Colombo Dockyard Limited v Athula Anthony Jayasinghe trading as Metro Maritime Services [2002] SGHC 289

Case Number : Suit No 2238 of 1998

Decision Date : 07 December 2002

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Deborah Barker SC and Audrey Chiang (Khattar Wong & Partners) for the plaintiffs; G Raman (G Raman & Partners) for the defendant

Parties : Colombo Dockyard Limited — Athula Anthony Jayasinghe trading as Metro Maritime Services

Companies – Acts of officers – Ploy by officers of company to siphon moneys from company – Whether plaintiffs can recover moneys remitted to defendant by its officers – Whether company infected by contrivances of officers

Contract – Illegality and public policy – Plaintiffs' officers remitting moneys to defendant for illegal purpose – Illegal purpose not carried out – Whether plaintiffs entitled to recover moneys from defendant

Evidence – Weight of evidence – Delay in providing explanation – Inferences drawn

Judgment

GROUNDS OF DECISION

Background facts

1 The plaintiffs, Colombo Dockyard Limited, are a large public corporation in Sri Lanka. They are, as their name suggests, in dockyard, maritime and port-related activities. They are said to own 51% of a company incorporated in Singapore known as Ceylon Shipping Agency.

2 The defendant, Athula Anthony Jayasinghe, is a Sri Lankan national. He was at all material times the managing director of a Singapore company known as Oriental Pearl Trading Pte Ltd ('Orient Pearl'). The defendant also carried on business in Singapore under the name of Metro Maritime Services.

3 On or about 1 January 1995, the plaintiffs appointed Orient Pearl to act as managing agents of Ceylon Shipping Agency and the defendant as the managing director of Orient Pearl, took over the management of Ceylon Shipping Agency.

4 On or about 9 July 1997, a sum of US$650,000 was remitted by the plaintiffs to an account held by Metro Maritime Services with the Overseas Union Bank of Singapore. The receipt of the payment of the said sum by the defendant was never in dispute. The purpose of the remittance as averred in para 4 of the plaintiffs' statement of claim was that it was to be used to promote the plaintiffs' business and apply the said sum in accordance with instructions that were to be given to him by the plaintiffs from time to time. The person who admittedly liaised with the defendant and made arrangements on behalf of the plaintiffs in this connection was one Sarath De Costa ('De Costa'), a director of the plaintiffs.

5 What followed next was somewhat mystifying. In a nutshell, a tug-of-war developed between the plaintiffs and the defendant in relation to the disposition of the sum paid. Consequently, the plaintiffs brought this action for the recovery of a sum of US$649,187.50 (ie US$650,000 less bank charges of US$12.50) from the defendant. The defendant for his part denied that the plaintiffs were entitled to any repayment as he had disbursed the said sum according to instructions given to him by De Costa in relation to a confidential assignment beneficial to the plaintiffs.

Evidence

6 The plaintiffs' principal witness in this action was De Costa. His evidence insofar as is material can be stated in the following terms.

7 He met the defendant through a mutual friend who helped the defendant set up Orient Pearl. Ceylon Shipping Agency, one of the plaintiffs' subsidiaries, was a joint venture between the Ceylon Shipping Corporation (a government company) and the plaintiffs. On or about 1 January 1995, the plaintiffs appointed Orient Pearl to act as the managing agent of Ceylon Shipping Agency and the defendant as managing director of Orient Pearl took over the management of Ceylon Shipping Agency.

8 Sometime in the first half of 1997, the plaintiffs' directors decided to remit a substantial sum of money to Singapore to be used over a period of time in connection with the promotion of the plaintiffs' business. The plaintiffs' directors took the view at that time that it would be useful to have some funds in Singapore for the purposes of their business.

9 By this time, the defendant as managing director of Orient Pearl had been managing Ceylon Shipping Agency for about two years and the plaintiffs' directors had come to trust him. De Costa suggested to them that the defendant be asked to hold the monies on the plaintiffs' behalf and apply the same in accordance with instructions. He was then given the green light by the plaintiffs' directors to approach the defendant to act as custodian of the plaintiffs' funds and to apply the same in accordance with instructions which would be relayed to him from time to time.

10 Subsequently, De Costa met the defendant in Sri Lanka and conveyed to him the plaintiffs' wish. He asked the defendant whether he would be agreeable to hold the monies to be remitted to him, on the plaintiffs' behalf and to apply the same in accordance with instructions to be given to him from time to time. The defendant agreed.

11 Consequently, on 9 July 1997, a sum of US$650,000 was remitted by the plaintiffs to an account operated by the defendant in the name of Metro Maritime Services with the Overseas Union Bank Ltd, Singapore.

12 De Costa expected the defendant to contact him after the defendant had received the remittance but this did not happen. Two or three days after the remittance, De Costa's secretary informed him that the defendant was in Sri Lanka. De Costa then called the defendant in Sri Lanka but to his shock and surprise, the defendant not only pretended not to know him but also denied having received the said sum or having agreed to act on the plaintiffs' behalf or having anything to do with the plaintiffs. Presently, De Costa enlisted the help of D.L.H. Ganlath ('Ganlath'), an attorney-at-law, as well as a director of the plaintiffs, to speak to the defendant with a view to recovering the sum remitted.

13 He later learnt from Ganlath that the defendant had admitted receiving the said sum but was asserting a right to offset it against fees due to him for work he had done for De Costa. De Costa reported the developments to the other directors of the plaintiffs.

14 In or about October 1997, the directors of the plaintiffs decided that a further effort be made to resolve the matter amicably with the defendant. Subsequently, Sarath Obeysekera ('Obeysekera'), the plaintiffs' managing director, informed De Costa and his fellow directors that he had contacted the defendant and the latter had agreed to attend a meeting scheduled to take place in October 1997 at the Hyatt Hotel, Singapore.

15 Following the arrangement, the plaintiffs' then chairman, Ide, Obeysekera, Ganlath and De Costa arrived in Singapore for the meeting. The defendant, however, failed to turn up for the meeting at the appointed time and date and the result was that the plaintiffs' effort to achieve an amicable resolution of the matter failed.

16 In the event, by a letter dated 16 July 1998, the plaintiffs requested the defendant to repay the said sum to them. The defendant failed to comply with this request.

17 De Costa learnt subsequently from Koichi Yamanaka (Yamanaka) the new chairman of the plaintiffs, that the defendant had called him in Sri Lanka on 28 July 1998 and requested a meeting with him to discuss the remittance. Yamanaka's reply to the defendant was that the plaintiffs' board of directors had already made a decision to take legal action against the defendant and as such he should contact the plaintiffs' legal officer to discuss the matter instead. Subsequently, six pages of photocopied documents were left at Yamanaka's residence in Sri Lanka by the defendant. According to De Costa, the defendant had left the said documents in an endeavour to explain what he had done with the monies remitted to him. The documents however reflected some transactions in the year 1996, prior to the remittance of the sum of

US$650,000.00 and were unrelated to the sum in issue.

18 Since the defendant had failed to return the monies remitted to him, the plaintiffs wrote to him on 19 August 1998, stating that the documents which had been forwarded by the defendant did not provide any explanation as to what he had done with the monies remitted to him. The plaintiffs demanded in that letter that the defendant provide documents to show how he had utilised the said sum. No reply was forthcoming. Through their solicitors' letters dated 30 October and 7 November 1998, the plaintiffs again demanded the repayment by the defendant of the said sum. No payment was received from the defendant and hence the commencement of the proceedings herein on 8 December 1998.

19 De Costa also denied the allegations of the defendant, contained in the particulars of the defence filed on 25 May 1999, that De Costa had orally requested the defendant to render services to the plaintiffs and to carry out such services in strict confidence. De Costa said that the plaintiffs had no knowledge of any alleged concessions obtained, undertakings revalidated or environment created by the defendant for the plaintiffs through the officers of the Sri Lankan Government.

20 De Costa further averred that he had not participated in any fraudulent scam involving the siphoning out monies of the plaintiffs or any other wrongful acts. He asserted that the sum of US$650,000 was sent to the defendant for business promotion purposes; neither the said sum nor any part thereof comprised bribe money; and the plaintiffs had no knowledge of the making of any bribes by the defendant. He added that he did not receive any part of the said sum of US$650,000 and the allegation that he had received part of the sum of US$650,000 remitted to him were false, mischievous and malicious.

21 De Costa was cross-examined by counsel for the defendant in relation to his previous dealings with the defendant. It would appear from the answers given by De Costa in cross-examination that he had prior to 1997, an ongoing business relationship with the defendant to the extent that there were a number of payments made to him by the defendant – all of them pre-dating the remittance of the sum by the plaintiffs in July 1997 (pages 192 to 198 of the NE and AB-2 to AB-8). De Costa admitted receiving US$122,500, US$400,000 (AB-3/AB-4), US$30,000 (AB-6) and another sum of US$200,000 (AB-7) paid to his wife. He explained that the last payment of US$200,000 was chanelled through his wife to a person in Japan in connection with the plaintiffs' business promotional efforts (pages 196 and 197 of the NE). There were two other payments of US$28,000 and US$45,000. De Costa denied receiving these two sums.

22 De Costa explained why the plaintiffs had set up a business promotion fund in Singapore. He said it was to pay ship's crew such as superintendents, captains and the like to give them incentives to bring work to the plaintiffs' yards (see pages 190 to 192 of the NE).

23 De Costa was recalled after the defence witnesses had completed their testimonies, particularly in relation to his alleged handwriting in certain documents as well as to clarify the two payments of US$28,000 and US$45,000 reportedly received by his accountant. De Costa denied receipt of the said two sums. His replies were somewhat ambivalent.

24 Yamanaka, the present chairman of the plaintiffs, in his testimony confirmed that after his appointment as chairman on 22 April 1998, he was briefed about the remittance made to the defendant and the failure to recover the said sum from the defendant. He said that he met the defendant sometime in June or July 1998 at the residence of Obeysekera, a fellow director. At that meeting, Yamanaka asked the defendant whether the defendant had kept the funds for himself. The defendant presently showed him six pages of documents which looked like 'bank advices'. When he asked the defendant whether he could make copies of the said six pages, the defendant refused. When he asked the defendant what had happened to the monies, the defendant, after admitting that he had received the remittance, merely showed him the six pages once again.

25 According to Yamanaka, he received a telephone call from the defendant on 28 July 1998. The defendant told him that he wanted a further meeting to discuss the remittance. Yamanaka told the defendant this time that the plaintiffs had already decided to take legal action against the defendant and if there was any explanation, it should be provided to the plaintiffs' legal officer.

26 Subsequently, Yamanaka received six pages of documents, presumably sent by the defendant. On examination, he found the documents were all dated 1996, pre-dating the remittance in 1997 and they did not seem to provide any explanation as to the disposition of the sum sent to the defendant by the plaintiffs in July 1997. Consequently, legal proceedings were instituted against the defendant on 8 December 1998.

27 Obeysekera, the managing director of the plaintiffs, in his evidence said that sometime in the first half of 1997, the plaintiffs' directors decided to remit a substantial sum of money to Singapore to be used in connection with the plaintiffs' business. The plaintiffs' directors formed the view that having a fund in Singapore would be convenient for the plaintiffs and would enable the plaintiffs to respond to business needs more quickly. De Costa proposed that the sum be remitted to the defendant, on the basis that the defendant would hold the sum as custodian and apply it in accordance with instructions which would be relayed to him from time to time.

28 Since the plaintiffs had previous dealings with the defendant the plaintiffs' directors had come to trust the defendant and agreed to the remittance of funds to Singapore to be held by the defendant as custodian. De Costa was asked to go ahead and approach the defendant to make the necessary arrangements for such a remittance. De Costa subsequently reported that the defendant had agreed to hold the monies on the plaintiffs' behalf and apply the monies in accordance with instructions to be given to him.

29 Consequently, a sum of US$650,000 was remitted to the defendant in Singapore in early July 1997. De Costa, subsequently reported to the chairman and board of directors of the plaintiffs that when he had called the defendant to confirm the remittance, the defendant pretended not to know De Costa and denied all knowledge of the remittance. De Costa further informed them that he had requested Ganlath (a director of the plaintiffs who also acts as Sarath De Costa's attorney) to speak to the defendant and obtain the refund of the monies remitted. However, Ganlath's endeavours were in vain.

30 Obeysekera averred that neither the said sum nor any part thereof comprised bribe money. He reiterated that he did not receive any part of the said sum of US$650,000 and the allegations in the particulars filed by the defendant that Obeysekera had received part of the said sum of US$650,000.00 were false, defamatory and mischievous. He added that he had no knowledge of any services rendered by the defendant justifying payment to the defendant of US$650,000 or any other amount thereof. The rest of his evidence was no different from that of De Costa and Yamanaka and requires no repetition here.

31 Insofar as is material, the evidence of Ganlath is as follows. He met the defendant upon instructions from the plaintiffs. The defendant told him that he had offset the monies he had received (ie US$650,000) against what was due to him for services rendered to De Costa. Ganlath asked the defendant to provide him with an account of how the defendant had dealt with the monies remitted and a detailed statement of the services rendered to De Costa so that he could take instructions from the plaintiffs. Although the defendant promised Ganlath that he would give a detailed account of the said monies, none was forthcoming. Later, Ranjith Silva, an attorney-at-law and the brother-in-law of the defendant informed Ganlath that the defendant would not be giving an account of the said monies. Ganlath further confirmed that he travelled to Singapore together with Ide, the former chairman of the plaintiffs, De Costa and Obeysekera in or about October 1997 to meet the defendant by prior appointment at the Hyatt Hotel but the defendant failed to turn up for the said meeting.

32 Miss Tan Lee Noi, Assistant Manager of Overseas Union Bank, where the defendant operated an account, was called to give evidence in relation to Metro Maritime's account No. 3430-33175-201. She detailed the movement of monies in the said account.

33 There was one other witness, Chandrasiri Kotigale ('Kotigale'), the deputy general manager of the legal department in Seylan Bank Limited, who was called by the plaintiffs to rebut certain aspects of the evidence of the defendant. His evidence and the subsequent developments in relation thereto will be dealt with later in this grounds.

34 Before recapitulating the evidence proffered by the defendant and his witness, it would be helpful to make reference to the defendant's pleadings. The defence filed originally on 31 December 1998 was skimpy. The averments of the defendant in paras 2 and 3 of his original defence were only these:

> 2. Save that the sum of US$650,000.00 was remitted to the Defendant on 9.7.97 by Mr Sarath de Costa who was acting for and on behalf of the Plaintiffs, paragraph 4 of the Statement of Claim is denied.
>
> 3. The Defendant avers that the said Mr Sarath de Costa, acting for and on behalf of the Plaintiffs, had obtained the services of the Defendant for a specific purpose directly beneficial to the Plaintiffs and the said purpose was mutually agreed to be strictly confidential. Upon provision of the said services and fulfilment of the said

specific purpose by the Defendant, Mr Sarath de Costa acting for and on behalf of the Plaintiffs, remitted the said sum of US$650,000.00 to the Defendant for payment of the same.

35 The amended defence filed on 29 April 1999 was expansive. Paragraphs 5 to 9 of the amended defence read as follows:

> 5. The Defendant avers that in early 1994, the Plaintiffs, who were then wholly owned by the Sri Lankan government, went through a re-structuring of shareholding and Onamichi Dockyard (Pte) Ltd became substantial shareholders in accordance with the government policy to privatise government owned enterprises. The Plaintiffs were privatised amidst massive protests from shareholders, workers, officials and trade unionists and attempts by interested parties to oust the new management. Subsequently, the Plaintiffs faced intense opposition from the government bodies as a result of inter alia the Plaintiffs' losses on investments. It was under the aforesaid circumstances that the Defendant was requested by the said Mr Sarath de Costa some time in March 1997 to render the said services.
>
> 6. The Defendant duly provided the said services in that he obtained concessions, re-validated default undertakings and created an environment for the Plaintiffs to conduct their affairs with the trust and goodwill of the government as well as enabled the Plaintiffs to participate in further government projects. The Defendant avers that part of the said sum of US$650,000.00 consisted of bribe money and that the Plaintiffs had exploited the said services pursuant to a fraudulent scam to siphon money out of the Plaintiffs which was unknown to the Defendant at the material time. Full details of the said services and how the said sum of US$650,000.00 was expended will be disclosed at the trial of this action.
>
> 7. Upon provision of the said services and fulfilment of the said specific purpose by the Defendant, Mr Sarath de Costa acting for and on behalf of the Plaintiffs, remitted the said sum of US$650,000.00 to the Defendant for payment of the same. It is therefore denied that the said sum was remitted to the Defendant for the purpose of promoting the Plaintiffs' business.
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> 8. The firm Metro Maritime Services was set up by the Defendant in Singapore on 21.6.97 at the request of the said Mr Sarath de Costa as the said Mr Sarath de Costa had feared a risk of a leak of information and a risk that the Defendant's identity be exposed if the said sum was remitted to the Defendant's personal account. Hence, Metro Maritime was set up for the sole purpose of receiving the remittance of the said sum.
>
> 9. Based on the aforesaid, paragraphs 5, 7 and 8 of the Statement of Claim are denied.

36 In the particulars provided in relation to para 6 of the amended defence, the defendant said:

Answers:

> a) i) The services are of a confidential nature and they were provided some time in March 1997 in Colombo. The services rendered are in the form of concessions obtained and default undertakings revalidated. The Defendant also created an environment for the Plaintiffs to conduct their affairs with the trust and goodwill of the government as well as enabled the Plaintiffs to participate in further government projects.

ii) The particulars of the concessions are of a confidential nature. The Defendant will repeat the answers to question 1 (ii)(a) and (b) above.

iii) The Defendant made representations to relevant authorities to rectify the errors committed by the Plaintiffs, the particulars of which are of a confidential nature and will be provided at the hearing of this action.

b) i) The sum of US$617,500.00 or thereabouts consisted of bribe money.

ii) The persons who were bribed were officers and other staff of government departments. However, both Sarath De Costa and Sarath Obeysekera also took portions of this sum of money. The Defendant is unable to disclose the identity of the officers and other staff at this stage as it involves important government officials and it was agreed between the parties that their said identities would be confidential.

iii) Bribe money was paid so that the Defendant could make representations to the relevant authorities to rectify the errors committed by the Plaintiffs and to enable the Plaintiffs to properly conduct their affairs with the government and to participate in further government projects.

iv) The bribe money paid out would benefit the Plaintiffs as seen in the answer in paragraph 3b iii) above.

v) A sum of US$32,500.00 was payment for the services.

c) i) The fraudulent scam was the siphoning out of monies of the Plaintiffs.

ii) In so far as the Defendant is aware of, the parties involved in the scam are Sarath De Costa, Sarath Obeysekara and Ide.

iii) After US$650,000.00 was remitted to the Defendant, Sarath De Costa said that he will despatch some documents to the Defendant for a formal signature and return. Thereafter, the Defendant received a draft Consultancy Agreement dated 1.1.97, a draft invoice and a draft receipt. The said draft Consultancy Agreement is a purported agreement between the Plaintiffs and Metro Maritime Services which was unknown to the Defendant and the said draft invoice was purported to be issued and signed by the Defendant. Upon perusing the said documents, the Defendant became aware of the said scam by the Plaintiffs to utilise Metro Maritime Services by requesting the Defendant to sign the said documents so as to siphon the said monies from the Plaintiffs.

iv) The Plaintiffs had exploited the Defendant's services by attempting to obtain the Defendant's signature for the Consultancy Agreement, invoice and receipt as seen in the answer in paragraph 3c iii) above.

37 In his opening statement, counsel for the defendant said:

2. The defendant's case

2.1 The Defendant does not dispute that the said sum had been remitted on

9.7.97 to his bank account in Singapore.

2.2 However, it is the Defendant's position that Sarath De Costa, the Plaintiffs' Vice-Chairman, acting on behalf of the Plaintiffs, had obtained the Defendant's services for a specific purpose directly beneficial to the Plaintiffs (referred to as the Assignment) and the Plaintiffs had paid the said US$650,000.00 to the Defendant in consideration of the same. It was further agreed between the parties that the said purpose would be strictly confidential.

2.3 In early 1993, the Plaintiffs were privatised and Onomichi Dockyard Co Ltd became major shareholders of the Plaintiffs amidst massive protests from shareholders, workers, officials and trade unionists and attempts by interested parties to oust the new management. This was largely due to the problems and defaults by Onomichi Dockyard Co Ltd to fulfill their undertakings At the same time, the Plaintiffs were facing intense opposition from the government bodies mainly as a result of the Plaintiffs' losses and defaults on investments.

2.4 It was under the aforesaid circumstances that the Defendant was requested some time in March 1997 by Sarath De Costa to render the Defendant's said services to the Plaintiffs and to carry out the Assignment.

2.5 It was agreed between Sarath De Costa and the Defendant that the said sum of US$650,000.00 would be remitted to the Defendant upon the completion of the Assignment. Of the said US$650,000.00, the Defendant would be paid US$32,500.00 for his said services rendered and US$367,500.00 was to be given to important government officials and other staff of government departments as bribes. The balance sum of US$250,000.00 was to be given to Sarath De Costa to pay the relevant officials which would involve the settling of certain issues with the Sri Lanka Port Authority.

2.6 The Assignment was completed successfully to the satisfaction of the Plaintiffs in late June 1997. The Defendant had obtained concessions, revalidated default undertakings and created an environment for the Plaintiffs to conduct their affairs with the trust and goodwill of the government as well as enabled the Plaintiffs to participate in further government projects.

2.7 The sole-proprietorship Metro Maritime Services was set up by the Defendant in Singapore on 21.6.97 at the request of Sarath De Costa for the sole purpose of receiving the remittance of the said sum. This is because Sarath De Costa had feared a risk of a leak in information and had feared that the Defendant's identity would be exposed.

2.8 Upon the completion of the Assignment by the Defendant, the Plaintiffs remitted the said sum to the Defendant's said account in the name of Metro Maritime Services in Singapore on 9.7.99.

2.9 Thereafter, the Defendant used part of the said sum to bribe the important officials and the Defendant gave portions of the said sum to Sarath De Costa and Sarath Obeysekara, the managing director of the Plaintiffs, as agreed between the parties.

2.10 More than a year later on 8.12.98, the Plaintiffs commenced legal action against the Defendant to recover the said US$650,000.00.

Defence evidence

38 The evidence of the defendant, insofar as is material is as follows.

39 He is the director of Orient Pearl which was set up in Singapore on 1 August 1992. On 1 January 1995, the plaintiffs appointed Orient Pearl to act as managing agents for Ceylon Shipping Agency, a subsidiary of the plaintiffs. In this connection, on or about May 1995, one Ananda Vitharana ('Vitharana') was assigned by Orient Pearl to manage Ceylon Shipping Agency. On 1 July 1998, Vitharana became the manager of Ceylon Shipping Agency. Metro Maritime Services was registered as a sole-proprietorship on 21 June 1997. The defendant is its sole proprietor. Metro Maritime Services was in fact registered at the request of the plaintiffs' vice-chairman, De Costa.

40 The plaintiffs who were previously wholly-owned by the Sri Lankan government went through a restructuring of its shareholding following the Sri Lanka government's effort to privatise state-owned entities. Consequently, a Japanese corporation known as Onomichi Dockyard Co Ltd ('Onomichi') became the managing shareholders of the plaintiffs in or about March 1993.

41 According to the defendant, there was in existence an agreement between the government of Sri Lanka and Onomichi, whereby upon the latter becoming the major shareholders of the plaintiffs, Onomichi was to provide an interest-free loan of Sri Lankan Rupees 100 million as foreign investment. Onomichi also agreed to send 50 local workers to Japan for training at Onomichi's expense. However, there were problems and defaults by Onomichi in relation to their obligations.

42 Further, when the plaintiffs became private in early 1993, they were facing massive protests from shareholders, workers, government officials and trade unions. To add to the problems, there were also attempts by interested parties to oust the new management of the plaintiffs.

43 Under the circumstances, sometime in March 1997, the defendant was requested by De Costa, acting on behalf of the plaintiffs to render his services for the benefit of the plaintiffs.

44 He added that De Costa provided him with the requisite information relating to the plaintiffs which enabled him to render the said services to the plaintiffs. As there were certain problems in connection with the sale of the shares of the plaintiffs to the said Onomichi, it was his allotted task to iron out the said problems by establishing contacts with certain government personalities. In this regard, he liaised with a group of very important people to obtain concessions, re-validate default undertakings, rectify the errors committed by the plaintiffs and create an environment for the plaintiffs to conduct their affairs with the trust and goodwill of the government. This was to enable the plaintiffs to participate in further government projects. The identity and information on the said group of very important people were furnished to him by De Costa.

45 He added that the terms of his assignment were on the following terms:

1) The Assignment was of a confidential nature and he was bound to maintain strict confidentiality of the Assignment and the parties involved;

2) A sum of US$650,000.00 would be remitted to him by the plaintiffs and of the said US$650,000.00, he would be paid 5% of the said sum amounting to about US$32,500.00 for his services.

3) Of the balance sum of US$617,500.00, about US$367,500.00 was to be given to important government officials and other staff of government departments as bribes.

4) Sarath De Costa was to take a portion of the said US$617,500.00 amounting to

US$250,000.00. Sarath De Costa informed him that the said US$250,000.00 would be used to pay the relevant officials and parties which would involve the settling of certain issues with the Sri Lanka Port Authority;

5) The said US$650,000.00 was to be remitted to his personal bank account; and

6) It was agreed that US$200,000.00, being part payment of US$650,000.00 was to be remitted to him when the clearing of certain immediate issues had progressed to a certain point.

46 He said that De Costa dealt with him on behalf of the plaintiffs at all times. The nature of the assignment was also fully known to Ide, the former chairman of the plaintiffs, Obeysekera and to Gilbert, the finance manager of the plaintiffs.

47 He said that he had pledged utmost confidence and secrecy with whom he had dealt in relation to the plaintiffs' assignment. He claimed that to disclose the identities of the persons to whom he had disbursed the sums of money, would expose him to serious risks including his life.

48 However, much later when under cross-examination he disclosed the names of three persons: M N Junaid the Secretary, Sri Lanka Ministry of Port & Shipping, M M Rafeek, Vice-Chairman, Sri Lanka Port Authority and H Wijeeoonuwardena, the managing director of Sri Lanka Port Authority (page 560 of the NE).

49 He said by early May 1997, the immediate issues had reached a certain point. However, an advance payment of US$200,000 promised, was not remitted to him despite several reminders. All the same, the assignment given to him was completed successfully to the satisfaction of the plaintiffs sometime in late June 1997.

50 He averred that it was at this stage that De Costa raised the spectre of the seriousness of the leak of information. De Costa felt that if US$650,000.00 was remitted to the defendant's personal account, it might reveal the defendant's involvement and identity to the senior officials, general management of the plaintiffs and eventually the shareholders of the plaintiffs and the government authorities. De Costa proposed that the defendant set up a firm in Singapore with a maritime name and to open a bank account for the firm so that US$650,000.00 could be remitted to the said account.

51 To expedite the said remittance, the defendant agreed to set up a firm in Singapore by the name Metro Maritime Services. The name was in fact selected by De Costa. Hence, Metro Maritime Services was set up on 21 June 1997 for the sole purpose of receiving US$650,000.00 from the plaintiffs so that the defendant's identity and involvement in the assignment would be kept confidential.

52 Upon the successful completion of the assignment, the plaintiffs remitted the said US$650,000.00 to the account of Metro Maritime Services by way of telegraphic transfer on 9 July 1997.

53 The important officials and the staff of government departments who were to receive the bribe monies were made up of three different groups. The said officials concerned had informed both De Costa and the defendant of their decision to collect the bribe monies through their agents from a trusted individual to be nominated by Sarath De Costa and the defendant. The said officials concerned conveyed to De Costa and him over the telephone, the names and the national identity numbers of three persons. It was for this reason that De Costa and the defendant decided to appoint their mutual friend Kaluhath Upali Rajapakse ('Rajapakse') to hand over the bribe monies to the said three nominated persons.

54 He added that in July 1997, he gave a sum of Rs 21,315,000 (which was equivalent to about US$367,500 at the material time) in cash to Rajapakse at Rajapakse's residence in the presence of De Costa. Both he and De Costa provided Rajapakse with the identity numbers of the said three persons who were to receive the bribe monies from Rajapakse. Subsequently, De Costa and he informed the said officials concerned, that the bribe monies were ready for collection from Rajapakse. Rajapakse's telephone number was also given to them. On the following day, Rajapakse and the said officials concerned confirmed that the monies had been handed over.

55 The defendant further averred that he had also paid certain sums to De Costa as well as Obeysekera. He said that he gave De Costa US$150,000 (approximately Rs 8,700,000) in cash, being part payment of the said US$250,000.00. Subsequently, on or about 11 July 1997, De Costa attempted to implicate the defendant in a fraudulent scam by requesting the defendant to sign a bogus consultancy agreement between the plaintiffs and Metro Maritime Services and a draft letter requesting US$650,000.00 from the plaintiffs. He refused to sign the said documents. He was shocked that De Costa had attempted to involve him in the said scam. He, therefore, terminated his relationship with Sarath De Costa. He denied that the said US$650,000 was remitted to him to promote the plaintiffs' business or to apply the said sum in accordance with the plaintiffs' instructions.

56 About a year later, on 16 July 1998, the plaintiffs wrote to Metro Maritime Services, alleging that US$650,000 had been entrusted to him for a specific purpose and requested the return of the said sum on the ground it had not been utilized. He was shocked by the erroneous contents of the letter since the said sum was remitted to him after the successful completion of the assignment given to him, as agreed, and not otherwise.

57 He confirmed that he had sent Yamanaka six pages of documents, all dated before the remittance by the plaintiffs to him of the said sum of US$650,000, to prove that he had extensive prior relationship with De Costa. This, he did in order to provide an explanation to the query raised by the plaintiffs in their letter dated 19 August 1998.

58 In this regard, the exchange of letters between the plaintiffs and the defendant require reproduction. In their letter dated 16 July 1998, the plaintiffs wrote to the defendant as follows:

> To: The Manager
>
> Metro Maritime Services
>
> **Transfer of US$.650,000.00**
>
> Bank of Ceylon, Colombo has confirmed with us the remittance of US$650,000.00 to your bank account with Overseas Union Bank Ltd, ACU Unit, Singaopre on 9th July 1997. You will appreciate that these funds were entrusted to you to be utilized for an intended purpose.
>
> It would however appear that the said funds have not been utilized by you for the intended purpose to-date. If this position be correct we shall be most thankful, if you will make arrangements to have the said funds remitted back within two weeks from the date of this letter to BANK OF CEYLON – FCBU, A/c No.04-082-541, Chip No.155911, With Bankers Trust Co., New York, O/A Colombo Dockyard Ltd, Account No. DD/USD/103.
>
> Trust you will treat our request as one of urgency.
>
> (Signed Colombo Dockyard Limited)

59 The plaintiffs again wrote to him on 19 August 1998 as follows:

> To: The Manager
>
> Metro Maritime Services
>
> …
>
> **Transfer of US$ 650,000.00**

It is noted with regret that we have had no response from you to our letter of 16th July 1998. Our Chairman, Mr. K. Yamanaka has however passed on to us six pages of which are purportedly photo-copies of documents pertaining to certain remittance to Sri Lanka which have been sent to his bungalow in Colombo.

May we hasten to observe that the photo-copies are not at all clear and do not possess the stamp of authenticity. We presume that your intention is to offer an explanation as to how the funds remitted to your account i.e. US$ 650,000 have been utilised. These documents regretfully do not offer a rational and clear explanation.

You will appreciate that this matter can be easily rectified if you will let us have the remittance certificates issued in respect of the account maintained by you with the Overseas Union Bank after the sum of US$650,000 had been credited.

Trust you will let us have the documentation very early.

(Signed Colombo Dockyard Limited)

60 The defendant's response on 24 September 1998 to the foregoing two letters was as follows:

To: The Legal Manager/Company Secretary

Colombo Dockyard Limited

…

Transfer of US$650,000.00

We refer to your letters of 16th July & 19th August 1998 in respect of aforesaid subject.

We are most surprised and confused at the erroneous contents of your said letters & wish to state we did not have any agreements or dealings at any time with your organisation.

The aforesaid remittance is solely our dues for the disbursements & services rendered o Mr. Sarath De Costa.

(Signed Metro Maritime Services)

61 The defendant maintained that he had been acquainted with De Costa from about 1978. He then proceeded to sketch out the business transactions he and De Costa were involved in, the various payments he made to De Costa and the sums he received in relation to the transactions. In sum, he denied that he was liable to the plaintiffs for the return of the said sum of US$650,000 or any sum at all.

62 The defendant was recalled for further cross-examination. They are too long to be entered upon here. Suffice it, if I referred to only a few significant aspects.

63 The defendant could not produce the notebook in which he had entered the residential and handphone numbers of the three important officials to whom he had paid the bribes. He said that he could not locate it (page 1199, lines 4 to 9 of the NE). He was also unable to produce copies of the five cheques referred to in his bank statements (exh P-9, page 1199 of the NE). When asked whether he would give his consent

to the plaintiffs to obtain information from his bank on the cheques which featured in the present case, his reply was that he had to seek legal advice on this matter. The other aspects of his evidence as to bank accounts and transfers will be referred to later in these grounds, if found necessary.

64 The next witness for the defence was Nissanka Gerrard Ranjith Maxwell De Silva, an attorney-at-law from Sri Lanka and the brother-in-law of the defendant. In his evidence-in-chief, he said that sometime in late July 1997, Ganlath who is an attorney, a director of the plaintiffs as well as the legal consultant and company secretary to De Costa's group of private companies, called him up and arranged to meet him and the defendant.

65 Following the said arrangement, sometime in late July or early August 1997, they met at the defendant's office at Colombo. At that meeting, Ganlath requested the defendant to sign a consultancy agreement purportedly between the plaintiffs and the defendant's Metro Maritime Services.

66 Being forewarned by the defendant of an attempt by De Costa to implicate the defendant in a fraudulent scheme, he advised the defendant not to sign the agreement. He told Ganlath that the proposed consultancy agreement was a fraudulent device and that Metro Maritime Services did not possess the requisite expertise or skills relating to construction of navy petrol boats as set out in the said consultancy agreement.

67 In late 1997, he accompanied the defendant to meet Obeysekera at the latter's residence at Colombo. Obeysekera also requested the defendant to sign the said consultancy agreement. Once again, he advised the defendant not to sign the agreement.

68 Sadly, De Silva fell ill at the very outset of his cross-examination. He was rushed to hospital by ambulance. The court was told the following day that he suffered a cardiac arrest and passed away as a result.

69 The evidence-in-chief of Rajapakse was to the following effect.

70 He has been a friend of De Costa and the defendant. In late July 1997, De Costa and the defendant requested his assistance to hand over Rs 21,315,000 in cash to three persons who would call on him to collect Rs 11,600,000 (US$200,000 approximately), Rs 7,250,000 (US$125,000 approximately) and Rs 2,465,000 (US$42,500 approximately) respectively. De Costa and the defendant told him that the said payments were for some important people who had assisted them. Both of them told him that they were bribe monies and the matter was strictly confidential.

71 Subsequently, sometime in late July 1997, De Costa and the defendant came over to his house and handed to him a sum of Rs21,315,000 in cash. They then provided him with the names and national identity numbers of the three persons who would be collecting the monies from him.

72 The following day, he handed over the said Rs 21,315,000 in three parcels to three persons, Ruparatne, Fernando and Gamage after verifying their identities. He did not, however, receive any receipt for the said sums from them.

73 When cross-examined, he said that De Costa and the defendant spoke to him first on 21 July 1977 in relation to this transaction (page 897 of the NE). When asked whether either De Costa or the defendant mentioned to him the amount of Rs 21,315,000 on that day, he replied: '… both of them only told me that an amount about 21 million has to be handed over' (page 907, lines 1 to 2 of the NE). However, when his attention was invited to what he had said in para 2 of his affidavit where he had mentioned the figure 21,315,000, he said he was told the specific amount of Rs 21,315,000 (page 907, lines 10 to 12 of the NE).

74 When he was further cross-examined as to whether either De Costa or the defendant mentioned the three separate figures of Rs 11,600,000, Rs 7,250,000 and Rs 2,465,000 on 21 July 1997 to him, he replied that these breakdowns were not given to him (page 908, lines 1 to 5 of the NE). Later, he changed his evidence and claimed that he was told of the specific amounts (page 908, lines 20 to 24 and page 909, lines 1 to 18 of the NE).

75 On being questioned when De Costa and the defendant visited him in his house, he said it was on 22 July 1997. As to why he did not

mention the relevant dates in his affidavit, he said at the time when he was affirming the affidavit he was not sure of the dates. He had them noted in his diary, and hence his recall at present (page 912 of the NE). In relation to his earlier claim that De Costa and the defendant told him of the names and national identity numbers of the prospective three recipients of the monies, he said that the names and identity numbers were mentioned only by De Costa and not by the defendant (pages 918 and 919 of the NE).

76 The next witness called by the defendant was Telge Tyrone Damien Peiris ('Peiris') the former chairman of the plaintiffs from August 1999 to May 1994. Insofar as is material, his evidence related to matters concerning the plaintiffs in the years he was the chief executive officer of the plaintiffs.

77 He said that there was a collaboration agreement between the Sri Lankan Government and Onomichi in the years 1993 and 1994. He said that under the agreement, Onomichi was obliged to bring in to the plaintiffs Rs 100 million in the form of an interest-free loan as foreign investment and that Onomichi was also required to send 50 workers of the plaintiffs to Japan for training at the expense of Onomichi. He mentioned that following defaults by Onomichi on these agreements, there had been massive protests from shareholders, workers, officials and trade unionists. From 1993 to 1994, there were attempts by interested parties to oust the new management of the plaintiffs. He added: 'I am aware that the aforesaid matters continued after 1994 and they still exist todate.'

78 The next significant witness for the defence was: Condagamage Punsiri Saman Fernando ('Fernando'). His evidence is as follows.

79 He is a friend of the defendant. He has had previous dealings in currency with the defendant. Sometime in July 1997, there was a telephone call for him from Singapore from the defendant. The defendant asked him whether Fernando would be able to advance him Sri Lankan currency to the equivalent of US$425,000. The defendant said that he would need the money sometime in late July 1997 and he had with him US$425,000. Fernando agreed and asked the defendant to place the sum of US$425,000 in two fixed deposit accounts in De Costa's favour in the sums of US$100,000 and US$325,000 respectively for a term (see 1010 of NE). Sometime in late July 1997, the defendant accompanied by De Costa, called at his residence and collected a suitcase containing Sri Lankan rupees 24,000,000 plus.

80 Sometime in early July 1998, Fernando instructed the defendant to remit to De Costa's non-resident foreign currency account US$100,000, in order to repay Fernando a sum of Rs 6,325,000. The defendant complied with the request.

81 He claimed that he had known the defendant well and trusted him. Later, he also asked the defendant to obtain for him a bank guarantee from the ABN Amro Bank in Singapore, against the security of the deposit of US$325,000. The defendant duly obtained the guarantee requested on 26 May 1999 in favour of a company known as Vajira House Builders in Colombo, which was owned by Fernando. He added he had since received full settlement of the sums he had advanced to the defendant, equivalent to US$425,000, including all interests earned.

82 When cross-examined, Fernando claimed that the defendant first spoke to him about him making available to the defendant a large sum of money in Colombo sometime at the end of April or early May 1997 (page 1020 of the NE, lines 1 to 6). He later said that his intention was to advance a sum of about Rs 24 to 25 million Rupees to the defendant not as a loan but as an investment (page 1028, lines 4 to 7).

83 His evidence as respects how the sum of 24 million rupees was packed, counted and handed over to the defendant appears from pages 1037 to 1045. He said that the notes were in denominations of 1,000 Rupees and were placed in a suitcase. They were all stacked in bundles. The defendant and De Costa counted them while they were in his house for about 35 minutes in the evening of 22 July 1997 (page 1045 of the NE).

84 When questioned as to whether he had asked the defendant to sign any document confirming that the sums of US$325,000 and US$100,000 in the fixed deposits were in fact his (ie Fernando's), he replied in the negative. He said that the defendant was his friend and therefore he did not think he was taking a risk. He was of the view that even if the defendant were to die, the defendant's wife would have repaid the monies to him (page 1054 of the NE).

85 The last witness for the defence was Sunil Rohan Abeywickrema. His evidence was as follows.

86 He is a director of a travel agency in Sri Lanka. He had known both the defendant and De Costa well. He had handled their travel

matters previously. On 14 July 1997, the defendant who was then in Singapore called him in Colombo. He told him that he wanted to remit to him a sum of US$50,000 and in return he wanted its equivalent sum in Sri Lankan Rupees when the defendant returned to Colombo. Consequently, he received a sum of US$50,000 in the later part of July 1997 in his foreign currency account for which he gave the defendant Sri Lankan Rs 2.9 million. This sum was handed to the defendant in Colombo.

87 It now remains for me to deal with two further witnesses called by the plaintiffs with leave of court, with a view to rebutting certain aspects of the defendant's claim in relation to two bank accounts operated in his name with the Seylan Bank, Colombo, ie: (a) Account No. 5807960 – Sri Lankan Rupees Account ('Rupee Account') and (b) Account No. 5932295 – US Dollar non-resident foreign currency account ('USD Account'), both operated by the defendant.

88 Chandrasiri Kotigalage ('Kotigale') Deputy General Manager of the Legal Department of Seylan Bank, testified as follows.

89 He confirmed that the Rupee Account and USD Account were maintained at the Boralesgamua branch of the Seylan Bank. He then compared exh P-9, a set of copies of Seylan Bank statements supplied to the plaintiffs by the defendant's solicitors during the trial (page 664, lines 1 to 6 and page 668, lines 1 to 2) with the bank's own records. According to him, pages 1, 3 and 4 of exh P-9 which seemed to indicate movement of monies in the month of July 1997, did not take place.

90 He said that the Rupee Account according to the bank records was in the name of the defendant and his wife and not in the defendant's sole name as indicated at pages 3 and 4 of the statements (exh P-9). According to him, the Rupee Account was opened only on 9 October 1997. The first deposit in this account was made on the same day by a cheque for Rupees 77,000. However, page 3 of exh P-9 purported to show transactions for the period 1 July 1997. He then produced a copy of the statement from the bank which entirely contradicted page 3 of exh P-9. According to him, the transactions listed at page 3 of exh P-9 did not take place. He also disputed the veracity of page 4 of the said exhibit.

91 Similar comments were made by him in relation to the USD Account. In this connection, comparing pages 1 and 2 of exh P-9 with the bank's records, he said that entries in the said exhibit do not correspond with the entries in the bank records.

92 He also pointed out the discrepancy in the address of the bank as appearing in the defendant's alleged bank statements (exh P-9). In sum, the testimony of this witness was that the copies of bank statements produced by the defendant were false and exh P-9 did not truly reflect the state of both the accounts.

93 Kotigale was required for further cross-examination. However on the next occasion he was to be made available, the defendant could not be present due to his business commitments. Subsequently, for some reason Kotigale could not again come to Singapore and as a result, the plaintiffs produced another bank officer, James Joy Rajakumar Joseph ('Joseph') Deputy General Manager of Restructuring and Recoveries Department of Seylan Bank. His evidence was objected to by the defence. After hearing arguments, I admitted his evidence since the bank's witnesses were here to give evidence from documents and had little interest in the outcome of the proceedings. Suffice it if I said that Joseph's evidence was not dissimilar to that of Kotigale.

94 Before I deal with the closing speeches by respective counsel, I must observe that at the last minute, sometime in July 2002, the defendant wanted to call one further witness, Vitharana, an employee of Ceylon Shipping Agency. The court was told that Vitharana would be able to narrate to the court that he received instructions some time in May 1997 to remit a sum of US$200,000 to the wife of De Costa. It was also alleged by the defence that it was Obeysekera who prevented Vitharana from giving evidence for the defendant earlier. The plaintiffs' counsel objected to the proposed evidence stating that Obeysekera was presently overseas and not available to contradict the fresh allegations by Vitharana. Since I formed the view that the proposed evidence by Vitharana appeared to be peripheral to the issue at hand and at any rate, his evidence as respects payment to the wife of De Costa pre-dated the transaction at hand, I disallowed the application to call further witnesses at this very late stage.

Issues, arguments and conclusion

95 There were lengthy and involved submissions by both counsel on behalf of their respective clients. Their arguments spanned a vast spectrum of evidence adduced at this trial, substantially in relation to the credibility of witnesses and what weight and value the court should

attach to such evidence. Stripped of excess and overlap, there are in the main two issues which fall for determination. The first is whether the defendant did disburse the monies sent to him in accordance with the terms of his alleged assignment. Second, even if the court were to disbelieve the defendant as to his several averments, that he paid out the said sum as bribes to various Sri Lankan public servants and shared the remainder with De Costa, Obeysekera and himself, is the remittance by the plaintiffs irrecoverable on grounds that the purpose of the remittance is tainted by illegality?

96 In relation to the first issue, it should be mentioned at the outset that there is no denial that the said sum of US$650,000 less the bank charges of US$812.50 was indeed received by the defendant. The question then moves to the next plane whether the defendant indeed paid out those sums as being alleged by him. In other words is his story credible?

97 In evaluating the evidence in this regard, I first considered the declared stand of the defendant prior to the commencement of the proceedings. What he said in his letter dated 24 September 1998 to the legal manager and company secretary of the plaintiffs was significant. He said: '… *we did not have any agreements or dealings at any time with your organisation … The aforesaid remittance is solely our dues for the disbursements and services rendered to Mr Sarath De Costa*.'

98 If what the defendant is contending at present that he greased the palms of various Sri Lankan public officials on behalf of and for the benefit of the plaintiffs and shared the balance with De Costa and Obeysekera, the foregoing explanation, in my view, is totally out of character.

99 Now as to the details to whom the monies were disbursed and in what proportion they were distributed, here again his original defence filed on 31 December 1998 was curiously silent. In para 3 of his original defence, he merely averred that De Costa, acting on behalf of the plaintiffs had obtained the services of the defendant for a specific purpose directly beneficial to the plaintiffs; the said purpose was mutually agreed to be confidential and upon provision of the said services, De Costa acting on behalf of the plaintiffs, remitted the said sum of US$650,000 to him. Strangely, there were no details in the original defence as to how and to whom the said sum was paid out, despite the fact that the defendant had the services of competent and able counsel both from Sri Lanka and Singapore at the time the original defence was filed.

100 It was not until 29 April 1999, the defendant came out with an explanation that he had rendered services to the plaintiffs in connection with problems they were allegedly facing from government officials, trade unions, the public and the shareholders. The allegation that De Costa and Obeysekara received a substantial portion of the money also did not surface until the defendant provided particulars on 25 May 1999. And further, the names of the three government officials Junaid, Rafeek and Wijeoonuwardena, were not mentioned until his cross-examination.

101 In my evaluation, a person who had carried out such a sensitive and important assignment to the satisfaction of his principals, would have immediately come up with a scathing response the minute his alleged handler had become a betrayer and an accuser. In my view, the defendant's story is simply beyond belief.

102 Now about the cash advance from Fernando. According to the defendant as well as Fernando, cash totalling 24 million rupees was advanced to the defendant without so much as even a slip of paper acknowledging the receipt of such a sum. What more, even the deposit of the notional collateral of US$425,000 was kept not in the name of Fernando but in the name of the defendant, that also, curiously divided into two segments of US$325,000 and US$100,000 respectively. In my view, it is extremely unlikely a person of Fernando's ilk would have taken the risk of lending such a large sum to a business associate without proper documentation, let alone security.

103 Rajapakse claimed that a huge sum of Sri Lankan rupees totalling 21,315,000 was carted into his house by De Costa and Fernando one evening, and the next day he handed the monies to three persons also without obtaining any acknowledgement from them. In his affidavit of evidence-in-chief, he mentioned that it was sometime in late July 1997, De Costa and the defendant came over to his house to hand over the cash. However, suddenly during cross-examination he was able to specify the date of delivery as being 22 July 1997. In my evaluation, Rajapakse's evidence was least persuasive, both in terms of his recall of dates as well as narration of events.

104 Returning to the evidence of the defendant, there was a host of aspects in his testimony which tended to devalue rather than add lustre to his credibility. First of all, his claim that he had successfully completed the assignment given to him and solved the problems the plaintiffs were facing with government officials, trade unions and others was negated by the evidence of Peiris, the former chairman of the

plaintiffs called by the defendant to give evidence on his behalf. Peiris averred that the problems the plaintiffs were facing continued after 1994 and even until the date of his testimony (page 980 – lines 17 to 18 of the NE).

105 Next, the defendant claimed in his affidavit of evidence-in-chief that he had pledged utmost confidence and secrecy with whom he had dealt in relation to the plaintiffs' assignment. He claimed that Obeysekera, Ide as well as Gilbert were fully knowledgeable of the secret assignment. If this was indeed the case, there was no earthly reason why he should feel coy about placing these facts in his earlier replies as well as in the defence.

106 Next, when he was cross-examined, he revealed for the first time the names of three officials he had allegedly bribed on behalf of the plaintiffs. He claimed that he had their names and handphone numbers in a note book kept by him. He promised to produce it to the court at the resumed hearing. But when he was recalled, he could only say that the book had been misplaced.

107 He was also significantly unable to produce copies of five cheques referred to in in his purported bank statements (exh P-9), some of which were alleged cash payments to De Costa. When challenged whether he would grant permission to the plaintiffs to get the relevant particulars from his bankers, he baulked saying that he had to seek legal advice although such advice was at hand all the time.

108 What almost conclusively destroyed his credibility were his Seylan bank statements. The evidence of both Kotgalge and Joseph, two neutral witnesses from the Seylan Bank, was that exh P-9 containing four pages of Seylan Bank's alleged statements produced to the court by the defendant were false and that they did not reflect the actual bank transactions. Although a brave attempt was made by defendant's counsel to diminish the value of these witnesses' testimony, the inference that exh P-9 was a concoction was inescapable.

109 Now let me deal with De Costa's evidence. I must hasten to add that his evidence was also remarkable for its absence of candour. His initial attempt to portray himself as a squeaky clean executive of the plaintiffs was dashed by the revelation of his past dealings with the defendant and several inexplicable monetary transactions.

110 Omission by De Costa to mention his past close connections with the defendant as well as his slippery answers concerning the payments of US$28,000 and US$45,000 apparently received by his accountant Mendis, in fact cast doubt on his claim to purity and innocence. However, whether his less than proper conduct infected the current claim of the plaintiffs against the defendant would be dealt with later in these grounds.

111 As to the evidence of Yamanaka, I accepted his evidence that the defendant did not offer or attempt to offer him any plausible explanation as to the disposition of the remittance of US$650,000 and I agree that the defendants' forwarding of six pages of documents detailing his past transactions with De Costa had little to do with the claim at hand.

112 Then there is this puzzle concerning an alleged consultancy agreement (DB-151 to 155) allegedly forwarded to the defendant for his signature. It would appear that the intended parties to this so-called consultancy agreement would be the plaintiffs and the defendant's Metro Maritime Services. Under this agreement, Metro Maritime was required to provide design, consultancy and engineering services to the plaintiffs in connection with the production and supply of six aluminium fast patrol boats to the Sri Lankan Navy.The contract price is US$2,250,000. The documents produced to the court included a draft letter (DB-156) which contains a purported request from Metro Maritime Services to the plaintiffs to remit to the latter a sum of US$650,000 upon the signing of the consultancy agreement.

113 None of the plaintiffs' witnesses seemed to throw any light on this document. However, having regard to the notations and fax numbers appearing at the top portion of the draft letter (DB-156), it would appear that these documents indeed emanated from the office of the plaintiffs. Both De Costa and Obeysekera denied any knowledge of the said documents. Nonetheless, having regard to all the evidence, I was left with a clear impression that there was in existence a ploy by some executives of the plaintiffs to siphon off funds from the plaintiffs' coffers. The explanations of De Costa on this aspect left much to be desired.

114 There is also one other detail which ought to be attended to presently. This is in relation to the non-availability of Vitharana who was employed by Ceylon Shipping Agency. The court was informed that the defendant's subpoena to call him as his witness could not be served on him as he was not available for service. The plaintiffs who ought to have known his whereabouts did not oblige either. After much delay, when the court was about to hear final speeches, the court was told of the availability of Vitharana to testify on behalf of the

defendant. It was claimed that Vitharana would say that it was Obeysekera who caused him to not to give evidence earlier. The plaintiffs objected to this evidence on grounds Obeysekera is currently away and not available to rebut the allegations levelled against him. I upheld the objection not merely because of the prejudice that might befall the plaintiffs due to the absence of Obeysekera but because the evidence of Vitharana appeared to be connected only with the past dealings between De Costa and the defendant as well as in relation to the receipt of a copy of the consultancy agreement through fax from the plaintiffs' Colombo office. On both these issues, I felt there was no need for any further evidence.

115 To recapitulate, in my determination, the evidence of the defendant that he disbursed the monies in the manner he had detailed in his testimony, defies belief. Equally, I found the evidence of De Costa disconcerting in a number of aspects. The explanations offered by Obeysekera on the consultancy agreement were also feeble. What now remains for me to consider is the effect of their evidence on the claim of the plaintiffs. I will revisit this aspect after I have addressed the second issue raised.

116 Let me now deal with the second issue. Counsel for the second defendant contended that the remittance was for an illegal purpose. He invited my attention to two well known legal maxims: '*ex turpi causa non oritur actio'* and '*in pari delicto potior est conditio defendentis*.' According to Black's Law Dictionary (6th Edn) the first maxim signifies that out of a base, illegal or immoral consideration, an action does not and cannot arise. The second maxim stands for the principle (see also Black's Law Dictionary) (6th Edn) that in a case of equal or mutual fault between two parties, the condition of the party in possession or defending is the better one. Where each party is equally at fault, the law favours him who is actually in possession. Where the fault is mutual, the law will leave the case as it is.

117 Defence counsel contended that even assuming that the defendant did not carry out what he was instructed to do by the plaintiffs or by De Costa, it was clear that the purpose for which the US$650,000 was remitted was illegal. It is therefore unenforceable.

118 Reliance was placed on ***Alexander v Rayson*** [1936] 1 KB 169, where the English Court of Appeal reiterated the principle that where it appears that the subject matter of an agreement is intended to be used for unlawful purpose, the court will refuse to enforce it. The judgment of Romer LJ (read by Scott LJ and concurred by Greer LJ) at page 182 reads:

> It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the Court will not lend its help to such a plaintiff. Many instances of this are to be found in the books.
>
> In *Gas Light & Coke Co.* v. *Turner* (I) the plaintiffs had demised certain premises to the defendant to be used by him for an unlawful purpose. It was held that the plaintiffs were not entitled to sue the defendant upon the covenant for rent in the lease. We shall have to refer to this case later upon another point. In *Pearce* v. *Brooks* (2) a coach builder had let out a brougham on hire to a prostitute for the purpose of enabling her (to use the words of Pollock C.B.) "to make a display favourable to her immoral purposes." The coach builder subsequently sued the prostitute for moneys payable under the agreement. It was held by the Court of Exchequer that he could not recover. "I have always considered it as settled law," said the Chief Baron, "that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for

> that purpose, cannot recover the price of the thing so supplied." He added: "Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, ex turpi causa non oritur actio, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other."

119 The principle upon which a contract may be impeached on account of illegality is also dealt with by the authors of ***Chitty on Contract*** (26th Edn, Vol 1, para 1135) in the following terms:

> … "The principle of public policy," said Lord Mansfield, "is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis*." The "*ex turpi causa* defence," as was stated by Kerr L.J. in *Euro-Diam Ltd.* v. *Bathurst*, "rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts". …

120 Plaintiffs' counsel contended, on the other hand, that even if the monies had been handed over for an illegal purpose, this would not prevent the plaintiffs from recovering the same, if the illegal purpose had not been carried out.

121 In this regard, plaintiffs' counsel relied on the following passage from ***Chitty on Contract*** (27th Edn, Vol 1, para 16 to 162) which reads:

> A principal can recover from his agent money which he has paid to the agent, albeit for a legally objectionable purpose, provided that he instructs the agent to return it to him before the agent has paid it over under the contract, at any rate if the purpose was not grossly criminal or turpitudinous or if the principal still enjoyed a *locus poenitentiae*. …

122 It is instructive at this stage to make reference to a number of decisions on this particular aspect of the law in relation to locus poenitentiae (a place or chance of repentance, a power of drawing back from a bargain before any act is done to confirm it in law).

123 In ***Bone v Ekless*** (5 H & N 925, reproduced in 157 ER 1450) the facts are as follows.

124 The plaintiff (Bone) sailed to Constantinople in September, 1856, with directions from the defendant to sell the vessel. There was a difficulty in effecting the sale, and the plaintiff informed the defendant (Ekless) that in order to effect a sale it was necessary to bribe the Turkish officials, and he authorized the plaintiff to do so. He directed the plaintiff to inform him of the nett price offered for the vessel. The plaintiff telegraphed from Constantinople, 'Sold six thousand.' The defendant telegraphed in reply, 'Sale confirmed.' The defendant wrote to the plaintiff to say he had agreed to sell the 'Pioneer' for 6,000 nett; the price to be paid for the vessel being 6,500, and the 500 to be paid by him to the Turkish officials for effecting the sale. The defendant ratified this sale, and assented to the application of the 500, and that this was a fraud on the Turkish government. The 6,500 was paid to the plaintiff by the Turkish government. The plaintiff remitted 6,000 to the

defendant. The plaintiff paid 300 to some of the officers; but he did not pay, as he had agreed to do, 200 to one J.H., an official who had been instrumental in effecting the purchase of the vessel; and the plaintiff still retains that sum in fraud of J.H.

125 The action was confirmed only in relation to the remaining sum of 200. On a case stated to the Court, Bramwell B (concurring with Martin B and Channell B held:

> … The 6500l. was received to the defendant's use, with an authority to apply 500l. in a particular manner. Before the whole had been so applied the authority as to part, viz. the 2001. now in question, was countermanded. The case therefore falls within the principle upon which *Hastelow* v. *Jackson* (8 B. & C. 221) was decided, viz. that where money is paid upon an illegal agreement it may be recovered back before the execution of the agreement, though not afterwards. …

126 Similar views were expressed by the English Court of Appeal in ***Taylor v Bowers*** (1876) Vol 1 QBD 291. The facts of the case as appears from the headnotes of the case are as follows.

127 The plaintiff, being in embarassed circumstances, in pursuance of an agreement between him and Alcock made over all his stock-in-trade to Alcock and fictitious bills of exchange were given by Alcock in plaintiff's favour. Possession of the goods was given to Alcock together with an inventory, but no bill of sale was executed by the plaintiff. The object of the transaction was to prevent plaintiff's creditors from getting hold of the goods, and so being paid in full. Defendant was a creditor for 100, and was cognisant of what was concocted between the plaintiff and Alcock After Alcock had removed the goods from plaintiff's premises, two meetings of plaintiff's creditors were held, but no compromise was effected with the creditors. Some months afterwards Alcock executed a bill of sale of the goods to the defendant, for the alleged purpose of securing the debt due from the plaintiff to the defendant, but the plaintiff was no party to the bill of sale, nor did he sanction or know of it. Plaintiff having demanded the goods from Alcock and defendant, brought an action against defendant for the detention of the goods.

128 Affirming the decision of the Queen's Bench Division, the Court of Appeal (per James, Mellish LJJ's Baggallay JA and Grove J) held that the fraudulent purpose not having been carried out, plaintiff was not relying on the illegal transaction, but was entitled to repudiate it and recover his goods from Alcock and the defendant had no better title than Alcock as he knew how Alcock had become possessed of the goods.

129 In ***Harry Parker Ltd v Mason*** [1940] 2 KB 590 at 608, the English Court of Appeal re-affirmed the principle that public policy is best served by allowing a party to an illegal arrangement to repent before it is too late and to prevent the completion of the illegal purpose by reclaiming the money paid by him in pursuance of it.

130 ***Taylor v Bowers*** (*supra*) was distinguished in ***Bigos v Boustead*** [1951] 1 KBD 92. It is a case of statutory illegality. The facts of the case are as follows.

131 In 1947 the defendant was anxious to send his wife and daughter abroad for the sake of the daughter's health. Owing to the restrictions on English currency which were then in force he was unable to obtain from the Treasury what he considered an adequate allowance to enable them to stay abroad sufficiently long for the visit to be of benefit to the daughter. On August 25, 1947, he entered into an agreement with the plaintiff, in contravention of the Exchange Control Act, 1947, s. 1(1), whereby the plaintiff agreed to make available 150 worth of Italian money for the wife and daughter in Italy within a week and the defendant promised to repay her with English money in England. As security for his promise, the defendant deposited with the plaintiff a share certificate for 140 shares in a company. On August 28, the defendant's wife and daughter went to Italy, but the plaintiff failed to make any Italian money available for them, and on October 13, they returned to England, sooner than they would have returned if they had the money. The defendant then asked the plaintiff to return to him his share certificate, but she refused to do so. In an action by the plaintiff to recover the sum of 150 from the defendant on the ground that she had made a loan to him of that sum, the defendant denied the loan, set out the true facts of the transaction, and counterclaimed for the return of the certificate. The plaintiff abandoned her claim at the commencement of the hearing of the action, but the defendant proceeded with his counterclaim and contended that, although the contract was an illegal one, as it was still executory he was allowed a *locus poenitentiae*, and, therefore, he was entitled to claim the return of the certificate.

132 In dismissing the defendant's counterclaim on the basis that the facts was on all fours with ***Alexander v Rayson*** (*supra*) Pritchard J held that the reason that the illegal transaction was not carried out was due, not to any repentance on the part of the defendant, but to the frustration of the contract by the plaintiff, and, therefore, as the agreement relating to the deposit of the share certificate was one which sprang from the main illegal agreement and was tainted with the same illegality as that which attached to that agreement, and as the parties were *in pari delicto* at the time of making the agreement, the defendant was not entitled to seek the aid of the court to recover the certificate.

133 The approach taken by Pritchard J in ***Bigos*** did not quite meet the approval of the Court of Appeal in a later case. Millett LJ (as he then was) in ***Tribe v Tribe*** [1995] 3 WLR 913, observed at pages 938 and 939:

> *The doctrine of the locus poenitentiae*
>
> It is impossible to reconcile all the authorities on the circumstances in which a party to an illegal contract is permitted to withdraw from it. At one time he was allowed to withdraw so long as the contract had not been completely performed; but later it was held that recovery was barred once it had been partly performed: see *Kearley v. Thomson* (1890) 24 Q.B.D. 742. It is clear that he must withdraw voluntarily, and that it is not sufficient that he is forced to do so because his plan has been discovered. In *Bigos v. Bousted* [1951] 1 All E.R. *92 this was, perhaps dubiously, extended to prevent withdrawal where the scheme has been frustrated by the refusal of the other party to carry out his part.*
>
> The academic articles Grodecki, "In Pari Delicto Potior Est Conditio Defendentis" (1955) 71 L.Q.R. 254, Beatson, "Repudiation of Illegal Purpose as a Ground for Repudiation" (1975) 91 L.Q.R. 313 and Merkin, "Restitution by Withdrawal from Executory Illegal Contracts" (1981) 97 L.Q.R. 420 are required reading for anyone who attempts the difficult task of defining the precise limits of the doctrine. I would draw back from any such attempt. But I would hold that genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent. I would also hold that voluntary withdrawal from an illegal transaction when it has ceased to be needed is sufficient. It is true that this is not necessary to encourage withdrawal, but a rule to the opposite effect could lead to bizzare results. *Suppose, for example, that in Bigos v. Bousted [1951] 1 All E.R. 92 exchange control had been abolished before the foreign currency was made available: it is absurd to suppose that the plaintiff should have been denied restitution. I do not agree that it was correct in Groves v Groves, 3 Y. & J. 163, 174, and similar cases for the court to withhold its assistance from the plaintiff because "if the crime has not been completed, the merit was not his.*"
>
> [Emphasis added]

134 Reverting to the facts of the case, it is apparent that the problem concerning the sum of US$650,000 seemed to have arisen almost immediately after the defendant had received the sum. The defendant's evidence that he paid out over Rs 24 million to the three government officials and the remainder, save for a sum of US$32,500 which he was entitled to, was paid out to De Costa and Obeysekera, did not, in my finding, appear to have any ring of truth around it.

135 In my evaluation, if what the defendant now claims is the truth, he would have erupted in white heat and recounted at once what he now alleges to be the truth to Yamanaka when he went to see him. The defendant who had seen fit to send the six pages of documents to disclose his past financial dealings with De Costa, would not have lain low for long to come up with the explanation which he is now attempting to make.

136 Further, his letter dated 24 September 1998 addressed to the legal manager of the plaintiffs would not also have stated as it did, that

the remittance was solely his fees for disbursements and services rendered to De Costa. In my determination, the narration of events by the defendant that he bribed Sri Lankan officials and paid out a substantial portion of the remittance to De Costa and Obeysekera was a late invention. In my view, De Costa and Obeysekera would not have come forward to fix the defendant, if indeed they had been paid as claimed by the defendant.

137 Counsel for the plaintiffs traced the movement of the sum of US$650,000 from the OUB documents of the plaintiff. The summary produced by counsel at para 133 of his submission reads as follows:

> (i) US$150,000 was remitted to the Defendant's USD NRFC Account with Seylan Bank on 15 July 1997 and used (a) to make payments amounting to US$96,739 to various persons and (b) to place a fixed deposit in his own name;
>
> (ii) US$50,000 was sent to SR Abeywickrama on 15 July 1997;
>
> (iii) US$2,500 was sent by telegraphic transfer to Commercial Bank of Ceylon for the Defendant's credit on 15 July 1997;
>
> (iv) US$425,000 was placed in 2 fixed deposits of US$325,000 and US$100,000 with OUB on 15 July 1997;
>
> (v) US$1,500 was drawn in cash on 8 August 1997;
>
> (vi) US$13,684.48 was transferred to the account of Metro Maritime services on 17 April 1998 from the deposit of US$325,000 and the balance thereof was replaced in a fixed deposit;
>
> (vii) US$1,500 was drawn in cash on 17 April 1998;
>
> (vii) interest of US$4,163.05 on the sum of US$100,000 (which was placed in a fixed deposit) was transferred on 20 April 1998 to the account of Metro Maritime Services and the said fixed deposit was renewed;
>
> (ix) US$5,400 was drawn in cash on 22 April 1998;
>
> (x) US$12,500 was remitted to the Defendant's USD NRFC Account with Seylan Bank on 21 April 1998;
>
> (xi) US$1,000 was drawn in cash on 2 November 1998;
>
> (xii) US$100,000 was transferred to the Defendant's USD NRFC Account with Seylan Bank on 2 July 1998 and the interest paid to the Defendant's personal account with OUB (the sum of US$100,000 was not withdrawn from Seylan Bank as alleged by the Defendant, but was placed in 2 fixed deposits of US$50,000 each in his name with Seylan Bank and held under lien);
>
> (xiii) interest of US$18,222.57 on the US$325,000 deposit was withdrawn and credited to the account of Metro Maritime Services with OUB;
>
> (xiv) US$325,000 was transferred to ABN Amro Bank and held as security for Vajira House Builders; and
>
> (xv) ABN Amro Bank off set the fixed deposit against the liabilities of Vajira

House Builders in 1999.

138 Reviewing the totality of the evidence, I am of the view that the claim by the defendant that he obtained nearly Rs 24,650,000 (equivalent to US$425,000) in July 1997 from Fernando without any documentation for the purposes of paying bribes to Sri Lankan government officials as well as De Costa and Obeysekera, is not supported by any credible or creditworthy evidence. I must add here that the stories narrated by Fernando and Rajapakse defy credence and cannot be relied upon. The defendant's credibility is further entirely devalued by the cogent evidence of officers from the Seylan Bank that the statements (exh P-9) furnished by the defendants' solicitors were fake. Further, the movements of the funds in the defendant's Singapore bank account also do not seem to support the defendant's story.

139 I must now deal with the defence argument that the remittance from the plaintiffs to Singapore was for an illegal purpose in that its object was to bribe captains and crews of ships in connection with the plaintiffs' business. De Costa as well as Obeysekera, admitted in their evidence that the money was for business promotion purposes and that it was intended as a form of incentive or inducement to ships' crew, with a view to attracting work for the plaintiffs.

140 In my opinion, even if the monies were intended for the purposes of some illegitimate motive, there was no evidence placed before the court to conclude that any gratification was in fact given to any crew member of any ship by anyone from the funds provided. Inasmuch as the proposed objective to bribe had not been carried out, the intention to offer gratification remained only incipient and not executed. In the circumstances, so long as the execution of the illegal purpose has not been carried out, the plaintiffs are entitled to recover the sum from the defendant. In my opinion, the plaintiffs' repudiation is both timeous and voluntary. In this, I find that the plaintiffs have satisfied the test laid in ***Taylor v Bowers*** read with ***Tribe v Tribe*** (*supra*).

141 Before I conclude, I must also deal with the aspect whether the possible involvements of De Costa or for that matter Obeysekera in a scheme to siphon off funds from the plaintiffs, would in any way infect the claim of the plaintiffs for the refund. In my evaluation, De Costa is no saint. It might well be that he was involved in a scheme together with the defendant to siphon off funds from the plaintiffs. But neither he nor Obeysekera, the second person accused by the defendant, is the alter ego of the plaintiffs. The claimants in the present action are a public listed corporation. They are a separate legal entity and have amply satisfied me that that they had demanded the return of the sum remitted voluntarily and well before the monies were utilized for any improper or illegitimate purpose. In my opinion, they are not infected nor sullied by any artful contrivances of any of their officers.

142 In my determination, the defendant who has admitted the receipt of the sum, has not discharged the burden on balance of probabilities that he expended the monies for the benefit or on behalf of the plaintiffs. The defendant's evidence is completely discredited not only by the improbabilities of his account but also by the false Seylan Bank statements which the defendant attempted to pass, as the true reflection of his state of accounts with the Seylan Bank.

143 In the premises, I am of the view that the plaintiffs are entitled to judgment as prayed for in the re-amended statement of claim ie, for the sum of US$649,187.50 as well as costs. They are also entitled to interest on the judgment sum at the rate of 6% per annum from the date of writ until date of judgment. The plaintiffs are further granted a declaration that the defendant is holding the said sum of US$649,187.50 upon trust for the plaintiffs.

Order accordingly.

Sgd:

MPH RUBIN

Judge