Jenton Overseas Investment Pte Ltd v Townsing Henry George
[2006] SGHC 31

Case Number : Suit 832/2004

Decision Date : 24 February 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Rabi Ahmad (Rabi Ahmad and Co) for the plaintiff; Cavinder Bull, Chia Voon Jiet and Lim Wei Lee (Drew and Napier LLC) for the defendant

Parties : Jenton Overseas Investment Pte Ltd — Townsing Henry George

Companies – Directors – Duties – Whether director breaching statutory duties and fiduciary duties by making payments – Section 157(1) Companies Act (Cap 50, 1994 Rev Ed)

Insolvency Law – Avoidance of transactions – Unfair preferences – Whether creditors unduly preferred by receiving payments – Section 100(1) Bankruptcy Act (Cap 20, 2000 Rev Ed)

24 February 2006 *Judgment reserved.*

Lai Siu Chiu J:

Introduction

1 The plaintiff, Jenton Overseas Investment Pte Limited, is a company incorporated in Singapore and holds all the issued shares in a New Zealand incorporated company called NQF Limited ("NQF"), which was formerly known as Newmans Quality Foods Limited. The plaintiff is in turn a wholly-owned subsidiary of Newmans Group Holdings (Pty) Ltd ("NGH"), a company incorporated in Australia. (In the later part of this judgment, the three companies will be referred to collectively as "the Newmans Group".)

2 The plaintiff was placed in creditors' voluntary liquidation on 9 July 2004. Chee Yoh Chuang and Lim Lee Meng ("the Liquidators") from the accounting firm of M/s Chio Lim & Associates were appointed the liquidators. NQF was placed under receivership on 29 July 2004. Prior thereto, NQF carried on the business of fruit processing in Tauranga, New Zealand. The plaintiff and NGH are only holding companies and have no business activities.

3 The common shareholders of the plaintiff and NQF include Wong Peng Koon ("PK Wong") and his son, Mark Wong Kuan Meng ("Mark Wong"). Father and son (hereinafter referred to collectively as "the Wongs") are solicitors practising under the name and style of PK Wong & Associates LLC (since 1 March 2004).

4 The defendant, Henry George Townsing, who is an Australian, was a director of NGH, the plaintiff and NQF at the material time. The defendant (together with one Daud Yunus ("Daud")) is also a representative of Normandy Nominees Limited ("Normandy") of which he was a director between 1995 and 1998. Normandy is incorporated in the British Virgin Islands ("BVI"). Further, the defendant is a director of Normandy Finance & Investments Asia Ltd ("NFIA"), a wholly-owned subsidiary of a UK company known as Normandy Finance & Investments Limited ("Normandy UK"). (Henceforth, Normandy, NFIA and Normandy UK will be referred to collectively as the "Normandy Group".) The principal activity of the Normandy Group is to invest in unlisted companies.

The facts

5 John Sharman ("Sharman") is an investment director with CVC Venture Managers Pty Ltd ("CVC Venture") which is part of a group of investment companies known as the CVC Group, which group is headed by its chairman, Vanda Gould. CVC Venture is itself a joint venture between CVC Investment Managers Ltd and Normandy Finance & Investments Asia Pty Ltd.

6 The defendant was told in late 2000 by Daud and Sharman of a possible investment opportunity in a New Zealand food manufacturing company for the Normandy Group as well as for the CVC Group. Prior thereto, Daud had been introduced first to PK Wong and then to Nicholas Chia, the managing director of NQF.

7 Subsequently, Daud introduced the defendant to PK Wong and Mark Wong, who are the chairman and director respectively, of the plaintiff and NQF. Daud also introduced Nicholas Chia to the defendant. Daud then negotiated with the Wongs on behalf of the Normandy and the CVC Groups.

8 The outcome of those negotiations was that on 13 February 2001, the defendant wrote to PK Wong to confirm that the Normandy and the CVC Groups would subscribe for two million redeemable preference shares in the plaintiff. On 30 April 2001, the Redeemable Convertible Preference Share Agreement ("the RCPS Agreement") was executed by the plaintiff and Normandy. The RCPS Agreement was prepared by M/s PK Wong & Advani, the predecessor of PK Wong & Associates LLC. In the preamble, Normandy was described as a company incorporated under the laws of the Special Administrative Region of the People's Republic of China with its registered office at 12th floor, China Merchants Tower, Shun Tak Centre, 168-200, Connaught Road Central, Hong Kong.

9 The $2m subscription sum for two million preference shares at $1.00 per share was paid to the plaintiff by Normandy in two tranches. On 18 April 2001, Normandy paid $250,000 while the balance $1,750,000 was paid on 2 May 2001. Both payments were effected by NFIA on Normandy's behalf. Out of the $2m, approximately $1.125m was lent by the plaintiff to NQF. Under cl 6.2 of the RCPS Agreement, not more than $825,000 could be used to repay bank facilities and advances made to the plaintiff by its members. PK Wong, his other son Keith Wong, Nicholas Chia and the plaintiff's bank were repaid their loans under this clause.

10 Pursuant to cl 4.2.1 of the RCPS Agreement, the plaintiff was to appoint a person nominated by Normandy to be a director of the company. The defendant was Normandy's nominee and became a director of the plaintiff on 2 May 2001.

11 In May 2001, Normandy through its consultant, Ian Greenyer ("Greenyer"), discovered that the accounts of the plaintiff and NQF might have materially understated and misrepresented the losses of the plaintiff and NQF while overstating the value of assets and the potential of NQF's business. This was a breach by the plaintiff of the warranties under para 3.1 of Sched 3 of the RCPS Agreement.

12 After the execution of the RCPS Agreement, Greenyer and CVC Venture discovered in the files of NQF a letter dated 14 February 2001 from its auditors, Hayes Knight, which *inter alia* cast serious doubts on the value of some of the assets of NQF and its financial viability. The defendant then received an
e-mail from Greenyer stating that the latter had been told by NQF's bankers, ANZ Bank, that Nicholas Chia had promised to repay ANZ Bank loans of NZ$3m by 11 May 2001, using moneys invested by Normandy.

13 The defendant advised ANZ Bank on 10 May 2001 that NQF was not in a position to repay NZ$3m. At Normandy's request, Nicholas Chia was subsequently removed from all positions in the plaintiff and NQF. At the defendant's suggestion, Greenyer and Sharman were later retained by NQF as consultants to help turn the company around.

14 The plaintiff's breach of the RCPS Agreement and Normandy's right to terminate the RCPS Agreement were conveyed to the plaintiff by Normandy's lawyers, M/s Rajah & Tann. In the event, the plaintiff did not issue or allot redeemable convertible preference shares to Normandy.

15 The defendant then discussed Greenyer's findings with PK Wong. While he assured PK Wong that Normandy remained committed to invest in NQF, the defendant stipulated it was on the condition that the parties could reach agreement on a new deal. He then informed Daud, Greenyer and Sharman in an e-mail on 16 May 2001 that the terms of the RCPS would have to be renegotiated and the investment in the plaintiff and NQF restructured. It was to facilitate the restructuring of Normandy's investment that NGH was incorporated in Australia on 21 August 2001. The plaintiff's shareholders transferred all their shares to NGH in exchange for an equal number of shares in NGH.

16 Normandy decided to restructure its investment by subscribing to convertible notes to be issued by NGH amounting to $2m. The $2m owed by the plaintiff to Normandy under the RCPS Agreement would be assigned to NGH. Normandy also required NGH to secure its debt by a charge over the assets of the plaintiff and NQF as recommended by Greenyer.

17 After negotiations between the plaintiff and the defendant, the conversion price for the shares in NGH was reduced from $1.00 to $0.61. As an Australian company, NGH's shares have no par value and new shares could therefore be issued to Normandy at $0.61 instead of $1.00.

18 Pursuant to the arrangement agreed between the plaintiff and Normandy, a loan and option agreement dated 8 July 2002 ("the Series 1 Agreement") was executed between NGH, the plaintiff and Normandy wherein it was provided that the $2m owed to Normandy by the plaintiff was deemed to have been repaid by the plaintiff to Normandy and treated as borrowed by NGH from Normandy.

19 NGH further issued a loan note ("the Series 2 Loan Note") to its shareholders in July 2002. NGH called for a rights issue under the Series 2 Loan Note in August 2002 to which Normandy subscribed for shares to the value of $431,844. Normandy, however, did not make full payment of the subscription sum as it set off $200,000 against a deposit of $400,000 which it had placed with ANZ Bank, as required under Recital D of the Series 1 Agreement. The documentation for the Series 1 Agreement and Series 2 Loan Note was drafted by Rajah & Tann.

20 A charge dated 8 July 2002 ("the NGH charge") was executed by NGH in favour of Normandy for moneys owed to Normandy following the assignment mentioned at [18] above under the Series 1 Agreement. In turn the plaintiff executed a deed of debenture (drafted by Mark Wong) in favour of NGH on 9 July 2002 ("the Jenton debenture"). At the defendant's request, a charge dated 22 August 2002 was also executed by NQF ("the NQF charge") in favour of Normandy and registered in New Zealand. The Jenton debenture, however, was neither stamped nor registered with the Registry of Companies & Businesses ("the RCB") in Singapore. Had the same been registered, this dispute would probably not have arisen as, if NGH could enforce the Jenton debenture against the plaintiff, Normandy would by virtue of the NGH charge have been able to enforce its rights against NGH and, in turn, against the plaintiff. In the defendant's closing submissions, the Wongs were blamed for the non-registration of the Jenton debenture and for breaching ss 131 and 132 of the Companies Act (Cap 50, 1994 Rev Ed).

21 A charge dated 5 September 2002 was also executed by the plaintiff in favour of Normandy at the defendant's request ("the Jenton charge") and registered with the RCB in Singapore. The NQF and Jenton charges were in the exact same terms save for references to the respective companies.

22 PK Wong & Advani rendered a bill on 22 August 2002 to NGH[note: 1] for Mark Wong's services relating to the drafting of the Jenton debenture, the Series 1 Agreement and the Series 2 Loan Note, including the issuance of notices to shareholders for convening the extraordinary general meeting ("EOGM") to approve the Series 1 Agreement as well as monitoring the subscription for the Series 2 Loan Note. In cross-examination, Mark Wong explained he rendered a bill because he did not receive director's fees for his services.

23 In January 2003, Mark Wong and the defendant signed a deed of subordination and priority on behalf of NQF with ASB Bank ("the Deed of Subordination and Priority"), to subordinate the rights of Normandy under the NQF charge to those of the ASB Bank, as security for the refinancing package from ASB Bank. (In his closing submissions[note: 2] for the defendant, counsel argued that execution of this deed was an implicit acknowledgment by NQF that Normandy had a valid and effective charge over the assets of NQF.)

24 ASB Bank required a legal opinion verifying Normandy's corporate structure, which Normandy obtained from lawyers in the BVI. A dispute arose subsequently between the Wongs and Normandy as to who should bear the costs of that legal opinion.

25 A deed of debenture was also executed on 5 February 2003 ("the NQF debenture") by PK Wong on behalf of NQF in favour of the Series 2 Loan Note holders.

26 In view of its worsening financial situation, NQF agreed in April 2003 to sell its operating assets and business. Sharman (on behalf of CVC Venture) was appointed to assist in the sale. The Wongs claimed that it was then that the defendant asserted that Normandy had a prior claim under the Jenton and NQF charges to the proceeds of sale of NQF's assets.

27 In July 2003, the defendant presented the Wongs with a draft deed of rectification to amend the Series 1 Agreement and the Series 2 Loan Note, in an apparent attempt (the Wongs claimed) to obtain a guarantee for Normandy from the plaintiff of the debt owed by NGH; the Wongs refused. Eventually, however, a deed of rectification dated 17 June 2004 ("the Deed of Rectification") was signed by the defendant as sole director on behalf of NQF, by Daud on behalf of Normandy and by one Deryk Rowan Andrew as receiver of NGH.

28 The defendant later claimed that the Deed of Rectification was prompted by a letter of demand dated 12 March 2003 from the solicitors for the plaintiff's main unsecured creditor, Chye Seng Tannery Private Ltd ("Chye Seng"), for repayment of its loan. PK Wong had (with Nicholas Chia) guaranteed the plaintiff's debt to Chye Seng on which Chye Seng obtained (default) judgment in Suit No 480 of 2004 on 23 June 2004 in the sum of $1,150,000. The plaintiff was also indebted to a director of Chye Seng, one Tay Thiam Song, in the sum of $488,664 and to PK Wong for $99,058 (on interest paid for Chye Seng's loan). According to the defendant, Chye Seng's demand (on which PK Wong managed to negotiate for instalment payments) and the prospect of NGH's only tangible asset, *viz* NQF's business, being sold, prompted him to seek a review by Normandy's Australian lawyers (M/s Landers & Rogers) of the loan documentation relating to the Series 1 Agreement and Series 2 Loan Note. It was Landers & Rogers who recommended that a deed of rectification be executed to properly and accurately reflect the common intention of the parties (denied by the Wongs) that Normandy was to have a second ranking charge over the assets of NQF.

29 On 28 August 2003, Normandy demanded payment of $240,404 as interest for the loans it had extended under the Series 1 Agreement and Series 2 Loan Note. Nothing came out of this demand after the plaintiff and NQF wrote separately on 29 August 2003 to Normandy to dispute their liability. In any case, NQF did not then have the means to repay the plaintiff's loan such that the plaintiff could repay NGH and in turn NGH could repay Normandy.

30 On 9 October 2003, NQF signed an option with Delmaine Fine Foods Limited ("Delmaine"), a New Zealand company, to sell all its operating assets and business for a consideration of NZ$3,737,500 ("the purchase price"). A down payment of NZ$20,000 was made by Delmaine. This was followed by the signing on 13 May 2004 of a sale and purchase agreement between Delmaine and NQF. The purchase price was to be paid in two tranches:

(a) $2,950,000 on or before 28 May 2004;

(b) $787,500 on or before 31 May 2005.

31 In anticipation of receiving the purchase price, NQF had on 12 May 2004 opened a bank account with Westpac Bank in Tauranga ("the Tauranga account"). Because of the ongoing dispute between the defendant and the Wongs, the managing director of NQF (Peter Tinholt) arranged for PK Wong and the defendant to be joint signatories to operate the account. The defendant was of the view that Normandy had a priority claim as a secured creditor against NQF whereas the Wongs maintained that NQF was not indebted to Normandy and it had not issued any guarantee to Normandy for debts owed by NGH or the plaintiff.

32 As a requirement for completion of the sale to Delmaine, NQF signed documents for a partial discharge of security over the assets which were the subject of the sale. Mark Wong was tasked with obtaining, and did obtain, the written consents of the Series 2 Loan Note holders to the partial discharge, including those of Normandy and PK Wong.

33 On 14 May 2004, Normandy demanded payment of interest totalling $336,750 from NGH, the plaintiff and NQF, and directed that it be paid into NFIA's bank account with HSBC Singapore. No payment was made by any of the companies.

34 On 4 June 2004, Normandy appointed Deryk Rowan Andrew and Ronald Bentley Brown ("Andrew and Brown") from the Sydney accounting firm of Bentleys MRI as receivers and managers of NGH, pursuant to the NGH charge. Andrew and Brown wrote to PK Wong on 7 June 2004 to advise him of their appointment and to request, *inter alia*, that he file a report as to affairs on behalf of NGH as its director. The Wongs asserted this was the first time they discovered that Normandy was not a Hong Kong company. (In the various charges executed by Normandy, it was stated that Normandy was registered in Hong Kong.)

35 Andrew and Brown purported to act for the shareholders of the plaintiff and by resolutions passed at an EOGM held on 4 June 2004, they appointed the defendant as the plaintiff's corporate representative, removed the four existing directors of the plaintiff (the Wongs; PK Wong's wife, Ooi Chooi Lean; and PK Wong's friend, Tay Kiong Pang) and appointed one Marimmal d/o Odiyappin ("Marimmal") as a director.

36 On 7 June 2004, the defendant and Marimmal passed a directors' resolution removing the then secretary of the company, Rebecca Chung, and appointing one Cheryl Kwan in her place. The registered address of the plaintiff was also changed from the office of PK Wong & Advani to Peace Centre #05-34. Subsequently, when she was contacted by the Liquidators, Marimmal disclaimed

knowledge of the defendant's actions as set out in the following paragraphs.

37 Unbeknownst to the Wongs, the defendant appeared at the office of Westpac Bank ("the Bank") in Auckland on 4 June 2004 and produced to the Bank:

(a) three shareholders' resolutions of NQF solely signed by himself all dated 4 June 2004 which:

(i) removed the Wongs as directors and changed the registered office to that of M/s Buddle Findlay ("Buddle"), a firm of solicitors in Auckland;

(ii) removed PK Wong as joint signatory of the Tauranga account and made himself the sole signatory;

(iii) established a cash management account with Westpac Bank, Auckland ("the Auckland account") with himself as the sole signatory;

(b) a directors' resolution in the same terms as (a)(ii) above; and

(c) two cheques in NQF's favour dated 4 June 2004, one for NZ$2m and the other for NZ$707,300.

The defendant instructed the Bank to immediately transfer the two sums totalling NZ$2,707,300 from the Tauranga account to the Auckland account.

38 The defendant further presented to the Bank a document headed "Newmans Quality Foods Limited Application of Sale Proceeds 4 June 2004" which instructed the Bank to transfer NZ$985,246 from the Auckland account to the trust account of Buddle and to wire transfer a sum of NZ$1,692,054 to Normandy UK. The Bank complied with the defendant's instructions.

39 On 18 June 2004, pursuant to letters from the defendant written on behalf of the plaintiff and NQF, Buddle transferred from its trust account the sum of NZ$985,246 to Normandy UK. Buddle remitted the sum notwithstanding its
e-mail to the defendant dated 25 May 2004 where it said:

> As far as the residual settlement proceeds are concerned, Buddle Findlay is happy to receive those as stakeholder. They would of course go on interest bearing deposit … and [we] *would not release them to any party unless we received a written joint instruction from the claimants being Normandy and Jenton and failing an instruction from both of those parties, an order of the Court.* [emphasis added]

The Wongs only learnt of the defendant's actions on or about 19 July 2004.

40 By a deed dated 29 July 2004 made pursuant to the NQF charge as varied by the Deed of Rectification, Normandy appointed Andrew and Brown together with Geoffrey Stewart Hatten ("Hatten") as receivers and managers of NQF. PK Wong was notified of the appointment by a fax dated 30 July 2004.

41 On behalf of NGH and NQF, PK Wong wrote (copied to Buddle) on 17 and 29 September 2004 respectively, to Andrew and Brown as well as Hatten, putting them on notice that their appointment as receivers and managers was invalid and of no effect. PK Wong's views were based on a legal opinion dated 17 September 2003 that Mark Wong had obtained from a New Zealand solicitor, Steven

Gibbs ("Gibbs"), on the legal effect of the Series 1 Agreement, Series 2 Loan Note and the various charges. Gibbs had opined that NQF, not being a party to either the Series 1 Agreement or Series 2 Loan Note, had no direct liability to Normandy. Hence, no moneys were owed by NQF to Normandy under the NQF charge. PK Wong's stand was rejected by Andrew and Brown's solicitors (M/s McCabe Terrill) in their letter dated 25 November 2004.

42 The defendant in his capacity as the corporate representative of NGH then passed a special resolution on 9 July 2004 to liquidate the plaintiff. On the same day, at a creditors' meeting, a committee of inspection ("the COI") which included PK Wong and the defendant, was appointed. On 14 July 2004, the Liquidators demanded from NQF payment of the sum of $4,452,284 owed to the plaintiff.

43 After the Liquidators' appointment, PK Wong wrote to the Bank on 19 July 2004 to notify the Bank of the appointment. On 22 July 2004, the Liquidators adopted a resolution confirming that the Wongs had not resigned as directors of NQF and that they were reappointed as directors with immediate effect; the registered address of the plaintiff was also changed.

44 A meeting of the COI of the plaintiff attended by PK Wong (and Chye Seng's representative) was held on 27 July 2004 in Singapore. The defendant participated from Australia via teleconference. He was informed of the Liquidators' appointment and that it was agreed by the COI in Singapore that a liquidator in New Zealand be appointed to protect the assets of NQF. The defendant objected, fearing that it might affect some covenants furnished by NQF to Delmaine in the sale. The defendant was asked what had happened to moneys in the Tauranga account. He replied that he had transferred out 95% of the moneys but refused to give further details. What was left in the Tauranga account was about NZ$25,000.

45 On 2 August 2004, the Liquidators passed a special resolution of shareholders on the plaintiff's behalf liquidating NQF and appointing as liquidator a chartered accountant, Anthony John McCullagh ("NQF's Liquidator"), from Horwath Corporate (Auckland) Limited in Auckland.

46 It was only on receipt of the Bank's letter dated 20 August 2004 in reply to the inquiry from NQF's Liquidator, that the plaintiff's directors and the Liquidators learnt the identities of the recipients of the funds from the defendant.

47 On 16 September 2004, the Hong Kong Registrar of Companies wrote to the Liquidators to confirm that Normandy had never been registered in the territory.

48 On 8 October 2004, PK Wong (in his capacity as chairman of NGH) lodged a complaint with the Australian Securities and Exchange Commission ("ASEC") against (a) the defendant; (b) Andrew and Brown; and (c) David Perry, a partner of Buddle. He lodged a separate complaint against David Perry with the Auckland District Law Society ("the Law Society"). On 16 November 2004, ASEC notified PK Wong no action would be taken on his complaint while the Law Society replied on 3 February 2005 to say there were no ethical or professional standards matters involved in his complaint that concerned the Law Society.

49 On 3 March 2005, Normandy commenced proceedings in the High Court of New Zealand ("the New Zealand proceedings") against NQF[note: 3] for, *inter alia*, a determination of whether the NQF charge secured the indebtedness to Normandy under the Series 1 Agreement and Series 2 Loan Note. In the alternative, Normandy prayed for rectification of the NGH charge at common law on the basis that it was the common intention that it would secure the moneys owed by NQF to the plaintiff. NQF's liquidator is disputing the New Zealand proceedings which are still pending.

The pleadings

50 On 14 October 2004, the plaintiff filed this suit against the defendant. In the (amended) statement of claim the plaintiff alleged that the defendant had breached various duties which he owed to the company as its director. In particular, it was alleged that in transferring out the sum of NZ$2,677,300 from the Tauranga account, the defendant had, *inter alia*, acted:

(a) dishonestly in the discharge of his duties;

(b) *mala fides* and against the interests of the plaintiff and its creditors;

(c) in breach of his duties as trustee as he well knew that his act would deprive the plaintiff of the use of the money to discharge the debts it owed to its creditors.

51 The plaintiff further averred that the defendant's act had given undue or fraudulent preference to the defendant and other parties connected to him (identified subsequently as the Normandy Group in the plaintiff's further and better particulars) and thereby had unjustly enriched them at the expense of the plaintiff and the plaintiff's other creditors. The plaintiff alleged it had reason to believe that Normandy and Normandy UK were directly or indirectly owned and/or controlled by the defendant or that the defendant directly or indirectly had an interest in Normandy and Normandy UK.

52 In his defence, the defendant pleaded that by June or July 2003, NGH, the plaintiff and NQF were in default of interest payments under the Series 1 Agreement and Series 2 Loan Notes. None of the three companies remedied the default by paying interest to Normandy despite demands being made of them. Consequently, pursuant to cl 5 of the Series 1 Agreement and Series 2 Loan Note, Normandy was entitled to and did enforce the Jenton charge and the NGH charge over the assets of NQF.

53 The defendant averred that in paying the sums of NZ$985,246 and NZ$1,692,054 to Buddle and Normandy UK respectively, he had acted in accordance with his duties as a director of the plaintiff and NQF – Normandy was entitled at law to look to the assets of NQF for repayment of moneys owed under the NGH and Jenton charges. The defendant contended that the plaintiff incurred no loss because the moneys owed were paid to Normandy out of the assets of NQF and/or the plaintiff. The defendant added that he relied on the advice of Singapore professionals (from Rajah & Tann and Kelvin Chia Partnership) in this regard.

54 Even if the NQF and Jenton charges were not valid (which the defendant denied), the defendant contended that the plaintiff owed NGH $2,982,235 which sum NGH owed in turn to Normandy and the Series 2 Loan Note holders. The plaintiff also owed $1,150,000 to Chye Seng, $488,664 to Tay Thiam Song and $99,058 to PK Wong. Normandy would still be entitled to a portion of the NZ$2,707,300 after taking into account the debts owed to the three other creditors. Normandy's portion amounted to NZ$1,692,054 which was the sum the defendant remitted to Normandy.

The evidence

55 The Wongs were the principal witnesses for the plaintiff. One of the Liquidators, *viz* Chee Yoh Chuang ("Chee"), also testified but his testimony is not material as, by his own admission, Chee had no personal knowledge of what actually transpired before the plaintiff was put into liquidation. The defendant called two legal experts to testify besides calling Sharman and Daud as his witnesses;

Greenyer was not a witness.

The plaintiff's case

56 PK Wong[note: 4] testified that had he known Normandy was not a Hong Kong but a BVI company, he (and Mark Wong) would never have done business with the company. He had an aversion to BVI companies as well as those that were registered in the Cayman Islands and Panama; he felt such companies engaged in nefarious activities like money laundering. PK Wong denied he used the "misdescription" (according to counsel for the defendant) of Normandy's registered office as an attempt to renege on the plaintiff's legal obligations to Normandy. Contrary to the defendant's claim, PK Wong asserted that Normandy hid from the directors of the plaintiff the fact that it was a BVI company. He did not agree that the misdescription was an innocent mistake. The documents all referred to a non-existent company. Hence he contended, the Jenton and NQF charges were invalid.

57 PK Wong testified he could not recall signing the NQF debenture (see [25] above) even though he acknowledged it was indeed his signature on the document when the original was produced in court. Unlike the Jenton debenture, the NQF debenture was not prepared by PK Wong & Advani but by the Melbourne solicitors of NGH, namely M/s Batten Sacks. (I should point out at this juncture that PK Wong's admission that he did sign the NQF debenture puts paid to his allegation that it was a fraudulent document. Counsel for the defendant cited this incident as an example of PK Wong's lack of credibility.)

58 As for the failure to register the Jenton debenture, PK Wong denied it was a deliberate omission on his part due to his personal guarantee to Chye Seng. He explained he completely lost track of the document after signing due to his then preoccupation with the capitalisation of NGH and with the issue of new shares in NGH as replacement for those held by the plaintiff's shareholders. He had left it to Mark Wong to handle the registration. Mark Wong, on the other hand, testified he did not register the document as he had told the defendant that if the defendant wanted to register the document, the defendant would have to pay for the registration as well as the attendant solicitors' costs. In any case, Mark Wong said, he handed the document to Daud (together with the Series 1 Agreement) soon after it was signed and he was not aware of what happened to it thereafter. (When Daud testified, he claimed he expected PK Wong & Advani to register the Jenton debenture (which had been signed in multiple copies) as the firm had prepared the document. It was not the responsibility of Normandy's solicitors, Rajah & Tann, to do so since Normandy was not a party thereof.)

59 The Wongs disputed the defendant's pleaded case that there was a common intention on the part of the plaintiff and NQF to give a guarantee or to be liable for NGH's indebtedness to Normandy. Indeed, had a guarantee been requested by Normandy at the material time from either the plaintiff or NQF for NGH's debts, the request, PK Wong said, would have been flatly refused.

60 Contrary to the defendant's fears, PK Wong testified he had given the defendant no reason to believe he would act unilaterally with regards to the Tauranga account. He could not act unilaterally in any case as the Tauranga account required joint signatories for its operation.

61 PK Wong further denied the defendant's allegation that he and Mark Wong had signed the 2003 accounts of the plaintiff without reference to the other board members; he had shown the draft accounts to the defendant. Mark Wong said the first drafts of the accounts had been circulated to board members and the defendant had indicated he wanted to communicate directly with the plaintiff's auditors. Mark had sent an e-mail to all the plaintiff's directors on 5 January 2004 requesting them to sign the resolution authorising him and his father to sign the accounts. The resolution was

then backdated to 30 December 2003 and the accounts were signed on 7 January 2004. When the defendant remonstrated over the signing of those accounts without his knowledge or approval, Mark Wong reportedly said "tough luck".

62 Mark Wong disagreed with counsel for the defendant that the manner in which he and his father "forced through" the passing of the 2003 accounts gave the defendant cause for concern that they would take control of the sale proceeds of NQF. On the contrary, he countered, it was the defendant who took control of the sale proceeds by transferring out the moneys from the Tauranga account on the very day that Chye Seng issued its writ of summons against the plaintiff.

63 Mark Wong[note: 5] was taken to task by counsel for the defendant for the legal opinion he procured from Gibbs. Mark Wong was accused of misleading Gibbs by his letter of instructions wherein he stated that there were no debts owed by either NQF or Jenton to Normandy. Counsel pointed out those were actually Mark Wong's conclusions, not his instructions. The Wongs were also criticised for their unilateral action in briefing Gibbs without consulting the defendant or informing NQF's managing director, Peter Tinholt. PK Wong explained that Peter Tinholt had indicated he did not wish to be dragged into the dispute between the Wongs and the defendant.

64 Counsel for the defendant made much of the fact that Gibbs ceased to act for NQF subsequent to his legal opinion and that Gibbs refused to testify for the plaintiff, an omission from which counsel wanted the court to draw an adverse inference. As Gibbs' opinion was based on Mark Wong's conclusions, counsel described it as "worthless". I should add that the Wongs subsequently made (unsuccessful) attempts through Gibbs to remove the NQF charge from the New Zealand register.

65 Mark and PK Wong were also accused of being untruthful in claiming ignorance of Normandy's status as a BVI company. Counsel for the defendant pointed out that the "misdescription" of Normandy's registered address started with the RCPS Agreement and continued into the Series 1 Agreement. He alleged that as early as July 2002, Mark Wong was aware Normandy was a BVI company as Mark Wong had sent proxy forms and documents to the defendant on 7 August 2002 for filing in the records books of NGH, following the EOGM of 18 July 2002. Amongst the documents sent by Mark Wong was a resolution of Normandy signed by Andrew Ross on behalf of its sole director, Manfell Limited, which resolution was headed "Normandy Nominees Limited (incorporated in British Virgin Islands)".

66 Counsel described as "feeble" Mark Wong's explanation that as he did not list out that resolution as he had done with the other documents he forwarded, it could not have been part of his enclosures. Apparently, there were other enclosures in Mark Wong's letter which he had not listed out either.

67 Counsel also pointed out that on 7 November 2003, Daud had sent to the Wongs Normandy's proxy forms for NGH's EOGM on 12 November 2003. The proxy form again recited Normandy's registered address as being in the BVI. The Wongs' explanation was that the proxy form was only received after the EOGM and PK Wong did not pay any attention to the same.

68 Mark Wong explained he and his father refused to execute a deed of rectification when requested by the defendant because it purported to create a guarantee in favour of NGH and would have given an undue preference to Normandy over other creditors. He wanted to protect the shareholders of the plaintiff and NQF not his father, whose liability as a guarantor had crystallised by then.

69 In his time, Mark Wong also provided secretarial services to the plaintiff and prepared minutes of meetings of the board of directors. Sharman, who did not usually record minutes of meetings, however prepared the minutes of a meeting of NGH held on 27 August 2003. Mark Wong took issue with those minutes on the basis that they were inaccurate, for reasons which will be set out later.

The defendant's case

70 The testimony from the three witnesses representing Normandy's and the CVC Group's interests was very similar. The defendant, Sharman and Daud all testified that it was the common intention of the parties concerned, *viz* the plaintiff, NGH and NQF on the one part and Normandy on the other, that the assets of all three companies would secure the loan by Normandy to NGH.

71 Before I consider the evidence of the defendant, I shall refer briefly to Daud's testimony. Daud (who is based in Kuala Lumpur) is the managing director of Perkasa Normandy Holdings Sdn Bhd ("Perkasa"), a Malaysian company in which he holds a majority (80%) of shares. He is also a consultant to NFIA. Daud revealed that Perkasa received "an advisory fee" for brokering Normandy's investment in the plaintiff. The plaintiff paid Perkasa $50,000 and allotted 60,000 of its ordinary shares to the company, pursuant to an agreement contained in the plaintiff's letter dated 1 April 2001.

72 It was apparent from his evidence that Daud was most likely the source of the mistake made in the RCPS Agreement and perpetuated in subsequent legal documents, that Normandy was a Hong Kong registered company.

73 It was adduced from Daud in the course of cross-examination that:

(a) he contacted Rajah & Tann on behalf of Normandy in negotiations leading to the signing of the RCPS Agreement and (presumably) furnished the solicitors with particulars relating to Normandy's incorporation which he thought was in Hong Kong where it had a place of business;

(b) he had requested a legal opinion from a Hong Kong lawyer but was told by Maggie Sy of Island Corporate Services (the company secretary) in February 2003 that the opinion must come from a BVI lawyer because Normandy was a BVI company;

(c) ASB Bank, Buddle and even Sharman (until February 2003) all believed that Normandy was Hong Kong incorporated until they learnt otherwise from Maggie Sy.

74 Daud explained away his mistake as a "human error". Yet (quite unreasonably, as the plaintiff's counsel submitted), he insisted that the Wongs knew or ought to have known that Normandy was a BVI company by 2002, referring to proxy forms of Normandy he had forwarded to Mark Wong which I have touched on earlier at [65] and [67] above.

75 A document which purported to be a resolution of Normandy dated 30 April 2001 was alleged by the Wongs to be fabricated. Their counsel had drawn the defendant's attention to the fact that the resolution referred to events *after* 30 April 2001. The defendant explained it was a mistake. Nothing however turns on the document itself.

76 Sharman's testimony is material in one respect. Sharman had prepared the minutes of a board meeting of NGH held on 27 August 2003 (see [69] above) that was attended by the Wongs, the defendant and himself. The Wongs were alleged to have admitted at the meeting that Normandy had a valid second ranking charge over the assets of NQF to secure the $2m owed to Normandy under the

Series 1 Agreement. The Wongs were also alleged to have admitted that the intention of the Series 1 Agreement and Series 2 Loan Note was to have priority over other debts and to give effect to Normandy's security over all the assets of the group, especially NQF. The Wongs had at the time explained that Chye Seng's debt and PK Wong's attendant position as guarantor precluded them from executing the deed of rectification the defendant had requested.

77 It was the defendant's case that Mark Wong's unwillingness to prepare the minutes was because of the admissions made at the meeting. For that reason, Sharman drafted the minutes and circulated the same to board members. Mark Wong had made amendments to Sharman's minutes which the defendant contended changed the tenor of what transpired. In his submissions, counsel for the defendant accused the Wongs of hiding the truth in order to improve PK Wong's position in relation to his personal guarantee to Chye Seng. Not unexpectedly, Sharman's written testimony in this regard was disputed by Mark Wong. In the event, the minutes of the meeting on 27 August 2003 were never finalised.

78 Although Normandy could have terminated the RCPS Agreement when the due diligence exercise carried out by Normandy revealed breaches by the plaintiff of the representations it had made, Sharman testified Normandy was nevertheless still keen to invest in the plaintiff because NQF had potential for growth. The CVC Group contemplated buying and subsequently did purchase 10% of the shares in an Australian listed company, Green Foods, which business had synergy with that of NQF.

79 In this connection, evidence had been adduced from the defendant and Sharman concerning Normandy's previous acquisition of a distressed company called Vita Life Sciences Ltd ("Vita"). CVC Venture and Normandy had turned the company around and subsequently listed it on the Australian stock exchange in Sydney. Presumably, Normandy hoped to repeat the same success with NQF (which Sharman had described as poorly managed but with potential). Unfortunately, after investing in the plaintiff, Normandy did not proceed with its intention to synergise NQF's business with that of Green Foods. Interestingly enough, in the prospectus for the initial public offering of Vita's shares, Normandy was also described as a Hong Kong company.

80 Sharman and Daud both dwelt at length on the need for a deed of rectification. Sharman explained it was due to "typographical" mistakes in the NQF charge. The preamble in that document stated:

> [T]he Mortgagor [NQF] has agreed to provide security in the form of this Charge provided for in an agreement named the "Series 1 Notes Subscription and Issue of Options" [the Series 1 Agreement] …

The definition in the NQF charge under cl 1.1(c) of "Moneys hereby secured" included "any money which is now owing or hereafter becomes owing under the terms of [the Series 1 Agreement]".

81 Sharman explained that the definition was slightly inaccurate as NQF was neither a party to nor did it owe Normandy any money under the Series 1 Agreement. The error was not detected at the time but the document did not represent the understanding of the parties of what had been agreed. He surmised that the reason for the inaccuracy was due to the document template for the NGH charge being used for the NQF charge and, due to the oversight of the Melbourne lawyers (Batten Sacks) who drafted both documents, reference to "the mortgagor" in the NQF charge was not changed to "NGH". However, the clear intent behind both documents was that the charges were meant to cover the assets of the plaintiff, NGH and NQF for the debt owed to Normandy by NGH. It would not have made sense to execute a charge over the assets of NQF unless the charge was

meant to secure the moneys owed under the Series 1 Agreement.

82 As for the Jenton charge, Sharman deposed that its similarity in wording to the NQF charge showed that it was also meant to secure the assets of the plaintiff against the moneys owed by NGH to Normandy under the Series 1 Agreement. The same error in drafting was made by Batten Sacks because the solicitors again used the template for the NGH charge.

83 Sharman testified that PK Wong signed two copies of the NQF debenture in his presence at a meeting of the board of NGH in Singapore on 5 February 2003, which was also attended by Daud, Mark Wong and the defendant. (In the course of cross-examination, Mark Wong admitted that he was told of his father's signing of the NQF debenture although PK Wong claimed to have no recollection.)

84 Sharman revealed that on 4 June 2004 he had collected three cheques from the office of Delmaine's solicitors and had handed the cheques for NZ$2m and NZ$707,300 to the defendant. He retained the third cheque which was for commission payable to CVC Venture in acting as agent for the sale to Delmaine.

85 It was clear from his affidavit evidence that Sharman himself laboured under the mistaken belief that Normandy was a Hong Kong company. After referring to the fact that Normandy was erroneously described as being incorporated in Hong Kong in the Series 1 Agreement and subsequent documents, Sharman deposed:[note: 6]

> I have since learnt that Normandy Nominees is in fact incorporated in the British Virgin Islands ("the BVI") and has its office at 12th floor, Shun Tak Centre, 166 Connaught Road Central, Hong Kong. Although it is incorporated in the BVI, Normandy Nominees' principal place of business is in Hong Kong.

86 Sharman only realised his mistake around February 2003 when he was told that the legal opinion required of Normandy should come from a BVI and not a Hong Kong firm of solicitors.

87 I turn now to the defendant's evidence. He was cross-examined *in extenso*. The defendant made no attempt to deny his actions in almost cleaning out the Tauranga account. Neither did he dispute the fiduciary duties he owed as the plaintiff's director. Indeed, at one stage when the defendant was questioned on his duties as a director of the Newmans group of companies, he admitted as much when he said:

> I was on the board of the three companies at the request of Normandy. In my capacity as a director of the three companies, my duty of care is to those three companies not to Normandy.

88 By his own admission, the defendant had served as a director of public as well as of unlisted companies and was also familiar with the law on undue preference and insolvency, although he was less familiar with the Companies Act of Singapore than he was with the equivalent Australian legislation.

89 At another stage of his cross-examination, when he was asked whether he had sought legal advice on what should be done with regards to Normandy's claim against NQF under the NQF charge, the defendant said:

> One of my duties as a director when a company is insolvent and at this time NQF was insolvent, is to preserve its assets. I had seen advice on this topic from my lawyers. I believed the charges were good having considered all the factors, we all knew what the common intention was. It was

in the best interest of NQF and its creditors that the tranche 1 sale proceeds be eventually remitted to Normandy as the first secured creditor.

90 As was apparent from his pleaded defence, the defendant sought to justify his conduct on the basis that Normandy was owed moneys that ought to be repaid by NQF and it was his duty as the company's director to ensure that the debt was repaid.

91 The defendant disagreed with the Wongs' contention that the plaintiff and/or NQF were insolvent in 2002. He recalled that there was a meeting of the board of directors in April 2002 where the then managing director (Marvin Beduya) of NQF presented a report which reflected the company going forward. By then, NQF was making profits at the operations level. There was even an offer from the CVC Group to underwrite a $1m investment in the Newmans Group. (I note that in the course of cross-examining PK Wong on 29 August 2005, counsel for the defendant himself took the position that NQF was in poor financial health based on the auditors' report as at 14 February 2001 and that the plaintiff was already insolvent since 2001.)

92 The defendant elaborated on his (and Normandy's) fears that the Wongs (by virtue of their majority control of the board of the plaintiff and NQF) would seize control of the sale proceeds of NQF and keep them out of reach of Normandy. He cited the Wongs' previous conduct, including the fact that PK Wong had once told the defendant that he (PK Wong) had seized control of funds in a dispute with his former partners in PK Wong & Advani.

93 The defendant claimed his fears were exacerbated by an e-mail he received from PK Wong on 11 May 2004, setting out a proposal on how the sale proceeds of Delmaine would be divided. Noting that NQF was a bad investment for everyone, PK Wong stated that any lenders getting their capital back under such circumstances would be considered lucky. PK Wong then suggested that Normandy should look at recovery of its capital and forgo its interest claims. PK Wong added that the plaintiff should get back about $3.6m and it was only fair that $1m was left with the plaintiff to satisfy the debts owed to Tay Thiam Song and Chye Seng leaving $2.6m for Normandy to satisfy its loans to NGH. PK Wong then reminded the defendant that he (PK Wong) and Nicholas Chia would still have to come out with additional funds to pay Tay Thiam Song and Chye Seng. The defendant testified he rejected the proposal as it meant that Chye Seng would have priority over the Series 2 Loan Note holders.

94 In the defendant's closing submissions, it was submitted that the above offer from PK Wong amounted to an admission that Normandy had a valid security over the assets of the plaintiff and NQF, just weeks before completion of the sale to Delmaine.

95 The defendant relied on Normandy's three demands (made between August 2003 and May 2004) for payment of interest, to justify his payments to Buddle and Normandy UK. What he could not do (as the plaintiff's counsel pointed out) was to show that Normandy had given notice to NGH for repayment of the principal sum owing under the Series 1 Agreement following the default in the payment of interest.

96 When he was cross-examined on why he and the receivers and managers did not see it fit to obtain the consent of the Series 2 Loan Note holders to the Deed of Rectification, the defendant prevaricated by claiming he was not sure of the legal technicalities involved and reiterated that the document merely clarified the common intention of the parties by the parent company (NGH) and NQF. The defendant's explanation must be viewed with scepticism in the light of his familiarity with company law regulations, his directorships of listed and unlisted companies and his access to legal advice (both in-house within the Normandy Group as well as from independent firms of solicitors) in

Australia and in Singapore. It bears remembering that one of his defences was that he had relied on legal advice from two Singapore law firms.

97 Like Daud and Sharman, the defendant relied on the Jenton charge for his contention that the plaintiff remained liable to Normandy for the $2m originally invested under the RCPS Agreement. The plaintiff, however, pointed out the absurdity of this argument. That payment was treated as Normandy's payment for the loan note that was issued to Normandy under the Series 1 Agreement. If indeed the plaintiff continued to remain liable to Normandy for the $2m that it received under the RCPS Agreement, it meant that Normandy did not pay NGH $2m for the loan note issued under the Series 1 Agreement.

98 The plaintiff criticised the Deed of Rectification. It was pointed out that Normandy and the defendant sought to rectify the NQF (and Jenton) charge by adding in the following words:

> all debts and liabilities (contingent or otherwise) owed at any time by [NGH] ... to [Normandy] pursuant to the [Series 1 Agreement] …

If indeed (as the defendant and all his witnesses contended) it was the common intention reflected in cl 4.3 of Sched 2 to the Series 1 Agreement that the plaintiff and NQF were to guarantee the obligations of NGH, why then was there a need to execute the Deed of Rectification to amend the NQF and Jenton charges?

The expert testimony

99 The defendant called two lawyers as his expert witnesses. Michael John Whale ("Whale"), a legal consultant from the Auckland law office of M/s Phillips Fox, testified that under New Zealand law the NQF charge was valid and effective notwithstanding the incorrect description of the place of Normandy's office. Whale's opinion was premised on the court holding or finding that there was a debt owed by NGH to Normandy under the Series 1 Agreement and to the Series 2 Loan Note holders (including Normandy).

100 In giving his opinion[note: 7] on what constituted a guarantee, Whale was of the view that no precise formula was required in order to create a guarantee but the word used must not be equivocal. He added that the guarantee would not be binding if the consideration expressed in the instrument was illusory or a sham.

101 Mark Gordon,[note: 8] a solicitor from the Adelaide law firm of M/s Piper Alderman, testified that the misstatement of the place of incorporation of Normandy did not affect the validity of the NGH charge and the appointment of the receivers and managers under Australian law. He opined that under Australian law, a misstatement of the place of incorporation of the mortgagee was not material unless it caused confusion as to the identity of the intended mortgagee, for example, if there was another company with a name which was the same or similar to the mortgagee. He cited various Australian cases to support his opinion.

102 Counsel for the defendant made much of the fact that despite bearing the burden of proof (to show that the NGH charge and the appointment of receivers and managers thereunder were invalid), the plaintiff failed to call any expert to rebut the testimony of Mark Gordon. The same submission was made by counsel in relation to the absence of a corresponding witness to disprove Michael Whale's testimony on the validity of the NQF charge under New Zealand law.

103 The plaintiff, on the other hand, relied on Whale's evidence for its submission that the

defendant's own expert had acknowledged that if the defendant or the defendant's witnesses had conceded that NQF had not given any guarantee or indemnity under the Series 1 Agreement or Series 2 Loan Note, then there was no necessity for the court to decide that issue. The plaintiff submitted that Whale's admission would apply with equal force to the Jenton charge. The plaintiff also relied on Daud's affidavit where Daud had acknowledged[note: 9] that the definition of "moneys hereby secured" in the NQF charge was incorrect as NQF was not a party to the Series 1 Agreement nor did NQF owe money to Normandy under the same. Daud further deposed in his affidavit[note: 10] that the debt owed by NGH to Normandy was not secured by any guarantee given by NQF or the plaintiff.

The issues

104 The main issue to be determined is: Did the defendant breach the fiduciary duties which he owed to the plaintiff? As I had observed earlier, the defendant did not dispute he owed those duties to the plaintiff. The entire tenor of the defendant's testimony was to justify his actions in remitting the two sums claimed in these proceedings on the basis that the plaintiff and NQF, and not only NGH, were indebted to Normandy. Determination of this issue turns on whose interpretation of the meaning and effect of the relevant documents is correct.

105 The second issue to be determined is: Did the payment by the defendant to Normandy constitute undue preference under s 329 of the Companies Act?

106 The third issue I have to decide is whether the fact that Normandy was wrongly described in the legal documentation as a Hong Kong registered company as opposed to a BVI company is fatal to the validity of those documents.

107 Finally, did or does the defendant control Normandy as the plaintiff alleged?

The main issue

108 In order to determine the main issue, it is necessary to first examine the relevant provisions of the Series 1 Agreement upon which the defendant, Daud and Sharman placed heavy reliance. Clause 4.3 of Sched 2 therein states:

> [NGH] agrees to execute security and such other documentation as required in respect of the Notes in order to ensure that a second ranking Charge over the assets of the Newmans Group Companies is effective in New Zealand, Singapore and Australia.

The phrase "Newmans Group" was defined in the definitions clause (cl 1.1) in both the Series 1 Agreement and in Sched 2 thereof to mean:

> [NGH], [the plaintiff], [NQF], Newmans Quality Foods (S) Pte Ltd and any Subsidiary from time to time and "Newmans Group Company" means any of such corporations.

109 Other salient clauses in the Series 1 Agreement include the following:

> 2.1 [The plaintiff] and [Normandy] hereby agrees [*sic*] and acknowledges [*sic*] that the RCPS Subscription Agreement shall be terminated forthwith upon the execution of this Agreement and that accordingly, [the plaintiff] is liable to refund the Initial Investment Amount in full to [Normandy] and that for so long as such refund has not been made, the Initial Investment Amount [S$2m] shall be a debt (the "Jenton debt") due and owing by [the plaintiff] to

[Normandy].

2.4 The parties hereby agree that:

2.4.1 [The plaintiff] hereby on the signing of this agreement assigns its obligations arising out of the Jenton debt to [NGH] …

110 It was submitted on the defendant's behalf that cl 4.3 of Sched 2 to the Series 1 Agreement read with the definition of "Newmans Group of Companies" was plain and unambiguous. It was a clear manifestation of the common intention of the parties that Normandy would have a charge over the assets of NGH, the plaintiff and NQF for its $2m invested in the plaintiff, which sum was deemed to be transferred to NGH.

111 Clause 4.3 of Sched 2 to the Series 2 Loan Note was similar in wording to cl 4.3 of Sched 2 to the Series 1 Agreement save that it provided for a third ranking charge over the assets of the Newmans Group.

112 The plaintiff, on the other hand, relied on Recital A and cl 1.1(c) in both the NQF and Jenton charges to say that neither NQF nor the plaintiff respectively owed money to Normandy. However, the plaintiff admitted it did owe money to NGH and in turn NQF owed money to the plaintiff.

113 Recital A in the NQF and Jenton charges state:

WHEREAS [Normandy] has, at the request of [NQF or the plaintiff], provided financial accommodation to [NGH] for which [NQF or the plaintiff] has agreed to provide security in the form of this Charge provided for in an agreement named the [Series 1 Agreement] …

whilst cl 1.1(c) states:

"Moneys hereby secured" means all moneys for which [NQF or the plaintiff] may now or hereafter be indebted or liable or contingently indebted or liable to [Normandy] on any account or for any reason whatsoever either solely or jointly with any other person as principal and surety, including in particular but without limiting the generality of the foregoing:

(i) any money which is now owing or hereafter becomes owing under the terms of the [Series 1 Agreement] between [NQF or the plaintiff] and [Normandy] or under the terms of any security (including this charge) guarantee or indemnity given by [NQF or the plaintiff] to [Normandy] …

114 Another prong of attack relied on by the plaintiff was to be found in the conditions attached to the Series 1 Agreement. Counsel for the plaintiff submitted that a redemption notice was a condition precedent under Condition 6 of Sched 2 to the Series 1 Agreement, before a demand for payment of the principal sum could be made. Condition 6 stipulates:

6.1 If at any time and for any reason (and whether within or beyond the control of any party to this Agreement) any Event of Default has occurred and subsists for a period of ten (10) days from the Event of Default occurring, the Noteholders may by notice in writing to [NGH] declare the Notes to be immediately due and payable at the option of the Noteholders whereupon any Noteholder may, but shall not be obliged to, at any time thereafter and from time to time by sending a Redemption Notice to [NGH] declare its Note(s) to be immediately payable at the Maturity Redemption Amount. The following are Events of Default:-

6.1.1 [NGH] fails to pay any sums due in respect of the redemption of the Notes; or

6.1.2 [NGH] fails to pay within fourteen (14) days of due date of any sum due in respect of the Notes other than such sums referred to in Condition 6.1.1 above …

"Events of Default" were defined in the conditions as "any of the events of default set out in Condition 6.1".

115 As no redemption notice was given by Normandy, the plaintiff submitted that the defendant was not justified in paying the principal on the loans owed to Normandy. Further, under the Series 2 Loan Note (Condition 6.1of the terms and conditions), no single Series 2 Loan Note holder could issue a redemption notice to NGH without a note holder approval notice in writing. There was no evidence that the defendant or Normandy had obtained such approval notice.

The findings

The main issue

116 While the defendant, Daud and Sharman all claimed it was the common intention that all companies in the Newmans Group should furnish security to Normandy for the loans made to NGH, the defendant did not see it fit to call the solicitor in Batten Sacks who drafted the NQF and Jenton charges to testify that it was indeed his mistake in using the NGH charge template for those documents that resulted in the NQF and Jenton charges not reflecting the true intent of the parties.

117 It was not for Sharman to state his belief of what had happened at the time the two charges were prepared. It was for Batten Sacks' solicitor to come to court and testify on the purported mistake he had made in using the wrong template. It bears mentioning that the defendant had testified that CVC Venture as NGH's agent had instructed Batten Sacks to prepare the NQF charge. Indeed, Batten Sacks' invoice dated 22 July 2002 stated that Sharman and Jeremy Robbins of CVC Venture instructed them on the Series 2 Loan Note and the NQF and Jenton charges. There was no primary or any evidence before the court on how the purported mistake came to be made in those charges, if indeed it was a result of sloppy drafting by Batten Sacks (as Whale concluded in his opinion).

118 I would add that the defendant's testimony that he had relied on the advice of Rajah & Tann and Kelvin Chia Partnership has little probative value. He did not call the solicitors he consulted to corroborate his defence. I note further that he consulted Rajah & Tann on the validity of the Jenton charge, which is not the issue here, whilst Kelvin Chia Partnership was requested to draft resolutions for Jenton to enable the defendant, as its corporate representative, to appoint himself as the corporate representative of NQF. It is also noteworthy that he consulted the two law firms on behalf of Normandy.

119 The determination of the main issue turns on whether I accept the plaintiff's interpretation of Recital A and cl 1.1 in the NQF charge or, I accept the defendant's contention that cl 4.3 of Sched 2 to the Series 1 Agreement applies.

120 It is a fact that NQF was *not* a party to either the Series 1 Agreement or Series 2 Loan Note. Neither is Normandy a party to this action. Purely on basic contracting principles alone, NQF cannot be bound by an agreement which was only made between its parent (NGH) and Normandy. Even if it was bound, NQF, as well as the plaintiff and NGH, complied with the obligation set out under cl 4.3 of the Series 1 Agreement by executing the NGH charge, the NQF charge, the Jenton charge, the Jenton

debenture and the NQF debenture. It is no fault of theirs if the documents executed turned out to be ineffective at law.

121 On the other hand, Recital A and cl 1.1(c) of the NQF charge makes it quite clear that the charge only extends to moneys directly owed by NQF to Normandy; it would not cover the debts owed by either the plaintiff or NGH. If indeed there was ambiguity, then as the plaintiff submitted, the *contra proferentum* rule should apply and the ambiguity interpreted against Normandy. In addition, the parol evidence rule precludes the defendant (as his counsel sought to do) from referring to extrinsic evidence, such as a document dated 14 February 2001 headed "Summary of Terms and Conditions" to support the defendant's contention that it was the common intention (as Normandy had requested for it from the outset), that Normandy should have security over the assets of the plaintiff and its subsidiaries.

122 Even if I am wrong in my interpretation of the relevant clauses, it was not disputed that Normandy did not make payment for the loan note issued under the Series 1 Agreement; the loan of $2m was set off against the $2m paid to the plaintiff under the RCPS agreement. Consequently, the defendant's argument that the NQF charge secured the debt of NGH is flawed; the consideration was non-existent or illusory. If indeed Normandy was so confident of its legal position on the NQF charge, it would not have applied to the New Zealand High Court for a determination of whether that document secures the indebtedness to Normandy under the Series 1 Agreement and Series 2 Loan Note. Whale's expert testimony therefore has to be treated with caution.

123 The fact that counsel for the defendant extracted an admission from Mark Wong that there was indeed a common intention for Normandy's loan to be secured by the assets of the Newmans Group of companies does not detract from the reality of the situation – no moneys were owed by NGH or the plaintiff or NQF to Normandy, due to the offsetting arrangement referred to above.

124 I note from the defendant's closing submissions that there was no substantive reply to the plaintiff's argument on the lack of consideration by Normandy for the NGH charge. In cross-examination, it was put to Mark Wong that the consideration in cl 2.4.2 of the Series 1 Agreement was NGH's agreement to issue the notes to Normandy. The clause states:

> The Jenton Debt shall be owed by [NGH] to [Normandy]. In consideration for payment of the Notes Principal Sum [$2m] and as security for the indebtedness of [NGH] to [Normandy] arising out of the assignment of the Jenton Debt [NGH] agrees to issue the Notes to [Normandy].

Mark Wong quite rightly disagreed. The second sentence in the above clause clearly states that NGH would issue the notes to Normandy in consideration of *the $2m paid by Normandy and as security for the debt*. The debt referred to was the plaintiff's debt assigned to NGH under cl 2.4.1 (see [109] above).

125 Even if I am wrong in my interpretation of cl 2.4.2, since Normandy did not pay $2m for the loan note under the Series 1 Agreement, it would still owe $2m to NGH, while NGH in turn owes $2m to Normandy by reason of the assignment of the plaintiff's debt. The two debts would cancel each other out so that neither side owes any money to the other.

126 The plaintiff had also raised the lack of a redemption notice by Normandy when the defendant purportedly repaid Normandy's outstanding loan. The response from the defendant was to say[note: 11] that this allegation was never pleaded in the plaintiff's case and must fail. The defendant then complained that he had suffered serious prejudice as, if the allegation had been pleaded, Whale as the defendant's expert on New Zealand law could have addressed the issue in his opinion. It was not

a question of law that could be dealt with in submissions.

127 The defendant contended that in any case, a formal notice or demand for payment from Normandy was unnecessary under cll 5 and 5.1 of the NQF charge, which state:

> 5 The moneys hereby secured shall at the option of [Normandy] immediately become payable, the floating charge hereby created shall become a fixed charge and the security hereby created shall become enforceable without the necessity for any demand or notice, notwithstanding any delay by [Normandy] or any previous waiver by [Normandy] of its rights, upon the happening of any of the following events:
>
> > 5.1 upon default by [NQF] in payment of any of the moneys hereby secured, or in the performance and observance of any of the covenants and obligations of [NQF] pursuant to [the Series 1 Agreement].

128 The defendant's submission is necessarily premised on the NQF charge securing the debts of NGH, not of NQF. As I said earlier at [120] above, NQF could not be in default of the Series 1 Agreement as it was not a party to the same. As it is my view that NQF did not owe any money to Normandy under the Series 1 Agreement, there can be no question of it being in default under cl 5.1 of the NQF charge, as the clause does not apply.

129 The gravamen of the defendant's case was that he was justified in paying Normandy the sum of NZ$1,692,054 because Normandy's demands for payment of interest on its loan were not met. However, Normandy's demands for interest payments were nowhere near the aforesaid sum. I agree that a redemption notice for payment of principal is a condition precedent under Condition 6 (see [114] above) of the Series 1 Agreement. However, as this was not pleaded in either the statement of claim or reply, the plaintiff's submission in this connection must be disregarded.

130 In the result, no money was owed by NQF to Normandy that justified the defendant's conduct in orchestrating the transfer out of the bulk of the sale proceeds from the Tauranga account to pay Normandy, with Sharman's assistance. I do not accept the defendant's professed claim that he discharged his duties as director of NQF in paying the sums of NZ$985,246 and NZ$1,692,054 to Buddle and Normandy respectively. It was not done for altruistic reasons. The defendant was prompted by his desire to ensure that Normandy recouped its original investment as much and as quickly as possible. His conduct was dictated by his loyalty to Normandy, not to the Newmans Group. Assuming I am wrong and the defendant was indeed justified in paying Normandy's loan, it was still not within his duties as a director of NQF or the plaintiff or NGH, to pay the claims of creditors. That function was reserved to the accountant or equivalent person in the employment of NQF or the plaintiff or NGH.

131 I reject the defendant's excuse (see [93] above) that he wanted to pre-empt PK Wong from taking control of the sale proceeds from the Tauranga account, based on PK Wong's e-mail dated 11 May 2004 and PK Wong's past conduct in allegedly seizing control of the funds from the now defunct partnership of PK Wong & Advani. If a person intends to seize control of moneys in a joint account, he would not be so foolish as to give prior notice of his intention to the other signatory to the account.

132 My view is exemplified by the defendant's conduct. He had planned with military precision his moves to take possession of the moneys from the Tauranga account, as can be seen from the following chronology of events:

(a) On 19 May 2004, the defendant wrote on Normandy's behalf to Kelvin Chia Partnership and instructed the law firm to review draft resolutions to remove the plaintiff's directors (save for himself) and to appoint a new secretary and director as well as to change its registered office. He indicated a receiver would be appointed to NGH.

(b) Kelvin Chia Partnership was also asked to review a resolution to appoint the defendant as the plaintiff's corporate representative to the NQF board.

(c) The defendant consulted Leow Quek Shiong, a director of Chio & Lim, and followed up with his letter dated 19 May 2004 on Normandy's behalf, setting out his proposal to secure repayment of money owed to Normandy by a holding company and a trading company (he did not identify or name the entities involved) and also referred to the appointment of a receiver as well as a provisional liquidator.

(d) The defendant then appointed Cheryl Kwan and Marimmal as secretary and director respectively of the plaintiff, on 25 May 2004 and 28 May 2004.

(e) On 4 June 2004, when the cheques from Delmaine representing the sale proceeds were collected by Sharman, the defendant removed all the directors of the plaintiff and NQF, in particular the Wongs. On the same day, Normandy purported to appoint the receivers and managers pursuant to the NGH charge.

133 The statutory duties of a director are to be found in s 157 of the Companies Act; it states:

(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

(2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

(3) An officer or agent who commits a breach of any of the provisions of this section shall be —

(*a*) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and

(*b*) guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year.

(4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

(5) …

134 The plaintiff cited a Court of Appeal decision in relation to s 157 of the Companies Act in its closing submissions. In *Kea Holdings Pte Ltd v Gan Boon Hock* [2000] 3 SLR 129 at [19], Yong Pung How CJ had this to say:

Under s 157(4), the duties under s 157(1) are specifically stated not to be in derogation of any

other rule of law relating to the duty or liability of directors or officers of a company, including the common law and equitable rules. There are two principals of conduct of relevance to the present case. First, that a director must act in what he honestly considers to be the company's interest, and not in the interests of some other person or body. Secondly, the equitable rule that a fiduciary must not place himself in a position where his duty to the company and his personal interests may conflict.

135 Where a director of a company is also a director of other companies within a group, his duties at common law are as follows (*per* Pennycuick J in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 ("*Charterbridge Corporation*") at 74):

> Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

Pennycuick J's test in *Charterbridge Corporation* was applied by L P Thean JA in the Court of Appeal decision of *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 (at 324–325, [29]–[30]).

136 The defendant did not dispute he owed fiduciary duties to NQF. Applying the above test to our facts, I find that the defendant breached his fiduciary duties to the plaintiff in withdrawing NQF's moneys from the Tauranga account to pay Normandy without the knowledge or consent of the other directors. It did not lie in his mouth to assert that the receivers and managers endorsed his action. Their appointment was pursuant to the NGH charge, not the NQF charge.

137 Nor can the defendant rely on the Deed of Rectification to justify his action as that document was executed *after* the moneys had been transferred out of the Tauranga account. The defendant cannot expect this court to believe he was acting in the best interests of NQF and its sole shareholder (the plaintiff) when he spirited off the sale proceeds of NQF to pay Normandy. There was a clear conflict of interest between Normandy on the one side and the Newmans Group on the other. The defendant acted in breach of his statutory duties under s 157(1) of the Companies Act and breached his fiduciary duties at common law. His actions benefited Normandy at the expense of NQF and the plaintiff.

138 I reject as untrue the submission of his counsel[note: 12] that "[t]he Defendant did what he did in spite of an absence of personal financial benefit because he simply knew that what he was doing was right". Counsel had also submitted that as a nominee director of Normandy, the defendant was entitled to take into account the interests of Normandy as long as such interest did not conflict with the interests of NGH, the plaintiff or NQF (relying on Chao Hick Tin JA's judgment in *Oversea-Chinese Banking Corp Ltd v Justlogin Pte Ltd* [2004] 2 SLR 675 at [31]). In the light of my finding, this submission is unsustainable.

The second issue

139 The law on undue preference is encapsulated in s 329 of the Companies Act; it states:

> (1) Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done

by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act 1995 (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.

(2) For the purposes of this section, the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —

(*a*) in the case of a winding up by the Court —

(i) the date of the presentation of the petition; or

(ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the date upon which the resolution to wind up the company voluntarily is passed,

whichever is the earlier; and

(*b*) in the case of a voluntary winding up, the date upon which the winding up is deemed by this Act to have been commenced.

(3) ...

140 Sections 99(1), 99(3), 100(1), 101(1) and 101(4) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) state:

99.—(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.

(3) For the purposes of this section and sections 100 and 102, an individual gives an unfair preference to a person if —

(*a*) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and

(*b*) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

100.—(1) Subject to this section, the time at which an individual enters into a transaction at an undervalue or gives an unfair preference shall be a relevant time if the transaction is entered into or the preference given —

(*a*) in the case of a transaction at an undervalue, within the period of 5 years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt;

(*b*) in the case of an unfair preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), within the period of 2 years ending with that day; and

(*c*) in any other case of an unfair preference which is not a transaction at an undervalue, within the period of 6 months ending with that day.

101.—(1) For the purposes of sections 99 and 100, any question whether a person is an associate of another person shall be determined in accordance with this section.

(4) A person is an associate of an individual whom he employs or by whom he is employed and for this purpose, any director or other officer of a company shall be treated as employed by that company.

141 By virtue of the Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Rev Ed) ("the Regulations"), the provisions of the Bankruptcy Act apply to the Companies Act. This is provided for under reg 3 which states:

For the purposes of sections 227T and 329 of the Act, sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act shall be read subject to —

(*a*) the modifications set out in regulations 4 and 9; and

(*b*) such textual and other modifications as may be necessary for their application to a company being placed under judicial management or being wound up, as the case may be.

142 Regulations 4 and 9 of the Regulations state:

4. Any reference to an associate of a person or an individual who has been adjudged bankrupt (except any such reference in section 101 of the Bankruptcy Act) shall be read as a reference to a person connected with a company which has been placed under judicial management or against which a winding-up order has been made, as the case may be.

9. For the avoidance of doubt, the application of sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act (as modified by these Regulations) upon a company being placed under judicial management or being wound up, as the case may be, shall be without prejudice to the availability of any other remedy, including a remedy in respect of a transaction or preference which the company had no power to give.

143 Regulation 2 of the Regulations defines the phrase "person connected with a company" as:

(*a*) a director or shadow director of the company or an associate of such director or shadow director; or

(*b*) an associate of the company.

144 Based on s 329 of the Companies Act read with s 99(3)(*a*) of the Bankruptcy Act, I find that the defendant has given undue preference to Normandy's debt over the claims of other creditors of NQF and the plaintiff. Normandy did not enjoy priority because I do not accept it was a creditor, let alone a secured creditor of NQF or the plaintiff.

145 In para 6 of the (re-amended) reply, the plaintiff had pleaded:

At the relevant time, all the members of the Plaintiff's as well as the NQF's Board of Directors, including the Defendant, were aware that the total assets of the Plaintiff, which includes the

assets of NQF, were insufficient to satisfy the total debt liabilities of the Plaintiff. As such, the Plaintiff as well as NQF's Board of Directors has a duty to preserve the assets of the Plaintiff and NQF for the benefit of the Plaintiff's creditors.

146 Aside from my comment in parentheses at [91] above, the 2002 accounts of the plaintiff[note: 13] clearly showed a company whose financial situation had worsened between 2001 and 2002. The plaintiff's profit and loss accounts showed that its losses for 2001 of $53,535 had ballooned six-fold to $322,259 for 2002. The plaintiff's balance sheet showed accumulated losses of $132,470 for 2001 and $454,729 for 2002.

147 Judging from its annual report,[note: 14] NQF fared no better. Its net loss after tax for 2002 was NZ$813,276 and increased to NZ$934,534 for 2003. It had negative equity of NZ$395,114 in 2002 and NZ$908,391 in 2003.

148 As Normandy was unduly preferred (on 4 and 18 June 2004) over other creditors within six months of the liquidation of NQF on 9 July 2004, the two payments it received from the defendant are caught by s 100(1)(*c*) of the Bankruptcy Act read with regs 2, 4 and 9 of the Regulations. Equally, the Deed of Rectification executed by the defendant on 17 June 2004 would also be void or voidable at the option of the Liquidators, under s 329 of the Companies Act.

149 In the defendant's submissions[note: 15] as well as in Whale's opinion,[note: 16] it was argued that undue preference was not pleaded by the plaintiff and the plaintiff was thereby precluded from raising this issue. That is incorrect. Undue preference was specifically pleaded in para 12(d)(c) of the amended statement of claim and in para 6 of the re-amended reply. The defendant's submission that he is in any case not caught by s 100(1)(*b*) of the Bankruptcy Act because he does not control Normandy is misconceived; that is not the relevant section. As an employee, although not a director of Normandy, the defendant is an "associate" of Normandy, within the definition of a "person connected with a company" under reg 2(*b*) of the Regulations. Normandy came within the definition of a creditor under s 99(3)(*a*) of the Bankruptcy Act, which provision is applicable to companies under reg 3 of the Regulations.

The third issue

150 When counsel for the plaintiff pointed out to the defendant that there was a world of difference between a company incorporated in Hong Kong and one incorporated in the BVI, the defendant replied:

> It [Normandy] is a legally constituted corporation and had the lawyers done their work correctly which I say with hindsight, it would have been easily determined as to the place of incorporation of Normandy. Generally, the recipients of the funds are not concerned about the place of incorporation of the company. They are concerned with the people they are dealing with and receiving the money. If the place of incorporation of Normandy is a problem, then we have a number of vehicles that can make the investment. The plaintiff did not ask for the accounts or do checks that I am aware of, in the period early 2000 through to completion of the Series 1 Agreement some 18 months later.

151 I endorse the defendant's comment. Contrary to their repeated assertions that they would not do business with a BVI company, I doubt it would have made any difference to the Wongs, even if they had known that Normandy was incorporated in the BVI and not in Hong Kong as they had thought. The Wongs would have welcomed Normandy as an investor regardless of its place of incorporation. It is noteworthy that the plaintiff paid Daud's company, Perkasa, "an advisory fee" (a

term used in the RCPS Agreement) for securing Normandy as an investor and NQF in turn paid CVC Venture a commission for procuring Delmaine as a buyer. The Wongs were desperate for an investor who could inject additional capital into the plaintiff and ultimately into NQF. It was a proverbial case of "beggars can't be choosers". In cross-examination, Mark Wong revealed that shareholders had poured substantial moneys (more than $10m) into the plaintiff and/or NQF by the time Normandy came onto the scene. However, more capital was required. As was admitted by PK Wong in his e-mail dated 11 May 2004 to the defendant, NQF had turned out to be a bad investment. It was unlikely that its existing shareholders would have agreed to pump further funds into NQF even if they had the wherewithal to do so.

152 At the same time I find it a startling proposition coming from counsel for the defendant[note: 17] that it was incumbent on the Wongs to conduct company searches to ascertain Normandy's country of incorporation. As was rightly pointed out in the plaintiff's submissions,[note: 18] the plaintiff would have to carry out a search in the company registries of all the countries in the world to find out if there was a Normandy Nominees Limited incorporated in any of the countries. The defendant's expert, Whale, had acknowledged that in the absence of evidence or information from the other party when a search in the Hong Kong register of companies drew a blank, it would be difficult to establish who the other party to the contract was and it might not be possible to do so.

153 Neither *Newborne v Sensolid (Great Britain) Ld* [1954] 1 QB 45 cited by the plaintiff nor *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85 ("*Goldsmith*'s case") and *Nittan (UK) Ltd v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633 cited by the defendant assisted the parties on this issue, as can be seen from the facts of these cases.

154 In *Newborne v Sensolid (Great Britain) Ld*, the plaintiff was the promoter and prospective director of a limited company, Leopold Newborne (London) Ltd, which at the material time had not been registered. A contract for the supply of goods to the defendants was signed "Leopold Newborne (London) Ltd" and the plaintiff's name "Leopold Newborne" was written underneath. In an action for breach of the contract brought by the plaintiff against the defendant, the English Court of Appeal held that the contract was made not with the plaintiff, whether as agent or as principal, but with a limited company which at the date of the making of the contract was non-existent. Therefore, it was a nullity and the plaintiff could not adopt it or sue on it as his contract.

155 *Goldsmith*'s case turned on different facts. In that case, the shares of the plaintiff company were owned by B, his wife and son. The plaintiff company bought a piece of land and it was conveyed in 1966 to Goldsmith Coaches (Sicklesmere) Ltd based on B's instructions to his solicitors. Subsequently, Goldsmith Coaches (Sicklesmere) Ltd sold the piece of land, as beneficial owner, to the defendant and B signed the memorandum of agreement "for and on behalf of Goldsmith Coaches (Sicklesmere) Ltd". On searching the companies register, the defendant's solicitors discovered there was no company registered in that name and informed the plaintiff's solicitors accordingly. A supplemental conveyance to the 1966 conveyance was made by the original vendor in favour of the plaintiff. However, taking the view that there was no vendor and therefore no contract, the defendant refused to complete his purchase and sought to resile from the contract. The plaintiff sued for specific performance of the contract. Stamp J held that by reference to the surrounding circumstances, it was clear that Goldsmith Coaches (Sicklesmere) Ltd was an inaccurate description of the plaintiff, that a limited company had characteristics other than its name by which it could be identified. The plaintiff was accordingly granted an order for specific performance.

156 Similarly, in *Nittan (UK) Ltd v Solent Steel Fabrication Ltd*, the defendant was insured for product liability cover with the third party, Cornhill Insurance Co Ltd ("Cornhill"). The endorsement by Cornhill on the policy stated "for the purposes of this Section the Insured shall be deemed to include

Sargrove Electronic Controls Limited". The assets of Sargrove Electronic Controls Limited were taken over by the defendant and the former became dormant. The work in electronics was taken over by the defendant under the trade name "Sargrove Automation". In an appeal by Cornhill against the trial judge's decision that the exclusion clause in the product liability policy did not apply, it was *inter alia* held by the Court of Appeal that the reference to Sargrove Electronic Controls Limited was clearly a misnomer, all concerned knew that the insured was the defendant and that the defendant's business had been expanded to include the manufacture of electronic apparatus, which was reflected in the endorsement by Cornhill.

157 The above three cases are of little assistance. Indeed, Whale had acknowledged when relying on *Goldsmith*'s case in his opinion, that it concerned a different misdescription altogether, *viz*, of the name of the company, not its place of incorporation. It is significant to note that neither of the defendant's two experts nor his counsel were able to cite any Australian, New Zealand or English cases relating to misdescription of the place of incorporation of a limited company.

158 It is my view therefore that the incorrect registered address of Normandy in the legal documentation did not render any of the agreements or charges void. This was not a situation like *Goldsmith*'s case where the contracting company was non-existent. Normandy does exist, albeit not in Hong Kong but in the BVI. Neither was it a case where the name of the company was misdescribed, as in the two cases cited on the defendant's behalf.

The fourth issue

159 The plaintiff had alleged[note: 19] that Normandy and Normandy UK are directly or indirectly controlled by the defendant. This plea has not been made out on the evidence. It is clear that while he is a senior employee and was at one time a director of Normandy, the defendant does not control or own any entity within the Normandy group and was certainly not Normandy's *alter ego* as counsel put to him in cross-examination. The decision makers on investments in the Normandy group were a committee that comprised of Vanda Gould, Sandy Beard, Sharman, Daud as well as the defendant.

Was there a common intention vis-à-vis the security over the assets of the Newmans Group?

160 It is clear from the evidence that Normandy wanted security over the assets of the entire Newmans Group for its investment. It is equally clear from the evidence that the Wongs resisted Normandy's request initially. That was why the Wongs procrastinated in the signing of the NQF charge until pressed to do so by Jeremy Robbins (on 20 August 2002) and again by the defendant (on 21 August 2002) when Jeremy Robbins' request was not complied with. It was probably also the reason why Mark Wong omitted to register the Jenton debenture.

161 The defendant had submitted that (a) the Deed of Subordination and Priority and (b) the documents for a partial discharge of security must mean that Normandy did have security over the assets of NQF. The Wongs on the other hand explained that the Jenton and NQF charges were executed at the insistence of Normandy so the Deed of Subordination and Priority and the partial discharge of security were consequential documents pursuant to the signing of the two charges. On the evidence, I find that the Wongs were clearly aware of Normandy's requirements, however reluctantly they may have acceded to the same. Unfortunately, the legal documentation turned out to be inadequate for the purpose intended by Normandy.

Credibility of the witnesses

162 There only remains for me to make some brief observations on the witnesses who testified

before concluding this judgment. Each side had accused the other party's witnesses of lying. In the case of the Wongs, the defendant's submissions repeatedly criticised them as being unreliable and untruthful witnesses and that they had misled the court. The defendant went to the extent of submitting that PK Wong should be made to bear the costs of this action personally, alleging PK Wong instigated the Liquidators to initiate (and he funded) these proceedings. I would add that the defendant and his witnesses were not spared similar criticisms in the plaintiff's submissions.

163 Granted, PK Wong could have been more forthright in accepting that he signed the NQF debenture when he first took the stand. However, that is not to say his evidence was entirely discredited. Mark Wong understandably would want to see his father released either totally or substantially from the latter's obligations as guarantor of the Chye Seng debt if it was possible. However, Mark Wong had never denied PK Wong's liability which he acknowledged had already crystallised with the judgment obtained by Chye Seng. That said and leaving aside the controversy surrounding the accuracy of Sharman's minutes of the meeting on 27 August 2003 (which has no bearing on my decision), I do not find that the Wongs' testimony was so completely unreliable as to warrant it being rejected totally. Father and son were no doubt mindful that although they were witnesses, they were, first and foremost, officers of the court as members of the Singapore Bar.

164 I had stated earlier (at [70] above) that the defendant and his two witnesses of fact were consistent in their testimony on the issue of the common intention. The evidence of Daud and Sharman merely corroborated that of the defendant who did not deny what he had done but as I had stated previously (at [87] above), he sought to justify his actions. It is, however, no answer to his breach of fiduciary duties for the defendant and his counsel to say[note: 20] that Normandy would have been entitled to 63.2% of the sale proceeds from Delmaine on a *pari passu* basis in any case. As PK Wong said, the task of paying the plaintiff's creditors should be left to the Liquidators. It was not for the defendant to usurp that role and decide that Normandy should have the first and largest bite of the sale proceeds, even if the company could ultimately prove its entitlement was to the sum that it did receive.

Conclusion

165 Consequently, I award judgment to the plaintiff against the defendant for its claim of NZ$2,677,303 with interest at 6% per annum from 4 June 2004 until the date of the judgment. The plaintiff is also awarded costs on a standard basis.

[note: 1] See AB373.

[note: 2] At para 248.

[note: 3] See AB1332-1346.

[note: 4] PW1.

[note: 5] PW2.

[note: 6] In para 128 of his affidavit.

[note: 7] In his paras 34 to 37.

[note: 8] DW3.

[note: 9] In para 87.

[note: 10] In para 120.

[note: 11] In para 539 of his submissions.

[note: 12] Para 74.

[note: 13] Exhibited in HGT-31 of the defendant's affidavit of evidence-in-chief.

[note: 14] At AB755-767.

[note: 15] In para 556.

[note: 16] Para 52.

[note: 17] In para 98 of his closing submissions.

[note: 18] Para 165.

[note: 19] In para 11(e) of the amended statement of claim.

[note: 20] In para 720 of his submissions.