

INDUSTRIAL COURT OF MALAYSIA

CASE NO. 25/4–875/05

BETWEEN

ENCIK WONG KING LAI

AND

BERG & SCHMIDT (M) SDN. BHD.

AWARD NO : 1521 OF 2010

BEFORE : **YA DATO' JALALDIN BIN HJ. HUSSAIN
CHAIRMAN (Sitting Alone)**

VENUE : Industrial Court, Kuala Lumpur.

DATE OF REFERENCE : 20 May 2005.

DATES OF MENTION : 23 August 2005, 20 October 2005, 29 May
2006, 23 January 2007, 9 February 2007,
24 September 2007 and 19 Mac 2008.

DATES OF HEARING : 10 December 2007, 25 March 2008, 22
April 2008, 23 May 2008, 6 August 2008, 24
October 2008, 17 November 2008, 18
November 2008, 3 December 2008, 6
January 2009, 27 February 2009, 23 March
2009, 20 July 2009, 21 July 2009, 11
November 2009, 12 November 2009 and 13
November 2009.

**DATES OF RECEIPT OF
SUBMISSIONS** : By the Claimant – 31 march 2010.

By the Company – 1 July 2010.

Reply by Claimant – 1 September 2010.

REPRESENTATION : Encik Mahadi Muhammad of Messrs.
Mahadi Redzuan & Co., counsel for the
Claimant.

Mr. Joseph Ting of Messrs. Joseph Ting &
Co., counsel for the Company.

REFERENCE:

This is a reference under Section 20(3) of the Industrial Relation Act 1967 (hereinafter referred to as IRA 1967) arising out of the dismissal of **Encik Wong King Lai** (hereinafter called "the Claimant") by **Berg & Schmidt (M) Sdn. Bhd.** (hereinafter referred to as "the Company").

The matter was referred to the Industrial Court through a reference ordered by the Honourable Minister of Human Resources dated 20 May 2005. The matter was first mentioned in Court 25 on 23 August 2005 before the then Chairman the late YA Dato' Mohamad K. Abdul Rahman. I took over the Court on 16 August 2006. Hearing proceeded on 10 December 2007 and final submission was filed on 1 September 2010.

AWARD

Brief Facts:

The Claimant was employed as a Sales Manager of the Company as of 1 June 2001 with a monthly salary of RM4,400.00.

The Claimant was answerable to the Managing Director of the Company one, Mr. H. V. Bhawe.

In the course of his employment with the Company, the Claimant alleged that the said Mr. H. V. Bhawe was supporting the Company's competitor in China.

The Claimant did inform the Company's Headquarter in Hamburg of his problems with Mr. Bhawe and his confrontation as 16 October 2003 at a Company's meeting in Bali Island, Indonesia. The Claimant had on 16 October 2003 requested Mr. Bhawe to stop supporting the Company's competitor in China. The letters addressed to Berg & Schmidt Headquarter in Hamburg, Germany were addressed to Miss Helga Bieleberg as per CLB pages 59 to 62 (dated 27 October 2003) and to Mr. Adrea Reith as per COB pages 63 to 68 dated 11 November 2003.

On 22 December 2003, the Claimant alleged that he was called by Mr. Bhawe for a meeting with one Dato' T. Y. Lim, the Chairman of the Company. The Claimant alleged that he was forced to resign. Dato' T. Y. Lim told the Claimant, "if you don't resign by yourself, we will kick you out".

The Company denied that Dato' T. Y. Lim was a Director of the Company or that such conversation took place.

The Claimant further averred that on 30 December 2003, the Claimant was instructed to go to Singapore office where he met Mr. Bhawe who then asked him to sign a prepared resignation letter dated 30 December 2003.

The Claimant alleged that the Company then immediately accepted his resignation on 30 December 2003.

The Claimant thus claimed that he was forced to resign from the Company initially on 22 December 2003 and ultimately on 30 December 2003. The Claimant contended that the forced resignation was unlawful and an unfair dismissal.

The Issue:

The issue before the Court is whether the Company's act or conduct amounted to a constructive dismissal. Did the Claimant in fact voluntarily resign from his employment or was he in truth dismissed?

The Law:

The law on constructive dismissal has been clearly stated in the leading case of *Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn. Bhd.* [1988] 1 CLJ 45: [1988] 1 CLJ (Rep) 298. In the words of Salleh Abas LP:-

“The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer ...

We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus, it would be dismissal if an employer is guilty of a breach, which goes to the root of the contract, or if he has evinced an intention no longer to be bound by it. In such situations, the

employee is entitled to regard the contract as terminated and himself dismissed”.

In the classic case of *Western Excavating (ECC) Ltd. v. Sharp* [1978] IRLR 27 Lord Denning made this observation:-

“An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of contract.

The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover the employee must make up his mind soon after the conduct of which he complains.

If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged”.

In *Colgate Palmolive (M) Sdn. Bhd. v. Yap Kok Foong* [1998] 2 ILR 965 (Award No. 368 of 1998) it was held as follows:-

“In a Section 20 reference, workman's complaint consists of two elements: *firstly*, that he has been dismissed, and *secondly* that such dismissal was without just cause or excuse. It is upon these two elements being

established that the workman can claim his relief, to wit, an order for reinstatement, which may be granted or not at the discretion of the Industrial Court. As to the *first element*, industrial jurisprudence as developed in the course of industrial adjudication readily recognises that *any act which has the effect of bringing the employment contract to an end is a 'dismissal' within the meaning of Section 20*. The terminology used and the means resorted to by an employer are of little significance; thus, contractual terminations, **constructive dismissals**, non-renewals of contract, forced resignations, retrenchments and retirements are all species of the same genus, which is 'dismissal'. [emphasis added]"

In the case of *Southern Bank Bhd. v. Ng Keng Lian & Anor [2002] 2 CLJ 514*, it was submitted to the Industrial Court that as the employee had not informed her employer that she considered herself to be constructively dismissed that the Industrial Court would not be seized with jurisdiction to adjudicate the claim of constructive dismissal as the representation was premature. The Industrial Court, however, decided otherwise, and found that the claim was not premature. As to this approach the High Court in that case made these observations:-

“If the Industrial Court is correct in its view, then any employee can walk out of employment for whatever reasons (e.g. for a better job) without first informing her employer or giving notice to her employer and then when things do not go the employee's way, the employee can say that he or she was in fact constructively dismissed by the employer. This would be an abuse of a claim of constructive dismissal. The High Court then held that the decision of the

Industrial Court on the issue is also incompatible with the contract test in constructive dismissal cases as enunciated in the leading Supreme Court case of *Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn. Bhd. [1988] 1 CLJ 45: [1988] 1 CLJ (Rep) 298* ”.

The High Court held at page 532:-

“As the common law contract test is applicable to all cases of constructive dismissal, it was incumbent on the Industrial Court to apply the test for the purposes of determining the issue before it. In doing so, the approach that the Industrial Court should have taken is to ask itself whether under the common law contract test there was a duty on the employee to inform her employer that she deemed herself as having been constructively dismissed before she made the representation”.

Burden Of Proof:

The burden is on the employee who complains of constructive dismissal to prove the same. The law pertaining to constructive dismissal based on the contract test has been propounded, followed and restated in innumerable superior court judgments and Industrial Court awards. In *Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn. Bhd. [1988] 1 CLJ 45: [1988] 1 CLJ (Rep) 298*, the Supreme Court laid down the doctrine of constructive dismissal in the local context at page 95 in this manner:-

“The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as

affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. ...

When the Industrial Court is dealing with a reference under Section 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concept to the U.K. legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from paragraph (c) of Section 55(2) of the U.K. Protection of Employment Act 1978. Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word "dismissal" in our Section 20. We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* and *Donovan v. Invicta Airways Ltd.*)”.

In *Western Excavating (E.C.C.) Ltd. v. Sharp* [1978] 1 Q.B. 761 which was adopted in *Wong Chee Hong*, Lord Denning M.R. illuminated the contract test at page 769:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

Evidence, Evaluation And Findings:

Evidence – The Claimant

The Claimant called three witness. The first witness, CLW1 was Encik Mohamed Zambri, the Claimant's neighbour. CLW1 testified that the Claimant informed him that the Claimant had been forced to resign in the last week of December. According to CLW1, the Claimant looked very sad and frustrated due to the said forced resignation.

Under cross examination, CLW1 said the Claimant did not tell him that the Claimant was paid six months salary when he resigned. CLW1, however, said that the

Claimant did tell him the overall benefits the Company gave to the Claimant amounted to RM100,000.00 due to the resignation.

CLW1 too agreed that COB pages 12 and 13 were not written by someone who is frustrated. CLW1 too said he was not aware of the Claimant's business dealings nor did the Claimant informed him that the Claimant was to set up business in Shanghai.

Under re examination, CLW1 said he had never seen COB page 12 before and did not know or understood its contents. When asked by the Court based the fact that the Claimant had received close to RM100,000.00 pay and benefits and looking at COB page 12 and 13 could the Claimant be said to be play acting? CLW1 said, yes the Claimant could be play acting. CLW1 too agreed if the Claimant were to receive the above said amount he would not believe that the Claimant was forced to resign

CLW2 was the Claimant's friend of ten years. He testified that the Claimant phoned him in mid December 2003 and told him that the Claimant was forced to resign. The Claimant sound sad, depressed and frustrated.

CLW2 under cross examination said the Claimant did not tell him of the benefits the Claimant got when he resigned. When referred to COB pages 12 and 13, CLW2 said that the letters were written in March 2004 and the Claimant sound confident. CLW2 too said the Claimant did not tell him that the Claimant was starting a business in Shanghai. CLW2 too agreed that if it was true that the Claimant received RM100,000.00 benefits, then "maybe the Claimant is not forced to resign".

The Claimant in his Witness Statement, CLWS-3 (A) said:-

Q28 : Please tell the Court what had transpired during the meeting at Bali?

A : On 16.10.2003, I reached Bali and during the meeting which was held on the same day at Bali, I had openly urged Mr. H.V. Bhawe to stop under-cutting the Company's market in China and also to immediately stop his support to the Company's competitor in China.

Q29 : What was Mr. Bhawe's reaction to your statement which had been made against him during the meeting?

A : Mr. Bhawe admitted during the meeting to his co-operation with the Company's competitor and he said he will stop supporting him.

Q30 : Please refer to pages 59 – 62 CLBD. What document is this?

A : This is a copy of a fax which I sent to the Company's headquarters at Germany on 27.10.2003 where I had complained to them about the under-cutting strategy and/or action which was done by Mr. Bhawe to the Company's market in China and to immediately stop his support and/or co-operation with the Company's competitor in China.

Q31 : Why did you send this document to Germany?

A : I sent this document because I could not trust Mr. Bhawe. After the Company's meeting at Bali, I was also told by one of the

Company's and/or BSA's distributor that Mr. Bhawe had made a negative remark against me in the market.

Q32 : Please refer to pages 63 – 68 CLBD. What document is this?

A : This a copy of the fax which I had sent to Mr. Reith the Managing Director in Germany on 11.11.2003 following my earlier fax which I had sent on 27.10.2003. In this document, I had also mentioned about the under-cutting strategy and/or action which was done by Mr. Bhawe to the Company's market in China and also to ask the headquarter in Germany to immediately stop his support and/or co-operation with the Germany's competitor in China.

Q33 : Please tell this Honourable Court what happened on 22.12.2003?

A : On 22.12.2003, I was called by Mr. H. V. Bhawe for a meeting with one Dato' T. Y. Lim, the Chairman for the Company at Shah Alam, Selangor. During the said meeting, I was told by Dato' T. Y. Lim and Mr. H. V. Bhawe that I had made a 'mistake' by reporting directly to the Germany headquarter. I was then forced by the Company to resign from my post and to my surprise, Dato' T. Y. Lim had uttered the words, *"If you do not resigned by yourself, we will kick you out!"*. The Company also promised that if I resigned, it could always give strong recommendations and referrals to any of my prospective future employers. In addition, the Company had also promised that if I

resigned from my post, the Company would appoint me as the distributor for the Company's products. Dato' T. Y. Lim had also told me that the Company can dismiss me based on the term of my contract of employment. Immediately after the meeting, Mr. H. V. Bhawe prepared the 'letter of resignation' by himself and urged me to sign. I had not signed the 'letter of resignation' as yet. However, after the said meeting, Mr. H. V. Bhawe had immediately held a Company's meeting and announced my so called 'resignation'.

Q35 : Please tell the Court what happened on 29.12.2003 and/or 30.12.2003.

A : I was instructed by the Company to be in the Company's office in Singapore either on 29.12.2003 or 30.12.2003. I was then asked and/or instructed by Mr. H. V. Bhawe to sign the 'letter of resignation' dated 30.12.2003 with a 6 months notice. Mr. H. V. Bhawe printed out the said 'letter of resignation' from his personal computer as I did not bring the copy that had been given to me earlier by him at Shah Alam on 22.12.2003.

Q36 : Please look at page 71 CLBD. What document is this?

A : This a copy of the 'letter of resignation' dated 30.12.2003 which was printed out by Mr. H. V. Bhawe from his personal computer. Dato'. T. Y. Lim's name was also mentioned at the 1st paragraph of the said letter.

Q37 : Did you sign the letter of resignation voluntarily?

A : No. I did not voluntarily signed the resignation letter dated 30.12.2003. It was signed while I was in a state of confusion, was very upset emotionally and depressed and also not mentally free due to the threat and/or coercion and/or persuasion by the Company.

Q38 : Please look at page 72 CLBD. What document is this?

A : This is the letter of acceptance of resignation by the Company dated 30.12.2003 which was signed by Mr. H. V. Bhawe who had accepted my forced resignation with immediate effect despite the 6 months notice. The Company also had asked me to return all its properties immediately.

Q39 : Please look at page 79 CLBD. What document is this?

A : This is also a letter of acceptance of resignation by the Company dated 30.12.2003 which was signed by Mr. Bhawe who accepted my forced resignation with immediate effect despite the 6 months notice. In this letter, the Company said that my 6 months salaries will be paid into my account. The Company also had asked me to return all its properties immediately.

Q40 : Please look at page 70 CLBD. What document is this?

A : This a copy of the relevant page of my passport which had shown that I had traveled to Singapore on 28.12.2003 as I was instructed by the Company to be in the Company's office in

Singapore either on 29.12.2003 or 30.12.2003 to meet Mr. Bhawe.

Q41 : Please look at page 20 CLBD. What document is this?

A : This is the cheque voucher dated 12.1.2004 for a sum of S\$12,879.00 being my 6 months salaries paid by BSA in Singapore when the BSA and the Company accepted my forced resignation with immediate effect.

Q42 : Please look at page 21 CLBD. What document is this?

A : This is the cheque voucher dated 13.1.2004 for a sum of RM20,802.00 being my 6 months salaries paid by the Company when the BSA and the Company accepted my forced resignation with immediate effect. This payment had been made after deducting my income tax and my EPF.

In his Additional Witness Statement, CLWS-3 (B), the Claimant said:-

Q1 : Please look at page 157 of the Claimant's Bundle of Documents Volume III (CLBD Vol-III). What document is this?

A : This is a copy of the email from Mr. Bhawe dated 12.1.2004 to one Miss Angeline Ngoi who is one of the Company's employee which had unilaterally confirmed the Company's term of settlement of my termination. It can be read from paragraph 3 of the email that the Company had confirmed that my 3rd quarter commissions for year 2003 was from RM12,888.89.

- Q2 : Please look at page 158 of the Claimant's Bundle of Documents Volume III (CLBD Vol-III). What document is this?
- A : This is a copy of the email from Mr. Bhawe dated 24.2.2003 to me which had confirmed that I was responsible for the Company's markets in Malaysia, China and Taiwan.
- Q3 : Please look at page 159 of the Claimant's Bundle of Documents Volume III (CLBD Vol-III). What document is this?
- A : On the top of page 159, this a copy of the email from Mr. Bhawe dated 6.10.2003 to me which had confirmed that there will be a market presentation by myself during the Company's meeting in Bali.
- Q4 : Please look at page 160 of the Claimant's Bundle of Documents Volume III (CLBD Vol-III). What document is this?
- A : This is a copy of the document which was signed by me and Mr. Bhawe which had confirmed in principle that I was an employee for both the Company and Berg & Schmidt Asia Pte. Ltd. And that I was earning an income from both of the entities.
- Q5 : Please look at page 161 of the Claimant's Bundle of Documents Volume III (CLBD Vol-III). What document is this?
- A : This is a copy of my account statement for the month of July 2003 which showed that on 1.7.2003 an amount of S\$5,730.61 was paid by the Company for my 1st quarter commissions for year 2003 for the Malaysian market. In the Malaysian Ringgit currency, this was equivalent to RM12,557.72.

Q6 : Please look at page 162 of the Claimant's Bundle of Documents Volume III (CLBD Vol-III). What document is this?

A : This is a copy of the Company's payment voucher dated 13.1.2004 which was showed that an amount of RM12,888.89 was paid by the Company to me as my 3rd quarter commissions for year 2003 for the Malaysia markets.

Q7 : Please look at page 163 of the Claimant's Bundle of Documents Volume III (CLBD Vol-III). What document is this?

A : This is a copy of my account statement for February 2004. From this statement, it can be found that the Company had paid me S\$15,009.05 on 12.2.2004 being my sales commissions for the 4th quarter of 2003 for the other foreign markets.

In answer to Supplementary Questions in Court at pages 20 to 23 of the Notes of Proceeding dated 10 December 2007, the Claimant said:-

Q : Question 25?

A : I told Mr. Bhawe my daughter was sick. He told me, it was my personal matter and nothing to do with Company's business. This is the second time Bhawe used "personal matter" which was very rude to an employee. The first time was in August 2000 when I applied for annual leave to attend the funeral of my deceased father. He said it was a personal matter. He said, "I give you three days". I applied for annual leave, he said, "your father passed away had nothing to do with the Company's

business, it was your personal matter”. So when he used it “personal matter”, a second time, it lead to a bigger conflict which lead to the forced resignation.

Q : Question 27 CLB-1 page 107?

A : This is a formal annual meeting in Bali and not a holiday as claimed by Mr. Bhawe.

Q : Question 36 CLB-1 page 71?

A : This resignation letter prepared by Mr. Bhawe, including the name of Dato' TY Lim inside.

Q : Question 38?

A : I remember when I went to Company on 31st December 2003 at Shah Alam, I was urged by Miss Shanta to leave the Company immediately or she will call the guard to kick me out. When I went back to return my Company's car and computer, I had to get a pass.

Q : Question 45 pages 136 to 154 CLB-2?

A : This is the audit statement of my Company. I was suddenly forced out and not having time to prepare for my Company, that is why my Company had no product to sell and thus Company made a loss.

Q : Question 48, refer to CLB1 page 88?

A : This is regarding about my application for a new job in a new company. I was already a Deputy General Manager in Berg & Schmidt Malaysia with a high pay, why should I apply for a new

job with a lower pay? It showed that I was forced out and had to do something to feed my family. I would be crazy to let go of a job with a higher pay at the age nearly 50 to go a job with lower pay, unless I was to forced to resign.

Q : Question 56 CLB-1 page 76?

A : Company said they paid me compensation if I resign voluntarily. Why need compensation? This showed clearly Company kicked me out and I don't resign by myself.

In this letter, last para Bhawe also invited me to buy and sell Company's product. This morning, the Company produced COB pages 12 and 13, it is a response to Mr. Bhawe's invitation to me to sell Company's product. Bhawe invited me to sell product so I responded by the two said letters as per COB pages 12 and 13 but Bhawe rejected it.

Q : Question 57, CLB-1 pages 77 and 78?

A : Company informed customer of my termination only by BSA (Berg & Schmidt Asia). If they said they were a separate body, why no notice from BSM (Berg & Schmidt Malaysia)?

Q : Question 58, CLB-1 pages 73 to 75 was related to pages 77 to 78.

A : This is a draft copy by BSA. This copy is different from the fair copy which can be found at pages 77 and 78.

The difference is at page 73, last para “our association with him shall continue till 30 June 2004 afterward he should act as canvassing agent for Berg & Schmidt products”.

These words were not present in the fair copy at pages 77 to 78 CLB-1. From page 75, the Company also cc the letter to Berg & Schmidt Hamburg to Mr. Andreas Reith but in fair copy it was left out.

This shows Bhawe tried to fool me and pleased me with the word “canvassing agent” and then cc the copy to Germany. He made me feel that Germany had agreed with the forced resignation of me so Mr. Bhawe, coaxed me with this draft.

Q : Question 59 CLB page 108?

A : Photograph, last row first left is Mr. James Ling, he was the step son of Dato' TY Lim, so they alleged Dato' TY Lim, was Chairman of PAOS which is a supplier of Berg & Schmidt and not Chairman of Berg & Schmidt Malaysia. Do you think that a son of the supplier was also the employee of the Company? If Dato' TY Lim was not the Chairman, how can his step son be working with Berg & Schmidt?

Under cross examination, the Claimant said that he was claiming against Berg & Schimdt (M) Sdn. Bhd. The Claimant said he was transferred from the Singapore office to the Malaysian office while still being employed by Berg & Schmidt (A) Ltd.

The Claimant's scope of job for B & S (A) was to develop foreign market and for B & S (M) was in charge of and developing Malaysian market.

Document COB pages 6 and 7 and Form 24, however, shows that B & S (A) and B & S (M) were two separate entities but the Claimant disputed them. The following documents CLB-1 pages 4, 7 to 9 and 55 were shown to the Claimant and the Claimant confirmed that CLB-1 pages 10, 27, 55 and 77 were all not order forms. At page 56 CLB-1, the Claimant signed as Deputy General Manager for B & S (A). The above said documents were communication between B & S (M) with the foreign market.

At pages 10 to 16 of the Notes of Proceeding dated 22 April 2008, the Claimant said:-

Q : Refer to Question 28, is Mr. Bhawe your boss?

A : Yes.

Q : Question 29, I put it to you, you are out of your place as a subordinate to confront your boss with unsubstantiated allegation?

A : I don't understand the question (counsel explains).

Definitely no, I did not. Criticizes my boss, I only did the presentation about the facts and showed the facts.

Q : Look at Question 28, this is not what you said?

A : What I said in answer to Question 28 was the facts and the truth and truth with proof.

Q : Do you agree that Company can sell to anybody that Company wanted to sell to?

A : No. They have to respect me and the distributors. The distributors were the people who put in the effort and investment to help the Company to develop the market, so we have to respect them.

This was the trust and rule in the business practice but Bhawe was not practising this. If they can sell to anybody then, I also can sell to anybody like my friend and let my friend make a profit but this was wrong, we have to ensure the Company made a profit. The rules have to be followed so that the clients or market will have confidence with the Company.

Q : Is Mr. Bhawe working for you or you working for Bhawe?

A : I am working for Berg & Schmidt.

Q : Is Mr. Bhawe your boss?

A : Yes.

Q : Is Mr. Bhawe a Director of Company?

A : Yes.

Q : Mr. Bhawe a Director of BSA or BSM?

A : Yes.

Q : Does the Board of Director have a right to decide what a Company wants to do?

A : It depends on what matter.

- Q : If Board of Directors cannot make a decision for Company who can?
- A : The Company had appointed me and made a decision to employ me and let me developed the market. The Company had made a decision to allow me to do the marketing so why Bhawe needed to interfere?
- Q : I put it to you, Company had a right to develop the market through any other way and not necessarily through you?
- A : No, unless they terminate me first. They appointed me and let me develop the market then they cannot simply take it away from me and if they do so, it was like terminating me.
- Q : At first time when you resigned from Company, were you still handling the market you develop for BSA?
- A : Yes, up to today I have not resign.
- Q : Up till the day you left BSA you were still handling the market you developed?
- A : Yes.
- Q : No incident of people from BSA taking away market from you?
- A : Mr. Bhawe had partly taken my market (China market) by giving to Omega Nutrition.
- Q : Which of your customer have you lost and given to Omega Nutrition?
- A : Shanghai Dairy Farm and smaller companies under Shanghai Dairy Farm as distributors.

- Q : When you said take away from you and gave to Omega Nutrition?
- A : These markets are like this. This Shanghai Dairy Farm and distributors were my distributors in China. Mr. Bhawe took away these markets and gave it to Omega Nutrition.
- Q : What do you mean by taking away?
- A : The market was developed by me and Shanghai Dairy Farm as BSA distributor in China, but Mr. Bhawe sold something to Omega Nutrition and Omega sold to Dairy Farm's customers. Mr. Bhawe supported Omega Nutrition to sell to the customers of BSA distributor in Shanghai, China.
- Q : Did Mr. Bhawe tell you to stop your dealing with Shanghai Dairy Farm?
- A : No, but Bhawe selling cheaper to Omega Nutrition. This Omega has a cheaper price to attach Shanghai Dairy Farm's market.
- Q : BSA was free to sell to any party even though the customer may not be from you?
- A : No.
- Q : I put it to you, BSA as a business entity was free to do business with any party without asking you first?
- A : No, a healthy business organisation cannot practice in this way.
- Q : I put it to you, Mr. Bhawe did not take Shanghai market from you?
- A : No, he did.

- Q : Refer to pages 1 to 3 CLB-1, did it say you have exclusive rights to develop China market?
- A : No, it did not mention any market. It was in other document.
- Q : Did Company give you exclusive rights to develop market in Asia region? Company never give you exclusive rights to develop any region?
- A : Not in pages 1 to 3, but in other letters. The Company did give allocation for me to develop China and Taiwan markets.
- Court : Anybody else allocated?
- A : Only me. See CLB-2 page 156 (South East Asia market). See CLB-3 page 158 (for Malaysia, Taiwan, China and some other territories after completion of reorganisation).
- Q : Any exclusive rights?
- A : No such words, but everybody understood that if the market was allocated to you, it was under your rights to develop and monitor the market and if Company wants to take back the market then, they will have to make arrangement and get the mutual consent from the particular sales and not simply interfere or attack the market secretly without telling the person in charge.
- Q : How many other Manager or Develop General Manager in charge of sales in BSA?
- A : Only three. Myself, Bhawe and another Germanese.
Bhawe – Indian market because he was from India.

Germanese – Filipina and later took over USA market from me after I developed it and also Thailand.

Ravindra – Sri Lanka (Colombo market). I developed first and Ravindra took over.

James – We did not employ him to be in charge of any market for BSA. He was employed by Dato' TY Lim to be in charge of certain markets.

Q : Refer to Question 29. I put it to you that Mr. Bhawe admitted to your baseless allegation?

A : No, it was 100% truth.

Q : Refer to Questions 30 and 32 CLWS-3(A). You referred to pages 59 to 62 CLB-1? I put it to you, all your allegations were false?

A : No, all these were true.

Q : After you faxed document to Germany, did Germany take any action against Bhawe?

A : They queried Mr. Bhawe. So Mr. Bhawe became very angry after he came back from Germany so he immediately invited me to have a meeting with Dato' TY Lim in PAOS office – PAOS Bhd. (a soap company).

Q : After the query, did they take any action against Mr. Bhawe?

A : I don't know.

Q : Is Mr. Bhawe still holding same position?

A : Till the time I was kicked out, Mr. Bhawe was till the MD.

Q : I put it to you, no action taken against Bhawe?

A : Yes, up to the time I was kicked out. What happen later, I don't know.

Q : Refer to COB page 3, Form 49. Bhawe still a Director?

A : Yes, Harshawardhan Vaman Bhawe.

Q : Refer to page 4 COB, Form 49 continuation, date?

A : 27 July 2004.

Q : Even in 2004, Mr. Bhawe was still a Director of Company?

A : Yes.

Q : Was Mr. Bhawe MD?

A : Yes, when I was with the Company, Mr. Bhawe was MD for BSA and BSM.

Q : I put it to you no action taken against Bhawe because your allegation untrue and it is a lie?

A : No, I totally cannot agree.

Q : I put to you, you made up allegation to damage Mr. Bhawe?

A : No, I got all the proof and so it was not just an allegation.

Q : I put it to you as a subordinate, it was wrong for you to do, what you did?

A : No, because I do it for the benefit of the Company as I am working for Company and not for Bhawe.

Q : I put it to you, what you did amounts to in subordination? Yes or no?

- A : No and I took it as a serious cause because if the misconduct of Mr. Bhawe and I felt it was my duty.
- Q : Refer to Question 31, you claimed Mr. Bhawe made a negative remark to whom?
- A : Wesson Trading Sdn. Bhd., Mr. Chai Zent Fah.
- Q : I put it to you, you made it up yourself?
- A : No. Chai was a friend of Mr. Bhawe.
- Q : Refer to Question 33. I put it to you, the meeting did not happen as what you said?
- A : No.
- Q : I put it to you, you wanted to resign from BSM and BSA in order to start your own business?
- A : No.
- Q : I put it to you, Company out of kindness allow you to leave early and pay your six months salary without requiring you to work for it?
- A : No, it was not a kindness.

At page 2 and 3 of the Notes of Proceeding dated 23 May 2008, the Claimant said:-

- Q : The outstanding commission were all paid?
- A : Yes.
- Q : The only outstanding amount was the five months salary?
- A : Yes.
- Q : Can you tell the Court the date of document CO-1?

A : 6th February 2004.

Q : Refer to COB page 22, you said item number 4, when you wanted it to be paid by?

A : 15th March 2004.

Q : From CO-1, the Company had paid you before the time frame?

A : Yes.

Q : Can you tell the Court when did you make the representation at Jabatan Perhubungan Perusahaan?

A : I cannot remember the date but around February or March 2004.

Q : See page 164 CLB-3, date letter issued?

A : 11th March 2004.

Q : Therefore, your representation was before 11th March 2004?

A : Yes.

Q : You had through page 22 COB asked for payment as stated despite asking for these payments you reported before 15th March 2004 to Jabatan Perhubungan Perusahaan (JPP). You agree?

A : Yes.

Q : At page 22 COB-1, you said, "I accept your final proposal with following payment ... "?

A : Yes, I said that.

Q : You actually agreed with Company on certain payment and you went back on your own and reported to JPP?

A : No.

- Court : When did you return the Company's car and lap top?
- A : I cannot remember.
- Q : I put it to you that you have resigned from the Company and went back to ask for more payment?
- A : No.
- Q : I put to you out of goodwill and your service for quite sometime, the Company agreed to pay you an additional of five months?
- A : I am not sure but Company did say they will pay extra five months. I am not sure whether Company really wanted to pay or not.
- Q : Refer to page 21 COB, did Company put in writing they were going to pay you five months out of goodwill?
- A : Yes.
- Q : Even though you accept Company proposal at page 21 COB as per page 22 COB, you still went ahead and complained to JPP and took action against Company? Yes or no?
- A : Yes.
- Q : I put it to you because you have started the action that is why Company cannot pay you the five months salary? Yes or no?
- A : No.

At pages 3 to 6 of the Notes of Proceeding dated 6 August 2008, the Claimant said:-

- Q : I put it to you, your resignation was voluntarily and you put it in with your own free will and no other factor has influenced you?

- A : No.
- Q : Refer to Question 54, I put it to you, Company was paying you extra because the Company was being nice to you and payment out of goodwill because you have worked for them for four or five years already?
- A : No.
- Q : I put it to you that the five months payment was not because you were forced to resign?
- A : No.
- Q : Refer to Question 55 and page 84 CLB-1. Why do you sent email as per page 84 when you have agreed with the five months payment?
- A : It was because I was forced to resign and not voluntarily resign.
- Q : Why after agreeing to payment of five months, you wrote this letter?
- A : I wrote this letter because I was not happy because Mr. Bhawe was lying through Miss Santha that I resigned voluntarily at the meeting with Perkeso.
- Q : Refer to page 22 COB, was it not your letter saying you agreed to the proposal of accepting the five months?
- A : At that time, yes, because I was confused and misled by Mr. Bhawe and Dato' TY Lim.
- Q : Refer to Question 56 CLWS-3(A), have you ever signed a Canvassing Agent agreement with the Company?

A : No.

Q : Have you ever negotiated the terms of the Canvassing Agent?

A : Yes.

Q : With whom?

A : With Mr. Bhawe in Singapore BSS office.

Q : What kind of terms you have negotiated? i.e. Board terms?

A : I cannot remember because Mr. Bhawe was not serious on that so I did not follow up on the agreement.

Q : Isn't it true then that there was no negotiation?

A : It also can be said like that.

Q : Is it true that there was then no agreement between you and Company?

A : Yes.

Q : I put it to you that the Company was not obliged to appoint you as its Canvassing Agent in the terms dictated by you?

A : No.

Q : I put it to you, just like any business dealing, if you had been appointed, it will to be based mutually agree? Agree?

A : Yes.

Q : I put it to you, at the end you were not appointed Canvassing Agent partly because the terms and conditions cannot be agreed upon?

A : No.

- Q : I also put it to you that you are not appointed Canvassing Agent because you made an appeal to Perkeso?
- A : No.
- Q : When was expiry of the six months notice?
- A : 30th June 2004.
- Q : When was the time you are allowed to be a Canvassing Agent, if you were one?
- A : The Company actually honestly and sincerely did not fix a time. In the real situation no such time, it was just an empty promise.
- Q : Refer to page 71 CLB-1 second para, was there a time fixed or not?
- A : Yes.
- Q : When do you make the representation to Perkeso?
- A : 24 February 2004.
- Q : Expiry was 30 June 2004 to become a Canvassing Agent as per page 21 CLB-1. Why don't wait until 30 June 2004, why report on 24 February 2004?
- A : Because I am forced to resign.
- Q : I put it to you, you were lying when you answered, no, to the question I asked you that you were not made the Canvassing Agent because you made representation to Perkeso even before the expiry of the six months period?
- A : No, I am not lying.

- Q : Question 57, CLWS-3(A) refers to pages 77 and 78 CLB-1. You said this was the copy of the fax dated 5th January 2004 informing of your forced resignation. Where does it state your forced resignation?
- A : It does not state "forced resignation".
- Q : As Marketing Manager, do you have authority to take purchase order from Company's customers?
- A : Yes.
- Q : If you took an order for the Company and purchased it for a certain price and certain amount, the Company was bound by what you accept?
- A : Yes.
- Q : After you resigned from Company and became as a Manager, you have the authority to bind the Company and therefore, it was necessary for the Company to inform all its business associates as soon as you resign. Isn't it true?
- A : Yes.
- Q : I put it to you, then there was nothing wrong for the Company to issue pages 77 and 78 CLB-1 about your resignation?
- A : Yes.
- Q : Was your resignation letter accepted by Company?
- A : Yes by BSA only.

On 24 October 2008, the Company produced COB (A) and the Claimant was asked at page 2 of the Notes of Proceeding on the same date as follows:-

Q : Was Dato' TY Lim the Chairman of BSA as per the documents?

A : No.

Q : Refer to pages 3 to 7 COB, who were the Directors of BSM?

A : Andres Reith, Bhawe, Pang Hee Kin, Teoh Cheng Chuan and Wywiol.

Q : Look at pages 6 and 7 COB, who were the shareholders of BSM?

A : Teoh Cheng Chuan and Pang Hee Kin and Berg and Schmidt Asia.

Q : Do you agree that shareholders of BSA different from BSM?

A : Yes, from the documents.

Q : Dato' TY Lim's name as Chairman in any of the documents (BSA and BSM)?

A : No.

On 17 November 2008, the Claimant was referred to the distributorship agreement as per CLB-1 page 11 and under cross examination agreed at page 2 as follows:-

Q : Refer to CLB-1 page 11, is it addressed to you? Yes or no?

A : No.

Q : The exclusive distribution agreement as per page 11 CLB-1 addressed to whom?

A : To my Shanghai distributor.

Q : Did that document (page 11 CLB-1) say that BSA gave you (Claimant) the whole China market exclusively? Yes or no?

A : No, it does not give me. I have different distributor in China.

Q : I put it to you that only the customers developed by you in China were exclusively yours but not the China market itself? Do you agree?

A : No.

Q : I put it to you that the email was clear that BSA have the discretion to add more territories or take away the territories from you? Do you agree?

A : No.

Q : I put it to you that the email clearly said page 158 CLB-3, clearly gave BSA the power to review your target on a quarterly basis?

A : No.

Q : Refer to Item 1 page 158 CLB-3. Can target be reviewed quarterly?

A : Yes, it can be adding more or reduce. That should be the meaning, there may be.

At page 6 of the same Notes, the Claimant said:-

Q : Do you agree that the Board of Directors of the Company were the ones who will decide the business strategy and philosophy of the Company?

A : No.

Q : Do you agree that as an employee of the Company, you have to follow the business strategy and philosophy and direction of Company as set by the Directors of the Company?

A : I agree.

Q : I put it to you that what you are protesting i.e. BSA supplying to Allgreen and Omega Nutrition was actually going against the business strategy and philosophy of BSA as set by its Directors?

A : No.

Q : Do you know that by supplying to competitors, BSA got to collect data on the market which BSA would not otherwise have collected?

A : Of course no. This is a very funny practice.

Q : Do you know by supplying to competitors, BSA was also able to enlarge its market share of the sale of its products?

A : No, I only know that this practice will enlarge the market of Bhawe himself or to Bhawe own market in China.

At pages 8 to 9, the Claimant said:-

Q : I put it to you, you have no proof that Mr. Bhawe was getting benefit from BSA's sale from anybody or party?

A : No.

Q : I put it to you that you have no access or privy to the executive's decisions made by the Board of Directors of BSA and the

Company and therefore, from your own opinion which is wrong and jump to your own conclusion?

A : No.

Q : Refer to page 66 CLB-1, third para. I put it to you, you only suspect, Bhawe, you have no proof?

A : No.

Q : I further put it to you that you are speculating when you say "it is more look like"?

A : Yes, because I cannot see other reason which benefit the Company and why Bhawe needed to do that since Bhawe was selling much cheaper i.e. 53 USD cheaper to competitors than selling to our sole distributor who had developed the market with me and the BSA's market. I cannot find a reason why he should sell cheaper to a competitor and not to our distributor.

At pages 14 to 17, the Claimant said:-

Q : I put it to you that two months after you resigned, you found out it was not so easy to start your own business, you neglected and started taking action against Company?

A : No.

Q : After you resigned, do you write any letter to Company to inform that you were forced to resign and that you wanted to come back and work?

A : Yes.

Q : When did you write?

A : Should be 11 March or around that.

Q : After you have started the action, right?

A : Yes.

Q : Before you start action, do you write?

A : Yes, as per CLB-1 page 80 dated 23 February 2004.

Q : What did email say?

A : I am asking Bhawe for payment of five months.

Q : In this email at page 80 CLB-1, did you say you want to come back and work?

A : No.

Q : Do you say you were forced to resign?

A : No.

Q : Did you write to German and said you were forced to resign?

A : No, I called them.

Q : I put it to you, you lied with regard to Germany call?

A : No.

Q : Did Germany gave a direction to take you back?

A : No.

Q : Even Germany accepted the resignation?

A : Yes, I think they have to do that as everything has been done by Bhawe.

Q : Earlier you said nobody put a knife or gun on your head to sign?

A : Yes, but Dato' TY Lim said if I do not resign by myself and sign the letter, he can kick me out of the Company if I don't sign.

Q : Was Dato' TY Lim a Board of Director of BSA and BSM?

A : Dato' TY Lim was Chairman of BSM.

Q : Refer to COB pages 3 and 4, do you agree that this is Form 49 of Company?

A : Yes.

Q : Do you see Dato' TY Lim's name in the Form 49?

A : No, he was represented by Mr. Pang Hee Kin and Mr. Teoh Cheng Chuan.

Court : How do you know Dato' TY Lim was represented by the two?

A : I was told by Mr. Bhawe and step son of Dato' TY Lim, Mr. James Lim.

Court : Any document to prove?

A : No, documentary proof.

Court : As far as Form 49 is concerned, any representation or written that these to represented Dato' TY Lim?

A : No.

Q : I put it to you, after you resign, you wrote at least five letters to Company but did not in anyone of them that you were forced to resign, do you agree?

A : No, refer to CLB-1 page 84.

Q : Date you wrote CLB-1 page 84?

A : 12 April 2004.

Q : This was after you have initiated the proceeding and meeting in Perkeso?

A : Yes.

Under re examination, the Claimant at pages 2 to 4 of the Notes of Proceeding dated 18 November 2008 said as follows:-

Q : It was put to you under cross that your allegation against Bhawe was baseless is your own imagination, you said, “no, I cannot agree”. Please explain why.

A : I got documentary proof. Look at CLB-1 page 56, this is an email from our biggest distributor in China, Hechang Shanghai, complained that we were supporting.

Page 56 is my email to the our main distributor in China, Hechang Shanghai. This is pertaining to Hechang's complaint about we supporting a competitor company to undercut Hechang's market (the market developed by Hechang). I copied the email to Mr. Bhawe. This was on 8th October 2003.

Then we go to page 57 CLB-1. Second bottom line numbering “13; on August 13”. This document shows that the Company had sold products to Omega Nutrition at a cheaper price than to our own distributor.

According to all items, Company sold to Omega as per quantity and price stated and all delivered to Shanghai on date stated, all sold by BSA and not BSM.

- Q : Any document to show price sold to Hechang?
- A : See page 58 – sold by BSA to Shanghai Citico, products same as page 57 – T-300 – price was as per stated.
For T – 300 – at page 57, price was 437.5 USD.
For T – 300 – at page 58, price was 470.00 USD.
Both sold by BSA – Shanghai Citico was importer for Hechang.
Hechang paid commission to Shanghai Citico to import through them.
- Q : Any other document?
- A : CLB-3 page 159. This was email I sent to Bhawe. This was about sale to Omega as per page 57 CLB-1 and also page 56 CLB-1.
Mr. Bhawe then replied to me as per 159 CLB-3, “we shall meet in Bali to discuss on this issue, please clarify your points on your presentation during the meeting”.
Refer also to page 65 CLB-1, the last para, page 65 was my complaint to Germany, it starts at page 64.
My complaint at page 65, last para was about the sale to Omega Nutrition, I said, “at the beginning he (Omega Nutrition) bought smaller quantity but was growing bigger now as the price given by Mr. Bhawe was becoming even lower”.
See also page 66 CLB-1 para 3. Items 1 and 2. (Witness reads)
It says I got information about a company registered in China B & S Dalian which was registered under the name of Bhawe and

Sun Anquan. I asked Bhawe and Bhawe admitted Sun Anquan had registered a company under Bhawe's name. I told Germany about this.

For item 2, it shows Bhawe was supporting Sun Anquan though he told me not to be close to Sun Anquan. Sun was a small company, why does Bhawe need to support him. Sun was secretly getting supply from our southern (Johor) suppliers i.e. Malaysian vegetable oil (MV) and Sun also supplied to our Guangdong distributor and Bhawe was still supporting Sun by giving commission for the sale from BSA to BSA's distributor in Guangdong, China although Sun Anquan was undercutting the supply and undercutting the market.

Q : Any other document?

A : CLB-1 page 67, Item 3 second para. Bhawe had no confidence in me. Bhawe denied he got commission from Sun though Sun alleged Bhawe sharing commission with him. This allegation not able to get proof. I have no other document as I cannot remember now.

At pages 5 to 7 of the same Notes, the Claimant said:-

Q : What do you mean when you said it depends on what matter “for the Board to decide what it wants to do”?

A : I meant Board can decide to employ or dismiss me. They have the power to do that. They asked me to find a sole distributor

and gave them an exclusive distributorship. Both BSA and BSM asked me to do that.

Court : Where did they ask you to do that?

Q : CLB-1 page 15 was my appointment by BSM as of 1st June 2001.

Court : You were appointed by B & S (A) in 1999?

A : Exclusive Agreement – page 4 CLB-1, first company – page 4 CLB-1 - 1st December 2000, second company – 29th March 2001.

- Now witness corrects himself, for the sole distributorship as per pages 4 and 11 CLB-1, “I was asked to do by BSA”.

Q : BSM in charge of which market?

A : Only Malaysia.

Q : Does BSM has its own distributors in Malaysia?

A : Yes.

Q : During cross, you were asked BSA as an entity can do anything but you disagreed, why?

A : As per CLB-1 page 4 and page 11 for China market, BSA has given the two companies and had asked me to appoint them as sole distributor and had signed the distributorship agreement with them but how can the BSA MD, Mr. Bhawe secretly attacking the distributor market by supporting a company (BSA) competitor.

Q : Refer to Question 33 CLWS-3(A). Meeting on 22nd November 2003 between TY Lim himself and Mr. Bhawe, it was suggested

that the meeting did not take place. Please tell this Court why you don't agree.

- A : (i) Refer to Company's Statement in Reply page 5 para 5.15 Clause (d), Company confirmed the meeting took place.
- (ii) Page 71 CLB-1 – resignation letter shows Dato' TY Lim was involved with the discussion.
- (iii) Page 75 CLB-1 – cc for information of Dato' TY Lim. Dato' TY Lim has something to do with BSM.
- (iv) page 84 CLB-1, third para of letter, I wrote to Bhawe informing that I will take it up and tell what happen in Industrial Court.
- (v) Page 10 COB – letter I wrote to Bhawe, second para, commission form BSM. Reference was made to discussion with Dato' and Bhawe on sales commission. So this shows that there was a discussion on commission with BSM on 22nd December 2003.

With regards to compensation, the Claimant at page 8 of the same Notes said:-

“Refer to page 76 CLB-1, fourth para, that I will be paid compensation as per employment contract and rules. Refer to page payment voucher from BSA Singapore, six months salary up to June 2004. This is in line with employment contract.

Refer to page 157 CLB-3, letter by Bhawe regarding final settlement from Berg & Schmidt. "Berg & Schmidt will pay you for January to June 2004, six months basic salary".

Page 15 CLB-1, Clause No. 7, termination either party may terminate six months notice. Company followed this term they terminated, me they paid six months.

CLB-1 page 1, Clause 10, regarding termination (b), say if terminate, pay six months salary. That is why they paid me six months salary. All these show I was sacked by Company as per my answer to Question 33, CLWS-(A)".

With regards to his acceptance to resignation, BSM at pages 8 to 9 of the same Notes, the Claimant said:-

Q : BSM is out of kindness allowed you to resign and paid you six months salary. Why do you agree?

A : The six months was compensation as per employment contract, page 15, Clause 7 and they asked me to leave Company immediately. This six months salary was only basic salary less than RM60,000.00 and this was only equivalent to two months income from BSA and BSM, so how to call this kindness. This is exploitation and cruelty and Bhawe promised six months commission, five months extra salary and Canvassing Agent but none fulfilled so it was not kindness. This is not kindness, it was as per termination clause as per para 7 CLB-1 page 15.

Court : If Clause 7 page 15 CLB-1 only six months salary nothing else?

A : Yes.

When asked to explain why he signed his resignation letter as per CLB-1 page 71, the Claimant at pages 2 and 3 of the Notes of Proceeding dated 3 December 2008 said:-

“I was fooled by Mr. Bhawe as Mr. Bhawe also told me that HQ also wanted me to resign. Actually Bhawe not even dare to notify Germany about the resignation. Bhawe did not inform HQ about the resignation at the time he notified all the business associates. This is the most deadly psychological attack from Bhawe and made me signed the letter.

Secondly, immediately after the meeting with Dato' TY Lim on 22nd December 2003 Bhawe immediately hold a meeting at BSM and told all the staff that I had resigned from BSM and then he told me to leave BSM on that day.

At that time, I have no alternative. Mr. Bhawe also promised me a Canvassing Agent of the Company. At that time, Company also owed me my hard earned commission for year 2003 and I am afraid if I don't sign, Company will not pay me my commission. At that time, I was also depressed due to the condition of my daughter ear infection and my own gastric problem as per CLB-1 pages 95 to 97.

I could not get correct advice at that time. Bhawe also admitted subconsciously that the letter was from him, from Company's Witness Statement Question 3 (note Company's Witness Statement has not be admitted yet) and Company Statement of Reply page 6 para (g) (even if the letter of resignation was prepared by a third party, the Claimant had still to

sign to make effective). There was a document to prove that this is a false document, see CLB-1 page 21.

BSM paid me six months salary in one go as compensation, CLB-1 page 2, Company paid me six months salary in Singapore dollar and here it is written as per employment contract. Refer to CLB-1 page 72 (given six months salary – we accept this). Refer also to CLB-3 page 157 second sentence – “Berg and Schmidt shall pay you six months salary as per employment contract”.

Refer to page 15 CLB-1, Clause number 7, termination clause. Either party may terminate this contract without assigning any reason, therefore, at anytime by giving six months salary in lieu thereof. I am saying it is the Company who was terminating me, that is why they paid me six months salary. If I resign, I pay them six months salary or I have to work for six months”.

With regards to the question of voluntary resignation, the Claimant at pages 1 to 3 of the Notes of Proceeding dated 6 January 2009 said:-

Q : During cross it was put to you that your resignation was voluntarily and your disagreed. Please tell this Court why you disagree?

A : Started from my employment with Berg & Schmidt, I never tell anybody I want to resign. It was Bhawe and Dato' Lim who asked me to resign. Dato' Lim even said, “if you don't resign by yourself, we will kick you out”, he used very heavy words.

Actually at that time in Berg & Schmidt, I was already very exhausted, tired and having poor health and I need to restore my health first and not to suitable to start my own business.

In Berg & Schmidt, I had built a very good market network and I hope and tried to use this market to support myself to have an easier life to restore my health first. Of course, I am not that stupid to resign and apply a new job and new business to start from zero. In Berg & Schmidt, I am already qualify and planned to maintain my mature market and need not be so difficult to keep on developing new market but Bhawe still want to carve more new and recovery market from me.

Refer to CLB-3 page 158. Bhawe mentioned “to achieve sales and recovery targets for the markets in Malaysia, Taiwan and China. We should add some more territories after completion of reorganisation”. Bhawe also said, “introduction of new products in your territories, development for new customers”. After I left, Bhawe tried to use a junior staff or cheaper new employee to maintain the market I built for Company. Also at the time I was badly disturbed by the illness of my daughter and no medical doctor could tell me what was the problem with my daughter. So how can my mind was still free and having the mood to consider to resign and do my own.

When I was working with Berg & Schmidt, I dumped all my money into long term security, others even my partial EPF some

to Mutual Fund and Housing. I had no extra money to do any business. I had prepared to work with Berg & Schmidt until retirement and was very dependent on income from Berg & Schmidt. I also had financial burden to support my old mother and two parents in laws and also heavy educational fee for my kid.

I was forced to leave the Company on 22nd December 2003 even before I signed their letter on 29th December 2003. Dato' Lim even told me he would prepare to fight with me if I take action against the Company after I was forced out. So there is no alternative except accepting their proposal as Canvassing Agent. Bhawe also coax me by telling me the Company in Germany wanted me to resign as per page 75 CLB-1. This is a notification letter to the market for my forced resignation. This letter is for only showing me (page 75 CLB-1) and Bhawe pretending to cc a copy to Berg & Schmidt Malaysia for the information of Dato' Lim and cc a copy to Berg & Schmidt Germany, HQ, Mr. Andreas Reith.

See also page 78 CLB-1, this is the real notification letter to the market and Bhawe hiding this letter to me and in this letter Bhawe no more cc a copy to Berg & Schmidt Germany, HQ. It is also not logic if Dato' Lim is the supplier can involve with the resignation of a Company high rank manager like me. If I had not signed the letter from Bhawe, he will not pay me the hard

earned years commission. If I had the right advice, I would have not signed the letter from Mr. Bhawe or resign.

With regards to Canvassing Agent, the Claimant at pages 5 to 6 of the same Notes said:-

- Q : You were asked in cross whether you had ever negotiated any terms of the canvassing agreement, you said, "yes". Please inform Court when did the negotiation take place.
- A : Only after I signed the forced resignation and already signed the letter from Bhawe (CLB- page 71).
- Q : You were asked whether the negotiation was in broad terms or in details. You said, "I cannot remember because Mr. Bhawe was not serious on that". Please tell this Court why you said so.
- A : After I signed the resignation letter from Bhawe, I could see he has no intention on this Canvassing Agent and came back to me on 5th January 2004 telling me there is no Canvassing Agent.
- Q : I was put that the Company is not obliged to appoint you as Canvassing Agent in the terms dictated by you. You said, "no", why you disagree with the suggestion that Company is not obliged to appoint you as Canvassing Agent in the terms dictated to you?
- A : This was promised by Bhawe himself on a condition to sign the resignation letter from him and I never asked for it.

Q : It was also put that just like any other business dealing if you were appointed, it had to be based on terms on both parties can agree mutually and you said, "yes", you agree with this. Explain why you agree.

A : Because if Bhawe was willing to negotiate the terms of the contract and I am willing to negotiate but Bhawe never came back to me.

Q : Please explain why you don't agree with suggestion which was put to you that at the end you were not appointed as a Canvassing Agent partly because the terms and conditions cannot be agreed upon?

How to agree as Bhawe never came back to me to negotiate the terms instead he came back to me on 5th January 2004 telling me there is no Canvassing Agent for me. It was put to you that you were not appointed because you made representation for reinstatement before the expiry of the period of six months and you said, "no". Did the Company wait for the expiry of the six months notice before they decided not to appoint you as a Canvassing Agent?

A : No, the Company already came back (Bhawe came back) and told me, no Canvassing Agent on 5th January 2004.

With regards to CLB-1 page 25, the Claimant at page 8 of the same Notes said:-

Q : You were referred to page 25 CLB-1. It was put to you that you made up this document yourself. You disagree, why?

A : I got this from Miss Santha, we have the minutes of record kept by the Company. It shows the signatory and signature.

Court : Where is the signatory and signature on CLB-1 page 25?

A : No.

Court : Agree or not page 25 is not the record minutes of the meeting?

A : Yes.

With regards to being an employee during the six months after his resignation, the Claimant at page 9 of the same Notes said:-

Q : It was put to you during cross that since you were still receiving your salary from Company (six months) you were still an employee of Company even if you stop working, you disagree. Please explain why you disagree?

A : I disagree because this is not salary or reward to work for them. This is six months notice as employee, this is not a reward. This is a salary to work with them on six months notice as employee. They only used six months salary as compensation to replace six months notice. Instead of giving me the job to work with them for another six months because this is immediate forced resignation. If this is their six months notice and they still want me to work with them for six months, I am still their employee then I am not allowed to work on feed fat for my own, I can

reach the new information of the Company. (I can reach the resources of the Company). I already stopped working, so how can they can still regard me as the employee.

I only want to support and sell the Company's products and this is helping them since I no need to work for them for six months in the office and I cannot understand what is wrong. I felt my termination was immediate when they paid me six months salary and asked me to go as per page 76 CLB-1.

With regard to CLB-1 pages 13, the Claimant at page 11 of the same Notes said:-

Q : It was also put to you as early on March 2004, preparation work set up a company in Shanghai, China was already in place at that time, you disagree, why?

A : CLB-1 page 13 is not a full letter. I only using this idea for convincing Bhawe and thelling Bhawe that I am willing to do a difficult job to set up a Shanghai company to sell the Company's product to the giant feed miller in China. I hope this suggestion can help to solve our conflict even I had made appeal to Jabatan Perhubungan Perusahaan but last time I was wrong as I used the wrong word Perkeso as I am not familiar with Malay word. So I cannot understand this is a benefit for the Company why Bhawe objected and even use this to attack me.

This idea of establishing a Shanghai company was dropped after my meeting with Bhawe. Bhawe said let the case be settled by the Industrial Court.

With regard to his phone call to Berg & Schmidt Headquarter, the Claimant at page 8 of the Notes of Proceeding dated 23 March 2009, said:-

Q : During cross, you said you did not write to Germany that you were forced to resign but said you call HQ in Germany. To whom did you call or speak to when you called HQ in Germany?

A : The GM of HQ Germany, Mr. Reith.

Q : What was Mr. Reith's response?

A : Mr. Reith said Mr. Bhawe had told Mr. Reith that I had resigned voluntarily.

Q : During cross examination, you agreed with Company's counsel that even HQ in Germany accepted your forced resignation and you said you think HQ had to accept because everything was done by Bhawe, what was done by Bhawe?

A : Bhawe told them that I resigned by myself.

With regard to his mental condition when he resigned, the Claimant at page 10 of the same Notes said:-

Q : It was put to you that it was not true that you were having emotional stress, depress or confuse when you resigned, you disagreed and said, "no", explain.

A : I was badly motivated and hurt when Bhawe told me and cheated me that even HQ wanted me to resign. Even the earlier announcement by Bhawe to my colleague pushed me up to the dead corner without option and I felt shy and I was badly disturbed by my daughter's illness. Before she went to sleep or woke up even during sleep, she will cry and shouting. My gastric problem also worsen. Suddenly Bhawe and Dato' TY Lim forced me out. At least for six months, I cannot sleep well and cannot even sit down and concentrate to read even a single sentence. At the same time after the meeting, I had to sent my daughter to hospital and helped my cousin who was helped by someone in KL. Faced with all these problems, I was also a Sarawakian staying in KL and also have to help my relatives with their problems. That was why I cannot think well and get proper advice.

Towards the end of his re examination, the Claimant produced CLB-4 and CLB-5. CLB-4 was a medical report of the Claimant's daughter at Subang Medical Centre. It also shows that the Claimant's daughter had been referred to Klinik Duta Jaya four times and that the Claimant had brought his daughter to hospital on 14 November 2003 prior to him going to Bali. It also shows that the Claimant's daughter was sick for quite some times and not so sudden. CLB-5 was a letter signed by H. V. Bhawe appointing Foshan Chamnu as the Company's exclusive agent addressed to Ministry of Agriculture People's Republic of China to deal with registration procedure.

The Company then tendered three documents: COB(a), (b) and (c) and the Claimant was recalled. The Claimant admitted that COB (b) was an email he sent to Mr. Wywiol of the Company's Headquarter in Germany. The Claimant said B & S Dalian of China was a company formed by Sun An Quan for the initial S and Bhawe for the initial 'B' and not B & S for Berg and Schmidt. He said he got information from Sun An Quan's brother. At pages 3 and 4 of the Notes of Proceeding dated 20 July 2009, the Claimant said:-

Q : Anything else to add?

A : I mentioned about at last page COB (b) page 33 that I kindly requested Mr. Wywiol to keep the email confidential and reference only. Why I said so was because I had the experience that Mr. Bhawe will not be happy I talked to Mr. Wywiol more than just "hello or hi". I said I wanted to cooperate and support my boss, Mr. Bhawe and hoped it can provide constructive reference and taken as an emotional issue. Overall I like my boss and I still need to cooperate with him (see page 33).

I remembered after this email, Mr. Bhawe had come back to me and gave me warning and said if I still write to Germany next time, he will take disciplinary action on me. I felt that what I wrote was the truth and good for Company, so the second time I was requested by Mr. Reith to write, I wrote and explained to Germany again and then Mr. Bhawe came to me immediately with the back up of the Company's Chairman, Dato' TY Lim, so

they kicked me out of the Company. This email was the first conflict between me and Mr. Bhawe.

Under cross examination on COB (b), the Claimant at pages 4 and 5 of the same Notes said:-

Q : When was the date of email?

A : 10th July 2001 at 14.15.

Q : Do you agree since 2001 you have started writing to Germany complaining of Mr. Bhawe?

A : No, I am not complaining about Mr. Bhawe.

Q : Refer to page 32, did you say, "I hope I can persuade him to make changes ... about Mr. Bhawe's relation with Sun". Do you agree that you have been writing to Germany informing about Mr. Bhawe without Mr. Bhawe's knowledge?

A : Yes.

Q : After you have written this email, the relationship between you and Mr. Bhawe was good?

A : I felt I am good to Mr. Bhawe but do not know how he felt.

Q : How did Mr. Bhawe treat you?

A : He spoke to me only on business or Company's matter. He scolded me sometimes, also related to business matter but when I personally needed his help to get the leave to take care of my daughter's ear infection and Mr. Bhawe threw out the words, "your daughter's illness is your personal matter, nothing

to do with Company's business", so I cannot apply for leave. Bhawe said, "if you do not go for the Bali meeting, I will give your market and let other sale manager sharing for".

The Company:

The Company's only witness (COW) was Harshawardhan Vaman Bhawe, the Company Managing Director of the Company. In his Witness Statement, COW said:-

Q3 : I refer to pages 3 to 9 of the Company's Bundle of Document (COB), can you tell the Court who are the shareholders and directors of the Company as recorded in those documents?

A : At that point in time, the shareholders at pages 6 and 7 are Mr. Teoh Cheng Chuan, Mr. Pang Hee Kin and Berg & Schmidt Asia Pte. Ltd. and at page 3, the Directors are Mr. Andres Karl Reith, me, Mr. Pang Hee Kin, Mr. Volkmar Alfred Detrich Wywiol and Mr. Teoh Cheng Chuan, who is also the Chief Executive Officer.

Q4 : I refer to pages 23-26 of the Company's Bundle of Document No. 2 (COB A), can you tell the Court who are the shareholders and directors of the Berg & Schmidt Asia Pte Ltd?

A : The shareholders at page 25 are Mr. Reith Andres Karl, me and Berg & Schmidt International GMBH and at page 24, the Directors are Mr. Wywiol Volkmar Alfred, Mr. Reith Andres Karl and me.

Q10 : What is the relationship between the Company and Berg & Schmidt Asia Pte Ltd?

A : Berg & Schmidt Asia Pte Ltd is a company registered in Singapore, the 50% shareholder of the Company and is totally separate entity from the Company. The Claimant's last drawn salary from Berg & Schmidt Asia Pte Ltd is not related to the Company at all and is irrelevant to the claim herein as they are separate legal entities.

Q11 : Did the Claimant have any contract of employment with the Company?

A : Yes, the contract was in the form of a Letter of Appointment dated 01.06.2001 issued by the Company offering the employment as a sales manager of the Company.

Q12 : Was the Claimant transferred from Berg & Schmidt Asia Pte Ltd to the Company?

A : No, the Claimant's appointment under the Company was a separate appointment totally independent of the Claimant's employment under Berg & Schmidt Asia Pte Ltd. It was not a secondment nor was it a transfer.

Q13 : How was it that the Claimant was employed by 2 separate companies?

A : By mutual consent and a common practice amongst multinationals, the Company and Berg & Schmidt Asia Pte Ltd mutually agreed for the Claimant to be employed by both the

companies. This is an additional benefit to the Claimant as the Claimant would then received 2 sets of salaries.

- Q14 : What is the main business of the Company?
- A : The Company's main business is to deal with, i.e. to procure and supply, oil palm product to Berg & Schmidt Asia Pte Ltd, Berg & Schmidt headquarter at Hamburg, Germany and for the domestic Malaysian market only.
- Q15 : Does the Company trade with any foreign countries apart from Berg & Schmidt Asia Pte Ltd and Berg & Schmidt Hamburg in Germany?
- A : No. All the foreign markets are handled by Berg & Schmidt Asia Pte Ltd. The Company only deal with the domestic market as well as to supply internally to Berg & Schmidt Asia Pte Ltd and Berg & Schmidt Hamburg in Germany.
- Q16 : Which other foreign market did the Claimant deal for the Company?
- A : None, the Claimant was employed by the Company solely for the purpose of doing sales within the Malaysian domestic market. The foreign markets handled by the Claimant, were Berg & Schmidt Asia Pte Ltd and not for the Company.
- Q17 : Did the Company ever pay commission to the Claimant for sales carried out by the Claimant in any of the foreign market?
- A : No. The Company only employed the Claimant to handle the sales in the domestic and all the commissions paid to him by the

Company are for the sales handled by him within the domestic market. All commissions for sales handled by him in any foreign market were paid to him by Berg & Schmidt Asia Pte Ltd in his bank account in Singapore because he was employed by Berg & Schmidt Asia Pte Ltd to handle the sales in the foreign market.

Q18 : Did the Claimant ever deal with the Sri Lanka, Japan, American, Taiwan, China or Thailand markets on behalf of the Company?

A : No. All his foreign transactions were for Berg & Schmidt Asia Pte Ltd, and of the foreign market, he was only in charge of the China market.

Q19 : Why did the Company make payments to the Claimant on behalf of Berg & Schmidt Asia Pte Ltd?

A : It was for convenience only as the Claimant resided in Malaysia. The Company and Berg & Schmidt Asia Pte Ltd are two separate entities, the Company is also the supplier for Berg & Schmidt Asia Pte Ltd and all payment made by the Company to the Claimant or any other third party on behalf of Berg & Schmidt Asia Pte Ltd will be reimbursed by Berg & Schmidt Asia Pte Ltd.

Q21 : The Claimant claimed that goods were shipped by the Company on behalf of Berg & Schmidt Pte Ltd to the customer in China in his statement, can you clarify that?

A : As one of the suppliers of Berg & Schmidt Asia Pte Ltd, sometimes we shipped the goods on behalf of the Berg & Schmidt Asia Pte Ltd directly to their customers, but they were Berg & Schmidt Asia Pte Ltd's customers. It is the business practice in the world to classify business into manufacturing plus logistic and marketing plus finance where the manufacturer also delivers on behalf of their customers to save costs of shipment.

Q23 : Can you tell the Court about the "serious ear infection" mentioned by the Claimant in October 2003?

A : The Company and the management had no knowledge whatsoever of the alleged "serious ear infection" suffered by the Claimant's daughter and the Company and I had only come to know about this incident for the first time upon reading the Claimant's Statement of Case. The Claimant did not at any time disclose this to me or to the Company. In any event the Company provides good medical benefit for its employees and the Claimant was fully aware of that.

Q24 : Did the Company organise a holiday trip to Bgali, Indonesia in 2003?

A : Yes. The Company organised annual trips as a benefit for the staff and also for the staff to get to know each other better.

Q25 : Is it compulsory for the staff to go on the Company's annual trips?

- A : No, of course not. It is a benefit to the staff. If the staff does not go, the Company will incur less cost, why should the Company make the trip compulsory for the staff? It is an absolutely voluntary trip, no compulsion on any person at all.
- Q26 : Did the Company force the Claimant to attend the Company's annual holiday trip?
- A : Of course not. It is ridiculous to allege that the Company can force any person against his/her will to attend the Company's annual holiday trip. There were some staff that did not go for the Bali trip.
- Q27 : Why was the Claimant required to do a presentation during the Bali holiday trip?
- A : The Bali holiday trip was mainly for rest and relax. Many games and fun activities such as beach volleyball and water activities were organised. However, there was also a session planned for the employees to present their plans and targets for the following year. This was more like an appreciation function where they get to share their achievements and knowledge with the others. However, this presentation was not compulsory for anybody and only applicable to those who are prepared to present. Since the Claimant was coming and did not apply for leave, I asked him to share his presentation. He did not protest at all. He did not disclose to me that his daughter was ill at that time at all.

Q28 : Did the Claimant apply for leave during the time when the Company was having the annual holiday trip?

A : No.

Q29 : Did the Claimant seek help from the Company in respect of his daughter's "serious ear infection"?

A : No, as a matter of fact, all the employees of the Company, including the Claimant knew full well that the Company maintained a comprehensive medical and hospitalisation insurance coverage with medical hospitalisation card for the Company's employees and their family including the Claimant and his family and the Claimant's wife could easily have arranged for the daughter to be sent for treatment for the alleged ear infection under the Company's medical plan. If he did not do so, it was because he chose not to do so.

Q30 : Were outsiders normally invited in the Company's trainings, meetings or seminars organised by the Company?

A : Yes, the Company always invited the management officers of our key distributors, suppliers and agents to attend our meetings to discuss about the issues raised by some of the customers and also to feed back to them the complaints made by our customers. This is a great feed back sessions for them.

Q31 : Were Dato' T. Y. Lim invited to some of the activities organised by the Company?

A : Yes.

- Q32 : Can you tell the Court what was the position of Dato' T. Y. Lim in the Company in 2003?
- A : Dato' T. Y. Lim had no position in the Company at that time, Dato' T. Y. Lim is the Chairman of a supplier company to the Company but was never a director or shareholder of the Company and neither was he an employee of the Company at that time.
- Q33 : Can you tell the Court what is in pages 3 to 9 of the Company's Bundle of Documents?
- A : These are the copies of the Company's Forms 24 and 49 as at 27.07.2004 which show that Dato' T. Y. Lim was neither the Chairman, the Director nor the shareholder of the Company.
- Q34 : Who is Dato' T. Y. Lim then?
- A : Dato' T. Y. Lim is the Chairman of PAOS Sdn. Bhd (Company No:124693-X) (hereinafter called "PAOS") a company whose office is located next to the Company's office and a major supplier of the Company which has long term business relationship with the Company. In fact, PAOS owns the building the Company is located in. The Company rented the office space from PAOS.
- Q35 : What actually happened during the meeting between you and the Chairman on 22.12.2003?
- A : When I was having a meeting with Dato' T. Y. Lim on that day, the Claimant came to see me about his intended resignation

and intention to act as the Canvassing Agent for the Company after his resignation. Since PAOS is a long standing business associates of the Company and is involved in the same nature of business, I thought Dato' T. Y. Lim may be able to give some business to the Claimant after he resigned from the Company and accordingly, my discussion with the Claimant about his intended resignation took place in the presence of Dato' T. Y. Lim.

Q36 : Did Dato' T. Y. Lim dismiss the Claimant?

A : No, this allegation is rather ridiculous as Dato' T. Y. Lim, being an unrelated party to the Company, did not have the authority to dismiss the Claimant. As a long term employee, the Claimant was fully aware of that.

Q37 : Did the Company promise to appoint the Claimant as Canvassing Agent?

A : No. First of all, I would like to make it clear that the Company has no part in this Canvassing Agent appointment because the Canvassing Agent was for sales of the oil palm product to foreign market and the Company never sells directly to overseas market. The negotiation for the appointment of the Claimant as the Canvassing Agent was purely for Berg & Schmidt Asia Pte Ltd as the proposed Canvassing Agent appointment was for the Claimant's China market. It was Berg & Schmidt Asia Pte Ltd who had agreed in principle to take the Claimant as Canvassing

Agent after the expiry of 6 months from his resignation. Of course, as in any business dealing, the Claimant's intended appointment as Canvassing Agent of Berg & Schmidt Asia Pte Ltd was subject to the terms and conditions being mutually upon and subject to a formal contract being finalised.

Q38 : Why was there a 6 months lapse of time before the Company appointed him?

A : That was because both the Company and Berg & Schmidt Asia Pte Ltd had, out of goodwill, agreed to pay the Claimant 6 months salary even though he was released from performing his work immediately and therefore as the Claimant still enjoyed the benefit from the Company and from Berg & Schmidt Asia Pte Ltd during this period of time it was not proper for the Claimant to be appointed as the agent of Berg & Schmidt Asia Pte Ltd during this period. In addition, the parties also needed the time to negotiate on the terms and finalise the appointment of Canvassing Agent agreement.

Q39 : In the end was the Canvassing Agent agreement concluded?

A : No.

Q40 : Why?

A : For several reasons, amongst the main reason are that, we discovered that the Claimant was carrying out a competitive business with Berg & Schmidt Asia Pte Ltd immediately after he left the Company and prior to the expiry of the 6 months period

and also that prior to the expiry of 6 months period, we received the letter from the Human Resource Ministry informing us that the Claimant has commenced a claim against us which surprised us all. In addition to all that, Berg & Schmidt Asia Pte Ltd was not able to conduct the business in the manner wanted by the Claimant because, due to the frequent fluctuation in the pricing, the manner of trading proposed by the Claimant was not viable for Berg & Schmidt Asia Pte Ltd. The Claimant was informed of this.

Q41 : Please tell Court what is the document exhibited in page 76 of the Claimant's Bundle of Documents?

A : This is the letter dated 05.01.2004 issued to the Claimant in reply to the Claimant's proposal of becoming Canvassing Agent.

Q42 : The Claimant alleged that you prepared his resignation letter, is that true.

A : This is the most ridiculous and unreasonable accusation I have ever heard. If I were to prepare the resignation, why would I mention Dato' T. Y. Lim? Why would I give 6 months notice? Why would I mention appointment for Canvassing Agent? I would simply write "I hereby tender my resignation with immediate effect", and save myself all this trouble which I am facing now. Even **assuming** that I did prepare the resignation letter, **which is denied**, the Claimant, who was highly educated

and had a university degree, still had to sign the letter for it to be effective.

Q43 : The Claimant alleged that he signed the resignation letter because you instructed him to do so. What do you have to tell the Court about that?

A : I state that the Claimant prepared and signed the resignation letter himself and then he forwarded it to me. It was my understanding that he intended to leave the Company to start a business of his own. I did not have such influence over the Claimant' that he would be so obedient as to sign the resignation letter when I asked him. If it were so, I am sure he would have withdrawn this claim when I asked him to withdraw this claim.

Q44 : The Claimant alleged that he was forced to leave immediately, what do you have to tell the Court about that?

A : No. The Company never "forced" any of its employees to leave immediately. However, it is the Company's policy not to keep unwilling workers. Since the Claimant had claimed to be unhappy with the management, including with me, and was also eager to start his own business and the management had already accepted his resignation, the management decided that it will be to mutual benefit to release the Claimant early and pay him the notice period without requiring him to continue to serve out the notice period.

Q45 : Who else in the Company knew about the Claimant's resignation?

A : It is the Company's practice to inform all the staff and business associates of the resignation of any of the Company's management and marketing staff. This is to avoid confusion, malpractice and abuse. As I have said earlier, as a sales manager, the Claimant can bind the Company with sales orders accepted by him.

It would also ensure that internally and externally people will not be confused as to whom they should deal with. Both the staff and the customers need to be informed of our succession plan so that the business will continue to operate smoothly and customers know who to liaise with following the resignation. All these are business practices learnt by the Company over the years to ensure that the customers do not suffer and that they get the best service from the Company. I believe this is a prudent and normal business practices practiced by all successful businesses.

Q46 : Who are the other parties informed of the Claimant's resignation?

A : As I stated earlier, in order to provide good service to customers and to ensure the smooth operation of the business, all the suppliers, distributors, customers and other parties whom the Claimant had been dealing with immediately prior to his

resignation, including PAOS Industries Sdn Bhd, which is located near to the Company were informed. It was done as a matter of course and it will be like the whenever there is a resignation by the employees of the Company, especially employees at the management level and the marketing staff who deals with the customers and suppliers.

Q47 : The Claimant further alleged that he was confused, upset emotionally, depressed, mentally unfit due to coercion or persuasion when he signed the resignation letter. What do you have to tell the Court about that?

A : It is not true that the Claimant was confused, upset emotionally, depressed, mentally unfit due to coercion or persuasion when he signed the resignation letter. He appeared coherent, composed, alert, well aware of this rights and in full faculty when he tendered his resignation to the Company. In fact, he was clear and calculative and even tried to secure a canvassing agency for himself after his resignation. This is self evident in the letter of resignation. The resignation was voluntarily and unequivocal.

Q48 : Did the Claimant speak to you about his resignation?

A : Yes. In fact, it has come to my knowledge that the Claimant had on several occasions spoken about resigning or threatened to resign before. This time, the Claimant informed me that he wished to set up his own company and had started dealing with his contacts in China, Taiwan, India and various other countries

and he wanted Berg & Schmidt Asia Pte Ltd to support him. The Claimant even claimed that he had set up a company in Shanghai, China.

For his resignation, the Claimant further negotiated with me and requested the Company and Berg & Schmidt Asia Pte Ltd to pay him some ex-gratia payment because he needed the money to support his new ventures and out of goodwill, the Company had agreed to pay the Claimant 5 months salary as goodwill payment to enable the Claimant to commence his business.

Q49 : Please explain to us what are the documents exhibited in pages 21 and 22 of the Company's Bundle of Documents?

A : These are the letters from the Company to the Claimant and the Claimant's letter both dated 12.01.2004. Basically, the Company agreed to give the Claimant 5 months salary to the Claimant which the Claimant has accepted.

Q50 : Please explain to us in regard to the documents exhibited in pages 12 and 13 of the Company's Bundle of Documents?

A : These are the e-mails from the Claimant to me, amongst others, requesting for the appointment as Canvassing Agent.

Q51 : Please tell the Court what are the documents exhibited in pages 14 to 20 of the Company's Bundle of Documents?

A : This is the company search of Nutrisupport Sdn Bhd (Company No 638704-H), I believe this company was formed on 06.01.2004, a few days after the Claimant have resigned. The

Claimant later became a director of Nutrisupport on 24.03.2004, a few weeks after he sent an email to me requesting for supplies as shown in the e-mail in page 12 of the Bundle of Documents.

Q55 : What is your personal relationship with Mr. Sun Anquan?

A : I have no personal relationship with Mr Sun Anquan. However, Berg & Schmidt Asia Pte Ltd did supply to Omega Nutrition previously. Now, Omega Nutrition has stopped buying from Berg & Schmidt Asia Pte Ltd and I understand they are now buying from Indonesian palm oil producers.

Q56 : Why did Berg & Schmidt Asia Pte Ltd supply Omega Nutirion, a competitor of Berg & Schmidt Asia Pte Ltd?

A : There are two different kinds of sales in Berg & Schmidt Asia Pte Ltd. Berg & Schmidt Asia Pte Ltd not only sell it product directly to distributor under its own brand name but also sell to other competitive distributor as a supplier. This Berg & Schmidt Asia Pte Ltd's business model and strategy adopted by the Board of Directors of Berg & Schmidt Asia Pte Ltd. Berg & Schmidt Asia Pte Ltd made money supplying its product to other distributors as well as selling its own product direct. This is a common business model applied by various big international corporations throughout the world in the trading of various merchandise and it is not uncommon.

Supplying to the other competitors allowed us to gauge the market sentiments, the pricing and provides data to allow Berg &

Schmidt Asia Pte Ltd to develop its own strategy. It also enable Berg & Schmidt Asia Pte Ltd to enlarge our market share in the total sales of our products and creates performance benchmark for my team. In any event, if we do not supply to the competitors, some other supplier will. It it most important business strategy to produce for competition and create other brands. It is followed by all the cooking oil producer/soap producer/ fat producer in Malaysia. It is essential to optimise plant through put and benchmark sales team.

Q58 : Did your other marketing managers ever complain about Berg & Schmidt Asia Pte Ltd selling to competitors who compete in their market?

A : Not at all and it is going on even today. In fact, we wish to create other brand quantity. Apart from the China market, Berg & Schmidt Asia Pte Ltd also sold its product in India, Bangladesh, the Philippines, Thailand, Japan etc and we do sell to our competitors in some of the market and so far none of our managers have complained except the Claimant who was handling the China market.

Q61 : Was the board of Berg & Schmidt Asia Pte Ltd aware of the dealing with Omega Nutrition?

A : Of course, it is Berg & Schmidt Asia Pte Ltd who was dealing with Omega Nutrition. It was not my personal dealing. The pricing and supply were all approved by the board of Berg &

Schmidt Asia Pte Ltd. The Claimant has no privy to the board's decisions and he was just making wild allegations. That is the reason why his wild allegation to Germany was not entertained. Berg & Schmidt International GNBH is 80% shareholder of Berg & Schmidt Asia Pte Ltd and they stand to gain the most from the increased sales made by Berg & Schmidt Asia Pte Ltd by being a supplier. If they had been unhappy, being 80% shareholder, they could easily have removed me. But instead, because of my business strategy, I was later promoted.

Q62 : You said he made wild allegations to Germany, were you angry with the Claimant?

A : I was more annoyed than angry. He was confronting me, going around telling everybody his baseless believe that I was cheating Berg & Schmidt Asia Pte Ltd, in which I am a shareholder, going above me to complain to the major shareholders, etc. He was insubordinate and refused to take my instruction. However, all these are business and I have nothing personal against him. He was still performing his duties by doing sales in China. His wild allegations though annoying, was not hurting me because I was acting with the Board's approval. The shareholders knew what I was doing.

Q63 : Were you going to fire him?

A : No, of course not. If he persisted in what he did, I might have taken some disciplinary action but there was still no reason for

me to fire him. We do not dismiss people lightly and our companies are not in the habit of firing our staff. That will be truly a last resort action. And even if we were to dismiss somebody, we would have consulted our lawyers and make sure that the dismissal would be proper carried out after due inquiry. We were aware of the labour law in this country and we do not take the law lightly. However, before it had come to a stage where I needed to take any disciplinary action, he resigned on his own accord. After that he asked for some ex-gratia payments as he was starting his business and he also wanted to get the Berg & Schmidt Asia Pte Ltd to commit in supporting him with our product. While all this was still on going, suddenly we received a letter to say that the Claimant has made a representation against us. All these are documented in various letters which had already been referred to previously.

Q67 : Did you force Mr. Wong King Lai to resign?

A : Of course not. The Claimant handed me his resignation letter duly signed by him. There is no way I could have forced him to resign or induced him to resign with a Canvassing Agent promise. I did say that Berg & Schmidt Asia Pte Ltd can consider making a Canvassing Agent if the opportunity arises and provided the terms and conditions can be agreed upon. I don't know what kind of conclusion the Claimant drew from that but I certainly did not commit to him and neither did I force him.

He took action almost **60 days later** and insist that the resignation letter which he signed:-

- (a) was forced upon him: OR
- (b) that he signed in a state of confusion; OR
- (c) in a moment of emotional weakness; OR
- (d) was tricked into signing: OR.

How flimsy and how ridiculous can his excuse be. I state that he resigned voluntarily and subsequently changed his mind and now wants the Company to either take him back or compensate him with more money.

In answer to Supplementary Questions at page 7 of the Notes of Proceeding dated 20 July 2009, COW said:-

Q : Can you tell what was B & S Dalian stand for ?

A : Berg & Schmidt Dalian.

Q : Why was it registered or incorporated?

A : The Group has always a region based Company. We always wanted to be present in key market areas like China.

Q : The incorporation of B & S Dalian, is it known to all Board of Directors of B & S Group?

A : Yes, my Directors were aware of the incorporation of the Company in China.

At page 8 of the same Notes, COW said:-

Q : Claimant said when his daughter had ear infection and he wanted to seek leave not to go to Bali, you did not allow the leave and said, "your daughter's illness is your personal matter and nothing to do with the Company". Can you inform Court what exactly transpired?

A : I did not know about this and only knew when B & S was sued and told that I did not allow his leave when his daughter was sick and that he was forced to go to Bali by me. I did not know of this.

Q : Mr. Wong (Claimant) further alleged that you said if Claimant did not go to Bali trip you would give the business to other sales rep. Can you tell the Court what happened?

A : No, I never said that and we do not have any other Sales Manager to whom this business (China) could have been given.

At page 9 of the same Notes, COW said:-

Q : After this email was sent Mr. Wywoil, how can your relationship with Claimant?

A : When this email was forwarded to me, my relation with Claimant was till good, in fact at the same time he was given further promotion in 2003. I only explained to him that I am shareholder of the Company and have a relationship in the Company and shareholder was defined by Memorandum or Article of Association.

- Q : Did you after the email tick off or scold him unreasonably?
- A : No, I did not in fact next to next year he was promoted as Deputy GM.
- Q : After this email, how did it affect you?
- A : This email really has no impact on my career as I was a founder shareholder of the Company and in 2005 I was also adopted on the German Board of Directors of the Company.
- Q : Can you tell the Court whether B & S Malaysia have the position of a Chairman of the Company?
- A : No, it does not have a Chairman.
- Q : What position have you got?
- A : Managing Director (MD).
- Q : Who was the MD?
- A : I am the MD.

Under cross examination at pages 10 and 11, COW said:-

- Q : I put it to you, based on page 160 CLB-3, the Claimant's salary had been divided between two companies?
- A : Yes.
- When BSM was formed, my salary was also apportioned to Malaysian Company and local shareholders approved the salary because both the Companies have different jurisdiction and different shareholders. Like we did the same for Claimant.

Claimant worked in Singapore for B & S Asia and also worked for B & S Malaysia.

If you look at the paper which we submitted this morning COB (b), we wanted Mr. Wong to stay in Singapore but he wanted to stay in Malaysia. So Claimant was paid for the work done in Malaysia by Malaysian Company. I agree that I used wrong word that salary be divided but I also learnt a lesson that I have to use the word very cautiously.

COW agreed that pages 1 to 3 CLB-1 was the Claimant letter of appointment and that the Claimant was to undergo a probationary period. COW also agreed that Clause 14 of CLB-1 page 3 contained a transfer clause from BSA to BSM and that the Claimant need not undergo a probationary period at BSM. COW, however, disagreed that the Claimant was transferred from BSA to BSM.

COW was referred to COB-5 pages 175 and testified that it was signed by James Lim, the son of Dato' T. Y. Lim. COW, however, disagreed that it showed that BSM dealt with foreign market.

With regard to the Bali meeting, COW agreed that he sent an email as per CLB-3 page 159 stating, "we shall meet in Bali to discuss this issue, please clarify the points on your presentation during the meeting". At page 20 of the Notes of Proceeding dated 20 July 2009, COW said:-

A : The issue was we also have to discuss that the Claimant mentioned in his email i.e. three points. The point number 3, Claimant mentioned whether I want Claimant to sell more quantity to Korea, Thailand, Japan and others.

Claimant also wrote in last para, "So I hope Glenn does not need to look into my market and neglect his own".

Glen referred to another Sales Manager at that time by the name of Glenn Rimer. Glenn took care of Korea, Thailand, Vietnam, Japan and others markets. Claimant does not want to look into his market so on the top I wrote, "we can clarify this point and discuss it during your presentation at Bali".

Q : I put it to you that the issue was actually regarding your cooperation and your supply at a cheaper price to Company's competitors like Omega and Allgreen and that was the main issue as per first para in Claimant's email. Claimant also stated at third para of his email that the issue was he be allowed to sell direct to market in Korea, Thailand, Vietnam, Japan and others and not through Allgreen and Omega, do you agree?

A : This was one of the main issue, I agree.

COW disagreed that Dato' T. Y. Lim was Chairman of BSM. He testified that the Bali meeting was a Team Building session attended by employees of BSA, BSM, Mulchemie and four employees of a distributors of Company, PAOS.

At pages 4 and 5 of the Notes of Proceeding dated 21 July 2009, COW under cross examination, said:-

Q : Do you agree with me that a supplier of the Company in this case, PAOS or Dato' TY Lim does not have any say on any matters pertaining to any payment of compensation or goodwill to the Company's staff?

A : I agree.

Q : Look at COB pages 10 to 11, what is it?

A : A long letter from Claimant.

Q : After his so called "resignation"?

A : May be.

Q : Do you agree that Claimant had stated that Dato' TY Lim and you had agreed to six months commission not to able to be included?

A : From the contents of the letter seen, have this is what Claimant said.

Q : You agree with me that in your correspondence or email to Claimant you never denied this i.e. that Dato' TY Lim and you cannot include six months commission?

A : I don't recollect replying this faxes. Claimant sent so many mails and letters, so not every mails or letters were able to replied. To be frank, we do not understand why Claimant was sending so many faxes.

Q : I put it to you, the reason why you did not reply to COB pages 10 and 11 was because Dato' TY Lim was indeed the Chairman of BSM when he and you decided not to be able to include the Claimant next six months sales commission after his so called "resignation"?

A : I disagree.

Q : I put it to you, this letter at COB pages 10 and 11 was attentioned to you and very well within your knowledge and yet you did not deny that Dato' TY Lim and you was not able to include the Claimant next six months sales commission?

A : I disagree.

At pages 8 to 13, COW said:-

Q : Question 35 COWS, what transpired on 22nd December 2003? You were having meeting with Dato' TY Lim. I put it to you, if Dato' TY Lim was only a supplier, there is no logic and beyond comprehension for Claimant to see you about his intended resignation in the presence of Dato' TY Lim whom you alleged was only a supplier to the Company?

A : Even I was equally surprised as to why Claimant has to chose that time to see me. If you look at Claimant's Bundle, Claimant have been sending email to Helga in Germany who was a Marketing Assistant. Claimant had even been sending his grievances to Germany.

The Claimant seemed to have a habit of communicating with irrelevant people and it can be seen in Claimant's documents.

Q : I put it to you that it was not the Claimant who willingly came to you together with Dato' TY Lim on 22nd December 2003?

A : I disagree.

Q : I put it to you that on 22nd December 2003, the Claimant was the one who was called by you for a meeting with Dato' TY Lim at the Company's premises in Shah Alam?

A : I disagree.

Q : I put it to you, during the said meeting on 22nd December 2003, the Claimant was told by Dato' TY Lim and you that Claimant had made a mistake by reporting directly to the German HQ about your cooperation with competitors like Allgreen and Omega Nutrition and you did like that?

A : I disagree because such complaints were from 2001 and not in 2003. That was why I submitted COB (b), the Claimant email in 2001.

Q : I put it to you that the Claimant had made complaints to German HQ on 11th November 2003 and 27th October 2003, are you aware?

A : This I was not aware of, I only saw it yesterday when you showed me as per pages 63 to 68 CLB-1.

- Q : Do you agree CLB-1 pages 63 to 68 Claimant had written complaints to HQ German on 27th October 2003 and 11th November 2003?
- A : Yes, I agree.
- Q : It was addressed to Mr. Andreas Reith, who was holding a management post?
- A : Yes even today Mr. Andreas Reith is MD of B & S (Hamburg) German.
- Q : I put it to you during the meeting on 22nd December 2003 the Claimant was forced by you and Dato' TY Lim to resign from his post?
- A : I disagree.
- Q : I put it to you that during the said meeting Dato' TY Lim told the Claimant that if he does not resign by himself, the Company will kick him out?
- A : I disagree.
- Q : I put it to you that during the meeting on 22nd December 2003, you and Dato' TY Lim had also promised if the Claimant resigned, the Company will always give strong recommendation and referrals to any of the Claimant's prospective future employment?
- A : I disagree.
- Q : I put it to you that in addition to that during the meeting on 22nd December 2003 you and Dato' TY Lim had also promised if

Claimant resigned from his post, the Company would appoint him as the distributor or agent for Company's product?

A : I disagree.

Q : I put it to you, immediately after the meeting, you had prepared the Claimant's letter of resignation and urged the Claimant to sign?

A : I disagree.

Q : I put it to you that the Claimant did not sign the letter of resignation prepared by on on 22nd December 2003?

A : I disagree, I never prepare any resignation letter on 22nd December 2002.

Q : I put it to you, after the said meeting on 22nd December you had immediately held a Company's meeting and announced the Claimant alleged resignation?

A : I disagree.

Q : I put it to you that you instructed Claimant to go to BSA office in Singapore around 29th or 30th December 2003?

A : I disagree.

Q : I put it to you that at the BSA office in Singapore, you had instructed the Claimant to sign his letter of resignation?

A : I disagree, I never instructed Claimant to sign.

Q : I put it to you that the letter of resignation dated 30th December 2003 was printed from your personal computer as the Claimant

did not bringing the copy which had been given to him in Shah Alam on 22nd December 2003?

A : I disagree. If I get the opportunity, I would have prepared a more proper resignation letter and not complicated the matter.

Q : In your answer to Question 35 COWS. I put it to you that you have created your answer in order to justify Dato' TY Lim's presence even though the Claimant as alleged by you wanted to discuss about his intended alleging resignation?

A : I disagree, I never created such answer.

Q : I put it to you that there is no need for Dato' TY Lim if he was a supplier to stay for the discussion because he was just a supplier?

A : Yes but Mr. Wong (Claimant) came for a short while and what should I do.

Q : Am I correct to say the reason why you proceeded with the Claimant i.e. discussion of Claimant was because you thought Dato' TY Lim could give you Claimant some business to the Claimant?

A : Yes.

Q : Do you agree that when we talked about an employees' resignation, it should be treated as highly confidential?

A : Yes, but Wong came to discuss, what can I do.

- Q : Do you agree with me that if Dato' TY Lim was just a supplier, he can always give business opportunities to the Claimant after the meeting on 22nd December 2003?
- A : PAOS was our contract producer of BSM, product in supplying chain management. It is important that supplier and brand owner work together. So we cannot accept Dato' TY Lim giving some private business to Claimant but it must be with the knowledge of Berg & Schmidt.
- Q : Do you agree that even if Dato' TY Lim gave business to Claimant, you can get information from Dato' TY Lim as PAOS is a long time business associate of the Company?
- A : Yes.
- Q : So I put it to you, the reason why Dato' TY Lim was present at the meeting was that Dato' was the Chairman of BSM?
- A : I disagree.
- Q : Look at Question 37, I put it to you that when the Claimant was forced to resign you had promised the Claimant that Claimant will be appointed as Canvassing Agent for both Malaysian and overseas markets?
- A : I disagree.
- Q : I put it to you that the document as per page 71 CLB-1 was prepared by you on 30th December 2003 at BSA office in Singapore?

A : I disagree because if I had the opportunity, I would have not written such a complicated letter.

Q : I put it to you in order for you to persuade the Claimant to sign the letter of resignation at page 71 CLB-1, you had made a promise that the Claimant shall be appointed as a Canvassing Agent for the Company for Malaysia, Taiwan and China markets.

A : I disagree.

Q : You have said in your answer that it was BSA who had agreed to take the Claimant as a Canvassing Agent after the expiring of six months of his resignation. I put it to you that BSM also did the same?

A : No, I disagree to appoint somebody as distributor after resignation was MD's prerogative. If Claimant had written in his resignation letter, it was not binding on the Company to accept him as Canvassing Agent but in order to support a colleague, we said for BSA to support him as Canvassing Agent but for my answer, there was no agreement made.

Q : I put it to you that there was no agreement which was signed between Claimant and BSM because from day one you had never intended to appoint the Claimant as the Company's Canvassing Agent. The promise was only made to force and induce Claimant to sign the Claimant's resignation letter?

A : I disagree on this.

At pages 15 to 19, COW said:-

Q : Look at Question 40 COWS, your answer. Do you agree that your answer to Question 40 are the reasons why Claimant was not appointed as the Company's Canvassing Agent?

A : Yes, I agree.

Q : I put it to you that it is impossible and illogical for the Company to wish to appoint the Claimant as its Canvassing Agent in the future if immediately you alleged that the Company discovered that the Claimant was carrying out a competitive business immediately after Claimant left the Company?

A : When I wrote the letter, we never found that he was doing competition activity only at later date. In my answer to Question 40, I used the word "immediately" but did not state the time. When I wrote page 76 CLB-1 at that time, we never found Claimant doing any competition deal because it was only four or five days after Claimant left.

Q : I put it you, you are not telling the truth.

A : I disagree, I said I am telling the truth.

Q : I put to you that the Claimant intended appointment as Canvassing Agent was also for the Malaysian markets?

A : I remember discussing with him for overseas market from Singapore.

Q : Look at second para CLB-1 page 76. I put it to you that the reason why you have stated that James Lim shall liaise with

buyers in Malaysia because you had indeed intended to appoint the Claimant as the Company agent in Malaysia as well?

A : I disagree because this para doesn't say so.

Q : Question 38, why six months lapse? I put it to you that the payment of six months salary was not done out of goodwill but it had to be paid by the Company as a compensation when the Company had accepted the Claimant's resignation with immediate effect and not after the six months notice as required?

A : I agree.

Q : I put it to you that you had forced the Claimant to resign and because of that the Claimant had to give his six months notice period as per his letter of appointment but you were so eager to get rid of the Claimant with immediate effect and that is why you had accepted Claimant's resignation with immediate effect?

A : I disagree. After I received Claimant's decision to resign, I discussed my decision with the other Board members and we all felt that Claimant had in his position had the authority to buy and to sell. When he had decided to leave, it is not in the interest of the Company to continue such authority.

Q : I put it to you that you had as early as 5th January 2004 informed your customers, distributors, agents and suppliers of the Claimant's resignation?

A : I agree.

- Q : Refer to pages 77 and 78 of CLB-1, do you agree that these are the documents you have forwarded to your agents of Claimant's resignation?
- A : Yes.
- Q : So I put it to you there was no necessity for you to accept the Claimant's resignation. If you wanted to avoid the Company from being obliged with the sales or transactions done by the Claimant after he was forced to resign because you had already informed other parties such as suppliers, distributors or agents that the Claimant had no such authority anymore vide documents as per pages 77 and 78 CLB-1?
- A : I disagree with you. The letter of acceptance of resignation is as per CLB-1 page 72 dated 30th December 2003 and CLB-1 pages 77 and 78 was sent on 5th January 2004.
- Q : I put it to you that there was no discussion between you and the other Board members in accepting the Claimant's resignation with immediate effect?
- A : I disagree.
- Q : I put it to you that your alleged reason for Company to accept Claimant's resignation with immediate effect is only your afterthought?
- A : I disagree.
- Q : Refer to page 79 CLB-1 dated 12th January 2003. Is this letter acceptance of resignation?

- A : No, my acceptance is as per CLB-1 page 72.
- Q : Do you agree with me at page 72 CLB-1 and page 79 CLB-1, you have never stated the reasons for the Company in accepting the Claimant's resignation with immediate effect? Agree?
- A : We never stated the reason, I agree.
- Q : I put it to you, since you have not stated the reasons of the Company in accepting the Claimant's resignation with immediate effect all the reasons which you have told the Court before, are only your afterthoughts?
- A : I disagree.
- Q : Do you agree that there were no negotiation between you and Claimant pertaining to Claimant's appointment as the Canvassing Agent for the Company?
- A : I disagree because at page 76 last para, I put the terms of appointment very clear.
- Q : I put it to you that the last para of CLB-1 page 76 is not the negotiation for the appointment of Claimant as Company's Canvassing Agent?
- A : I disagree.
- Q : I put it to you that the Claimant had never carried out any competitive business with BSA or the Company BSM immediately after he left?
- A : I disagree.

Q : I put it to you, you have no proof or evidence to show that Claimant was carrying out a competitive business with BSM or BSA?

A : I agree, I have no proof or evidence.

Q : I put it to you, since you have no proof or evidence that Claimant was carrying out competitive business with BSA or BSM immediately after he left, you just were making your own assumption as your reason?

A : Because there is a company, Nutrisupport formed by Mr. Wong and he started canvassing his product. I do not have his sales purchase agreement as proof but Claimant purchased a shelf company and started promotion activity of his product. This company markets animal feed fats and animal feed ingredient. This can be seen from annexures 81 to 83 CLB-1.

The proof of company purchase is later but it Claimant's competition activity started immediately.

Q : Is that all your answer?

A : Nutrisupport is a company. For Nutrisupport was formed on 5th January 2004. The day on which we circulated to the market that Claimant has resigned. On 24th March 2004 shelf directors resigned and Mr. Wong (Claimant) joined the Company.

We knew about this company and we were knowing its animal feed activity and that is what I mean by competition. There were also COB page 13 where Claimant sent me the mail and asked

us to support him on the product but also mentioned in Exhibit 13 that he is at sixth para that Claimant is going to have a Shanghainese company soon and also on March 17th, Company received the notice that Mr. Wong (Claimant) had sued the Company.

At pages 10 to 12 of the Notes of Proceeding dated 11 November 2009, COW said:-

Q : I put it to you it was the Company who had made the offer of five months salary to the Claimant?

A : This was a goodwill gesture and Company followed same goodwill measure in Ravi's case. He resigned and we still paid. We can produce the evidence on Ravi tomorrow and Ravi resigned in 2008.

Q : Who made the offer?

A : Company did not make the offer.

Q : Look at page 21 COB, email to Claimant on 12th January 2004. Do you agree in second last para of this email, line number 2. You have stated goodwill payment shall be paid by April 2004. From the above sentence, it was the Company who has proposed or made the offer for the payment of five months salary as a goodwill measure?

A : This is the email after Claimant had resigned and not before Claimant had resigned. After he had resigned, we only gave as a goodwill to him. We did not offer him before he resigned. It

was a Company's policy to pay employees one month salary for every year of services if he or she resigned. In case of Ravi, we also did so and this is as a goodwill. Is it a crime to do so and paid to employees.

Q : Do you agree with me this five months goodwill was not paid?

A : Yes because he had sued the Company.

Q : Question 40 and look at answer Question 40. In Question 40, you said the Canvassing Agent did not materialise because you found out that the Claimant was carrying out a competitive business immediately after Claimant left the Company. So I put it to you that the reason why Company agreed to pay Claimant five months salary as a goodwill measure was because the Claimant had never carry out competitive business with the Company before he resigned?

A : Long question, I don't understand.

Q : Question 40, you said Claimant carried out competitive business, would you still give the Claimant five months goodwill even if you had known that the Claimant compete with the Company immediately after he left?

A : Yes, we will still give him. The same was true with Mr. Sun Anquan and Mr. Ravi, they competed with the Company.

Q : I put it to you, there is no logic in your answer just now?

A : I disagree.

Q : I put it to you even if you agree to pay the Claimant five months salary as a goodwill gesture, it was because the Claimant had never involved in a competitive business with the Company?

A : I disagree.

Q : Refer to page 21 COB. I put it to you that all the incentives and five months salary as a gesture of goodwill as per the contents of this email at page 21 COB, were offered to the Claimant as an inducement in forcing the Claimant to resign from his post on 22nd December 2003 in Shah Alam?

A : I disagree.

At the hearing on 12 November 2009, COW produced COB (C) pages 1 to 8. At page 3 of the Notes dated the same, COW said:-

Q : I put it to you that Mr. Ravi had resigned on his own accord but not in the Claimant's case. Ravi resigned on his own?

A : Yes, I agree Ravi resigned on his own.

Q : I put it to you that the Claimant on the other hand was induced or forced to resign from the Company?

A : I disagree.

Q : I put it to you that the Claimant had never used his legal suit as a leverage to get the Company to deal with him? Refer to Question 65.

A : But this is what we feel from Claimant's letters.

Under re examination at pages 10 to 14 of the same Notes, COW said:-

Q : He claimed you have taken his market and gave to someone else?

A : Claimant was the only one doing business in China, who can I give the market? Even if I take away the market, we still have to give Claimant other markets as Company cannot afford to pay salary for nothing.

Court : Claimant's allegation is that you had indirectly given the market by offering the competitors to buy the BSM's product at a lower price?

A : Firstly, China is BSA's market not BSM's business. It is not related to BSM.

Secondly, we never sold product to competitor at lower price. Last point, compare to whole China business, if China business is 100%. Mr. Sun Anquan business was 3%.

Court : Claimant is saying even with 3% the exclusivity of Fushan Chahmu was no longer there?

A : First, exclusivity is only linked to B & S brand. It is Company's decision also to produce product for other competition brand. Please refer to CLB- page 27. This is parallel brand promoted by Claimant which created competition for Bergafat (B & S's product) in Taiwan, Korea, Thailand and Japan. Claimant was doing exactly the same for other market, how can he complain for China market.

There is no exclusivity in China. Exclusivity is for the brand (B & S), I also refer you to CLB-1 pages 50 to 54, where we have mentioned this product as our brand for Taiwan market.

Court : Look at page 11 CLB-1.

On page 11 CLB-1 – Areas of exclusivity, Eastern China – states:- Shanghai, Jiangsu, Zhejiang, Jiangxi, Fujian, Henan, Hubei of China. The words are – exclusive authorised sole agent of B & S Asia Pte. Ltd. for the above areas and not the whole of China.

Secondly, the brand name appeared on page 11 (Brand names) page 12 (quantity targeted). Brands names:-

- (i) Bergafat HTL 306
- (ii) Bergameal
- (iii) Bergafat DLN2 & PCO
- (iv) Bergaprime

Exclusivity given to Shanghai Hechang Industries Co. Ltd. As for the other brands, they were owned by other companies. They can sell anywhere in the world including Eastern China.

Court : What about price?

A : See CLB-1 pages 57 and 58. Omega Nutrition sold the product as MMK Fat. We sold to that company (Omega Nutrition) the product which was produced from left over batches which we mixed together. The mixed left over batches were sold to Omega Nutrition.

If you look at produce manufacturing code, refer page 57 CLB-1. It is written T-300-M (M stands for "mixed"). HTL-306-M (M stands for "mixed").

If you refer to page 58 CLB-1 shows the product sold to our distributor in pure form, it does not have "M". We sold exactly similar product also to India to another company by the name Leargue.

When Company launches a brand, it is extremely careful about its name and quality. B & S as a German brand will never sell inferior product under its own brand. Claimant was aware of that. That is why, there was a small price difference between the mixed and pure product.

Q : See price at page 57, for Omega Nutrition on 13th August 2003?

A : We sold T-300-M at USD437 on 13th August 2003 to Omega Nutrition. On 14th August 2003, we supplied to Shanghai Citico T-300 at USD470. There is a difference of USD33.00 for pure and impure product.

Secondly, Omega Nutrition's payment, refer to page 57 CLB-1 is 100% advance whereas Shanghai Citico at page 58 it was cash against document. The cost of LC or cash against document was about USD14 per metric ton, because bank in Singapore and bank in China will collect the charges and commission.

Court : When do you pay cash against document?

A : After one month of shipment because we needed ten days to prepare the document then bank needed ten to twelve days to process the document and sent it to customer. After customer in China paid, we needed another eight days to receive the payment. So if we calculate cost of interest and banking cost and credit risk insurance, it costs us about USD23 to 24 per metric ton.

Whereas in case of Omega Nutrition, we received 100% advance payment. The whole Board of Director also received quarterly sales report and nobody had any objection about it. We felt if Omega Nutrition really purchased the product only 10 to 12 USD cheaper than our distributor but of inferior quality, they still made a profit margin, so how can Omega be cheaper than Hechang Shanghai in the market when Hechang Shanghai has a pure product.

Omega Nutrition product was seen as USD33 cheaper but it has cost of USD24 and it is inferior to Hechang Shanghai product. We at B & S will never sell inferior product in our brand and Claimant knew about this.

Q : Can third party dealer or distributor sell Bergafat or Bergmeal in Eastern China?

A : No.

Q : Other competitors who sells in Eastern China cannot sell B & S brand?

- A : They cannot.
- Q : If you do not supply to the competitors, can they get their product from somebody else?
- A : There were five producers in Malaysia who produced product similar to Bergafat. They were Mewah Oils Sdn. Bhd., ECO Feed Sdn. Bhd., Carotino Malaysia Sdn. Bhd., IOI Oleo Chemicals Sdn. Bhd. and the fifth was KLK Palm Oleo.
- The last to enter was Kulim from JB and their company's name is Natural Oleo Chemical.
- Berg & Schmidt was only one of the manufacturers not the only manufacturer. So third party brand can also buy their product from any of these suppliers other than B & S.
- Q : If B & S do not supply to these competitors in China, will it be able to stop the competitors from entering China market?
- A : No, because many of these competitors were bigger than B & S. Example IOI, Wilmar, KLK Palm Oleo, Natural Oleo already sold their products in China market and since last five years IOI, KLK Palm Oleo and Wilmar now has established also plants in China, so many China third party producer bought from them locally in China including Sun Anquan.
- Q : Apart form Claimant, did BSA appoint any other person to handle China market?
- A : No, only Claimant.

At pages 18 and 19, COW said:

Q : Do you have minutes of meeting on 26th February 2002 based on page 25 CLB-1?

A : As per our record, there was no meeting held on 26th February 2002, but I have produced some resolution as per COB (C) where it shows that Dato' TY Lim was not related to the Company. These resolutions as per COB (C) were passed when Claimant was still with Company, see COB (C) pages 1 and 2.

Q : You were asked that meeting in respect of employees resignation was confidential. You agreed, why then did you discuss it in the presence of Dato' TY Lim?

A : As I said earlier, the Claimant wanted to resign. He came and discussed when I was having meeting with Dato' TY Lim. I didn't discuss it, Claimant came when I was having a meeting and he discussed in front of Dato' TY Lim that he wanted to resign so where is the question of confidentiality. If there was a breach, it was the Claimant who had breached it.

Q : What did Claimant wanted to discuss about?

A : Claimant wanted to discuss about canvassing and getting the help of Dato' TY Lim and B & S.

Q : Did you or Dato' TY Lim induce or force Claimant to resign in any way?

A : No way.

Q : Did you promise him anything?

A : I never promised him anything.

Q : Dato' TY Lim?

A : I remembered Dato' TY Lim said, where there is business opportunity, then Dato' TY Lim will support the Claimant but Dato' did not promise him anything.

Q : You said Claimant complained to Germany, did not effect you, explain.

A : I hold on two ways position in the group. I am a shareholder as well as MD. I looked after the Asia Pacific business with six manufacturing locations and five different companies in India, Malaysia and Singapore. We were gross shareholders (myself, Mr. Reith and Mr. Wywiol or common shareholders) at four others locations other than B & S Malaysia. In the whole group structure, Asia is my responsibility of which Malaysia is one of the parts.

Malaysia company is governed by Board of Directors of BSM and its MD (myself), so even if Claimant wrote emails to Germany, he never received any reply from them because Germany was not the HQ of BSM, it is also 50/50 joint venture.

At pages 5 and 6 of the Notes of Proceeding dated 13 November 2009, COW said:-

Q : It was put to you that you cooperated with Sun Anquan in your personal capacity to undercut the Company's market in China for your personal benefit?

A : It was always the Company, BSA, who sold the product to Omega Nutrition. It was sold for inferior product which was a kind of mixed or left over product (M – brand) at USD30 to 35 per metric ton (MT) lower than pure product with payment in advance. If we calculate insurance, interest, advance payments and banking cost, the next lower cost was on USD10 to 15 per MT, lower than pure product.

Bergafat which was fifty years old brand in 2003 was much established from three years old than Omega Nutrition plan for inferior product. So in no way does it provide competition for Bergafat.

Q : So no undercutting of China market?

A : We do not undercut China market. I am a shareholder of the Company and MD, why should I undercut my own business.

Q : Do you receive any personal benefit for your cooperation with Sun Anquan?

A : I never received any benefit from Sun Anquan and consider this very serious allegation against me as a person. In fact none of the Board members even replied to Claimant's letter since 2001, COB (B) pages 31 to 33.

B & S Dalian was established as shelf company then and it exist even today and whenever B & S wish to go to China market as local company, we shall use this shelf company. It was established before Claimant joined BSM.

B & S has similar shelf company with other agents in Indonesia and Thailand. When we established company, B & S Malaysia, it was also a similar shelf company. We can say in my entire career BSA and BSM has never sold even RM1 of product to B & S Dalian. We sold it only to Omega Nutrition which is Mr. Sun Anquan own company.

At page 8 of the said Notes, COW said:-

Q : When Claimant came and saw you at your meeting in Shah Alam, who brought in issued as Canvassing Agent?

A : Claimant.

Q : Did you or Dato' TY Lim mislead the Claimant as Canvassing Agent at Shah Alam meeting?

A : No.

Q : Did you promise any other thing or encourage him to resign?

A : No, we never encouraged him to resign. If you look page 71 CLB-1, it was one week later and I am sure Claimant had adequate time to rethink of it.

Q : You were asked about strategy of BSA and you can decide at your level, explain.

A : Company's Board meet normally two or third times a year to review the business. Quarterly sales report and financial goes to all the Directors. Board members decided only strategic policy and key decisions which has impact more than RM5 million. Day to day operational management was the function of MD.

At pages 10 and 11, COW said:

Q : COB (C), you were asked that a Chairman of the Company will not sign a circular resolution, you disagreed, why?

A : For Sdn. Bhd. company, it is not necessary to have Chairman. Chairman only for public listed company. If you refer to Board's resolution COB (C), before and after Claimant's resignation, the ROC has no mention of Chairman.

Q : Do you have anything else to add with regards to question asked in cross by Claimant's counsel pertaining to Claimant's dismissal?

A : I will simply say Claimant resigned on his own after 22nd December 2003. He had ample time to think till 30th December 2003 and we think it is always our moral obligation to support our ex employees in business as nice upon a time they did contribute to the Company and that is the reason Company gave goodwill gesture payment to Sun Anquan, offered to Wong and Ravi after they have resigned and most important in today's business world customer buy brand because he trusts its quality

and service at the market place. No established brand of fifty years you will supply inferior product in its own brand. We are in this country since last ten year, today we produce apart from Bergafat, six others brand and in 2008 we increased our business from RM68 million in 2003 to RM170 million in 2008. This shown our marketing policy, our philosophy and strategy work. It was the same in 2003 and it the the same even today. Our overall business in Asia has grown from RM140 million in 2003 to almost RM500 million in 2008.

Evidence, Evaluation And Findings:

The Claimant claimed forced resignation against Berg & Schmidt (M) Sdn. Bhd. (BSM). There is no claim whatsoever against Berg & Schmidt Asia Pte Ltd (BSA) nor is BSA made a party or joined as a party in the proceeding before this Court. No application was ever made before me to join BSA. However, intertwined the issues may have been. This is more so as the disputed letter of the Claimant's resignation as per WKL-4 attached to the Statement of Case was addressed to both BSM and BSA and his salary as per CLB-3 page 160 was divided between the two companies. Whatever claims and remedies, this Court can look into would as printed out by the Claimant's counsel at the last sentence of para 50.1 of his submission and the Company's counsel at para 6 of the Company's submission in reply limited to BSM.

The dispute with BSM was based in a purported letter of resignation dated 30 December 2003 which was the dismissal date as per ministerial reference.

There is no dispute between parties that the said letter was signed by the Claimant on 30 December 2003. The only dispute being that the Claimant alleged that he was forced or induced to sign it.

The said letter was alleged by the Claimant to have been given to him by COW immediately after a meeting on 22 December 2003 at Shah Alam. Apart from the Claimant, the meeting was attended by COW and one Dato' T. Y. Lim

At the said meeting, the Claimant alleged that both COW and Dato' T. Y. Lim had told the Claimant that the Claimant had made a mistake by referring directly to the Company's Headquarter in Germany. The Claimant was then forced to resign by Dato' T. Y. Lim who said, "if you do not resign by yourself, we will kick you out". Dato' T. Y. Lim also told the Claimant that the Company can dismiss him based on the term of his contract of employment. The Company also promised him that if he resigned, the Company would give strong recommendation and referrals to the Claimant's future employers and would appoint him as a distributor for the Company's products (see para 4.7 of the Claimant's Statement of Case). It is not disputed that the Claimant did not sign the said letter of resignation prepared by COW immediately after the meeting.

The Claimant, however, alleged that despite him not signing the said letter of resignation, COW immediately held a Company's meeting and announced the Claimant's resignation (see para 4.7. Statement of Case).

It was also not disputed that the Claimant went to see COW on 30 December 2003 in Singapore. At the said meeting, the Claimant was instructed to sign the letter of resignation dated 30 December 2003 (as per WKL-4 attached to the Claimant's Statement of Case).

The Claimant alleged that he did not bring the letter of resignation given by COW on 22 December 2003 and that COW printed out the same from COW's personal computer (see para 4.9 Claimant's Statement of Case).

Immediately after the signing of the said letter, COW announced the Claimant's resignation. The Company too immediately accepted the Claimant's resignation vide its letter dated 30 December 2003 as per Exhibit WKL-5 annexed to the Claimant's Statement of Case.

In short the Claimant claimed that he was forced to resign initially on 22 December 2003 and ultimately on 30 December 2003. The Claimant to alleged that he did not sign WKL-4 voluntarily as he was in a state of confusion, was very upset emotionally, was depressed and not mentally free due to the threat/coercion/persuasion by the Company.

Question: Was There Forced Resignation On 22 December 2003:

The Claimant's first witness, CLW-1, his neighbour said that the Claimant told him that the Claimant was forced to resign, "in the last week of December" but he did not tell him that the Claimant was paid six months salary when he resigned nor the

overall benefits the Company gave the Claimant amounting to RM100,000.00. It is interesting to note that CLW1 testified that, “if the Claimant were to received the above said RM100,000.00, CLW1 could not believe that the Claimant was forced to resign.

CLW2, a friend of the Claimant for then years said, the Claimant told him in “mid December”, that the Claimant was to forced to resign but did not tell him of the benefits the Claimant got. CLW2 too said that if it was true that the Claimant received RM100,000.00 benefits then, “may be the Claimant is not forced to resign”.

In answer to Question 33, CLWS-3, the Claimant said the following happened:-

“COW called him to Shah Alam for meeting with one Dato' T. Y. Lim, the Chairman of the Company. During the meeting, Dato' T. Y. Lim and COW told the Claimant the following:-

- (a) that the Claimant had made a mistake by reporting to the Germany Headquarter;
- (b) the Claimant was forced to resign when Dato' T. Y. Lim said, “if you do not resign by yourself, we will kick you out”;
- (c) the Company also promised that if I resign, it could always give strong recommendations and referrals to any of my prospective future employers;
- (d) in addition, the Company had also promised to appoint the Claimant as the distributor of the Company's product;

- (e) Dato' T. Y. Lim also told the Claimant that the Company can dismiss him based on the term of his contract of employment;
- (f) immediately after the meeting, COW prepared a resignation letter "by himself" and urged the Claimant to sign it. The Claimant did not sign the resignation letter; and
- (g) COW had immediately held a Company's meeting and announced the Claimant so called resignation.

It was the Claimant's evidence that the letter of resignation was prepared by COW and given to the Claimant on 22 December 2003. The Claimant too said that a copy of the letter was given to him on 22 December 2003 by COW but he did not bring it on 30 December 2003 when he met COW in Singapore. It would then be probable that the copy of the letter of resignation which was given to the Claimant on 22 December 2003 would still be with the Claimant and it would if produced remain unsigned. The said letter purportedly given to the Claimant by COW was never produced by the Claimant during the hearing of this case.

It was also alleged by the Claimant that the said letter as per page 71 CLB-1 was printed out by COW from COW's personal computer on 30 December 2003. That being the case, the date would have been 22 December 2003 as it was only a print out. The Claimant did not at anytime testify that COW had changed the date of the said resignation letter as per CLB-1 page 71.

At pages 1 to 3 of the Notes of Proceeding dated 6 January 2009, per page 50 of this award, the Claimant said that he signed the letter of resignation on 29 December 2003. It was the Claimant's own evidence that he went to Singapore on 28 December 2003 and was in Singapore on 29 December 2003 and 30 December 2003. This evidence is in stark contrast to his evidence that COW directed him to sign CLB-1 page 71 on 30 December 2003.

As stated earlier, it was the Claimant's evidence that COW prepared a resignation letter as per CLB-1 page 71 by himself immediately after the meeting on 22 December 2003. If it was so, the date on the said letter would have been 22 December 2003 and not 30 December 2003. The Claimant too never testified that COW had dated the said letter on 30 December 2003. From the above analysis, the Claimant's allegation as para (f) above is not probable.

There was also no supporting evidence that COW had immediately after the said meeting announced the Claimant so called resignation. Other than the Claimant's allegation as per his answer to Question 33 CLWS-3(A). This on a balance of probability allegation (g) is not probable.

A sum total of CLW1 and CLW2's evidence were that the Claimant only informed them that he was forced to resign had they known that the Claimant were to be paid monetary compensation then CLW1 would not believe the Claimant was forced to resign and CLW2, "may be the Claimant is not forced to resign".

Taking the resignation letter as per CLB-1 page 71 and COB page 10, the letter which the Claimant admitted to have written to COW, it is apparent that there was references to monetary benefits which was never told to CLW1 and CLW2 nor raised by the Claimant's answer to Question 33, CLWS-3 (A) as part of what transpired on 22 December 2003. This on a balance of probability makes the forced resignation not probable.

The Claimant also said that the Company promised him strong recommendation or referrals to any of his prospective future employers. The produced letter of application as per CLB-1 pages 85 to 94 none of which had any recommendation or referrals from the Company produced letter of application as per CLB-1 pages 85 to 94, none of which had any recommendation or referrals from the Company. The applications were made in May 2004 after the Claimant had made representation to the Industrial Relations Department in April. The Claimant did not produce any document nor any evidence of him requesting for any references or referrals from the Company. The Claimant on a balance of probability would have asked for one if there was such a promise. This makes the Claimant's allegation as per para (c) not probable on a balance of probability.

The next issue is the "force" used by Dato' T. Y. Lim. It was put to the Claimant that nobody put a knife or gun on his head and asked the Claimant to sign to which he said "yes". From the Claimant's evidence, the only force used was verbal when Dato' T. Y. Lim said, "if you do not resign by yourself, we will kick you out". The Claimant's contention was that the words had an impact of forcing him out of his job

as it was said by the Chairman of the Company. The Claimant was shown COB(A) and he agreed that Dato' T. Y. Lim's name did not appear in any of the documents as Chairman of the Company (BSM). The Claimant also agreed that Form 49 of the Company does not show that Dato' T. Y. Lim was the Chairman of the Company. The Claimant as per page 40 of this award said that COW told him that Dato' T. Y. Lim as represented by Mr. Pang Hee Kin or Mr. Teoh Cheng Chuan but did not have any documentary evidence in support thereof. As far as Form 49, there is nothing in it to show that Dato' T. Y. Lim was a Director of the Company. The Claimant also referred to pages 75 and 78 CLB-1. The Claimant said page 74 had a cc copy to Dato' T. Y. Lim. It is argued that no cc copy would be given if Dato' T. Y. Lim was not a Chairman. It is noted that CLB-1 page 75 states with page 73 which was dated 31 December 2003 after the Claimant had tendered his resignation through CLB-1 page 71 dated 30 December 2003. It remains an unsigned letter as per CLB-1 page 74. The signed copy is as per CLB-1 page 78 and there is no cc copy to Dato' T. Y. Lim. The Claimant too testified as per page 50 of this award that, "it is also not logic if Dato' T. Y. Lim is the supplier can involve with the resignation of a Company high rank manager like me".

From the above testimony of the Claimant, the said words used by Dato' T. Y. Lim would not on a balance of probability have any effect unless Dato' T. Y. Lim was the Chairman of the Company. COW had testified that as for as the documents as per COB pages 3 to 9, Dato' T. Y. Lim was not a Director nor a shareholder of the Company. According to COW, Dato' T. Y. Lim attended some of the activities organised by the Company as a major supplier of the Company.

According to COW, Dato' T. Y. Lim according to Forms 24 and 49 as at 27 July 2004 was neither the Chairman, Director or shareholder of the Company. Dato' T. Y. Lim was the Chairman of PAOS Sdn. Bhd. a company whose office is located next to the Company's office.

COW when referring to COB (C) said the Company (BSM) as Sdn. Bhd. company and it was not necessary to have a Chairman. Chairman was only for public listed company. From COB (C), the Board's resolution it has no mention of a Chairman.

It was the Claimant who alleged that Dato' T. Y. Lim was the Chairman of the Company. It is then incumbent upon him to adduce evidence that would show on a balance of probability that Dato' T. Y. Lim was the Chairman of the Company (see Sections 101 to 105 of the Evidence Act 1950). The Court finds from the evidence adduced by the Claimant and the Company that the Claimant have failed to do so on a balance of probability. The allegation of forced resignation by Dato' T. Y. Lim as stated by the Claimant himself would not have any effect as according to the Claimant, "it is also not logic if Dato' Lim is the supplier, can involve with the resignation of the Company high rank manager like me". The basis of the "force" was the Chairmanship of Dato' T. Y. Lim if the basis fail, the argument that there was "forced" used against the Claimant would also fail. As the Claimant had failed to prove on a balance of probability that Dato' T. Y. Lim was the Chairman of the Company his claimed that Dato' T. Y. Lim had forced him to resign on 22 December 2003 could also on a balance of probability.

The Claimant did not mention Dato' T. Y. Lim for the incident on 30 December 2003 in Singapore. In Singapore, it was only the Claimant and COW.

The Company's version of what transpired on 22 December 2003 had earlier been adumbrated as per pages 66 to 70 and 85 to 88 of this award. COW did not deny that there was a meeting on 22 December 2003. COW's version was that on 22 December 2003, it was the Claimant who came to see him about his intended resignation and intention to act as Canvassing Agent. At that time, COW was having a meeting with Dato' T. Y. Lim. There was a discussion about the Claimant's resignation in the presence of Dato' T. Y. Lim. The Claimant informed COW that he wanted to resign to start his own business and that he was unhappy with the Management including COW. According to COW, he did not prepare or give the Claimant any letter of resignation and the meeting was for a short while.

According to COW, there was no discussion of any monetary benefits prior to the Company's acceptance of the Claimant's resignation as it was the Claimant who wanted to resign voluntarily. COW's evidence that there was no monetary discussions would on a balance of probability be in line with CLW1 and CLW2's evidence that the Claimant did not mention any monetary benefits when the Claimant told them he was forced to resign. COW too at page 67 of this award had stated that it would be "ridiculous" for Dato' T. Y. Lim to dismiss or force the Claimant to resign as Dato' T. Y. Lim is "an unrelated party to the Company" and "did not have the authority to dismiss the Claimant". This is not disputed by the Claimant as the Claimant too agreed that if Dato' T. Y. Lim was not the Chairman of the Company,

there would not have been any “force” for the Claimant to resign. COW's evidence with regard to the purported resignation letter said to be prepared and given by him is also considered. According to COW, he would not have worded it the way it was (see pages 69/70 of the award). The Claimant too was not detained or prevented from going back after the discussion with COW even when he did not sign the alleged letter.

The Claimant too did not complain of his forced resignation immediately to the Company and in fact took action almost 60 days later when he referred his case to the IR Department . If indeed he was forced would not have complained earlier. It is trite law in cases of constructive or forced resignation for the Claimant to immediately take action or complain of the forced resignation.

The Claimant himself admitted that he did not sign any letter of resignation on 22 December 2003. It would then show on a balance of probability that he was not forced to do so. The Claimant himself said he did not sign the letter and had the letter with him but forget to bring it to Singapore. What than was the reason for the Claimant to have gone to Singapore to see COW if not because of his resignation. The Claimant went to Singapore not on 30 December 2003 but on 28 December 2003. The Claimant had ample opportunity to get the letter. It is also not probable on a balance of probability of the Claimant had made an appointment to see COW in Singapore for him to have forgotten to bring the said letter of resignation. Be that as it may from the totality of the evidence before this Court with regard to the incident on 22 December 2003 involving Dato' T. Y. Lim. The Court finds that the Claimant

had not proved on a balance probability that Dato' T. Y. Lim as the Chairman of the Company had forced him to resign.

Question: Inducement By COW On 22 December 2003:

The next allegation was that COW had induced the Claimant on 22 December 2003 by promising strong recommendation and good referrals to his future employers and agreed to appoint the Claimant as a distributor of the Company's product. The Court had discussed the probability of recommendation and referrals and would now consider the question of distributorship.

COW had testified that he did not promise to appoint the Claimant as distributor/Canvassing Agent of the Company as BSM was only involved with Malaysia market and not overseas market. The negotiation for the appointment as Canvassing Agent for BSA for the China market. This would have not be discussed at Shah Alam as in Shah Alam it was regarding the Claimant's resignation from BSM. This was after the Claimant had tendered his resignation on 30 December 2003 and the appointment was after the expiry of six months from the Claimant's resignation and subject to a formal contract being finalised.

From the totality of the evidence adduced with regard to the inducement, the Court finds on a balance of probability the Claimant's allegation that COW had induced him to resign on 22 December 2003 not probable. A scrutiny of the documents pertaining to the as Canvassing Agent were all after the Claimant had tendered his resignation.

The Claimant's main dissatisfaction as per his evidence was not against the Company but against COW. The basis of all his resentment was that COW was supporting distributors or suppliers who were competitors of BSA's business in China. It is not disputed that all dealings with foreign markets were handled by BSA. BSA would then place orders with the Company (BSM) who would then provide the products to the China market. It is also not disputed that the Claimant was in charge of the China market and had his suppliers. It was also evidenced before this Court that Sun Anquan was a former employee of BSA and was formerly in charge of the China market before the Claimant joined the Company. The first complaint by the Claimant was on exclusivity. The Claimant submitted that based on CLB-1 page 11, the Exclusive Distributorship Agreement signed by him on behalf of BSA and Shanghai Hechang Industries dated 29 March 2001. BSA could only sell to the China market through Shanghai Hechang Industries Co. Ltd. as per para 1 to 4 as per pages 12 to 14 CLB-1. COW explained that CLB-1 page 11 had its limitation as per para 1.0 CLB-1 page 12. Firstly, the areas of exclusivity is limited to Eastern China: state of Shanghai, Jiangsu, Zhejiang, Jiang Xi, Fujian, Henan and Hubei. Secondly, the products were limited to:-

- (a) Bergafat HTL 306
- (b) Bergafat DLN 2
- (c) Bergameal
- (d) Bergaprime.

This is stated by COW as per page 11 Notes of Proceeding dated 12 November 2009.

Other than the above, the period of exclusivity limited to be from 1 January 2001 to 1 January 2004 and the weight for each item is also limited as follows:-

- (a) 2040 MT/year
- (b) 1200 MT/year
- (c) 1200 MT/year
- (d) 1200 MT/year

The Claimant also complained that BSA was also selling the products at a cheaper price. To support his case, the Claimant produced CLB-1 pages 57 and 58. Page 57 was the price sold to Omega Nutrition which was linked to Sun Anquan and a competitor to BSA and page 58 was the price sold to Shanghai Citico, BSA's distributor. The Claimant said the price sold to Shanghai Citico for HTL 306 was USD525.00 and for T-300 it was USD470. While that for Omega Nutrition, was USD485.00 and USD437.00 respectively.

COW explained at page 12 of the Notes of Proceeding dated 12 November 2009 explained that the products at CLB-1 pages 57 and 58 were not same. The one sold to Shanghai Citico is HTL 360 and T-300. HTL 360 is carried by the exclusivity Agreement and it is a pure form (100%). What is sold to Omega Nutrition is HTL-360-M. "M" stands mixed which is mixed left over batches. According to COW, Berg & Schmidt do not sell mixed product to its distributors as it is extremely careful about its name and quality. It only sold product in its pure form to its distributors. That is why according to COW, there is a difference in the prices. According to COW, the product HTL-360-M and T-300-M was also sold to India to another company by the name Leargue.

Apart from the product manufacturing code COW also explained that Omega Nutrition payment as per CLB-1 page 57 is 100% advance whereas Shanghai Citico at page 58 CLB-1 was cash against document. COW explained that the letter of credit (LC) or cash against document was about USD14.00 per metric ton as bank in Singapore and bank in China will collect the charges and commission. Cash against document was paid after one month of shipment. This is because BSA needed ten days to prepare the document, the bank then took ten to twelve days to process the document and sent it to customers. The customers in China then paid and eight more days was needed to receive payment. COW said further, "if we calculate cost of interest and banking cost and credit insurance risk insurance, it cost at about USD23.00 to USD 24.00 per metric ton. Since the difference in price is USD 33.00, Omega only made USD 10.00 to USD 12.00 cheaper for an inferior product whereas Shanghai Hechang has a pure product. COW also explained that there were also six other producers/suppliers who sell products similar to Bergafat or Bergameal in Eastern China. They were Mewah Oils Sdn. Bhd., ECO Feed Sdn. Bhd., Carotino Malaysia Sdn. Bhd., IOI Oleo Chemicals Sdn. Bhd., KLK Palm Oleo and Natural Oleo Chemical. These suppliers too could supply to other distributors in Eastern China apart from BSA. Some of these producers have plants in China and many distributors in China bought from these plants locally. All these according to COW, could have caused competition in China's market.

From the above analysis, COW have given on a balance of probability a probable explanation that BSA was in no way involved in supporting competitors in the China's market nor was undercutting them as alleged by the Claimant.

It is not disputed by the Claimant that his allegation against COW's involvement with Sun Anquan and the China market stated in his email dated 13 July 2001 as per COB (b) pages 31 to 33. Despite that, it is not disputed that COW on 24 February 2003 promoted the Claimant from 1 March 2003. COW claimed that the said letter did not effect his relationship with the Claimant is on a balance of probability, probable. See also COW's answer to Questions 58 to 66 COWS.

COW also testified that he was the MD and shareholder of BSA and as such why should he undercut his own business. The Court finds his explanation on a balance of probability, probable.

With regard to B & S Dalian which the Claimant alleged to be "Bhawe (COW) and Sun (Sun Anquan)", there is no documentary evidence to support such an allegation. According to COW, both BSA and BSM has never sold even RM1.00 of product to B & S Dalian.

Claimant admitted that he was exhausted, tired and having poor health. Claimant needed to use the China's market to support him to have an easier life. Claimant was badly disturbed by his daughter's illness as no medical doctor could tell him what was the problem with his daughter. The Claimant to restore his health first but COW still wanted the Claimant to carve more new and recovery market. COW wanted to add more territories after completion of reorganisation and introduction of new products in the Claimant's territories and development of new customers. This is complied with the fact that the Claimant was having the impression that COW was

supporting Sun Anquan and undercutting his China's market. From the above state of affairs, it is on a balance of probability that the Claimant wanted to leave the Company. This is supported by testified that the Claimant had on several occasions prior to 22 December 2003 spoken about resigning.

From the totality of the evidence, the Court finds on a balance of probability that there was no forced resignation on 22 December 2003.

Question: Incident On 30 December 2003:

The Claimant testified that on 30 December 2003, he went to see COW and was instructed to sign CLB-1 page 71. The Claimant did not plead that he was forced to sign but merely said COW instructed him. It was also not pleaded that he was asked "to sign or else" nor was it pleaded that he was not allowed to leave until he signed the said CLB-1 page 71.

It is also the Claimant's evidence that he signed the letter on 29 December 2003 which made COW's evidence that the Claimant came with a duly signed letter of resignation on a balance of probability, probable.

It is also the evidence of CLW1 and CLW2 that when the Claimant told them of the forced resignation, there was no mention of monetary benefits. This makes COW's evidence probable that till the time the Claimant met him on 30 December 2003 and tendered his resignation, there was no discussion of monetary benefits.

A reference to CLB-1 page 71 first para indicates that it is the Claimant who was tendering his resignation and giving six months notice.

The six months notice is in line with item 10 (b) of the Claimant terms and conditions of service with BSA as per page 2 CLB-1 and first paragraph of item 7 of his letter of appointment with BSM as per CLB-1 page 15.

It is also provided in item 10 (c) CLB-1 page 2 (for BSA) and the second para of item 7 page 15 CLB-1 (for BSM) that if the Company were to terminate the Claimant's contract, it would have been "without notice or salary in lieu thereof".

Considering the above position with the Company (BSM and BSA) could have terminated the Claimant's contract without notice of salary in lieu thereof had COW wanted to do so.

Even the Claimant said Dato' T. Y. Lim said the Company could take action against the Claimant. This was denied by COW. If we were to consider the Claimant's evidence, the Claimant had agreed that he had been warned by COW not to write to Germany but the Claimant himself admitted to writing to Germany on 27 October 2003 and 11 November 2003. This was after Bali meeting and despite the fact that the Claimant himself said COW agreed at the Bali meeting that COW had agreed to stop supporting Omega Nutrition or undercut his markets in China. The Claimant testified that the Bali meeting was not a holiday while COW said it was more of a Company holiday. A perusal of the Claimant's fax to Helga dated 27 October 2003

at page 60 CLB-1, first and second para stated in the Claimant's own word, "I am busy after coming back from the meeting in Bali Island. Sorry for the delay to contact you. This is a good Company holiday ... ". The Claimant too admitted that he had been warned not to write to Germany but apparently he did not need to advise and kept writing to Germany. This would have been insubordination which on a balance of probability given the Company the opportunity to terminate the Claimant's contract without six months notice and salary in lieu. The Claimant would then be left with nothing. However, if it was the Claimant who resigned, it would entail that he needed to give a six months notice or otherwise lose his six months salary. This was not disputed by the Claimant. The Claimant alleged that both COW and Dato' T. Y. Lim had called him because of the two emails as per COB-1 pages 60 to 62 and CLB-1 page 64 to 68. COW denied having any knowledge of it. A perusal of COB (b) page 31 shows that the Claimant's email dated 11 July 2001 to Berg & Schmidt Germany was referred to COW by Andreas Reith. However, there is no evidence to support the Claimant's alleged claim that COW knew of CLB-1 pages 60 to 62 and 64 to 68. There is no evidence that COB (b) was copied to Dato' T. Y. Lim or that Dato' T. Y. Lim knew of it. A perusal of CLB-1 pages 60 to 62 and 64 to 68 too do not involve Dato' T. Y. Lim. It is then on a balance of probability not probable for Dato' T. Y. Lim to have forced the Claimant to resign based on the two emails. It is also not probable for COW and Dato' T. Y. Lim to have forced the Claimant to resign based on the email. This issue was also not raised on 30 December 2003. The only issue raised on 30 December 2003 was COW instructed the Claimant to sign and he signed. It is not disputed that the Claimant was highly educated as he had a university degree. The Claimant had from 22 December 2003

till 30 December 2003 to think about the said letter of resignation even if it was said to be given to him. He had the opportunity to seek advice but did not do so. Even after 30 December 2003 he did not report the matter but did so nearly sixty days later.

From the totality, the Court finds on a balance of probability that there is no forced used against the Claimant in signing the resignation letter. From the Claimant's own evidence, the Court finds on a fact that the Claimant had duly signed the resignation letter on 29 December 2003 and presented it to COW on 30 December 2003.

Subsequent Events:

COW testified that upon receipt of the Claimant's resignation letter, he referred the matter to the Board members who accepted the Claimant's resignation. It is also COW's evidence that the Management decided that it would be mutual benefit to release the Claimant early and pay the Claimant the notice period without requiring him to continue to serve out the notice period.

COW too testified that in line with the above and the Company's practice of informing its clients, the Company issued CLB-1 pages 77 and 78 dated 5 January 2004. The Court had earlier rejected CLB-1 pages 73 to 75 as it was not on the Company's letterhead nor signed by COW. It is also probable on a balance of probabilities for the Company to inform its clients as it had decided that the Claimant would no longer work for the six months period. Someone has to take over the Claimant's job function during the six months period and the customers would have to be informed

who to deal with. A similar letter as per COB (c) page 5 for Mr. Ravindran's resignation, supported COW evidence.

In consequence to the Management's decision, the Company sent a letter dated 5 January 2004 as per page 76 addressed to the Claimant regarding their association with the Claimant. It makes references to CLB-1 pages 77 and 78.

The next letter is COB page 10 dated 8 January 2004 from the Claimant to COW. A perusal of COB page 10 shows that there is a request by the Claimant for payment in lieu of his services with the Company. This is ex gratia payment of five months which was given by the Company according to COW to employees who had resigned from the Company. COB (c) pages 7 and 8 support COW's contention. The second para of the Claimant's letter faxed on 8 January 2004 clearly states:-

“Actually this is important for supporting me to take time to build up my new business”.

The above statement supports COW's version that it was the Claimant who wanted to resign to build up his own business.

The Claimant vide COB pages 10 and 11 was clear in his mind on evidence by his clear directions as to how payments were to be made to him. COB pages 12 and 13 and pages 14 to 20 further support that the Claimant was starting his own business.

COB pages 10 and 11 do not contain any complaint of forced resignation or disagreement. It shows on a balance of probability that the relationship was cordial and beneficial to both sides and that there was no forced resignation.

The subsequent pages of communication as per COB pages 21 and 22 and CLB-1 page 79 dated 12 January 2004 lends further support.

COB page 21 is a reply to CLB-1 pages 10 and 11, it is the Company's final proposal which the Claimant vide COB page 22 accepted. There is no mention of any forced resignation at page 22 or any disagreement thereof. Payment was made to the Claimant as per CLB-1 page 79 and the Claimant acknowledged receipt thereof.

The Court thus finds from the documents subsequent to the Claimant's letter of resignation on a balance of probability shows that the Claimant's resignation was voluntarily and that he was not forced to resign.

Conclusion:

In conclusion, the Court finds, taking into account the totality of the evidence adduced by both parties and bearing in mind Section 30(5) of the Industrial Relation Act 1967 to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form, the Claimant had failed to prove on a balance of probability that he was constructively dismissed by the Company.

The Claimant's claim is hereby dismissed.

HANDED DOWN AND DATED THIS 29 NOVEMBER 2010

sgd

**(DATO' JALALDIN BIN HAJI HUSSAIN)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**