Sitt Tatt Bhd v Goh Tai Hock
[2008] SGHC 220

Case Number : Suit 560/2006

Decision Date : 26 November 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Harpreet Singh Nehal SC and Lim Shack Keong (Drew & Napier LLC) for the plaintiff; N Sreenivasan and Ramesh Bharani Nagaratnam (Straits Law Practice LLC) for the defendant

Parties : Sitt Tatt Bhd — Goh Tai Hock

Companies – Incorporation of companies – Lifting corporate veil – Company entering into contracts – Company acting solely through sole shareholder and director – Whether sole shareholder and director liable for breach of trust as alter ego of company – Whether court should pierce the corporate veil

Contract – Collateral contracts – Parol evidence rule – Company entering into contracts – Company acting solely through sole shareholder and director – Whether company fulfilled obligations depending entirely on sole shareholder and director – Whether direct contract with sole shareholder and director should be implied – Whether personal covenant should be implied into existing contracts – Section 94 Evidence Act (Cap 97, 1997 Rev Ed)

Trusts – Constructive trusts – Quistclose trusts – Sole shareholder and director of company receiving money as agent – Agent knowing purpose of money – Agent paying money out for other purposes – Whether money subject to trust – Whether payment out in breach of trust

26 November 2008 Judgment reserved

Judith Prakash J:

1 By this action, the plaintiff seeks the return of a sum of US$1 million which it remitted to the defendant's personal bank account on 3 August 2005. The plaintiff has put forward two causes of action, one for breach of trust and the other for breach of contract. The defendant's position is that he received the money on behalf of his company, Prime International Consultants Pty Ltd ("Prime"), which was entitled to it as a commitment fee and that he did not hold the same on trust for the plaintiff. He further denies that there was ever any contract between him and the plaintiff. The relevant contractual relations were between the plaintiff and Prime.

Background

2 The plaintiff is a company incorporated in Malaysia and listed on the Kuala Lumpur Stock Exchange. The key decision maker in the plaintiff at the material time was its Executive Deputy Chairman, Tan Sri Datuk Dr Mohan M K Swami ("Tan Sri Mohan"). In relation to the matters giving rise to this action, he was assisted chiefly by the plaintiff's Director of Corporate Affairs, Ravi Navaratnam ("Mr Navaratnam").

3 The defendant is a chartered engineer by profession. He emigrated to Australia from Singapore in 1987 and thereafter acquired a wealth of work experience in relation to oil and gas in the engineering, trading, marketing and consultancy sectors. In 1991, he procured the incorporation in Australia of Prime. Prime is wholly owned by the defendant. He is its sole shareholder and director. In

relation to the matters giving rise to this action, Prime was assisted by its business consultant Kevin Humphrys ("Mr Humphrys").

4 The next important player in this story is an Indonesian company, PT Kutai Timur Resources ("KTR"). In about April 2005, KTR received letters of recommendation from various local authorities in Indonesia allowing it to survey, study, mine, manage, revive, develop, explore, exploit and produce oil and gas from wells located in the region of Kutai Timur, East Kalimantan, Indonesia (the "Project").

5 On 16 July 2005, Prime signed a memorandum of understanding ("MOU") with KTR. The purpose of the MOU was to record the parties' intentions to negotiate with each other to secure the Project and to define their respective responsibilities and interests in connection with the Project. Prior to the signing of the MOU, the defendant had met Tan Sri Mohan and had learnt that the plaintiff was interested in going into the oil and gas industry. The defendant had approached the plaintiff in connection with the Project because Prime and KTR required funding for the operation of the Project.

6 On 22 July 2005, the defendant and Mr Humphrys met Tan Sri Mohan in Prime's office in Perth. They discussed the possibility of Prime and the plaintiff participating in a joint venture with KTR in relation to the Project. They then signed a document entitled "Heads of Agreement" which was expressed to be made between the plaintiff represented by Tan Sri Mohan and Prime represented by the defendant. This was a short document. It contained four terms. The relevant portion read as follows:

> OBLIGATIONS
>
> PI [Prime] to facilitate the successful signing of the Project Agreement in partnership with PT Kutai Timur Resources and other multinational oil and gas companies.
>
> STB [the plaintiff] to compensate PI on the successful signing of the agreement by the following:
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> 1. Within thirty days of the signing of the Project Agreement, make available the sum of US5,000,000 per oil field block (payable to PI or other parties nominated by PI).

7 Thereafter, Tan Sri Mohan went to Jakarta with the defendant to meet KTR. On 26 July 2005, Tan Sri Mohan met with Pak Sulaiman, the president of KTR, his colleague Abdullah Syafei (known to all as "Pak Sany"), and two officials from Pertamina (Indonesia's state oil company). Pak Sulaiman told Tan Sri Mohan that KTR was considering inviting the plaintiff to participate as a partner in the joint venture for the Project. He also told Tan Sri Mohan that KTR would obtain the requisite approval for the Project from Pertamina in about two months. Tan Sri Mohan confirmed that the plaintiff was interested in participating, subject to the results of due diligence being satisfactory.

8 The defendant then produced a document entitled "Tripartite Joint Venture Agreement" ("TJVA"). The plaintiff reviewed the document and, after further discussion, the parties agreed on the terms of the TJVA. It was signed on 27 July 2005 by all three parties, *viz*, KTR, Prime and the plaintiff. At the same time, MOU signed a power of attorney ("POA") in favour of Prime and the plaintiff. Among the salient terms of the TJVA were the following:

> (a) KTR was desirous of working together with the plaintiff and Prime on the Project (Recital 8);
>
> (b) the parties were desirous of entering into a further joint venture agreement (the "Final JVA") to define their complete roles and responsibilities in the Project (Recital 8);

(c) the parties were to endeavour to achieve the terms of the TJVA in a timely and efficacious manner (Clause 1(1));

(d) upon the signing of TJVA, KTR was to confirm with the relevant authorities in Indonesia, including BP MIGAS and Pertamina, that the necessary approvals and licenses would be issued to enable KTR, Prime and the plaintiff to survey, study, mine, manage, revive, develop, explore, exploit and produce oil and gas from the Project (Clause 2(1)); and

(e) the plaintiff and Prime were to at all times act consultatively and jointly with each other to assist in negotiating relevant terms with third parties such as consultants, contractors, engineers, financiers and other external experts required to further the successful implementation of the Project (Clause 2(2)).

9 The parties have different versions of the next part of the story. According to Tan Sri Mohan, before he and the defendant left Jakarta on 28 July 2005, the defendant requested that the plaintiff make an upfront payment of US$5 million. This was the first time he had raised the issue of such a payment. He told Tan Sri Mohan that the money was needed to purchase a data pack from BP Migas which contained important geological information about the area where the Project's oil wells were situated.

10 The parties arrived in Singapore on 28 July 2005. Tan Sri Mohan was joined by Mr Navaratnam and another colleague, Dato Pang Wee Pat ("Dato Pang"). All three of them had a meeting with the defendant the same day. At that meeting, the defendant said that "the Indonesians" were in Singapore and that they had asked for an upfront payment of US$5 million. After some discussion, the defendant reduced this amount to US$1 million and Tan Sri Mohan said that if the Project was genuine there should not be a problem about an upfront payment but that he needed authority from the plaintiff's board in order to make the same. On 2 August 2005, the plaintiff's board met and, after discussion, gave its mandate for a payment up to US$2 million.

11 On 3 August 2005, there was a meeting in Singapore between Tan Sri Mohan, Dato Pang, Mr Navaratnam and the defendant. Tan Sri Mohan informed the defendant that the plaintiff proposed to make payment directly to KTR in two stages: the first US$500,000 would be paid upfront and the balance US$500,000 would be paid after suitable operator for the Project had been appointed. The defendant did not accept this and it was eventually agreed that the sum of US$1 million would be paid to Prime. On 3 August 2005, the plaintiff remitted this sum to the defendant's personal bank account in Singapore. In this connection, the plaintiff wrote a letter to Prime which read as follows:

Re: Acknowledgement of receipt of US$1,000,000.00

With reference to your letter dated 29 July 2005, authorizing the payment of US$1,000,000.00 to be made to Mr. GOH TAI HOCK, kindly acknowledge receipt of the sum of US$1,000,000.00 via Telegraphic Transfer (TT) enclosed herewith being an up front payment to secure the Project as stipulated under the Tripartite Joint Venture Agreement between PT Kutai Timur Resources and Sitt Tatt Berhad and Prime International Consultants Private Limited.

The letter was signed by Dato Pang. Beneath his signature, there was an acknowledgement of receipt of the US$1 million signed by the defendant.

12 The defendant's version of events as set out in his affidavit of evidence-in-chief was that during the meeting in Perth on 22 July 2005, Tan Sri Mohan had agreed that Prime would receive a sign-on fee if it succeeded in getting the plaintiff involved in the Project by signing agreements with

KTR. This fee was discussed and agreed in an amount of up to AUD 2 million. It was understood that a portion of these monies would be paid to KTR's representatives. Tan Sri Mohan suggested that after the plaintiff had signed agreements with KTR, he and the defendant should fly into Singapore for Prime to collect the sign-on fee.

13 During the subsequent discussions with KTR in Jakarta, KTR agreed to appoint Prime and the plaintiff as its attorneys under the POA in order to facilitate the progress of the Project. The POA was signed on 27 July 2005. Thereafter, according to the defendant, Prime and the plaintiff at a separate meeting agreed that a sign-on fee of US$1 million (equivalent to AUD 2 million) would be paid by the plaintiff to Prime for the successful signing of the POA. A portion of these monies were to be disbursed to Pak Sulaiman and Pak Sany on behalf of KTR for their involvement in the signing of the POA and other agreements with KTR. The defendant said it was only on 28 July 2005 when he met Dato Pang in Singapore that he and Tan Sri Mohan were told that the approval of the plaintiff's board would be required for the payment of the sign-on fee. The defendant reiterated that the purpose of this payment was for Prime to assist the plaintiff to secure its involvement in the Project by signing the POA, the TJVA and the Final JVA pursuant to clause 1.2 of the TJVA.

14 It was agreed at the meeting that as Prime did not operate a bank account in Singapore, it would be in order for the plaintiff to pay the fee into the defendant's own bank account in Singapore. Prime wrote a letter on 29 July 2005 to authorise the payment of the money into the defendant's account. On the same day, the defendant informed Tan Sri Mohan that Pak Sulaiman and Pak Sany were expecting their share of the sign-on fee before the Project could continue and the Final JVA be executed. On 30 July 2005, the plaintiff presented the defendant with a letter addressed to Prime to document the payment and the terms of the payment. This letter stated that the US$1 million would be fully refundable. The defendant said that he unequivocally rejected the document.

15 After the defendant received the money on 3 August 2005, he paid US$450,000 to Pak Sulaiman and US$150,000 to Pak Sany. The payments were effected on 5 August 2005. The defendant retained the balance of US$400,000 in his Singapore account.

16 Thereafter matters proceeded. A team from the plaintiff met various Indonesian parties from 22 to 24 August 2005. These meetings culminated on 24 August 2005 in the signing of the Final JVA. The salient terms of the Final JVA were as follows:

(a) By s 1.01 (vi), the parties would incorporate a joint venture company ("the JV Company") in Indonesia;

(b) By s 1.02, the shareholding proportions would be:

i. fifty-five percent (55%) to Kutai [KTR];

ii. thirty percent (30%) to STB [the plaintiff];

iii. fifteen percent (15%) to Prime;

(c) By s 4.02 (ii) (a), KTR was to be primarily responsible for the establishment and setting up of the JV Company.

It was envisaged that the JV Company would be the entity to receive the various approvals and be the operator of the Project. The Final JVA also reiterated that the parties had an obligation to cooperate in procuring the participation of third- party technical experts to assist in the

implementation of the Project.

17 Thereafter, problems arose. There were essentially two problems. First, the parties could not agree on the third-party expert or technical partner. The defendant suggested an Australian company called Advanced Well Technologies but this company was not acceptable to the plaintiff because it was not prepared to fund the exploration directly or from the sale of pre-production oil. The plaintiff then brought in a Chinese company, Asian Oil Company. On 15 December 2005 the plaintiff signed a letter of intent with Asian Oil Company without informing Prime. The second problem was that the JV Company was not set up because there were disputes as to how much paid-up capital was required and the plaintiff who was to fund the establishment of the JV Company would not provide the necessary capital until these disputes were resolved.

18 By an email dated 9 February 2006 and a letter dated 14 February 2006, Prime wrote to the plaintiff and stated that it would withdraw from the Final JVA and "rescind all claim to any entitlements and responsibilities defined in the [Final JVA]". By a further email dated 21 February 2006, Prime told the plaintiff that its withdrawal related specifically to all claims to entitlements and responsibilities defined in the Final JVA and that it did not rescind its right to claims and entitlements that were defined outside of the Final JVA. On 22 February 2006, the plaintiff wrote to Prime and asserted that the latter's withdrawal from the Project amounted to abandoning the Project in its entirety. It further demanded the immediate refund of the US$1 million payment made to Prime on 3 August 2005. This letter was followed by the plaintiff's lawyer's letter dated 9 March 2006 in which it was asserted that Prime was in breach of its obligation under the Final JVA and that it was unlawful for Prime to continue to retain the US$1 million. Immediate repayment was demanded. Prime did not repay the money and this action was commenced on 30 August 2006.

19 The big problem that the plaintiff faced in putting forward its claim that the defendant was liable to repay it the US$1 million was that in legal terms the defendant was not the recipient of the money. Although in fact it was sent to his account, this was done because he was the agent of Prime, the party with whom the plaintiff was in a contractual relationship, and he had been authorised by Prime to collect the money on its behalf. It was Prime who was a party to the TJVA and the Final JVA and who withdrew from these contracts. Whilst the plaintiff sought to recover the money from Prime in arbitration proceedings, it also asserted a right of recovery against the defendant since he was the controlling mind of Prime and also Prime itself has only a very minimal paid-up capital.

20 As I have said above, the plaintiff pitched its case on two bases: trust and contract. I will deal first with the claim in contract.

The contractual claim

21 In the statement of claim, the plaintiff pleaded that on the basis of the parties' conduct, it was to be inferred that a contract came into being between the plaintiff and the defendant in or around late July/early August 2005 which contract contained the following terms:

(a) that the plaintiff was to make payment of the sum of US$1 million as an upfront payment to secure the Project;

(b) that the defendant would procure that Prime would, at all times, exert its best efforts to secure the Project and its best efforts to achieve the successful realisation and completion of the Project;

(c) that the defendant would procure that Prime would at all times faithfully discharge all its

obligations under both the TJVA and the Final JVA.

22 The conduct that the plaintiff relied on was the demand by the defendant for payment of the sum of US$5 million to secure the Project, the negotiations resulting in the defendant agreeing to accept US$1 million as the upfront payment to secure the Project, and the receipt of the same by the defendant on 3 August 2005.

23 In its submissions on this issue, the plaintiff pointed out that the defendant was the controlling mind and will of Prime. Prime acted solely through the defendant and no one else and the defendant, in turn, decided how Prime would act in respect of any matter. At all material times, KTR and the plaintiff dealt directly with the defendant. Whilst the MOU, TJVA and Final JVA were contracts made with Prime, the issue which arose was whether it was open to the defendant, after having collected the US$1 million advance payment from the plaintiff, to assert that the plaintiff had to look solely to Prime for any remedy it might wish to pursue. It had to be remembered that whether Prime fulfilled its legal obligation under the contracts depended entirely upon the defendant. It was he alone who decided whether Prime would undertake and fulfil its legal obligations under the TJVA and Final JVA.

24 The plaintiff noted that, under cross-examination, the defendant had accepted without reservation that:

(a) the joint venture partners, KTR and the plaintiff, were entitled to assume that the defendant would be the person with the responsibility to make sure that Prime did what it was supposed to do under the two joint venture contracts; and

(b) it was not open to the defendant to say to the joint venture partners that he was not responsible if Prime failed to fulfil its obligations under those contracts.

25 The plaintiff argued that in this situation it was open to the court to infer that, in addition to the contracts which were made between Prime and the plaintiff, there existed a parallel contract between the defendant personally and the joint venture partners pursuant to which the defendant was legally obliged to use his best efforts to make Prime fulfil its obligations under the Final JVA. The plaintiff further submitted that, on the authorities, the test used by the court is whether the parties' conduct is explicable only on the basis of a binding agreement. The plaintiff asserted that if this question is answered in the affirmative, then the court will infer that a contract is entered into between the parties. Further, the court will examine the arrangements and, having regard to the benefits conferred on one party, as well as the detriment suffered by the other party under that arrangement, will ask itself if an objective bystander would have concluded that the benefit was conferred in consideration of a promise made by the other party.

26 The authority cited for the above proposition was *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Australia) Pty Ltd*, 1988 NSW Lexis 8785 where the Supreme Court of New South Wales found, on the facts, that there was a contract to be inferred from the conduct and statements made by the parties. The court said (at [*23] to [*24]):

> It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of "offer", "acceptance", "consideration" and "intention to create a legal relationship" which are the benchmarks of the contract of classical theory… Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words …. *The question is in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement*. [emphasis added]

It should be noted that in the cited case, there was no concluded agreement but there was performance by the parties; the court then implied a contract.

27 The plaintiff submitted that in this case a contract may be inferred from the following circumstances and conduct of the parties:

(a) at all times, Prime was a $2 company. The defendant was Prime's controlling mind and will;

(b) the TJVA and JVA were contracts in respect of a Project involving large sums. Indeed, under the Heads of Agreement, Prime stood to receive the sum of US$5 million per oil field block;

(c) although the plaintiff was not legally obliged to do so at the time, the plaintiff was requested to make and did make an advance payment of US$1 million to "secure the Project"'

(d) whether Prime fulfilled its obligations under the JVA was entirely dependent upon the defendant, its controlling mind and will.

(e) the defendant accepted under cross-examination that the plaintiff was entitled to assume that the defendant would be the person with the responsibility to make sure that Prime did what it was supposed to do under the JVA; and

(f) the defendant also accepted under cross-examination that it was not open to him to say to the plaintiff (and KTR) that he was not responsible if Prime failed to fulfil its obligations under the JVA.

28 I am not convinced by the above submissions. I accept the principle that a contract may be inferred from conduct but, as the Supreme Court of New South Wales was at pains to point out, such a determination can only be made when all the circumstances support it. The circumstances of *Integrated Computer Services Pty Ltd* (cited at [26] above) were very different from those that existed here. As the defendant submitted, the circumstances that existed in this case do not provide a basis to imply that a parallel contract existed between KTR, the plaintiff and the defendant personally. The plaintiff had only contracted with Prime and KTR and those contracts were documented and the terms that each party had to abide by were freely expressed in the documents. There was no void that needed to be filled by an implied contract.

29 From the outset, the plaintiff was aware that whilst it was negotiating with the defendant, the company that would be contracting with it was the company run by the defendant, *ie*, Prime. This is apparent from the Heads of Agreement signed in Perth. The plaintiff must therefore have been aware that the defendant was not undertaking personal liability in his dealings with the plaintiff. It was open to the plaintiff if it was uncomfortable with Prime to insist that the defendant must either contract personally with it or guarantee Prime's performance. It did not do this. The fact that whether Prime fulfilled its obligations under the JVA was dependent on the defendant causing it to do so and the further fact that the defendant agreed that the plaintiff was entitled to assume that the defendant had the responsibility to make sure that Prime fulfilled its obligations under the Final JVA, cannot lead to the implication of a direct contract between the plaintiff and the defendant. This is because the defendant and Prime are separate legal entities and the defendant as the director of Prime would in that capacity have a fiduciary duty to Prime to ensure that Prime fulfilled its contractual obligations. The argument put forward by the plaintiff in circumstances like these would, if accepted, have the potential to impose liability by way of a collateral contract between the directors who control any company and third parties who contract with that company. In my judgment, the circumstances relied on by the plaintiff are inadequate to support the plaintiff's contention.

30 Further, the plaintiff's case of two contracts was put to Tan Sri Mohan. He denied that there were two contracts. He conceded that the defendant represented Prime and stated that the defendant spoke on his own behalf only until the agreements were drafted when the company (Prime) was introduced. Prior to this part of his evidence, Tan Sri Mohan, when asked whether there was a contract between the plaintiff and the defendant personally, answered: "Yes, … because he represented Prime". Later, when he was asked whether there was a contract between and the plaintiff and Prime, he again answered in the affirmative. The third question was whether these were the same contracts or two different contracts and his answer was that they were the same contract. I agree with the defendant that this evidence made clear that there was no parallel or collateral contract between the parties in that Tan Sri Mohan was trying to imply a personal covenant on the part of the defendant in the existing contract. It is not possible to add such a personal covenant into the existing contracts as they were written contracts and therefore the parole evidence rule set out in s 93 of the Evidence Act (Cap 97, 1997 Rev Ed) would not permit the admission of oral evidence to vary the written contracts.

31 Subsequent events did not disclose any evidence of a collateral contract either. All correspondence sent by or on behalf of the plaintiff and by or on behalf of KTR regarding the Project were addressed to Prime and not to the defendant. Even after the dispute had arisen, the plaintiff in a letter of 20 February 2006 alleged that Prime had failed or refused to facilitate the successful implementation of the Project. No such allegation was directed against the defendant personally. None of the plaintiff's internal documents made any reference to a collateral contract or understanding that the defendant had undertaken personal obligations. The demands by the plaintiff and its Malaysian solicitors for the return of the US$1 million were made to Prime and not to the defendant. Mr Navaratnam, when questioned about this, confirmed that until the receipt of legal advice, the plaintiff had never thought of a personal contract between it and the defendant.

32 For the reasons given above, the plaintiff's claim on the basis of a direct contract between it and the defendant must fail. The plaintiff also put forward an alternative claim in contract. This was that Prime was in breach of contract in repudiating the Final JVA and that the defendant had to be held responsible for that breach as the alter ego of Prime. I will consider this issue after I deal with the claim in trust.

The claim in trust

33 The planks of the plaintiff's claim in trust are as follows:

(a) an agent who receives trust property lawfully but who then deals with it in a manner inconsistent with the terms of the trust is liable for breach of trust;

(b) the sum of US$1 million which the plaintiff advanced to the defendant was not a sign-on fee but was advanced to secure the Project. Therefore the defendant was not entitled to treat that money as if it belonged to him or Prime but was legally obliged to apply the money only for purposes connected with the Project with a view to advancing the Project;

(c) at the least, the defendant was liable to the plaintiff for the sum of US$350,511.71 because when Prime withdrew from the Project in mid February 2006, the Project came to an end and the defendant was obliged to refund this sum (which was then the balance in his Singapore account) to the plaintiff;

(d) the defendant was also liable to the plaintiff for two additional payments totalling US$50,000 which he had paid out to two individuals in August and October 2005 as these

payments had not been made to further the Project; and

(e) even if the defendant was not liable to the plaintiff for breach of trust as an agent of Prime, he would be liable for breach of trust as the alter ego of Prime.

34 In relation to the law, the plaintiff relied on texts and authorities establishing the proposition that an agent or stranger to a trust can be held liable as a constructive trustee if it can be shown that the agent or stranger to the trust received trust property knowing it to be such but thereafter dealt with it in a manner inconsistent with the terms of the trust. The plaintiff placed particular reliance on the following paragraphs from *Halsbury's Laws of Singapore*, Vol 9(2), (2003, Lexis Nexis):

> **[110.585] Knowing receipt or dealing: recipient liability**
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> A recipient may be liable where he (1) knowingly receives trust property in breach of trust ('receipt of property constructive trust'); or (2) receives trust property without notice of the trust and subsequently deals with it in a manner inconsistent with the trusts of which he has become cognizant ('wrongful dealing constructive trust'); or (3) receives trust property knowing it to be such but without breach of trust and subsequently deals with it in a manner inconsistent with trust. In such cases, the description of the recipient as a constructive trustee is misconceived. Such a person is not a trustee at all, even though he may be liable to account as if he were.
>
> Head (3) above relates to a person, usually an agent of the trustees, who receives the trust property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust. He is liable to account as a constructive trustee if he received the trust property knowing it to be such, although he will not necessarily be required in all circumstances to have known the exact terms of the trust.
>
> …
>
> **[110.587] Receipt of trust money**
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> The law is reluctant to make a mere agent a constructive trustee. Accordingly a banker, broker, solicitor or other stranger to the trust who lawfully receives money, for not his own benefit, from a trustee which he knows to be part of the trust property does not become a constructive trustee of it in relation to the beneficiaries unless he either misappropriates it or is guilty of some other wrongful act in relation to that money. To act wrongfully, he must be guilty of (1) knowingly participating in a breach of trust by his principal; or (2) intermeddling with the trust property otherwise than merely as an agent and thereby becoming a trustee de son tort; or (3) receiving or dealing with the money knowing that his principal has no right to pay it over or to instruct him to deal with it in the manner indicated; or (4) some dishonest act relating to the money.

In this connection, the case of *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 which recognises (at 221) that there is ample authority for the proposition that monies paid by A to B for a specific purpose which has been made known to B are clothed with a trust, is also apposite.

35 To bring its claim within those principles, the plaintiff recognised that it had to establish that:

(a) the sum of US$1 million that the defendant received from the plaintiff on 3 August 2005

was subject to a trust;

(b) the defendant knew that the sum of US$1 million was subject to a trust; and

(c) the defendant dealt with the sum in a manner inconsistent with the terms of the trust.

Was the payment of US$1 million subject to a trust?

36 How this issue is determined depends on the purpose for which the sum of US$1 million was paid to the defendant. The plaintiff's version was that the sum was paid to the defendant "to secure the Project". As such the defendant was not entitled to treat the money as belonging to him or Prime but was obliged to utilise it for the purpose of securing the Project and/or of advancing the Project. The defendant, on the other hand, contended that the US$1 million was a non- refundable upfront payment to secure the signing of the Final JVA, which purpose was fulfilled.

37 The defendant in advancing his case on this issue, laid great stress on the letter of 3 August 2005 which he described as the key document setting out the purpose of the US$1 million payment. He emphasized that it had been prepared by the plaintiff, a listed company with both in-house and external solicitors. The fundamental assumption must be that the plaintiff would have put down in that letter any terms that had been agreed; and the absence of any particular term must mean that it was not agreed. The letter described the sum of US$1 million as "being an upfront payment to secure the Project as stipulated under the Tripartite Joint Venture Agreement …" and said nothing else about the terms of the payment. It was significant that the term "up front" rather than "deposit" or "advance" was used to describe the payment. No reason was given as to why an advance or deposit was required. If payments were to be made to third parties, the plaintiff would have disbursed these directly. Further, the defendant had made it clear to the plaintiff that Prime did not accept that the payment would be refundable and the plaintiff had effected the payment with this knowledge.

38 The defendant also commented that the plaintiff was not clear what was meant by "to secure the successful implementation of the Project". He asserted that Tan Sri Mohan had modified the plaintiff's position to state that Prime's obligation was to use best efforts for a successful implementation. This was explained further to mean getting the necessary data, setting up the joint venture company and getting a technical operator on board. In Perth, Tan Sri Mohan had already promised Prime US$5 million per oil field block for the same steps but in court he said that the payment of US$1 million covered the same obligations. Further, the very first draft of the minutes of the plaintiff's board meeting held on 25 August 2005 described the payment as a payment to secure entry to the Project. Entry would be secured by the signing of the Final JVA.

39 Building further on the wording of the letter of 3 August 2005, the defendant dealt with what was meant by securing the Project "as stipulated under the [TJVA]". The TJVA, he said, was an interim agreement to govern the relationship between the parties until the Final JVA was signed. The TJVA defined the term "Project" as used in that document to mean the oil and gas wells located in the Desa Mata Air, Desa Bangun Jaya and Desa Sempayau districts of East Kalimantan, Indonesia. Recital 8 and cl 1.2 of the TJVA required the plaintiff, KTR and Prime to enter the Final JVA to define their complete roles and responsibilities in the Project. Pursuant to clause 6, the TJVA was to remain valid and binding until the signing of the Final JVA which would only happen after the plaintiff's due diligence had been completed. Securing the Project therefore meant securing the plaintiff's participation as envisaged in the TJVA, that is to bind KTR until due diligence had been carried out and to achieve the purpose of the TJVA, to wit, the signing of the Final JVA. The plaintiff was anxious to enter the oil and gas industry and offered very large sums to secure such entry. Once the TJVA was signed, the final step to secure such entry was the Final JVA.

40 Whilst the defendant relied mainly on documents to establish his position on the purpose for the payment, the plaintiff chose to emphasise the defendant's evidence in court. It submitted that his version was completely undermined by many inconsistencies and shifts in his testimony. It described his evidence on this issue as unreliable, confusing and contradictory and submitted that it should be rejected in toto. Secondly, it contended that the acknowledgement of 3 August 2005 and the circumstances leading to the US$1 million payment supported its version rather than the defendant's. Thirdly, in the plaintiff's view, the other contemporaneous documents also supported its version.

41 The plaintiff's submissions on the twists and turns resorted to by the defendant while he was on the stand are, substantially, unanswerable. On this issue the defendant was a very bad witness indeed. He was one of those witnesses who cannot stop talking and elaborating on his evidence until the whole becomes an elaborate tangle.

42 As the plaintiff pointed out, the shifts in the evidence started from the very beginning: from the defendant's account of the telephone conversation he had with Tan Sri Mohan before the two men met in Perth. He initially testified that during this conversation, there was no discussion about the up front fee. In almost the next breath, the defendant said that there was a mention "in passing" that there would be a payment "but we didn't go any further than that". Minutes later, he asserted that during this conversation, Tan Sri Mohan informed the defendant that if he got KTR to grant the plaintiff the POA, Tan Sri Mohan would ensure that Prime was paid a sign-on fee. Therefore, the defendant then expected that Prime would receive the sign-on fee if KTR signed the POA. The defendant however changed tack again to say he expected the sign-on fee to be paid "before the joint venture was signed" but shortly thereafter he reverted to his earlier position of expecting payment on signing of the POA.

43 There were more contradictions to follow in relation to the defendant's assertion of when the sign-on fee was to be paid. At various points the defendant confirmed that there was a firm agreement reached between him and Tan Sri Mohan in Perth that Prime would receive the fee the moment it succeeded in getting the plaintiff a confirmed role in the Project, even if the plaintiff's exact shareholding was not confirmed. He also said that the agreements to be signed in Indonesia with KTR would confirm the plaintiff's role and therefore following their execution Prime would be entitled to its sign-on fee. When asked why he did not ask for payment of the sign-on fee immediately after the signing of the POA and TJVA, in response the defendant asserted that he had done so. It was then pointed out that no such assertion appeared in his affidavit. The defendant then changed his evidence and said that, at that point, the plaintiff's shareholding in the Project was not confirmed and the fee was only due after the Final JVA confirming the parties' shareholdings in the Project had been signed.

44 The evidence that the sign-on fee would only be payable upon the signing of the Final JVA was inconsistent with his earlier evidence that the fee would be paid once agreements were signed in Jakarta securing the plaintiff's role in the Project. It was also inconsistent with paragraph 44 of his affidavit where he stated that in Singapore on 30 July 2005 he had told the plaintiff's representative that Prime had already done all it needed to do to receive the sign-on fee.

45 The defendant had also testified that Tan Sri Mohan had insisted that the plaintiff's exact shareholding in the Project had to be confirmed before the fee was paid. He was asked why, if that was so, the parties had met in Singapore immediately after the signing of the TJVA to, as he alleged, discuss the payment of the fee. In response, he explained that it was only initially that Tan Sri Mohan had wanted the fee to be paid after the confirmation of the shareholdings. After meeting the Indonesians, however, he became very comfortable with them and was prepared to pay the sign-on fee immediately after the POA and TJVA were signed. That explanation, however, contradicted

another piece of the defendant's testimony which was that it was after the POA was signed that Tan Sri Mohan insisted he needed the Final JVA to be signed before the sign-on fee would be paid.

46 At another point in the evidence, the defendant further contradicted his previous testimony. He said that the agreement entitling Prime to payment of the sign-on fee after the conclusion of the Final JVA was made in Perth. This contradicted the earlier statement that in Perth the agreement was that the sign-on fee would be payable once agreements were signed confirming the plaintiff's role in the Project. Confronted with this inconsistency, the defendant shifted his position and asserted that the agreement providing for payment of the sign-on fee after the conclusion of the Final JVA was only reached in Jakarta.

47 The defendant did not take issue with the plaintiff's assertions regarding the contradictions in his evidence. In his view, these shifts in evidence were not material when the evidence of the plaintiff, in particular that of Tan Sri Mohan, was considered. Both parties, the defendant averred, did not give a clear version of events because the earlier discussions between the parties were not clear. In any case, the paramount issue was the purpose of the US$1 million payment and whether it was refundable. The question turned on the events that immediately preceded the payment and the contemporaneous documents and the purported inconsistencies did not touch on these key events.

48 I do not agree that the inconsistencies in the defendant's testimony are not germane to the issue of the purpose of the payment. The manner of the defendant's account of why the payment was made and the course of events that allegedly led to the plaintiff agreeing to pay Prime a non-refundable sign-on fee was material in my assessment of the credibility of his account. The defendant shifted positions so many times in the course of his testimony that I am not able to decide which part of his testimony was true and which part was not. That considerably weakens his assertion that the plaintiff's case on the reason for the payment was false. No doubt there were some inconsistencies in Tan Sri Mohan's evidence as pointed out in the defendant's submissions. I do not specify them here because I am satisfied that where they existed they were minor and, as the plaintiff pointed out in its Reply Submissions, in a couple of cases the alleged inconsistency was not borne out. Whatever the minor inconsistencies in the plaintiff's evidence were, they paled in comparison with the defendant's tectonic changes of position.

49 The plaintiff's version is, however, supported by more than the testimony of Tan Sri Mohan. There is, first of all, the wording of the acknowledgement which the defendant signed on 3 August 2005. That was drafted by the plaintiff and it described the payment as an "up front payment to secure the Project". The defendant's argument was that these words "secure the Project" meant that the defendant had to procure that KTR signed the Final JVA. The plaintiff, however, argued that they meant that the payment was being made to "advance" the Project. It pointed out that if its intention had been to refer to the signing of the Final JVA the language would have been "to secure Sitt Tatt Berhad's involvement in the Project" and not simply "to secure the Project". Whilst, obviously, this is a self-serving argument, it is a sensible one. On a plain reading the words "to secure the Project" indicate that the payment was being made to advance the Project, or, using the defendant's language "to get the Project going". These words are also consistent with Tan Sri Mohan's account that the defendant had explained to him that money was needed to get hold of certain information required for the Project and, later, that the Indonesians were in Singapore and required the payment urgently. It is also significant that the defendant should have insisted on this payment after the signing of the TJVA when, if his evidence was to be believed, it was not due until the Final JVA had been signed. If that was the case, then the defendant had no ground to even ask for the US$1 million in July 2005.

50 The defendant in his submissions was in part contending that one could not simply have regard

to the phrase "to secure the Project" without considering the second half of the sentence which read "as stipulated under the TJVA". Looking at that portion of the sentence, the intention was to secure the plaintiff's participation in the project by signing the Final JVA. In my view, that is not the way to read the sentence. Rather the reference to the Project in conjunction with the TJVA was obviously meant as a definition of the term "Project" and to indicate that this definition was the same one as given to that term in the TJVA.

51 Reading the words to "secure the Project" as meaning an up front payment which was intended to be used to advance the Project would also be consistent with the same words as used in the MOU. Clause 1.1 of the MOU stated that "the parties shall negotiate with one another in good faith … to secure a project …." The words "secure the project" also appear in clause 1.2 of the MOU. The defendant agreed in court that the purpose of the MOU was for Prime and KTR to work together "to get the Project going". He argued that in the context of the MOU the phrase "to secure the project" in clauses 1.1 and 1.2 meant "to get the Project going". Later, under cross examination, the defendant used the phrases "to get the Project going", "to move the Project" and "to secure the Project" interchangeably.

52 It is also important to have regard to the fact that the payment was described as an "upfront" payment. The defendant had agreed in court that under the terms of the TJVA, the parties were not obliged to fund the Project pending the execution of the Final JVA and, at that time, the parties knew that it might take some time for the JV Company to be set up in Indonesia. He also agreed that pending the setting up and capitalisation of the JV Company, there were various expenses which were needed to get the Project going and neither Prime nor KTR was going to fund the Project in this interim period. He also agreed that nevertheless all parties wanted the Project to be funded pending the execution of the Final JVA in order to advance the Project expeditiously. The defendant had brought the plaintiff into the Project basically as a source of funding but knew that no obligation to fund arose before the signing of the Final JVA. The foregoing background makes it probable that the US$1 million payment was not intended as a sign-on fee but was a payment made pending the formation and capitalisation of the JV Company to provide funds to meet various expenses required to get the Project going. These circumstances are also consistent with Tan Sri Mohan's evidence regarding the funding needed for the data pack.

53 Additionally, the defendant could not produce any documentary support for his case that Prime was entitled to a sign-on fee. The defendant's story was that this fee was discussed in Perth at the same time as the terms of the Heads of Agreement were. It is surprising that reference to the fee was not included in the Heads of Agreement. That document was produced by Mr Humphrys who had no difficulty with reducing the terms of the Heads of Agreement into writing. There was no acceptable explanation as to why he could not have done the same had it been agreed in Perth that Prime would be paid a sign-on fee once the Final JVA was signed. The defendant said that writing was not necessary because he trusted Tan Sri Mohan. This was not a viable explanation since the Heads of Agreement was put into writing. The defendant's explanation for that was that it was Tan Sri Mohan who had wanted to document that agreement but, even if that was so, given that Tan Sri Mohan had wanted something in writing, it would only have been sensible for the defendant to ensure that the writing was complete and reflected all that was agreed. Since the writing was drafted by Mr Humphrys, there would have been no difficulty in the defendant giving him instructions to include this term before the document was given to Tan Sri Mohan for approval.

54 The defendant alleged that before the JV Company was formed, it was necessary to secure the plaintiff's involvement in the Project and that this was to be achieved by Prime paying US$600,000 to the two parties connected to KTR. He also considered that it was noteworthy that both Tan Sri Mohan and Mr Navaratnam knew that money was going to be paid to Indonesian parties. However, in

cross-examination, when asked if there were expenses that were needed to get the Project going until the JV Company had been set up and capitalised, the defendant only mentioned the expenses relating to the setting up of the JV Company itself. He did not mention that he needed to pay US$600,000 to KTR personnel for this purpose. Whilst the plaintiff's representative may have known that payments were being made to Indonesians, Tan Sri Mohan's evidence was that as far as he was aware, what he was told was that the funding was required because the Indonesians had asked for an up front payment of US$1 million to purchase a data pack from BP Migas and that the payment would have to be channelled through KTR. Under cross-examination, Tan Sri Mohan maintained that this funding provided by the plaintiff was for the purpose of acquiring information for the Project, and in this respect his evidence was corroborated by Mr Navaratnam. Additionally, there was evidence that Asian Oil Company subsequently asked for the same data pack and some indication that some data could be purchased from Pertamina. Tan Sri Mohan also testified that the plaintiff would not have paid a sign-on fee of US$1 million before the plaintiff knew what the terms of the Final JVA were. It follows from this that the plaintiff would also have not have paid the US$600,000 to secure KTR's execution of the Final JVA before it knew the terms of this document.

55 A contemporaneous indication of the state of mind of the plaintiff is obtained from a note of meeting taken by Mr Navaratnam on 3 August 2005. It was written shortly after he, Tan Sri Mohan and Dato Pang met with the defendant in the Four Seasons Hotel in Singapore to discuss the up front payment. According to the note, Mr Navaratnam himself led the negotiations on the basis of the fact that the plaintiff's board wanted to mitigate risks by injecting US$500,000 to the Indonesians directly and asking them to acknowledge this payment as well as to consider it as a deposit if the deal did not go through for regulatory or licensing issues or the Project was not financially feasible. The balance US$500,000 would be paid if and when the operator was found for the Project. Mr Navaratnam noted that the defendant rejected the suggestion completely and in the end the US$1 million was paid to Prime with an acknowledgement of receipt of the fund. It was clear that the plaintiff was not considering making a non-refundable payment but wanted the money to be used for the Project and that was why it wanted an acknowledgement directly from the Indonesians. Further, those minute do not refer to the payment being a sign-on fee. It was also Mr Navaratnam's testimony that the payment was to be used to obtain certain information on the Project via the relevant payments to certain parties. Mr Navaratnam's credibility was not impugned during cross-examination.

56 It is also worth noting that when both the plaintiff and its solicitors by different letters demanded repayment of the upfront fee after Prime pulled out of the Project, neither Prime nor the defendant immediately rejected such demands on the basis that the payment was not an advance but a sign-on fee which Prime was entitled to keep.

57 Having considered the evidence as a whole, I am satisfied that the plaintiff's version is, on the balance of probabilities, the correct one and that the US$1 million was paid to Prime for it to be used to advance the Project and not simply as a sign-on fee which was due because KTR had signed the TJVA or was more or less committed to signing the Final JVA. I therefore accept the plaintiff's submission that when the money was in the defendant's possession, he was aware that the US$1 million was only to be used to advance the Project and that he was not entitled to utilise it for his or Prime's personal benefit. As the extracts from *Halsbury's Law of Singapore* quoted in [34] above make plain, where a recipient of money accepts that money with knowledge of the circumstances which make the money, in law, trust money, the recipient will become a constructive trustee of the money. In this case, if the money had been paid to Prime, Prime would have held it on trust to be used to advance the Project because the money was paid for that specific purpose. The money was paid to the defendant as Prime's agent and on Prime's authority and therefore, the defendant too became a trustee of the money and was responsible for ensuring that it was only used for the specified purpose and no other. The defendant would only be trustee of the money if he knew that it

was trust money. In this case it is not necessary to have a long discussion of the defendant's state of knowledge since it was the defendant who dealt with the plaintiff and KTR on behalf of Prime and therefore was fully aware at all times of the reason for the payment.

58 Alternatively, since the fee was paid for a specific purpose, then when that purpose failed, the case of *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 ("*Quistclose*") is the authority for the proposition that thereafter the balance of the money would be held on a resulting trust for the person who had provided the funds for that purpose.

59 The defendant argued that in law the plaintiff must show he was an agent of the plaintiff before he could be made liable as a constructive trustee. No authority was cited in support of this proposition. It runs counter to the principles set out in *Halsbury's Law of Singapore* which indicate (see [34]) that where an agent receives money belonging to his principal which he knows is subject to a trust, then he can become liable himself for breach of trust if he deals with the money in a way that to his knowledge does not conform to the requirements of the trust notwithstanding that he has been instructed by his principal to deal with it in this way. It is clear that the principal concerned is the recipient, not the payer of the funds. In this case, the principal would be Prime, the intended recipient and owner of the money, and not the plaintiff. Therefore, the defendant's liability would arise because he was Prime's agent and should have dealt with the money in accordance with the purpose for which it was remitted to him on behalf of Prime.

Did the defendant deal with the money in a manner that was inconsistent with the trust?

60 In its closing submissions relating to this issue, the plaintiff did not assert that the defendant had dealt with the whole sum of US$1 million in a manner that was inconsistent with the trust. Its submissions were restricted to two smaller amounts *viz* the sum of US$350,511.71 and US$50,000. These amounts were made up as follows:

(a) the balance of US$350,511.71 which was standing to the credit of the defendant's account on 14 February 2006 and which he subsequently disbursed as follows:

i. on 7 March 2006, US$5,000 was sent to an unknown party;

ii. on 2 May 2006, US$5,528.49 was sent to a Malaysian firm of solicitors; and

iii. on 2 June 2006, US$340,000 was remitted to Prime itself.

(b) the sum of US$50,000 comprised a payment of US$30,000 which was paid out by the defendant on 16 August 2005 and a payment of US$20,000 that was made to Pak Sany on 7 October 2005.

61 In respect of the sum of $350,511.71, the plaintiff's case was that when Prime withdrew from the Project on 14 February 2006, the Project came to an end. The Project was conceived in the contemplation that all three parties would work together and therefore once one of them withdrew, this tripartite project necessarily ended. Once the Project ended, the balance of the US$1 million which was then standing in the defendant's account (US$350,511.71) was held by the defendant on a resulting trust for the plaintiff in accordance with the principles established in the *Quistclose* case. Alternatively, the defendant was obliged to account to the plaintiff for the sum as a constructive trustee as he knew that the money was intended to be used to advance the Project.

Did Prime's withdrawal bring the Project to an end?

62 Before I can deal with those arguments, I have to consider a sub-issue raised by the defendant's response. The defendant argued that Prime did not breach the Final JVA by withdrawing. It was Prime's position that the JV Company had to be formed as soon as possible since it was to be the prime mover of the Project. Prime understood that the JV Company was needed in order to get a technical operator on board and to go ahead with regulatory approvals. The failure of KTR to set up the JV Company and the failure of the plaintiff to fund the JV Company coupled with the plaintiff's intention to get a technical operator on board without that company being incorporated were the reasons why Prime pulled out. Prime was justified in pulling out in view of the breaches of contract on the part of the plaintiff and KTR. However, even if the pulling out was not justified, no loss arose from Prime's withdrawal. Its withdrawal removed the obstacles to the signing of a letter of intent with Asian Oil Company and permitted the plaintiff and KTR to continue with the Project. The correspondence showed that they did continue and the Project only foundered in May 2006 over the lack of funding by the plaintiff. That was not caused by Prime.

63 The first question is on what basis the plaintiff could be said to be in breach due to the fact that the JV Company had not yet been formed. The defendant's response was that it was the plaintiff's duty to fund the JV Company and to capitalise it and that because the plaintiff did not advance the necessary funds the setting up could not take place. However, there is nothing in the Final JVA that requires the plaintiff to solely fund the Project or solely capitalise the JV Company. In fact, s 5.03 (ii) states that each of the party has to subscribe for the percentage of shares specified against its name in s 1.02. Further, s 9.01 which deals with financing of the JV Company provides that all financing needed by the company in excess of the funds which the company would generate itself shall be obtained through borrowings from financial institutions.

64 Whilst there was a meeting of the parties on 12 October 2005 to discuss the setting up of the JV Company and the initial capitalisation required, the plaintiff did not agree at that meeting to solely capitalise the JV Company. Draft minutes of the meeting recorded that it had been agreed that US$5 million would be deposited in the account of the JV Company and that this US$5 million would be funded by the plaintiff. The plaintiff however, refused to sign those minutes and did not accept that they accurately reflected the agreement reached at the said meeting. On 17 October 2005, Mr Navaratnam wrote to KTR, making amendments to the minutes and stating that while Pak Sulaiman had mentioned at the meeting that in his view a sum of US$5 million would be required ultimately as the paid-up capital, what had been agreed was that the extent of this would be checked up on and the ultimate paid-up capital could be paid in progressive stages. This was because there had been a dispute between the representatives of KTR and the plaintiff as to the quantum of the initial paid-up capital required. Whilst the plaintiff was willing to fund the extent of the paid-up capital required, it did not agree to pay US$5 million within any particular period. The plaintiff's Indonesian solicitors had informed them that a sum of between US$250,000 and US$500,000 would suffice. A further meeting was held to discuss the issue on 15 December 2005 and at that stage, KTR informed the parties that the JV Company required a minimum capital of US$500,000 in order to obtain a business licence for mining activities. The partners agreed to look into the matter. It should also be noted that no deadline was provided in the Final JVA for the setting up of the JV Company. Thus, the defendant had no basis to assert that the plaintiff and KTR were in breach of the Final JVA because the JV Company was not set up by 14 February 2006 or because the plaintiff had not provided funding of US$5 million for the capitalisation of the JV Company.

65 In court, in trying to justify Prime's withdrawal, the defendant laid emphasis on the proposed arrangements with Asian Oil Company. He stated that Prime did not want to sign the proposed letter of intent with Asian Oil Company before the JV Company had been formed. It insisted that the letter be signed by the JV Company itself. Secondly, Prime did not wish to stop the other two joint venture partners from proceeding with the Project just because it did not find the commercial terms of the

proposed arrangement with Asian Oil Company attractive. It therefore withdrew.

66 As the plaintiff pointed out, there was nothing in the Final JVA which prevented the joint venture partners from signing a non-binding letter of intent with Asian Oil Company pending the formation of the JV Company. In fact the letter of intent was drafted to provide that the eventual contract would be concluded between Asian Oil Company and the JV Company. Since the letter of intent was not to be legally binding, there was no basis on which Prime could justify not signing it when it was clear in all the circumstances that in order for the parties to get Asian Oil Company on board as the technical operator of the Project, they needed to give something in writing to Asian Oil Company to indicate their intention to work with Asian Oil Company on the Project. Thus the proposed signing of the letter of intent did not provide Prime with a legal justification to withdraw from the Final JVA.

67 The fact that Prime did not wish to stop the other two joint venture partners from proceeding with the Project was not a legally acceptable reason for its withdrawal. The Final JVA did not contain any opt-out provision and therefore once Prime had signed it, it was obliged to observe its covenant in s 4.02 (i) to take all necessary and/or reasonable steps on its part to give full effect to the provisions of the Final JVA. Taking such reasonable steps would not include unilaterally withdrawing from the Final JVA. Further, the fact that Prime did not find the commercial terms of the proposed arrangement with Asian Oil Company attractive was also not a valid reason for its withdrawal. There was nothing in the Final JVA which prohibited the commercial terms which Asian Oil Company wanted and which Prime objected to. At the material time, Asian Oil Company was the only party with the technical expertise and financial muscle to undertake the Project. Whilst Prime had previously introduced a different party as the prospective operator, this party was not acceptable to the plaintiff as it was not willing to provide financing for the Project. By early 2006, the parties had no viable alternative to Asian Oil Company to fill the position of technical operator.

68 Based on the evidence, I also accept the plaintiff's submission that it was Prime's unreasonable conduct in refusing to agree to the letter of intent and its subsequent unilateral withdrawal from the Final JVA that undermined the entire Project and brought it to an end.

Application of the monies in the defendant's account

69 Dealing first with the sum US$350,511.71 standing to the credit of the defendant's account on 14 February 2006, the defendant's evidence was that he applied this sum as follows:

(a) he remitted US$5,000 to an unknown party on 7 March 2006 (he explained that this sum was used to pay hotel bills);

(b) he remitted US$5,528.49 to the firm of Rahman Too and Co on 2 May 2006 in settlement of the legal costs incurred by Prime in defending the arbitration proceedings which the plaintiff had commenced against Prime; and

(c) he remitted US$340,000 to Prime's account on 2 June 2006.

70 Prime was obliged to use the US$350,511.71 in order to secure or advance the Project. The defendant, knowing that, was equally obliged to ensure that the money was used for that purpose and that purpose only. He did not show how the remittances listed in [69] above advanced the stated purpose. When Prime withdrew from the Final JVA on 14 February 2006, it could no longer use the money for the stated purpose. It should therefore have returned the same to the plaintiff and the defendant, as Prime's agent in possession of the funds, should have acted accordingly instead of

paying out the money to third parties for reasons that had nothing to do with advancing the Project or paying Prime itself the balance. I therefore hold that the defendant acted in breach of trust in making these payments and is responsible to reimburse the plaintiff the sum of US$350,511.71.

71 Next I turn to the plaintiff's claim for a further US$50,000. Its case was that the defendant committed a breach of trust in paying out two sums totalling this amount. The first was the sum of US$30,000. This was paid on 16 August 2005 into the account of one Yau Mei Ling. In court, the defendant said that Yau Mei Ling was the wife of one Johnny who had introduced him to Tan Sri Mohan and that the sum was paid to Johnny as an introduction fee. He also said that he knew that Johnny would not be applying the money towards the Project. Then on 7 October 2005, the defendant paid Pak Sany US$20,000. According to the defendant, the latter had asked for this additional sum because "he was going to meet up with Migas".

72 I agree with the plaintiff's submission that the payment of US$30,000 to Johnny was a misapplication of trust money because the defendant clearly knew that the money would not be applied towards the Project. The defendant would therefore be liable to the plaintiff for this sum and I hold that he must repay it.

73 In relation to the sum of US$20,000 to Pak Sany, the plaintiff argued that it was also a misapplication of trust money because there was no indication that the defendant had any basis for believing that the money would be applied to advance the Project. There was simply the defendant's bare allegation that Pak Sany had asked for the additional sum because he was going to meet BP Migas. Whilst I recognise that there was no other evidence supporting the purpose of the payment, I do not find this explanation improbable. From the time that Tan Sri Mohan was in Jakarta, he knew that money would have to be paid to the Indonesians for the purpose of acquiring information and that such information was possessed by Pertamina and BP Migas. The first few payments from the upfront fee were made to the Indonesians and the plaintiff had no quarrel with this. I accept that this additional payment which was only two months after the first payments were made to the Indonesians and at a time when parties were working on getting the necessary regulatory approvals was, on the balance of probabilities, made for the purpose of advancing the Project.

74 I have found that the defendant is liable as trustee to repay the plaintiff the sums of US$350,511.71. This finding is correct whether the trust arose at the moment when the money was paid to the defendant on behalf of Prime or whether it became repayable to the plaintiff on the basis of a resulting trust which arose when the purpose for which the payment was made failed. As far as the sum of US$30,000 is concerned, however, the defendant's liability to repay this only arises on the basis that from the beginning the fee was received on trust to be applied for a particular purpose only.

75 As far as the balance of the fee is concerned, *viz* the sum of US$600,000, the evidence was that the defendant paid sums totalling this amount to two officers of KTR in early August 2005. At the time the plaintiff knew that payments were to be made to the Indonesians but did not know precisely how much would be paid. Although it appears from the defendant's evidence in court that these payments did not relate to the data pack from BP Migas, there is insufficient evidence to establish that these payments were not made for the purpose of securing the Project and therefore they cannot be reclaimed on the same basis as the sums mentioned in [75].

Claim against the defendant as alter ego of Prime

76 The plaintiff had contended that if the defendant was not liable as an agent to repay the sum of US$350,511.71 which was standing in his account after the Project came to an end, he should be

held liable for Prime's breach of trust under the alter ego doctrine. It is not necessary to consider this argument in this context in view of my findings on the defendant's liability as Prime's agent.

77 The plaintiff had a further claim against the defendant on the basis that he was Prime's alter ego. It argued that in the circumstances of the case, it would be appropriate for the court to pierce Prime's corporate veil and hold the defendant personally liable for Prime's final repudiation of the Final JVA. It was the defendant who personally steered Prime to repudiate the Final JVA. As the alter ego of an AUD $2 company, who was answerable to no one else and who used Prime as he wished, the defendant could not make Prime a shield for himself and seek to avoid the damages suffered by the plaintiff on account of Prime's repudiation of contract.

78 I cannot accept that submission. The separate legal personality of a company was established more than a hundred years ago in the famous case of *Salomon v A Salomon & Co Ltd* [1897] AC 22. Following that case, it is an accepted principle of law that, as stated in *Mayson, French & Ryan on Company Law* (Stephen W Mayson et al, Blackstone Press, 18th ed, 2001] at p 145:

> Persons are entitled to incorporate companies for the purpose of separating their business affairs from their personal affairs or for the purpose of separating the affairs of one part of a business from another part. In doing so they are relying on the separate personalities of the companies they incorporate and this separate personality is respected by the courts, even if it is to the detriment of the incorporators.

79 It is correct that from time to time the courts have ignored the corporate separate personality claim and have ascribed the companies' rights and/or liabilities to another person. This has been referred to as lifting or piercing the corporate veil but there are only limited circumstances in which this course can be taken. In the case of *Adams v Cape Industries Plc* [1990] Ch 433, the English Court of Appeal said at p 536:

> … save in cases which turn on the wording of particular statues or contracts, the court is not free to disregard the principle of *Salomon v A Salomon and Co. Ltd* … merely because it considers that justice so requires.

As the defendant submitted, the general proposition in law is that parties are entitled to protect themselves by creating companies even if these are effectively one man companies and that those dealing with such companies can protect themselves by requiring personal guarantees from the party who runs the companies as noted by Toulson J in his judgment in *The Rialto* (No 2) [1998] 1 Lloyd's Rep 322 at 329.

80 In *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98, following the principles established in *The Rialto*, I held that the courts would pierce the corporate veil where it was merely a device, façade or sham. In this connection, a sham referred to acts done or executed by parties to the sham that were intended by them to give to third parties the appearance of creating between the participating parties legal rights and obligations which were different from the actual rights and obligations which the participating parties intended to create.

81 In this case, all parties knew that the defendant was the controlling mind behind Prime. They also knew that they were contracting with Prime and not the defendant. Prime had an office in Perth. It operated its own bank account, its own assets, telephone line, fax line and letterheads. As the defendant submitted, the mere fact that he held all the shares in Prime would not make him liable for Prime's debts. There was no assertion of any impropriety in the defendant or Prime's dealings and Prime had not been used by the defendant to further any improper purpose. Prime's venture with the

plaintiff and KTR was a *bona fide* commercial transaction. Thus there was no evidence that Prime had been created as a sham or a façade to shield the defendant from responsibility for nefarious transactions. No false picture was presented to KTR in its dealings with Prime or with the defendant as the representative of Prime. In these circumstances, whilst the plaintiff might have been aggrieved that its contractual recourse was only against Prime, a company with few assets, I cannot simply on the basis that the defendant as the only director of Prime was instrumental in Prime's breach of contract hold him personally liable for that breach.

Conclusion

82 For the reasons given above, there will be judgment for the plaintiff against the defendant for the following:

(a) US$350,511.71;

(b) US$30,000;

(c) interest from the date of the writ; and

(d) costs.