VVF Singapore Pte Ltd *v* Sovakar Nayak
[2012] SGHC 126

Case Number : Suit No 3 of 2010

Decision Date : 21 June 2012

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Kelly Yap with Kamini Thillaithan (Oon & Bazul LLP) for the plaintiff; R Srivathsan with Puja Varaprasad (Haridass Ho & Partners) for the defendant.

Parties : VVF Singapore Pte Ltd — Sovakar Nayak

Contract – Breach of employment contract – Director's duties

21 June 2012 Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff has brought this action against its former director and employee, the defendant, for losses allegedly arising from unauthorised transactions and breach of fiduciary duty and also for the reimbursements of sums withdrawn from the company's accounts and an accounting of allegedly secret profits.

2 The plaintiff, VVF Singapore Pte Ltd, was incorporated in Singapore on 2 July 2006. At all material times, 90% of its issued share capital was held by a company incorporated in India, VVF Limited ("VVFL"), and the remaining 10% was held by the defendant, Mr Sovakar Nayak, an Indian national. When the defendant resigned from the plaintiff in April 2009, his shares were transferred to VVFL. Throughout the events in question, VVFL regarded and treated the plaintiff as its subsidiary.

3 VVFL is in the business of manufacturing oleochemicals and their derivatives such as soap noodles, fatty acids, fatty alcohols, glycerine and household soap. It obtains the raw materials necessary for its business from producers in Malaysia and Indonesia. VVFL is run by, among others, Mr Rustom Godrej Joshi ("Mr Joshi"), its Chairman and Managing Director, Dr Balasaheb R. Gaikwad ("Dr Gaikwad"), its President of Oleochemicals, and Mr Tapan Kumar Ghosh ("Mr Ghosh"), its Head Strategic Procurement (Asia).

4 The defendant has worked in the chemical industry since 1986. Between 1986 and September 2006, he worked in India and in Malaysia in the sales and marketing departments of several multinational businesses involved in the chemical industry, palm products and the oleochemicals industry. Among his employers was an Indian company, Raj Agro Mills Ltd ("Raj Agro").

5 The defendant became a director of the plaintiff upon the plaintiff's incorporation. The other directors on the plaintiff's board were Mr Joshi, Dr Gaikwad, Mr Faraz Joshi, Mr Jagmohan Agarwal and Mr V Sivaramakrishnan. All these persons were representatives of VVFL.

6 The plaintiff held an official opening ceremony on 2 October 2006. This was organised by the defendant and, from that date, the defendant was also employed by the plaintiff as its Vice-President

of Marketing (South East Asia). The defendant was the only director in the plaintiff to be employed as an executive of the company and was also the only employee of the plaintiff who held an executive position. He handled its day-to-day operations. The defendant resigned his directorship on 26 November 2008 and left the plaintiff's employ on 30 April 2009. This action was commenced on 4 January 2010.

Background

7 The main dispute between the parties revolves around the limits of the defendant's authority to trade on behalf of the plaintiff. The plaintiff's claim is that the defendant was only authorised to trade in oleochemicals and their derivatives. The defendant's position is that he had authority to trade in oleochemicals and their derivatives, and also in palm products that are not oleochemicals or their derivatives.

8 All the products involved in the plaintiff's business are derived from the fruit of the palm tree. The raw palm fruit is broken down into other products by (i) a physical process and (ii) a chemical process. Oil is extracted from the palm fruit by the physical processes of milling and refining. The fruit is broken down into a crude oil which can be processed further by refining, bleaching and deodorizing to produce a liquid known as olein or a solid known as stearin. Some of the products that can be obtained from the physical process are:

(a) RBD Palm Olein (RBD refers to refined, bleached and deodorised);

(b) Palm Kernel Oil

(c) Palm Fatty Acid Distillate (PFAD);

(d) Palm Kernel Fatty Acid Distillate;

(e) RBD Palm Stearin.

9 The chemical process is one in which the chemical chain of palm oil and palm kernel oil is broken down to produce chemicals. These are the chemicals called oleochemicals and there are several such chemicals that can be extracted from the oil. Some of these are:

(a) Crude Glycerine;

(b) Sodium Palmitate;

(c) Myristic Acid;

(d) Stearic Acid.

10 In late 2005, VVFL conceived the idea of incorporating a company in Singapore for the purpose of assisting in its operations. At that time, the defendant was working for an edible oil company in Johor and had met Dr Gaikwad in the course of his business. In late 2005, Dr Gaikwad approached the defendant, offering him employment with VVFL. The defendant refused the offer and counter-proposed a joint venture. He then submitted a business proposal ("the Business Plan"), listing three proposed businesses:

(a) Trade in soap noodles, glycerine, fatty acids and fatty esters (*ie* oleo-chemicals and their derivatives, VVFL's main business);

(b) Commission sales from India; and

(c) Strategic Oil buying (lauric oils).

The Business Plan included a list of working capital requirements which included non-oleochemicals, namely, PFAD, stearin, and an entity labelled "oil packed" (the defendant deposed that this clearly referred to Palm Olein and palm oil).

11 Dr Gaikwad and Mr Joshi admitted to having "cursorily" reviewed the Business Plan. When asked what "oil packed" referred to, Mr Joshi averred that he would not have known what it was even if he had read the Business Plan. The plaintiff claims that the Business Plan was not part of the parties' agreement.

12 After lengthy negotiations, a letter of employment ("the Employment Letter") and a memorandum of understanding ("the MOU") were drawn up and signed on 1 June 2006. The MOU is a relatively brief document. For present purposes, the relevant clauses are 4, 5, 6 and 7 which read as follows:

> 4. The Company will be engaged in the marketing of Oleochemical products sourced from any manufacturer included [*sic*] VVF Ltd, India at the competitive price and market the same to any customer at a remunerative price.
>
> 5. VVF Singapore Pte, shall assist VVF Ltd, India in procurement of Palm Oils and its derivatives and also update on day to day basis the availability and price trends of Palm oils in Singapore/Malaysia/Indonesia markets. VVF Ltd, India at its discretion and satisfaction that VVF Singapore Pte, has directly contributed towards efficient and economical buying or availing of a profitable opportunity, which other-wise VVF Ltd, India would have missed ,will reasonably reward such an effort of VVF Ltd Singapore Pte, in line with the trade practice in India.
>
> 6. VVF Ltd, India shall have exclusive right to nominate the Board of Directors of VVF Singapore Pte and shall have full control on [*sic*] the management and affairs of the company.
>
> 7. VVF Singapore Pte, shall appoint Mr. Nayak as Head-Marketing of the company and he will draw a salary of USD 100,000 per annum on cost to company basis (CTC). In case the company incurs operating loss after providing for the expenses of maintaining the Singapore office then Mr. Nayak will draw a salary equivalent to USD 60,000 per annum. The balance USD 40,000 shall become payable in the year when VVF Singapore makes up accumulated losses and earns profit in income statement. VVF Singapore Pte, will assist Mr. Nayak in purchase of a car of engine capacity equivalent to 1600 CC.

13 The Employment Letter was an even shorter document. Written on the letterhead of VVFL, it stated in totality:

> Dear Mr. Nayak,
>
> Based on the personal discussions we had with you on 23rd February, 2006 and subsequent telephone talks, we are pleased to offer you a position of "Vice-President – Marketing (South East Asia)" located at Singapore in our proposed subsidiary company having it's [*sic*] registered office at Singapore. Your remuneration will be as mentioned in the MOU dated June 1, 2006.

You will be responsible for marketing of Oleochemical and it's [*sic*] derivatives in the region and to the customers approved by Mumbai Office. You will also extend your full co-operation to our oil buying group in India.

A detailed appointment letter will follow.

We look forward for your early joining.

14 The "detailed appointment letter" mentioned in the Employment Letter and the "separate share holders [*sic*] agreement with VVF Ltd India, which will clearly define the rights and obligation [*sic*] of the shareholders of the joint venture" mentioned in cl 15 of the MOU which were meant to follow did not materialise. Dr Gaikwad testified that the MOU was clear enough and the letter of appointment would not have added much. The parties now dispute the scope of the agreement embodied in both the MOU and Employment Letter. It bears emphasis that both these documents were between VVFL and the defendant. The plaintiff was not incorporated at the time they were executed and the plaintiff did not subsequently issue any document referring to the MOU, the Employment Letter or the terms of the defendant's employ.

15 From 2006 to 2008, the defendant carried out his duties as both director and employee of the plaintiff without incident. On 13 July 2008, Mr Ghosh informed the defendant that VVFL wanted to start trading in RBD Palm Olein through the Singapore office. The nature of the proposed transactions is disputed. The defendant, who seemed to be operating on the basis of the broad categories listed in the Business Plan, divided his transactions into two parts: those made on behalf of VVFL (*e.g.* paper trade of RBD Palm Olein Cargo in June 2007) and those made for the plaintiff. The former would require directions from VVFL, and the latter would not. Mr Ghosh testified that authorisation was only required for trades made on behalf of VVFL.

16 In the second half of 2008, the defendant issued four contracts to Raj Agro in respect of the sale of RBD Palm Olein ("the Raj Agro contracts"). All the Raj Agro contracts were backdated to 7 August 2008. The details of the same are:

(a) On 15 August, PT/8001 for 1,500 MT at US$970/MT for delivery of 500 MT each in October, November and December 2008;

(b) On 15 August, PT/8002 for 1,500 MT at US$905/MT for delivery of 500 MT each in October, November and December 2008;

(c) On 18 September, PT/8003 for 1,500 MT at US$725/MT for delivery of 500 MT each in January, February and March 2009; and

(d) On 9 October, PT/8004 for 1,500 MT at US$625/MT for delivery of 500 MT each in January, February and March 2009.

The Raj Agro contracts were classified as paper trades (*ie* trades where no delivery was actually made), although there was the option to turn them into physical trades should the parties so require. All the contracts were not signed by Raj Agro.

17 The Raj Agro contracts were priced at a US$5/MT mark-up (characterised as a "commission" in an unsigned memorandum of understanding purportedly between the plaintiff and Raj Agro) ("the Raj Agro MOU") from the following corresponding purchase contracts entered into on the day of, or few days prior to, the Raj Agro contracts:

(a) On 7 August, a contract with Mewah Industries ("Mewah") for 500 MT in 20MT flexibags at US$1005/MT for delivery in September 2008, and 1,000 MT in bulk at US$965/MT for delivery in November and December 2008;

(b) On 13 August, a contract with Aavanti Industries ("Aavanti") for 1,500 MT at US$900/MT for delivery in October, November and December 2008;

(c) On 16 September, a contract with Golden Agri International Pte Ltd ("Golden Agri") for 1,500 MT at US$720/MT for delivery in January, February and March 2009; and

(d) On 9 October, a contract with Global Advance Oils & Fats (Macao) Commercial Offshore Ltd ("Global Advance") for 1,500 MT at US$620/MT for delivery in January, February and March 2009.

18 The Raj Agro contracts precipitated this dispute. Raj Agro refused to take delivery or pay, and when the sums owing were claimed by the plaintiff, Raj Agro claimed, in an email dated 10 November 2008, that it had no outstanding contracts with the plaintiff. The only documented transaction of RBD Palm Olein between Raj Agro and the plaintiff is for the shipment of 252.14 MT at US$1080/MT. This was duly invoiced and paid for by Raj Agro.

19 Raj Agro's failure to pay, coupled with falling market prices, resulted in a series of washout contracts. A washout contract is where goods are sold back to the seller before the delivery date in order to minimise the buyer's losses. It is common ground that the following washout contracts were made:

(a) The contract with Mewah for 1,500 MT at US$965/MT for delivery in October, November and December 2008 was washed out on 14 October by:

(i) Selling back the 500 MT due for delivery in November 2008 for US$600/MT, resulting in a loss of US$182,500 [(US$965/MT- US$600/MT) x 500 MT]; and

(ii) Selling back the 500 MT due for delivery in December 2008 for US$525/MT, resulting in a loss of US$220,000 [(US$965/MT-US$525/MT) x 500 MT].

(b) The contract with Aavanti for 1,500 MT at US$900/MT for delivery in October, November and December 2008 was washed out on 14 October by:

(i) Selling back the 500 MT due for delivery in October 2008 for US$605/MT, resulting in a loss of US$147,500 [(US$900/MT-US$605/MT) x 500 MT];

(ii) Selling back the 500 MT due for delivery in November 2008 for US$615/MT, resulting in a loss of US$142,500 [(US$900/MT-US$615/MT) x 500 MT]; and

(iii) Selling on the 500 MT due for delivery in December 2008 to Mewah at US$525/MT, resulting in a loss of US$187,500 [(US$900/MT-US$525/MT) x 500 MT].

(c) The 500 MT at US$720/MT due for delivery in January 2009 under the Golden Agri contract was dealt with via a "circle washout" (where commodities are traded between industry players, and the loss is the final price less the lowest price in the string of transactions ("the string")). The lowest price in the string was US$527.50. The loss to the plaintiff was US$96,250 [(US$720/MT-US$527.50/MT) x 500 MT].

(d) The contract with Global Advance for 1,500 MT at US$620/MT for delivery in January, February and March 2009 became part of the same circle washout as [(c)] for the 500 MT due for delivery in January. The loss to the plaintiff was US$46,250 [(US$620/MT-US$527.50/MT) x 500 MT]. No evidence was led as to the remaining 1,000 MT to be delivered.

For the purposes of its loss calculations, the plaintiff took into account other transactions where the remaining contracted quantities were sold on. The defendant does not challenge this particular aspect of the plaintiff's loss calculations.

20 The defendant also sent a debit note to Raj Agro to recover losses under a further contract with Wilmar Trading Pte Ltd for 500 MT at US$710/MT to be delivered in October 2008. This loss amounted to US$17,500.00 and was incurred under a washout contract on 9 October 2008 to sell back the 500 MT at US$675/MT. The loss arising from this contract is included in the plaintiff's calculation of loss.

21 On 11 November 2008, the defendant emailed Mr Joshi and Dr Gaikwad informing them of the losses arising under the washout contracts, and the remaining unsold RBD Palm Olein stock. Dr Gaikwad responded on the same day, expressing surprise that there had been such trades, and asking why the Raj Agro contracts had not been brought up in any of his previous meetings with the defendant.

22 The defendant claims that Dr Gaikwad then called him sometime on 12 November, threatening to report him to the police unless he wrote an email apologising for his failure to obtain proper authorisation for these trades. Dr Gaikwad flatly denied this, and submitted telephone records that show that no outgoing calls to the defendant's telephone were made on that day.

23 On 12 November 2008, the defendant wrote to Dr Gaikwad ("the 12 November email"), stating that:

(a) Buying and selling in RBD Palm Olein had been done on the instructions of Mr Sanjeev Bansal ("Mr Bansal"), the Chairman of Raj Agro, and was analogous to the trades the plaintiff was making as an agent of VVFL;

(b) He had not kept Dr Gaikwad or VVFL informed as he trusted Mr Bansal not to default, and thought it was thus a low risk venture;

(c) Raj Agro's failure to make payment was due to a "sudden fall in the commodity market", but efforts were being made to formalise a payment scheme. This was briefly discussed with Mr Ghosh;

(d) The defendant took full responsibility for his negligent failure to "inform management" and take the proper collateral; and

(e) Raj Agro was willing to meet VVFL representatives and an arrangement should be made for signing an agreement with Raj Agro for settlement of the outstanding sums.

24 This settlement agreement never materialised. The defendant went to Mumbai on 17 November 2008 in an attempt to smooth things over. From 23-25 November 2008, he sent multiple text messages to Mr Bansal, beseeching him to clarify the issue and sign the proposal. Mr Bansal replied twice: once to ask him to stop sending these "false, emotional SMS [*sic*]", and once agreeing to meet the defendant's "boss" in Ludhiana. When this meeting fell through, the defendant returned to

Singapore and tendered his resignation as director on 26 November 2008. He agreed, however, to stay on as an employee.

25 The relationship between the defendant and the VVFL representatives continued to sour. Eventually, on 6 March 2009, the defendant tendered his letter of resignation from his employment with the plaintiff. The process of sorting out the accounts for his resignation resulted in a further dispute concerning overdrawn salary. The plaintiff claims that, as 2008 was a loss-making year, cl 7 of the MOU applied. This clause states that a salary of US$60,000 per annum (instead of the usual US$100,000) would be payable when there is an operating loss. The balance US$40,000 would only become payable when the accumulated losses were made up. The defendant's drawings and calculations were based on the belief that 2008 was not a loss-making year, as the potential profits from the paper trades were not included in the accounts. The plaintiff claims that the defendant had overdrawn an aggregate amount of US$52,953.77. The defendant counterclaims that the accounts were wrongly drawn up, and that he had drawn less than his entitlement. He thus counterclaims US$7,481.00 in respect of unpaid salary and expenses in the sum of US$1,225.00. The plaintiff has offset these claims against the sums allegedly owing to it for the purposes of calculating the aggregate overdrawn amount of US$52,953.77.

The plaintiff's case

26 The plaintiff claims that the defendant acted in excess of his authority by entering into RBD Palm Olein trades. It alleges the following:

(a) The MOU and Employment Letter form the agreement between the parties, and clearly limit the defendant's authority to the marketing of oleochemicals and their derivatives. This was later extended to allow non-edible non-oleochemicals to be marketed.

(b) The agreement was supplemented by a "very elaborate and detailed discussion" between Dr Gaikwad and the defendant which clarified that the latter's authority was limited and that the parties were proceeding without benefit of the Business Plan. This was affirmed in Dr Gaikwad's email to the rest of VVFL dated 6 October 2006.

(c) The defendant's own actions (holding the plaintiff out to its clients as a marketer of oleochemical products, his self-appraisal of his role within the company, and the 12 November email) show that this was also the defendant's subjective understanding of the agreement.

(d) There was a clear reporting structure in the plaintiff and policy guidelines, and the parties' subsequent behaviour showed the defendant asking for approval on a regular basis.

(e) Any trade in RBD Palm Olein by the plaintiff would be done as an agent of VVFL, on its instructions. It is clear from the 12 November 2008 email that the defendant was aware of this. Yet, he traded on the plaintiff's account without approval. The defendant should have notified VVFL's representatives or asked for approval. Instead, the plaintiff was kept in the dark in respect of all trades in RBD Palm Olein, and the records of the trade were made only in the most obscure terms. The plaintiff never authorised these trades.

27 The plaintiff also claims that the defendant acted as an agent for Raj Agro. The defendant himself had described the trade in these terms, and there is no other explanation for the way the contracts were structured, why no contract was issued for the Wilmar contracts, or why the debit notes did not claim the agreed US$5/MT commission from Raj Agro. It accordingly alleges that the defendant was in breach of his employment contract, his director's duties, and his fiduciary duties. It

is unclear from the plaintiff's submissions what the source of this fiduciary duty is; the plaintiff seems to have conflated fiduciary duties with director's duties, although they are listed as separate issues. But for the acts complained of, the plaintiff would not have suffered a loss. The plaintiff claims all losses from the RBD Palm Olein trades.

28 The plaintiff makes a further claim for secret profits arising out of trades done on behalf of Raj Agro. The plaintiff does not point to particular transactions where there may have been a secret profit. Instead, it obtained specific discovery of the defendant's bank accounts, highlighted suspicious amounts, and claimed that the lack of a proven explanation for these deposits should lead to an adverse inference being made that these were indeed secret profits.

29 For its claim for the overdrawn salary owing from the defendant, the plaintiff relies on its unchallenged expert evidence that paper trades should be counted as derivative trades for the purposes of calculation of profits. Accordingly, there was a loss in 2008, and the defendant was not entitled to draw more than US$60,000 as his salary for 2008. Since there was no agreement for his salary to be calculated at a fixed exchange rate of US$1=S$1.5778, a variable exchange rate should be used. The plaintiff avers that, as its calculations are consistent with sums reflected in its accounting ledgers, these calculations should be preferred to the defendant's inconsistent evidence on this score. Alternatively, the defendant is required to account as a constructive trustee for all sums drawn while a director of the plaintiff.

30 The plaintiff refutes the defendant's counterclaim in relation to the audited accounts for 2008 on two main bases. The first is that the counter-claim essentially challenges his own management decisions, and it does not lie in his mouth to now claim that such decisions were imprudent, or did not reflect the true state of accounts. The second is that the way the plaintiff has allocated profits and losses to the 2008 accounts is justified by the accounting and expert evidence.

The defendant's case

31 The defendant alleges that the MOU and Employment Letter do not exhaustively set out his authority, and are loosely worded and ambiguous documents. The Business Plan is a necessary interpretive tool. Constant updating kept the plaintiff aware of the defendant's trades in non-oleochemicals, yet it elected to affirm these trades by choosing to remain silent. The defendant claims that the 12 November email is not an admission because it was made under great pressure, and this is evident from his frantic text messages to Mr Bansal.

32 He further avers that the following sudden shifts in the plaintiff's case clearly indicate that its arguments are mere afterthoughts:

(a) The shift from saying that authority was limited to oleochemicals and its derivatives to saying that authority was limited to non-edible oils and their derivatives shows that the plaintiff's interpretation of the MOU and Employment Letter is wrong. There is no legal basis for implying a term to limit his authority. The plaintiff has failed to prove its claim that the defendant was inexperienced in RBD Palm Olein trade, or that such trades were not envisioned as potential activities for the plaintiff. These losses were accordingly not a result of the defendant having acted beyond the scope of his authority.

(b) The plaintiff knows that its arguments on scope of authority are spurious, and thus shifts its claim to saying that authority was limited to physical and not paper trades. It has not discharged its burden of proof. There were no clear guidelines for approving the type of trade, or for reporting of the same. The defendant had a lot of autonomy.

(c) The shift from claiming that the defendant acted outside the scope of his authority to claiming that he was acting as an agent for Raj Agro is a desperate attempt to put the plaintiff's case on a sure footing. The words "principal", "agent", and "on behalf of" contained in the Raj Agro MOU do not show the true nature of their agreement. The defendant sought to have Raj Agro sign the contracts, consistently tried to claim the sums owing, and kept careful records of the same. This behaviour shows that he was not an agent for Raj Agro, and his failure to contract with Raj Agro based on the Wilmar contracts, and to claim the commission amount, cannot prove otherwise. In any event, the plaintiff was, at all material times, aware that such trades were happening, as this was clearly reflected in the suspense accounts, and it does not lie in the plaintiff's mouth to object. The defendant acted in good faith and in the interests of the plaintiff at all material times, and was not in breach of his director's duties.

33 The defendant claims that he was not a secret agent for Raj Agro. The emails he received from Raj Agro's client which were addressed to Raj Agro were sent to his email address because Mr Bansal did not have access to his own account while he was in Singapore, and asked for the plaintiff's assistance in the matter. The emails were deleted not because they were smoking guns, but because they had nothing to do with the defendant or the plaintiff's business. There is no evidence to suggest that there existed, or that there was any intention to create, a contractual relationship between Raj Agro and the defendant in order to support, in law, an agency relationship.

34 The defendant also claims that he did not overdraw his salary without authority. All withdrawals were approved. By contrast, he alleges that there are discrepancies in the plaintiff's accounts, namely that it failed to take into account the following:

(a) Green Planet LLC's ("Green Planet") contracts were eventually honoured and were not unrealised trades which could be classified as derivatives;

(b) VVFL still owed the plaintiff unpaid commissions, and the lack of an invoice for these and another pending shipment should not prevent their being recorded as a profit in the plaintiff's accounts; and

(c) The plaintiff's calculated loss from the washout contracts took into account only 2,500MT of the 6,000MT under the Raj Agro contracts and wrongly included the US$5/MT commission.

Issues

35 The plaintiff set out a list of 13 issues in its closing submissions and the defendant condensed these into seven broad issues. Taking a slightly broader approach to the formulation of the issues, they would appear to be the following:

(a) What was the agreement between the parties in relation to the defendant's scope of authority as director and employee?

(b) What was the nature of the defendant's trades in RBD Palm Olein, and were these trades within the scope of the defendant's authority?

(c) If these trades were not within the scope of the defendant's authority, was he in breach of his employment agreement?

(d) Did the defendant act as an agent for Raj Agro?

(e) Is the defendant liable to account to the plaintiff for secret profits?

(f) Did the defendant's actions constitute a breach of his director's duties?

(g) If there was a breach of his employment agreement, what is the quantum of damages flowing from that breach?

(h) If there was a breach of his director's duties, or any other fiduciary duty, how is loss to be computed?

(i) Did the defendant overdraw monies, and is he liable to return these sums to the plaintiff?

What was the agreement between the parties in relation to the defendant's scope of authority?

The status and role of the MOU and Employment Letter

36 Both parties accept that the MOU and the Employment Letter embody the agreement between them. It is worth noting that the MOU is not only an agreement for the defendant's employment, but also an agreement for a joint venture. This is evident from clauses 1 and 2, which refer to the setting up of "a joint venture Company named VVF Singapore Pte" and a shareholder's agreement to follow "which will clearly define the rights and obligation [*sic*] of the shareholders of the joint venture". The clauses in the MOU that both parties rely on relate to the authority of the plaintiff and not the authority of the defendant. The plaintiff recognises this and has submitted that "as director of the Plaintiffs, the Defendant's authority was naturally limited by what the Plaintiffs were incorporated to do". There are two separate issues:

(a) What was the defendant's usual authority as director and as the Vice-President of marketing? Walter Woon on Company Law (Sweet & Maxwell, Rev 3rd ed, 2009) ("Woon") at 3.14 states that:

> It may generally be said that the managing director has implied authority to do whatever is reasonably incidental to the management of the company's business in the ordinary way. However, his usual authority is only confined to the commercial business of the company and does not extend outside the scope of the business.

(a) What would be reasonably incidental to the management of the company's business in the ordinary way can only be decided from an understanding of the scope of business as embodied in the MOU. It should also be noted that the defendant was never appointed managing director of the plaintiff although he was the only director to carry out executive functions. The MOU made it clear that the power to establish policy for the plaintiff lay with VVFL. In this respect, both VVFL and its representatives on the board of the plaintiff undoubtedly had the power to restrict the way in which the defendant carried out his executive duties.

(b) What was the defendant specifically authorised to do as the Vice-President of marketing? This can be found in the Employment Letter, and in cl 7 of the MOU.

While conceptually separate, on the facts, the answer to both questions are the same as the Employment Letter incorporates the MOU.

37 Additionally, it should be noted that the MOU and the Employment Letter, entered into on

1 June 2006, preceded the incorporation of the plaintiff, on 2 July 2006. Strictly speaking, the MOU and the Employment Letter are agreements between VVFL and the defendant. They are unlikely to be pre-incorporation contracts, as they do not purport to have been entered into "by any person on behalf of a company prior to its formation", nor were they ratified after the plaintiff was incorporated; s 41(1) of the Act. The Employment Letter was signed by Mr Joshi, the managing director of VVFL, and the MOU was signed by Mr Agarwal and Dr Gaikwad as representatives of VVFL. Even though the plaintiff is the subsidiary of VVFL, the two companies are still separate entities, and the actions of one are not the actions of the other. In the pleadings, however, the defendant did not take the point that there was no valid agreement between him and the plaintiff because the plaintiff was not party to either the MOU or the Employment Letter.

38 The defendant's position in his Defence and Counterclaim (Amendment No 3) is that he was not employed by the plaintiff pursuant to the terms of offer in the Employment Letter. Instead, that was a document setting out an offer to him, by the terms of which "a detailed appointment letter" was to follow. The plaintiff did not issue the detailed appointment letter and the defendant avers that the terms of the MOU broadly governed the business relationship between himself and the plaintiff. He relied on cll 4, 5, 7, 10 and 14 of the MOU as contractual terms.

39 Therefore, although the defendant repudiated the Employment Letter as a contractual document between himself and the plaintiff, he did not take the same approach to the MOU and in the analysis that follows, I will make my determinations on the basis that the defendant accepted that the MOU contained terms that applied as between himself and the plaintiff on the issue of his employment and authority, notwithstanding that the plaintiff only came into existence after the issue of the MOU. It is clear in any event that both parties conducted themselves in relation to remuneration at least on the basis of the terms of the MOU.

The objective interpretation of the MOU and Employment Letter

40 The exact wording of the clauses is found at [12] and [13]. The MOU lays down a two-fold mandate:

(a) Marketing mandate (Clause 4): the plaintiff is a marketing and *not* a trading company. This is consistent with Mr Joshi's characterisation of the VVF group as mainly involved in distribution. However, the plaintiff was unlike VVFL as it does not manufacture, but only markets existing oleochemical products "sourced from any manufacturer" including VVFL; and

(b) Procurement mandate, coupled with keeping VVFL apprised of the market situation of palm oils in the region (Clause 5): This extends to procuring palm oils, and not just oleochemical products. The use of the word "assist" does not conclusively show that this was an agency relationship. Clause 5 contains a rather mystifying sentence:

> VVF Ltd, India at its discretion and satisfaction that VVF Singapore Pte, has directly contributed towards efficient and economical buying or availing of a profitable opportunity, which other-wise VVF Ltd, India would have missed, will reasonably reward such an effort of VVF Ltd Singapore Pte, in line with the trade practice in India.

(a) This seems to give the defendant a broad mandate to make profitable purchases for VVFL, although it is unclear what availing or contributing towards "efficient and economical buying" might entail. Clause 5 is not clear on its face; its "natural and ordinary meaning" (see *BCCI v Ali* [2002] 1 AC 251) connotes autonomy, but it is unclear how far that autonomy extends. The context of the clause indicates that these "profitable opportunit[ies]" are limited to the

procurement of palm oils for VVFL, and is not, as the defendant seems to believe, to make a "strategic business unit and a profit centre" in Singapore.

41 The defendant's authority was limited by the plaintiff's twin objectives of oleochemical marketing and procurement of palm oils specifically for VVFL.

42 The Employment Letter states briefly that the defendant was "responsible for marketing of Oleochemical and it's [*sic*] derivatives in the region and to the customers approved by Mumbai office. You will also extend your full co-operation to our oil buying group in India." Mr Joshi admitted under cross-examination that what was meant by "full cooperation" was not precise. The letter makes reference to the MOU. Read together, the defendant has authority as Vice-President to market oleochemicals and procure palm oils for VVFL.

In the absence of clear wording, is either party entitled to adduce additional evidence as an interpretive tool?

43 Ambiguity is not a prerequisite for admitting extrinsic evidence to aid contractual interpretation; *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] ("*Zurich Insurance*") 3 SLR (R) 1029 at [114]. The CA opined at [121]-[122] that:

> evidence is admissible... to "clear up any other doubt that may arise in applying the document to the case" ... words are sometimes penumbral; the context of the contract breaks down the rigidly-defined boundaries of meaning, introduces hues and shades, and defines the contours and limits of the penumbra.

This was recently affirmed in *Master Marine AS v Labroy Offshore Ltd and others* [2012] SGCA 27 at [34]. Extrinsic material is admissible if it is relevant, and reasonably available to all the contracting parties; see *Zurich Insurance* at [125].

44 This is a classic case of words with a penumbra of meaning. The plaintiff, while averring that the words of the MOU and Employment Letter are clear, still seeks to rely on discussions between VVFL's representatives and the defendant. Dr Gaikwad accepted in court that cl 5 was generally worded and asserted that he could clarify what it meant on the basis that:

> ... I had a very elaborate and detailed discussion with Mr Nayak before recruiting him, where I was the sole person who had all the discussions with him, prior to having a meeting with our managing director. So these are not loosely worded, these are intentionally worded, this is what our understanding with Mr Nayak was.

This implies that something may be required to understand what the parties meant.

45 The parties should be able to adduce additional evidence as the necessary context for interpreting the agreement. Relevant evidence includes:

(a) The Business Plan; and

(b) The discussions between the defendant, Dr Gaikwad and Mr Joshi.

46 The Business Plan which the defendant presented envisioned the plaintiff as a trading and not merely marketing company. It included strategic oil buying. It is common ground that both Mr Joshi and Dr Gaikwad received and read this document, although Mr Joshi asserted in court that he did not

read it carefully enough in order to be familiar with its contents. Dr Gaikwad gave evidence that the defendant had discussed these plans with him. Mr Joshi clarified that the Business Plan was given in the context of a presentation to show what the defendant could bring to the table, not a proposal of a joint business plan.

47 The plaintiff cannot, however, claim that it was unaware of the contents of the Business Plan; the plan was reasonably available to both parties and thus fulfils one of the conditions for the admissibility of extrinsic material in *Zurich Insurance* at [125(b)]. Dr Gaikwad and Mr Joshi both testified, however, that the defendant's plans were irrelevant; they had deliberately omitted the additional facet of strategic oil buying from the MOU. They claimed at trial that "all the essential terms required to be known to the employee is [*sic*] contained in this letter" and accompanying MOU. The plaintiff claims that this means that the Business Plan should not be taken into account. There is authority for this: insofar as the Business Plan was a "declaration of subjective intent" (see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913), it should be excluded from consideration.

48 On the facts, the Business Plan does not appear to be a mere declaration of subjective intent. Both Mr Joshi and Dr Gaikwad admitted under cross-examination that the model for the plaintiff was a form of co-ownership, or at the very least, a profit-sharing agreement accommodating the defendant's desire to "become a business owner". The Business Plan was thus not a presentation of the defendant's abilities as Mr Joshi claimed, but the defendant's vision for the plaintiff. The plaintiff seeks to include the parties' earlier discussions as contextual evidence, and the Business Plan was a part of these discussions. You cannot admit one without admitting the other. More importantly, both Mr Joshi and Dr Gaikwad fall short of saying that the Business Plan had been rejected, and nowhere in their affidavits or during cross-examination did they say that a rejection was communicated to the defendant. To an objective observer, it would have looked like the parties proceeded to make the agreement with the Business Plan in mind. This is consistent with the defendant's evidence under cross-examination that he thought the MOU and Employment Letter were generally built on*, inter alia*, his business plan, and that this would be clarified in the detailed letter of employment.

49 Regarding the second piece of extrinsic evidence to wit the discussions between the parties, Dr Gaikwad claims that these discussions dispelled any lack of clarity in the MOU and Employment Letter. Yet, there is nothing in the plaintiff's affidavits stating, nor did Mr Joshi and Dr Gaikwad elaborate under cross-examination, what the content of these discussions was. Dr Gaikwad merely asserts that the plaintiff's interpretation of the agreement was communicated to the defendant during these discussions. Dr Gaikwad testifies that this was communicated in a meeting in which only the defendant and he were present. However, the MOU, while written by Dr Gaikwad, was drafted on Mr Joshi's broad directions, and he testified that it reflected these directions. These background discussions carry less probative weight than the Business Plan, although both are part of the same context.

50 It should be noted that the Business Plan was not expressly incorporated into the MOU. The Court of Appeal was careful to say in *Zurich Insurance* that extrinsic evidence must be used to explain or illuminate the written words and not to contradict or vary them. Clauses 4 and 5 of the MOU may be interpreted more broadly than the words used, as long as they are not supplanted by the Business Plan:

(a) Clause 4 may extend beyond mere marketing of oleochemicals to the prerequisite for such marketing, *ie*, buying of non-oleochemical products which are directly related to and may increase the value of the plaintiff's oleochemical business. This would explain the sales of non-oleochemicals (PFAD, RBD Palm Stearin, CFAD, and even Tea Tree Oil) from 2006-2008. Dr

Gaikwad and Mr Joshi do not deny that they were aware of the sale of these products, choosing instead to aver that the scope of authority extended to non-oleochemicals which were also non-edible oils. It is worth noting that this is *not* the same as saying that clause 4 covered "strategic buying", or that the Business Plan converted the plaintiff into an oils trading firm.

(b) This helps to make sense of cl 5, which only speaks of procuring and not selling, yet refers to profitable opportunities. Such profitable opportunities are likely to arise only where some form of selling or trade is involved (otherwise, there would only be expenditure with no revenue, and hence no profit). The Business Plan presents a coherent way of reading cl 5. Read with the benefit of the Business Plan as context, it would appear that the mandate given to the defendant was not limited to mere procurement of palm oils for VVFL, but included trades in those oils where he saw a lucrative business opportunity. This does not, however, support the defendant's contention that it was a broad mandate to make profit for the plaintiff. Clause 5 refers to VVFL only as the beneficiary and eventual buyer.

The probative weight of subsequent behaviour

51 The plaintiff claims that the defendant's subsequent behaviour shows that he knew that his authority was limited to procuring palm oils as VVFL's agent. It is unclear, however, whether it is seeking to adduce this evidence as an interpretive tool, or to found a claim of estoppel. The former would sit better with the rest of its case on interpretation, while the latter would sit better with the references in the plaintiff's pleadings to the defendant's state of mind. The latter also would be appropriate had the defendant pleaded that the MOU and Employment Letter did not form a valid agreement.

52 If the plaintiff is seeking to use subsequent behaviour to interpret the written agreement, it is on shaky ground. Lord Reid in *James Miller (James) and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603 opined:

> ... it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

The emails adduced showing the defendant's subsequent conduct are not relevant to the construction exercise.

53 By contrast, if the plaintiff is seeking to admit subsequent conduct to support a claim of estoppel (*ie*, that the defendant could not claim that this was a generally worded document if his conduct showed that he adopted a more narrow interpretation of it), or that the contract had been varied by subsequent agreement, evidence of subsequent conduct may be used; see *Amalgamated Investment & Property Co Ltd (In liquidation) v Texas Commerce Bank* [1982] QB 84 at 120, and *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38 at 49. However, the difficulty for the plaintiff here is that it did not plead either of these alternatives.

54 It may be argued that the plaintiff's case implies that there was variation by subsequent agreement. If the MOU and Employment Letter are to be as narrowly construed as the plaintiff claims, then variation is implicit in the plaintiff's shift from its initial stand that only trading in oleochemicals and its derivatives was within the defendant's scope of authority, to its eventual stand that only trading in non-edible oils and their derivatives was within this scope.

55 In any event, it is doubtful whether these emails support the plaintiff's case. The regular business reports do not ask for approval, but were mere attempts to inform. The defendant asserts that these emails were not sent pursuant to a hierarchy of authority. He alleges that such a hierarchy did not exist. The defendant's self-appraisal also lists, under the heading "limiting factors", the lack of system and policy. As late as his resignation letter on 6 March 2009, the defendant was still asking for clearer policy guidelines. Mr Joshi, when asked about the alleged reporting processes, rather disingenuously replied that they were implied into the MOU at cl 11, which stated that "fortnightly or monthly expense reports need to be submitted for approval of Mumbai office". Neither Mr Joshi nor Dr Gaikwad could point to a reporting structure in the context of which the alleged approval might be given. In light of this, there is limited probative value to the emails that the plaintiff seeks to adduce, which are shorn of their context and do not give a full picture of the defendant's dealings.

What was the nature of the defendant's impugned trades in RBD Palm Olein, and were these trades within the scope of his authority?

56 The defendant seems to take the view that in concluding trades, he could either do so with a view to making a profit for the plaintiff or as VVFL's representative on its instructions. His evidence under cross-examination is that the trades of RBD Palm Olein which are now impugned by the plaintiff fell within the first category. However, his evidence on this score is confused. When asked about the authority that he was given to carry out these and similar trades, the defendant agreed that "any and all directors in VVF India, regardless of whether they are directors of VVF Singapore, can authorise him to sell non-oleochemicals". This contradicts his later evidence that he was carrying out these trades to make a profit for the plaintiff and that this did not require any approval. Trade to make a profit *simpliciter* was not within the scope of his authority under the MOU and Employment letter.

57 The contrary view is that these trades were VVFL trades, carried out by the plaintiff on its instructions. Mr Ghosh sent an email to the defendant on 13 July 2008 which stated:

> It has been decided to start business on CP, PFAD (to start with), olein and hedging of PKO in Malaysia thru [*sic*] Singapore office. Necessary funds are arranged fro [*sic*] VVF Singapore.

Mr Ghosh was not a director of the plaintiff. He was VVFL's representative, and he testified that the plaintiff was used to administer funds for these transactions.

58 There were in fact occasions on which the plaintiff carried out trades in RBD Palm Olein on VVFL's instructions. Whether, strictly speaking, in those cases the plaintiff was VVFL's agent is, however, not so clear:

> (a) There is no clear separation between VVFL and the plaintiff. Mr Joshi regards the plaintiff as "the Singapore operations" of VVFL, and "a subsidiary of our Indian Company"; the defendant was to report to Dr Gaikwad as the international operations head of VVFL, and not as a co-director of the plaintiff. Dr Gaikwad testified that the defendant was initially approached for "a VVF role ... working in this region," and not to set up a new business (albeit with VVF's involvement). Even the Employment Letter stated that the defendant's title was "Vice-President of marketing (Southeast Asia Region)", instead of an executive of a separate entity. The defendant himself seems to have regarded the plaintiff as falling under the purview of VVFL. VVFL, as parent company, gave instructions to the plaintiff. The defendant admitted in court that all VVFL directors could authorise him to sell products that were not oleochemicals despite their having no involvement in the plaintiff. There is scope for autonomy within the relationship of parent and subsidiary, depending on internal policy and structures. It is not a strict agency

relationship with the accompanying obligations.

(b) The relationship between VVFL and the plaintiff is not a formal agency relationship. The word "assist" in the MOU does not give it the nature of an agency contract, but implies some form of cooperation. This is consistent with the notion that the plaintiff was set up as a joint venture (cll 1 & 2, MOU) with the defendant as a minority co-owner.

59 These were trades which should have been carried out with VVFL as the beneficiary. They were palm oil trades entered into subsequent to the 13 July 2008 email. These were not transactions within the plaintiff's oleochemical business. By engaging in a general trade for profit set of transactions, the defendant acted beyond the scope of his authority:

(a) Generally, instructions were sought to carry out these trades, and the defendant admitted to this under cross-examination. He sought to distinguish buying on VVFL's "advice" from buying on their "instructions", but could not maintain this distinction for long, eventually agreeing that all paper trades for RBD Palm Olein were "done based on instructions given to [him] by VVF India". There was likely a process whereby such trades were initiated and/or approved by VVFL notwithstanding that these processes were not structured.

(b) The defendant could not explain, either in his affidavit or under cross-examination, why he had departed from this practice, other than to assert that he was given autonomy in many things. He contradicted his earlier statement that he required approval for non-oleochemical trades with VVFL by asserting that he did not take "any approval for any products ... within the scope of the Business Plan in discussion." The defendant never claimed that the Business Plan was incorporated into the agreement between the parties. Moreover, the Business Plan makes reference to lauric oils, and not to RBD Palm Olein. The defendant's assertion that "oil packed" means RBD Palm Olein is not obvious or supported; even Mr Joshi, who was familiar with the industry, was confused as to what it meant.

(c) Dr Gaikwad's unchallenged evidence is that the defendant had sent him reports of all trades done in 2006 and 2007. It was only in January 2008 that the defendant stopped sending weekly and monthly reports on the plaintiff's trades due to lack of time. In place of the reports, however, the defendant would telephone Dr Gaikwad each week to update him on the plaintiff's business. On Dr Gaikwad's evidence, therefore, there was a practice in place of reporting on trades carried out by the plaintiff. Dr Gaikwad also testified that the defendant never told him about the RBD Palm Olein trades.

(d) The plaintiff was not aware of the RBD Palm Olein trades. The defendant's case for saying otherwise is unconvincing. The defendant claims that the suspense accounts clearly show transactions with Golden Agri, Aavanti, and Global Advance, indicating an underlying RBD Palm Olein trade. This is not the same as reporting or seeking approval for the contracts. Neither was it sufficient for the defendant to claim that the contracts were available for inspection as this does not fulfil a reporting requirement. The defendant probably did not intend to hide these transactions, but this does not detract from his failure to inform or seek instructions from VVFL for trades purportedly made for its benefit.

(e) The 12 November email confirms this. It stated:

> I had not briefed anybody in HO or taken prior permission ... I take full responsibility of [*sic*] my negligence not to inform management and not having proper amount as collateral, as I trusted him.

(a) The defendant's claim that this was entered into under duress or because of threats Dr Gaikwad made on the phone is implausible. Dr Gaikwad submitted his mobile phone records, and there was no record of any call being made to the defendant's number on 12 November 2008. When cross-examined on this point, the defendant evasively responded with: "oh this document it does not say so, but he might have called some other number". The defendant could have produced his phone records to put his case on a sure footing, but he chose not to do so. His explanation for this under cross-examination (that he was only able to obtain a record of outgoing calls) is implausible. When given the opportunity, the defendant was unable to explain why he was frightened by the possibility of a police complaint if he knew that such a complaint was "unwarranted" and he had done nothing wrong. It is more likely that the 12 November email was sent in response to an email from Dr Gaikwad to the defendant on 11 November, where Dr Gaikwad expressed his surprised at not being informed "about such deal and losses with Raj Agro either over phone or during your visit to Mumbai in the last month". The rather ominous closing line of the 11 November email ("we need to discuss on this subject on my resuming duty") probably precipitated the 12 November email.

(f) The plaintiff was going through a transition at the time; Mr Ghosh testified under cross-examination that the intention behind trading via the plaintiff was to start a business in trade, and this informed the decision to position a trader in Singapore. The plaintiff may have eventually expanded into a general oil trading firm following these trades, but there is no evidence that this had already happened, and no evidence of new structures put in place for this transition.

(g) The defendant was not a convincing witness when he tried to explain away the 12 November email. He came up with many stories regarding this period and the stress that he was under. His assertion in court that he had been detained in Mumbai by VVFL during that period was not foreshadowed in his affidavit and gave the clear impression of being an afterthought.

60 There is a further issue of whether paper trading was within the scope of the defendant's authority. The MOU and Employment Letter are silent on this point. It is unlikely that there was such a restriction:

(a) Mr Joshi's explanation for why the defendant's authority was limited to making physical trades was unconvincing. He asserted that

> ...by outlining Nayak's responsibilities and his duties, it is very clear that he is not in the role of doing speculative business [such as paper trading].... [B]y not specifically mentioning that he is supposed to trade in oils, it is implied [in the MOU] that he cannot do this kind of a paper trade.

(a) However, he was unable to point to anything in the MOU or the Employment Letter that showed this.

(b) Mr Ghosh testified that at least one of the plaintiff's contracts was entered into with "the option... open whether we will go for physical or paper." When asked to explain how the contracts were generally structured, he responded: "if it is a paper trading [*sic*], in future if it amounts to paper trading ... the contract will be changed to VVF Singapore and we will wash out and receive the money there." The defendant also testified that paper and physical trades were "interchangeable". It was apparent from the evidence that paper trading was a normal part of the plaintiff's RBD Palm Olein contracts for VVFL as the beneficiary.

If these trades were not within the scope of the defendant's authority, was he in breach of his

employment contract?

61 The scope of the defendant's authority has been determined at [40], [41] and [46(b)] above. The defendant would be in breach of his employment agreement if his act did not:

(a) Increase the value of the plaintiff's oleochemical trade; or

(b) Make use of a profitable opportunity for VVFL's benefit.

The defendant does not claim that his acts fulfil [(a)]. He testified simply that this was normal trade business. The plaintiff's case is that trade in edible oils could not be for the benefit of oleochemical marketing; the defendant does not dispute this except to say that there had been other non-oleochemical, non-edible oil trades. However, if VVFL was not intended as the beneficiary, the defendant was in breach of his employment agreement for the reasons given at [59] above. There were no "profitable opportunities" seized for VVFL: the defendant testified that "VVF Singapore made the trade with Raj Agro". If so, the profit would accrue to the plaintiff and not VVFL, who would not have received the final product if the Raj Agro contracts had been honoured. The defendant therefore did not make use of a profitable opportunity for VVFL's benefit. As such his actions were not within [(b)] above and were in breach of his authority and the terms of his employment.

Did the defendant act as an agent for Raj Agro in carrying out Palm Olein Trades?

62 The plaintiff sought to support its case that the RBD Palm Olein trades were not authorised and were not "normal" trades by the defendant by asserting that the defendant had used the plaintiff to enter into the trades on behalf of Raj Agro. To this end, the plaintiff seeks to rely on the Raj Agro MOU and on the following further points:

(a) That the defendant had purchased 7,500mt of RBD Palm Olein and not 6,000 as pleaded;

(b) That the defendant did not claim the profit margin of US$5/MT when he sent debit notes to Raj Agro;

(c) Alleged inconsistency in issuing debit notes to Raj Agro; and

(d) Alleged inconsistency in payment terms.

63 The defendant points out that none of these matters have been specifically pleaded. In the Statement of Claim (Amendment No 3) ("SOC"), the plaintiff's allegation that the defendant had acted as an agent for Raj Agro is contained in para 21 and relates to transactions between Raj Agro and Global Oils & Grains Pte Ltd ("Global Oils") between 2007 and 2008 which were brokered by Intra Oils & Fats Sdn Bhd ("Intra Oils"). These transactions are not the unauthorised RBD Palm Olein trades which are dealt with above. Those are dealt with in paras 13 to 18 of the SOC and especially in para 14 which sets out the particulars of the defendant's breach. None of those particulars refer to the matters listed in [62] above. There is, accordingly, substance in the defendant's assertion that having failed to plead such matters, the defendant is not entitled to raise them in its submissions. It is also not really necessary for me to deal with them since I have already found that the trades are unauthorised.

64 It may, however, be helpful for me to give my views on what the evidence discloses. Whilst not all the evidence that the plaintiff relies on unequivocally discloses that the defendant was acting in a less than normal manner, some of it does raise questions.

65 First, the words "on behalf of" and "help" in the text messages the defendant sent to Mr Bansal were clearly not intended as terms of art reflecting an agency relationship that Raj Agro and the defendant were in. The text messages were sent in a high pressure situation; they were laced with grammatical and other mistakes, and did not make sense in parts. The defendant, who knew that his job situation was under threat, was making an emotional appeal to Mr Bansal, and it is understandable that he would have attempted to appeal to the benefit or help that Mr Bansal and his company would have derived from these trades. It is also common ground that the Raj Agro contracts were the reason for buying the first 6,000MT of RBD Palm Olein. The trades were carried out "on behalf of" Raj Agro but these words did not necessarily mean that Raj Agro was the principal. They could equally well be interpreted as a reference to Raj Agro as the eventual buyer.

66 More suspicious is the Raj Agro MOU. This document was sent by the defendant to Raj Agro on 8 November 2008 together with four sales contracts in the hope that Raj Agro could sign all of the same and acknowledge its obligations to the plaintiff. The Raj Agro MOU was backdated to 8 August 2008 and signed by the defendant only. The defendant's position is that this document was sent purely as a measure to compel Raj Agro to honour its contracts with the plaintiff. This does not make much sense. How could Raj Agro be compelled by a document it had never signed? In any event, the defendant submits that the Raj Agro MOU was a meaningless document and that in referring to the plaintiff as "Principal" and Raj Agro as "Buyer", it did not lend any credence to the plaintiff's contention that the defendant was trading "on behalf" of Raj Agro.

67 It seems to me that the defendant is protesting too much. Presumably he drafted the document and it is a rather peculiar one. The preamble to the document states that the "Buyer has proposed to carry out Palm Products Physical/Paper trade on his behalf to the Principal". This in itself is difficult to understand but the plaintiff says that a reasonable construction of the clause would be that Raj Agro had proposed that the plaintiff carried out physical or paper trades on behalf of Raj Agro. This would seem to be the most reasonable construction given that there is no evidence, and the defendant does not assert, that Raj Agro ever carried out any trades on behalf of the plaintiff. The document further provides for the Principal to obtain the best possible price for the products upon instructions from the Buyer and to inform the Buyer of the Seller's details. The Buyer is supposed to have the full liability to perform the contracts "dealt on his behalf" by the Principal and is to reimburse the Principal with US$5/MT as the operational cost for the volume handled by the Principal. The Buyer is also responsible for all expenses relating to the trades.

68 Looking at the Raj Agro MOU as a whole, it would seem that it reflects an arrangement for the plaintiff to act as an intermediary to buy and sell palm oil products on Raj Agro's behalf and to be paid US$5 per metric ton. If this was truly the arrangement between the defendant and Raj Agro, then it was not an authorised arrangement as the defendant had no authority to commit the plaintiff to trading on behalf of any party other than VVFL. However, the Raj Agro MOU may not even have truthfully reflected the dealings between the defendant and Raj Agro since he did not comply with its terms when trying to get Raj Agro to settle the RBD Palm Olein trades in respect of which the four sale contracts were sent out on 8 November 2008.

69 The defendant did not seek to recover the profit or commission of US$5/MT from Raj Agro. Although he chased Raj Agro for payment in respect of the Raj Agro contracts, none of his debit notes took into account the US$5/MT. When asked about this, the defendant's initial response was that he did not recall the reason for the omission. Subsequently, he changed his evidence to say that it was not necessary to specifically mention the US$5/MT in the debit notes because the sale prices under the Raj Agro contracts took this profit into account. That evidence was not, however, supported by the various debit notes which the plaintiff sent out to Raj Agro from October 2008 onwards. Most of those contracts were washed out with the sellers and the plaintiff claimed the

difference between the original sale price and the washed out price from Raj Agro. The amounts claimed did not take into account the US$5/MT. I find this behaviour suspicious. Even if some of the debit notes were sent out to Raj Agro after the defendant resigned as director of the plaintiff, he could still have taken steps to ensure that the correct amounts were billed since he was still working in the plaintiff's office in an executive post albeit with no authority for financial matters.

70 The other thing that was suspicious about the sales to Raj Agro and may be evidence that the defendant had not in fact done a normal on-sale of the RBD Palm Olein to Raj Agro was the difference between the payment terms on which the plaintiff bought these parcels and those terms on which it "sold" those parcels on to Raj Agro. The payment term in the plaintiff's sales contract to Raj Agro was "LC within 48 hours of presentation of documents" while the payment terms in the respective purchase contracts from Aavanti, Golden Agri and Global Advance was "CAD". The difference in the payment terms meant that if the suppliers had presented the documents to the plaintiff, it would have had to pay the suppliers immediately while Raj Agro's bank would have up to 48 hours after the presentation of documents to make payment. Usually traders try to ensure that they receive payment from their buyers either before or at the same time as paying their suppliers. The defendant testified that despite the contract terms, the plaintiff would not have to make payment before Raj Agro did because, he said that "CAD" under Incoterms, meant that the bank would allow up to seven days for payment. When it was pointed out that Incoterms were not applicable to the contracts, he said that under the PORAM/MEOMA terms, there was a 72-hour grace period in which to pay. When it was put to him further that the PORAM/MEOMA terms did not give such a grace period, his answer was that this was "the industry practice". It appears to me that the defendant was trying to wheedle his way out of a situation which he found difficult to explain.

71 Overall, the evidence in the case appears to indicate that the RBD Palm Olein trades with Raj Agro were not normal trades as the defendant maintained.

Is the defendant liable to account to the plaintiff for secret profits?

72 As stated above, the plaintiff's pleading at para 22 of the SOC is that the defendant acted as an agent in various RBD Palm Olein trades between Raj Agro and Global Oils between 2007 and 2008. There is, however, no direct evidence of any involvement of the plaintiff or the defendant in these contracts which were brokered by another party altogether, Intra Oils. The plaintiff is relying on the fact that after the defendant left its employ, it discovered that he had deleted a substantial number of emails and documents from his computer. The plaintiff discovered two emails which it now relies on in support of its case that the defendant was acting as an agent for Raj Agro in respect of the transactions in question.

73 These emails were sent to the defendant by the broker, Mr Mohta of Intra Oils, to be forwarded to Mr Bansal in August 2008. They were confined to two sets of documents sent on the same day. The defendant deposed that these emails were sent to him so that Mr Bansal could receive them in Singapore, and that he deleted them because they had "nothing to do with me or my work in [the plaintiff]". The dates of these emails match the dates that Mr Bansal was allegedly in Singapore. These dates have not been challenged by the plaintiff. The defendant's explanation is plausible, and the plaintiff has not raised any other evidence to show, on a balance of probabilities, that receipt of such emails was a normal activity undertaken by the defendant on behalf of Raj Agro or Mr Bansal.

74 It is the plaintiff's case that the defendant would have earned a secret fee or commission for acting as Raj Agro's agent in each of the contracts between Raj Agro and Global Oils. I think its case is speculative and the two emails found are not sufficient to weigh the scales against the defendant.

75 The plaintiff also relied on information obtained from its specific discovery of all the other defendant's bank accounts in Singapore, Malaysia and India. It considered that there were 18 suspicious deposits in these accounts for which there was:

(a) No indication of the source and purpose of the deposit as well as no supporting documentary evidence showing either; or

(b) The source of the deposit was indicated but the purpose was not and there were no supporting documents showing the purpose of the deposit; or

(c) The source of the deposit was indicated but the purpose was not and there was no supporting documentary evidence showing either the source or purpose of the deposit.

76 The defendant rightly pointed out in his submissions that the plaintiff has not discharged its burden of proof by pointing to slightly suspect numbers in the defendant's bank account and alleging that they were secret profits. The plaintiff overstates its case by alleging that there was no explanation proffered for these deposits. The defendant had explained that some of these deposits were made by his wife to buy property. A failure to put his wife in the box is not the same as a failure to provide an explanation; an adverse inference can only be drawn from the latter. There is no reason to believe that the defendant's wife had no independent sources of income. The documents disclosed by the defendant do show the payments that his wife made to him. The plaintiff's arguments in this respect are weak. Indeed, Dr Gaikwad has conceded that there are:

(a) no documents in evidence before the court showing that commission was directly paid to the defendant; and

(b) It is possible that a person would not keep meticulous records of every transaction which had occurred a few years earlier.

77 On a balance of probabilities, the plaintiff has not proven that these sums were secret profits.

Did the defendant's actions constitute a breach of his director's duties, or any other fiduciary duty?

78 As a director, the defendant owed the plaintiff an additional duty apart from those applicable under his employment contract. That duty was to act *bona fide* in the plaintiff company's interests and this included a duty not to place himself in a position where his duty to the company and his own interests would conflict. See *Halsbury's Law of Singapore* (vol 6, 2010 Reissue) at [70.244]. The plaintiff does not submit that in this case any additional fiduciary duty was imposed on the defendant, and there is in fact no ground to impose any other fiduciary duty on him outside of his director's duties. This is not a relationship of trust where the plaintiff depended on the defendant, but one where two business parties entered into an agreement for their mutual benefit.

79 The allegation that the defendant was in breach of his common law director's duty to act in the company's interests is based on the fact that he had engaged in unauthorised trades which appeared to be less than *bona fide*. The defendant also had a duty to act honestly and the plaintiff says he did not do so in entering into these trades. The facts relied on to establish the breach of fiduciary duty are the same as those relied on to establish the assertion that the defendant acted outside the scope of his authority. Since I have found that the defendant was in breach of his contractual duty because he entered into unauthorised trades and since the damages claimed by the plaintiff are identical in respect of the unauthorised trades whether the same are categorised as arising out of a

breach of fiduciary duty or out of a breach of the employment contract, there is really no need for me to consider whether the defendant's actions constituted a breach of fiduciary duty as well.

80 I observe that in order to establish the breach of fiduciary duty, the plaintiff must show that the defendant was not acting honestly in its interests. The defendant is consistent in his evidence on affidavit and in his cross-examination that he had entered into the Raj Agro contracts hoping to make a profitable trade for the plaintiff. The Raj Agro contracts showed a US$5/MT mark up from the purchase price and this would have given the plaintiff some profit. Even Mr Ghosh testified that this was not an inherently unprofitable trade, but losses were incurred "after the fall of Lehman Brothers in the US … [when] the entire commodity market started collapsing and everybody was in a selling mode". Beyond the bare assertion in its submissions that the defendant's actions gave rise to "an inference of dishonesty", the plaintiff raises no evidence that the Raj Agro contracts were risks which no director could reasonably have taken in the interests of the company. Dr Gaikwad gave evidence that trading in RBD Palm Olein was riskier than trade in soap noodles because there were more variable factors. This cannot be equated with a claim that RBD Palm Olein trade was so risky that no reasonable director would have engaged in it. Indeed, Dr Gaikwad could not make such a claim because VVFL also traded in RBD Palm Olein.

81 Although, as I have noted above, there were some suspicious circumstances indicating that the Raj Agro contracts may not have been normal trades, I will not express a conclusion on this issue. Those suspicious circumstances were not pleaded as part of the particulars of the defendant's breach of duty.

What is the quantum of damages flowing from the breach under the employment contract?

82 The preliminary question is whether the defendant's actions caused the losses that the Plaintiff claims. On a "but for" causation test, this threshold is fulfilled: but for the defendant's actions, the trades in RBD Palm Olein under the Raj Agro contracts would not have been entered into, and no loss could have occurred.

83 In entering into the Raj Agro contracts, the defendant acted as an agent for the plaintiff. The quantum of damages should be calculated by reference to contracts concerning principal and agent. H. McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at 30-011 explains the relevant principle for calculation of damages:

> Where the principal's property entrusted to the agent is improperly parted with by the agent so that, though not physically destroyed, it is lost to the principal, the principal may recover the value of the property, or the value of that which should have been obtained in exchange.

84 In this instance, the property is the plaintiff's money and credit lines which were used to procure and pay for the Aavanti, Mewah, Golden Agri, and Global Advance contracts. It is established law that where expenditure is incurred as a result of a wrongful act, the same can be recovered as damages.

85 There is a second question: is this damage too remote? The defendant's argument is that the losses arose because of the fall in the market. On the facts, however, it is difficult to argue that the damages were too remote. This is unlike *Compania Financiera "Soleada" v Hamoor Tanker Corp (the Borag)* [1981] 1 WLR 274, where the court found that interest charges on the bank guarantee the owners had to take out to recover a vessel its agents had caused to be wrongfully arrested were not recoverable. In that case, the damages sought to be recovered were two steps removed from the actual situation. By contrast, the damage here is direct: the losses did not merely flow from a fall in

the market, but from Raj Agro's default on the contracts. These contracts would not have existed if not for the defendant's breach. As between the plaintiff and the defendant, the defendant is liable for these damages.

86 The plaintiff's loss calculations were set out at Annex C of its written submissions. These calculations are supported by primary documents, and are not challenged insofar as they relate to transactions entered into as a result of the trades in RBD Palm Olein. The defendant challenges these calculations on the basis that the plaintiff's accounts clerk, Ms Jennifer, had entered these accounts into the ledger, but had mistaken the volume of RBD Palm Olein under these contracts, and wrongly added the plaintiff's profit margin to monies payable by the plaintiff to third parties. However, Annex C is not calculated based on Ms Jennifer's accounts but based on debit notes and invoices for the actual transactions. Ms Jennifer's accounts were only taken as a means of calculating total loss for 2008.

87 The defendant asserts that in its calculation of losses, the plaintiff has failed to take into account a profit of US$1,501,539.87. This sum arose in respect of 2,000 MT of RBD Palm Olein, part of the Raj Agro contracts, which were due for shipment in February and March 2009. The plaintiff's contracts with the sellers of the oil were taken over by VVFL and the cargo was shipped to India and sold by VVFL. The defendant argues that the plaintiff has failed to properly explain or account for profits derived from this cargo of 2,000 MT. However, the plaintiff was liable to make payments in respect of these 2,000 MT and when VVFL took over these contracts, the plaintiff's liabilities were transferred to VVFL, and these contracts were accordingly excluded from Annex C. The plaintiff would not be entitled to any profit made by VVFL since it was no longer a party to the contracts once VVFL took them over. The money from the sale by VVFL can only be taken into account if the full liabilities of the plaintiff under these contracts are added back to the balance sheet. This, the defendant has not done.

88 I find that the defendant is liable to the plaintiff in respect of its losses of US$963,265.91 arising out of the Raj Agro contracts.

Did the defendant overdraw monies without authority, and is he liable to return these sums to the plaintiff?

The defendant's salary entitlement

89 Before deciding if there has been an overdrawing of monies, it is first necessary to establish whether 2008 was a year of profit or of loss. It would be recalled that under the terms of his employment, the defendant was entitled to a salary of US$100,000 per year if the year was a profitable year but if the year was a loss making year, his salary would go down to US$60,000 for that year.

90 In this respect, the plaintiff has proven its case on a balance of probabilities. The defendant asserts that the plaintiff's accounts for the year ending on 31 December 2008 were incorrect. He points out that the management accounts for that period reflected a net accumulative profit of US$807,007.44 whilst the subsequent audited accounts showed a loss of US$430,004. The defendant argues that the audited accounts were wrong because:

(a) The figure of US$329,871 being the loss on futures contracts had not been properly derived and the loss should not have been included in the plaintiff's audited accounts for 2008;

(b) The profits which should have been earned from four contracts between the plaintiff and

Green Planet had not been accounted for in the 2008 audited accounts; and

(c) The audited accounts fail to take into account sales and purchase commissions totalling US$77,205 which were due from VVFL to the plaintiff.

91 There is no merit in the defendant's complaints. Regarding the first, the plaintiff has tendered unchallenged expert evidence that the futures contracts were derivative trades and do not go into a calculation of revenue. There are proper accounts for its claims of computation for loss in the sum US$329,871. By contrast, the defendant has merely asserted the contrary, but has failed to raise evidence proving either that they should not be classified as derivative trades, or that there was a realised profit.

92 Secondly, the defendant alleges that the contracts with Green Planet should be counted as part of the 2008 profits, as payments made in 2009 were for a 2008 contract. The evidence does not support this claim. The email correspondence which resulted in the 2009 purchase was a revision of the purchase order entered into on 30 March 2008. This listed 1800MT to be sold at US$1100.00/MT. Green Planet could not take up the full sum. When offered a new price of 1150/MT for 560MT on 5 November 2008, Green Planet's Ishtiaq Ahmad responded with an email on the same date stating:

> Please note that you will receive a revise order from Green Planet for the balance quantity for the revised price you sent.

This revised order was only received on 16 January 2009 for shipment in February and March, with payment upon delivery. Profit from this re-contracting and delivery of the balance was only realised in 2009 and therefore became part of the 2009 receipts. This amount cannot be used for the purposes of calculating a profit in 2008.

93 Thirdly, the defendant claims that VVFL owed the plaintiff commission which did not appear in the accounts. This claim is based on the defendant's understanding of the words "will reasonably reward such an effort of VVF Ltd Singapore Pte, in line with the trade practice in India" in cl 5 of the MOU. He claimed that "this reward was to be in the form of commissions payable to [the plaintiff]". No evidence was adduced as to what the trade practice in India was, or whether it supports the defendant's interpretation. Even if this "reward" took the form of commissions, cl 5 does not state how much this sum would be, and there are no corresponding invoices to prove these commissions.

94 This is really an estoppel claim: The alleged commissions were listed as part of "commission sales" in business reports sent to Dr Gaikwad as VVFL's representative on 29 January, 16 February, 9 march, 26 April, 9 May, 4 June, 15 June, 2 July, 24 August 2007, and 2 January 2008. Dr Gaikwad does not deny having received these reports. VVFL is thus estopped from claiming that these were not sums due to the plaintiff.

95 Other than the fact that most of these reports pertain to transactions in 2007 (for which there is no dispute), there is an even bigger problem: VVFL is not the plaintiff. It is not the defendant's claim that these commissions were actually paid to the plaintiff and should now be considered part of its profit. If the plaintiff wishes to recover commission yet to be paid by VVFL, a suit lies against VVFL with no guarantee that these sums would be recovered. They thus cannot be included in the plaintiff's accounts for 2008. Neither are these commissions payable to the defendant personally in order to offset the sums he owes to the plaintiff.

96 Moreover, contrary to the defendant's submissions, the invoices for the commission should have been sent by the defendant to VVFL as the plaintiff's only executive officer. Mr Agarwal's position as

CFO of VVFL does not oblige him to organise the plaintiff's financial documents and invoices, notwithstanding his concurrent position as a director of the plaintiff. The defendant's failure to issue these invoices was, at the very least, negligent. He cannot now rely on these reports to claim that commissions for sales to VVFL should have been included in the plaintiff's audited accounts. In any event, even if the sums owing (US$77,205) were added as profits in the 2008 accounts, there would still be a total loss of US$252,666 (US$329,871- US$77,205). This claim thus does not help the defendant.

The amounts withdrawn by the defendant

97 The plaintiff's claim for reimbursement of the sum overdrawn by defendant is based on the following drawings made by the defendant:

(a) Salary of $120,000 between October 2006 and December 2007;

(b) Rent of $16,500 in 2007;

(c) Salary adjustment of $27,500 in 2007;

(d) Rent of $16,350 in 2008;

(e) Salary of $176,000 in 2008; and

(f) Salary of $39,444 between January and April 2009.

It is worth noting that the defendant did not always properly record the purposes for which he made drawings from the plaintiff. For example, the $50,000 purportedly drawn as salary is listed in the OCBC debit sheet as a loan.

98 The salary owed to the defendant has been offset against the withdrawals that he made. The defendant cannot claim that the plaintiff has admitted his counterclaim. The lynchpin of the defendant's case is that the sums were correctly drawn as (a) 2008 was a profit-making year, and (b) the accounts were wrongly calculated. Neither of these allegations has been proved. The alleged discrepancies in the accounts go towards the plaintiff's gross profit, and not the sums the defendant has withdrawn. The plaintiff's calculations as set out in [97] have not been effectively challenged.

The computation of the exchange rate

99 The defendant pleaded that in or about April 2007, the parties agreed that the defendant's salary was to be paid in Singapore dollars at a fixed exchange rate of US$1 = S$1.5778. It is unclear from this pleading whether the defendant is asserting that this was a collateral contract or an agreed variation of the employment contract. No details were given in his pleading of the circumstances in which the agreement was reached or which director(s) agreed to it on behalf of the plaintiff. It is worth noting that an implied agreement to a fixed exchange rate would not be inferred because such a term would neither pass the officious bystander test nor the business efficacy test. A floating exchange rate is more efficacious and reasonable, as this would be the only way to keep salaries in line with inflation rates and company profits (which would be calculated based on prevailing exchange rate).

100 Given that a reasonable term is one of a floating exchange rate, and no fixed rate was agreed in the original contract, the defendant bears the burden of proving that it was subsequently agreed

either as a variation or as a collateral contract that he should draw a salary based on a fixed exchange rate. The defendant has not done this; it is not sufficient proof of the existence of an agreement to point to an email agreeing to a sum calculated on that basis, particularly when there is other evidence (see [101] below) that the approval was given for a different part of the calculated sum.

Whether approval was given

101 The defendant further claims that the plaintiff is estopped from making its claim for reimbursement of overdrawn salary because these payments had been approved by Dr Gaikwad in an email dated 6 December 2008. Dr Gaikwad clarified in court that his approval was given only for the monthly salary payment, and not the increase of US$5,148 needed to take the defendant's annual salary up to US$100,000. It is likely that Dr Gaikwad had cursorily looked through the documents and approved them without checking the figures.

102 The question then is whether this apparent approval binds the plaintiff to paying the defendant these sums. There is no evidence of an intention to create a binding commitment. As late as 16 January 2009, Dr Gaikwad still seemed to be operating on the assumption that full salary would only be drawn from January 2009 (*ie* on the assumption that 2009 would be a profitable year). In his email of the same date , he stated at para 4:

> ... you can draw your agreed full salary from January 2009. As informed to you during our recent visit to Singapore, we have already discussed your pending appraisal and have worked out your pending increments and bonus related dues and the same will be given to you once you overcome the losses of Olein trade. Please be assured that you will get a fare [*sic*] evaluation and all your dues also will be paid as per our agreements.

It is clear from the foregoing that the defendant's salary was still being worked out, and that the earlier 'approval' was not intended to be a binding commitment to pay the defendant the sums he now claims. It is also clear that the parties were operating on the assumption that 2008 was a loss-making year. If it were profit-making, there would be no need to work out pending increments after making up for the loss, nor would there be a need to clarify that full salary could only be drawn from January 2009. The defendant would have known this. In his response the same day to Dr Gaikwad's email, he does not mention anything about salary. If he had thought that the approval in Dr Gaikwad's 6 December 2008 email was meant as a final determination of his salary, then he would have commented on the foregoing paragraph as it was inconsistent with approval having been given.

Conclusion

103 For the reasons given above, I find that the plaintiff's claim for reimbursement of overdrawn salary and its calculations based on a floating exchange rate are well founded. Accordingly, the defendant must repay the plaintiff the sum of US$52,953.77 and his counterclaim cannot be allowed.

Conclusion

104 In the circumstances, there will be judgment for the plaintiff for the following:

(a) US$963,265.91 being the losses arising from the defendant's breach of his employment contract;

(b) US$52,953.77 in overdrawn salary;

(c) Interest on the amounts specified above from the date of the writ at the court rate; and

(d) Costs of the claim and counterclaim.

105 The defendant's counterclaim is dismissed.