

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 14 of 2002
(Grand Court Cause No. 389 of 1999)

BETWEEN

CVC/OPPORTUNITY EQUITY PARTNERS LIMITED

Appellant/Plaintiff

AND

LUIS ROBERTO DEMARCO ALMEIDA

Respondent/Defendant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice G. Collett, Justice of Appeal
The Honourable Mr. Justice M. Taylor, Justice of Appeal

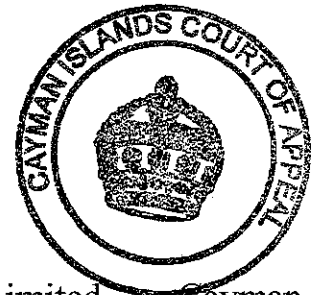
Roger Ellis, Q.C. and James Chapman for the Appellant
Michael Black, Q.C., Duncan Nichol and Andrea Dunsby for the Respondent

Heard: November 17-21, 2003

Judgment Released: March 24, 2004

REASONS FOR JUDGMENT

TAYLOR, J.A.



The appellant, CVC/Opportunity Equity Partners Limited, a Cayman-incorporated investment company carrying on business in Brazil, brought this action to recover \$1,000,000 (US) in “signing-on” benefits received by the

respondent, Luis Roberto Demarco Almeida, a “deal maker” dismissed after a little over a year in its employ, and for a declaration of the extent of Mr. Demarco’s beneficial interest as a shareholder.

(a) The Background

Executed agreements were entered into with respect to issuance to Mr. Demarco of a single share and some of the terms of his employment, but these did not deal with the terms on which he had earlier received the \$1,000,000 (US) in benefits -- \$500,000 in cash and a \$500,000 investment in the group’s mutual funds -- or with the extent of his beneficial shareholding.

Mr. Demarco’s terms of employment were said by each side to have been first settled by oral agreement during the month of October 1997, in which his employment began. Mr. Demarco contended that the deal was made a day or two before he started work, and says that he would not otherwise have left his former employment. The company maintains that the terms were settled almost three weeks after he joined its staff. The company contends that Mr. Demarco received the \$1,000,000 as a refundable advance, in cash and investment, by way of security for future distribution of profits by dividends and bonuses, together with the right

to acquire a 3.5 per-cent beneficial shareholding incrementally over five years in its employ. Mr. Demarco maintains that he was to receive the \$1,000,000 unconditionally, along with an immediate 3.5 per-cent beneficial shareholding, as a “golden hello” with no strings attached, and that he later agreed to the company’s proposal that half the money be invested for him in its mutual funds, as a demonstration of confidence in the organization.

The company sued for the return of the \$500,000 paid in cash, for the right to retain the balance of the \$500,000 invested in its mutual funds, for recovery of \$56,451 by which the investment had declined in value, and for a declaration that Mr. Demarco’s shareholding, accruing at 3.5 per-cent over five years or 0.7 per-cent a year, amounted to 0.875 per-cent in early 1999 when he was dismissed for what it described as “bad performance”. The company maintained that Mr. Demarco agreed he would return the \$1,000,000 in signing-on benefits if dismissed for “bad performance”, and that he was properly dismissed for that reason, while Mr. Demarco denied both that he had been guilty of “bad performance” and that he ever agreed that this would be a ground on which the company might call for return of the signing-on benefits. He sought by dismissal of the action to establish his right to retain the \$500,000 paid in cash, to receive the balance remaining after market losses of the \$500,000 invested for him in the

company's funds -- then being held on terms by Cayman attorneys -- and to have his equity interest declared, in response to the company's claim, at a fully-vested 3.5 per-cent beneficial shareholding.

After a 10-day hearing the trial judge found wholly in Mr. Demarco's favour, both on the case as pleaded and on the unpleaded grounds that an oral agreement for repayment in the event of "bad performance" would be void for uncertainty and excluded by the parol evidence rule. The judge found the evidence given on behalf of the company to be "manufactured and false in all its material respects", and described the company's conduct in prosecuting the action as "a gross abuse of the process of this Court".

The company seeks a new trial.

It contends that the judge made errors of fact and findings contrary to the weight of the evidence, failed properly to consider and understand the evidence and resolve essential issues, and erred in matters of law and mixed law and fact. It says that the judge's persistent interventions during the presentation of evidence rendered the trial unfair, and that an informed and objective observer considering the way the trial was conducted would conclude there was a real possibility that the court was biased. It says also that the way in which the trial was conducted

contributed to the errors which it alleges in the reasons for judgment, and that an informed and objective observer considering the reasons for judgment in combination with the manner in which the trial had been conducted would go further, and would conclude that the court was, indeed, biased.

Counsel for Mr. Demarco says that the judge did not err in his reasons for judgment, that he properly engaged himself during the trial in a more active style which, counsel maintains, judges are today encouraged to adopt, and that the judge's criticism of the company's case, and adverse attitude towards some of its witnesses, were warranted by inconsistencies in its pleadings and in positions taken by it, as well as by the evidence it presented.

(b) The Judge's Task

There were incongruities involved in the case for both sides.

Mr. Demarco maintained that the company promised him an outright \$1,000,000 cash payment, and an immediately-vested shareholding of perhaps greater value, in addition to a salary of \$300,000 (US) a year, with no obligation to remain in its employ for any period of time. The company maintained that the signing-on benefits were in the nature of a loan or advance to be repaid out of any

additional remuneration attributed to him in excess of his salary, which would be divided as between cash and debt-repayment according to a formula that was never in fact engaged because he was granted no remuneration in addition to his salary during his 16 months in its employ.

The positions at various times taken by the company with respect to Mr. Demarco's shareholding were markedly inconsistent.

In its original statement of claim the company asserted that Mr. Demarco was entitled to subscribe for 1 per-cent of its shares and 1 per-cent of the shares of an associated Brazilian company by which he was said also to be employed, with no mention of any obligation to relinquish his shareholding on termination. In an amended statement of claim filed two years later, after Mr. Demarco indicated he would bring a shareholder's winding-up action, the company maintained he was to become a 3.5 per-cent shareholder incrementally over a period of five years in its employ, and that if he left its employ he was to relinquish his interest "at its then value". In affidavit evidence the company said that Mr. Demarco was not in fact entitled on termination to receive the value of his shareholding at that date, but only its par value, that is to say \$1.00 per share.

The Judicial Committee of the Privy Council upheld the decision of this Court dismissing an action brought by the company to restrain Mr. Demarco from bringing the winding-up petition: see *CVC/Opportunity Equity Partners Limited et al. v. Demarco Almeida* [2002]. CILR 77. The petition thereafter brought by Mr. Demarco has been the subject of interlocutory proceedings in the Grand Court and this Court: see *In Re CVC/Opportunity Equity Partners Limited* [2002] CILR 531 (C.A.). In the decision of the Privy Council, given shortly before the trial of the present action, Lord Millett noted (at p. 87) the changes in the company's position with respect to Mr. Demarco's shareholding, and observed that the latest version, contained in its amended statement of claim in the present action, sat "uneasily" with the company's contention in the winding-up proceedings that the shares were to be valued on a liquidation basis rather than, as previously stated, at their "then value" at the date of termination, that is to say their value as shares in a company in fact carrying on business as a "going concern". In the present proceedings the controversy regarding his shareholding seems to be limited to whether it amounted to 3.5 per-cent or 0.875 per-cent, or perhaps 1 per-cent. To the extent that the question whether he was obliged to sell his shareholding on termination was an issue at trial, it seems now to have been overtaken by, or subsumed in, the winding-up proceeding.

The trial judge was thus faced with difficult issues of fact that had to be decided on the basis of conflicting oral evidence, with little assistance to be found in conventional commercial practice or ordinary business sense.

The judge's task was complicated by the fact that English was not the first language of the principal witnesses for either side, some documents were poorly translated, and the relevant dealings had been conducted in a business and legal environment different from that which prevails in common-law jurisdictions. The action was one of a number of concurrent proceedings involving the Opportunity group and Mr. Demarco, in some of which the company's conduct attracted judicial disapproval. At the outset of the trial counsel for the company sought an adjournment, stating that preoccupation with related proceedings had prevented them from properly preparing the case to be presented at trial, but the application was denied. It was not suggested on appeal that the judge erred in principle in refusing the adjournment application, but it was a decision that inevitably resulted in difficulties for counsel and the court.

We will discuss certain central features of the case, and the manner in which they are dealt with by the trial judge in his reasons for judgment, before addressing the way in which the trial was conducted.

(c) The Negotiations

Mr. Demarco's case was that he reached agreement on the terms of his employment with Persio Arida, then head of the Opportunity group's Sao Paulo office, on October 11 or 12, 1997, and started work on October 13.

The company contended that agreement was reached only on or about October 31, 1997, when it paid \$500,000 (US) into Mr. Demarco's New York bank account, to be followed on November 3, 1997, by payment of \$500,000 (US) to its transfer agent for investment in its mutual funds in Mr. Demarco's name. 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. Mr. Demarco produced an undated memorandum which he said Mr. Arida approved on or about October 11 or 12, 1997, causing him to leave his current employment and to start work with Opportunity one or two days later. This document, headed "Our Deal", sets out the terms as: (i) "3.5% initial stake, which may reach 5.0% within one year"; (ii) "payment of \$1,000,000 net, as a signing fee", to compensate for loss of benefits from his current employment; (iii) Mr. Arida and Daniel Dantes, head of the

Opportunity group, to accept responsibility for the signing-on fee; (iv) a 6-month term bonus, to be calculated according to a proposed formula; and (iv) salary of \$300,000 (US) a year. The memorandum is reproduced as Document 1 in the Schedule to these reasons for judgment.

There are three later written communications in the form of proposed draft agreements, dated between October 21 and 24, which show negotiations to be in progress, and suggest quite different terms.

Mr. Demarco sent an e-mail dated October 21, 1997, to Veronica Dantas, sister of Daniel Dantas, head of the Opportunity group, herself a director of one of its companies and the holder of power of attorney on behalf of the plaintiff company. In this document, which is headed "Memorandum of Understanding" and a copy of which is directed to Mr. Arida, Mr. Demarco records proposed terms intended to constitute a binding contract of employment on acceptance by the company. An English translation, apparently accepted by the parties, is reproduced as Document 2 in the Schedule to these reasons.

The memorandum, as translated, proposes terms for repayment of what it describes as an "advance of \$1,000,000", such advance to "be deducted from dividends and bonuses", presumably meaning to be reduced by such payments, at a

rate of 20 per-cent of such dividends and bonuses, to increase to 30 per-cent “until” (presumably meaning when) “at the end of 1998 the partner’s shareholding is increased from 3.5 per-cent to 5 per-cent”. Writing 10 days after the date of a conversation with Mr. Arida in which he says the terms of employment were agreed, Mr. Demarco here describes the \$1,000,000 signing-on benefit as an advance against future dividends and bonuses, not an outright payment. Consistently with the deal he claimed to have made with Mr. Arida 10 days earlier, he proposed an immediate 3.5 per-cent shareholding. This is to increase to 5 per-cent at the end of the following year, something stated only as a possibility in the undated memorandum (Document 1). He adds:

In case the above-mentioned partner resigns from the company by his own choice he will re-imburse the remaining unpaid balance of the advance.

In case the company dismisses the mentioned partner by its own volition, the advance will be automatically paid off, nothing being due by the partner unless the dismissal occurs by reason of improper conduct.

The e-mail message says that it will have “legal value” if electronically signed by the parties. This did not, of course, happen.

A lawyer for the company responded by draft letter of October 22, 1997, proposing terms which make no mention of the amount of any immediate shareholding but contemplate Mr. Demarco having a 5 per-cent shareholding at some later date. This draft letter deals somewhat differently with the manner in which the \$1,000,000 advance will be repaid out of future remuneration. The original Portuguese-language version of the draft and an English translation, apparently accepted by the parties, are reproduced in the attached Schedule as Document 3 and Document 4 respectively. With regard to repayment of the advance, the draft letter proposes that 20 per-cent of net remuneration, including “dividends, wages and profit sharing” attributed to Mr. Demarco by the Cayman company (the present plaintiff), and 25 per-cent of such remuneration from the Brazilian company, be “deducted” from the advance, presumably meaning that his indebtedness on the advance would in this way be reduced, to be increased to 30 and 42.8 per-cent respectively when Mr. Demarco’s capital participation in the two companies “attains 5 per-cent”. The draft letter, as translated (the phrase in brackets being part of the translation), continues:

5. In case you resign from the company by your own choice the balance due of the Advance registered in the graphic account will have to be paid off, added of interest based on the LIBOR rate for loans in dollars (6 months).

6. In the same way, if you are dismissed from the Company due to misconduct or bad performance, the balance due of the Advance registered in the graphic account will have to be immediately paid off, added of interest based on the LIBOR rate for loans in dollars (6 months). (“bad performance” is crossed in the Portuguese version, but it is handwritten that “bad performance is crucial”.)

The draft letter proposes that should Mr. Demarco’s employment be terminated by reason of a buy-out of his shareholding, or because of incapacity, he will pay off the advance without interest over a period of 30 years.

These last two documents are exhibited to an affidavit sworn by Ms. Dantas on June 22, 1999, for the purpose of interlocutory applications, and entered on behalf of Mr. Demarco as an exhibit at trial. They are referred to in her affidavit and in a responding affidavit of Mr. Demarco, also entered as an exhibit at trial. They were referred to and described during the cross-examination of Ms. Dantas at trial, and alluded to during the cross-examination of Mr. Dantas.

The documents were not accepted on appeal by counsel for Mr. Demarco to be part of the evidence at trial. Copies were for some reason not included in the exhibit book with the affidavit of Ms. Dantas, to which they are exhibited, when that affidavit was entered at trial by counsel for Mr. Demarco.

In Paragraph 9 of her affidavit Ms. Dantas says of the two documents that they were “exchanged during negotiations” and set out terms “subsequently changed in the negotiations”. She says the words “bad performance” in the October 22 draft were struck out by Mr. Demarco, and that Mr. Arida added the notation: “bad performance is crucial”. After further discussion, she says, “it was agreed that the term of the engagement should include dismissal for bad performance (inter alia in effecting deals) or misconduct”.

A further draft letter addressed to Mr. Demarco dated October 24, 1997, was entered as an exhibit at trial. A proffered, and apparently uncontested, translation is reproduced in the Schedule to these reasons as Document 5. The \$1,000,000 payment is here described as an “anticipation” from which deductions are to be made in respect of remuneration assigned to Mr. Demarco by the two companies in excess of his salary of \$300,000, at the rates of 20 per-cent and 25 per-cent respectively, to rise to 42.85 per-cent when Mr. Demarco’s participation reaches 5 per-cent. The draft proposes that Mr. Demarco be required to repay any outstanding amount of the advance with interest over two years should he be dismissed “for a just cause (which comprises the reasons forseen under art. 482 of the CLT, as applicable)”. There are proposed provisions for repayment in the event Mr. Demarco should leave of his own choice, or his employment be

terminated for a reason other than “just cause”, as defined. No mention is made of any initial shareholding, or of the circumstances under which his shareholding might, as suggested, increase to 5 per-cent.

Thus there was reference at trial to three documents created during October 1997, after the meeting with Mr. Arida at which Mr. Demarco maintained his contract was settled in accordance with the terms set out in his undated memorandum (Document 1), and before payment of the \$1,000,000: (i) Mr. Demarco’s memorandum of October 21 to Ms. Dantas and Mr. Arida (Document 2), in which Mr. Demarco himself describes the \$1,000,000 as an advance against future dividends and bonuses; (ii) the draft from the lawyer of October 22 (Documents 3-4), which, like his memorandum of the previous day, Mr. Demarco accepted as a communication exchanged during negotiations; and (iii) the draft of October 24 (Document 5), proposing repayment terms in an important respect different from those contained in the draft of October 22. All are drawn so that, on acceptance, they will become binding contracts.

The significance of Documents 2 and 3-4 is apparent from the evidence at trial of Ms. Dantas and the affidavits of Ms. Dantas and Mr. Demarco, entered as exhibits at trial. The affidavit of Ms. Dantas was considered by the trial judge, and referred to in the reasons for judgment, as was Document 5, in itself an exhibit at

trial, of which the judge notes in his reasons that it was disclaimed by the company's witnesses; Ms. Dantas said it was probably prepared by the company's lawyer, who she described as a lawyer of "common trust", after discussions with Mr. Demarco, and did not reflect the company's position. Because Documents 2 and 3-4 were for some reason not physically included with the affidavit that exhibits them, when that affidavit was entered as an exhibit at trial by counsel for Mr. Demarco, nor marked after Ms. Dantas referred to and described their significance to the case during her cross-examination, and because they were not put to Mr. Demarco, their importance was not impressed on the judge. There was, of course, no suggestion by either side that any of these proposals fully sets out the agreement that it says was ultimately reached.

The significance of these documents – particularly Document 2 and 3-4, which are acknowledged by both in their affidavits to be documents exchanged during negotiations – lies in the fact that they show Mr. Demarco to be engaged in late October, 1997 in discussions involving: (i) characterization of the \$1,000,000 payment as an advance to be repaid out of a portion of the remuneration assigned to him; (ii) allocation of such remuneration as between cash and reduction of indebtedness for the advance according to a formula differing as between the companies, difficult for the non-Portuguese-speaking outsider to understand but

apparently understood by those involved; (iii) a proposal for repayment by Mr. Demarco of the balance of the amount advanced in the event he were to be dismissed for "bad performance"; and (iv) consideration of some process by which Mr. Demarco's shareholding would in some way increase, or become "vested", over a period of time. These matters were the subject of negotiations between Mr. Demarco and the company at least 10 days after the discussion with Mr. Arida in which Mr. Demarco maintained at trial that final agreement was reached, and a week before the date at which the company says that agreement was reached and when the first of the signing-on money was in fact paid. Mr. Demarco's position cannot have been that there were no negotiations after October 11 or 12, 1997, regarding these matters. His position must have been that there were negotiations during which efforts were made by both sides to arrive at some agreement different from that which he said was reached on October 11 or 12, but that these negotiations changed his original proposal only in that half of the signing-on money was to be invested in the company's funds.

In his reasons for judgment the trial judge says (at p. 15) with reference to the undated memorandum (Document 1), to which Mr. Demarco says that Mr. Arida agreed on or about October 11 or 12, 1997:

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. [Emphasis added]

The judge goes on to reject the evidence of Ms. Dantas that the undated Demarco memorandum (Document 1) was “merely a step in the negotiations that led to an oral agreement being reached” on October 31, after meetings between Messrs. Demarco, Dantas and Arida and herself. The judge says:

Not only is there a complete absence of any written record of the terms of the agreement alleged by the Plaintiff, *there is no written record of what transpired at any of these meetings*. [Emphasis added]

Thereafter in his reasons (at p. 26) the judge returns to the evidence of negotiations given by Ms. Dantas, including her evidence of having taken notes of these so that the company lawyer could prepare a written contract. At this point the judge again says: “no draft contract was put in evidence”.

Later in the judgment (at p. 27), the judge deals with the formula described by Mr. Dantas and his sister for repayment of the \$1,000,000 advance from a proportion of bonuses and dividends attributed to Mr. Demarco by the two Opportunity entities which employed him. The judge was unable to follow the

suggested formula, and concluded that no such agreement for repayment of the signing-on benefit had been made. The judge says:

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.* [Emphasis added]

It appears that confusion with respect to the arrangement described by the company's witnesses persuaded the judge that there could not in fact have been an agreement under which the \$1,000,000 would be treated as an advance to be "paid-off" out of a portion of any extra remuneration attributed to Mr. Demarco. Of the "pay back" formula described by Mr. Dantas the judge says (at pp. 43-44): "There is no question in my mind that Dantas *was simply making it up as he went along, although he was testifying under oath*". [Emphasis added]

It is unfortunate that counsel were not in a better position to assist the judge in understanding the company's evidence.

The formula which Mr. Dantas described, and illustrated by several examples, was one under which Mr. Demarco would be assured of receiving in

cash a portion of his annual remuneration in excess of \$300,000 and a portion by way of reduction of the repayable amount of the \$1,000,000 said to have been advanced. In the proposal which had been made in Document 3-4, the letter of October 22, 1997, from the company's lawyer to Mr. Demarco, the amount to be credited to reduction of the advance is stated as 20 per-cent of the total annual remuneration attributed to Mr. Demarco by the Cayman company and 25 per-cent of that attributed to him by the Brazilian employer company, but only if the total sum were "equal or superior to US \$150,000 per semester" [i.e.: \$300,000 per year]. In his evidence of the agreement which he said was reached about nine days after that, Mr. Dantas described such a scheme, under which 20 per-cent and 25 per-cent deductions would be made from total annual remuneration, including salary, bonuses and dividends, but subject to a condition that ensured that Mr. Demarco would receive at least \$300,000 in cash, and perhaps somewhat more. If application of the 20 or 25 per-cent deduction would result in Mr. Demarco receiving less than \$300,000, then under the formula described by Mr. Dantas Mr. Demarco would receive the whole year's remuneration in cash. If for instance, he said, Mr. Demarco were to receive \$50,000 in bonuses solely from the Cayman company, so that his total income was \$350,000, then application of the 20 per-cent appropriate to that company would produce \$70,000; when deducted from the \$350,000 the result is somewhat less than \$300,000. In such a

case, Mr. Dantas said, there would be no allocation to reduction of the advance: the whole \$350,000 would go to Mr. Demarco in cash. Despite considerable confusion, this explanation seems to have a basis in logic, and other examples given by Mr. Dantas seem consistent with it. The formula does not appear to be one that would be considered complicated to those involved in financial dealings. It is very much like that proposed to Mr. Demarco in the October 22, 1997, letter (Document 3-4), although more favourable to Mr. Demarco. The details that Mr. Dantas said were not gone into in his discussions with Mr. Demarco, such as arriving at a “weighted average” when applying the different percentages to income received from the two companies, are of the sort that a court would probably imply, so as to give a contract “commercial efficacy”.

The documents referred to above support the evidence of Daniel and Veronica Dantas that negotiations were in progress after October 11 and before October 31, 1997. This is especially true of Documents 2 and 3-4. All are in the form of draft agreements. They show terms being discussed between the company and Mr. Demarco that include repayment of the \$1,000,000 out of annual remuneration attributed to Mr. Demarco, according to a formula varying as between the two employer companies which appears to differ only in minor respects from that described by Mr. Dantas.

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 characterizing the company’s evidence as “manufactured and false in all its material respects”.

(d) Are the Documents in Evidence?

Counsel for Mr. Demarco takes the position that the important memoranda of October 21 and 22, 1997, (Documents 2 and 3-4) were not in evidence at trial, and particularly so since the judge had said that material had to be entered in the exhibit books in order to be properly before him.

They were, however, described and referred to both in oral evidence and in affidavit evidence exhibited at the trial.

In her cross-examination Ms. Dantas referred to Documents 2 and 3-4, and perhaps also to Document 5, when she said the following in answer to questions put by the judge and by counsel for Mr. Demarco:

THE COURT: Well, maybe I can shorten it.

Miss Demarco (sic), paragraph 18 we looked at in another context yesterday in the first statement of claim. This business about the 25% and the 20% and the total cash sum which is referred to in paragraph 22.

I have to tell you that I find this -- paragraphs 18 and 22 -- these provisions of the contract, you say were made orally, very difficult to follow even when they are in writing.

Now, are you saying that all of this was agreed to by Mr. Demarco orally in a company that has \$30,000,000 in its kitty didn't set this out in a written agreement or even in a letter? Is that what you want me to believe?

THE WITNESS: Yes, sir.

THE COURT: As I say, Mr. Black, that might shorten it.

THE WITNESS: It was not finalised the agreement, but if you look at some attachments, you will see some letter exchanged between Demarco in which this agreement is written.

THE COURT: Well, there is a writing that includes all these complicated terms --

THE WITNESS: It is not a final writing --

BY MR. BLACK:

Q That is quite misleading because --

A It is not misleading.

Q -- because you say -- let me ask --

Q -- because you say -- let me ask --

A Can I finalise my answer first?

Q No. I will ask the question because --

A I'm saying -- I am answering My Lordship--

THE COURT: Excuse me.

THE WITNESS: I am answering him.

THE COURT: Let the witness answer.

THE WITNESS: I am saying that there were emails exchanged between Mr. Demarco and Mr. Persio Arida and some of them in those emails, you will see this written down. It was not a final agreement that's why I said it ended up that we didn't sign this. So, I am not considering it to be a final agreement. But, you will see this in the transcript over here written in one of these emails.

THE COURT: Miss Dantas, in your original statement of claim and in these paragraphs of your affidavit, you are talking about the agreement that was final and you have said several times and your counsel has said the employment agreement -- distinct from the

directorship -- was all oral.

Now you are telling me that there are emails which are not final, but discuss these concepts; is that correct?

THE WITNESS: Yes, sir.

THE COURT: But, there is no document confirming the final arrangement?

THE WITNESS: Yes, sir. That is exactly it.

THE COURT: All right. So, there are emails discussing the concepts, that the witness says became part of the oral agreement --

THE WITNESS: Part --

THE COURT: -- but no written confirmation of the terms of the final oral agreement?

THE WITNESS: That's it, sir. And those emails that -- you see that they change over time because they were not the final agreement. Specifically this part is written over there, but you will see the others changing because they were not a final agreement.

And later, when questioned regarding document disclosure:

A No, sir, I have to answer you very frankly. What I said in regard to this was I didn't show the emails because I didn't have them. I received two emails. As I said, the emails were exchanged between Persio Arida

and Demarco. When Persio left the company, he gave me a file. In this file, there was two emails. These two emails I filed. The rest of them, I took notice when Demarco put them together with his document. So, I didn't have them.

Counsel then read to Ms. Dantas from her second affidavit what must be references to Document 2 and Document 3-4:

13. However, when Persio Arida left the Plaintiff, he gave me a file of correspondence with Demarco which he had kept: It contained only 2 documents which I exhibited . . . to my first affidavit.

. . .

20. The only major differences between the documents exhibited by respectfully myself and Demarco are the annotations. The annotations on the copy in the plaintiff's possession are in Persio Arida's handwriting, while I assume the annotations on the copy in Demarco's possession must be made by him. Either way, the copy marked by Demarco is not available for exhibition to my first affidavit and I believe that this cannot be said to amount to a failure to give full and frank disclosure

You are happy with that evidence? I wanted to read it in full to be fair to you.

A I think this is exactly what I said.

And later, in what must be a reference to all of Documents 2, 3-4 and 5:

THE COURT: What I want to know is this an all-oral agreement as the plaintiff's case is or is it partly in writing; and if it is partly in writing, I wish somebody would show me the writing.

THE WITNESS: Yes, sir. The attempt was to have an agreement in writing, which we never end up having one. So, we end up having an oral agreement as being the final agreement. But, during this period of time, not only we had conversations on the phone in the oral agreement, but also the exchange of these emails between Persio Arida and Mr. Demarco and a draft letter that I think a lawyer was preparing to send to Demarco and in these documents, I remember it. That's what I am saying, I recall reading the 300.

So, you ask me if this is written anywhere and I said, yes, it was exchanged in these documents.

Counsel for Mr. Demarco then has one of the documents which had been referred to marked as an exhibit. This is Document 5, of which Ms. Dantas had said that it did not originate from Opportunity and must have been written, by the lawyer who she described as a "lawyer of common trust", at the suggestion of Mr. Demarco. The other documents to which Ms. Dantas must have been referring are Document 2 and Document 3-4. These were *not* marked. Yet later in her cross-examination Ms. Dantas was to return again to "the notes I referred to before by Demarco and Persio Arida, the e-mails and so on".

Despite the confusion that emerges from these interchanges, it is obvious that Ms. Dantas did all she could to draw the court's attention to the memoranda, including Document 2 and Document 3-4, exhibited to and referred to in the affidavits on which she was questioned. Since these documents had been exhibited to her affidavit which was before the court, Ms. Dantas had reason to expect that they would be placed before the judge.

Of particular significance is the following exchange between counsel for Mr. Demarco, witness and judge.

Q But again – because we've rather diverted off the course that I was trying to take. Have we now seen the documents that you wanted His Lordship to see?

A I just wanted to –

Q Yes or no?

A I just wanted to tell His Lordship that this agreement was written somewhere. The complicated description over there, I read in some kind of document exchanged between Demarco and Persio Arida email, memorandum or whatever; I have read it.

Q Yes. The document we've just looked at is that the one you're referring to?

A Could I see the others? I saw two. I know

Demarco put more than two. I can't –

Q They are there behind that tab.

A In the same tab 7?

Q I think so. I am just anxious that you have an opportunity to refer to all the documents that you want to tell His Lordship about. There seems to be two versions of this?

A Yes, it is two versions of the documents.

Q With more or less the same wording?

THE COURT: Where is the second version?

THE WITNESS: In my case, just after –

MR. BLACK: There are two Portuguese documents. One the 24th and one the 22nd of October, 1997.

THE COURT: I see. When, in fact, was the million dollars paid – or the 500,000?

THE WITNESS: When?

THE COURT: Exactly what date?

THE WITNESS: At the end of October, '97 and 31st October, after this.

THE COURT: Halloween, okay.

THE WITNESS: Halloween.

THE COURT: Right.

BY MR. BLACK:

Q Right. Can we then go back to the exercise that – I wanted to go through the original statement of claim.

There was thus an invitation to Ms. Dantas to identify the documents that she wished the judge to see. Her response must be a reference to Document 2 and Document 3-4. But these documents were not produced. The discussion was instead diverted to another document, perhaps Document 5, of which there are copies bearing different dates, and then to other subjects.

At the beginning of the trial the judge had said that “nothing – and I mean nothing – will be in evidence in this trial unless and until it is proved in open court” or admitted by consent. The judge said that there was to be an exhibit binder. “We will place into that binder,” he said, “as the document is introduced into evidence, the exhibits in the order in which they are received and marked accordingly”. The two memoranda which have assumed particular importance on this appeal were “proved” in the sense that Ms. Dantas in her testimony identified

them by reference to her affidavit that was marked as an exhibit, and to which they were exhibited when that affidavit was filed in court. In this way they were “introduced into evidence”. But the judge’s direction that all documents proved and introduced into evidence be placed in the exhibit book and sequentially numbered was not followed. By reason of that omission they were not recognized as exhibits at trial and placed before the judge.

Counsel for Mr. Demarco suggested before us that a strict view ought to be taken of what is and is not to be considered to be “in evidence”, because the judge laid down a strict rule in this regard, and for the reason that both sides alleged fraud. Counsel emphasized that the judge did not say in his judgment that there were no such documents as Documents 2 and 3-4, but only that none were “entered in evidence”. We do not, however, accept that the judge would have made the findings that he did had these documents, or the evidence of Ms. Dantas regarding them, been drawn to his attention. The purpose of the ruling to which counsel refers cannot have been that documents identified and described in evidence but not put in the exhibit book and numbered would be deemed not to exist. Had application been made after the trial to re-open the case in order to have these documents marked, and so that Mr. Demarco might respond to them, it seems most unlikely – in view of the importance that the judge was to attach to their absence in

assessing the credibility of the company's witnesses – that such an application would have been refused. The severe findings made by the judge in that regard were not based on failure to have these documents bound and marked. They were based on the premise that no such documents existed.

We are of the view that it would, in any event, be quite wrong in the circumstances to say that because they were not marked and bound with the trial exhibits, as they ought to have been, Documents 2 and 3-4 cannot be considered relevant for the purposes of this appeal.

(e) Shareholders' and Director's Agreements

In order, it is said, to meet the requirements of Citibank, an international financial organization headquartered in New York whose funds the company and its corporate partners were to invest, a joint shareholders' agreement and individual director's agreements, all dated December 30, 1997, were prepared in New York and executed for all the parties under power of attorney.

In his reasons for judgment (at p. 8) the judge says of the shareholders' agreement, a copy of which is included in the Schedule hereto as Document 6: "it can accommodate all of the elements of Demarco's version of his oral contract

with CVC/CI [the plaintiff] but not all the elements of the plaintiff's version". Of the shareholders' agreement and director's agreement together – both of which adopt the law of the Cayman Islands as their governing law – the judge says (at p. 5) that they “contained provisions one would expect to find in employment contracts and there can be no doubt that in combination those agreements were intended to regulate every aspect of Demarco's relationship with CVC/CI”. The judge says of the shareholders' agreement that it is no more than an “agreement to agree”, but that this is not true of the director's agreement. The judge concludes (at p. 51) that on execution of these agreements, in particular the director's agreement, evidence of any prior oral contract involving an advance by the company repayable in the event of dismissal for “bad performance”, as contended for by the company, would be excluded by the parol evidence rule.

It must have been known to the New York lawyers involved, and perhaps others, that the shareholders' agreement was fundamentally defective. A number of important terms, including those establishing future rights to buy and sell shares as between the company and its shareholders, are said in the body of the agreement itself to be contained in an “Annex A” there referred to. The annex was not completed when the document was signed, nor does it appear ever to have been completed. Attached in its place, in the copy of the agreement entered in evidence,

is a sheet listing matters to be dealt with in it, including several relevant to the future shareholding and remuneration of employees.

The executed, but thus fundamentally incomplete, shareholders' agreement shows that one of 98 shares to be issued, at \$1.00 each, is to go to Mr. Demarco. It is accepted that Mr. Demarco was in fact registered as the holder of this share. Ninety-four shares are to be issued to Opportunity Invest II Inc., a company which already owned the only two previously-issued shares, and which is described as belonging to Mr. Dantas, Mr. Arida and one Dorio Ferman. One each of the four remaining shares is to be issued to four named "deal makers", including Mr. Demarco. Messrs. Dantas and Arida and the four deal makers are to be directors; all except Mr. Arida are required to enter into a director's agreement with the corporate controlling shareholder.

There is nothing in the terms of the shareholders' agreement that purports to record the duties of Mr. Demarco's employment as a "deal maker" – a job he had by then been doing for 11 weeks -- or that deals with his remuneration, or any benefit to be received by him other than his single share. Despite its "complete agreement" clause, it leaves important matters undecided.

The “bullet points” appearing in place of “Annex A” in the copy of the shareholders’ agreement entered in evidence show that matters such as “vesting of points”, “annual salary” and “semi-annual bonuses” were intended to be dealt with in this Annex, and the description of the annex in Clause 1(1) states that it will include procedures for allocation of “points” and the manner in which a shareholder’s interest in respect of such points will “vest”. Clause 13(3) of the shareholders’ agreement contemplates payment of bonuses and “distributions” in respect of shares under “Clause 13(1)(c)”, but there is no such clause. The agreement of greater consequence in the present context must be the director’s agreement, a copy of which is appended as Document 7 in the attached Schedule. It contains no “entire agreement clause”, and cannot have been intended to encompass all the terms of Mr. Demarco’s employment because it was executed concurrently with the incomplete shareholders’ agreement, which refers to others which remained undecided. The director’s agreement requires that Mr. Demarco devote his full time to the company’s business and sets his salary at \$12,000 a month, about half that said to have been agreed on. It says that the “employment of the Director shall commence on December 30, 1997, and shall continue until terminated pursuant to Clause 9”. The “employment” referred to cannot be the directorship; that could be brought about only by the shareholders, and terminated only by replacement by them or by resignation. It could not be effected by an

agreement such as this, between the company and the director, a point that was to cause some confusion on the part of counsel.

The director's agreement starts from the position that Mr. Demarco has already been appointed a director. It sets out the terms on which, as from December 30, 1997, he will also be employed by the company. But the two capacities are linked together by Clause 15, which provides:

Upon termination by whatever means of his employment under this agreement:

- 15.1 the Director shall at the request of the Company immediately resign from the office as a director of the Company without claim for compensation, and in the event of failure so to do, the Company is hereby irrevocably authorized to appoint some person in his name and on his behalf to sign and deliver such resignation or resignations to the Company;

The company eventually went through the motions required by this provision to remove Mr. Demarco from the Board after his dismissal.

Clause 3.1 deals with Mr. Demarco's duties. It says that he is to be employed full-time in the business of the company and to perform such duties as may be assigned by the Board, including the following:

- (a) to carry out all policies and procedures implemented by the Board.
- (b) to manage and maximize the profitability of the business of the Company in an efficient and effective business-like manner.
- (c) to liaise and communicate with the Directors as often as may be necessary.
- (d) to take such actions as may be necessary in connection with the Company's role as general partner of the Partnership as directed from time to time by the Board, including organizing, analyzing, structuring, negotiating and closing monitoring and realizing publicly bid and privately negotiated equity and equity related investments in companies based and primarily operating in Brazil.

These words contain, albeit in general terms, the duties that Mr. Demarco was to perform, from that date on. The company's position must be that he failed properly to perform such duties, and was for that reason dismissed.

Clause 9 states the manner in which Mr. Demarco's employment – but not his directorship -- may be terminated.

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 willful 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 interest;

- 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.

Clause 8.3 states that should he be absent from work for 180 days in any 12-month period the company may by notice terminate immediately.

There is nothing in Clause 9, or elsewhere in this or the shareholders' agreement, that limits the right of the company to terminate Mr. Demarco's employment. At common law an employer has the right to terminate the employment for any reason, of which bad performance must be one of the more common. Clause 9 does not restrict this right, but deals instead with questions of notice. Mr. Demarco's employment can be terminated without notice under Clause 9.1 on dissolution of the corporate partnership in which the company is engaged, under Clause 9.2 if guilty of any conduct there listed, under Clause 9.4 on his ceasing to be a director, under Clause 9.5 if he exposes the company to liability

to taxation. Under Clauses 9.6 and 8.3 his employment terminates so soon as notice is given if absent from work for the period stipulated. But in any event his employment may be terminated under Clause 9.3 for any reason at any time, by the company or by Mr. Demarco, on three days notice.

The judge says (at p. 51) that Clause 9 of the directors' agreement "deals exhaustively with all possible grounds for Demarco's termination, leaving no room whatever for his dismissal for "bad performance"". The judge adds:

Demarco could not be terminated for "bad performance" in the light of the provisions of the director's agreement. In other words once the director's agreement was executed the circumstances upon which the Plaintiff could call for repayment of the US\$1 million could not occur even if the Plaintiff's version of the oral agreement had been accepted.

It is in this context that the judge finds also that evidence of an oral agreement for repayment of the \$1,000,000 in signing-on benefits which Mr. Demarco earlier received is excluded by the parol evidence rule.

When the judge raised the parol evidence issue at trial, counsel for Mr. Demarco said that the problem was "not a parol evidence problem". Mr. Demarco's position was that there were three separate agreements to be

considered: the original oral employment agreement, the shareholders' agreement and the director's agreement. The judge rejected this view.

The judge says in his reasons (at p. 51) that the company's contention for an oral agreement that Mr. Demarco's shareholding would vest incrementally over a five-year period – were it correct -- would not offend the parol evidence rule, because Clause 4.4 of the director's agreement entitled Mr. Demarco to "such other benefits as may be agreed between the Company and the Director from time to time", but that a prior oral agreement by which the company granted Mr. Demarco an advance repayable on stipulated terms would not be so protected. This was apparently because the money had been paid before the director's agreement was entered into, and the remaining obligation to repay in accordance with an oral term would not constitute a "benefit".

The parol evidence rule is, of course, one designed to give effect to, and not to defeat, the intention of the parties. Its operation is described in *Phipson on Evidence* (15th ed.) (at p. 1165):

Where *a transaction* has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document. [Emphasis added]

The learned editors emphasize (at p. 1166) that the rule does not apply where it appears, as seems the case here, that a writing does not contain all of the express terms intended by the parties to be included in their agreement. But in the present case there was, in any event, not one *transaction* but several, the number depending on the view taken of the original agreement.

Mr. Demarco commenced work on or about October 13, 1997, under an oral contract of employment either (i) in the terms of his memorandum reproduced in the Schedule as Document 1, as the judge held, together with such other terms as the law would imply, or (ii) under some other oral and implied terms which came into effect at that time and were amended on or about October 31, 1997, by the further oral agreement which the company alleges. No foreign law having been proved, the terms to be implied would be those which, in the absence of contrary express terms, the common law normally implies in a contract of personal service. These include the right of employer or employee to terminate the employment at any time and for any reason on reasonable notice, or, where there is "cause" as understood by the law, to terminate at any time without notice. Reasons such as "misconduct" and "bad performance", mentioned in the negotiations evidenced by Document 3 as translated by Document 4 and included in the company's version of the oral agreement, are well known reasons for termination. Where such

“misconduct” or “bad performance” is not so serious as to constitute “cause”, as recognized at common law, the employer is required to give “reasonable notice” or to pay damages for failure to give such notice.

The effect of Clause 9 of the directors’ 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. Were Mr. Demarco dismissed for misconduct or bad performance not falling within the Clause 9.2 definition of conduct warranting termination without notice, he would be entitled to three days notice of termination, or to damages for lack of such 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 \$1,000,000 signing-on payment was repayable in the event he were dismissed for that reason. If the performance was not such as to permit dismissal without notice under Clause 9.2, a question would arise whether Mr. Demarco received the three days notice to which he was entitled and, if not, what damages were payable on that account. That question was not raised by Mr. Demarco in the action.

The contractual issues raised in the present action do not arise solely from the transaction evidenced by the shareholders' and director's agreements of December 30, 1997; they relate also to an earlier transaction governing both the payment of Mr. Demarco's signing-on benefits and his employment for 11 weeks prior to the date on which the shareholders' and director's agreements were entered into. The oral agreement or agreements already acted on could not be said to "add to, vary or contradict" the later written agreements. The later written agreements evidence a separate, subsequent and different transaction. The later written terms could and *did* amend some of the earlier oral and implied terms, so far as Mr. Demarco's subsequent employment was concerned. They did so, for instance, with respect from then on to the requirements regarding notice of termination. But nothing in the written agreements deals in any way with the terms of the earlier transaction under which the company had paid the \$1,000,000.

When asked whether the original agreement was "entirely sheltered under this [the director's] agreement" Ms. Dantas agreed that it was. But that, like other questions put to these witnesses, was not only a question of law but one of law foreign to them. It was also one which even a Cayman attorney would be loath to answer without taking counsel's advice.

The judge was understandably reluctant to accept that the terms asserted by the company would have been agreed to without any written agreement. The evidence of Mr. Dantas was that, for reasons which he did not fully understand, the company's lawyer had advised that an agreement contemplating dismissal for bad performance might offend Brazilian law unless carefully framed, and that the \$1,000,000 in signing-on benefits might under Brazilian law expose the company to liability for payroll deductions in excess of 60 per-cent. He said that it was for these reasons the agreement was not reduced to writing when made, or as part of the shareholders' agreement or director's agreement, or thereafter. It seems that the company may not have wished to have the agreement disclosed by the employee to the Brazilian labour, or taxation, authorities. The judge must, of course, have rejected that explanation.

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.

(f) The Questioned Documents

Much time was taken up at trial with a charge made on behalf of Mr. Demarco that documents said by the company to have been used to effect transactions relating to the \$500,000 invested for him in the group's mutual funds were fraudulently created after this dispute arose.

The documents were those authorizing the initial investment, later "switching" of portions of the investment from one fund to another, and the withdrawal by Mr. Demarco of funds generated by the investment in excess of the original \$500,000, which according to both versions of the governing oral contract Mr. Demarco had agreed to maintain in the Opportunity funds. Mr. Demarco accepted that all transactions in this account up to the date of his dismissal were in accordance with his instructions. But the transaction documents produced by the company were not executed by Mr. Demarco. They were executed by Veronica Dantas, or both Daniel and Veronica Dantas, on behalf of Opportunity Asset Management, by which the account was opened by Ms. Dantas for Mr. Demarco. The contention advanced for Mr. Demarco was that these documents were created, not in 1997 and 1998, at the time of the transactions in question, but in 1999 after the present dispute had arisen, and that this was done by Daniel and Veronica

Dantas for the purpose of creating the false impression that the investment had at all times been under the control of the Opportunity group. Experts were called for both sides to give opinions as to the dates on which it appeared from the condition of the ink that the signatures on these documents were written -- that is to say whether at the dates in 1997 and 1998 which the documents bear or in 1999, after the present dispute had arisen. The experts were in qualified disagreement.

From the evidence of Veronica Dantas it appeared that instructions given by Mr. Demarco to his account manager in the Sao Paulo office, although written on forms addressed to the Cayman office of the Opportunity mutual funds and the Cayman transfer agent -- at first Midland Trust and later an organization called ABN AMBRO -- were in fact transmitted to the Opportunity head office in Rio de Janeiro, where Ms. Dantas substituted for them forms in the same terms signed on behalf of the Opportunity group entity by which she opened the account for Mr. Demarco. Ms. Dantas said that this was done with Mr. Demarco's knowledge and approval, but Mr. Demarco denied both that he gave such approval and that he knew such a process was being followed.

The issue was clarified by the evidence of an officer of the current transfer agent. His independent records showed the documents complained of to be documents in fact acted on by the transfer agency on or about the dates that they

bear. The witness was able to say this with certainty with respect to documents acted on during his time, because he had "ticked" and initialled these documents when carrying out the instructions they contain. As to the earlier documents, his evidence suggested they must have been those in fact acted on, because they are the only documents in the file authorizing the relevant transactions. The witness said that the account in Mr. Demarco's name had been opened by Opportunity Asset Management, and that only documents signed for that entity could therefore be accepted as authority for subsequent transactions.

In light of this evidence it does not seem possible that a case of forgery could be made out on the basis of the contested expert ink-dating evidence. A question remained whether Mr. Demarco had, in fact, agreed that the account be controlled in the Rio office of the Opportunity group. Mr. Demarco conceded he was told that the original subscription form would be sent to Ms. Dantas in Rio; he assumed that later instructions he gave to his account manager in the Sao Paulo office would be sent directly to the Opportunity office in the Cayman Islands and transfer agent there. He said he received regular statements of his account, in accordance with instructions in the original subscription agreement, and assumed that the investment -- although to be maintained by agreement in the Opportunity group mutual funds -- would be under his sole control. Mr. Demarco said he did

not know that the number assigned to the account was one which indicated that any requested transaction would be routed through the Opportunity head office, and be subject to approval by Ms. Dantas, rather than sent directly to the Opportunity office, and that of the transfer agent, in the Cayman Islands.

There was another remaining issue, on which counsel for the company lays emphasis. Mr. Demarco presented in evidence a copy of one of the documents concerned, bearing his signature, for comparison with an otherwise identical document produced from the transfer agent's file which is signed on behalf of the relevant Opportunity entity. The latter was the only such document in possession of the transfer agency, and there was no suggestion that the document it received had been tampered with, so as to remove and replace Mr. Demarco's signature. The company's allegation was that Mr. Demarco submitted an unsigned copy of this document to his account manager in Sao Paulo, that this was later executed on behalf of the Opportunity entity in the Rio de Janeiro office, that Mr. Demarco kept a copy of the unsigned document and that he later signed and copied the retained copy to support his forgery case.

With respect to Mr. Demarco's forgery allegations against Daniel and Veronica Dantas, the judge did not find it necessary to decide whether the documents concerned had been executed on the dates they bore, rather than after

the dispute arose. The judge said in his reasons for judgment (at p. 31) that he had “no difficulty whatever in finding that Veronica Dantas altered and indeed concocted” these documents. The judge added: “If that had been done in the Cayman Islands it would be a criminal offence”. The judge concluded:

The documents, whether created at the time or later are false documents. In my judgment Veronica and Daniel Dantas created false documents by altering investment forms so as to make it apparent that the requests initiated by Demarco were instructions emanating from OAM.

(OAM being the Opportunity entity in the name of which the investment had been made.) And later the judge says (at p. 45):

His (Demarco's) evidence was that before the one million dollars was advanced at the end of that two-week period (in October, 1997) he was asked to demonstrate his loyalty by investing one-half of the million dollars in the Opportunity Fund. It seems far more likely that during this period Dantas either alone or at the urging of his sister came to the conclusion that he had been too generous and, as a result, the scheme to entice Demarco to invest \$500,000 in the Opportunity Fund where Veronica could control it was conceived. *As we know this scheme was then implemented by forgery and uttering false documents.* [Emphasis added]

There was no evidence that any of the forms had been fraudulently altered. The judge's findings of dishonest conduct must have been based on his conclusion that,

in dealing with Mr. Demarco's investment instructions as they did, Daniel and Veronica Dantas acted in breach of the agreement concerning the \$500,000 which the parties agreed would be invested in the Opportunity funds. The judge did not identify facts that would establish either of the criminal offences mentioned if, as the evidence indicated and the judge appears to accept, these documents were probably prepared at the dates which they bear.

Counsel for the company makes a point of the fact that the judge did not deal with the counter allegation made against Mr. Demarco himself, that is to say that for deceptive purposes he later signed a copy of a document the original of which he had delivered unsigned to the company and which was thereafter signed by Veronica Dantas on behalf of the Opportunity entity by which the account was operated. There was, in our view, no obligation on the judge to decide that issue having in mind the confused state of the evidence and the many opportunities for copying of the document, signed and unsigned.

Veronica Dantas said that the manner in which she arranged the control of the mutual fund investment made for Mr. Demarco was in accordance with the terms under which the money was invested for him. If the money was invested on terms under which Mr. Demarco was entitled to take out any gains but obliged to

leave the original sum in the funds to the extent that it was not reduced by dividends or bonuses, so that the investment constituted a form of security held by the company, as Ms. Dantas testified, the conduct of Ms. Dantas in maintaining control of the investment while facilitating fund changes requested by Mr. Demarco, and the withdrawal by Mr. Demarco of funds generated by the investment, would be consistent with that agreement. So would Mr. Demarco's conduct in limiting his withdrawal request, while he remained in its employ, to the amount by which the investment had increased. If the agreement was that Mr. Demarco would be obliged to repay any unearned portion of the \$1,000,000 if dismissed for bad performance, the company's refusal of Mr. Demarco's later request to withdraw the balance of the investment following his dismissal would also be consistent with the terms of the contract, that is to say if, as the company maintains, he was dismissed for bad performance.

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.

(g) Mr. Demarco's Dismissal

The date of Mr. Demarco's dismissal, and the manner in which it was effected, were the subject of much confusing evidence, dealt with at several points in the judge's reasons for judgment.

The the judge summarizes (at p. 32) the following evidence of Ms. Dantas. Mr. Arida told her in December, 1998, that he had dismissed Mr. Demarco but had been asked by Mr. Demarco to keep the dismissal quiet until Mr. Demarco returned from holiday. In January, 1999, she heard from Mr. Arida that Mr. Demarco had returned from holiday but refused to leave until he received a formal letter. She asked the company's human resources department to prepare a 'standard' dismissal letter. Such a letter, dated February 4, 1999, was entered in evidence in an English translation. The letter, as translated, says that Mr. Demarco's employment has been revoked "from February 4, 1999 on, with immediate dismissal, without attending the period of previous notice, which will be indemnified" in accordance with a stated provision of Brazilian labour law. In affidavit evidence Ms. Dantas had pointed to the fact that this letter is signed on behalf of the Brazilian employer company, and asserted that it did not apply to his employment by the plaintiff Cayman company. In her evidence at trial she said

she intended to dismiss Mr. Demarco on behalf of both companies. The judge observes that the letter does not mention "bad performance", nor state, as had Ms Dantas in her affidavit, that he was dismissed "on the grounds that he had consistently failed to perform his contract to the adequate satisfaction of the plaintiff". It is, however, clear from the terms of the letter that the termination was not intended to be a summary dismissal – it was intended to be a dismissal with compensation *in lieu* of notice – and in those circumstances there would, of course, be no need for any reason to be given.

The judge refers to a meeting of directors of the plaintiff held on November 24, 1999, at which Mr. Demarco was present. The minutes of this meeting show that a resolution was passed that the December 30, 1997, director's agreement between the company and Mr. Demarco be terminated pursuant to Clause 8.3 on the ground of his absence from work for more than 180 days, and under Clause 9.3 that Mr. Demarco be required to resign as a director under Clause 15.1, which stipulates that a director shall resign in the event that his employment by the company cease for any reason.

Earlier in his reasons the judge had found that bad performance could not constitute cause for dismissal under the agreement, all causes for dismissal being exhaustively listed in Clause 9.2, and this not being one of them. But

Mr. Demarco could in fact be dismissed on three days notice for bad performance or any other reason, and should three days notice not be given compensation would be payable. The letter of February 4, 1999, says that the dismissal is without notice and that compensation will be paid. 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 p. 49) 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. Mr. Demarco might, of course, have claimed damages for want of the prescribed notice of termination, but he did not.

(h) A Coherent Explanation

The evidence of Ms. Dantas was that the plaintiff company is the investment manager for a corporate partnership whose function is to invest \$300,000,000 for the Citibank organization in the purchase, management and resale of controlling interests in Brazilian enterprises, particularly those recently privatized.

The project, if not terminated earlier, has an eight-year time span, which could be extended to 10 years. The company receives management fees during the currency of the project, and at its end is to share with Citibank any profits made in excess of a stipulated threshold amount. The intention was that management fees would cover current operating expenses, including remuneration of deal-makers and other employees. The hope was that there would be profit available, during or at the end of the project, for distribution among the shareholders -- that is to say profit from interim income or from resale of the enterprises acquired with Citibank's funds during the contract term in excess of the threshold figure at which it would be divisible between Citibank and the company.

Since the company has a corporate majority shareholder, it seems that individual deal-makers, although shareholders and directors, could have only a limited say in its affairs, and little security of tenure. They had the possibility of

sharing in profits in proportion to their shareholding, through dividends or on a liquidation, and of receiving bonuses in the meantime, but no dividends or bonuses had been paid by the time of trial. According to the evidence of Ms. Dantas the purpose of Mr. Demarco's \$1,000,000 signing-on benefit was to "guarantee" Mr. Demarco's participation in profits through bonuses or dividends. Ms. Dantas said that bonuses would be paid in the discretion of the Board, and the same might obviously be said of dividends. As a result, perhaps, of language difficulties, it was at first unclear in what sense she used the word "guarantee". The intent of the "Solomonic solution" which she described, involving half of the \$1,000,000 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 plaintiff company existed only for the Citibank venture; it had no significant assets other than its income and anticipated profits from that venture. The venture could be terminated by Citibank at any time, and when it ended the company would in all probability go out of existence.

Although it did not emerge until well into her cross-examination, this explanation by Ms. Dantas suggested a rationale for her version of the agreement governing Mr. Demarco's signing-on benefits.

That purpose would be to assure to Mr. Demarco that he would not be deprived of a share in the profits, so long as he performed his duties well and chose to remain in the company's employ. To the extent that he received in the meantime extra remuneration, in the form of bonuses or dividends, this might to some extent go to reduce the amount of the advances that he would have to repay if dismissed for misconduct or bad performance, or if he left of his own volition. Part of the \$1,000,000 would be held by Mr. Demarco, part held by the company and invested in its funds; if dismissed otherwise than on the stated grounds, both would be his. If he remained he would share in the profits of the venture in accordance with his shareholding, whatever that might then be, and the advances would no doubt be taken into account in the final settlement. If the share of profit due to him were paid by way of bonuses and dividends, there might well be nothing payable to him in respect of his shareholding.

Such an arrangement would be consistent with the tenor of the negotiations conducted in October, 1997, between Mr. Demarco and the company, as evidenced by Documents 2, 3-4 and 5, and also with the director's agreement and with at least

the purpose of the shareholders' agreement as indicated by some of its terms including those relating to the intended "Annex A".

We do not, of course, find that this was in fact the agreement reached between the parties; we say no more than that the agreement alleged by the company is not one devoid of any logical basis.

(i) The Signing-on Benefits

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"?

The first and third questions are questions of fact. The second involves construction of the contract. While the meaning of a contract is a question of law, a contract can be given its meaning only in the context of its surrounding circumstances, or "factual matrix". In many cases, of which this is one, establishing the surrounding circumstances necessarily involves findings of fact. It

follows that the answer to each of the above three questions turns on the judge's view of the evidence. That view was determined by the judge's conclusions regarding the credibility of the company's witnesses.

In dealing with Question (i), whether Mr. Demarco agreed that part or all of the \$1,000,000 in signing-on benefits would revert to the company if he were dismissed for bad performance, the judge accepted the evidence of Mr. Demarco that the matter was settled on or about October 11, 1997, without any term requiring repayment of benefits, and particularly without mention of any formula by which the advance would be reduced through the credit of a percentage of dividends and bonuses on a basis differing as between the two employer companies. The judge seems to have accepted Mr. Demarco's evidence that the payments were to be made without any obligation in return on his part to perform his work for the company to any particular standard or for any period of time. In rejecting the evidence of the company's witnesses, the judge was influenced by his belief that terms such as those asserted by them nowhere appear in any document produced during the course of negotiations, that no draft agreements were produced in the course of such negotiations, and that there were indeed no such negotiations after October 11, 1997. There were documents referred to and described in evidence, one prepared by Mr. Demarco himself, which demonstrate

the contrary. These documents show negotiations in progress between Mr. Demarco and the company between October 21 and 24, 1997, 10 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 discuss 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 propose 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).

With respect to Question (ii), the meaning to be given in this context to “bad performance”, the evidence of Veronica and Daniel Dantas suggested that it was to some extent to be subjective – that is to say, that failure to perform to the satisfaction of management would constitute “bad performance”. That was one possibility. If the criteria were in this sense subjective, there would, however, still have to be a reasonable basis for arriving at the conclusion that Mr. Demarco’s performance had been “bad”, if the company’s evidence was to be accepted. It might, on the other hand, have been intended that the performance criteria be purely objective, so that it would be necessary that the court be satisfied that Mr. Demarco’s conduct in fact fell short of the level of performance reasonably to be expected of an employee in carrying out the work for which he had been employed. That would, of course, provide Mr. Demarco with a greater measure of security. The meaning of the term depended, not just on the words, but on the factual context in which they were used, if used they were.

The judge cited from the well-known decision of the House of Lords in *Scammell v. Ouston* [1941] 1 All E.R. 14, the statement of Viscount Magham (at p. 16) that to constitute a valid contract “the parties must so express themselves that their meaning can be determined with some degree of certainty”, and from a passage in the speech of Lord Wright (at p. 25):

Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of intention, however, is to be found in the words used. If these words, considered however broadly and technically, and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.

Although voidness for uncertainty had not been pleaded or argued, the judge found the expression “bad performance” too vague to be enforceable in the present context. The judge said (at p. 52):

The phrase “bad performance” which is not a term known to the law of this jurisdiction (and apparently is not known to the law of Brazil either) is too vague to form part of a contract of employment. It is not a term of art such as “cause” which has a long history in the common law and has been defined and redefined by our courts.

Later (at p. 53) the judge said of the formula described by Daniel Dantas to determine the credit due to Mr. Demarco that it, too, was too vague to be enforceable, and “far too complex ever to have been agreed to orally”.

In *Scammell v. Ouston* the contract sued on had not been carried into effect. The contractual phrase in issue in was: “the balance of purchase price can be had on hire purchase terms over a period of 2 years”. Lord Wright said (at p. 29) that

the law “has not defined, and cannot of itself define, what are the normal and reasonable terms of a hire-purchase agreement”. This was a task somewhat different from that which faced the Court in the present case. The problem facing the judge, if he found the contract to be as the company contended, would be to determine from the evidence what the duties of Mr. Demarco were, and what could reasonably be expected of him in the context of the company’s business and the circumstances in which his performance was called into question. Where a contract has been in part carried out, a court will not, of course, readily throw up its hands, so to speak, and find as in *Scammell v. Ouston* that no contract at all exists, with the consequences that must flow from such a finding after the parties have already embarked on its performance.

If the court were of the view that the language of the contract might be incapable of meaning, that would be a matter on which it would not, in our view, be appropriate to rule without amendment of pleadings and further submissions, including those directed to appropriate relief.

Because he was satisfied that the contract asserted by the company was not made, and that bad performance was “too vague to be enforceable even if the Plaintiff and Demarco had agreed that he was to be employed on that basis”, the judge (at p. 47) found it unnecessary to deal in detail with the company’s evidence

on Question (iii) -- whether Mr. Demarco had in fact been dismissed for bad performance. The judge concluded (at p. 49) that Mr. Demarco's termination "cannot be justified on the basis of cause, misconduct or bad performance". This may not represent a finding of fact -- that is to say, that "bad performance" had not been established -- but rather reflect the judge's conclusion that bad performance was not available to the company as a ground for dismissal. The judge made no finding why Mr. Demarco was, in fact, dismissed.

We are of the view that it was open to the court to determine the duties that Mr. Demarco was required to perform and whether the company had established that he was properly dismissed for performing them badly. That was a matter on which the company bore the onus of proof. There was extensive evidence given by the company in this regard. 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".

This conclusion, as we have said, was influenced by findings that have been shown to be in error, for the reason that they do not take into account important documents referred to in evidence.

(j) The Beneficial Shareholding

By the time of trial it seems to have been conceded by the company that Mr. Demarco was promised a 3.5 per-cent interest; the issue that remained was whether this interest was to “vest” in October, 1997, when he started work, as Mr. Demarco contended, or was to accrue at a rate of 0.75 per-cent a year, so as to amount to 3.5 per-cent only after five years in the company’s employ, and stand at 0.875 per-cent when he was dismissed, in February, 1999.

There is some logic in the company’s position that Mr. Demarco’s shareholding would start at zero and accrue with his length of employment. The uncompleted “Annex A” to the shareholders’ agreement was intended to include some machinery for progressive acquisition of “points” to be transferred into shares, by “vesting”. Mr. Demarco’s position is that he was to receive a fully-vested 3.5 per-cent beneficial shareholding immediately, without commitment to remain in the company’s employ or to perform satisfactorily as a deal-maker. Ms. Dantas referred in affidavit material to his interest as a 3.5 per-cent shareholding, without qualification or suggestion of any period over which it was to accrue, and this certainly seems to support Mr. Demarco’s position. Neither contended that the one per-cent shareholding granted by the shareholders’

agreement represented the true position; the company proposed this as a solution only in the event the court was unable to resolve the conflict in evidence.

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 per-cent beneficial shareholding when he signed on, a finding of fact based on a conclusion as to credibility that contains the flaw we have described.

(k) Adverse Inferences

Persio Arida, the head of Opportunity's Sao Paulo office at the time Mr. Demarco was hired, and the person on behalf of Opportunity with whom Mr. Demarco said he settled the terms of his employment, was not called as a witness, nor was Rosangela Browne the Opportunity group account manager at Sao Paulo to whom Mr. Demarco gave his instructions regarding the \$500,000 invested for him by the company, or Arthur Cavalho, a deal-maker said by Daniel and Veronica Dantas to have been involved in salvaging the one deal that Mr. Demarco put together during his employment by the company.

The judge says in his reasons (at p. 50) that he would, had he “needed to”, have drawn inferences adverse to the company’s case from its failure to call these witnesses. The judge did not say that he had in fact drawn adverse inferences, or in what respects he was of the view their evidence would have differed from that of the witnesses in fact called for the company. In the case of Mr. Arida, it would be difficult to infer that he did indeed make the contract that Mr. Demarco alleged on October 11, 1997, without taking into account Mr. Demarco’s memorandum of October 21, 1997, (Document 2) of which a copy was directed to Mr. Arida, which shows that Mr. Demarco was at that later date proposing different terms of employment, and, as we have said, that document was overlooked. In the case of Ms. Browne, it is difficult to say what evidence she might have given that was favourable to Mr. Demarco’s case or adverse to that of the company, since the Court had been told that she informed the Brazilian securities authorities that she transmitted Mr. Demarco’s account instructions to Ms. Dantas because Mr. Demarco told her that this was what had been agreed with Ms. Dantas. Neither Mr. Arida nor Ms. Browne were members of the company’s staff at the time of trial; Ms. Dantas said in evidence that Mr. Arida remained on friendly terms, but that he had other commitments.

All these potential witnesses appear to be Brazilian residents, who could not have been compelled to testify in the Cayman Islands. There was no evidence whether they might have been compelled by a Brazilian court to testify in that country, on commission or some other process requested by a Cayman court. It was, of course, for the company or its legal advisors to say what efforts had been made to obtain evidence from them, whether in person or by some other means, and it did not do so. That failure was particularly significant in the case of Mr. Arida, whose evidence, although described by counsel for the company as unnecessary, would have been of obvious importance to the case. The facts that Mr. Arida was out of the jurisdiction and had other commitments, and was no longer associated with the company, would not in themselves be reasons why an adverse inference could not be drawn: *see Wisniewski v. Central Manchester Health Authority* [1998] Lloyds Rep. Med. 223.

The fact that the judge would under other circumstances have drawn adverse inferences against the company in respect to its failure to explain adequately the lack of evidence from these witnesses is 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.

(1) The Proceedings at Trial

Counsel for the company at trial, none of whom were counsel before us, opened with an adjournment application, based in part on the ground they had been so much engaged in other proceedings between the parties and preparing the adjournment application that they were not prepared for trial.

It transpired that the company's witnesses were still in Brazil on the opening day of trial and there would, it seems, be no time for the painstaking pre-trial preparation which is essential if counsel are to present a coherent case in this sort of trans-national commercial litigation. Only with careful, and sometimes repeated, witness interviews will it be possible in cases of this sort for counsel to identify and overcome the all-too-familiar barriers created by inter-jurisdictional differences in law, language and business practice, so as to present a case that the court can comprehend. Without such preparation the danger of miscarriage of justice in such cases, through oversight or misunderstanding, is ever present. After the judge dismissed the adjournment application senior counsel for the company did not say in his opening what the company's evidence would be. He told the judge: "We shall simply see what the witnesses say".

The court was thus deprived of important assistance. With the calling of Ms. Dantas the next day, as the company's first witness, it became apparent that, despite an English-language education and business training, she was confused by unfamiliar concepts and terminology, and that she had a less than full understanding of legal issues involved. Not long into her 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' 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. Although she was to be found guilty of that and other acts of dishonesty, it cannot fairly be said that she did not directly answer the charges. She also gave important evidence regarding documents that supported the company's case. During the testimony of Daniel Dantas the judge characterized his evidence as consisting of

“vague generalities”. We do not think it necessary to review further the instances in which the judge spoke critically of the evidence of the company’s witnesses or the submissions advanced by its counsel.

It seems that the judge came to the hearing with the view that the company might have no case. The conflicting pleadings and other material filed would alert a reader to this possibility. When at the opening of the trial counsel moved for an adjournment the judge was presented, at the last moment, with the choice between further delay in determining Mr. Demarco’s rights, arising from events of now three years ago, or a trial in which only limited assistance could be expected from counsel for the company. There is nothing to suggest that the judge approached the case with any intention other than to do justice between the parties according to the law and the evidence as he understood it.

It was after then counsel for the company had indicated that they could not properly present the case that the judge took on the task of examining witnesses. This was, in a sense, understandable. It was the judge, in the end, who would bear responsibility for resolving the issues. But the dangers inherent in such a course are well known. They are emphasized in the judgment of Lord Greene, MR, in *Yuill v. Yuill* [1945] P. 15 (at p. 20):

A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue. That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded has indeed been recognized by House of Lords itself.

This was a reference to *Hvalfangerselskapet v. Unilever Ltd.* (1933) 40 Ll. L. Rep. 29 (H of L), a case in which the House of Lords reviewed and overturned findings of credibility made by a trial judge.

In his famous judgment in *Jones v. National Coal Board* [1957] 2 Q.B. 55 (C.A.), Denning, L.J. (as he then was), took up the reference of Lord Greene to "the dust of the conflict", saying (at p. 64):

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to

favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the “nicely calculated less or more” – but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties: see *In re Enoch & Zaretsky, Bock & Co.* So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other: see *Rex v. Cain, Rex v. Bateman*, and *Harris v. Harris*, by Birkett L.J. especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see *Reg. V. Clewer*. The judge’s part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

It is obvious that in the present case the judge, by his questioning and comments, went well beyond the role described by Lord Denning. In his determination to arrive at the truth he must have appeared to favour the defendant’s case over that of the company. Along the way important documents were overlooked, with unfortunate results that have been described.

That is not, however, the end of the matter. The issue that arises in cases such as this was more broadly canvassed in the judgment of the Court of Appeal for New South Wales in *Galea v. Galea* (1990) 19 NSWLR 263. There the importance of the continuing appearance of impartiality throughout the trial is emphasized by Kirby, A-CJ (as he then was), (at p. 278):

From first to last, from beginning to end, the appearance of an impartial and unprejudiced mind on the part of a judicial officer is of the essence of the system of justice. If at any point there is a loss, in fact or appearance, of that impartiality the trial will thereafter miscarry. The litigant who can establish such a miscarriage has not had a trial according to law. Subject to other arguments, for example, as to waiver, that litigant is entitled to a re-trial.

But after reviewing authorities on bias and trial unfairness, that learned judge goes on to make this important observation (at pp. 281-2):

The general rules of conduct of a trial and the general expression or the respective functions of judge and advocate do not change. But there is no unchanging formulation of them. Thus, even since *Jones* and *Tousek*, 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: see *Whitehorn v. The Queen* (1983) 152 CLR 657 discussed in *R v R* (1989) 18 NSWLR 74 at 84F per Gleeson CJ. [Emphasis added]

A judge who holds strong views where justice appears to lie may do justice no favour in keeping them privately, it seems, where they cannot be reached and corrected should they have been formed in error. Thus it is said that maintaining silence, in order to preserve the appearance of impartiality, may in some circumstances result in the judge not in fact doing justice at all.

In *Galea v. Galea* the court concluded that certain highly critical comments and questions of a trial judge during the examination of a witness, although in their form “blunt and even robust”, did not, when considered in context, create an appearance of bias or render the trial unfair.

Counsel for the company took no objection to the judge conducting most of the examination of the company’s principal witnesses. At the end of the judge’s questioning of Ms. Dantas the judge asked counsel if this had covered everything

needed of the witness, and counsel said: “I think those are the principal points”. The judge’s expressions of disbelief and confusion might, perhaps, have been helpful to counsel in other circumstances. In disclosing his thinking –albeit at times in severe terms – the judge certainly alerted counsel to matters on which they might, under other circumstances, have been able to render assistance to the court. But that counsel for the company were unprepared gave particular importance to the duties of civility, patience, caution and restraint that are the hallmarks of the system, and of special importance in the resolution of trans-national commercial disputes. In ‘joining the fray’ the judge deprived himself of the advantage of “calm and dispassionate observation”, and formed an early view of the company’s evidence that proved in important respects to be mistaken.

The test for bias, as laid down by the House of Lords in *Porter v. Magill* [2002] 2 A.C. 357, and applied by the House in *Lawal v. Northern Spirit Limited* [2003] UKHL 35 (at para. 103), is whether the fair-minded and properly informed observer in the courtroom would conclude there was “a real possibility that the tribunal was biased”, the reasonable observer in question being, as described by Kirby, J., in *Johnson v. Johnson* (2000) 200 C.L.R. 488 (at p. 509), a person “neither complacent nor unduly sensitive or suspicious”.

We do not believe that such an informed impartial observer, considering the manner in which the trial was conducted, either alone or in combination with the reasons for judgment, would conclude that there was a real possibility that the judge was biased, in the sense of being inclined to decide the case otherwise than in accordance with the law and the evidence. 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 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.

Notwithstanding that the company's failure to come to trial prepared undoubtedly played a role in this unfortunate outcome, we do not believe the decision can in the circumstances be allowed to stand.

(m) Conclusions

We have said that assumptions which led the judge to reject the evidence of the company's witnesses on every material issue, as "manufactured and false", are shown to be fundamentally in error by documents produced to the court in the action that were referred to and described both in affidavits entered as exhibits at trial and in the company's oral evidence at trial.

The judge's findings that Veronica and Daniel Dantas were guilty of forgery and uttering false documents and that they and the company's other witnesses gave false testimony on every material issue could only be supported by cogent and convincing evidence, and cannot in the circumstances be allowed to stand. Nor can the finding that the company's conduct in maintaining the action constituted an abuse of process. The judge erred in law, in our view, in concluding that the director's agreement deprived the company of the right to dismiss Mr. Demarco for bad performance, and in holding that the director's or shareholders' agreement terminated, by operation of the parole evidence rule, any right that the company might otherwise have had to call for return of the money paid or invested as signing-on benefits. We have said that the judge erred, too, in finding that "bad performance", and the proposed formula for crediting bonuses and dividends to

reduction of Mr. Demarco's potential indebtedness, were terms too vague to be enforceable. To the extent that these findings involved questions of fact, as in the case of the judge's findings on questions of fact alone, they flow from his rejection of the company's evidence on every relevant issue which is based on assumptions that must be regarded as fundamentally incorrect.

If the same outcome would be bound to ensue, even if these errors were not made, it might be said that a new trial would not be warranted. It is for this reason that we have in the course of these reasons considered whether the company's evidence regarding its agreement with Mr. Demarco could have any rational basis. We are of the view that it presented a factual case which, had the credibility of its witnesses not been rejected on all material issues, *might* – despite obvious shortcomings -- have been accepted. We are not persuaded that there is any ground in law on which it was bound to fail.

The only safe course open in these circumstances is to offer the company the opportunity, on appropriate terms, to have a new trial.

(n) Disposition

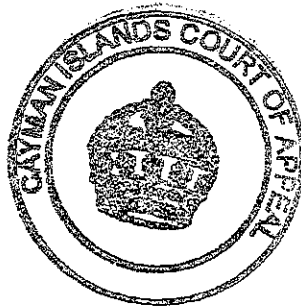
Counsel for Mr. Demarco characterized this and the related litigation as a battle of economic attrition, in which Mr. Demarco is bound, if it goes on long enough, to be the ultimate loser.

In light of the history of the litigation, the far-from-certain merits of the company's claim, the conflict in its material, its failure for whatever reason to ensure readiness for the last trial, the consequences that have flowed from its default and the position in which this has placed Mr. Demarco, we are of the view that the company should be put on terms that will ensure both the earliest possible new trial and that Mr. Demarco will not be unduly handicapped in facing it. In this regard consideration must be given to the strength of Mr. Demarco's case, and particularly that his shareholding of not less than 0.875 per-cent, and perhaps 1 per-cent, is effectively admitted by the company, and should have been recognized five years ago. Should a new trial proceed, the trial judge will not be restricted by anything contained in these reasons for judgment from deciding the case according to evidence and submissions regarding the law that may be advanced on behalf of the parties at that time.

Counsel are invited to address at the forthcoming sitting of the court the terms on which this appeal should be allowed and a new trial ordered.

E. Zacca, P.

G.D.M. Collett, J.A.



M.R. Taylor, J.A.

SCHEDULE OF DOCUMENTS

**Referred to in Reasons for Judgment of Court of Appeal of the
Cayman Islands in CVC/Opportunity Equity Partners
Limited v. Demarco**

<u>Document No.</u>		<u>Date</u>
1.	English translation of Memorandum to Mr. Arida from Mr. Demarco	Undated
2.	Memorandum of Understanding to Ms. Dantas and Mr. Arida from Mr. Demarco	Oct. 21, 1997
3.	Portuguese-language draft letter to Mr. Demarco	Oct. 22, 1997
4.	English translation of above letter	Oct. 22, 1997
5.	English translation of draft letter to Mr. Demarco	Oct. 24, 1997
6.	Shareholders' Agreement	Dec. 30, 1997
7.	Director's Agreement	Dec. 30, 1997



MANOEL ANTONIO SCHEIDT

Tradutor Público e Interprete Comercial

Matricula Nº 499 da Junta Commercial do Estado de São Paulo

Rua da Sé. N. 14 - Andar - Casal. L. 409 - Tel. (011) 259-1077 - Fax 3162-603 - São Paulo - SP

LIVRO Nº 0158 FOLHA Nº 1 TRADUÇÃO Nº I-44.454/99

I, the undersigned sworn Translator and Commercial Interpreter, hereby CERTIFY this is the transcription and faithful translation of a DOCUMENT written in Portuguese, which I translate as follows:.

MEMORANDUM

To: Patricia Arida
From: LR Demareo

Subject: Our Deal

Please find below my understanding on what we agreed in relation to my entry in Opportunity:

PARTICIPATION:

⇒ 1.5% Initial stake, which may reach 5.0% within one year.

ENTRY BONDS:

⇒ Payment of 1 million dollars net, as a signing fee, to compensate the losses with leaving Garantia.
⇒ Périsio and Daniel are responsible for the payment.

6-MONTH TERM BONDS:

⇒ Proportional to the participation in the company.
⇒ Calculated with basis on the expectation of profits of the fund, which defines the "virtual cash generation" during the semester, upon which is applied the shareholder participation in the Company, being 50% of this amount distributed, should the real cash generated by the company be sufficient for covering such minority partners rather than the controlling shareholders. The portion "virtual" will be deducted from future real profits.
⇒ The 2597 bonus will be calculated considering the full semester, as if the date of entry in the company were July 1st, 1997, in virtue of the ongoing projects and the



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LIVRO Nº 0198 FOLHA Nº 2 TRADUÇÃO Nº 1-44.454/99

Know-how of minor shareholder.

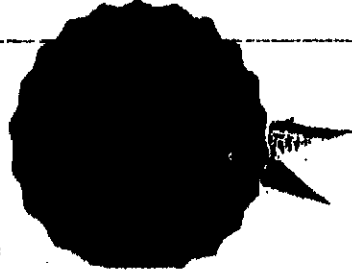
⇒ The value of the "virtual cash generation" of the company already defined for the 2597 is 50 MDCSS.

SALARY:

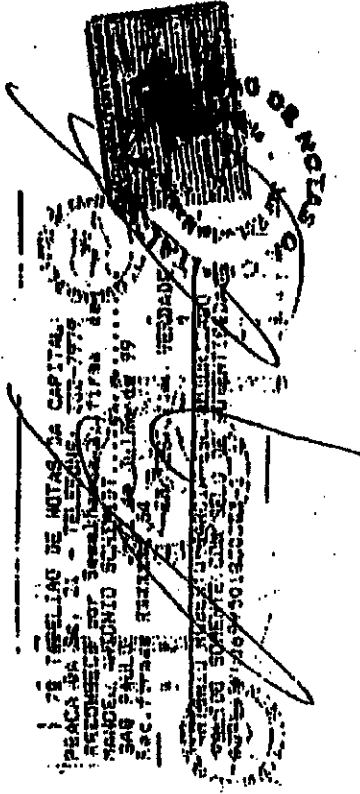
⇒ Annual salary of 100 KUSS, which is equivalent to 25 KUSS a month for the position of Director (12 times, without Christmas salary).

..... X X X X

NOTHING ELSE was contained in said original, which I return with this faithful translation. IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, this July 12th, 1999.



Manoel Antonio Schmidt
Manoel Antonio Schmidt
Sworn Translator



or interest and will always be accounted for in dollars. The deductions will also be effected in dollars.

In case the above mentioned partner resigns from the company by his own choice, he will reimburse the remaining unpaid balance of the advance.

In case the company dismisses the mentioned partner by its own volition, the advance will be automatically paid off, nothing being due by the partner, unless the dismissal occurs by explicit reason of improper conduct.

The above mentioned document, electronically signed by the parties, has legal value.

DM



Luis Demarco
10.21.97 01:54 PM

To: Veronica Rodenburg/OAM@Opportunity
cc: Persio Arida/OAM@Opportunity
Subject: Memorandum of Understanding

During the process of admission of the partner Luis Roberto Demarco Almeida in the Cia. Opportunity Private Equity, the following conditions were established concerning the advance of US\$ 1,000,000.00 (one million dollars) received on 10.21.1997.

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

The percentage of deduction of dividends and bonuses for pay off/payment of the advance will be increased up to 30% in case, until at the end of 1998, the partner's shareholding is increased from 3.5% to 5.0%, in accordance with the negotiated plan of goals.

The advance amount or balances will never be increased of any kind of "correção monetária" (adjustment of currency devaluation)

01209

22 de outubro de 1997

Ilmo, Sr.
Luis Demarco Almeida
Em mão

Prezado Senhor:

Conforme nossos entendimentos serve a presente para confirmar o recebimento por V. Sas., a título de adiantamento, do montante de US\$ 1.000.000,00 (Um milhão de dólares), adiantamento esse aqui referido apenas como o "Adiantamento", e que será regido pelas regras aqui estabelecidas.

1. O valor do adiantamento deverá ser deduzido do total recebido por V.Sas a título de remuneração pelo trabalho, de dividendos em dinheiro atribuídos às (ações) [quotas] de sua participação no capital da "Sociedade Brasileira" e da "Sociedade Off-Shore", e de participações no resultado que futuramente vierem a ser distribuídas a V. Sas. por decisão dos [acionistas][quotistas] da Sociedade Brasileira ou da Sociedade Off-Shore. Sociedade Brasileira e Sociedade Off Shore aqui definidas como as gestoras do fundo Brazilian Equity Partnership. Fundo Mútuo de Investimentos Carteira Livre e General Partner do Brazilian Equity Partnership LP respectivamente.
2. A dedução acima referida deverá corresponder ao somatório de: a) 25% (vinte e cinco por cento) do valor líquido de imposto de renda retido na fonte, se for o caso, dos dividendos, das remunerações e participações no resultado que vierem a ser atribuídos a V. Sa. no futuro pela Sociedade Brasileira, valores esses que serão convertidos em dólares, para fins de amortização do Adiantamento, pela taxa média de compra e venda do câmbio comercial (a "Taxa de Câmbio"), pela Taxa de Câmbio no dia do pagamento efetivo a V. Sa., e b) 20% (vinte por cento) da remuneração, dos dividendos e participações no resultado que vierem a ser atribuídos a V. Sa. no futuro pela Sociedade Off-Shore. A dedução só será efetuada se o saldo a ser pago a V.Sas a título de remuneração dividendos ou participação nos resultados das empresas for igual ou superior a US\$150.000,00 por semestre.
3. Os percentual de 25% (vinte e cinco por cento) e 20 (vinte por cento) previstos no parágrafo anterior passarão a ser de 42,85% (quarenta e dois inteiros e oitenta e cinco por cento) e 30% (trinta por cento) a partir do momento em que a participação de V. Sa. no capital da Sociedade Brasileira e da Sociedade Off-Shore atingirem 5% do respectivo capital total.

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[Handwritten mark]

Atenciosamente

10. Qualquer divergência oriunda deste instrumento deverá ser solucionada no foro central da comarca do Rio de Janeiro (RJ)

9. Os compromissos aqui estabelecidos serão regidos pela lei de Cayman Islands.

8. Caso a presente expressa o teor de outros entendimentos, solicitamos a devolução da segunda via da presente para que passe a valer como contrato entre as partes, obrigando também a herdeiros e sucessores, a qualquer título.

7. Caso, por outro lado, V. Sza. deixe de integrar o quadro da Sociedade por fato alheio à sua vontade, inclusive exercício de opção de compra de suas ações ou quotas pela Sociedade ou por terceiro por esta indicado, falecimento e incapacidade permanente, o saldo devedor do Adiantamento deverá ser liquidado em 30 dias, sem juros ou outra forma de correção monetária.

6. Da mesma forma, caso V. Sza. venha a ser desligado do quadro da Sociedade por sua conduta *(má-fé)*, o saldo devedor do Adiantamento registrado em conta-gráfica deverá ser liquidado de imediato, acrescido de juros fixados com base na taxa LIBOR para empréstimos em dólares (6 meses).

5. Caso V. Sza. venha a desligar-se do quadro da Sociedade por iniciativa própria, o saldo devedor do Adiantamento registrado em conta-gráfica deverá ser liquidado de imediato, acrescido de juros fixados com base na taxa LIBOR para empréstimos em dólares (6 meses).

4. Para fins de registro, será mantida pela Sociedade, uma conta-gráfica que deverá registrar o montante original do Adiantamento, em dólares norte-americanos, bem como todas amortizações feitas na forma do parágrafo anterior. Esta conta será mantida em dólares norte americanos.

October 22, 1997

Mr. Luiz Demarco Almeida

Dear Sir,

Further to our conversations, the present letter serves to confirm your receipt, as an advance, for the amount of US\$ 1,000,000.00 (one million dollars), this advance referred herein simply as "Advance" and will be governed by the following rules.

1. The amount of the advance will be deducted from the total amount you received as wages for your work, dividends in cash for the (shares) of your participation in the capital of the Brazilian and the off-shore company and profit sharing in the results which will be distributed to you in the future by decision of the Brazilian or off-shore company shareholders herewith defined as the managers of the Brazilian Equity Partnership Fundo Mútuo de Investimentos e Carteira Livre and General Partner of the Brazilian Equity Partnership LP, respectively.

2. The above mentioned deduction should correspond to the sum of:
a) 25% (twenty five percent) of the net amount of the retained



01211

income tax, if the case, of the dividends, wages and profit sharing which will be attributed to you in the future by the Brazilian company, and those amounts will be converted into dollars in order to pay off the advance, at the average commercial exchange rate (the "Exchange Rate"), at the "Exchange Rate" of the date of effective payment and **b)** 20% (twenty percent) of the wages, dividends and profit sharing attributed to you in the future by the off-shore company. Deductions will only be made if the balance to be paid as wages, dividends and profit sharing of the company are equal or superior to US\$ 150,000.00 per semester.

3. The percentage of 25% (twenty five percent) and 20 (twenty percent) mentioned in the previous paragraph will become 42,85% (forty two point eighty five percent) and 30% (thirty percent) as soon as your participation in the capital of the Brazilian and the off-shore companies attains 5% of the total capital.

4. For registration purposes, the company will keep a graphic account of the original Advance, in US dollars, as well as all future pay-offs, as mentioned in the previous paragraph. This account will be up dated in US dollars.

5. In case you resign from the Company by your own choice, the balance due of the Advance registered in the graphic account will



have to be immediately paid off, added of interest based on the LIBOR rate for loans in dollars (6 months).

6. In the same way, if you are dismissed from the Company due to misconduct or bad performance, the balance due of the Advance registered in the graphic account will have to be immediately paid off, added of interests based on the LIBOR rate for loans in dollars (6 months). ["bad performance" is crossed in the Portuguese version, but it is handwritten that "bad performance is crucial"]

7. On the other hand, in case you exit the Company for reasons independent of your will, including the buying option of your shares by the Company or by a third party indicated by the Company, death or permanent incapacity, the balance due will have to be paid off in 30 years, without interest or any other form of "correção monetária" (adjustment of currency devaluation).

8. In case the present document describes our agreements, we would appreciate receiving the attached copy of it, to have the same value as a contract between the parties, binding heirs and successors in any title whatsoever.

9. The obligations herewith established will be ruled by the laws of Cayman Islands.



10. Any doubts arising from this instrument shall be solved at the forum of Rio de Janeiro (RJ).

Sincerely yours,

A



MANOEL ANTONIO SCHMIDT

Tradutor Público e Interpretador Comercial

Matrícula Nº 490 da Junta Comercial do Estado de São Paulo

Fraça de São, 21 - 14º Andar - Conj. L.489 - Tel: (011) 239-1077 - Fax: 3105-8683 - São Paulo - SP

LIVRO Nº 0198 FOLHA Nº - 1 - TRADUÇÃO Nº 1-44.459/99

I, the undersigned Sworn Translator and Commercial Interpreter, hereby CERTIFY this is the description and faithful translation of a DOCUMENT written in Portuguese, which I translate as follows:-

October 24, 1997

Mr.
Luis Roberto Demarco Almeida

Dear Sir,

According to our understandings, this is to confirm your receipt of the anticipation title, for the amount of US\$ 1,000,000.00 (one million U.S. dollars), said anticipation herein referred to simply as "Anticipation", to be governed by the rules set forth herein.

1. The anticipation amount will be deducted from the total received by you, as a compensation for the work, from dividends in cash attributed to the [stocks] [quotas] from your participation in the Brazilian Company's and Off-Shore Company's capital, and the participation on the results to be distributed to you in the future, upon decision by the [quotaholders] [stockholders] of the Brazilian Company or the Off-Shore Company. The Brazilian Company and the Off-Shore Company defined hereunder as managers of the Brazilian Equity Partnership Mutual Investments Fund, Free Portfolio and General Partner of the Brazilian Equity Partnership LP, respectively.

2. The deduction referred to above should correspond to the total of: a) 25% (twenty-five percent) of the net amount of the withholding tax, as applicable, on dividends, the compensations and the participations on the result that might be attributed to you in the future, by the Brazilian Company, except for the monthly compensation previously established in reais, equivalent to US\$ 25,000.00 (twenty-five thousand U.S. dollars), said amounts to be converted in dollars, for the purposes of Anticipation amortization, at the average commercial exchange purchase and sale rate (the "Exchange



MANOEL ANTONIO SCHMIDT

Tradutor Público e Intérprete Comercial

Matrícula Nº 490 da Junta Comercial do Estado de São Paulo

Praça da Sé, 21 - 14º Andar - Conj. L409 - Tel: (011) 339-1077 - Fax: 3105-8643 - São Paulo - SP

LIVRO Nº 0198 FOLHA Nº - 2 - TRADUÇÃO Nº I-44.459/99

Rate), at the Exchange Rate on the date of effective payment to you, and b) 20% (twenty percent) of the compensation, the dividends and participations in the result to be attributed to you in the future, by the Off-Shore Company.

3. The percentages of 25% (twenty-five percent) and 20% (twenty percent) foreseen under the former paragraph will be of 42.85% (forty-two point eighty-five percent) and 30% (thirty percent) as of the time your participation in the Brazilian Company and the Off-Shore Company reach 5% of the respective total capital.

4. For filing purposes, a graphic account will be maintained by the Company, so that the original amount of the Anticipation, in U.S. dollars, can be recorded, as well as all future amortizations, according to the former paragraph.

5. Should you come to leave the Company by your own initiative, the outstanding balance of the Anticipation, as filed in the graphic account, should be liquidated in up to 24 months, added to interests set forth based on the LIBOR rate for loans in dollars (6 months).

6. Likewise, should you come to be dismissed by the Company, for a just cause (which comprises the reasons foreseen under art. 482 of CLT, as applicable), the outstanding balance of the Anticipation, filed in the graphic account, should be liquidated in up to 24 months, added to interests fixed at the LIBOR rate for dollars loans (6 months).

7. On the other hand, should you no longer integrate the Company for a fact foreign to your will, including due to the performance of the purchase option of your stocks or quotas by the Company, or a third-party assigned by the same, death and permanent incapacity, the outstanding balance of the Anticipation should be liquidated in 50 years, with no interests or another monetary adjustment form.

8. Should this letter expresses the contents of our understandings, would you please return the second copy, so



MANOEL ANTONIO SCHEMIDT

Tradutor Público e Intérprete Comercial

Matrícula Nº 490 da Junta Comercial do Estado de São Paulo

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LIVRO Nº 0198 FOLHA Nº - 3 - TRADUÇÃO Nº I-44.459/99

as to be valid as agreement between the parties, also obliging the inheritors and successors, at any title.

9. The commitments set forth herein will be governed by the laws of Cayman Islands.

10. Whatever dispute arising under this instrument will be settled at the Central Court of the County of Rio de Janeiro (RJ).

Sincerely,

----- XOOOX -----

NOTHING ELSE was contained in said original, which I return with this faithful translation. IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, this July 12, 1999.

Manoel Antonio Schmidt
Manoel Antonio Schmidt
Sworn Translator



78 FABELIANO DE MOURA DA COSTA
RUA CADEADANGE, 21 - TEL: 232-7977
RECONHECIDO POR SEU ASSINADO
MANOEL ANTONIO SCHEMIDT
CAB. P. 11531
Rec. 13/07/99
SECRETARIA DE NOTARIADO
JALTES/SECRETARIA DE NOTARIADO
005308/0067944985

SHAREHOLDERS' AGREEMENT

THIS AGREEMENT is made the 30th day of December, 1997.

PARTIES:

- (1) OPPORTUNITY INVEST II INC. ("Opportunity")
- (2) MR. DANIEL VALENTE DANTAS ("Dantas")
- (3) MR. PERSIO ARIDA ("Arida")
- (4) MR. DORIO FERMAN ("Ferman")
- (5) MR. RODRIGO BHERING ANDRADE ("Andrade")
- (6) MR. LUIS ROBERTO DEMARCO ALMEIDA ("Demarco")
- (7) MR. ARTHUR JOAQUIM DE CARVALHO ("Carvalho")
- (8) MR. ROBERT E. WILSON, III ("Wilson")
- (9) CVC/OPPORTUNITY EQUITY PARTNERS, LTD. (the "Company")

RECITALS:

- (A) The Company is an exempted company limited by shares incorporated on 26th January, 1996 under the Companies Law and has at the time of execution of this Agreement an authorized share capital of US\$50,000.
- (B) The Shareholders have agreed to enter into this Agreement for the purpose of regulating their relationship with each other and certain aspects of the affairs of and their dealings with the Company which acts as general partner of the Partnership.
- (C) The Company has agreed with the Shareholders that it will comply with the terms and conditions of this Agreement insofar as they relate to the Company.
- (D) Dantas, Arida, Wilson, Andrade, Demarco and Carvalho have been appointed as and are the only Directors of the Company at the date of execution of this Agreement.
- (E) Dantas, Arida and Ferman are the beneficial owners of the entire share capital of Opportunity and hold all voting rights in Opportunity.

NOW IT IS HEREBY AGREED**1. Definitions and interpretation**

In this Agreement (which expression shall be deemed to include the Schedules hereto):

(1) unless there be something in the subject or context inconsistent therewith the following expressions have the following meaning.

- "Advisory Committee" has the meaning given thereto in the Partnership Agreement.
- "agreed form" means in the form previously agreed by or on behalf of the parties to this Agreement and signed for the purposes of identification by or on behalf of the Company.
- "Annex A" means Annex A, which shall incorporate definitive language in respect of, among other things, the following:
- (a) procedures pursuant to which the Points allocated to a Shareholder may be increased;
 - (b) the terms and conditions pursuant to which (i) a Shareholder may put its Ordinary Shares to the Company and (ii) the Company may call a Shareholder's Ordinary Shares;
 - (c) a revised schedule pursuant to which a Shareholder's interest in amounts allocated to it in respect of its Points vests, which schedule shall provide for, among other things, (x) the death or disability of a Shareholder that is a natural person and (y) the termination of a Shareholder's relationship with the Company; and
 - (d) procedures regarding the transfer of ownership of Ordinary Shares in the event of the death or disability of a Shareholder that is a natural person.
- "the Articles" means the articles of association adopted by the Company on January 10, 1997, and as amended from time to time

(and any reference to an Article shall be a reference to that article of the said articles of association).

- "associate" means in relation to any person, a person who is connected with that person.
- "the Auditors" KPMG Peat Marwick and their successors.
- "the Board Minutes" means the minutes of a meeting of the Board of Directors of the Company in the agreed form.
- "the Board of Directors" means the Directors in a duly constituted meeting or acting by unanimous written consent.
- "Business" means the business of acting as general partner of the Partnership in connection with originating, analyzing, structuring, negotiating, closing, monitoring and realizing publicly bid and privately negotiated equity and equity related investments in accordance with the investment objectives, policies, procedures and restrictions set forth in the Partnership Agreement.
- "Carried Interest" has the meaning given thereto in the Partnership Agreement.
- "the Companies Law" means the Companies Law (1995 Revision) of the Cayman Islands.
- "Completion" means the performance by the parties of the obligations assumed by them respectively under Clause 4.
- "the Directors" means the Directors holding office for the time being and, unless otherwise stated, includes their duly appointed alternates.
- "Group" means the Shareholders and any affiliates of the Shareholders.
- "Investment Committee" means a committee of the Company which shall initially comprise Dantas, Arida, Wilson, Mr. Byron Knief and Ms. Mary Lynn Putney.

"Operating Agreement"

means the agreement dated the date hereof among the Company, Citibank, N.A., Banco Opportunity S.A., CVC/Opportunity Equity Partners Administradora de Recursos Ltda., Opportunity, Dantas, Arida, Ferman, Andrade, Demarco, Carvalho and Wilson.

"Ordinary Shares" or
"Shares"

means the Ordinary Shares of US\$1.00 each in the share capital of the Company, authorized and issued from time to time.

"Other Shareholders"

shall have the meaning set forth in Clause 12(1)(a).

"Parties Hereto"

means the Shareholders and the Company.

"Partnership"

means CVC/Opportunity Equity Partners, L.P.

"Partnership Agreement"

means the amended and restated agreement of limited partnership relating to the Partnership dated December 30, 1997.

"Permitted Transferee"

shall have the meaning set forth in Clause 12(1)(c).

"Principal"

means any of Dantas, Wilson, Andrade, Demarco and Carvalho, and such other Directors as may be agreed in accordance with Clause 9 and "Principals" means all of them together.

"Private Placement Memorandum"

means the confidential private placement memorandum relating to the offering of US\$600 million limited partnership interests in the Partnership, dated the date hereof.

"Security Interest"

means and includes any interest or equity of any person (including, without prejudice to the generality of the foregoing, any right to acquire, option or right of preemption) or any mortgage, charge, pledge, lien, assignment or any other encumbrance, priority or interest or arrangement of whatsoever nature relevant property.

- "Sell" means transfer, sell, exchange, assign, mortgage, pledge, encumber, hypothecate, declare a trust, grant a usufruct or otherwise dispose or transfer.
- "Selling Shareholder" shall have the meaning set forth in Clause 12(1)(a).
- "the Shareholders" means the registered holders of Ordinary Shares from time to time together (and the expression Shareholder shall be construed accordingly).
- "Third Party" shall have the meaning set forth in Clause 12(1)(a).
- (2) reference to any statute or statutory provision includes a reference to that statute or statutory provision as from time to time amended, extended or re-enacted.
 - (3) words and phrases the definitions of which are contained or referred to in the Companies Law shall be confirmed as having the meaning thereby attributed to them but excluding any statutory modification thereof not in force on the date of this Agreement.
 - (4) words and phrases the definitions of which are contained or referred to in the Articles shall be construed as having the meaning thereby attributed to them.
 - (5) words importing the singular number shall include the plural and vice versa, words importing the masculine shall include the feminine and neuter and vice versa, and words importing persons shall include bodies corporate, unincorporated associations and partnerships.
 - (6) references to Clauses, Schedules and Recitals are references to Clauses, Schedules and Recitals of this Agreement and references to sub-clauses, paragraphs and sub-paragraphs are, unless otherwise stated, references to sub-clauses, paragraphs and sub-paragraphs of the sub-clause (or, as the case may be, Schedules or sub-paragraphs of the paragraph in which the reference appears). The Recitals in this Agreement shall be deemed to form part of this Agreement.
 - (7) all warranties, representations, indemnities, covenants, agreements and obligations given or entered into by more than one person are given or entered into severally unless otherwise specified.
 - (8) the headings to the Clauses and paragraphs are inserted for ease of reference only and shall not affect the interpretation or construction of this Agreement.

2. Consideration

In consideration of the mutual agreements and undertakings herein set out the parties to this Agreement have granted the rights and accepted the obligations hereinafter appearing.

3. Warranties

- (1) Each of Opportunity, Wilson, Andrade, Demarco and Carvalho hereby warrants to each other that (insofar as they relate to the Company) the Recitals are true and correct in every particular and that the Company has not incurred any liabilities or obligations of any nature whatsoever other than its paid up share capital and those imposed on the Company by virtue of its incorporation and any changes in its officers and constitution since its incorporation and those arising by virtue of its participation as general partner in the Partnership.
- (2) (a) Each of Opportunity, Andrade, Demarco, Carvalho and Wilson warrants and undertakes to each other that they will acquire the Ordinary Shares referred to in Clause 4 and (b) Opportunity warrants that it has acquired the 2 Ordinary Shares currently registered in its name for its own absolute beneficial ownership and not on behalf of any other person and undertakes to use its best efforts to give effect to the terms set forth herein.
- (3) The Shareholders warrant and undertake to each other that they have the capacity and power to enter into this Agreement, that this Agreement has been duly executed by them and that their holding of Ordinary Shares is not contrary to the laws or regulations of any jurisdiction and will not result in any other Shareholder or the Company being subject to any taxation or the laws or regulations of any jurisdiction which would not have been the case had such Shareholder not held Ordinary Shares in the Company.
- (4) Each of Dantas, Arida and Ferman warrant and undertake to the parties hereto that for so long as Opportunity holds a majority of the Ordinary Shares, not to cause or permit a Change of Control (as such term is defined in the Partnership Agreement) in the General Partner.

4. Completion

- (1) Concurrently with or as soon as reasonably practicable after the signing of this Agreement (if the same shall not already have occurred) the parties shall use their respective powers and efforts to cause the following to take place:

(a) each of Dantas, Wilson, Andrade, Demarco and Carvalho shall enter into directors agreements with the Company in a form to be agreed,

(b) each of Dantas, Arida, Wilson, Andrade, Demarco and Carvalho shall be appointed Directors of the Company provided however only Dantas and Arida shall have the power and authority to sign on behalf of the Company, as provided in Clause 7(c),

(c) subscribe for and the Company shall issue the following Ordinary Shares at the prices set out below:

Shareholder	Number of Ordinary Shares	Issue Price
Opportunity	94	US\$94.00
Andrade	1	US\$ 1.00
Demarco	1	US\$ 1.00
Carvalho	1	US\$ 1.00
Wilson	1	US\$ 1.00

(e) the Company shall establish the Investment Committee.

(2) This Agreement shall terminate if each of the above matters have not been completed by January 31, 1998 and the parties shall have no further liabilities hereunder.

5. Registered office; accounting reference date; secretary

Unless otherwise agreed between the Shareholders in writing:

- (1) the registered office of the Company shall be at the offices of Maples and Calder, P.O. Box 309, Uglan House, South Church Street, George Town, Grand Cayman, Grand Cayman Islands;
- (2) the accounting reference date of the Company shall be 31st December in each year; and

- (3) the secretary of the Company shall be Wilson or such other person as may be selected by the directors.

6. Finance

- (1) Subject to Clause 13(2), no Shareholder shall have any obligation, express or implied, to make further subscriptions for Ordinary Shares of or other capital contributions to, or to make any loans to or guarantees on behalf of, the Company, unless otherwise mutually agreed in writing.

7. The Company's Business

- (1) Except as the Shareholders may otherwise agree in writing or as otherwise provided or contemplated in this Agreement, the Shareholders shall exercise their powers in relation to the Company so as to ensure that:
- (a) the Company carries on and conducts its Business and affairs in a proper and efficient manner and for its own benefit;
 - (b) the Company transacts all its Business on arm's length terms;
 - (c) the Business of the Company shall be carried on pursuant to policies laid down from time to time by the Directors;
 - (d) the Company shall keep books of account and therein make true and complete entries of all its dealings and transactions of and in relation to its businesses;
 - (e) the Company will make available to each Shareholder within 3 months of the end of each financial year with management accounts for such year audited by the Auditor and in a form acceptable to the Shareholders;
 - (f) KPMG and its successors serve as auditors of the Company and the Partnership;
 - (g) the Company shall prepare its accounts on December 31;
 - (h) each accounting reference period of the Company shall be a period of 12 calendar months;
 - (i) the Company will make available to each of the Shareholders information as to all its financial and business affairs;

- (j) if the Company requires any approval, consent or license for the carrying on of its business in the places and in the manner in which it is for the time being carried on or proposed to be carried on, the Company will use its best endeavors to maintain the same in full force and effect; and
 - (k) the Company comply with the Partnership Agreement, the Operating Agreement and such other agreements entered into by the Company.
- (2) The Shareholders shall exercise their powers in relation to the Company so as to ensure that, in relation to the Company's activities as general partner of the Partnership:
- (a) any potential investment being considered by the Company on behalf of the partnership shall involve at least one Principal;
 - (b) any potential investment being considered by the Company on behalf of the Partnership shall be reviewed by one or more Directors prior to submission to the Investment Committee for their approval;
 - (c) no investment shall be made by the Company on behalf of the Partnership without the prior written approval of the Investment Committee.

8. Investment Committee

- 8.1 The Shareholders and the Company shall procure that the Company shall establish the Investment Committee.
- 8.2 The Directors shall delegate to one or more Directors the power and authority to consider and review potential investments by the Company acting as general partner of the Partnership with full authority to negotiate, structure and analyze such potential investments with a view to preparing a report for consideration and, if appropriate, final approval by the Investment Committee.
- 8.3 The Directors shall delegate to the Investment Committee the power and authority to approve, on behalf of the Company as general partner of the Partnership, the investment of the Partnership Assets, subject to the terms of the Partnership Agreement.
- 8.4 Decisions of the Investment Committee shall be taken by majority vote of those members attending and voting. The quorum for the Investment Committee shall be a majority of the members present in person or by proxy.

8.5 Subject to Clause 8.4, the Board of Directors shall establish such procedures and regulations relating to the proceedings of the Investment Committee as they consider appropriate.

8.6 The composition of the Investment Committee shall only be changed by a vote of 51% in interest of the Shareholders provided that the Shareholders shall ensure that the Significant Investors (as defined in the Partnership Agreement) always have, if such Significant Investors so choose, the right to appoint collectively at least 40% of the members of the Investment Committee.

9. Principals and Directors

9.1 All Principals shall be Directors.

9.2 All Principals shall enter into a directors agreement with the Company in a form to be agreed and each Principal shall be required to devote his full business time and attention to the Company and its activities as general partner of the Partnership.

9.3 The Shareholders shall procure that:

- (a) any person approved by Dantas is appointed as Director
- (b) that Directors may only be removed by a resolution adopted by shareholders holding a majority of the Ordinary Shares at a duly held meeting of the Shareholders, it being understood that, pursuant to Annex A, this provision may be superseded.

10. Important management decisions

(1) The Shareholders shall exercise their powers in relation to the Company to procure that, save as otherwise herein provided, the Company shall not (other than with the agreement of 51% in interest of the Shareholders):

- (a) allot or issue its shares and other securities, incur debt or guarantee or otherwise contingently liable on any obligation other than an obligation which relates to the activities of the Company as general partner of the Partnership, it being understood that, pursuant to Annex A, this provision may be superseded;
- (b) carry on any business other than the Business;

- (c) incur any material expenditure or liability of a capital nature save in respect of office machinery and equipment and administrative expenses reasonably required in the ordinary course of its Business;
 - (d) arrange any overdraft or other borrowing facilities;
 - (e) borrow or lend or prepay any funds;
 - (f) issue or consent to the assignment of, or the granting of options over, any shares, debentures or other securities of the Company or any reorganization of the Company's share capital, it being understood that, pursuant to Annex A, this provision may be superseded;
 - (g) pay dividends or make any other distribution (except as provided herein), it being understood that, pursuant to Annex A, this provision may be superseded;
 - (h) acquire or invest in another company or business or the incorporation of any subsidiary on the Company's account;
 - (i) create or allow to subsist any Security Interest over any of the Company's assets;
 - (j) give any guarantee or indemnity in respect of the obligations of any person;
 - (k) participate in any joint venture or partnership (other than the Partnership) with any person or merge or amalgamate with any person;
 - (l) commence any legal or arbitration proceedings;
 - (m) make any claim, disclaimer, surrender, election or consent of a material nature for tax purposes;
 - (n) permit the delegation by the Directors of any of their powers to any executive director or committee of directors or to any other person whatsoever other than the Investment Committee.
- (2) The Company shall be permitted, if appropriate and subject to the terms of the Partnership Agreement, to appoint any Principal to act as director or other officer of any entity in which the Company, acting as general partner of the Partnership, has made an investment.

11. Transfers of shares

- (1) Subject to Annex A, none of the Shareholders (not including Opportunity) shall directly or indirectly transfer or create or dispose of any interest (including a Security Interest) in or over any of his Ordinary Shares except to a transferee as permitted by this Agreement.
- (2) The Shareholders (not including Opportunity) shall be entitled to contribute their Ordinary Shares in the Company to personal holding companies in which they hold more than a majority of the voting shares.
- (3) The parties hereto shall procure that before any person (other than a person who is already a Shareholder) is registered as a holder of any Ordinary Share in the Company such person shall enter into a deed of adherence (in a form satisfactory to the Shareholders) covenanting with the continuing parties hereto to observe, perform and be bound by all the terms of this Agreement which are capable of applying to such and which have not then been performed. The Company shall not register any such person as the holder of any Ordinary Share until such a deed has been executed; upon being so registered that person shall be deemed to be a party to this Agreement.
- (4) The Company shall not register any transfer made in breach of sub-clauses (1), (2) or (3).

12. Offer of Ordinary Shares; death; disability

- (1) Except as otherwise expressly provided herein and subject to Annex A, each Shareholder hereby acknowledges that he will not Sell (as hereinafter defined) any Ordinary Shares except to Opportunity pursuant to Annex A and that any attempted Sale other than to Opportunity pursuant to Annex A shall be null and void and shall be of no effect.
- (2) Subject to Annex A, in the event that any Shareholder dies or becomes disabled or otherwise incapable of personally performing his obligations under this Agreement or as a Shareholder in general, such Shareholders heirs, estate, guardian or other similar person or entity which acquires control of such Shares shall immediately upon demand from Opportunity, in accordance with Annex A, sell such Shares to Opportunity.
- (3) Opportunity hereby grants to each of Wilson, Andrade, Demarco and Carvalho an irrevocable put option over their Shares in the Company at a price and according to the payment terms and conditions to be agreed pursuant to Annex A.

- (4) Each of Wilson, Andrade, Demarco and Carvalho hereby grant to Opportunity an irrevocable call option over their Shares in the Company at a price and according to the payment terms and conditions to be agreed pursuant to Annex A.
- (5) For purposes of this clause 12 the term Shareholder shall be deemed not to include Opportunity.

13. Dividends and Other Payments

- (1) Subject to Annex A, dividends shall be paid to each Shareholder in accordance with each Shareholders Share ownership. Opportunity may, in its sole discretion, transfer its Shares to any other Shareholder as a way to reward performance.
- (2) Subject to Annex A, each such Shareholder agrees that they shall be jointly and severally liable with the Company for payment, if necessary, of the GP Giveback (as defined in the Partnership Agreement).
- (3) Subject to Annex A, each such Shareholder shall be entitled to require the Company to pay the amounts due to them under Clause 13(1)(c) either as distributions in respect of the Ordinary Shares held by them or as bonus payable under the directors agreements.
- (4) Subject to Annex A, all payments made by the Company shall be made without any withholding or deduction unless required by law in which case the Company shall not be obliged to gross up any payments, and any withholding or deduction allocable to a payee shall be deducted from such payee's portion of the distribution or bonus.

14. Shareholder's consent

Where this Agreement provides that any particular transaction or matter requires the consent, approval or agreement of any Shareholder such consent, approval or agreement may be given subject to such terms and conditions as that Shareholder may impose and any breach of such terms and conditions by any person subject thereto shall ipso facto be deemed to be a breach of the terms of this Agreement.

15. Duration of obligation

The obligation of each of the Shareholders shall continue for so long as each remains a holder of shares in the Company but upon any such person ceasing to be a shareholder in the Company the obligations of that person hereunder shall cease and determine save for

any provision hereof which in relation to that person is expressly or by implication intended to come into force on or to continue in force after such cessation, and without prejudice to the due performance by such person of all his obligations up to the date of such cessation and the remedies of any of the other parties hereto in respect of a breach thereof.

16. The Articles

- (1) If, during the continuance of this Agreement, there shall be any conflict between the provisions of this agreement and the provisions of the Articles then, during such period, the provisions of this Agreement shall prevail.
- (2) Each of the parties hereto undertakes with each of the others to fully and promptly observe and comply with the provisions of this Article to the intent and effect that each and every provision thereof shall be enforceable by the parties hereto inter se and in whatever capacity.
- (3) Nothing contained in this Agreement shall be deemed to constitute an amendment of the Articles or of any previous articles of association of the Company.

17. Parties bound

- (1) The Company undertakes with each of the Shareholders to be bound by and comply with the terms and conditions of this Agreement insofar as the same relate to the Company and to act in all respects as contemplated by this Agreement.
- (2) The Shareholders undertake with each other to exercise their powers in relation to the Company so as to ensure that the Company fully and promptly observes, performs and complies with its obligations under this Agreement.
- (3) Each Shareholder undertakes with each of the other parties hereto that whilst he remains a party to this Agreement he will not (except as expressly provided for in this Agreement) agree to cast any of the voting rights exercisable in respect of any of the shares held by him in accordance with the directions, or subject to the consent of, any other person (including another Shareholder).

18. Confidentiality

The Shareholders undertake to each other and the Company that they will not any time hereafter use or divulge or communicate to any person other than to members, officers or employees of the Group, and to their and the Group's attorneys, accountants and advisors, whose province it is to know the same or on the instructions of the directors any

confidential information concerning the business, accounts, finance or contractual arrangements or other dealings, transactions or affairs of the Group which may come to their knowledge and they shall use their best endeavors to prevent the publication or disclosure of any confidential information concerning such matters.

19. **Mutual Consultation and Goodwill**

- (a) The Shareholders confirm their intention to promote the best interest of the Company and to consult fully with one another, the Investment Committee and the Advisory Committee, as appropriate, on all matters materially affecting the development of the Business. Each party shall act in good faith towards the other party in order to promote the success of the Company and the Business.
- (b) The Shareholders shall execute, and the parties shall procure that the Company executes and delivers, such agreement as the parties may from time to time agree (in their absolute discretion) are necessary to further the Business of the Company.

20. **General**

(1) *Costs*

The Shareholders and the Company shall pay their own costs and expenses incurred in relation to the negotiation, preparation and execution of this Agreement.

(2) *Notices*

All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in this Agreement or in any deed entered into pursuant to Clause 11(2) or such other address as the recipient may designate by notice given in accordance with the provisions of this sub-clause. Any such notice may be delivered personally or by first class prepaid letter or facsimile transmission and shall be deemed to have been served if by personal delivery when delivered if by first class post 48 hours after posting and if by telex or facsimile transmission when dispatched.

(3) *Successors bound*

This Agreement shall be binding on and shall endure for the benefit of the successors and assigns and personal representatives (as the case may be) of each of the parties hereto.

(4) *Assignment*

None of the parties hereto may assign his rights and obligations in whole or in part hereunder without the prior written consent of the other parties hereto; provided this sub-clause shall not prevent a transfer of Ordinary Shares pursuant to Clause 11.

(5) *Continuing agreement*

All provisions of this agreement shall so far as they are capable of being performed and observed continue in full force and effect notwithstanding Completion except in respect of those matters then already performed.

(6) *Good faith*

Each of the parties hereto undertakes with each of the others to do all things reasonably within his power which are necessary or desirable to give effect to the spirit and intent of this Agreement (including Annex A) and the Articles.

(7) *Further assurance*

The parties hereto shall, and shall use their respective reasonable endeavors to procure that any necessary third parties shall, do, execute and perform all such further deeds, documents, assurances, acts and things as any of the parties hereto may reasonable require by notice in writing to the others to carry the provisions of this Agreement (including Annex A) and the Articles into full force and effect.

(8) *Time of the essence*

Any date or period mentioned in this Agreement may be extended by agreement between the parties hereto failing which, as regards any such date or period, time shall be of the essence of this Agreement.

(9) *Entire agreement*

This Agreement constitutes the entire agreement between the parties hereto with respect to the matters dealt with therein and supersedes any previous agreement between the parties hereto in relation to such matters. Each of the parties hereto hereby acknowledges that in entering into this Agreement it has not relied on any representation or warranty save as expressly set out herein or in any document referred to herein. No variation of this Agreement shall be valid or effective unless

made by one or more instruments in writing signed by such of the parties hereto which would be affected by such variation.

(10) *Law*

This Agreement shall be governed by and construed in accordance with the laws of the Cayman Islands and the parties hereto irrevocably submit to the nonexclusive jurisdiction of the Cayman Islands Courts in respect of any dispute or matter arising out of or connected with this Agreement.

(11) *No partnership*

Nothing in this Agreement shall constitute or be deemed to constitute a partnership between any of the parties hereto and none of them shall have any authority to bind the others in any way.

(12) *Duration*

The terms of this Agreement shall remain in full force and effect until terminated by mutual consent between the parties but in relation to a Shareholder which has transferred all of his shares as permitted by this agreement and the Articles they shall thereupon cease to have any further force and effect except as provided in sub-clause (13).

(13) *Termination*

The termination of this Agreement however caused and the ceasing by any Shareholder to hold any shares shall be without prejudice to any obligations or rights of any of the parties hereto which have accrued prior to such termination or cessation and shall not affect any provision of this Agreement which is expressly or by implication provided to come into effect on or to continue in effect after such termination or cesser.

(14) *Waiver*

No failure to exercise and no delay in exercising on the part of any of the parties hereto any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies otherwise provided by law.

(15) *Severability*

Notwithstanding that any provision of this Agreement may prove to be illegal or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect.

(16) *Exercise of powers*

Where any Shareholder is required under this Agreement to exercise his powers in relation to the Company to procure a particular matter or thing, such obligation shall be deemed to include an obligation to exercise his powers both as a Shareholder and as a Director (where applicable) of the Company and to procure that any Director appointed by him (whether alone or jointly with any other person) shall procure such matter or thing.

(17) *Counterparts*

This Agreement may be executed in one or more counterparts and each counterpart shall be deemed an original but all of which shall together constitute one and the same instrument.

(18) *Amendments*

This Agreement may be amended by a majority in interest of the Shareholders.

(19) Executed as a Deed the day and year first written above.

Samuelle de Carvalho
OPPORTUNITY INVEST II INC.

Samelle de Carvalho
DANIEL VALENTE DANTAS

Samelle de Carvalho
PERSIO ARIDA

Samelle de Carvalho
DORIO FERMAN

Samelle de Carvalho
RODRIGO BHERING ANDRADE

Samelle de Carvalho
ARTHUR JOAQUIM DE CARVALHO

Witness
Witness

Witness
Witness

NYDCS02/1177

Janette Silvestri
LUIS ROBERTO DEMARCO/ALMEIDA

Janette Silvestri
ROBERT E. WILSON, III

Janette Silvestri
CVC/OPPORTUNITY EQUITY
PARTNERS, LTD.

Janette Silvestri
CVC/OPPORTUNITY EQUITY
PARTNERS, LTD.

De Gracia
Witness

[Signature]
Witness

State of New York)
) ss.:
County of New York)

I, GARY L. WITTMAN, notary public, duly qualified, commissioned, sworn and acting in and for the County of Kings, State of New York, do hereby certify on this 26th day of December, 1997 that:

1. Before me personally came Ms. Danielle Silbergleid known to me, who being by me duly sworn, did depose and say that she is signing her name on the foregoing instrument, in my presence, as a duly authorized attorney in fact for, and on behalf of the persons listed on Schedule I hereto;

2. Before me personally came Alessandro De Giorgis and Richard S. Aldrich, Jr., each being one of the subscribing witnesses to the foregoing instrument, known to me, each of whom being by me duly sworn, did depose that they reside at 244 Madison Avenue, Apt. 9L, New York, New York 10016 and 136 East 64th Street, New York, New York 10021 and that they know Ms. Danielle Silbergleid and that they were present and saw said individual execute the foregoing instrument in New York, New York on the 26th day of December, 1997, having signed themselves, same instrument in my presence on this 26th day of December, 1997.

In testimony whereof I have hereto subscribed my name and affixed my Notarial Seal this 26th day of December, 1997.

GARY L. WITTMAN
Notary Public in and for the
County of Kings

State of New York)
County of Kings) ss.:

No 185747

Form 1

I, WILBUR A. LEVIN, Clerk of the County of Kings, and also Clerk of the Supreme Court for the said County of Kings being a Court of Record, having a Seal, DO HEREBY CERTIFY, That

whose name is subscribed to the deposition, certificate of acknowledgment or proof of the annexed instrument, was at the time of taking the same a NOTARY PUBLIC in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his appointment and qualifications, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County this _____ day of _____ 19

Clerk



MAR 26 1998

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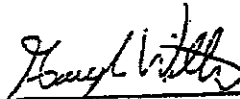
State of New York)
) ss.:
County of New York)

I, GARY L. WITTMAN, notary public, duly qualified, commissioned, sworn and acting in and for the County of Kings, State of New York, do hereby certify on this 26th day of December, 1997 that:

1. Before me personally came Ms. Danielle Silbergleid known to me, who being by me duly sworn, did depose and say that she is signing her name on the foregoing instrument, in my presence, as a duly authorized attorney in fact for, and on behalf of the persons listed on Schedule I hereto;

2. Before me personally came Alessandro De Giorgis and Richard S. Aldrich, Jr., each being one of the subscribing witnesses to the foregoing instrument, known to me, each of whom being by me duly sworn, did depose that they reside at 244 Madison Avenue, Apt. 9L, New York, New York 10016 and 136 East 64th Street, New York, New York 10021 and that they know Ms. Danielle Silbergleid and that they were present and saw said individual execute the foregoing instrument in New York, New York on the 26th day of December, 1997, having signed themselves, same instrument in my presence on this 26th day of December, 1997.

In testimony whereof I have hereto subscribed my name and affixed my Notarial Seal this 26th day of December, 1997.



GARY L. WITTMAN
Notary Public in and for the
County of Kings

GARY L. WITTMAN
Notary Public, State of New York
No. 24-4897619
Qualified in Kings County
Commission Expires June 1, 1999

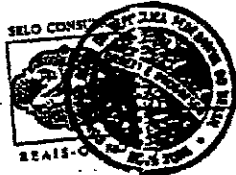




CONSULADO-GERAL DO BRASIL EM NOVA YORK

Reconheço verdadeira a assinatura, no documento anexo, com _____ página(s), de
WILBUR A. LEVIN, Tabelião do foro do Condado de
KINGS, Estado de NEW YORK, Estados Unidos da
América. E, para constar onde convier, mandei passar o presente, que assinei e fiz selar, com o Selo de
Armas desta Repartição consular. É dispensável a legalização da assinatura da Autoridade consular, nos
termos do artigo 2º, do Decreto nº 84.451, de 31.01.80.

Nova York, em 27 de MARÇO de 1998



Sílvio Meneses Garcia
Cônsul - Adjunto

Recebi: R\$ 20 ,00 (ouro) ou
US\$ 20 ,00 Tabela: 416

*A legalização deste documento não implica aceitação ou aprovação de seu conteúdo.
The legalization of this document does not imply approval or acceptance of its contents.*

LEB14-PL-6104-1277-64

SCHEDULE I
TO ACKNOWLEDGMENT
OF THE SHAREHOLDERS AGREEMENT

DANIEL VALENTE DANTAS
PERSIO ARIDA
DORIO FERMAN
RODRIGO BHERING ANDRADE
ARTHUR JOAQUIM DE CARVALHO
LUIS ROBERTO DEMARCO ALMEIDA
ROBERT E. WILSON, III
CVC/OPPORTUNITY EQUITY PARTNERS, LTD.
OPPORTUNITY INVEST II INC.

Carried Interest

- Call/put upon exit
- Vesting of Points
- Death and disability

Ownership of Ordinary Shares

- Mechanics on how to adjust ownership interest
- Call/put upon exit
- Death and disability

Compensation

- Annual salary
- Semi-annual bonuses

DIRECTORS AGREEMENT

This Agreement is made the 30th day of December 1997.

- BETWEEN:** (1) CVC/Opportunity Equity Partners, Ltd. whose registered office is situated at P.O. Box 309, Uglan House, South Church Street, Grand Cayman Islands (the "Company"), and
- (2) Luis Roberto Demarco Almeida (the "Director")

WHEREBY the Company agrees to employ the Director and the Director agrees to accept employment during this term of this Agreement as herein specified, upon the following terms and conditions:

1. Definitions and Interpretation

- 1.1 the "Board" means the board of directors of the Company.
- 1.2 "Intellectual Property" means letters patent, trade marks whether registered or unregistered, designs, utility models, copyrights, including design copyrights, applications for any of the foregoing and the right to apply for them in any part of the world, discoveries, creations, inventions or improvements upon or additions to an invention, confidential information, know-how and any research effort relating to any of the above mentioned business names whether registered or not, moral rights and any similar rights in any country.
- 1.3 the "Partnership" means CVC/Opportunity Equity Partners, L.P.
- 1.4 The "Shareholders Agreement" means the shareholders agreement dated December 30, 1997 between Rodrigo Bhering Andrade, Luis Roberto Demarco Almeida, Arthur Joaquim de Carvalho, Robert E. Wilson, III (collectively, together with Daniel Valente Dantas ("Dantas") and Persio Arida ("Arida"), the "Directors"), Opportunity Invest II, Inc., the Company, and the other parties thereto from time to time.
- 1.5 Words importing one gender include all genders and words importing the singular include the plural and vice versa.
- 1.6 Any reference to a statutory provision shall be deemed to include a reference to any statutory modifications or re-enactment of it.

2. **Term of Employment**

The employment of the Director shall commence on December 30, 1997 and shall continue until terminated pursuant to Clause 9 below.

3. **Duties**

- 3.1 The Director shall be employed full time in the business of the Company and its affiliates and shall perform all duties connected with such office as the Board may from time to time direct, which duties shall include, without limitation, the following:
- (a) to carry out all policies and procedures implemented by the Board.
 - (b) to manage and maximize the profitability of the business of the Company in an efficient and effective business-like manner.
 - (c) to liaise and communicate with the Directors as often as may be necessary.
 - (d) to take such actions as may be necessary in connection with the Company's role as general partner of the Partnership as directed from time to time by the Board, including originating, analyzing, structuring, negotiating and closing, monitoring and realizing publicly bid and privately negotiated equity and equity related investments in companies based and primarily operating in Brazil.
- 3.2 During the continuance of his employment under this Agreement, the Director shall (x) be required to devote his whole time and attention to the business of the Company, and (y) not, without the prior written consent of the Board but subject to full disclosure in accordance with general law and the Articles of Association of the Company (in relation to (b) only),
- (a) engage in any other business; or
 - (b) be concerned or interested in any other company.

4. Remuneration

- 4.1 The Company shall pay the Director a fixed salary (which shall accrue from day to day) at the rate of US\$12,000 per annum payable monthly in arrears on the last business day of each month.
- 4.2 The said salary shall be reviewed annually and in the Board's discretion may be increased.
- 4.3 In addition, the Company may, in its discretion, pay to the Director a bonus subject to the terms of the Shareholders Agreement.
- 4.4 The Director shall also be entitled to such other benefits as may be agreed between the Company and the Director from time to time.

5. Expenses

The Company shall by way of reimbursement pay or procure to be paid to the Director all reasonable traveling, hotel and other expenses wholly exclusively and necessarily incurred by him in or about the performance of his duties under this agreement PROVIDED that the Director, if so required by the Company, provides reasonable evidence of the expenditure in respect of which he claims reimbursement and had obtained prior approval from the Company for such expenses.

6. Hours of Employment.

The Director shall work such hours as may from time to time become necessary in order to meet the needs of the Company's business.

7. Holidays

- 7.1 The Director is entitled to take four (4) weeks holiday in each calendar year.

8. Sickness

- 8.1 The Director is entitled to his full salary for the first ninety (90) days of sick leave taken during any consecutive twelve (12) month period.
- 8.2 After the first ninety (90) days of sick leave taken during any consecutive twelve (12) month period, the Director shall be entitled to a further ninety (90) days of unpaid sick leave.

- 8.3 If the Director is absent from work from any reason for a period or periods in excess of 180 days in any twelve (12) month period, the Company shall be entitled to terminate the employment at any time by notice to the Director.

9. Termination of Employment

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 willful 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 interest;
- 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.

10. Confidentiality

- 10.1 The Director is aware that in the course of employment under this Agreement he will have access to and be entrusted with information in respect of the business of the Company and its dealings, transactions and affairs all of which information is or may be confidential.
- 10.2 The Director shall not (except in the proper course of his duties) during or after the period of his employment under this Agreement divulge to any person whatever or otherwise make use of (and shall use his best endeavors to prevent the publication or disclosure of) any trade secret or any confidential information concerning the business of the Company.
- 10.3 All notes and memoranda of any or confidential information concerning the business of the Company which shall be acquired, received or made by the Director during the course of his employment shall be the property of the Company and

shall be surrendered by the Director to someone duly authorized in that behalf at the termination of his employment or at the request of the Board at any time during the course of his employment.

11. Intellectual Property

- 11.1 The parties foresee that the Director may make, discover or create Intellectual Property in the course of his duties under this agreement and agree that in this respect the Director has a special obligation to further the interests of the Company.
- 11.2 If at any time during his employment under this agreement the Director makes or discovers or participates in the making or discovery of any Intellectual Property relating to or capable of being used in the business for the time being carried on by the Company, full details of the Intellectual Property shall immediately be communicated by him to the Company and shall be the absolute property of the Company. At the request and expense of the Company, the Director shall give and supply all such information, data, drawings and assistance as may be requisite to enable the Company to exploit the Intellectual Property to the best advantage and shall execute all documents and do all things which may be necessary or desirable for obtaining patent or other protection for the Intellectual Property in such parts of the world as may be specified by the Company or as it may direct.
- 11.3 The Director irrevocably appoints the Company to be his attorney in his name and on his behalf to sign, execute and do any such instrument or thing and generally to use his name for the purpose of giving to the Company (or its nominee) the full benefit of the provisions of this clause and in favor of any third party a certificate in writing signed by any Director or the secretary of the Company that any instrument or act falls within the authority conferred by this clause shall be conclusive evidence that such is the case.
- 11.4 If the Intellectual Property is not the property of the Company, the Company shall have the right to acquire for itself or its nominee the Director's rights in the Intellectual Property within 3 months after disclosure pursuant to clause 11.2 above on fair and reasonable terms to be agreed or settled by a single arbitrator.
- 11.5 Rights and obligations under this clause shall continue in force after termination of this agreement in respect of Intellectual Property made during the Director's employment under this agreement and shall be binding upon his representatives.

12. Non-solicitation

The Director covenants with the Company that he will not, for the period of 2 (two) years after ceasing to be employed under this agreement, without the prior written consent of the Board, in connection with the carrying on of any business similar to or in competition with the business of the Company or the Partnership, on his own behalf or on behalf of any person, firm or company, directly or indirectly;

12.1 seek to procure orders from or do business with any person, firm or company who has at any time during the 2 (two) years immediately preceding such cesser done business with the Company or the Partnership; or

12.2 endeavour to entice away from the Company any person who has at any time during the 2 (two) years immediately preceding such cessation been employed or engaged by the Company or the Partnership;

PROVIDED that nothing in this clause shall prohibit the seeking or procuring of orders or the doing of business not relating or similar to the business or businesses described above.

13. Non-competition

The Director covenants with the Company that he will not, and for 2 (two) years after ceasing to be employed under this agreement, without the prior written consent of the Board, either alone or jointly with or as manager, agent, consultant or employee of any person, firm or company, directly or indirectly carry on or be engaged in any activity or business which shall be in competition with the business of the Company or the Partnership.

14. Securities Dealing

The Director shall be bound (and shall procure that his spouse and minor children shall abide), by the rules and procedures of the Board, as enacted from time to time, in respect of the acquisition, sale, exchange or other disposition of any shares or other securities of any company or other entity or securities derived from such shares or securities.

15. Resignation from Directorships

Upon the termination by whatever means of his employment under this Agreement:

15.1 the Director shall at the request of the Company immediately resign from office as a director of the Company without claim for compensation, and in the event of his

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failure so to do, the Company is hereby irrevocably authorised to appoint some person in his name and on his behalf to sign and deliver such resignation or resignations to the Company; and

15.2 the Director shall not without the consent of the Company at any time thereafter represent himself still to be connected with the Company.

16. **Indemnity**

The Director shall be indemnified out of the assets of the Company from and against all actions, proceedings, costs, charges, losses, damages and expenses which he shall or may incur or sustain by reason of any act done or omitted in or about the execution of his duty as director, except such (if any) as he shall incur or sustain by or through his breach of a fiduciary duty, fraud, bad faith, gross negligence or willful malfeasance, intentional breach of his obligations hereunder or his obligations under any rules or procedures from time to time adopted by the Board, and the Director shall not be answerable for the acts, receipts, neglects or defaults of any other director unless the same shall happen through the breach of a fiduciary duty, fraud, bad faith, gross negligence or willful malfeasance of the Director.

17. **Governing Law and Jurisdiction**

17.1 This Agreement is governed by and shall be construed in accordance with Cayman Islands law.

17.2 The parties to this Agreement submit to the exclusive jurisdiction of the Cayman Islands courts.

18. **Notices**

Notices may be given by either party by letter addressed to the other party at (in the case of the Company) its registered office for the time being and (in the case of the Director) his last known address and any notice given by letter shall be deemed to have been given at the time at which the letter would be delivered in the ordinary course of post or if delivered by hand upon delivery and in proving service by post it shall be sufficient to prove that the notice was properly addressed and posted.

19. **Execution**

Executed as a Deed the day and year first above written.

IN WITNESS WHEREOF, the Company has caused this Agreement to be executed and the Director has hereto set his hand the day and year before written.

Smuelle de la Cruz

Signed for and on behalf
of CVC/Opportunity Equity
Partners, Ltd.

Smuelle de la Cruz

Signed by FOR AND ON BEHALF OF
Luis Roberto Demarco Almeida

Witness: Alonso de la Cruz

Witness: [Signature]

State of New York)
) N.Y.
 County of New York)

I, GARY L. WITTMAN, notary public, duly qualified, commissioned, sworn and acting in and for the County of Kings, State of New York, do hereby certify on this 26th day of December, 1997 that:

1. Before me personally came Ms. Danielle Silbergleid known to me, who being by me duly sworn, did depose and say that she is signing her name on the foregoing instrument, in my presence, as a duly authorized attorney in fact for, and on behalf of the persons listed on Schedule I hereto;

2. Before me personally came Alessandro De Giorgis and Richard S. Aldrich, Jr., each being one of the subscribing witnesses to the foregoing instrument, known to me, each of whom being by me duly sworn, did depose that they reside at 244 Madison Avenue, Apt. 9L, New York, New York 10016 and 136 East 64th Street, New York, New York 10021 and that they know Ms. Danielle Silbergleid and that they were present and saw said individual execute the foregoing instrument in New York, New York on the 26th day of December, 1997, having signed themselves, same instrument in my presence on this 26th day of December, 1997.

In testimony whereof I have hereto subscribed my name and affixed my Notarial Seal this 26th day of December, 1997.

Gary L. Wittman

 GARY L. WITTMAN
 Notary Public in and for the
 County of Kings

GARY L. WITTMAN
 Notary Public, State of New York
 No. 24-4897819
 Qualified in Kings County
 Commission Expires June 1, 1997

**SCHEDULE I
TO ACKNOWLEDGMENT
OF THE DIRECTORS AGREEMENT**

**LUIS ROBERTO DEMARCO ALMEIDA
CVC/OPPORTUNITY EQUITY PARTNERS, LTD.**

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