

# SUPREME COURT OF QUEENSLAND

CITATION: *Lake v GBST Holdings Limited* [2019] QSC 253

PARTIES: **STEPHEN MAURICE LINTON LAKE**  
(plaintiff)  
**v**  
**GBST HOLDINGS LIMITED**  
(defendant)

FILE NO/S: SC No 2004 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 October 2019

DELIVERED AT: Brisbane

HEARING DATES: 12 – 16, 19 – 23 and 26 November and 7 December 2019; further written submissions on 21, 24 and 29 January 2019.

JUDGE: Douglas J

ORDER: 

- 1. Judgment for the plaintiff for damages totalling \$2,225,205.04 plus interest subject to any variances for changes in exchange rates since the trial.**
- 2. Dismiss the defendant’s counterclaim.**
- 3. Further submissions about costs shall be heard**

CATCHWORDS: EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATION OR BREACH – GENERALLY – where the plaintiff had been chief executive officer of the defendant company, GBST Holdings Limited, since 2001 – where the board of directors decided not to renew the plaintiff as CEO at a board meeting – where the decision not to renew the plaintiff as CEO was communicated to the plaintiff – where the plaintiff subsequently sold shares in the defendant and caused one of its subsidiary companies to enter into a lease to his advantage for a residential dwelling – where the plaintiff was purportedly dismissed for alleged breaches of the terms of his employment contract – whether the plaintiff was in breach of the terms of his employment in selling his shares at a time when he was possessed of price sensitive information that was not available to the general market – whether the plaintiff was in breach of the terms of his

employment in causing the defendant's subsidiary to enter into the lease for the apartment in which he and his family were to continue to live up to and beyond the termination of his employment – whether dismissal was wrongful

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – GENERAL PRINCIPLES – where the plaintiff had been chief executive officer of the defendant company, GBST Holdings Limited, since 2001 – where the board of directors decided not to renew the plaintiff as CEO at a board meeting – where discussions as to the plaintiff's separation package occurred – where the package as discussed included an entitlement to a salary and rent for a set period as well as performance rights under a long-term incentive scheme in circumstances where performance and service conditions were satisfied on a vesting date – where the plaintiff allegedly orally accepted an offer in respect of the separation package – where the plaintiff was subsequently dismissed prior to the vesting date for alleged breaches of the terms of his employment contract – where the dismissal was allegedly wrongful – whether the alleged wrongful dismissal of the plaintiff amounted to a repudiation by the defendant – whether the plaintiff was entitled to the separation package discussed prior to his dismissal

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING AND DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – PARTICULAR CASES – CONTRACTS GENERALLY – where communications were made by directors of the defendant company, GBST Holdings Limited, relating to share sales for the purpose of the plaintiff obtaining approval to sell shares and with respect to a proposal for entry into a lease for the benefit of the plaintiff – where the plaintiff subsequently sold shares in the defendant company and caused a subsidiary of the defendant company to enter into a lease for an apartment in which he and his family were to live – where as a result of the plaintiff's entry into these transactions, the defendant company alleged that he had engaged in fundamental and serious breaches of his employment contract giving it the right to summarily terminate that contract – whether the communications occurred in the course of trade or commerce – whether the communications were misleading – whether the plaintiff relied on the communications – whether the plaintiff would not have proceeded with entering into the transactions if the alleged misleading or deceptive conduct had not occurred

*Australian Consumer Law (sch 2 of the Competition and Consumer*

Act 2010 (Cth))  
*Civil Proceedings Act 2011* (Qld)  
*Competition and Consumer Act 2010* (Cth)  
*Corporations Act 2001* (Cth)

*Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2013]  
 QCA 183, considered

*Bartlett v Australia & New Zealand Banking Group Ltd* [2016]  
 NSWCA 30, considered

*Concut Pty Ltd v Worrell Pty Ltd* [2000] HCA 64; (2000) 75 ALJR  
 312, considered

*Downer EDI Limited v Gillies* [2012] NSWCA 333, considered

*Heugh v Central Petroleum (No 5)* [2014] WASC 311, considered

*Hodgson v Amcor Ltd* [2012] VSC 94, considered

*Johnson v American Home Assurance Company* [1998] HCA 14;  
 (1998) 192 CLR 266, considered

*Mair v Rhodes & Beckett Pty Ltd* [2018] VSC 132, considered

*Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20, considered

*Rankin v Marine Power International Pty Ltd* [2001] VSC 150,  
 considered

*Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359,  
 considered

*Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357,  
 considered

*Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, considered

*Vision Eye Institute Ltd v Kitchen* [2014] QSC 260, considered

*Visscher v The Honourable President Justice Giudice* [2009] HCA  
 34; (2009) 239 CLR 361, considered

COUNSEL: D G Clothier QC with K M Riedel for the plaintiff  
 M Trim for the defendant

SOLICITORS: King & Wood Mallesons for the plaintiff  
 McCullough Robertson for the defendant

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### **Nature of the dispute**

- [1] The plaintiff Mr Lake's principal claim against his former employer, the defendant GBST Holdings Limited (GBST), is for damages for the wrongful purported termination of his employment in November 2015. He had been its chief executive officer since 2001. GBST purported to terminate his employment for breach of its share trading policy for its employees and also because he caused one of its subsidiary companies, GBST Hong Kong Limited, to enter into a lease to his advantage without authority and without obtaining prior approval for that transaction from the Board.
- [2] Mr Lake sought damages for breach of contract, or alternatively, pursuant to s 236 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) comprising:
- (a) Twelve months' salary of \$643,100, or alternatively, six months' salary of \$321,550;
  - (b) The value of 365,177 ordinary shares in GBST as at 9 November 2015, totalling \$1,460,708, or alternatively, the value of those shares at the date of trial plus dividends;
  - (c) Interest pursuant to section 58 of the *Civil Proceedings Act 2011* (Qld); and
  - (d) Costs.
- [3] Mr Lake also claimed monies owed to him in relation to entitlements which he had accrued, but was not paid, on the cessation of his employment with GBST. The claim equated to a total of AU\$121,397.04.
- [4] Mr Lake no longer pursues a claim for specific performance of the 2012 performance rights contract<sup>1</sup> and instead elects to claim damages, being the value of 365,177 ordinary shares in GBST as at 9 November 2015.
- [5] In response to Mr Lake's claim, GBST filed a counterclaim seeking compensation in the sum of \$3,088,793.15, or alternatively a sum between \$2,606,180 and \$3,088,793.15, from Mr Lake pursuant to ss 1043L and 1317H of the *Corporations Act 2001* (Cth) (*Corporations Act*) in recompense for alleged insider trading in the company's shares by Mr Lake and for causing a subsidiary of the defendant to enter into a lease for an apartment in Hong Kong in circumstances where the lease should have been one for Mr Lake personally.

### **GBST**

#### ***GBST's business, its revenue and its products***

- [6] GBST is a business that was floated on the Australian Stock Exchange in 2005 which provides software and support to the financial services sector. It was and is a global business with overseas offices in London, Hong Kong and Singapore which required Mr Lake as its chief executive officer to travel internationally.

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<sup>1</sup> SML.009.

- [7] GBST had two main divisions in its business at all relevant times: namely Wealth Management and Capital Markets. Capital Markets had two divisions, Capital Markets Australia and Capital Markets International, and Wealth Management was broken up into Wealth Management Australia and Wealth Management United Kingdom.
- [8] At the relevant times GBST had three main computer software products called SYN~, Shares and Composer. The SYN~ and Shares products were used by the Capital Markets division. Composer was the primary product used by the Wealth Management division throughout 2015. By 2015 Composer administered approximately \$500 billion of funds under management across various clients. The Composer product offered an end to end funds administration registry and management software product which was designed to consolidate and manage the books and records of various investments. It allowed advisors and investors to manage their current financial position irrespective of the complexity of their affairs.
- [9] In 2015 GBST's revenue was broken up into two broad categories or streams: being licence revenue and services or sponsored revenue. Licence revenue was more long-term and represented a licence fee payable to GBST by clients. The licence fee was usually payable pursuant to the terms of a licence agreement for the use of GBST software.
- [10] Services or sponsored work involved enhancing software that had already been provided to clients. It was building something different, better or additional to what the client had access to under the licence agreement. The services or sponsored work was ordinarily contracted by use of a "statement of work" document. Mr Lake, GBST submitted, was not generally familiar with the contents of those statements of work, but the executives were. When considering possible services work, it was typical for GBST to undertake a scoping exercise of what client's requirements might be and that could take some time.
- [11] GBST acquired a company called Infocomp in or about August 2007. That was a company of which Mr Rob DeDominicis was the CEO. That company was the developer of the Composer product that was subsequently operated by GBST in 2015. Infocomp effectively became the wealth management division within GBST after it was acquired. By 2015 Composer had become GBST's biggest product by revenue.

***Aegon and its significance to GBST***

- [12] One of GBST's biggest clients in 2015 was Aegon in the United Kingdom. Aegon UK was the name used by a subsidiary of a large multinational life insurance pension and investment company, Aegon NV, based in the Netherlands. In or about 2010 Aegon wanted to make some changes to its relationship with GBST, including using the Composer product as the single biggest strategic platform for its new business. Aegon advised GBST that its desire to expand was driven by legislative reforms to the UK's retail financial advice sector. In or about 2010 GBST and Aegon agreed to new contractual terms. The effect of the contract that had commenced in 2011 between Aegon and GBST was to increase the licence payments to GBST from about £600,000 per year to about £3.2 million per year.
- [13] Part of the work done by GBST for Aegon was performed by a "ring fenced" team of GBST people for which Aegon paid daily fixed rates. In early 2015, it was expected that the ring fenced team's services work would come to an end in the second half of 2015. Mr Lake knew

of that in early 2015. The effect of the reduction of the services work for Aegon led to the belief among some employees of GBST early in 2015 that the services revenue was likely to decline significantly in the second half of 2015.

### ***Constitution of the Board***

- [14] Mr John Puttick was the chairman of GBST's board during the times relevant to this action. He had been involved with it since the company's formation in 1983. Other directors included Mr Allan Brackin who chaired the board by the time of the trial, Ms Christine Bartlett who joined in 2015 and is now the deputy chair, Mr David Adams and Mr Kim Sundell, All those directors with the exception of Mr Sundell gave evidence in the proceedings.

### ***Roles of different employees of GBST***

- [15] Mr Robert DeDominicis replaced Mr Lake as CEO of GBST, having first been named as interim CEO after the termination of Mr Lake's employment.
- [16] Mr Patrick Salis trained as a chartered accountant and was at GBST from September 2007 as chief financial officer then chief operating officer by 2015. He was based in the Sydney office.
- [17] Ms Isabel Sanchez was the chief technology officer of the defendant based in Wollongong and was responsible for maintenance of the software products.
- [18] Mr Andrew Ritter had trained as a chartered accountant but worked in GBST as its company secretary and chief financial officer although he reported to Mr Salis on the finance side. He worked on governance and compliance in particular.
- [19] Mr Denis Orrick was, in 2015, head of the capital market side of the defendant's business. He was involved in the budget process.

### **Mr Lake's role as CEO of GBST**

#### ***History***

- [20] Mr Lake was engaged pursuant to a deed of executive service.<sup>2</sup> He moved to Hong Kong for three years from 1 February 2012 pursuant to a secondment agreement.<sup>3</sup> That secondment was extended for 12 months from 1 February 2015 as agreed at a board meeting of 29 January 2015 evidenced in an email of 11 February 2015.<sup>4</sup>
- [21] Pursuant to his employment contract, he was entitled to a total salary of A\$643,100 including a base salary of A\$590,000 and superannuation of A\$53,100 per annum.<sup>5</sup> He might also be provided "Non-Salary Benefits", a term defined to include non-cash components, which could

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<sup>2</sup> SML.003.

<sup>3</sup> SML.006.

<sup>4</sup> SML.015.

<sup>5</sup> SML.003, cl 4.1, Schedule.

be added or removed during the term of the contract.<sup>6</sup> He was entitled to five weeks paid annual leave for each 12-month period of service, which was to accrue on a pro rata basis. He was also entitled to long service leave of 13 weeks after completing 10 years of service, plus an additional 1.3 weeks per year for each subsequent year of service.<sup>7</sup>

- [22] Pursuant to the secondment agreement he was also entitled to a housing allowance of HK\$120,000 per month, totalling HK\$1,440,000 per annum.<sup>8</sup> He was entitled to 25 days annual leave, plus a further 5 days additional leave (having completed 10 years employment) per annum.<sup>9</sup>
- [23] He had been invited to apply for performance rights under a long-term incentive scheme in the defendant's performance rights and option plan to which he agreed on 8 November 2012.<sup>10</sup> Those performance rights were to vest on the later of three years from the grant date or the date of release of the defendant's financial results for the 2015 financial year. The plaintiff's case was that they were due to vest, therefore, on 8 November 2015, the financial results for that year having been released on 11 August 2015. His evidence was that he did not receive those performance rights. If he had received them, he would have sold them a month or two after he ceased his employment with the defendant.
- [24] The plaintiff's written submission about the performance rights was as follows:

"18. The Performance Rights Contract entitled Mr Lake to receive 365,177 performance rights (**Performance Rights**)<sup>11</sup> if performance and service conditions were satisfied on the vesting date.<sup>12</sup> It is not disputed that the vesting date was 8 November 2015.<sup>13</sup> On that day, provided the vesting conditions were met, the Performance Rights would be automatically exercised,<sup>14</sup> the effect being that

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<sup>6</sup> SML.003, cll 1.1, 4.2, 4.3.

<sup>7</sup> SML.003, cll 7.1, 7.4.

<sup>8</sup> SML.006, cl 7, Remuneration Schedule.

<sup>9</sup> SML.006, cl 6.1.

<sup>10</sup> SML.009.

<sup>11</sup> SML.009. GBT.004. Clause 1.1 of GBT.004 defined performance rights as 'an entitlement of a Participant granted under this Plan to be allocated a Share subject to the satisfaction of any Vesting Conditions, to be held on trust by the Trustee [GBST ESOP Pty Limited] for a Participant pursuant to these Rules. For the avoidance of doubt, a Performance Right has a Nil exercise price'. Share was also defined in cl 1.1 of the Rules to mean a 'fully paid share in the capital of the Company'.

<sup>12</sup> SML.009. GBT.004.

<sup>13</sup> SML.009. GBT.004. Statement of claim, [18]. Defence, [15]. Defendant's opening outline, [18].

<sup>14</sup> Clause 6.1 of GBT.004 indicated that the terms and conditions of the performance rights offered or granted would be set out in the invitation letter (SML.009) which was provided to Mr Lake on 30 October 2012. Clause 7.1(b) of GBT.004 stated that a vested Performance Right would be automatically exercised within the period specified by the board in the Invitation Letter.

365,177 GBST ordinary shares would be acquired and held on Mr Lake's behalf<sup>15</sup> until withdrawn by him.<sup>16</sup>

19. The performance condition related to the financial performance of GBST in the 2013, 2014 and 2015 financial years. There is no dispute that the performance condition was satisfied. Mr Lake was notified of that fact on 7 October 2015.<sup>17</sup>

20. The service condition was expressed as continuous employment with GBST from the grant date to the vesting date. The GBST Performance Rights and Option Plan Rules (**the Rules**),<sup>18</sup> and the invitation Mr Lake received on 30 October 2012 (**Invitation Letter**)<sup>19</sup> addressed the situation in which he ceased employment with GBST before the vesting of the Performance Rights.

21. The Invitation Letter stated:

**Cessation of employment:** If you cease employment with GBST and hold Performance Rights, your ability to retain those Performance Rights will depend on the circumstances in which your employment ceases.

The Plan Rules define Other Leavers and Good Leavers.

If you are an Other Leaver, your Performance Rights will be automatically forfeited, unless the Board determines otherwise.

If you are a Good Leaver, the GBST Board will consider the circumstances of you ceasing your employment and may exercise its discretion to allow some or all of your Performance Rights to vest (and be exercised).

22. The Rules defined 'Good Leaver' and 'Other Leaver' in clause 1.1 as follows:

**Good Leaver** means a Participant who is not an Other Leaver, and includes where a Participant ceases employment or office due to Redundancy, Retirement, Permanent Incapacity or death.

**Other Leaver** means a Participant who ceases to be an employee or officer of the Group in any of the following circumstances:

The employment of the Participant is terminated, or the Participant is dismissed from office (as the case may be), due to serious or wilful misconduct, wilful disobedience, negligence or incompetence,

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<sup>15</sup> Pursuant to cl 7.3(b) of GBT.004, the shares were to be held by GBST ESOP Pty Limited (**Trustee**) as trustee on behalf of Mr Lake.

<sup>16</sup> Clause 1.1 of GBT.004 indicated that Mr Lake's beneficial interests in the shares would be held by the Trustee until he issued the company with a withdrawal notice.

<sup>17</sup> SML.052.

<sup>18</sup> GBT.004.

<sup>19</sup> SML.009.

insubordination, behaviour which damages or is likely to damage the business or reputation of the Group or any of its clients, or any other conduct justifying termination of employment or office without notice at common law;

The Participant resigns or ceases their employment or office with the Group (as the case may be) and commences employment, or holds the office of director, or directly or indirectly holds more than 5% of the issued capital with a Competitor in breach of any post-termination restrictions in their contract of employment or associated documentation; or

The Participant is ineligible to hold their office for the purposes of Part 2D.6 of the Corporations Act or as a result of any relevant corporations or securities law.

23. Clause 6.3(b) of the Rules stipulated:

6.3 Conditions for vesting

...

(b) Performance Rights or Options will only vest and be exercisable if the applicable Vesting Conditions have been satisfied, waived by the Board, or are deemed to have been satisfied under these Rules.

24. The Rules also stated in clause 7:

7. Exercise

7.1 Method of exercise – Performance Rights

At the sole and absolute discretion of the Board as set out in the Invitation Letter, a vested Performance Right:

Will be exercisable by a Participant by delivery to the registered office of the Company a signed Notice of Exercise; or

Will be automatically exercised with in the period specified by the Board in the Invitation Letter.

...

25. The Rules also stated in clause 8:

8. Leavers

8.1 Good Leaver

Where a Participant who holds Performance Rights or Options becomes a Good Leaver, all unvested Performance Rights or Options

will automatically lapse, unless the Board determines in its sole and absolute discretion:

To allow some or all of the unvested Performance Rights to vest, in which case those Performance Rights will be automatically exercised; and/or

...

## 8.2 Other Leaver

Where a Participant who holds Performance Rights becomes an Other Leaver, all unvested Performance Rights or Options will automatically lapse unless the Board in its sole and absolute discretion, determines otherwise.

26. On 18 October 2015, Mr Lake completed the requisite form to facilitate transfer, to himself, of the shares resulting from the vesting of the Performance Rights,<sup>20</sup> and he caused his secretary to submit that form to GBST's company secretary and chief financial officer (**CFO**), Andrew Ritter,<sup>21</sup> on 19 October 2015.<sup>22</sup>

27. By reason of its purported termination of Mr Lake's employment on 6 November 2015, GBST has treated the Performance Rights as not having vested for Mr Lake because of non-satisfaction of the service condition. Mr Lake's unchallenged evidence was that if they had vested, he would have sold the shares that he acquired within a 'month or two' of them vesting.<sup>23</sup>

### ***Termination discussions commencing 10 May 2015***

[25] On 10 May 2015, Mr Lake had a discussion with Mr Puttick, then chairman of the defendant, in Brisbane at the Stamford Heritage Hotel. Mr Puttick told him that the defendant was not going to renew his contract as they were searching for a new chief executive officer. The decision not to renew Mr Lake as CEO had been made at a board meeting in Hong Kong in April 2015.

[26] His deed of executive service which was described by the parties as his employment contract provided for the termination of his employment in these relevant terms:

#### **"8. TERMINATION**

8.1 GBST may summarily terminate your position immediately if at any time:-

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<sup>20</sup> T2-10/45; SML.052.

<sup>21</sup> T2-14/25.

<sup>22</sup> T3-13/5-30; SML.171.

<sup>23</sup> T2-10/40.

- a) you commit any fundamental and serious breach of your responsibilities as Chief Executive Officer as determined by the Board;
- b) you commit persistent breaches of material provisions of this Agreement;
- c) you are convicted of an indictable offence;
- d) you commit any act of serious dishonesty or fraud on GBST.

...

- 8.4 Either party may terminate your employment without cause by giving to the other not less than 6 months notice of the cessation of employment provided that the date of cessation is on or after the conclusion of the Term.
- 8.5 If GBST wishes, it may pay a sum to you for the notice period in lieu of your service during that time. The amount of the sum shall be calculated on the Remuneration Package as at the date of termination and shall provide for a cash payment for the Non-Salary Benefits in lieu of the provision of the Non-Salary Benefits during the notice period.”

[27] By 2 April 2015 Mr Puttick knew that Mr Lake was looking for a new two year tenancy for an apartment in Hong Kong because his current lease had, in effect, become a month to month tenancy.<sup>24</sup> After the decision that he should retire had been taken, Mr Puttick agreed that it was not then relevant to reach any different conclusion about where Mr Lake might live. There was no point in him leaving Hong Kong.

[28] Mr Puttick wanted Mr Lake to assist him in the search for a new CEO as he believed at that stage that nobody then employed internally by the defendant was suitable. The company was to engage a recruitment agency to establish a long list of potential candidates which Mr Puttick estimated would take about three months.

[29] He wished to advise the stock market about Mr Lake’s pending retirement in about August 2015 by which time he expected to have a short list. He expected it would then take about three to six months for the person selected from the short list to give notice to his or her current employer and to resign and a further three months for a handover of the position from Mr Lake to the new appointee. Mr Puttick told him that he would receive six months’ notice from February 2016 which would include six months’ rent of his apartment.

***Company’s leases of premises for Mr Lake to inhabit in Hong Kong***

[30] Mr Lake told Mr Puttick that he and his wife were then looking for another apartment than the one they had been living in and had found one that they liked. He said that Mr Puttick said to him words to the effect of “Well, you have to live somewhere. That’s okay”.<sup>25</sup> The minimum

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<sup>24</sup> JFP.010.

<sup>25</sup> T2-16/12-13; T5-70/23.

tenancy agreement he could enter into was for 12 months and he emailed a draft agreement to Mr Ritter, one of the administrative officers of the defendant, and to the defendant's internal counsel on 19 May 2015.<sup>26</sup> Mr Ritter then made arrangements for the termination of his old lease and entry into the new one.<sup>27</sup> He had asked Mr Ritter to speak to Mr Puttick to find out if the proposed new lease was appropriate and was later told by Mr Ritter that it was. He said that if Mr Puttick had objected to his entry into the lease he would not have entered into it.

[31] Mr Ritter's evidence was that Mr Lake had a housing allowance paid directly by GBST to the landlord. He agreed that, if he were asked by Mr Lake to seek Mr Puttick's approval for a lease, he would do that and report back. He would also help set up payment for the lease and deal with the landlord.<sup>28</sup> He obtained a final signed lease in respect of the new apartment as company secretary of GBST Hong Kong Limited, a GBST subsidiary, and arranged for that company to make payments to the landlord.<sup>29</sup>

[32] The new lease was actually for a two year term from 20 July 2015 to 19 July 2017 but cl 9 enabled the parties to elect to terminate the lease early.<sup>30</sup> It provided that:

“... after the expiration of the first twelve months of the tenancy hereby created, either party shall have an option for early termination of the tenancy hereby created and be released from the obligation of the terms of this Agreement upon giving not less than two (2) months' prior written notice or by paying the sum equivalent to the two (2) month's rent in lieu of such notice to the other party.”

[33] Mr Lake was familiar with his ability to break the lease at an earlier stage but not necessarily with the precise terms of cl 9. He believed, in spite of the fifth schedule prescribing that the premises could only be used for him and his family, that the defendant could substitute another tenant for them.

[34] In cross-examination Mr Lake agreed that he knew at the 10 May 2015 meeting at the Stamford Heritage Hotel that the board had lost confidence in him and that cl 8 of his employment agreement included provision for termination.<sup>31</sup> It was suggested to him that he had no written agreement requiring his employment after 1 February 2016 with which he agreed and he also agreed that his secondment agreement as extended finished on 1 February 2016.<sup>32</sup> He believed, however, that the notice period he would be entitled to took him out to August 2016 under the employment contract and that the lease he had entered into was appropriate within that timeframe. He had spoken about it with Mr Puttick whom he believed

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<sup>26</sup> GBT.277.

<sup>27</sup> GBT.277; GBT.288.

<sup>28</sup> GBT.277.

<sup>29</sup> SML.020; SML.025.

<sup>30</sup> GBT.008.

<sup>31</sup> GBT.001.

<sup>32</sup> GBT.007.

represented the board in their discussions. Mr Puttick's evidence was that he had hoped to have appointed a new CEO by Christmas 2015 but no hard and fast date had been set.

- [35] Mr Lake explained his failure to write to Mr Puttick in an email about the lease by saying that it was different from share trading. He did not believe the lease was a serious matter. Nor did he send an email about the lease to other members of the board. That had not been his practice in the past, to take leases of apartments rented by him to the board for approval.
- [36] He accepted that Mr Ritter and Ms Smith did not have the authority to permit him to enter into the lease on behalf of the defendant. Mr Ritter organised the payment of the rent by the company. He believed from the discussions he had had with Mr Puttick that Mr Puttick had given authority for him to enter into the lease and he asked Mr Ritter to speak with Mr Puttick about that.
- [37] After 10 May 2015 Mr Puttick had had no discussion with Mr Lake concerning the lease but knew by 17 September 2015 that it was a company lease extending beyond February 2017. He also knew, by 7 September 2015,<sup>33</sup> that the earlier lease had been month to month and was due to finish by September 2015. He also knew that the company lease would be on foot until at least 30 June 2016 and therefore knew that it bound the defendant or its subsidiary to pay rent at least until that time.<sup>34</sup> He said that he had no problem with it and no board member had told him that they had a problem with it. He assumed that Mr Ritter in his role as company secretary had arranged the lease.

***Further termination discussions***

- [38] An announcement of Mr Lake's retirement as Managing Director of the defendant was made to the Australian Stock Exchange dated 17 September 2015. It is useful to set out the events leading up to that announcement. Mr Puttick had been on leave after his and Mr Lake's conversation on 10 May 2015 and they spoke when he returned from leave in late June or early July. They, together, planned to issue a press release when the defendant's results were released in order to advise the stock market first of his departure.
- [39] There were discussions between Mr Puttick and Mr Lake about the form of the announcement to be made.<sup>35</sup> They also discussed his separation terms and the identity of his replacement. By about 24 or 25 August 2015 they had narrowed the list of potential candidates to six. Mr Robert DeDominicis was the eventually successful candidate. He had, in fact, been an internal rather than an external candidate.
- [40] In Mr Lake's discussions with Mr Puttick about the terms of his leaving the defendant, Mr Puttick told him by telephone that he would get six months' rent, six months' salary and his performance rights. He told Mr Puttick that 12 months' salary was more usual for a CEO of 14

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<sup>33</sup> GBT.071.

<sup>34</sup> JFP.039.

<sup>35</sup> GBT.303; GBT.060.

years. Mr Puttick agreed with him about that.<sup>36</sup> In his oral evidence Mr Puttick discussed telling Mr Lake how a “good leaver” should be treated. Mr Lake favoured a 12 month payout notice period which Mr Puttick regarded as the upper limit but said that that period would be reasonable given his long service as a “good leaver”. He believed that the 12 month period would commence from the date of separation from the company.

- [41] Then, by an email of 4 September 2015, Mr Puttick suggested that his termination payment recommendation should be determined by reference to his salary for 12 months and should include an indemnity for his liability particularly in respect of an action brought against him on behalf of the company by a Mr Murdoch.<sup>37</sup> Mr Lake explained the reference to the indemnity in respect of the litigation brought by Mr Murdoch by relating a history of proceedings for alleged oppression brought by Mr Murdoch against him and Mr Sundell that had settled in about October 2004.
- [42] About six months later a further claim was made by Mr Murdoch. He alleged that a secret agreement existed between Mr Lake, Mr Puttick and Mr Sundell, pursuant to which Mr Lake was to purchase shares in GBST from Mr Sundell. Mr Murdoch claimed that the existence of the secret agreement rendered settlement of the oppression claim null and void.<sup>38</sup> Mr Lake’s defence of that further claim was funded by the defendant and had been discussed at a board meeting on 29 January 2015.<sup>39</sup> While it was understood that joinder of Mr Sundell, Mr Puttick and GBST was possible, such a course was decided against because it would result in four sets of legal fees instead of one. Accordingly, it was considered more effective for Mr Lake to deal solely with the case.<sup>40</sup>
- [43] Mr Lake had concerns that the amount to be paid to him on termination may exceed the maximum permitted pursuant to the *Corporations Act* and Mr Puttick suggested to him that he may be able to continue as a consultant for the 12 months following his termination. A later version of the proposed payout to him also referred to a pre-committal of 12 months for the company rent in respect of the apartment he was leasing.<sup>41</sup> By 9 September 2015, a draft settlement and release deed was supplied to Mr Lake for his consideration, prepared by the defendant’s solicitors. He had engaged solicitors himself to advise him. He wanted to have a deed agreed before the announcement about his departure was released to the market.<sup>42</sup>
- [44] In mid-September 2015, Mr Lake attended a management meeting in London at the Savoy Hotel. It began on 15 September and he flew in the night before or that morning. The announcement to the stock exchange of his departure was released on the morning of

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<sup>36</sup> GBT.059.

<sup>37</sup> GBT.068.

<sup>38</sup> T2-21/3045, T2-23/5-10.

<sup>39</sup> SML.071.

<sup>40</sup> T2-23/5-10.

<sup>41</sup> GBT.071.

<sup>42</sup> GBT.072 includes the draft settlement and release deed.

16 September London time which was the evening of 16 September in Australia. Effectively, therefore, it was released through the Australian Securities Exchange (ASX) on 17 September early in the morning.

- [45] Mr Lake attended the management meeting on 15 September and told people there that he was leaving. Mr Puttick arrived after lunch and he spoke to the executives of the defendant for about half an hour. Then Mr Puttick and Mr Lake met at about 4.00 pm to discuss the process to go through on 16 September. Mr Lake told Mr Puttick that he still had nothing in writing and Mr Puttick said that he would have to trust him.
- [46] They then went to a pub next door to the Savoy Hotel in London. Mr Lake then told Mr Puttick that he would sell shares in the defendant. Mr Puttick told Mr Lake that he would wait until June 2016 before standing down as Chairman. Mr Lake told Mr Puttick that he would sell nearly half of his shares when he stepped down as CEO as that was a good time to do so.
- [47] The defendant had engaged a media company to handle the public relations side of the announcement of Mr Lake's retirement. He and Mr Puttick briefed journalists at 7.00 am on 16 September and then released the ASX announcement to the defendant's staff as well as to the ASX. Mr Lake said that he relied on Mr Puttick saying that he had to trust him as indicating that he and the company had an agreement in place as justifying the making of the announcement to the ASX. He said that he wanted to do the right thing by the company at that time.
- [48] By 22 September 2015, Mr Puttick and Mr Lake were still discussing Mr Lake's draft departure terms.<sup>43</sup> Mr Lake had provided him with a response to the draft deed which included quite a number of changes.<sup>44</sup> This document appears to have been sent on 25 September 2015 at 3.23 pm around the time of Mr Lake's share transfers. It also reflects his concerns about the indemnity for the Murdoch litigation.
- [49] Mr Lake sold shares in the defendant on 25 September 2015 as did his wife.<sup>45</sup> He first contacted his stock broker, Mark Pittman of a firm called Taylor Collinson in Adelaide, on about 18 September from London and then on about 21 or 22 September from Hong Kong when he discussed how a sale of his and his wife's shares might be arranged. They discussed the fact that he was the CEO of the defendant and Mr Pittman and he spoke of what they called a "reverse book build" as a means of selling the shares.
- [50] Mr Lake flew to Adelaide on 24 and 25 September and spoke to Mr Pittman in the afternoon of 25 September from about midday. Mr Pittman told him that there was interest in his shares, but he was not sure he would do a deal that day. He had an initial offer for the shares of \$4.60 per share when the market price was then \$4.95. Mr Lake thought that was too much of a discount and gave Mr Pittman a price of \$4.75.

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<sup>43</sup> GBT.337.

<sup>44</sup> GBT.340.

<sup>45</sup> SML.042; SML.043.

- [51] He had just seen a notice that a co-director, Allan Brackin, had sold some of his shares and informed Mr Puttick of his intentions "... to sell some as well over today and the next week ..." by email at 2.59 pm that Friday, 25 September.<sup>46</sup> Mr Brackin had sold his shares on 19 September.<sup>47</sup> Mr Brackin's sale was consequential on a separation from his wife and the need to create a balanced portfolio for her share of their matrimonial property.
- [52] Mr Lake received a reply from Mr Puttick to his notice of his intention to sell with the word "acknowledged" which he took to mean that Mr Puttick did not object to him selling shares.<sup>48</sup> That was not surprising considering he had told Mr Puttick earlier in August that he intended to sell some of his shares. Other directors, including Mr Puttick, had also spoken of selling shares, some of them proposing to do so after the announcement of Mr Lake's departure was made. His email had also indicated to Mr Puttick that he proposed to sell at least some of his shares that day. When he sent the email the stock exchange had only about an hour of trading left. He then spoke to Mr Pittman and informed him of the email he had received from Mr Puttick. His evidence was that if he had not received that email, he would not have sold the shares on 25 September.
- [53] He had been discussing selling shares with his wife for some time previously and had told her that he could not do that until the market was informed about his prospective retirement. He believed, by reference to a number of emails from his and his wife's iPad and MacBook computer, that he confirmed the instructions to trade the shares around 4.00 pm on that day.<sup>49</sup> A confirmatory note was sent to him at 4.10 pm Adelaide time. He had to notify the ASX of the changes in his shareholding and Mr Ritter drafted a form which Mr Ritter lodged notifying the ASX of a change in a substantial shareholding in the company. Mr Lake's shareholding then was about 7.5% of the company which was reduced to less than 5% by this transaction.
- [54] He read and approved the defendant's securities trading policy.<sup>50</sup> His practice in the past had been to deal with Mr Puttick and obtain his approval to trade in the shares. He would also deal with him about employment issues, usually by sending him an email.
- [55] When asked about cl 6 of the company's securities trading policy which required "written clearance from the Chairman of the GBST Board of Directors prior to any trading in GBST Securities at any time during a Closed or Prohibited Period", he said that he did not submit a request to the company secretary as he understood that he would be notifying himself.<sup>51</sup> Presumably this was because the company secretary would have to refer it on to Mr Lake. Nor did he use the form attached to that policy because it was for a "closed or prohibited" period and this was not one of those.

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<sup>46</sup> GBT.094.

<sup>47</sup> GBT.087.

<sup>48</sup> GBT.095.

<sup>49</sup> SML.040; GBT.097; GBT.098.

<sup>50</sup> SML.146.

<sup>51</sup> T2-38/38.

- [56] Mr Ritter was the company secretary and his evidence was that the share trading policy was meant to be an accountability measure for staff members to be responsible for their trading rather than placing the responsibility particularly on Mr Lake. Before the 2015 policy was implemented there had been a debate about whether there should be an open or closed policy. An open policy was one where staff and directors had periods where trading was permissible rather than designated blackout periods.<sup>52</sup>
- [57] He agreed that the 2015 policy was an enhancement of the 2013 policy but also a self-contained existing document. It was not circulated with the 2013 document.
- [58] GBT.170 was one of the first drafts of the new 2015 policy and included appendices A and B. Appendix B dealt with disclosure during a closed or prohibited period while appendix A dealt with disclosure during an open period. That was what was sent to Mr Lake by Mr Ritter on 28 September 2015. Appendix A had, however, been removed from the 2015 policy (with Appendix B renamed as Appendix A in the policy's final version). That appeared to have been a deliberate move.<sup>53</sup>

### ***Securities Trading Policies***

- [59] In that context it becomes important to describe in more detail the defendant's staff securities trading policies that were in force at the relevant times. The first relevant policy was one dated 25 July 2013 that provided among other things that: "Directors and Employees must gain approval prior to any trading of GBST Securities (buying or selling)... The CEO must not for his/her own personal transactions trade unless otherwise advised by the Board."<sup>54</sup>
- [60] Subsequently, on 3 September 2015, GBST adopted a new securities trading policy, the 2015 securities trading policy.<sup>55</sup> The board had reviewed the previous policy from around December 2014.
- [61] The 2015 policy was lodged with the ASX and was therefore accessible to all members of the public. It was provided to all of the directors, officers and employees of GBST with no reference to the need to consult the 2013 policy for information about its meaning or operation. The 2015 policy was obviously intended to apply to persons who became directors, officers and employees of GBST after it came into effect. It was a new, self-contained document; an update, the plaintiff submitted, rather than a supplement to the previous policy.
- [62] The defendant submitted, however, that the 2015 policy was designed to be a continuation of the previous policy because it referred to its existence. A contemporaneous email from Mr Puttick to other senior employees including Mr Lake also mentions that it is a continuation of the previous policy.<sup>56</sup> A note about the history of the policies does appear in the 2015 policy

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<sup>52</sup> GBT.291.

<sup>53</sup> See GBT.169; GBT.170; GBT.171 at p 5 of 7.

<sup>54</sup> SML.126; GBT.167 at cl 3.

<sup>55</sup> SML.146.

<sup>56</sup> GBT.315 at p 2.

which mentions that there were earlier versions in 2005, 2010 and 2013 but nothing in the 2015 policy expresses on its face that any of those policies continued to be effective. It said that the 2015 policy had been revised in light of the latest ASX listing rules.

[63] It seems to me to be appropriate, therefore, to consider the applicability of the 2015 policy independently from the 2013 policy. There were submissions, however, from the defendant that the 2013 policy could throw light on any ambiguities in the 2015 policy.

[64] Its relevant terms included:

**“3. Restrictions on trading**

At any time, all Staff of GBST are prohibited from trading in GBST Securities whilst in possession of unpublished price sensitive (or inside) information. Please refer to section 4 for more details on what constitutes inside information.

In addition to this overarching prohibition of insider trading, all Staff of GBST are not permitted to trade under the following circumstances:

- During Closed Periods or Prohibited Periods (refer to section 5);

...

**4. Insider Trading and Inside information**

**Insider trading** is prohibited at all times under this policy and is illegal under the Corporations Act. Insider trading includes trading in all GBST Securities by a person who possesses non-public 'price-sensitive' information (or inside information) concerning the Company's affairs.

If a person possesses inside information, and ought reasonably to know that it is inside information, they must not:

- apply for or acquire or dispose of GBST Securities, or enter into an agreement to do so (**'Dealing offence'**);
- procure another person to do so (**'Procuring offence'**); or
- directly or indirectly communicate the information, or cause the information to be communicated the insider knows or ought reasonably to know that a person would deal with (**'Tipping offence'**).

**Inside information** is information relating to GBST which is not generally available and if the information were known, would likely [sic] to:

- a reasonable person would expect it to have a material effect on the price or value of GBST Securities; or
- influence persons who commonly invest in securities in deciding whether or not to buy, sell or deal in GBST Securities.

It does not matter how or in what capacity you became aware of the inside information, and it does not have to be obtained from within GBST to constitute inside information. Practical examples of inside information include:

- Financial performance against budget or forecast;
- Change in strategic direction of the Company;
- Possible acquisition or disposal of significant assets;
- Possible change in capital structure (including capital raisings or borrowings);
- Proposed changes to dividends or dividend policy;
- Entry into or termination of important agreements;
- An unexpected liability; or
- Changes to GBST's Board of Directors or the KMP of GBST.

Potential consequences of breaching the insider trading laws may expose you (and/or members of your family and/or any other person you pass inside information onto) to criminal and/or civil liabilities under the Corporations Act.

#### **5. Closed (or black-out) Periods and Prohibited Periods**

It is assumed for the purpose of this policy that GBST Staff are likely to be in possession of inside information by virtue of their position. This is considered likely to occur on a periodic basis during the period prior to the release of the company's half year and full year results. For that reason, GBST Staff are not permitted to trade in GBST Securities as follows (each a '**Closed Period**')

- The period from (and including) the 15th of December to the end of the first business day following the release of the Company's half-year results (reviewed by the Company's auditor) to the ASX; and
- The period from (and including) the 15th of June to the end of the first business day following the release of the Company's audited full year results to the ASX.

In addition, each of the Closed Periods referred to in this section and the period during which an ASX release is being considered up to the release to ASX are '**Prohibited Periods**'. Section 7 provides specific permission due to exceptional circumstances in accordance with this policy.

**Furthermore, a black-out period may be imposed by the Company at any time without explanation. Irrespective of whether trading occurs in accordance with this policy, no trading can occur if it involves the use of inside information.**

#### **6. Approval for Trading**

To assist in protecting the interests of all shareholders of GBST, all GBST Staff may only trade in an Open Period.

For all trades during an Open Period, you must first obtain approval from your Manager and the relevant details must be submitted to the Company Secretary prior to a trade in GBST Securities being initiated [sic], who will register the request on the basis that the requested trade does not contravene any provision under this policy or any law, and will forward the declaration to the Group CEO.

Exceptional circumstances must exist before a member of GBST Staff may be given permission to trade during Closed or Prohibited Periods.

***Written clearance procedure during a Closed or Prohibited Period - GBST Staff (excluding Directors):***

You must must [sic] first gain approval from your Manager, and then the attached GBST Securities Trading Application (Closed or Prohibited Period) form (Appendix A) request shall be submitted to the Company Secretary, who will then register the request and then submit to the Group Chief Executive Officer & Managing Director ('Group CEO') for approval. The same written clearance procedure applies for KMP and any other GBST Staff who report directly to the Group CEO. The Board delegates its responsibility to the Group CEO to make such approvals, and in the absence of the Group CEO approval must be obtained from the Chairman or another Non-Executive Director (in the absence of the Chairman).

***Written clearance procedure during a Closed or Prohibited Period - Directors of GBST:***

The following persons must receive written clearance from the Chairman of the GBST Board of Directors prior to any trading in GBST Securities at any time during a Closed or Prohibited Period:

- The Group CEO;
- A Non-Executive Director other than the Chairman.

If the Chairman wishes to trade in GBST Securities during a Closed or Prohibited Period, written clearance must be obtained from the Deputy Chairman or another Non-Executive Director prior to trading.”

[65] Ms Bartlett recalled some discussion, probably at the 6 August board meeting, about how directors would get approval, especially in the case of Mr Puttick. He was supposed to check with Mr Brackin and Mr Lake. She could not remember any particular discussion about what the CEO should do when trading, nor the meaning of “manager” but said that the effect was that one should go to the person one worked for. Nor could she recall any discussion about the reference to CEO trading in the 2013 policy at p 3.<sup>57</sup> She described the 2015 policy, however, as an update of the 2013 policy.

[66] To consider the arguments about the share sales, whether they were authorised or in breach of the policy or constituted insider trading, it is necessary to consider what information about the defendant’s activities Mr Lake possessed leading up to the sales. This requires an examination in some greater detail of the events that occurred during the period leading up to Mr Lake’s termination.

**Development of the 2016 financial year budget from about 19 April 2015**

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<sup>57</sup> GBT.167.

- [67] Mr DeDominicis gave evidence about the development of the 2016 financial year budget commencing with the outlook paper of 19 April 2015.<sup>58</sup> The budget, from his point of view, was significantly affected by his expectation that work from Aegon UK was decreasing. It had formed a very significant part of the company's work. It was their largest platform in the United Kingdom and in Australia. They had a "ring-fenced" team working solely for that client under what was called the "Blue Planet" program. He lived and worked in the United Kingdom for the company and had constant contact with Aegon there through Mr Grace, Mr Chong and Mr Denning in particular. He spoke regularly both informally and formally with them. Their formal meetings occurred on a monthly basis.
- [68] By early 2015, he knew that Aegon's work with the company was ramping down as GBST had fully built out its system. He discussed that likelihood with Mr Lake by early 2015 by telephone. He believed that the revenue would go down as shown in the first outlook paper.<sup>59</sup> Mr Salis had drafted the text in that outlook paper and discussed it with him. The revenue was also predictable because it was provided through the ring-fenced team.
- [69] Mr Salis said he imported high level assumptions from the executive team into his draft. He spoke to all of that team and some of the topics of concern were that the Aegon run was coming to an end and that the capital markets business had problems because a contract it had with Pershing, another global financial solutions provider, was likely to be terminated and the cost base of the New York team had increased significantly. There was further discussion at the executive meeting in Hong Kong from 20 April 2015. That was the meeting for which he prepared that first budget outlook paper, GBT.009.
- [70] Mr Salis said that Mr Lake described that document on Monday, 20 April 2015 in a quite agitated fashion as "rubbish". In cross-examination, he agreed that the outlook documents were more preliminary than the budget documents. Mr Salis said that he was trying to say that it was worthwhile talking about what they had there, but Mr Lake then left to prepare for dinner. He told them "you guys need to work through this". The budget was also discussed perhaps on Wednesday, 22 April for an hour or so where Mr DeDominicis repeated observations he had previously made about the Aegon pipeline decreasing and spoke about income from North American expansion and research and development work. Mr Lake was present during that meeting and more conciliatory and they decided to consider those issues further at their next meeting.
- [71] Mr Lake's evidence about the defendant's budget preparation was that it would commence on an annual basis that would extend from May to mid-July with a first preparatory paper prepared in 2015 in mid-April. It was approved in mid-August. He described the budgetary process as building a model for expectations for the coming financial year where one would commence with a high level overview and then descend down to more subtle levels of detail.
- [72] One example he gave had to do with the resources the company should put into North America. He believed it was necessary to put more resources into that area while anticipating a greater short-term loss. Mr Salis was opposed to that view but Mr Lake believed that he,

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<sup>58</sup> GBT.009.

<sup>59</sup> GBT.009.

Mr Lake, had always been aggressive in pursuing growth for the company. It had secured a second customer in that area and he wished to continue to expand there.

- [73] He said preparing a budget involved questions of judgment. He wanted to stretch managers but not too far by giving them more challenging targets. He described Mr Salis, for example, as more pessimistic and conservative than he was. He described the budget as a working document which would be updated and varied at least quarterly. There would be the opportunity to change its settings and bring forward revenue or cut costs. Revenue could be brought forward, for example, by encouraging a client to bring a project forward earlier than it might have planned.
- [74] Mr Lake gave evidence of expectations he had during 2015 about the development of relations with particular clients of the defendant. One was the company Aegon where he was involved in discussions with its chief executive officer, Adrian Grace, to expand with Aegon the use of the Composer wealth management platform produced by the defendant. That was significant, in his view, as the projections for income from Aegon were as low as £3 million. He believed there was a significant chance that the actual income would be much higher than that. By 6 August 2015, for example, he received an email from a Mr Richard Denning from Aegon expressing real excitement about what that company might be able to do “going forward” with the defendant.<sup>60</sup> That led Mr Lake to conclude that there was the prospect of a significantly greater income from the defendant’s dealings with Aegon in the next financial year. He also spoke about the positive relationship that the company had with that client.<sup>61</sup>
- [75] There was also the prospect of an acquisition of a competitor company called Bravura<sup>62</sup> which would have reduced costs but would also have had the potential to increase revenue.
- [76] When cross-examined about the budgetary process, Mr Lake agreed that his executive team included Mr DeDominicis, Mr Salis, Ms Sanchez and others. They met roughly every month when they discussed revenue and profitability. He agreed that it was suggested during such meetings that the Aegon revenue was decreasing.<sup>63</sup> He agreed that Aegon was a significant source of revenue for the defendant. He could not recall Mr DeDominicis saying to him in about April 2015 that there was nothing left in the pipeline for Aegon. He was aware, however, that there was going to be a drop in work from it.

#### ***Discussions in Hong Kong in April 2015***

- [77] Mr DeDominicis had weekly discussions with Mr Lake in the first half of 2015 in which he discussed the Aegon outlook in particular and expense reduction also. A number of outlook papers were developed. One was discussed at a meeting in Hong Kong on 20 April 2015.<sup>64</sup>

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<sup>60</sup> GBT.381.

<sup>61</sup> T3-18/29-35.

<sup>62</sup> Perhaps Bravura Solutions Ltd.

<sup>63</sup> SML.147 and its reference to revenue concentration with Aegon continuing.

<sup>64</sup> GBT.009.

Mr DeDominicis was comfortable with the financial projections shown on p 5 of GBT.009 and with the words describing the significant issues on p 6. He said that document was discussed by the executive team in the Hong Kong meeting in April 2015. Mr Salis explained the paper and the outlook. The document, at p 11, also referred to an increase in operating expenses of \$5 million. Mr Lake did not take that explanation well and left the meeting shortly after it was discussed, having become a bit emotional and unhappy, and having used the word “rubbish” a couple of times. Mr DeDominicis told Mr Lake that the forecast was reasonable and correct. He could not recall the outlook paper having been discussed again during that three day meeting and said that the discussion would have taken about one hour.

- [78] Mr Lake was cross-examined about the series of “outlook papers” beginning from GBT.009 dated 19 April 2015 suggesting that the work from Aegon would drop.<sup>65</sup> He described that as the starting point of the budgetary process and accepted that Mr Salis, who helped prepare that document, said he had consulted others on the executive team. He agreed that there was a robust discussion with Mr DeDominicis at the meeting on 20 April 2015 in Hong Kong concerning the outlook paper. Mr Lake had described it as rubbish. Mr Salis was concerned about expansion in the United States and may have said that there were challenges ahead. Mr Salis repeated his concerns about the United States at a further meeting on 23 April 2015.
- [79] Ms Sanchez said that the entire executive team discussed the outlook paper dated 19 April 2015 a little on 20 April but more on the last day, 23 April. She could not recall specific statements by Mr Lake but said that there was a discussion about the reduction in work available. One matter affecting the Aegon projections related to a potential acquisition by it of a company called Cofunds which may have led to significant increases in the work for Aegon by GBST. The projections indicated that there may be higher fixed price work from September which arose from discussions Mr DeDominicis held with Mr Denning of Aegon which were conveyed to Mr Lake.<sup>66</sup>

***Discussions at executive meeting in May 2015 and afterwards***

- [80] A second draft of the outlook paper was prepared on 14 May 2015.<sup>67</sup> Mr DeDominicis said it was discussed by the executive in a meeting which he attended by video conference. He recalls discussing changes to forecasts in it and said that Mr Salis talked through the paper and summarised it.
- [81] Mr Salis’ evidence was that he had drafted it also based on the same sources of information as before. He discussed it with Mr Lake in preparation for the meeting in May echoing the sentiments he had expressed earlier. Mr Lake told him it was his opinion and it was up to them to get others’ views and form a consensus view. That meeting occurred on 14 May 2015. Mr Salis said that Mr DeDominicis spoke again about Aegon and the timing of new revenue which he said was likely to be “back ended”<sup>68</sup> to the second half of the year. Mr Lake put

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<sup>65</sup> GBT.009.

<sup>66</sup> GBT.014 at p 7; T7-31/1 to T7-32/20.

<sup>67</sup> GBT.014.

<sup>68</sup> T8-86/1.

forward his view that there was more upside than had been accounted for. He also spoke about the expansion of the capital markets' business into North America and Asia.

- [82] It was suggested to Mr Lake in cross-examination that the document reflected a decrease in Aegon revenue and a reduction in the "ring-fenced team" doing the work for it in the United Kingdom. He said, however, that his expectation then was that they would receive new work from Aegon and that it was wrong to say that there was no new project on foot.<sup>69</sup> He was discussing possibilities with Aegon then, as was Mr DeDominicis with Mr Denning from Aegon. He agreed that that document showed a forecast decrease of more than \$4 million in earnings between the 2015 financial year and the 2016 financial year and said that that was what the executive team was discussing.<sup>70</sup> Mr Salis was still concerned about investment in the United States. Mr Lake said that the company's investment in the United States started slowing down around that time.
- [83] By 1 June 2015, Mr Salis had prepared a new outlook paper.<sup>71</sup> He did not recall speaking with Mr Lake about that version of it and drafted it from the same sources of information he had used previously. He said it was not much different from the second version. The next version produced was dated 18 June 2015.<sup>72</sup> He discussed it with Mr Lake over the telephone when Mr Lake was in Hong Kong. He gave feedback and Mr Salis incorporated changes into the document for a planning session held in Sydney between 23 and 25 June 2015.<sup>73</sup>
- [84] GBT.017 again referred to a decrease in Aegon revenue. Mr Lake's evidence was that the information from Aegon was not consistent with that document. When it was suggested to him that there was a fixed price project showing revenue from Aegon of \$1.9 million per month included in the assumptions he said that there was no allowance for discussions that GBST was having with Aegon at that time.

***Discussions at Sydney executive meeting 23-25 June 2015 and afterwards***

- [85] Mr DeDominicis' views about prospects remained consistent throughout a number of other documents that were put into evidence.<sup>74</sup> He discussed the budget at a management planning session between 23 and 25 June 2015 but could not recall particular comments from the session dealing with it during that meeting. Nor was he aware of any new customers in North America apart from their existing client, Raymond James.<sup>75</sup>

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<sup>69</sup> GBT.014 at p 7.

<sup>70</sup> GBT.014 at p 23.

<sup>71</sup> GBT.017.

<sup>72</sup> GBT.019.

<sup>73</sup> GBT.021.

<sup>74</sup> GBT.021; GBT.017; GBT.019.

<sup>75</sup> GBT.203.

- [86] Mr Orrick also attended the Sydney planning session between 23 and 25 June 2015. During it Mr Salis said that the performance forecasts were going backwards. Mr Orrick said Mr Lake was present. Mr Orrick was involved in discussions about the possible acquisition of Bravura and described the numbers as not realistic. That was something said by Mr DeDominicis.
- [87] Ms Sanchez also attended the planning session from 23 to 25 June 2015 in Sydney and said that the budget papers were discussed.<sup>76</sup> There was discussion of the amount of revenue and what were called “stretch targets”. There was also discussion about the need to reduce costs in the capital management area. Revenue was said to be at risk from ANZ and Aegon with the Aegon statement of work being discussed. It guaranteed work only until September.
- [88] Around this time there was discussion about the acquisition of Bravura and Mr Lake asked Mr DeDominicis to consider what changes the defendant would make if it acquired that company. One possibility was a decrease in expenditure in respect of the PowerBuilder to Java project. That was a proposal to rewrite their Composer program to use the Java coding language instead of the existing PowerBuilder code. There was also the potential revenue from Aegon because of the possibility that it would replace its web portal. A further possibility was of an increase of revenue from the UK business because of a change in the foreign exchange rate between the pound and the Australian dollar.<sup>77</sup>
- [89] Mr DeDominicis produced a budget in mid-July to model the impact of a possible purchase of Bravura.<sup>78</sup> If that occurred, for example, the defendant might not need the PowerBuilder project immediately. There was also the prospect of income of £5 million for developing Aegon’s new web portal. The previous budgets had not been based on the possibility of acquiring Bravura nor were the subsequent ones. The Bravura budget showed \$28.7 million EBITDA.<sup>79</sup>
- [90] Mr Salis was also involved with the production of the budget based on the assumption that GBST acquired Bravura.<sup>80</sup> His evidence was that Mr Lake had asked Mr DeDominicis and himself to prepare an alternative budget if GBST had merged with Bravura. One of those documents was GBT.024 and another may have been GBT.529 of 16 July 2015 which dealt with the “levers” they could use from acquiring Bravura. Further changes were made in GBT.530 to do with the foreign exchange rate while GBT.532 of 17 July 2015 incorporated further changes, including the foreign exchange figures. That led to an EBITDA of \$25.1 million. Mr Salis discussed it with Mr Lake who said that it was to be used in any negotiation with Bravura which he described as having had a very rosy forecast and expressed the view that GBST should provide something similar to Bravura.

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<sup>76</sup> GBT.172.

<sup>77</sup> GBT.530.

<sup>78</sup> GBT.025.

<sup>79</sup> GBT.499.

<sup>80</sup> GBT.529.

- [91] GBT.037 issued on 21 July 2015 was the financial year 2016 budget showing EBITDA of \$21.6 million. Mr Salis described it as a business as usual budget based on previous sources and showing the unaudited actual figures for the financial year ended 30 June 2015. Mr Lake told Mr Salis that it was short of his expectations but that he should submit it to the board.
- [92] Mr DeDominicis was concerned about the highly speculative nature of the possible future Aegon work. Nor were there any new clients in the United Kingdom that he was aware of which might produce a further revenue item of \$5 million discussed in that proposed budget.<sup>81</sup> He agreed that the earlier budgets prepared set the baseline for the assumed changes were Bravura to be acquired. He believed that the numbers shown for revenue were, however, not realistic.<sup>82</sup> He was away for much of August on holiday returning towards the end of that month. On his return he saw a revised budget to which he responded by expressing concern about the overly optimistic revenue figures for the wealth management division of the company.<sup>83</sup>
- [93] His responses shown in GBT.066 had been influenced by a conversation or conversations he had with Mr Denning leading him to believe that the numbers were highly optimistic about the acquisition of Cofunds and because of the delays with Aegon's other possible work.
- [94] Mr Lake agreed that the budget was updated from time to time depending on discussions among the executive and at board level.<sup>84</sup> He was not aware, however, that, at the management planning session of the executive minuted on 23-25 June 2015, the estimates were called a "stretch target". Other documents he was taken to he described as consistent with other discussions he had with Mr DeDominicis and Mr Salis.<sup>85</sup> He agreed that the ring-fenced team in London had begun to wind down and said that it was wrong to assert that the EBITDA had been adjusted to take into account the process of negotiating to take over Bravura.<sup>86</sup>
- [95] He agreed that the work for Aegon that he thought was likely to start from September 2015 possibly could be delayed. He also said that Mr DeDominicis may have said that some of the figures proposed, for example in GBT.532, may have not been realistic.
- [96] He was taken in detail through a number of draft budgets that went to the board which showed an estimate for EBITDA in 2016 of \$25.1 million.<sup>87</sup> He said that there was another \$28 million budget in existence, but it was the \$25.1 million budget that went to the board. He agreed that Mr DeDominicis thought that the \$25.1 million budget was too optimistic. He

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<sup>81</sup> GBT.532 at p 6.

<sup>82</sup> GBT.029.

<sup>83</sup> GBT.062.

<sup>84</sup> GBT.019; GBT.169; GBT.172.

<sup>85</sup> GBT.529; GBT.530; GBT.532.

<sup>86</sup> GBT.532 at p 6.

<sup>87</sup> GBT.036; GBT.027.

described various expenses that could be reduced, for example, by reducing the amount of work put into the “PowerBuilder to Java” project.<sup>88</sup>

- [97] He also gave some detail of other expenses that could be removed from the budget and further income that was likely to be available from new clients and changes in the foreign exchange treatment in respect of the defendant’s income.
- [98] He described the budget of \$25.1 million as too optimistic in an email to Mr Puttick of 20 July 2015.<sup>89</sup> Another budget shown to him showed EBITDA at \$21.6 million.<sup>90</sup>

***Presentation of budget to the Board in August 2015***

- [99] There was one occasion when there were two versions of a budget presented at a board meeting on 6 August 2015. Ms Bartlett remembered that the discussion about the budget at the meeting, her first, was confusing because directors had different versions of the proposed budget. Mr Brackin challenged Mr Lake about the assumptions in the forecast in the budget and Mr Lake was quite dismissive of Mr Brackin’s points telling him “you don’t understand”. She said the exchange was heated and that because the discussion was chaotic in respect of the budget it was agreed that further work should be done on it. That became the budget approved at the meeting of 11 August 2015.<sup>91</sup>
- [100] Mr Lake explained the fact that there was more than one budget at that board meeting in cross-examination. He said it was because the company was exploring its opportunities with Bravura at the time. One of the budgets proposed was the one based on the assumption that Bravura was acquired. It included EBIDTA of \$28.7 million.<sup>92</sup> Other cost cutting proposals included the figures associated with the rewriting of the PowerBuilder software.<sup>93</sup> The defendant was still continuing to cut costs by 7 August 2015.<sup>94</sup> One budget had to be withdrawn and the executive team submitted a new budget to the board reflecting the cost cutting.<sup>95</sup>
- [101] Mr Lake could not recall Mr Brackin having a heated disagreement with him at the meeting of 6 August nor recall any congratulations from Mr Puttick or criticism from Mr Salis at that

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<sup>88</sup> GBT.027 at p 7.

<sup>89</sup> GBT.033.

<sup>90</sup> GBT.037.

<sup>91</sup> GBT.043; GBT.178.

<sup>92</sup> SML.078.

<sup>93</sup> GBT.025.

<sup>94</sup> GBT.040.

<sup>95</sup> GBT.301; GBT.042; GBT.217; GBT.302; GBT.086.

meeting. Mr Salis had the view that the profits from the Aegon relationship were going into the capital markets division internationally.<sup>96</sup>

- [102] The agenda mentioned that the Aegon ring-fenced team had closed down and Mr Puttick agreed that he had approved the 2016 financial year budget knowing that fact. He pointed out that the work for Aegon was decreasing in the first quarter but that the budget was for the whole of the financial year and reflected the capacity to generate revenue. He agreed that budgets were occasionally “re-cut” but said that was not done often. If it were done it would normally be between half yearly results. He agreed that delays on some projects might impact on the first quarter earnings for the 2016 year.
- [103] Mr Lake then asked Mr Salis to prepare a new budget.<sup>97</sup> Mr Salis spoke to Mr Lake after the board meeting of 6 August 2015. Mr Lake told him that the board expressed consternation about the alternatives and that there was tension arising from the need for the board to finalise the budget. After the meeting, Mr Lake told Mr Salis that the budget showing \$21.6 million was not adequate as the defendant needed to match its actual results in 2015 so that if there was no more revenue there should be \$3 million cut from the expenses. Mr Salis then produced GBT.042 on 10 August 2015 showing the changes necessary to produce a \$24.7 million EBITDA. That was approved by the board. It was not built on the same assumptions as the previous budgets and also had the foreign exchange effect added.<sup>98</sup> It also took into account a reduction in revenue from Aegon and did not factor in the most recent opportunities discussed with Aegon. He agreed in cross-examination that the assumptions shown in the final version of the budget submitted to the board and approved by it in GBT.042 were accurate when submitted.
- [104] Mr Puttick said that Mr Lake made a presentation to a meeting on 10 August referring to the opportunities as well as the delays facing the company and raised concerns that it would be a difficult transition period. Some of these issues were discussed by him in an email exchange with Mr Lake.<sup>99</sup> The budget was approved at the director’s meeting of 11 August 2015.<sup>100</sup>
- [105] Mr Lake’s report to the board for the meeting proposed for 11 August 2015 covered a number of areas of developing business with significant companies including the stock broking arm of SoftBank Japan, Citic, the largest investment bank in China, and Haitong, the second-largest stockbroker in China as well as Deutsche Japan and other significant financial concerns in America. One of them was a firm called Raymond James which he described as their second client in the United States with whom he was discussing a third phase of their involvement. Those prospects encouraged him to believe that the outlook for the defendant for 2016 included the potential for a very significant upside in revenue.

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<sup>96</sup> GBT.176 at pp 2-3; GBT.175 at p 21 of 201, cl 3.1.2.

<sup>97</sup> GBT.042.

<sup>98</sup> GBT.042 at pp 2, 11 and 16.

<sup>99</sup> GBT.302.

<sup>100</sup> GBT.178.

- [106] In cross-examination Mr Lake did not recall Mr DeDominicis being concerned about the 2016 budget by August or September 2015. Mr DeDominicis was on holidays from early to late August. He had been involved in the budget process up until late July.
- [107] Mr DeDominicis' evidence was that he discussed his concerns with Mr Lake that the revenue numbers were too high. He said they spoke at least once a week and he expressed his concern about the revenue numbers for the wealth management business based on what he had been told by Mr Denning that Aegon was not likely to produce the fees it had in the past. His expectations for income over the next six months from early September 2015 were that the ring-fenced team's work would be winding down and the porting of the Composer software to Java would be starting to complete so that the rate of fees would be nowhere near the previous 12 months. Nor were there any large new clients to fill the void and he could not recall that changing during September 2015.

***Acceptance of the budget by the Board***

- [108] There was then another board meeting on 11 August 2015 at which the budget for the financial year ending 30 June 2016 was approved. Mr Lake believed that he made a presentation to the board about the prospects for the company based on his experience in attending such meetings. The company's results were then released to the market and he and others did a "road show" to present the results to the major institutional investors. The company also received reports from analysts who followed it.

***Events leading to the London meeting on 15-17 September 2015 and the announcement of Mr Lake's departure***

- [109] Mr Salis spoke to Mr DeDominicis in late August after his return from holidays. Mr DeDominicis was worried about the revenue projections from Aegon and the timing of the new client work expected from the United Kingdom. He told Mr Salis that that timing was likely to be pushed out and that the Aegon numbers were optimistic.<sup>101</sup> This email was not sent to Mr Lake. From GBT.066 of 3 September 2015 the assertion appears that Mr DeDominicis did tell Mr Lake that the current outlook was well short of the budget. Mr Salis recalled discussing that issue with Mr Lake on 3 September and telling him that the budget was unlikely to meet the outlook for the second half of the financial year. In cross-examination Mr Salis limited his recollection of his conversation with Mr Lake then to the statements in GBT.066 that he had mentioned to Mr Lake that day "that the current outlook for FY16 looks like it will be well short of the budget." He also accepted that they agreed to discuss the topic at the London meeting.<sup>102</sup>
- [110] Mr Lake asked him where he got his information from and he told him that it came from Mr DeDominicis and the company records and reflected his concern about the capacity of the company to generate revenue.

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<sup>101</sup> GBT.063.

<sup>102</sup> T9-56/36-37.

- [111] Mr DeDominicis also said he had spoken to Mr Salis at the end of August/beginning of September after his return from holidays about his comments saying that the forecast for revenue was unlikely.<sup>103</sup> In his oral evidence Mr DeDominicis described it as “incredibly unlikely”.<sup>104</sup>
- [112] During September Mr Lake was moving between Hong Kong and Australia a lot. He was focussing on the communication plan for his departure from the company but still had a heavy interest in the business development plan. In early September of that year, he had discussions with Mr Salis in Sydney about cost savings in the company. They also discussed the accounting treatment of expenditure compared to ongoing income. In early September Mr DeDominicis said he relayed comments made by Mr Denning of Aegon to Mr Lake about Aegon’s plans.<sup>105</sup> He mentioned that the current outlook for the financial year 2015-2016 looked like it would be well short of the budget. There was robust discussion around his views about the likelihood of the defendant achieving equivalent revenue to the previous year.
- [113] By the time of the “flash” results on 9 September 2015,<sup>106</sup> Mr Orrick also said the company was not travelling to plan. There was a poor performance in the international capital markets division and they were below budget in wealth management. He was not aware of new projects in the United Kingdom and Mr Salis was expressing his concern. He and Mr Salis spoke daily while they were in Sydney.
- [114] Mr Lake disagreed when cross-examined that the discussions between 6 and 9 September 2015 he had with Mr Puttick about his leaving were preliminary. He knew, however, that an offer had to be approved by the board. He also said that he told Mr Puttick he would sell his Hong Kong shares in the defendant but did not believe that they spoke then about when he would sell them.
- [115] When the ASX announcement of his departure on 17 September 2015 was to be made Mr Lake wished it to indicate that he was to “retire”. Mr Puttick believed that a smooth transition would be good for the company.<sup>107</sup> The first draft of a deed for the separation of Mr Lake from the company was prepared by 9 September 2015.<sup>108</sup>
- [116] Mr Puttick agreed that Mr Lake did not want an announcement to be made to the ASX without an assurance in respect of his departure from the company. Mr Puttick agreed that they had spoken about him having 12 months’ remuneration, 12 months’ rent and his 2012 long-term incentive payments as well as a further short-term incentive payment of \$250,000. He was not sure about all of the elements being present at that time. Nor was he sure whether the issue

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<sup>103</sup> GBT.066.

<sup>104</sup> T7-56/5.

<sup>105</sup> GBT.066.

<sup>106</sup> GBT.073 at p 2.

<sup>107</sup> SML.037.

<sup>108</sup> GBT.072.

of the indemnity sought by Mr Lake in respect of the Murdoch litigation was discussed at that stage.

- [117] Mr Puttick was asked about cl 2.2 of that draft deed.<sup>109</sup> It referred to the long-term incentives as being represented by 365,177 shares while cl 4 and cl 7.4 indicated that the indemnity would continue in respect of the Murdoch litigation. The deed spoke of a trigger date which appeared to be likely to be one month from the commencement of the new CEO's appointment.<sup>110</sup>
- [118] There were later discussions about the structure of Mr Lake's termination payments with respect to the maximum amounts allowed under the *Corporations Act*. Therefore, Mr Puttick agreed that the terms of payment had been agreed by then but said the structure had not. There were exchanges between him and Mr Lake consistent with such payment terms having been agreed.<sup>111</sup> Mr Puttick said that the defendant's remuneration committee was in agreement with him about these proposed terms and none of them had significant objections to them. He was aware of the existence of the lease at that stage and that it had a minimum term up until 30 June 2016 and believed that it required three months' notice to terminate.
- [119] By 7 September 2015, he had all but one of the defendant's board of directors supporting the payment he had discussed with Mr Lake.<sup>112</sup> That negotiation reflected Mr Lake's requirement for assurance in respect of his future before the announcement went out to the ASX. He agreed that, in London, he and Mr Lake went out one evening and discussed the release of the announcement. Mr Lake expressed his apprehension that the announcement would go out without a termination package having been agreed and Mr Puttick said that Mr Lake would just have to trust him. They then shook hands.
- [120] Mr Lake was asked about an email from Mr Ritter of 9 September 2015, GBT.073, which revealed a variance from the budget for August 2015 of net EBITDA for the GBST Group of \$271,000.<sup>113</sup> The budget anticipated a net amount of earnings of \$387,000 but the "flash" or early assessment of a variance was that there would be a loss of \$271,000 which would lead to a positive variation of \$274,000 for the year to date from July 2015. He said that it was quite usual for such monthly variations to occur. He was not concerned about those results at the time. He believed he probably read that document about the time it was sent.
- [121] Page 2 of that document shows a chart and figures showing that the performance for August was slightly behind the budget and well short of the previous year. Mr Salis was not aware of any significant new projects at that time and recalled telling Mr Lake in a conversation on 9 September that momentum had slowed. The cost base in the United Kingdom had also increased and was tracking well short of the previous year. Mr Lake told him that unless he

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<sup>109</sup> GBT.072.

<sup>110</sup> GBT.068.

<sup>111</sup> JFP.039 of 4 September 2015 and GBT.071 of 7 September 2015.

<sup>112</sup> JFP.033.

<sup>113</sup> GBT.073 at p 2.

could pull a rabbit out of his hat, they were going to have to do something. That was followed by the executive team meeting in London.<sup>114</sup>

- [122] Mr Lake then spoke about a company meeting in London which was to have occurred from 15 to 17 September 2015. Mr Puttick said that he attended the management meeting at the Savoy Hotel on Wednesday, 16 September 2015, during the afternoon and spoke of Mr Lake's departure. He may have been mistaken about that, however, as he agreed, having been shown ex GBT.328, that he arrived on Tuesday, 15 September 2015 and attended a management meeting that afternoon and also the management meeting on 16 September. He and Mr Lake had roles to perform on 16 September in respect of the communications plan dealing with Mr Lake's departure.<sup>115</sup>
- [123] The meeting assumes some significance in assessing what Mr Lake's knowledge was of GBST's prospects when he and his wife sold their shares. The London meeting agenda was sent to him on 14 September.<sup>116</sup> He discussed particularly the events of what may have been the second day of the conference, 17 September 2015. After dealing with the announcement of his retirement, he joined a planning session meeting after which he and Mr Puttick travelled to two of the offices of the defendant at Watford in London where they briefed staff about his departure and eventually returned to the Savoy Hotel. When cross-examined he said he was not 100% sure that he was involved in discussions about the budget on 17 September. Nor was he sure that he attended the morning session and believed that he and Mr Puttick went to Watford that afternoon. He denied the suggestion that Mr Puttick had said to him that the budget figures needed to be written down at that stage.
- [124] Mr Puttick's evidence about this occasion was that he arrived at the meeting in London on 16 September for the late afternoon session after afternoon tea. He explained to those present that there would be a new CEO and details of the search process. It was also necessary then to inform the market and he and Mr Lake used the late afternoon and the early morning of 17 September to do that. At about 7.30am, Mr Salis rang Mr Puttick in his room advising him that he should be aware that the executives had serious concerns about the revenue forecasts in the financial 2016 budget.
- [125] Mr Puttick said that he attended one session of the meeting on 17 September and then travelled to see the defendant's staff at Watford with Mr Lake. He said he raised what Mr Salis had said to him with Mr Lake in the car on the way to Watford. When they returned to the Savoy from Watford, they had a further discussion about the need to write-down figures in the budget which occurred in a pub just outside the Savoy Hotel. The essence of the view conveyed by Mr Salis was that there was a view emerging among some executives that the current budget would not be achieved. He could not recall the details. He said that Mr Salis was worried about it and felt there would be a need to write-down the budget. He said that he, Mr Puttick, was concerned and surprised. 2015 had been a very good year for the company. He discussed these issues with Mr Lake in his car briefly as they were heading out to

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<sup>114</sup> GBT.081.

<sup>115</sup> GBT.332.

<sup>116</sup> GBT.077.

see employees of the company. He also had a discussion that evening with him about possible upsides to the company's business, including countervailing revenue opportunities.<sup>117</sup> He agreed that Mr Lake's views about these issues were shared by him until he received the document of 30 September from Mr Salis.

- [126] Mr Puttick also said that Mr Lake described Mr Salis as a pessimist and that Mr DeDominicis was typically self-serving. He described the occasion at the pub as more of a conversation than a meeting between the two of them.
- [127] Mr DeDominicis said that he attended most of the management planning session at the London meeting. He recalled the performance and the budget being discussed on the first day of the meeting in the context of performance being well below budget. He could not recall whether he discussed it on other days of the meeting. He had been away from the meeting on 16 September 2015 after 11.21 am for an indeterminate period.
- [128] Mr Salis said that the financial year 2015/2016 performance and budget were discussed on the morning of the second day of that meeting. He said that Mr DeDominicis commented about work relating to Aegon and the pipeline and highlighted the increase in the cost base in North America which had quite a significant impact on the bottom line but was well short of the previous year's performance. Mr Lake spoke of growth potential and the need to invest now for the future and countered Mr DeDominicis's comments about the wealth management business. Mr DeDominicis responded by saying that he was close to the people on the ground and that the revenue projections were softer than expected.
- [129] Ms Sanchez said there were discussions about bringing forward revenue and what additional costs could be cut from the budget. One of the items of revenue discussed was one that could be brought forward related to Aegon. They were looking at costs across the board but "CMI" (the capital markets international division) was the initial area of focus for cost reduction by reducing staff from the United Kingdom and the United States of America.
- [130] Mr DeDominicis believes he would have said during the management planning session that he had concerns over the year to date figures and the forecasts. Mr Salis concurred with his views. He and Mr Salis spoke frequently to each other to discuss these matters.
- [131] Mr Orrick also attended the management planning session in London and believed the budget was discussed on the first or second day with the executive team all present, including Mr Lake. Mr DeDominicis raised concerns about Aegon at that stage and Mr Salis was very concerned about what would occur if Aegon's revenue did not come to fruition. Mr Lake expressed the view that Mr DeDominicis was keeping revenue back in respect of Aegon. Mr Orrick could not recall Mr Lake being there particularly on the second day. He believed he was in and out of the room with his retirement having been advised on the first day. Mr DeDominicis and Mr Lake wanted to lock down more revenue from Aegon. He believed that Mr Puttick was in the room for the budget discussion on the second day.

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<sup>117</sup> GBT.382.

- [132] On 18 September 2015 Mr Puttick received financial results from Mr Ritter which he believes he would have seen later.<sup>118</sup> He said he would certainly have read them by 25 September.<sup>119</sup> He described those results as disturbing and confirmed what Mr Salis had been telling him.
- [133] Mr Lake's recollection of that episode was that there were friends of the company who came for drinks at the Savoy and on the last day of the conference he said there was a half-day session about which he could not recall much.
- [134] There were minutes made of the planning meeting. One of the items mentioned was for Mr DeDominicis to discuss with Aegon bringing forward the revenue relating to their web rebuild. The note indicates that that could not be done before 1 January 2016.<sup>120</sup>
- [135] Mr Lake attended parts of the meeting including one dealing with goal setting and strategy planning. The state of the budget was not on the original agenda but was added later. In cross-examination he said he was possibly present on the second day of the meeting when the budget was discussed. He could not recall anyone saying that the year to date figures were not looking good.
- [136] He was aware of discussion about the budget in London.<sup>121</sup> He was not aware, however, of concern either inside or outside the company about meeting the budget figures. On what he knew he would not accept that any variances were significant. He agreed, however, that a \$5 million variance would have a significant effect on the share price. He regarded both Mr Salis and Mr DeDominicis as excessively conservative but said that Mr DeDominicis usually over-performed on his predictions. He accepted that the company was reliant on the income from Aegon and that the costs involved in the expansion into North America were significant.<sup>122</sup>
- [137] On 18 September he had a lunch with staff and then flew back to Hong Kong and then on to Adelaide on 24 September. His view of the defendant's prospects had not changed by 25 September 2015 when he and his wife sold the shares relevant to this proceeding.

***Work on the budget forecasts by the executive from the London meeting until 30 September 2015***

- [138] There were further communications between Mr Salis and Mr DeDominicis on 21 September about the performance of the business and the status of the relationship with Aegon with things slowing down there.<sup>123</sup> On 22 September 2015, Mr Salis spoke to Ian Jack, recently appointed as head of the CMI business. He expressed reservations to Mr Jack with the forecast numbers, describing them as overly optimistic. Mr Salis then produced the forecast of

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<sup>118</sup> GBT.086.

<sup>119</sup> GBT.086.

<sup>120</sup> GBT.106 p 5.

<sup>121</sup> GBT.091 at pp 5-8.

<sup>122</sup> GBT.097; GBT.098; GBT.103; GBT.112; GBT.120.

<sup>123</sup> GBT.229.

30 September 2015.<sup>124</sup> That was discussed at the disclosure committee meeting on 30 September 2015 where the numbers showed a significant reduction in performance which might require the company to go to the market with an update. There was also discussion about bringing revenue forward and the question about what “levers” the company could pull.

- [139] By 21 September 2015<sup>125</sup> Mr DeDominicis was still concerned about the Aegon revenue likely to be received in the second half of the year. There were changes to be made to the budget as a result of the meeting at the Savoy.<sup>126</sup> He believed that the task was urgent and he was concerned whether there was a need for the company to issue a downgrade from well before that date, 21 September 2015. His view was that the road show had put forward one view of the defendant’s prospects and that its duty of disclosure to the market required it to issue a downgrade because of the problem he foresaw with future income.
- [140] Mr Salis said in cross-examination that he could not recall for certain when the budget discussions occurred in London and agreed that they were still gathering information by 22-28 September.<sup>127</sup> They still did not know what Aegon would spend by 28 September 2015.<sup>128</sup> GBT.104 of 28 September at .4 also reflected ongoing debate about the budget resulting in delay in the financials.
- [141] Mr DeDominicis described Mr Lake as asking for better numbers and described him as pushing the performance of the executive team. He reached the conclusion that the problem with the flow of work related to the period after 30 September, a point of view he reached over the previous four weeks since his return from holidays.<sup>129</sup> He said that he realised the urgency of dealing with the problem when he came back from leave at the end of August.<sup>130</sup> He said that the work he did to reforecast the revenues did not involve accelerating them. He could not recall looking at the acceleration of forward revenues before October 2015.
- [142] Mr DeDominicis had further discussions with Mr Denning on 24 September, however, which revealed that Aegon expected to spend about £10 million with GBST on development work.<sup>131</sup> There were attempts made to accelerate the work from Aegon. He did not agree with the proposal by Mr Lake to discount the fees charged for accelerating the work.

***Trading in the defendant’s shares by Mr Lake on 25 September 2015***

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<sup>124</sup> GBT.111.

<sup>125</sup> GBT.229.

<sup>126</sup> GBT.236.

<sup>127</sup> GBT.236; GBT.237.

<sup>128</sup> GBT.245.

<sup>129</sup> GBT.244; GBT.100.

<sup>130</sup> GBT.063; GBT.066; GBT.229.

<sup>131</sup> GBT.245. See also GBT.025.

- [143] Mr Lake informed Mr Puttick of his intention to sell shares on 25 September 2015 after he had seen an email dated 19 September 2015 from Mr Brackin to Mr Puttick telling him that Mr Brackin proposed to sell shares.<sup>132</sup> He did not, however, see a form signed by Mr Brackin around the time of the email on 19 September.<sup>133</sup>
- [144] One of the other directors of the defendant, a Mr Sundell, wanted to sell shares as did Mr Brackin, also on the board around that time. The previous practice had been for directors to come to Mr Puttick or Mr Brackin for approval to sell shares, not to the full board. Mr Puttick approved Mr Brackin's application to trade shares and agreed that he took a cautious approach in September 2015 to the approval of share trading if there was price sensitive information not available to the market.
- [145] Mr Puttick's evidence was that he received an email from Mr Lake about his proposal to sell shares on 25 September when he was on the vehicle ferry to Stradbroke Island at about 3.00 pm on a Friday. That is the email to which he replied with the word "acknowledged".<sup>134</sup> He also later received copies of the trading notes on 28 September and another email about Mr Lake's trading as well.<sup>135</sup>
- [146] Mr Puttick had no reason not to approve Mr Brackin's application to trade on 19 September 2015 and did not know if Mr Sundell traded shares around that time although he agreed that Mr Sundell was keen to get the announcement about Mr Lake's departure out so that he could trade.<sup>136</sup>
- [147] When he received Mr Lake's request on 25 September he appreciated that he would need to give his approval soon to permit a trade in the timeframe suggested by Mr Lake.<sup>137</sup> At the time he was on the way from his house at Yeronga to Stradbroke Island which he estimated would take a little more than two hours.
- [148] When cross-examined about the budgetary concerns raised by Mr Salis in London at about 18 September and afterwards, Mr Puttick said that they had not stopped him approving Mr Brackin's share trading of 19 September. He said to Mr Salis in an email that that was fine "now we have the CEO announcement out".<sup>138</sup> Mr Brackin was the Deputy Chair of the company and a member of the audit and risk and disclosure committees. He said that he was concerned about the capital markets section of the company's revenue growth in the short-term but not so much in the long-term. He believed that there was "live work" and "live deals" on foot. He also believed there were potential cost savings to be made. That suggests that he

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<sup>132</sup> SML.038.

<sup>133</sup> SML.039.

<sup>134</sup> GBT.095.

<sup>135</sup> GBT.235.

<sup>136</sup> GBT.303 dated 13 August 2015.

<sup>137</sup> GBT.094.

<sup>138</sup> GBT.336 at p 3.

did not then believe that the market needed to be informed about the concerns that had previously been raised with him by Mr Salis.

- [149] Mr Puttick was copied later into an email to Mr Lake from Mr Ritter asking Mr Lake to complete a GBST “securities trading application”. That was sent on 28 September 2015.<sup>139</sup> It was pointed out to him that that form was not the one completed by Mr Brackin and did not refer to it being a “closed or prohibited period”.
- [150] He had a conversation with Mr Lake on 1 October 2015 where he reminded him about the revised process for approving share trading.<sup>140</sup> He believed that conversation focussed on the use of the appropriate form. He had not looked at the securities trading policy before he went to the board to discuss this issue.<sup>141</sup>
- [151] There had been no extensive discussion about Mr Lake’s email sent to him notifying him of his wish to trade on 25 September 2015. He was not aware of the fact that the form attached to the 2015 policy only referred to trading in a “closed or prohibited period”. He was surprised that there was no general form in the 2015 share trading policy and agreed that Mr Lake’s trades did not occur in a closed period. He agreed that the written clearance procedure during a closed or prohibited period for GBST staff (excluding directors) did not apply to Mr Lake.<sup>142</sup> He had not gone back to the policy and checked what he said about the forms to be used before or during the board meeting on 15 October.
- [152] Mr Lake believed that Mr Puttick’s response saying “acknowledged” to his email about selling the shares was equivalent to approval and did not believe that he needed to clarify it. In re-examination, he said that these arrangements had not previously been mentioned at board level. Nor could he recall any direct requests to trade shares going to the board previously.
- [153] Mr Mark Pittman was Mr Lake’s stockbroker. He established that he sold the shares for Mr and Mrs Lake on 25 September. Mr Lake gave him instructions to proceed with the sale about 3.15 pm Adelaide time on that day having spoken to him first on 17 September about selling the shares in the next few days but expressing no urgency about when they should be sold. He was concerned about the fact that it was the chief executive officer of the company selling and told him that he would speak to clients, which he did. The trades occurred at about 4.15 pm Sydney time on 25 September.<sup>143</sup>
- [154] Mr Pittman was disappointed when he learnt about the downgrade in the defendant’s forecast released on 13 October 2015 and said that he and his clients were not happy about the sale having occurred shortly before that event. He spoke to Mr Lake about that. Mr Lake told him that he did not see what had happened coming. He also offered to try to reverse the

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<sup>139</sup> GBT.099.

<sup>140</sup> GBT.346.

<sup>141</sup> Cf SML.146 and the discussion at GBT.382.

<sup>142</sup> SML.146 at p 6, cl 6.

<sup>143</sup> SML.174.

transactions but Mr Pittman told him that the transactions could not be unscrambled. He did tell him that it would be good to speak to those to whom he had sold.

- [155] When asked in cross-examination about the timing of his share sale Mr Lake said that he thought it was good timing to sell on his retirement, having waited until after the results were released. He knew that an AGM was coming but believed that the release of the results was the significant matter to occur after which he could sell.

***Forecast dated 30 September 2015***

- [156] Mr DeDominicis had a discussion with Mr Puttick on 28 September 2015 about issues related to the budget as Mr Puttick wanted to find out why Mr DeDominicis was concerned when the first couple of months had gone according to budget. Accordingly, Mr DeDominicis sent an email which reflected his views at that time but was not copied to Mr Lake.<sup>144</sup> In it he said to Mr Puttick:

“The budget I approved in June had an EBITDA of ~\$18M for WMD. When I was away on leave it was changed without my involvement and the EBITDA was set at ~\$22M for WMD.

At the moment our estimate is that the EBITDA is more like ~\$16M for FY16, with first half EBITDA of ~\$4M.

This assumes ANZ NZ is going ahead by November – which is not 100%. If it does not proceed that’s another ~\$3M revenue for the year which will hit the bottom line.”

- [157] Five days after he and his wife sold their shares, Mr Lake received an email from Mr Salis dated 30 September 2015.<sup>145</sup> It contained the latest version of the forecast for the 2016 financial year. It shocked him because the revenue forecast and the results up until September were significantly lower than he expected. The forecast earnings were \$18.7 million compared to the budget estimate of \$24.7 million, a \$6 million variance. He said he felt sick because of the fact that he had sold the shares a week before not knowing of this information.
- [158] Mr Ritter remembered the late September re-forecast of the budget was done by him with Mr Salis and his financial controllers. There was no discussion by him with Mr Lake about it. He said it was unusual for the re-forecast to go to the board without Mr Lake’s input.<sup>146</sup> He put the memo of 30 September 2015<sup>147</sup> together as a draft. A man called Sean Normal may have had a role in that as would Mr Salis. The information in it about first quarter performance derived from discussions with Mr Salis with his “flash” or early results. He agreed that it was unusual for the first quarter’s performance to be available by 30 September and said that had never been done before. He imagined the information came from Mr Salis as he was the

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<sup>144</sup> GBT.246.

<sup>145</sup> GBT.111.

<sup>146</sup> GBT.111.

<sup>147</sup> GBT.181.

driver of the document. He could not recall any communication about it to Mr Lake as group CEO. He assumed Mr Salis and Mr Lake had had a conversation about the paper and said that it was normal for them to work together.

- [159] Mr Lake's notes to himself about the document highlighted the fact that these results seemed unusually early in recording the figures up until the end of September. He also made a note to himself that not all executives had been consulted and there had been no time to provide solutions. He also noted to himself some opportunities for cost cutting. One note also suggests that the timing of services revenue may have had an impact. He was concerned that there had been no "brainstorming" of these figures and that he had not been involved in their preparation.
- [160] He prepared some other documents or made notes in respect of a meeting around that time.<sup>148</sup> In one of them,<sup>149</sup> he pointed out that the defendant did not have the first quarter of the financial year results at that stage and that the document had not had input from all of the executives; this was the first time he had seen it and he had had no chance to consider it.
- [161] He mentioned that Mr DeDominicis had told him to expect Aegon to bring forward revenue and mentioned that Mr Salis had told him, before he left for London, that the accounting standards allowed licence fee revenue to be brought forward but that he had changed that story by the day before that note was made. There was a meeting of the defendant's disclosure committee on 30 September 2015 dealing with the draft reforecast for the 2016 financial year including the estimated earnings of \$18.7 million compared to the budget figure of \$24.7 million.<sup>150</sup> He said that, after the announcement made about his departure in London and before 30 September, there had been a noticeable drop-off in communications between other executives and him.
- [162] Mr Salis' paper of 30 September encouraged him and other executives to speak to their clients and try to bring work forward. Clients such as Aegon, however, wanted significant discounts to do that.<sup>151</sup> Mr DeDominicis objected to offering such discounts.
- [163] When the report of 30 September 2015 was produced<sup>152</sup> Mr DeDominicis said that the executives decided to try to shore up the figures to get a better result. Mr Lake was to speak to clients, particularly Aegon. Mr DeDominicis followed up with Mr Lake on 1 October 2015<sup>153</sup> to ask him how the conversation with Aegon went. He also followed up with Mr Denning of Aegon and went back to Mr Lake and told him he did not think that it would work with Aegon.

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<sup>148</sup> SML.049; SML.050; SML.087.

<sup>149</sup> SML.087.

<sup>150</sup> GBT.182.

<sup>151</sup> GBT.120.

<sup>152</sup> GBT.113.

<sup>153</sup> GBT.120.

There was a lot of talk about the results at the executive meeting on 9 October 2015.<sup>154</sup> Then there was the market announcement of 13 October 2015.<sup>155</sup>

- [164] In response to Mr Lake's evidence that he was shocked, surprised or concerned by Mr Salis' report on the performance to budget on 30 September 2015, it was suggested to Mr Lake that that was not shown in the minutes of the relevant meeting.<sup>156</sup> He was concerned around this period, however, that the defendant was "getting fat" and that expenses could be cut to assist with the budgetary issue.
- [165] He was also asked about the necessity to "re-cut" budgets expressed on 24 September 2015 which he said came from the planning session in London.<sup>157</sup> When asked again why the minutes of the 30 September 2015 meeting did not contain a reference to him being shocked about the results, he said that he had expressed surprise and did not draft the minutes.<sup>158</sup>
- [166] After Mr Lake realised that he had sold his shares shortly before the defendant was to release an amended forecast, he spoke to his stockbrokers to ask whether he should buy back the shares from those to whom they had been sold. The advice he received from them was that he could not do so and one of the stockbrokers gave an example of an institution which had purchased some of his shares and then traded out of them making a profit so that it would be impossible to unwind those transactions.
- [167] When Mr Puttick received the draft revised outlook provided on 30 September 2015 his reaction was surprise which he expressed to the disclosure committee. The minutes of that committee meeting on 30 September 2015 did not reveal any expression of surprise but he said it was not normal to do that in minutes.<sup>159</sup> He could not recall Mr Lake expressing surprise at that meeting. The company then worked to try to cut costs and bring forward income. He imposed a ban on trading by employees on 1 October 2015.<sup>160</sup>

### **Dismissal of Mr Lake**

#### ***Events leading up to the Board meeting of 15 October 2015***

- [168] By 1 October 2015 the selection process for a new CEO had narrowed the field down to eight external applicants and one internal. There had been no interviews by board members to that stage.<sup>161</sup> By 8 October 2015 they were finalising the deed of separation with Mr Lake.<sup>162</sup> The

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<sup>154</sup> GBT.186.

<sup>155</sup> GBT.187; GBT.073.

<sup>156</sup> GBT.186.

<sup>157</sup> GBT.092.

<sup>158</sup> GBT.182.

<sup>159</sup> GBT.182.

<sup>160</sup> GBT.118.

<sup>161</sup> GBT.347.

draft deed in existence then did not mention the long-term incentive payments. They were to be dealt with under a different agreement. Mr Lake's draft had different concepts in respect of implementation of the payments under the deed. The agenda for the 15 October 2015 board meeting included an item dealing with the separation agreement for the CEO.<sup>163</sup> Mr Puttick's recommendation to the board was to accept the CEO agreement.

[169] There was a further meeting of the disclosure committee including Mr Lake on 8 October 2015.<sup>164</sup> An updated draft reforecast for the 2016 financial year was provided which took into account increased revenue opportunities that had been identified, any cost savings to be implemented and changes to accounting treatment where possible.

[170] When questioned about two emails dated 8 October 2015 which referred to his separation agreement not being documented, Mr Lake said that he believed he had an agreement, presumably an oral agreement, but was expecting a formal written agreement from the defendant also.<sup>165</sup>

[171] A decision was taken to release a market update to the ASX on 13 October which downgraded GBST's previously forecast results. It said, among other things:<sup>166</sup>

"The company expects EBITDA to be within the range of \$7.0 million to \$9.0 million for 1H FY16, and in the range of \$12.0 million to \$14.0 million for 2H FY16. This compares with 1H FY15 EBITDA of \$12.3 million and 2H FY15 EBITDA of \$12.2 million. This guidance for 1H FY16 does not include any recruitment costs for the new CEO and final payments due to the outgoing CEO which are still being negotiated.

GBST Managing Director, Stephen Lake said: 'We have experienced temporary delays in major client projects while increasing costs across our businesses to manage anticipated growth.

'While recurring license revenue continues to grow, our challenge has been managing the timing of new implementations which provide service revenue and the capacity necessary to complete them. These activities are necessary steps before software goes 'live' and annuity licence revenue commences.

'UK wealth management projects, with existing clients expected to begin in this half will now start in the second half; and a significant Australasian wealth management project has also been deferred to start in early 2016.

'While our Australian capital markets business had a strong first quarter and is expected to report an improved first half result, the performance of our

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<sup>162</sup> SML.053.

<sup>163</sup> GBT.188 at p 111.

<sup>164</sup> JFP.051.

<sup>165</sup> GBT.355; GBT.356.

<sup>166</sup> GBT.187.

international capital markets business has also been affected by delays to projects which are now due to begin in the second and third quarters.

‘We maintain strong relationships with our clients and expect all of these projects to progress. We anticipate a stronger second half and, with several new business proposals underway, are well positioned to take advantage of market opportunities and resume growth in FY17.’

- [172] Mr Lake had flown in to Sydney on the evening of 14 October from Singapore as Mr Puttick had told him that the board wanted him to explain what information he had when he sold the shares. Mr Puttick discussed the issue with Mr Lake on 14 October before the board meeting due for 15 October 2015 and told him that the board would want a full explanation about the trade and whether there was a need to issue a downgrade about the company’s performance.
- [173] Mr Salis agreed in cross-examination that he endorsed the final version of the downgrade announcement in GBT.187 as accurate. An initial draft came from a public relations firm on 8 October 2015.<sup>167</sup> Mr DeDominicis and his team had input into its preparation but Mr Lake had the final say. He could not recall Mr Lake overriding the proposed release. He agreed that the company actually made \$8.5 million in the first half of the 2016 year and that the other statements in GBT.187 were accurate. He also agreed that the problems revealed in the budget were not with the July and August figures, but with the September EBITDA. The deferral of the income from Aegon, a client called Alliance Trust Savings (ATS) and ANZ had a very significant impact on the results by the time of the executive meeting on 9 October 2015.<sup>168</sup> Those forecasts did not refer to the underlying source material for the figures.
- [174] Mr Salis agreed that September was the month where there was a large variation between the budget and the actual figures. Most of them came from the wealth management division.<sup>169</sup> The figure of \$1.93 million was a variance shown in the wealth management division and the decrease in Aegon revenue was not a major component of the figure for sponsored work. ATS was another major contributor to the profit downgrade.<sup>170</sup> The income from it was now expected to begin in October 2015.<sup>171</sup> The significant figure, therefore, appeared to be that there was a decrease of \$1.93 million in the wealth management area of the budget for September. The delay in the expectation of ATS revenue was reflected in the press release of 13 October 2015 as was an increase in Aegon revenue from the previous months.<sup>172</sup> He agreed that even after 13 October work continued to be done to reconsider the revenue and costs shown in the budget.

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<sup>167</sup> GBT.256.

<sup>168</sup> GBT.186; GBT.086 at pp 19-20.

<sup>169</sup> GBT.126.

<sup>170</sup> GBT.086 at p 20.

<sup>171</sup> GBT.187; GBT.086.

<sup>172</sup> GBT.086; GBT.111; GBT.353; GBT.186; GBT.273.

[175] He also agreed in cross-examination that, during September 2015, he had shared frustrations with Mr Lake about how their relationship had gone. He said Mr Lake had moved responsibilities from him and he said that his frustration arose more because the company was in a difficult period and Mr Lake was not reacting appropriately to the problems. His concerns predated 7 May 2015. He did not speak to Mr Sundell about his issues with Mr Lake but heard Mr Sundell tell Mr Puttick on 15 October, the day of the board meeting and before the AGM also on that day, that he wanted Mr Lake to leave the company immediately.<sup>173</sup>

***The Board meeting of 15 October 2015, announcement to the ASX and subsequent correspondence***

[176] Mr Lake prepared some notes before that meeting of 15 October.<sup>174</sup> He used those notes when he explained to the board the information that he had when he sold the shares.

[177] The notes indicate that he decided to sell some or all of his Hong Kong shares after a discussion with Mr Puttick and also discussions with his wife. He thought that his announcement about his future would be released about the same time as the results in August 2015 when he had roughly agreed terms of his departure but no formalised document had been prepared.

[178] He noted that, at the August board meeting, at the same time as Mr Brackin advised that he would sell some shares, he had also said that he would sell some shares. His notes also refer to him feeling quite positive and upbeat about the business before he went to London and refer to some of the potential deals and prospects such as with Aegon and other companies mentioned previously. He was not aware of any decision to do a new budget and his notes refer to him having been told later that there were some budget discussions in London. I infer from what he wrote that he was not a party to them.

[179] He also noted that he missed all of the planning sessions on the Thursday of the London meeting because he went to the defendant's offices in London to advise staff of his departure. The notes indicate that he was not aware of the September budget outlook and express his surprise when he was told of the new forecast on 30 September which he did not know was being prepared.

[180] The first part of the meeting dealt with Mr Lake's trading, his explanation for it and the forecast for the company's performance for the year ahead. The board decided to ask Mr Lake to stand down and appointed Mr DeDominicis as interim CEO. Mr Lake told the board that he felt that there were still prospects of revenue coming to the company and read out a list of where the revenue might come from and then left the meeting. The board was not happy with Mr Lake's explanation of his trading and resolved that he be asked to leave his position immediately. Words such as "disingenuous" and "self-serving" were used by board members to describe his presentation to them.

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<sup>173</sup> GBT.370.

<sup>174</sup> SML.097.

- [181] Mr Lake said that Mr Brackin, during the Board meeting of 15 October, referred to the securities trading policy of the defendant, waving a piece of paper in the air and saying that Mr Lake had not signed the form and did not get written permission which was contrary to his obligations as the CEO to provide a good example. He was then asked to leave the meeting.
- [182] Mr Puttick's evidence of this meeting was that he was present for the first one and a half hours until 12.45 pm. He said that he had a discussion with Mr Lake the night before the AGM.<sup>175</sup> The expression of strong views by Mr Sundell, another director, against Mr Lake contained in his email of 15 October 2015 before the board meeting and the AGM were topics that it was highly likely he had spoken about to Mr Lake, but he was not sure that he had. Those views expressed by Mr Sundell were to this effect:<sup>176</sup>

“From discussion with some of the executives in the past few days many of them have consistently stood by poorer budgeted numbers for 2016 so it is a pantomime to say SML had no knowledge of this. I have no doubt that he will have a case to answer for with the ASX and ASIC. The conduct of the Company is in my mind is [sic] legal and yes this is a matter for the individual but our actions now are very important to staff, the market and our own personal reputation as Board members. Previous to this issue there was very little support for him from the executive, [sic] investors and the board. My position is simply I will not support SML having any role with the Company any more

I do not believe he should front the AGM tomorrow and that should be handled by yourself with either Allan or Rob standing in as interim CEO

The decision around the new CEO is now 6 months into the process and is behind the timeline agreed and need to focus on this as a key priority

Also I want a briefing from executive team to address some of the key Issues facing GBST and their recommendations. Many of these are common sense and obvious approaches, which have been dismissed previously under SML leadership”.

- [183] It seems likely that Mr Puttick was under strong pressure at the meeting from some of the other directors such as Mr Sundell. Perhaps that is some explanation, though not an excuse, for his failure to provide information that may have assisted and clarified Mr Lake's position.
- [184] Mr Puttick said the board had sought legal advice about Mr Lake's share trading and the possibility of his termination from before the first disclosure meeting on about 29 September 2015 from the company's in-house lawyer. He had not then formed the view that Mr Lake should be terminated. There was some suggestion that Mr Sundell may lack objectivity in respect of Mr Lake.<sup>177</sup> He had also spoken to McCullough Robertson concerning the discussion he had with Mr Lake on 13 October.

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<sup>175</sup> GBT.382.

<sup>176</sup> GBT.382.

<sup>177</sup> JFP.059, a note written by Mr Puttick on 22 October concerning the events of 15 October 2015.

- [185] Mr Lake was asked to explain to the board meeting on 15 October his share trading from his own standpoint. Mr Puttick's note of that meeting does not record any reference to the entry into the new Hong Kong lease and Mr Puttick said the main query made of Mr Lake was why he entered into such a large trade of shares at that time. Nor did the minutes of the meeting of 15 October 2015 mention the lease.<sup>178</sup> After that board meeting Mr Puttick called Mr Lake and offered him a termination on the basis that he step aside and receive his long-term incentive shares, six months' remuneration and six months' rent.<sup>179</sup>
- [186] He agreed that he had not linked the long-term incentive share transfer to the release of the indemnity involving the Murdoch litigation. The board had endorsed that approach.
- [187] Mr Puttick left the meeting to tell Mr Lake what had occurred and to set in train a market announcement. He also combined the chairman's and CEO's speeches for the annual general meeting to be delivered by him instead of him and Mr Lake. He showed Mr Lake the notice he intended to issue to the market and Mr Lake asked for time to consider it.<sup>180</sup> He also made notes about his dealings with Mr Lake.<sup>181</sup> He also made a note of the grounds for termination which he discussed with the board at a meeting on 22 October where other directors said that Mr Lake should either offer his resignation or be terminated because his trading had been outside the securities trading policy with prior knowledge of a profit downgrade and because of the issue in respect of the lease for the Hong Kong premises which had by then come to the board's attention.<sup>182</sup>
- [188] Mr Puttick's evidence was that he did not apologise for letting Mr Lake down when he caught up with him after the meeting of 15 October. He agreed that he had dinner with Mr Lake and Mr Sundell that evening. They met at the Stamford Heritage Hotel in Brisbane after the annual general meeting had finished. Mr Puttick told Mr Lake that he had been dismissed immediately for misconduct and offered him six months' salary, six months' rent and his long-term investment options. They discussed the period of notice. Mr Lake's evidence was that Mr Puttick apologised to him at the Stamford telling him that he had let him down.
- [189] Later, Mr Lake said he had a telephone conversation with Mr Puttick who gave him two options, either immediate termination or a graceful exit. He was told that the graceful exit would include payment for his performance rights which was not tied to the type of departure. He was also told that he would receive six months' salary and six months' rent payments. There was no talk of 12 months' salary then but, a month earlier, in September, he said that he was under the impression they had an agreement. He also said that he preferred a graceful exit. The issue about the indemnity for the Murdoch litigation was not raised until later.

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<sup>178</sup> GBT.376.

<sup>179</sup> GBT.373, a note dated 22 October 2015 as was JFP.059.

<sup>180</sup> GBT.060; SML.056.

<sup>181</sup> JFP.068; JFP.057; JFP.059.

<sup>182</sup> GBT.373.

- [190] Mr Brackin's evidence about the board meeting of 15 October 2015 was that Mr Lake's employment was discussed. The entire board was present. He called Mr Lake into the room to get his explanation for trading the shares at this point. He said that Mr Lake could not explain what he did and that the board was unanimous that his explanation was not plausible. They decided to terminate his employment because he did not get permission of the board or the chairman to engage in the share trading or tell the company secretary. He was not clear about whether the issue to do with the lease in Hong Kong was raised at this meeting. He agreed that nothing was put to Mr Lake about the lease in particular at that meeting.
- [191] He recalled Mr Puttick discussing the terms of the separation of Mr Lake from the company before mid-September. His recollection was that six months' remuneration was spoken of. He was on the nomination and remuneration committee and said that the main terms were agreed by early September 2015.<sup>183</sup> He was then shown GBT.068 setting out proposed terms which included 12 months' remuneration and assumed that he saw it. He said, however, that he could not recall the document. Nor did he recall the reference to a company lease in it. I formed the view that he was being evasive about his knowledge of this document.<sup>184</sup> I also formed the view that he found it very difficult to focus on the questions he was being asked and to provide relevant answers to them. He was also cross-examined about a phrase in GBT.366 concerning Mr Sundell and his objectivity. Again I believed he was being evasive about this issue.<sup>185</sup>
- [192] When it was suggested to Mr Brackin that Mr Lake had given an explanation for his share sales, namely that the trade was timed to follow the announcement to the market of his departure and that several other directors had said they intended to trade shares once his departure was announced, he agreed, after some equivocation, that Mr Lake may have said that.<sup>186</sup>
- [193] He asserted that he had not made his mind up at that stage. He could not recall whether Mr Puttick discussed his dealings with Mr Lake about his share trading on 15 October. He denied holding up a form that should have been filled in, from his point of view, by Mr Lake. He said that in his experience, when engaging in share trades, directors went to Mr Puttick to seek his permission.
- [194] Ms Bartlett's evidence, which I thought was delivered very objectively, said the board had a discussion before Mr Lake was invited in and a further discussion after he was invited to leave. Mr Brackin expressed significant concern about Mr Lake's share sale in the meeting before Mr Lake was invited in. All the directors quizzed him after he had been invited and Mr Brackin challenged him on his sale of the shares. The board allowed him to speak but, after he left, there was a general consensus that they did not believe his explanation and also believed that he traded while in possession of sensitive market information. She recalled Mr Lake saying words to the effect that he had been in the UK communicating with customers about his departure and was not aware of the detailed content of the management meeting there.

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<sup>183</sup> JFP.039.

<sup>184</sup> JFP.039.

<sup>185</sup> T10-57/1-34.

<sup>186</sup> T10-61/22 to T10-62/30.

- [195] There was frustration and anger coming from Mr Brackin and Mr Sundell. She said Mr Sundell was extremely angry. Mr Brackin said he did not believe Mr Lake and was quite dismissive of him. They also believed that his role was untenable after he sold the shares with, they thought, insider information and that he had then fallen into the category of “bad leaver” rather than being a “good leaver” for the purposes of discussing his termination. They also had quite a tight timeline that day because of the AGM being held later that afternoon.
- [196] There was a discussion about Mr Brackin trading shortly before Mr Lake had but the view was that Mr Brackin did not have the availability of the information that Mr Lake had and had also done the paperwork required by the share trading policy. She believed that Mr Puttick had liaised with executives and was very confident at the time that these issues were raised at the September 2015 conference in London.
- [197] When cross-examined, she was not firm on whether she had seen the dismissal letter of 6 November 2015 before it was sent but said that she was very clear on what it was meant to contain and had had a discussion about its contents with Mr Puttick. She said the whole board was involved in email discussions about the reasons for terminating Mr Lake.
- [198] She was concerned about the significant size of the trading by Mr Lake and felt very strongly about it. She said that if no action had been taken by the board she would have resigned. There was a lot of anger in the room during the meeting on 15 October with Mr Sundell being very vocal and angry. There had been emails circulated before the meeting and she had shared a flight and a taxi to Sydney for the meeting with Mr Brackin during which they talked about the issues.
- [199] There was a discussion about Mr Lake not getting approval from Mr Puttick and not doing the necessary paperwork. Mr Puttick said he had received an email from Mr Lake informing him of his sale but not asking for approval. She was also told that he did not fill out the paperwork. She brought up the necessity to fill in the form attached to the 2015 policy and referred to Mr Lake’s lack of interest in the security trading policy. Mr Brackin also discussed the need for the paperwork to be done and expressed his relief that he had complied with the policy. She could not remember him showing a form to Mr Lake during that meeting.
- [200] She said the bigger discussion was whether Mr Lake had market sensitive information not known to the public when he engaged in his trading. Around the time of his dismissal on 15 October the board was taking legal advice from internal and external advisers which was used in formulating the dismissal letter of 6 November.
- [201] Mr Adams, another director whose evidence seemed to me to be reliable, said Mr Brackin asked heatedly why Mr Lake had traded when the re-forecast was under way in the first half of September. Mr Brackin said it was inconceivable Mr Lake would not have been aware of what his executive team was saying about the numbers. He said that Mr Lake was therefore potentially in possession of price sensitive information while he was trading. Mr Lake said he was not in possession of such information. When Mr Lake left the meeting, Mr Brackin described Mr Lake’s statements as “self-serving” and inaccurate.
- [202] Mr Adams said there was also discussion whether Mr Lake had followed procedures about the share trading and it was then decided that Mr Lake should be asked to resign because he was

in breach of the securities trading policy and there was the potential for him to have traded while in possession of insider information.<sup>187</sup>

- [203] By mid-September 2015 Mr Adams knew that the basic terms being discussed between Mr Lake and Mr Puttick included 12 months' remuneration and 12 months of his company lease. He was also aware of the discussion about the long-term incentives and did not necessarily concur with Mr Lake receiving them. He agreed, however, on being referred to GBT.068, that there was broad agreement that Mr Lake was entitled to those long-term incentive shares because he was regarded as a "good leaver" at that time in mid-September 2015.
- [204] After mid-September and the meeting of 15 October 2015 he had formed the view that Mr Lake was not following proper procedure in not obtaining approval for the share trading. No-one consulted the 2015 share trading policy at the board meeting, however, and he could not recall looking up that policy before the letter of 6 November 2015 dismissing Mr Lake was sent. He said there was discussion about Mr Lake not having obtained approval from Mr Puttick. He was not told anything by Mr Puttick about his dealings with Mr Lake about his share trading and could not recall any reference to there having been discussions between them in London or by email from Mr Lake to Mr Puttick about his share trading. Nor was there any discussion of the Hong Kong lease on 15 October 2015.
- [205] A market update was released to the ASX dated 15 October 2015 announcing that the company and Mr Lake had mutually agreed that his role as managing director and chief executive officer would cease, effective that day, and that he would be replaced by Mr DeDominicis as interim chief executive officer with immediate effect.<sup>188</sup>
- [206] Mr Sundell said to Mr Puttick in an email of 17 October 2015 in respect of the possibility of Mr Lake travelling to Bangkok that he wanted Mr Lake out immediately.<sup>189</sup>
- [207] About two days later Mr Puttick called Mr Lake again and told him he would receive something in writing. The second offer was for six months' rent or rent up until the end of July or the end of the school year in Hong Kong in November 2016. He had a daughter at school in Hong Kong. He also made notes of his conversation with Mr Puttick in October<sup>190</sup> and later received an email on 2 November 2015 in which Mr Puttick set out two options to resolve his separation payment from the defendant.<sup>191</sup> One of the contentious points was a proposal by the defendant that he release it from its indemnity of him for the litigation costs in respect of Mr Murdoch's action against Mr Lake.

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<sup>187</sup> GBT.373. See also GBT.376 apparently drafted by Mr Adams.

<sup>188</sup> GBT.190.

<sup>189</sup> GBT.370.

<sup>190</sup> SML.149.

<sup>191</sup> GBT.160.

[208] Subsequently he received an email containing an assertion that he had locked the defendant into an apartment lease in Hong Kong without consultation with Mr Puttick.<sup>192</sup> After that he received a further email dated 6 November 2015 terminating his employment “effective immediately” for the express reasons that:<sup>193</sup>

“1. You failed to comply with GBST’s Securities Trading Policy when you sold 2,421,123 ordinary shares in GBST for a total price of AUD11,500,334.25 on 25 September 2015; and

2. On 24 July 2015 you executed a two year residential lease agreement on behalf of GBST Hong Kong Limited (“**Hong Kong Lease**”) outside your authority and without obtaining prior approval for that transaction from the Board.”

[209] In a conversation he had with Mr Puttick about the alleged breach through entry into the apartment lease, Mr Lake said to Mr Puttick that Mr Puttick knew all about it. Mr Puttick was silent in response. They also had a conversation about the proposed release of the indemnity of him in respect of the Murdoch litigation where Mr Puttick said the defendant would prefer to give him the money to fight Mr Murdoch, in effect providing an incentive for him to resolve it as quickly and cheaply as possible.<sup>194</sup>

***Board meeting of 21 October 2015***

[210] The directors’ minutes of 21 October 2015 included a discussion of resistance to the transfer of shares in the company to Mr Lake.<sup>195</sup> Mr Puttick said that issue was raised by most of the other board members and that he agreed with the board’s view. Those other members thought that the downside of the risk of litigation involving Mr Murdoch was more in Mr Lake’s control.

[211] Mr Brackin said the board also discussed the issues at a further meeting on 21 October where he said he agreed with Mr Puttick’s statements about the reasons for termination in an email of 22 October:<sup>196</sup>

“We need to be very clear about the grounds for termination

Could you please review the below and confirm

Please either correct, add or subtract from this list

My understanding of the grounds we are now taking for termination of Stephen's contract with reduced consideration are as follows:

Putting his own interests ahead of GBSTs

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<sup>192</sup> GBT.375.

<sup>193</sup> GBT.162.

<sup>194</sup> T3-40/35-42.

<sup>195</sup> GBT.192.

<sup>196</sup> GBT.373.

Selling GBT [sic] without first obtaining permission as per current trading policy and before a profit downgrade

Renewing HK lease for a two year term in July after having been advised contract would not be renewed after Feb 2016

Not disclosing EA remuneration as the second highest salary after the CEO in the remuneration report to shareholders

Being unaware of actual business performance in spite of numerous warnings to the contrary

Note when I spoke with Stephen last Thursday I gave him the choice of resigning or being terminated

He opted for resigning with the wording as 'stepped down' with six months notice, six months rent and LTIPS#1

We do need to be very clear of our grounds

Allan and I have also discussed how the current litigation will be managed following on from this given that we are in the position of his indemnifier and that is also waiting on advice as I understand it."

- [212] Mr Brackin said that Mr Puttick did not raise any knowledge he had about the lease for Mr Lake's premises in Hong Kong at a board meeting. He could not recall who raised the issue about the release of the indemnity in respect of the Murdoch litigation and could not recall any discussion about the desire to keep the long-term incentives as a fund to fight that litigation. He said that it was Ms Bartlett's suggestion to retain the long-term incentives as a small war chest and that there was no discussion of it at the board meeting.<sup>197</sup> He agreed that it was possible that Mr Sundell had an interest in the litigation.<sup>198</sup>
- [213] Mr Brackin also agreed that Mr Lake's indemnity was from the company<sup>199</sup> and believed that Mr Lake opted for a resignation with six months' pay and six months' rent and his long-term incentives in a conversation with Mr Puttick on 15 October. He could not recall exactly what happened there but agreed that what proceeded was not the option given by Mr Puttick to Mr Lake on 15 October.
- [214] When asked about the Hong Kong lease Ms Bartlett said that she believed it was not discussed with Mr Puttick by Mr Lake and went beyond both his tenure as CEO and his delegation from the company. She agreed that it was not discussed at the 15 October board meeting but that it was discussed at the two further meetings held in October after that date. She believed it was raised in a board meeting when they were discussing an appropriate commercial settlement with Mr Lake, possibly in the second board meeting in October. She remembered

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<sup>197</sup> GBT.375.

<sup>198</sup> SML.071 at p 2 declared in December 2014.

<sup>199</sup> GBT.374.

Mr Puttick and Mr Brackin talking about it a lot. Mr Puttick did not say he had discussed the lease with Mr Lake.

- [215] There had been discussion about the terms of Mr Lake's separation before he became a "bad leaver".<sup>200</sup> She did not recall GBT.068 but agreed that it reflected the agreement reached with Mr Lake at that stage. It and JFP.039 referred to the company lease lasting at least to 30 June 2016. And she agreed that because of that email about 9 September 2015 she was aware that a company lease was on foot. She also agreed that the taking of a lease beyond the retirement date was dependent on when the replacement for Mr Lake began which could take his employment up until mid-2016. She agreed that the proposal that that occurred looked reasonable at the time. She did not recall any connection being made back to the lease referred to in JFP.039 at the meetings in October 2015.<sup>201</sup>
- [216] She described the lease issue as very much a second issue compared to Mr Lake's share trading as a reason for his termination. She said that it was brought up by Mr Brackin and discussed by the whole board and that Mr Puttick was delegated as chairman to have a discussion with Mr Lake about that issue and to clarify it with him. She could not recall Mr Puttick clarifying the issue with the board. When asked about the absence of any reference to Mr Puttick referring the issue back to the board in the minutes, she said that the minutes did not capture all matters discussed.
- [217] She said that the board was developing new reasons for Mr Puttick's dismissal after 15 October to strengthen the position the board was taking.
- [218] She was then asked about the linking of the long-term incentive shares to the indemnity release sought in respect to the Murdoch litigation. It was her suggestion that it would give the company a small war chest but she said she was a little uncomfortable with packaging that proposal with the offer to Mr Lake and she went along with the consensus of the board on that issue. She could not recall Mr Puttick expressing discomfort. She recalled that discussion about the link of an indemnity release with the Murdoch litigation as having happened on 21 October.<sup>202</sup>
- [219] Her recollection was that the link to the Murdoch litigation was raised by Mr Brackin. She had been briefed about its key elements but was not sure when she discovered that Mr Sundell had an interest in that litigation. She agreed that he was part of the meeting which discussed it. She did not recall whether his interest was discussed in the meeting. She said that nobody discussed avoiding the issue of Mr Lake having to join Mr Sundell into the case and said the sense was that Mr Lake was the best equipped person to deal with the litigation. She only remembers the discussion of a release being in respect of GBST, the company, not its officers or agents.<sup>203</sup>

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<sup>200</sup> JFP.039.

<sup>201</sup> GBT.375.

<sup>202</sup> GBT.191.

<sup>203</sup> GBT.374; GBT.194.

- [220] Mr Adams believed that the matter of the lease may have been raised at this further meeting in October and said that Mr Brackin was concerned that the lease signed in July was entered into without reference to the board or Mr Puttick. Mr Brackin had said that it was clear he had not sought either the board's or Mr Puttick's authority. Mr Puttick made no specific comments about that that Mr Adams could recall.
- [221] Mr Adams could not recall knowing about the lease in mid-September or it being discussed in board meetings. He was not aware that a lease had been signed in July for two years. He understood that it was able to be terminated after 12 months with two to three months' notice but agreed that Mr Puttick said nothing at the second meeting in October raising those issues in respect of his discussions about the lease.<sup>204</sup>
- [222] He believed that the board probably discussed the potential link between the long-term incentive payments and the indemnity in respect of the Murdoch litigation at the board meeting after 15 October. They wanted a full and final settlement and regarded the indemnity in existence in respect of the Murdoch case as an open-ended commitment. He knew that Kim Sundell had an interest in that litigation but did not recall any discussion about that fact at that meeting or Mr Sundell declaring any such interest. The board was taking external and internal legal advice about Mr Lake's separation at that time.
- [223] He could not recall any discussion at the 21 October board meeting about Mr Lake having accepted the second option offered to him by Mr Puttick on 15 October after that meeting.<sup>205</sup>
- [224] At the meeting on 21 October he could not recall any discussion about the release of directors and officers personally in respect of the Murdoch litigation. He was concerned about the company's indemnity for Mr Lake.
- [225] In referring to the absence of the discussion about Mr Lake's acceptance of the second option offered to him by Mr Puttick on 15 October, he said that the situation was fluid and he was not sure whether these terms were ones agreed.

***Board meeting of 30 October 2015***

- [226] Mr Puttick had set out his reasons for terminating Mr Lake on 22 October and said that the board meeting continued without him on 15 October after he left and that the board had arrived at different arrangements from what he had told Mr Lake on 15 October.<sup>206</sup>
- [227] He said that he would have reminded the board that its proposal at the 30 October meeting<sup>207</sup> went against the agreement that Mr Puttick had made with Mr Lake on 15 October. He said he sought consensus from the board. At this stage he broke down in the witness box when asked whether he thought it was the wrong thing to do by Mr Lake.

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<sup>204</sup> T10-27/41 to T10-28/11.

<sup>205</sup> GBT.373; GBT.374.

<sup>206</sup> GBT.374.

<sup>207</sup> GBT.194.

- [228] He also agreed that on the weekend after 30 October 2015 he told Mr Lake that he would receive six months' pay, six months' rent and his long-term incentive share transfers.
- [229] It is my view that, generally speaking, Mr Puttick failed to inform the Board of the nature of his conversations with Mr Lake. It is clear to me that he had agreed to the entry into the new lease but failed to tell the Board that. It also seemed obvious to me that his response to the information that Mr Lake proposed to sell the shares was to acquiesce to it. He was too weak, however, to present a more objective factual case to the board arising from his own knowledge of events. Perhaps the apparent antipathy to Mr Lake from Mr Brackin and Mr Sundell dissuaded him from doing so.

***Dismissal letter of 6 November 2015***

- [230] Mr Puttick said that the letter of dismissal of 6 November 2015 was drafted by the company's internal lawyer.<sup>208</sup> He had spoken to the internal lawyer about the broad principles. He was asked questions about the sending of the letter. He said that he had discussions with each director about the issues both at the meeting of 30 October 2015 and after it. He set out a number of grounds in an email to the other directors.<sup>209</sup> He said he spoke to them over the next two or three days after an email was sent on 22 October 2015 and that each eliminated a number of grounds either in discussion with him or at the meeting leaving the grounds relating to selling shares in the defendant without first obtaining permission as per the current trading policy and before a profit downgrade and the renewal of the Hong Kong lease for a two year term in July 2015 after he had been advised that his contract would not be renewed after February 2016. There was only one response from the other directors, from Ms Bartlett, proved in the emails tendered in evidence.
- [231] He could not recall individual conversations with individual board members and said that there had been considerable discussion at the board level on 30 October 2015 about Mr Lake's not having obtained approval for selling the shares and his not having used the appropriate form as well as not having sought permission from Mr Puttick as "manager". He said that issue was the trigger point for the discussion to terminate him and the board discussed a decision to offer him a commercial settlement or termination. The lease was also discussed at the meeting in the context of whether he had the authority to renew a company lease for a two year term when his contract was not due to be renewed after February 2016. He said that the termination letter<sup>210</sup> was distributed by email. When that email was called on it was not produced.
- [232] Mr Lake replied to the letter of dismissal of 6 November 2016 by email saying, among other things: "The current proposal by the company is not consistent with that [referring to an earlier conversation with Mr Puttick as to separation terms], is grossly unfair, and is not in

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<sup>208</sup> GBT.373.

<sup>209</sup> GBT.373.

<sup>210</sup> JFP.065.

keeping with either the handshake arrangement or my terms of employment. I have not engaged in any misconduct and reject any suggestion that I have".<sup>211</sup>

[233] Mr Puttick also agreed that, perhaps in a phone conversation on 6 November 2015 about the Hong Kong lease allegedly having been entered into without approval from the company, that he did not dispute that Mr Lake said to him "you knew all about that". He could not recall what Mr Lake said about his share trading.

[234] By later correspondence of 19 November 2015 Mr Lake accepted GBST's repudiation of his contract of employment.

#### **Evidence as to GBST's alleged damages**

[235] Mr Lonergan was an expert witness who gave evidence about the likely effect on the price obtained by Mr Lake for his shares had the information released on 13 October 2015 been known to the market when his shares were sold. He relied on a definition of insider information described in the defendant's pleadings which he reproduced in cll 30-32 of his report.<sup>212</sup> He also referred to more specific pleadings of the issues reproduced by him at para 29.

[236] He was not given the financial analysis underlying the 13 October 2015 announcement in any detail and focussed on the information he was given that the results for the first half of the financial year and the full year would be significantly worse than the previous financial year.

[237] He relied on four analysts' reports in respect of his conclusions at footnote 29 to indicate the pre-existing financial year forecast EBITDA of \$24 million to \$25.8 million with an average of \$24.75 million. He concluded that, after the 13 October 2015 announcement, the share value drop to \$3.86 would, in effect, reflect the result of that announcement. If it had been known that the CEO's shares were traded then he would have expected a greater fall. He had also worked out the price of \$3.86 by working out a volume weighted average for the five day trading period after 13 October. He used the analyst's forecasts to help him arrive at an implied EBITDA multiple.<sup>213</sup>

[238] He also described GBST as a company which had to invest a lot into its software development so it was not simply a services company but one which had to capitalise the value of the software development work done by it. He regarded the analysts as having mainly derived their results from the EBITDA even though they spoke about discounted cashflow analysis in their reports.<sup>214</sup> He had not done the mathematics to determine whether the \$5.70 value

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<sup>211</sup> GBT.375.

<sup>212</sup> GBT.558.

<sup>213</sup> GBT.558 at paras 60 and 99.

<sup>214</sup> GBT.196.

referred to in that analyst's report was used to derive the EV/EBITDA ratio at 13.3 referred to in it.<sup>215</sup>

- [239] He had derived the implied EBITDA multiple partly from the Baillieu Holst report.<sup>216</sup> After the announcement the price target in the valuation became different. He did not take the brokers' documents one by one but took the consensus view of them. He was asked whether the EBITDA analyst's figures were likely to be a derivative of value as compared to the price target and said that he derived a consensus view averaging across the brokers.<sup>217</sup>
- [240] In re-examination, he said that a 20% drop in earnings reflected in the EBITDA would be a very unpleasant outcome even if that EBITDA figure is an imperfect measure of value. He referred to that percentage drop by reference to the EBITDA before the announcement of \$25 million compared to that after the announcement of about \$20 million.
- [241] The multiple for the greater figure would have been higher also because it would lead to the view that the company was growing quickly where a fall of the order of 20% would suggest that the company was going into decline so that its discounted cashflow valuation would also drop and the EBITDA multiple would drop as a measure of the present value of the company's future cashflow. He did not regard a discounted cashflow analysis as the appropriate one for this case.<sup>218</sup> He concluded by repeating that his opinion was based on the definitions of insider trading in paras 30-32 of his report.

### **Factual findings**

#### ***Issues of credit***

- [242] I concluded at the hearing that Mr Lake was a credible witness. Most of my factual conclusions on the evidence were made from observations I recorded at the time when taking notes of and summarising each day's evidence. His evidence was coherent and made sense in the context of the additional evidence that was available touching on his knowledge of other events happening within GBST at the time stemming from the contemporaneous emails and reports in particular. It was evident from the emails that he was not kept in the loop after the London meeting about possible changes to the company's financial forecasts.
- [243] In particular, also, his proposal to his stockbroker to "unwind" the share sales he ordered when he discovered the changes to GBST's forecasts at 30 September 2015 speaks of someone who was previously ignorant of that information, concerned about his apparent taking advantage of inside information and embarrassed about the perception that he may have done that. That reaction occurred before he was taken to account at the directors' meeting on 15 October. It is also buttressed by the independent, contemporaneous evidence of the stockbroker,

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<sup>215</sup> T11-78/25 to T11-79/38.

<sup>216</sup> GBT.393.

<sup>217</sup> T11-82/16.

<sup>218</sup> T11-86/9-16.

Mr Pittman. Mr Lake seemed to me to be someone whose business instincts were honourable.

- [244] I had reservations about the evidence from Mr Puttick, Mr Brackin and Mr Salis for reasons I have already expressed or shall set out shortly. It was also significant that Mr Sundell did not give evidence and there was no explanation for that. The other evidence suggested that he had a particular animus against Mr Lake. There is an inference open that his evidence would not have assisted GBST.
- [245] The critical factual findings relate to whether Mr Lake sold his shares at a time when he was possessed of price sensitive information that was not available to the general market. That was the reason advanced by GBST for terminating his employment. The other factual issue of note was whether he was in breach of the terms of his employment in causing GBST's Hong Kong subsidiary to enter into the lease for the apartment in which he and his family were to continue to live up to and beyond the termination of his employment.

### ***Entry into the lease***

- [246] I shall deal with the issue of the lease first. It was an afterthought as a reason to terminate Mr Lake's employment but the relevant facts occurred earlier. The survey of the evidence on that issue makes it clear that Mr Puttick agreed to the arrangement, saying that Mr Lake had to live somewhere in circumstances where he was proposing to enter into a lease in connection with his employment that could not be terminated until well after the former extension of the secondment agreement. That, no doubt, was because he anticipated that Mr Lake would be entitled to rent the apartment until well into 2016 as a result of the combination of his continued employment up to the commencement of a new CEO's employment and during a transition period after that. Mr Puttick's failure to tell the board about those conversations and arrangements later in 2015 when the termination of Mr Lake was being discussed reflects poorly on him. He knew then that the arrangement had been made properly with his acquiescence.<sup>219</sup>
- [247] When Mr Lake sent a copy of the draft tenancy agreement for the lease to Mr Ritter and GBST's legal counsel on 19 May 2015 for review, no issue was raised in relation to it or its term or to Mr Lake executing it on behalf of the Hong Kong subsidiary. Mr Ritter's evidence was also consistent with him having done what Mr Lake asked him to do, namely to speak with Mr Puttick and ask if the lease was okay.<sup>220</sup>
- [248] Accordingly, there was no breach of the terms of Mr Lake's employment by his entry into that lease and by the entry of the Hong Kong subsidiary into the lease with him. It had been approved in advance by Mr Puttick and subsequently agreed appropriately through the company's normal arrangements.

### ***Insider trading***

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<sup>219</sup> See the summary of the evidence earlier in these reasons at [37].

<sup>220</sup> T2-16/40-45; T8-55/15-25.

- [249] The next issue is whether Mr Lake knew of the relevant information at the time of the share sale. The relevant information as pleaded was:
- a. From around 3 September 2015 there had been growing concern within the GBST executive staff that GBST was not going to meet its profit forecast for the financial year ending on 30 June 2016, and the shortfall was significant and likely to be in the region of over \$5 million, or around 20% of the forecast EBITDA of \$24.7 million;<sup>221</sup> or
  - b. Alternatively, from around 3 September 2015 there had been growing concern (or concern) within the GBST executive staff that GBST was not going to meet its profit forecast for the financial year ending on 30 June 2016 and the shortfall was, or was likely to be, significant.<sup>222</sup>
- [250] I have set out earlier my summary of the evidence relevant to the discussions which Mr Lake was party to, particularly during and after the meeting in September in London up until his sale of the shares on 25 September. It may be accepted that Mr Lake knew that the Aegon services work was expected to reduce in the second half of 2015. His view was, however, that there was the potential for further income streams to come from Aegon during that financial year.
- [251] The budget approved by the board that was finalised on 10 August 2015 showed a net EBITDA of \$24.7 million<sup>223</sup> and was changed on that date to contain an EBITDA of \$23.5 million.<sup>224</sup> The plaintiff submitted, it seemed to me accurately, that those forecasts remained within the parameters of assumptions previously sanctioned by the board in respect of revenue.
- [252] Mr DeDominicis said that he told Mr Lake on an unspecified number of occasions that he considered the revenue forecast for the wealth management division in the budget to be unrealistic.<sup>225</sup> He based that on discussions with Mr Denning from Aegon, something not put to Mr Lake in cross-examination. It seems, however, as was submitted for Mr Lake, that Mr Salis' view was that there was a possibility that the Aegon revenue generated in the 2016 calendar year would be similar to that achieved in the 2015 financial year.<sup>226</sup>
- [253] That led to the submission that, even if the August and September telephone calls alleged to have been held between Mr DeDominicis and Mr Lake occurred, their relevance was limited given the ongoing discussions with Aegon and the constantly changing expectations with regard to future revenue.
- [254] GBST had also pleaded that Mr Salis had a conversation with Mr Lake on or about 3 September 2015 during which he said words to the effect that the current outlook for the 2016 financial

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<sup>221</sup> Defence, [52(b)(ii)].

<sup>222</sup> Defence, [52(c)].

<sup>223</sup> GBT.063.

<sup>224</sup> GBT.302.

<sup>225</sup> T7-49/30-45.

<sup>226</sup> GBT.066.

year looked like it would be well short of the budget and would need to be discussed at the London planning session. He had no recollection of the conversation independent of an email he sent to Mr DeDominicis on 31 August 2015.<sup>227</sup> Nonetheless, he asserted that he conveyed the concerns detailed in his email to Mr DeDominicis.

- [255] The plaintiff's submission was that that evidence was a recent invention because, although Mr Salis had been involved in various forensic processes since 15 October 2015 which led to the recording of his recollection of events,<sup>228</sup> the assertion was raised for the first time during his evidence at trial. Nor, it was submitted, was it contained in GBST's recent pleading amendments, was not opened and was not put to Mr Lake in cross-examination, nor was an attempt made in re-examination to explain the issue.
- [256] The submission made, that I accept, was that Mr Salis did not have any detailed conversation with Mr Lake on that occasion. Nor had Mr Salis undertaken any work by that date, 3 September 2015, to prepare a revised outlook or obtain executive consensus on a revised outlook. He also circulated some days after 3 September the version of the budget approved by the board on 11 August 2015 on the basis that it provided a "good overview of the plan for the year ahead and some of the key revenue drivers or CM overall".<sup>229</sup>
- [257] There was also a conversation pleaded on 9 September during which Mr Salis allegedly said to Mr Lake that the results for September were likely to be at least as bad as those for August and that he was not aware of imminent sales to substantially improve performance. Mr Salis' evidence was again criticised as going beyond the bounds of the pleaded case and challenged as a recent invention.<sup>230</sup> No attempt was made in re-examination to controvert the lack of a denial of that allegation by Mr Salis.
- [258] There were other significant attacks on Mr Salis' credit which seemed to me to be justified. Nor could the evidence about what occurred at the London planning session conversation permit a confident conclusion to be drawn about the exact nature of the discussions which took place. No document had been prepared to present an updated forecast nor had any detailed work commenced to determine the result of any forecasts.
- [259] The agenda appeared to have been disrupted by the announcement of Mr Lake's departure and he was intermittently absent from the planning session from that time onwards. There is a lack of clarity about what actually occurred, as the plaintiff submitted, and it is clear that Mr Lake's main preoccupation was with the announcement of his departure to staff both at the meeting and also at the defendant's other offices in London.
- [260] He had no recollection of words being said at the discussion about the budget to the effect that the budget had to be revised downwards significantly or that the increased cost of the capital market international division would have a significant negative impact upon it.

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<sup>227</sup> GBT.066.

<sup>228</sup> T9-54/10-45.

<sup>229</sup> GBT.069.

<sup>230</sup> See the plaintiff's closing submissions at paras 281-282.

- [261] As the plaintiff submitted, the evidence of that meeting was not such as to lead to the conclusion that anything was said in the London planning session, in the presence of Mr Lake, that conveyed a real concern that the budget would have to be revised down substantially.
- [262] Nor am I satisfied that Mr Puttick's allegation of a conversation occurring on 17 September relating to the forecasts for the company should be accepted. As was submitted for the plaintiff, that was an allegation included in the pleading at a very late stage where Mr Puttick had previously been a party to the proceeding and had not raised it in his own defence. Nor was it corroborated by any evidence from Mr Salis although it was opened that he would give such corroboration.
- [263] There was doubt that Mr Puttick and Mr Lake travelled to Watford together on 17 September 2015 and in a later email of 19 September 2015 relaying feedback about the London planning session in an email exchange with Mr Brackin, Mr Puttick made no reference to a conversation with Mr Salis or of the budget being written down. Instead he identified concern about the short-term revenue growth for the Capital Markets international division and explained that there was a good pipeline of work in place at the time. Nor did that evidence support a conclusion that Mr Salis was relaying anything other than his own concerns rather than concerns held by the executive team generally.
- [264] Further, if that had been Mr Puttick's information from Mr Salis on 17 September why would he have approved Mr Brackin's share sale on 19 September? The timing of the share sale was readily explicable by the fact that Mr Lake's retirement had been announced on 17 September 2015. It was significant that two other directors sold shares shortly after that date also. The defendant's hypothesis that Mr Lake was seeking to take advantage of information arising from the London planning session by selling before it became public did not make sense, according to the plaintiff's submissions, which I accept, because he had openly discussed his intentions with Mr Puttick and sought Mr Puttick's approval on the day of the sales and his instruction to his stockbroker to sell only occurred on 25 September 2015.
- [265] The submission for the plaintiff, therefore, that Mr Lake did not know the information at the time of the share sale is one that I find compelling.<sup>231</sup> Those findings are decisive in respect of much of the defendant's pleaded case but there are legal issues that need to be considered also.

### **Legal issues and conclusions**

- [266] There were three claims for damages for breach of contract included in Mr Lake's pleaded case. The first was that the purported termination of his employment on 6 November 2015 was wrongful. Secondly, he submitted that the board failed to exercise its discretion properly by not allowing his performance rights to vest. Thirdly, he submitted that the defendant underpaid him his entitlements.

### ***Wrongful purported termination of Mr Lake's employment***

- [267] My factual findings establish that his employment was terminated wrongfully.

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<sup>231</sup> See the reasons asserted in the plaintiff's written submissions at paras 298-300.

- [268] The plaintiff's submission was that his employment could only be terminated pursuant to the employment contract because it had excluded any common law right on the defendant's part to summarily dismiss him. Because of my factual findings, it is not necessary for me to resolve that legal issue.
- [269] There may be some point, however, in saying something about the issue. There were detailed circumstances set out in cl 8 of the employment contract dealing with termination. The relevant circumstances in which his employment could be terminated included summary termination if he committed any fundamental and serious breach of his responsibilities as CEO as determined by the board; persistent breaches of material provisions of the employment contract and committing any act of serious dishonesty or fraud on GBST. There was also a provision entitling GBST to terminate his contract on not less than six months' notice provided that the date of cessation was on or after the conclusion of the term.
- [270] The plaintiff relied upon the decision of Digby J of the Victorian Supreme Court in *Mair v Rhodes & Beckett Pty Ltd*<sup>232</sup> to support his submissions on this point. His Honour distinguished the facts before him from the decision of *Concut Pty Ltd v Worrell Pty Ltd*<sup>233</sup> in the High Court by accepting the argument that the all-encompassing nature of the termination clause in *Mair* and, particularly, the fact that it appeared to cover all relevant conduct at common law, evinced the parties' clear intention that it would codify all aspects of termination under the contract and exclude the common law right to summarily dismiss the employee.<sup>234</sup> There seem to me to be strong arguments from those decisions in support of that proposition in this case also. The consequence would be that the contractual provisions precluded any summary dismissal of Mr Lake's employment at common law. The secondary consequence was said to be that his employment could only be terminated in accordance with those contractual provisions where strict compliance with them was required.<sup>235</sup>
- [271] As I have said, on my factual findings, Mr Lake's behaviour was not such as to breach the terms of his employment contract or sufficiently serious to allow summary termination. Accordingly, even if the alternative possibility of termination at common law existed, the occasion for its use did not. Consequently, the occasion to discuss whether the approach in *Shepherd v Felt and Textiles of Australia Ltd*<sup>236</sup> applied did not arise. Namely, there was no other ground valid at the time of termination not relied on at the time justifying the termination of the contract.<sup>237</sup>

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<sup>232</sup> [2018] VSC 132; see also *Heugh v Central Petroleum (No 5)* [2014] WASC 311.

<sup>233</sup> [2000] HCA 64; (2000) 75 ALJR 312.

<sup>234</sup> See *Mair v Rhodes & Beckett Pty Ltd* [2018] VSC 132 at [108]; *Heugh v Central Petroleum (No 5)* [2014] WASC 311 at [87].

<sup>235</sup> *Vision Eye Institute Ltd v Kitchen* [2014] QSC 260 at [236].

<sup>236</sup> (1931) 45 CLR 359.

<sup>237</sup> See the discussion of the applicability of the *Shepherd v Felt and Textiles* approach in *Hodgson v Amcor Ltd* [2012] VSC 94 at [1612], *Downer EDI Limited v Gillies* [2012] NSWCA 333 at [133]-[135], Mason CJ in *Sunbird*

- [272] Nor could the provision in cl 8.1(a) of the employment contract permitting GBST to summarily terminate Mr Lake's position immediately if he committed any fundamental and serious breach of his responsibilities as CEO as determined by the board, permit that determination to be other than one based objectively on information obtained not only by the employers' investigations, but also on the whole of the evidence before the court.<sup>238</sup>
- [273] Nor was there substance in the defendant's argument that Mr Lake was required to obtain approval in respect of the share trading from GBST's board. There was no part of the policy in force at the time that required him to do that. He did in fact, on my view of the evidence, seek and obtain approval from Mr Puttick on 25 September, something which Mr Puttick did not tell the board as he did not show the board the email he had received from Mr Lake on 25 September or his response of the same day. Mr Brackin's evidence was that that email exchange may have been discussed but neither Mr Adams nor Mr Puttick had any such recall of a discussion of that nature at the meeting.
- [274] Nor was there any requirement that Mr Lake complete a form in respect of the transaction at the time and submit it to the company secretary. Nobody had reviewed the 2015 trading policy which only required its Appendix A to be completed when seeking approval to trade during a closed or prohibited period. The date of the trade, 25 September 2015, was not within such a period. Even if he had been required to fill in a form, there was no substantive effect on his fulfilment of his obligations. He provided the relevant details to Mr Ritter on 28 September 2015 and the forms required to be lodged with the ASX were provided to it without incident.
- [275] There had never been a practice of directors seeking approval from the board. The practice was to seek approval, in Mr Lake's case, from Mr Puttick, something that he did and which Mr Puttick failed to convey to the board.
- [276] The plaintiff also submitted that the defendant had not relied on insider trading allegations as a ground of termination in the letter of dismissal of 6 November and could not rely on them at this stage either but, as I have said, I am not satisfied that he did engage in insider trading and do not need to deal with that legal issue.
- [277] The second ground of termination relied on by the defendant was Mr Lake's entry into the lease. Again, on my factual findings, it is my view that that was not a breach by him of his employment contract and certainly not one permitting the defendant to terminate his employment summarily. It was something done with the consent of Mr Puttick who again did not tell the board fully what had occurred between him and Mr Lake.
- [278] It was not raised as a basis for terminating Mr Lake's employment until the board meeting on 21 or 30 October 2015 where he was not present. The evidence of Mr Adams, Mr Brackin and Ms Bartlett was that they had no recollection of Mr Puttick telling the board about any dealings that he may have had with Mr Lake or Mr Ritter about Mr Lake's entry into the lease.

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*Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 262 and *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20 at [104]-[109].

<sup>238</sup> *Bartlett v Australia & New Zealand Banking Group Ltd* [2016] NSWCA 30 at [36] and [49].

Nor was the lease discussed at the board meeting on 15 October 2015 which was attended by Mr Lake so he was not given the opportunity to explain his position at the time. That constituted a failure to act reasonably by the defendant.<sup>239</sup>

- [279] It was also submitted for Mr Lake that, even after the board meeting of 15 October 2015, the defendant continued to offer him a separation package, including six months' rent, such that it was precluded from relying on this ground of termination to summarily dismiss Mr Lake because by 6 November 2015 it had clearly and unequivocally elected not to rely on any such breach as a ground of summary dismissal.
- [280] The submission was that, by early September 2015 at the latest, all of GBST's directors knew that there were dealings about Mr Lake's separation package which included approval of payment of 12 months' rent on the lease and that he would seek and rely on assurances about his separation package before permitting an announcement about his retirement to be made. The argument was that he was given those assurances, including in the form of a draft settlement deed providing, among other things, for the payment of 12 months' rent, with an announcement that he would leave at some unidentified time in 2016 under a cooperative arrangement. The submission was that, having secured Mr Lake's cooperation in relation to that announcement, on the basis of knowledge of the lease and an assurance about the payment of rent under it, GBST could not subsequently complain about the circumstances of it.<sup>240</sup>
- [281] Again, there seems to me to be merit in those submissions, but based on my primary factual findings, I am satisfied that Mr Lake did not breach the terms of his employment by entry into that lease.

***Mr Lake's loss arising out of his wrongful termination***

- [282] Mr Lake accepted the repudiation of the defendant's obligations under the employment contract conveyed by its termination letter of 6 November 2015 in his response of 19 November 2015.<sup>241</sup>
- [283] The damages he claims for the repudiation of his entitlements under the contract include \$643,100 as 12 months' salary, including superannuation entitlements. GBST had expressed its willingness to pay him a separation package, including 12 months' salary as late as 8 October 2015.<sup>242</sup>
- [284] As was submitted for Mr Lake, but for the purported termination, it was likely that he would have received a separation package consisting of that amount. The alternative to that claim was one for six months' salary but, in my view, the plaintiff has established his entitlement to 12 months' salary based on previous negotiations and on the reasonableness, to my mind, of a

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<sup>239</sup> *Bartlett v Australia & New Zealand Banking Group Ltd* [2016] NSWCA 30 at [53]-[54].

<sup>240</sup> *Rankin v Marine Power International Pty Ltd* [2001] VSC 150 at [352].

<sup>241</sup> SML.063.

<sup>242</sup> SML.053; GBT.188; T6-58/10-35.

period of notice of that length. His entitlement under cl 8.4 of the employment contract was to not less than six months' notice provided that the date of cessation was on or after the conclusion of the term of the contract. The previous negotiations can be looked at, in my view, to ascertain the probable result had the purported termination not intervened.

***The performance rights contract***

- [285] The performance rights contract entitled Mr Lake to receive 365,177 performance rights if the service and performance conditions were satisfied on the vesting date, 8 November 2015. The value of those shares at that time was \$1,460,708.<sup>243</sup>
- [286] His case was that because the employment contract was not terminated until he accepted GBST's repudiation on 19 November 2015, he was entitled to receive those rights. My conclusions on the facts and about the invalid nature of the attempt to terminate his employment on 6 November 2015 support that conclusion. His argument was that, despite the purported termination of his employment contract on 6 November 2015, he remained in continuous employment with GBST until he accepted its repudiation. He submitted that it would be absurd to construe the reference to continuous employment to permit GBST to bring an end to his entitlement to the performance rights by its own wrongful repudiation.<sup>244</sup>
- [287] The conclusion, therefore, seems appropriate to me that, until Mr Lake accepted GBST's repudiation, the employment contract continued and Mr Lake remained in continuous service with it.<sup>245</sup>
- [288] The further submission was that, if the performance rights did not vest on 8 November 2015, the board still had a discretion to determine whether or not they would vest generally under cll 1.1, 6.3(b), 7 and 8.<sup>246</sup> The submission was that the board could still allow those rights to vest even if he did not satisfy the service condition by not being employed on 8 November 2015.
- [289] Mr Lake, therefore, relied on an alleged implied term that any discretion which GBST exercised would be for a proper purpose and in good faith and not exercised arbitrarily, capriciously or unreasonably.<sup>247</sup> The submission proceeded, therefore, on the basis that, since GBST's purported termination of Mr Lake's employment was wrongful and he was in fact a "good leaver", then GBST failed to direct itself to the correct question in determining whether the performance rights should vest.
- [290] It had been prepared to allow them to vest until 22 October 2015 in proffering a draft settlement agreement to him on 9 September 2015, including their vesting. It also made an

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<sup>243</sup> SML.163.

<sup>244</sup> See *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2013] QCA 183 at [38], [70]-[71] and *Johnson v American Home Assurance Company* [1998] HCA 14; (1998) 192 CLR 266.

<sup>245</sup> See *Visscher v The Honourable President Justice Giudice* [2009] HCA 34; (2009) 239 CLR 361.

<sup>246</sup> SML.009.

<sup>247</sup> *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 at [5]-[6].

offer on 15 October 2015 to the effect that they would vest in circumstances where Mr Lake had accepted the offer made on 15 October 2015. The argument was that, therefore, the board procured Mr Lake's agreement on 15 October 2015 to a form of departure in GBST's interests to announce on the basis of the unconditional vesting of the performance rights. After that, the submission went, GBST changed its position on 22 October 2015 but did not notify Mr Lake of that fact until 2 November 2015 when it provided him with a deed of agreement tying his separation package and the vesting of the performance rights in him by terminating the indemnity in respect of the Murdoch litigation. That appeared to have been motivated by a wish by the board to retain the money previously offered to Mr Lake in the form of six months' salary, rent and the vesting of the performance rights in order to provide a "small war chest" to help offset the costs of the Murdoch litigation and also in the hope of a full and final settlement with Mr Lake.

[291] The submission was that the board's motivation for seeking the termination of the indemnity was unrelated to any of the issues detailed in the termination letter and in circumstances where it was well known that Mr Sundell had a potential interest in the Murdoch litigation and appears to have participated in the decision.

[292] In the circumstances, those submissions appear to me to be persuasive, particularly given the fact that Mr Lake remained employed by GBST until two days before the performance rights would have automatically vested on 8 November 2015 and in circumstances where his purported termination on 6 November 2015 was invalid. Because of GBST's breach of that argued implied term, he suffered loss in that the performance rights did not vest and he did not acquire their value which equated, at 9 November 2015, to \$1,460,708.

### ***Accrued entitlements***

[293] Mr Lake claimed accrued entitlements while he worked in Hong Kong pursuant to the terms of his employment contract and the secondment agreement amounting to \$63,874.33 at 10 November 2015 based on the AUD:HKD exchange rate at that date.<sup>248</sup> He also claimed a further \$57,522.71 as entitlements accrued during his work for GBST in Australia.<sup>249</sup> The argument was that he had been underpaid annual leave, long service leave and "Toil"/longevity leave of a total of 190.12 hours. The total underpayment was calculated by reference to his pay rate of \$302.56 per hour during Mr Lake's work in Australia.

[294] These claims were not challenged by the defendant factually at the trial. The relevant documents on which the plaintiff relied had been admitted by consent as category "A" documents admissible as to the truth of their contents. There was no cross-examination of Mr Lake about them.

[295] Mr Trim for GBST had submitted, in his written trial submissions, that none of those entitlements were recoverable without clearly articulating why. He submitted that if I accepted that GBST was not entitled to terminate Mr Lake's contract of employment summarily then "the only relief that the Court ought to award is the payment of six months of

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<sup>248</sup> SML.159; GBT.562.

<sup>249</sup> See paras 164-169 of the plaintiff's closing submissions.

Mr Lake's wages or, alternatively, the payment of six months wages plus the value of any shares in GBST as at the date of trial".<sup>250</sup> Subsequently, in a further written submission, GBST submitted that the provisions of the employment agreement and the secondment agreement and the evidence relied on by Mr Lake did not establish his entitlements.

- [296] The plaintiff submitted, however, that the claims had been pleaded in the amended statement of claim and the second further amended statement of claim and were agreed in its written opening and the oral opening. Those claims covered both entitlements accrued in Australia and in Hong Kong. The closing submissions, as I have indicated, also spelt out the amounts of the claims.
- [297] The plaintiff therefore submitted that there was no procedural unfairness to GBST to refuse to entertain the further submissions given that it was aware of the case that Mr Lake intended to run in relation to the unpaid entitlements,. For that reason it opposed any grant of leave to make further submissions. It seems to me, however, that it is more convenient to consider the submissions that were made.
- [298] Mr Lake also submits, in any event, if leave is granted to make the supplementary submissions, that they arise out of cl 7.1 and 7.4 of the employment contract and cl 6.1 of the secondment agreement. Clause 7.1 entitled him to five weeks' paid annual leave for each 12 month period of service while cl 7.4 entitled him to long service leave. The calculations were buttressed by reference to GBT.559, GBT.561, GBT.562 and SML.159 together with other documents admitted by the parties as category "A" documents as well.
- [299] GBST did not offer any alternative unpaid leave calculations and no alternative documents or oral evidence was adduced by it to disprove the contents of the documents relied on by Mr Lake. It was also submitted that Mr Lake's claim for unpaid entitlements was drawn from GBST's own documents admitted as true and as establishing his underpayment.
- [300] In the circumstances, it seems to me that Mr Lake has identified his claimed legal entitlement and, in the absence of evidence clearly identifying problems in the documents relied on for the calculations, I am, having regard to the conduct of the litigation, of the view that the claim should be allowed. Accordingly, I shall allow that claim in the sum of \$121,397.04 subject to any recalculation of it arising out of changes in exchange rates since the trial.

***Misleading or deceptive conduct***

- [301] Mr Lake pursued parallel proceedings pursuant to s 236 of the *Australian Consumer Law* (sch 2 of the *Competition and Consumer Act 2010* (Cth)) for contravention of s 18 by GBST. The allegations were that the conduct of Mr Puttick and Mr Ritter was conduct in trade and commerce within the scope of their respective actual or apparent authority as officers, employees or agents of GBST or, in the case of Mr Puttick, as chairman of its board.
- [302] The behaviour of Mr Puttick in saying, in effect, to Mr Lake on 10 May 2015 that "he had to live somewhere" in respect of the proposal for entry into the lease and the silence of Mr Ritter when provided with a copy of the draft tenancy agreement on 19 May 2015 and coupled with

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<sup>250</sup> See para 333 of the defendant's closing submissions.

the statement made by Mr Ritter to Mr Lake in early July 2015 that the lease was “okay”, was conduct with a trading or commercial quality.

- [303] Similarly, Mr Puttick’s silence when told by Mr Lake words to the effect that he was going to sell about half of his Hong Kong shares, being the shares in GBST he had acquired in Hong Kong, and his response in his email of 25 September 2015 saying “acknowledged” in response to Mr Lake’s email notifying that he would “look to sell some [shares] as well over today and next week” also amounted to conduct in trade and commerce as communications about share sales for the purpose of obtaining approval to sell shares. The process of obtaining an approval had been implemented to protect the defendant as a publicly listed company and ensure that it complied with the relevant trading policy requirements issued by the ASX.
- [304] For the reasons I have already discussed, it seems clear that Mr Puttick’s failure to provide the board with the information he possessed about the entry into the lease as well as about the proposed share sales and Mr Ritter’s silence about the validity of the lease, caused Mr Lake to believe that his entry into the lease was acceptable as was his proposal to sell shares, against the background of the other information he provided about his intention to do that, including during the board meeting on 6 August 2015. Mr Puttick’s failure to inform him that the share sales were impermissible had the consequence that Mr Lake proceeded with transactions he otherwise would not have.<sup>251</sup> Consequently, it was submitted, Mr Puttick’s conduct was misleading or deceptive as it led Mr Lake into error.
- [305] The consequence alleged was that, but for this misleading or deceptive conduct, the situation would not have arisen that he entered into the lease or made the share sales relied on by GBST to allege that he had engaged in fundamental and serious breaches of his employment contract giving it the right to summarily terminate that contract. Therefore, but for the misleading and deceptive conduct such a situation would not have arisen, Mr Lake would have continued in his employment with GBST on the terms of the employment contract and secondment agreement until at least the vesting date so that he would have received the value of the 365,177 ordinary shares in the defendant worth on 9 November 2015, \$1,460,708. He would also have entered into an agreement containing the core terms of the draft settlement agreement as to his separation package, namely \$643,100 as 12 months’ salary, given that GBST continued to confirm its willingness to pay him that amount as late as 8 October 2015.<sup>252</sup>
- [306] That conclusion is one that appears persuasive to me and, were it necessary, I would have assessed damages for misleading and deceptive conduct under the Act on that basis also.

### ***Insider trading***

- [307] My factual findings preclude the defendant from succeeding in its argument that GBST is entitled to the payment of compensation by Mr Lake to it resulting from the alleged contravention of s 1043A(1) of the *Corporations Act*.

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<sup>251</sup> T2-34/5-10.

<sup>252</sup> GBT.188; T6-58/10-15.

- [308] There was a preliminary issue as to whether that section of the *Corporations Act* was sufficient to entitle GBST to compensation for damage suffered by it as the issuer of a financial product. The argument for Mr Lake was that GBST could only recover compensation for damages pursuant to s 1043L by way of an action under s 1317HA of the *Corporations Act*. No such action had been commenced in this proceeding. Section 1317HA is the primary liability provision relating to compensation orders where financial services civil penalty provisions have been contravened. It allows a court to order compensation where there is a contravention of s 1043A. The argument was that, in circumstances where GBST's claim fails to identify any basis upon which an award of compensation can be made, the claim advanced pursuant to ss 1043L and 1317H must fail.
- [309] There are few decisions relating to the operation of these sections, but it is not necessary for me to discuss them based on the factual findings I have made. Actual knowledge of the information is required and the matters relied on in GBST's pleading were not established to my satisfaction as showing such knowledge held by Mr Lake at the time he sold his shares.
- [310] As was argued for Mr Lake, at the trial, there was no evidence led to the effect that, as at 25 September 2015, the executive staff were concerned that GBST would not meet its profit forecast and that the shortfall would be significant and likely to be in the region of over \$5 million or around 20% of the reforecast EBITDA of \$24.7 million. The evidence was that those figures were the product of investigations and work done, at least substantially, after the share sales had occurred. Nor was any evidence led to the effect that a quantified concern had been communicated to Mr Lake at any relevant time.
- [311] The concerns relied on were those of Mr Salis and Mr DeDominicis in circumstances where other people in GBST's executive staff did not necessarily share their concerns, including Mr Lake and Mr Puttick. Similar problems associated with the evidence are discussed in the plaintiff's written submissions.<sup>253</sup>
- [312] It seems notable to me, in particular, that none of the underlying data on which the forecast circulated by Mr Salis on 30 September 2015<sup>254</sup> was based was available or disclosed in evidence. The submission was that no connection could be drawn between the reasons for that reforecast and the profit downgrade on 13 October 2015 so that GBST could not prove that the information led to that result.
- [313] It was not until 21 September 2015 that Mr Salis circulated draft preliminary budget documents to Mr Orrock and Mr DeDominicis for the purpose of commencing the reforecast process.<sup>255</sup> Mr Lake had been excluded from those communications about the budget after the London planning session. There was still ongoing debate by 28 September 2015 about the likely financial results for the next financial year.<sup>256</sup> A number of the high level assumptions

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<sup>253</sup> See paras 216-247.

<sup>254</sup> GBT.111.

<sup>255</sup> GBT.231.

<sup>256</sup> GBT.104.

adopted by Mr Salis in his draft forecast were challenged by Mr Orrock on 29 September 2015.<sup>257</sup>

- [314] It was also submitted for Mr Lake that he was genuinely shocked by the 30 September reforecast as demonstrated by his various handwritten notes.<sup>258</sup> He was expecting Aegon revenues to be brought forward and that accounting standards allowed licence fees to be brought forward and that significant work could be expected from HSBC from January 2016. His knowledge of those matters all changed after the share sales. Consequently, I am not satisfied that he acted in breach of the insider trading provisions of the *Corporations Act*.<sup>259</sup>
- [315] The plaintiff also argued that the relevant information was generally available because of information circulated in various brokers' newsletters and market announcements between February 2015 and 24 September 2015 dealing with GBST's dependency on a limited number of customers for the majority of its revenue, key risks to its revenue from project delays, including long leave times associated with lumpy contract wins and client loss, particular constraints on earnings growth during the 2016 financial year and that it was facing an ongoing revenue drop of \$4 million to \$5 million.<sup>260</sup> There were other examples of information about possible effects on its revenue or earnings during the 2016 financial year which had been available for a reasonable period.
- [316] Mr Lake conceded, however, that the information pleaded against him was not generally known outside of GBST and that it might have a material effect on the share price.<sup>261</sup> That was put to him on the basis that there was a growing concern that the shortfall was going to be significant and likely to be in the region of over \$5 million and around 20% of the forecast EBITDA figure of \$24.7 million. That was a figure which, on my analysis of the evidence, however, was not known to Mr Lake when he sold the shares. I am not satisfied, therefore, that he knew or was reckless as to whether any information would have a material effect on price or value if publicly known at the time he sold the shares.
- [317] There were also disagreements between him, Mr DeDominicis and Mr Salis about their respective approaches to the budgeting process. Mr Puttick's approval of Mr Brackin's share sale was relied on as indicating that there was nothing in the August results to give Mr Lake knowledge or make him reckless as to whether what was said was price sensitive. Accordingly, I agree with the plaintiff's submissions that Mr Lake could not be found to have known or to have been reckless as to whether the information he did have was price sensitive.
- [318] Consequently, I am not satisfied that he has acted in breach of those provisions of the *Corporations Act*. The attempt to quantify the relevant compensation in Mr Lonergan's

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<sup>257</sup> GBT.247; T9-67/5-25.

<sup>258</sup> SML.048; SML.049; SML.050; SML.087.

<sup>259</sup> See also paras 298-300 of the plaintiff's written submission

<sup>260</sup> GBT.399.

<sup>261</sup> T4-55/5-20.

evidence was criticised on behalf of Mr Lake but, given my factual findings, the occasion to make a compensation order has not arisen.

### **Conclusion**

[319] Accordingly, I have concluded that Mr Lake's claim for damages for breach of contract should succeed as should his claim for damages for misleading and deceptive conduct. In assessing the damages, it seems appropriate to me to focus on the claim for damages for breach of contract. On the findings I have made, he is entitled to the following heads of damage:

- damages for breach of contract for wrongful termination of his employment: \$643,100 as 12 months' salary, including superannuation entitlements;
- the value of the 365,177 ordinary shares in GBST as at 9 November 2015, namely \$1,460,708 as damages for breach of contract; and
- underpayment of entitlements: \$121,397.04.

[320] He would also be entitled, of course, to interest on those damages.

[321] The damages claimed for misleading and deceptive conduct consisted of his likely separation package had that conduct not occurred, namely payment of \$643,100 as 12 months' salary. He would also have been entitled to receive the value of the 365,177 ordinary shares in the defendant which as at 9 November 2015 equated to \$1,460,708.

[322] Accordingly, I would give judgment for the plaintiff for the total of \$643,100, \$1,460,708 and \$121,397.04, namely \$2,225,205.04 plus interest subject to any variances for changes in exchange rates since the trial. I would also dismiss the defendant's counterclaim.

[323] I shall hear the parties further as to costs.