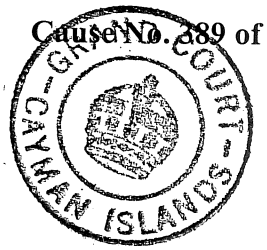
CJ/LIBRARY

31/5/02

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. 289 of 1999



Before the Honourable Mr. Justice Kellock

BETWEEN:

CVC/OPPORTUNITY EQUITY PARTNERS LIMITED

Plaintiff

- and -

LUIS ROBERTO DEMARCO ALMEIDA

Defendant

Anthony Trace Q.C. instructed by Andrew Bolton and Jeremy Walton of Hunter & Hunter for the Plaintiff.
Michael Black Q.C. instructed by Seamus Andrew of Walkers for the Defendant.

Trial holden at George Town: April 22nd – 26th, 29th, 30th, May 1st – 3rd 2002

REASONS FOR JUDGMENT

Kellock J.

This action was commenced by the Plaintiff CVC/Opportunity Equity Partners Limited ("CVC/CI") by writ of summons (which included a statement of claim) on June 23rd 1999. The original writ and statement of claim were replaced by an amended statement of claim filed April 10th 2001, which was amended again during the course of the trial.

The pleaded cause of action arises from an oral contract made between the parties in the fall of 1997 pursuant to which the defendant Luis Demarco Almeida ("Demarco") was employed by CVC/CI as a "deal maker". The phrase "deal maker" is an invention of the Plaintiff. The parties have agreed that an oral contract was made and it is common ground that Demarco received a large payment of money at or shortly after he commenced working for CVC/CI in the

fall of 1997. The Plaintiff contends that this payment was to be retractable by the Plaintiff unless Demarco earned the right to retain it. Demarco contends that the payment was a "signing on" fee and when paid became his sole and absolute property. The first issue to be determined is which of these competing views is the correct one.

It is also common ground that Demarco was, upon entering into the Plaintiff's employment, entitled to an interest in the issued share capital of CVC/CI. The Plaintiff contends that while Demarco could earn the right to a 3.5% interest in the company which would "vest" over a period of 5 years, he had earned only an 0.875% interest as at February 4th 1999 when the Plaintiff alleges that he was dismissed from its employment. Demarco, on the other hand, asserts that he was and is entitled to a 3.5% interest in the Plaintiff's issued share capital, which interest was fully vested in him when his employment commenced. Which of these propositions is the correct one is the second issue to be resolved.

For the Plaintiff to succeed it must prove that the contractual terms it alleges, were in fact agreed to. If I am unable to conclude on the balance of probabilities what the agreed terms were, the action must fail. In that case and in the normal course, the action would be dismissed. However, I have been invited by counsel for both parties to issue a declaration as to exactly what interest the Defendant has in CVC/CI. It was agreed by the parties that I have the jurisdiction to do so. (See Woolf, The Declaratory Judgment, second edition, 1993, p. 109, par 4.011). I have been advised that the consequences of the declaration will be the subject matter of other proceedings.

In the early part of 1997, CVC/CI became the general partner of an exempted limited liability partnership established in this jurisdiction called CVC Opportunity Equity Partners L.P. ("the Cayman LLP") (see the list of *Dramatis Personae* I have appended to these reasons). CVC/CI was incorporated in January 1996. It was originally incorporated with the name Brazilian Equity Partners Ltd. but that name was changed by special resolution dated September 9th 1997. As will appear, the controlling shareholders of CVC/CI are Brazilian. CVC/CI has authorized share capital of $50,000 U.S. divided into 50,000 shares with a par value of US$1 each.

Both CVC/CI and the Cayman LLP are exempted entities and are, as such, expected to conduct business outside of the Cayman Islands. The other members of the Cayman LLP are entities controlled by Citibank N.A. The funds invested in the partnership, which were to be in turn invested by the general partner CVC/CI, were injected by the Citibank entities. The Cayman LLP was to last 8 years although its life might be extended to 10 years. The investments to be made by CVC/CI for the Cayman LLP were to be made in the acquisition of businesses established or being carried on in Brazil. The strategy was to acquire these businesses at a price, which, after a period of time, would produce a profit when resold. It was contemplated that, while owned (or controlled) by the Cayman LLP, the acquired businesses would be managed by CVC/CI and it was hoped that these businesses could be carried on at a profit, but the prime goal was to achieve a capital gain. CVC/CI was entitled to a management fee from the Cayman LLP calculated on the basis of a percentage of the money invested and eventually to a 20% share of the profits, provided the limited partners achieved a stipulated minimum profit (which was called the "hurdle rate"). A sister company to CVC/CI was incorporated in Brazil with the name CVC/Opportunity Equity Partners Administradora de Recursos Ltda. I will call that company "CVC/Brazil". CVC/Brazil was to be the investment advisor and manager of a Brazilian entity which would play the role of (or a role similar to the role played by) the Cayman LLP in Brazil. That entity was called CVC/Opportunity Equity Partners Fundo de Investimento em Açôes (the "Brazilian Fund").

It appears that Demarco was employed by CVC/CI and CVC/Brazil on the same terms, but according to counsel under two separate contracts. This may be so, but I was unable to tell from the evidence whether that was intended by the parties, or what, if anything, flows from it. There was no evidence to suggest that either party contemplated that Demarco's employment with either company could be terminated independently.

Both CVC/CI and CVC/Brazil are controlled by a Brazilian national named Daniel Dantas ("Dantas"). Dantas was the founder of what has come to be known as the Opportunity Group of companies. The Opportunity Group includes a mutual fund (the Opportunity Fund), which was incorporated in the Cayman Islands in 1992 and is managed by a Dantas company

called Opportunity Asset Management Inc. ("OAM"). The share capital of Opportunity Fund (a Cayman corporation) includes a series of classes of shares intended to be issued to investors in the fund according to the nature of the investment desired by each investor. As a result, an investor can direct his investment to one or more of Opportunity Fund's "sub funds", e.g., Brazilian equities, Brazilian aggressive equities, a money market fund, a hedge fund and a fund called fixed income derivatives. The evidence was that Opportunity Fund has been hugely successful and I therefore presume that so has Dantas.

Rodrigo Andrade who is a CVC "deal maker" testified that in the investment community in Brazil, Dantas is regarded as a person who "walks on water". He is certainly the person who calls the shots for the Opportunity Group including CVC/CI and OAM. That is to say, CVC/CI, CVC/Brazil, OAM and their employees are expected to act in accordance with Dantas' wishes. One consequence of this was that a number of Dantas' relatives were employed by the Plaintiff.

Before committing to the limited liability partnership, Citibank concerned itself, *inter alia*, with the details of the corporate structure of CVC/CI to the point that its New York lawyers, Shearman and Sterling, were asked to draft or review a shareholder's agreement and a series of director's agreements. The transaction which completed the CVC/Citibank arrangement was closed at the end of December 1997 and the shareholder's agreement is dated that day. The director's agreement between CVC/CI and Demarco is also dated December 30th 1997. All of the signatories to both of these documents executed them through an attorney who appears to have been in New York at the time and the documents were signed there.

According to the shareholder's agreement the shareholders of CVC/CI were:

(1) Opportunity Invest II (a Dantas company)
(2) Daniel Valente Dantas
(3) Persio Arida
(4) Dorio Ferman
(5) Rodrigo Bhering Andrade
(6) Luis Roberto Demarco Almeida

(7) Arthur Joaquim de Carvalho (a brother-in-law of Dantas)

(8) Robert E. Wilson, III

(9) CVC/CI

The shareholder's agreement contemplated that director's agreements would be entered into between CVC/CI and its directors who where the individuals named above (with the exception of Ferman). The director's agreement between CVC/CI and Demarco describes Demarco as "the director" and recites that CVC/CI "agrees to employ the director and the director agrees to accept employment during the term of this agreement as herein specified upon the following terms and conditions ..."

Despite their labels, the shareholder's agreement and the director's agreement 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 shareholder's agreement was prepared on the basis that it would include an Annex A which was defined in paragraph 1 of the shareholder's agreement as follows:

> "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 evidence is that Annex A was never completed and its contents were never agreed upon. There is a page entitled "Annex A" attached to the copy of the shareholder's agreements which was made an exhibit at the trial (exhibit P-13), but it is simply a bullet point list of topics or subject matters.

The shareholder's agreement required the establishment of an investment committee, "which shall initially comprise Dantas, Arida, Wilson, Mr. Byron Knief and Ms. Mary Lynn Putney". Kneif and Putney were representatives of Citibank.

Paragraph 4(1)(c) of the shareholder's agreement provided that CVC/CI would issue "the following ordinary shares at the prices set out..." These were as follows:

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

Paragraph 7.2 of the shareholder's agreement required the shareholders to ensure that no investment was made by CVC/CI on behalf of the Cayman LLP without the prior written approval of the investment committee.

Paragraphs 8.2, 8.3 and 8.4 of the agreement were as follows:

"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."

The agreement defined "principal" to include Dantas, Wilson, Andrade, Demarco and Carvalho and paragraphs 9.1, 9.2 and 9.3 stated that:

9.1 All Principals shall be Directors.

9.2 All Principals shall enter into a director's 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.

By paragraph 12 of the agreement, Demarco and others were granted "put options" over their shares in the company at a price and according to the payment terms to be agreed pursuant to Annex A.

The same paragraph granted a call option to CVC/CI over the shares of Demarco (and others) "again at a price and according to the payment terms and conditions to be agreed pursuant to Annex A".

The Plaintiff's evidence was that there was great pressure on CVC/CI to close the Citibank transaction before the end of 1997 according to Citibank's timetable. As there was a lack of agreement on the contents of Annex A, the closing had to occur without it. The intention (it was said) was to take up the Annex A matter early in 1998. The fact is, there was no Annex A as at December 30th 1997 and there is no Annex A today. This is of some significance because many of the provisions of the shareholder's agreement (I have mentioned only some of them) were dependent upon the existence of Annex A. As a result the shareholder's agreement was reduced in whole or in part to an agreement to agree. Either way it can accommodate all of the elements of Demarco's version of his oral contract with CVC/CI but not all of the elements of the Plaintiff's version. I will return to this topic in due course.

The provisions of the director's agreement are also of importance. The parties to it are, CVC/CI described as "the company" and Demarco who was described as "the director". As mentioned earlier, this agreement reaches far beyond references to attendances at meetings of the board of directors. As mentioned it begins with this recital: "Whereby the company agrees to employ the director and the director agrees to accept employment during the term of this agreement as herein specified upon the following terms and conditions...."

I will set forth the important provisions which follow that recital.

"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 has obtained prior approval from the Company for such expenses.

5. 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.

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.

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 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."

Both written contracts required Demarco to devote all of his working hours to the CVC companies and it is apparent that the shareholder's agreement and the director's agreement were not designed to merely regulate the conduct of shareholder *qua* shareholder or director *qua* director.

While the director's agreement is not subject to a non-existent appendix A, it does explicitly contemplate, and therefore leaves room for, collateral agreements. Paragraph 4.4 of the director's agreement expressly entitled Demarco to "such other benefits as may be agreed between the company and the director from time to time" in addition to the specified salary and bonus.

As a result, the oral agreement as to Demarco's entitlement to shares of CVC/CI, whatever it is found to be, does not add to, vary, or contradict the shareholder's agreement because that agreement was left incomplete.

I can now come to the circumstances which give rise to this litigation.

In or about August 1997, Demarco was employed by a Brazilian business entity described as GP Investimentos S.A. The "G" apparently stands for "Garantia". The Garantia Group includes a bank as well as GP, which is a business similar to the business the CVC companies and the Cayman LLP were formed to carry on. Prior to joining GP, Demarco had had a distinguished career. He became the CEO of a joint venture between IBM and a Brazilian company at a very early age and that company was extremely successful while under his guidance. Demarco had, while working for GP, been responsible for the acquisition by GP of a large supermarket business in Brazil at a price which enabled GP to make a very substantial profit. As a result Demarco was awarded a bonus of US$300,000.

It seems that Demarco's accomplishments came to the attention of Dantas and Persio Arida, who was then Dantas' right-hand man. Arida was a former president of the national bank of Brazil.

Demarco said that Dantas was interested in hiring him away from GP as he regarded doing so as a sort of "coup", that is, an advantage to be achieved at the expense of a competitor. At the time (i.e., August 1997) Arida was a partner of Dantas, and together with Dantas and Ferman, were the beneficial owners of the entire share capital of Opportunity Invest II, the overwhelming majority shareholder of CVC/CI. Demarco was introduced to Arida through Arida's wife who had heard Demarco speak to a meeting of people interested in structuring investments in Brazil's professional soccer clubs. Arida inquired of Demarco as to whether or not he would be interested in leaving GP in order to work for the Dantas interests. Demarco advised Arida in mid October 1997 that he would be prepared to join the CVC companies if he could (a) obtain a 3.5% interest in the equity of his employer with the possibility of an increase in that stake to 5% within a year, (b) be paid an "entry bonus" or "signing fee" of US$1,000,000.00 to compensate him for the loss of his prospects at GP where he was about to be made a partner, (c) a bonus each six months and (d) a salary of US$300,000 per annum. Demarco followed up his conversations with Dantas and Arida with a memorandum to Arida in the Portuguese language which, although undated, was said to have been delivered to Arida's home on or about the weekend of October 11th 1997. The English translation of this memorandum (exhibit P-18) is as follows:

"MEMORANDUM

TO: Persio Arida
FROM: LR Demarco
Subject: OUR DEAL

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

PARTICIPATION:

⇒ 3.5% initial stake, which may reach 5.0% within one year

ENTRY BONUS:

⇒ Payment of 1 million dollars net, as a signing fee, to compensate the losses with leaving Garantia.

⇒ Persio and Daniel are responsible for the payment.

6 MONTHS TERM BONUS:

⇒ 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 distribution. In fact, this means an advancing to the minority partners rather than the controlling shareholders. The portion "virtual" will be deducted from future real profits.

⇒ The 2S97 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 know-how of minor shareholder.

⇒ The value of the "virtual" cash generation" of the company already defined for the 2S97 is 50 MMCSS.

SALARY:

⇒ Annual salary of 300 KUSS, which is equivalent to 25 KUSS a month for the position of Director (12 times, without Christmas salary)."

The Plaintiff did not produce a copy of this memorandum by way of discovery claiming that it did not have a copy. However, the Plaintiff did provide an affidavit sworn by Veronica Dantas (the sister of Daniel Dantas) on August 17th 1999. This affidavit was provided in

response to the suggestion that she had failed to make full and frank disclosure of the relevant facts in her affidavit sworn June 22nd 1999 filed in this court in this action upon the Plaintiff's successful *ex parte* application for a Mareva injunction against Demarco.

I will set forth here in their entirety paragraphs 16 - 18 of the second affidavit of Veronica Dantas

> "16. I am informed by Persio Arida that, having seen the document exhibited as 'LRDA-2', he now recalls that Luis Demarco did present him with a memorandum. Persio Arida does not have a clear recollection of the exact terms of that memorandum and does not recall if that memorandum was the same as the document 'LRDA-2'. He has no recollection of whether he kept it or a copy of it. I would expect to have been sent a copy of the final agreement only for the Plaintiff's files.
>
> 17. I am further informed by Persio Arida that when he and I spoke about the terms of my first affidavit he did not recall the existence of this memorandum and thus failed to alert me of its possible existence (albeit that the Plaintiff did not have a copy of the memorandum, and that if copies of the letters exist, there are none in the offices of the Plaintiff). He had categorically stated to me that he was not acting willfully or dishonestly when he failed to disclose to me the fact that such a memorandum might exist.
>
> 18. In any event the memorandum would simply have been part-and-parcel of the ongoing negotiations: it predates the date of the second draft letter exhibit LRDA-3 (exhibit P 18) and demonstrates that definite terms had not been reached and that therefore the relevant terms were oral. This omission cannot, therefore, be said to have prejudiced Demarco's case on the injunction application: its inclusion would have strengthened the Plaintiff's application."

Paragraph 18 is an argument disguised as evidence. This is a practice that ought to be discouraged and one that should alert the Court to the need for special scrutiny. The paragraph does not state that Arida regarded Demarco's memorandum as "simply… part of the ongoing negotiations". That "spin" was introduced by Ms. Dantas.

The Plaintiff did not call Arida to testify at trial, nor was any effort made to take his evidence on commission. According to Veronica Dantas, Arida remains a "good friend" although he ceased to work for CVC/CI in March 1999 and resigned as a director of CVC/CI in November of that year.

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

The Plaintiff's case, as Veronica Dantas suggested, is that the memorandum which Demarco provided to Arida was merely a step in the negotiations which the Plaintiff alleges led to an oral agreement made on October 31st 1997. According to the Plaintiff, this agreement was reached as a result of a series of meetings with Demarco variously attended by Dantas, Veronica Dantas and Arida. Not only is there a complete absence of any written records of the terms of the agreement alleged by the Plaintiff, there is no written record of what transpired at any of these meetings. That cannot be due to a lack of secretaries or word processing equipment at the offices of the Opportunity Group.

As at June 23rd, 1999 the Plaintiff's case was set forth in its original statement of claim. It was that case that led to the *ex parte* application for a Mareva injunction. I gather that the injunction sought by the Plaintiff was granted on the basis (*inter alia*) of Veronica Dantas' first affidavit.

As set forth in the original statement of claim, the Plaintiff's case was then as follows:

> " 5. On or about 31st October 1997 terms were agreed with the Defendant by which he would be separately engaged by the Plaintiff and CVC/Opportunity Brazil as a deal maker to effect deals for the benefit of the Cayman Partnership and the Brazilian Fund respectively and by which the Defendant was to be appointed a director of each entity and to be permitted to subscribe for 1% of the shares in each.

Pursuant to the agreement the Plaintiff and the Defendant, inter alios, entered into a shareholders' agreement dated 30th December 1997 and the Plaintiff and the Defendant entered into a director's agreement dated 30th December, 1997.

8. The terms of the oral agreement between the Plaintiff and the Defendant provided, inter alia

   i) that the Defendant would receive in aggregate an annual salary of US$240,000 (including the US$12,000 remuneration pursuant to his appointment as director under the terms of the said directors' agreement);

   ii) any dividend declared on his share in the Plaintiff;

   iii) a performance bonus by way of a share in the profit (i.e. net of taxes and costs) on any deal he properly effected for the Cayman Partnership. The share and therefore the amount of the bonus payable was to be calculated by the Board of Directors. The said bonus arrangement was also agreed by the Defendant with CVC/Opportunity Brazil in respect of the deals effected for the Brazilian Fund with a bonus calculated on the same basis.

9. Further, the Plaintiff agreed to advance to the Defendant US$500,000 to be invested at the Defendant's discretion. The Plaintiff agreed to advance a further $500,000 to be invested by the Plaintiff in a Group fund nominated by the Defendant and approved by the Plaintiff. It was further agreed that the Plaintiff would calculate annually the aggregate of salaries due and payable by the Plaintiff and CVC/Opportunity Brazil, the dividends in respect of the shares held by the Defendant in the Plaintiff and CVC/Opportunity Brazil and bonuses awarded by each entity as set out in paragraph 8 (iii) above (hereinafter known as the "Annual Total Cash Sum"). In practice, because of the common investment the calculation of the share in the profits on deals in respect of each bonus would be identical in respect of each entity.

10. As and when the Defendant was awarded and paid an Annual Total Cash Sum over the threshold of US$300,000

it would be deducted from the advance in cash and shares of US$1 million as follows:

i) 25 % of the portion of the annual total cash sum attributed to the Defendant by CVC/Opportunity Brazil and

ii) 20% of the portion of the annual total cash attributed to the Defendant by the Plaintiff. The balance of the annual total cash sum was to be paid to the Defendant.

11. In the event that the annual total cash sum was less or equal to the threshold of US$300,000 no deduction was to be made from the US$1 million advanced.

12. In the event that the Defendant was dismissed by the Plaintiff for misconduct or bad performance (including in relation to deals effected for the Cayman partnership) the agreement between the Plaintiff and the Defendant provided that if the aggregate Annual Total Cash Sum never exceeded US$300,000:

i) the cash advance of US$500,000 would be repayable plus interest from the date of dismissal at the 6 month US dollar LIBOR rate;
ii) the Defendant would have to repay the amount that the shares had fallen in value below US$500,000; and
iii) the shares in the group fund would remain the property of the Plaintiff.

13. Further, it was a term of the agreement between the Plaintiff and Defendant that in the event that the shares in the nominated Group fund increased in value, the Defendant could request the Plaintiff to redeem shares representing the excess in value over US$500,000. Further, it was a term of the contract that in the event that the Defendant's engagement with the Plaintiff was terminated other than for misconduct or bad performance aforesaid the Plaintiff would retain the balance of the US$1 million advanced after deduction of Annual Total Cash Sums."

It is clear to me that the word "Plaintiff", underlined above, was an error. The word "Defendant" was intended. It should also be noted that Demarco was entitled to a salary of $53,000 Reais from CVC/Brazil. It is my understanding that the salaries from both CVC companies was a total of US$300,000.

In April 2001, almost 2 years after the delivery of the original version of its claim, the Plaintiff delivered an entirely fresh statement of claim. As of April 2001 the Plaintiff's case was as follows:

> "2. An oral agreement concluded on or about 31 October 1997 between the Plaintiff and the Defendant contained the following terms:
>
> (i) The Defendant would be employed by the Plaintiff as a deal maker.
>
> (ii) The Defendant would, so long as he remained employed as a deal maker, be incrementally entitled to become a 3.5 % shareholder in the Plaintiff over a period of five years such increment to vest at the rate of 20% per year (and pro rata for any fraction of a year) in which the Defendant remained employed as a deal maker.
>
> (iii) If the Defendant ceased for any reason to be employed as a deal maker by the Plaintiff, he would cease to be entitled to any further increments by way of shareholding in the Plaintiff and would relinquish his interest in the Plaintiff vested as at that date at its then value.
>
> (iv) The Defendant would be advanced US$500,000 in cash to be invested by the Plaintiff in the Opportunity Fund, an exempted company established in the Cayman islands which is a mutual fund ("the Opportunity Fund Investment"). The Opportunity Fund Investment would remain at all times the property of the Plaintiff, but the Defendant would be at liberty to direct (subject to the consent of the Plaintiff) in which sub-funds of the Opportunity Fund it was to be invested; save, however, that the Defendant would be entitled to call upon the Plaintiff to redeem shares and pay to the Defendant any increase in value of the Opportunity Fund Investment over US$500,000.

(v) In the event that the Defendant's employment as a deal maker was terminated by the Plaintiff for misconduct or bad performance (including in relation to deals effected for the Fund):

(a) The Opportunity Fund Investment would remain the property of the Plaintiff: and

(b) The Defendant would have to repay to the Plaintiff the US$500,000 cash advance, together with interest payable from the date of termination to the date of repayment at the six month US$ LIBOR rate, less any increase in the value of the Opportunity Fund Investment over US$500,000 as at the date of termination of the Defendant's employment as a deal maker: and

(c) The Defendant would have to pay to the Plaintiff an amount equal to any reduction in the value of the Opportunity Fund Investment below US$500,000 as at the date of termination of the Defendant's employment as a deal maker.

The above was subject to adjustment if the Defendant's total earnings from the Plaintiff and from CVC/Opportunity Equity Partners Administradora de Recursos Ltda exceeded US$300,000 but this did not occur."

It is remarkable that there was no mention in the original statement of claim of Demarco's alleged obligation to relinquish his share or shares of CVC/CI should he cease to be an employee of that company. This seems peculiar. The Plaintiff's alleged right to retract Demarco's shares is one of the two crucial issues in this case, yet it was not alleged to form part of the contract until after the Plaintiff became aware that Demarco intended to seek the winding up of CVC/CI (See the judgment of the Privy Council in *CVC/Opportunity Equity Partners Limited v. Demarco* delivered March 21 2002).

In the amended statement of claim the Plaintiff's case was re-stated to allege that upon the termination of his employment, Demarco was obliged to relinquish his interest in the share capital of CVC/CI at its then value, not the par value which the Plaintiff's witnesses suggested

was the agreement reached with Demarco. The content of the amended statement of claim seems to have been influenced by the threat of winding up proceedings.

Nothing is said explicitly in the amended statement of claim about the complex arrangements pleaded earlier concerning the "annual total cash sum" and the calculations related thereto, other than the reference in the language which appears in the concluding four lines of paragraph 2, i.e., "the above was subject to adjustment if the Defendant's total earnings from the Plaintiff and from CVC/Opportunity Equity Partners Administradora de Recursos Ltda. exceeded US$300,000 but this did not occur."

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

It is necessary to review the evidence of the only witnesses called to testify by the Plaintiff who were in a position to establish the Plaintiff's allegations as to the terms upon which Demarco was engaged. These were Daniel and Veronica Dantas. Before doing so I will refer again to Demarco's evidence.

The memorandum setting forth the terms upon which Demarco was prepared to leave GP and join the Opportunity Group was delivered to Arida's home on the weekend of October 11th 1997. A day or so after the delivery of that memorandum Demarco telephoned Arida. He asked if he could come and see Arida so that both could sign the memorandum. Arida told Demarco that there was no need for that saying, "you have my word, it is agreed". As a result Demarco immediately resigned his employment with GP and joined the CVC companies the next day. Demarco said he then had difficulty obtaining payment of the US$1 million and that Veronica Dantas appeared to be primarily responsible for that. He therefore complained to Arida about the Plaintiff's failure to pay the US$1,000,000.00. Arida told him that the commitment would be honoured but that the Plaintiff would like Demarco to demonstrate his confidence in the

Opportunity Group by investing half of the signing fee in the Opportunity Fund. Demarco agreed. Thereupon US$500,000 was paid into Demarco's bank account leaving US$500,000 to be invested in the Opportunity Fund. The US$1 million was paid on October 31st 1997 approximately two weeks after Demarco commenced his employment with CVC/CI. No documents were put before me to indicate the mechanics of the payment of the $1 million or the date thereof although such documents would be in the Plaintiff's possession.

I note that paragraph 26 of Veronica Dantas' witness statement says that the US$500,000 (which was not paid into Demarco's bank account and was to be invested in the Opportunity Fund) was transferred by OAM to Demarco in October 1997. Demarco's evidence to the effect that there was a two week delay between the date he commenced working for the Plaintiff and the payment of the US$1,000,000 is corroborated by Dantas. Although contending that Demarco's employment commenced October 31st 1997, Dantas said that Demarco was getting concerned that his million-dollar fee had not been paid. Demarco could not have begun his employment on October 31st, been paid the million dollar fee on October 31st and been concerned about the Plaintiff's failure to pay the million dollar fee all on the same day.

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

I have no doubt that the delay was caused by the fact that Dantas had second thoughts about the agreement reached between Demarco and Arida. I will have more to say about this later.

It must be accepted that the million dollars was paid on October 31st 1997.

On October 31st, 1997, Demarco went to his Opportunity Fund account manager, one Rosangela Browne (she was the person who had handled his earlier investment in the Opportunity Fund which had been made at a time when he was still employed with GP). On October 31st 1997 he selected the money market fund and filled in a form (a subscription

agreement). Both Demarco's office and Browne's office were located in the same office building in São Paulo but on different floors.

A copy of the subscription agreement signed by Demarco became exhibit P-2 at trial. Although the face of the form does not contain the language of an agreement, the agreement language appears in small print on the back of the form. The face of the form stated "please send to: Opportunity Fund c/c Midland Bank Trust Cooperation (Cayman) Ltd. This was followed by an address in George Town and a fax number. It was suggested that c/c meant "copy to". However once Midland Bank was replaced as the transfer agent for the Opportunity Fund by ABN AMRO Trust Company (Cayman) Limited, the forms were corrected and the c/c became c/o, which was clearly what was intended from the beginning. That is to say the form was to be sent to Opportunity Fund in care of the transfer agent in Grand Cayman.

It was suggested by Mr. Trace that the usual *modus operandi* for customers of Opportunity Fund required that the customer himself was required to send the form to the transfer agent in Grand Cayman. Demarco never did that with any of his investments in the Opportunity Fund before or after joining CVC/CI and I do not believe that could ever have been the practice. Opportunity Fund, as a mutual fund, was obviously interested in attracting investors worldwide and therefore I assume anxious to attract investment from brokers and dealers. I do not believe that Opportunity Fund required its customers to do their own paper work and then to forward that paper to the transfer agent at their own expense. I have no doubt that forms prepared by professional investment dealers (e.g., Merrill Lynch) would be sent by those dealers to the transfer agent, but Demarco was a direct retail customer of Opportunity Fund.

According to Demarco, after he signed exhibit P-2, Miss Browne said that she would send the form to Veronica Dantas at Opportunity's offices in Rio de Janeiro. As Demarco had never been responsible for the processing of the paperwork relating to his investments, it is not surprising that he failed to comment on or express surprise at this statement. As before, the investments Demarco made in Opportunity Fund were in fact made and Demarco received the usual fund statements on a regular basis. These statements do not disclose that anyone other than

Demarco had any interest in or control over these investments. As it turned out Opportunity Fund had assigned a new account number for this investment, which differed from the account number given to Demarco's earlier Opportunity Fund investment. The new account number was 1001213-368. Unknown to Demarco the last three digits of that number (368) were an internal code indicating that the account was among a number of accounts which were to be personally supervised by Veronica Dantas.

The subscription form (exhibit P-2) indicated that Demarco was the investor and the "subscriber" and it is therefore not surprising that he would be registered by the transfer agent as the owner of the shares in Opportunity Fund, had exhibit P-2 been sent to the transfer agent. As it turned out, it wasn't. Exhibit P-3 is a similar form to exhibit P-2 but it has been filled in by a different person. The space which contained the information regarding Demarco's Merrill Lynch account which Demarco had placed on exhibit P-2 to indicate were his money should be sent in the event that all or part of the investment was redeemed, was left blank on exhibit P-3. On exhibit P-3, Demarco's name remained as the subscriber, but instead of Demarco's signature (which appears on exhibit P-2), exhibit P-3 was signed by Veronica Dantas over the name "Opportunity Asset Management Inc". Demarco testified that he first saw this document (exhibit P-3) in 1999 after this action was commenced. The provenance of exhibit P-3 will be explained shortly.

After leaving Ms. Browne's office having signed Exhibit P-2 he decided not to put US$500,000 in the money market fund but instead to put $350,000 in the derivative fund and $150,000 in the Brazilian aggressive equity fund. He therefore called Miss Browne to advise her of the change. She said "okay" and indicated she would use the same form (e.g. exhibit P-2).

Exhibit P-4 is similar to exhibit P-3 but designates the investment as split between the derivative fund and the Brazilian aggressive equity fund, $350,000 in the former and $150,000 in the latter. In all other respects exhibit P-4 is the same as exhibit P-3 except that in the case of exhibit P-4 Veronica Dantas' signature is accompanied by the signature of Daniel Dantas. Demarco only became aware of exhibit P-4 as a result of this litigation.

It is Demarco's evidence that on March 23rd 1998 he redeemed $30,000 from the derivative fund and filled out and signed the appropriate form in that regard (this form was marked as Exhibit P-5). Later on he switched his investment in the derivative fund to the Brazilian aggressive equity's fund. These transactions were concluded, between Demarco and his Opportunity Fund account managers. As it turned out none of the forms signed by Demarco were processed. Instead all of Demarco's requests and the forms he had signed were directed to Veronica Dantas who prepared (or had prepared) new forms which were then signed by her and in some cases also by her brother. These include a redemption request (exhibit P-6) and a "switching request" (exhibit P-8). Therefor, while the subscriber/shareholder was at all times Demarco, so far as the transfer agent in Grand Cayman was concerned, the authorised signatory for account number 1001212-368 was OAM. All of this was done without Demarco's knowledge or consent. It was clearly done by Dantas and his sister in order to keep a string on the US$500,000 which Demarco had decided to invest in the Opportunity Fund at the Plaintiff's request in order to demonstrate his loyalty to the Dantas' interests.

The Plaintiff led the evidence of one Karine Esteves. Esteves worked in the Opportunity offices in Rio and was responsible for communications with the transfer agent in Grand Cayman. She said that when Demarco's initial (October 31st 1997) investment was made she received a telephone call from Rosangela Browne in São Paulo who said that Esteves should go to the fax machine (in Rio) because Browne was about to send her a subscription form which she was to take off the fax machine and give to Veronica Dantas. She was told that this matter was confidential.

Miss Esteves' witness statement was marked at trial as exhibit P-37. Paragraph 13 of that witness statement reads as follows:

> 13. "I have been shown copies of the versions of the subscription agreement dated 31 October 1997 which appear as exhibits VVDR-5, VVDR-6 and LRDA-7 to the first affidavits sworn by Veronica Dantas and the Defendant respectively in these proceedings. I remember

being telephoned by Rosangela Browne, who worked in our São Paulo office, who said that she would be sending me by fax a subscription agreement form and asked me to take it to Veronica Dantas. I understood this to be because all dealings on that investment account had to go through Veronica, and that this client could not act without her authority."

The evidence is that the subsequent transactions authorised in São Paulo by Demarco were handled in the same way.

Demarco testified that he did not see any of the forms signs by Veronica Dantas (or by Veronica and Daniel Dantas) until they appeared as exhibits to the affidavits sworn by Veronica Dantas after this litigation was commenced. Demarco said that he was unaware that anything was amiss because he received regular statements indicating the status of his investments in Opportunity Fund. In April 1999, he attempted to redeem a large portion of his investment in the Opportunity Fund i.e. US$400,000. His then Opportunity account manager, a Mr. Kaufman, declined to honour his request to redeem and referred him to Veronica Dantas. He then attempted in vain to speak to her. Eventually Demarco retained counsel in Grand Cayman in the attempt to have ABN-AMRO honor his redemption request. ABN-AMRO had declined to do so on the grounds that his signature was not the authorised signature for account number 1001213-368. I gather that Demarco's Cayman attorneys were still attempting to obtain the redemption of Demarco's investment when this action was commenced in June 1999.

It appears from the judgment of the Privy Council (referred to earlier) that Demarco was engaged in discussions with the Dantas' interests in the spring and early summer of 1999 in an attempt to have his shares in the CVC/CI purchased from him. The evidence is that he was first offered $1, the par value of the share, and later a value which might be described as a "breakup value". Eventually the Plaintiff obtained an injunction restraining Demarco from presenting a petition to wind up the Plaintiff. This injunction was set aside by the Court of Appeal and the Plaintiff's appeal to the Privy Council was dismissed.

THE EVIDENCE OF VERONICA DANTAS

Ms. Dantas is a director of OAM but she is not an officer or director of CVC/CI. Yet she holds a power of attorney from CVC/CI which would confer upon her very considerable ostensible authority.

She testified that the meetings and discussions between Demarco and representatives of the Plaintiff leading to the oral employment agreement were primarily conducted between her brother Daniel Dantas and Persio Arida. She said that she attended some of these meetings and took notes to "remind herself" so that the company lawyer one Paul Arãgao could prepare a written contract. She did not keep those notes because she said she would, "be receiving from the lawyer a better written draft" of the contract so she "didn't need to keep the small pieces of paper". She repeated several times that she took notes in order to "remind herself". No notes authoured by Veronica Dantas were produced in evidence at the trial. Arida did not testify and no draft contract was put in evidence. Veronica Dantas' evidence leaves no doubt that she did not attend the final meeting between Demarco, Dantas and Arida when all of the terms of the oral agreement were said to have been reviewed and final agreement reach upon them. However she testified that a written contract was prepared by Arãgao and given to Daniel Dantas who rejected it saying "it was not correct". As I have said no such document found its way into evidence. She said that the problem with the draft contract was Brazilian labour legislation. This was later explained as a payroll tax problem, that is to say, that the Brazilian authorities levied a 70% tax on wages and interpreted "wages" very broadly so that the CVC companies were potentially liable to pay a tax of US$700,000 or its Brazilian equivalent in respect of the 1 million dollar signing fee paid to Demarco. This labour law problem was also given as a reason for the absence of Annex A. No expert evidence as to Brazilian law was adduced and it was never made clear how the Brazilian authorities could tax CVC/CI. I do not find this explanation for the lack of a written contract or annex A to be credible.

I should add that there was no attempt to explain why the situation under Brazilian Law would be affected one way or the other by the failure to put the oral agreement between the

Plaintiff and Demarco in writing. Whether oral or in writing it was still an agreement and Dantas insisted that the agreement was legal under Brazilian law whether made in writing or orally.

As she was not present at the final meeting between Demarco, Dantas and Arida, Veronica Dantas became aware of the terms that had been agreed to through further meetings with her brother, meetings with Arida and meetings with Demarco. She did not, she said, take notes of those meetings and no such notes were put in evidence. When asked how she remembered the terms of the agreement made in October 1997 as at September 2001 when she signed her witness statement she said "I remembered because I was told by Daniel and I went to him, we sat down, we wrote down what was agreed with Demarco... he knew exactly what was agreed with Demarco". That writing was not produced in evidence either.

Consequently, Veronica Dantas was not in a position to give first hand evidence as to what her brother Arida and Demarco had agreed to. However she did attempt to explain how the "total annual cash sum" formula was supposed to work. Suffice it to say, that she was unable to do so. Her evidence in this regard was both incomprehensible and contradictory. I was therefore unable to obtain from her a coherent explanation as to how the formula was supposed to work. All I could get from her was that Demarco had to earn in excess of $300,000 in order to achieve any credit against the US$1 million dollar payment.

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

The evidence given by Veronica Dantas concerning Demarco's investment of one half of his signing fee in the Opportunity Fund was clearly manufactured. After saying that the terms of

the contract between the Plaintiff and Demarco were "concluded" about October 31st 1997, her evidence (taken from her witness statement) was as follows:

Paragraph 11:

> "Pursuant to this agreement, the Defendant was nominally registered as the holder of one share in the Plaintiff, US$500,000 was advanced in cash to the Defendant on or about the 31st October 1997 and US$500,000 was invested in the Opportunity Fund under subscription number 1001213-368 on or about 4th November 1997.

Paragraph 12:

> "By 31st October 1997, the Defendant had decided that he wished to invest the US$500,000 in the Opportunity Fund Money Market Sub-fund. He brought me a form that he had completed, a copy of which is exhibited at "LRDA-7" to the Defendant's first affidavit. I told him that, pursuant to his agreement with the Plaintiff, the investment was to be under our custody: accordingly, I would have to sign the subscription form. This was because I thought that the signing subscriber for the shares would be the controlling party."

I believe that exhibit LRDA-7 is exhibit P-2, the subscription form initially signed by Demarco.

Paragraph 13:

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

I believe that exhibit VDR-5 became exhibit P-3 at trial. (i.e., the subscription agreement altered and signed by Veronica Dantas).

I regard the statement "he did not disagree with me" followed by "in fact I remember him saying okay" as very strange. According to Veronica Dantas it had been agreed on October 31st 1999 that the $500,000 was not Demarco's money and was under the Plaintiff's control as paragraph 12 of her witness statement states. If this were the case, there would have been no need for her to make the statement she says she made to Demarco, because that is what had just been agreed to. There was no evidence to support a finding that Demarco traveled to Rio on October 31st 1997 or conversely that Dantas and Arida (who had made the agreement with Demarco) were in São Paulo on October 31st 1997. Demarco dealt with Rosangela Browne who was in São Paulo. If Demarco "brought Veronica Dantas the form (as paragraph 12 states) both of them had to be either in Rio or São Paulo at that time". There is no evidence that she was ever in São Paulo in connection with the matters put in evidence at the trial of this action.

If, the oral agreement included the provisions surrounding the investment by Demarco (or by the Plaintiff) of one half of the million dollar payment which the Plaintiff alleges, there would have been no need whatever for Rosangela Browne to send forms signed by Demarco to Veronica by confidential fax or otherwise. There would have been no need for Demarco to sign any form. The Plaintiff's pleading and the evidence of Dantas and his sister all state that the second US$500,000 tranche of the million dollar payment was to be invested by the Plaintiff. (Amended statement of claim paragraph 2 (iv), Veronica Dantas witness statement paragraph 10 (iv), first affidavit of Veronica Dantas paragraph 22, Dantas witness statement paragraphs 23 and 25 and the evidence given orally at trial).

If the Plaintiff's evidence represented the truth Demarco's role in the investment of the US$500,000 would have been very minor indeed. It would have been limited to suggesting the sub fund or sub funds in which he would like to see the money put. That information could have been obtained from him by telephone.

Veronica Dantas' witness statement continues with the following:

"Paragraph 15:

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

This evidence is simply not believable.

The subscription form contains the following at the top:

> "INVESTOR TO COMPLETE
>
> Shares to be held in registered (book – entry) form.
>
> Subscribers name _____
>
> Joint shareholder (if Applicable)
> _____

In addition on the lower right hand side of the form the following appears:

> " _____ I/We want to have my shares held through
>
> ___ Euroclear ____ Cedel"

Those portions and other portions of the form make it abundantly clear that the investor/subscriber is to be the shareholder.

Yet Veronica Dantas who claims to be an MBA graduate and who supervises a number of the Opportunity accounts asked the Court to believe that she did not know that when Demarco's name appeared in the form as the subscriber/shareholder that he would then be so

recorded in the transfer agent's records or the records of the company. When she then adds the statement "I took no Cayman Islands legal advice...." I can only imagine that she is purporting to suggest that according to the corporate legal regime in force in Brazil the subscription form she signed would have led to some different but unstated result. No evidence of Brazilian law was adduced in support of that proposition and I do not find it credible. Veronica Dantas well knew that Demarco had to be shown as the subscriber so that he would receive (as he did) the frequent statements issued by Opportunity Fund concerning the balances from time to time in his investment account otherwise he would have discovered the fraudulent scheme. He expected to receive those reports and statements and he did. They give no indication whatever that the investment belonged to the Plaintiff and not to Demarco, nor do they provide the slightest indication that CVC/CI, OAM or anyone else had an interest in or control over these investments.

I find Veronica Dantas' statement to the effect that she put Demarco's name on the form as the subscriber in order to "segregate the investment" as quite simply a lie. Demarco's account was already "segregated" because it bore a unique number which identified Demarco as the account holder and, unknown to Demarco, placed the account directly under Veronica Dantas' supervision. I have therefore no difficulty whatever in finding that Veronica Dantas altered and indeed concocted exhibits P-3, P-4, P-6 and P-8. If that had been done in the Cayman Islands it would be a criminal offence.

Mr. Black sought to establish by expert evidence that Veronica's alterations to these documents were made long after the original documents came into existence and called an expert (Dr. Aginsky) in support of that case. The Plaintiff called another expert in response. The evidence as to the techniques used to determine the age of the ink signatures was fascinating but in my opinion unnecessary. The documents whether created at the time or later are false documents. In my judgment Veronica and Daniel Dantas created false documents by altering the investment forms so as to make it appear that the investment requests initiated by Demarco were instructions emanating from OAM.

Before leaving this topic I should note that exhibit P-4 (the subscription agreement investing US$150,000 in Brazilian aggressive equities and $350,000 in derivatives) has clearly been tampered with in another way. The information that appears on the face of exhibit P-4 has been somehow overlaid onto the back of that document which is supposed to contain only the terms of the agreement. Veronica Dantas said she knew nothing of that.

Exhibit P-6 (the US$30,000 redemption request) is not the original paper but treated photocopy or fax paper. The figure "30,000" has been photocopied, but Dantas and Veronica Dantas's signatures are not photocopies, they were placed on a photocopy. Veronica Dantas testified that in the case of the switching request she destroyed the original request and prepared exhibit P-8 to take it's place. This is nothing short of appalling.

I come now to the evidence given by Veronica Dantas concerning the termination of Demarco's employment. She says that she was advised by Arida in December 1998 that he (Arida) had dismissed Demarco but had been asked by Demarco to keep it quiet until Demarco returned from a planned vacation. She heard from Arida again in January 1999 when Arida advised her that Demarco had returned from vacation to the São Paulo office and that he would not leave until he received a formal letter of dismissal. She therefore asked the human resources department of the Opportunity Group to prepare a "standard" dismissal letter. That letter became Exhibit P-10.

The Plaintiff's case is of course that Demarco was dismissed for bad performance. It is further the Plaintiff's case that the dismissal was communicated to Demarco by Arida in December 1998. Why Demarco would return to the São Paulo office after his holiday as if nothing had happened was not explained. The obvious explanation is that nothing in fact had happened. Further, if it was necessary for the Plaintiff to dismiss Demarco for "bad performance" in order to recover the US$1 million dollars (as pleaded in all versions of the statements of claim) the terms of Exhibit P-10 are incomprehensible.

Exhibit P-10 is as follows:

" OPPORTUNITY

Rio de Janeiro: Av. President Wilson 231/280, Floor – Centro – RJ – Brazil
CEP 20030.021 – Tel: 55 21 212. 1717 – Fax: 55 21 532 3269
Sao Paulo: Av. Brigadeiro Faria Lima 2179/1st floor – Pinheiros – SP – Brazil
CEP 01452.000 – Tel: 55 11 811.4000 – Fax: 55 11 870.0864

Rio de Janeiro, February 4, 1999

Mr. LUIS ROBERTO DEMARCO DE ALMEIDA

IN HANDS

Re: NOTIFICATION OF RESCISION OF EMPLOYMENT AGREEMENT

Dear Sir,

This is to inform you that the Company decided to revoke your employment agreement from February 4, 1999 on, with immediate dismissal, without attending the period of previous notice, which will be indemnified in accordance with section 487, paragraph 1st, of the CLT, e.g. Labor Law Statement.

In accordance with Normative Rule 24 of December 29, 1994, you shall attend the MEDICAL EXAMINATION FOR DISMISSAL PURPOSES, with the appropriate form we are delivering to you, which requests your attendance at Av. Treze de Maio 23, suites 935 and 940.

After taking notice of the three copies of this letter, please attend to the Personnel Department, where you shall deliver the following documents:

- Corporate Identification
- Agenda Franklin Quest
- Labor and Social Security Book

Next February 11, 1999 at 2:00 p.m., you shall be present at the Personnel Department, in order to accomplish with further formalities relate to the rescission of your employment agreement, including the registering of same with the labour union.

Yours faithfully,

CVC/OPPORTUNITY EQUITY PARTNERS ADM. DE REC. LTD.
(s.) Illegible
Personnel Department

Agreed:
Data: February 4, 1999.
(s.) Luis Roberto Demarco Almeida
CTPS: 83771/056

ANNEX:

Section 487. In case there is not a defined period, the part who wishes to revoke the employment agreement, without a just cause, shall notify the other on its decision with a prior written notice with at least:

I – (Revoked by the Federal Constitution, in accordance with Section 7, XXI);

II – 30 (thirty) days, for employees who are paid quarterly or monthly, or work for the company for more than 12 (twelve) months.'

First Paragraph – Lack of previous notice by the employer gives the right to the employee to receive the salaries related to the period of previous notice, the integration of said period in the employee's service time, being always guaranteed.

Second Paragraph – The lack of previous notice by the employee gives the employer the right to deduct the amount related to this term from the salaries.

Third Paragraph – In case of salary paid with basis on tasks, the calculation, for the purposes of the paragraphs mentioned herein above, will be made in accordance with the average of salaries of the last 12 (twelve) months of services rendered.

Fourth Paragraph – The amount related to the previous notice period is due when indirect dismissal occurs."

This letter was signed by Veronica Dantas on behalf of CVC/Brazil and despite it's content, her evidence was that she intended to dismiss Demarco for bad performance from his employment with both CVC/Brazil and CVC/CI. This is very strange indeed as he had already been dismissed by Arida two months before. Paragraph 37 of Veronica Dantas' first affidavit sworn June 22nd 1999 states in part as follows:

> "On 4th February, 1999 Luis Demarco was dismissed by the Plaintiff on the grounds that he had consistently failed to perform his contract to the adequate satisfaction of the Plaintiff."

On this occasion Ms. Dantas swears that Demarco was dismissed on February 4th 1999, not for bad performance but because his performance did not please the Plaintiff. Yet the Plaintiff's case as pleaded on June 23rd 1999 was that CVC/CI had the right to the US$1,000,000 only if Demarco was dismissed for "misconduct or bad performance".

The Veronica Dantas witness statement (which was prepared in September 2001) contains the following at paragraphs 45, 46, 47 and 48

> " 45. Consequently, the dismissal letter (exhibit P-10), which was prepared for the Defendant related only to his employment by CVC/Opportunity Brazil, so as to comply with the formal requirements of Brazilian Labour Law. I did not consider the letter to be relevant to his dismissal by the Plaintiff: Demarco had been employed orally and had been dismissed orally.
>
> 46. The fact that the letter appears to state that the Defendant was dismissed "without cause" by CVC/Opportunity Brazil does not mean that he was dismissed without cause by the Plaintiff. Nor in my belief does it even mean that, just because the Defendant was dismissed without any stated cause in the letter, he was not in fact dismissed for bad performance by CVC/Opportunity Brazil.
>
> 47. We have had cause to dismiss employees in the past for bad performance, and in every case, we have used the same standard letter of dismissal. The reason for this is that if an employee receives a formal letter of dismissal for cause, that will seriously damage his re-employment prospects in the future: we therefore keep the reason for an employee's dismissal private, for his sake. I specifically recall one occasion when he had to dismiss an employee who had carried out unlawful trades: even in that case, I signed a formal letter dismissing him "without cause".
>
> 48. Since this practice in relation to dismissals is well-known and universally-accepted, I believe that the Defendant well knows that the terms of the letter dated 4th February 1999

does not affect his dismissal for bad performance by the Plaintiff, the reasons for his dismissal having been explained to him by Persio Arida."

The Plaintiff has now put forward the following propositions:

1. Demarco was dismissed from his employment with CVC/Brazil and CVC/CI by Arida in December 1998. That "dismissal" could not possibly have been confined to Demarco's employment with CVC/CI because the Plaintiff's evidence is that Demarco was not supposed to return to the CVC offices in Brazil after his 'vacation'. There is no evidence to suggest that CVC/CI had an office other than the office in the Opportunity building in São Paulo.

2. Veronica Dantas intended to dismiss Demarco from his employment with both CVC companies on February 4th 1998.

3. Exhibit P-10 only related to Demarco's employment with CVC/Brazil and despite it's language Demarco was dismissed from that employment for 'bad performance'.

4. On February 4th 1999 Demarco was dismissed from CVC/CI's employ because "he had consistently failed to perform his contract to the adequate satisfaction of the Plaintiff. (how this dismissal was accomplished is not explained)

These propositions cannot stand together. It is therefore apparent that the Plaintiff has been unable to tell a consistent story, either to its attorneys (who drafted the pleadings, affidavits and witness statements) or to the Court at trial.

I also note that whether there were two separate contracts of employment or one, the terms in so far as Demarco's tenure was concerned were identical. There is no foundation in the evidence for the suggestion that Demarco's performance for one CVC company was 'bad' while his performance for the other was not 'bad'.

In order to complete the Demarco dismissal story it is necessary to describe a meeting of the Board of Directors of CVC/CI held November 24th 1999. This meeting was attended by Arthur Carvalho, Robert E. Wilson III and Demarco in person and by Dantas and Arida by proxy. The relevant portion of the minutes of that meeting is as follows:

> "Gustavo Fernandes de Andrade, Persio's attorney in fact, declared that he would represent Persio Arida on the basis that Persio Arida is still formally a Director of the Company although he has resigned his employment since March 10, 1999.
>
> The Chairman proposed that –
>
> a. The Directors Agreement between the Company and Mr. Luis Roberto Demarco Almeida ("Mr. Dermarco") dated 30th December, 1997 be terminated pursuant to Clause 8.3 thereof (due to Mr. Demarco's absence from work for a period in excess of 180 days in a twelve month period) and pursuant to Article 9.3 of such Agreement (3 days notice in writing);
>
> b. Pursuant to Clause 15.1 the Company exercises its right to require Mr. Demarco to resign from office as a Director without claim for compensation on the basis of the termination of his Directors Agreement as aforesaid and that in the event of his failure to do so, the Company should appoint any other Director to sign and deliver Mr. Demarco's resignation on his behalf;
>
> After discussion it was RESOLVED that the Directors Agreement with Mr. Demarco be terminated and that Mr. Demarco be removed from office as a director as aforesaid and that any Director or Officer of the Company be and is hereby authorised to take any action required in connection with the foregoing matters

> including, without limitation, giving notice of termination of Mr. Demarco's Director's Agreement pursuant to Clauses 8.3 and 9.3 of the same and executing on behalf of Mr. Demarco a resignation pursuant to Clause 15.1 of such Directors Agreement, if necessary."

It will be recalled that paragraph 15 of the Director's Agreement provided that upon the termination, by whatever means, of his employment under the agreement the Director should at the request of the company immediately resign from office, and should he fail to do so the company was authorised to sign and deliver a resignation of his directorship.

These November 1999 minutes have been carefully drawn to avoid any reference to the word "employment". It was the termination of Demarco's employment which triggered the loss of his status as a director and the Plaintiff's right to resign on his behalf. According to the Plaintiff, Demarco's employment had been terminated in December 1998 or February 1999. Why this meeting was held in November 1999 and why the minutes say what they say was not explained.

Consequently, the evidence put forward by the Plaintiff and reviewed to this point in these reasons seems to variously show that:

(1) Demarco was dismissed by Arida in December 1998.

(2) Demarco was dismissed from his employment with CVC/Brazil and CVC/CI for failing to perform to the adequate satisfaction of the Plaintiff on February 4 1999.

(3) Demarco was dismissed by CVC/Brazil on February 4 1999 without cause.

(4) Demarco was dismissed from his employment with CVC/CI in November 1999, again without cause.

THE EVIDENCE OF DANIEL DANTAS

After describing the various meetings between Demarco, Dantas and Arida, Dantas said that everything was summarized at the last meeting he and Arida had with Demarco, although "pieces had come to a conclusion "in prior meetings". When asked who attended the last meeting he said "Persio, myself and Veronica". He also said this was a meeting at which Veronica took notes, but the notes were not available because " those notes were only for our records to implement the agreement".

The preliminary transcript of the evidence taken at trial contains the following:

"THE COURT:	Which was did you discuss all the terms at the last meeting?
A:	Yes and we did discuss and agree.
THE COURT:	So, Veronica would then have known what had been agreed even at those meetings she didn't attend?
THE WITNESS:	Yes. Sure."

It is expected that a truthful witness will be able to state and restate important facts although not necessarily in exactly the same language. On the other hand it is often difficult for a witness who has invented facts to state and re-state those facts without material alterations. This problem is compounded when the invented story must be told by more than one person. This must have been what Sir Walter Scott had in mind when he famously wrote: "Oh, what a tangled web we weave, when first we practice to deceive!"

In his examination in chief and in response to questions put to him by Plaintiff's counsel asking him to state "what terms you agreed with Mr. Demarco" Dantas testified as follows:

(a) Demarco was to receive US$240,000 per annum from CVC/CI and R$54,000 from CVC/Brazil

(b) Demarco would be entitled to semi annual bonuses at the discretion of the boards of Directors of each company.

(c) Demarco would be entitled to participation in the companies that could go up to 3.5 % over 5 years.

(d) Demarco would have to sell his shares back "in case he leaves the company" (that is either company).

(e) Demarco was required to give his shares back at the issue price (i.e. the par value of $1) "but he would receive whatever equity would be on his participation in the company at the time."

Dantas explained that 50% of the profits of CVC/CI were to be paid in bonuses and the remaining profit paid out as dividends so that at the end of each fiscal period the company would have no assets (saves pens, pencils and paper). If Demarco left CVC/CI's employment before a dividend were declared he would still be entitled to a dividend.

I note that this evidence is contradicted by the Plaintiff's pleadings. Both the amended statement of claim and the re-amended statement of claim say that Demarco was required (on leaving the Plaintiff's employment to relinquish his share holding interest in CVC/CI) at "its then value".

I will return briefly to Veronica Dantas' evidence.

On July 16, 1999 Veronica Dantas swore another affidavit which was marked as exhibit P-21. Paragraph 14 of that affidavit states in part as follows:

> "It was agreed and understood by all the shareholders that in the event that a director shareholder was dismissed, either for misconduct or bad performance, that director shareholder would

> have to sell his one share to Opportunity, upon the exercise by Opportunity of its call option. It was also understood by the shareholders that, in the event that a director shareholder was dismissed, he would receive the dividends to which he was entitled, following which his one share in CVC/Opportunity would be bought by Opportunity at par value."

The typed version clearly said "book value" not "par value". It has been altered in pen. Contrary to Veronica Dantas assertion, the Plaintiff never had a "call option" as the terms that might have found their way into annex A to the shareholders agreement were not agreed to.

In an affidavit sworn on December 11th 2000 (exhibit 24) Veronica Dantas swore that after the Directors meeting of November 24th 1999 Demarco sought a further Directors' meeting to discuss the purchase of his shares. Veronica Dantas' sworn evidence on that occasion was as follows:

> "Since the supposed business of the meeting was the purchase by the Plaintiff of the Defendant's 3.5% shareholding, at a price many times higher in the Plaintiff's view than that shareholding was in fact worth, this was a matter of great concern to the Plaintiff. The purchase of the Defendant's shareholding in the Plaintiff at a fair price was a matter being resolved in the proper way before the Grand Court. The proposed meeting of 30th November 1999 would have allowed the Defendant to decide the valuation of his shareholding unilaterally, rather than by means of the due process of the Grand Court."

On this subject the evidence of Dantas and his sister maybe accurately described as a moving target. On some occasions it was said that Demarco was entitled to receive 'par' value for his shares and at other times a real value.

It is to be noted that this paragraph did not say "the Defendant's alleged 3.5 % shareholding" and gives the impression that Demarco was entitled to a "fair price" for his shares. The only possible conclusions to be drawn from the (Dantas/Veronica Dantas) evidence led by the Plaintiff on this subject matter are either, they do not know what was agreed to, or they are lying.

Daniel Dantas went on to say in his evidence that when Demarco became an employee of the CVC companies he was to receive, by way of a payment into his bank account, US$500,000 and a further $500,000 would be segregated in "our account". He said he did not specify in whose control that fund would be but it would be out of Demarco's control. Dantas then said that Demarco was required to return the money if he resigned or was dismissed for "bad performance or bad behavior" but not if he was arbitrarily dismissed.

Consequently, the Plaintiff's witnesses have variously described the oral agreement as linking the Plaintiff's loss of the right to retain the million dollars,

(1) to dismissal for "misconduct or bad performance" (all versions of the statement of claim),

(2) failure to perform his contract to the adequate satisfaction of the Plaintiff (the first affidavit of Veronica Dantas, paragraph 3) and

(3) to dismissal for "bad performance or bad behavior".

Dantas then said that the second tranche of the million dollar payment, i.e., US$500,000, was to be retained under "our" control and was in fact kept by Opportunity Asset Management Inc. (OAM). According to Dantas, OAM is a 96% shareholder of CVC/CI "indirectly".

It should be recalled that as at December 30th 1997, 94 out of 98 of the issued shares of CVC/CI were owned by Opportunity Invest II Inc. and Exhibit P-13, the shareholder's agreement, states that "Dantas, Arida and Ferman are the beneficial owners of the entire share capital of Opportunity Invest II Inc. and hold all voting rights in that company. Whatever the true situation was, it is clear that at all material times OAM was effectively controlled by Dantas.

Dantas then said, in describing the oral agreement reached with Demarco, that "there was also provision for a small mathematical formula". He explained that to mean that Demarco would have earned the right to retain the million dollars when defined portions of the bonuses he received over time were "sufficient to deduct it all" (i.e. all of the one million dollars). He said

that the formula was an invention of his and Arida's and that Demarco would not have been familiar with it.

Dantas said that all of this was agreed between "myself and Demarco and Persio Arida at the time".

He was then asked to state the formula. His answer was as follows:

> "The formula was that 20% and 25% in one I think 20% was in the Cayman company if I am not wrong and 25% in the Brazilian. You would calculate... provided that his total payment exceeded $300,000 a year this fraction deduced (deducted) from the pool".

When asked to give examples of how this "small mathematical formula" would work in order to make his evidence understandable Dantas proceeded to tie himself in knots. He first attempted to confine the calculation to a scenario in which 100% of the bonuses were paid by CVC/CI. When asked to give an example that incorporated bonuses paid by both CVC/CI and CVC/Brazil he talked about a "weighted average".

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

along, although he was testifying under oath. Having got himself in this difficulty Dantas testified as follows:

> "This calculation (with) this precision we just say it was going to be *pro rata* we did not go (through) this step by step this degree of precision. Mainly if you give a look that doesn't make a lot of difference but that is how I understood would be executed".

The following appears in the rough transcript:

> "Q. I don't want interpretations I want to know what is agreed you maybe right there is only one meaning to *pro rata*.
>
> A. There was one meaning to *pro rata* and we didn't go into the details of making a calculation like this".

Again the only conclusion I can come to is that no such arrangement was agreed to.

Both Veronica Dantas and Daniel Dantas testified that the US$1 million payment was made in order to guarantee Demarco's bonuses. But both witnesses testified that whether or not a bonus was paid and the amount of the bonus if paid, were decisions entirely within the discretion of the boards of directors of the CVC companies. When I was listening to this evidence which was first given in-chief by the first witness called (Veronica Dantas) it seemed to me to be highly unlikely that Demarco or the Plaintiff could have regarded the one million payment as a guaranty of bonuses if the Plaintiff had no obligation to pay any bonus and Demarco had no right to any bonus. The word 'guaranty' cannot be properly applied to such circumstances.

It will be recalled that the Plaintiff's case was that the oral agreement between the Plaintiff and Demarco was reached on October 31st 1997. Dantas testified that 15 days after that date (i.e., the middle of November 1997) the arrangements were changed slightly as Demarco

had decided that the $500,000, which according to the agreement had been retained under the Plaintiff's control, should be invested in the derivatives fund and the Brazilian aggressive equities fund rather than in the money market fund. Dantas agreed that the aggressive equity fund and the derivatives fund were more risky than the money market fund. Accordingly Dantas said it was agreed that Demarco should bear the risk that the $500,000 investment might turn out badly. In that case he would indemnify the Plaintiff by making up the amount of any loss. Unfortunately for Dantas, and more importantly for Dantas' credibility, the first investment in the Opportunity Fund that was implemented was the investment in the derivatives fund and the Brazilian aggressive equity fund and the subscription form for that investment is dated October 31st 1997. On the Plaintiff's evidence there could not have been a two-week hiatus. However, according to Demarco's evidence there was a two-week delay between the date he commenced his employment and the date the one million dollars was advanced. His evidence was that before the one million dollars was advanced at the end of that two-week period (i.e. October 31st 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 that two-week 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 Dantas could control it was conceived. As we know this scheme was then implemented by forgery and uttering false documents.

Dantas also described in his evidence the investment goals of the CVC companies and partnership. The plan was to identify businesses which could be acquired, restructured, managed and operated and eventually sold for a capital gain. While Dantas agreed that it would be nice if the businesses had sufficient revenues to be self-sustaining pending their ultimate disposition, the anticipated profit would come, not from operating the business, but from the eventual sale. He went on to provide a job description of a deal maker which was for all practical purposes the job description contained in paragraph 3.1 (d) of the Director's Agreement.

Dantas was then asked to define "bad performance" and asked whether that term was defined in the Plaintiff's discussions with Demarco leading up to the oral agreement.

He said:

> "There was some discussion as to what was considered to be bad performance but there was no explanation or conclusion it was something that both sides knew".
>
> "We didn't discuss what bad performance was..."
>
> "I am saying we did not clarify to him (Demarco) exactly how we would be measuring the performance because this performance could not be measured to surgical precision..."

It is clear from those references that even if Dantas' version of the oral contract was accepted it was his intention that he would decide what did or did not amount to "bad performance". This is confirmed by the statement taken from Veronica Dantas' first affidavit referred to above to the effect that Demarco was fired for failing to "perform his contract to the adequate satisfaction of the Plaintiff". If this arrangement was held to be the agreement, Demarco's employment and his right to the US$1million would have been (as Mr. Black put it) entirely at the whim of the Plaintiff. I do not believe that the oral contract between the Plaintiff and Demarco contained any such terms.

Before leaving the evidence given by Daniel and Veronica Dantas I should mention exhibit 19. This is a letter dated October 22nd 1997 (although the English translation states October 24th). It is addressed to Luis Demarco Almeida. It is not typed on letterhead and it is not signed. However, the Portuguese version (which must be the language in which it was prepared) contains the words "created by Opportunity" after the word in Portuguese which I take to be the equivalent of "sincerely".

The content of this letter contains some elements of the Plaintiff's version of the contract but seems to say that Demarco might be dismissed under Brazilian Labour Law (article 482 of CLT) "for a just cause". It further provides that if Demarco's employment was terminated for reasons other than just cause or resignation the one million dollar "anticipation" payment would only have to be repaid over a 50 year period. The Plaintiff's witnesses disclaimed any knowledge of this document.

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

I must however mention the evidence given by Rodrigo Andrade. Andrade had met Demarco when both were working for GP. GP fired Andrade and he then became a deal maker at CVC/CI and CVC/Brazil. Andrade was one of those witnesses who repeatedly volunteered information that the questions put to him did not call for, almost as if he had been programmed to provide it, and was expected to provide it, whenever it occurred to him to spout it out without regard to the questions actually asked. Indeed a great deal of his evidence could not have been adduced had the questions put to him given any indication of the nature of the expected answer as the questions would have then drawn objections. Andrade repeatedly said that he was a very, very close friend of Demarco's up until the Plaintiff left CVC/CI. However he gave no indication as to why that close friendship did not survive. In any event, this close friend accused Demarco of bizarre and even scandalous conduct. I did not believe any of this evidence.

One of the Plaintiff's major criticisms of Demarco (repeated by Andrade) was that he could not properly complete the negotiations with the owners of the Soccer Club so that the Plaintiff had to replace him with another deal maker (Arthur Carvahlo who was Dantas' brother-in-law). Further, according to the Plaintiff's witnesses the contracts Demarco proposed to carry out the acquisition were poorly drafted and disadvantageous to the Plaintiff. Like the Plaintiff's case in support of its version of the Demarco contract, the documents which were put in evidence did not support these criticisms. There was however voluminous documentation put in evidence concerning the Bahia Soccer Club acquisition but the allegedly badly drafted contract was not included. As the trial progressed it became clear that the requirements of the Shareholder's Agreement for a full review and approval of the Soccer Club investment by the Investment Committee of the Plaintiff were in fact observed. Accordingly, if the transaction was

disadvantageous or the documentation improperly prepared, the "deal" was never-the-less approved by the people put in place by Dantas for the very purpose of ensuring that potential CVC/CI investments were scrutinized and only approved if found to be appropriate. Indeed Dantas testified that the acquisition had been analysed by him and by Arida.

As I have said before, the evidence is that nothing of importance could be done by the Plaintiff without the knowledge and approval of Dantas himself. Dantas regarded the Soccer Club investment as relatively insignificant in terms of the money involved but it afforded a valuable learning experience for the Plaintiff. As a matter of fact the Soccer Club asset remains in the Plaintiff's portfolio and the Plaintiff continues to expect that it will yield a profit of an amount sufficient to satisfy the Plaintiff's investment policy guidelines.

Arthur Carvalho was not called to testify and no other witness was able to explain exactly what it was that Carvalho had contributed to the successful acquisition of the Soccer Club. In any event, Demarco was allowed to supervise the Soccer Club for the rest of 1998, even on the Plaintiff's evidence. Had the Plaintiff's case been that Demarco had been dismissed for cause (as distinct from bad performance) as a result of his involvement in the Soccer Club transaction the action would have failed for want of proof. The acquisition was closed in early February 1998 and, having regard to the shareholder's agreement, that could only have occurred with the approval of the investment committee which included representatives of Citibank. It is indeed strange that the Plaintiff attempted to make the case it did in the absence of any minutes of any meeting of the investment committee, as the evidence was that those meetings were recorded.

It will also be recalled that in March 1998 Demarco redeemed US$30,000 of his US$500,000 investment in Opportunity Fund and Dantas and his sister allowed him to do so. That occurred on March 23rd 1998 more than a month after the closing of the Soccer Club acquisition in early February 1998. In fact on April 7th 1998 Veronica Dantas directed ABN AMRO to pay the US$30,000 into Demarco's account at Merrill Lynch in New York. This is totally inconsistent with the Plaintiff's assertion that the US$500,000 invested in the Opportunity Fund was the Plaintiff's money, and Demarco was not entitled to any of it unless and until the 'small mathematical formula' earned Demarco a credit (which it never did). Allowing the

redemption of US$30,000 in March 1998 destroys the Plaintiff's ability to assert that Demarco had botched the Soccer Club acquisition the month before.

There is no doubt that Demarco's employment was terminated, but that termination cannot be justified on the basis of cause, misconduct or bad performance.

Once Demarco's employment with CVC/Brazil was terminated on February 4th 1999 he had no office to go to. Consequently he was at least constructively dismissed from the Plaintiff's employment on that date. However he was dismissed without cause and without notice, i.e., he was arbitrarily dismissed.

I can now deal with the two issues identified at the beginning of these reasons.

I will do so by simply stating that the Plaintiff failed entirely to establish it's version of the oral agreement in relation to either the million dollar payment or the nature and extent of Demarco's shareholding interest in the Plaintiff.

CONCLUSIONS

1. Demarco was employed by CVC/CI on the terms he put in evidence which terms are confirmed by his memorandum (Exhibit P-18).

2. Demarco is therefore entitled to retained the US$1million signing fee and in particular he is entitled to trace the initial $500,000 investment in Opportunity Fund and recover that investment in specie or in cash at his option. I gather that some portion of that investment has been liquidated as a result of these proceedings and the money paid firstly into Court and then to Demarco's attorneys. It should now be paid to him.

3. Demarco is beneficially entitled to 3.5% of the Plaintiff's issued share capital and the declaration I have been invited to make is therefore made. In all other respects the Plaintiff's action is dismissed.

4. Demarco is further entitled to recover whatever damages he has sustained by reason of the granting of the Mareva injunction and all other interlocutory orders made as a consequence. The Mareva injunction will of course be discharged.

In my judgment the Court was deliberately deceived by the Plaintiff and the Mareva injunction should not have been granted. I will therefore direct that the damages to be recovered from the Plaintiff by reason of that injunction shall include any costs Demarco has been ordered to pay or been deprived of, pursuant to interlocutory orders made to date in these proceedings. I cannot now reverse those orders but it would be inappropriate and unjust for the Plaintiff to retain any benefit whatever that may have flowed to it as a result of the deceit practiced on this Court.

While the above conclusions flow from the evidence and my findings thereon I should add that the Plaintiff's action fails for other reasons as well. Firstly, had I needed to I would have drawn inferences adverse to the Plaintiff as a result of its failure to call Persio Arida, Arthur Carvalho or Rosangela Browne as witnesses. (See *Wisniewski v. Central Manchester Authority*, Court of Appeal April 1st 1998 unreported).

Secondly, the Plaintiff's case as to the terms of the oral agreement made between it and Demarco cannot be sustained in the light of the parol (extrinsic) evidence rule. Mr. Trace suggested in argument that this problem was equally applicable to the Defendant's case. I reject that suggestion entirely. The US$1,000,000 signing bonus had been paid and was a *fait acompli* by the time the shareholder's and director's agreements were executed at the end of December 1997. There were no strings attached to it. There was therefore no need to add to, vary or contradict the written contracts.

In addition paragraph 4.4 of the director's agreement explicitly contemplated that there could be collateral contracts conferring additional benefits on Demarco. That would of course include his 3.5% interest in the share capital of CVC/CI.

On the other hand the Plaintiff's version of the contractual terms alleged to surround the US$1 million payment cannot stand with the written contract. While it is arguable that the string alleged to have been attached to the US$1 million payment could be sheltered under paragraph 4.4 of the director's agreement, the "string" could not be pulled unless Demarco was dismissed for "bad performance". That alleged provision of the oral agreement would contradict paragraph 9 of the director's agreement which deals exhaustedly with all possible grounds for Demarco's termination leaving no room whatever for his dismissal for "bad performance". Consequently the "string" could not be pulled because 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$1million could not occur even if the Plaintiff's version of the oral agreement had been accepted.

It is true of course that the Plaintiff's version of the agreement regarding Demarco's interest in the share capital of CVC/CI could also be sheltered under paragraph 4.4 of the directors' agreement so that this interest might have been subject to "vesting" had I found that that was what had been agreed to.

The applicable law is simply stated by P.O. Lawrence J in *Jacobs v. Batavia and General Plantations Trust Ltd.* (1924) 1 Ch 287 at 295 as follows:

> " It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that (except in cases of fraud or rectification and except, in certain circumstances, as a defence in actions for specific performance) parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties"

The Plaintiff's version of the agreement concerning the US$1,000,000 payment made in October 1997 cannot stand against the written contracts made in December 1997.

There is an additional problem with the Plaintiff's version of the oral contract. 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.

Two references to the judgment of the House of Lords in *Scammell v. Ouston* [1941] 1 All ER 14 are appropriate.

Viscount Maugham at page 16:

> "It is a regrettable fact that there are few, if any, topics on which there seems to be a greater difference of judicial opinion than those which relate to the question whether, as the result of informal letters or like documents, a binding contract has been arrived at. Many well-known instances are to be found in the books, the latest being that of *Hillas & Co. Ltd. v. Arcos Ltd.* The reason for these different conclusions is that laymen unassisted by persons with a legal training are not always accustomed to use words or phrases with a precise or definite meaning. In order to constitute a valid contract, the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that, unless this can be done, it would be impossible to hold that the contracting parties had the same intention."

Lord Wright said at page 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. Such a position is not often found, but I think that it is found in this case. My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. There are many cases in the

> books of what are called illusory contracts – that is, where the parties may have thought they were making a contract, but failed to arrive at a definite bargain. It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. In my opinion, that requirement was not satisfied in this case."

I should add that the Plaintiff's assertion that Demarco's employment contract included what Dantas called " a small mathematical formula" must also fall victim to the law laid down by the House of Lords in this case quite apart from the fact that it is far too complex to have ever been agreed to orally.

Mr. Black invited me to set aside the order made on November 16th 2001 by my brother Sanderson J. restraining the parties hereto and others from publishing any of the facts or events relating *inter alia* to these proceedings (cause 389/99). That order was made in a separate action brought, I am told, for the purposes of restraining the use by the Plaintiff of documents stolen from Demarco as well as other documents. I do not believe that I have jurisdiction to discharge any of the provisions of that order in relation to any other proceeding. However Sanderson J.'s order contemplates that the documents in question may be publicized with the leave of the Court. Consequently, my judgment will provide leave to make whatever use of the proceedings at the trial of this action and my reasons for judgment as would otherwise be proper had Mr. Justice Sanderson's order not been made.

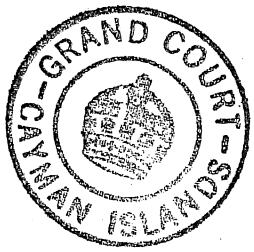
I come now to the question of costs.

I have no hesitation in finding that the prosecution of this action was a gross abuse of the process of this Court. The evidence put forward by the Plaintiff firstly by affidavit and then at trial was in my judgment manufactured and false in all of its material respects. It has caused the Defendant untold grief and expense and were I in a position to award punitive damages against the Plaintiff I would not hesitate to do so.

In the circumstances, the least the court can do is award the costs of the action to the Defendant to be taxed and paid on a full indemnity basis.

As I am not familiar with all of the interlocutory proceedings that have taken place and because the exact terms of the formal judgment to be signed and filed as a result of these reasons may not be agreed upon I may be spoken to in order that those terms may be settled and all of the "loose ends" tied up.

Dated this 31st day of May 2002.



The Hon. Mr. Justice Kellock