Subsequently, on 18 March 2014, the Respondent received a second letter from the Appellant ("the 18 March 2014 Letter"). The material portions of the 18 March 2014 Letter are as follows:

> 1. We refer to our letter dated 28 February 2014 in which you were given notice of termination of your employment.
>
> 2. Subsequent to your termination of employment, we have looked into various matters and discrepancies

> arising whilst you were the Managing Director of the Company. From our investigation, it has become apparent that you have been guilty of serious misconduct and/or have not acted in the Company's best interest and/or have acted in breach of your fiduciary duties to the Company.
>
> … [details of allegedly wrongful claims were set out] …
>
> 8. As set out above, it appears that an amount of SGD 498,651.57 has been misappropriated, and that you are responsible for the same. For your convenience, we are making available a copy of the relevant documents for the impugned payments. If, on an examination of the documents you are able to account for any of the impugned payments, we trust that you would respond within 10 days hereof. Particularly, in relation to each claim you should provide:
>
> i) details of why the payment had been justified;
>
> ii) identify any other party who had approved the expense/payment;
>
> iii) set out the circumstances in which the approval had been sought and obtained; and
>
> iv) copies of all documents recording the relevant approval.
>
> 9. In the circumstances, without prejudice to our other rights, we hereby put you on notice that your employment with the Company is summarily terminated.
>
> 10. Given the matters set out above, it is apparent that you are not entitled to receive either payment in lieu of notice or the 100% annual salary as one-off payment. In fact, we reserve the right to assert a set off and/or make a claim for the monies wrongfully paid out. This may include a claim for other sums which may not have been specifically referred to in this letter. As such, for the avoidance of doubt, all rights are reserved.

The 18 March 2014 Letter was accompanied by a stack of receipts relating to the allegedly wrongful expense claims made by the Respondent.

22 On 4 April 2014, the Respondent's solicitors sent a letter to the Appellant claiming that there was no basis for the allegations made in the 18 March 2014 Letter. The Respondent instead claimed for a sum of $1,946,400 which was asserted to be due and payable to him.

23 The Respondent then commenced Suit No 404 of 2014 on 14 April 2014.

The decision below

The Respondent's claim

24 In his primary claim, the Respondent asked for damages pursuant to the Appellant's alleged contractual breach and sought the salary and bonuses he would have earned if he had been employed for the full three-year term. As this claim was rejected by the Judge and no appeal has been brought against that decision, we will not detail the particulars of this claim.

25 As an alternative, the Respondent claimed, among other things, one year's salary which was due to him under cl 2 of the Employment Contract given that the Employment Contract was terminated before the expiry of the three-year term ("the Alternative Claim"). The Respondent argued that he was entitled to the following sums:

(a) Salary for three months' notice amounting to S$141,900.00.

(b) Salary for the period between March 2014 and February 2015 amounting to S$567,600.00.

(c) Guaranteed bonus for the period between March 2013 and February 2014 amounting to S$243,600.00.

(d) Guaranteed bonus for the period between March 2014 and February 2015 amounting to S$283,800.00.

Total: S$1,236,900.00

The Appellant's counterclaim

26 The Appellant's counterclaim was for a total of $499,719.20 which consisted of 867 claims of allegedly unauthorised payments. These claims were divided by the Appellant into the following eight categories:

(a) *Category A*: claims amounting to S$100,340.40 which the Respondent admitted, in his Reply and Defence to Counterclaim (Amendment No 1), were unauthorised. The Respondent averred that he had fully intended to settle those sums at the end of the financial year (after the accounts had been audited), but that he had not been given a chance to do so before he was terminated.

(b) *Category B*: claims relating to expenses incurred prior to the commencement of the Employment Contract (*ie*, 1 March 2013).

(c) *Category C*: claims relating to the Respondent's expenses overseas which the Appellant asserted were the Respondent's and his family's personal vacation expenses. The Respondent claimed that these overseas expenses were either spent on business trips or on entertaining potential business partners for the Appellant's business.

(d) *Category D*: claims for services and purchases that the Appellant asserted were personal in nature. The Respondent's position, generally, was that these expenses either related to benefits he was

entitled to under his Employment Contract, or were made for the Appellant and its staff.

(e) *Category E*: claims for food and beverage expenses. The Appellant asserted that these were personal expenses, pointing out that they were largely for meals on the weekend or on public holidays. The Respondent claimed that all the expenses in Category E were corporate expenses.

(f) *Category F*: claims for expenses incurred at hotels in Singapore. The Respondent claimed that these hotel expenses were incurred when he hosted actual or potential business partners of the Appellant.

(g) *Category G*: claims for taxi services in Singapore. The Appellant asserted that the Respondent had no basis to make taxi claims because the Appellant had already provided him with a motor car.

(h) *Category H*: a residual category of claims which include a substantial payment of $209,601.63 to Fincastle Trading Limited and a payment of $10,718.50 to BNP Paribas. The Respondent was the sole shareholder of Fincastle Trading Limited and he alleged that the payments were part of his bonus for the year. As for the payment to BNP Paribas, the Respondent said that the payment was for charges relating to an overdraft facility. According to Popov, these charges were unnecessary and had only been incurred because the Respondent was careless and had failed to close an overdraft facility.

The decision

27 As no cross-appeal is brought by the Respondent, we will only summarise the findings of the Judge which are germane to the present appeal.

28 The Judge dealt first with the Appellant's counterclaim since he held that the extent of the Respondent's alleged wrongdoing *vis-à-vis* the unauthorised payments would have a bearing on the determination of the Respondent's claim. In this regard, the Judge made the following findings:

(a) *Category A* expenses: this was not in issue as the Respondent accepted that he was not entitled to these sums.

(b) *Category B* expenses: the Judge found that the Respondent was not entitled to claim for expenses which were incurred prior to 1 March 2013 even if they were business expenses of Asiafert (see the Judgment at [62]).

(c) *Category C* expenses: the Judge found that there was insufficient evidence to establish that the Respondent was not entitled to these sums. The Judge noted that the Respondent, when probed, was always able to explain the business meetings he attended on these overseas trips. The Judge further held that in the absence of specific company regulations to the contrary, even "mixed business and personal trips" – that is to say, trips where the Respondent was accompanied by his family and where he had a number of business meetings but did not spend all his time working – qualified as "business trips" (see the Judgment at [70]−[71]).

(d) *Category D* expenses: the Judge found that there were a large number of items in respect of which no evidence was adduced at trial

to show why the Respondent was not entitled to them. Of those items which the Appellant specifically adduced evidence on, the Judge only found that a transaction for a spa service at St Regis Hotel was a personal expense which the Respondent was not entitled to claim for (see the Judgment at [77]−[78]).

(e) *Category E* expenses: the Judge found that they were legitimate business expenses incurred by the Respondent in the discharge of his duties (see the Judgment at [79]−[85]).

(f) *Category F* expenses: the Judge found that there was insufficient evidence to prove that these claims were wrongful and that the Respondent had managed, *prima facie*, to give reasonable explanations for each hotel expense he was questioned about. His general explanation was that these expenses were spent on hosting actual or potential business partners who came to Singapore (see the Judgment at [86]−[88]).

(g) *Category G* expenses: the Judge found that the Respondent was not entitled to claim for taxi travel given that the Appellant had already provided him with a motor car (see the Judgment at [89]−[90]).

(h) *Category H* expenses: the Judge found that the payment to BNP Paribas was a corporate expense. The Judge noted that the Appellant was not claiming for losses flowing from the Respondent's negligence so even if the charges would not have been incurred had the Respondent not been careless in failing to close the overdraft, this would not change the character of the payment to BNP Paribas; it would still be a corporate expense (see the Judgment at [96]). As for the Fincastle Trading Ltd payments, the Judge found that the payments

were made as part of the Respondent's annual bonus and were legitimate (see the Judgment at [98]−[99]).

29 As for the Respondent's Alternative Claim, the critical issue before the Judge was whether the Appellant was entitled to terminate the Respondent without any notice or payment in lieu of notice, which the Respondent would ordinarily have been due under cl 14 of the Employment Contract. This question turns on whether the Respondent was guilty of any serious misconduct or wilful breach or non-observance of any of the stipulations in the Employment Contract (as *per* cl 20 of the Employment Contract), which would entitle the Appellant to terminate the contract without paying the aforementioned sums (see the Judgment at [214]–[215]).

30 The Judge held that the Respondent had breached cl 3 of the Employment Contract ("Cl 3") to "faithfully serve the Company in all respects and use his best endeavours to promote the interests of the Company" by applying the Expense Accounting Practice. According to the Judge, the Respondent's practice of claiming for personal expenses during the year, and only reimbursing the Appellant for these expenses when and if Tricor raised queries at the end of the financial year, could not be said to be in the interest of the Appellant. The Judge found that by so doing, there was a likelihood that not all the personal expenses claimed by the Respondent would be reimbursed to the Appellant since it would have been impossible for Tricor to determine which of the claimed expenses were legitimate corporate expenses and which were the Respondent's personal expenses which he was not entitled to claim for (see the Judgment at [237]−[238]).

31 For the same reasons (*ie*, by utilising the Expense Accounting Practice), the Judge also held that the Respondent had breached his implied

contractual duty to serve the Appellant with good faith and fidelity (see the Judgment at [242]) and his fiduciary duty to act in the best interests of the Appellant (see the Judgment at [249]).

32 The Judge, however, found that although there were these breaches on the part of the Respondent, he was not guilty of serious misconduct or wilful breach or non-observance of the stipulations in the Employment Contract.

33 With respect to whether there was "serious misconduct", the Judge found that the breaches complained of were not so serious that they struck at the root of the Employment Contract or destroyed the confidence underlying the Contract. The Judge reached this conclusion on the basis that the Phosagro Group and its shareholders seemed to show little to no interest in regulating the way the finances of the Appellant were managed when it came to issues like entertainment expenses or employment benefits. Further, the Judge accepted that the Respondent had always intended to fully reimburse the Appellant for all the personal expenses claims he made throughout the year. The Judge also held that although the Respondent should have set up a better system to manage claims for the reimbursement of expenses, the Respondent genuinely believed that he was entitled to use the Expense Accounting Practice (see the Judgment at [252]−[262]).

34 As for whether there was a wilful breach of the Employment Contract, the Judge held that there was no intentionality or deliberateness in the commission of the breaches (see the Judgment at [263]−[265]).

35 Therefore, the Judge held that the Respondent was not entitled to rely on Cl 20 to terminate the Employment Contract. Consequently, the Respondent was entitled to one year's salary under cl 14 of the Employment

Contract, as well as three months' salary for payment in lieu of notice (on the basis that a term for the payment of salary in lieu of notice could be implied): see the Judgment at [271] and [273]. The Judge also awarded one year's bonus to the Respondent for the period between 1 March 2013 and 28 February 2014 because this bonus had accrued by the time he was terminated, but did not grant him judgment for his claim for bonus for the period between March 2014 and February 2015 (see the Judgment at [276]).

The parties' arguments

The Appellant's case

36 The Appellant has two primary grounds of appeal. The first ground of appeal pertains to the Judge's decision to allow the Respondent's Alternative Claim for the one year's salary and three months' salary for payment in lieu of notice. According to the Appellant, the Judge erred both in law and fact by finding that the Respondent's breaches of his contractual, general and fiduciary duties did not amount to serious misconduct or wilful breach under the Employment Contract. The Appellant advances the following points to support its first ground of appeal:

(a) The Respondent's misconduct had a material impact on the employment relationship between the Appellant and the Respondent.

(b) The Respondent did not genuinely believe that he was entitled to utilise the Expense Accounting Practice nor did he intend to reimburse the Appellant for personal expense claims. In any event, the Respondent's willingness or intention to repay the Appellant for the wrongfully claimed expenses could not negate the severity of the

wrongdoing and was consequently immaterial to the question of whether there had been serious misconduct.

(c) The Respondent's breach of fiduciary duties was significant and sufficient in and of itself to warrant summary dismissal.

(d) It was irrelevant that the Respondent had a past practice of utilising the Expense Accounting Practice.

37 The Appellant's second ground of appeal pertains to the Judge's decision to only allow some of the Appellant's counterclaim for the reimbursement of personal expenses. The Appellant submits that the Judge had erred in determining that the Appellant bore the burden of proving that the expenses were personal in nature. In this regard, the Appellant argues that pursuant to s 108 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"), it only has to show a *prima facie* case that the expense claims were personal in nature and that, thereafter, the burden was on the Respondent to show that the claims had, in actual fact, been properly and reasonably incurred. The Appellant submits that it had shown such a *prima facie* case, so the burden was on the Respondent to justify the expenses but he had not done so.

The Respondent's case

38 In response to the Appellant's first ground of appeal, the Respondent argues the following:

(a) The Judge was correct in finding that the Phosagro Group was largely indifferent to the Respondent's management of the Appellant's accounting practices and had therefore correctly found that the

Respondent's misconduct had little impact on the employer-employee relationship between the Appellant and the Respondent.

(b) The Judge was correct in taking into account the fact that the Respondent did have the intention to reimburse the Appellant and that this supported the finding that there was no serious misconduct or wilful breach of the Respondent's contractual obligations.

(c) The Judge was correct in finding that a breach of fiduciary duty did not, in and of itself, warrant summary dismissal and that, on the facts, the Respondent's breaches did not rise to the level as would justify summary dismissal.

39 As for the Appellant's second ground of appeal, the Respondent argues that the Appellant had failed to establish a *prima facie* case to show that the expense claims were personal in nature. Additionally, even if the burden fell on the Respondent to show that these expense claims were not personal, the Respondent had successfully discharged this burden.

The issues before this court

40 There are two main issues to be considered, which correspond to the two grounds of appeal raised by the Appellant:

(a) first, whether the Respondent was guilty of serious misconduct and/or wilful breaches of the Employment Contract ("Issue 1"); and

(b) secondly, whether the Appellant is entitled to reimbursement of all of the alleged personal claims ("Issue 2").

Our decision

Issue 1

41 The focus – as we have, in fact, assumed from the outset of this judgment – appears to us to be a fairly conventional one. Put simply, what is crucial in the context of the present appeal is simply an issue of interpretation: whether there had been "serious misconduct" and/or "wilful breaches" of the Employment Contract within the meaning of Cl 20. If there had been such "serious misconduct" and/or "wilful breaches", the Respondent would fail in his claim against the Appellant (see also the Judgment at [251]). The natural corollary of this is that should there *not* have been "serious misconduct" and/or "wilful breaches" of the Employment Contract within the meaning of Cl 20, the Respondent would succeed in his claim against the Appellant as there would have been no justification for the Appellant to summarily dismiss the Respondent. Indeed, this was the finding which was made by the Judge.

42 However, we do note that there was a *prior* (arguably threshold) issue that was considered by the Judge and this was whether the Appellant could even invoke Cl 20 in the first place since it had only sought to rely on this particular clause in the Employment Contract in its 18 March 2014 Letter *after* it had *first* purported to terminate the Respondent's employment via the 28 February 2014 letter. In this particular regard, the Judge had utilised the seminal English Court of Appeal decision of *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch D 339 ("*Boston Deep Sea Fishing*") ***by analogy*** in order to arrive at the conclusion that Cl 20 *could*, in fact, be relied upon by the Appellant. The legal principle in embodied in *Boston Deep Sea Fishing* is well-established and was succinctly (and helpfully) summarised by the Judge as follows (see the Judgment at [164]−[165]):

> 164 *Boston Deep Sea Fishing* stands for the proposition that if an employer did not rely on his employee's misconduct at the time of the dismissal because he did not know about it, he may subsequently invoke the said misconduct as *a defence* to a wrongful dismissal claim brought by the employee. This "transforms" what would have been a *termination in breach of contract* by the employer (hence giving rise to a claim for damages on the part of the employee), to a *lawful termination* pursuant to a repudiatory breach of the contract by the employee (removing any right on the employee's part to claim for damages).
>
> 165 *Boston Deep Sea Fishing* was more equivocal, however, about what would be the case if the employer knew about the misconduct but did not rely on it to dismiss the employee. In this regard, as seen from the passage quoted above, Cotton LJ seemed to have contemplated the possibility that estoppel may arise to preclude an employer from relying on those grounds of misconduct.
>
> [emphasis in original]

The principle in *Boston Deep Sea Fishing* has been applied by our courts on several occasions (see *eg*, the Singapore High Court decisions of *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 and *Cowie Edward Bruce v Berger International Pte Ltd* [1999] 1 SLR(R) 739).

43 At this juncture, it is important to emphasise that while the Judge referred to the legal principle in *Boston Deep Sea Fishing*, he was not actually applying the principle ***directly*** but was instead using it ***analogically***. It can be readily seen why the Judge had to do so. The legal principle in *Boston Deep Sea Fishing* was set out in the context of ***the termination of an employment contract for breach at common law***. The facts of the present case are ***quite different*** in so far as they concern the termination of an employment contract (by the Appellant) pursuant to ***the express terms of the employment contract (viz, the Employment Contract) itself***. It is our view, however, that the Judge was ***entirely correct*** in drawing, ***by analogy***, from the legal principle established in *Boston Deep Sea Fishing* and applying it in the context of a

termination of an employment contract for breach at common law. In particular, we see ***no reason in principle why*** the ***general proposition*** embodied in *Boston Deep Sea Fishing* (albeit *at common law*) ought ***not*** to apply in a situation where the termination of the employment contract is effected *pursuant to the express term(s) of the employment contract itself.* Put simply, if an employer (here, the Appellant) has purported to terminate the employment contract pursuant to the terms of that contract without relying on any particular clause, we see no reason in principle and logic why the employer ought not to be permitted to *subsequently* specify and rely upon a clause which justifies summary dismissal without compensation (in this case, Cl 20), even if the employer was not aware of its right to do so at the time of termination.

44 The Judge, however, went further and considered the effect of the English Court of Appeal decision of *Cavenagh*, which purported to modify the legal principle established over a century earlier in *Boston Deep Sea Fishing*. *Cavenagh* involved a situation where the employer sought, *first*, to terminate the employment contract concerned *pursuant to an express term of the contract itself*, *but subsequently* discovered wrongdoing on the part of the employee which would have entitled it (the employer) to terminate the employment contract *for breach at common law instead*. The court in *Cavenagh* held that the employer could *not* avail itself of the principle contained in *Boston Deep Sea Fishing* to terminate the contract for breach at common law instead. Central to its decision was the fact that any monetary remedy for termination under the former would, as noted both by the Judge and by the court in *Cavenagh* itself, result in ***an accrued debt*** *that is due to the employee concerned pursuant to the employment contract itself*, whereas any monetary remedy for termination under the latter would result in an award of

damages *to the employee concerned.* The former remedy (*viz*, an accrued debt) is, of course, a *liquidated* amount, whereas the latter remedy (*viz*, an award of damages) involves an *unliquidated* amount (that is also subject to possible legal limitations such as causation, remoteness and mitigation). The Judge *agreed* with the legal principle established in *Cavenagh*, *but* thought that it did not apply on the facts of the present case because there was *no "clash" between a situation involving an accrued debt as a monetary remedy and one involving damages as a monetary remedy.* Whilst we can understand why the Judge wanted to discuss *Cavenagh* in order to distinguish it, it was, with respect, ***not necessary*** for the Judge *to endorse the legal principle laid down in Cavenagh*. We will explain why this is so in a coda to our judgment (see [77]–[87] below) but it suffices to say for now that there are persuasive arguments both for as well as against the adoption of the legal principle laid down in *Cavenagh* and it would, in our view, be preferable for the courts to express a definitive or conclusive view only when it arises ***directly*** for decision in a future case.

45 Indeed, it is ***common ground*** between the parties in the context of the present appeal that there are no legal difficulties surrounding the threshold question as to whether Cl 20 could even be relied upon in the first place. This is – having regard to the reasons we have set out above – the correct position to adopt.

46 We turn now to consider Cl 20, which constitutes, as already mentioned, the ***crux*** of the present appeal. It would be apposite to set out the clause once again, as follows:

> 20. If at any time during his employment, hereunder the employee [the Respondent] shall be guilty of **[1]** ***any serious misconduct*** ***or*** **[2]** ***any wilful breach or non-observance of any of the stipulations herein contained and on his part***

> ***to be observed or performed*** ***or*** **[3]** shall compound with his creditors generally ***or*** **[4]** shall have a Receiving order in bankruptcy made against him ***then*** in ***any such case,*** the Company [the Appellant] may ***terminate*** the employee's employment hereunder ***without any notice or payment in lieu of notice***. [emphasis added in bold, bold italics and underlined bold italics]

47 Cl 20, as set out in the preceding paragraph, comprises four limbs which, for ease of reference, we shall refer to as limbs **[1]**, **[2]**, **[3]** and **[4]**, respectively (we have marked out each limb by way of a series of interpolations). For the purposes of the present case, we are only concerned with the first two limbs (*viz*, limbs **[1]** and **[2]**); and, as will be evident from the outset of this judgment, our particular focus is on limb **[1]**, which relates to the issue of "serious misconduct".

48 It is important to note at this particular juncture that, in interpreting Cl 20, there appears to us to be, in *substance*, no difference between limbs **[1]** and **[2]**, save in two important respects. ***First***, limb **[2]** *necessarily* involves (by dint of the presence of the word "wilful") *an* ***intentional*** *breach or non-observance of one or more of* ***the express terms of the Employment Contract itself*** (which, of course, must be ascertained based on *the objective evidence* available). The ***second*** difference is no less important. It would appear that ***any wilful breach of any of the terms of the Employment Contract would – without more – justify the Appellant in terminating the Respondent's employment, irrespective of the severity of the breach***. This is different from limb **[1]**, which requires that the misconduct rise to the level of being "serious" before the right to summarily dismiss the employee may be exercised.

Was there "serious misconduct" by the Respondent under Cl 20?

49 It is in this regard that the central question arises for consideration: what guidelines should apply in determining whether there has been "serious misconduct" for the purpose of limb **[1]**? In the absence of any guidance from the terms of the contract itself, there is a danger that any standard set by the court might be viewed as arbitrary. In our judgment, therefore, the most principled approach would be to look to ***the common law principles relating to discharge of breach*** for guidance. Put simply, under **[1]**, "serious misconduct" refers to ***a breach of the Employment Contract that is so serious that it would justify the Appellant in terminating the Respondent's employment without more (and, in particular, without the need for (as Cl 20 itself states) "any notice or payment in lieu of notice")***. When looked at in this light, it is clear that ***the common law principles relating to discharge by breach (ie, a repudiatory breach)*** which have been set out by this court in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") ***would be relevant to the determination of whether the Respondent was guilty of "serious misconduct" within the meaning of Cl 20***. This was the approach adopted by counsel for the Appellant, Mr Paul Tan. We add also that counsel for the Respondent, Mr Eugene Thuraisingam ("Mr Thuraisingam"), did not (correctly, in our view) seek to adopt (in substance at least) a different approach.

50 The decision of the Judge with regard to the issue as to whether there had been "serious misconduct" by the Respondent which justified the termination of his employment by the Appellant are contained at [252]−[262] of the Judgment. Because of their importance to the present appeal, we reproduce these paragraphs in full as follows:

(1) Serious misconduct

252 The parties have not made submissions on how I should interpret the term "serious misconduct". Unfortunately, the words do not speak with clarity for themselves – while a degree of gravity is clearly required, there is little else we can gather from the language of the contract itself. As such, I found it helpful to refer to the case law relating to employment contracts to see when, under common law, the courts have found that the employee's misconduct was sufficiently grave or serious to constitute a repudiatory breach, justifying summary dismissal.

253 In *Cowie Edward Bruce* ([157] *supra*) at [39], the High Court held:

> In each case, it is a matter of degree whether the act complained of is of the requisite gravity… it must be so serious that it strikes at the root of the contract of employment, that it destroys the confidence underlying such a contract.

The judge then continued at [40] to state:

> The relevancy and effect of any misdeed complained of must, it seems to me, be judged by reference to its *effect on the employer-employee relationship*. It also seems to me that in judging the relevancy and effect of the acts complained of, account must be taken of the *habits and attitude of the employer at the relevant time*. They cannot be judged totally in a vacuum. [emphasis added]

254 This holding was affirmed in *Surteco Pte Ltd v Siebke Detlev Kurt* [2011] SGHC 74 at [12] as well as in *Aldabe Fermin* ([155] *supra*) at [58]. Thus, it is clear that careful attention must be paid to the *effect* the breaches of duty has on the employer-employee relationship. Naturally, this would be affected in part by the employer's attitude to the breaches in question.

255 Based on the evidence, it appears that since the Phosagro Group took over the [Appellant], they have neither enquired about the existing accounting practices of the [Appellant], nor have they taken steps to implement new corporate governance and accounting regulations. The shareholders have shown little to no interest in regulating the way the finances of the [Appellant] are managed when it comes to issues like entertainment expenses or employment benefits.

256 Moreover, it is clear that what put a strain on the employment relationship was the difference in views on bigger issues like the business direction the [Appellant's] business should take, and the appointment of new directors onto the [Appellant's] board. It does not appear that issues to do with the expenses of the directors or internal financial accountability were that significant to the [Respondent's] employers [ie, the Appellant].

257 Therefore, while the [Respondent's] practice of claiming for personal expenses and, in all likelihood, not fully accounting for them at the end of the financial year, was a breach of his contractual and fiduciary duties, I am of the view that it did not constitute "serious misconduct" under cl 20 of the Employment Contract. I emphasise that I accept the [Respondent's] evidence that he intended to fully reimburse the [Appellant] for all the personal expense claims he made throughout the year. Whether the system that he had put in place to do so was sufficiently rigorous, or whether his judgment of what were "personal" and "business" expenses was entirely accurate, are separate questions. In my view, the fact that the [Respondent] made some wrongful claims is not sufficient to justify a finding of "serious misconduct" such as to trigger the operation of cl 20. In my view, the [Respondent] genuinely believed that he was entitled to make the claims he did, and at trial, he expressed full willingness to account for whatever he may have mistakenly claimed.

258 When it comes to claims for expenses, it is understandable if employers and employees have a different interpretation of what the employee is entitled to claim and how the employee is to be reimbursed. This is especially so where there are no clear contractually incorporated or internal company regulations. As such, looking at the facts and circumstances as a whole, I do not find evidence of serious misconduct arising from the mere fact that some expenses claimed were wrongful.

259 What is trickier is the fact that the [Respondent] carried over the same expense accounting practice he adopted at Asiafert (which he owned) in his management of the [Appellant's] operations. As discussed earlier, the expense accounting practice, whilst convenient for the employee, was not in the best interest of the [Appellant]. Nevertheless, it is still necessary to consider this in the light of all the circumstances including the attitude of the [Appellant] (and the owners of the [Appellant]). Whilst the matter was not explored in depth, there was some evidence that Popov also submitted and accepted expense reimbursements during the year. Further, it does not appear that the new owners of the [Appellant] had taken any effort to establish regulations over

> company expenses and claims, *etc*. Monthly financial statements were provided to the Phosagro Group. These statements included the expense claims/payments. Even if the Phosagro Group did not know the individual details of the expense claims, they must have been aware that sizeable claims were being made.
>
> 260 Whilst it has been held in *Sinclair v Neighbour* ([243] *supra*) that an employee who takes money from the cash till (leaving behind an IOU) commits a repudiatory breach of contract, each case must turn on its own facts and circumstances. In the latter case, the employee knew that the employer would not have given him permission to take cash from the till. This was a "knowing" breach that destroyed the relationship of trust between the employee and the employer and rendered the employment relationship untenable.
>
> 261 In the present case, I am satisfied that the [Respondent] believed that he was entitled to use the expense accounting practice he carried over from Asiafert and that the [Appellant] employer either knew or would not object to that method. Indeed, there is some evidence that supports the [Respondent's] belief that the [Appellant] employer did not object and was broadly aware of expense claims. On balance, I am of the view that whilst the [Respondent] as the managing director could and should have set up a better system for expense claim reimbursement (and was therefore in breach of his duties as managing director), his breaches did not amount on the facts before me to serious misconduct.
>
> 262 Whilst the [Appellant] has made much of the point that it was only after the counterclaim was filed that admission was made in respect of Category A expenses, it must be borne in mind that the [Respondent] was clearly caught by surprise when he received the letter of termination by e-mail on 28 February 2014. I elaborate more on this below.
>
> [emphasis in original]

51 As noted above, the Judge was correct in finding (at [252] of the Judgment) that for there to be "serious misconduct", it must have been misconduct which is so serious as to constitute a "repudiatory breach". That having been said, a point of the first importance in the context of the present appeal ought to be made: whilst the Judge sought to apply the relevant common law principles on repudiatory breach as set out in *RDC Concrete* in

the interpretation of the phrase "serious misconduct" in Cl 20, he did not, with respect, apply ***all the principles*** laid down by the court in *RDC Concrete*.

52 In *RDC Concrete*, this court noted that there were four situations in which a breach of contract would amount to a repudiatory breach:

(a) ***Situation 1***: where the contract clearly and unambiguously states that, in the event of a certain event or events occurring, the innocent party will be entitled to terminate the contract (*RDC Concrete* at [91]).

(b) ***Situation 2***: where a party, by his words or conduct, simply renounces his contract inasmuch as he clearly conveys to the other party to the contract that he will not perform his contractual obligations at all (*RDC Concrete* at [93]).

(c) ***Situation 3(a)***: the condition/warranty approach where the focus is on the nature of the term breached and, in particular, whether the intention of the parties to the contract was to designate that term as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract (*RDC Concrete* at [97]).

(d) ***Situation 3(b)***: where the focus is on the nature and consequences of the breach; in particular, where the breach in question will give rise to an event which will deprive the innocent party of substantially the whole benefit which it was intended that he should obtain from the contract (*RDC Concrete* at [99]).

53 From the passages of the Judgment reproduced (see above at [50]), it appears that the Judge only focused on one aspect of the entire complement of legal principles set out in *RDC Concrete*. In particular, the Judge was, in *substance*, referring to ***Situation 3(b)*** in *RDC Concrete.* That this is the case is clear from the Judge's reference to *the* ***nature and consequences*** *of the breach* (see also, the reference to the phrase "a degree of gravity" and the focus on the *effect* of the breach at [252]–[254] of the Judgment). ***However***, it is our view that ***Situation 3(a)*** in *RDC Concrete* would also be (potentially) applicable, as would all the other situations set out therein. That this is so is both logical as well as principled although we acknowledge that the usual case involving "serious misconduct" in the context of an employment contract will traditionally focus on the *nature and consequences or effects of the breach* (which will involve *Situation 3(b)* in *RDC Concrete*). Indeed, in *Sinclair v Neighbour* [1967] 2 QB 279, a decision which had been relied upon by counsel for both parties, this appears to have been the reason why the English Court of Appeal found that summary dismissal was justified. There, an employee of a bookmaker took out £20 from the till without the employer's permission, of which £15 was used for the purpose of placing a bet in another betting shop. The employee put an IOU into the till and repaid the money the money into the till the next day, his bet having turned out to be successful. The employee accepted that if he had asked the employer for permission to borrow money from the till for gambling, permission would have been refused. In finding that such misconduct warranted summary dismissal, Sellers LJ focused on the dishonesty of the employee and noted (at 287) that such conduct was of such a type which was "inconsistent, in a grave way" with the employee's employment and Davies LJ highlighted (at 289) that such misconduct was "of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant, such as would render the

servant unfit for continuance in the master's employment". The Judge characterised the case of *Sinclair* as being one where the misconduct "destroyed the relationship of trust between the employee and employer and rendered the employment relationship untenable" (see [260] of the Judgment). We agree with this description and, in our view, this shows quite clearly that *Sinclair* was a ***Situation 3(b)*** type breach (*ie*, the nature and consequences of the breach warranted termination). However, it is important to emphasise that this is ***not*** the ***only*** possible situation that might involve "serious misconduct" on the part of the employee.

54 Indeed (and on a more general level), it is our view that the legal principles set out in *RDC Concrete* are of ***general*** *application* to ***all*** *contracts*. It should be noted that the Judge himself referred to *RDC Concrete* ***on numerous occasions in the Judgment***. Unfortunately, he did not refer to *RDC Concrete* at all in the paragraphs of the Judgment wherein he considered the present issue (*viz*, whether there was "serious misconduct" by the Respondent within the meaning of Cl 20). As we have observed in the preceding paragraph, he did, however, refer (in *substance*) to one of the situations enunciated in *RDC Concrete* (*viz*, *Situation 3(b)*). We are nevertheless of the view that the concept of "serious misconduct" must be read as well as applied in ***context – in particular, in the context of the contract as a whole***. Looked at in this light, "serious misconduct" would include the ***breach*** *of* ***important term(s)*** *of the employment contract itself.* Such terms would be termed "***conditions***" pursuant to ***Situation 3(a)*** in *RDC Concrete.* The breach of such terms would entitle the innocent party (here, the employer) in electing to treat the employment contract as discharged, ***regardless of*** the ***nature and consequences of the breach.*** The ***rationale*** for adopting such an approach (*ie*, taking into account the breach of important terms of the Employment Contract

as constituting "serious misconduct") is ***the same*** as that for treating the breach of "condition" at common law as being a repudiatory breach – namely, if the term concerned was *intended by the parties* to be of such importance that *any* breach of it (*regardless of* the consequences) would *entitle* the innocent party to elect to treat the contract as discharged, then ***there is no reason in principle why effect ought not to be given to that intention***.

55 Indeed, and for the sake of completeness, ***apart from Situations 3(a) and 3(b)*** of *RDC Concrete*, the breach concerned could be such that it amounts to a ***renunciation*** of the contract by the employee – in which case the employer could elect to treat the contract as discharged pursuant to ***Situation 2*** of *RDC Concrete*. Finally, the fact situation could be such that the employer could elect to terminate the contract because there is ***an express term in the contract itself that clearly covers that particular situation***. This is, in fact, ***Situation 1*** in *RDC Concrete* and is, by its very nature, ***quite distinct from Situations 2, 3(a) and 3(b) in* RDC Concrete.**

56 In so far as ***Situation 3(a)*** is concerned, this court has, in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") (at [160]−[174]) set out certain relevant, but non-exhaustive, factors which a court should consider in ascertaining whether or not a given contractual term (in this case, Cl 3) is a "condition". These factors include the following:

(a) whether a statute classifies a specific contractual term as a "condition";

(b) whether the contractual term itself expressly states that it is a "condition";

(c) the availability of a prior precedent; and

(d) whether the contract arises out of a mercantile transaction.

This court, in *Man Financial*, went on to note that although these factors were important, the ultimate focus was on *ascertaining the intention of the contracting parties themselves* (at [174]):

> 174 The aforementioned factors are important. But, they are not exhaustive and, to use a familiar phrase (albeit in a somewhat different context), the categories of factors are not closed. The actual decision as to whether or not a contractual term is a condition would, indeed, depend very much on the particular factual matrix before the court. It also bears repeating that there is no magical formula. In the final analysis, the focus is on *ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole* (see also [161] above). [emphasis in original]

57 Applying the principles set out in the preceding paragraph to Cl 3 (see above at [30]), which is the clause that the Respondent had breached, it is clear that the four factors mentioned therein are not applicable. However, that does *not* ***necessarily*** mean that Cl 3 is *not* a "condition". As this court was at pains to emphasise in *Man Financial* (at [160]), "there is no magical formula (comprising a certain fixed number of factors or criteria) that would enable a court to ascertain whether or not a given contractual term is a condition". What ***is*** essential is to ***ascertain the intention of the contracting parties (here, the Appellant and the Respondent) by construing the actual contract itself (including the contractual term concerned (here, Cl 3)) in the light of the surrounding circumstances as a whole***.

58 What, then, are we to make of Cl 3? The Appellant had formerly belonged to the Respondent, who was now its employee and whose duty was

to ensure that he did not take advantage of his insider knowledge to advance his own interests, but prioritised the welfare of the Appellant instead. This requirement is, in fact, embodied within both the letter as well as spirit of Cl 3 itself. It must be emphasised that the Respondent was in a unique position of being entrusted with a significant degree of authority, responsibility and independence in the conduct of the Appellant's affairs. Indeed, this is made abundantly clear from the fact that the Respondent had the sole authority to reimburse *both* himself and Popov for the expenses which they had incurred. In our view, it is precisely because the Respondent had previously been the sole shareholder and director of Asiafert that he was accorded such autonomy in the running of the Appellant. With such trust being reposed in the Respondent, one would expect that a clause (*ie*, Cl 3) which places the obligation on the Respondent to "well and faithfully serve the [Appellant] in all respects and use his best endeavours to promote the interest of the [Appellant]" would have been intended by the parties to be of the utmost importance.

59 It is our view, therefore, that Cl 3 is, in law, a "***condition***" within the meaning of ***Situation 3(a)*** in *RDC Concrete* and, given that there has been a clear breach of that particular clause, that breach ***does*** constitute ***"serious misconduct"*** within the scope of ***Cl 20***. This finding would be sufficient to allow the appeal with respect to Issue 1. However, for completeness, and since it was the focus of the Judge's analysis in the court below, we consider (briefly) whether the Respondent's conduct also fell within the purview of ***Situation 3(b)*** in *RDC Concrete*; if it did, then that would constitute ***an additional reason*** to allow the appeal with respect to Issue 1.

60 In so far as *guidance* with respect to Situation 3*(b)* is concerned, the following observations by this court in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 (at [62] and [64]) might be usefully noted:

> 62 In our view, the focus must be on the formulation laid down by Diplock LJ in *Hongkong Fir* ([39] *supra*) itself: The innocent party must establish deprivation of "substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration" (see *Hongkong Fir* (at 66)) for the performance of the innocent party's own obligations. At bottom, the focus is on determining *what exactly constituted the benefit* that it was intended the innocent party should obtain from the contract (which, looked at in one sense, is a question of construction, but not in the sense utilised in the context of ascertaining whether a term is a condition pursuant to the condition-warranty approach (*cf* also *Koompahtoo* (especially at [55], reproduced below at [63]) as well as Turner on *Hongkong Fir* ([27] *supra*) at 435–436, although Turner was probably referring to construction in the latter sense just mentioned)), *and then* examining very closely the *actual consequences* which have occurred as a result of the breach *at the time at which the innocent party purported to terminate the contract in order to ascertain whether the innocent party was, in fact, deprived of substantially the whole benefit of the contract that it was intended that the innocent party should obtain*. We would emphasise here that regard should be had only to the *actual* consequences and events resulting from the breach.
>
> …
>
> 64 There is, in fact, no magical formula that would enable a court to ascertain whether or not the breach is sufficiently serious so as to permit the innocent party to terminate the contract pursuant to the *Hongkong Fir* approach. There are certainly a number of general formulations (some of which have been set out above at [61]). However, as we have noted above (at [61]), these general formulations are, in fact, similar in substance. More specifically, there are also particular factors which can be found in the case law (such as those set out by the majority of the court in *Koompahtoo* (at [54], reproduced in the preceding paragraph). However, as we have also noted above (at [63]), they are by no means either exhaustive or conclusive. In the final analysis, the actual decision as to whether or not the breach concerned is sufficiently serious so as to permit the innocent party to terminate the contract is largely dependent on the precise factual matrix of the case itself (see also *Breach of Contract* at

> para 655 and Ewan McKendrick, *Contract Law – Text, Cases, and Materials* (Oxford University Press, 3rd Ed, 2008) at p 795).
>
> [emphasis in original]

61 As is the case with Situation 3(a) of *RDC Concrete*, there is no magic formula as such which would be determinative of the case concerned. Much would depend upon the precise facts and circumstances of the case itself. In so far as the present case is concerned, could it be said that the Respondent's conduct in breach of Cl 3 was such that it deprived the Appellant of substantially the whole benefit of the Employment Contract which it was intended that it (the Appellant) should have? In our view, it cannot. Notwithstanding the Respondent's breach of Cl 3 through the utilisation of the Expense Accounting Practice, this particular breach did *not* detract from the ***overall*** contributions of the Respondent to the Appellant itself, such that the Appellant could be said to have been deprived of substantially the whole benefit of the Employment Contract. However, as we have already noted, even though Situation 3(b) is not applicable to the present case, Situation 3***(a)*** is applicable, and this would suffice for us to find that there had been "***serious misconduct***" within the meaning of Cl 20.

Were there "wilful breaches" of the Employment Contract by the Respondent under Cl 20?

62 We turn now to the issue of whether there were "wilful breaches" of the Employment Contract by the Respondent under Cl 20. Given our finding that there had been "serious misconduct" by the Respondent under that same clause (*viz*, Cl 20), it is, strictly speaking, unnecessary for us to consider this particular issue. However, we will nevertheless proceed to consider this issue for the sake of completeness.

63 The decision of the Judge with regard to the issue as to whether there had been "wilful breaches" by the Respondent which justified the termination of his employment by the Appellant are contained at [263]–[265] of the Judgment, which we reproduce in full as follows:

> (2) Wilful breaches of the Employment Contract
>
> 263 The parties did not make submissions on how "wilful" should be interpreted. Given that no authorities were submitted to me for my consideration, I shall take the plain meaning of the word, and proceed on the basis that a "wilful" breach is one that requires some form of intentionality or deliberateness in the commission of the breach. In this regard, I was guided by the High Court's holding in *Xuyi Building Engineering Co v Li Aidong* [2010] 4 SLR 1041 at [30]:
>
> > The provision refers to 'any wilful breach' of a condition of the contract of service. Counsel for the employees equated that to a fundamental breach. I do not think that was apt, and I would consider a wilful material breach would suffice … A considered decision not to pay an employee in accordance to those provisions of the Act is a wilful material breach.
>
> 264 In this regard, I find that the [Appellant] is not guilty of a "wilful breach or non-observance" of the stipulations in the Employment Contract. While the [Respondent] may have breached cl 3 and several implied duties in the Employment Contract, I find that he did not do so wilfully. On the contrary, as noted already, I find that the [Respondent] genuinely believed that he was entitled to claim his entire credit card bill without differentiating business from personal expense out of convenience, so long as he reimbursed the [Appellant] at the end of the financial year. I also accept that he would have been willing to reimburse the [Appellant] for expenses that were personal in nature and outside of his entitlement. In this regard, the [Respondent's] admissions to the Category A claims cement this finding of fact. It is therefore not enough to show that the [Respondent] knew that some of his expense claims may have been personal or may fall outside what he was entitled to claim. It is necessary to go further and establish that the [Respondent] knew that he was not entitled to make the expense claims under the system established at Asiafert.
>
> 265 The [Appellant] submits that the [Plaintiff] failed to admit to any of his personal expenses after his termination, even when requested to in the 18 March 2014 Letter, and only

> did so when he filed his defence to the counterclaim. However, as indicated earlier, I accept the [Respondent's] explanation that he was distraught and sought legal advice after receiving the 18 March 2014 Letter. I therefore do not think it detracts from my overall finding of fact that the [Respondent] never intentionally tried to cheat the [Appellant] of money, and never intentionally or deliberately breached the terms of his Employment Contract.

64 We agree with the reasoning of the Judge as set out in the preceding paragraph. Central to his conclusion that the Respondent had not committed "wilful breaches" of the Employment Contract was his finding that the Respondent had *genuinely believed* that what he had done was correct (notwithstanding the fact that they constituted breaches of contract). We agree with this finding, and it follows, therefore, that the breaches were *not* "*wilful*" within the meaning of Cl 20.

Conclusion

65 To summarise, although we have found that the Respondent had not been guilty of "wilful breaches" under Cl 20, we have nevertheless found that he had (contrary to the Judge's finding) been guilty of "serious misconduct" within the meaning of that same clause. We therefore allow the appeal with regard to Issue 1.

Issue 2

66 We note at the outset that the Judge dealt with this particular issue in great detail.

67 The Appellant's main argument in this regard is that because it is especially within the Respondent's knowledge whether the expenses are personal in nature, pursuant to s 108 of the Evidence Act ("Section 108"), the burden should be on him to prove otherwise. Section 108 provides as follows:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him

68 At this juncture, it warrants mention that Section 108 is a provision which should only be invoked in "very limited circumstances" since "[w]idely construed and lifted out of its context, it will reverse the burden of proof of the essential ingredients of the [claimant's] case which by section 103 [of the Evidence Act] is cast on the [claimant]" (see Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) ("*The Law of Evidence in Singapore*") at paras 3.055−3.056, citing (at para 3.055) Tan Yock Lin, "The Incomprehensible Burden of Proof" [1994] SJLS 29 at 38). Section 103 of the Evidence Act provides that the party who desires any court to give judgment as to any legal right or liability which is dependent on the existence of facts which he asserts has the burden of proving the existence of the asserted facts. Put simply, Section 108 is the exception to the rule and may be successfully invoked "only in very extreme scenarios" (see *The Law of Evidence in Singapore* at para 3.064). That this is so was made clear in the Singapore High Court decision of *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 24, albeit in the context of a criminal matter, where V K Rajah J (as he then was) noted as follows (at [95]–[96]):

> 95 … Section 108 of the EA cannot relieve the Prosecution from its burden of proof. It can only be employed to address certain *exceptional cases* where it would be impossible or at any rate disproportionately difficult for the Prosecution to establish facts which are "especially" or "particularly" within the knowledge of the accused which an accused can prove without difficulty or inconvenience.
>
> 96 The Court of Appeal decision of *PP v Abdul Naser bin Amer Hamsah* [1996] 3 SLR(R) 268 emphatically reiterates that *s 108 of the EA applies in extremely limited and narrow circumstances*. It does not have the effect of imposing on an accused the onus of proving that no offence was committed even if the accused is the sole witness. It cannot and does not apply to the present factual matrix to shift or ameliorate the Prosecution's evidential burden. The Prosecution must stand

> on its own intrinsic merits and not on the frailty or paucity of the defence.
>
> [emphasis added]

69 The above view was also reiterated in a civil matter in the Singapore High Court decision of *Surender Singh s/o Jagdish Singh (administrators of the estate of Narindar Kaur d/o Sarwan Singh, deceased) v Li Man Kay* [2010] 1 SLR 428 ("*Surender Singh*") where Lai Siu Chiu J observed thus (at [217] and [219]):

> 217 Section 108 of the Evidence Act states that when any fact (whether affirmative or negative) is especially within the knowledge of any person, the burden of proving that fact is upon him. ***This is an exception to the general rule contained in s 103 of the Evidence Act, that the burden is on the party who asserts a fact***. Section 108 of the Evidence Act applies only to those matters which are supposed to be within the knowledge of a defendant. It cannot apply when the fact or facts are such that they are capable of being known also by a person other than the defendant (see Sarkar's Law of Evidence ([141] supra) vol 2 at p 1672).
>
> …
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> 219 In a similar vein, Ratanlal and Dhirajlal, *Law of Evidence* (at pp 1133–1134) and Woodroffe & Ali, *Law of Evidence* ([141] *supra*) (vol 3 at p 4223) notes [sic] that s 108 of the Evidence Act is:
>
> > … ***designed to meet certain exceptional cases*** in which it would be impossible, or at any rate disproportionately difficult, for the [plaintiff] to establish facts which are 'especially' within the knowledge of the [defendant] and which [the defendant] could prove without difficulty or inconvenience. When any fact is within special knowledge of any person, the burden of proving that fact is upon him. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.
>
> …
>
> [emphasis added in bold italics]

70 That having been said, the Respondent does not dispute that Section 108 is applicable in the present case. His main contention is instead that the Appellant has failed to establish a *prima facie* case that *each and every* expense raised in the counterclaim is personal in nature.

71 The Appellant, accepts (correctly, in our view) that a mere allegation that the expenses are personal will not suffice to trigger the application of Section 108; instead, it accepts that it must first establish a *prima facie* case that the expenses were personal in nature before Section 108 may be invoked (see *Surender Singh* at [221]). According to the Appellant, the following three facts – (a) the Expense Accounting Practice was improper (as found by the Judge); (b) the Appellant was able to prove that certain expense claims were indeed unauthorised; and (c) the Respondent admitted that certain claims were personal (*eg*, the Category A expenses) – cumulatively suffice to establish a *prima facie* case that *all* the expense claims which are the subject of the counterclaim were personal in nature.

72 In our view, the fact that the Expense Accounting Practice was improper in that it amounted to a breach of the Respondent's contractual duties to act in the best interest of the Appellant, does *not* – in and of itself – suffice to establish a *prima facie* case that *all* of the expenses in the counterclaim were personal in nature. If that were the case, the Appellant would essentially be able to allege that *every single expense* in the Respondent's credit card statements, even those which are not subject of the counterclaim, is *prima facie* a personal expense. This cannot be correct. The concept of a "*prima facie* case" was explained by Wee Chong Jin CJ in the decision of the Federal Court of Malaysia in *Gan Soo Swee and another v Ramoo* [1968–1970] SLR(R) 324 (at [21]), where he clarified that in order to establish a *prima facie* case, a plaintiff had to "prove facts from which in the

absence of an explanation liability could properly be inferred". This definition was cited with approval by Chan Sek Keong CJ in the Singapore High Court decision of *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 at [7]. In our view, the mere production of the Respondent's credit card statements, coupled with the finding that the Expense Accounting Practice was generally improper, cannot suffice to lead to the inference that all payments made under the Respondent's credit card were personal in nature.

73 Secondly, it is not appropriate, in our view, for the Appellant to assert that because it was able to prove at trial that some expenses were personal in nature, it had established a *prima facie* case that *all* of the expenses raised in the counterclaim were personal. The burden on the Appellant to show a *prima facie* case that the expenses were personal in nature was a burden which fell on it at trial. It is therefore illogical, with respect, for the Appellant to suggest that because the Judge had found, *after the trial*, that *some* of the expense claims were personal, this finding can now be relied upon to discharge its burden of proving a *prima facie* case that *every single one* of the expenses was personal in nature.

74 It is significant, in our view, that the Appellant did not attempt to call any representative of Tricor to give evidence as to whether the expense claims which formed the subject matter of the counterclaim were unauthorised. Since the Expense Accounting Practice involved Tricor identifying which of the expense claims were personal in nature, it must surely have had some criteria for identifying such claims. Therefore, a *prima facie* case could have been established if the Appellant had procured a representative from Tricor to give evidence that, based on the criteria it applied, these expense claims were of a personal nature. The Appellant has sought to rely on the New South Wales Industrial Relations Commission decision of *Boniface v SMEC Services Pty*

Limited and anor [2007] NSWIRComm 301 ("*Boniface*") to argue that the burden should be on the Respondent to explain the nature of all the expenses raised in the counterclaim. In *Boniface*, the Commission held (at [206]) that:

> … where a director seeks reimbursement of monies said to be expended on behalf of a company, it is incumbent upon the director to ensure that proper and appropriate records are available which will allow the company and its auditors to identify the expense as being one that is properly payable by the company. A failure to recognise this fundamental obligation constitutes a breach of a director's fiduciary duty …

It should be noted, however, that, contrary to the Appellant's submissions, the above observations made by the Commission did not pertain to the issue of who bore the burden of proving the nature of the expenses. Rather, the issue before the Commission was whether the applicant in that case (the Chief Executive Officer of his company) was guilty of misconduct. The Commission relied on the above to conclude that because the director did not have such proper and appropriate records, he had breached his fiduciary duty to the employer. In fact, in *Boniface*, an audit committee had analysed the various expense claims made by the director and had flagged these expenses as being unauthorised. This is a significant distinguishing factor from the present case. As noted above, if the Appellant had called on a representative of Tricor to give evidence that, based on his analysis, these were expenses that were personal in nature, it would be legitimate for the Appellant to argue that the burden had shifted to the Respondent to show otherwise. However, in the light of the Appellant's failure to do so, we do not think that it can said that the Appellant has established a *prima facie* case that all the expense claims raised in the counterclaim were personal in nature.

75 In the circumstances, we affirm the decision of the Judge with regard to Issue 2.

Conclusion

76 For the reasons set out above, we allow the appeal with regard to Issue 1, but dismiss the appeal with regard to Issue 2. In the circumstances, it is our view that there should be no order as to costs. There will be the usual consequential orders.

Coda

77 As we have already noted, it was, strictly speaking, unnecessary for the Judge to have discussed *Cavenagh* in order to arrive at his decision on the facts of the present case (see above at [44]). Indeed, the Judge went further and accepted *Cavenagh* as being good law in Singapore (see the Judgment at [191]). As we have already mentioned above (at [5]), we will set out some brief views in order to flag out some important legal issues that will need to be considered in more detail when they next come before the courts for a definitive ruling. In particular, we will set out both the advantages as well as disadvantages stemming from the legal principles concerned and express some tentative views pending a full and final pronouncement on them in a subsequent case.

78 We have already set out – in the briefest of fashions – the legal principle embodied in *Cavenagh* and how (in particular) it has modified the legal principle set out over a century earlier in *Boston Deep Sea Fishing*. In *Cavenagh*, the respondent company had summarily terminated the appellant's appointment as managing director of the company pursuant to an express term of his service agreement and agreed to give the appellant six months' pay in lieu of notice. Subsequently, it came to the company's attention that the appellant had been guilty of misconduct pre-termination and the company therefore refused to give him the six months' pay which they had initially said

they would. This led the appellant to commence action against the company. In its defence, the company argued that the appellant had been guilty of gross misconduct as he had wrongly procured a payment of £10,000 to his personal pension provider even though he knew he was not entitled to do so. In doing so, the company submitted, the appellant had committed a repudiatory breach of contract which would have entitled the company to summarily terminate the appellant's employment at common law. Mummery LJ, who delivered the leading judgment, rejected the company's defence and distinguished *Boston Deep Sea Fishing* on the basis that it *did not* concern a case where the employee had been terminated pursuant to a clause of the employment contract. We set out the reasoning of the Mummery LJ in detail (at [36]–[39]):

> 36 However, I am persuaded by Mr Catherwood that the correct legal analysis of this case, on the basis of the pleaded case and the arguments at trial, turns on the effect of the decision of the Company in the letter of 12 March 2010. There is no escaping the fact that, on that date, the Company purported to exercise its contractual power under clause 11.5 to terminate the service agreement without notice, but with pay in lieu, and the Company agreed to pay it. A debt by the Company to Mr Cavenagh thereby accrued.
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> 37 Having chosen to terminate the service agreement in that way, the Company was not entitled to resile from the contractual consequences of its choice by later following the different common law route of accepting repudiation by relying, after the termination event, on an earlier act of misconduct by Mr Cavenagh of which it was unaware on 12 March 2010.
>
> 38 The contract itself did not contain any provision releasing the Company from its contractual obligation to pay the debt that arose from the exercise of the contractual power on 12 March. The contractual right to payment in lieu having accrued, Mr Cavenagh was entitled to payment of it in the same way as other sums that had accrued due at the date of dismissal.
>
> 39 The general law did not release the Company from its contractual liability on the only ground relied on by the Company in this action, namely that it acquired knowledge after it had terminated the contract under clause 11.5, which

> would have entitled it to terminate it outside that clause and summarily without liability for pay in lieu. [*Boston Deep Sea Fishing*] did not go as far as to say that after-discovered misconduct provided an employer with a defence to an action for payment of an accrued debt. The principle for which that case stands is that an employer can defend a claim for damages for wrongful dismissal by using at trial, in its defence of justification, evidence of misconduct by the employee that was not known to the employer at the time of dismissal. In this case the Company was not seeking in the proceedings to justify its dismissal of Mr Cavenagh. There was no dispute that his appointment was terminated summarily on 12 March 2010 and in a fashion that was lawful: it was not a prima facie wrongful act, which the Company had to justify by evidence of breach of duty. The consequence of the lawful termination was that the Company became contractually bound to Mr Cavenagh for pay in lieu. All of that happened before the Company knew of, or was in a position to accept, Mr Cavenagh's prior repudiatory breach. The lawful termination had already triggered the liability for pay in lieu, which was, as a matter of legal analysis, quite a different situation than that facing the Court of Appeal in *Boston Deep Sea Fishing*.

79 We note that in *Shepherd Andrew v BIL International Ltd* [2003] SGHC 145, a decision which pre-dated *Cavenagh*, the Singapore High Court had similarly held that where an employee had been summarily dismissed pursuant to a term of the employment contract which would entitle the employee to contractually stipulated severance payments, the employer cannot subsequently rely on the employee's repudiatory breaches as a defence to the latter's claim for severance payments under the contract. The court, however, did not provide a detailed explanation for so finding and simply noted (at [122]) that the principle in *Boston Deep Sea Fishing* "ha[d] no application to this case".

80 In so far as *Cavenagh* draws a distinction between termination pursuant to a *term of the contract itself* on the one hand and termination at common law on the other, we find that distinction to be both logical as well as principled. Indeed (and as already observed above at [44]), any monetary

remedy for termination under the former will, as noted both by the Judge and *Cavenagh* itself, result in ***an accrued debt*** *that is due to the employee concerned pursuant to the employment contract itself*, whereas any monetary remedy for termination under the latter will result in an award of ***damages*** *to the employee concerned.* The former remedy (*viz*, an accrued debt) is, of course, a *liquidated* amount, whereas the latter remedy (*viz*, an award of damages) involves an *unliquidated* amount (that is also subject to possible legal limitations such as causation, remoteness and mitigation).

81 Indeed, this same distinction (between an accrued debt and damages arising from a breach of contract) underlies (albeit in a different context) the legal principle embodied in the House of Lords decision of *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 ("*White and Carter*"). In particular, it was held (albeit by a bare majority of three to two) in *White and Carter* that, where there is a claim for a fixed sum (as opposed to a claim for unliquidated damages), there is no duty on the part of the plaintiff to mitigate its loss. However, this could possibly lead to unjust and unfair (and even bizarre) results. This perhaps explains the qualification by Lord Reid in that decision (at 430−431) in which the learned Law Lord (who was in the majority) observed, in essence, that the plaintiff could not refuse to mitigate its loss and insist on continuing with its performance in order to claim the fixed sum agreed upon by the parties where (a) it (the plaintiff) required the co-operation of the other party (*viz*, the defendant) or (b) it (the plaintiff) had no legitimate interest in continuing such performance. The second qualification, in particular, is problematic and has (in addition to a series of decisions over the last half a century or so) just been canvassed in a recent decision of the English Court of Appeal in *MSC Mediterranean Shipping Council SA v Cottonex Anstalt* [2016] EWCA Civ 789. However, as the legal principle in

White and Carter does not arise in the present appeal and is only relevant by way of analogy, the difficulties that arise from this case need not detain us here.

82 Returning to the issue raised in the present appeal (and, in particular, by reference to the distinction drawn in *Cavenagh*), whilst we have already observed that the distinction between termination pursuant to a term of the employment contract and termination as a result of a breach by the employee is a logical and principled one in law to draw, the further legal consequences that are set out in *Cavenagh* itself may not, with respect, be as clear as the court makes them out to be. To recapitulate, in the former situation (*viz*, where termination is effected pursuant to a term in the employment contract and not owing to misconduct), even if the employer is subsequently made aware that the employee had misconducted himself and was liable to be summarily dismissed by the employer, the employer will not be able rely upon this misconduct as a defence to any payment which may have accrued upon the employer's termination of the employee. Such a defence would only be available to the employer if he had initially terminated the employee without reliance on any term in the contract. In such a situation, the employer would be able to rely on the subsequently revealed misconduct to transform what would have been a termination in breach of contract by the employer to a lawful termination pursuant to a repudiatory breach of the contract by the employee. That was precisely the situation in *Boston Deep Sea Fishing*. Put simply, the court in *Cavenagh* ***confined the legal principle in*** **Boston Deep Sea Fishing** ***to its facts (*****viz*****, a situation in which the original termination of employment was based on a breach at common law)***. At first blush, this appears to be a persuasive as well as attractive approach to adopt; in particular, there is a ***symmetry*** inasmuch as an employer who had originally terminated

the employee's employment *pursuant to a term of the employment contract* ***cannot justify such a termination*** *by reference to new facts which would have justified such termination for* ***breach (at common law)*** *instead*.

83 ***However***, notwithstanding the distinction between the *nature* of termination pursuant to a term of the employment contract and termination for breach by the employee at common law (which we have accepted is a logical, if not necessary, one), it does *not*, in our view, ***necessarily*** *follow* that the court *ought to* adopt the approach suggested in *Cavenagh*. In particular, if the focus is on whether the employer is ***justified*** in terminating the employee's employment, why should it (the employer) not be afforded the opportunity to rely on new facts that *justify* the said termination (*albeit on a* ***different*** *legal basis*)?

84 At this juncture, we note, however, that the court in *Cavenagh* did suggest an approach that ***balances*** the tension between doing justice to *both* employer *and* employee alike. Whilst the employer might, under the approach taken in *Cavenagh*, be precluded from relying on new facts to justify the termination of the employee's employment for breach at common law if it has already purported to terminate that employment pursuant to a term of the employment contract itself, *this does* ***not*** *necessarily mean that the employee will get away with his or her breach of contract (especially since it was a breach so serious that it would have justified the employer in terminating his or her employment had the employer been aware of those facts in the first place)*. As the court in *Cavenagh* had intimated (at [19]), the company could have brought a ***counterclaim*** for damages on the basis that the employee had breached his duty to the company by failing to inform it of his gross misconduct, either at the time he committed it or at any time before he was dismissed. The court further suggested that it might have been open to the

company to argue that the agreement to make the payment in lieu of notice was void or voidable by reason of a vitiating unilateral mistake on the part of the company which was known to the employee. These issues, however, did not fall to be determined by the court since they did not form part of the company's pleaded case. We pause to observe, parenthetically, that this balance ***becomes especially important*** in light of the fact that ***even a breach of a term of the employment contract itself could embody (or at least overlap with) what is, in substance, a repudiatory breach at common law***.

85 Returning to *Cavenagh*, there are reasons to commend the decision in that case if we bear the ***balance*** established in that case in mind, although it is also important to note that we do not need to decide this point definitively in the context of the present appeal.

86 Notwithstanding the reasons that appear to weigh in favour of endorsement of the decision in *Cavenagh* (briefly set out in the preceding paragraphs), there are, however, ***practical*** *difficulties* that point in the ***opposite*** direction. If, for example, an employer terminates the employee's contract of employment pursuant to an express term of the said contract (and pays a contractually promised sum in severance) and later discovers that the employee had committed a repudiatory breach at common law which would have entitled the employer to terminate the employee's employment (pursuant to one or more of the situations set out in *RDC Concrete*), *Cavenagh* would permit the employer to mount a claim on the basis of the employee having breached his fiduciary duty to the company by failing to disclose his misconduct. However, it should be noted that such a duty may not apply to an employee who is not in a fiduciary position. In that case, the only breach that the employer would be able to rely upon would be the *original* misconduct of the employee. However, there might be a ***disconnect*** between ***the sum which***

the employee would have (wrongfully) received in severance *and what the* ***employer would be able to recover in its claim for the employee's breach of contract***, thus resulting in ***unfairness***. Utilising the facts of the present case as the basis for a ***hypothetical*** *illustration*, if the employer had terminated the employee's employment pursuant to cll 2 and 14 of the Employment Contract, the employer would have to provide severance payments to the employee pursuant to the aforementioned terms. If the employee had been guilty of a repudiatory breach of the Employment Contract at common law by using the employer's accounts to pay for his personal expenses, and *assuming that the employee was not a fiduciary*, the employer could mount a claim against the employee and what the former could claim against the latter would be the repayment by the employee to the employer of personal expenses (assuming that those expenses could be proved by sufficient evidence adduced by the employer). *However*, if the amount of the severance payments was *larger than* the amount of personal expenses claimable by the employer, the *overall* result might be less than satisfactory. Whilst the employer could attempt to claw back the severance payments made to the employee, this could well be a very difficult task since it could be difficult to establish that the employee's repudiatory breach of contract at common law had *caused* the employer to make the said severance payments. As a ***practical*** way around the difficulty just stated, practitioners who have commented on *Cavenagh* have suggested that, in these circumstances, employers should word their respective employment contracts in a way that makes it a condition of the payment of any amounts pursuant to the express term(s) of the employment contract concerned that the employee in question has not been guilty of any serious misconduct and that if it transpires that the employee had in fact been guilty of any such breach(es), any severance payment which had already been made would be repayable on demand. Whilst this does furnish a possible solution to the

difficulty at hand, the question arises as to whether the onus ought to be placed upon employers to word their respective employment contracts in the manner just mentioned.

87 It is clear, therefore, that *Cavenagh* raises a number of difficult issues that require resolution. As already mentioned more than once, this court will deliver a definitive ruling upon these issues only when the issues arise directly for its consideration in a future case.

Andrew Phang Boon Leong	Judith Prakash	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge of Appeal

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