THE HIGH COURT

COMMERCIAL

[2017/2991 P.]

BETWEEN

ADRIANUS GOUDRIAAN

PLAINTIFF

AND

JENDA CORPORATE HOLDINGS LIMITED,

BOSAL NETHERLAND BV

AND

UNITED TRUSTEES (NZ) LIMITED

DEFENDANTS

JUDGMENT of Mr Justice Quinn delivered on the 24th day of May, 2019

1. The plaintiff's claim is for specific performance of the provisions of a Shareholder's Agreement made on 22nd January, 2010, which included a Share Option Plan ("SOP") which conferred on him the right to exercise options to acquire 155 shares (being 15% of the entire share capital) in the Second Named Defendant, Bosal Netherland BV ("Bosal"). The defendants plead that in the events which occurred and on a proper construction of the relevant agreements, at the time when the plaintiff moved to exercise the share options the period during which they were exercisable had expired, and that he was estopped or otherwise precluded from exercising the options.

2. The relevant events were that before the plaintiff exercised the option notice had been given to him of the convening of a shareholder meeting to consider proposals to dismiss him as "President-Director" of Bosal and as CEO of the Bosal Group. He moved to exercise the option after receiving the notice and before the scheduled date of the meeting. The case turns almost entirely on the proper interpretation of Article 3.4 of the SOP which provides that the "exercise period" expires "in case of termination of the plaintiff's service agreement as a result of an urgent reason pursuant to Article 11.3", Article 11.3 of the plaintiff's Services Agreement being the company's right to terminate that agreement without giving notice.

3. I have concluded that when the plaintiff exercised the option the exercise period had not expired and he is entitled to an order for specific performance.

Background

4. Bosal is the parent company of a group known as the Bosal Group, a large international automotive group which designs and manufactures components for emission control systems and other automotive components.

5. In 2010 the group had a turnover of approx. €750m and had thirty-one manufacturing plants in twenty-seven countries, sixteen R&D centres and eighteen distribution centres and 7,500 employees worldwide. Its chairman, Karel Bos Senior, was elderly and in failing health. Recognising that, and the challenge facing the business of the group, he was desirous of recruiting a new leader for the business. Whilst his son, Karel Bos Jnr., had occupied a leadership role for a number of years, there was a need for a strong external recruit, so that the Bos family could continue to enjoy ownership of the Group while relying on loyal and effective management.

6. Before joining the Bosal group, the plaintiff had been President-Director of DAF Trucks which had an annual turnover of €5 billion and 8,000 employees. It was part of a group known as PACCAR Inc. which designed manufactured and supported premium trucks, including D.A.F. He says that at the time of the initial approach by Mr. Bos in 2009 he was also a Vice President and member of the executive committee of PACCAR Inc. and had been invited to take up an even more senior position in that group at its headquarters in Seattle, Washington, USA.

7. Negotiations took place over a period of some months and ultimately on 22nd January, 2010 agreements were entered into for his appointment. The terms of these agreements are of critical importance in this case.

Services Agreement

8. This was an agreement made between Bosal and the plaintiff. It recited that Bosal wished to enlist the services of the plaintiff "as a director to the Company (hereinafter the "Director"). It recited also that day to day management of the company was delegated to Bosal International Management NV (Belgium) ("BIM"), described as the global headquarters for the Bosal Group. The agreement also recited that Bosal also wished "to enlist the services of Mr. Goudriaan in order to perform the day to day management of Bosal International Management NV".

9. BIM was a company incorporated in Belgium which acted as a service provider to the group as a whole, those services including the services of the plaintiff. No formal service agreement was in place between BIM and the Group.

10. The critical operative provisions of the Services Agreement are as follows: -

> *Article 1.1. The company engages Mr. Goudriaan, who hereby accepts as a Director to the Company as of the Effective Date as defined in Article 2 below and for the duration of the present Agreement to provide the Management Services (as detailed below) to the Company and its subsidiaries and other affiliated companies (collectively referred to as the "Bosal Group"). Said function statutory Director shall not be remunerated by the company.*
>
> *1.2 To allow Mr. Goundriaan to provide the Management Services (as defined below) as efficiently as possible the Company shall cause its general shareholders meeting to appoint Mr. Goudriaan on the Effective Date as a Member of the Board of Directors of the Company ("Directeur") pursuant to Article 9.2 of the Articles of Association of the*

Company.

The Company shall further cause the general shareholder's meeting of any of its subsidiaries and affiliated companies to appoint Mr. Goudriaan as a member of the Board of Directors of any of the said subsidiaries or companies, if required.

The general shareholder's meeting of the Company shall further appoint on the Effective Date Mr. Goudriaan as Managing Director of the Company ("President Directeur") to whom all powers regarding the day to day management of the Company shall be entrusted subject to certain specific limits as specified in Article 12 of the Articles of Association of the Company.

1.3. Mr. Goudriaan shall report to the Supervisory Board of the Company.

1.4. It is further understood and agreed that the Company shall procure that Mr. Goudriaan shall be appointed as managing director ("gedelegeerd-bestuurder") of Bosal International Management NV (Belgium) as of the Effective Date of this Agreement. The remuneration as specified in Article 6.1, 6.2, 6.3 and 6.4 shall be paid by Bosal International Management NV (Belgium) to Mr. Goudriaan in his capacity as Managing Director ("gedelegeerd-bestuurder") / CEO of the Bosal Group.

11. Article 2.1 provided for the agreement to commence on 1st June, 2010, or earlier, being the Effective Date and that "*on the Effective Date the general shareholders meeting of the Company shall decide to appoint Mr. Goudriaan as a Member of the Board ,which appointment shall subject to the provisions of Article 11 below, continue in effect for an indefinite period of time."*

12. Article 2.2 provides that in the event that the Company should decide not to appoint the plaintiff on or before 1 June, 2010, as a member of the Board he would be entitled to a "Sign-on Fee" of €950,000 plus an amount by way of an indemnity. This did not arise, and he was duly appointed and took up his position in April 2010.

13. Article 3 provides as follows:

"3.1. Mr. Goudriaan shall undertake the following tasks and duties (hereinafter "Management Services'):-

(a) Carrying out the daily management of all financial, operational, administrative, commercial and legal aspects of the global business operations of the Company and of the Bosal Group;

(b) Developing policies to further the industrial, commercial, financial and other activities of the Company and of the Bosal Group;

(c) Developing future market strategy of the Company and of the Bosal Group;

(d) Reporting to the Supervisory Board of the Company (as referred to in Article 4 below) on a regular basis and when so requested; and

(e) Representing the Company and the Bosal Group in all matters relating to the daily management.

3.2 The Managing Director may use the title 'CEO of the Bosal Group'.

14. Article 4 provides for the plaintiff to report in his capacity as CEO of the Bosal Group and as President Directeur of the Company to the Supervisory Board of the company. It noted that it was is understood that such Supervisory Board would be installed by the company no later than 31st December, 2010, and the members of the Supervisory Board would be appointed in joint consultation with the plaintiff.

15. A "supervisory board" is a structure common in the Netherlands comprised of non-executives, and which sits "above" the board of "executive" directors. In the events which occurred no supervisory board was in fact established or "installed". Instead a group known as the "*Bosal Council*" was formed which comprised a number of senior and experienced industry experts available to act in an advisory capacity to the Group.

16. Article 6 governed the remuneration package, which was to be "procured" by Bosal and paid by BIM. It comprised a salary or "*fixed annual fee*" of €1.2 million payable by 12 equal instalments, "*in return for the Management Services*". It included a pension scheme but excluded expenses.

17. Article 6.2 provided for the payment of a Fixed Annual Bonus of €300,000. This was a guaranteed minimum and in the event of the plaintiff receiving a higher "dividend" under the Company's "equity incentive plan" he would be entitled to that excess.

18. The Agreement provided for the payment of a one-time fee of €950,000 as a "Sign-On Fee" and for a company car.

19. Also Article 6.5 provided that "the components of the remuneration as provided by Article 6.1 and 6.2 above will be reviewed annually by the Supervisory Board of the company (annual merit increase review) commencing on 1st January, 2011."

20. Bosal was jointly and severally liable with BIM for the amounts payable under the agreement.

21. Article 8 contained provisions relevant to taxation, including a provision in 8.1 that the remuneration would be considered as gross remuneration to be paid "*as consideration for the performance of the Management Services, which are performed without any form of subordination and therefore shall not be considered as executed under an employment contract".*

22. On taking up the appointment, the plaintiff relocated to Belgium, and travelled extensively for the Group throughout the year. The structure by which he would be remunerated through BIM enabled him to benefit from a favourable Belgian "ex-pat" tax regime. The defendants claimed that the structure by which he was remunerated and services were to be provided through BIM was one which he had proposed. The plaintiff's evidence was that this was a structure which was in existence before he joined the Bosal Group and to which he simply acceded.

23. Article 9 contained standard provisions requiring the plaintiff to act "*in the best interests of the company, to the best of his*

abilities, in a loyal manner and in good faith" and to "devote to his tasks all means, time and endeavours as is necessary to perform his mandate in a timely and professional manner."

24. Article 11 governed the provisions for termination of the agreement.

11.1. provided for retirement at the age of 65 years. Articles 11.2 and 11.4 provided for termination by either the company or the Plaintiff on giving notice. 11.3 and 11.5 provided for termination by either the company or the Plaintiff without giving notice on the occurrence of certain events. Article 11.3 is central to the events which occurred in this case and reads as follows:

11.3. 'The company is entitled to terminate this Agreement, [emphasis added] *and any service agreements with other companies of the Bosal Group, effective immediately, at any time and without providing notice or compensation in lieu thereof, in the event that -*

> *(a) The Managing Director has committed an act involving dishonesty, disloyalty or fraud with respect to the company or its business or has otherwise… brought the company into substantial public disgrace or disrepute or substantially and adversely prejudiced the interests of the Company or other companies in the Bosal group.*
>
> *(b) The Managing Director systematically refuses to perform tasks consistent with the present agreement as reasonably directed by the Supervisory Board of the company or repeatedly performs such tasks in an unsatisfactory, unlawful or poor manner based on clear evidence after having received notice to that effect from the Company.*
>
> *(c) The Managing Director commits gross negligence or wilful misconduct with respect to the performance of the Management Services under this agreement.*

25. The agreement also contained non-complete obligations, non-solicitation obligations, provisions regarding the protection of confidential and proprietary information, intellectual property rights and a standard "entire agreement" Article.

26. The agreement was stated to be governed by the laws of Belgium and contained an Article submitting any dispute to the courts of Brussels.

Shareholders Agreement
27. Also on 22nd January, 2010 a Shareholders Agreement was entered into between Emerian Corporation N.V. (then the principle shareholder in Bosal) Bosal and the plaintiff. The agreement recited the establishment of a Stock Option Plan pursuant to which the plaintiff would have the right to acquire 15% of the share capital of the company at a price to be determined under the Stock Option Plan. The agreement also regulated the respective rights of the parties regarding their shareholdings. It contained provisions regarding dividend policy, "tag along rights" call options and put options (governing circumstances in which such rights would be exercisable at or after termination of the service agreement). The agreement is expressed to be governed by Dutch law and contained a submission to the exclusive competence "of the courts of Utrecht."

Share Option Plan 2010
28. This document was an Annex to the Shareholders Agreement. Its relevant provisions are as follows:

> *"Emerian Corporation MV has decided to allocate share options for its shares in Bosal Netherlands BV at no cost to the Beneficiary (the plaintiff) to be listed below, according to the modalities and conditions as stated in this share option plan.*
>
> > *(1) "Purpose of the Plan.*
>
> *The purpose of the Plan at hand is to allow the beneficiary to share in the success of the Bosal group as a reward for his efforts.*

29. Article 3.1 provided as follows:

> *"Beneficiary is offered 155 options by a Emerian Corporation NV at no cost. Each option confers the right to acquire one unencumbered share of the Corporation (Bosal) according to the modalities and conditions as stated below."*

Clauses 3, 5 and 6 contained provisions regarding acceptance of the offer, the mode of exercise of the options, and determination of the price. They provide that on exercise of the options the Plaintiff could postpone payment of the exercise price for up to 2 years without interest, and he would be entitled to an interest free loan for the amount of the exercise price.

30. The article most central to the determination of this case is Article 4, headed "Exercise Period".

> *"All assigned options can be exercised at the earliest on January 1st, 2014 and at the latest on December 31st 2019. Failing an exercise at the latest on December 31st 2019 all (remaining) options expire.*
>
> *However, the Beneficiary has the right (but not the obligation) to exercise the options before January 1st, 2014 in case of termination of the service agreement entered into between the Beneficiary and the Corporation.*
>
> *In case of termination of the service agreement as the result of an urgent reason pursuant to Article 11.3, the right of the Beneficiary to exercise the option expires without compensation both before as well as after January 1st, 2014."*

31. Neither the SOP or the Shareholder Agreement define the term "service agreement". However, the Shareholders Agreement recites that the Plaintiff has entered into a "Services Agreement" with Bosal and it has not been suggested that this is not the services agreement referred to in Article 4.3 (Article 4 of the SOP is not "sub numbered", but for ease of reference in this judgment I shall refer to its third paragraph as Article 4.3).

32. The SOP is also stated to be governed by Dutch law and provides for disputes to be submitted "to the exclusive competence of the court of Utrecht".

33. In 2014, the Group was restructured and the shares held by Emerian were distributed to United Trustees (NZ) Limited, the Third Named Defendant. In turn they were contributed by United Trustees as capital in the First Named Defendant, Jenda Corporate

Holdings Limited, a company incorporated in Ireland ("Jenda"), Jenda thereby becoming the shareholder in Bosal. By a Deed of Novation made on 24 June, 2014, the parties agreed that Emerion's rights, obligations and liabilities under the Shareholders Agreement would be novated to Jenda. This Deed also amended the choice of law and jurisdiction clauses to Irish law and the courts of Ireland.

34. In April, 2010 the plaintiff took up the appointments and offices provided for in the Services Agreement and assumed his duties.

35. At the time of the plaintiff's recruitment the Bosal Group, although successful in the market, was encountering certain trading and financial challenges. The plaintiff says that after joining he learned that the group was not as strong financially as he had been led to believe. During the hearing references were made to issues of controversy as between the plaintiff and the defendants in relation to the plaintiff's contribution and performance. It was said by Mr. Daniel Martineau, now a directors of the First and Second Named Defendants, that for a long time prior to the plaintiff's dismissal the plaintiff had been fully aware of the scale and existence of certain financial challenges, had received advice from Messrs. Rotschild and others as to urgent steps which needed to be taken to remedy the group's position, particularly with its bankers, but had failed to communicate to the shareholders the gravity of these issues or the important advice which had been given by Rotschild. It was said that his failure to address these matters and to appraise the shareholders caused the group to face a crisis in 2016 which would have been mitigated if he had acted earlier.

October 2016

36. During the course of 2016 the mandate of Rotschild (who had originally been retained for the disposal of an important division of the group) was expanded to include restructuring and banking advice and support. At a meeting at the London office of Rotschild in early October, 2016, attended by representatives of the shareholders, Rotschild identified the gravity of the situation and outlined certain restructuring options. It was said by the defendants that this was the first time the shareholders were hearing much of this. This led to heated exchanges immediately thereafter regarding the extent of the group's difficulties and a focus on questions around the plaintiff's performance. In particular, certain evidence was given on behalf of the defendants to the effect that at a time when the group ought to have been focussed on measures being recommended by Messrs Rotschild and addressing the trading and financial difficulties the plaintiff had himself been more focussed on his own personal issues including resisting discussions regarding a restructuring which could have entailed a dilution of his potential shareholding.

37. It was agreed that a meeting would be held on 21 October, 2016, to consider and follow up on matters arising from the Rotschild meeting. This was brought forward by a day and on 20th October, 2016, the plaintiff attended a meeting with Mr. Martineau (who by March, 2016 had been appointed a director of Jenda and of United Trustees) in his capacity as a representative of the shareholder, and Mr. Ton Vernaus, who at that time was Chief Financial Officer and a member of the management board of Bosal. The plaintiff had understood that this meeting would be for the purpose of a discussion about the action points to be implemented following a meeting earlier that month with Rotschild.

38. At the meeting Mr. Martineau handed to the plaintiff a letter inviting him to attend a general meeting of the company to take place on 4th November, 2016 at 11am. The attachment to the letter comprised an agenda for a general meeting of Bosal. The agenda identified two proposed resolutions as follows: -

> *(1) "The proposal to dismiss Mr. A.L. Goudriaan with immediate effect as President ("President Directeur") of Bosal Netherlands BV and CEO of Bosal Group.*
>
> *(2) The proposal to appoint as directors of the Company with immediate effect (a) Mr. Karel Boss Jnr, and (b) Mr. Daniel Martineau.*

39. The annexes to the agenda comprised two documents. Annex 1 "*Termination of Co-Operation with Mr. A.L. Goudriaan"* and Annex 2 "*Summary of Meeting Notes of 12th October, 2016".*

40. Annex 1 was in the following terms: -

> *"Termination of Co-Operation with Mr. A.L. Goudriaan*
>
> *Jenda Corporate Holdings Limited, the sole shareholder (hereinafter "shareholder") of Bosal Netherlands BV (hereinafter "Company") intends to take the decision to terminate with immediate effect and without any compensation or notice the mandate of Mr. A.L. Goudriaan as President (President Directeur) and CEO of the Company and mandates the Company's competent Board of Directors to immediately and without any further delay terminate the Services Agreement of 22nd January, 2010 between the company and Mr. A.L. Goudriaan (the Services Agreement) in accordance with its Article 11.3, meaning with immediate effect and without any compensation.[emphasis added]*
>
> *The Shareholder intends to take this decision because it recently became acquainted with a number of facts that could globally and/or each separately qualify as events in the meaning of Article 11.3 of the Services Agreement. These events have caused the immediate loss of confidence in the loyalty, reliability and competency of Mr. A.L. Goudriaan and, above all, had as a result that the company and the Bosal Group find themselves in an extremely difficult situation which can only be overcome through extreme measures like divestures and capital increase.*
>
> *Mr. A.L. Goudriaan will be given the opportunity to share his views on the invoked reasons for termination at the extraordinary general meeting of shareholders of 4 November, 2016 (hereinafter "General Meeting"). In order to give Mr. A.L. Goudriaan the opportunity to provide his views on the proposed decision, we will illustrate the gross negligence, wilful misconduct, financial misrepresentation and disloyal behaviour grounds for having this point on the agenda of the General Meeting, with a summary of some examples that have recently come to the attention of the shareholder".*

41. The Annex then identified and described four headings of complaint and concluded with a statement that the company had concerns in other areas and reserved the right to submit additional material which may come to its attention either prior to the proposed meeting on 4th November or subsequently.

42. Annex 2 to the Agenda was a "Summary of Meeting Notes" of the meeting held on 12th October, 2016 at Rotschild's office in London. The plaintiff does not agree that this is a fully accurate record. Nonetheless, it is a summary of the discussions with Rotschild as to the status of the group and measures required to remediate it. The second part of the summary is a note of the meeting after the Rotschild's advisers had left, and which comprised an acrimonious discussion between the plaintiff and Mr. Martineau and Mr. Karel Boss Jnr.

43. At the meeting on 20th October, 2016 Mr. Martineau also presented to Mr. Goudriaan the draft of an Agreement under which he

would take "garden leave" pending the meeting on 4th November, 2016. The agreement proposed that Bosal and the plaintiff agree that "*in view of the contemplated termination of collaboration on 4th November, 2016, the plaintiff would immediately go on voluntary garden leave*". The plaintiff declined to sign this.

44. On 25th October, 2016 Jenda passed a resolution as sole shareholder of Bosal to suspend the plaintiff as "managing director and CEO of the Company with immediate effect." The plaintiff was immediately notified of this suspension.

45. On 28th October, 2016 the plaintiff exercised the share options in accordance with Article 5 of the Share Option Plan in respect of all 155 shares. He also exercised the right to defer payment of the exercise price of €1.550m for the maximum period of two years from the date of exercising the options. The exercise forms were duly completed and submitted to each of the defendants. No issue has arisen to the validity of the execution and service of the exercise forms.

46. On 4th November, 2016 the plaintiff attended the meeting of shareholders of the plaintiff. The sole shareholder Jenda was represented by Mr. Martineau as proxy. Also in attendance were Mr. Deschriver, general counsel to Bosal, together with external counsel on behalf of Bosal, counsel on behalf of Jenda and the plaintiff's counsel.

47. The plaintiff and his counsel made lengthy representations. Having heard the representations Mr. Martineau and counsel withdrew for the purposes of consulting by telephone with the board of Jenda. After approximately half an hour Mr. Martineau returned and stated that after consultation the board of Jenda had determined that it had no confidence in the relationship continuing. The minute records that Mr. Martineau stated that "they had agreed that I register on their behalf through the proxy the termination for Aad (being the plaintiff)."

48. The plaintiff's counsel enquired whether the board had considered the consequences of the termination of the plaintiff as a statutory director for the Services Agreement. Mr. Martineau said "It has been considered. I don't know what you mean by considered. Had they considered it? The answer is yes. If you mean something more specific, I don't know." The Plaintiff's counsel then asked would the Services Agreement be terminated and Mr. Martineau said: "It would be terminated." Further exchange took place and again the Plaintiff's counsel asked if "point one on the agenda has been resolved?" Mr. Martineau confirmed that "Point one on the agenda" is resolved. "Point one" was the resolution to dismiss the Plaintiff "with immediate effect as President (President-Director) of Bosal and CEO of Bosal Group."

49. Later that day the plaintiff received a letter from Bosal signed by Mr. Vernaus and Mr. Martineau terminating his respective positions. The letter contains the following paragraph: -

> *"Your explanation has not changed the Shareholders' view and, therefore, the Shareholder decided to terminate the co-operation with you with immediate effect as President. Insofar as needed (given the General Meeting's resolution), we would like to inform you that the Company has decided to terminate the Services Agreement of 22nd January, 2010 in accordance with its Article 11.3, meaning with immediate effect and without any compensation or notice".*

50. On 2nd December, 2016 the plaintiff wrote to the defendants referring to the notice of exercise of the Stock Option Plan given by him on the 28th October, 2016. He noted that the deadline to transfer the stock option shares had expired and that Jenda had failed to transfer the stock option shares to him. He notified the defendants that he intended to hold them liable for this default and reserved his right to commence legal proceedings.

51. On 30th May, 2017 Jenda wrote to the plaintiff informing him that it was Bosal's position that he "*had no valid right to exercise the share option given the circumstances which resulted in the termination of your Services Agreement with Bosal".*

52. This letter continued by stating that although Jenda did not believe that the plaintiff held any shares in Bosal or that he had lawfully exercised the options, insofar as it might ultimately be determined that he was legally entitled to shares in Bosal on foot of the purported exercise of the share option Jenda by that letter exercised the call options on those shares. It did this without prejudice to its position as to the plaintiff's lack of entitlement to any such shares.

53. The plaintiff's position in this case is that when he exercised the share options, the option period had not expired. He claims that all that had occurred was that he had been given notice of a meeting to be held on 4th November, 2016 at which the shareholder would consider the termination of his positions in the group or of the "*collaboration*". (It has not been suggested that the suspension decision of 25 October, 2016, had a legal effect on the right to exercise the options).

Defendants' position

54. The defendants admit that the plaintiff's position was terminated on 4th November, 2016, seven days after he exercised the option. It says the following:

> (1) The option period had expired before the plaintiff exercised the option,
>
> (2) That in circumstances where the plaintiff had been informed on 20th October, 2016 that Jenda intended to take the decision to terminate his position, having regard to the provision of Article 4.3 of the SOP he was from 20th October, 2016 estopped or precluded from exercising it. The "estoppel" point was not developed or expanded upon at hearing.
>
> (3) That the words "*in case of termination*" appearing in Article 4.3 must be read as meaning "*a process of termination*" and that that phrase means the entirety of the termination process which commenced on 20th October, 2016.
>
> (4) That the "*case of termination*" began on 20th October.
>
> (5) That despite the "*immediate termination"* provision in Article 11.3 of the Services Agreement the effect of certain case law in the Supreme Court of the Netherlands is that as a matter of Dutch law, it was not open to Bosal to terminate the Services Agreement otherwise than after giving 15 days' notice of intention to do so. This is based on a rule which says that in a case where a person is a director of a company and also holds other positions in the nature of employment/management and these respective roles satisfy a 'close connection test' discussed in the relevant judgments, then if the director's position is terminated his position as an employee/manager is automatically terminated as a consequence. The defendants say that as a matter of Dutch law a director can only be removed by resolution of the shareholders and that before such a resolution can be passed notice must be given of the meeting at which the resolution for his removal would be proposed, such notice typically being fifteen days, and that the director and other directors of the company are entitled to receive such notice for the purpose of making submissions. It is said that because such a

termination has the effect of terminating also the executive position it is not possible for the executive position to be terminated otherwise than on giving the same notice. The defendants say that in this case the combined effect of these rules is that an immediate termination under Article 11.3 of the Services Agreement was never possible regardless of the action or conduct of the plaintiff. The argument continues that if the plaintiff were entitled to exercise the option after he had been given such notice this would make no commercial sense because he would then "be rewarded" in circumstances of the wrongdoings referred to in Article 11.3 of the Services Agreement.

55. The relevant Supreme Court judgment is referred to as the "April 15 Rulings".

56. All of this is said to support the proposition that the only proper interpretation of the phrase "in case of termination" in Article 4.3 is that the "termination" event extends to the entire process of termination commencing with the notice given on 20 October, 2016. The Defendants submit that the factual matrix relevant for the interpretation of the SOP includes knowledge to the part of all parties when entering into the SOP of the effect of the rulings of the Dutch Supreme Court, and that Article 4.3 should be read in that light. The Defendants say that modern principles of interpretation require that as a starting point, the court must look at the commercial purpose of the agreement, and that if a literal reading of the words used leads to an absurd result, the court should apply a construction which does not have that result. Reliance is placed on the judgment of Mr. Justice O'Donnell in *The Law Society of Ireland v. Motor Insurers Bureau of Ireland* [25th May 2017] and the judgment of Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 ER pg. 98.

Other proceedings

57. Proceedings concerning these and related issues have been issued in separate jurisdictions as follows:

(1) Because the Services Agreement itself is governed by Belgian law and is subject to the jurisdiction of the Belgium courts, the Plaintiff instituted proceedings in the First Chamber of the Dutch Language Commercial Court in Brussels. At the time of the hearing the plaintiff had succeeded in this action but an appeal is pending. It is acknowledged that if the final result in Belgium is that the termination was invalid the Plaintiff will be entitled to the shares. If the result is otherwise, the plaintiff will still maintain that the termination only occurred on 4 November, 2016, and therefore that the option period has expired. This is the central issue before this court.

(2) The plaintiff commenced proceedings in the District Court of the Middle Netherlands challenging the validity of the corporate resolutions affecting his dismissal and seeking damages. These are pending.

(3) On 24th October, 2016 the plaintiff initiated proceedings in the Enterprise Section of the Amsterdam Court seeking certain reliefs including injunctions. That court declined to grant the reliefs sought and the parties gave different accounts as to the reason for this finding.

58. In these proceedings the Court is not required to determine the merits or validity of the termination of the plaintiff's position. The only question before this Court is whether the option period had expired or whether the plaintiff is otherwise estopped or precluded from exercising the options.

59. Although the Shareholders Agreement and the Share Option Plan are governed by Irish law and are expressed to be subject to the jurisdiction of the Irish court, the defendants claim that the factual matrix which informs the proper interpretation of the relevant agreements includes the principles of Dutch law applicable to the termination of the plaintiff's position as established by the 15th April Rulings.

Principles of interpretation of contracts

60. In the *MIBI* case the court was concerned with the question of whether Article 4.1.1 of the MIBI Agreement, being the agreement between the Motor Insurers Bureau of Ireland and the Minister for Transport, which governed the obligations of MIBI, to make payments in respect of determined liabilities of uninsured or untraceable drivers, extended to cases where the failure of the judgment debtor to pay was due to the insolvency of his/her insurer. The Supreme Court by a majority held that the Article did not extend to such cases.

61. The relevant Article stipulated as follows: -

"Subject to the provisions of Article 4.4, if Judgment/Injuries Board Order to Pay in respect of any liability for injury to person or death or damage to property which is required to be covered by an approved policy of insurance under s.56 of the Act is obtained against any person or persons in any court ... or the Injuries Board … whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgment is not satisfied in full within 28 days from the date on which the person or persons in whose favour such judgment is given become entitled to enforce it then MIBI will so far as such judgment relates to injury to person or damage to property and subject to the provisions of this Agreement pay or cause to be paid to the person or persons in whose favour such judgment is given any sum payable or remaining payable thereunder in respect of the aforesaid liability including tax costs … or satisfy or cause to be satisfied that such judgment whatever may be the cause of the failure of the judgment debtor". [emphasis added]

62. In that case the words of the clause had made no reference to the insolvency of an insurer and are not otherwise specifically directed towards such a case. It had been argued that the words of the Clause were so general that they must encompass claims made against clients of insolvent insurers. O'Donnell J. found that the words used in Clause 4.1 were not sufficiently specific and this gave rise to the ambiguity which lead to the controversy. The court considered it appropriate to examine not only all of the other terms of the MIBI agreement but also the structure by which the MIBI operated, and the existence of the alternative scheme for payment in respect of insolvent insurers under the Insurance Act. The court considered that relevant factors included not only broad language of the MIBI agreement itself, but also the headings to it, the history of payment by MIBI of certain claims of equitable insurance companies (insolvent), similar agreements in the UK considered in judgments there, notes to the accounts of MIBI for certain years, a government memorandum of 1964, the provisions and operations of the Invoice Act 1964 (as amended), the interpretation attributed by the parties, the memorandum of association of MIBI, and considerations of commercial common sense.

63. O'Donnell J. said the following: -

"The legal aspires to clarity, certainty and precision but much of the business of the courts, particularly in the interpretation of contracts or statute involve the consideration of ambiguity".

64. In the MIBI case, and in the present case, all parties were agreed that the operative principles are those set out by Lord Hoffman

in *Investors Compensation Scheme v. West Bromwich Building Society* which were summarised by Mr. Justice O'Donnell as follows: -

> *(1) "Interpretation is the ascertainment of the meaning which the document will convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is if anything an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the expectation to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which were ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason to have used the wrong words or syntax.*
>
> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'.*

65. O'Donnell J. continued that: -

> *"The background, the context, the knowledge shared between the parties, and the purpose for which the agreement was being made all lead me to the conclusion that the MIBI agreement was not intended to extend to cases where the defendant was insured but his insurer has become insolvent".*

66. He concluded: -

> *"It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard the court must consider not just the words used but also the specific context, the broader context, the background law, any prior agreements, the other terms of this agreement, other provisions drafted at the same time and forming part of the same transaction and what might be described as the logic, commercial or otherwise of the agreement. All of these are features which point towards the interpretation of the Agreement, and in complex cases a court must consider all of the factors and the weight to be attributed to each".*

67. The MIBI case concerned a complex set of issues and material. None of the agreements in the present case are complex documents and the facts are not complex.

68. As regards the question of whether an agreement made was prudent, the court continued: -

> *"There is no doubt therefore that if the Agreement has the effect contended for by the Law Society that it was an extremely foolish agreement to make on a professional level and indeed to continue to supplement and renew on five occasions up until the most recent Agreement in 2009. This is not a determinative factor since it is not unknown for commercial parties to make agreements that in retrospect are clearly unwise. Nevertheless, the commercial impact of the Agreement is a necessary part of the background since if an agreement is plainly foolish to the point of threatening the financial viability of the companies then it is necessary to offer some plausible explanation why a prudent party would enter such an Agreement and renew it over a period of sixty years".*

69. With the benefit of hindsight, it its arguable that it was "foolish" of the defendants in this case to make an agreement in which it was open to the plaintiff to exercise share options at a time when he was under notice of the shareholders' intention to take a decision to dismiss him. That does not render the agreement inoperable or so "plainly foolish" that it would never have been agreed between the parties, particularly in circumstances where it is uncontradicted that an entitlement to a shareholding of 15%, by the mechanism of the SOP, (reduced from the 20% he sought at the outset of the negotiations for his recruitment), was a feature of the plaintiff's decision to leave DAF and take up the Bosal offer. As an explanation for making such an agreement, that is more than "plausible", as O'Donnell J. said would be required.

70. In *ICDL v. European Community Driving Licence Foundation Limited* [2012] IR p. 327, Mr. Justice Fennelly referred to a series of cases including *Analog Devices BV v Zurich Insurance Company* [2005] IESC 12 and *ICS v West Bromwich Building Society*, and said: -

> *"These various dicta are notable for their emphasis on the potential admissibility of background knowledge or what Lord Willberforce famously described as the "matrix of fact". Emphasis on those admissible aids to interpretation should now however mislead us into forgetting that a contract is in the first instance composed of the words used by the parties".*

He then cited with approval the statement of Lord Hoffman in *ICS v. West Bromwich Building Society*. He continued however with important cautionary words: -

> *"This passage, particularly paragraph 4, should not be misunderstood as advocating a loose and unpredictable path to interpretation. A court will always commence with the examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises, normally be interpreted in accordance with their 'natural and ordinary meaning*

ellipsis'. Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract".

71. In *Marlan Homes Limited v. Walsh, Supreme Court* [2012] IESC 23 Mr. Justice McKechnie considered also the principles elucidated in previous cases and quoted Keane J. in *Kramer v. Arnold* where he said: -

> *"In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was having regard to the language used in the contract itself and of the surrounding circumstances".*

72. Mr. Justice McKechnie continued:

> "The correct approach therefore is to have regard to the nature of the document in question and to consider the words used, by reference to the context in which they are set".

He continued: -

> *"It is important however to note that where the parties committed their responsibility to written form, in a particular manner, it must be assumed that they had intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly, it is important that, when faced with a construction issue a court should focus its mind on the language adopted by the parties being that which they have chosen to best perfect their intentions. It is not for the court, either by means of giving business or commercially efficacy or otherwise, to import into such arrangement a meaning that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of interpretative rules as mentioned".*

73. The principles and contractual interpretation were also considered by Lord Neuberger of Abbotsbury PSC in *Arnold v. Britton* [2015] AC p.1619 where he emphasised seven factors: -

> *"Firstly, the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed … unlike commercial common sense and the surrounding circumstances the parties have control over the language they use in a contract and again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*
>
> *Secondly, when it comes to considering the centrally relevant words to be interpreted I accept that the less clear they or to put it in another way the worse their drafting the more ready the court can properly be to depart from their natural meaning. That is simply the observe of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify a court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue's interpretation which the court has to resolve.*
>
> *The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement if interpreted according to its natural language, has worked out badly or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as of the date that the contract was made.*
>
> *Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed not what the court thinks they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract, a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*
>
> *The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time when the contract was made and which were known or reasonably available to both parties. Given that a contract is a bi-lateral or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision to take into account a fact or circumstances known only to one of the parties.*
>
> *Sixthly, in some cases an event subsequently occurs which is plainly not intended or contemplated by the parties judging from the language of their contract. In such a case if it is clear what the party would have intended, the court will give effect to that intention".*

74. Lord Neuberger's emphasis on avoiding the application of common sense retrospectively has direct relevance to this case, and clearly the defendants are invoking common sense retrospectively. Further, the practice of informing the interpretation of the contract by reference to the factual matrix at the time of the contract was formed, requires proof of known facts. Even if there were consensus among witnesses and commentators as to the exact meaning, scope and application of the 15 April Rulings, as a matter of Dutch law – which is absent – the proposition that the factual matrix includes a clear knowledge on the part of all parties to the SOP as to how those principles would sit with the application of the governing law of the Services Agreement, namely Belgian law, is untenable.

75. Lord Neuberger's reference to cases where events subsequently occur which were plainly not intended or contemplated by the parties has no application in that the Shareholders Agreement, SOP and Services Agreement all contain clauses addressing what will occur in the event of termination of the Services Agreement. I shall return to this later.

76. In the MIBI case the court was considering a Clause- which was in very general terms and was deemed by the court to be capable of more than one meaning. There also existed a suite of other material and history including previous such agreements, legislation, the existence of parallel schemes for the funding of claims covered by insolvent insurers to name only a few. Nothing in the judgments of the Supreme Court in the MIBI case suggest that examination of the words and language of the agreement itself is not still the starting point.

Implied Terms
77. The defendants say that they are not claiming that any terms should be implied into the Share Option Plan. Instead it is urging on the court to decide that the proper meaning of the words "*in case of termination*" must having regard to the commercial purpose of the agreement and all of the circumstances, include "*a process of termination*" or the "*commencement of a process of termination*" or the "*giving of notice of such a termination".*

78. Whether a reader applying those expanded meaning to these words would still have a clear understanding of the agreement is doubtful and does not achieve any certainty as to how the SOP would be applied in those events, or in the events which occurred here. The plaintiff highlighted those uncertainties as including such questions as what would occur if a notice of termination or proposed termination was served but ultimately not acted upon. The defendants' response was that if ther termination did not ultimately occur the issue would be moot in that Article 4.3 would not be invoked at all. But this does not cure the inherent uncertainty which would flow from the construction proffered.

79. It has not been suggested directly that the termination itself in this case had retrospective effect. However, to define this event of termination as including the giving of notice of a meeting at which there will be proposed for discussion a resolution for the termination is tantamount to giving retrospective effect to the termination event itself, and unsustainable. Therefore, I have concluded that the word "*termination*" in Article 4.3 can only mean the occurrence of a termination and accordingly it is not necessary to resort to the factors relied on by the defendants in order to properly construe the SOP and other agreements. Nonetheless, I have considered the SOP and related agreements, and the factual matrix to assess whether they are so compelling that this Court should import into Article 4.3 the more expansive meaning for which the defendants contend.

The Share Option Agreement and the Shareholder's Agreement
80. The Shareholders Agreement contains typical provisions regulating such matters as dividend policy, tag along rights, call options, put options and the like.

81. Article 4.1 provides for a call option over all shares in Bosal owned by the plaintiff "*at or after termination of the service agreement*". Similarly a put option is exercisable by the plaintiff "*at or after termination of the service agreement*" in each case, subject to a limit of 6 months after termination. None of these references to "*termination of the service agreement"* distinguish between the different forms of termination provided for under the Services Agreement. Therefore, the price formula for these put and call options applies in all circumstances of exercise. This means that even in a case of termination under Article 11.3 of the Services Agreement that price would be payable.

82. The Share Option Plan itself recites that the "*purpose of the Plan at hand is to allow the Beneficiary to share in the success of the Bosal group as a reward for his efforts*". Having made this recital, which is no more than a description of the typical incentive for any share options, the SOP then contains no operative provisions rendering the exercise of the share option conditional on the achievement of particular targets or milestones. Whilst evidence of the plaintiff's intention and requirements in negotiating the total remuneration package would be inadmissible, it is clear from the entirety of the SOP itself that the plaintiff was being conferred with the right to acquire a 15% shareholding without such pre-conditions.

83. The only conditionality of any substance, and of course of central importance in the determination of this case, is the Exercise Period during which the options must be exercised in accordance with Article 4.

84. There was some discussion as to the necessity for a defined Exercise Period and it was explained that this had a bearing on the tax treatment of this benefit, as had the fact that the entitlement was conferred by way of options instead of an immediate transfer of shares. The period of 1 January, 2014, to 31 December, 2019, envisages that, subject to the Bosal call option in the Shareholders Agreement, the plaintiff could exercise options and hold shareseven after termination of his Services Agreement.

Article 4.2 permitted the plaintiff to exercise options before 1 January, 2014, "in case of termination of the Services Agreement". This clearly meant that he could acquire shares through the exercise of options notwithstanding a termination of the Services Agreement, albeit that Bosal would in that circumstance have become entitled to "call" those shares back, a circuitous possibility.

85. What these provisions inform a reader is that the concept that, subject to immediate termination under Article 4.3, the plaintiff could be a holder of shares whilst not still an employee or director, was not being eliminated by the SOP.

86. Article 4.3 is the Article in controversy and effectively permitted the defendants to invoke the particular provisions of Article 11.3 of the Services Agreement, namely termination without notice, in which case the right to exercise the option would expire.

87. The Services Agreement itself makes no express reference to the SOP. Article 6.2 provides for the guaranteed bonus of €300,000 per annum as a minimum payment against dividends "pursuant to the equity incentive plan". Any connection of this Article to the SOP was not debated during the hearing.

88. Article 11.3 provides for termination in "fault" circumstances "without providing notice or compensation in lieu thereof." Clearly, the "compensation" excluded by this Article is compensation in lieu of notice only.

89. Article 12 provides for "Consequences of Termination". On certain forms of termination unrelated to 11.3 the plaintiff would have been entitled to an indemnity equal to €3 million, in compensation for the non-compete and non-solicitation obligations. All that is said about an Article 11.3 termination is that it is:-

> *"without prejudice to any rights the Terminating Party may have in respect of the breach by the other Party of any of the provisions of this Agreement which occurred prior to termination."*

90. All of these documents contain references to termination of the Services Agreement and the consequences of such termination, including in the case of the SOP and the Services Agreement, the consequences of different forms of termination. In so far as the SOP itself is concerned, it referred to a "fault based" termination by reference to Article 11.3 of the Services Agreement, thereby incorporating for its very purpose, the stated ability or power of Bosal to terminate "effective immediately at any time and without

providing notice …". This incorporation carried with it and relied on the stated ability to terminate without notice. In circumstances where it is acknowledged that these agreements were negotiated by the parties, each with the benefit of professional advice, the proposition that the parties knew as a matter of fact at the time of these negotiations that this Article 11.3 could not, as a consequence of certain case law of the Dutch Supreme Court, be implemented in its terms, and yet still cited Article 11.3 as the basis for expiry of the option period, is unstateable.

91. Insofar as Article 11.3 refers to a termination "*without providing notice or compensation in lieu thereof*", it is clear that this Article is intended to exclude any form of compensation in lieu of notice and it cannot be relied on to suggest that that phrase applies directly to the reference to the option expiring "*without compensation*" in Article 4.3 of the Share Option Plan.

92. A central feature of the defendants' position which took much time at the trial was the contention that the Share Option Plan must be interpreted in light of the proposition that as a matter of Dutch law, because of the close connection between the role of the plaintiff as a director of Bosal – which role could only have been terminated on giving fifteen days' notice – and the role of CEO and other roles conferred on him under the Services Agreement, a termination process inevitably built in a fifteen day notice period and that Article 11.3 of the Services Agreement must be read subject to that overriding legal principle. This contention is put forward despite the express provision in Article 11.3 of the Services Agreement for an entitlement on the part of the employer to terminate the Agreement "*effective immediately at any time and without providing notice*." That very Article is the reference point utilised in Article 4.3 of the SOP.

The 15th April Rulings.
93. On 15 April, 2015, the Supreme Court of the Netherlands delivered rulings in three important cases arising from dismissal or removal of directors of companies. The defendant's evidence of these rulings was that in a case where there is a sufficiently close connection between the role performed by a person as a statutory director the removal or dismissal of the director will have the effect of automatically terminating both the directorship position and the employment position. It was said that if the relevant company expressly distinguish the positions this may not follow, but if the decision is made and implemented without making a distinction this will be the effect. This court was referred to quotes from the Advocate General of the Dutch Supreme Court, Mr. Timmerman where he stated as follows:

> *"Having regard to the interconnectedness of the decision under corporate law and the notice of termination of the employment contract, then unless the contrary is evident, or as the case may be if statutory prohibition prevents the termination of the employment contract it must in principle be assumed that the company intended to break off the entire two sided legal relationship with the director by means of the dismissal".*

94. The defendants' expert as to Dutch law, Mr. Jan Trap, acknowledged that the corollary to this principle did not necessarily apply. In other words, it did not follow that if a decision were taken to terminate the employment of a person who was also a director, this would automatically cause the removal of such person from his directorship and the Supreme Court had not so held. The general rule is that a director could only be terminated by the passing of a resolution of shareholders on giving due notice, typically 15 days of a shareholder meeting both to the shareholders and to the directors.

95. The defendants' proposition is that in a case such as the present where the roles are effectively indivisible, the principles to be derived from this judgment mean that there are no circumstances in which the employment or management position of such a person could be earlier than the passing of the resolution for this removal, and after the due notice of the relevant meeting has been given.

96. The Court heard evidence of Dutch law and debate as to whether in a case such as this where notice was duly given to the relevant director, the termination of his directorship would inevitably follow. Mr. Trap suggested that although the *ratio legis* of the notice requirement was that the director in such circumstances would have the right and opportunity to make representations, which should be taken into account by the shareholders the process is in effect a "*sham*" and he had never experienced a situation where the shareholders "changed their mind" in the face of such representations.

97. The plaintiff's expert as to Dutch law, Professor Perrick disagreed with this proposition and said that even if this was the invariable experience and practice, the legal position must be that the purpose of giving notice is to enable the shareholders to consider any representations made. Therefore, however likely it is a dismissal resolution would be passed, the notice of such a meeting should not properly be regarded as the commencement of an inevitable termination.

98. If Mr. Trap's evidence in this regard were to be believed, and in particular his characterisation of such a process as a "*sham*" this would undermine the contents of the correspondence issued to the plaintiff on 20th October 2016 when he was invited to the meeting on 4th November, 2016 for the purpose of making representations. When he was invited to agree to take "*gardening leave*" this offer was put in the context of enabling the plaintiff to prepare his representations to the shareholders' meeting.

The application of the close connection test
99. The plaintiff asserted that on a proper analysis of the Services Agreement and of the manner in which he performed his functions a valid distinction could be made between the roles of director of Bosal and subsidiary of companies and the CEO role. He refers in particular to the executive or management functions conferred directly by Article 3 of the Services Agreement and Article 2 which requires separately that he be appointed a director of Bosal and its subsidiaries and stipulates that the function as statutory Director "shall not be remunerated by the Company". He referred also to Article 8.1 which provided that the gross remuneration was being paid to him "as a consideration for the performance of the Management Services."

100. Each of the experts as to Dutch Law and as to Belgian Law proffered opinions as to whether in the circumstances of this case and having regard to the terms of the Services Agreement itself, the roles of the plaintiff were in any sense divisible such that the "*close connection test*" under the Supreme Court rulings would apply. On this subject, evidence was also given by the plaintiff himself and by Mr. Martineau as to the actual performance of the functions in the context of this test.

101. In the plaintiff's evidence he sought to portray demarcation between the functions of "President-Director" of Bosal and CEO of the Bosal Group, explaining that the Services Agreement provided that the directorship appointments would be made separately by the respective companies in the Group, the separate definition of "Management Services" in Article 3 of the Services Agreement, and the fact that the directorship functions were to be unremunerated. He also gave evidence that he believed that a number of the management functions he performed were such that the office of directorship was not a pre-requisite.

102. Under cross-examination there was put to the plaintiff extensive evidence concerning the interchangeable use by him of titles such as "CEO of Bosal", "President Director" and the like, in particular, evidence of the use of these titles in such documents as financial statements of the group and engagement letters with professional advisors. He suggested these were errors, but it appears,

that the use of such terms interchangeably was frequent or regular occurrence.

103. The plaintiff's expert as to Belgian law, Professor Dieux gave evidence to the effect that the roles could be treated as divisible, and could be treated as independent and autonomous. The defendants' Belgian law expert disagreed, referring principally to the express provisions of the Services Agreement.

104. Whether the roles of the plaintiff were so closely connected to satisfy the "close connection" test for the purposes of the 15 April rulings, is a mixed question of fact and of Dutch law. Even hearing the evidence of Dutch law, the most important evidence before this court on this subject is the Services Agreement itself, and that of the plaintiff.

105. The Court heard that the plaintiff had insisted that in addition to the CEO title conferred on him, he be appointed to the board of Bosal and of all necessary and appropriate subsidiaries. Any reading of Article 3 of the Services Agreement shows that the role conferred by that same agreement extended from day-to-day management of financial, operational, administrative, commercial and legal aspects of the business of the entire group through to development of policies and strategies and representing the group.

106. The separate treatment of remuneration, and the procurement of remuneration through the legitimate tax efficient structure of BIM does not alter the fundamentals of the interwoven functions and responsibilities conferred on the plaintiff. I conclude that on a proper reading of the Services Agreement and of the plaintiff's own evidence the plaintiff's roles, although conferred by separate provisions of the Services Agreement and by resolutions of different entities were closely, if not inextricably, linked.

107. Therefore, I am not persuaded that the plaintiff's roles were performed by him so independently of each other as to take him outside the scope of the "close connection" test.

108. This finding only goes to establishing that under Dutch law if directorship positions held by the plaintiff were terminated, it would follow that his employment position would be automatically terminated at the same time. But the Services Agreement is governed by Belgian law. The question then is whether it follows from the 15 April Rulings that it would never be possible for Bosal to invoke Article 11.3 of that Agreement in accordance with its stated terms, to effect a termination of that Agreement. The Dutch law expert called by the defendants sought to establish that under the Dutch civil code because the corporate relationship is the dominant relationship over the employment relationship, and because the corporate role of director could only be terminated under Dutch law having first given notice of and held a shareholder meeting, this would override any provision of the Services Agreement regarding early termination without notice, and any provision of Belgian law which would be inconsistent with the Dutch law. In the cross-examination of Mr. Trap, no authority or basis was given for taking the proposition that far.

Termination of the Services Agreement itself

109. Even if the directorships in the Netherlands could not have been terminated without the giving of fifteen days' notice I am not persuaded that the defendant could not have invoked Article 11.3 to at least remove the plaintiff from his positions in so far as he held them directly pursuant to the Services Agreement. Superficially this would have the appearance or potentially artificial effect that the Belgian Law governed contract in the Services Agreement would have terminated whilst certain directorships of Dutch companies continued until such time as Bosal had complied with the necessary notice requests and held the appropriate shareholders meeting. Nothing in the evidence or submissions, even as to the effect of Dutch law, shows that the defendants were precluded from such action.

110. If as a matter of Dutch Law or under the Articles of Association Bosal found itself under a disability in terms of terminating the Services Agreement without notice, for example because the relevant board was not competent to act immediately, that was an internal matter for Bosal. It does not mean that under the clear terms of the contract it did not have a right to terminate the plaintiff's position.

Conclusion

111. The defendant's case rests on the proposition that at the time the contract was entered into, because of the close connection and because of the 15 April Rulings the parties knew or ought to have known that the relationship could only be terminated on giving fifteen days' notice. This analysis flies in the face of the express language of Article 11.3 of the Services Agreement. Secondly, the court has heard different experts opine as to (a) the exact scope of the Supreme Court rulings (b) what exceptions apply (c) whether the facts in this particular case bring the case within the rule, and (d) what organ of the company i.e. viz board or shareholders was competent to take the necessary decision to terminate.

112. This court cannot conclude that all of these matters were so clear as a matter of fact – even to the parties having the benefit of advice – that the Share Option Agreement should now be construed against a background that the parties knew or ought to have known that there were no circumstances in which, notwithstanding its terms, the Services Agreement could be terminated otherwise than on giving fifteen days' notice.

113. None of the evidence persuades me that Article 3.4 of the Share Option Plan had any more than one meaning, namely that it would expire on the occurrence of a termination, and not earlier.

114. The plaintiff is entitled to a decree for specific performance of the Shareholder Agreement including the Share Option Plan.

115. I shall hear counsel as to what further or other orders should be made having regard to the reliefs sought in the plenary summons.