[2011] UKPC 2
Privy Council Appeal No 0103 of 2009

JUDGMENT

(1) Steven Kent Jervis
(2) KST Investments Limited
v
Victor John Skinner

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Hope
Lord Walker
Lord Collins
Lord Clarke
Sir John Laws

JUDGMENT DELIVERED BY
Lord Clarke
ON

9th February 2011

Heard on 27 and 28 October 2010

Introduction

1. This is a second appeal by Steven Jervis ('Mr Jervis') and his company ('KST') against the judgment and order made by Mr Justice Carroll (Acting) ('the judge') in the Supreme Court of the Bahamas on 15 June 2007. The judge held that Mr Jervis unlawfully and in breach of contract terminated Mr Skinner's contract of employment on 11 January 2005. By that order the judge ordered KST to pay (1) damages in the net sum of $88,312.84 for breach of the contract of employment, (2) the sum of $25,000 by way of bonus for the year 2004 and (3) the sum of $250,000 which, on 15 December 2004, Mr Jervis agreed should be paid by KST to Victor Skinner ('Mr Skinner') under a profit sharing agreement ('PSA') between Mr Jervis and Mr Skinner. The judge further made an award of interest and costs. He also made a number of declarations and directed that an account be taken under the PSA.

2. Mr Jervis and KST appealed to the Court of Appeal in the Bahamas. The appeal was heard by Dame Sawyer P, Osadebay JA and Longley JA. The judgment was delivered by Osadebay JA, with whom the other members of the court agreed. By an order dated 24 June 2009 the Court of Appeal dismissed the appeal with costs, save that it held that the PSA was wrongfully terminated on 10 January 2005 and that, in respect of the period thereafter, Mr Skinner was entitled to damages rather than to an account. It remitted the assessment of damages to the Registrar of the Supreme Court. In fact, it appears that an account had already been taken in accordance with the order of the judge that the account be taken within 60 days. By an order dated 24 September 2009 the Court of Appeal granted Mr Jervis and KST permission to appeal to the Privy Council.

The history

3. This appeal arises out of an internecine dispute between Mr Jervis and Mr Skinner, who were once great friends but who have now fallen out. They are both British nationals and met at the Solihull Rugby Club in the late 1970s. They kept in touch over the years after that. For example, in 1984 Mr Skinner, Mr Jervis and Mr Jervis' younger brother Keith went to Freeport in the Bahamas on a rugby tour. Mr Jervis, who is an engineer by trade, became a successful businessman. In 1997 he visited Mr Skinner in South Africa where he was by then living. By 1998 he had decided to leave the United Kingdom

for tax reasons. In March 1998 he and his family went to Freeport in the Bahamas and in April 1998 he decided to settle there.

4. Mr Skinner is a quantity surveyor. When Mr Jervis decided to purchase or build a house in Freeport, he telephoned Mr Skinner for advice. Their discussions led to the idea of developing some land on the beach in or near Freeport. The development went ahead and was called 'Shoreline'. At the invitation of Mr Jervis, Mr Skinner flew to Freeport in August 1998 to discuss the development. Mr Skinner and his wife stayed with Mr Jervis and his wife. During the visit it was agreed that the development would proceed and that they would share the profits as to 75 per cent for Mr Jervis and as to 25 per cent for Mr Skinner. It was further agreed that Mr Skinner would receive a salary. However nothing was put in writing at that time. It was agreed that Mr Jervis would put money into the scheme, while Mr Skinner would put his skill and experience into it in order to get it up and running. Mr Skinner initially went back to South Africa but returned to Freeport in October 1998 and stayed with Mr Jervis. Discussions proceeded. Mr Skinner again returned to South Africa but some time towards the end of 1998 or in early 1999 Mr Jervis said to Mr Skinner that his services would be required full time in Freeport as from March 1999.

5. As the Court of Appeal put it, Mr Skinner was not paid compensation for his pioneering work on the project. However, he began full time employment on the project on 1 March 1999 and received his first salary after completing one month. Mr Skinner did not immediately become aware of the existence of KST. He has maintained throughout that his employment agreement was with Mr Jervis and not with KST or any other company. Before the judge and the Court of Appeal there was much debate about the role of KST. However before the Board it was accepted that, at any rate for the purposes of the issues between the parties in this action, KST was properly to be treated as the nominee or agent of Mr Jervis. This judgment accordingly proceeds on that basis.

The agreements

6. As appears from the judgments and orders of the courts below, there were two agreements, the employment agreement and the PSA. The employment agreement was never reduced to writing. It was however agreed that Mr Skinner would look after the construction side of the project while Mr Jervis would look after the financial, legal, accounting, sales and marketing side. Mr Skinner was also involved with the selection of engineers and architects for the project. Mr Skinner was to receive a salary of $7,000 a month together with an allowance of $3,000 for his rent. Mr Jervis was to receive an

equivalent salary. Initially the project was to involve the construction of 86 houses, although in the event 76 houses were built. They included one for Mr Skinner, at no 3, and one for Mr Jervis at no 4.

7. The PSA was reduced to writing in February 2001. This was done on the insistence of Mr Skinner, who had begun to feel marginalised. The PSA described Mr Jervis as 'the Developer' and Mr Skinner as 'the Project Manager'. It referred to the development as developing certain property into a residential community known as 'Shoreline Subdivision'. It recited that the Developer had agreed to give 25 per cent of the profits as defined to the Project Manager and provided that the Developer and Project Manager agreed as follows:

> "1. That the Developer and the Project Manager shall share the profits of the development and sale of the lots and houses in the said Subdivision as to Seventy-five per centum (75%) to the Developer and Twenty-five per centum (25%) to the Project Manager after the following general expenses shall have been deducted from the gross profits of the said Subdivision development: -
>
> i. pay Barclays Bank PLC all principal and interest charges loaned to the Developer for the development and sale of the lots and houses in the said Subdivision
>
> ii. pay the Developer all moneys loaned to the company for the development of the said Subdivision without interest thereon
>
> iii. deduct the sum of US$40,000.00 (or its Bahamian dollar equivalent) loaned to the Project Manager by the Developer for the purchase of a home by the Project Manager
>
> iv. and all other costs expenses and disbursements associated with the development of the said Subdivision including but not limited to All Direct Construction Costs, Infrastructure Costs, Land Acquisition, Overheads, Plant and Equipment, Architect fees, Insurance, Bank

Charges, Attorneys fees, Accounting and Audit fees Advertising and sales commissions.

2. That the Accounting firm of PricewaterhouseCoopers shall be the accountants for the Development of the said Subdivision and its statement as to profits subject to the aforementioned deductions shall be final evidence of the net profits of the said development of the subdivision. A review will be carried out with the Accountants on an annual basis to determine the proportion of profits to be distributed as profit shares paying due regard to cash flows and banking requirements.

3. That both parties will

a) diligently attend to the said development and devote his whole time and attention thereto;

b) forthwith pay all monies cheques and negotiable instruments received by him on account of the said development into the said Barclays Bank PLC Shoreline Subdivision development account; and

c) be just and faithful to the other of them and afford every assistance in his power in carrying on the business for their mutual advantage.

4. That this agreement is irrevocable for the term of the said development of the said Subdivision and until the last lot and house is sold in the said Subdivision.

5. This agreement shall be governed by and interpreted under the laws of the Commonwealth of The Bahamas."

The issues

8. The issues in this appeal may be summarised in this way:

i) whether Mr Jervis was in breach of the contract of employment in summarily dismissing Mr Skinner on 10 or 11 January 2005;

ii) whether Mr Skinner was entitled to a bonus of $25,000 in respect of his work during 2004;

iii) whether Mr Skinner was in repudiatory breach of the PSA so as to entitle Mr Jervis to treat the PSA as at an end;

iv) whether Mr Skinner was entitled to $250,000 under the PSA in respect of his net share of the profit for 2004 pursuant to an agreement made on 15 December 2004;

v) whether the judgment of the judge was unsafe having regard to its tone and phraseology;

vi) whether the judge failed to make specific findings of fact on four specific issues; and

vii) whether the judgment is unsafe by reason of the delay before it was delivered.

The correct approach

9. This appeal is essentially an attack on the findings of fact made by the judge, most of which were upheld by the Court of Appeal. It is therefore a second appeal in a case in which there have been concurrent findings of fact. In any appeal which challenges a judge's findings of fact the appellant has an uphill task. The judge has had the opportunity of seeing and hearing the witnesses and the authorities show that a court of appeal will be very slow to interfere with them. A second court of appeal will be even more reluctant where the first court of appeal has refused to do so. This principle has been recently restated in *Benoit Leriche v Keon Cherry* [2008] UKPC 36, where the Board said through Lord Neuberger that the principle laid down in a number of cases, perhaps most famously *Devi v Roy* [1946] AC 508 at pp 520-1, was that the Board should not review the evidence where there are concurrent judgments of two courts on pure questions of fact "unless it can exceptionally be shown that there has been some miscarriage of justice or violation of some principle of law or procedure". The principle had been analysed in some detail just two

years earlier in *Stemson v AMP General Insurance (NZ) Ltd* [2006] UKPC 30, where the judgment was given by Lord Hope.

10. In the instant case the judge analysed the issues in some considerable detail. He preferred the evidence of Mr Skinner to that of Mr Jervis. He approached their evidence on the basis that they had begun as friends and, perhaps as a result, did not initially reduce their agreements to writing. Serious allegations of dishonesty were made against Mr Skinner, which the judge rejected on the basis that he accepted Mr Skinner's evidence that he always intended to account to Mr Jervis for all relevant monies which he used for his own account. The Board has concluded that the judge was entitled to approach the evidence in the way he did and to reach the conclusions as to Mr Skinner's honesty that he did.

11. The relationship was not an ordinary commercial relationship but was, at any rate at the outset and for some considerable time thereafter, based in friendship and mutual trust. The Board is reminded of the dissenting speech of Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 at 432 (quoted by Lloyd J in *The Good Helmsman* [1981] 1 Lloyd's Rep 377 at 379), where Lord Pearce said this:

> "This class of case, where love has turned to hate, where old friends have each suddenly discovered how abominable the other is and wonder in amazement that they could ever have been friends, presents its own particular difficulties for the trial judge. In the use of probability as a touchstone upon bygone events, he has to free his mind of the parties in their present enmity and put in their place the old friends that once they were."

While it does not suggest that the facts of this case are as extreme as in either *Onassis v Vergottis* or *The Good Helmsman*, it appears to the Board that the judge adopted a similar approach in judging the evidence of Mr Skinner and Mr Jervis. The Board has concluded that he was entitled to accept Mr Skinner's evidence that he always intended to play fair by Mr Jervis.

12. The Board turns to the issues in the appeal.

The dismissal of Mr Skinner

13. Some background is necessary. It can be taken largely from the findings of the judge. As stated above, Mr Skinner was engaged full time on the

development from March 1999. In early 2000 Mr Jervis lent Mr Skinner $40,000 to enable him to buy no 3, the remainder being financed by a mortgage. Mr Jervis bought no 4 at about the same time and took up residence there in July 2000, being the first of the residents of Shoreline to do so. Mr Skinner took up occupation of no 3 with his family in August or September 2000.

14. The PSA was entered into in February 2001. This was done on the insistence of Mr Skinner because he felt vulnerable. He was in the Bahamas on a one year work permit. He had asked for a three year permit but had been told by Mr Jervis that such a permit was not available, although it later turned out that it was. Moreover he had heard Mr Jervis say that he was not irreplaceable.

15. The development proceeded apace. Although the plan was that the two partners would take the roles identified above, in practice the roles were not so narrowly delimited. All the revenue from the project was deposited in accounts in the name of KST and KST had no other income. Ms Lane, who was KST's in-house accountant, produced financial accounts for the purpose of determining the profitability of Shoreline. As already stated, Mr Jervis controlled KST but the final accounting for the development was to be done by PricewaterhouseCoopers in accordance with clause 2 of the PSA.

16. In the course of 2004 certain tensions arose between Mr Skinner and Mr Jervis. On 9 December 2004 Mr Jervis wrote to Mr Skinner complaining about both the latter's absenteeism and his aggressive attitude to staff, to customers and to Mr Jervis himself. The thrust of the allegation of absenteeism was that Mr Skinner went to South Africa for much longer periods than had been agreed. Mr Jervis ended by saying that Mr Skinner would have to improve his attitude in the future or there would be no alternative to their parting company. It is noteworthy that none of these allegations formed the basis of Mr Skinner's subsequent dismissal.

17. Mr Skinner replied by letter dated 13 December 2004. He responded in detail to the allegations of absenteeism. As to his recent attitude, he said that, if he had been aggressive or uncooperative, he sincerely apologised. So far as Shoreline was concerned, he said this (in a passage quoted by the judge at para 168):

> "We started this as partners friends and equals; everything between us has been negotiated. You have never dictated terms and vice versa, and I would never want to, and that cannot start

> now. I am a reasonable person and will do the best I can for Shoreline."

He further asserted that he had always been fully committed to Shoreline. The letter finished with a statement that he would never intentionally jeopardise either Mr Jervis' or his own investment in it. Mr Jervis replied to that letter on 15 December 2004. He responded to one or two of the points on absenteeism and made a number of points about time keeping in the future. The letter, however, contained none of the allegations made in these proceedings.

18. Those were first made at a meeting on 10 January 2005 at which Mr Jervis, Mr Skinner and Ms Lane were present. Mr Jervis referred to renovations done to Mr Skinner's house in Shoreline, which was known as no 3 Shoreline Properties. He complained that the renovations and related costs had not been accounted for in KST's books; in particular that Mr Skinner had instructed Mr Kerrington (Chinese) Wilkinson's crew to book costs to other houses. Mr Skinner accepted that he had told him to book them to repairs but not that he told him to book the repairs to other houses. Mr Jervis and Ms Lane said that Chinese had said that he was instructed to book the labour costs to other houses. Mr Skinner insisted that he had given no such instructions. Mr Jervis said that even booking the costs to KST was wrong and Mr Skinner accepted that it was wrong. He also accepted that materials used had not been booked because they were used out of stock but he also stated that Mr Jervis had used the company to pay for personal expenses as well as Keith Jervis' expenses. Mr Jervis said that, if that had been done, it had been accounted for directly in the books of KST. Mr Skinner insisted that it was not his intention to defraud KST or to avoid paying for the renovations. Mr Skinner referred to the amount of money taken out of the company by Mr Jervis and added that he did not think that Mr Jervis should dictate to him because he was entitled to a 25 per cent share. Mr Jervis then said that Mr Skinner was in a position of trust which he had broken and that Mr Skinner was "terminated as of today". Mr Jervis said that he hoped that they could arrive at a fair settlement but insisted that termination was what he wanted.

19. A further meeting was held the next day at which the same three people were present. Mr Jervis handed Mr Skinner a termination letter dated 11 January which referred to the meeting the day before, noted that he had advised him of his false billing to other jobs of work done on no 3 and of his instructions to carry out such false billing and stated that his employment as project manager was one of trust and depended upon his integrity and honesty. The letter alleged that he had acted dishonestly and committed a fraud on KST and that he was unsuitable to continue to act in his capacity as project manager. It dismissed him with immediate effect.

20. Discussion ensued along the same lines as the day before and Mr Jervis made a without prejudice offer of financial settlement to the effect that, although he was only liable to him for approximately $20,000, he was willing to pay him "the $250,000 that was already offered to him last month". The judge held that that had been agreed on 15 December 2004 at a lunch meeting between the two men. Mr Skinner rejected the offer made on 11 January 2005. A further without prejudice offer was made on 17 January which was not accepted.

21. The judge held that Mr Skinner was entitled to payment of $250,000 under the PSA on the basis that that sum was due before he was dismissed on 11 January 2005. He further held that he was entitled to a bonus in the same amount as had been paid to Mr Jervis on 21 December 2004, namely $25,000.

22. Mr Patrick Talbot QC submitted on behalf of Mr Jervis that the judge misdirected himself on the relevant test for wrongful dismissal and that the Court of Appeal was wrong to treat the appeal to it as solely an appeal on the facts. He submitted that the judge's error of principle led him to reach wrong conclusions on the facts. It was common ground both in the Court of Appeal and before the Board that the judge did apply the wrong test. The judge applied the test under the Employment Act 2001 ('the 2001 Act'), whereas it is now common ground (although it was not before the judge) that he should have applied the test at common law. The test has been much discussed in the authorities but it was not in dispute in this appeal that the test was correctly stated by Lord Jauncey sitting as the Visitor to Westminster Abbey in *Neary v Dean of Westminster* [1999] IRLR 28, where he said at para 22:

> "that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

23. The judge said at para 160 that the law appeared to be either that the employee must have committed a fundamental breach of his contract of employment or have acted in a manner repugnant to the fundamental interests of the employer or that the employer honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of dismissal. The judge further said at para 161 that after-discovered wrongdoing was irrelevant in such cases and that the position at common law, if different, was irrelevant. It is common ground that the second part of para 160 and the whole of para 161 are wrong. However, Mr Harvey Tynes QC submitted on behalf of Mr Skinner that, although the judge had identified the wrong test in the sense that he identified the test applicable under

the Act, he nevertheless asked himself the correct question. At para 166 he asked himself this question:

> "Did [Mr Skinner] take [KST's] labour and materials to work on his house without approval of [KST] and with no intention of paying for such labour and materials?"

24. As the Board sees it, that question encompassed the essence of the wrongdoing alleged by Mr Jervis against Mr Skinner, both then and now. The Board thus accepts the submission that, although the judge did misdirect himself as to the correct legal test, he nevertheless asked himself what was essentially the correct question on the facts. It is therefore correct to hold that the appeal to the Court of Appeal essentially involved an appeal on the facts. As the Board has already indicated, the same is true of this second appeal. In these circumstances, given the principles set out above, the Board will briefly consider whether there has been a miscarriage of justice or relevant error of principle.

25. In this appeal Mr Jervis has sought to reargue the factual case he made both before the judge and before the Court of Appeal. The substance of that case was that Mr Skinner used money from KST to pay for personal work on his own house or received payment personally for work carried out by KST for others for the purpose of retaining the benefit of such transactions and payments for himself. The judge rejected the submission that Mr Skinner acted dishonestly in any of the alleged respects. Mr Jervis particularised his allegations in this regard in some detail in para 18 of his written case prepared for this appeal. Together with other allegations made by Mr Jervis, they were dealt with in considerable detail by the judge at paras 166 to 343 of his judgment.

26. In sub-paras (i) and (ii) of para 18 of the case it is alleged that between October and December 2004 Mr Skinner used labour and materials belonging to KST to carry out renovations to his own house at no 3 without keeping any proper records, without calculating what he had to repay KST and without making any offer to repay KST or Mr Jervis. Those sub-paras further allege that the wrongs were compounded by Mr Skinner giving instructions to Mr Chinese Wilkinson in the presence of two witnesses to book the work on no 3 to house no 31 on the development. It is Mr Jervis' case that this attempt to hide the work shows that Mr Skinner had no intention of paying for it. Mr Skinner admitted that he instructed Mr Wilkinson to have such renovations carried out, that he had not calculated what he had to repay KST or Mr Jervis and that he had not accounted for those sums by the time Mr Jervis terminated the contract. However, he denied that he had instructed Mr Wilkinson to

attribute them to no 31 or any of the other houses to which Mr Wilkinson referred in evidence. His evidence was that he intended to account to Mr Jervis for all the expenditure on his house and that he did not intend to defraud Mr Jervis. He acted honestly throughout.

27. In dealing with these allegations the judge correctly put them in context. In doing so he was in effect following Lord Pearce's advice that the trial judge in such a case should consider the protagonists as the old friends that once they were. Thus they were in effect partners who did not think it necessary to put everything in writing. Each trusted the other: see the judgment at paras 168 to 180. The judge noted that Mr Jervis himself spent money on his own account. The scheme was that there would in due course be an accounting which would be carried out by PricewaterhouseCoopers in accordance with the PSA. At paras 186 and 187 the judge accepted evidence from Mr Skinner that he told Mr Jervis that he had to replace some of the floors of no 3 caused by hurricane damage and that he would take the opportunity to make renovations to the house; and that Mr Jervis replied "Fine". The judge correctly recorded at paras 187 and 188 that Mr Jervis accepted in evidence that he had indeed said "Fine". The judge added that, while Mr Skinner took Mr Jervis' reply as approval, Mr Jervis said in evidence that it was not.

28. The judge accepted Mr Skinner's evidence. At paras 188 to 194 the judge gave a number of convincing reasons for the conclusion that it was not credible to conclude that Mr Skinner could have thought that he would be able to carry out work of which Mr Jervis was unaware, especially since Mr Jervis' own house was next door at no 4. The work was carried out by KST men between 28 October and 8 December 2004. Mr Skinner was away from 17 October and 1 November 2004 and from 17 November to 1 December 2004. The judge asked at para 192 why Mr Skinner would have told Mr Jervis about the work if he did not intend to pay for it. He further asked at para 193 why, having instructed Chinese Wilkinson to do the work, he then left the country for significant periods.

29. At para 196 the judge recorded that Mr Skinner admitted that he had had work done on no 3 and that his evidence was that he intended to reimburse KST when the work was complete. The judge said that he had no difficulty in accepting that evidence. Mr Skinner said in evidence that he had estimated that that the cost of repairs would be around $20,000. In the event, on the judge's findings of fact, the total amount for which Mr Skinner was liable to account was $29,603.71. (The net figure of $88,312.84 set out in the judge's order is arrived at after deducting that sum plus $1,706.00 in respect of materials.) It is plain that the judge accepted Mr Skinner's evidence that he would pay whatever the correct sum was on the taking of an account and that there was no significance in the fact that his estimate was less than proved to be the case.

30. The judge rejected the evidence of Mr Chinese Wilkinson and others and preferred the evidence of Mr Skinner. He rejected part of the evidence of Mr Jervis and, in particular, much of the evidence of Mr Wilkinson as untrue: see paras 201 to 219 of the judgment. In those paras the judge gave detailed reasons for his conclusions. He was, for example, particularly struck by the fact that Mr Jervis permitted Mr Wilkinson to continue carrying out the work on no 3 and booking it to no 31 and by the fact that he did not sack Mr Wilkinson for carrying out the work (or for falsifying the records) but paid him a bonus in December. In para 220 the judge noted that that these allegations were not made in Mr Jervis' letters to Mr Skinner of 9 and 15 December 2004. In para 221 he noted that Mr Jervis explained in evidence that he did not mention his complaints about the work and the false booking because he was further investigating them. He rejected that explanation as being incredible.

31. In paras 18(v) and (vi) Mr Jervis makes further specific allegations relating to work on no 3. However, the judge did not accept any of them. As to sub-para (v), Mr Jervis gave somewhat equivocal evidence. As to sub-para (vi), it is alleged that Mr Skinner dishonestly wrote "no 57" on an invoice relating to no 3. Mr Skinner admitted that he had done so but said that it was a mistake. The judge accepted Mr Skinner's evidence that he had made a mistake and, in relation to all these allegations (as in relation to the case as a whole), he concluded that Mr Skinner did not act dishonestly. See in particular paras 238 to 252 of the judgment. Again the Board concludes that the judge was entitled to reach these decisions.

32. In para 18 of his case Mr Jervis also included a number of matters which came to light after Mr Skinner had been dismissed. The judge correctly treated them as relevant to the issues before him. However, he held in each case that Mr Jervis had failed to show that he had reasonable grounds for concluding that Mr Skinner had acted dishonestly. As stated above, that was not the correct test but implicit in that decision was the conclusion that Mr Jervis had not shown that Mr Skinner had acted dishonestly in any of the respects alleged.

33. In para 18(iii) of his case Mr Jervis says that in 2004 Mr Skinner arranged for granite work to the value of about $2,500 to be carried out by KST for a Mr Daniel Hoffman at his apartment in Grand Bahama. Instead of paying his bill to KST, with the concurrence of Mr Skinner Mr Hoffman provided Mr Skinner with a plasma television and sound system which were delivered to him off Grand Bahama at sea. The allegation is that Mr Skinner took personal payment in kind for work carried out by KST and both dishonestly failed to account to KST for that benefit and dishonestly failed to reimburse KST for the cost of the granite work.

34. In evidence Mr Skinner accepted that he arranged for granite to be installed for Mr Hoffman. However he said that he had discussed it with Mr Jervis and that Mr Jervis had said that there should be no charge because Mr Hoffman had done them a favour. He accepted that he had received the plasma television but denied that he had received it for the granite. He denied that he had acted in any way dishonestly.

35. The judge considered this issue in detail between paras 254 and 305. He correctly said at para 267 that Mr Jervis' case was that Mr Skinner had acted dishonestly in this regard. The judge discussed at some length the emails in March and April 2005 in which Mr Jervis sought to obtain evidence from Mr Hoffman which implicated Mr Skinner. He concluded that Mr Hoffman was not a witness whose evidence could be relied upon, as he put it at para 278, "for accuracy, consistency and correctness". For example, he held at para 290 that Mr Hoffman never answered the question posed by Mr Jervis in his email of 21 April 2005 in which he said that 'The only thing that is not clear is how did you know that the TV, sound system and cash were for the granite work". Mr Jervis also relied upon the evidence of a Mr James Pfeiffer but the judge rejected it as unreliable at paras 298-300. The Board has reached the conclusion that the judge was entitled to reach these conclusions.

36. The Board notes in passing in this regard that at paras 291-292 the judge specifically considered Ms Lane's evidence. He did not reject it as untrue. Nor did he reject her evidence as untrue in any other part of the case. It was not necessary to do so in order for him to reach the conclusions he did. So, for example, the allegations relating to no 3 did not depend upon the credibility of Ms Lane, much of whose evidence depended upon what she was told by others, part of whose evidence the judge did not accept as credible.

37. In para 18(iv) of the case it is alleged that between about July 2000 and November 2004 Mr Skinner purchased personal items by using KST's bonded account at Dolly Madison's store in Freeport to a value of $1,138.46 without accounting to KST for it. Mr Skinner said in evidence that Mr Jervis had bought fishing tackle from Dolly Madison and that he had asked him if he could "get stuff" from Dolly Madison. Mr Jervis asked him what he wanted to get and he replied "just fishing tackle, small items". Mr Jervis said that that would be fine. Mr Skinner also said that Mr Jervis' wife and brother also bought household goods on account from Dolly Madison. In short, it was Mr Skinner's evidence that Mr Jervis had given him authority to do what he did.

38. The judge considered these allegations in detail at paras 306 to 343. He in effect accepted Mr Skinner's evidence that both parties were using the account in a similar way. At para 343 he held that it was quite obvious that Mr

Skinner had authority to use the account in the way he did at least as early as two weeks after it was established on 6 May 1999. The Board concludes that the judge was entitled to reach the conclusions he did.

39. The judge expressed some of his conclusions in colourful language but, in the opinion of the Board, the tone of the judgment does not provide any basis for concluding that the judge's conclusions are unsound. In short, the judge was entitled to prefer the evidence of Mr Skinner to that of Mr Jervis, Mr Wilkinson and the others. The Court of Appeal so held and, for the reasons given above, it is not appropriate for the Board to conduct a detailed analysis of the evidence. The Board is firmly of the view that this is not, in the words of Lord Neuberger quoted above, a case in which it can exceptionally be shown that there has been some miscarriage of justice or violation of some principle of law or procedure.

40. In short, as the Board sees it, the position can be summarised in this way. There was no relevant error of law or principle in the judge's conclusions of fact. Although the judge did not correctly state the legal test at common law, he nevertheless asked himself in the course of his judgment whether Mr Skinner acted dishonestly. In particular he held that Mr Skinner would have accounted for all the relevant expenditure when the account was taken and would have rectified any mistake that has been made. The judge identified and ruled upon the essential submissions made on behalf of Mr Jervis.

41. The four aspects of the case referred to in para 8 vi) above with which it is said that the judge failed to deal were the PSA, the incorporation and systems of KST, the booking and cost of materials for no 3 and the steps taken by Mr Jervis and Ms Lane to investigate Mr Skinner's conduct. As to this point, first, it is not incumbent upon a judge to rule upon absolutely every submission that was made by parties in a case. It is only necessary for a judge to resolve the essential issues in the case. Secondly, it is plain from the above discussion (and from what follows) that the judge did consider these issues so far as relevant in no little detail. The Board is unpersuaded that there were any significant matters with which the judge failed to deal such as to make his conclusions in any way unsafe.

42. As to the findings of fact made by the judge, the Board detects no miscarriage of justice. The issues raised what were essentially jury questions. The judge did not simply state general conclusions without detailed analysis. On the contrary, he delivered a comprehensive judgment. He directed himself by reference to the relationship between the parties, much as Lord Pearce had suggested that a trial judge should, and, having heard all the witnesses cross-examined by reference to a plethora of documents, he rejected Mr Jervis' case

that his erstwhile friend and partner had acted dishonestly. The Board sees no inherent improbability in that conclusion. After all, both parties in some respects used the KST accounts for expenditure which would in due course have to be accounted for under the PSA. That accounting had not been done by January 2005 when Mr Skinner was dismissed.

43. On the findings of the judge, which were upheld by the Court of Appeal, it could not possibly be said, in Lord Jauncey's words quoted above, that Mr Skinner's conduct so undermined the trust and confidence which is inherent in his contract of employment with Mr Jervis (or KST) that they should no longer be required to retain him in their employment. It follows that the question raised by issue i) identified in para 8 above, namely whether Mr Jervis was in breach of the contract of employment in summarily dismissing Mr Skinner him on 10 or 11 January 2005, must be answered in the affirmative. It further follows from the above discussion that issues v) and vi), namely whether the judgment was unsafe having regard to its tone and phraseology and or to a failure to make specific findings on specific issues, must be answered in the negative. These conclusions are however subject to the question of delay raised by issue vii).

Delay

44. Mr Jervis submits that the decision of the judge is unsafe having regard to the delay before the judgment was delivered. The Board accepts the submission made on behalf of Mr Skinner that the correct approach to cases of excessive delay is to ask whether, as a result of the delay, the decision under appeal is unsafe and whether "it would be unfair or unjust to let it stand". The test was stated thus by Lord Scott of Foscote, giving the judgment of the Board in *Cobham v Frett* [2001] 1 WLR 1775 at 1783:

> "In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."

This test has been followed in a number of cases: see eg *Deidrichs-Shurland v Talanga Stiftung* [2006] UKPC 58 at paras 24 and 25, *Habib Bank Ltd v Liverpool Freeport (Electronics) Ltd* [2004] EWCA Civ 1062 at paras 18 and 19, *Boodhoo v A-G of Trinidad and Tobago* [2004] UKPC 17, [2004] WLR

1689 at para 13 and *Hurndell v Hozier & Another* [2009] EWCA Civ 67 at para 43.

45. Those cases also show that, where there is excessive delay the appeal court must consider the findings of fact of the judge with particular care: see in particular the *Habib Bank* case and *Goose v Wilson Standford*, 13 February 1998, *The Times* 19 February 1998. In the *Habib Bank* case Lord Phillips MR, giving the judgment of the Court of Appeal, quoted part of the judgment of Lord Scott in *Cobham v Frett* set out above and added this further quote:

> "It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party."

46. In the instant case there were very regrettable delays between the end of the trial and the delivery of the judge's judgment. The trial extended over a period of some 15 days between 5 December 2005 and 31 January 2006. The judge did not hand down his judgment until 15 June 2007. The judge postponed the date fixed for handing down on a number of occasions. On 28 February 2007 the judge announced in open court that Mr Skinner had succeeded in what he called "both cases". He said that there had been a "tremendous amount of material" and that by the time he got through reading most of it he had "forgotten most of it and so on". He said that he would put his reasons in writing. He added that he did not want to make any more promises but "may be within the next two weeks, but sometime during the remainder of March".

47. On 2 March 2007 he again sat in open court on what was thought to be the last day of his extended contract period as an acting judge. He gave a further indication that he would hope to be able to deliver his judgment by the end of March. In the event, as stated above, he did not hand down his reasoned judgment until 15 June 2007. In these circumstances, whatever the reasons for the delay, the Board cannot but conclude that the delay was excessive.

48. This delay has led the Board to give anxious scrutiny to the question whether it would be unfair or unjust to let it stand. The Court of Appeal considered this question and concluded at paras 99 and 100 that it would not. In *Cobham* the Judicial Committee noted at page 1783D that the quality of the notes of evidence available to the judge is relevant to this issue. In the instant case, like the Court of Appeal and the Board, the judge had available transcripts of evidence given to him and of submissions made to him. The Court of

Appeal noted that they were contained in nineteen volumes with an average of 200 pages in each volume. It said at para 99 that it must have taken the judge a long time to go through the evidence in order to produce his judgment which itself contained 131 pages. It concluded that there was no evidence that the decision of the judge was in any way adversely affected by the delay.

49. The Board sees no reason to interfere with the decision of the Court of Appeal on this question. For the reasons given earlier the Board has concluded that the judge was entitled to reach the conclusions he did in his comprehensive judgment. They are conclusions which are readily understandable in the context of the relationship between the parties referred to above. Within the limits of what is appropriate in a second appeal, the Board has carried out a careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party. It has reached the clear conclusion that the delay has not caused injustice to Mr Jervis.

50. For these reasons the Board concludes that the answer to issue vii) is that the judgment is not unsafe by reason of the delay before it was delivered.

The bonus

51. The judge held that Mr Skinner was entitled to a bonus of $25,000 in respect of 2004. The judge made these findings at paras 29, 179-180 and 216. As already stated, it was agreed at the outset that Mr Jervis and Mr Skinner would receive the same salary and, as a matter of fact, until 2004 they received the same salaries and received pay rises, including impromptu payments, at the same time. Every employee was paid a bonus. 2004 was a good year and everyone, including Mr Wilkinson and Mr Jervis (see above), was paid a bonus. Mr Jervis accepted in evidence that there was no reason why Mr Skinner should not have received a bonus for 2004. He had always received the same bonus as Mr Jervis in the past and, on this basis, he was entitled to a bonus of $25,000 on 21 December, when such a bonus was paid to Mr Jervis.

52. In these circumstances by the end of the appeal it was not seriously contended that Mr Skinner was not entitled to a bonus in that amount, at any rate if Mr Jervis' principal allegations against him failed. In any event the Board has reached the clear conclusion that Mr Skinner was contractually entitled to a bonus in the same sum as that paid to Mr Jervis and was entitled to it on 21 December 2004. It follows that, in so far as the bonus issue remains live, the question raised by issue ii) in para 8, namely whether Mr Skinner was

entitled to a bonus of $25,000 in respect of his work during 2004, must be answered in the affirmative.

The PSA

53. The question raised by issue iii) in para 8 is whether Mr Skinner was in repudiatory breach of the PSA so as to entitle Mr Jervis to treat the PSA as at an end. The reasoning which has led the Board to conclude that Mr Jervis was not entitled to dismiss Mr Skinner summarily also leads to the conclusion that Mr Skinner was not in repudiatory breach of the PSA and that Mr Jervis was not entitled to treat it as an end on the basis of any such breach. It further leads to the conclusion that it was Mr Jervis who was in repudiatory breach of the PSA in bringing it to an end on 10 January 2005. The Court of Appeal held that the PSA in effect came to an end on that date and that Mr Jervis is liable to Mr Skinner in damages in respect of the period after that. It is not now in dispute that the PSA did come to an end on 10 January or that, if (as has now been held) that was caused by Mr Jervis' repudiatory breach of the PSA, any damages suffered by Mr Skinner as a result should be assessed by the Registrar.

54. The remaining question arising out of the PSA is that stated in issue iv) in para 8 above, namely whether Mr Skinner was entitled to $250,000 under the PSA in respect of his net share of the profit for 2004 pursuant to an agreement made on 15 December 2004. The judge's conclusion on this issue are contained in his paras 133 and 134 as follows:

> "133. Victor Skinner during the trial testified that on or about the 15th of December, 2004, when having lunch at Club Caribe, he and Steve Jervis agreed that there would be a profit share payable in January 2005 and that the sum payable to him would have been $250,000.00. I accept Victor Skinner's evidence on this matter. Minutes of the meeting of 11th of January 2005 in relation thereto contradict the testimony of Steve Jervis thereon. He appeared later to concede the point, however. I hold that this sum was unconditionally acquired by Skinner before he was terminated on 11th of January, 2005. He had an accrued right to it.
>
> 134. This sum is to be paid to Mr Skinner as a sum due from [KST] under the said agreement made at lunch by Skinner and Jervis on 15th December, 2004."

It was of course open to the parties to make such an agreement, if only to avoid the expense of an assessment. However, it was submitted on behalf of Mr

Jervis that the judge was wrong on the evidence to hold that such an agreement had been reached.

55. The Court of Appeal did not focus on the judge's reasoning. So the Board has considered the evidence in particular detail. It is somewhat equivocal but the question is, as before, whether the judge was entitled to reach the conclusion he did. There was much common ground in the evidence of Mr Skinner and Mr Jervis on this issue. There was a discussion in September or early October 2004. Mr Skinner's evidence may be summarised in this way. He said in evidence in chief that Mr Jervis approached him and said that the sales and forecast were good and that there would a be profit share of which $250,000 would be Mr Skinner's and $750,000 would be for Mr Jervis. A little later he described the discussion at the December lunch. He referred to "the profit share we had agreed, or that Steve had suggested earlier in the year". He said he asked Mr Jervis if he could increase his profit share from $250,000 to $300,000. Mr Jervis said that it could be possible if it was restructured as a loan, although he did not explain how that would work. The only cross-examination to which the Board was referred was cross-examination about his $40,000 loan from Mr Jervis but his answers in both cross-examination and re-examination throw no light on what was agreed at the meeting.

56. In examination in chief Mr Jervis was asked about the discussion about profit share, which he thought was in September. He was asked if he remembered much about the original discussion and he said: "I had discussed that he had received $250,000 profit that year". He then referred to a later discussion in which Mr Skinner said that he would like to have a profit share of $300,000. A little later he was asked about the December lunch. He again said that Mr Skinner had asked for $300,000 as opposed to $250,000. He wanted to pay off his mortgage. Mr Jervis said that he suggested that if Mr Skinner wanted to take $300,000, it might be possible for him to take it in the form of a loan as a profit distribution. He was then asked whether they reached an agreement as to the profit share for 2004 and he said no.

57. In the opinion of the Board those answers must be taken in context. The context was that Mr Jervis had originally suggested a figure of $250,000. There was no suggestion from Mr Jervis that Mr Skinner's share would be less than $250,000. As the Board reads the evidence, the discussion thereafter proceeded on the assumption that his share would be at least that amount. There was some cross-examination as to the propriety of showing the whole or part of the profit as a loan, which does not seem to the Board to be directly relevant for present purposes. Later in the cross-examination Mr Jervis was asked directly a number of times whether he had offered Mr Skinner $250,000. He did not initially answer directly but ultimately said that the answer was no.

58. A passage from an affidavit sworn by Mr Skinner was then put to Mr Jervis. It was in these terms:

> "I have not been furnished with the financial statements for December 2004 and I have not been paid my share of profits for the year end 2004, although [Mr Jervis] and I had earlier agreed to a profit share payment of at least $250,000 would be made to me at the end of the financial year 2004".

He said that he had not agreed to that, although he did say that it would be reasonable to split $1 million and that he had so suggested to Mr Skinner. He said that Mr Skinner had asked for more and that they had not finalised their discussion. He said that he did not offer him $250,000.

59. The part of the discussion on 11 January 2005 (quoted from a note of the meeting at para 20 above) where Mr Jervis referred to "the $250,000 that was already offered to him last month" was put to him. He was asked whether the expression "already offered" accurately reflected what he would have said on 11 January 2005 and he said yes. A little later he accepted that there had been an earlier offer of $250,000.

60. The question is whether, in that state of the evidence, the judge was entitled to hold that the parties agreed a figure of £250,000 in December 2004. The case for Mr Jervis is that he was not because no binding agreement had been reached because Mr Skinner was holding out for more. Although the judge was entitled to find that Mr Jervis offered to pay $250,000, he was not entitled to find that that offer was accepted. The evidence showed that, far from accepting the offer, Mr Skinner made a counter-offer that he should receive $300,000 which was never accepted. As Mr Jervis put it in evidence, they had not finalised their discussion. It was further submitted on behalf of Mr Jervis that the figures looked somewhat different in December from what they had looked in September.

61. The case for Mr Skinner can be put thus. The fact of an agreement was evidenced in the affidavit quoted above, which the judge was entitled to accept. Moreover the discussion in December proceeded on the basis that Mr Skinner was entitled to at least $250,000 and that the only remaining issue between the parties was whether Mr Jervis would agree to more which he would not. The correct conclusion is that the parties agreed to Mr Skinner receiving at least $250,000. There was no agreement that he was entitled to any more and Mr Skinner does not say that he was. Indeed, as the Board understands it, Mr Skinner does not now seek any more.

62. The Board was at one time attracted by Mr Skinner's submissions. However, after a detailed analysis of the evidence, it has reached the conclusion that there was at no time a legally binding agreement that Mr Jervis would pay $250,000 whatever happened. As the Board reads the evidence put before it, the judge was wrong to say that Mr Skinner testified that at the December lunch he and Mr Jervis agreed that there would be a profit share payable in January 2005 and that the amount would be $250,000. Mr Skinner nowhere clearly stated in his oral evidence that there was such an agreement. The evidence of both witnesses was that the discussions were ongoing. In addition to discussion about the amount of the payment, they included discussion of the possibility of some, perhaps all, of the money being paid by some form of loan.

63. In para 133 the judge appears to treat this issue as one of credibility. He simply says that he accepts Mr Skinner's evidence on the matter. In support of his conclusion he refers to the minutes of the meeting of 11 January, which he says contradict Mr Jervis' evidence. He adds that Mr Jervis appeared later to concede the point. The Board entirely accepts that the judge was entitled to reject Mr Jervis' evidence in so far as it was contrary to the minutes. However, the point made at the meeting as evidenced by the minutes was that "the $250,000 … was already offered to him last month". The minutes do not suggest that the sum of $250,000 had been agreed in December. As stated in para 59 above, the point that Mr Jervis then conceded in cross-examination was that $250,000 had been offered. It was not that that sum had been agreed.

64. Thus, by contrast with the earlier issues where the questions for decision largely turned on the credibility of Mr Skinner and other witnesses, the resolution of this issue does not depend upon the credibility of the witnesses but upon what, on a fair view of the evidence, was agreed. The judge did not consider the point made that there was no binding agreement because the discussions were not complete. If he had done so, he would have concluded that the discussions were not complete and that there was no binding agreement that Mr Jervis would pay $250,000 in respect of Mr Skinner's share of net profits for 2004.

65. In these circumstances, the question raised in issue iv), namely whether Mr Skinner was entitled to $250,000 under the PSA in respect of his net share of the profit for 2004 pursuant to an agreement made on 15 December 2004, must be answered in the negative. It follows that the appeal must be allowed on this point. However, Mr Skinner is entitled to his net profit share for 2004. Whether he is entitled to that share as monies due or damages depends upon whether the share was due before the PSA came to an end. On either footing the quantum should be remitted to the Registrar for determination.

CONCLUSION

66. For these reasons the Board will humbly advise Her Majesty that the appeal be dismissed on all issues except issue iv) in para 8, in respect of which the appeal be allowed. The parties should make submissions in writing as to the precise form of order and as to costs within 21 days of the judgment being given.