Piattchanine, Iouri *v* Phosagro Asia Pte Ltd
[2015] SGHC 259

Case Number : Suit No 404 of 2014

Decision Date : 09 October 2015

Tribunal/Court : High Court

Coram : George Wei J

Counsel Name(s) : Eugene Thuraisingam and Jerrie Tan (Eugene Thuraisingam LLP) for the plaintiff; Andrew Ang and Andrea Tan (P K Wong & Associates LLC) for the defendant.

Parties : IOURI PIATTCHANINE — PHOSAGRO ASIA PTE LTD

Employment law – contract of service – misconduct

Employment law – termination

Contract – contractual terms – fundamental breach

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 200 of 2015 was allowed in part by the Court of Appeal on 28 October 2016. The appeal with regard to the first issue (on whether the respondent was guilty of serious misconduct and/or wilful breaches of the employment contract) was allowed, while the appeal with regard to the second issue (on whether the appellant is entitled to reimbursement of all of the alleged personal claims) was dismissed. See [2016] SGCA 61.]

9 October 2015 Judgment reserved.

George Wei J:

1 Iouri Piattchanine ("the Plaintiff") commenced Suit No 404 of 2014 claiming sums he asserts are due to him following the termination of his employment as Managing Director of Phosagro Asia Pte Ltd ("the Defendant") on 28 February 2014. The Plaintiff's claims were essentially advanced on two fronts: for sums due under the contract, and alternatively, for damages pursuant to a breach of contract. The Defendant counterclaims for sums which it alleges the Plaintiff has wrongfully paid to himself by way of expense claims.

Background facts

2 The Defendant is a company incorporated in Singapore and is engaged in the fertiliser trade. The Defendant is fully owned by Phosint Trading Limited, a Cyprus-incorporated company. Phosint Trading Limited is, in turn, fully owned by the Phosagro Group (which is based in Russia) [note: 1]. The Plaintiff was the Managing Director of the Defendant for close to a year before the termination of his employment. The Plaintiff is an experienced senior manager in the fertiliser trade. Maxim Popov ("Popov") was the Defendant's other director throughout the material period [note: 2]. He is also the key witness for the Defendant in the present suit. The history of the present dispute traces back to a share purchase agreement signed between the Plaintiff and Phosint Trading Limited.

Share purchase agreement

3 For almost a year prior to 26 February 2013, the Plaintiff was the sole director and shareholder of Asiafert Trading Pte Ltd ("Asiafert") [note: 3]. Sometime in November 2012, Andre Guryev ("Guryev"), the Chief Executive Director of the Phosagro Group, approached the Plaintiff about a possible sale of Asiafert to the Phosagro Group [note: 4].

4 The negotiations culminated in a share purchase agreement dated 26 February 2013 for the purchase of Asiafert by Phosint Trading Limited ("the SPA"). [note: 5] The SPA is exhibited in the Plaintiff's affidavit of evidence-in-chief ("AEIC"). [note: 6]

5 I highlight several material terms in the SPA:

(a) By cl 3, the consideration for the purchase of 100% of the shares in Asiafert was US$207,539.

(b) By cl 9.8, the Plaintiff was to bear "all costs incurred by [him] in connection with the preparation, negotiation and entry into of this Agreement and the sale of the Shares".

(c) By cl 1.2.2 of Schedule 2, one of Phosint Trading Limited's closing obligations was to "deliver an employment agreement recording the terms of [the Plaintiff's] continued employment as the Managing Director by the Company" on mutually agreeable terms.

(d) By cl 2.2 of Schedule 3, the Plaintiff warranted that Asiafert had no outstanding liabilities as of 26 February 2013.

6 When the Phosagro Group bought over Asiafert, they renamed it Phosagro Asia Pte Ltd (*ie*, the defendant in the present suit). [note: 7]

7 In short, the Plaintiff sold his company (Asiafert) to Phosint Trading Limited and the Phosagro Group. Aside from the sale price, the Plaintiff's employment as Managing Director of Asiafert was to be continued on mutually agreeable terms. Indeed, the Plaintiff claims that Asiafert was sold at a "low value" because of the understanding that he would be employed by Phosagro Asia. [note: 8]

The Plaintiff's employment contract

8 Pursuant to an employment agreement dated 1 March 2013 ("the Employment Contract"), the Defendant hired the Plaintiff as its Managing Director. The Plaintiff exhibited the Employment Contract in his AEIC. [note: 9] Evidence of pre-contractual negotiations was adduced by the parties. [note: 10] It is undisputed that the Plaintiff prepared the draft of the Employment Contract. [note: 11]

9 The Plaintiff signed his own Employment Contract on behalf of the Defendant, his employer. [note: 12] When cross-examined as to whether the Phosagro Group had sight of the Employment Contract, the Plaintiff asserts that drafts of the Employment Contract were discussed and exchanged between the Plaintiff, Guryev, and Sergey Sereda ("Sereda"), the Deputy Chief Executive of the Phosagro Group. The Plaintiff asserts that Guryev and Sereda agreed to the Employment Contract exhibited in the Plaintiff's AEIC. [note: 13] I have no reason to doubt this evidence.

10 I note that the copy of the Employment Contract exhibited in Popov's AEIC [note: 14] is identical to that exhibited in the Plaintiff's AEIC, save that "Annex 2" (on housing entitlement) is missing from

the version of the Employment Contract exhibited in Popov's AEIC. In this regard, the Plaintiff was cross-examined on whether he had sent Annex 2 of the Employment Contract to Guryev and/or Sereda for approval. The Plaintiff claimed that he could not remember if the Annexes were sent to Guryev and/or Sereda, but insisted that the parties had agreed on all the terms therein. [note: 15]

11 At this juncture, I stress that save for Annex 2, the Defendant does not challenge the terms and validity of the Employment Contract exhibited in the Plaintiff's AEIC. [note: 16] The only disputed fact appears to be whether Annex 2 also forms part of the Employment Contract, however, nothing turns on this.

12 I now set out some of the material terms in the Employment Contract:

> 2. Subject as hereinafter provided the employment *shall commence on 1st March, 2013* for the period of three years having the option to be renewed by another term with parties intentions to be decided one year before expiry of the first term unless terminated by either party to the agreement by giving to the other party not less than three months' notice in writing. 100% annual salary as one-off payment to be settled in case contract is terminated before expiry of it's validity.
>
> 3. During the continuance of this agreement, the employee shall, unless prevented by ill-health, devote such of his time and attention to the business of the Company as shall be required for the proper performance of his duties and in all respects conform to and comply with the directions and regulations of the Board of directors of the Company and shall well and faithfully serve the Company in all respects and use his best endeavours to promote the interests of the Company…
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> …
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> 6. The employee shall be entitled to receive annual bonuses as specified from time to time.
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> …
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> 14. … Except of any reason stipulated in Point 20 of this Employment Contract, if the employee is terminated or resigns prior to the completion of his contractual period, *annual salary as one-off payment* to be settled in full, should the contract is terminated before expiry of its validity. employer shall give employee, or vice versa, three months' notice in writing.
>
> …
>
> 20. If at any time during his employment, hereunder the employee shall be guilty of any serious misconduct or any wilful breach or non-observance of any of the stipulations herein contained and on his part to be observed or performed or shall compound with his creditors generally or shall have a Receiving order in bankruptcy made against him then and in any such case, the Company may terminate the employee's employment hereunder without any notice or payment in lieu of notice.
>
> [emphasis in italics added]

13 The Plaintiff's salary was provided for in cl 5 of the Employment Contract and was set out in "Annex 1" (being S$40,600 per month from 1 March to 31 December 2013, and S$47,300 per month thereafter). The Plaintiff's bonus entitlement was provided for in cl 6 of the Employment Contract and was set out in "Supplement to Annex 1" (being a guaranteed bonus of 50% of the Plaintiff's annual

remuneration, and a discretionary bonus of up to 50% of the Plaintiff's annual remuneration). The relevance of this will become clearer below in the context of the Plaintiff's entitlement (if any) to a "one-off" bonus when his contract is terminated prior to expiration of the three-year term.

14 Besides his salary and bonuses, in brief, the Plaintiff was also entitled to the following benefits under the Employment Contract:

(a) Clause 7: to have a telephone and overseas telephone bills incurred in discharge of his duties paid for by the Defendant.

(b) Clause 8: to have his utility bills paid for by the Defendant.

(c) Clause 9: club membership fees, membership fees in various business clubs which are deemed beneficial to the Defendant's business, as well as fees for language courses, business schools, and seminars would be borne by the Defendant.

(d) Clause 10: the Defendant was to provide a motorcar "of suitable type" for official and private use (all associated expenses including petrol and parking fees were to be paid by the Defendant).

(e) Clause 11: to be reimbursed for all travelling, hotel and other out-of-pocket expenses incurred during business trips "according to the Company regulations".

(f) Clause 12: to be reimbursed for all entertainment expenses reasonably incurred in discharge of his duties in "accordance with the Company regulations".

(g) Clause 13: to be provided free medical consultations and medicine for him and his family.

(h) Clause 16: his and his family's travelling expenses during annual leave would be borne by the Defendant.

(i) Clause 19: the Defendant was to purchase life and accident insurance policies for the Plaintiff.

15 "Annex 2" to the Employment Contract states that the Defendant is obliged to pay for the Plaintiff's housing rent. It will be recalled that the parties disagree whether "Annex 2" is properly part of the Employment Contract.

The management of the Defendant

16 As managing director, it appears that the Plaintiff had wide-ranging powers to run the Defendant's business and entertain actual or potential business partners. There was no evidence that the Plaintiff had to report to anybody when making day-to-day financial or other decisions on behalf of the Defendant. Based on the evidence before me, there were no rules relating to the corporate governance of the Defendant imposed by the new owners. Indeed, this is borne out by the fact that the Plaintiff was even permitted to sign his own employment contract.

17 The Plaintiff managed the Defendant with Popov, the Defendant's other director. Whilst the evidence could have been clearer, it appears that the Plaintiff first became acquainted with Popov when Asiafert was a customer of the Phosagro Group. Shortly after the sale of Asiafert to the Phosagro Group, Popov was appointed as an executive director of the Defendant (in or about May

2013). [note: 17] The evidence was that Popov enjoyed similar entitlements to expenses. [note: 18] That said, as will be seen, there is disagreement as to whether there was a practice or understanding to the effect that expenses could be claimed upfront (as and when incurred) with subsequent verification and adjustment (if needed) only at the end of the accounting year.

18 When it came to handling the finances of the company, it appears that the following processes were in place:

(a) The Plaintiff and Popov were both authorised to sign all cheques on behalf of the Defendant, with no limit as to amount. [note: 19] However, Popov gave evidence that he never actually signed cheques. [note: 20] Popov's evidence was that the Plaintiff kept tight control over the Defendant's accounts and cheque books. [note: 21]

(b) The Defendant's accounts were done by an external accountant, Tricor Singapore Pte Ltd ("Tricor"). [note: 22] Tricor would come to the Defendant's office once a week to handle the Defendant's accounts. [note: 23]

(c) Every month, the Plaintiff would submit his credit card statements together with supporting receipts to Tricor. [note: 24] The Plaintiff had a credit card in his name which he used primarily for corporate expenses, but occasionally for personal expenses too. [note: 25] During the year, Tricor did not spend much time checking the Plaintiff's credit card bills. [note: 26] The Plaintiff would then sign a cheque to himself as reimbursement for his expenses. [note: 27] Popov similarly submitted expense claims for reimbursement, and it was the Plaintiff who signed the cheques to Popov. [note: 28] According to the Plaintiff, at the end of the financial year, Tricor would identify expense claims that the Plaintiff and Popov were not (or appeared not to be) entitled to and seek reimbursement from them. I shall call this the "expense accounting practice".

(d) The Defendant's financial year ran from January to December. The Plaintiff's evidence is that the expense accounting practice was carried over from Asiafert, where he was sole shareholder and director. While the evidence on this was confused, it seems that this practice was never directly communicated to the Phosagro Group. [note: 29] That said, it does not appear that Guryev or any other officer of the Phosagro Group initiated discussions with the Plaintiff on his expense claims during the year or that he was told that his approach was contrary to the practice which the Phosagro Group wished to implement.

(e) When questioned, the Plaintiff accepted that the expense accounting practice could give rise to problems where the director was unable to repay expenses at the end of the financial year. However, the Plaintiff's position, which he strenuously asserted, was that this was the usual practice at Asiafert and that it was the job of the accountants (Tricor) to verify expense claims at the end of the financial year. [note: 30] I accept the Plaintiff's evidence that the expense accounting practice was adopted in Asiafert and that he continued with this practice when Asiafert was sold and renamed as the Defendant. Popov testified that based on his experience, such a practice was not a generally acceptable corporate practice. No independent evidence was placed before the court as to what the normal or standard practice for expense claims by senior employees or officers are in Singapore. Indeed, it may well be that the rules and procedures will vary considerably and in any case, at the end of the day, what is important is to examine any internal company regulations as well as what is provided for in the contract between the Plaintiff and the Defendant.

(f) The Defendant's management accounts were sent to the Phosagro Group every month. [note: 31] The directors' expenses were listed therein, but a detailed breakdown cannot be found in those accounts. [note: 32] As a minimum, it must follow that the Phosagro Group must have been aware that the Plaintiff was making expense claims during the year. Moreover, the Phosagro Group must have been aware of the terms of the Plaintiff's contract and his contractual entitlement to the various heads of expense claims and benefits.

(g) Based on the evidence before me, the Defendant had no regulations that governed the accounting practices of the company or the entertainment and expense claims of directors. [note: 33] Whilst cll 11 and 12 of the Employment Contract referred to reimbursement of expenses in accordance with the Company Regulations, no such regulations were adduced in evidence. Moreover, there is no evidence that the Phosagro Group required the Plaintiff to implement any company regulations to govern the reimbursement of expense claims. There is also no evidence that Popov had complained to the Phosagro Group about the absence of company regulations.

Breakdown of the relationship between the Plaintiff and Defendant

19 Shortly after the Plaintiff started work with the Defendant, tensions arose between the Plaintiff and Popov as well as the officers from the Phosagro Group. [note: 34] The parties did not see eye to eye on many management decisions. To be clear, the disagreements related to the direction of the company's business, not the day-to-day management or expense claims.

20 The tipping point that led to the Plaintiff's termination seemed to have been the Plaintiff's response to the Phosagro Group's intended appointment of Sereda as a director of the Defendant. The Plaintiff claims that in February 2014, when he heard about the possibility that Sereda would be appointed on the Defendant's board of directors, he wanted to ensure that there would not be a conflict of interest for Sereda to be both a director of the Defendant, and a director of the Phosagro Group. [note: 35] The Plaintiff therefore sought legal advice from M/s Rajah and Tann LLP ("R&T") on the issue. [note: 36]

21 In its legal advice, R&T opined that there would likely be a conflict of interest for the same person to act as director of both a parent and subsidiary company. [note: 37] On 26 February 2014, the Plaintiff forwarded R&T's legal advice to Phosint Trading Limited's solicitors. [note: 38]

22 On 27 February 2014, the Plaintiff received an email from Guryev which contained only one line: "*What r u doing?*". [note: 39] On the same day, the Plaintiff replied to Guryev's email explaining that he had sought R&T's advice in the interest of the company and the shareholders. [note: 40] The Plaintiff received no further reply from Guryev.

The Plaintiff's termination

23 On 28 February 2014, the Plaintiff returned to Singapore from a business trip in Japan. When he landed and opened his email, he received a termination letter from the Defendant dated 28 February 2014 ("28 February 2014 Letter"), and signed by Popov. [note: 41]

24 I set out the material portions of the 28 February 2014 Letter: [note: 42]

1. This letter serves as notice that your employment as a Director of Phosagro Asia Pte Ltd (the

"Company") is terminated *pursuant to the terms of the employment contract dated 1 March 2013* (the "Employment Contract").

2. The *termination takes effect immediately*.

3. Subject to such deductions as the Company is entitled to make, the Company will arrange payment of such monies that may be due to you. In this respect, the Company is looking into the amount, if any, to be paid to you on account of the termination of your employment. Any amount to which you are entitled will in any case be subject to deductions to be determined by the relevant authorities.

…

6. The Company *reserves the right to withhold any payment which may otherwise be due to you on account of any breach of contract and/or any misconduct or non-observance of the Employment Contract and/or breach of any of your fiduciary duties* and/or in the event that a claim is to be made against you, whether for misrepresentation or otherwise or in relation to your non-performance/inadequate performance of your duties.

[emphasis added]

25 Pausing here, I note that para 3 of the letter expressly refers to payment to the Plaintiff of such monies due to him under the contract subject to any deductions to be determined by the relevant authorities.

26 The Plaintiff testified that upon receiving the 28 February 2014 Letter, he called Popov, who informed him that the decision was taken by the shareholders. [note: 43] The Plaintiff also sent an email to Guryev to ask if his termination was a mistake, and if not, how they could arrange his smooth departure from the Defendant, but he received no reply. [note: 44]

27 Subsequently, on 18 March 2014, the Plaintiff received a second letter from the Defendant ("the 18 March 2014 Letter"). The material portions of the 18 March 2014 Letter are as follows: [note: 45]

1. We refer to our letter dated 28 February 2014 in which you were given notice of termination of your employment.

2. Subsequent to your termination of employment, we have looked into various matters and discrepancies arising whilst you were the Managing Director of the Company. From our investigation, it has become apparent that you have been guilty of serious misconduct and/or have not acted in the Company's best interest and/or have acted in breach of your fiduciary duties to the Company.

… [details of wrongful claims were set out] …

8. As set out above, it appears that an amount of SGD 498, 651.57 has been misappropriated, and that you are responsible for the same. For your convenience, we are making available a copy of the relevant documents for the impugned payments. If, on an examination of the documents you are able to account for any of the impugned payments, we trust that you would respond within 10 days hereof. Particularly, in relation to each claim you should provide:

i) details of why the payment had been justified;

ii) identify any other party who had approved the expense/ payment;

iii) set out the circumstances in which the approval had been sought and obtained; and

iv) copies of all documents recording the relevant approval.

9. In the circumstances, without prejudice to our rights, we hereby put you on notice that your employment with the Company is summarily terminated.

10. Given the matters set out above, it is apparent that you are not entitled to receive either payment in lieu of notice or payment of a lump sum. In fact, we reserve the right to make a claim of the monies wrongfully paid out. This may include a claim for other sums which may not have been specifically referred to in this letter. As such, for the avoidance of doubt, all rights are reserved.

28 The 18 March 2014 Letter came with a huge stack of receipts relating to the allegedly wrongful claims made by the Plaintiff. The Plaintiff did not respond to justify the claims listed in the 18 March 2014 Letter. [note: 46]

29 On 4 April 2014, the Plaintiff's solicitors sent a letter to the Defendant claiming that there was no basis to the allegations made in the 18 March 2014 Letter, and claiming for a sum of S$1,946,400 which was asserted to be due and payable to the Plaintiff. [note: 47] The present proceedings were then commenced by the Plaintiff on 14 April 2014.

The parties' respective claims and positions

Plaintiff's claims

30 The Plaintiff's primary claim is that the Defendant has breached its contractual obligation to employ the Plaintiff for three years by terminating his employment with immediate effect on 28 February 2014. [note: 48] In consequence he claims that he suffered the following losses pursuant to that breach [note: 49] :

(a) Salary for the period between March 2014 and February 2015 amounting to S$567,600.00.

(b) Salary for the period between March 2015 and February 2016 amounting to S$567,600.00.

(c) Guaranteed bonus for the period between March 2013 and February 2014 amounting to S$243,600.00.

(d) Guaranteed bonus for the period between March 2014 and February 2015 amounting to S$283,800.00.

(e) Guaranteed bonus for the period March 2015 to February 2016 amounting to S$283,800.00.

Total: S$1,946,400.00 ("the Primary Claim")

31 The Plaintiff alternatively claims that it is a term of the Employment Contract that an annual salary as one-off payment was to be paid to him should the contract be terminated by the Defendant before the end of the three-year term. Therefore, the Defendant is contractually obliged to pay the Plaintiff the following sums [note: 50] :

(a) Salary for three months' notice amounting to S$141,900.00

(b) Salary for the period between March 2014 and February 2015 amounting to S$567,600.00.

(c) Guaranteed bonus for the period between March 2013 and February 2014 amounting to S$243,600.00.

(d) Guaranteed bonus for the period between March 2014 and February 2015 amounting to S$283,800.00.

Total: S$1,236,900.00 ("the Secondary Claim")

32 Essentially, in the Primary Claim, the Plaintiff is bringing a *suit for damages* pursuant to the Defendant's contractual breach. The Plaintiff's claim is for the salary and bonuses he would have earned if he had been employed for the full three-year term.

33 In the secondary claim, however, the Plaintiff does not plead any contractual breach; instead, the Plaintiff claims that certain sums are simply *due under the Employment Contract* given that the said contract was terminated (in accordance with the terms of the contract) before the expiry of the three-year term. I observe that para 12 of the statement of claim might be read to suggest that the Secondary Claim in fact arises from the Defendant's breach of contract as well. However, reading para 9 of the statement of claim, which states that "the Defendant is contractually obliged to pay the aggregate sum of S$1,236,900.00", it is clear that the Secondary Claim is not premised on a contractual breach.

34 The Defendant's primary position is that the Plaintiff is not entitled to any payment upon termination because of certain unauthorised payments he made to himself in breach of express and/or implied terms of the Employment Contract as well as the Plaintiff's general and fiduciary duties to the Defendant [note: 51] .

35 In particular, the Defendant relies on the contractual right to summary termination under cl 14 and 20 of the Employment Contract in asserting that the Plaintiff is not entitled to any sums upon termination [note: 52] . The Defendant also submits that its termination letter on 28 February 2014, while failing to mention summary termination or the Plaintiff's misconduct, was without prejudice to its right to subsequently clarify that the Plaintiff was *summarily* terminated on the grounds of his misconduct.

36 However, in its closing submissions at [84]–[103], the Defendant submits that it also had a *common law right of termination* pursuant to repudiatory breaches by the Plaintiff.

37 I observe that while the Defendant did specifically plead its rights under cl 14 and 20 of the Employment Contract, it did not specifically plead the fact that it had a common law right to termination pursuant to repudiatory breaches by the Plaintiff.

38 Nevertheless, it is clear that the Defendant is taking the position that it had the right to

terminate the Plaintiff without making any compensatory payments. Moreover, I am satisfied that the Defendant has pleaded the essential facts to support its legal submission that it has a common law right to terminate the Employment Contract. Therefore, I shall proceed on the basis that the Defendant's claim to be entitled to terminate the Employment Contract summarily is founded both *on the contract* itself, as well as *at common law*.

39 The Defendant also takes the position that the Primary Claim is without basis as the contract does not entitle the Plaintiff to be paid a salary for the remaining period of the three-year term if the Plaintiff is "prematurely" terminated [note: 53]. Moreover, the Defendant submits that no bonuses are due to the Plaintiff because his first year bonus had not accrued as of 28 February 2014, when the Plaintiff's employment was terminated. The Plaintiff's Employment Contract commenced on 1 March 2013, and as of 28 February 2014, the first year of employment was not yet completed.

Defendant's counterclaim

40 The Defendant also counterclaims for damages arising from the Plaintiff's breach of his contractual, general and fiduciary duties to the Defendant.

41 In this regard, the Defendant claims that the Plaintiff is "liable to repay and/or account for the monies that had been paid without due and/or proper authorisation." [note: 54]

42 According to the Defendant, this amounts to a total of S$499,719.20. The Defendant attached a breakdown of the alleged unauthorised claims made by the Plaintiff in its pleadings [note: 55]. However, a more detailed tabulation of each unauthorised claim together with references to the supporting documentation (*eg*, receipts) can be found in Popov's AEIC at MP-13.

43 In brief, the Defendant's counterclaim consists of eight categories of allegedly unauthorised payments, which entail 867 claims [note: 56]. The eight categories (as helpfully summarised in Popov's AEIC) are as follows:

(a) Category A: [note: 57] claims amounting to S$100,340.40 which the Plaintiff admits are unauthorised in his Reply and Defence to Counterclaim (Amendment No 1) (see Annex A). The Plaintiff states that he fully intended to settle those sums at the end of the financial year (after the accounts had been audited), but that he was not given a chance to before he was terminated.

(b) Category B: [note: 58] claims relating to expenses incurred prior to the commencement of the Employment Contract (*ie*, 1 March 2013). The Defendant submits that the Plaintiff cannot make claims for expenses incurred by him before 1 March 2013 because the Defendant (and its new owners) is not liable for such expenses under the SPA.

(c) Category C: [note: 59] claims relating to the Plaintiff's expenses overseas which the Defendant asserts were the Plaintiff's and his family's personal vacation expenses. The Plaintiff claims that these overseas expenses were either spent on business trips or on entertaining potential business partners for the Defendant's business.

(d) Category D: [note: 60] claims for services and purchases that the Defendant asserts are personal in nature and which the Plaintiff is not entitled to under his Employment Contract. The Plaintiff's position is generally that these expenses either relate to benefits he was entitled to

under his Employment Contract, or were made for the Defendant and its staff.

(e) Category E: [note: 61] claims for food and beverage expenses. The Defendant asserts that these are personal expenses especially since they are largely for meals on the weekend or public holidays. The Plaintiff claims that all the expenses in Category E are business expenses.

(f) Category F: [note: 62] claims for expenses made at hotels in Singapore. The Defendant asserts that these are not business expenses incurred on behalf of the Defendant, but the Plaintiff claims that these hotel expenses were incurred when he hosted actual or potential business partners of the Defendant.

(g) Category G: [note: 63] claims for taxi services in Singapore. The Defendant asserts that the Plaintiff had no basis to make taxi claims because the Defendant already paid for his motor car. The Plaintiff however claims that these were mostly his family's transport expenses which he was entitled to claim for under the Employment Contract.

(h) Category H: [note: 64] residual category of claims which include a substantial payment to Fincastle Trading Limited (S$209,601.63) and a payment to BNP Paribas (S$10,718.50).

Issues

44 The legal and factual issues in this case are interlinked and not easily separated. As such, I propose to structure my judgment as follows. First, I will consider the Defendant's counterclaim, *ie*, whether the alleged unauthorised claims made by the Plaintiff (save for those admitted by the Plaintiff in Category A) are indeed unauthorised (as falling outside what the Plaintiff was entitled to claim). Resolving this may help to provide a sharper focus for the remainder of the judgment.

45 Second, I shall consider whether there is any contractual basis for the Plaintiff's Primary Claim for the salary and bonuses he would have earned during the remaining period of the three years should the Employment Contract not have been terminated.

46 Third, I shall consider the general principles of employment law regarding an employer's termination of an employee's employment contract. In particular, it will be necessary to consider the permissibility of raising new grounds or reasons for termination at a subsequent date when those grounds or reasons were never raised at the time of termination.

47 Fourth, I shall consider the parties' respective entitlements following the Defendant's termination of the Plaintiff's employment on 28 February 2014. In particular, the following issues arise:

(a) What are the grounds and reasons relied upon by the Defendant at the time of termination, *ie*, 28 February 2014?

(b) What is the relevance of the 18 March 2014 Letter?

(c) Is there a basis for the summary termination of the Plaintiff based on the Plaintiff's purported misconduct (*ie*, whether there was a repudiatory breach under common law, or whether the conditions in cl 20 are satisfied)?

(d) Can the grounds, reasons and facts retrospectively raised on 18 March 2014 after the Plaintiff's termination as well as at trial now justify the Defendant's summary termination of the

Plaintiff's employment?

48 Finally, I shall consider whether the Plaintiff's first year's bonus accrued to him on or before 28 February 2014 under the Employment Contract.

Issue 1: Extent of wrongful claims and payments

49 As managing director, the Plaintiff was entitled to receive payment for certain expense claims from the Defendant. These included claims for benefits that he was entitled to under the Employment Contract, as well as claims for business expenses. In particular, cll 11 and 12 of the Employment Contract state as follows:

> 11. While on business trips, the employee will be reimbursed for all travelling, hotel and other out-of-pocket expenses according to the Company's regulations.
>
> 12. The employee shall be reimbursed all entertainment expenses reasonably incurred by him in or about the discharge of his duties in accordance with Company's regulations.

50 Given that the Plaintiff's expense claims were broken down into eight categories, I shall consider each category in turn to determine if the expense claims made by the Plaintiff were indeed wrongfully made.

51 At this juncture, I highlight the fact that the Defendant has alleged there were more than 800 wrongful expense claims made by the Plaintiff. Aside from evidence of supporting receipts and an assertion by Popov in his AEIC that the expense claims were wrongful, there was no other evidence or indeed cross-examination on the majority of the alleged unauthorised claims.

52 Whilst it is obvious that going through all 800 alleged wrongful expense claims in the evidence would take a considerable amount of time, it stands to reason that this is a matter the Defendant must be prepared to address. Indeed, the parties were requested to address the issue of how the court should approach the merits of the Defendant's counterclaim (wrongful expense claims) given the large number of claims. The question was not however directly dealt with in the submissions.

53 That said, whilst the Defendant did not address in detail the wrongfulness of the claims in each category, it appears that the Defendant's focus was primarily on establishing the wrongfulness of the expense accounting practice instituted by the Plaintiff (based on the Category A payments admitted by the Plaintiff), rather than on proving each detail in the counterclaim, *ie*, that the entire S$499,719.20 worth of claims highlighted by the Defendant in its pleadings were wrongful.

54 To be clear, the Defendant did cross-examine the Plaintiff on *some* of the individual claims. It follows that the Defendant is essentially relying on the court drawing inferences from (a) the expense accounting practice that the Plaintiff had adopted, and (b) the evidence from the particular expense claims that the Plaintiff was cross-examined on.

55 Given that the Defendant is the party claiming for the "reimbursement" (by way of an account or damages) of the said sums, the burden of proof is naturally on it to demonstrate that the claims made by the Plaintiff were indeed wrongful. The problem, however, is that evidence on the majority of the allegedly wrongful claims made by the Plaintiff was simply not adduced or tested in court. Ultimately, the question must be whether the Defendant has done enough for the court to draw an inference that all the alleged wrongful claims were indeed wrongful such that it can be said to have made out its case.

56 As will be seen from the following paragraphs, I am unable to make a factual finding on most of the individual claims/expenses said to be unauthorised. In the discussion that follows, I will generally limit any factual findings or discussion to the allegedly wrongful claims that were actually traversed at trial.

57 It is unnecessary to consider "Category A" given that the Plaintiff has admitted that the claims listed therein are sums he was not entitled to claim. But it is noted that there is the general question as to the propriety of his practice of claiming and receiving payment "upfront" and leaving it to the accountants to raise queries at the end of the year. This will be discussed below.

Category B

58 The Defendant's objections to the claims made by the Plaintiff in Category B are two-fold. First, the Defendant submits that the fact that the claims were incurred before 1 March 2013 is sufficient to prove they are wrongful. Second, at trial, the Defendant also questioned whether the expenses were of a personal or business nature.

59 In relation to the second ground, when questioned about several specific expenses during cross-examination, the Plaintiff claimed that he either did not remember what the expenses were for, or explained that the expenses were for things like bottled water for the company and for entertaining business partners (whose identities he cannot remember) [note: 65].

60 In my view, the evidence on this point unfortunately does not allow me to reach a finding of fact that the Category B claims traversed during cross-examination were personal rather than business expenses. There simply is not enough evidence. The Plaintiff was able to give reasonable explanations for at least some of the claims put to him, and while there is no independent evidence backing up the Plaintiff's testimony, there is similarly no independent evidence backing up the Defendant's position that the claims are wrongful either. I therefore reject the submission that the Category B claims were personal rather than business expenses.

61 Fortunately, given the presence of some documentary evidence, I find myself more able to evaluate the Defendant's first submission. The Defendant primarily relies on the terms of the SPA and the date of commencement of the Employment Contract to submit that it is not liable for any of the Plaintiff's expenses prior to 1 March 2013 [note: 66]. The Plaintiff relies on pre-contractual communications between the parties which he submits evinces an understanding that the Defendant will be liable for all operating expenses incurred by Asiafert from 1 February 2013.

62 Having considered the evidence and submissions of the parties, I agree with the Defendant that the Plaintiff was not entitled to make claims for the expenses he incurred prior to 1 March 2013. This is so even if these were business expenses of Asiafert. My reasons are as follows:

(a) First, the Employment Contract does not entitle the Plaintiff to any benefits from the Defendant prior to its commencement on 1 March 2013. The Employment Contract is clearly forward looking and has no clause that suggests the Defendant would bear the Plaintiff's expenses incurred prior to the commencement of the contract.

(b) Second, as mentioned at [5(d)] above, by cl 2.2 of Schedule 3, the Plaintiff warranted that Asiafert had no outstanding liabilities as of 26 February 2013. Given that the claims made by the Plaintiff in Category B were not on Asiafert's balance sheets, I agree with the Defendant that it would clearly be inconsistent for the Plaintiff to claim that these sums were due to him from Asiafert prior to 26 February 2013, the date the SPA was signed.

63 On balance, the documentary evidence therefore suggests that the Plaintiff was not entitled to claim the expenses he incurred prior to 1 March 2013. While the Plaintiff did adduce two emails dated 14 January 2013 and 4 February 2013 suggesting that the new investors were to bear Asiafert's operating expenses from 1 February 2013, I note that both these emails were sent by the Plaintiff to Popov, and in both instances, the Plaintiff has failed to adduce evidence of concurring replies from officers of the Phosagro Group. I therefore attach no weight to the Plaintiff's unilateral email communications.

64 Thus, I find that the Defendant's counterclaim in respect of Category B succeeds. The amount of expenses wrongly claimed and paid amounts to S$8570.12. [note: 67]

65 That said, I also accept that the Plaintiff genuinely believed at the time he claimed these expenses, and indeed even at trial, that he was entitled to make these claims. In other words, his evidence was that he did not deliberately make claims for items he *knew* he was not entitled to. Indeed, his unilateral email communications to Popov are consistent with a finding that he always believed he was entitled to have his expenses from 1 February 2013 covered by the "new investors". The relevance of this holding will become clearer below in respect of the discussion of the seriousness and gravity of the wrongful claims and the Defendant's claimed right of summary termination under cl 20.

Category C

66 As mentioned, Category C claims relate to the Plaintiff's expenses overseas which the Defendant asserts were the Plaintiff's and his family's personal vacation expenses. The Plaintiff's position is that these are expenses he is entitled to be reimbursed for under his Employment Contract (*viz* cll 11, 12 and/or 16).

67 At cross-examination, only a portion of the Category C claims were traversed. [note: 68] Given the relatively lengthy cross-examination on the Category C claims, I summarise the main points that came out of the cross-examination:

(a) The hotel bills show that at least some of the hotel reservations were made for more than one person. [note: 69] The Plaintiff admitted at trial that his wife and/or son have stayed with him on occasion when he was on business trips. [note: 70]

(b) The Plaintiff admits that at several of the business meals, his wife was in attendance as well. [note: 71]

(c) The Plaintiff testifies that for many of the business trips he claimed for, it was partially for leisure and partially for work. He had meetings with business partners throughout the time he spent overseas, but did not spend the entire time working. [note: 72] The evidence shows that the Plaintiff admits that some of the claims on a single trip may be personal, whilst others may be for business, and that he does, at least on some occasions, distinguish them. [note: 73]

(d) The Plaintiff was often able to recall the specific people he met on the various business trips the Defendant's counsel questioned him about during cross-examination. [note: 74]

(e) It became clear that many of the business meetings the Plaintiff had were with people the

Plaintiff considered potential business partners, rather than present business partners of the Defendant. [note: 75]

68 At this juncture, it is useful to go back to the Employment Contract to see what the Plaintiff is entitled to claim. Clause 11 allows the Plaintiff to be reimbursed for all "travelling, hotel and other out-of-pocket expenses according to the Company's regulations" when on business trips. It is clear that on many of the business trips he went for, and during many of the business meals, his wife would be in attendance (and occasionally his son would stay in the hotel room as well). However, the question remains whether this renders the Plaintiff's claims for the hotel room he stayed in as well as the meals in which his wife was present *wrongful*.

69 First, I re-emphasise that there were no "Company Regulations" governing these matters. This is clear from Popov's evidence during cross-examination. [note: 76] The court must therefore make a decision on the broad wording of the Employment Contract alone.

70 In this regard, I find that the evidence before me is insufficient to allow a finding of fact that any of the claims made under Category C related to expenses on *purely personal holidays*, rather than on mixed business and personal trips. The Plaintiff, when probed, was always able to explain the business meetings he attended. While there is no independent verification of any of the Plaintiff's evidence, the Defendant has similarly adduced no evidence that the Plaintiff was giving false testimony. I therefore find myself with no option but to operate on the premise that the Plaintiff's testimony is true.

71 As such, the question is whether "business trips" under cl 11 includes trips which the Plaintiff spent with his wife and on occasion, his son, and on which he had a number of business meetings, but did not spend all his time working. In my view, in the absence of specific company regulations to the contrary, I find that such trips can be considered business trips under cl 11. At the senior management level, I accept that a lot of business trips entail meeting and entertaining present and potential business partners. It is not surprising that the Plaintiff's wife might join some networking events or dinners. Moreover, I accept that while the Plaintiff's family may have stayed with him on occasion when he was on business trip, this did not disentitle him from claiming the expense as a business trip expense under cl 11. Indeed, in respect of hotel claims for example, I note that the Plaintiff always only booked one hotel room for each business trip. If the Plaintiff had booked more than one hotel room, that might have raised some eyebrows. However, if the Plaintiff's family simply came along and stayed with him (or sat in his limousine) during his business trips, this does not, in my view, disentitle the Plaintiff from claiming the hotel expense as a business trip expense.

72 Of course, I acknowledge that there was no independent, corroborating evidence that the Plaintiff did indeed attend business meetings on the various trips he claimed for. This assumption is solely based on his testimony. However, given that the Plaintiff has shown a willingness to admit that certain overseas expenses were personal, and has also generally been able to offer some explanation of each trip raised during cross-examination, I find that on the evidence, the Defendant has not proven that the expense claims in Category C are wrongful.

Category D

73 Category D claims relate to services and purchases which the Defendant asserts are personal in nature and which the Plaintiff is not entitled to under his Employment Contract. A large number of claims are embodied within Category D. They include S$3140.55 for telephone and broadband services, S$104.74 for Ritz crackers, sour cream and cottage cheese from Cold Storage, S$677 for perfumes from Watsons, S$2,865 for a fountain pen, S$138 for contact lens solution, as well as many

claims in respect of iTunes charges (mostly of small sums).

74 Indeed, it is noted that some of the Category D expense claims relate to purchases at pharmacies. In some cases, the items are not mentioned. In other cases, the item, such as contact lens solution, is mentioned. Whilst these may be expenses of a personal nature, I note that under cl 13 of the Employment Contract, the Plaintiff is entitled to claim medical expenses.

75 During cross-examination, the Plaintiff was questioned only on a few purchases, which he explained as follows: [note: 77]

(a) Transaction at St Regis Hotel dated 3 March 2013: the Plaintiff explained that this was for a spa service he and his wife enjoyed at the hotel, and which he was entitled to claim as a substitute for a club membership which he did not sign up for but was entitled to under the Employment Contract. [note: 78]

(b) Transaction at Huber's Butchery dated 11 August 2013 under the name of "Tattana Piattchanine" (the Plaintiff's wife): the Plaintiff explained that his wife bought this bottle of wine on his behalf to entertain some business contacts. [note: 79]

(c) Transaction at the Oak Cellar for a bottle of Chateau Petrus dated 15 January 2014: the Plaintiff explained that the bottle of wine was purchased as a gift for Guryev. [note: 80] The cost was $3,402, which the Plaintiff accepted was expensive. His response was that it was a special wine for a special person.

(d) Transaction at DFS Venture dated 4 August 2013: the Plaintiff explained that he purchased the bottles of alcohol to entertain guests at restaurants or as business gifts. [note: 81]

76 Regarding the transactions at (b) to (d) set out above, I find that there is insufficient evidence to demonstrate that the purchases were not business expenses. The Defendant has failed to adduce objective evidence to show that the purchases were for the Plaintiff's personal use or otherwise disprove the Plaintiff's evidence.

77 As for the spa services at the St Regis (set out at (a) above), however, I find that this is a wrongful claim as the Plaintiff is not entitled to such benefits under the Employment Contract. The Plaintiff cannot claim to be entitled to spa services under his Employment Contract just because he did not exercise his right to a club membership. Therefore, the Defendant's counterclaim in relation to Category D succeeds only in relation to the Plaintiff's claim for the St Regis spa service (and other related spa services and treatments).

78 To be clear, I make no specific finding in relation to the other items in Category D as evidence on those was simply not adduced at trial. I will address the question as to whether it is possible to infer that all the Category D expenses were wrongful based on the items that were covered in cross-examination later in this decision.

Category E

79 Category E relates to claims for food and beverage expenses. The Defendant submits that many of these expenses are largely for meals on public holidays or Fridays, Saturdays and Sunday evenings. [note: 82] The Plaintiff's position is that these were all claims in relation to entertainment expenses

incurred by the Plaintiff in the discharge of his duties. [note: 83] During cross-examination, the Defendant's counsel questioned the Plaintiff about three specific meal expenses:

(a) The first was an expense of $2,155.68 incurred at Morton's steakhouse, which the Plaintiff testified related to a business dinner with one Mr Lomakin, a general director of the International Potash Company, and now said to be a member of parliament in Russia. [note: 84]

(b) The second was an expense of $1,194.66 incurred at Waku Ghin, which the Plaintiff testified related to a meal he had with a general director of a company which builds gas and oil pipelines in Kazakhstan. [note: 85]

(c) The third was an expense of $1,177 incurred at Imperial Treasure, which the Plaintiff testified was for a meal between himself, his wife, Popov, and Popov's wife.

80 It is useful at this juncture to consider the specific criticisms made by the Defendant against the Plaintiff's entertainment expenses.

(a) First, the Defendant submits that there was no need to entertain potential suppliers (*eg*, Mr Lomkin from the International Potash Company) as the Defendant's business model was one which relied on the Phosagro Group entirely for its supplies. Against this, the Plaintiff's position was that this business model was unviable and that the Defendant should look towards diversifying. The Plaintiff was simply trying to keep the option of diversifying alive. [note: 86]

(b) Second, the Defendant also questioned why the Plaintiff was entertaining business people from countries in which the Defendant had no business in, and from industries which are unrelated to the Defendant's business (*eg*, an oil and gas company in Kazakhstan). [note: 87] The Plaintiff's response to that criticism is simply that he thought it important to develop and maintain relationships with important business people who may be useful for the Defendant's business in future. [note: 88]

81 The disagreements between the Plaintiff and Defendant described above were representative of the disagreements that surfaced throughout the trial. In short, the Plaintiff and the owners of the Defendant seemed to have rather different ideas about the direction in which the Defendant's business should be developed, and how it should be run. In the absence of evidence to the contrary, I accept that the Plaintiff was indeed meeting business partners as described above, and that he genuinely believed that those meetings were beneficial for the Defendant's business in future. Indeed, much of his entertainment expenses and meetings in Category C, as well as his hotel expenses in Category F (as will be discussed below), were also premised on this belief.

82 While the Defendant may not agree with the Plaintiff's vision for the company, and while this certainly eventually led (in part at least) to the Plaintiff's dismissal, in my view, this difference is not sufficient to render these entertainment expenses "unreasonably incurred" under cl 12 of the Employment Contract. Popov did give evidence that the Plaintiff was expressly allocated certain markets by the Phosagro Group (*ie*, Asian markets and not markets like Kazakhstan) and was told not to purchase non-Phosagro products for the Defendant's business because of quality control issues. [note: 89] However, no written evidence to this effect was produced to the court. Indeed, the Plaintiff's position when questioned by the court was that there was no resolution or direction from the shareholders or management that the Plaintiff was to focus only on a particular business direction. In the absence of such, the Plaintiff was of the view that as managing director, he had the

liberty to look ahead and do what he deemed necessary to keep the business competitive. [note: 90]

83 Given the absence of company regulations or any written board resolutions (or the equivalent) restricting the scope of entertainment the Plaintiff may carry out (or indeed, the amounts he may incur in the course of entertainment) as managing director of the Defendant or limiting the business opportunities he may explore, I am of the view that he was given significant liberty to entertain present and potential business partners. While Popov did testify that the Plaintiff's mandate to explore markets and business opportunities was limited, the absence of actual documentary evidence of this or evidence from the shareholders who issued this limitation is conspicuous. In the absence of better evidence, I am unable to conclude that the Plaintiff's expenses at [79(a)] and [79(b)] – and indeed other similar expenses which the Defendant objects to on the ground that it exceeded the mandate the Plaintiff was given – were wrongful.

84 The expense at Imperial Treasure raises a more difficult question. The Plaintiff justifies this as a company dinner that is beneficial to the Defendant as it maintains a good relationship between the managers. [note: 91] While I can appreciate the incredulity the Defendant's counsel expressed when questioning the Plaintiff about whether he can expect the Defendant to pay for a meal he enjoys with his wife, Popov and Popov's wife, I also accept that the Plaintiff genuinely views the meal between the directors of the company as a legitimate company expense.

85 While there is no provision in the Employment Contract that entitles the Plaintiff to claim for a meal between himself and Popov, hosting a meal for the directors of the company may be viewed as a company expense (in the same way buying water or snack supplies for the company might be). Popov had been sent to Singapore by the Phosagro Group to serve on the Defendant's board. The Plaintiff and Popov were the key office holders in Singapore and had only relatively recently started working together. On balance, I find that in the absence of specific company regulations to the contrary, the Imperial Treasure meal can be justified as a business expense on the particular facts of this case.

Category F

86 The claims in Category F relate to expenses at hotels in Singapore. The Defendant submits that it should not be made to pay for the Plaintiff's personal hotel stays in Singapore. However, the Plaintiff testified that these hotel expenses were never spent on a personal stay for himself or his family. Rather, they were always spent on hosting actual or potential business partners who came to Singapore. [note: 92]

87 I do not find it necessary to go through each claim that the Plaintiff was cross-examined on. Suffice to say, I find that there is insufficient evidence to prove that these claims were wrongful. The Plaintiff has managed, *prima facie*, to give reasonable explanations for each hotel expense he was questioned about. In the absence of further evidence to undermine the Plaintiff's testimony, I am unable to conclude that these were wrongful claims made by the Plaintiff.

88 I acknowledge that the Defendant's ultimate owner, the Phosagro Group, may not have agreed with the types of business opportunities the Plaintiff was exploring. However, in the absence of evidence to prove that the Plaintiff's mandate was *clearly limited and communicated to him*, and in the absence of better evidence from the shareholders themselves, I am unable to find that the Plaintiff's entertainment and hosting claims were wrongful.

Category G

89 The claims in Category G relate to taxi expenses incurred by both the Plaintiff and his family.

The Plaintiff explained that under cl 10 of the Employment Contract, the Defendant was obliged to provide the Plaintiff with a motor car "for the discharging his employment obligations and private use". Thus, some of the taxi claims made related to his family's expenses when the car was not available for their private use. [note: 93]

90 In relation to Category G claims, I find that the Plaintiff was not entitled to claim for taxi travel given that the Defendant had already paid for his private car. Clause 10 of the Employment Contract clearly stipulates that he shall be provided with "a motor car", implying a single car. This was provided by the Defendant throughout the Plaintiff's employment (initially, by the Defendant bearing the expense of the Plaintiff's existing car, and subsequently, by the Defendant paying for the purchase of a new Mercedes Benz car that the Plaintiff used). While the private car provided may be used for both business and private purposes, the Employment Contract did not require the Defendant to bear all the transport expenses of the Plaintiff's whole family. The Plaintiff thus was not entitled to claim for his and his entire family's transport expenses. Therefore, I find that the counterclaim in respect of the Category G claims succeeds.

Category H

91 There are two claims under Category H: first, the payment made to BNP Paribas, and second, the payment made to Fincastle Trading Limited.

BNP Paribas

92 The Plaintiff was not cross-examined on the payment made to BNP Paribas. Popov's affidavit evidence is that the Plaintiff failed to close the BNP Paribas overdraft facility, incurring unnecessary charges for the Defendant. [note: 94] The Plaintiff however claims that the sums due to BNP Paribas are incurred in the use of the electronic banking system and that he did take steps to close the overdraft account after receiving approval from Mr Alexandra Sharabaiko ("Sharabaiko"), the Chief Financial Officer of the Phosagro Group, to do so.

93 The evidence shows that there were communications between the Plaintiff and Sharabaiko about closing the BNP Paribas account. [note: 95] However, while the Plaintiff asserts that steps were taken to close the account, there is at best slim evidence of the steps taken by him to do so. In his AEIC, the Plaintiff exhibited an email from Christine Kor, an employee of the Defendant, to himself dated 19 September 2013, containing a letter in the Plaintiff's name to one Mr Christian Salatko from BNP Paribas indicating the Defendant's intention to close the BNP Paribas account. [note: 96] However, this is clearly only an internal email between Christine Kor and the Plaintiff. There is no evidence that this letter was sent out. Short of that, I am not convinced that the Plaintiff has demonstrated that he took steps to close the BNP Paribas account.

94 Indeed, Popov gives evidence in his AEIC that as of 28 March 2014, the BNP Paribas account was in a "pre-close status" because outstanding charges were not settled. Popov then had to take steps to effect the closure of the account, which was finally executed on 25 April 2014.

95 On balance, I accept that the Plaintiff had failed to take steps to close the BNP Paribas account even though he was instructed to do so. Having said that, this in my view is at best evidence of some carelessness on the Plaintiff's part. And even then, the Plaintiff's carelessness is not clearly established on the evidence as the Plaintiff was never given a chance to explain why he never ultimately effected the closure of the BNP Paribas account despite evidence that he had taken some very preliminary steps to do so. An assessment of whether the Plaintiff was careless in light of

this omission must surely be assessed with reference to what a reasonable director in the Plaintiff's position with the demands facing the Plaintiff at that time might have done. The surrounding facts have not been sufficiently explored for me to come to a proper determination on this point.

96 Nevertheless, even if the Plaintiff was careless, it does not render the sums paid by the Defendant to BNP Paribas a charge that should be borne by the Plaintiff – it is still a company expense. I note that the Defendant does not plead for losses arising from the Plaintiff's negligence. Short of that, I find that the charges relating to the BNP Paribas account are company expenses.

Fincastle Trading Limited

97 It is undisputed that a payment of S$209,601.63 was made by the Defendant to a company called Fincastle Trading Limited on the instructions and authorisation of the Plaintiff. I start by summarising the evidence that was given at trial on the Fincastle Trading Limited payment:

(a) The Plaintiff is the sole shareholder of Fincastle Trading Limited.

(b) The Plaintiff testified that Guryev knew that he was the sole shareholder of Fincastle Trading Limited. [note: 97] Moreover, he testified that Popov, Sereda and Sharabaiko knew about the payment made by the Defendant to Fincastle Trading Limited. [note: 98]

(c) The Plaintiff initially testified that the payment to Fincastle Trading Limited was payment for market consultancy and trade related services. [note: 99] However, on re-examination, the Plaintiff clarified or added that the payment was part of his bonus for the year. [note: 100] The Plaintiff however claimed that it was unclear whether the payment related to the guaranteed bonus due to the Plaintiff annually, or to the discretionary bonus the Defendant may give the Plaintiff under the Employment Contract. [note: 101]

(d) Popov testified that the payment to Fincastle Trading Limited was part of the payment of the Plaintiff's *guaranteed* annual bonus. [note: 102] Indeed, Popov admits that he received a similar bonus payment *via* the company, Zeylon Management Limited. [note: 103] However, Popov explained that he considered the payments to Fincastle Trading Limited and Zeylon Management Limited unauthorised at the time of payment because those payments were paid out without approval from Phosint Trading Limited or the Phosagro Group. Popov testified that he did not feel comfortable about the bonus payments at that time, and hence officially stated that the payment to Zeylon Management Limited was his bonus payment sometime in 2014, and sought official approval from the shareholders. The Plaintiff however did not do the same. [note: 104]

98 On balance, I do not find that the payment to Fincastle Trading Limited was wrongful. The evidence from *both* the Plaintiff and Popov is that the payment was made to the Plaintiff as part of his annual bonus. If so, the Plaintiff must be entitled to it. While there is some suggestion in Popov's evidence that the payments were not properly authorised by the shareholders *at the time they were made*, no evidence of regulations governing the obtaining of authorisation for the payment of bonuses or related corporate governance regulations were adduced. Indeed, the evidence suggests the corporate controls imposed by the shareholders on the Defendant's directors were almost non-existent. As such, I find that there is insufficient evidence to justify a finding that the payment to Fincastle Trading Limited was unauthorised at the time it was made. Indeed, I accept the point made by the Plaintiff's counsel during his cross-examination of Popov that the Defendant has failed to call the officers of the Phosagro Group to dispute the Plaintiff's assertion that he informed Guryev,

Sharabaiko and Sereda about the payment to Fincastle Trading Limited. In any event, even Popov now accepts that the Fincastle payment was made to the Plaintiff as part of his bonus.

99 I also find that the bonus was part of the Plaintiff's *guaranteed* annual bonus. The Plaintiff was equivocal on this, saying it was never clearly stated which part of his bonus this payment belonged to, but Popov took the clear position that the bonus was part of the Plaintiff's guaranteed bonus. On balance, while the evidence does not allow for a clear finding of fact, I find that the payment to Fincastle Trading Limited was part of the payment of the Plaintiff's guaranteed annual bonus (just as the payment to Zeylon Management Limited was part of Popov's guaranteed annual bonus).

Summary on wrongful claims

100 The Counterclaim includes the following prayers:

(a) The sum of S$499,719.20;

(b) An order for account on the sum of S$499,719.20;

(c) An order for payment by the Plaintiff to the Defendants on all sums found due on the taking of an account; and

(d) Damages

101 I now summarise my findings and decision in relation to the Defendant's counterclaim. The Defendant's counterclaim succeeds in respect of:

(a) The claims in Category A totalling S$100,340.40. These are the expenses that the Plaintiff accepts are outside his entitlement and which he is bound to repay.

(b) The claims in Category B. These are expenses said to have been incurred prior to the commencement of the contract with the Defendant.

(c) The claim for the St Regis spa service and other related spa services and treatments in Category D.

(d) The claims in Category G for taxi services.

102 The sum of S$499,719.20 is the total amount of alleged unauthorised expense claims. It follows that the Defendant has only partially succeeded on its counterclaim as summarised in [101] above.

103 I conclude this part of my judgment on the counterclaim with three final observations. First, while I have found on the facts that the Plaintiff did make a substantial number of wrongful claims, I accept that in most cases, the Plaintiff genuinely believed that he was entitled to make the claims. While I have disagreed with some of the Plaintiff's reasons (for example why he thought it proper to claim for spa services, or taxi claims), I find on balance that the Plaintiff *was not knowingly making wrongful claims against the Defendant*.

104 Second, whilst I have found that some of the items (expense claims) examined within Category D fell outside what he was entitled to (for example the spa claim), I am not able to draw an inference that all the other expense claims within that Category must also necessarily be wrongful. For example, I noted earlier that under Category D, complaint was also made of the expense claim of S$3,140.55 for telephone and broadband services. This was not touched on in the oral evidence. The Plaintiff of

course denies that this is a personal expense that he is not entitled to claim. Indeed, whilst the matter was not traversed at trial or in submissions, I note that cl 8 of the Employment Contract states that the Defendant will pay the employee's utility bills. The question as to what is meant by utility bills was not touched on in the evidence or the submissions. Whilst the Defendant has taken the general position that the burden falls on the Plaintiff to explain each and every expense claim and to show why the claim was proper, the Plaintiff has indeed been able to give a response to many of the expense claims when questioned under cross-examination. Moreover, given that the Defendant is the party asserting that expense claims were wrongfully made, the burden is naturally on it to prove its assertion.

105 Third, the difficulty that the parties had in the trial in marshalling evidence and examining each and every expense claim challenged illustrates the weakness of the expense accounting practice that the Plaintiff asserts was followed at Asiafert and carried over to the Defendant. If expense claims had to be justified as and when presented (and before payment) the room for subsequent dispute and misunderstanding would be much reduced (although not avoided entirely).

106 That said, as noted already, the owners of the Phosagro Group must have been aware that the Plaintiff was claiming (significant) monthly expenses (even if they did not know of the details at the time). Further, it is also clear that the new owners did not implement new rules or regulations regarding expense claims at or after the time when Asiafert was bought and renamed the Defendant. It also appears that whilst disagreements as to management direction *etc* arose later, the Phosagro Group was, by and large, content to leave the day-to-day running of the Defendant in the hands of the Plaintiff and Popov.

107 It stands to reason that senior management with broad areas of responsibility will incur or generate considerable legitimate expenses in connection with the company's business. Depending on the terms of the contract, the range of "perks" such as housing, school expenses for children *etc* will vary and may come to a considerable amount. Whilst the expense claims made are large, it is clear the Plaintiff only claimed a small fraction of his weekly or monthly expenses from the Defendant. The Plaintiff testified that his total personal expenses were in fact very much larger than what is in issue. [note: 105]

Issue 2: Contractual basis for the Primary Claim

108 The main ground for the Plaintiff's Primary Claim is cl 2 of the Employment Contract, which states "the employment shall commence on 1st March, 2013 for the *period of three years* having the option to be renewed…" [emphasis added]. The Plaintiff submits that terminating the contract before the three-year period expired amounted to a breach of cl 2.

109 The Defendant on the other hand submits that the Employment Contract clearly contemplated both parties having the contractual right to terminate the contract *before the expiry of three years*.

110 In cl 2 itself, consequences for terminating the contract "before expiry of it's [sic] validity" are stipulated. Similarly, cl 14 states "if the employee is terminated or resigns prior to the completion of his contractual period, annual salary as one-off payment to be settled in full, should the contract is [sic] terminated before expiry of its validity".

111 From cll 2 and 14 of the Employment Contract, it is clear that terminating the contract prior to the expiry of the three-year term is not a breach of contract without more; the contract expressly allows it. There is no contractual obligation on either party to ensure the employment relationship lasts for a period of three years. Consequently, the Plaintiff's claim for the salary and bonuses he

would have earned during the remaining two years of the Employment Contract's validity but for the termination must fail.

112 The setting out of a term (period) of employment does not preclude a party from terminating the contract prior to the expiry of that period in accordance with the contract provisions. The purpose of stating a period is to delineate how long the contract governs the relationship between the parties. This is important if the parties desire the contract to naturally expire at some point (by effluxion of time), rather than to "end" only when either party terminates it. Of course, it is possible to draft a contract such that both parties may not terminate the contract (without being in breach) prior to the expiry of a stated period. Whether this is the case depends on the construction of the particular contract. In the present case, the Employment Contract clearly envisions contractual termination prior to the expiry of the three-year term, and stipulates the consequences that follow.

113 It must follow that there are no grounds for the Plaintiff to claim two years' worth of salary and bonuses under the contract on the basis the Defendant was contractually obliged to employ him for the full three-year term. The most the Plaintiff is entitled to under the contract, leaving aside the question of any accrued bonus, is "100% annual salary" as a one-off payment and three months' salary in lieu of notice. That said, I also note that there is a question as to whether the Defendant had the option to pay salary in lieu of notice. This is discussed later.

114 I therefore proceed on the basis that the Primary Claim must fail, leaving only the Secondary Claim to be considered.

Issue 3: Legal principles governing the termination of an employment contract

115 The general principles of the law of contract apply to employment contracts as well: Ravi Chandran, *Employment Law in Singapore* (LexisNexis, 4th Ed, 2014) ("*Employment Law in Singapore*") at para 6.1.

116 To clarify the legal backdrop, it will be helpful to discuss briefly the following (in the context of the facts that have arisen): (i) how a right to termination may arise; (ii) the exercise of the right to termination; and (iii) the consequences or effects of termination (*ie*, the parties' respective rights and obligations following termination).

How a right to termination may arise

117 It is well-established that a contract may be terminated by one party either in accordance with the contractual provisions therein (*ie*, by virtue of the agreement), or under common law following a repudiatory breach by the other party. The same principle applies to employment contracts: *Employment Law in Singapore* at para 6.1.

118 In the present case, the Defendant claims a right of termination pursuant to the contractual agreement. It has also asserted a right of termination under common law pursuant to the Plaintiff's repudiatory breach. It is therefore appropriate to consider the legal principles governing how these rights arise.

A right to terminate under contract

119 It is well-established that parties may provide for termination clauses in employment contracts which allow the employer or the employee to terminate the employment relationship by giving the other contractual notice. Termination on this basis does not depend on any prior breach of contract

at all: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 18.024.

120 Provided that the party exercising the contractual right to terminate complies with the provisions governing the exercise of the contractual right, the terminating party is not in breach of contract. The contract may also stipulate certain consequences upon the exercise of the contractual right of termination.

121 In the present case, the right to contractually terminate the contract before the expiry of the three-year term may be found at cll 2 and 14 of the Employment Contract.

122 Pursuant to cll 2 and 14 of the Employment Contract, an employer seeking to terminate the employment contract must give three months' notice to the employee and must pay the employee a full year's salary as a one-off payment should it terminate the contract before its expiry.

123 Where a contract is terminated in accordance with its own terms, and the contract specifies that the other party (*ie*, the one who did not elect to terminate the contract) is entitled to certain sums of money upon termination, those sums of money will be due to the said party as a contractual debt. The claim is said to be for a *debt arising under the contract*, rather than for *damages pursuant to a breach of contract* (indeed there may not even have been a breach). The significance of this point will be addressed later.

The common law right to terminate following a breach

124 Regardless of whether the contract expressly provides for its own termination, parties may also acquire a right to terminate a contract under common law. It is axiomatic that not all contractual breaches give the innocent party a right to terminate the contract: *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 ("*Sports Connection*") at [23]. Only *repudiatory breaches* provide the innocent party with a right of election: to choose whether to "accept" the repudiatory breach so as to discharge the contract thereby bringing it to an immediate end (*ie*, to terminate the contract), or to "reject" the repudiatory breach thereby keeping the contract "on foot": *The Law of Contract in Singapore* at para 17.006.

125 The question, of course, is what counts as a repudiatory breach. While there is an established body of English case law on this question, I shall limit myself to considering the Singapore approach in this judgment, especially since several Court of Appeal decisions have authoritatively spoken on this question.

126 The first Court of Appeal decision that arises for consideration is *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*"). This case concerned a concrete supplier, RDC Concrete Pte Ltd ("RDC"), who contracted to supply concrete to Sato Kogyo (S) Pte Ltd ("Sato"). Following RDC's repeated failures to provide concrete of sufficient quality and to provide the concrete on time, Sato eventually terminated its contract with RDC.

127 In discussing the general right to terminate a contract for breach, the Court of Appeal explained the situations in which a right to termination may arise.

128 In what the court labelled as "Situation 1", it held that where the contract clearly and unambiguously states that, in the event of a certain event or events occurring, the innocent party will be entitled to terminate the contract (*RDC Concrete* at [91]). On the facts of *RDC Concrete*, the example of a Situation 1 case provided by the court was the clause which provided that if the other

party was unable to meet certain requirements or to continue the supply, then Sato reserved the right to terminate, to seek an alternative source of supply and to seek compensation for the non-compliance. The Court of Appeal was not referring to a contractual right of termination that was not dependent on any breach by the other party. By Situation 1, the Court of Appeal was concerned with a case where the contract clearly and unambiguously set out events of non-compliance which gave Sato as the *innocent party* the right to terminate. Situation 1 is essentially concerned with a contractual right to terminate that arises from certain stated events of non-compliance.

129 The rest of the situations discussed by the court in *RDC Concrete* dealt with the situation where the contract did not clearly and unambiguously refer to the right to terminate the contract. In this regard, the Court of Appeal held that there are at least three possible situations under which the innocent party may elect to terminate the contract (see *RDC Concrete* at [92]):

> (a) Situation 2: where a party, by his words or conduct, simply renounces the contract inasmuch as it clearly conveys to the other party to the contract that it will not perform its contractual obligations at all (*RDC Concrete* at [93]).
>
> (b) Situation 3(a): where the intention of the parties to the contract was to designate the term breached as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract. Such a term is traditionally known as a "condition" in legal terminology (*RDC Concrete* at [97]).
>
> (c) Situation 3(b): where the breach in question will "give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract" [original emphasis omitted] (*RDC Concrete* at [99]).

130 As to the relationship between Situations 3(a) and 3(b), the Court of Appeal held as follows (at [112]):

> In so far as any potential tension (arising from the precise facts of the case) between Situation 3(a) and Situation 3(b) is concerned, the approach in Situation 3(a) (*viz*, the condition-warranty approach) should be *applied first*. If the term is a *condition*, then the innocent party would be entitled to terminate the contract. However, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (viz, the *Hongkong Fir* approach).
>
> [emphasis in original]

131 It was clarified that while Situations 1 and 2 operate independently, the test in Situation 3(b) operates only if the term breached is not a condition (which gives rise to a right to termination upon its breach) as determined by the test in Situation 3(a), *ie*, the parties' intentions (*RDC Concrete* at [113]).

132 One question which arose in critical commentary following the decision in *RDC Concrete* is what happens if the parties expressly intended for the breach of a particular term *never to give rise to a right to termination*, no matter how serious the consequences of the breach are: see the discussion in *The Law of Contract in Singapore* at paras 17.130–17.135.

133 This was addressed in the Court of Appeal decision of *Sports Connection*. The appellant was the exclusive distributor of the Respondent's Deuter products during the material period. In the Distributorship Agreement signed by the parties, there was a non-competition clause which prohibited

the appellant from selling products which are in competition with Deuter without the prior written consent from the respondent. The appellant breached this obligation, and the respondent terminated the Distributorship Agreement. On appeal, the appellant submitted that its breach was not so serious as to entitle the Respondent to terminate the Distributorship Agreement.

134 In *Sports Connection* at [28], the Court of Appeal acknowledged a common critique of its decision in *RDC Concrete*:

> A common point of critique of *RDC Concrete* in both Carter's Critique and Goh's Critique centres on the failure in that case to exclude the *Hongkong Fir* approach where the parties have in fact agreed that the term breached is a "warranty". In other words, the argument is that where parties are found to have intended (presumably, either expressly or as a matter of construction) a term to be a warranty (hereinafter "a warranty intended by the parties"), their intention *should* be given effect to and the term concerned should be conferred the legal effect of a warranty (pursuant to the condition-warranty approach)…
>
> [emphasis in original]

135 The Court of Appeal's response to this critique is, in brief:

> (a) First, the fact that parties have designated a particular term as a "warranty" (without more) may not necessarily be dispositive of the matter. It may not mean that the parties intended that there should be no right to terminate the contract pursuant to a breach of the said term regardless of the consequences: *Sports Connection* at [29]–[31].
>
> (b) Second, it would be extremely rare (or at least uncommon) for parties to intend that a breach of some terms would *never* entitle the innocent party to terminate the contract, even if the consequences of the breach were so serious as to deprive the innocent party of substantially the whole benefit of the contract which it was intended that the innocent party should have: *Sports Connection* at [33].
>
> (c) Third, while there is a presumption that the test in Situation 3(b) of *RDC Concrete* applies once it is determined that a term is *not a condition* under Situation 3(a), this is not an irrebuttable presumption. It is open to the parties to expressly agree (in clear and unambiguous language) that the term concerned *can never give rise to a legal right to terminate the contract*, regardless of the consequences of the breach of that particular term. Such an agreement would clearly rebut the (initial) presumption that the term is an intermediate term: *Sports Connection* at [50].

136 Ultimately, the Court of Appeal in *Sports Connection* at [57] reaffirmed its decision in *RDC Concrete*, subject to the "*extremely limited exception* that, where the term itself states *expressly (as well as clearly and unambiguously)* that *any* breach of it, *regardless* of the seriousness of the consequences that follow from that breach, will *never* entitle the innocent party to terminate the contract, then *the court will give effect to this particular type of term*" [emphasis in original].

137 From the above discussion, two further well-known questions arise: first, how the court ascertains whether a contractual term is a condition, and second, how the court determines whether there was a substantial deprivation of benefit (required in Situation 3(b) of *RDC Concrete*). The first question was discussed by the Court of Appeal in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") and affirmed in full by the Court of Appeal in *Sports Connection* at [59]. The second question was also

discussed in detail in *Sports Connection*. It is not, however, necessary for me to examine the holdings on these two questions in the present case.

Overview of the right to terminate

138 It follows that the right to terminate will arise in the following circumstances:

(a) Exercise of a contractual right to terminate that is not dependent on any breach or non-performance by the other party such as where a 3-year contract of employment is terminable on 3-month notice or where a lease is terminable on the giving of notice.

(b) Exercise of a contractual right to terminate which arises where the contract clearly and unambiguously provides that upon occurrence of certain events the *innocent* party is entitled to terminate. This is what was referred to in the *RDC Concrete* case as a Situation 1 case. The difference between Situation 1 and contractual termination on notice (above) is that Situation 1 is concerned with a breach situation.

(c) Exercise of the right to terminate under common law because of renunciation, breach of a condition, or because of the consequences of the breach (Situations 2, 3(a) and 3(b)).

Exercising the right to terminate

139 A right to terminate a contract may exist, but termination only takes effect if the right is actually *exercised*. This is obvious in the case of contractual termination clauses like those found in the present case.

140 Clauses 2 and 14 of the Employment Contract give both the employer and employee the right to terminate the contract on 3-month notice. Clause 20 of the Employment Contract gives the employer (the Defendant) the contractual right to terminate the employment with immediate effect (no notice required) where the employee (the Plaintiff) is "guilty of any serious misconduct or willful breach or non-observance of any of the stipulations …" Clause 20 is essentially an example of what *RDC Concrete* referred to as Situation 1.

141 Similarly, where one party to the contract is guilty of a repudiatory breach, the contract is not automatically discharged or brought to an end under common law: *The Law of Contract in Singapore* at paras 17.221. The right to terminate the contract must actually be exercised: *The Law of Contract in Singapore* at para 17.222.

142 In the present case, the following avenues were available to the Defendant to terminate the contract prior to the expiration of the 3-year term: (i) termination by giving contractual notice pursuant to cll 2 and 14; (ii) summary termination under cl 20 of the contract (Situation 1); and (iii) termination at common law under the doctrine of repudiatory breach (Situations 2 and 3). Which avenue did the Defendant rely on and which is he entitled to rely on?

143 Ordinarily, where the contract is terminated in any of the above situations, the right to terminate is exercised by giving notice to the other party. The language used in the notice read against the context and circumstances in which the notice was given will usually make clear what is the ground relied on for the termination. No particular formula of words is required. Indeed, in some cases, the ground or basis on which the party is terminating (or purporting to terminate) the contract may be unclear. It goes without saying that determining whether there is a proper basis to terminate the contract is especially important where the other side disputes the right to terminate. Where a

party purports to exercise a "right" of termination (whether a contractual right or a right under common law) it does not have, the consequences are very serious since that party may now be in repudiatory breach himself.

144 The problem is compounded in those cases, such as the present, where the party seeking to terminate the contract has several possible alternative grounds to support the termination. The consequences flowing from the termination may depend on the legal ground relied on. The position becomes even more complex where the reason initially relied on by the terminating party proves to be erroneous or inapplicable although there may have been a different basis on which termination could have been based.

145 In *Cavenagh v Williams Evans Ltd* [2013] 1 WLR 238 ("*Cavenagh v Williams Evans*"), the English Court of Appeal had to determine, *inter alia*, if the company elected to exercise its right of termination under the contract. At the time when the company terminated the contract under the contractual terms, it did not know about the prior gross misconduct of its managing director. If it had known about the misconduct, it would have elected to accept his repudiatory breach and to regard itself as discharged from liability for pay salary in lieu of notice.

146 At [40]–[41] of its judgment, the Court of Appeal cited and discussed the first instance decision of *Shell Egypt West Manzala GmbH & Anor v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation)* [2010] EWHC 465 (Comm), and observed that in that case,

> the contract and the general law provided Shell Egypt with alternative rights having different consequences. In the light of the legal principles emerging from the authorities, Tomlinson J held that the critical question was *whether the termination letter was to be read by a reasonable recipient as unequivocally communicating an election by Shell Egypt to terminate the contract under the contractual clause*.
>
> [emphasis added]

147 The English Court of Appeal adopted Tomlinson J's general approach at [42] of *Cavenagh v Williams Evans*. It stated that "the critical question [was] whether the letter of 12 March 2010 was to be read by a reasonable reader in the position of Mr Cavenagh as unequivocally indicating an election by the Company to terminate the contract under clause 11.5 of the service agreement". In the court's view, the Company "albeit in a position of ignorance of the prior repudiatory breach elected to terminate the appointment as managing director under clause 11.5, which is different from the right under the general law to accept a repudiatory breach as discharging the contract". The Court of Appeal went on to hold at [42] that the prior unknown misconduct was not a defence to the claim for payment of the debt arising from the Company's election to terminate the service agreement summarily under clause 11.5.

148 Thus, the approach commended by the English Court of Appeal, which I agree with, is to take the point of view of the reasonable reader in the position of the recipient of the termination notice, and ask how he would construe the said notice.

Consequences or effects of termination

149 It is well-established that the termination of a contract brings it to an end. It extinguishes all prospective and unperformed contractual obligations of both parties: *The Law of Contract in Singapore* at [17.006].

150 However, if a contractual obligation accrued *before the contract was terminated* (*eg*, a debt that was due and payable under the contract prior to the date of termination), or if the contract stipulates that certain obligations would accrue *upon the termination of the contract*, then the obligor would still be bound by such obligations. Such sums would be claimed as a *contractual debt*, rather than as *damages for loss*.

151 On the other hand, in some cases, termination gives rise to a claim for damages. This may happen in the following scenarios. First, if one party terminates the contract pursuant to the other party's repudiatory breach (*ie*, in exercise of his common law right to terminate the contract), the innocent party may have a right to claim damages for losses he suffered from the other party's repudiatory breach. Second, if one party purported to terminate the contract without lawful grounds to do so, the other party may have a right to damages if he can prove that there were no lawful grounds for termination (*ie*, the termination was in breach of contract), and he has suffered loss as a result of the purported termination.

Retrospectively determining the consequences of termination

152 Where a suit is brought for the recovery of a contractual debt or for damages after termination has taken effect, the court must determine the rights and obligations of the parties following the termination. Theoretically, this should not be a complicated exercise – the court simply needs to consider if any debt has accrued under the contract before termination or upon termination, and whether there were any contractual breaches on the facts justifying a claim for damages.

153 However, one issue that has caused some difficulty is whether the consequences of the termination ought to be determined by reference to the actual *legal grounds* and *reasons* relied upon by the party at the time of termination, or whether it ought to be determined by reference to all the possible options available to the party who terminated the contract at the time of termination. In other words, is a party allowed to adduce new grounds or reasons never relied upon at the time of termination to justify the termination? Are such new grounds or reasons a valid defence to the other party's claim for sums due under the contract or for damages?

154 Before going into a discussion of the authorities, I briefly summarise the position taken by the parties.

155 The Plaintiff relies on *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 ("*Aldabe Fermin*") to submit that the general principle is that the employer can rely on any act of misconduct to justify summary dismissal notwithstanding that at the time of dismissal, the employer was not aware of that act and/or was aware of the act but did not rely on it. [note: 106] In closing submissions, the Plaintiff cited a passage from *Aldabe Fermin* where the court cited Devlin J in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 at 443 for the proposition that a rescission or repudiation if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason.

156 The Plaintiff, however, goes on to cite *Aldabe Fermin* at [48] for the submission that this general principle is subject to the following exceptions:

(a) If the point not taken is one which if taken could have been put right, the principle would not apply.

(b) If a party by its conduct precludes itself from setting up another ground at a later date, the principle would not apply.

(c) If statute as a matter of construction precludes a party from raising other grounds at a later time, the principle would not apply.

157 The Defendant relies [note: 107] on the case of *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch D 339 ("*Boston Deep Sea Fishing*"), as well as the Singapore cases of *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 ("*Goh Kim Hai Edward*") and *Cowie Edward Bruce v Berger International Pte Ltd* [1999] 1 SLR(R) 739 ("*Cowie Edward Bruce*"), in support of the proposition that an apparently wrongful dismissal may be justified by an employer if the employer did indeed have a right to summarily dismiss the employee, even if it did not rely on or invoke that right or the facts supporting that right at the time of termination.

158 The Defendant however also acknowledged that the Singapore High Court case *Shepherd Andrew v BIL International Ltd* [2003] SGHC 145 ("*Shepherd Andrew*") and the English Court of Appeal case *Cavenagh v Williams Evans* suggest that there may be some circumstances where grounds not relied upon at the time of termination may not be subsequently invoked as a defence to a claim by the other contracting party.

159 I start by discussing the cases which support the view that a contracting party *is entitled* to raise new grounds at trial in defence of its termination of the contract. I then consider the extent of the principle as well as whether it has been qualified by the contrary case law such as *Shepherd Andrew* and *Cavenagh v Williams Evans*.

160 The usual starting point for any discussion on this issue is the 19th century English case *Boston Deep Sea Fishing*. The defendant was employed as the managing director of the plaintiff company. The defendant contracted for the construction of certain fishing-smacks on behalf of the plaintiff and, unknown to the plaintiff, took a commission from the shipbuilders on the contract. Several months later, the plaintiff dismissed the defendant on other grounds of alleged misconduct which the plaintiff was unable to substantiate at trial. At the time of the dismissal, the plaintiff did not know about the defendant's receipt of commission from the ship-builders. The court held that the plaintiff company was entitled to rely on the defendant's receipt of commission from the ship-builders to justify its termination of the employment contract even though it did not rely on that fact at the time of termination.

161 Cotton LJ held at p 352:

> … if there was any circumstance, though unknown to the company at the time when they dismissed Mr. Ansell from his position, which would justify them in so acting, it was immaterial whether that was known at the time, and if it was known and established after the time the action was brought, then they could justify the dismissal by proof of that fact.

162 Cotton LJ however added this qualification (at p 358):

> Of course if he knows of the act and still continues to employ him, it might have been held by Judges of fact or by a jury that he had condoned it and prevented himself from insisting on the legal right. But assuming that the act of misconduct was unknown, it cannot be said that the mere fact that it happened eighteen months before, prevents the company from insisting upon their legal right to discharge a person who has so misconducted himself.

163 Bowen LJ also affirmed the position taken by Cotton LJ, and held at p 364 that the defendant was "dismissed by [the plaintiff] rightly even though they did not discover the fraud until after they had actually pronounced the sentence of dismissal".

164 *Boston Deep Sea Fishing* stands for the proposition that if an employer did not rely on his employee's misconduct at the time of the dismissal because he did not know about it, he may subsequently invoke the said misconduct as *a defence* to a wrongful dismissal claim brought by the employee. This "transforms" what would have been a *termination in breach of contract* by the employer (hence giving rise to a claim for damages on the part of the employee), to a *lawful termination* pursuant to a repudiatory breach of the contract by the employee (removing any right on the employee's part to claim for damages).

165 *Boston Deep Sea Fishing* was more equivocal, however, about what would be the case if the employer knew about the misconduct but did not rely on it to dismiss the employee. In this regard, as seen from the passage quoted above, Cotton LJ seemed to have contemplated the possibility that estoppel may arise to preclude an employer from relying on those grounds of misconduct.

166 The principle in *Boston Deep Sea Fishing* was affirmed by the Singapore High Court in *Goh Kim Hai Edward*. That case concerned an action for wrongful dismissal. The plaintiff was the managing director of the defendant company, but was subsequently summarily dismissed by the defendant. The High Court had to determine, *inter alia*, if the defendant had grounds for terminating the employment contract. On this issue, the High Court held at [8] as follows:

> At the time of his dismissal, no justification was put forward by the company or the shareholders who voted in favour of removing the plaintiff from his post. It was clear then that the plaintiff had fallen in the course of a shareholder battle when the control of the company passed from one substantial shareholder to another. In that context, the plaintiff's dismissal was inevitable. While at the time the plaintiff was dismissed because of corporate politics, this does not mean, however, that the company has no defence to his action. *It is an accepted principle of employment law that the apparently wrongful dismissal of an employee can be justified if it is subsequently discovered that that employee had conducted himself in such a way as to make him liable to be dismissed even though the misconduct was not known at the time of the actual dismissal.*
>
> [emphasis added]

167 While express reference to *Boston Deep Sea Fishing* was not made, the High Court affirmed the principle that an employer may raise instances of misconduct by the employee to justify its termination of the employment contract in a wrongful dismissal suit if it did not know about the misconduct at the time of the dismissal.

168 In *Cowie Edward Bruce*, the plaintiff was hired by the defendant company as its managing director. The defendant company was then taken over by Ariza Holdings Ltd ("Ariza"). Ariza appointed six new directors to sit on the defendant's board. Differences arose between the plaintiff and the new board. The plaintiff wrote a letter to the board computing the amount of compensation for which he said he would leave on an amicable basis. The board purported to accept his letter of resignation. Subsequently, the plaintiff denied that the letter was a letter of resignation and claimed damages for wrongful dismissal. In its defence, the defendant company asserted that the cessation of employment upon the defendant paying reasonable compensation was mutual, and in the alternative, that the plaintiff had committed various misdeeds during his employment which would justify his summary dismissal had the defendant known about them. Given the context of the present discussion, I will only touch on the court's decision in relation to the defendant's latter submission.

169 In its decision, the Singapore High Court cited *Boston Deep Sea Fishing* for the proposition that "where an employee has in fact been guilty of uncondoned misconduct so grave as to justify instant

dismissal, the employer can rely on that misconduct in defence of any action for wrongful dismissal even if at the date of the dismissal the misconduct was not known to him": *Cowie Edward Bruce* at [39]. On the facts, the court held that the defendants failed to demonstrate that the plaintiff had committed grave misdeeds justifying instant dismissal: *Cowie Edward Bruce* at [53].

170 The final case which supports the raising of new grounds to justify termination is *Aldabe Fermin*. In *Aldabe Fermin*, the plaintiff was hired by the defendant to fill a senior position in Singapore. The Letter of Offer sent to the plaintiff on 6 November 2008 was signed and returned by the plaintiff on 11 November 2008. The Letter of Offer expressly stated that the commencement date was 17 November 2008. On 14 November 2008, the defendant informed the plaintiff that his start date would be 1 December 2008. There were some disputes between the parties in the interim period leading up to 1 December 2008. When the disputes could not be resolved, the plaintiff informed the defendant that he would resign with one month's notice. As the plaintiff was typing his resignation letter, the defendant sent him a letter informing him that the Letter of Offer was withdrawn. The plaintiff commenced a suit against the defendant on 15 December 2008. In the defendant's letter, the only reason given for withdrawing the Letter of Offer was the plaintiff's desire to resign from the defendant. However, at trial, the defendant sought to supplement its reasons for summarily dismissing the plaintiff (including assertions of the plaintiff's misconduct and unreasonable behaviour *etc*). One of the issues discussed by the High Court was whether the defendant could supplement its reasons for summarily dismissing the plaintiff at trial when those reasons were never raised at the time of termination.

171 The plaintiff objected to the defendant raising new reasons to justify its dismissal of the plaintiff. As the High Court summarised at [44] of its judgment:

> The plaintiff submitted that the defendant could not rely on grounds which were not stated in its withdrawal letter. The plaintiff submitted that although the defendant was already aware of the additional grounds at the time of termination, it elected not to rely on them. Accordingly by its conduct, the defendant had condoned the plaintiff's action and was thereby precluded from relying on the additional grounds.

172 However, the High Court held (at [45]) "[i]t is well established that at common law, a party who furnishes a wrong reason for terminating a contract does not deprive himself of other justifications that would have entitled him to do so". Importantly, the court also held (at [47]) that "the law does not draw a distinction between reasons which the terminating party was not aware of at the time he terminated the contract, and reasons which the terminating party was aware of but did not rely on".

173 Nevertheless, the court, citing *Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR(R) 65 at [30], noted that these general principles are subject to certain exceptions (see [48]):

> To the common law rule stated above there are certain recognised exceptions. First, 'if the point not taken is one which if taken could have been put right the principle will not apply' – *per* Somervell LJ in *Heisler v Anglo-Dal Ltd* [1954] 1 WLR 1273 at 1278. Parker J cited this statement with approval in *André et Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep 463 at 469. Secondly, the rule is subject to the qualification that a party may by its conduct preclude itself from setting up another ground at a later date: see *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 and *Cerealmangimi SpA v Toepfer (Alfred C), The Eurometal* [1981] 3 All ER 533. Thirdly, the rule does not apply where a statute as a matter of construction precludes a party from raising other grounds at a later time: see *Davis (W) & Sons v Atkins* [1977] AC 931, an unfair dismissal case made under the Employment Protection Act 1975 [UK].

174 Thus, from the above discussion, it seems that an employer may raise new grounds to justify its dismissal of an employee even if those grounds were not raised at the time of the termination. However, if any of the three exceptions apply (*ie*, the matter could have been put right if the point was taken earlier, estoppel operates to bar the raising of new grounds, or statute precludes the raising of new grounds), then new grounds may not be raised at trial.

175 I now consider *Shepherd Andrew* and *Cavenagh v Williams Evans*, authorities which may, at first glance, seem to detract from the position stated above.

176 In *Shepherd Andrew*, the plaintiff was the Chief Financial Officer of the defendant. The defendant subsequently terminated the plaintiff's employment, expressly invoking cl 5.2 of the employment contract, which stated "At any time during the term of this contract the company may terminate your employment. If the company terminates your employment under this clause it will pay you the severance payment specified in appendix C." The letter of termination was issued on 25 February 2002, and termination was to take effect from 31 March 2002.

177 Shortly after, the defendant alleged that it had discovered that the plaintiff had committed serious breaches of his duties and wrote to the plaintiff to require him to leave by 4 March 2002. The defendant, however, never sent the plaintiff a notice of summary dismissal (or anything equivalent) throughout the material period. The plaintiff then wrote to the defendant demanding to be paid his severance payment under appendix C of the employment contract, but the defendant did not reply. The plaintiff, therefore, commenced an action against the defendant.

178 The High Court had to decide, *inter alia*, if the defendant could rely on the plaintiff's purported repudiatory breaches as a defence to the latter's claim for severance payments under the contract. It bears emphasis that on the facts, at the time of termination, the defendant had *expressly* relied on the contractual right of termination found in cl 5.2 of the employment contract.

179 In its decision at [119]–[122], the High Court cited *Boston Deep Sea Fishing* and acknowledged that "it is an accepted principle of employment law that the apparently wrongful dismissal of an employee can be justified if it is subsequently discovered that that employee had conducted himself in such a way as to make him liable to be dismissed even though the misconduct was not known at the time of the actual dismissal". However, the court in *Shepherd Andrew* held that this principle "has no application to this case" (see [122]).

180 The court reasoned as follows (at [123]):

> The plaintiff submitted that the rights of the parties had crystallised on 31 March 2002 when the plaintiff's employment was terminated under cl 5.2 of the principal employment contract; the defendant/BSL/BIC did not summarily dismiss the plaintiff under cl 5.3 thereof. The defendant and the two (2) subsidiaries did not purport to terminate the contract for cause even after the contract ended, although they had ample opportunity to do so during the notice period. The plaintiff pointed out that the US$5.5m liabilities on Kaluakoi were known by November/December 2001 and the defendant's board knew by 1 February 2002. The accounting provisions put into the suspense account were discovered in early March 2002, so too was the breach of the BIL covenant. I agree with the plaintiff's submission; the defendant could have notified the plaintiff during the notice period if not earlier, that he would not be given his severance entitlement and the reasons therefor [sic].
>
> [emphasis in original]

181 From the above passage, it appears that the High Court was of the view that upon the contractual termination taking effect (under cl 5.2 of the employment contract), the "rights of the parties had crystallised". Given that the defendant never purported to terminate the contract "for cause" (*ie*, on the ground that the plaintiff was in repudiatory breach of the contract), the parties' rights were crystallised in accordance with contract once the termination was effective.

182 As the court in *Shepherd Andrew* succinctly summarised at [129], "the defendant cannot rely retrospectively on the plaintiff's misconduct as a defence to his prior claim for severance payments, which debt (the plaintiff submitted) arose earlier".

183 At this juncture, I address the Defendant's submission that the holding in *Shepherd Andrew* was premised on the fact that the defendant knew about the plaintiff's misconduct before the termination was effective (*ie*, 31 March 2002), but failed to exercise its right to summarily dismiss the plaintiff before that [note: 108]. The implication is that if the defendant had not known about the plaintiff's misconduct before termination was effective, the High Court would have allowed it to rely retrospectively on the plaintiff's misconduct to avoid paying severance payments under the contract.

184 With respect, I disagree with this submission. In my view, the essential ratio of the High Court's decision is that the rights of the parties under contract had *crystallised* without the interference of any purported act of summary dismissal, and those rights once crystallised could not be retrospectively redefined by evidence that the employer could have terminated the employment contract in another way. The fact remains that the contractual right of termination, not the common law right of termination for cause, was relied upon.

185 Indeed, this analysis of *Shepherd Andrew* accords with the clear holdings of the English Court of Appeal in *Cavenagh v Williams Evans*. In that case, the appellant was the managing director of the respondent company. On 12 March 2010, the company terminated the appellant's employment contract, which provided for six months' pay in lieu of notice. At the time of termination, the company agreed to pay the appellant in lieu of notice. Indeed, the court found that although the contractual termination clause was not mentioned in the dismissal letter, it is clear from its terms that the respondent company was purporting to exercise its contractual power of termination under the said clause (see *Cavenagh v Williams Evans* at [15]).

186 Subsequently, after 12 March 2010, the company discovered wrongdoing on the part of the appellant. It therefore did not keep its promise to pay the appellant as it discovered that the appellant was guilty of gross misconduct pre-termination. In June 2010, the appellant commenced an action to recover six months' pay in lieu of notice.

187 In its defence, the company submitted that following *Boston Deep Sea Fishing*, it was entitled to rely upon the after-discovered fact of employee misconduct which would have justified summary dismissal without payment in lieu of notice. This is notwithstanding the fact that it had exercised a *contractual right* to terminate the employment summarily with pay in lieu (see *Cavenagh v Williams Evans* at [20]). Moreover, counsel for the company "submitted that there was no difference, in principle, according to whether the employee brought a claim against the employer for damages or in debt; or whether the employer had purported to exercise its common law right to accept the employee's repudiation by gross misconduct, or had purported to exercise its contractual power to terminate the contract summarily with provision for pay in lieu." (see *Cavenagh v Williams Evans* at [30]).

188 The English Court of Appeal however rejected the company's submissions. I find it helpful to cite the court's reasoning at [36]–[39] in full:

36. However, I am persuaded by Mr Catherwood that the correct legal analysis of this case, on the basis of the pleaded case and the arguments at trial, turns on the effect of the decision of the Company in the letter of 12 March 2010. There is no escaping the fact that, on that date, the Company purported to exercise its contractual power under clause 11.5 to terminate the service agreement without notice, but with pay in lieu, and the Company agreed to pay it. A debt by the Company to Mr Cavenagh thereby accrued.

37. Having chosen to terminate the service agreement in that way the Company was not entitled to resile from the contractual consequences of its choice by later following the different common law route of accepting repudiation by relying, after the termination event, on an earlier act of misconduct by Mr Cavenagh of which it was unaware on 12 March 2010.

38. The contract itself did not contain any provision releasing the Company from its contractual obligation to pay the debt that arose from the exercise of the contractual power on 12 March. The contractual right to payment in lieu having accrued, Mr Cavenagh was entitled to payment of it in the same way as other sums that had accrued due at the date of dismissal.

39. The general law did not release the Company from its contractual liability on the only ground relied on by the Company in this action, namely that it acquired knowledge after it had terminated the contract under clause 11.5, which would have entitled it to terminate it outside that clause and summarily without liability for pay in lieu. *Boston Deep Sea Fishing* did not go as far as to say that after-discovered misconduct provided an employer with a defence to an action for payment of an accrued debt. The principle for which that case stands is that an employer can defend a claim for damages for wrongful dismissal by using at trial, in its defence of justification, evidence of misconduct by the employee that was not known to the employer at the time of dismissal. In this case the Company was not seeking in the proceedings to justify its dismissal of Mr Cavenagh. There was no dispute that his appointment was terminated summarily on 12 March 2010 and in a fashion that was lawful: it was not a prima facie wrongful act, which the Company had to justify by evidence of breach of duty. The consequence of the lawful termination was that the Company became contractually bound to Mr Cavenagh for pay in lieu. All of that happened before the Company knew of, or was in a position to accept, Mr Cavenagh's prior repudiatory breach. The lawful termination had already triggered the liability for pay in lieu, which was, as a matter of legal analysis, quite a different situation than that facing the Court of Appeal in *Boston Deep Sea Fishing*.

189 The reasoning above in *Cavenagh v William Evans* provides a fuller explanation for the outcome in *Shepherd Andrew*. In short, an important distinction was drawn between a situation where the employee was suing the employer for an *accrued debt due to him under the employment contract*, and where the employee was suing the employer for *damages pursuant to a purported wrongful dismissal (in breach of the employment contract)*.

190 In particular, the English Court of Appeal made the following points:

(a) In the former situation, there is no assertion that the employment contract was breached by the act of termination. Rather, the contract is terminated lawfully in accordance with contract. This is obviously different in the latter situation.

(b) In the latter situation, the company is put in the position of having to justify its *prima facie* wrongful dismissal. In the process of justification, the employer may raise grounds or reasons not raised at the time of termination to justify the termination. However, in the former

situation, there was nothing to justify. The character of the termination was clear – it was contractual. There is simply no dispute as to whether it was wrongful.

(c) In the former situation, once the employer has elected to terminate the employee on contractual grounds, it may not then resile from its choice after the termination has taken effect and retrospectively argue that it terminated the employment contract on the ground of the employee's repudiatory breaches. The character of the termination is determined by the circumstances *at the time of termination* – the employer cannot retrospectively provide a different complexion to its earlier act of termination. Indeed, this was so even if the employer did not know about the employee's misconduct at the time of termination.

191 While the decision in *Cavenagh v Williams Evans* is not binding on me, I accept the legal principles expounded and applied therein. Indeed, I find that the Singapore High Court in *Shepherd Andrew* essentially already supports the substantive position taken in *Cavenagh v Williams Evans*. It follows that attention must be paid to the character of the termination of the contract. The court must consider the legal grounds upon which the contract was purportedly terminated. This will be determined by looking at the facts and circumstances at the time of the termination, and by consideration of how a reasonable reader would interpret the termination. The broad issue is whether the contract was terminated by reliance on a contractual right (such as termination on contractual notice *etc*) or on the basis that the other party was in repudiatory breach. Only in the latter situation is the employer entitled to raise new facts as a defence to the suit for wrongful dismissal.

Damages for wrongful dismissal

192 I now briefly consider one final issue under this section – if the termination of the contract is indeed unlawful and in breach of contract, how are damages assessed?

193 In this regard, I found the Defendant's submissions helpful. [note: 109] Based on the decisions in *Alexander Proudfood Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin and another appeal* [1992] 3 SLR(R) 933, *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 and *Aldabe Fermin*, it is clear the correct measure of damages is the amount the employee would have earned or been entitled to under the contract for the period until the employer could lawfully terminate the contract. This was described in *Aldabe Fermin* at [78]–[79] as the minimum legal obligation rule: the quantum of damages would be based on the amount the employee would have obtained had the employer dismissed the employee in the manner least costly to the employer. While the High Court in *Aldabe Fermin* contemplated that the minimum legal obligation rule could be displaced by proof that the defendant would not have chosen the most advantageous method of performing or terminating the contract, it is usually very difficult to prove such: *Aldabe Fermin* at [85]–[89].

194 It follows that if an employment contract provides for a notice period of three months, and the contract could have been lawfully terminated with three months' notice and nothing more, the most the employee can recover in a successful wrongful dismissal suit is three months' salary.

195 I emphasise that the principles stated above apply only in the situation where the court has already determined that the act of termination was in breach of contract, and is then required to assess damages. In those circumstances, the court will consider what the most advantageous lawful method the employer could have employed to terminate the contract was (if any). These principles have no application where the court is still at the stage of determining (as a matter of fact) the legal grounds which were actually relied upon at the time of termination. There is no principle that requires the court to assume the employer adopted the most advantageous method of terminating the contract (*eg*, pursuant to the common law right of termination as opposed to contractual notice); the

court's role is to neutrally and objectively interpret the act of termination in light of the facts and circumstances at the time of termination.

Issue 4: Payments due to the Plaintiff following his termination

196 I now apply the above principles to the facts of the present case.

The termination on 28 February 2014

197 It is undisputed that the Defendant's termination of the Employment Contract took effect on 28 February 2014. [note: 110] Paragraph 2 of the 28 February 2014 Letter states that the "termination takes effect immediately".

198 The question that arises is what is the legal ground upon which the Defendant relied on to terminate the Employment Contract? In particular, did the Defendant terminate the Employment Contract in accordance with the contractual terms *or* pursuant to a common law right of termination? If neither "route" is available, the termination letter amounts to a plain breach of contract.

199 As discussed above, the approach to ascertaining the legal ground of termination relied on is to ask how a reasonable reader in the position of the recipient of the termination notice would construe the notice. This is a question of fact. Would a reasonable reader have construed the termination notice to indicate an exercise of a contractual right of termination, or would the termination notice be otherwise construed as a termination on some other basis?

200 In the present case, para 1 of the 28 February 2014 Letter states as follows:

> 1. This letter serves as notice that your employment as a Director of Phosagro Asia Pte Ltd. ("the Company") is terminated *pursuant to the terms of the employment contract dated 1 March 2013* (the "Employment Contract").
>
> [emphasis added]

201 The above paragraph makes it clear that the Defendant terminated the Employment Contract in exercise of its contractual rights under the Employment Contract. While the specific contractual clauses relied on were not mentioned, this does not detract from the Defendant's unequivocal election to exercise its *contractual rights of termination* (if any).

202 This is significant because the authorities discussed above, in particular, *Cavenagh v Williams Evans*, suggest that if the contract is terminated pursuant to a contractual right of termination, the party who terminated the contract cannot retrospectively claim that the contract was terminated under common law pursuant to the other party's repudiatory breach so as to take away accrued rights and debts due to the other party under the contractual provision.

203 It might be argued that in the present case, *Shepherd v Andrews* and *Cavenagh v Williams Evans* do not apply because, notwithstanding the fact that the Defendant had clearly elected to terminate the Employment Contract "pursuant to the terms of the employment contract", the parties rights had not yet *crystallised*. This is because the Defendant never expressly stated whether it was terminating the Employment Contract pursuant to cl 20 or cll 2 and 14. In short, was the Defendant exercising the contractual right to terminate on notice or payment in lieu (cll 2 and 14) or on the basis of serious misconduct or wilful breach or non-observance of the contractual stipulations (cl 20)? Termination under cl 20 is essentially a Situation 1 contractual termination for breach discussed in

RDC Concrete above.

204 In particular, the Defendant reserved its rights in para 6 of the 28 February 2014 Letter:

> "The Company reserves the right to withhold any payment which may otherwise be due to you on account of any breach of contract and/or any misconduct or non-observance of the Employment Contract and/or breach of your fiduciary duties…"

205 One interpretation of the 28 February 2014 letter is that the Defendant was exercising its contractual right to terminate on notice (or payment in lieu of notice) under cll 2 and 14 of the Employment Contract. If so, the Plaintiff would be entitled to receive certain contractual payments. The fact that the Defendant reserved its rights in respect of any claim that it may have had for the employee's breach of contract did not change the complexion of the termination. Termination of a contract by notice (or payment in lieu) may prevent the employer from subsequently trying to base the termination on a repudiatory breach instead. It does not however alter the fact that the Defendant employer may have valid claims against the employee for damages or recovery of monies arising out of pre-termination breaches.

206 The second interpretation is that the Defendant, whilst primarily relying on cll 2 and 14, was merely trying to preserve its contractual right under cl 20 to terminate the Employment Contract without payment of the one-off annual salary and salary for the notice period should it transpire that the Plaintiff had in fact been guilty of some serious misconduct *etc*.

207 Nevertheless, whilst it is unclear which contractual provision was relied on by the Defendant, I am of the view that the Defendant is bound by its election to terminate the Employment Contract "pursuant to the terms of the employment contract". This means that the Defendant may not rely on the common law right of termination by asserting a repudiatory breach.

208 I agree with the analysis in *Cavenagh v Williams Evans* that the *Boston Deep Sea Fishing* principle only applies to *justifying an otherwise wrongful dismissal*. Only in that context have the courts allowed parties to retrospectively raise further reasons that were not raised at the time of termination, but which can justify what would otherwise be held to be a wrongful termination. However, there is no rule or principle of law or equity that permits a party to deny that it was exercising a contractual right of termination after it had clearly and unequivocally chosen to do so.

209 On the facts, given that the 28 February 2014 Letter clearly evinces an intention to rely on the contractual rights of termination found in the Employment Contract, the Defendant ought to be bound by such an election and cannot subsequently rely on a common law right to terminate the contract pursuant to the Plaintiff's repudiatory breaches (so as to avoid accrued rights flowing from a contractual termination).

210 I interpret para 6 of the 28 February 2014 Letter (cited at [204] above) to be the Defendant reserving its rights in relation to a choice between exercising the right of termination under cl 20, as opposed to under cll 2 and 14 of the Employment Contract. Given the clear language of para 1 of the 28 February 2014 Letter, para 6 cannot be interpreted to be the Defendant reserving its rights to redefine the termination as an acceptance of a repudiatory breach under common law.

211 I therefore find that based on the 28 February 2014 Letter, the Defendant no longer has the right to assert the Plaintiff's repudiatory breaches as a basis for its termination of the Employment Contract under common law. The 28 February 2014 Letter unequivocally states that the termination is effected "pursuant to the terms of the employment contract". However, given that the Defendant did

not specify the contractual clause it was relying upon, but merely stated that the termination was pursuant to the terms of the Employment Contract, and in fact, expressly reserved its rights in that regard at para 6 of the 28 February 2014 Letter, I find that the Defendant is at liberty to rely on either cl 2, 14 or 20 in the present suit to explain its termination. The Defendant's inability to rely on the common law right of termination thus may not prejudice its position if it can prove a case for termination pursuant to cl 20 of the Employment Contract.

The relevance of the 18 March 2014 Letter

212 I briefly deal with the 18 March 2014 Letter. As described above, the Defendant subsequently sent a second letter describing the dismissal of the Plaintiff as a "summary termination of employment". After stating the various breaches of duty and misconduct the Plaintiff was guilty of, at para 9 of the 18 March 2014 Letter, the Defendant put the Plaintiff on notice that his "employment with the Company is summarily terminated". At para 10 of the 18 March 2014 Letter, the Defendant stated the following:

> Given the matters set out above, it is apparent that you are not entitled to receive either payment in lieu of notice or payment of a lump sum. In fact, we reserve the right to make a claim for the monies wrongfully paid out…. for the avoidance of doubt, all rights are reserved

213 The termination of the Employment Contract had taken effect on 28 February 2014. Thus, on 18 March 2014, the Defendant cannot have "summarily terminated" an employment relationship that was already previously terminated. In my view, the 18 March 2014 Letter is helpful in setting out the grounds of misconduct alleged by the Defendant, and in giving the Plaintiff notice of the allegations and a chance to respond. However, it does not and cannot, in law, change the complexion of the contractual termination that took effect on 28 February 2014.

Entitlement to terminate under clauses 14 and 20 of the Employment Contract

214 In its pleadings, the Defendant primarily relies on its right to terminate the Plaintiff "without any notice or payment in lieu of notice" under cl 14 and 20 of the Employment Contract. [note: 111]

215 To be clear, if I find that the Defendant is entitled to rely on cl 20 to terminate the Employment Contract, the Defendant would not be required to pay the Plaintiff salary in lieu of notice and a whole year's salary as a one-off payment for termination before the expiry of the Employment Contract. Clause 20 expressly states that termination may take place "without any notice or payment in lieu of notice", and cl 14 states "[e]xcept of any reason stipulated in Point 20 of this Employment Contract, if the employee is terminated or resigns prior to the completion of his contractual period, annual salary as one-off payment to be settled in full, should the contract is [sic] terminated before expiry of its validity".

216 Clause 14 provides that the obligation to pay the employee an "annual salary as one-off payment" does not apply if "Point 20" of the Employment Contract applies. In short, there is a clear "linkage" set out in the contract between cl 2, 14 and 20.

217 I now proceed to consider if the Defendant can rely on cl 20 to terminate the Employment Contract. For convenience, I reproduce cl 20:

> If at any time during his employment, hereunder the employee shall be *guilty of any serious misconduct or any wilful breach or non-observance of any of the stipulations herein contained* and on his part to be observed or performed or shall compound with his creditors generally or shall

have a Receiving order in bankruptcy made against him then and in any such case, the Company may terminate the employee's employment hereunder without any notice or payment in lieu of notice.

[emphasis added]

218 It is noted that the contractual right of termination provided in cl 20 is triggered by a number of stated events. These are: (i) "serious misconduct" or "wilful breach or non-observance" of any of the stipulations in the Employment Contract; (ii) compounding with his creditors; and (iii) having a receiving order in bankruptcy made against him.

219 In this case, the only question is whether the Plaintiff is "guilty of any serious misconduct or any wilful breach or non-observance of any of the stipulations" contained in the Employment Contract.

220 In this regard, I propose to first consider what breaches, if any, the Plaintiff is "guilty" of based on the evidence before me. If the Plaintiff is indeed found to be guilty of breaches of contractual or other duties, I shall then consider if these constitute "serious misconduct" or a "wilful breach or non-observance" of the terms in the Employment Contract. However, before going into the substance of the discussion, it is necessary to consider if the Plaintiff is entitled to raise facts it never raised in its 28 February 2014 Letter to presently justify summary termination under cll 14 and 20 of the Employment Contract.

Can the Defendant raise facts it never cited at the time of termination to justify its reliance on cl 14 and 20 of the Employment Contract?

221 As of 28 February 2014, when the termination of the Employment Contract took effect, the Defendant never raised any of the material relating to the Plaintiff's misconduct subsequently mentioned in its 18 March 2014 Letter and in the present suit. The question therefore is whether the Plaintiff may now raise these "new" facts not mentioned at the time of termination, to justify its reliance on cl 14 and 20 of the Employment Contract.

222 This question is slightly different from the question which the court in *Boston Deep Sea Fishing* had to deal with. In *Boston Deep Sea Fishing* and the line of cases that affirmed it, the question was whether new grounds could be raised to justify the termination in common law, and prevent the employer from being in a wrongful breach of contract. In that situation, the court found that new grounds could be raised. Here, the question is whether new grounds not raised at the time of termination can be raised to justify reliance on the summary termination clause *in the contract*.

223 In my view, the *Boston Deep Sea Fishing* principle ought to apply, by analogy, to this slightly different factual context as well. While it does not apply to allow a party to *depart from the legal ground* upon which it elected to terminate the contract (namely termination on the basis of a contractual right to terminate so as to negate any accrued or crystallised rights that flowed from the exercise of the contractual right), *Boston Deep Sea Fishing* can apply to allow a party to justify the course of contractual termination that the party elected to proceed with. If retrospective justification of a common law termination for repudiatory breach may be given, I see no good reason why retrospective justification of a contractual termination cannot also be given. This is especially so in a case such as this, where the letter of termination (*ie*, the 28 February 2014 Letter) did not set out the specific reasons or basis for the exercise of a right of contractual termination (*ie*, whether it was asserting cll 2 and 14 or cl 20). The Defendant therefore had not elected to either rely on cll 2 and 14 or cl 20. In such circumstances, the Defendant is free to rely on either clause and to adduce the

evidence necessary to justify its case.

224 Thus, while the Defendant never mentioned the wrongful claims for expenses made by the Plaintiff at the time of the termination of the Employment Contract, it is entitled to do so now and take the position that the termination took place pursuant to cl 20 of the Employment Contract. I note that if the Defendant had elected to rely on cll 2 and 14 of the Employment Contract in its 28 February 2014 Letter, it may well not be entitled to raise new grounds to justify summary termination under cl 20.

What breaches of duty is the Plaintiff guilty of?

225 The Defendant pleads that the Plaintiff has breached the following contractual duties: [note: 112]

(a) Duty in cl 3 of the Employment Contract to "well and faithfully serve the Company in all respects and use his best endeavours to promote the interests of the Company".

(b) Implied contractual duty to act with care and diligence.

(c) Implied contractual duty not to cause loss to the Defendant or misuse the Defendant's assets.

(d) Implied contractual duty to disclose any benefits that had arisen from the directorship.

(e) Implied contractual duty not to make unauthorised claims or allow unauthorised payments.

(f) Implied contractual duty to obtain approval as necessary before allowing the Defendant to make payments.

226 The Defendant also pleads that, as managing director of the Defendant, the Plaintiff has breached his general and fiduciary duties to the Defendant to do the following: [note: 113]

(a) Act honestly.

(b) Act bona fide in the interest of the company.

(c) Act for a proper purpose.

(d) Avoid conflicts of interest and not to profit from his position.

(e) Exercise skill, care and diligence at the standards expected of a director.

227 The Defendant also pleads that the Plaintiff has breached ss 157 and 158 of the Companies Act (Cap 50, 2006 Rev Ed).

228 In my view, it is plain that in making certain claims for reimbursement from the Defendant which fell outside his entitlement and failing to repay the said sums to the Defendant, the Plaintiff has breached some of his duties to the Defendant. However, it is still necessary to characterise the *nature of those breaches* so that it can be assessed whether the breaches constitute "serious misconduct" or a "wilful breach" of the terms in the Employment Contract such as to entitle the Defendant to rely on cl 20.

229 In its closing submissions, the Defendant did not go through the scope of each and every one of the above legal duties to show how they apply to the Plaintiff and were breached on the facts. Instead, the Defendant identified the key aspects of the Plaintiff's conduct which it submits was in breach of the following duties: [note: 114]

(a) His contractual duty to act "well and faithfully serve the Company in all respects and use his best endeavours to promote the interests of the Company" pursuant to cl 3 of the Employment Contract

(b) His implied contractual duty of care and of good faith and fidelity as employee and director of the Defendant

(c) His fiduciary duties as director of the Defendant.

230 First, the Defendant submits that the Plaintiff's act of claiming reimbursements for some of his personal expenses from the Defendant is in breach of his duties to the Defendant, even if the Plaintiff genuinely intended to ultimately reimburse the Defendant at the end of the financial year. [note: 115]

231 Second, the Defendant submits that the Plaintiff's failure to take the initiative to account for and declare his personal expenses to Tricor was wrongful. In this regard, it was insufficient for him to simply rely on Tricor to point out his personal expenses given that Tricor would not have sufficient facts to identify every expense which is not claimable. Moreover, there is evidence that the Plaintiff was not very willing to reimburse the Defendant even when Tricor pointed out certain wrongful expense claims. [note: 116]

232 Third, the Defendant submits that the Plaintiff's failure to disclose the above accounting practice to the shareholders was wrongful. [note: 117]

233 Fourth, after his termination, the Plaintiff's conduct consistently reveals that he never intended to reimburse the Defendant for even the Category A expenses, and only admitted to them at the last moment after receiving the Defendant's counterclaim. [note: 118]

234 I observe that the Defendant's submissions were primarily centred on the expense accounting practice that the Plaintiff himself testified to, as well as the wrongful claims in Category A that the Plaintiff admitted to. These submissions were thus not in any way contingent on the Defendant's counterclaim succeeding. In any event, the Defendant's counterclaim did succeed in part as I found that certain claims which the Plaintiff did not admit to, were wrongful. I shall now proceed to consider each duty which the Defendant submits has been breached by the Plaintiff in light of the Plaintiff's conduct. While the list of duties which the Defendant pleads has been breached by the Plaintiff is more extensive, I shall focus the discussion only on the duties which the Defendant made submissions on.

Duty under cl 3 of the Employment Contract

235 The Defendant specifically submits that the Plaintiff has breached his contractual duty to "well and faithfully serve the Company in all respects and use his best endeavours to promote the interests of the Company". Neither party made submissions on the scope or interpretation of this clause. In the absence of any relevant authorities being brought to my attention, or any submissions on the principles that should guide my interpretation of cl 3, I shall adopt a plain reading of the clause and consider if it was breached on the facts.

236 Based on the evidence, I am of the view that in most respects, the Plaintiff appears to have strived to further the interests of the Defendant, even if he may have had a different idea about what was good for the business. While his expenses were significant, I find, based on the evidence before me, that most of his business meetings and entertaining was done to serve and promote the interests of the Defendant.

237 That said, the Plaintiff's practice of claiming for personal expenses during the year, and subsequently reimbursing the Defendant for these expenses when and if the accountants raised queries at the end of the financial year, cannot be said to be in the interest of the Defendant. Indeed, based on the evidence, I find that there is a likelihood that not all the personal expenses claimed by the Plaintiff would be reimbursed to the Defendant. I accept the Defendant's submission that in the circumstances, it would have been impossible for Tricor to identify all of the Plaintiff's personal expenses. The receipts alone simply do not disclose enough – a receipt at Waku Ghin could as much have been a business dinner, as it could have been a personal meal with his wife. Further, I also accept the Defendant's submission that to well and faithfully serve the Defendant *in all respects*, the Plaintiff should have, minimally, taken the initiative to identify his personal expenses.

238 I therefore find that the Plaintiff has breached cl 3 of the Employment Contract. In claiming for personal expenses and relying solely on Tricor to identify them to him at the end of the financial year, the Plaintiff was not "well and faithfully" serving the Defendant in all respects, nor was he using his best endeavours to promote the interests of the Defendant. I point out, however, that the Plaintiff's conduct post termination was irrelevant to my decision on cl 3 of the Employment Contract since the contractual duty ceased to bind the Plaintiff once the contract was terminated.

Implied contractual duty of care and of good faith and fidelity

239 The Singapore Court of Appeal has affirmed that there is "an *implied* term in the employer's favour that the employee will serve the employer with good faith and fidelity, and… use reasonable care and skill in the performance of his or her duties pursuant to the employment contract" [emphasis in original]: *Man Financial* at [193]. The Court of Appeal referred to the High Court decision in *Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad and another* [2004] 1 SLR(R) 234 at [61], where Tay Yong Kwang J held:

> There can be no denying that all employees are expected to serve their employers diligently, honestly and loyally. What this duty translates into factually depends on the circumstances such as the nature of the work. Employees should not be engaged in other business or employment during their working hours without the approval of their employers. They should certainly not be diverting business opportunities that they got wind of only because of their employment status and during the subsistence of the employment, whether or not such information amounted to confidential information within the meaning of the law.

240 The scope of the duty of care and of good faith and fidelity thus may differ depending on the nature of the work. I also accept the Defendant's submission that a higher standard of care and fidelity may be expected from senior employees, especially those who also hold fiduciary positions: *Employment Law in Singapore* at paras 5.14 and 5.23.

241 In my view, the Plaintiff has not breached the duty to exercise reasonable care in the performance of his job. While the Plaintiff may be said to have been careless in settling his personal accounts *vis-à-vis* the Defendant, this was not carelessness in the Plaintiff's *performance of his job*.

242 However, the Plaintiff has, in my view, breached his implied contractual duty to serve the

Defendant with good faith and fidelity. As the learned author of *Employment Law in Singapore* opines, the duties of good faith and fidelity encompass, *inter alia*, a duty not to make use of the employer's property for one's own purposes (at para 5.17) and a duty to give due consideration to the interests of the employer (at para 5.22).

243 In *Sinclair v Neighbour* [1967] 2 QB 279 ("*Sinclair v Neighbour*") at 287–288 , the UK Court of Appeal held that an employer was justified in instantly dismissing an employee who took out £15 from the till, left an IOU in its place, and repaid the money the next day. The employee's actions were a breach of an implied contractual duty not to misconduct oneself.

244 In the present case, by making claims for personal expenses, and subsequently, failing to take the initiative to reimburse the Defendant, I am of the view that the Plaintiff has breached his duty to serve the Defendant with good faith and fidelity. Even if many of the individual sums at stake are not large, this "casual" approach in dealing with his expense claims does not give due consideration to the interests of the employer. It is a method that is rather convenient to the employee but rather inconvenient or potentially problematic for the employer.

245 It is noted that *Sinclair v Neighbour* holds that even if the sums are eventually repaid, the very act of taking monies the employee is not entitled to, is also a breach of an employee's implied contractual duties such as to justify summary dismissal. In that case, the employee was the manager of a betting shop. The money was taken for the purpose of gambling in circumstances when the employee *knew* that the employer would not have given consent.

246 It was in these circumstances that Davies LJ held that summary dismissal was justified. The manager took the money from his employer's till behind his back knowing that the employer would not consent. It did not matter whether the act was dishonest. The question was whether the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant, such as to give the employer the right of summary dismissal.

2 4 7 *Sinclair v Neighbour* involved the question whether the employee could be terminated summarily at common law on the grounds of repudiatory breach. In the present case, what is at issue is whether the conduct of the Plaintiff (in respect of his claims for expenses etc.) amounts to *serious* misconduct or *wilful* breach or non-observance of the contractual stipulations. This will be examined below.

Fiduciary duties

248 As the managing director of the Defendant, the Plaintiff is clearly subject to fiduciary duties. As the Defendant submits, it is well-established that a director's fiduciary duties at common law include the duty to act *bona fide* in the best interest of the company, and a duty not to exercise their powers for an improper purpose: see *DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR(R) 424 at [80].

249 In this regard, I find that the Plaintiff was not acting in the best interests of the company in making claims for his personal expenses, and not assuming full responsibility for reimbursing the Defendant for such. I therefore also find that he has breached his fiduciary duty to act in the best interest of the Defendant. That said, the question remains whether the breaches of the duty to act in the best interests of the company are to be regarded as "serious misconduct" *etc* under cl 20 of the Employment Contract.

Is the Plaintiff guilty of "serious misconduct or any wilful breach or non-observance of any of the

is the Plaintiff guilty of "serious misconduct or any wilful breach or non-observance of any of the stipulations" in the Employment Contract?

250 While I have found that the Plaintiff has breached his express contractual duty in cl 3 of the Employment Contract, his implied contractual duty to serve the Defendant with good faith and fidelity, and his fiduciary duty to act in the best interest of the Defendant, the question still remains whether these breaches of duty constitute "serious misconduct", or a "wilful breach or non-observance" of the stipulations in the Employment Contract.

251 This is ultimately a question of contractual interpretation. The court must ascertain what the parties intended by "serious misconduct", or a "wilful breach or non-observance" of the stipulations in the Employment Contract. Did the Plaintiff's actions in relation to his expense claims constitute serious misconduct? Moreover, were the breaches of the stipulations in the Employment Contract wilful?

Serious misconduct

252 The parties have not made submissions on how I should interpret the term "serious misconduct". Unfortunately, the words do not speak with clarity for themselves – while a degree of gravity is clearly required, there is little else we can gather from the language of the contract itself. As such, I found it helpful to refer to the case law relating to employment contracts to see when, under common law, the courts have found that the employee's misconduct was sufficiently grave or serious to constitute a repudiatory breach, justifying summary dismissal.

253 In *Cowie Edward Bruce* at [39], the High Court held that "[i]n each case, it is a matter of degree whether the act complained of is of the requisite gravity… it must be so serious that it strikes at the root of the contract of employment, that it destroys the confidence underlying such a contract". The judge then continued at [40] to state:

> The relevancy and effect of any misdeed complained of must, it seems to me, be judged by reference to its *effect on the employer-employee relationship*. It also seems to me that in judging the relevancy and effect of the acts complained of, account must be taken of the *habits and attitude of the employer at the relevant time*. They cannot be judged totally in a vacuum.
>
> [emphasis added]

254 This holding was affirmed in *Surteco Pte Ltd v Siebke Detlev Kurt and another suit* [2011] SGHC 74 at [12] as well as in *Aldabe Fermin* at [58]. Thus, it is clear that careful attention must be paid to the *effect* the breaches of duty has on the employer-employee relationship. Naturally, this would be affected in part by the employer's attitude to the breaches in question.

255 Based on the evidence, it appears that since the Phosagro Group took over the Defendant, they have neither enquired about the existing accounting practices of the Defendant, nor have they taken steps to implement new corporate governance and accounting regulations. The shareholders have shown little to no interest in regulating the way the finances of the company are managed when it comes to issues like entertainment expenses or employment benefits.

256 Moreover, it is clear that what put a strain on the employment relationship was the difference in views on bigger issues like the business direction the Defendant's business should take, and the appointment of new directors onto the Defendant's board. It does not appear that issues to do with the expenses of the directors or internal financial accountability were that significant to the Plaintiff's employers.

257 Therefore, while the Plaintiff's practice of claiming for personal expenses and, in all likelihood, not fully accounting for them at the end of the financial year, was a breach of his contractual and fiduciary duties, I am of the view that it did not constitute "serious misconduct" under cl 20 of the Employment Contract. I emphasise that I accept the Plaintiff's evidence that he intended to fully reimburse the Defendant for all the personal expense claims he made throughout the year. Whether the system that he had put in place to do so was sufficiently rigorous, or whether his judgment of what were "personal" and "business" expenses was entirely accurate, are separate questions. In my view, the fact that the Plaintiff made some wrongful claims is not sufficient to justify a finding of "serious misconduct" such as to trigger the operation of cl 20. In my view, the Plaintiff genuinely believed that he was entitled to make the claims he did, and at trial, he expressed full willingness to account for whatever he may have mistakenly claimed.

258 When it comes to claims for expenses, it is understandable if employers and employees have a different interpretation of what the employee is entitled to claim and how the employee is to be reimbursed. This is especially so where there are no clear contractually incorporated or internal company regulations. As such, looking at the facts and circumstances as a whole, I do not find evidence of serious misconduct arising from the mere fact that some expenses claimed were wrongful.

259 What is trickier is the fact that the Plaintiff carried over the same expense accounting practice he adopted at Asiafert (which he owned) in his management of the Defendant's operations. As discussed earlier, the expense accounting practice, whilst convenient for the employee, was not in the best interest of the Defendant. Nevertheless, it is still necessary to consider this in the light of all the circumstances including the attitude of the Defendant (and the owners of the Defendant). Whilst the matter was not explored in depth, there was some evidence that Popov also submitted and accepted expense reimbursements during the year. Further, it does not appear that the new owners of the Defendant had taken any effort to establish regulations over company expenses and claims *etc*. Monthly financial statements were provided to the Phosagro Group. These statements included the expense claims/payments. Even if the Phosagro Group did not know the individual details of the expense claims, they must have been aware that sizeable claims were being made.

260 Whilst it has been held in *Sinclair v Neighbour* that an employee who takes money from the cash till (leaving behind an IOU) commits a repudiatory breach of contract, each case must turn on its own facts and circumstances. In the latter case, the employee, knew that the employer would not have given him permission to take cash from the till. This was a "knowing" breach that destroyed the relationship of trust between the employee and the employer and rendered the employment relationship untenable.

261 In the present case, I am satisfied that the Plaintiff believed that he was entitled to use the expense accounting practice he carried over from Asiafert and that the Defendant employer either knew or would not object to that method. Indeed, there is some evidence that supports the Plaintiff's belief that the Defendant employer did not object and was broadly aware of expense claims. On balance, I am of the view that whilst the Plaintiff as the managing director could and should have set up a better system for expense claim reimbursement (and was therefore in breach of his duties as managing director), his breaches did not amount on the facts before me to serious misconduct.

262 Whilst the Defendant has made much of the point that it was only after the counterclaim was filed that admission was made in respect of Category A expenses, it must be borne in mind that the Plaintiff was clearly caught by surprise when he received the letter of termination by email on 28 February 2014. I elaborate more on this below.

Wilful breaches of the Employment Contract

263 The parties did not make submissions on how "wilful" should be interpreted. Given that no authorities were submitted to me for my consideration, I shall take the plain meaning of the word, and proceed on the basis that a "wilful" breach is one that requires some form of intentionality or deliberateness in the commission of the breach. In this regard, I was guided by the High Court's holding in *Xuyi Building Engineering Co v Li Aidong and another and another appeal* [2010] 4 SLR 1041 at [30]:

> The provision refers to "any wilful breach" of a condition of the contract of service. Counsel for the employees equated that to a fundamental breach. I do not think that was apt, and I would consider a wilful material breach would suffice… A considered decision not to pay an employee in accordance to those provisions of the Act is a wilful material breach.

264 In this regard, I find that the Defendant is not guilty of a "wilful breach or non-observance" of the stipulations in the Employment Contract. While the Plaintiff may have breached cl 3 and several implied duties in the Employment Contract, I find that he did not do so wilfully. On the contrary, as noted already, I find that the Plaintiff genuinely believed that he was entitled to claim his entire credit card bill without differentiating business from personal expense out of convenience, so long as he reimbursed the Defendant at the end of the financial year. I also accept that he would have been willing to reimburse the Defendant for expenses that were personal in nature and outside of his entitlement. In this regard, the Plaintiff's admissions to the Category A claims cement this finding of fact. It is therefore not enough to show that the Plaintiff knew that some of his expense claims may have been personal or may fall outside what he was entitled to claim. It is necessary to go further and establish that the Plaintiff knew that he was not entitled to make the expense claims under the system established at Asiafert.

265 The Defendant submits that the Plaintiff failed to admit to any of his personal expenses after his termination, even when requested to in the 18 March 2014 Letter, and only did so when he filed his defence to the counterclaim. However, as indicated earlier, I accept the Plaintiff's explanation that he was distraught and sought legal advice after receiving the 18 March 2014 Letter. I therefore do not think it detracts from my overall finding of fact that the Plaintiff never intentionally tried to cheat the Defendant of money, and never intentionally or deliberately breached the terms of his Employment Contract.

Conclusion on payments due to the Plaintiff following termination

266 Thus, while the Plaintiff has breached several of his duties to the Defendant, the Defendant is not entitled to rely on cl 20 to terminate the Employment Contract. It follows that the contractual termination on 28 February 2014 must take effect under cll 2 and 14 of the Employment Contract.

267 Under cl 14, the Plaintiff is entitled to one year's annual salary as a one-off payment for termination before the expiry of the three-year term.

268 The Plaintiff also claims three months' salary in lieu of notice. Contractual termination under cll 2 and 14 requires the giving of three months' notice. However, cll 2 and 14 do not make express reference to the payment of three months' salary in lieu of notice. The issue that arises is therefore whether under cll 2 and 14, the plaintiff is entitled to three months' salary in lieu of notice or whether he can only recover such sums by way of damages for the breach of the requirement to give notice.

269 Whilst the English High Court in *Konski v Peet* [1915] 1 Ch 530 is authority (on its own facts) for the proposition that a term can be implied to pay salary in lieu of the stipulated notice, counsel for the Defendant rightly drew my attention to case law supporting the contrary position.

270 In particular, the Defendant cited *Heron, Gethin-Jones & Liow v John Chong* [1963] MLJ 310 ("*Heron*") as authority for the proposition that "the right to terminate by way of payment in lieu of notice cannot be implied even though cl 20 refers to payment in lieu of notice". In *Heron*, the court had to decide if there was an implied term entitling the plaintiff to salary in lieu of notice because the Plaintiff only sued for three months' salary in lieu of notice under the contract; he did not sue for damages for wrongful dismissal (termination in breach of the requirement to give notice) in the alternative. The plaintiff's claim therefore failed because the court found that a term entitling the plaintiff to salary in lieu of notice could not be implied.

271 Thus, it seems that the question of an implied term only makes a difference to the *legal basis* upon which an employee must assert his claim: if there is an implied term for payment of salary in lieu of notice, he will be entitled under the termination clause to receive the salary; on the other hand, if there is no implied term, the proper course to take would be to sue the employer for damages following the breach of the requirement to provide the requisite notice. Practically, the sum recovered would be the same in both scenarios.

272 In the present case, given that the plaintiff has pleaded for both damages for wrongful dismissal as well as for sums due under the Employment Contract pursuant to his termination, nothing turns on whether a term for payment of salary in lieu of notice can be implied into the Employment Contract.

273 To sum up, I find that the Plaintiff is entitled to one year's salary under cl 14, as well as three months' salary either under the contract as being payment in lieu of notice, or as damages for breaching the contractual notice period. In particular, the following points should be noted:

(a) I find that the reference to one year's salary by way of "one-off payment" in cll 2 and 14 of the Employment Contract does not include the Plaintiff's guaranteed bonus. The bonus entitlements are separate from his salary. The "one-off payment" is to be valued at the salary the Plaintiff was earning for the period between 1 March 2013 and 28 February 2014.

(b) The three months' salary is to be valued at the monthly salary the Plaintiff was earning at the time of dismissal, *ie*, S$47,300.

274 Thus, under cll 2 and 14, following the termination of the Employment Contract, the Plaintiff is entitled to S$507,300 + S$141,900 = S$649,200.

Issue 5: Bonus

275 The parties disagree on whether the Plaintiff's guaranteed annual bonus for his first year of work had accrued as of 28 February 2014, which was the very last day of his first working year (which commenced on 1 March 2013). In my view, while the contract did not clearly state when the annual bonus would accrue under the Employment Contract, a reasonable reader would interpret the annual bonus for that year to have accrued, at the latest, on the last day of the year, *ie*, 28 February 2014.

276 I therefore find that the Plaintiff's first year guaranteed bonus has accrued. However, in light of my earlier finding that the payment to Fincastle Trading Limited was a part payment of the Plaintiff's guaranteed bonus, the Plaintiff is only entitled to the sum outstanding, which is S$33,998.37 (S$243,600 - S$209,601.63).

Conclusion

277 In conclusion, I order as follows:

(a) The Plaintiff is awarded S$649,200 pursuant to the Defendant's termination of the Employment Contract without notice.

(b) The Plaintiff is awarded S$33,998.37 for the outstanding annual bonus due to him for his first and completed year of employment.

278 The Defendant's counterclaim succeeds in respect of:

(a) The claims in Category A totalling S$100,340.40. These are the expenses that the Plaintiff accepts are outside his entitlement and which he is bound to repay.

(b) The claims in Category B. These are expenses said to have been incurred prior to the commencement of the contract with the Defendant.

(c) The claim for the St Regis spa service and other related spa services and treatments in Category D.

(d) The claims in Category G for taxi services.

279 Interests is awarded to both the Plaintiff and the Defendant in respect of their successful claims at the court rate from the date the writ was issued to the date of payment.

280 Given that the claim and the counterclaim succeeded only in part, I order the Defendant to bear 1/3 of the Plaintiff's costs. For the avoidance of doubt, the Defendant is to bear its own costs.

281 Costs to be agreed or taxed.

[note: 1] Plaintiff's closing submissions, [4]

[note: 2] Plaintiff's closing submissions, [5]

[note: 3] Plaintiff's closing submissions, [8]

[note: 4] NE, 17 April 2015, pp49-50

[note: 5] Plaintiff's closing submissions, [9]

[note: 6] Plaintiff's AEIC, IP-1, at p37

[note: 7] Plaintiff's closing submissions, [9]

[note: 8] Plaintiff's AEIC, [6]

[note: 9] Plaintiff's AEIC, IP-2, p55

[note: 10] NE, 15 April 2015, pp19-322

[note: 11] Popov's AEIC, [5], [8]; NE, 15 April 2015, p33 lines 14-27

[note: 12] NE, 15 April 2015, p37 lines 24-28

[note: 13] NE, 15 April 2015, p31 line 24- p 32 line 7; p 33 line 28 – p 34 line 19

[note: 14] Popov's AEIC, MP-2, p56

[note: 15] NE, 15 April 2015, p34 line 20 – p35 line 32

[note: 16] Popov's AEIC, [9]; Defence and Counterclaim (Amendment No 1), [3].

[note: 17] NE, 17 April 2015, p55 lines 1 – 8, p89 lines 3 – 6

[note: 18] Plaintiff's AEIC, [46]

[note: 19] NE, 17 April 2015, p35 lines 12-19, p52 lines 24-32; Plaintiff's AEIC at [44]

[note: 20] NE, 17 April 2015 p89 line 5 – p90 line 26

[note: 21] NE, 17 April 2015 p115 lines 13 – 20

[note: 22] Plaintiff's AEIC, [45]

[note: 23] NE, 17 April 2015, p36 lines 2-10

[note: 24] NE, 17 April 2015, p36 lines11-15

[note: 25] NE, 17 April 2015, p60 line 18 – p63 line 10

[note: 26] NE, 17 April 2015, p36 lines 21-30

[note: 27] NE, 16 April 2015, p41 line 26 – p43 line 19

[note: 28] NE, 16 April 2015, p43 line 20 – p44 line 16

[note: 29] Plaintiff's AEIC, [45]-[47]; NE, 16 April 2015, p58 lines 3-16

[note: 30] Plaintiff's AEIC, [45]

[note: 31] Plaintiff's AEIC, [48]

[note: 32] NE, 17 April 2015, p57 lines 21-32

[note: 33] NE, 17 April 2015, p35 lines 8-19; p88 lines 22-29

[note: 34] Popov's AEIC, [12]-[15]; Plaintiff's AEIC, [18]-[24]

[note: 35] Plaintiff's AEIC, [25]

[note: 36] Plaintiff's AEIC, [25]; Popov's AEIC, [22]

[note: 37] Plaintiff's AEIC, IP-11

[note: 38] Plaintiff's AEIC, [26]; Popov's AEIC, [25]

[note: 39] Plaintiff's AEIC, p122

[note: 40] Plaintiff's AEIC, p122

[note: 41] NE, 15 April 2015, p69 lines 4-10

[note: 42] Popov's AEIC, p133

[note: 43] NE, 15 April 2015, p69 lines 11-17, p70 lines 7-16

[note: 44] NE, 15 April 2015, p72 line 22-p74 line 4

[note: 45] Popov's AEIC, p136

[note: 46] Popov's AEIC, [32]

[note: 47] Popov's AEIC, [32], p516-517

[note: 48] Statement of Claim, [7]

[note: 49] Statement of Claim, [8]

[note: 50] Statement of Claim, [9]

[note: 51] Defence and Counterclaim (Amendment No 1), [10]–[13]

[note: 52] Defence and Counterclaim (Amendment No 1), [16]

[note: 53] Defence and Counterclaim (Amendment No 1), [17]

[note: 54] Defence and Counterclaim (Amendment No 1), [30]

[note: 55] Defence and Counterclaim (Amendment No 1), Schedule 1–3

[note: 56] Popov's AEIC, MP-13, Bundle of Affidavits vol 3, p 1367

[note: 57] Popov's AEIC, [78]-[81]

[note: 58] Popov's AEIC, [82]-[88]

[note: 59] Popov's AEIC, [89]-[96]

[note: 60] Popov's AEIC, [97]-[100]

[note: 61] Popov's AEIC, [101]-[103]

[note: 62] Popov's AEIC, [104]-[108]

[note: 63] Popov's AEIC, [109]-[111]

[note: 64] Popov's AEIC, [112]-[115]

[note: 65] NE, 16 April 2015, p10 – p12 line 16

[note: 66] Popov's AEIC at [83]-[86]

[note: 67] see Popov AEIC, [90].

[note: 68] NE, 16 April 2015, p18 line 20 – p53 line 2

[note: 69] Popov's AEIC, [91]–[92]

[note: 70] See for example NE, 16 April 2015, p23 lines 23–29

[note: 71] See for example NE, 16 April 2015, p24 lines 25–32

[note: 72] NE, 16 April 2015, p21 line 30 – p22 line 9

[note: 73] Popov's AEIC, [93]

[note: 74] See for example NE, 16 April 2015, p22 lines 6-9

[note: 75] See for example NE, 16 April 2015, p27 lines 18-30

[note: 76] NE, 17 April 2015, p35 lines 8-11

[note: 77] NE, 16 April 2015, p53 line 21 – p 65 line 1

[note: 78] NE, 16 April 2015, p54 lines 12–32

[note: 79] NE, 16 April 2015, p55 line 29 – p57 line 11

[note: 80] NE, 16 April 2015, p57 line 12 – p59 line 23

[note: 81] NE, 16 April 2015, p62 line 3 – p63 line 16

[note: 82] Popov's AEIC, [102]

[note: 83] Plaintiff's closing submissions, [61]

[note: 84] NE, 16 April 2015, p65 line 8 – p66 line 32

[note: 85] NE, 16 April 2015, p70 lines 12–17

[note: 86] NE, 16 April 2015, p67 line 21 – p 68 line 15

[note: 87] NE, 16 April 2015, p70 lines 12– p71 line 13

[note: 88] Plaintiff's closing submissions, [62(b)]

[note: 89] NE, 17 April 2015, p96 – p98 line 23; p111 line 29 – p113 line 30

[note: 90] NE, 17 April 2015, p72 line 19 – p73 line 29

[note: 91] NE, 16 April 2015, p72 lines 12-26

[note: 92] Plaintiff's closing submissions, [63]-[64]

[note: 93] Plaintiff's closing submissions, [65]

[note: 94] Popov's AEIC, [115]

[note: 95] Plaintiff's AEIC, IP-21, p585

[note: 96] Plaintiff's AEIC, p 587

[note: 97] NE, 16 April 2015, p93 lines 1-13

[note: 98] NE, 16 April 2015, p93 lines 18-24, p95 lines 8-15

[note: 99] NE, 16 April 2015, p93 lines 29-32

[note: 100] NE, 17 April 2015, p39 line 29- p40 line 22

[note: 101] NE, 17 April 2015, p41 lines 11-15, p71 line 27 – p72 line 18Popov:

[note: 102] NE, 17 April 2015, p93 line 19-22; p116 lines 10-p117 line 2

[note: 103] NE, 17 April 2015, p116 lines 10-p117 line 2

[note: 104] NE, 17 April 2015, p117 line 20-p118 line 15

[note: 105] NE, 17 April 2015, p59 line 30 – p60 line 14

[note: 106] Plaintiff's closing submissions, [95]–[96]

[note: 107] Defendant's closing submissions at [57]–[72]

[note: 108] Defendant's closing submissions, [117]

[note: 109] Defendant's closing submissions at [73]–[78]

[note: 110] Statement of Claim, [7]; Defence and Counterclaim (Amendment No 1), [7].

[note: 111] Defence and Statement of Claim (Amendment No 1), [16]

[note: 112] Defence and Counterclaim (Amendment No 1), [10] and [11]

[note: 113] Defence and Counterclaim (Amendment No 1), [13]

[note: 114] Defendant's closing submissions, [94], [102] and [103]

[note: 115] Defendant's closing submissions, [86]

[note: 116] Defendant's closing submissions, [85(ii)], [90]–[93]

[note: 117] Defendant's closing submissions, [85(i)], [102(ii)]

[note: 118] Defendant's closing submissions, [96], [98]–[101]