3-10-06

Privy Council Appeal No 48 of 2004

Luis Roberto Demarco Almeida *Appellant*

v.

Opportunity Equity Partners Ltd *Respondent*

FROM

THE COURT OF APPEAL OF
THE CAYMAN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 3rd October 2006

Present at the hearing:-

Lord Hope of Craighead
Lord Steyn
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

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*[Delivered by **Lord Walker of Gestingthorpe**]*

1. On 31 May 2002 Kellock J, sitting in the Grand Court of the Cayman Islands, gave judgment for the defendant Mr Luis Roberto Demarco Almeida ("Mr Demarco") after the trial of an action brought against him by a Cayman exempted company, CVC/Opportunity Equity Partners Ltd ("OEP"). On 24 March 2004 the Court of Appeal of the Cayman Islands (Zacca P and Collett and Taylor JJA) gave judgment setting aside the whole of the judge's order and directing that there should be a new trial. Mr Demarco appeals from the Court of Appeal's order with final leave granted on 5 August 2004.

2. The principal (although by no means the only) ground of appeal relied on before the Court of Appeal was that OEP had not had a fair trial of its claim against Mr Demarco. The trial before Kellock J certainly had many unsatisfactory features, and some of them (including OEP's failure to comply with its obligations in relation to discovery of documents, and significant changes in its case as pleaded and as put forward in interlocutory affidavits) cannot be laid at the judge's door. In other respects the judge's conduct of the trial is open to fairly severe criticism. The ultimate issue for their Lordships is whether there was (as the Court of Appeal found) "a fundamental failure of justice," and what are the principles on which a new trial should be ordered after a civil trial conducted by a judge without a jury.

3. The litigation has been fiercely contested at every stage and has involved allegations (by and against both sides) of forgery, theft of documents, bad faith and contempt of court. The best way to approach the issues will be to start with a brief summary of the undisputed facts. It will then be necessary to see how the disputed issues have emerged, and changed, in the course of the litigation. Finally it will be necessary to examine the judge's conduct of the trial.

The undisputed facts in outline

4. The individuals most closely involved in the matter were engaged in private equity investment in Brazil. There had been extensive privatisations of utilities in Brazil (including telecommunications, transport and sanitation) and these produced many possibilities for profitable investment. A group of companies called the Opportunity Group ("Opportunity") was a prominent player in the financial services market in Brazil and wanted to expand into private equity investment. OEP was a newly-formed company in this group, which was ultimately controlled by a British Virgin Islands company named Opportunity Invest II Inc ("OII"). The leading shareholders in OII were Mr Daniel Dantas ("Mr Dantas") and Mr Persio Arida ("Mr Arida"), a prominent banker.

5. The financial services offered by Opportunity included several managed investment funds. Some were established in Brazil and some were offshore. Some were closed funds and others were open-ended. In this case three funds call for mention.

(a) The Opportunity Fund is a mutual fund (comprising several different sub-funds) established in the Cayman Islands in 1992. Its investment is managed in Brazil by Opportunity Asset Management Inc ("OAM") but its transfer agents are established and operate in the Cayman Islands. During the relevant period there were three

successive transfer agents, a Cayman company within the Midland Bank Group until 1 March 1998, then a Cayman company within the ABN-AMRO Group until 31 July 2000, and then a Cayman company within the UBS Group.

(b) There was an exempt limited partnership called CVC/Opportunity Equity Partners LP ("the limited partnership"). This was established under Cayman law on 3 March 1997 between CVC, a subsidiary of Citibank (which was the limited partner) and OEP (the general partner). It was a close-ended investment vehicle intended to last for a period of eight years (extendable to ten years) and to invest mainly in Brazilian privatised utilities. CVC contributed the funds and OEP contributed the investment expertise. OEP was to be rewarded by periodical management fees and (at the end of the limited partnership) by a share of the final proceeds in excess of Citibank's agreed return (called the "hurdle rate").

(c) The Cayman limited partnership was mirrored by a Brazilian entity called CVC/Opportunity Equity Partners Fundo de Investimento em Acoes ("the Brazilian private equity fund"). It had the same investment managers, CVC/Opportunity Equity Partners Administradora de Recursos Ltda ("CVC Brazil") and followed the same investment policy as the limited partnership. It was open to Brazilian investors and its investors included some Brazilian pension funds.

6. Mr Dantas was the most powerful man in Opportunity (one of his senior staff described him as "walking on water"). His close associates included his sister Veronica Valente Dantas Rodenburg ("Ms Dantas"), Mr Arida, Mr Arthur Carvahlo (Mr Dantas' brother-in-law), and Mr Rodrigo Andrade. Opportunity employed about 140 people. Its main office was in Rio de Janeiro but it also had an office in Sao Paulo (about half an hour by air from Rio).

7. Mr Demarco originally trained as a chemical engineer but then took an MBA and (while working for IBM in Brazil) attained other academic qualifications. His success with IBM led to his recruitment in 1997 by a Brazilian investment house called GP Investimentos ("GP"). He worked for GP in Sao Paulo. Through his girlfriend Mr Demarco met the wife of Mr Arida, Ms Elena Landau, who was very interested in football. They discussed an idea, on which Mr Demarco was already working, to turn one or more Brazilian football teams (which were then community-owned) into public companies (on the model of Manchester United). Mr Arida was asked to join in the discussion, and showed interest in it.

8. In June or July 1997 Mr Arida put forward the idea of Mr Demarco coming to work with Opportunity in its new private equity venture (and in particular, of continuing to develop the football club plan). Discussions continued until October 1997. The main participants on behalf of Opportunity were Mr Arida and Mr Dantas with Mr Andrade (who had himself recently moved from GP to Opportunity) supporting the idea of Mr Demarco's recruitment as a "deal-maker." Most of the meetings were at Mr Dantas' penthouse in Rio or at Mr Arida's apartment in Sao Paulo. No notes were taken at these meetings.

9. On 11 October 1997 (a Saturday) Mr Demarco delivered to Mr Arida's apartment a short written memorandum ("the Demarco memorandum") which he had prepared at home on his word processor. It set out (in Portuguese) the terms (described as understood to be agreed) on which he was willing to join Opportunity. On 12 October Mr Demarco gave notice to GP (his boss at GP lived in the next apartment block in Sao Paulo; he was seriously displeased but, as Mr Demarco had anticipated, told him not to work out his notice). On 13 or 14 October he attended for work at Opportunity's offices in Sao Paulo.

10. Mr Demarco set a high price on his talents, as appears from the terms of the Demarco memorandum [949 and in translation 947: *note*: this and similar subsequent references are to pages in the four volumes (1-4) of the Record, paginated 1-1631, or to pages in the six volumes (VI-XI) of the trial transcript, paginated 2241-4254]. The first two items were as follows:

> "Participation:
> 3.5% initial stake, which may reach 5.0% within one year.
> Entry bonus:
> Payment of 1 million dollars net, as a signing fee, to compensate the losses with leaving [GP].
> Persio [Arida]and Daniel [Dantas] are responsible for the payment."

Then there was an item headed "Six-month term bonus" which contained an obscure reference to "virtual cash generation." The basic salary was to be $300,000. (Throughout this advice all references to dollars are to US dollars.)

11. It is common ground that from 13 October 1997 (or some other day very close to that date) Mr Demarco had a contract of employment, on some terms, within Opportunity. In the event he was treated as employed by two companies, OEP and CVC Brazil. OEP paid him a basic salary of

$240,000, and CVC Brazil paid him the near equivalent (in Brazilian Reis) of $60,000.

12. Until he started work at Opportunity Mr Demarco had little contact with Mr Dantas's sister, Ms Dantas. Before then she attended some of what were called the more social meetings. But it was Ms Dantas whom Mr Dantas asked to see to the production of a formal contract for Mr Demarco. It is now common ground that two letters embodying proposals for a formal contract were written, one written by Mr Demarco and dated 21 October 1997 [1305 and in English translation 1306] and the other (which in the original Portuguese appears in variant forms, reflecting amendments made in manuscript or on word-processing equipment) dated 22 October 1997 in two versions [1308 and 1314] and 24 October 1997 in another version [1316]. These documents ("the draft contractual letters") attracted little attention at trial (in particular, Mr Demarco was not cross-examined about them at all) but they assumed great importance on the appeal to the Court of Appeal.

13. It is common ground that none of the draft contractual letters effected a binding variation of the terms (whatever they were) on which Mr Demarco had started his employment. But it is also common ground that Mr Demarco did in one respect modify his requirement for a signing-on fee of $1m. On 31 October 1997 he was paid half that sum, and another $0.5m was invested for him in the Opportunity Fund mentioned in para 5(a) above. It was invested in his name but with a special suffix (368) to his account number (1001213-368) indicating to the transfer agents and some insiders within Opportunity (but not, on his case, to Mr Demarco himself) that instructions on the account were to be accepted only with the authority of one or both of Mr Dantas and his sister, acting on behalf of OAM. The beneficial ownership of this investment, and much else concerned with it, has been a matter of acute controversy in interlocutory skirmishing before trial, at trial, and on appeal. As it happened, Mr Demarco was already an investor in the Opportunity Fund, under another account number (182109-716), since GP had invested a bonus of $250,000 for him; but references in this advice are (unless otherwise stated) to the holding with the 368 suffix.

14. On 30 December 1997 Mr Demarco (and some other deal-makers employed by OEP) signed (by an attorney) a shareholders' agreement [1329] and (separately) a number of director's agreements [1354]. These agreements were drafted by New York attorneys, Shearman and Sterling, and were completed under considerable pressure from Citibank in order to be in place before 1 January 1998. Because of the hurry, part of the shareholders' agreement, termed Annex A, was incomplete (and is accepted by both sides to have been unenforceable for that reason). The

terms of the two agreements signed by Mr Demarco differed in a number of respects from the terms of the Demarco memorandum. In particular the shareholders' agreement provided for Mr Demarco (among others) to have issued to him one of the 100 OEP shares originally issued.

15. At Opportunity Mr Demarco's work centred on the conversion of the Bahia Football Club into a limited company, and later on its financial management. On 4 February 1998 the Bahia transaction was approved by the investment committee of the Brazilian private equity fund. There was an acute conflict of evidence at trial as to the quality of Mr Demarco's performance at Opportunity, particularly in relation to the Bahia transaction.

16. What is beyond doubt is that there was on both sides a cooling of enthusiasm for Mr Demarco's employment with Opportunity, and it was terminated at some time between November 1998 and February 1999. OEP says that Mr Demarco was dismissed by Mr Arida in December 1998, but asked that his dismissal should not be made public until the new year. At the beginning of February 1999 Ms Dantas asked Opportunity's personnel department to issue a standard-form dismissal letter to Mr Demarco, and a letter [1375] was sent to him on 4 February 1999. The crucial paragraph was (in translation) as follows [1377]:

> "This is to inform you that the Company decided to revoke your employment agreement from February 4, 1999 on, with immediate dismissal, without attending the period of previous notice, which will be indemnified in accordance with section 487, paragraph first, of the CLT, eg. Labor Law Statement."

The back of the letter set out the terms of section 487, relating to periods of written notice when employment is terminated "without a just cause."

17. Mr Arida left Opportunity soon afterwards. He did not give evidence at trial, and OEP did not give any explanation of its failure to call him as a witness.

18. On 5 April 1999 Mr Demarco attempted to redeem $400,000-worth worth of his investment in the Opportunity Fund, and to switch another $90,000-worth into a more conservative sub-fund. On 28 May 1999 he attempted to redeem the whole of his investment. The transfer agents, ABN-AMRO, declined to give effect to any of these instructions.

19. Mr Demarco was advised that Annex A to the Shareholders' Agreement (under which he would have had a put option for his shareholding in OEP) was unenforceable. He was advised that he should present a petition in the Cayman Islands for the winding up of OEP. His lawyers wrote a letter dated 18 June 1999 alleging that there had been a breakdown in mutual trust between the participants, and indicating that a winding-up petition would be presented unless he was paid the full value of his interest in OEP within 14 days. However on 23 June 1999 OEP launched a pre-emptive strike in the Grand Court, so initiating litigation which has now continued for more than seven years.

The litigation: interlocutory stages

20. OEP's pre-emptive strike took the form of two ex parte applications against Mr Demarco: for a freezing order restraining him from disposing of his holding in the Opportunity Fund, and for an injunction restraining him from presenting a winding-up petition. Both these applications were successful.

21. The application for the freezing order was supported by a lengthy affidavit sworn on 22 June 1999 by Ms Dantas, who described herself as an "attorney in fact" of OEP. For present purposes the most noteworthy points on the affidavit are that it stated that Mr Demarco was never intended to be the legal owner, and was not the beneficial owner, of the Opportunity Fund investment, and had been registered as an investor by mistake (paras 4, 24 and 28); that the plan for bonuses had been for Mr Demarco to have had a "virtual account" but that that arrangement was superseded by agreement between Mr Dantas, Mr Arida and Mr Demarco before Mr Demarco's employment commenced (paras 18 to 22); and as regards Mr Demarco's attempts to redeem his investment (para 40),

> "I understand that if a proper request is received by the Opportunity Fund from Luis Demarco then the Opportunity Fund will give effect to the request."

Before the Board counsel for Mr Demarco said that in view of the Dantas's control (by means of the "368" suffix to the account number) this statement was "a profound piece of dishonesty" and OEP's counsel did not put forward any explanation or defence of it. This was the basis on which a freezing order was made against Mr Demarco.

22. Ms Dantas's affidavit did not exhibit or refer to the Demarco memorandum. It exhibited some (but not all) of the draft contractual letters. Mr Demarco exhibited the Demarco memorandum and some

more of the draft contractual letters to an affidavit of his sworn on 13 July 1999. A large volume of affidavit evidence was put in by each side during July and August 1999. It is unnecessary to attempt to summarise it all, except to note that allegations of falsification of documents (in connection with the Opportunity Fund) began to emerge.

23. At the same time as the application for the freezing order OEP served a writ and statement of claim in the action (cause no. 389 of 1999). This was later entirely deleted by amendment, but it is relevant as showing how OEP's case stood at the outset of the litigation. Its salient points can be summarised as follows.

(a) It alleged an agreement made on 31 October 1997 which "was partly oral and partly in writing, or alternatively was evidenced in writing."

(b) It acknowledged that Mr Demarco was entitled to a 1% shareholding in OEP, and to a basic salary of $240,000.

(c) It pleaded an agreement that Mr Demarco was to receive two advances of $500,000 each, one to be invested at his discretion and the other to be invested in the Opportunity Fund. Mr Demarco's total annual remuneration in salary, bonuses and OEP dividends (the Annual Total Cash Sum or ATCS) was to be treated as satisfied year by year (as to 25% in respect of remuneration from CVC Brazil and as to 20% in respect of remuneration from OEP) by deduction from the advances totalling $1 million, but only so far as the ATCS exceeded $300,000 in any year.

(d) By mistake the subscription agreement in respect of the Opportunity Fund was not completed in accordance with the agreement. OEP remained the beneficial owner of the Opportunity Fund investment.

(e) Mr Demarco was dismissed on 4 February 1999 for bad performance.

(f) OEP was therefore entitled to (i) the Opportunity Fund investment and (ii) $500,000 plus interest (as repayment of the other part of the advance) together with other ancillary and consequential relief. The pleading did not seek any relief in respect of Mr Demarco's shareholding in OEP.

24. The application for an injunction restraining presentation of a winding-up petition was also before the Grand Court during July 1999.

OEP's lawyers indicated on 29 June 1999 that Mr Demarco's single share would be purchased for "an appropriate price" and on that basis Graham J made an ex parte order on 2 July restraining presentation of a petition. Ms Dantas made an affidavit deposing to an oral understanding under which Mr Demarco would, on being dismissed for bad performance, transfer his share at par. This was followed by an offer to purchase the share at break-up value. On 29 July 1999 Graham J continued his order restraining presentation of a petition.

25. On 24 November 1999 there was a Board meeting of OEP at which it was resolved that Mr Demarco's director's agreement should be terminated on the grounds of his having been absent from work for 180 days. He was called on to resign his directorship.

26. On 17 October 2000 the Court of Appeal discharged Graham J's order restraining presentation of a winding-up petition, because it was not satisfied that the offer for Mr Demarco's shareholding was a fair one. A petition was presented soon afterwards. It stood adjourned at the time of the trial and it still stands adjourned.

27. On 27 March 2001, after a hotly contested application in which both Ms Dantas and Mr Demarco were cross-examined, Graham J made an order allowing the redemption proceeds of the Opportunity Fund investment to be used, subject to safeguards, for Mr Demarco's legal costs.

28. In the course of the hearing leading to the order of 27 March 2001 Ms Dantas was cross-examined about her reference, in an affidavit sworn on 11 December 2000, to Mr Demarco's "3.5% shareholding." She said that they were willing to pay Mr Demarco for 3.5% in order to settle the matter, but that he "knows full well the vesting" and was not entitled to 3.5% at that time. In re-examination she said that there was an agreement for the shareholding to vest over five years.

29. On 10 April 2001 OEP substantially amended its statement of claim in cause no. 389 of 1999, deleting the whole existing pleading and asserting an oral agreement concluded on or about 31 October 1997. The terms of the agreement, and other salient facts asserted in the amended pleading [176], can be summarised as follows.

(a) Mr Demarco was to be incrementally entitled to a 3.5% shareholding in OEP over five years; if he ceased to be employed for any reason, he would relinquish his vested entitlement at its then value.

(b) Mr Demarco would receive two advances of $500,000 each, one to be invested in the Opportunity Fund but to belong to OEP beneficially.

(c) If Mr Demarco's employment was terminated for misconduct or bad performance (i) the Opportunity Fund investment would remain in the ownership of OEP (ii) Mr Demarco would have to make good any shortfall if the value of the investment was below $500,000 (iii) he would also have to repay the other advance of $500,000 with interest. This part of the pleading (para 2(v)) continued: "The above was subject to adjustment if [Mr Demarco's] total earnings from [OEP and CVC Brazil] exceeded $300,000 but this did not occur."

(d) Mr Demarco was dismissed for bad performance and his dismissal took effect from 4 February 1999.

(e) In the circumstances Mr Demarco (i) was entitled to a shareholding in OEP of 0.875% only, which he was obliged to relinquish at its value as at 4 February 1999; (ii) was obliged to repay $500,000 with interest; and (iii) was not entitled to the Opportunity Fund investment and was bound to make good a shortfall of about $56,000 in its value.

(f) The amended statement of claim ended with a claim for appropriate declarations, orders for payment and other relief.

30. On 28 June 2001 proceedings were commenced in the Grand Court by a Canadian company, Telesystem International Wireless Inc. ("TIW"), its Brazilian subsidiary and Mr Demarco against OEP, Mr Dantas and others to restrain the use of a confidential document which was said to have been stolen from Mr Demarco. It described an arrangement (as to the conduct of litigation in the Cayman Islands) agreed between TIW and Mr Demarco. The trial of those proceedings began on 2 October 2001 before Sanderson J and on 29 October he gave an oral judgment in chambers. It was unfavourable to TIW and Mr Demarco. The episode is described in a judgment of Smellie CJ in later proceedings for contempt of court reported at [2002] CILR 96 [1508]. Before their Lordships neither side referred to the proceedings before Sanderson J but they call for this brief mention since they were frequently referred to during the trial of action number 398 of 1999.

31. On 21 March 2002 the Board advised Her Majesty that OEP's appeal from the Court of Appeal's order of 17 August 2000 should be

dismissed. The Board's advice (delivered by Lord Millett) ([2002] UKPC 16)contained the following passage (para 30) [1562]:

> "Since the hearing in the Court of Appeal, Opportunity has amended its pleading in the action in the Grand Court. It now pleads an oral agreement that if Mr Demarco should cease for any reason to be employed by the Company as a deal-maker he would relinquish his interest in the Company 'at its then value.' It also pleads that, so long as he was so employed, he would be incrementally entitled to become a 3.5% shareholder over a period of 5 years. Thus the Company has variously alleged (i) that Mr Demarco's shareholding belongs beneficially to Opportunity (ii) that there was an oral understanding that if he were dismissed for misconduct or bad performance he would transfer it to Opportunity at par (iii) that it was orally agreed that if he ceased for any reason to be employed as a deal-maker he would relinquish his interest at its current value, presumably (if the Company was likely to continue to carry on business in the foreseeable future) on a going concern basis. The action is due to be heard in April of this year, and accordingly their Lordships content themselves with observing that Opportunity's latest version of what was orally agreed between the parties sits uneasily with its contention that it was unreasonable of Mr Demarco to refuse its offer to buy his shares on a different and less favourable basis."

The trial before Kellock J

32. Because of the grounds on which the Court of Appeal set aside the judge's order and directed a new trial, it will be necessary to consider the course of the trial in some detail. But at this stage it may be more useful to give only a brief summary of the proceedings below and then to examine, as the Court of Appeal did in the central sections of its judgment, the principal factual issues in the case. Whether there was a fair trial depends not only on the way in which the judge intervened during the oral evidence, but also on whether (in the words of Henry LJ in *Heffer v Tiffin Green* 17 December 1998, Court of Appeal) the judge had due regard "to the building blocks of the reasoned judicial process, where the evidence on each issue is marshalled, the weight of the evidence analysed, all tested against the probabilities based on the evidence as a whole, with clear findings of fact and all reasons given."

33. The trial began on Monday, 22 April 2002 and lasted for 10 days, ending on Friday, 3 May 2002. Day 1 was occupied by OEP's application for an adjournment, which was refused, and a short opening by OEP's leading counsel. The proceedings were then adjourned because OEP's witnesses were not present. Day 2 was occupied by Ms Dantas's evidence in chief and the beginning of her cross-examination (the judge had made clear that he expected evidence in chief to be given orally, not simply by confirmation of witness statements). Her cross-examination continued throughout day 3 (she was also briefly recalled on day 5). Mr Dantas's evidence occupied most of day 4 and a short time on day 5. The rest of day 5, day 6 and most of day 7 were occupied by other witnesses for OEP, including Mr Andrade, Ms Karine Esteves (who worked in Opportunity's offices in Rio) and Mr Victor Vicioso (who worked for the ABN-AMRO transfer agents in Cayman). Mr Demarco began his evidence in chief towards the end of day 7. He gave evidence throughout day 8 and until mid-day on day 9. The rest of day 9 was taken up with the evidence of handwriting experts, ending at 5.45 pm. Day 10 was taken up with counsel's closing submissions, which occupied a little under four hours of court time.

34. The judge reserved judgment for only four weeks, handing down his judgment on 31 May 2002. In his judgment he set out the background, giving a detailed summary of the two written agreements of 30 December 1997 and of the Demarco memorandum. The judge said [481]:

> "The Demarco memorandum is not part of an exchange of correspondence. No other memorandum, letters or other communications relating to the negotiations were put in evidence. In fact the Plaintiff failed to provide me with a single piece of paper to corroborate any of the terms of the oral contract the Plaintiff alleges was made."

He had previously criticised Ms Dantas's affidavit of 13 August 1999 (answering an allegation of material non-disclosure on the application for a freezing order) as "argument disguised as evidence."

35. The judge then drew attention to substantial changes in OEP's pleaded case. The complex arrangements originally pleaded in relation to the "Annual Total Cash Sum" had been replaced by the form of words quoted in paragraph 29(c) above. The judge commented [486]:

> "In his opening [leading counsel for OEP] invited me to keep in mind, when listening to the evidence, whether the

> Plaintiff's version of the oral agreement was more likely than the Defendant's to be the truth. It seems to me that it was highly unlikely that a contract as complex as that alleged by the Plaintiff would have been made orally. That is even more the case when the Plaintiff is a sophisticated business entity which *inter alia* has an in house legal department."

He referred to evidence given by Mr Demarco, Mr Dantas and Ms Dantas and concluded [487]:

> "There can therefore be only one conclusion. Demarco did begin to work for the CVC Companies in mid-October and there was a two-week delay in paying the million dollar fee."

It has not been suggested that that conclusion was incorrect.

36. The judge turned to the documentary and oral evidence, including the evidence of Ms Karine Esteves, in relation to the $500,000 investment in the Opportunity Fund. This led up to important sections of his judgment entitled "The Evidence of Veronica Dantas" [492-504] and "The Evidence of Daniel Dantas" [505-512].

37. The judge described the evidence of Ms Dantas as to the Annual Total Cash Sum as "both incomprehensible and contradictory." He went on [493]:

> "As neither [OEP] nor CVC/Brazil paid Demarco any money by way of dividends or bonus, neither Dantas nor his sister seemed to regard the specifics of the formula as an important part of their story (which is also the point of view taken by the amended statement of claim). In that they were both wrong. The mechanics of the formula turned out to be vitally important. The inability of either Dantas or his sister to provide a coherent explanation of how the formula was intended to work contributed to my conclusion that the oral contract which the Plaintiff relies on was never made. It also led me to the conclusion that the evidence given by Dantas and his sister was manufactured and false."

The judge considered in detail, and rejected, the evidence of Ms Dantas about the $500,000 investment in the Opportunity Fund. He pointed out [502 and again at 504] that Ms Dantas and her brother had put forward four different, and inconsistent, accounts of Mr Demarco's dismissal.

38. The judge was similarly critical of the evidence of Mr Dantas. He discussed the evidence as to the size of the shareholding in OEP to which Mr Demarco was to be entitled, and the terms on which his shareholding would be realised in the event of his departure from Opportunity. He said [507]: "On this subject the evidence of Dantas and his sister may be accurately described as a moving target." He was also very critical of Mr Dantas's evidence about the arrangements as to the Annual Total Cash Sum (para 23(c) above), saying [509]:

> "When asked to give examples of how this 'small mathematical formula' would work in order to make his evidence understandable, Dantas proceeded to tie himself in knots."

39. Towards the end of his judgment the judge referred to the allegation that Mr Demarco was dismissed for "bad performance". He said [513]:

> "In support of his allegations that Demarco was dismissed for 'bad performance' the plaintiff called a number of witnesses all of whom testified that Demarco had botched the Plaintiff's acquisition of a Soccer Club (Esporte Clube Bahia). I need not refer to any of this evidence in detail as I am satisfied that the contract alleged by the Plaintiff was not made and in any event 'bad performance' is a criterion which is too vague to be enforceable even if the Plaintiff and Demarco had agreed that he was to be employed on that basis."

Nevertheless the judge briefly discussed the evidence on this point, stating that he did not believe any of the evidence on this point of Mr Andrade.

40. The judge's conclusions [515-6] can be summarised as follows:

> (1) Mr Demarco was employed on the terms of the Demarco memorandum.
>
> (2) He was therefore entitled to retain the whole of the $1m signing fee, including the whole of the Opportunity Fund investment.
>
> (3) He was entitled to 3.5% of OEP's issued share capital.

(4) He was entitled to damages for any loss sustained as a result of the freezing order and other consequential interlocutory orders.

OEP was ordered to pay Mr Demarco's costs on an indemnity basis.

The decision of the Court of Appeal

41. OEP gave notice of appeal [528], initially asking for the judge's order to be set aside and replaced by various forms of relief in favour of OEP. But at the hearing of the appeal a new trial was the only order that OEP was seeking. Its amended memorandum of grounds of appeal set out three grounds together with a schedule containing 183 references to the trial transcript [533]:

"(1) the trial judge intervened excessively in the proceedings, with the result that the trial was not fair;

(2) the trial judge usurped the role of counsel and 'descended into the arena,' which denied the appellant the opportunity to present its full case, with the result that the trial was not fair; and

(3) the conduct of the trial judge was such that a reasonable bystander would not have regarded the Court as impartial and/or would have apprehended the Court to be biased."

The re-amended notice [798] elaborated these grounds with a further 25 paragraphs and a further schedule, but the three grounds set out above remained at the heart of the appeal.

42. The appeal was heard over four days during November 2003. The Court of Appeal's judgment (delivered by Taylor JA) was handed down on 24 March 2004. It is conveniently divided into sections (a) to (n) as follows:-

(a) The background [830-833]

(b) The judge's task [833-836]

(c) The negotiations [837-850]

(d) Are the documents in evidence? [850-860]

(e) Shareholders' and Director's Agreements [860-872]

(f) The questioned documents [873-879]

(g) Mr Demarco's dismissal [880-882]

(h) A coherent explanation [883-886]

(i) The signing-on benefits [886-893]
(j) The beneficial shareholding [893-894]
(k) Adverse inferences [894-897]
(l) The proceedings at trial [897-905]
(m) Conclusions
(n) Disposition [908-909]

The first of these sections does not call for comment, and comment on sections (l) to (n) is better deferred. The others call for brief summary.

43. In section (b) the Court of Appeal recognised that the judge had a difficult task [836]. In section (c) the Court of Appeal recorded that despite their initial differences [837]:

> "By the end of the trial the parties seem to have been agreed that Mr Demarco's employment started on about October 13, 1997. It was common ground that the agreement was oral, but there are documents dealing with proposed terms said to have been written both before and after that date."

The Court then gave a detailed summary of the Demarco memorandum and the draft contractual letters. The Court emphasised that the letters did contain references to an advance and to the advance being used as a basis for deductions of percentages (20% for Cayman and 25% for Brazil) from Mr Demarco's total remuneration during his employment (their Lordships will call this the earn-out formula, although that expression was not used below). They also contained references to "bad performance". The Court discussed these documents at some length [840-849] concluding [850]:

> "Had the judge had these documents before him he could not have made findings that obviously influenced him in rejecting the evidence of Daniel and Veronica Dantas in its entirety, in stating that Mr Dantas was 'simply making it up as he went along', and in characterising the company's evidence as 'manufactured and false in all its material respects.'"

In section (d) there is a discussion (with excerpts from the transcript) as to how it was that some of these documents were not marked as exhibits during the trial.

44. Section (e) contained a full discussion of the shareholders' and director's agreements [860-872]. The Court of Appeal concluded [872]:

> "The judge in our view erred in concluding: (i) that the shareholders' and director's agreements together constituted complete agreements containing all the terms of Mr Demarco's employment; (ii) that these agreements limit the grounds on which his employment might be terminated; and (iii) that they have the effect, by application of the parol evidence rule, of rendering unenforceable any previous oral terms on which he received his signing-on benefits."

45. Section (f) ("the questioned documents") was concerned with documents which came into existence in connection with the $500,000 investment in the Opportunity Fund, and subsequent switches and withdrawals from that Fund. The trial judge had concluded that some of these documents were, in some sense, false documents. The Court of Appeal discussed this at some length [873-879] and concluded [879]:

> "The judge's conclusion that the questioned documents, even if prepared by Ms Dantas at the dates they bear, were nevertheless forged, and that their use amounted to uttering false documents, must be based on rejection of the evidence of Daniel and Veronica Dantas with respect to the terms on which the money was invested. It is a conclusion that could not have assisted the judge in deciding whether to accept their evidence on that important point."

46. Section (g) contains a rather inconclusive discussion of the circumstances of Mr Demarco's dismissal [880-882]. The Court of Appeal observed [882]:

> "The evidence of Ms Dantas in this regard is sometimes contradictory, and sometimes makes little sense, but Ms Dantas here found herself in a legal maze through which counsel themselves had some difficulty in finding their way.
>
> The judge in the end accepts (at p49) that Mr Demarco's employment was terminated on February 4, 1999, when it must be taken that he was at least constructively dismissed. The judge adds that the dismissal was 'without cause and without notice, i.e. he was arbitrarily dismissed.'
>
> We do not understand that anything turns, so far as these proceedings are concerned, on the fact that Mr Demarco's dismissal may have been 'arbitrary,' without notice or without

> 'cause' – that is to say without proof of such conduct as would entitle the company to terminate without notice under clause 9 of the director's agreement."

47. In sections (h) and (i), "a coherent explanation" and "the signing-on benefits" [883-892], the Court of Appeal suggested its own explanation of the arrangements of the two payments of $500,000 which made up the signing-on fee [884]:

> "The intent of the 'solomonic solution' which she described, involving half of the million dollars being in Mr Demarco's hands and half being invested in the company's mutual funds, was initially equally obscure. Ms Dantas suggested that each $500,000 was in the nature of an 'escrow', held to ensure performance. From the evidence as a whole a coherent explanation may be said to emerge. She says that the money was intended to secure Mr Demarco against the possibility of dismissal otherwise than for misconduct or bad behaviour before he received his share of profits, anticipated or actual, generated through his efforts. That was, of course, a real possibility."

The Court then posed three questions in relation to the signing-on benefits [886]:

> "Resolution of the dispute regarding entitlement to the signing-on benefits appears in the end to have involved three questions: (i) did the oral agreement entered into in October, 1997, require that Mr Demarco repay the outstanding balance of the signing-on benefits if dismissed for 'bad performance'; if so, (ii) what is the meaning of 'bad performance', and (iii) was Mr Demarco in fact dismissed in February, 1999, for 'bad performance'?"

48. On the first of these questions the Court of Appeal came back to the draft contractual letters of 21 to 24 October 1997 [888]:

> "These documents show negotiations in progress between Mr Demarco and the company between October 21 and 24, 1997, ten days after the date at which Mr Demarco said that all terms were settled, and a week before payment of any signing-on money. The documents discussed terms in many respects similar to those on which the company's witnesses said that

> the parties later agreed, and all take the form of draft agreements.
>
> Had counsel been aware of the importance that these documents would assume, no doubt they would have been brought to the judge's attention. As has been mentioned, the first two were omitted from the affidavit which refers to them, and of which they must be regarded as part, when that affidavit was entered as an exhibit at trial by counsel for Mr Demarco. It was an unfortunate omission, which resulted in the judge reaching important but erroneous conclusions. These documents were repeatedly referred to by Ms Dantas in evidence, and had earlier been produced in Court, but were not marked and bound with the trial exhibits. Perhaps because the terms they proposed do not fully support the case of either side, they were not referred to in argument. As a result, the judge made incorrect assumptions that influenced him in rejecting the evidence of the company on all material issues, particularly those raised by question (i)."

On the second question the Court said that the judge was wrong (especially in the absence of a pleading to that effect) to conclude that bad performance was too vague to be capable of standing as a contractual term. On the third question the Court thought that the judge may not have found as a fact that bad performance had not been established, and [892]:

> "to the extent that the judge made any finding of fact that the dismissal was *not* justified by bad performance, that must, of course, have followed from his rejection of the evidence of the company's witnesses, on every material issue, as 'manufactured and false.'"

49. In section (j), Mr Demarco's beneficial entitlement to shares in OEP, the Court of Appeal concluded [894]:

> "The judge rejected the company's evidence, on this as on all other material points, as a result of his conclusion on credibility, and accepted Mr Demarco's evidence that he received an immediate unconditional 3.5% beneficial shareholding when he signed on, a finding of fact based on a conclusion as to credibility that contains the flaw we have described."

50. In section (k), the Court of Appeal was not critical of what the judge said about adverse inferences to be drawn from OEP's failure to call Mr Arida and other witnesses, but concluded [896] that it was "but one factor to be considered in determining, as we must, the prospects that the company might have succeeded at trial had the errors to which we have referred not been made."

The central issues of fact

51. Their Lordships are therefore faced with two long and thorough judgments reaching starkly different conclusions. The judge, who saw and heard the witnesses, reached very clear conclusions as to their credibility. The Court of Appeal reached the clear conclusion that the judge had disregarded, misunderstood or misevaluated much of the evidence, and that on those grounds (as well as on the grounds, which have yet to be considered, of excessive judicial intervention and usurpation of counsel's role during oral evidence) there would have to be a new trial.

52. It is not appropriate, in their Lordships' advice, to attempt to investigate in detail every one of the factual issues raised on the judgments below. But this appeal is important both to the parties and for the administration of justice in the Cayman Islands, and it is inescapable that their Lordships, having had full written and oral submissions on behalf of Mr Demarco from Mr Black QC (who has been Mr Demarco's counsel throughout) and from Mr Ellis QC (who did not appear at trial but did appear in the Court of Appeal) should address the most important areas of controversy. These are (1) the general shape of the negotiations, the documentary evidence and the probabilities about the terms of the contract; (2) the earn-out formula, the terms of the $1m payment, and the significance of changes in OEP's pleaded case; and (3) the arrangement as to the half of the $1m which was invested in the Opportunity Fund. Their Lordships must also comment, rather more briefly, on the agreements of 30 December 1997 and on the circumstances of Mr Demarco's dismissal.

The negotiations

53. Before their Lordships there has been much more common ground than there was in the courts below as to the general shape of the negotiations between Mr Demarco, on the one hand, and Mr Dantas and Mr Arida, on behalf of OEP and other Opportunity companies, on the other hand. The negotiations fell into two distinct phases, sharply divided by the weekend of 11-12 October 1997. That was the weekend during which Mr Demarco sent his memorandum to Mr Arida and immediately

burned his boats by giving notice to terminate his very promising position with GP; and during which Mr Dantas and Mr Arida committed themselves to taking him on as a deal-maker with Opportunity – as is now common ground, on the terms of an oral contract which was in place when Mr Demarco started work on 13 or 14 October.

54. Both sides committed themselves in this way without there being any written agreement apart from the Demarco memorandum, an undated and unsigned document. This may seem surprising, but the first phase of the negotiations (from June or July until mid-October 1997) had been conducted largely at the homes of Mr Dantas and Mr Arida. Both of them were very experienced and powerful businessmen, and they seem (from the evidence of Mr Dantas) to have been inclined to leave details to subordinates. The only exception as to the venue of meetings seems to have been one meeting at Opportunity's offices in Rio on the evening of 9 or 10 October 1997, at which (on Mr Demarco's case) the deal recorded in his memorandum was struck.

55. Mr Demarco gave detailed evidence of this [Day 8, 3661-3662] which the judge seems to have accepted:

> "And then the discussions went on and in the beginning of October – I think it was Thursday night, Thursday night or Friday night – October 9 or 10, I was invited to go to Rio to the offices of Opportunity and I was waiting – the office also have a very nice bay view in the twenty-eighth floor and I was waiting for Persio. Persio came and said, Demarco, we want to have you here, but 5% is too much because the others have 1%. So, I waited and he said, I can give you 3.5%, which was a kind of the middle between what I asked and what he had and the one million dollars I asked, he said the million dollars, let me check and he left the room."

According to Mr Demarco Mr Arida then checked and confirmed that the one million dollar payment was accepted. Mr Demarco was not apparently shaken in cross-examination as to the 3.5% being an immediate entitlement [Day 8, 3790-3801]. Demarco's memorandum was, on his case, a proper record of the terms on which he joined Opportunity.

56. Their Lordships have already mentioned the judge's comment on the negotiations [481]:

> "The Demarco memorandum is not part of an exchange of correspondence. No other memorandum, letters or other communications relating to the negotiations were put in evidence. In fact the Plaintiff failed to provide me with a single piece of paper to corroborate any of the terms of the oral contract the Plaintiff alleges was made."

The Court of Appeal was critical of this [846] but it seems to be a correct analysis of events down to the weekend of 11-12 October 1997.

57. By contrast the judge also observed [486]:

> "In his opening [leading counsel for OEP] invited me to keep in mind, when listening to the evidence, whether the Plaintiff's version of the oral agreement was more likely than the Defendant's to be the truth. It seems to me highly unlikely that a contract as complex as that alleged by the Plaintiff would have been made orally. That is even more the case when the Plaintiff is a sophisticated business entity which *inter alia* has an in-house legal department."

This comment seems much more questionable. All those involved in the first stage of the negotiations were intelligent, sophisticated professionals and they do not seem to have regarded the negotiation as particularly complex (though the part of the Demarco memorandum headed "6-month term bonus" contained technicalities which were not fully explored in the oral evidence). Opportunity had an in-house legal department but the way in which the negotiations were conducted seems simply not to have involved the legal department.

58. Important documentary evidence – the draft contractual letters – came into existence after the weekend of 11-12 October 1997, during the period of three working weeks between the time when Mr Demarco joined Opportunity and the time when the $1m payment was made. The Court of Appeal thought that the judge had fallen into serious error in not paying more attention to these letters. But neither side was contending that any of the draft contractual letters had matured into a binding contract, and each side had tactical reasons not to emphasise certain aspects of the proposals which the letters contained (Mr Demarco in his letter of 21 October 1997 referred to the $1m payment as "an advance"; but his letter also referred to a possible increase of his shareholding from 3.5% to 5%; the letters of 22 and 24 October also referred to a possible increase to 5% but in addition they contained quite detailed proposals about the earn-out of the advance, including the percentages of 20% and

25% for Cayman and Brazilian earnings respectively; and all the letters recognised that the circumstances in which Mr Demarco might leave his employment with Opportunity would be significant). The letters were therefore very material as to the credibility of the witnesses.

59. Both the judge [493] and the Court of Appeal [844-855] recognised this. But the judge was influenced by his perception that neither Mr Dantas nor his sister had been able to explain how the earn-out formula was meant to work. That topic is considered in the next section of this advice.

60. Their Lordships are inclined to think that the judge did attach insufficient weight to the draft contractual letters as material to the issues of credibility. But he did not overlook them entirely, and at least one was given an exhibit number in the proceedings [512]. If he was in error in giving them insufficient weight his error was in some ways understandable. Ms Dantas in her evidence strongly denied that any of them had originated from Opportunity, and sought to distance Opportunity from its lawyer, Mr Aragao, as to responsibility for them [Day 3, 2622-2632]. She had earlier emphasised [Day 3, 2604] that they were never agreed. When asked about non-disclosure on discovery she said:

> "And those emails that – you see that they change over time because they were not the final agreement."

OEP's counsel made little or nothing of the draft contractual letters in his closing submissions, perhaps for the reason already suggested.

61. Mr Demarco's evidence, which the judge seems to have accepted, was that after he had joined Opportunity he complained to Mr Arida that Ms Dantas was trying to renegotiate the terms on which he had joined Opportunity and that the matter was then settled between himself and Mr Arida [Day 8, 3679-3680]:

> "Well, after this initial difficulty, I came to Persio Arida one day and said, Persio, look, I left a very significant job for me because you said I could trust your word and now Veronica Dantas is trying to change the deal we made so, I will leave if this continues to be. And he said, No, no, no. Let me deal with that. And he came back to me and said OK, OK, Demarco, I will pay you what we agree it with you. Everything will be honoured. It is just because people is busy and all this kind of excuses that are typical of Opportunity.

> But, Persio said to me you will be honoured. The only thing I would like to ask you is that to demonstrate confidence in the company, it is a – let's say, it is a culture here that the partners, the principals, they invest some amount of money at Opportunity.
>
> I remember I said to him, I have already invested in the Opportunity Fund. So, would you mind to invest half of your signing-on bonus, signing-on fee - to the Opportunity Fund. And I said, No. That's fine. So, he paid me $500,00 in my New York bank account and $500,000 I could invest in the Opportunity Fund, as Mr Andrade had also invested in the Opportunity Fund and several other people of Opportunity have invested in the Opportunity Fund.
>
> Q. Was there any discussion about your participation in the company?
>
> A. Not at all. Not at all. The 3.5% was always sacred."

62. Ms Dantas (whose evidence at trial was of a single process of negotiation continuing until 31 October 1997) accepted that she had not been present at what she called the "last meeting" [Day 3, 2699-2700]. In short it seems fairly clear from Ms Dantas's own evidence that she was not present at any of the crucial oral discussions, and yet she was put forward as the main witness as to the terms of the contract. Mr Dantas made clear in his evidence that he had left matters of implementation to his sister, and he was not involved with OEP's lawyers in the preparation of the claim [Day 4, 2968-2978].

The earn-out of the $1m advance

63. One of the improbabilities relied on by OEP was the notion that Mr Demarco, having signed on with a $1m payment, should be able to walk away to another job, if he wished, without having to account for the advance in any way. Mr Demarco was pressed with this in cross-examination [Day 8, 3854-3857] but insisted that a payment of $1m was agreed. He had already testified [Day 8, 3739] that until he gave notice of possible proceedings in the Grand Court, no one asked him to repay any part of the $1m.

64. Mr Demarco does not seem to have been cross-examined at all about the earn-out arrangements. This may have been because they had been omitted, as already noted, from OEP's amended statement of claim; or because the judge had already taken a very unfavourable view of the

evidence on this topic given by Ms Dantas and Mr Dantas. He was not therefore asked to explain the reference (in his draft contractual letter of 21 October 1997 [913]):

> "The advance will be deducted from dividends and future bonuses, the deductions equivalent to 20% of the amount of the respective dividends and bonuses."

65. Ms Dantas [Day 2, 2443-2450 and 2561-2574] and Mr Dantas [Day 4, 3013-3023] were asked about the earn-out at length, with the judge doing much of the questioning. The judge considered that neither of the witnesses could provide a coherent explanation of how the earn-out formula was meant to work, concluding [493] with the observation, quoted in para 37 above, that their evidence was "manufactured and false."

66. It appears from the transcript that Ms Dantas did not give a good explanation of the formula. But in their Lordships' opinion Mr Dantas did do so, and the judge's conclusion on this part of his evidence was unjustified (whatever other unsatisfactory features there may have been in other parts of his evidence). The judge gave this account of his evidence [509-510]:

> "In attempting to explain the formula Dantas said that, if for example, Demarco earned $500,000 in a year, a percentage of that amount (he used 20% for convenience) would be $100,000. As Demarco had earned more than $300,000 he would be entitled to a credit against the $1m of $100,000 and would thereafter only be required to return to the Plaintiff $900,000 if he were dismissed for bad performance. The example was then changed to a scenario in which Demarco earned $350,000 in a year. Dantas explained that in those circumstances 20% of $350,000 would be $70,000 and if that were deducted from $350,000 [an agreed correction to the written judgment] Demarco would have earned less than $300,000. Nevertheless in those circumstances Demarco would be entitled to a credit of $50,000 against the $1m. This of course makes no sense at all. In the first example Demarco is entitled to a credit of only 50% of the excess of his earnings over the $300,000 limit and in the second example he is entitled to a credit of 100% of that excess. There is no question to my mind that Dantas was simply making it up as he went along, although he was testifying under oath."

67. Contrary to the judge's view, Mr Dantas's explanation did make sense. If Mr Demarco earned over $300,000 in a year (because his basic salary was increased by bonuses and dividends) then a fraction of his total earnings (assumed for simplicity to be one-fifth, although OEP's case was that it was one-fifth for Cayman earnings and one-quarter for Brazilian earnings) was to be unpaid, and treated instead as reducing the amount of the $1m advance (so as to reduce, on OEP's case, the amount which Mr Demarco would have to refund if he chose to walk away from Opportunity, or was dismissed for bad performance). Below $300,000 there was no earn-out and no deduction. Above $375,000 there was a steady earn-out and deduction (on the simplified example) of one-fifth of the total earnings ($75,000 is one-fifth of $375,000). The effect of this is that the earn-out (as a *percentage* of the excess over $300,000) gradually diminishes: it is 50% of an excess of $200,000, 40% of an excess of $300,000, 35% of an excess of $400,000, and so on. This is all quite simple mathematics, although it may not have seemed so simple in the stress of giving and hearing oral evidence. The judge was puzzled by the fact that between $300,000 and the marginal figure of $375,000 the whole of the excess was to be taken as part of the earn-out, and no part of it was to be paid in cash. That was by no means obviously to Mr Demarco's advantage, as although the earn-out was accelerated, he would receive less cash in hand. That wrinkle could have been avoided by some (relatively complicated) form of taper relief. But it was simply wrong to say that the system described by Mr Dantas made no sense.

68. The judge was right, in their Lordships' view, to give weight to the significant changes that were made in OEP's pleaded case. These (together with similar disparities in interlocutory affidavits made on behalf of OEP) provide some support for the view that the company's witnesses were constructing its case in an opportunistic way as they went along, whereas Mr Demarco's case remained basically unchanged. The omission from the amended statement of claim of any detail about the earn-out formula (compare paras 23(c) and 29(c) above) was not the most important of the changes. The judge seems to have paid too much attention to it without recognising that the evidence about it raised two distinct issues: (i) whether there was an earn-out formula at all and how it was to operate if Mr Demarco remained with Opportunity and earned substantial bonuses; and (ii) what the parties' rights were to be if Mr Demarco left Opportunity (in various scenarios as to the circumstances of his departure) before his $1m advance had been fully earned out.

The Opportunity Fund Investment

69. The factual issues connected with the investment of $500,000 in the Opportunity Fund (and subsequent dealings with that investment) are

important for two reasons. In the first place, they are determinative of entitlement to that sum, which is a significant part of the total sum at stake between the parties. In the second place, and perhaps even more important, it is the factual issue on which the oral evidence, and the witness's accounts of the documentary evidence, came into the most violent head-on collision, and were most fully tested during the oral evidence. Quite apart from the allegations and counter-allegations of forgery committed during 1999 (on which the judge made no findings) the Opportunity Fund investment took up large portions of the evidence of Ms Dantas [Day 2, 2451-2493 in chief and Day 3, 2788-2815 in cross-examination] and Mr Demarco [Day 8, 3695-3715 in chief and Day 8, 3743-3790 in cross-examination (including a period of ten minutes immediately after the short adjournment when the witness was asked to remain outside the courtroom)]. The assessment of this evidence was highly relevant to the general issue of credibility. It must therefore be examined in some detail.

70. The crucial period, concerned with the initial investment, spanned the weekend of 1-2 November 1997. It is common ground that on Friday, 31 October Mr Demarco (having had $500,000 paid to him and another $500,000 placed at his disposal for investment) filled in an application form for an investment in the money market sub-fund of the Opportunity Fund. He did so in Opportunity's office at Sao Paulo. Ms Rosangela Browne, an account manager employed by another Opportunity company, had an office in the same building, but on a different floor. She had handled Mr Demarco's original investment in the Opportunity Fund, made when he was employed by GP. She filled in the form and Mr Demarco signed it. Ms Browne kept the original and gave Mr Demarco a copy [1321].

71. It is common ground that subscription applications such as that filled in by Ms Browne and signed by Mr Demarco would as a matter of normal course be sent to the transfer agents (then a Midland company) in the Cayman Islands. That was the clear evidence of Ms Karine Esteves, who was called by OEP. She was employed in Opportunity's Rio office as a point of contact with the transfer agents: they told her of new subscriptions, switches and redemptions, and she saw that they were put through at the correct valuation, and that appropriate action was taken by the fund managers in Rio. She had a clear recollection of Mr Demarco's investment being routed through the Rio office, because it was such an unusual occurrence, because of the 368 suffix, and because Ms Browne telephoned her specially [Day 6, 3404]:

> "Rosangela Browne, she worked in the office of Opportunity, Sao Paulo and she was a sales officer for the offshore funds and she call me and she ask me for a favour. She said, Karine, I am going to fax you a subscription form and you should give this subscription to Veronica and it is confidential so go to the fax now. I went to the fax and I took the subscription and I gave it directly to Veronica."

72. The evidence about the 368 suffix left many questions unanswered. Ms Browne (who, after she had left Opportunity, made a short affidavit on behalf of Mr Demarco but did not give evidence at trial) deposed [84] that she had sent the original form to Opportunity's offices in Rio. She mentioned the 368 suffix but without comment. She never came to be asked about her phone call to Ms Karine Esteves or about the "confidential" nature of the transaction. Ms Esteves said [Day 6, 3401] only that a 368 account was "under the supervision of Veronica." But she seemed to regard this particular account as unique (as did Ms Dantas herself, according to her witness statement [284]).

73. By contrast Mr Victor Vicioso, who had worked for the ABN-AMRO (but not the Midland) transfer agents, and who was called by OEP, said that there were several 368 accounts and that Ms Dantas had not merely supervision but control over them [Day 6, 3493]:

> "Q So, there was a whole series of accounts that Veronica Dantas had the power to sign for, even though they weren't in her name?
>
> A That's correct. The amount, I don't know.
>
> Q Yes. Yeah, sure. And you presumably didn't hold a power of attorney, a copy of any power of attorney or a copy of any mandate for each of those accounts, did you?
>
> A I don't think so. No, I don't recall.
>
> Q So, there was a general instruction, right, in relation to the 368, her signature was okay? You don't need to check with the person who is named as a shareholder; that's right, isn't it?
>
> A That's correct."

74. It is now necessary to come back to the two main witnesses. In her witness statement Ms Dantas stated [281] that on 31 October Mr Demarco brought her a completed subscription form [1321]. She did not specify where this happened. Her witness statement continued [281]:

"I told him that, pursuant to his agreement with the Plaintiff, the investment was to be under our custody: accordingly, I would have to sign the subscription form. This was because I thought that the signing subscriber for the shares would be the controlling party.

Louis Demarco did not disagree with me, in fact I remember him saying, 'okay'. I therefore completed and signed a fresh form, a true copy of which is exhibited as the second document at 'VVDR-5' to my first affidavit [1323]. I did not fill in any of the banking details on the left-hand side of the form, because I thought this was unnecessary: the details of OAM were obviously known to the Opportunity Fund's administrators.

The subscription agreement was signed in the name of OAM rather than the Plaintiff because the Plaintiff had only just started trading, it had not yet received any income by way of its first instalment of management fees, and consequently the subscription had to be made with the benefit of a loan from OAM. Until this loan was repaid, I thought that it would be better for the funds to remain under the control of OAM.

I put the Defendant's name on the subscription agreement as subscriber, in order to segregate the investment, because the defendant would be entitled to choose what sub funds to invest, and it would be simpler to calculate the value of these investments. I used OAM to sign the form, so that only OAM could redeem or transfer any share and would have the full control of the money invested. I did not realise that by doing so, the Defendant would be entered as registered shareholder of the shares and thereby be legal owner of the shares. I took no Cayman Islands legal advice on what I thought was an administrative matter."

75. Her witness statement then deposed that she had a further meeting with Mr Demarco in her office in Rio on Monday, 3 November 1997, when he informed her that he wanted to alter the investment (to have $150,000 in the Brazilian aggressive equities sub-fund and $350,000 in the derivatives sub-fund). She stated that she checked with her brother whether this was acceptable and then altered a new form which had had filled out (and had herself signed) [282]:

> "Then, in the Defendant's presence, I erased the $500,000 figure on the subscription form with liquid paper and filled in the new figures as requested by the Defendant: that is why it can be observed from the first document at 'VVDR-5' that a part of the line opposite the 'money market' row has been erased [1323] I then had Daniel countersign the form, which I then sent by fax to Midland.'"

She denied that she had done anything fraudulent.

76. In cross-examination [Day 3, 2790-2795] Ms Dantas shifted from 31 October to 3 November 1997 for the conversation at which Mr Demarco was said to have agreed to her controlling the investment. She said that Mr Demarco always came to Rio on a Monday. She wanted the investment to be in his name for the purpose of "segregating" it from OAM's other investments, and did not realise that Mr Demarco would as a result be the registered shareholder. She also gave ground on whether she used the liquid paper in Mr Demarco's presence [Day 3, 2803].

77. Mr Demarco specifically denied both in chief [Day 8, 3696-3702] and in cross-examination [Day 8, 3773-3775] that he had had any such conversation with Ms Dantas, or had been present when she altered any document with liquid paper. He said that he had arranged the alteration of sub-funds by speaking to Ms Browne in the offices at Sao Paulo; he was uncertain about the date but thought that she said she would use the same form. He denied that he had ever agreed to his Opportunity Fund investment being under the control of Ms Dantas, and denied that he had any knowledge of her control until 1999, when he found that he could not redeem his investment, because the ABN-AMRO transfer agents declined to act on his instructions.

78. The evidence about subsequent switches and redemptions followed the same pattern. Mr Demarco signed instructions which were then (on Mr Demarco's case, without his knowledge) passed to Rio and replaced by instructions signed by Ms Dantas. It is not necessary to go into the detail of the evidence. Nor is it necessary to go into the allegation that Ms Dantas actually forged one document by ante-dating it. That was the main issue to which the evidence of the handwriting experts was directed. The judge made no finding on that issue, and neither side has criticised him for refraining from making a finding.

79. The judge saw and heard all this evidence (though it has to be said, to anticipate the final topic, that he was particularly persistent in interrupting the cross-examination of Mr Demarco on these issues). He was extremely critical of the evidence of Ms Dantas. He rejected her

explanation of "segregating" the investment as incredible and "quite simply a lie". He observed [497]:

> "Veronica Dantas well knew that Demarco had to be shown as the subscriber so that he would receive (as he did) the frequent statements issued by Opportunity Fund concerning the balances from time to time in his investment account otherwise he would have discovered the fraudulent scheme. He expected to receive those reports and statements and he did. They gave no indication whatever that the investment belonged to the Plaintiff and not to Demarco, nor do they provide the slightest indication that [OEP], OAM or anyone else had an interest in or control over these investments."

80. In their Lordships' view there was (subject to the issue of the judge's conduct of the trial) no basis for the Court of Appeal not to accept the judge's clear findings on these issues. They had been examined at great length in the oral evidence. Either Ms Dantas or Mr Demarco was persistently telling lies about the Opportunity Fund investment. The Court of Appeal rejected the judge's findings, it seems [877-879] because the judge unwisely referred to "false documents" [497] and again (still more unwisely) to "forgery and uttering false documents" [511]. He would have been well advised to have limited his conclusion to stating that Ms Dantas had, in consultation with her brother and with the assistance of some of Opportunity's employees, embarked on a deceitful plan to make Mr Demarco think that he owned a $500,000 investment in the Opportunity Fund, whereas in fact it remained under the control of Ms Dantas and her brother. It will be recalled (para 21 above) that in June 1999 Ms Dantas had sworn an affidavit, in support of an ex parte application for a freezing order, deposing that Mr Demarco's Opportunity Fund investment would be redeemed if he made a proper request.

81. There remain two minor mysteries about this episode. One (for which no explanation has been suggested) is how the original altered subscription application came to have xeroxed across it a copy of the small print on its back [1325]. The other is why Ms Dantas resorted to the use of liquid paper to alter, not a signature, but the details of the sub-funds. Why did she not simply have a new form filled up and sign it again? Had the top copy been sent to the transfer agents, the alteration (which was not initialled) would have been apparent. The evidence of Mr Vicioso (who had direct knowledge only of procedures under ABN-AMRO) [3451]) was that instructions were sometimes faxed and sometimes delivered by courier. Ms Dantas seems to have used the fax and kept the top copy. A possible explanation of what she did (suggested

by the evidence of Ms Karine Esteves [3439]) is that, improbable though it seems, application forms were not normally stocked in the head office at Rio, but were kept by distributors.

The agreements of 30 December 1997

82. The shareholders' agreement and the director's agreements of 30 December 1997 were considered at some length in the judgments below. That is understandable, since (in contrast to the Demarco memorandum and the draft contractual letters) they consisted of professionally-drafted, signed and dated contractual documents. But the impression conveyed by most of the witnesses is that these agreements were regarded as a rather bureaucratic requirement imposed by Citibank, and that they made little practical difference to the existing arrangements (especially as Annex A was not complete: it was, as Mr Dantas agreed in cross-examination, a "to-do list" [Day 4, 3033]). This impression is confirmed by the fact that every party to the agreements signed by the same attorney, one Danielle Silbergleid, in New York.

83. The Court of Appeal disagreed [872] with the judge's view as to the effect of these agreements (para 44 above). Their Lordships do not accept all the Court of Appeal's criticisms. The judge does seem to have misunderstood the parol evidence rule [516] and Mr Black did not seek to uphold that part of his judgment. But the judge did not hold that the agreements were complete agreements which rendered unenforceable any terms which had been orally agreed before. On the contrary he remarked [474] on the absence of enforceable terms in Annex A:

> "As a result the shareholders' agreement was reduced in whole or in part to an agreement to agree. Either way it can accommodate all of the elements of Demarco's version of his oral contract with [OEP] but not all of the elements of the Plaintiff's version."

84. Clause 9 of Mr Demarco's director's agreement provided as follows [1357]:

> "The employment of the Director shall be terminated:
>
> 9.1 upon the dissolution of the Partnership;
>
> 9.2 by the Company without notice if the Director is guilty of any breach of a fiduciary duty, fraud, bad faith, gross negligence or wilful malfeasance in connection with or affecting the business of the

> Company or in the event of any breach or non-observance by the Director of any of the stipulations contained in this Agreement which is materially detrimental to the Company's interests;
>
> 9.3 by either party upon giving the other not less than 3 days' notice in writing;
>
> 9.4 upon the Director ceasing to be a Director of the Company;
>
> 9.5 if the employment of the Director causes the Company to become subject to taxation in any jurisdiction;
>
> 9.6 in the circumstances set out in clause 8.3 [180 days' absence]"

The judge held [517] that this clause deals exhaustively with all possible grounds for Demarco's termination leaving no room whatever for his dismissal for "bad performance".

85. The Court of Appeal stated [870]:

> "The effect of clause 9 of the director's agreement of December 30 1997, is to limit the company's common law implied right to dismiss Mr Demarco *without notice* to specific situations there described, to permit his dismissal immediately on notice being given in cases of extended absence and to otherwise entitle him to three days' notice . . . Thus the contractual issue of consequence was not whether the Company could dismiss for 'bad performance', which it plainly could, but whether the parties agreed that the $1m signing-on payment was repayable in the event he were dismissed for that reason."

The reference to "the company's common law implied right to dismiss Mr Demarco without notice" is rather obscure (for the general principles see Chitty on Contracts, 29th ed. Vol. II, 39-150, 39-155 and 39-175). But in any event the issues of practical importance are, as the Court of Appeal observed, whether there was a contractual term that the $1m signing-on fee would be repaid if Mr Demarco were dismissed for bad performance, and whether he was indeed dismissed for bad performance.

Mr Demarco's dismissal

86. The draft contractual letters did contain various references to "explicit reason of improper conduct" [1307], "misconduct or bad performance" [1312, noting the manuscript annotation by Mr Arida "bad

performance is crucial"] and "just cause" under article 482 of CLT (the Brazilian Labour Law) [1319]. But none of the draft contractual letters matured into a concluded contract. Their Lordships consider that the judge was wrong in his view [513] that "bad performance" is too vague a criterion to be enforceable. But he based his decision on the logically prior point that there was never any concluded agreement as to the consequences of Mr Demarco being dismissed for bad performance.

87. Nor was there any convincing evidence that Mr Demarco was dismissed for bad performance in the expectation that he would then have to refund $1m. Such an event would have been far from a routine occurrence. Yet there is not a scrap of documentary evidence as to his dismissal for bad performance (or any other cause) having been discussed, decided on or communicated to Mr Demarco. The only relevant document – the dismissal letter of 4 February 1989 – [1375] which (in translation [1377]) stated in terms that his dismissal came under the statutory rubric of "without a just cause." No one called on Mr Demarco to repay anything until five months later, when he threatened action in the Cayman Islands over his shareholding. This part of OEP's case fails simply for lack of any credible evidence (and in particular, evidence from Mr Arida) to support it.

88. Had the Court of Appeal's criticisms been directed only to the judge's assessment of the documentary and oral evidence, and his rulings on questions of law, their Lordships would have had little hesitation in concluding that it should not have set aside his judgment. The judge did make a number of mistakes, some by no means trivial, including (i) his misunderstanding of the parol evidence rule; (ii) his view as to "bad performance" being too vague to be enforceable; (iii) his unreasonable conclusion as to the evidence of Mr Dantas about the earn-out formula; (iv) his exaggerated and unnecessary references to false documents and forgery (when he had specifically refrained from deciding the real forgery issue). Nevertheless Mr Demarco's evidence seems to have been consistent and largely unshaken in cross-examination. By contrast Ms Dantas's evidence as to OEP's version of the oral agreement was plainly unsatisfactory, and the judge was entitled to conclude that she was lying persistently about the Opportunity Fund investment. The evidence of Mr Dantas added little to OEP's case on these issues. The judge was also entitled to conclude that Mr Demarco was not dismissed for bad performance. His conclusions (para 40 above) followed from these findings.

89. The judge was however found by the Court of Appeal to have been responsible for a "fundamental failure of justice" [905]. Like the Court of Appeal their Lordships have deferred this issue until the end of their

advice, but they consider that it is the most important issue in the appeal, and it overshadows all the other issues. The parties' right to a fair trial is so fundamental that any conclusion as to the judge's findings of fact reached without regard to the fairness of the trial can only be provisional and precarious.

Ordering a new trial: the law

90. Rule 18 of the Cayman Islands Court of Appeal Rules (2001 Revision) provides as follows:

> "(1) On the hearing of any appeal, the Court may, if it thinks fit –
>
> > (a) set aside a verdict, finding or judgment of the court below; or
> >
> > (b) make such other order as could have been made by the Lord Chancellor and the Court of Appeal in Chancery on an appeal from a judgment of the Court of Chancery prior to the coming into force of the Supreme Court of Judicature Act, 1873 of the United Kingdom.
>
> (2) A new trial shall not be ordered on the grounds of misdirection, the improper admission or rejection of evidence or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned."

Substantially the same rule was in force in England before the introduction of the Civil Procedure Rules. The wording of the rule is more apt for civil trials heard with a jury (see *Bray v Ford* [1896] AC44), and in relation to a civil case tried by a judge sitting alone the reference to misdirection is not easy to apply. It cannot mean every erroneous self-direction since errors of law can generally be corrected by the Court of Appeal. It might include an erroneous self-direction as a result of which the trial judge refrained from making findings of fact essential to the proper decision of the case.

91. Be that as it may, Rule 18(2) is in a negative form and does not purport to be an exhaustive statement of the circumstances in which a

new trial should be ordered. A new trial may have to be ordered, as in *Heffer v Tiffin Green*, on the ground that the judge has (in Henry LJ's words), decided the case "without sufficient regard being paid to the building blocks of the reasoned judicial process" (but in the absence of unfairness an appellate court will always be most reluctant to order a new trial on that ground). It may have to be ordered (and will in the absence of waiver be ordered as a matter of course) on the ground that the judge was disqualified by actual or apparent bias: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 496-497. It may have to be ordered because the judge misconducted himself at trial by over-frequent interventions and usurpation of the role of counsel: *Jones v National Coal Board* [1957] 2 QB55.

92. These are not exclusive categories. Sometimes (particularly in the case of a judge with some sort of financial or other personal interest in the case before him) the appearance of bias may have nothing whatever to do with his conduct of the trial. But sometimes it is connected to his "track record" of antipathy towards the defendant's expert witnesses in personal injury cases and his attitude to them in the particular case under appeal (as in *Timmins v Gormley,* one of the cases heard with *Locabail*, or the case in the High Court of Australia of *Vakauta v Kelly* (1989) 167 CLR 568). Sometimes there may be no "track record" but a judge may intervene in a way that appears to show impatience, incredulity or hostility to one party or his witnesses (as with the complaint, not upheld by the Court of Appeal of New South Wales, in *Galea v Galea* (1990) 19 NSW LR 263).

93. It is not their Lordships' opinion that every case in which it is contended that a trial was unfair because of excessive judicial intervention should be analysed in terms of apparent bias (what Kirby A-CJ referred to in *Galea* at p279 as "a supervening apprehension of bias"). In *Jones v National Coal Board* the hearing ended with both sides appealing on the ground of not having had a fair trial, and the judge can hardly have been guilty of apparent bias against both sides simultaneously. In ordering a retrial in that case the Court of Appeal observed [1957] 2QB 55, 66,

> "[Counsel for the NCB] asked us to say that the decision reached by the judge was the inevitable decision, but we cannot say that. We have not the material for the purpose. We have some of the primary facts, but not all of those necessary to a decision."

This suggests that if all the material facts had come out in evidence the Court of Appeal might have dismissed the appeal, and the Court's observations at p67 should perhaps be read in that context.

94. *Galea v Galea* shows that attitudes to judicial intervention have changed a good deal since the trial in *Jones v National Coal Board* (which took place fifty years ago). Kirby A-CJ (at pp281-282) summarised what he took to be the relevant guidelines (the quotation omits most of the references to authority):

> "1. The test to be applied is whether the excessive judicial questioning or pejorative comments have created a real danger that the trial was unfair. If so, the judgment must be set aside.
>
> 2. A distinction is drawn between the limits of questioning or comments by a judge when sitting with a jury and when sitting alone in a civil trial. Although there is no relevant distinction, in principle, between the judicial obligation to ensure a fair trial whatever the constitution of the court, greater latitude in questioning and comment will be accepted where a judge is sitting alone. This is because it is conventionally inferred that a trained judicial officer, who has to find the facts himself or herself, will be more readily able to correct and allow for preliminary opinions formed before the final decision is reached.
>
> 3. Where a complaint is made of excessive questioning or inappropriate comment, the appellate court must consider whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and "into the perils of self-persuasion".
>
> 4. The decision on whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. It is important to draw a distinction between intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion.

> 5. It is also relevant to consider the point at which the judicial interventions complained of occur. A vigorous interruption early in the trial or in the examination of a witness may be less readily excused than one at a later stage where it is designed for the legitimate object referred to in *Jones*, namely of permitting the judge to better comprehend the issues and to weigh the evidence of the witness concerned. By the same token, the judge does not know what is in counsel's brief and the strength of cross-examination may be destroyed if a judge, in a desire to get to what seems crucial, at any stage prematurely intervenes by putting questions.
>
> 6. The general rules for conduct of a trial and the general expression of the respective functions of judge and advocate do not change. But there is no unchanging formulation of them. Thus, even since [*Jones* in 1957 and the New South Wales case of *Tousek v Bernat* in 1959], at least in Australia, in this jurisdiction and in civil trials, it has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists. In part, it reflects an increase in specialisation of the judiciary and in the legal profession. In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party affected then has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of the injustices that can sometimes occur from undue delay or unnecessary prolongation of trials deriving in part from new and different arrangements for legal aid. The conduct of criminal trials, particularly with a jury, remains subject to different and more stringent requirements."

Priestley and Meagher JJA agreed in short concurring judgments. Meagher JA stated at pp283-284:

> "Where, as in the present case, a judge is confronted by a witness who is both deceitful and evasive, there is no principle that he is not at liberty to express his measured displeasure at being trifled with. There is no principle that he must endure the ordeal with ladylike serenity. Indeed in *Vakauta* (at 611;

> 635; 68, 939) Brennan, Deane and Gaudron JJ state that to maintain a total silence in such situations 'would not represent a model to be emulated'. More than that, a timely intervention serves the interest of the party leading such evidence, as it provides him with a chance to mend the damage already inflicted. In my view, if a reasonable disinterested bystander had heard the passage at arms complained of in the present case he would not have reasonably apprehended that the trial judge was prejudiced, he would only have noted that an exceptionally irritating witness had eventually succeeded in irritating the judge."

95. Their Lordships regard the summary by Kirby A-CJ as providing valuable guidance as to the principles to be applied in deciding this appeal. They would however add that the facts and circumstances which may render a trial unfair, either in whole or in part, are so multifarious that the principles may need to be applied flexibly in some circumstances (in particular, it may simply not be possible to order a new trial which would itself have any prospect of being fair).

The judge's conduct of the trial

96. This litigation attracted a good deal of interest in the Cayman Islands, but there is no reason to suppose that the judge approached it in a partial state of mind. In the course of the trial [Day 8, 3829] he said in open court that he had deliberately refrained from reading the judgment of Smellie CJ referred to in para 30 above (which had been delivered about two months before the trial began).

97. However the trial began in an inauspicious way for OEP. Its leading counsel applied for an adjournment which the judge refused without calling on Mr Demarco's counsel [Day 1, 2297]. When the judge said that he wanted to hear the witnesses giving their evidence in chief orally, OEP's leading counsel suggested a "half-way house" [2305]. Then he had to disclose that he could not call any witnesses until midday on the second day, which the judge described as "entirely unacceptable" [2310]. Then, despite the complexity of the case, counsel said that he was not going to make a long opening: "we shall simply see what the witnesses say" [2313]. If the judge came to the oral evidence thinking that he was going to have to undertake a fairly active part in managing the conduct of the trial, it was not unreasonable for him to do so.

98. The judge did indeed play a very active part during the oral evidence. The Court of Appeal summarised the position [898]:

> "Not long into [Ms Dantas's] evidence-in-chief the judge took over her questioning, and this was to continue.
>
> The judge conducted most of the examination-in-chief of Veronica Dantas (counsel 136 questions, we are told, court 313) and almost all of the examination-in-chief of Daniel Dantas (counsel 70 questions, we are told, court 381).
>
> The judge's remarks during their testimony exhibited at times a high degree of scepticism and disbelief. At the end of Ms Dantas's evidence the judge said:
>
> > 'I am wondering why this witness was called, in the first place. Anyway she seems to have an overview of everything and a detailed knowledge of nothing.'
>
> Yet Ms Dantas was, of course, defending herself against allegations of forgery."

99. Their Lordships make three comments on this passage. First, whether a judge's interventions are proper or improper cannot be decided by a simple process of counting questions (and it is plain that the Court of Appeal did not take that view). It depends on the nature of the case, the skill of counsel, the tone and purpose of the interventions and many other factors. Second, the judge's comment quoted by the Court of Appeal was made at 4.57 pm on Day 3 [2817], when Ms Dantas was very near the end of her evidence. She had been giving evidence for the best part of two days and it had become increasingly apparent that she could not give much (if any) first-hand evidence about the terms of the oral contract which was at the centre of the case. Third, the judge had heard no proper opening speech and much of Ms Dantas's evidence about the Opportunity Fund investment must have been very hard to follow. Still more so the allegations of forgery, which were not properly pleaded but were scattered through interlocutory affidavits. Indeed the judge was still in the dark about the forgery allegations on Day 8, when he sent Mr Demarco out of court in the middle of his cross-examination and said [3760]:

> "All of you people know what the forgery issue is and I don't. I have no idea what it is. I don't know what the issue is and I am having trouble following the evidence for that reason."

This was at 2.15 pm on the penultimate day of the oral evidence.

100. In the section of its judgment headed "The proceedings at trial" the Court of Appeal showed itself well aware of the judge's difficulties, citing extracts from *Galea* as well as other authorities, and noting that counsel took no objection to the judge's interventions in the evidence of OEP's witnesses [897-904]. It might be thought that it is very difficult for counsel to ask a judge to stop interrupting, and still more to ask him, in the middle of a trial, to recuse himself for misconduct, though the majority of the Court of Appeal of New South Wales took a robust view of counsel's duty in *Vakauta v Kelly* (1989) 167 CLR 568. However waiver is not an issue in this case.

101. Most of this section of the Court of Appeal's judgment is reasonably favourable to the judge, although the Court of Appeal was plainly right in observing [901] that "the judge, by his questioning and comments, went well beyond the role described by Lord Denning" (in *Jones v National Coal Board* [1957] 2 QB 55, 64, a passage which the Court had just quoted). But then at the end of that section the Court concluded [905]:

> "Assuming the observer to be a person knowledgeable in the field of trans-national dispute resolution, an important part of the administration of justice in the Cayman Islands, it seems likely that his or her reaction would be that the trial had been rendered unfair by reason of the combination of circumstances that we have described. These included adoption by the trial judge of the function of counsel in the extensive questioning of witnesses, and adverse comment by the judge during the evidence of one of the parties. That important documents produced in the action were not placed before and considered by the judge, despite the best efforts of a principal witness for one side who was unfamiliar with the process, and that this led to unusually sweeping condemnation of that party and its witnesses, would persuade such an observer that a fundamental failure of justice had in fact occurred."

In this conclusion the Court of Appeal was plainly influenced, and in their Lordships' view was unduly influenced, by the matter of the draft contractual letters which their Lordships have already discussed at length.

102. This is a matter on which their Lordships are in as good a position as the Court of Appeal to take a view on the unfairness of the trial. Their Lordships' study of the transcripts, in the light of the very helpful written

and oral submissions which have been addressed to them, lead them to the following conclusions.

(1) The judge intervened extensively and repeatedly in the course of the oral evidence, not only during the examination-in-chief of OEP's witnesses (on which the Court of Appeal seems to have concentrated) but also during the cross-examination of Mr Demarco. Even allowing for the particular difficulties of this case, his interventions were excessive.

(2) During the evidence of Ms Dantas the judge's interventions were not obviously hostile, although they were often impatient and did not always succeed in elucidating the matter. A typical example occurred on the morning of Day 3 [2601, item 35 in the Schedule of Interventions] when the judge intervened with the words,

> "Maybe I can shorten it"

and found, as judges sometimes do, that he had not succeeded in shortening it at all; at one point [2602] the judge, Mr Black and the witness were all interrupting each other.

(3) To Mr Dantas some of the judge's questions were impatient and abrupt, and his interventions sometimes showed that the judge was not following the evidence. The earn-out formula (which their Lordships have already considered at length) is an example of this. Nevertheless the judge's purpose throughout seems to have been to try to clarify the evidence and to shorten matters, even if he was not always successful in achieving that.

(4) The judge's treatment of the evidence of the other main witnesses on behalf of OEP was similar. By then the trial was on to Days 5, 6 and 7 and the judge may have formed the provisional view that "bad performance" over the football club transaction was unlikely to be a decisive issue in the case. He must have been anxious to get on to the evidence of Mr Demarco.

(5) Some of the judge's most objectionable interventions seem to have been interruptions of the cross-examination of Mr Demarco by leading counsel for OEP. The Court of Appeal paid little attention to this aspect of the matter. A striking example occurred just before the short adjournment on Day 8 [3753-3757, item 143 in the Schedule of Interventions]. Leading counsel for OEP put to Mr Demarco a question about a particular document in connection with the Opportunity Fund investment. The following exchange occurred:

"A. And that is what I said yesterday to My Lord.

The Court: And he has said it again today.

Q. But, there is not a single mention that you changed this to – and split it between $350,000 in one fund and $150,000 in another? This is the subscription agreement you are –

The Court: With respect, [name of counsel], these paragraphs of this affidavit are directed to an entirely different point.

Counsel: My Lord, no, they are not.

The Court: Yes, they are."

And so it goes on for two pages until [3756]:

"Counsel: My Lord, I would prefer, if I may, to cross-examine the witness.

The Court: Well, you may cross-examine, but I don't think you can misstate the evidence to him.

Counsel: My Lord, with respect, I am not misstating the evidence."

And so it goes on for another page until [3757]:

"Counsel: But – My Lord, let me just carry on, if I may?"

103. Their Lordships wish to state plainly that the judge was seriously at fault in the way he conducted this trial. Even making generous allowance for all the difficulties already mentioned, and adopting the robust approach approved in *Galea*, his interventions went some way beyond what was proper. But the judge's interventions were motivated, not by partiality, but by the wish to understand the evidence (which was often obscure and inconsequential) and to push on the trial process. There is no reason to suppose that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased (see *Porter v Magill* [2002] 2 AC 357, 494). In the view of their Lordships (respectfully differing, by a fairly narrow margin, from the Court of Appeal) the judge's conduct was not such as to render the trial unfair. Leading counsel for OEP (who was also operating under great difficulties, and whose skill and sense of professional duty – after an inauspicious start – the judge seems to have underestimated) was able to put his client's case before the court. It failed not because the trial was unfair but because it was a case without merit, and OEP's witnesses were shown to have lied to the court in interlocutory affidavits, in their witness statements and in their oral evidence at trial.

104. Their Lordships will therefore humbly advise Her Majesty that Mr Demarco's appeal should be allowed with costs before the Board and in the Court of Appeal; that the order of the Court of Appeal should be set aside; and that the order of Kellock J should be restored.