Carl Eckman v Saco Defense Ltd

Jurisdiction:	Jersey
Judge:	Clarke, J.A., Vaughan, J.A
Judgment Date:	18 July 2002
Neutral Citation:	[2002] JCA 136
Reported In:	[2002] JCA 136
Court:	Court of Appeal
Date:	18 July 2002

Text

[2002] JCA 136

COURT OF APPEAL

Before:

The Hon. M.J. Beloff, **Q.C., President**, C.S.C.S. Clarke, **Esq., Q.C.; and** D.A.J. Vaughan, **Esq**., C.B.E., **Q.C**.

Between
Carl Eckman
Plaintiff/Respondent
and
(1) Saco Defense Limited
(2) Sidem International Limited
Defendants/Appellants

Advocate D. F. Le Quesne **for the Plaintiff/RESPONDENT;**

Advocate S. J. Young **for the defendants/APPELLANTS**.

Authorities

Mayo Associates S.A. v Cantrade (1998) JLR 17 p173 – 195.

Chitty on Contracts (28 th Ed'n) Vol 1, p204 – 227.

Banning v Wright (Inspector of Taxes) [1972] 2 All ER 987.

Philip Collins Ltd v David and another [2000] 3 All ER 808.

Vanbergen v St Edmunds Properties Limited [1933] 2 KB 223.

Woodhouse Ltd v Nigerian Produce Ltd [1972] AC 741.

Chaudry v Prabhakar and another [1989] 1 WLR 29.

Alghussein Establishment v Eton College [1991] 1 All ER 268.

Cross v Kirkby [2000] TLR 268.

Bowstead and Reynolds on Agency (17 th Ed'n) p149–177.

Appeal by the Defendants/APPELLANTS from so much of the Judgment of the Royal Court of 17 th October, 2001, as adjudged that:

1. the contract costs for the 'Saudi Contract' from 1984 until end 1995 should be fixed at a sum of US$650,000.00;

2. it would be inequitable to allow the Defendants/APPELLANTS to go back on their fixed sum of US$650,000.00 in order to re-open the expenses before that time;

3. the sum of US$10,113,322.00 unpaid to Mawarid Electronics be treated as profit of the 'Saudi Contracts;

4. the Plaintiff/RESPONDENT was not in breach of his duty to the Defendants/APPELLANTS with respect to the misuse of the 'Letterheads';

5. the Plaintiff/RESPONDENT be allowed to share in the sum of US$10,113,322.00; and

6. an account of profits for the 'Saudi Contract' should be taken only from the end of 1995 to the end of contract.

Clarke, J.A.

1 This is an appeal from a judgment of the Royal Court delivered on 17th October 2001. By that judgment the Court ordered an account to be taken of the profit made on certain contracts for the supply of armaments to the Kingdom of Saudi Arabia in respect of which the Plaintiff was entitled to a 50% share. The Order made was that the account was to be taken for the period starting 1st January 1996 and upon the basis that “contract expenses” to the end of 1995 were to be treated as those stated in what the judgment described as “reconciliations” dated 28th October and 1st December 1994. In the course of its judgment the Court held that a figure of $10,113,332 was an exceptional profit, which should be brought into the account. From that judgment the Defendants appeal.

The Parties

2 The Second Defendant, Sidem International Limited (“ *Sidem*”), is a long established Canadian corporation, which in 1949 branched out into the armaments business. Mr Jacques Michault, who was the father of Mr Patrick Michault, was its Chairman. He died in December 1995. The First Defendant, Saco Defense Limited is a Jersey company. Both Saco Defense Limited and Sidem were administered in Jersey.

3 Saco Defense Inc is a company based in Portland, Maine in the United States. It manufactures armaments. Saco Defence Limited (“ *SDL*”) was formed to obviate the regulatory difficulties involved if Saco Defense Inc (“ *SDI*”) were to pay the very large commissions necessary for business to be obtained in countries such as Saudi Arabia. It acted as a distributor of SDI's products. Sidem owned 80% of SDL and SDI the other 20%. Sidem, itself, was owned, indirectly, by two family trusts established by Mr Jacques Michault.

4 Sidem had been trying since 1984 to sell machine guns with grenade launchers and ammunition to the Saudi Arabian Ministry of Defence and Aviation (“ *MODA*”). By 1989 those negotiations, which had been extensive and had involved a Saudi delegation visiting NATO forces in Belgium and high level discussions in Washington and Saudi Arabia, had not yet borne fruit. In that year, Mr. Jacques Michault came into contact with Mr. Carl Eckman, the Plaintiff.

5 Pinnacle Trustees Limited (“ *Pinnacle*”) is a company that provided directors for the Defendants and performed certain statutory and book keeping functions, and secretarial duties, from mid-1993 until mid-1999. Mr. Ian Moodie is the Managing Director of that company. Mr Johnnie Johnston (“ *Mr Johnston*”) did most of the pure accounting work for Pinnacle.

The Plaintiff

6 The Plaintiff has over 20 years experience of business in Saudi Arabia. Originally he worked for a Texan company named E Systems, which dealt in electronic security systems.

The Vice-Chairman of that company or its predecessor became acquainted with Mr. Jacques Michault and, through him, the Plaintiff came to know the Michault family.

Mawarid

7 In September 1988 the Plaintiff left E Systems to become Managing Director of Mawarid Electrics Limited (" *Mawarid*"). The Mawarid group of companies were engaged in the fields of electronics, food and finance. The Group was owned by Prince Khalid Bin Abdullah, the nephew of the Founder of the Kingdom and cousin to the current King. Three of his sons ran the respective divisions of the group. The Mawarid Group had a joint venture with Nobel, the Swedish explosives enterprise, manufacturing explosives for the Saudi Arabian highway system. Mr Jacques Michault had a consultancy contract with Mawarid to assist them in putting dormant manufacturing facilities of the joint venture to work. In September 1991 the Plaintiff ceased to be an employee of Mawarid and became senior consultant to the Group, in which position he stayed until September 1993.

8 By early 1990 Sidem had dismissed its then representative, Khalid Rashid. In his place, on the Plaintiff's recommendation, they appointed Mawarid. On 2nd February 1990 SDL and Mawarid reached an agreement whereby Mawarid agreed to provide SDL with services and advice relating to the sale in Saudi Arabia by SDL of arms manufactured by SDI. That agreement did not stipulate what commissions were payable; but agreement was reached on that subject in December 1990.

9 In July 1990 the Plaintiff filed for bankruptcy in Texas. He had joined with two business partners, who had previously declared themselves bankrupt, in giving joint and several guarantees in respect of loans to finance a property venture, which had failed. The Plaintiff's losses exceeded $2,000,000. The Royal Court found that he was discharged from bankruptcy in September 1991.

10 Mr Patrick Michault (" *Mr Michault*") had learned of the Plaintiff's bankruptcy in October 1990 when he was told of it by Prince Fahad and Prince Saud, two of Prince Khalid's sons. He was, also, told that Mr Eckman had borrowed substantial sums of money from Mawarid employees and was to be replaced as managing director as soon as a replacement could be obtained.

11 In May 1991, upon the occasion when Mr Michault visited the Plaintiff in Saudi Arabia and gave him some letters on SDL notepaper signed in blank, to which I shall refer hereafter, the Plaintiff broached the subject of sharing in the profits of the Saudi contracts. According to Mr Michault the Plaintiff, who pointed out that Mr Michault was aware of his financial difficulties, said that it was quite likely that he would be departing from Mawarid Electronics and that he felt he could be of great assistance to Mr Michault in the execution of the contracts. He asked whether, since the first contracts, then in negotiation, were likely to yield very little return, Mr Michault could share 50% of the profits with him. Mr Michault told

him that he would have to refer the question to his father, who was Chairman of Sidem, and Mr Ray Harvey, who was a director of Sidem and SDL.

12 On June 9th, 1991 Mr. Jacques Michault wrote to the Plaintiff a letter which included the following passage:

> *"I am naturally saddened by the turn of events that have afflicted both you and your family.* My son is a very generous person. Whilst both Ray Harvey and myself have disagreed with your request for 50% of the final profits on the MK19 contracts in Saudi Arabia, we will agree with Patrick, primarily to allow you and your family to rebuild your lives.
>
> *After so many years of efforts, I am confident that the MK19 contracts will be signed*.
>
> *I understand from Patrick that you may move to London and that you wish your share to be paid "offshore".* The company lawyers will assist you.
>
> *Once all the payments have been received, should these contracts be ratyfied (sic) and once the performance bonds have been released, our accountants will draw up a statement of the final profits*.
>
> *These initial contracts may not yield much.* The expenditure has been substantial. There will be further business over the years to come, which will provide the returns anticipated.
>
> *I am just sorry I may not be there to join in the fun!"*

13 In a letter to his father of 14th June 1991 Mr Michault wrote:

> *"Just a few words on your letter to Carl (9/6)*.
>
> *If we finally sign, the profit once we repay all the loans and your $1.2 million plus all the expenses will be maximum 1.5.* million, Carl will get around 750,000. It will enable him to live (he still has his creditors at the door) and if the Saudis confirm a further order for 1000 MK 19s and Ammo I will offer him a job and salary plus a small percentage. He can't work in Saudi any longer and he can't work in the US as his creditors will take any money…"

The supply contracts

14 On 11th November 1991 SDL entered into two contracts for the supply of MK19 40mm grenade launchers, ammunition and accessories. The total cost under the contracts was $26,458,806, under the first, and $25,632,241 under the second, making $52,091,047 in total. Under the contracts SDL was required to provide a performance bond to the value of 5% of the Total Cost in the form of a bank guarantee, which was to stay in effect until at

least 4 months after the contracts had been completely finalised. The contracts contemplated partial shipments. Payment was to be against a Letter of Credit, 90% of the price being payable on tender of documents and 10% against a letter issued by the Government to the Bank indicating receipt of the shipment in question. The contracts had provisions for delay penalties, which could amount to up to 4% of the contract value. The manufacturer of the shells was to be Martin-Marietta Ordnance Systems of Milan, Tenn, USA. The manufacturer of the MK 19 machine guns was to be SDI.

The Purchase Order

15 On 30th December 1991 SDL issued two purchase orders – Nos. SDL/1/30 and SDL/1/32 – to SDI, pursuant to the Distribution Agreement between those two companies, for the supply of the armaments the subject of the two MODA contracts. The prices under the two contracts were $16,849,130.72 and $16,870,300 respectively making $33,719,430 in all. As appears from these figures the difference between the cost of the goods and the sale price was $18,371,617.

16 The arrangements between SDL and Sidem were such that any profit in SDL was passed to Sidem by means of a management charge so that there were no profits left in SDL.

17 The Plaintiff gave evidence that Mawarid's commission on the sale was to be something of the order of $11,000,000 to $13,000,000 and that overall SDL was going to make a profit of between $1.5 and 2 million. It seems from a calculation prepared in late 1991 that Mawarid itself would have been due to pay commission to others out of what it, itself, received.

Shipments

18 The goods were shipped to Saudi Arabia in 7 shipments during the period September 1993 to December 1994. But it was not until March 2000 that it was possible to prepare final accounts of the profit on the contracts. By that stage the performance bonds had been released and a portion of the penalties that had been imposed had been recovered.

The agreement with the Plaintiff

19 By the time of the hearing before the Royal Court it was accepted that it had been agreed between the Plaintiff and SDL and Sidem in or about 1991 that the Plaintiff would use his specialist knowledge of, and his contacts in, Saudi Arabia to assist those companies in connection with the completion of the MODA contracts for the supply of armaments to Saudi Arabia in consideration for which they would pay him 50% of the net profits of SDL and Sidem arising from those contracts, which payment was to be made once the net profit could be ascertained. He was, also, to assist with getting in more business for SDL and Sidem in Saudi Arabia. It was common ground that the contract was governed by English

law.

20 In fact payments were made to the Plaintiff on account of his share in the profits of the contracts before the final net profit could be calculated. The Defendants say that payments were made on account as a gesture of good will and in order to help the Plaintiff out of his financial difficulties.

21 The Plaintiff acknowledges, in his letter of 25th April 1998, that he was paid the following amounts on account on the following dates:

The $930,948 figure is the product of two figures $300,948 and $630,000. The Plaintiff claims that he is due nearly $3,000,000 more. The Defendants claim that the Plaintiff has been overpaid.

1.10.93	$ 300,000.00
23.2.94	$ 300,000.00
10.6.94	$ 114,000.00
22.11.94	$ 930,948.00
22.11.94	$1,244,992.00
8.2.96	$2,230,776.00
	_____
	$5,120,716.00

The dispute about contract expenses

22 On October 28th 1994 a statement (“the October Statement”) was drawn up by Mr Johnson. This showed the profit on the first three shipments under the MODA contracts. It set out, inter alia, (a) the contract price received (which was at that stage 90%) (b) the contract costs and (c) the contract expenses. The total contract expenses were stated to be $753,377 made up as follows:

Contract expenses	$ 650,000.00
Bank interest and charges	$ 80,568.00
Courier, fax and account charges	$ 5,000.00

C. Eckman expenses	$ 17,809.00
	_____
	$753,377.00

23 The figure of $650,000 had been approved by Mr Michault in a note to Mr Johnson of 5th October 1994 in which he acknowledged receipt of draft print outs in respect of the first 3 shipments and added:

> *"A charge of $650,000 was applied against the income from these shipments to recover SIL's marketing costs since 1986 to Contract time of November 1991 including $173,000 interest paid to SDI on the 900,000 loan"*.

24 The October Statement, which the Plaintiff saw on his return from holiday, showed a profit before commissions (being the contract price less the contract costs and the contract expenses) of $4,456,750. To that were added figures for interest earned, and from that were subtracted figures for outside commissions paid, leaving a profit for distribution of $4,511,901. Of that 50%, namely $2,255,950, was stated to be due to the Plaintiff. $714,000 of that, i.e. the sum of the first three items referred to in paragraph 21 above, had already been paid, so that the net sum specified as due was $1,541,950.

25 A similar statement was drawn up on 1st December 1994 (" *the December statement*"). The figures were very similar but not identical. The figure for total contract costs changed from $753,377 to $745,398. In respect of contract expenses the figure of $650,000 remained the same and the figures for "Bank interest and charges" and "Courier, fax and account charges" also remained the same. The figure for "C Eckman expenses" was stated as $9,830 and not $17,809. This statement produced a total profit for distribution of $4,521,880 leading to a total due to the Plaintiff of $2,250,940 from which was deducted the figure of $714,000 included in the earlier statement and a figure of $1,244,992 in respect of a payment made on 21st November (see paragraph 21 above). The net sum specified as due to the Plaintiff was $301,948.

26 The oral evidence given to the Royal Court by the Plaintiff, and not disputed by the Defendants, was that in 1995, following his return from holiday, correspondence took place between Mr Michault and the Plaintiff about the figures as a result of which the Plaintiff accepted the figures that had been given to him. Although the evidence that these exchanges took place in 1995 was undisputed it is clear to me, as I now explain, that they must have taken place in 1994 between the dates of the October and December statements.

27 The correspondence shows that the sequence of events was as follows. Firstly, the Plaintiff was provided with the October Statement. Then the Plaintiff delivered a manuscript note to

Mr Michault, containing some ten detailed queries on that statement. That note included the following:

> *"My review of the reconciliation J.J. made produced the following comments and questions.*
>
> *…*
>
> *7. How was $650,000 arrived at?*
>
> *…*
>
> *I made a reconciliation of everything that has been shipped to date.* Additionally, I have made an assessment of risks and what we ought to reserve if anything.
>
> *I suggest we recognise the number, review my comments on risks, decide if reserve ought to be done, and then make total distribution except for the 7,000 remaining pounds."*

28 Mr Michault later handed to the Plaintiff a detailed reply, which included the following:

> *"Response to your points on Saudi as follows:*
>
> *…*
>
> *7. At time of contracts signature I personally recommended $650,000 to cover all costs to signature as at that time our overall gross profit was considerably less than subsequent events turned matters into our favour. The case put to Jacques/Ray at that time was first and foremost in view of your very precarious financial status and the chance this contracts (sic) offered to allow you to have a decent capital to live on not knowing what your future would be. Jacques agreed on that basis as had we applied every penny cost the profit would have been considerably less to the company. The fraudulent documents changed all that but we have not changed our decision. The Saudi experience started in 1985 and at contract signature November 1991*
>
> | | |
> |---|---|
> | *Travel expenses* | *$ 360,000* |
> | *Entertaining* | *$ 6,000* |
> | *Demo expenses* | *$ 50,000* |
> | *Interest payment on $ 918,000* | *$ 173,000* |
> | *Fax, toll, couriers, notary charges* | *$ 60,000* |
>
> *No charges/costs were applied to these figures and contract expenses for:*

— legal fees (US/UK)

— Jersey Management/time fees relating to Saudi over A C (sic) year period.

— No portion of SDL company formation fees and annual Channel Islands corporate fees.

— No portion of overhead's (sic). Salary.

— No interest charges on funds personally lent by Jacques to the company.

— No portion of cash disbursements on our multiple visits to the US/Saudi.

— No portion of $240,000 start-up loan to SDL which has been refunded."

This document appears (see item 2) to have had some form of statement attached to it but it has not been possible to identify which that statement was.

In the last two paragraphs Mr Michault set out proposals for an interim distribution in respect of the second three shipments of 50% of $1,260,000 namely $630,000. In the last paragraph Mr Michault said that it was intended to proceed to a distribution "per attached statement" of 3 figures $780,277.50, $309,112 and $630,000.

29 The Plaintiff replied as follows:

"Patrick

Reference your comments (written) on the points I made on J.J's reconciliation.

…

7. First, let me say that I wasn't questioning the fact that there were accumulated costs or the integrity of the number. Rather, I was asking how the number was arrived at. You explained how you arrived at the (figure).

…

Concerning distribution and retention amounts I would appreciate discussion on this so that I may have benefit of your thoughts."

30 On 21st November 1994 Mr Michault instructed Mr Moodie to transfer £784,000 to an account of the Plaintiff from an account of Sidem. That figure was stated to be composed of £780,273 together with interest of £3,727 from 6th October 1994 to 21st November 1994. The £780,273, itself, was stated to be the Plaintiff's *"share due at 28/10/94"* and the note records *"The A/C on these first £ shipments being closed at 28.10.94"* The "£" sign is an obvious error for "3" – the lower case numeral of the same typewriter key. Someone has

calculated on the document that the dollar equivalent of £784,000 was $1,244,942.

31 On 22nd November 1994 Mr Michault instructed Mr Johnson to alter the figure in respect of "C Eckman expenses" which appears on the October Statement as $17,809 to $9,830. He also told Mr Johnson to amend a contract cost figure for "Mawarid commission" (the nature of which will become apparent hereafter) from $888,668 to $886,668; and the figure for the 10% retained on the first shipment under purchase order 1/32 from $724,340 to $724,370. Both these two amendments had been suggested in the Plaintiff's note referred to in paragraph 29. Mr Michault calculated that the sum due to the Plaintiff was $300,948; but this calculation does not appear to take account of the last two amendments. He asked Mr Johnston to send him a corrected statement.

32 By a further note on the same day Mr Michault instructed Mr Moodie to transfer to the Plaintiff $300,948 and $630,000. These two produce the figure of $930,948, which the Plaintiff admits having received.

33 The December Statement builds on the exchanges that precede it and seems likely to have been prompted by the request made by Mr Michault on 22nd November. It makes three significant alterations. First, it corrects the "Mawarid commission" figure to $886,668 instead of $888,668, thus reducing the total contract costs by $2,000 from $22,756,699 to $22,754,699. Secondly, it corrects the figure for "C Eckman expenses" from $17,809 to $9,530. Thirdly it gives credit for the $1,244,992 paid on 21st November. As a result it shows as due a figure of $301,948 as opposed to the $300,948 in fact paid.

34 I have dealt with these figures at what may seem inordinate length in order to show, first, why I have reached the firm conclusion that the correspondence thought in the Royal Court to have taken place in January 1995 in fact took place prior to 22nd November 1994; secondly, to show that the correspondence led, initially, to the payment out of $300,948 and then to an alteration in the December statement of some of the figures originally produced in the October statement; thirdly, to indicate the considerable scrutiny which Mr Michault and the Plaintiff gave to the relevant accounts.

35 Before the trial commenced it appeared that the principal matter in contention would be whether there was ever any contract for the payment to the Plaintiff of 50% of the profits from the MODA contracts. However, the Defendants accepted, as I have noted (see paragraph 19 above) at the trial that there was a contract, and attention rather belatedly focussed on the question of the accounts themselves, particularly in the light of the fact that by an amendment to the Answer in May 2001 the Defendants pleaded that five sizeable items should be added to the expenses incurred up to the end of 1994 or 1995 as the case might be. Advocate Young agreed and averred that all of these would, if they were to be taken into account, rank as contract expenses.

36 Of the four items in the October and December statements that between them made up

total contract expenses the last three were specific items about which there was no dispute, and not items that came within any of the descriptions of the additional contract expenses that the Defendants sought to introduce. In those circumstances attention inevitably focussed on the figure of $650,000.

37 By paragraph 7.2 of his Re-amended Order of Justice the Plaintiff pleaded as follows:

> *"The Defendants are estopped from*
>
> *…*
>
> *(b) denying that the figure for contract expenses of $650,000 for the period up to the end of January 1995 is binding, on the ground that the Defendants proposed that figure to the Plaintiffs in or about October 1994, the Plaintiff agreed that figure in or about January 1995, and thereafter the parties accepted that figure."*

38 The Defendants' claim at trial was that $650,000 was never agreed as a final figure for contract expenses as at the end of 1994 or the beginning of 1995; and that the figure of $650,000 was put forward with a view to assisting the Plaintiff and getting some money to him in what was, or was thought to be, his precarious financial position. They claimed that an account should be taken from the beginning of the negotiations for the contracts in (say) April 1984. They said that such an account would show that the contract expenses up to the date of signature were of the order of $1.8 million, (although their full extent may not then have been known), that they were greater as at the end of 1994, and that, in all, they now total something like $6,300,00. The evidence of Mr Beamish of Deloitte & Touche indicates that any determination of the "true" costs may well depend upon the allocation of indirect costs and the assumptions that are made in that respect.

39 On November 7th 1995 a further schedule was drawn up covering the last four shipments, and those receipts (less the penalties applied) on all seven shipments that had not previously been accounted for.

40 In January 1996 Mr Michault and the Plaintiff discussed a document *("the January 1996 statement")*, which purported to show income and expenditure from October 1994 until December 1995 and, also included a budget for expenditure for 1996. The income consisted of:

The total of (i), (ii) and (iii) was stated to be $7,414,248.55.

The expenses consisted of:

> (i) Saudi Bank charges made in 1995 in respect of a period from October 1994 to December 1995;
>
> (ii) RBS Letter of Credit charges less recoveries from SDI, all apparently in 1995;

(iii) Office Expenses in sterling which appear to have carried down as far as March 1996. These were then converted into dollars and then a further charge was made in dollars in respect of budgeted expenditure down to the end of 1996.

(i) the gross profit on the contracts after the distribution of $1,260,000 on 22nd November 1994; that is the distribution, which produced a payment of $630,000 to the Plaintiff;

(ii) Interest from receipt of funds from 1st December 1994 to 30th November 1995;

(iii) Interest on a figure of $918,000 as at dates in January, March, June and September 1995.

41 In the course of the discussion with Mr Michault some of the figures in category (iii) were increased. As adjusted the total expenses i.e. items (i), (ii) and (iii) totalled $900,028.85. When that figure was deducted from the $7,414,248.55 it produced a net profit of $6,514,219.70. $2,000,000 was then deducted as a “Temporary Reserve” leaving a total for distribution of $4,514,219.70. 50% of that was specified as due to the Plaintiff less a sum of $26,333 described as “Paid to FPC for loan to Bazzaz”, leaving a balance of $2,230,776.85.

42 In February 1996 a further distribution of $2,230,776.85 was made, of which the Plaintiff acknowledges receipt in his letter of 25th April 1998. By a document of February 7th 1996 Mr Michault had instructed Mr Moodie to proceed to distribute that sum and to add to that figure $105,000 and $14,000, the latter figure being a retainer at the rate of $7,000 per month in respect of January and February 1996.

43 In January 1998 the Plaintiff's solicitors wrote to the Defendants asking for payment of $1 million, being 50% of the $2 million Temporary Reserve together with interest. By a letter of 18th March 1998 Sidem claimed that the net sum due to the Plaintiff was $381,521. On 25th April 1998 the Plaintiff replied challenging those figures and contending that the sum that was due to him was $2,862,654. In May 1998 Mr Moodie produced to the Defendants' solicitors a calculation of profits based on the accounts of the Defendants filed with the Comptroller of Income Tax. This appeared to show that the Plaintiff had been overpaid by $46,000. Yet at the hearing Mr Moodie gave evidence that the Plaintiff was, in his opinion, entitled to $1,000,000 and said that the figures that he had put forward were for negotiating purposes.

44 On 6th August 1999 the Defendants' solicitors forwarded to the Plaintiff's solicitors a calculation of monies owed showing $425,063 as due to the Plaintiff. The Defendants pleading of that date accepted that that sum was due.

45 On 25th July 2000 the Plaintiff's solicitors sent to the Defendants' solicitors a calculation by the Plaintiff of the monies due to him, which responded to the calculation enclosed with the letter of 6th August 1999. The Plaintiff contended that the amount due to him was **$2,191,784.11** plus interest, legal fees, court costs and associated costs.

The blank letters.

46 In May 1991, according to the findings of the Royal Court, Mr Michault arrived in Saudi Arabia together with Bruce Makas, the Managing Director of SDI, and Mr Bob Gall the Vice President of Martin-Marietta, the manufacturer of the ammunition. There was a dispute as to whether a Mr Hossam Shoeb of Mawarid was also there. On that occasion Mr Michault handed to the Plaintiff some SDL stationery signed by him in blank. The Plaintiff accepted in evidence that he was given these letters *("the blank letters")* for the purpose of making minor alterations to the contracts, thus avoiding the need for Mr Michault to come out to Saudi Arabia for that purpose. His evidence was that when he ceased to be Managing Director of Mawarid in September 1991 he left the blank letters (save for one that he had used) in a filing cabinet since there was still a possibility of minor changes having to be made to the contract.

47 After the Plaintiff had left Mawarid someone got hold of at least two of these blank letters and filled them in so as to state, largely in Arabic, and above the signature of Mr Michault, that SDL guaranteed to pay a commission of, in one case, 3%, and in another case, 5% of the total contract value to an account at a bank in Switzerland. The documents were falsely dated 23rd December 1990. Mr Michault learnt that this had happened in 1993 when the letters were presented to him by a Mr Salim Ibrahim Zeidan. Mr Zeidan told Mr Michault that he had been contacted by the person to whom the commitment was ostensibly owed, who had asked him to contact Mr Michault in order to tell him that he had commitments that should be honoured. Mr Zeidan produced a translation of these two documents. In a letter to Mr Michault of 2nd December 1993 he said that the documents had been *"received via Mawarid"*.

48 On 14th September 1993 Mr Michault faxed to Prince Fahad Bin Khalid, the Vice Chairman of Mawarid, a letter in which he notified him that the blank letters had been used to make commitments on behalf of SDL. He requested that any such action should cease and that any remaining blank letters should be returned. He, also, asked for an urgent meeting in London. The letter terminated the relationship with Mawarid with immediate effect. It appears, however, that a notice had already been given, on 2nd August 1993 terminating the relationship from 2nd February 1994.

49 On 8th February 1994 a memorandum of agreement was signed between Abdullah Abordon, on behalf of Mawarid, and Mr Michault on behalf of SDL, which provided as follows:

> *"1. Saco Defence Limited will compensate Mawarid Electronics Limited the*

amount of US$11 million for services performed under contracts 1/670/412/108 AA and 1/671/412/109 AA.

2. The details of remuneration to be paid to Mawarid Electronics Limited will be specified in mutually agreed writing under a separate letter. This will include an immediate payment of US$886,668 and additional amounts as certain actions (to be specified in another document) occur."

It appears from the Plaintiff's evidence that the $11,000,000 was a lesser commission than had originally been agreed.

50 By letters dated 12th February 1994 Mawarid undertook, in short, to do everything necessary to cause SDL to be paid in full under the MODA contracts and to persuade MODA not to impose delay penalties, to conduct an internal review in respect of the use of the blank letters and to take decisive action if improper conduct had occurred. They, also, agreed *"to take full legal and financial responsibility for any commitments made by (Mawarid) in the Kingdom in its own name or on behalf of SDL to Saudi individuals or Saudi companies in relation to the Contracts"*. This undertaking opened the way to SDL making payments to Mawarid.

51 By a letter of 21st February 1994 Mr Harvey, on behalf of SDL specified a timetable for the payment of the $11,000,000 beginning with an immediate transfer of $886,668. Payment of the remainder was dependent upon fulfilment of a number of conditions such as receipt of various Certificates of Final Delivery and reductions by SDL's bankers of the value of the relevant Performance Bonds. In the event $886,668 was the only amount transferred to Mawarid.

The issues in respect of the blank letters.

52 The facts outlined above have given rise to two issues. First, the Defendants claim that the Plaintiff owed them a duty of care not to use or allow the use of the blank letters other than for the purpose for which they were given; and that he was in breach of that duty because, so the Amended Answer claimed at paragraph 4(5)(iv), "the unauthorised misuse of the letterheads was carried out by the Plaintiff or with the knowledge or involvement of the Plaintiff". The Defendants claim that, on account of this misuse, the Defendants lost their relationship with Mawarid and the business and profits associated therewith. They claim damages in an unspecified amount and the return of $5,147,049, which is, they say, the amount already paid to the Plaintiff. The Royal Court found there was no evidence that the Plaintiff had any knowledge of, or participation in, the misuse of the blank letters and did not accept that he was in breach of any contractual or tortious duty of care that led to the breakdown of the relationship with Mawarid. The Court dismissed that part of the counterclaim, which related to this issue.

53 Secondly, the Defendants claimed in their pleadings that the balance of $10,113,332,

which was not paid by SDL to Mawarid, was compensation to SDL from Mawarid for the misuse of the blank letters and the termination of the contract by SDL. The Plaintiff claims that, since it only became necessary to pay Mawarid $886,668 the profits were $10,113,332 more than they would have been had the full $11,000,000 been paid. He accepts that, to that extent, the profit was a windfall but asserts that it was a profit none the less, of which he his entitled to 50%.

The form of the Account

54 The Order made by the Royal Court was that an account should be taken of the MODA contracts upon the basis that the contract expenses to the end of 1995 were as stated in the October 1994 and December 1994 statements and that an account was to be taken on that basis for the period starting 1/1/96 under the directions of the Master. The Plaintiff's pleading was to the effect that it was not open to the Defendants to quarrel with the figure of $650,000 in respect of contract expenses *"for the period up to the end of January 1995"*: see paragraph 37 above, and the Plaintiff concedes that the Royal Court was in error in taking a starting date of 1st January 1996 for the purpose of the account. It may be that the Royal Court was confused because, in the course of his opening, Advocate Le Quesne said that the Plaintiff's case was that the account should be taken from 1st April 1996 and that *"the figures up to 1996 are done and dusted"* although at a later stage he said that the contract expenses were established at the end of 1994 *"and we look at the matter from then onwards"*.

The Issues

55 The issues that the Royal Court had to decide can, broadly be summarised as follows:

(i) Was there some agreement between the Plaintiff and the Defendants that precludes the Defendants from now contending that the contract expenses as at the end of 1994 were greater than specified in the October or December statements? If so what was the agreement and what is its ambit? If not, are the Defendants estopped from making the claims that they now make in respect of contract expenses?

(ii) Does the figure of $10,113,332 fall to be excluded from the income attributable to the two contracts?

(iii) Does the Plaintiff have a liability to the Defendants in respect of loss allegedly caused by a breach of his obligations in respect of the safeguarding of the blank letters.

(iv) What should be the form of the account?

Was there an agreement?

56 The reasoning of the Royal Court in relation to the $650,000 is not entirely clear. Paragraph 63 of the judgment records, correctly, that the Plaintiff neither asked for, nor suggested, the figure of $650,000. It goes on to find that the figure was put to him, he questioned it and accepted the explanation. In paragraph 83 the Court holds that the figure could not have been a genuine charge and that it was *"a decision made that reflected on the MODA contracts"*. In paragraph 85 the Court decides that it would be inequitable to allow the defendants to go back on their fixed sum of $650,000 in order to re-open the expenses before that time. In paragraph 86 the Court records that it had considered the doctrine of consideration *"so far as it applies to variation or forbearance"*, states that it did not see that this was a matter of law, and concludes that putting the expenses at $650,000 in 1995 was not a variation or forbearance but *"an agreed figure made by the guiding force of a company whose very existence was born of a pragmatic necessity"*. I take that to be a finding that there was an agreement, albeit not by way of variation of the original contract, that the figure for contract expenses should be capped at $650,000 and that that agreement was, as a matter of fact, supported by sufficient consideration to make it binding.

57 I have set out in paragraph 38 above the contentions of the Defendants at the trial. Advocate Young has developed those contentions before us and has, in particular, submitted, that the October and December statements were in the nature of management accounts and subject to change. Further the bargain between the parties was that the Plaintiff would get 50% of the net profits at the time when those net profits could finally be calculated. Even though payments were, in the event, made on account, the contract nevertheless contemplated a final account. Any interim account should only be regarded as provisional until the final accounting, not only in the sense that new receipts and expenditure would be received or incurred after any interim accounting, but also in the sense that figures put in any interim account as expenses incurred at or prior to the date of any such account could be revisited at any time up to the final account. He also emphasised that, if there was any agreement as to figures, it was necessary to identify what were the figures agreed.

58 In my judgment the Royal Court was entitled to find that there was an agreement between the Plaintiff and the Defendants whereby they agreed the figure of $650,000 as the figure for contract expenses (in addition to the three other items that make up the total under that heading) as contained in the October and December statements.

59 The evidence of the Plaintiff at trial, which the Royal Court must have accepted, was that, although he had queried some of the figures in the October statement, and, in particular, the origin of the $650,000 figure he came to accept it, as appears from paragraph 7 of the note of his to which I have referred in paragraph 29 above *(*"I wasn't questioning the fact that there were accumulated costs or the number"). Indeed his evidence went further than that and was to the effect that he accepted the figures in both statements.

60 The evidence before the Royal Court was not as satisfactorily adduced as it could have been in a number of respects. First, it proceeded upon what I regard as the erroneous basis that the correspondence questioning the figures was in 1995 and not 1994. Secondly,

attention was at times exclusively focussed on the $650,000 figure (no doubt because that was the figure most in issue) as opposed to the statements as a whole. Thirdly, it was not entirely clear whether the Plaintiff's acceptance either of the $650,000 or of the account as a whole was express or tacit or was said to arise from the correspondence and the acceptance of the money paid without demur. Despite these defects, which are replicated in the judgment of the Royal Court, the evidence taken as whole satisfies me that the figures in the October statement were put forward, commented on and, in consequence, partly changed. Payments were made in November in the light of the exchanges that had taken place. Later the December statement incorporated the changes that had been discussed. The Plaintiff was content to agree those figures, i.e. the October statement figures as marginally altered in the December statement, and to accept the monies paid in November without further demur. The figures in the December statement became agreed figures.

61 I do not accept that these figures should be regarded as provisional in respect of the receipts and expenses as at the dates to which the statements relate. The internal correspondence between Mr Michault and Pinnacle shows that in October 1994 he was instructing Mr Moodie and Mr Johnson to draw up an account to be presented to the Plaintiff in respect of the first three shipments. That account was, as he put it in his note of 21st November 1984, *"closed at 28th October 1994"*. The figures were put forward to the Plaintiff and accepted by him without any suggestion that they were temporary or provisional so that the $650,000 figure could be increased at some subsequent date, for example by the inclusion of all or any of those matters, which, in the memorandum to which I have referred at paragraph 28, Mr Michault made clear he was going to exclude.

62 I do not ignore the contention that what was happening in late 1994 was, as in 1991, that the Defendants, as the Plaintiff understood, were taking a low, and probably inaccurate, figure for contract expenses in order to allow the Plaintiff to get some money at that stage, upon the footing that that figure could, if appropriate be increased later, after receipts had come in from later shipments. The Royal Court rejected this contention. In my judgment it was right to do so in the light of the documents, which do not support it, and the Plaintiff's evidence, which the Royal Court must have accepted, which rejects it. The high watermark of the Defendants' argument in this respect was that in Mr Michault's note, referred to in paragraph 28 above, he pointed out that the $650,000 figure had been recommended by him in November 1991 as an act of generosity. The note does not suggest that the need to assist the Plaintiff, who had by now received $714.000 by way of distribution, remained as potent a driver as it was said to have been three years earlier, and claims as a point in favour of the acceptance of the $650,000 figure that the Defendants did not intend to change it, although they might have done. I cannot read this as indicating to the Plaintiff that the Defendants reserved the right to change the figure if they chose. In addition, as the Royal Court found, the Plaintiff had the figure presented to him and accepted it. The fact, if it be such, that there was an element of generosity in making the agreement cannot alter the fact that an agreement was made.

63 I am fortified in coming to the conclusion that I have reached by a consideration of what

happened after 1994. The next accounting, which led to the distribution of over $2,000,000 in February 1996, took up where the previous accounting left off or, at any rate, did not overlap with it. No attempt was made to revisit the figures in the previous statements. Later, when the Defendants came to plead their case in August 1999 they expressly averred, in what was then paragraph 8(3) of the Answer, as follows:

> *"Accounts prepared by a firm of independent accountants have since been drawn up for the years '96 onwards, the Plaintiff having accepted the calculation of 50% of the net profit up to and inclusive of 1995"*

When asked for particulars as to how this acceptance had come about the Defendants said:

> *"Attached are copies of two schedules that the Plaintiff tacitly accepted in his notes…"*

In fact nothing was attached to the particulars but Advocate Young confirmed to us that what was intended to be attached were the October and December statements. These pleadings remain on the record. Similarly in a letter dated 22nd August 2000 the Defendants' then Advocate, after dealing with a number of items contained in a calculation of the Plaintiff's as to what was due, made in response to one of the Defendants, ended by saying:

> *"Your client has previously accepted the majority of the expenses to which he has now raised objection.* At the time that the first distributions were made to your client, necessitated by your client's bankruptcy and not because monies were actually then payable, your clients raised queries and was satisfied with the calculation. Your client cannot now seek to reassess the expenses"

I agree. Equally the Defendants cannot do so either.

Authority

64 Advocate Young submitted to us that Mr Michault had no authority on behalf of the Defendants to make any binding agreement with the Plaintiff in relation to the figures, since he did not become a director of SDL until June 1999. Such want of authority was never pleaded, nor was it established to the satisfaction of the Royal Court, which took the view "that the companies were regarded by the Michault family as their own businesses with no real concept of the necessity for a corporate structure" (paragraph 54). In the absence of a plea of want of authority I do not think that we would now be justified in holding that Mr Michault had no authority, actual or apparent, unless we could be satisfied that all the relevant material had been disclosed, and that the Plaintiff had had an adequate opportunity to deploy it and to ask questions directed specifically to the point. I am not so satisfied.

65 In any event, it seems to me from the material that is before us, which is not the totality of the material before the Royal Court, that Mr Michault had either actual, or at least apparent,

authority on behalf of the companies. He is described in the first paragraph of the judgment as having been in 1987 a director of Sidem, and Advocate Young was not in a position either to show us that that was wrong or that he ceased to be such a director before 1994 or 1995. Further the documents show that Mr Michault was in a position to give instructions to Pinnacle both as to the drawing up of an account and as to payment out of very large sums of money from the bank accounts of both companies to, amongst others, the Plaintiff. It was he who was left to present the figures to the Plaintiff and discuss them with him, and he who told the Plaintiff what he was to receive and saw to it that he did so. This must have appeared entirely normal to the Plaintiff since Mr Jacques Michault was elderly and Mr Harvey was not a family member. At the lowest he was allowed by the Defendants to appear to the Plaintiff as authorised to agree figures with him and to authorise their payment, as he did.

Consideration

66 The next question is whether the agreement was supported by consideration. I have no doubt that it was. By agreeing the figures the Plaintiff forewent any opportunity to challenge them and to contend, for instance, that the figure for contract expenses of $650,000 was excessive. In addition the parties were saved any further accounting in respect of the figures as at the date of the accounts, which was calculated to benefit all of them.

Estoppel

67 In the light of my conclusion that there was an enforceable agreement between the Plaintiff and the Defendants, it is not necessary to determine whether, absent such agreement, an estoppel would arise. Had it been necessary to do so, it seems to me that the Plaintiff established that the parties proceeded on the basis of a common assumption, which they either shared or in which the Plaintiff acquiesced, that the figures in the December statement, and certainly the figure as to contract expenses of $650,000, was what was to apply for the purpose of the profit sharing agreement between them; and that it would (as the Royal Court found) be inequitable for the Defendants now to resile from that assumption, having regard to the long time for which it had been held and the difficulty of dealing many years later with figures going back to the period between 1984 and 1994 which had previously been treated as established.

Dates

68 The parties are agreed that the Court was wrong to decide that the account should be taken for the period commencing 1st January 1996, and that, if it is not to go back to the beginning of the contract, it should start in 1995. At the hearing in the Royal Court it was thought convenient to take the 1st January as a starting point since nothing material was likely to have occurred between 1st December 1994 and that date. I am content to adopt that pragmatic approach, subject to one point. Most of the items in the December statement

are not date specific. The contract price and the contract costs had all been received or paid prior to that date, as had the contract expenses. The outside commissions had, also been either paid or incurred. But there are some figures that are specified as being carried down only to a certain date. The figure of $2,951 represents interest down to 5th November 1993. The profit on investment of $252,666 is a figure at 6th October 1994. The figure of $29,534 in a figure carried down to January 1994. The account that is to be taken should, where appropriate, carry on from those figures. Thus, the $252,666 should be taken as what it is said to be namely the figure as at 6th October 1994 and not as if it was a figure as at December 1st 1994 or 1st January 1995.

The form of the Order

69 Accordingly in my judgment and, subject to any argument as to the form of the Order, we should vary paragraph 1 of the Order of the Royal Court so as to read:

> "(i) that an account shall be taken of the profit on the MODA contracts upon the basis that total contract expenses to the end of 1994 were as stated in the statement of December 1994 annexed to this order;
>
> (ii) that the account shall be taken on the basis set out in sub-paragraph (i) for the period commencing 1st January 1995, under the direction of the Master of the Royal Court, to whom any application must be made by way of summons."

The intended effect of such an order and of this judgment, is that it should not be open to the Defendants, or the Plaintiff, to contend that contract expenses in excess of $745,338 had been expended or incurred by December 1994, or that the other items in the account i.e. the contract price, the contract cost, the interest figures, and the figures for outside commission differed from the amounts stated in the December statement.

The figure of $10,113,332.

70 The Royal Court held that the $10,113, 322 figure was an exceptional profit and should be brought into the account: paragraph 82.ii. By that I take the Court to have meant that the accounts should be taken upon the basis that that figure should not be excluded from the income attributable to the two contracts or, to put it another way, should not be treated as a charge against that income. If so, I agree with its decision.

71 The $10,113,332 is an amount that has not been paid and has, accordingly not, heretofore, been treated as an expense to be deducted from the income in order to determine the net profit. It is convenient to describe it as a profit, provided that it is understood that the profit arises from the fact that receipts have not been diminished by an expense that has not been incurred. The Defendants now say that the $10,113,332 is not to be regarded as a profit in any sense, but as a form of compensation for Mawarid's breach of their obligations in respect of the blank letters, and that in determining what were the profits from the MODA

contracts a figure of $10,113,332 must be deducted. In my view the evidence provides no support for such a conclusion.

72 After the misuse of the letters had been discovered a compromise agreement was reached in February 1994 as to the amount that Mawarid should be paid for their services in connection with the two MODA contracts. That agreement provided for payment in stages. In the event only the first stage payment was made. Mr Michault accepted at the trial that Mawarid had not fulfilled the conditions for the payment of the balance. This is not surprising since in Particulars given on 27th June 2001 it was averred on behalf of the Defendants that Mawarid "manifestly failed to perform any of the functions and acts in accordance with the terms of (the Letter of 21st February 1994)". But for this failure SDL might have had to pay $11,000,000 in commission to Mawarid. If SDL had paid, or had to pay, the whole of that sum the payment would have reduced the profit on the contracts. But, as it happened, SDL did not have to pay any more than $886,668. So the charge that fell to be made, under this head, against income was only $886,668.

73 In those circumstances I can see no basis upon which the Defendants are entitled to say that what should have been deducted is the full $11,000,000. To my mind, that could only be so if it had been accepted by Mawarid and SDL that $10,113,332 was due by SDL to Mawarid under the compromise agreement, but that at least $10,113,332 was due by Mawarid to SDL as damages for breach of contract, and that the two amounts could be set off. The Defendants would then have incurred an obligation to pay commission, which would have reduced the profit on the contracts; and that obligation would have been satisfied by a set-off against damages for breach of contract. But, in the events which happened, the commission in excess of $886,668 was never earned at all.

74 Advocate Young has submitted that this is not a question that the Royal Court should have resolved. It should have been left to the taking of the account, in the course of which questions of accounting treatment and practice might have to be addressed. I disagree. The issue as to how the $10,113,332 is to be treated was raised by the Defendants and argued by them at the trial. Whether or not that figure is properly characterised as compensation for breach of contract or as a potential expense of the contract, which in the event the Defendants did not have to pay, is, to my mind, a legal, not an accounting, question. Nor is it material to know whether accountants would classify the resulting profit as exceptional when compiling company accounts. The relevant question is whether the $10,113,332, although it has never been paid or incurred, should be deducted for the purposes of determining what is the profit from the MODA contracts as contemplated by the agreement between the parties. In my judgment it should not.

75 I observe that in his note set out at paragraph 28 above Mr Michault recognised, I think rightly, that the overall gross profit had significantly increased when *"subsequent events turned matters to our favour"* – a reference, as Advocate Young accepted, to the windfall that arose as a result of the fact that only $886,688 of the $11,000,000 had to be paid to Mawarid.

The blank letters.

76 The Royal Court found that the Plaintiff was not in any way in breach of his duty, whether contractual or tortious, because the blank letters were misused. There was, indeed, no evidence that the Plaintiff had been party to the misuse of the blank letters. He, himself, had only used one of them for a contract amendment for which he obtained Mr Michault's prior consent. Mr Michault expressed the view that the Plaintiff would have accepted the removal of the blank letters and that Prince Fahad Bin Khaild was involved, but that is no evidence of the truth of his opinion. That leaves the question whether the Plaintiff was in breach of a duty of care owed to the Defendants and whether that had caused any proven loss.

77 The evidence established that the blank letters had been handed to the Plaintiff as Managing Director of Mawarid solely for the purpose of effecting in Saudi Arabia minor amendments to the contract. The evidence of both the Plaintiff and Mr Michault was that the documents were given to the Plaintiff and accepted by him in that capacity and for that purpose. The Plaintiff accepted that he owed a duty to the Defendants to keep them safe when he was Managing Director of Mawarid. He did not accept that he owed any such duty thereafter. When he left the employ of Mawarid the remaining blank letters, on the findings of the Royal Court, were left in a filing cabinet for future use. The Plaintiff accepted that he did not give specific instructions that the blank letters were not to be used except for minor contractual amendments. The Defendants say that he should have done.

Bailment

78 In those circumstances it seems to me that, insofar as there was a bailment of these documents, it was a bailment to Mawarid. The documents were taken and misused after the Plaintiff ceased to be Managing Director of Mawarid and it is Mawarid, if anyone, who is responsible if the terms of the bailment have not been observed by reason of the fact that the documents were obtained from their custody.

79 So far as any personal duty of the Plaintiff is concerned, I am prepared to accept that it was implicit in the Plaintiff's agreement with the Defendants, whereby he agreed to assist them in connection with the completion of the MODA contracts, that he would take reasonable care to see that the blank letters did not fall into the wrong hands. I do not accept that it was established that the Plaintiff was bound not to allow the blank letters out of his control. The letters passed out of his control when he ceased to be Managing Director of Mawarid in September 1991. At that time there could still be a need to use them for the purpose for which they had been given, particularly since the contracts were not signed until November 1991. In those circumstances the Plaintiff was not, in my view, in breach of any duty in leaving them at Mawarid. Nor do I think that it was incumbent on him to leave instructions, which would constitute a statement of the obvious, that they were not to be used except for the purpose for which they had been given.

80 But, even if I am wrong on that, it cannot realistically be supposed that the misuse of the documents that took place was the result of any failure to give such instructions. No one, least of all the person who sought to deploy them, could have thought that the use to which they were in fact put was a proper one. Nor can it sensibly be suggested that if the Plaintiff had given such instructions it would have made any difference to the persons who fraudulently misused the documents.

81 In my judgment the Defendants have, therefore, no sustainable claim against the Plaintiff in relation to the blank letters. I am glad to be able to reach such a conclusion since I note that the allegation that the Plaintiff had been involved in the fraudulent misuse of those letters was not made until shortly before the trial and had never been suggested in the correspondence from 1998 to 2000. The lesser allegation of negligent breach of duty was not pleaded at all.

82 Had I reached a different conclusion I would have had considerable reservations as to what damages properly flowed from any breach. The Defendants have not, in the event, been exposed to a successful claim for the 3 % and 5% commission. Instead they claim that, as a result of the Plaintiff's default, the blank letters were available to be misused by Mawarid; SDL then justifiably terminated its relationship with Mawarid on account of such misuse, as a result of which they have suffered loss in the form of future business, which they have not received. To my mind the cause of any such loss, the amount of which was wholly unproved at trial, was the discovery of what was, or was believed to be, dishonest behaviour on the part of Mawarid and not any fault of the Plaintiff.

83 Even had I thought that the misuse of the blank letters was caused by some breach of duty on the part of the Plaintiff, I would not have regarded that as disentitling the Plaintiff from claiming that the $10,113,332 was part of the profits of the contracts. The Defendants say that, unless the $10,113,332 is treated as an expense of the contract the Plaintiff will have profited from his own wrong. This is not so. The fact that $10,113,332 did not have to be paid to Mawarid and was, thus, not an expense of the contract, arose because Mawarid failed to comply with the conditions that they had to satisfy in order to earn it.

Conclusion

84 Accordingly, subject to any submissions of Counsel as to the form of the Order, I would vary the Order of the Royal Court in the manner that I have suggested in paragraph 69 above, but would otherwise dismiss the appeal.

THE PRESIDENT:

I agree.

Vaughan, J.A

I agree.