

Carl Eckman v (1) Saco Defense Ltd

Jurisdiction:	Jersey
Judge:	F.C. Hamon, OBE, Jurats A.P. Quérée, S.C.A. Le Brocq
Judgment Date:	17 October 2001
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Text

[2001] JRC 206

ROYAL COURT

(Samedi Division)

Before:

F.C. Hamon, **Esq.**, OBE, **Commissioner and** Jurats A.P. Quérée **and** S.C.A. Le Brocq

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

Advocate D. Le Quesne for the plaintiff

Advocate S. J. Young for the defendants**Authorities**

Mayo v Cantrade (1998) JLR 17.

Claim by plaintiff in contract for commission payment and for accounts to be taken to determine the amount.

Held: the court had inherent jurisdiction to order the taking of accounts.

Judgment for plaintiff, and order for accounts to be taken under the directions of the Master.

THE COMMISSIONER:

- 1 Some time at the end of 1987, a meeting was held between Washington lawyers and Mr. Patrick Michault, a resident of Switzerland and a director of Sidem International, a company incorporated in Canada. The meeting was held in Saco, Maine and was to decide how best to sell armaments and ammunition outwith the United States of America.
- 2 Sidem International Limited ("Sidem") had been founded by Mr. Jacques Michault, the father of Mr. Patrick Michault. It is a company that, in 1949, extended into the armaments business (or as Mr. Patrick Michault put it "the defence business").
- 3 In 1984, Sidem was requested by the U.S. government to sponsor a high powered delegation at the presentation of certain armaments and ammunition to the NATO forces in Belgium. The substantial sponsorship costs were borne by Sidem. This was not altruistic. A contract value of \$54M was being mooted.
- 4 At the meeting in Maine a modus operandi was suggested and was later confirmed by a Jersey resident, Mr. Ray Harvey. Mr. Harvey has been an employee of Barclays Trust International Limited where he met Mr. Jacques Michault with a view to the Bank providing certain banking facilities or administration services to Sidem. Mr. Harvey left Barclays to commence work with Compendium Trust Company Limited. He left Compendium to become a director of this arms dealing company at the end of 1989.
- 5 Sidem is part of a group of companies which included Saco Defense Inc. Mr. Harvey suggested a solution to the problem raised at the meeting in Maine in a letter to the President of Saco Defense Inc. on 29th May 1987.

"Jacques Michault explained to me the problem facing Saco Defence in dealing

with the payment of commissions to obtain foreign sales. I believe this is because of the size of the commission required in some areas of the world and the law and regulations in your country, which is quite restrictive in this respect.

Unfortunately, I have not had a chance to discuss the problem at any length with Jacques, but I think the solution which immediately comes to mind is for Saco Defense to give an exclusive marketing licence to an overseas company bearing a similar name. Then Saco Defence should deliver to an end user an agreement guaranteeing the performance of the product as the manufacturer.

The foreign company can be called for example, Saco Defense (Overseas) Limited and I would suggest it is incorporated in the U.K., but controlled outside that country, say in the Channel Islands, to avoid U.K. tax. It might also be preferable for it to be subject to Jersey tax, which is 20% of profits, but the company should end up with no profit, having paid your company for the goods and commissions to others and its own expenses.”

- 6 Saco Defense Limited (the first defendant in this action) was duly formed. It is an Isle of Man company administered in Jersey and for a time managed in Sark. Income into Saco was passed immediately to Sidem which passed 90% of the profits to a company called Hugin Investments Limited and paid tax on the remaining 10%.
- 7 Once the company was set up there were extensive discussions with the Saudi Arabian Ministry of Defence and Aviation (“MODA”). All these preparatory negotiations took time, money and care, for the stakes were high. Eventually, Saco Defense Inc. lent Sidem \$240,000 at a rate of 10% per annum.
- 8 Progress was slow until in 1989, the plaintiff, Mr. Carl Eckman made contact with Mr. Jacques Michault in London.
- 9 The representative in Saudi Arabia was a man called Khalid Rasheed who had been introduced to Sidem by the ambassador to the USA, Prince Bandar Bin Sultan and by a senior member of the Saudi Royal Family.
- 10 Relationships between Sidem and Rasheed and his company in Riyadh had broken down and in a powerful letter written by Mr. Patrick Michault on Sidem's behalf (from the company's address in Jersey) Mr. Rasheed was sacked.

“You are no longer authorised to present yourself as an agent for Saco Defense Inc. in Saudi Arabia”.

- 11 Mr. Eckman had over twenty years of business dealings with the Saudi Arabian government. He had originally worked there for a company named E Systems of Dallas Texas. That company dealt in electronic security systems. Because the chairman of that

company had been a close friend of Mr. Jacques Michault, the plaintiff had come to know the Michault family. He had also had dealings with a company called Mawarid. There were three arms to the Mawarid group – electronics, food and finance. Mawarid is owned by Prince Khalid Bin Abdullah who is the son of the brother of the founder of the Kingdom.

- 12 The plaintiff had left E Systems to become the managing director of Mawarid Electronics Limited (“Mawarid”).
- 13 Mawarid owned extensive manufacturing facilities in a joint venture with the Swedish explosives firm, Nobel. They had been making explosives for the Saudi Arabian highway system. They had silos, buildings and highways lying idle. Mr. Jacques Michault had much experience of such matters. He had helped Iraq to build an ammunition factory. The defendants needed a strong presence in Saudi to negotiate for them. The plaintiff took the employment for two years from September 1988 to September 1991. From September 1991 to September 1993 the plaintiff was what he called the “senior consultant” to the Mawarid group.
- 14 On 2nd February 1990, Saco Defense and Mawarid Electronics entered into an agreement for the development of markets and sale for “products” (such as machine guns and ammunition). The agreement is signed by the plaintiff as managing director of Mawarid Electronics and RSR Harvey as director of Saco Defense Limited.
- 15 All seemed to be going well until in late October 1990 Mr. Patrick Michault was invited to Riyadh by a Dr. Bill Jones, one time managing director of Mawarid but then adviser to the chairman of the group. In Riyadh he met Dr. Jones, Prince Fahad and Prince Saud where he was told that Mr. Eckman had been declared bankrupt and had borrowed substantial sums of money from employees of the company. Why it was necessary to summon Mr. Michault to Riyadh is unclear. Mr. Michault was “shocked” because the plaintiff was about to be replaced as managing director.
- 16 When Mr. Michault returned to London, he telephoned the plaintiff. The position was explained to him. The plaintiff explained the position to us. His explanation was perfectly understandable. Two business partners had been declared bankrupt. The plaintiff followed suit. He still had substantial funds available to him and he was discharged from his bankruptcy in September 1991. We are convinced that date is correct despite an attempt during the trial by the defendants to refute it with written secondary evidence.
- 17 The plaintiff was closely cross-examined by Advocate Young. He recalled having explained his financial situation to Mr. Michault. We can see little of consequence in all that evidence because Mr. Patrick Michault continued to deal with the plaintiff and he was content with the explanations given to him.
- 18 In may 1991, a delegation arrived in Saudi Arabia. With Mr. Patrick Michault were the

managing director of Saco Defense Inc. Mr. Bruce Makas and the Vice President of Martin-Marietta (the manufacturer of the machine-gun ammunition), Mr. Bob Gall. The contracts were close to completion. Because of the grammatical precision demanded by the Saudi's, blank letters were signed by Mr. Patrick Michault as "President" (whatever that may mean) of Saco Defense Limited.

- 19 We heard that the blank signed letters were handed to the plaintiff in the presence of Mr. Bruce Makas, Mr. Bob Gall, Mr. Hossam Shoeb (of Mawarid Electronics) and by Mr. Patrick Michault.
- 20 None of Mr. Makas, Mr. Gall or Mr. Shoeb were called as witnesses but we went into extraordinary detail of how the plaintiff in the presence of these people placed the documents in his safe. We heard from Mr. Patrick Michault where the safe was; we were given a sketch of the office showing the exact position of the safe and we were told that "the key to that safe was in fact on the plaintiff's main keyholder that had his house keys and his car key on the same chain, the car being a black convertible Mustang which had been passed down to him by Dr. Bill Jones".
- 21 The plaintiff was adamant that there was never a safe in his office and that he put the documents in his desk drawer. We cannot understand this extraordinary statement and denial. It proves nothing. We know for a fact that after the plaintiff had left the company, someone attempted to misuse the letters. They predate the time that they were handed over in blank. The Court accepts the fact that there was no safe.
- 22 It is a strange story. We have two letters in Arabic and two English translations of those letters. The translator, Mr. Zeidam, was handed the letters by an unknown person, apparently the intended beneficiary.
- 23 The translation reads:-

"Date: 23 Dec. 1990

CONSULTANCY AGREEMENT

SUBJECT: 40 MM mk 19 MOD 3 PURCHASE CONTRACT

SACO DEFENSE LTD GUARANTEE TO PAY 3% FROM THE TOTAL CONTRACT VALUE FOR THIS CONSULTANCY AGREEMENT AND THE AMOUNT WILL TRANSFER TO THE ACCOUNT NUMBER 411009 AT THE FOLLOWING BANK ADDRESS:-

BANQUE DE COMMERCE ET DE PLACEMENT S.A.

1211 GENEVE 1. RUE CHANTEPOULET 25. CP 215

TEL (022) 732200 – TELEFAX (022) 7347811

THE PAYMENT IT WILL BE AS FOLLOW:-

10% OF THE TOTAL COMMISSION WHEN THEY OPEN THE L/C.

90% OF THE TOTAL COMMISSION IN PRO-RATA BASE.

THIS CONSULTANCY AGREEMENT IS IRREVOCABLE AND UNCHANGED
FROM SACO DEFENSE LTD.

P. MICHAULT

THE PRESIDENT”

- 24 There was no independent translator of the Arabic. We only note that the telephone number 332200 in the Arabic is transposed in the translation to 322200 and there is no 7 before the telephone number and the fax number which is not on the same Arabic document. Mr. Zeidan's letter, enclosing the translation is dated 20th July 1993, just before the first shipment of arms to Saudi Arabia.
- 25 Mr. Zeidan wrote to Mr. Michault on 2nd December 1993. The letter contains this passage:-
- “Please note that the two agreements the five per cent and the three per cent already signed and dated on 23/12/1990 both mutually respected and agreed upon by you (Saco Defense Ltd) were received via Mawarid”.*
- 26 While Prince Fahad bin Khalid the Vice Chairman was in the view of Mr. Patrick Michault involved in the attempted fraud, it is difficult for the Court to see how the plaintiff was involved. He had left the company. He had apparently left the letters for his successors to deal with. More importantly, no one had asked for their return.
- 27 The plaintiff had used one of the letterheads for a change from one specification to another. He had first telephoned Mr. Michault to ensure that he agreed.
- 28 On 14th September 1993 a fax was sent by Mr. Michault to Prince Fahad which sets out the facts, calls for a meeting and says:-
- “In the meantime, our relationship with Mawarid Electronics Ltd. Is terminated immediately and with effect of this fax”.*
- 29 No mention of the plaintiff is made in the letter. Dealings with Marawid continued.
- 30 It was three years later, in 1996, that the plaintiff's involvement apparently became of

importance to the defendants.

- 31 Shortly after the discovery of the attempted fraud, a business partnership was formed called FPC. The Participants were Sheik Farham Al Faisal ("F"), Mr. Patrick Michault ("P") and Mr. Carl Eckman ("C").
- 32 The defendants would clearly blow hot and cold when it suited their financial future. On that basis we must return to the time when the plaintiff was declared bankrupt in Dallas, a bankruptcy which lasted one year.
- 33 Whatever requests were made by the plaintiff, whatever was understood by Mr. Jacques and Mr. Patrick Michault, a letter was sent to the plaintiff. It was dated 9th June 1991 and it reads:-

My dear Carl,

As you are aware, the MK19 negotiations for the potential sale to Saudi Arabia have been in the process for several years.

Although our U.S. friends still do not understand the Saudi mentality; production schedules, costs etc...., we have expanded [sic] several million dollars on this project.

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 of 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 ratified 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 expenditures have 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!"

- 34 Mr. Patrick Michault said in evidence:

"It was first and foremost a humanitarian act but further I believed that Mr. Eckman could be of assistance to me in the execution of the contract.

35 This Court has little doubt that expediency ruled over altruism.

36 We can mention at this point a letter to the plaintiff from Mr. Harvey, written from his home address. It is dated 30th January 1993.

"I have been asked to write to you regarding the financial arrangements between yourself and Sidem International Ltd. And/or Saco Defense Ltd. And the existing contracts with MODA, Saudi Arabia.

In my position as a Director of both the companies mentioned above I confirm on behalf of these companies that once all the payments due under the contracts have been received from Saudi Arabia and all costs, expenses and other outgoings have been met so we are able to calculate a net profit on the contract you will be paid fifty per cent of the said net profit.

This letter is not meant to be a contract between us but is a statement and agreement of the Intent of the companies mentioned above. However you may rest assured I will do all in my power and capacity as a director of the companies to see they abide by this arrangement."

37 Mr. Harvey told us in evidence when asked by Advocate Young whether Mr. Michault would go back on his word.

"Never. There is one thing I am sure the family prided itself on. It is one of the reasons why, with the contract, I use the word loosely, contract with Mr. Eckman, if you like, or agreement with Mr. Eckman, Mr. Michault Senior and I, when we talked about it, we said there was nothing in writing but Mr. Patrick Michault had given his word. He said he would pay 50% so we would have to do it. In many respects, it was better than a written contract because we always stuck by whatever we said."

38 It is in any event now formally admitted by the defendants that there was a contract. We will need to discuss the arguments that have arisen over that contract later in the judgment.

39 We can, however, at this stage deal with the question of the two misused "letterheads". When the defendants filed their answer on 6th August 1999 there was no mention of the letterheads (pleadings were still being amended during trial).

40 In May 2001 the question of the letterheads was first raised. In our judgment there is no evidence to support the allegation that the plaintiff had any knowledge of or participation in the misuse of the letterheads. The misuse of the letterheads was serious. So serious that it

led to the termination of the agreement with Mawarid. In our judgment we do not accept that the plaintiff was in breach of any contractual duty or a duty of care that led to the breakdown of the relationship with Mawarid. Accordingly we dismiss that part of the counterclaim.

- 41 However, we look at it, the distribution agreement was terminated on 2nd December 1997 by Saco Defense Inc.

"Saco Defense Limited,

5 St. George's Street, Douglas, Isle of Man.

Dear Mr. Harvey:

This letter will serve as notice pursuant to paragraph 11 of that certain distribution agreement dated 1 March 1988 by and between Saco Defense Inc. ("SDI") and Saco Defense Limited, a company incorporated in England, ("Old Saco"), (the "Distribution Agreement"), which was assigned on 23 November 1989 by Old Saco to Saco Defense Limited, a private company limited by shares incorporated in the Isle of Man, that SDI is exercising its right to terminate the Distribution Agreement forty-five (45) days after the effective date of this notice. This notice also constitutes notice under paragraph 6 of the Distribution Agreement that SDI has withdrawn its permission to use the name "Saco Defense".

Please initiate the steps necessary to insure that Saco Defense Limited will not use the name "Saco Defense" or any similar words in any way or hold itself out as having any connection with SDI.

We acknowledge that the termination of the Distribution Agreement will not effect any change in the rights or obligations of either party relating to any transactions occurring prior to the effective date of the termination.

Sincerely,

Michael E. Flannery

Vice President-Law & Administration

- 42 An Extraordinary General Meeting of Saco Defense Limited was held in Jersey on 6th January 1998 and the company was dissolved on 5th February 1998.

- 43 Mr. Patrick Michault in evidence told us that the plaintiff was "absolutely" wrong in saying that Saco Inc. terminated the contract. Mr. Michault was somewhat hesitant in his understanding of company law. We can give one specific example of this. The supply contract between MODA and Saco Defense Limited dated 11th November 1991 is signed by Mr. Michault as director of the company (the body of the Agreement mentioned correctly

and in detail that Mr. Michault represented the company by reason of a Power of Attorney.) Mr. Michault did not become a director until 4th June 1999, over a year after the company was initially dissolved. He certainly was not a director while the company was negotiating with the plaintiff through Mr. Harvey. The matter is surprising because on 21st January 1991 Saco apparently gave a Power of Attorney to Dr. William Jones (who was employed by Mawarid) to be its Attorney in Saudi Arabia. The Power, under seal, is signed by Mr. Harvey as Director but the signature of Mr. Patrick Michault as "Director" is replaced by "C. Evans, Secretary". There is then a similar Power of Attorney given to Mr. Michault dated 16th September 1991 which adds a clause empowering Mr. Michault "to negotiate and sign a contract for and on behalf of the company covering the 40mm MK19 Mod 3, all related parts and accessories and all related ammunition, 40 mm M430, HEDP and 40 mm M385 TP". That is signed under seal by an alternate director only.

- 44 We might have shed some light on the matter but a brief examination of the minutes books which were not disclosed on discovery only confirmed counsel's view that they were in a "shocking" state.
- 45 The main contention of the plaintiff is that there was a contract to pay 50% of the net profit on the Saudi contracts once all costs, expenses and other outgoings have been met.
- 46 In his re-amended Order of justice (submitted to the Court during the first day of the trial) there is a crucial submission at paragraph 7.2:

"7.2 The defendants are estopped from

(i) Denying that the Plaintiff was and is entitled to the payments made to him on account of his share of the profits on the ground that the Defendants from time to time proposed to the Plaintiff the net profit and the amount of that net profit available for distribution and the Plaintiff agreed with such proposals and the payments on account duly were made.

(ii) Denying that the figure for contract expenses of \$650,000.00 for the period up to the end of January 1995 is binding, on the ground that the Defendants proposed that figure to the Plaintiff in, or about October 1994, the Plaintiff agreed that figure in or about January 1995, and thereafter the parties accepted that figure."

- 47 Both sides have accused the other of tactical manoeuvrings and of developing the arguments until the last possible moment. We will make no comments. The Court's time is precious. Neither party has taken the other by surprise. The Court will make its decision on the finally pleaded arguments, however late they were filed.
- 48 The issue is that in or about October 1994 the parties agreed to cap the contract expenses at \$650,000 for the period ending January 1995. Has that figure been introduced (as

Advocate Young suggests) as a “life saving” exercise?

- 49 The false “letterheads” had been used to try to commit Saco to the payment of \$4,000,000 in commissions. We have found no evidence that the plaintiff was involved in that issue.
- 50 Nevertheless, the discovery of the letterheads resulted in a renegotiated payment schedule by Mawarid on 21st February 1994. (That is shown in a letter from Mr. Harvey to Mawarid.) The schedule was to have given Mawarid \$11,000,000 but only a first payment of \$886,668 was made. The balance of \$10,113,332 has been retained. We have heard much argument as to whether that sum is income (albeit exceptional income) or whether it can be taken by the defendants as compensation for the loss of future business in Saudi Arabia.
- 51 In essence, then, the argument is relatively simple. Advocate Le Quesne argues that the figures have been agreed up to 1996 (with the expenses pegged at \$650,000). Advocate Young argues that an account (for both sides agree that an account is necessary) should go back to the beginning of the MODA contracts.
- 52 Mr. Iain Moodie is the Managing Director of a company called Pinnacle Trustees Limited. That company provided the directors for the defendants and performed statutory and book-keeping functions and secretarial duties from mid-1993 until mid-1999. Overlying Sidem and Saco were two trusts, of which Pinnacle were the trustees. One of the trusts owned Sidem which owned some 80% of Saco. They were family trusts for the benefit of the Michault family.
- 53 In passing, we must remark with some disappointment that on 6th September 2001, three days before trial, Mr. Moodie received a letter from Bedell Cristin, signed by Advocate Young, to inform Mr. Moodie that Sidem and Saco were putting his company on notice that if, at the end of the trial, the companies considered Pinnacle to have been negligent or in breach of contract, then a substantial claim would be made. Mr. Moodie was advised to contact his insurers.
- 54 Most of Mr. Moodie's instructions came from Mr. Michault which only confirms our 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.
- 55 The relationship between Pinnacle and Mr. Patrick Michault broke down in 1999. Mr. Moodie describes Mr. Michault's behaviour as, in his words, “unreasonable and intolerable”. It was not the first relationship, originally friendly, which was broken off. We saw many letters where Mr. Michault, “more sinned against than sinning”, terminated relationships.
- 56 Mr. Moodie had been involved in 1993 when Mr. Michault and Mr. Harvey had informed

him of the agreement to pay the plaintiff 50% of the profits. Pinnacle kept the records and prepared a schedule of income and expenditure. This was sent to Mr. Michault for his comments and agreements. From time to time calculated payments were made to the plaintiff. The agreed 50% was paid to the plaintiff, the remaining 50% was either retained within Sidem or paid to the trusts.

- 57 The plaintiff had been paid some \$5.1M but the \$1M apparently due to him in the 1996 accounts had not been paid on the authority of the directors. (Mr. Moodie resigned on 4th June 1999). He told us that Mr. Michault had been on the telephone to him, at one stage almost nightly, saying that the plaintiff had been overpaid.
- 58 The first mention of the \$650,000 appears to occur in a Sidem letter sent to an employee of Pinnacle on 5th October 1994. The note to Mr. Johnson ends with these words:-

"J.J. could you send me a faxed draft on my home fax by next Monday so that we can review prior to final copy which I want to give C. Eckman when he returns from holiday".

- 59 Under the heading "Note" occurs this paragraph:-

"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 1999 including \$173,000 interest paid to SDI (Sidem) on the \$900,000 loan."

- 60 It is here, says Advocate Le Quesne, that the line is drawn in the sand. In a reconciliation handed to the plaintiff by Mr. Michault we have "contract expenses \$650,000". This clearly deals with the two MODA contracts.
- 61 We have notes penned by the plaintiff where he asks Mr. Michault many questions. One of these is "How was \$650,000 arrived at".
- 62 Mr. Michault wrote back:-

"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 (Mr. Jacques Michault and Mr. Ray Harvey) at that time was first and foremost in view of your very precarious financial status and the chance this contract 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 document changed all that but we have not changed our decision".

- 63 The plaintiff did not ask for, nor suggest, the figure of \$650,000. It was put to him, he questioned it and accepted the explanation. The fact that the defendants, (or Mr. Michault père et fils) have already paid the plaintiff \$5.2M, as well as assisting him with the rental of a flat in London and helped with his legal fees in regard to immigration issues is as irrelevant as was the payment out of the defendants' receipt of MODA monies to pay a commission of \$80,000 to Mr. Harvey for the Rhône Poulenc contract quite unconnected with the MODA contract.
- 64 Irrelevant for the purposes of establishing a legal contract but entirely relevant, in our view, is to see how the companies worked as the virtual cat's paw of Mr. Michault and Mr. Harvey.
- 65 The potential for profit was enormous. The plaintiff was an essential link in the potential profit. This Court can see no reason why the interpretation put upon the figure of \$650,000 cannot be accepted.
- 66 There remains an amount unpaid. It is quite remarkable that Mr. Moodie, a director of the company, in talking of the \$2M reserve, never wavered in his belief that the plaintiff was entitled to 50% of that.
- 67 We are somewhat cynical that this amount of \$650,000 was to do with generosity of spirit. It was more to do, in our judgment, with a determined view, even a gamble, on the outcome of the contracts. If we take generosity as the only guiding motive, for that is what we are asked to believe, then the plaintiff should have been told that at the end of the day, the \$650,000 would be abandoned as a pegged figure and that when the commissions and other expenses from the time that the MODA contract was entered into, were calculated, he might have to pay money back.
- 68 It is agreed that the plaintiff was entitled to 50% of the net profit. It was not until retentions were released (of \$199,800) in March 2000 that the defendants were able to prepare final accounts.
- 69 In the evidence and in our judgment the plaintiff had no authority to commit Mawarid to commission payments without the consent of Mr. Patrick Michault. There was only one commission payment documented on the file. That was a percentage commission to be paid from the sale price to Mr. Fahran Al Faisan. It was an agreement authorized by Prince Saud Bin Khalid with the caveat that Mawarid letterheads were not to be used and it was countersigned by Mr. Patrick Michault. We have gained a clear impression that the plaintiff was a necessary cog in a machine that was closely controlled by Mr. Patrick Michault and Mr. Harvey.
- 70 The relationship between the defendants and Mawarid was terminated in 1993. There was

then a renegotiation of terms with Mawarid on 8th February 1994. The memorandum of agreement is written by the plaintiff. It reads:-

"Memorandum of Agreement

In keeping with discussions during a meeting in London, on 8 February 1994, the parties whose names and signatures appear below came to certain agreements. Namely,

(i) SACO DEFENSE LTD. will compensate Mawarid Electronics Ltd. the amount of US\$11,000,000.00 for services performed under contracts 1/670/412/108AA and 1/671/412/109AA.

(ii) The details of remuneration to be paid to Mawarid Electronics Ltd. will be specified in mutually agreed to writing under a separate (sic) letter. This will include an immediate payment of US\$ 886,668.00 and additional amounts as certain actions (to be specified in another document occur.

The parties whose signatures appear below hereby agree to the above.

ABDULLAH ABORDON PATRICK MICHAULT

8 Feb 1994 8 Feb, 1994

SACO DEFENSE LTD. "

- 71 There was an exchange of correspondence between Mawarid and Mr. Harvey. Only one payment (\$886,668) was paid. The balance of scheduled payment totals \$10,113,332. Had that sum been paid to Mawarid there would still have been a modest profit in the terms of the agreement of about \$3M.
- 72 In our judgment the \$10,113,322 is a "profit" although it may be a special item to be noted on the accounts as such. It is a profit to be drawn into the calculations of the parties.
- 73 The problem that we have to resolve is that there is an agreement to share 50% of the net profits. Costs, according to the plaintiff, were pegged at \$650,000 in 1995. There were probably expenses of \$18M at that time.
- 74 When the plaintiff wrote to Mr. Moodie on 25 April 1998 he broke down the monies that he had received. They totalled \$6,120,716.
- 75 He has on that breakdown entered \$650,000 as the contract expenses.
- 76 The plaintiff continued to work for the defendants. Not on the armaments contract to Saudi Arabia. That was in its death throes.

77 In a letter from Mr. Patrick Michault on Saco Defense paper (with Mr. Michault still some four years away from being a director) we have these words. (The letter is written to Sheikh Al Faisal who had been requested by Prince Saud, of Mawarid, to see if he could resolve matters).

"In the little time we had between Carl's return from Hong Kong and departure to Sofia, we addressed the MK19 issue as it currently stands".

78 The letter ends with these words:-

"I shall not under any circumstances talk or meet with our ex-representatives and any further threats will be dealt with in no uncertain terms. It is a disgrace and we will put up with no more of this".

79 We heard from Mr. Peter Beamish FCA. He is a partner of Deloitte-Touche and well known to this Court for his assistance in analysing accounts. He had seen Sidem's accounts from 1984 to March 2000 and Saco's accounts from incorporation to March 2000. He had examined the ledgers and such other evidence as was available and he had no doubt that in order to establish a net profit figure all the expenses from the commencement of the contract in 1984 to March 2000 would have to be included.

80 That is, of course, helpful but it does not decide whether the \$650,000 is or is not a cut-off figure.

81 Mr. Beamish made it very clear that in order to carry out an audit the accounts would have to be restructured considerably. These are offshore companies which are ultimately owned by trusts. As he said:-

"Doing the accounts year on year there would be certain expenses that might have accrued which subsequently did not occur, such as the Mawarid contract. I suspect that it would be difficult to obtain substantive evidence of many of the costs and the nature of them. One of the matters of course, if there are no agreements in place, is that it would be very difficult for the auditor. He would have to rely on representation from the parties in the contracts."

82 In our judgment:

(i) The plaintiff was not in any way in breach of his duty be it a contractual duty or a duty of care because the letterheads were misused.

(ii) The \$10,113,322 is an exceptional profit and should be brought into the account.

- 83 The \$650,000 was not a figure that emanated from the plaintiff. It was the brain child of Mr. Michault and his late father. Whether it was motivated by altruism or by expediency is perhaps not relevant. In our judgment the \$650,000 could not have been a genuine charge. It was a decision made that reflected on the MODA contracts. That was known to the defendants. There is no indication in the letter written by Mr. Harvey that the figure was only a temporary one, plucked from the air, and that if he accepted it there might be a claim on the funds paid out if the payments from Saudi Arabia failed to materialize.
- 84 We have considered the legal authorities cited to us with some care. We appreciate the problems faced by the defendants. The original firm of advocates retained was sacked and Advocate Young's firm was appointed. Mr. Patrick Michault has had serious health problems. Company administrators and trustees have changed. It is not surprising that the minute books are in a "shocking" state. There was no one who would have complained apart from the plaintiff. The defendants are trading companies owned by family trusts. Despite the clear letter from Saco Inc. Saco still lies on the Isle of Man company registry.
- 85 In our judgment, 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.
- 86 We have considered in some depth the doctrine of consideration in so far as it applies to variation or forbearance. We do not see that this is a matter of law. The 50% split of profits was agreed and the defendants of their own volition put the expenses at \$650,000 in 1995. That was not a variation or a forbearance. It was an agreed figure made by the guiding force of a company whose very existence was born of a pragmatic necessity.
- 87 In our judgment the account should be given but only from 1995 onwards.
- 88 We are satisfied that we can order an account under the Court's inherent jurisdiction (see the leading judgment of Smith J.A. in *Mayo v. Cantrade* (1998) JLR 17 at pages 188–189.
- 89 With reference to the prayer in the Order of Justice we order as follows:-

Prayer A

(i) An account is to be taken of the MODA contracts upon the basis that contract expenses to end of 1995 were as stated in the reconciliations dated 28/10/94 and 1/12/94.

(ii) An account is to be taken on that basis for the period starting 1/1/96 under directions of the Master. Reference to the Master to be by summons.

(iii) Liberty to apply to Royal Court for further orders.

Prayer B

Adjourned but may be referred to Royal Court under (iii) above.

Prayer C

Adjourned to be referred to the Master by summons.

Prayer D

Adjourned to be referred to the Master by summons

Prayer E

Defendants to pay the plaintiff's costs on a standard basis. Costs before the Master to be determined by him.