Kaufman, Gregory Laurence and Others v Datacraft Asia Ltd and Another [2005] SGHC 174

Case Number : OS 179/2004

Decision Date : 22 September 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Sean Tan and Corinne Taylor (Tan Kok Quan Partnership) for the plaintiffs; Cavinder Bull and Johanna Tan (Drew and Napier LLC) for the defendants

Parties : Kaufman, Gregory Laurence; Kaufman, Gregory Laurence Trust; Robert Henry Leslie; Lisboa Ltd — Datacraft Asia Ltd; Datacraft Asia Investments BV

Evidence – Witnesses – Expert witness – Whether evidence of expert witness having connection with parties to proceedings or having interest in outcome admissible – Whether conflicting opinions should be rejected where potential conflict of interest existing

Trusts – Breach of trust – Whether entrustment relationship created by agreement between parties – Whether breach of fiduciary duty arising from entrustment relationship

22 September 2005 *Judgment reserved.*

Judith Prakash J:

Introduction

1 The first plaintiff, Mr Kaufman, and the third plaintiff, Mr Leslie, at various points in time were directors and employees of a company incorporated in Japan known as Datacraft Japan, Inc ("DC Japan"). The second and fourth plaintiffs are their respective trust companies through which they hold shares in DC Japan. DC Japan is a subsidiary of the second defendant, Datacraft Asia Investments BV, which in turn is owned by the first defendant, Datacraft Asia Ltd ("DCA"). DCA is the parent company in the Datacraft group of companies and is listed on the main board of the Stock Exchange of Singapore. Throughout the trial of this action, numerous references were made to Datacraft and such references were taken to mean the Datacraft group of companies, which included DCA, the second defendants, and DC Japan.

2 This dispute centres on the interpretation of an agreement entered into by the plaintiffs and the defendants and dated 29 January 2002. This agreement, referred to as "the Letter Agreement" by all the parties, is governed by the laws of Japan. The plaintiffs claim that they are entitled, by reason of the provisions of the Letter Agreement, to be given certain information and documents by the defendants. They also want an order for an account of what is due to them by reason of the provisions of the Letter Agreement.

Background

3 The Datacraft group is in the business of building and maintaining computer networks and providing computer solutions. On 28 July 1999, the defendants acquired 75% of the share capital of Netwave, Inc ("Netwave"), a company incorporated in Japan that also carried on the business of building computer networks. The vendors of the Netwave shares were Otsuka Shokai Co Ltd ("Otsuka"), Yoshimoto Uemura and Nobuyuki Amano. These persons were subsequently collectively referred to in the Letter Agreement as the "Potential Defendants" and that term was used for them

throughout these proceedings as well.

4 PTS Co Ltd ("PTS") was a company incorporated in Japan carrying on the same business as Netwave and the Datacraft group. On 14 December 1999, the defendants acquired 75% of the share capital of PTS from its then shareholders who included the second and fourth plaintiffs.

5 Sometime in 2000, the defendants decided to merge PTS into Netwave. The defendants owned 75% of PTS and 75% of Netwave and thus would own 75% of the merged entity. The defendants appointed an accounting firm, Deloitte Touche Tomatsu, Japan ("Deloitte") to conduct valuations of PTS and Netwave in order to provide the basis on which the merger could take place. Deloitte's valuations would determine the distribution of the remaining 25% equity in the merged entity between the minority shareholders of Netwave and PTS, but would not affect the defendants' shareholding in any way.

6 Deloitte's valuations resulted in a 6:1 ratio in favour of Netwave. The minority shareholders of PTS thus received one-seventh of the remaining 25% of the merged entity. Netwave was then renamed and became DC Japan. On 1 April 2001, DC Japan was merged with PTS and PTS was dissolved. DC Japan took over all of PTS's assets and liabilities, including all ex-employees. Mr Kaufman and Mr Leslie became employees of DC Japan.

7 Sometime in October 2001, Mr Leslie overheard some former Netwave employees talking about "commissions" that were still being paid by Otsuka to DC Japan. This struck Mr Leslie as odd as he was not aware of any transaction between Otsuka and DC Japan that would involve any payment being made by Otsuka. Mr Leslie was then the Director of Business Systems in DC Japan and had access to the entire database of DC Japan. He began to conduct investigations.

8 Mr Leslie uncovered what appeared to him to be compelling evidence that indicated that Otsuka and Netwave had entered into three sham contracts signed on or about 1 July 1999, prior to the defendants' acquisition of the 75% stake in Netwave. Pursuant to those contracts, various payments were made to Netwave. At the time Mr Leslie discovered the evidence, about ¥450m had been paid and there was a further ¥90m to be paid.

9 Mr Leslie discussed his findings with Mr Kaufman. It occurred to them that the effect of the three sham contracts was to inflate the value of Netwave. Otsuka had at that time been seeking a public listing of its shares on the main board of the Tokyo Stock Exchange. An increased value would have made Netwave more attractive to the investing public. There were two other effects of the sham contracts: first, DCA would have overpaid the vendors for the 75% stake in Netwave, and second, the 6:1 ratio used for the merger between Netwave and PTS would have been inaccurate.

10 Mr Leslie then arranged to meet with Mr Ron Cattell in Singapore. Mr Cattell was then the chief executive officer of DCA as well as the chairman of the board of directors of DC Japan. The meeting took place on 7 December 2001. There are slightly differing accounts of what occurred at that meeting.

11 According to Mr Leslie, he informed Mr Cattell briefly about what he had uncovered and thereafter handed to Mr Cattell a letter that had been drafted by the plaintiffs' lawyers in Japan, Squire, Sanders & Dempsey LLP ("Squire Sanders"). The letter provided for mutual co-operation and the gathering and sharing of information between the plaintiffs and the defendants, and the joint prosecution of a claim against the Potential Defendants. It also provided for a split of any recovery received from the Potential Defendants between the defendants and the plaintiffs in the ratio of 70:30 with the defendants receiving 70% thereof. Mr Leslie told Mr Cattell that he would not divulge

further information until and unless the said letter was signed. Mr Cattell read the letter, but informed Mr Leslie that he could not sign it there and then. Mr Cattell did, however, tell Mr Leslie that he could agree in principle to the 70:30 split of recoveries. Mr Cattell informed Mr Leslie that Mr John Bennetts, the defendants' solicitor, would be contacting Mr Leslie to follow-up on the matter.

12 According to Mr Cattell, Mr Leslie had showed him one piece of evidence to support Mr Leslie's assertion of the sham transactions between Netwave and Otsuka. Mr Leslie said that the evidence he had was valuable to the defendants because the defendants would be able to use it to seek compensation from the vendors in respect of the inflation of the value of Netwave. Mr Leslie said that he would share this evidence only if the defendants agreed to share the proceeds of any eventual settlement with himself and Mr Kaufman. Mr Cattell told Mr Leslie that as an employee of the Datacraft group, he was obliged to hand over such evidence in any case. Mr Leslie's response was that he and Mr Kaufman were not acting as employees of DC Japan but as parties to the sale of PTS to the defendants and the agreement to merge PTS and Netwave, and therefore they had a personal interest. Mr Cattell confirmed that he had told Mr Leslie that if the defendants decided to pursue the case, they would give Mr Leslie and Mr Kaufman 30% of the compensation they eventually received.

13 Immediately after his meeting with Mr Cattell, Mr Leslie met with Mr Koh See Heong who was then the chief operating officer of DCA and the acting president of DC Japan. Mr Koh was Mr Leslie's direct superior in DC Japan. Mr Leslie testified that he told Mr Koh exactly what he had told Mr Cattell.

14 Thereafter, there were negotiations between the defendants represented by Mr Bennetts and their Japanese lawyers, Freshfields Law Office ("Freshfields"), and the plaintiffs represented by Squire Sanders and Mr Leslie on the terms of the Letter Agreement. Prior to the signing of the Letter Agreement, the plaintiffs released the evidence they had uncovered to the defendants in two tranches, on or about 17 January 2002 and on or about 30 January 2002. In January 2002, there was also some investigation done on behalf of the defendants by PricewaterhouseCoopers ("PWC"). Mr Leslie himself continued to conduct further investigations that month.

15 The Letter Agreement was eventually signed by the defendants on 25 February 2002 but was dated 29 January 2002. Mr Leslie and Mr Kaufman also signed a consultancy agreement along with the Letter Agreement. The Letter Agreement provided, *inter alia*, for the defendants to pay the plaintiffs a total of 30% of any sum recovered from the Potential Defendants. There was no provision for the plaintiffs to pay the defendants any part of any sum that the plaintiffs recovered from the Potential Defendants.

16 On 12 June 2002, the plaintiffs discovered that the defendants had reached a settlement with the Potential Defendants. They asked the defendants for details of this settlement but were not given the same. On 2 August 2002, the plaintiffs received a letter from DCA informing the plaintiffs of the amount that they were entitled to pursuant to the terms of the Letter Agreement. DCA stated that this payment was in full and final performance of their obligations under cl 4 of the Letter Agreement. The plaintiffs were dissatisfied with the brevity of the breakdown given by DCA as to what the plaintiffs were entitled to and asked for details of the settlement. DCA refused to provide any details on the basis that there was a confidentiality clause in the settlement agreement that the defendants had signed with the Potential Defendants. The plaintiffs therefore commenced this action asking for the disclosure of information and documents relating to the settlement.

The Letter Agreement

17 The relevant provisions of the Letter Agreement are as follows:

Dear Ron,

This is to follow up on our earlier discussions regarding certain potential claims in relation to Netwave, Inc. and successor Datacraft Japan K.K., against Otsuka Shokai, Yoshimoto Uemura and Nobuyuki Amano (the "Potential Defendants"), by Datacraft Asia Investments B.V. or Datacraft Asia Ltd. (the "Datacraft Entities"), Lisboa Ltd., and the Gregory L. Kaufman Trust. Greg and I believe that it is necessary to reconfirm in writing, following the meeting with John Bennetts and the Squire Sanders lawyers on January 17th, 2002, our collective understanding regarding the manner in which we will cooperate with each other and any recovery or compensation would be split.

The signatories confirm by signing below that:

1. To the extent that the Datacraft Entities choose to seek compensation of any form in connection with the foregoing claims, the Datacraft Entities may elect to do so by themselves, or (i) the Datacraft Entities and (ii) Greg Kaufman ("Greg"), Robert Leslie ("Robert"), Lisboa Ltd or the Gregory L. Kaufman Trust may each in his or its own discretion elect to settle his or its claims jointly with the other parties hereto, but shall have no obligation to do so.

2. The Datacraft Entities, Lisboa Ltd., the Gregory L. Kaufman Trust, Greg and Robert shall, to the extent reasonably and legally possible, coordinate with and fully cooperate in collecting, sharing and disclosing information, prosecuting, settling or directly or indirectly resolving the claims.

3. …

4. Any settlement, judgment, proceeds or benefits directly or indirectly collected or realized by any of the Datacraft Entities, or their respective affiliates from any of the Potential Defendants, or any savings that any of the Datacraft Entities, or their respective affiliates realize, which directly or indirectly relate to the claims referenced above, shall be shared by and split as follows (after the deduction of costs and expenses of the Designated Legal Counsel (as defined below)): 70% going to Datacraft Asia Investments B.V. or its designee, and 15% going to each of the Gregory L. Kaufman Trust and Lisboa Ltd. (for a total of 30%, as also provided in the consultancy agreement between Greg, the Gregory L. Kaufman Trust, Robert, Lisboa Ltd and the Datacraft Entities, which shall be executed concurrently with this letter agreement in the form attached hereto. For the purposes of paragraph 2 of the consultancy agreement, the amount to be agreed in writing and to be paid to Robert and Greg shall be the 30% share determined in accordance with this paragraph 4). For the avoidance of doubt, nothing in the consultancy agreement is intended to enable Greg, the Gregory L. Kaufman Trust, Robert or Lisboa Ltd to claim any additional payments other than those set forth in this Letter Agreement, or to reduce or limit the payments to them set forth in this Letter Agreement. … Datacraft shall use commercially reasonable efforts to ensure that any non-cash-payment (if any) is finally confirmed and legally binding as soon as possible and shall make payment of the 30% share to the Gregory L. Kaufman Trust and Lisboa Ltd. within 14 days of the date such non-cash-payment (if any) is finally received, confirmed and legally binding. Our collective, future reasonable costs of legal counsel and experts and other reasonable expenses incurred in connection with the pursuit of the foregoing claims, from the date hereof until the cessation of action or settlement or compromise of claims by the Datacraft Entities shall be borne as follows:

(a) if recovery exceeds the costs and expenses of the Designated Legal Counsel (as defined below), then such costs and expenses will be deducted before the remainder of the recovery is

spilt 70/30 (as described above), provided that the first US$50,000 (to the extent available) before the remainder of the recovery is split 70/30 shall be paid to Lisboa Ltd and the Gregory L. Kaufman Trust as compensation for any legal costs incurred up to the date of this letter; and

(b) if recovery does not exceed the costs and expenses of the Designated Legal Counsel, then following the payment of such costs and expenses from the recovery, the excess costs and expenses of the Designated Legal Counsel above the recovery amount shall be borne 70/30 (with the Datacraft Entities paying 70% of the Designated Legal Counsel's costs and with Lisboa Ltd. and the Gregory L. Kaufman Trust paying 30% of the Designated Legal Counsel's costs).

5. …

6. The Datacraft Entities shall have the sole right to decide whether to proceed with, and to control the manner of resolving, litigating or compromising, their claims against the Potential Defendants described herein. Each of Lisboa Ltd., the Gregory L. Kaufman Trust, Greg and Robert shall have the sole right to decide whether to proceed with, and to control the manner of resolving, litigating or compromising, their respective claims against the Potential Defendants described herein, provided that they shall refrain from engaging in any correspondence with the Potential Defendants in relation to their claims, making demand upon the Potential Defendants, filing suit or otherwise initiating such claims (except in response to such demand or litigation by the Potential Defendants), until the sooner of October 1, 2003 or the date that the Datacraft Entities have finally resolved their above-referenced claims against the Potential Defendants.

7. In the event that the Datacraft Entities elect to cease pursuing their claims against the Potential Defendants, the Datacraft Entities shall, to the extent reasonably possible and permitted by law, cooperate fully and provide to the Gregory L. Kaufman Trust and Lisboa Ltd. all information available to them, or reasonably requested by the Gregory L. Kaufman Trust or Lisboa Ltd., relating to any claims against the Potential Defendants. The Datacraft Entities shall not be responsible for any legal fees or expenses incurred after the date of cessation of action by the Datacraft Entities or the settlement or compromise of any claim by the Datacraft Entities.

8. …

9. This letter agreement shall be subject to and be governed by the laws of Japan.

18 The consultancy agreement, a draft of which was annexed to the Letter Agreement, and the original of which was duly signed by Mr Leslie and Mr Kaufman, reads as follows:

Dear Greg and Robert

We wish to confirm the following in respect of the appointment of yourselves, the Gregory L. Kaufman Trust and Lisboa Ltd. as consultants to Datacraft Asia Investments B.V. and Datacraft Asia Ltd (the "Datacraft Entities") in relation to matters in connection with the acquisition of shares in the company Netwave, Inc which has been merged into Datacraft Japan K.K:

1. Gregory Kaufman, Robert Leslie, The Gregory L. Kaufman Trust and Lisboa Ltd (the *Consultants*) shall provide various consultancy services in respect of Netwave, Inc. and its successor Datacraft Japan K.K. as agreed in writing between the Datacraft Entities and the Consultants.

2. In consideration of the provision of these consultancy services, the Datacraft Entities

agree to pay the Gregory L. Kaufman Trust and Lisboa Ltd an amount agreed in writing between the Datacraft Entities and the Consultants. Prior to the payment of such agreed amount, the Gregory L. Kaufman Trust and Lisboa Ltd will enter into a formal agreement with respect to such consultancy services, which shall be identical to this agreement except that the exact amount of compensation shall be specified.

…

Kind regards

Ron Cattell

The pleadings

19 The plaintiffs commenced this action by way of an originating summons filed on 12 February 2004. Subsequently, the court ordered that pleadings should be filed and that the action should proceed in the same way as if it had been started by way of writ. The plaintiffs' Statement of Claim was filed in September 2004. After setting out the background facts, the plaintiffs recited the following material terms of the Letter Agreement, to wit, cll 9, 2, 4, 6 and 7. The plaintiffs then set out in paras 19 and 20 of the Statement of Claim what they averred were the legal consequences of the conclusion of the Letter Agreement. These paragraphs read:

> 19. The Plaintiffs aver that by virtue of the provision cited in paragraph 15 to 18 herein, by virtue of the laws of Japan, an agreement of entrustment or ("Inin" in Japanese) is created between the Plaintiffs and the Defendants resulting in the creation of a fiduciary relationship between the Plaintiffs and the Defendants as regards the co-ordination, collection and sharing of information and the prosecution and resolution of each parties' [*sic*] claims against, *inter alia*, the Potential Defendants.
>
> PARTICULARS
>
> Articles 643 to 656 of the Civil Code of Japan.
>
> 20. By reason of the fiduciary relationship averred in paragraph 19 herein, the Defendants are:
>
> (a) required to fully co-operate in collecting with the Plaintiffs, sharing and disclosing information relating to their claim against, *inter alia*, the Potential Defendants; and
>
> (b) required to fully co-operate and co-ordinate with the Plaintiffs in the prosecution, settlement or resolution of their claim against, inter alia, the Potential Defendants;
>
> (c) prohibited from entering into a settlement with, inter alia, the Potential Defendants without providing details on the terms of the settlement;
>
> (d) prohibited from entering into a settlement with the Potential Defendants that provides that the terms of the settlement and the information that the Defendants were required to disclose under the Agreement could not be disclosed to the Plaintiffs or any other party, without the Plaintiffs' prior consent; and
>
> (e) [to] provide a full and detailed account of the payments that the Defendants received from, inter alia, the Potential Defendants under any settlement between them.

22. In the further alternative, the Plaintiffs aver that … by virtue of Japanese law, the expressions "legally possible" and "permitted by law" found in clauses 2 and 7 of the Agreement respectively refers [*sic*] to the codified laws of Japan.

20 In paras 23 to 26 of the Statement of Claim, the plaintiffs recounted their efforts to obtain further information from the defendants about the settlement agreement the latter had concluded with the Potential Defendants. They also set out the contents of Freshfields' letter of 2 May 2003 which contained the reasons why the defendants had refused to comply with the plaintiffs' requests for further information. The plaintiffs averred that the position taken by the defendants was a breach of the defendants' obligations recited in para 20 of the Statement of Claim.

21 The plaintiffs then went on to make claims for:

(a) an order that there be disclosure by the defendants within seven days of the making of the order of the documents and information within their possession, custody, knowledge or control set out in the Schedule annexed to the Statement of Claim;

(b) an order for an account of what was due to the plaintiffs from the defendants in respect of the monetary and non-monetary compensation received by the defendants under the settlement;

(c) an order for payment by the defendants to the plaintiffs of such sums found due to the plaintiffs in accordance with cl 4 of the Letter of Agreement upon the taking of such account;

(d) all further proper accounts, inquiries and directions as the court deemed necessary;

(e) interest on such amount, at such rate and for such period as the court deemed fit; and

(f) costs.

22 The Defence was filed on 5 October 2004. By para 11, the defendants asserted that the plaintiffs had refused to give them the evidence and information in their possession relating to the allegedly sham transactions unless the defendants agreed to pay the plaintiffs a portion of any settlement that the defendants might receive from the Potential Defendants. In para 12, the defendants stated that they had no option but to agree to the plaintiffs' conditions and in the premises and/or on grounds of public policy, the Letter Agreement was unenforceable. Subsequently, by way of further and better particulars, the defendants elaborated that they were relying on public policy grounds under both Singapore and Japanese law.

23 By para 16, the defendants denied paras 19 and 20 of the Statement of Claim. They said that no agreement of entrustment had been created by the plaintiffs and the defendants by the terms of the Letter Agreement or otherwise. It was never the intention of the parties that the defendants should negotiate or pursue claims against the Potential Defendants on behalf of the plaintiffs. By para 17, the defendants said that the plaintiffs did not delegate to them any work or task by the Letter Agreement and the defendants did not accept any delegation by the plaintiffs of any work or task. In the alternative, the defendants pleaded by para 18 that even if a relationship of entrustment existed between the parties, any obligation to provide information or an account was limited by the confidentiality obligation contained in the settlement agreement with the Potential Defendants and such obligation was within the contemplation of the parties at the time the Letter Agreement was executed. The defendants further averred that the obligation to co-operate and provide information

to the plaintiffs granted by cl 7 of the Letter Agreement was applicable only in the situation that the defendants elected to cease to pursue their claims against the Potential Defendants. This situation had not occurred since the defendants had pursued their claims against the Potential Defendants to a successful conclusion by way of a settlement.

24 The defendants also relied on Japanese law. They pleaded that under Japanese law, the plaintiffs were not entitled to some of the remedies claimed. They also contended that under Japanese law, if a party did not exercise his rights in accordance with the principles of good faith and fair dealing, the courts had a discretion to refuse to grant him the remedy that he sought. The defendants pleaded that the plaintiffs had failed to act with good faith and fairness. Whilst various particulars of this allegation were given, the defendants relied chiefly on an alleged failure by Mr Leslie and Mr Kaufman to act in accordance with their duties of good faith and/or fidelity to their employer, DC Japan.

25 The issues that arise from the pleadings are, therefore, the following:

(a) whether, by the Letter Agreement, an agreement of entrustment was created between the plaintiffs and the defendants;

(b) if an entrustment was created, whether the Letter Agreement nevertheless provided:

(i) that the defendants would not be obliged to provide information to the plaintiffs if they had settled their claim with the Potential Defendants; or

(ii) that the defendants were entitled not to provide information if by doing so they would run afoul of a confidentiality clause in their settlement agreement;

(c) whether the plaintiffs are entitled to the remedies sought; and

(d) whether the Letter Agreement is in any event unenforceable as being contrary to Singapore or Japanese public policy.

Did the Letter Agreement create an entrustment?

Treatment of the expert evidence

26 In order to deal with the first issue, I have to determine the true meaning and effect of the Letter Agreement. This document has to be construed in accordance with Japanese law. Since this court is not a Japanese court, what the relevant Japanese law is has to be determined as a matter of fact. Thus, both parties called Japanese lawyers to testify on the relevant law. The plaintiffs' expert was Mr Shinichiro Abe, a partner in the law firm of Bingham McCutchen LLP whilst the defendants' expert was Mr Kazuki Okada, a partner of Freshfields. Whilst there were some areas on which they agreed, the experts differed substantially on the construction of the Letter Agreement. In their closing submissions, the plaintiffs devoted some time to the argument that the evidence of Mr Okada had to be given less weight than that of Mr Abe. The weight to be given to Mr Okada's evidence must therefore be dealt with first before I go on to consider the meaning of the Letter Agreement.

27 When the plaintiffs were given notice that Mr Okada would be called as the defendants' expert witness, they filed a notice of objections to his affidavit based on their assertion that Mr Okada did not appear to be independent and, in fact, could not be independent. On the first day of the trial, they submitted that Mr Okada should not be allowed to testify as he was in a position of

conflict of interests for the following reasons:

(a) Mr Okada was a partner of Freshfields and had been a partner since 1999;

(b) Freshfields had advised the defendants and had been involved in the negotiations on the wording of the Letter Agreement;

(c) Freshfields had assisted the defendants in the evaluation of the evidence received from the plaintiffs in relation to the sham transactions between Otsuka and Netwave;

(d) Freshfields had been engaged by the defendants to assist in the drafting of the settlement agreement with the Potential Defendants; and

(e) prior to the commencement of this action, Freshfields had responded to the plaintiffs' solicitors and had taken a position on the meaning and effect on some of the clauses in the Letter Agreement and these were the very same clauses that Mr Okada was required to give his opinion on.

I ruled that Mr Okada's evidence was admissible but that the weight to be attributed to his evidence could be dealt with in the closing submissions.

28 The plaintiffs submitted that Mr Okada's testimony should be given very insignificant weight. They pointed out that while on the witness stand, he had admitted that Freshfields had represented the defendants in the negotiation and drafting of the Letter Agreement and of the settlement agreement with the Potential Defendants. He confirmed that he was aware that the interpretation of clauses in both these documents would be in issue in the trial of this action. Mr Okada had agreed that Freshfields had an ongoing business relation with the defendants and that he himself had done work for DC Japan. He agreed too that Freshfields had taken a position on whether cl 7 of the Letter Agreement obliged the defendants to disclose the settlement agreement to the plaintiffs. The plaintiffs also submitted that Mr Okada did not understand the concept of conflict of interest. This was because he did not agree that there was a conflict of interest between his position as a partner of Freshfields, a firm that might be sued by the defendants if the firm had given the latter wrong advice, and his position as an expert with a duty to assist the court irrespective of anything else. The plaintiffs' argument was that Mr Okada had been placed in a position of conflict of interests by the fact that Freshfields had taken an earlier position on the scope and effect of some of the clauses of the Letter Agreement. If Mr Okada blindly agreed to support Freshfields' earlier view, although holding a different view himself, he would not be discharging his duty to the court to give an impartial view. On the other hand, if Mr Okada offered a view that was contrary to that espoused by Freshfields, he would be exposing Freshfields to a potential claim for negligence. Therefore, they reasoned, the true reason why Mr Okada came forward to give evidence as an expert witness for the defendants was so that he could ensure that his position would be consistent with that taken by Freshfields previously.

29 The defendants disagreed with the plaintiffs' analysis. Freshfields had taken the position in correspondence with the plaintiffs' present solicitors that there was no obligation to disclose information to the plaintiffs. The defendants said that even if this position had turned out to be wrong, the defendants would not have suffered any loss. The issue was merely the release of documents. To the extent that those documents might suggest that more would have to be paid to the plaintiffs under the provision for a 30% share, that would be a consequence of the Letter Agreement, and not a result of Freshfields' letter or its advice that the defendants take such a position. Further, there was no evidence of what Freshfields had advised in respect of the drafting of the Letter Agreement itself. Even if the Letter Agreement was supposed to prevent the disclosure of

documents and Freshfields failed to achieve that, again there would be no real financial loss to the defendants because it would just be a matter of documents and those documents could just as well have been obtained by pre-action discovery in Singapore. Therefore, the suggestion that Freshfields might be sued was unwarranted. There was nothing that the defendants could sue Freshfields for because even if their advice was wrong, there was no loss.

30 The defendants submitted that the above argument disposed of the plaintiffs' contention that Mr Okada lacked independence. There was no interest which Mr Okada needed to protect. Moreover, Freshfields had liability insurance. What was more important was the reputation of Mr Okada in Freshfields. It was wrong of the plaintiffs to suggest that Mr Okada would be willing to lie on the stand to protect the name of Freshfields. In fact, matters were the other way round. When Mr Okada was approached to testify as an expert witness, he became aware of Freshfields' letter of 2 May 2003 (see [20] above). He then researched the law. If he had found that the law was otherwise, he would certainly not have put his personal reputation at risk by taking a contrary position in open court. After all, Mr Okada was not previously involved in the matter and he was not the lawyer advising the defendants on the Letter Agreement or its aftermath. That argument applied equally to Freshfields. There was absolutely no reason to risk Freshfields' reputation in open court if Mr Okada did not believe wholeheartedly in the position he testified to at trial.

31 The plaintiffs relied on the cases of *Field v Leeds City Council* [2001] 17 EG 165 ("*Field*") and *Armchair Passenger Transport Limited v Helical Bar Plc* [2003] EWHC 367 ("*Helical Bar*") for the proposition that where an expert witness has a connection with one of the parties or otherwise has an interest in the outcome of the proceedings, then, although such interest does not automatically render his evidence inadmissible, the interest may nevertheless affect the weight of the evidence. They also cited *In Re Continental Assurance Company of London plc* [2001] BPIR 733 ("*Continental Assurance*") where the liquidators of C Ltd, an insurance company, brought an action against the former directors alleging that they were guilty of professional wrongdoing. Mr Gill, a member of the liquidators' professional team, was called as expert witness to give evidence on the quantum of loss due to the wrongful trades. The court held, after hearing the evidence, that Mr Gill did not have the independence to be acceptable as an expert witness. The judge observed that Mr Gill had been a permanent and a very important member of the liquidators' professional team. Throughout the trial, he sat in front of counsel for the liquidators and there was regular passing of notes between them and many whispered consultations. The judge, Park J, went so far to state that he imagined that outside court hours, counsel and Mr Gill were frequently in conference together, discussing the progress of the case and considering future lines of argument and evidence. The judge went on to hold that Mr Gill's involvement as a committed member of the professional team, the purpose of which was that the claims against the directors should succeed, meant that Mr Gill was not a suitable person to be an expert witness. The judge considered that Mr Gill would have been superhuman if he could have approached the task of making the quantum calculations without being influenced by what he was convinced the outcome of them must have been. Whilst the judge did not think that Mr Gill was deliberately partisan, he considered that in the circumstances, it was wholly unrealistic to expect that Mr Gill could have avoided being partisan. The judge concluded that he could not accept Mr Gill's evidence as establishing any case for the liquidators on quantum.

32 I have no quarrel with the propositions established by *Field* and *Helical Bar*. In fact, they were the basis on which I decided to admit Mr Okada's evidence and they now form the basis on which I am considering the weight to be accorded to such evidence. As far as *Continental Assurance* is concerned, the facts in that case wholly justified, with respect, the decision reached but, as Mr Bull, counsel for the defendants, submitted, that situation is far removed from the one before me. In that case, the essential problem was Mr Gill's identification with the liquidators, the plaintiffs in the case. Where an expert witness is like a client, giving instructions to lawyers and in the position of an

"officer holder" in an insolvency situation, then he cannot be an independent witness. Mr Gill was working full-time as part of the liquidators' team and was giving instructions to counsel. Thus, he could not have been independent.

33 In the present case, Mr Okada was not a member of the team that was defending the defendants. He did not give instructions to counsel and his role was isolated to the giving of an expert opinion. On the other hand, whilst Mr Okada's independence cannot be impugned, I cannot dismiss the possibility of a conflict of interest entirely. The defendants might say that there is no question of a suit by them against Freshfields should they lose this case because the case is only about documents, but that is not the whole picture. The defendants must have incurred substantial costs in defending this action and, if they lose it, they will have to pay the plaintiffs' costs as well. If that situation arises and the defendants judge that the advice given to them on the interpretation of the Letter Agreement caused them to defend the case and unnecessarily incur costs, they might then consider whether they may be able to recover those costs by taking action against Freshfields. This may be a remote possibility but it is a distinct one. Whilst this potential conflict of interest is not sufficient for me to rule out Mr Okada's evidence entirely, bearing in mind that he does have the requisite expertise, it does mean that I should scrutinise his evidence with care where it conflicts with that of Mr Abe and should accept such conflicting opinions only where I find them to be reasonable, measured and backed by authority or where Mr Abe's contrary opinion was clearly unsound or had not been properly arrived at after consideration of all relevant factors. In reaching this conclusion, I should state that I do not mean to criticise Mr Okada in any way or to suggest that he would consciously give biased evidence. I am sure that Mr Okada believed fully in the opinions that he expressed in my court.

Principles of Japanese law

Interpretation of contracts

34 The parties agree that the task of construing a written contract is performed very differently by a Japanese court from the way it would be done by a Singapore court. Whilst a court applying Singapore law would have regard only to the language of the contract in order to ascertain what it meant and, objectively, what the parties intended it to mean, a Japanese court is entitled to consider not only the form and language of the contract but also the testimony of the parties as to what their intentions were when they entered into the contract and what they intended its language should mean. In interpreting a written contract, therefore, the Japanese court is not limited to the four corners of the document but is able to rely on the parol evidence of the witnesses as to their negotiations and intentions and come to a conclusion based on a full appreciation of the factual matrix. Secondly, the court has to look at the terms of the whole agreement. There is no dispute that under Japanese law, the interpretation of a contract should be done with a consideration of the entire agreement and not by considering clauses in isolation. The various terms should also be read harmoniously. As the Letter Agreement is governed by Japanese law, the parties accept that, in construing it, I can act as a Japanese court would.

Elements of an entrustment

35 Articles 643 to 656 of the Civil Code of Japan ("the Code"), which appear in s 10 of the Code under the heading "Mandate", set out the rights and obligations under the concept of entrustment or "*I-nin*". It appears from the evidence of both expert witnesses that an entrustment is akin to a trust. The plaintiffs alleged that an entrustment creates fiduciary duties and this allegation is central to their case as their action is for breach of such fiduciary duties. As the plaintiffs are the parties seeking to enforce the performance of the fiduciary duties, the plaintiffs have to show that they

created an entrustment relationship between them and the defendants whereby the defendants became liable as fiduciaries to the plaintiffs.

36 Article 643 of the Code states:

> A mandate [an entrustment] becomes effective when one of the parties has commissioned the other party to do a juristic act, and the latter has consented thereto.

Therefore, there must be two parties to an entrustment: one who commissions an act and the second who agrees to do that act. In this case, the persons commissioning the act would be the plaintiffs and the persons agreeing to do the act would be the defendants. By so agreeing, the defendants would have accepted the role of a fiduciary.

37 Article 656 of the Code states:

> The provisions of this Section shall apply mutatis mutandis to commissions of affairs other than juristic acts.

38 Turning to what must be entrusted, Mr Abe defined an entrustment as follows:

> Articles 643 through 656 of the Civil Code of Japan ("CCJ") set forth the rights and obligations as to "entrustment" or "I-nin." According to Article 643, a mandate (an entrustment) "becomes effective when one of the parties has commissioned the other party to do a juristic act, and the latter has consented thereto." See CCJ Article 643. Moreover, Article 656 provides that the "provisions of this Section shall apply mutatis mutandis to commissions of affairs other than juristic acts." See CCJ Article 656. Accordingly, an entrustment is created when one party (the mandator) commissions another party (the mandatory) to manage affairs, both legal and otherwise, and the mandatory accepts such management.

In cross-examination he was asked whose affairs would be managed by the mandatory. He agreed that the "mandatory" must manage the affairs of the "mandator" and not those of the mandatory himself. He agreed further that the mandatory had to agree to do the act for the mandator and that it could be one act or a series of acts. Mr Abe said that an entrustment would arise when he entrusted an act to another to do on his behalf and that was why it was called an entrustment, because the mandator entrusts an act to the mandatory. In this case, the plaintiffs would be the mandator and the defendants the mandatory.

39 One disagreement on the law arose out of the above point. Mr Bull submitted that in an entrustment, the mandatory is commissioned to manage the affairs of the mandator. He considered that this was common sense as it would not make any sense for the entrustment to arise in respect of the mandatory's own affairs. It would be absurd to say that an entrustment arose when A asked B to manage B's own affairs. On the other hand, Mr Sean Tan, acting for the plaintiffs, submitted that essentially any act could constitute an entrustment if one party had commissioned the other party to do that act and that act need not be a task that the mandatory did on the mandator's behalf. So long as the mandatory accepted the task, the entrustment was formed. Thus, in Mr Tan's submission, even if A asked B to do a task that related to B's own matters, as long as B agreed to do that task, there would be an entrustment.

40 Looking at Mr Abe's evidence, however, there does not seem to be support for the proposition put forward by Mr Tan. Under cross-examination, Mr Abe gave the following answers:

Q : 1st affidavit pg 10 para under "A. General Rule" *[Reads].* Focusing on "manage affairs". This must refer to the affairs of the "mandatory". The "mandatory" must manage the affairs of the "mandator" not those of the mandatory.

A : Correct.

Q : The mandatory has to agree to do the act for the mandator.

A : Correct.

Q : It can be one act or a series of acts.

A : Yes, both.

Q : So an entrustment arises when I entrust an act to another to do on my behalf.

A : Correct.

Q : That's why it's called an entrustment because mandator entrusts an act to the mandatory.

A : Yes.

Mr Abe's testimony on this point was the same as that of Mr Okada who stated in his second opinion that an entrustment agreement would be formed when one party, the entrusting party, delegated *its work* (legal or otherwise) to another party. I should point out that in his Supplementary Affidavit of Evidence-in-Chief, Mr Abe said that an entrustment need not be accompanied by proxies and disagreed with the use of the word "delegate" by Mr Okada. Mr Tan submitted that Mr Abe considered that the work need not be done on someone else's behalf. This portion of Mr Abe's evidence, however, was not persisted with in cross-examination and, as would be noted from the extract of the evidence given above, at that stage, he agreed that the work had to be done on someone else's behalf.

41 On the basis of the evidence before me, therefore, I find that it is an essential element of the entrustment relationship under Japanese law that the mandatory has been commissioned or asked to manage the affairs of the mandator in the sense that the mandatory has been asked to do a task which would otherwise be the responsibility of the mandator to perform. In this case, therefore, to find that the Letter Agreement constituted an entrustment so as to make the defendants liable to meet fiduciary obligations, I must find that the plaintiffs asked the defendants to perform a task for the plaintiffs which the plaintiffs would otherwise have had to perform themselves.

42 The plaintiffs submitted that payment is not required to form an entrustment. Citing Art 648 of the Code which provides that in the absence of a special arrangement, a mandatory cannot demand remuneration from a mandator, Mr Abe testified that that it was clear that a mandate could occur where there was no payment of any compensation. The defendants did not disagree with this view. Mr Okada's opinion was that payment was a factor that favoured a finding of entrustment. He did not, however, claim that it was an essential element of an entrustment.

Were the elements of entrustment satisfied?

43 Mr Tan submitted that by the Letter Agreement, the plaintiffs created and the defendants

accepted four different entrustments. These were as follows:

(a) entrustment in the sharing of recovery;

(b) entrustment in the co-ordination and co-operation in collecting, sharing and disclosing information, prosecuting, settling or resolving the claims;

(c) entrustment in the commissioning of the plaintiffs to conduct further investigations; and

(d) entrustment in the plaintiffs agreeing to a moratorium before corresponding with or initiating a claim against the Potential Defendants.

Of these four alleged types of entrustment, the most substantial one is the second, which actually itself comprises two types of entrustment. The other three can be dealt with briefly.

44 In relation to the alleged entrustment in the sharing of recovery, the plaintiffs relied on Mr Cattell's testimony during cross-examination that what took place at the meeting between himself and Mr Leslie on 7 December 2001 was that Mr Leslie approached him and asked him to share the recovery from the Potential Defendants in a 70:30 split and Mr Cattell agreed to this proposal. It was put to Mr Cattell that this was an agreement of entrustment but Mr Cattell disagreed. The plaintiffs then submitted that what Mr Cattell had confirmed was that Mr Leslie (the mandator) had commissioned Mr Cattell or the defendants (the mandatory) to share the recovery from the Potential Defendants in a 70:30 ratio (the act), and Mr Cattell or the defendants agreed (the acceptance). They submitted that this was an agreement of entrustment and was thereafter encapsulated in cl 4 of the Letter Agreement. This interpretation was also consistent with the evidence of Mr Abe who stated in his affidavit that by signing the Letter Agreement:

> The Defendants consented to the commission of various acts to them – namely, (i) the act of collecting, sharing and disclosing information related to the respective claims of the parties, and (ii) the act of sharing certain recoveries from such claims pursued by the Defendants.

Under cross-examination, Mr Abe maintained that there was an entrustment that required the defendants to pay 30% of their recovery to the plaintiffs and that such a payment would be something that the defendants were doing on behalf of the plaintiffs.

45 The defendants' response to this assertion was that the plaintiffs had not pleaded that there was an entrustment to share the recovery from the Potential Defendants and therefore, the plaintiffs were not entitled to make this argument in their closing submissions. This rebuttal was well founded. Paragraph 19 of the Statement of Claim, which is set out in [19] above, pleads specifically that the fiduciary relationship between the plaintiffs and the defendants concerned "the co-ordination, collection and sharing of information and the prosecution and resolution of each party's claims" against the Potential Defendants. It does not mention the sharing of the moneys recovered from the Potential Defendants. Nowhere else in the Statement of Claim do the plaintiffs plead that there was an entrustment to share the recovery. The plaintiffs should not therefore have made this argument in their closing submission. In any case, for an entrustment to arise, the defendants must agree to do something on behalf of the plaintiffs or the defendants must manage the affairs of the plaintiffs. The payment to the plaintiffs of 30% of the defendants' own recovery was not something that was done on behalf of the plaintiffs. The plaintiffs' argument is akin to saying that the defendants were entrusted to try to achieve a settlement from the Potential Defendants so that they could pay the plaintiffs money from what was due to the defendants themselves. This is absurd.

46 The next alleged entrustment dealt with in the closing submissions was that there had been an entrustment because the defendants had commissioned the plaintiffs to conduct further investigations. This submission was based on Mr Bennetts' confirmation that Mr Leslie had been requested to uncover additional evidence after the original evidence had been released to the defendants at the end of January 2002. Mr Leslie did conduct these further investigations and reported his findings to the defendants. Whatever the evidence, in my judgment, the plaintiffs are not entitled to put forward this submission as this allegation was not pleaded either. Further, as the defendants submitted, this alleged entrustment does not make any sense. An entrustment is where A is commissioned to do something on behalf of B. The plaintiffs' entire case is that the defendants had been commissioned to do something on behalf of the plaintiffs but in relation to this assertion, their argument was that an entrustment arose because the plaintiffs themselves had been commissioned to do something, *ie*, conduct investigations.

47 The third alleged entrustment that I deal with is what the plaintiffs say was an entrustment created because the plaintiffs agreed to a moratorium before corresponding with or initiating a claim against the Potential Defendants. This alleged entrustment was another entrustment that was not pleaded and therefore cannot be pursued further. In any case, there was no allegation that there had been a breach of such an entrustment. The moratorium did not give rise to any problems at all. Finally, again, this entrustment was not the commissioning of the defendants to do anything on behalf of the plaintiffs. It was simply an obligation of the plaintiffs to wait for the defendants to resolve the latter's claims against the Potential Defendants before the plaintiffs started their own action.

48 I now turn to the two entrustments that were properly pleaded and, in fact, were the foundation of the plaintiffs' claim, the other alleged entrustments being rather like decorations added on for effect. These entrustments allegedly arose out of the mutual obligations set out in cl 2 of the Letter Agreement where, it will be recalled, the parties agreed that they would, to the extent reasonably and legally possible, co-ordinate with and fully co-operate in collecting, sharing and disclosing information, prosecuting, settling or directly or indirectly resolving the claims.

49 Mr Tan's argument ran as follows. He said that there were two operative phrases in cl 2. The first was "to the extent reasonably and legally possible" whilst the second was "coordinate with and fully cooperate in". Referring to the first phrase, the plaintiffs' position was that the words "legally possible" referred only to the codified laws of Japan and did not apply to matters of private autonomy. Accordingly, the defendants' arguments, that the obligations in cl 2 in relation to the disclosure of information were qualified by the confidentiality obligation in the settlement agreement so that the defendants were not obliged to comply with the cl 2 disclosure obligations, could not be sustained. It is not necessary to deal with this argument here. First, one must establish whether or not any entrustment arose from the provisions of cl 2. If no such entrustment arose in relation to the disclosure of information, then one need not worry about what it is legally possible to disclose.

50 Moving then to the second phrase "coordinate with and fully cooperate in", the plaintiffs' argument was that these words relate to six acts which can be classified into two groups:

(a) collecting information;

(b) sharing information; and

(c) disclosing information;

and

(d) prosecuting the claims;

(e) settling the claims; or

(f) directly or indirectly resolving the claims.

The elements of entrustment were met, Mr Tan said, because cl 2 set out an agreement between the parties to co-ordinate with each other and co-operate in the collecting, sharing and disclosing of information. The plaintiffs had entrusted the defendants with the task of collecting such information and the defendants had given a similar entrustment to the plaintiffs. As far as the element of consent or acceptance was concerned, the plaintiffs averred that the signing of the Letter Agreement by the plaintiffs and the defendants constituted the consent. They pointed out that Mr Okada had agreed that if there was a commissioning of an act from the mandator to the mandatory, the signing of the contract by the mandatory would be considered to be an acceptance of the task.

51 Developing this argument, the plaintiffs contended that it was clear from cl 2 of the Letter Agreement that the scope of the agreement was much wider than the mere provision of information to the defendants for a 30% share in the recovery from the Potential Defendants. Mr Leslie stated that the agreement required that the parties work together to pursue their respective claims. The plaintiffs would provide information to assist the defendants and in return the defendants would provide information to assist the plaintiffs and any recovery would be split. In the plaintiffs' view, cl 2 was drafted the way it was because it was intended to reflect mutual obligations between the parties. Mr Abe testified that the obligations set out in cl 2 were "specific and clear" and that in such a situation, a Japanese court would look to the express language of the Letter Agreement to determine the meaning of the clause rather than search for and rely on outside sources of evidence. Even if one looked at the intentions of the parties and other documents such as the earlier drafts of the Letter Agreement, the same result would be reached and it would be seen that it had all along been intended for there to be mutuality in the obligations in cl 2.

52 The defendants' response was that cl 2 did not obviously create an entrustment because, as the plaintiffs themselves had said, the operative words were "coordinate" and "cooperate". Clause 2 did not, the defendants said, state what was required of each party in terms of co-ordination and co-operation. It stated the areas in which co-ordination and co-operation were required, *ie*, the areas of:

(a) collecting, sharing and disclosing information; and

(b) prosecuting, settling or resolving claims.

Those words were not used in cl 2 as the operative words. They were used merely to define the areas in which the parties were required to "coordinate" and "cooperate". Clause 2 did not state that the defendants had to disclose all relevant information to the plaintiffs, nor did it state that the defendants had to collect information for the plaintiffs. In the defendants' submission, the language of cl 2 did not therefore spell out what needed to be done and by whom. It merely made a general statement that there should be co-operation and co-ordination in respect of gathering evidence and prosecuting claims. Thus, said the defendants, in order to establish the intention of the parties, it would be necessary to go beyond the words of cl 2 and look at the terms of the whole agreement and the extrinsic facts relating to the contract.

53 Generally, I accept the defendants' submission that the Letter Agreement has to be looked at as a whole. It is not correct to take clauses out of the context of an agreement and construe them in

isolation. The principles of Japanese law as regards this aspect do not differ from the principles of Singapore law. The difference lies only in the extent to which the court may seek help from oral evidence and other documents apart from the contract in establishing the intentions of the parties and the extrinsic facts relating to the contract. I therefore agree that one cannot find an entrustment to be created by cl 2 unless it is clear from all the evidence including the totality of the Letter Agreement that this is the effect that the parties intended cl 2 to have.

54 The wording of cl 2 is general. Whilst it directs the parties to co-operate and co-ordinate in the effecting of certain tasks, it does not specify exactly what each has to do in relation to those tasks. If cl 2 is given a wide interpretation, therefore, it would appear that it imposes mutual obligations on the parties to deal with each other in two areas. It is therefore possible to construe the clause as providing that each party entrusted the other to perform tasks in relation to each of those areas.

55 If cl 2 is looked at in the context of the whole document, however, it appears that the width of the language has to be cut down in the light of other clauses. For example, whilst cl 2 does state that the parties shall co-operate and co-ordinate with each other in the prosecution, settlement and resolution of claims, this wording cannot, in the light of subsequent clauses, be read as meaning that the parties are to prosecute, settle or resolve their claims together, which would otherwise be a reasonable interpretation of the wording. This is because the operation of cl 2 in this respect is limited by the first part of cl 6 which makes it clear that each party retains the right to settle or prosecute its own claim on its own terms. In that context, neither party could have been said to have been commissioned to pursue the other's claims against the Potential Defendants. Mr Kaufman and Mr Leslie recognised in court that there was no obligation on the defendants to include the plaintiffs' claims in the defendants' negotiations. Mr Leslie conceded that the defendants were not delegated the task of pursuing the plaintiffs' claims. In addition, Mr Abe twice conceded that his opinion did not contain any reason or rationale whatsoever for concluding that the plaintiffs had commissioned the defendants to pursue the plaintiffs' claims against the Potential Defendants.

56 Secondly, cl 2 is not in itself clear on the extent of the parties' responsibilities. This can be seen from the provision made by the latter part of cl 6. There, the parties agreed that the plaintiffs would refrain from making a claim on the Potential Defendants until the earlier of 1 October 2003 or the settlement of the defendants' claims. This provision therefore was the way in which the parties co-ordinated the prosecution, settlement and resolution of their respective claims. Looking at cl 2 alone, one would not know what agreeing to co-ordinate the claims meant, as it could have meant the parties were agreeing to assert the claims at the same time or, equally, it could have meant that they were agreeing to assert the claims in succession but with no indication of which was to go first. Thus, the provisions of cl 6 explain what needed to be done to satisfy the obligation to co-ordinate. Mr Okada was asked whether he agreed that an agreement to co-ordinate and co-operate in the settlement of the claims could include considering the best time to settle the claims and whether there was to be a joint settlement of both parties' claims. His reply, essentially, was that whilst such an agreement could theoretically include the matters stated, in this case, to do so might contradict the sole right which cl 6 gave to each party to settle its own claim. This evidence reflected the Japanese law position that clauses must be read harmoniously with each other and therefore that you cannot give to one clause a meaning that would cause it to contradict another provision.

57 Looking at the other area covered by the agreement to co-ordinate and co-operate, *ie*, in the collection, sharing and disclosing of information, it does not appear from cl 2 what this agreement actually requires. Clause 2 does not state who is to collect the information, who is to share the information with whom and who is to disclose the information to whom. If the words had been left as they were and no other provision of the Letter Agreement dealt with these obligations, I suppose

they could be given the widest possible interpretation, as the plaintiffs require. The defendants, however, submitted that other portions of the Letter Agreement did indicate what the words actually meant. They drew my attention to cl 4 of the Letter Agreement.

58 Clause 4 refers to a consultancy agreement which was to be executed at the same time as the Letter Agreement. The exact form of the consultancy agreement was attached to the Letter Agreement as a schedule. That document stated that the plaintiffs were to provide certain consultancy services to the defendants and that the defendants would pay for those services. As was specifically provided in cl 4 of the Letter Agreement, the payment for the consultancy services consisted of the 30% share in the defendants' recovery from the Potential Defendants that the defendants had agreed to pay the plaintiffs. The significance of the consultancy agreement is that it shows that it was the plaintiffs who were supposed to be providing the consultancy services and not the defendants. Thus, it was the plaintiffs who were supposed to collect the information, it was the plaintiffs who were supposed to share the information with the defendants and it was the plaintiffs who were supposed to disclose the information to the defendants. From the wording of cl 4, it is also clear that the terms of the consultancy agreement were an integral part of the arrangement contemplated by the Letter Agreement and that the two documents were to be read together as disclosing the entire agreement between the parties.

59 The Letter Agreement did not prevent the defendants from doing their own investigations. However, if they did so investigate, that would be outside the scope of the agreement. The agreement contemplated that one party alone would provide services and that party was the plaintiffs. Reading the words "collect, share and disclose" in that context, it is plain that it was the plaintiffs (and not the defendants) who were to collect the evidence and provide it to the defendants. The factual background, which I have recounted and will elaborate on later, also made it apparent that it was the plaintiffs who had the information and the defendants who needed it from them. Mr Leslie had full access to the computer system of DC Japan and he was the one who had first discovered the information and who was able to carry out investigations without arousing the suspicions of the Potential Defendants. Having heard the evidence, I have no doubt that there was not really any information that the plaintiffs needed from the defendants in order to make their own claim against the Potential Defendants.

60 Turning back to the legal aspect, when Mr Abe was asked about the consultancy agreement, he agreed that if an entrustment arose, then the one performing the services would be the mandatory and the one paying for the services would be mandator. In the context of the consultancy agreement, since the defendants were paying for the plaintiffs' consultancy services, the plaintiffs would be the mandatory and it would be the plaintiffs who owed fiduciary duties to the defendants rather than *vice versa*. Thus, to the extent that cl 2 created an entrustment, the provisions of cl 4 read with the consultancy agreement show that it was not the defendants who had been commissioned to do certain acts but the plaintiffs. Mr Leslie himself agreed that the consultancy agreement was understood by him to authorise the plaintiffs to do the tasks that had been outlined in cl 2 of the Letter Agreement, but he did assert in the same answer that that concession did not negate the mutual requirement for the defendants to do the same tasks for the plaintiffs.

61 The plaintiffs in their closing submission asserted that the defendants' argument was that the consultancy agreement altered the flow of the information. They said that the consultancy agreement was never intended to alter the flow of the information. The defendants' response was that the Letter Agreement, of which the consultancy agreement was an integral part, defined the flow of information. Read as a whole, the terms of the Letter Agreement clearly contemplated a one-way flow of information and it was the plaintiffs who sought to alter that position by ignoring the consultancy agreement. I accept this argument.

62 Quite apart from the objective interpretation of the document, the factual background, as I have said above, confirms the conclusion that the contract contemplated a one-way flow of information. It was the plaintiffs who had the evidence of the fraud that had been perpetrated by the Potential Defendants and it was the plaintiffs who were in a position to conduct further investigations. In that context, it would not make sense to speak of the defendants sharing information with the plaintiffs. Instead, it was the plaintiffs who were supposed to collect more information and share the additional information with the defendants. That was the intention behind cl 2.

63 It was apparent to me, as I heard the evidence unfold, that, as the defendants submitted, the plaintiffs, having obtained evidence of the fraud, thought hard about the best way to profit from it. When Mr Leslie first found out about it, he did not go straight to Mr Cattell, or to his immediate superior, Mr Koh, to disclose his suspicions and discuss the best way of proceeding for the benefit of all parties. Instead, he (with the approval of Mr Kaufman) spent more than a month gathering evidence and instructing the plaintiffs' lawyers to prepare a draft agreement. Once he had enough information and the legal document, Mr Leslie informed Mr Cattell of the fraud but refused to hand over the evidence unless the Letter Agreement was signed. In his evidence-in-chief, Mr Leslie stated that he told Mr Cattell on 7 December 2001 that he would not say anything further unless Mr Cattell agreed to sign the agreement. At the trial, he backpedalled a bit by stating he did not say those exact words but ultimately, he conceded that he had at least said words to that effect. He also stated in his affidavit that the one term in the draft agreement that he highlighted to Mr Cattell at the 7 December 2001 meeting was that recovery from the Potential Defendants had to be shared with the plaintiffs: "I asked him whether he had a problem with any of the other terms or conditions, in particular the agreement on the percentage split of any joint recovery." Subsequently, in his e-mail to Mr Cattell dated 14 December 2001, Mr Leslie himself stated:

> We agreed to the following:
>
> …
>
> 2. That in return for Lisboa and Kaufman Trust supplying all evidence and/or knowledge available to them to DCA, that DCA agreed to pool any claim with Lisboa and the Kaufman Trust, and that in the event any of them realizes any payment, avoids an expense (including the remaining payments otherwise due to the Netwave shareholders), or obtains other monetary compensation relating to the Netwave claim, that these would be distributed 70% to DCA, 15% to Lisboa and 15% to Kaufman Trust.

It appeared quite clearly from that e-mail that the 30% would be "in return for Lisboa and Kaufman Trust supplying all evidence". Mr Leslie himself thereby indicated that this was a sale of information from the plaintiffs to the defendants.

64 That the defendants understood that this was the intention can be gleaned from Mr Cattell's reply to the above e-mail. In his e-mail of 18 December 2001, Mr Cattell stated, in effect, that only one matter of substance had been agreed: "that if [the defendants] decided to pursue a claim against the parties mentioned as a result of information provided by yourself, we would in principle split the proceeds 70% [the defendants] and 30% [the plaintiffs]". Thus, after the 7 December 2001 meeting, the parties intended that the plaintiffs would get 30% of the defendants' recovery from the Potential Defendants and that was all. There was no agreement that the defendants would take a share of the proceeds of any recovery that the plaintiffs might receive directly from the Potential Defendants.

65 That the agreement was all about the sale of information was also reinforced by Mr Leslie's evidence at trial. He admitted then that he wanted the defendants to sign the Letter Agreement before he would release the evidence to them. He said that this was because he wanted a commitment in writing on the agreed terms from them. Yet, when the plaintiffs released the evidence, the Letter Agreement had not been signed. The only thing that the plaintiffs had secured in writing at that stage was Mr Cattell's e-mail of 18 December 2001 confirming that the plaintiffs would get 30% of any recovery made by the defendants. It therefore appeared that it was the payment condition that was vital to the plaintiffs and, as long as they got that single commitment in writing, they were prepared to release the evidence. Plainly, the plaintiffs' overriding aim was to receive money in return for information and in a situation like that, there could not have been an intention to create an entrustment or fiduciary duties of any sort.

66 The plaintiffs argued that the flow of information was not intended to be one-way because they needed the defendants' assistance in verifying the evidence which they had uncovered in order to determine if there was a valid claim to be made against the Potential Defendants. They cited evidence from Mr Bennetts under cross-examination where he agreed that the plaintiffs' lawyers, though confident about the strength of the evidence in the plaintiffs' hands, felt that it was important to obtain more evidence. He also agreed that when the defendants went to check certain records, they found some more evidence though he emphasised that they found very little more evidence than had been given to them by the plaintiffs.

67 The defendants' response to that argument was that the defendants were not really in a position to independently verify the information given to them by the plaintiffs. The only thing they could have done was to ask their nominee directors on the board of DC Japan to approach the person in DC Japan who was in charge of the database where the time sheets, e-mails and other evidence of the fraud were kept. They could ask that employee to access the computer and databases of the former Netwave employees and secure their evidence. But that person in charge of the computer database in DC Japan was none other than Mr Leslie. So there was nothing the defendants could do without Mr Leslie's help. Further, they pointed out that there was no evidence of any investigations by the defendants themselves save perhaps by PWC. PWC's investigation was, however, limited to looking at the financial books of DC Japan and comparing entries in those books against the available evidence provided by the plaintiffs. As Mr Leslie admitted in court, however, he was the one who had told PWC where to look for information, who to speak to and what to watch out for. Thus, the defendants submitted that the efforts to continue investigations after 7 December 2001 were conducted or directed by Mr Leslie. That work was contemplated by the consultancy agreement and Mr Leslie was just executing what he was paid to do.

68 On the facts of the case, I find that there was no reason for the plaintiffs to require any assistance from the defendants in verifying the information that they had obtained regarding the fraud. The plaintiffs through Mr Leslie had control over the sources of the information and they were the ones who first discovered it and realised its value. Any further evidence that was found after 7 December 2001 was found either directly by Mr Leslie or with his help. In any case, Mr Bennetts' firm assertion, which was unshaken in cross-examination, was that the plaintiffs did not need any help from the defendants to assess and confirm that there was a valid claim against the Potential Defendants. He maintained that at all material times, the plaintiffs could have commenced a claim against the Potential Defendants with the information they had and could have successfully pursued it. At the time, the plaintiffs themselves had no doubt about this as evidenced by an e-mail sent by their lawyer in May 2002 in which he said that Mr Leslie and Mr Kaufman remained convinced that their claims were strong in the light of the evidence that they had obtained over the past few months.

69 The defendants did not dispute that the Letter Agreement created a contract between themselves and the plaintiffs. A contract *simpliciter* does not, under Japanese law, create an entrustment relationship between the parties to the contract. To be an entrustment, the contract must contain the elements that I have discussed above, *ie*, that one party has commissioned the other to do an act on behalf of the first party and that the second party has consented to do that act. There must therefore be a mutual intention to create an entrustment. The facts as I have discussed them do not bear out that such an intention existed. Further, the plaintiffs' expert evidence on Japanese law did not establish that the Letter Agreement, interpreted according to Japanese law, created an entrustment.

70 The plaintiffs had the burden of establishing that the elements of entrustment existed in this case and that the parties intended to create the entrustment. They called Mr Abe to establish that under Japanese law, cl 2 of the Letter Agreement created an entrustment. Mr Abe opined that that clause did establish "entrustment with regard to 'collecting, sharing and disclosing information'". He also stated that it was clear from the document that only the defendants would have access to information in respect of which there would be an obligation to co-operate in the collecting, sharing and disclosing of such information under the Letter Agreement. He said further that "it seems clear that the parties must have contemplated that the Defendants would be responsible for collecting and sharing information" during the period in which the plaintiffs funded a portion of the defendants' legal costs and "refrained from pursuing their own collection of information from the Potential Defendants".

71 It is clear from the above that Mr Abe had made a fundamental mistake in his assessment of the factual situation. It was wrong for him to say that only the defendants would have access to the relevant information since it was the plaintiffs who had the evidence, not the defendants. Mr Abe's conclusion that there was an entrustment was founded on the erroneous assumption that only the defendants would have access to information in respect of which the parties would be obliged to co-operate to do the matters stated in cl 2. During cross-examination, Mr Abe conceded that if it was the plaintiffs who had the access to information and not the defendants, then cl 2 should be read to mean that the plaintiffs were collecting information. This admission meant that, had he been told the facts as I have found them, Mr Abe would have opined that it was the plaintiffs who were commissioned by the defendants to do an act and not *vice versa*.

72 Mr Abe also supported his conclusion that there was an entrustment to the defendants by asserting that the plaintiffs had agreed to fund a portion of the defendants' legal costs. This reasoning, however, is not supported by the terms of the Letter Agreement. Clause 4 of the Letter Agreement provided that the plaintiffs would get 30% of the defendants' recovery net of expenses. In the situation where recovery was so paltry that it did not even cover expenses, the plaintiffs were to share 30% of those expenses. This was a logical allocation of loss and not an agreement to "fund a portion of the defendants' legal costs". Mr Abe was stretching a point in order to bolster his opinion in favour of the plaintiffs' case.

73 There is one other major difficulty that prevents me from accepting Mr Abe's opinion. Clause 4 of the Letter Agreement made specific reference to the consultancy agreement. The consultancy agreement was part and parcel of the Letter Agreement and cl 4 required it to be executed concurrently with the Letter Agreement. Yet, it appeared from Mr Abe's evidence in court that he had not seen the consultancy agreement before the trial. He testified that he was not aware that there was a draft consultancy agreement attached to the formal Letter Agreement. He admitted that he had not asked to see a copy of the consultancy agreement referred to in cl 4. He further admitted that the first time he saw the consultancy agreement was when it was shown to him by Mr Bull. As I have said, when the consultancy agreement and the Letter Agreement are read together as a whole, it is plain that the movement of information contemplated by the contract was from the

plaintiffs to the defendants and not in the opposite direction as well. Mr Abe's opinion, which totally left out of consideration such an important document, cannot therefore be considered to be well founded. Mr Abe did not help things in court when, despite having been shown the relevant language, he refused to accept that the payment under the consultancy agreement was the same payment that had to be made by the defendants under the Letter Agreement. He also then asserted that the consultancy agreement was not signed. He had no basis to say that and had to concede later that it had been signed.

74 Mr Abe should have asked to see the consultancy agreement after he read cl 4 of the Letter Agreement. He did not do so. Instead, he rendered his opinion without perusing all the relevant documentation. It was also striking that although Mr Abe read Mr Okada's expert opinion, he did not read Appendix 2 to that opinion. Appendix 2 contained various drafts of the Letter Agreement which Mr Okada pointed out to explain what a Japanese court would find as the intention of the parties. These drafts were relevant to Mr Okada's analysis but Mr Abe did not think it necessary to read the drafts before disagreeing with Mr Okada.

75 In the circumstances, Mr Abe's evidence on the nature of the Letter Agreement is of no assistance to the plaintiffs in their effort to establish that it was more than a simple contract and that an entrustment obligation on the part of the defendants was thereby created.

Conclusion

76 The only cause of action that the plaintiffs pleaded was breach of fiduciary duty arising from the entrustment relationship created by the Letter Agreement. The Statement of Claim alleged in para 20 that this fiduciary relationship imposed five specific obligations on the defendants. I have found that there was no entrustment and thus no fiduciary relationship. The plaintiffs have not, therefore, been able to establish that the defendants owed them the five obligations set out in para 20 of the Statement of Claim. No alternative cause of action was pleaded in the Statement of Claim nor was any other cause of action advanced in their closing submissions and correctly so, since what has not been pleaded cannot be argued. The plaintiffs have accordingly failed to establish their case and this suit must be dismissed with costs.