

SUPREME COURT OF QUEENSLAND

CITATION: *Idea Technology Services Pty Ltd v Nguyen* [2002] QSC 432

PARTIES: **IDEA TECHNOLOGY SERVICES PTY LTD**
(ACN 080 911 931)
(plaintiff)
v
YEN KIM NGUYEN
(defendant)

FILE NO: SC No 10102 of 1998

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 December 2002

DELIVERED AT: Brisbane

HEARING DATE: 11-21 June 2002, 5 August 2002

JUDGE: Atkinson J

ORDER: **Judgment for the plaintiff in the sum of \$224,772.84**

CATCHWORDS: CONTRACTS – DISCHARGE BREACH AND DEFENCES TO ACTION FOR BREACH – OTHER MATTERS – where plaintiff company employed defendant as manager – where defendant misappropriated money belonging to plaintiff company – where defendant claimed she was authorised and entitled to take money – whether defendant liable for breach of contract – whether quantum of damages properly assessed

MONEY – PAYMENT – OTHER CASES – where defendant manager misappropriated money from plaintiff company – whether defendant liable to reimburse funds as money had and received – whether quantum properly assessed

Evidence Act 1977 (Qld), s 92

Briginshaw v Briginshaw (1938) 60 CLR 336, followed
Sharples v O’Shea and Hanson [2000] QCA 23, Appeal No 7592 of 1999, 10 March 2000, followed

COUNSEL: K S Howe for the plaintiff
P B O’Neill for the defendant

SOLICITORS: H Drakos & Company for the plaintiff
Lees Marshall Warnick for the defendant

- [1] The question to be determined in this case is whether or not the defendant, Yen Kim Nguyen, misappropriated money which belonged to the plaintiff, Idea Technology Services Pty Ltd (“Idea Technology”), and, if so, how much money was so misappropriated. If money was misappropriated then the plaintiff claims that money as damages for breach of contract or as money had and received by the defendant for the use and benefit of the plaintiff. The determination of this question involves a detailed examination of the relationship between the plaintiff and the defendant and in particular the defendant’s actions during the year 1998. This date is significant as the plaintiff commenced trading from 1 January 1998.

Background Facts

- [2] It is necessary to examine briefly the relationship between the parties prior to 1 January 1998. Prior to the commencement of trading by Idea Technology, a company known as KT Technology was involved in the manufacture, distribution and sale of computer equipment. KT Technology was a worldwide group of companies. The head purchasing office was in Singapore and the manufacturing division was in Malaysia. One of the directors of KT Technology was Cheng Tham Lok who used the anglicized names Ezekiel Lok and Albert Lok. He was generally known in the computer industry in Australia as Albert Lok. Like most of the witnesses in this case, English was not his first language and he gave evidence through an interpreter. One of Mr Lok’s brothers was the head of KT Technology worldwide.
- [3] KT Technology (Aust) Pty Ltd (“KT Technology”) was an Australian company with headquarters in Melbourne. It subsequently opened an office in Sydney. In 1996, Mr Lok’s nephew, Yew Kuan Tan, generally known in Australia as Allen Tan, became the manager of KT Technology in Sydney. Mr Lok is married to the sister of Mr Tan’s mother. Mr Tan had been an engineer and a relatively unsuccessful businessman in Singapore. Mr Tan regarded Mr Lok as a mentor and would look to him for advice on how to run the business. Mr Tan believed that he had learned a lot from Mr Lok and regarded him as a man of greater experience and intelligence.
- [4] The defendant, Yen Kim Nguyen, usually known as Christine Nguyen, met Mr Lok while she was working for D A T Technology. Mr Lok approached her to work for KT Technology in July 1995 and in November 1995 she commenced employment as a trainee manager in Melbourne. Mr Lok trained her in this position for about a year. Mr Lok told her that he intended to open an office of KT Technology in Brisbane and it was agreed that should he do so, Ms Nguyen would work in the Brisbane office.
- [5] Ms Nguyen had substantial office and administrative experience. After emigrating to Australia from Vietnam in 1982, she worked as an accounts clerk for the Logan City Council for nine years from 1985 to 1994, a job which involved entering information into the payroll system. She obtained a Bachelor of Business from the Queensland University of Technology in 1991. Ms Nguyen was an accounts manager at D A T Technology from 1994 to late 1995, where her work involved issuing invoices, banking and book-keeping. Although she was not a qualified

accountant, she had obtained a great deal of practical accounting experience in her employment. At KT Technology, she was responsible for reporting sales and purchases and for banking.

- [6] When Ms Nguyen went to Brisbane on holidays in January 1997, Mr Lok asked her to look for suitable business premises for KT Technology. Ms Nguyen found suitable premises at 3/9 Musgrave Road, West End, and gave the details to Mr Lok who organised a lease of the property. Ms Nguyen made arrangements to set up the office, including procuring office equipment and establishing an accounting system which was compatible with the system in Melbourne. The Brisbane office of KT Technology began trading in March 1997 with Ms Nguyen as its manager. Mr Lok exercised supervisory control over the business from the Melbourne office of KT Technology.
- [7] As branch manager, Ms Nguyen was responsible for the day-to-day operation of the business. She was responsible for day-to-day financial control and book-keeping and reported to the Melbourne head office where financial reports were produced on an ABM system. Ms Nguyen was paid a salary of \$578.10 net per week.
- [8] In April 1997, the Brisbane office of KT Technology employed Ms Nguyen's brother, Man Nguyen. He was employed to sell computer equipment on behalf of KT Technology from the showroom and door-to-door. Kong Yuen Chan was also employed then as a storeman. In May 1997, Katy Do was employed to help with accounts. In August 1997, Sam Chi Nguyen was employed as a technician, particularly to repair monitors. In September 1997, Mr Chan was replaced as storeman by William Chen. Ms Nguyen's sister, Anh Chan, commenced work in the Brisbane office in mid-November 1997.
- [9] Microsoft had taken court proceedings against KT Technology in 1996 prior to the Brisbane office being set up. In December 1997, Mr Lok told Ms Nguyen that he had lost the case with Microsoft and that KT Technology in Singapore had been wound up. Mr Lok's evidence was that KT Technology was wound up as a result of the company's financial collapse after the Asian economic crisis of 1997 and 1998. I accept that the failure of KT Technology was probably multi-factorial, and while it was principally the result of the Asian economic crisis, the loss of the litigation would also have had an adverse effect.
- [10] Mr Lok was depressed as a result of the financial collapse of KT Technology and wanted to close all branches of KT Technology in December 1997, but staff members at the Melbourne office persuaded him that the Australian operation was profitable and should be continued. He arranged for Mr Tan to close the Sydney office and asked Ms Nguyen if she wanted to buy the Brisbane office but she rejected the offer. Mr Lok therefore decided to sell the Brisbane office to Mr Tan who accepted the offer and established Idea Technology.

Idea Technology

- [11] At the beginning of 1998, there was, therefore, a significant change in the structure of the organisation. KT Technology ceased operation and the business which it had previously operated in Melbourne became Sato Enterprise, owned and operated by Sato Technology Pty Ltd. Mr Lok became the general manager of Sato Technology Pty Ltd in Victoria. The business of KT Technology in Brisbane was taken over by the plaintiff, Idea Technology. Although Sato Enterprise and Idea Technology were separate corporate entities, aspects of the branch office relationship previously existing when they were offices of KT Technology continued during 1998.
- [12] Mr Tan purchased the stock of KT Technology in Brisbane and operated that business as Idea Technology. He was the managing director of Idea Technology, and he installed Ms Nguyen as the manager of Idea Technology in Brisbane. Idea Technology began to trade from 1 January 1998. All the systems, procedures and forms used in KT Technology were retained, including the ABM accounting system. The staff remained the same. Signage was changed from KT Technology to Idea Technology.
- [13] Mr Tan, however, continued to defer to Mr Lok both because he was an experienced business person and because of their family relationship. Although Mr Tan was legally responsible for Idea Technology, Mr Lok continued to exercise a high degree of control over the day-to-day management of Idea Technology as he had with KT Technology. All of the company records including the common seal and share and directors' registers were kept in Melbourne at the offices of Sato Enterprise. Although Sato Enterprise was not formally the head office of Idea Technology, many of the day-to-day reporting lines were from the Brisbane office of Idea Technology to the Melbourne office of Sato Enterprise. This no doubt explains why the Melbourne office was sometimes informally referred to as the head office.
- [14] The sale of KT Technology's stock in Brisbane to Idea Technology was negotiated between Mr Tan and Mr Lok. Mr Tan saw this as a good business opportunity for him.

Stocktake on Changeover

- [15] There was no dispute that in late December 1997, Mr Tan came to Brisbane to perform a stocktake at the premises of Idea Technology, known at that time as KT Technology. Ms Nguyen said this happened because she telephoned Mr Lok and told him that as William Chen, the storeman, was away, she would need some help in performing the stocktake. Mr Lok, however, gave evidence that Ms Nguyen was informed that Mr Tan had accepted the offer to purchase the stock. Mr Lok said that it was not his practice to send staff to Brisbane if there was a shortage of staff but that the manager there would have to think of a way to solve the problem herself. He deposed that Mr Tan went to Brisbane to do a stocktake prior to purchasing all of KT Technology's stock at the Brisbane office.

- [16] Mr Tan gave evidence that he performed the stocktake because of his intention to purchase the stock of KT Technology in Brisbane as the Brisbane office was the most profitable of the three former offices of KT Technology. He performed the stocktake with the assistance of Ms Nguyen. He created a stocklist recording all the stock on hand. Whether or not Mr Chen was on leave, I accept that the reason why Mr Tan performed this stocktake, as Ms Nguyen knew, was because of his intention to purchase the stock and take over the business. Mr Tan flew up from Melbourne, completed the stocktake and returned on the same day. On his return to Melbourne, Mr Tan gave the stocklist to Mr Lok so that Mr Lok could prepare an invoice setting out how much Mr Tan should pay for the stock. Mr Tan said he did not know what had happened to the hand-written stocklist he had prepared in Brisbane, and which has not been found among documents searched in the Melbourne office.
- [17] The price originally recorded for the stock in Brisbane was prepared by Myloan Chi who was an employee of Sato Enterprise in Melbourne. She recorded a total price of \$286,805.78. After prices were attributed to the stock, Mr Tan asked Mr Lok if he could take the stock at a lower price and Mr Lok agreed. Mr Lok and Mr Tan agreed on a price of \$205,667 for the stock. This was recorded in a printed version of an invoice from KT Technology, invoice No.9800000, dated 2 January 1998. Mr Lok gave evidence, which was consistent with the picture painted by Mr Tan, that Mr Lok was depressed at that stage and not very interested in the business. This document was the only document which recorded the sale which was not otherwise recorded in a written contract. No formal arrangements were made for the payment of the \$205,667 from Mr Tan to Mr Lok. Mr Lok's evidence was that the amount was to be paid in regular instalments and he was not aware whether or not it had been fully paid.
- [18] Idea Technology also took over other assets of KT Technology in Brisbane, including shelving, a front counter, chairs and desks. Idea Technology continued to pay the lease payments on the premises in Brisbane, and at some stage in 1998, the lease was re-signed by Idea Technology. The lease on the van that had been used by KT Technology was also taken over by Idea Technology. Mr Lok confirmed each of these elements of the changeover. However, there was no sale of goodwill or other assets apart from the stock. Mr Lok said he gave the other items such as plant, equipment, counters and shelving to Mr Tan and did not ask Mr Tan to pay for them.
- [19] Ms Nguyen strongly contested that the sale of the business took place at the beginning of January 1998. She pointed to an affidavit sworn by John Walker, a solicitor acting for Idea Technology in 1998, setting out the matters that had been related to him by Mr Lok. Paragraph 12 of this affidavit records that: "Albert Lok invited [Ms Nguyen] to purchase [Idea Technology's] Brisbane business because of the decline in sales and because expenses exceeded sales." Mr Lok said that this was not correct and that the business was sold to Mr Tan in December 1997. It was put to Mr Lok on Ms Nguyen's behalf that he offered to sell the business to Ms Nguyen in May 1998, but this was denied by him. The earlier affidavit sworn by his then solicitor is affected by Mr Lok's lack of certainty in English and the lack of precision of expression in the affidavit. Mr Lok says that in May 1998 he could not offer to sell the business because it belonged to Mr Tan. Ms Nguyen did not,

herself, give evidence that Mr Lok offered to sell the business to her in May 1998. I am satisfied there was no offer by Mr Lok to sell the business to Ms Nguyen in May 1998.

[20] Ms Nguyen also contested that invoice No.9800000 reflected the stock on hand in Brisbane at the end of 1997. It was put to Mr Tan that that invoice reflected the stock on hand in Brisbane on 9 April 1998, not at the end of December 1997. This submission was said to be supported by the fact that a number of invoices in January 1998 record sales of stock which do not appear on invoice No. 9800000. In other words, it records the sale and delivery of items that were not in stock at the beginning of the month. An example is said to be shown by invoice number 9800033 which records a sale of 18 units of 32MB SD RAM. Mr Chen's invoice book shows that this invoice was issued on 8 January 1998 and that the stock was collected on 9 January 1998. However, invoice No. 9800000 records only two units of 32MB SD RAM in stock. There do not appear to be any purchase orders for 32MB SD RAM before 9 January 1998. It was therefore submitted that invoice No.9800000 could not have reflected the stock on hand on 2 January 1998. However, this submission fails to take account of the evidence of Ms Nguyen that, during the period January to October 1998, Mr Lok insisted that the Brisbane office concentrate on selling stock from Melbourne which came to Idea Technology through Sato Enterprise. These goods were not usually the subject of purchase orders or other documentation, and it appears that they were usually the first source of goods to be sold and delivered. It seems likely that the stock in Melbourne was the source of goods for any sales in Brisbane for which there was no stock on hand in Brisbane.

[21] It was submitted by the defendant that it could be deduced that the goods referred to in invoice No.9800000 were in fact the result of a stocktake on 9 April 1998. A picking slip, PS591, dated 9 April 1998, lists the same stock that was referred to in invoice No. 9800000, and the notation "PS591" appears on the handwritten version of invoice No. 9800000. However, the picking slip system was not used to identify particular items in stock at any one time. A picking slip is generally used in a warehouse to identify stock that needs to be collected in the warehouse to fill an order. There was no evidence that it was ever used for a stocktake. PS591 is described as a "back order" which usually refers to goods which have previously been ordered. Unlike invoice No. 9800000, PS591 does not purport to be a stock take. I accept that invoice No. 9800000 does represent a stocktake of the stock on hand at the changeover date of the business of KT Technology to Idea Technology on 2 January 1998 and that PS591 is a back order referring to goods in stock which were ordered by Idea Technology from KT Technology on 2 January 1998 but not yet paid for by 9 April 1998.

Ms Nguyen's Duties

[22] Mr Tan gave evidence, which I accept, that he had a conversation with Ms Nguyen when he was in Brisbane to do the stock-take in December of 1997, regarding her duties as manager. He did not speak to her in detail about what her duties were, but simply told her that her duties to Idea Technology would be the same as her duties at KT Technology had been.

- [23] Paragraph 1 of the amended statement of claim, dated 11 September 2001, alleges that Idea Technology employed Ms Nguyen as a “branch manager” from January 1998. Paragraph 2 alleges that it was a term of the contract, or in the alternative a duty owed by Ms Nguyen to Idea Technology, that she would a) act honestly; b) act in good faith towards Idea Technology; c) avoid any conflict of interest between her own interests and the interests of Idea Technology; d) keep a proper account of all moneys belonging to Idea Technology; and e) exercise reasonable care in carrying out her duties. I am satisfied that the allegations made out in these paragraphs of the statement of claim have been made out.
- [24] Mr Tan said that it was left to Ms Nguyen to organise the running of the business. If she encountered any problems she was to telephone Mr Tan in Melbourne and tell him about the problem. Unfortunately, Mr Tan did not take a close interest in the business in Brisbane, leaving Ms Nguyen, whom he believed to be experienced and competent, in charge. Mr Tan said he did not, for example, review weekly reports sent to Melbourne or look through information from Idea Technology on a daily basis. He delegated to Myloan Chi, who worked in the Melbourne office of Sato Enterprise, the task of ensuring that there were no discrepancies in the Idea Technology records. Myloan Chi was instructed to inform him if there were any discrepancies and up until May 1998, when he left the country, had not done so. Mr Tan also said that in January and February of 1998 it would not have been possible for him to keep track of everything that was going on in Brisbane because he was busy closing down the Sydney office of KT Technology. He said he trusted Ms Nguyen to the extent that he did not question what she was doing. Between December 1997, when he was in Brisbane for the previously mentioned stocktake, and May 1998, when he left Australia for Singapore, Mr Tan did not travel to Brisbane. In that time, Mr Tan did not have any personal communication with Ms Nguyen. This lack of supervision created a situation where Ms Nguyen was free of effective management and fiscal control by others.
- [25] In January of 1998, Katy Do was made redundant due to falling sales. From that point, her job was performed by Anh Chan. Mr Tan gave evidence that, in January of 1998, the staff employed at the West End office of Idea Technology were Anh Chan, Ms Nguyen’s sister, Sam Chi Nguyen, a repair technician, William Chen, a storeman, and Man Nguyen, the defendant’s brother who was employed as a salesman. Man Nguyen confirmed that throughout his time at Idea Technology, Ms Nguyen was the manager and the person giving instructions. She was responsible for the day-to-day operations of the business including the procedures for invoices, cash receipts and payments. Ms Nguyen deposed that her sister, Anh Chan, left Idea Technology at the end of February 1998, and that from this time on the office was seriously understaffed.
- [26] Ms Nguyen was responsible for making payments to staff. Mr Lok was asked whether KT Technology continued to pay Idea Technology staff into 1998 and he agreed that this happened. He explained that at the time he was under stress and he was not concerned with whose money was being used to pay for things. Mr Tan understood, although he did not have direct knowledge, that KT Technology would pay money into Ms Nguyen’s personal account, and that Ms Nguyen would pay the employees from that amount. Mr Tan had been told by Myloan Chi that the wages

were paid in this way so that the employees did not have to wait five days for a cheque to clear. He did not know whether Ms Nguyen paid employees by cheque, by bank transfer or in cash because those details were left to her.

- [27] Mr Lok deposed that he authorised the arrangement whereby staff wages would be paid into Ms Nguyen's account and she would use the money to pay the salaries.
- [28] In January and February of 1998, Mr Tan was living in Melbourne with Mr Lok. During this time, he was involved in closing down the offices of KT Technology in Sydney and travelling between Sydney and Melbourne. By the end of February, KT Technology in Sydney was closed down and Mr Tan remained in Melbourne. He assisted with the managing of Sato Enterprise in Melbourne.
- [29] Mr Tan resigned his directorship of Idea Technology on 25 February 1998, in preparation for his return to Singapore to complete compulsory military service, and appointed Tracey Seow as director. Ms Seow remained as director until 30 September 1998. Although she was a director, Ms Seow had very little involvement with the running of Idea Technology. Mr Tan continued to be notionally in charge of Idea Technology. In May of 1998, Mr Tan left Australia and went to Singapore to take part in military service.

Ms Nguyen Away from the Business for the Birth of her Baby

- [30] Ms Nguyen was pregnant and in February 1998 she had a telephone conversation with Mr Lok in which he asked when her baby was due. She told him it was due in late April and that she would be absent from the office on maternity leave around that time. She asked if Mr Lok wanted to send someone to stand in for her while she was away, but Mr Lok said that Man Nguyen could look after the business and it would give him a good opportunity to learn about managing the business.
- [31] On the weekend of 28 February and 1 March 1998, Ms Nguyen started to feel ill and on Tuesday 3 March she was admitted to hospital. Her baby was born by caesarean section the next day and she stayed in hospital for about ten days after that.
- [32] After being discharged from hospital, Ms Nguyen did not immediately go back to work. She said that she had little or nothing to do with the business of Idea Technology for all of March and most of April. However, the staff salaries were still being paid into her account, so she went to the office to pay William Chen and Sam Chi Nguyen as well as to look over paperwork and do odd jobs. Ms Nguyen said she could not recall how often she attended the office during this period. It appears that she was endeavouring to minimise her presence in the office. In spite of her new born baby, it appears she remained as the manager of the office and made regular visits to the office. She conceded that, because of a lack of staff, sales were falling and things were "in a bit of a mess".

- [33] Sam Chi Nguyen gave evidence that when Ms Nguyen was away no one else at the office was in charge of Idea Technology. He said that, during that period, business was slow and he and Man Nguyen had lots of time to play table tennis. Man Nguyen said he could not recall whether he had been left in charge of Idea Technology during his sister's absence on maternity leave.

Mr Lok's Supervision of Idea Technology

- [34] In May of 1998, Mr Tan left his uncle Albert Lok in charge of Idea Technology. Mr Tan authorised Mr Lok to sign cheques and oversee the business but did not give him specific instructions on how to run the business. This is hardly surprising given the degree of deference which Mr Tan clearly showed to Mr Lok. During the time he was away in Singapore, Mr Tan had very little discussion with Mr Lok regarding Idea Technology.
- [35] Mr Lok gave evidence that he went to Brisbane in May 1998. He only stayed in Brisbane for a day and had a look around the business. He had a meeting with Ms Nguyen at which Man Nguyen was not initially present. Mr Lok said he remembered that Man Nguyen came back to the office with a haircut and he was upset that Mr Nguyen had had a haircut during office hours.
- [36] Man Nguyen was a salaried employee of Idea Technology from January to May of 1998. During Mr Lok's visit to Brisbane, he told Ms Nguyen that he was concerned about the business and that Man would have to be made redundant or continue his employment on a "commission only" basis. Mr Lok explained that the commission Man could receive would be the difference between a minimum sale price for each item and the actual price at which the goods were sold. Man Nguyen gave evidence by affidavit that Mr Lok had said that Ms Nguyen or anyone else could also work under this commission system.
- [37] Mr Lok deposed that he did not authorise a commission system to be implemented. Ms Nguyen was to decide whether she wanted to implement that system. Mr Lok did not give any authority for her to implement a system of double invoicing which she said was used to record commission. This is a matter referred to in more detail later in these reasons. He said and I accept that the commission system was to be for Man Nguyen alone.
- [38] Man deposed that at the end of each day he was to deduct his commission from the sale proceeds he had collected and hand the minimum sale price to Ms Nguyen. When customers paid by cheque or direct debit to Idea Technology's bank account he would be unable to deduct his commission. When this occurred he would keep a note of the commission earned and Ms Nguyen would reimburse him at the end of the week. Man Nguyen was asked whether he declared the money he was earning in commissions on his tax return, but he declined to answer the question on the grounds that it might incriminate him. Man said that he could not tell what commission he had been paid and there were no records of the commission paid to him. He never made any demand upon Idea Technology or Mr Tan in relation to the commission he claimed was never paid. It is not possible to quantify what commission he was, or should have been, paid.

- [39] William Chen, the storeman, was made redundant in July 1998. From that time, the only employees of Idea Technology were Christine Nguyen, Man Nguyen and Sam Chi Nguyen.
- [40] Ms Nguyen deposed that Sam Chi Nguyen also started to get involved in selling and earning commissions. She said that Sam would come along to the markets to help and would then be paid around \$50 out of the total commissions earned on the day. Sam Chi Nguyen said in his evidence that he was “definitely not” a sales person. When confronted about this in cross-examination Ms Nguyen conceded that she was wrong.
- [41] Sam Chi Nguyen deposed that in August or September 1998 he repaired a 24 speed CD Rom drive which belonged to Idea Technology. Ms Nguyen later sold this CD ROM Drive to a customer. When Sam Chi Nguyen received his pay for the week, Ms Nguyen gave him an extra \$50 in cash. She said that it was for the sale of the 24 speed CD ROM drive that he had repaired the previous week. Sam Chi Nguyen said that he did not want the money as it was the company’s money and he was concerned that he would be responsible for warranty. Sam Chi Nguyen did not take the money and did not know what Ms Nguyen did with it. Sam Chi Nguyen vehemently denied that he ever received commissions for the sale of items. I accept that he was telling the truth. He was refreshingly direct and candid in his evidence. For example, he confirmed that at a meeting with Mr Lok, Man came and told him that he, Man, had been put on commission. On one occasion after that Man gave Sam \$20, saying he was very happy because he had sold lots of goods and made about \$1,000.00.
- [42] Mr Tan returned to Australia briefly in August 1998 to deliver some goods to Melbourne and then returned to Australia permanently in September. On the occasions he returned, Mr Tan attended the offices of Sato Enterprise in Melbourne but he did not review any of the documents relating to Idea Technology that had been sent through from Brisbane.
- [43] In September 1998, Mr Tan was informed by his co-director, Tracey Seow, that the Brisbane operation of Idea Technology was not performing and that turnover and cashflow had dropped dramatically. He was also informed that the manager, Ms Nguyen, had failed to provide weekly financial reports and that there were irregularities in the company’s bank statements. Commencing in June/July of 1998, deposits to the company’s bank account ceased being made daily, and were made only once or twice a week.
- [44] It was put to Mr Tan that the reason for the downturn in sales was that there was a reduction in staff and that the quality of stock was poor, much of it being obsolete. Mr Tan denied that these were the causes of a reduction in sales. He also denied that there was a reduction in sales caused by the refusal to accept cheques as payment. He said, and I accept, that it was not unusual to refuse to accept cheques in the computer industry.

Mr Tan Arrives in Brisbane

- [45] On 2 October 1998, Mr Tan flew from Melbourne to Brisbane and attended the offices of Idea Technology in West End. He was shown around the business by the staff and asked them questions. While he was in the office, a customer entered, paid for certain equipment and, when asked, told Mr Tan how much he had paid for it. Mr Tan then asked Ms Nguyen if she had charged the customer \$795.00 for an item when the invoice was only for \$755.00. Ms Nguyen denied she had done this. She did not offer the explanation, on which she later attempted to rely, that this method was to account for the payment of commission. Her denial adds to the likelihood that her later explanation, about duplicate invoices prepared for the same customer at different prices to account for commission, was a fabrication. That was a later explanation given in an attempt to cover up the misappropriation of the plaintiff's money.
- [46] As a result of this incident, Mr Tan became suspicious of Ms Nguyen and later suspended her from employment for two days. On Sunday, 4 October, Mr Tan went with Ms Nguyen to the markets where computer hardware was being sold. He then ordered that this practice be discontinued. Mr Tan conducted investigations into what had been occurring in the office. He found two bank statements for the month of July 1998 for accounts held at the National Australia Bank which were addressed to Ms Nguyen care of the plaintiff's address. The accounts revealed that Ms Nguyen held a National Bank cash management account No.69364-1088 with a credit balance of \$106,979.96, and a National Bank flexi account statement No.64951-3265 with a credit balance of \$43,725.60. He later received bank statements for September with the National Bank flexi account showing a balance of \$41,372.89 and the National Bank cash management account showing a credit balance of \$111,766.60.
- [47] Following Mr Tan's visit to the office in October, Sam Chi Nguyen saw Ms Nguyen shredding a number of documents. He said to her in Vietnamese that she was shredding documents like the Americans had done in Saigon in 1975 and she smiled. Mr Tan was not in the store at that time but he had been in earlier in the day and had told Sam Chi Nguyen to go upstairs and tidy up. Sam Chi Nguyen was taking items such as cartons, foam cups, wastepaper, and a box with KT Technology invoices in it, when he saw Ms Nguyen shredding paper. Ms Nguyen said in her evidence that she was shredding wastepaper in the machine. In fact, she had in my view commenced the destruction of documents which might incriminate her.

13 October 1998

- [48] On 13 October 1998, there was a meeting between Mr Tan, Ms Nguyen and Mr Lok at the premises of Idea Technology. Mr Tan said he asked Mr Lok to attend this meeting because there was a period in 1998 when Mr Lok was in charge of the cheques for Idea Technology and he also needed Mr Lok to ask questions.
- [49] Mr Lok asked Ms Nguyen how she had been treated and Ms Nguyen replied that she had been treated well. Mr Lok then asked Ms Nguyen how many bank accounts

she had, and she told him she had one account with the National Australia Bank at that time. Mr Lok told her that this was not true and produced copies of two statements, one for Ms Nguyen's flexi account and one for her cash management account. Mr Lok showed Ms Nguyen a number of National Bank account statements that belonged to her. She said that the money in the account was her savings. Mr Lok said the money could not be her savings because there were too many transactions. The defendant said the transactions must be "related to staff wages." Although Ms Nguyen denied it, I am satisfied that Mr Lok called the Melbourne office and after a telephone conversation he told Ms Nguyen that the transactions could not all relate to wages.

- [50] Ms Nguyen's behaviour on this occasion was similar to her later failure to comply with a court order, made on 24 October 1998 by Wilson J in interlocutory proceedings, to disclose the details of all of her bank accounts. A failure to comply with a court order is of course even more serious than her dishonest response to the questions of her employer and serves to demonstrate her lack of candour in her dealings whether with the court process or with her employer.
- [51] Wilson J had ordered that Ms Nguyen disclose to Idea Technology all bank accounts that she possessed. However, Ms Nguyen did not disclose a bank account she held with the ANZ Bank. Ms Nguyen said she did not think she had to disclose this account because it was only used to receive family allowance for her children. The terms of the order clearly extend to any bank account held by Ms Nguyen. The words used in that order were "all moneys deposited on account with any bank, building society or other lending or financial institution on term or at call which she is entitled to operate or are operated on her behalf". Her failure to disclose the bank account and her glib explanation both reflected poorly on her credit.
- [52] Mr Lok questioned Ms Nguyen about whether customers had paid a higher amount than was shown on the invoices. Ms Nguyen at first denied this. Mr Tan then told her he had spoken to a customer who confirmed that this customer had paid more than was shown on the invoice. Ms Nguyen then said that she thought she was entitled to keep any amounts above a certain price. Mr Lok asked if Ms Nguyen had taken money belonging to Idea Technology and she admitted that she had.
- [53] Later, Ms Nguyen denied having taken the money. Mr Lok produced a tape recorder and said he had recorded everything. The tape had not in fact recorded the conversation. Mr Lok said he had tried to record the conversation but nothing could be heard on the tape because it was in a bag when it was recording.
- [54] Mr Tan and Mr Lok both gave evidence that, by the end of the conversation, Ms Nguyen had admitted to taking the money. Mr Lok asked to be told how much she had taken so that Ms Nguyen could pay it back. She said that she would work out the amount she owed. Mr Tan gave her a bundle of original daily cash sales reports and other documents, which he numbered, for her to work out precisely how much she owed.

- [55] Mr Lok also asked Ms Nguyen about a stamp for “Computer Clearance Centre” which they had found but she could not provide a satisfactory explanation. I will return to that matter later in these reasons.
- [56] Ms Nguyen telephoned her husband, Khoi Nguyen, who she said was very angry and came to the office. She said he brought with him his personal bank statement which showed that \$44,630.93 was transferred from his account to her cash management account on 31 December 1997; and statements from Ms Nguyen’s account dating back to 1997 which showed that on 22 October 1997, \$51,731.28 was transferred from her flexi account to her cash management account. As a result of these transfers, Ms Nguyen said she had over \$100,000 in her cash management account by the end of 1997. However, Khoi Nguyen was not called to give evidence.
- [57] Ms Nguyen said in her oral evidence that she did not know what time her husband arrived at the premises of Idea Technology, because she was not there when he arrived. She said that she could however recall that her husband came to the office to bring her bank statements. In these circumstances, I am not prepared to accept her account of what transpired between Khoi Nguyen and Mr Tan and Mr Lok.
- [58] Mr Lok then asked her to go home and come back the next day to collect her belongings.

Ms Nguyen Dismissed from Idea Technology

- [59] Albert Lok and Mr Tan were at the offices of Idea Technology when Ms Nguyen arrived at the premises on the next day, 14 October 1998. One of the employees told Mr Tan that Ms Nguyen was in the building.
- [60] Mr Tan went downstairs and met Ms Nguyen who was with her husband. He gave Ms Nguyen a box with her personal things in it, and Ms Nguyen said she needed documentation from the office. Mr Tan told her she should know how much she had to pay back from her own bank statements. Mr Tan did not allow Ms Nguyen to go upstairs or to take any more documents as he was concerned that she might destroy them.
- [61] At this point, Ms Nguyen’s husband started shouting at Mr Tan and Mr Tan chased him from the building. As he was leaving, Ms Nguyen’s husband shouted something out to Sam Chi Nguyen, who was in the building, but Mr Tan did not understand it because it was in Vietnamese. He asked Sam Chi Nguyen what had been said and Sam Chi Nguyen said that Ms Nguyen’s husband had told him to leave the company. Mr Tan then told Ms Nguyen that she was dismissed.
- [62] Ms Nguyen deposed that her husband drove her to the office on 14 October 1998, but Mr Tan would not let her go to her desk. He asked her to come back the following day after he had finished searching through her belongings. Ms Nguyen became very angry and told Mr Tan that she was there to prepare a report for Mr Lok. She told Mr Tan to pass a message to Mr Lok to the effect that she would

not be coming back to work. She said she did not take anything with her and delivered a letter of resignation that day.

- [63] Mr Tan deposed that, a week later, he telephoned Ms Nguyen and asked her what was happening with regard to her calculation of the amount of money she had taken and an explanation. Ms Nguyen told Mr Tan that he should go to the police and that she would never be caught.
- [64] Mr Tan reported the matter to the Dutton Park Police on or about 27 October 1998. Mr Tan said that the police told him that the case was not a priority and that he therefore decided to pursue the matter as a civil action.
- [65] Idea Technology commenced these proceedings by writ filed on 30 October 1998. In an affidavit sworn on 12 November 1998, Mr Tan deposed that he dismissed Ms Nguyen on or about 5 October 1998 “on the basis that she had not been honest with the running of the business”. In his affidavit sworn as his evidence-in-chief at the trial, he corrected the date of the dismissal to 14 October 1998. I accept that the latter date is correct. The first affidavit is brief and obviously prepared in some haste. The trial affidavit was considerably more detailed. By 5 October 1998, Mr Tan was probably satisfied in his own mind that Ms Nguyen had not been honest in the running of the business but her formal dismissal did not take place until 14 October 1998.

Civil Litigation

- [66] The plaintiff retained an accountant, Mr Keith Cooper, to undertake a reconstruction of the accounts of Idea Technology during the period from 1 January 1998 to 30 September 1998, for the purpose of quantifying the amount of money misappropriated by Ms Nguyen. Mr Cooper holds a Commerce Degree, an Economics Degree and a Masters of Business Administration, and has worked in the accountancy field for over 40 years. He has practised as a partner in chartered accounting firms since 1977 and has 16 years of experience as an expert witness in litigation. He was assisted in preparing his reports by Mr Robert Leavy, a senior experienced accountant employed in his firm.
- [67] Mr Cooper prepared four reports for the purpose of this action: a detailed report of 14 August 2001 (the “initial report”) setting out his findings, and three subsequent reports responding to allegations by Ms Nguyen. In addition he provided further schedules whilst under cross-examination and attached to the final submissions by the plaintiff to take account of alternative factual scenarios and of concessions made by him. He presented as a competent and impartial witness who was prepared to make necessary concessions in the course of cross-examination. His evidence was of great assistance to the court. He was hampered in his task of reconstruction by the inadequacy and incompleteness of the records kept by Ms Nguyen as manager of Idea Technology or retained by Idea Technology. He described the accounting practices of Ms Nguyen as “chaos” and considered that those practices entailed unusually poor record-keeping. In his opinion, such poor record-keeping was only explicable by either incompetence or misappropriation or perhaps both. His report

is the basis of many of the particulars of the plaintiff's claims against Ms Nguyen and of the quantification of the plaintiff's claim against Ms Nguyen.

The Alleged Breaches

[68] The amended statement of claim sets out a number of breaches of the terms of employment and duties by the defendant as follows. In paragraph 3, it is alleged that the defendant:

- (a) *Failed to bank all moneys owing to the plaintiff.* These amounts were particularised on page 1 of appendix 3 of Mr Cooper's initial report;
- (b) *Failed to properly account to the plaintiff for invoices sent to customers and moneys paid by customers.* The particulars of this allegation were contained in appendices 4, 5 and 7 of Mr Cooper's initial report. In appendix 5, the discrepancy is quantified at \$1,690.50, and in appendix 7, at \$11,431.50;
- (c) This paragraph was not pursued at trial;
- (d) *Conducted and/or purported to conduct a business from the premises of the plaintiff whilst the defendant was an employee of the plaintiff.* This allegation was particularised by alleging the defendant signed and placed orders with Chips Resources using the name "Computer Clearance Centre" while she was employed by the plaintiff;
- (e) This paragraph was not pursued at trial;
- (f) *Placed orders on behalf of the plaintiff when the defendant was not authorised to do so.* This allegation was similar to that contained in paragraph 3(b) of the amended statement of claim and was particularised as follows:

- “(i) The Defendant purchased from Swift Rubber Stamps without the Plaintiff's authority a rubber stamp in the name of 'Computer Clearance Centre';
- (ii) The Defendant signed and placed orders on Chips Resources using the name 'Computer Clearance Centre' which orders were sent from the Plaintiff's premises in Brisbane and which stock was delivered to the Plaintiff's premises on the following dates and in the following amounts:-

Date:	Amount:
23 April 1998	\$2,358.00
15 July 1998	\$1,218.00
17 August 1998	\$ 708.00
3 August 1998	Unknown

- (iii) The Defendant was not authorised by the Plaintiff to place orders under the name 'Computer Clearance Centre' or to conduct a business in that name from the Plaintiff's premises."
- (g) *Executed documents in the name of Yew Kuan Allen Tan, the Managing Director of the plaintiff, when the defendant was not authorised to do so.* This was particularised as follows:
- “(i) By purchase order placed on Digital Valley Pty Limited on 21 April 1998, when the signature of Yew Kuan Allen Tan was forged;
- (ii) By purchase order placed on Gatum Dale on 19 February 1998 in which the signature of Yew Kuan Allan Tan was forged;
- (iii) On a cheque from the customer Complete Repair Centre on 4 August 1998 in which the Defendant placed the seal of the company on the reverse of the cheque and forged the signature of Yew Kuan Allen Tan.”
- (h) *Sold goods contrary to the set sales price, without the consent or authority of the plaintiff.* This was particularised by the following transactions:

Date	Customer	Description
07.10.98	Computer Warehouse	AST Computer System (D/T) model sold for a unit price of \$630.00 instead of \$768.00
14.09.98	Crown Computers	AMD K6 266 CPU & Fan sold for \$170.00 instead of \$180.00
09.09.98	Crown Computers	AST Laptop A70 sold for \$1,250.00 instead of \$1,806.00
01.09.98	Computer Rent & Leasing	TX Chaintech sold for \$70.00 instead of \$110.00, ESS Sound Card sold for \$18.00 instead of \$20.00, 32SP CDROM sold for \$80.00 instead of \$85.00
01.09.98	PC Power Force	1.44 FDD sold for \$25.00 instead of \$30.00, Midi Case sold for \$27.00 instead of \$40.00, 15" monitor sold for \$240.00 instead of \$290.00, TX Chaintech sold for \$70.00 instead of \$105.00
20.08.98	Computer Direct	2 Pentium Desktop sold for

		\$775.00 instead of \$875.00
17.08.98	Computer Direct	AST P166 Computer sold for \$750.00 instead of \$900.00, fax modem sold for \$50.00 instead of \$70.00
06.08.98	Computer Scene	105WIN95 Keyboard sold for \$9.00 instead of \$11.00
04.08.98	Complete Repair Centre	Old Intel System sold for \$890.00 instead of \$1,100.00
27.07.98	Complete Repair Centre	Pentium 200MMX System sold for \$981.00 instead of \$1,100.00
27.08.98	Hooked on Computers	6.4GB HDD sold for \$275.00 instead of \$285.00, Pentium II 333 CPU sold for \$480.00 instead of \$518.00"

[69] (i) *Misappropriated moneys belonging to the plaintiff.* The particulars of this allegation were that:

- (i) "the Defendant failed to bank all moneys belonging to the Plaintiff as particularised on [page 1 of appendix 3] of Mr Cooper's report." This repeats the allegation in paragraph 3(a) of the amended statement of claim;
- (ii) "the Defendant failed to properly account to the Plaintiff for invoices sent to customers and for moneys paid by customers as particularised in appendixes 4, 5 and 7 of Mr Cooper's report." This allegation repeats paragraph 3(b) of the amended statement of claim;
- (iii) "the Defendant placed orders on behalf of the Plaintiff which the Defendant was not authorised to do which is particularised in paragraph 9 of the particulars of 15 November 1999." This repeats the allegations particularised in paragraph 3(f) of the amended statement of claim;
- (iv) the report of Mr Cooper shows that the Plaintiff's loss is \$291,082.00 as particularised *inter alia* in paragraphs 9.16 and 9.17 of Mr Cooper's report.

[70] In paragraph 10 of the particulars dated 17 September 2001, the plaintiff alleged that:

"in breach of the contract of employment and/or the Defendant's duties owed to the Plaintiff, the Defendant issued credit notes on behalf of the Plaintiff which were not received by customers, which loss is particularised in appendix 6 to Mr Cooper's report."

- [71] Each of the specific allegations are examples of loss caused to the plaintiff, all of which are subsumed within the total loss particularised in paragraph (iv) of the particulars of paragraph 3(i) of the amended statement of claim. I shall deal with each of the allegations as particularised. However, it is the loss as particularised in paragraph 3(i)(iv) which was relied upon by the plaintiff as the measure of its loss. All of the other particulars are merely examples of ways in which the plaintiff is alleged to have misappropriated money.

Procedural matters

- [72] Because this is a civil case, the plaintiff bears the onus of proof on the balance of probabilities of establishing its claim. It is necessary, however, for the court to take into account the serious, quasi-criminal nature of the allegations in determining whether it is satisfied that the plaintiff has proved its case. Clear and cogent proof of misappropriation of funds is required.¹ The burden of proof nevertheless remains as the balance of probabilities.
- [73] The trial was conducted on affidavit. Affidavits had also been filed in interlocutory proceedings. This created certain difficulties because English was not the first language of many of the witnesses. I did, however, have the opportunity to observe those witnesses who were required for cross-examination, when they gave oral evidence. Ms Nguyen and her brother, Man Nguyen, made a very poor impression. Christine Nguyen, particularly, was evasive, opportunistic and less than candid in her answers.
- [74] The plaintiff relied on the evidence of Albert Lok from Sato Enterprise and KT Technology, Yew Kuan (Allen) Tan, and Sam Chi Nguyen from Idea Technology, the customers John Watson and Mary Castillo, and expert evidence from John Heath, a handwriting expert, and Keith Cooper, an accountant. Mr Watson was not required for cross-examination. The defendant relied on the evidence of the defendant and her brother Man Nguyen and Willian Chen who had worked for Idea Technology. She also relied upon evidence from Idea Technology's tax accountants and former solicitor as well as her own solicitor.
- [75] The defendant sought to rely on the rule in *Jones v Dunkel*² that an adverse inference may be drawn from the failure to call certain witnesses.³ The defendant pointed to the omission by the plaintiff to call evidence from Frankie Yim, the plaintiff's accountant who conducted a preliminary investigation, Tracey Seow, someone referred to as Daniel and Myloan who was apparently somewhere in Singapore at the time of the trial. A party is not obliged to call every witness who might possibly be able to give marginally relevant evidence. None of these witnesses was essential or even necessary to the plaintiff's case. The defendant did not suggest what adverse inference might be drawn. In those circumstances, I am

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; *Sharples v O'Shea and Hanson* [2000] QCA 23 Appeal No 7592 of 1999, 10 March 2000, at [19].

² (1959) 101 CLR 298.

³ *Sharples v O'Shea* unreported, Supreme Court of Queensland, No 6318 of 1998, 18 August 1999 at pp 54-55.

not prepared to draw any adverse inference from the failure to call witnesses whose evidence would at best have been only marginally relevant.

Short Banking of Money

- [76] Paragraph 3(a) of the amended statement of claim, dated 11 September 2001, alleges that Ms Nguyen failed to bank moneys belonging to Idea Technology. Mr Cooper, in his initial report, summarised the transactions for which there is a Westpac bank stamp on a deposit slip, but the amount has not been credited to Idea Technology's account. In her affidavit, Ms Nguyen deposed that the identified deposits, in August of 1998, had been mistakenly credited to the account of KT Technology, and she exhibited the bank statements showing this was the case. In his response to Ms Nguyen's affidavit, Mr Cooper conceded that this was correct. However, Mr Cooper says in his report that the amounts set out later in his report can also be considered to be amounts short banked.
- [77] Ms Nguyen was taken through the deposit slips for January and early February 1998 during cross-examination in order to demonstrate the problems with the banking practices she undertook or supervised. She agreed that, in general, the deposits recorded were matched to invoices, but that in some cases they were not. Initially she explained that for cash transactions there may be no invoice number. She said that it was an instruction from Mr Lok that cash transactions should be listed separately on a daily cash sales list and faxed to him. However, when asked about deposits of cheques that had no invoice number, she changed her explanation and said the invoice must not have been available when the banking was being done. She then said she could not explain why some deposits were not matched to an invoice.

Failure to Account for Money

- [78] Paragraph 3(b) of the amended statement of claim alleges that Ms Nguyen failed to account properly to Idea Technology for invoices sent to customers and money paid by customers. Paragraph 3(h) pleaded a related allegation that Ms Nguyen sold goods contrary to the set sales price, without the consent or authority of the plaintiff.
- [79] For the purpose of Mr Cooper's initial report, letters were sent to customers requesting copies of the invoices they had received. In his initial report, Mr Cooper summarised the differences between the invoices held in Idea Technology's accounting records and those received from customers as a result of the requests made. In relation to invoice numbers 9800714, 9800691, 9800677, 9800666, 9800668, 9800683, the copy of the invoice obtained from the customer shows a higher price than the copy found in the records of Idea Technology.
- [80] Mr Tan deposed that he found anomalies between invoices raised and the amount collected from customers. For example, Invoice No.9800688 raised on 4 August 1998 to Complete Repair Centre for computer equipment was in the sum of \$1,077.96, however, the customer paid \$1,287.96. Similarly, Invoice No.9800731 raised on 29 September 1998 to Complete Repair Centre was in the sum of \$68.32, yet the customer paid \$74.00. The total of the difference in amounts on these

invoices, and several other invoices which were not found at all in the company records, was \$1,690.50.

- [81] Among the customers contacted was John Watson, the proprietor of Complete Repair Centre. He did not receive the invoice showing the lower amount of \$1,077.96. Nor did he receive other duplicate invoices. The contact with Mr Watson served to uncover a number of other irregularities. On one occasion, Ms Nguyen asked Mr Watson to change the payee on a cheque from Idea Technology to herself. On another occasion, Man Nguyen delivered a computer system to his shop in Shailer Park. This was unusual because Mr Watson normally went to the premises of Idea Technology. Man required payment in cash. Mr Watson gave him a cash cheque and asked for a receipt. As the receipt did not appear to be from Idea Technology, Mr Watson requested that a proper invoice be sent to him. In spite of repeated requests that was never done. There was a further anomaly due to the creation of credit notes which were never received by Complete Repair Centre. I shall return to that matter.
- [82] Other duplicate invoices were also found in the records of Idea Technology, where the same customer and transaction were apparently recorded but one invoice recorded a higher price than the other. Mr Cooper calculated that the total sum of money identifiable as under banked from an analysis of these invoices was \$11,431.50. In making this calculation, Mr Cooper assumed that the higher amount was the amount charged to the customer. On these figures the total amount of money invoiced to customers but not accounted for to Idea Technology was \$13,122.00.
- [83] Mr Tan deposed that Idea Technology had a price list and a minimum sale price that was adjusted regularly in line with competitors' prices. His evidence, which I accept, was that Ms Nguyen did not have authority to raise an invoice below the sale price, charge the customer a higher price and keep the difference.
- [84] Ms Nguyen said that in June or July of 1997, Albert Lok had introduced a commission arrangement for the sales staff in Brisbane, who comprised herself and her brother Man Nguyen. She deposed that there was a small percentage commission on total sales turnover and a set commission for certain products such as monitors. Katy Do in the Brisbane office would prepare a commission report showing the total sales turnover for a month and the number of set-price items sold. The commission report would then be sent to Melbourne and commission was paid into Ms Nguyen's account from Melbourne and she would distribute commission, together with wages, to the other staff. This commission arrangement stayed in place until December 1997.
- [85] This commission system was not continued when the business began trading as Idea Technology. Instead, all employees were paid a salary. In the first week of May 1998, Man Nguyen was given the opportunity to go on commission. Ms Nguyen said that she recorded the commission system by issuing double invoices and credit notes to the salesmen. When sales were by cheque, Ms Nguyen would pay commissions, especially to her brother, by taking money from the cash sales and paying it to Man. When she was taken to a specific set of double invoices,

Ms Nguyen said there was no record kept of the commission payment apart from the two invoices, which she kept in the same place for the reference of Mr Lok.

- [86] An example is demonstrated by the following transaction. Two invoices were issued dated 1 September 1998 with the invoice No.9800714. One of these records a price of \$161.65 and the other a price of \$271.45. Ms Nguyen said the difference between the two would be the commission paid to the salesperson. Ms Nguyen said that Man Nguyen would have received that commission because the customer, Computer Scene, was one of his customers. However, the sales person named on both documents is "Christine". Ms Nguyen insisted that this must have been a mistake and the sales person was Man. She then asserted that Man Nguyen was not paid the commission on this sale because the entire cheque was paid into Idea Technology's account. She said she had intended that Mr Lok would write a cheque for the commission but it never happened because she left the company in October. The explanation given for this double invoice strained credulity.
- [87] In any event such a means of recording commission could only be regarded, as Mr Cooper said, as commercially irregular. This was particularly so in view of the practice of taking money from cash sales and not banking it but rather using it to pay commission said to be owing with no accurate record being kept of what commission was owing. As Mr Cooper said, a proper accounting system for the payment of commission is quite simple. It would not have been too difficult for someone with Ms Nguyen's education and experience. There appears to be no explanation for the method adopted except to hide the defalcation of moneys from the plaintiff.
- [88] The credit note system said to be for recording commission is allegedly illustrated by invoice No.9800535 and an accompanying credit note. Ms Nguyen deposed that the amount of \$1,080.00 shown on this invoice was paid in cash by the customer. As this was a commission deal, Man Nguyen's business TBM bought the goods from Idea Technology under invoice No.9800537 for the sum of \$1,000.00, and Man kept the balance of \$80.00. A credit note was issued to Man Nguyen to record this arrangement. On invoice No.9800535, the entry under the heading "sold by" is "CN" which could only stand for Christine Nguyen. Ms Nguyen attempted to explain that in evidence by saying that was a mistake made by the "accounts girl". This was another unlikely explanation. What in fact was happening was that she was using this system to take money from the plaintiff in such a way that the records would reflect banking of the amount apparently invoiced which was considerably less than the amount actually invoiced and received from the customers.
- [89] Ms Nguyen also said she attempted to implement the commission system by having some cheques paid into her bank account instead of into Idea Technology's bank account. She would then be able to organize for the commission to be paid to Man and the rest to Idea Technology. She said that cheque No.000055 from Complete Repair Centre was an example of this. That cheque has the word "I.D.E.A." crossed out and replaced with Yen Nguyen. Ms Nguyen said that Mr Lok suggested she should use her bank account in this way. Shortly afterwards, she contradicted herself and said that Mr Lok had left the implementation of the commission system

up to her. I do not believe her explanation. This was just another example of her execution of a plan to create records to cover up stealing by her of money belonging to Idea Technology.

Computer Clearance Centre

- [90] Paragraph 3 (d) of the amended statement of claim alleges that Ms Nguyen conducted a business from the premises of Idea Technology while she was an employee of Idea Technology. This allegation was particularised in accordance with the order of Muir J made on 25 October 1999. The plaintiff alleged that Ms Nguyen placed orders with Chips Resources using the name Computer Clearance Centre while she was employed by Idea Technology. As previously set out, there was a related allegation in paragraph 3(f) of the amended statement of claim that she placed orders when she was not authorised to do so.
- [91] Ms Nguyen deposed that in April of 1997, Mr Lok telephoned her and asked her to arrange a rubber stamp with the name and address of KT Technology on it, and another stamp with the name and address of Computer Clearance Centre on it. Ms Nguyen then typed up a purchase order requesting these stamps from Swift Rubber. Over the following three months she was instructed to create invoices using the rubber stamp from Computer Clearance Centre for the purchase of goods by KT Technology.
- [92] The purchase order for Swift Rubber is in fact dated 3 July 1997. Ms Nguyen changed her evidence under cross-examination and said that she had ordered the stamp in July 1997 in order to backdate purchases in April, May and June. Mr Lok denied that he had asked Ms Nguyen to procure a stamp with the name Computer Clearance Centre on it. Her evidence on this matter had all of the hallmarks of being invented when she was challenged in cross-examination and is not evidence on which I would be prepared to rely. It would appear that she ordered the stamp with the name Computer Clearance Centre on it for her own purposes without reference to, or approval by, her employer.
- [93] Ms Nguyen deposed that she again used the stamp in August 1998. In the middle of 1998, Idea Technology did not have any CPUs or RAM in stock so Ms Nguyen telephoned Albert Lok and asked whether she could order these products to meet customer demand. Mr Lok said he did not want to order any more stock and he wanted Ms Nguyen to sell stock already in the warehouse and stock coming from Melbourne. Ms Nguyen said she was frustrated with Mr Lok's approach and decided to personally order stocks of CPU and RAM. She ordered the stock with her own money and did not tell Mr Lok.
- [94] Ms Nguyen contacted Chips Resources who supplied these products and asked if they were prepared to deal with her on a cash basis. They agreed but said they wanted something in writing with a business name. Ms Nguyen therefore used blank order forms stamped with the name Computer Clearance Centre.

- [95] Chips Resources sent the stock and invoiced Computer Clearance Centre. Ms Nguyen said she paid the invoice out of her own money, included the stock in sales to customers of Idea Technology and when the stock was purchased she reimbursed herself. Ms Nguyen thought she made such purchases about three times. This was her considered explanation but was no more likely than other explanations which she made up whilst under cross-examination.
- [96] Mr Tan deposed that in October 1998 he found purchase orders ordering stock from Chips Resources in the name of Computer Clearance Centre. He also found a stamp in the office that had been made up for Computer Clearance Centre.
- [97] In his first affidavit of 12 November 1998, Mr Tan deposed that he telephoned a person called William who worked at Chips Resources. William told him that he believed Computer Clearance Centre was a part of Idea Technology and that the goods had been sent to Idea Technology's offices in West End. William said that he had been paid in cash by Ms Nguyen. When Mr Tan told William that Computer Clearance Centre had no relationship with Idea Technology, William was reluctant to speak further about the matter.
- [98] I am satisfied that the allegations pleaded in paragraphs 3(b) of the amended statement of claim have been proved by the plaintiff to the requisite standard. Other examples of the defendant's dishonesty support the quantum of damages pleaded with reference to paragraph 3(i)(iv) of the amended statement of claim.

Forging of Signatures

- [99] Paragraph 3(g) of the amended statement of claim alleges that Ms Nguyen executed documents in the name of Mr Allen Tan when she was not authorised to do so.
- [100] Mr Tan deposed that he found several examples of where his signature had been forged. Two examples were Purchase Order No.970205 made on Gatum Dale Pty Ltd on 19 February 1998, together with a Sales Tax Exemption Declaration, and Purchase Order No.970225 made on Digital Valley on 21 April 1998. Mr Tan deposed that he could not have signed these purchase orders and sales tax exemption declaration because he was not in Australia on those dates. This allegation was also contained in the earlier affidavit of 12 November 1998. This explanation by him was not correct as he was in Australia on those dates.
- [101] Mr Tan was cross-examined about the assertion in his affidavits that he was not in Australia on those dates. He explained that he believed he was in Melbourne on both dates. He said he wrote in his affidavits that he was not in Australia because he believed that other documents had been forged while he was not in Australia. He said he was shocked when he was going through piles of documents on 14 October 1998 and found numerous documents with forged signatures.
- [102] Mr Tan deposed that the signature in his name on the back of two Bank of Queensland cheques from the Complete Repair Centre, had not been signed by him.

- [103] Ms Nguyen's explanation for forging Mr Tan's signature was that when she began ordering stock on behalf of Idea Technology the suppliers asked for Idea Technology's sales tax exemption number. She called Mr Lok who told her that Idea Technology did not have a number and that she should fill out a sales tax exemption declaration form and give it to the supplier with the purchase order. Ms Nguyen signed the first few declaration forms herself but then became worried and decided to sign Mr Tan's name on the declaration forms. She deposed that she thought she had the authority to sign on Mr Tan's behalf because Mr Tan was a director of the company.
- [104] Ms Nguyen signed Mr Tan's name on a purchase order to Gatum Dale Pty Ltd dated 19 February 1998. When Mr Lok saw this purchase order he telephoned Ms Nguyen and told her that she had authority to sign her own name to purchase orders. Ms Nguyen deposed that the transaction with Gatum Dale Pty Ltd did not proceed so the forms were of no effect.
- [105] Mr Lok deposed that in February 1998 he received a faxed purchase order from Ms Nguyen and noted that on the bottom of the order Mr Tan's signature had been forged. Mr Lok deposed in his second affidavit, that the reason he knew about the documents was that Mr Tan was staying with him and brought those documents home from the office. In examination-in-chief he clarified this evidence by saying that Mr Tan brought the faxed purchase order to him at his home. He gave the same evidence in cross-examination. Mr Lok called Ms Nguyen but she could not explain why she had forged the signature. He explained that she had authority to sign her own signature and instructed her not to forge Mr Tan's signature again.
- [106] An expert's report was prepared by Mr Heath in relation to the questioned signatures. His expertise in handwriting and his report were not challenged, although the admissibility of the documents in his report was challenged. However, these were business records of the plaintiff and admissible as such.⁴ Mr Heath was given five specimens of Allen Tan's signature and asked to compare them to 63 examples of signatures that were questioned. He was able to conclude with a high degree of certainty that 29 of the questioned signatures were false signatures that had been produced by the same author, but not the author of the specimen signatures.
- [107] Two of the documents containing the verifiably false signature were purchase order No.970205 dated 19 February 1998 and addressed to Gatum Dale Pty Ltd, and the attached Quotation of Exemption Declaration.
- [108] In cross-examination, Ms Nguyen admitted that she signed Mr Tan's signature on the purchase order to Gatum Dale. She disputed that she had signed the Quotation of Exemption Declaration attached to that order. However, paragraphs in her affidavit of 27 May 2002⁵ and an earlier affidavit of 18 November 1998 appear to contain an admission that she signed this declaration form.⁶ Ms Nguyen also denied

⁴ *Evidence Act 1977 (Qld)*, s 92.

⁵ See Exhibit 41, paragraph 122.

⁶ Exhibit 59, paragraph 49.

signing Mr Tan's name on a number of other documents that were put to her in evidence. Each of these was a document identified by Mr Heath as containing the same false signature. Given that Ms Nguyen explicitly admitted, even in her oral evidence, to signing the Gatum Dale Pty Ltd purchase order No.970205, and implicitly admitted in her affidavit to signing the attached Exemption Declaration, both of which were identified as having the same false signature as 27 other documents, it seems certain that all of those signatures were forged by Ms Nguyen. She was therefore lying at this point in her cross-examination in a way that seriously undermined her credit as a reliable witness.

- [109] Her credit was further undermined when purchase order No. 970226 was put to her in cross-examination. This document contained another false signature of Allan Tan that was identified by Mr Heath as having been signed by the same person as the other suspect signatures. On the line for the signature, the beginning of Ms Nguyen's signature, which is quite distinctive, is crossed out and Allan Tan's name is written in. Nevertheless, Ms Nguyen falsely denied that it was the beginning of her signature or that it was her handwriting.
- [110] Mr Heath also noted that one document had a cut-out of a signature on it and that another 16 documents had been photocopied from that document. Ms Nguyen falsely stated in her affidavit that the photocopied forms suggested to her that someone in Melbourne had used photocopied forms for making purchases. There would be no reason for another person to seek to rely on a false signature when they had access to the correct signature.
- [111] In addition to falsely signing Mr Tan's name, Ms Nguyen also signed documents purporting to be the managing director of Idea Technology. Mr Tan deposed that he found a letter addressed to customers signed by Ms Nguyen as managing director of Idea Technology. This was a letter addressed to all customers of Idea Technology explaining the company's return authorisation procedure. Ms Nguyen explained this by saying that Sam Chi Nguyen or Man Nguyen gave her the document while she was in hospital and she signed without noticing the words "managing director". She said that Sam or Man had altered a generic letter during her absence, which previously had the name of Albert Lok as managing director. However, when Man Nguyen was shown the document in cross-examination he said that he had never seen it before. He could not remember either preparing the document or taking it to his sister in hospital. The document stated that the new return authorisation procedure would come into effect from 1 March 1998. Ms Nguyen went into hospital on 4 March 1998. This makes her explanation highly unlikely.
- [112] A similar form detailing changes to the return authorisation procedure to be effective from 20 January 1998 also contained Ms Nguyen's name above the title "managing director". Ms Nguyen originally agreed that her signature was on the document. She then denied that it was her signature. I accept that it was her signature and her denial was merely for the purpose of asserting that she had only signed as managing director once and then only by mistake at the instance of those beneath her in the organisation.
- [113] I am satisfied that Ms Nguyen habitually signed as "Allen Tan" on documents. That she did so showed that she well knew that he had taken over legal control of

Idea Technology from the beginning of 1998. That she denied doing so reflected very poorly on her credit.

Sales of Stock

- [114] Paragraph 3(h) of the amended statement of claim alleges that Ms Nguyen sold goods contrary to the set sales price, without authority. Paragraph 11 of the further and better particulars ordered by Muir J on 25 October 1999 particularises this allegation. This paragraph lists eleven transactions in which goods were sold under the authorised price. However it is not necessary to make particular findings as to each of these transactions as they are subsumed within paragraph 3(i)(iv) of the amended statement of claim and the method of calculating the quantum of the loss found therein.

Credit Notes

- [115] Mr Cooper notes in his report that the company records show an invoice and a credit note issued in the same amount, leaving the net amount due by the customer as nil. From the information provided by customers, for example John Watson, these credit notes were not received by them. Mr Cooper gave the opinion that this method could have been used by Ms Nguyen to take money for her own purposes since Idea Technology's records showed that nothing was owing by the customer. Appendix 7 to Mr Cooper's report summarises the credit notes that appear to have discrepancies. Ms Nguyen attempted in her affidavit to explain each of the invoices to which the suspect credit notes related. The explanations included credit to customers for wrongly charged sales tax, credit for an overpaid invoice and for recording commission transactions. Ms Nguyen also deposed that there was no reason for customers to be given credit notes because they were used at Idea Technology for internal accounting purposes.
- [116] Ms Nguyen also explained that credit notes were used to record returns of faulty goods. For example, a credit note was issued on 23 January 1998, bearing the words "Return CPU Faulty". Ms Nguyen gave evidence that this credit note was issued to record the return of faulty goods. However, in her affidavit Ms Nguyen said this credit note was wrongly issued. When questioned about this inconsistency she said the affidavit was a misinterpretation. She said she noticed the error before swearing the affidavit but did not tell her solicitor because she was too stressed. She said she told her solicitor about the error after she had signed the affidavit. She said she had prepared a list of errors in her affidavit that she wanted to correct during examination-in-chief but she did not make the corrections because she was stressed.
- [117] It was put to Ms Nguyen in cross-examination that credit notes were not used to record commission and that she had invented this explanation to hide the fact she was taking money, but she denied this allegation. A number of other credit notes were put to Ms Nguyen in cross-examination but she was unable to explain why they had been issued.

- [118] Mr Tan deposed that credit notes ought only to have been issued if goods were returned, for example, because the wrong quantity was ordered or the goods were not what were ordered. I am satisfied that the credit notes were used to cover up misappropriation of money by Ms Nguyen.
- [119] An example is found in the credit notes issued to the Complete Repair Centre. John Watson, the proprietor of that business, identified a number of examples of credit notes which are apparently made out to his business. He said that he did not receive those credit notes during his business dealings with Idea Technology. His normal business practice was to return faulty goods so that they could be replaced. The credit notes were created to show that no money was ever owing by the company when it had in fact paid the accounts for which credit notes were drawn but not given to the customer.

Total Money Claimed

- [120] As I have already noted, Idea Technology commissioned a report from Mr Keith Cooper, an experienced forensic accountant who practises in Brisbane. Mr Cooper investigated the accounts of Idea Technology in order to calculate the amount of money allegedly stolen by Ms Nguyen. In these reasons, I have referred to a number of examples of the many ways in which documents were created to conceal the amount of money in fact received rather than the amount banked. The difference between the two is the true measure of the plaintiff's loss.
- [121] In his supplementary report dated 26 February 2002, Mr Cooper calculated the amount of sales proceeds unaccounted for as \$201,393.01. I accept the methodology that he used for calculating the loss.
- [122] In order to arrive at this figure, Mr Cooper first calculated the total sales for the period from 1 January 1998 to 30 September 1998.

Total Sales Banked as per bank statements	\$706,666.54
Plus sales recorded in Deposit book but not banked (credited to KT Technology)	\$15,051.51
Plus sales invoices raised to Sato Enterprise set-off against purchases and therefore never deposited	\$22,359.60
Less sales tax	\$54,815.83
Total	\$689,261.82

Mr Cooper then calculated the total cost of purchasing the goods sold from 1 January 1998 to 30 September 1998.

Purchases as per purchases report from 1 January 1998 to 30 September 1998	\$892,954.00
Less revised invoices from Jay Pacific and Sinthanoo Data Company	\$16,900.00
Less faulty stock included in initial stock purchase from KT Technology	\$18,116.50
Less Credit Notes as per purchases report	\$3,789.00

Less Closing Stock on 30 September 1998	\$112,784.17
Less Obsolete Stock and Samples	\$2,000.00
Total	\$739,364.33

- [123] Next, Mr Cooper calculated the expected sales from these goods by applying a mark-up percentage. To establish the appropriate mark-up percentage he had his staff select invoices at random over the period from January to September 1998 and establish the cost price of the items sold for comparison with the sale price. He established an average mark-up percentage of 53.02% for invoices in January and 13.11% for invoices over the rest of the period. Mr Cooper stated that the industry average for businesses with income of \$750,000 or more was a mark-up of 47.69%. He believed the calculation of the lower mark-up percentage of 13.11% could have been affected by the circumstances of the case, including the suggestion that Ms Nguyen had priced invoices at less than the authorised amounts. If this was the case then the calculation of expected sales would be too low.

Initial stock purchase from KT Technology	\$205,667.00
Less faulty stock in purchase from KT Technology	\$18,116.50
Marked up by 53.02%	\$286,989.78

Stock purchases for remainder of period	\$533,697.33
Marked up by 13.11%	\$603,665.05
Total	\$890,654.83

Mr Cooper then subtracted the expected sales from the actual sales to reach the final figure.

Expected sales for the period 1 January 1998 to 30 September 1998	\$890,654.83
Less actual sales for the period 1 January 1998 to 30 September 1998	\$689,261.82
Total	\$201,393.01

- [124] Ms Nguyen submitted that she could not have stolen the amount of money alleged without people in Melbourne, who regularly reviewed the financial documentation, discovering the misappropriation. However, in my view, Ms Nguyen deliberately covered up her misappropriation of funds in the ways referred to in these reasons so as to make its earlier detection difficult.
- [125] The defendant also submitted that Mr Cooper's calculations failed to take account of several significant matters. Some of those matters are obviously of no relevance and can be dismissed without further discussion.

Computer Recyclers

- [126] Ms Nguyen deposed that in mid-January 1998 one of KT Technology's Brisbane customers, Computer Recyclers, paid by cheque for some goods that were purchased in early December 1997 and the cheques bounced. Two cheques were paid into Idea Technology's bank account, totalling about \$21,000.00. Ms Nguyen said she called Mr Lok who said he would instruct Mr Tan to speak to the owner of Computer Recyclers personally about the matter. Later Mr Tan called her and told her that he had spoken with Computer Recyclers and they were concerned about whether Idea Technology would honour warranties for stock sold by KT Technology. Eventually, the matter was dealt with by a debt collection agency, Receivables Management, and a person from this agency informed Ms Nguyen that Computer Recyclers had agreed to pay \$2,000.00 per month until the amount was paid. After these events, Mr Lok instructed Ms Nguyen that if possible Idea Technology should try to deal on a cash on delivery basis with customers.
- [127] The effect of this evidence was, however, that Idea Technology received money which was in fact owed to KT Technology. To the extent that it was counted in the total sales banked as per the bank statements it assisted Ms Nguyen by inflating that figure and so reducing the shortfall.

Jay Pacific, Sinthanoo and ARP

- [128] Ms Nguyen said that the invoices which showed purchases of goods from the suppliers, Jay Pacific Trading Co ("Jay Pacific") and Sinthanoo Data Company ("Sinthanoo") could not be relied upon. Ms Nguyen deposed that during the period January to October 1998 purchases were acquired from various suppliers in Brisbane, Sydney and Melbourne but because Mr Lok insisted that Idea Technology concentrate on selling stock from Sato Enterprise, there were no large acquisitions from external suppliers.
- [129] She deposed that she had no knowledge of three alleged suppliers, Jay Pacific, Sinthanoo and ARP Trading ("ARP") and that there were no records in the Brisbane office in relation to purchases from these organisations. She exhibited to her affidavit a document she referred to as a "suppliers list", but which is in fact headed "creditors list" and the three companies do not appear on it.
- [130] Ms Nguyen deposed that she did not order the goods listed in invoices dated 30 January, 10 February and 14 May 1998 from Jay Pacific and dated 20 March and 29 April from Sinthanoo. She deposed that these goods were not delivered to Idea Technology. In relation to these transactions there is no purchase order, no invoice with the storeman's notes on it and no consignment notes. Ms Nguyen contrasted this with records of purchases from two regular suppliers to Idea Technology, Digital Valley and Also Computers. These records were invoices with handwritten notes signed by Mr Chen on behalf of Idea Technology. Ms Nguyen deposed that the goods set out in the Jay Pacific and Sinthanoo invoices were never available for sale by Idea Technology and that the invoices are fabrications.
- [131] However the company records show that payments were made to these companies and there is no reason to doubt that therefore the goods were received. Mr Lok deposed that he signed cheque No. 400100 dated 10 June 1998 made out to cash in

the sum of \$100,000.00 and cheque No. 400123 dated 7 July 1998 made out to cash in the sum of \$30,000.00. The cheque butts reveal that these cheques were delivered to Jay Pacific and Sinthanoo respectively. On 10 June 1998, when cheque No.400100 was signed, the balance in Idea Technology's account was only \$83,558.34. The balance only rose over \$100,000.00 on 17 June when there was an overseas telegraphic transfer of \$28,905.54 into the account. The bank statement of Idea Technology for 18 June 1998 shows a withdrawal on cheque No .400100 in the amount of \$100,000.00.

- [132] Mr Lok deposed that a person attended his office in Melbourne to collect these cheques for goods supplied to Idea Technology. It was the same person on both occasions, of Asian appearance, possibly Thai or Vietnamese. On the occasions that he paid these cheques, Mr Lok had received a phone call from Ms Nguyen telling him it was appropriate to make the payment. On the first occasion the man arrived to collect a cheque, Mr Lok called Ms Nguyen in Brisbane to confirm that it was the right person and the man spoke to Ms Nguyen on the phone. Mr Lok said that the phone calls occurred in the mornings of 10 June and 7 July and that the cheques were picked up in the morning.
- [133] Several of the earlier invoices from Jay Pacific and Sinthanoo include an amount for sales tax. Mr Lok agreed that Idea Technology was entitled to a sales tax exemption. He did not know why sales tax was said to be payable on the Jay Pacific and Sinthanoo invoices despite the tax exempt status and he said he did not think about it at the time. It appears likely that he did not see the invoices at the time of making the payments.
- [134] The defendant alleged that the Jay Pacific and Sinthanoo invoices were created by someone acting on behalf of Idea Technology for the purpose of generating false sales tax offsets. It was argued that the amount of money allegedly missing from Idea Technology would have to be adjusted because stock was paid for but never received. This argument seems fanciful. Mr Lok said that he did not create the invoices and he said it was "impossible" that someone else in the Melbourne office could have prepared them.
- [135] Mr Tan deposed that he had had no dealings with Jay Pacific or Sinthanoo and that he had not heard of them until this dispute arose. The invoices from Jay Pacific and Sinthanoo were found by Mr Tan in a metal cabinet at the offices of Idea Technology in Brisbane.
- [136] Both Jay Pacific and Sinthanoo are genuine businesses and business name extracts for both companies were tendered during the trial.
- [137] Mr Cooper provided calculations of the amount of money misappropriated by Ms Nguyen if the Jay Pacific and Sinthanoo invoices are excluded but in my view these amounts were properly included. However, the correct amount of the Jay Pacific and Sinthanoo invoices is the amount shown on the second set of invoices provided by Mr Tan, which match the amount actually paid and properly payable,

as opposed to the amount shown on the original invoices, which incorrectly includes sales tax. This leads to a reduction in purchases of \$16,900.00.

- [138] Ms Nguyen deposed that she had never heard of ARP, a company that appears in Idea Technology's purchases reports. She deposed that she did not order any goods from ARP and that the goods did not come into the store.
- [139] On 29 July 1998, invoice No. 980777 was issued by ARP to Idea Technology in the sum of \$3,132.00. This amount is also recorded in the purchases report for August 1998 as having been paid on 4 August. In that purchases report there is no notation of a purchase order beside this entry. Similarly, there is no notation of a purchase order when the supplier is Sato Enterprise. A payment voucher dated 4 August 1998 records the payment to ARP of \$3,132.00 by cheque No. 400138. This payment voucher bears the handwritten notation, "contra acc with Sato". Cheque No.400138 is in the amount \$3,132.00 and is made out to cash.
- [140] On 4 August 1998, an Idea Technology payment voucher in the amount of \$2,680.00 to ARP was prepared, recording a payment by cheque No. 400137. This payment was not recorded in the purchases reports of Idea Technology. Cheque No. 400137 in the amount of \$2,680.00 was made out to cash. The cheque butt was made out to Sato Enterprise and bears the notation, "offset outstanding account".
- [141] On 8 July 1998, an invoice was issued to Idea Technology in the sum of \$1,410.00. On 8 July 1998, the purchases report showed a purchase from ARP in the sum of \$1,410.00. On 5 October 1998, a cheque No. 400175 in the amount of \$1,410.00 was paid to cash. The cheque butt recorded the payment as a cash purchase.
- [142] On 21 August 1998, an invoice was issued to Idea Technology for \$1,500.00. The invoice did not state the name of the supplier. The purchases report for August 1998 had an entry dated 21 August 1998 in relation to a payment of \$1,500.00 to ARP. The amount appears to have been paid by cheque No. 400152 dated 31 August 1998 signed by Mr Lok and made out to Sato Enterprise. The cheque butt has the words "Sato Enterprise" crossed out and "ARP" written in its place.
- [143] Mr Lok explained these transactions by saying that Sato Enterprise paid a representative of ARP in cash for the goods sold, and then an Idea Technology cheque was signed to reimburse Sato for the expense. The first two cheques were made out to cash because it was a reimbursement of cash. Mr Lok was not sure why the third cheque was made out to Sato Enterprise, but said he did not pay much attention to these kinds of details. When it was put to Mr Lok that ARP did not exist he said he had not checked but had assumed it existed because there was an invoice and Ms Nguyen had told him to make a payment. He denied he had fabricated the ARP transactions or that someone in Melbourne had fabricated the ARP transactions.
- [144] The suggestion to Mr Lok that he fabricated these transactions without Ms Nguyen's knowledge is fanciful. The invoice for \$1,500.00 records the receipt of

20 x 32 SP CD ROM @ \$75.00 each. Ms Nguyen has signed the invoice as having received these items. Ms Nguyen appears to have sent the invoice for \$1,410.00 to Myloan for her attention. I am satisfied that these transactions do represent purchases of stock for Idea Technology.

- [145] The invoice issued to Idea Technology in the sum of \$1,410.00 bears the notation “received 13/7/98 Albert Sydney”. On the purchases report of Idea Technology for July this transaction is listed as a purchase of stock from ARP. The defendant alleged that this transaction in fact involved goods being sent from Brisbane to Micro Technology in Sydney, under the instructions of Albert Lok.
- [146] Mr Lok gave evidence that he did not become aware of Micro Technology until the end of 1998 or the beginning of 1999. He denied that he instructed Ms Nguyen to send stock to Micro Technology in Sydney during 1998. Mr Tan was unable to comment on the transaction. In view of her many lies I am unable to accept Ms Nguyen’s explanation.

SkyHawk Electronics

- [147] Ms Nguyen deposed that SkyHawk Electronics had supplied goods to KT Technology in late 1997. The goods had come from Hong Kong. Some of these goods were part of the stock taken over by Idea Technology. A number of the goods were faulty and had to be returned in May 1998. To account for the return of the stock an invoice was issued to Skyhawk for the goods and the value of that invoice was set-off against the balance owed by KT Technology to Skyhawk for the original supply. Consequently, Idea Technology lost the benefit of the goods without receiving any payment for them. Ms Nguyen was not able to comment on whether there was a return authorisation form created for this transaction. Without supporting documentation, I am not prepared to accept Ms Nguyen’s explanation.

Robert Farndale – Computer Warehouse

- [148] Ms Nguyen deposed that in August 1998 she went to Computer Warehouse and spoke to Robert Farndale about his business. It was agreed that Idea Technology would supply goods to Computer Warehouse on a consignment basis. Mr Farndale deposed that between 21 August 1998 and 6 October 1998, Ms Nguyen supplied \$40,000.00 worth of computer hardware and software to his company, the National Computer Rental Company of Australia, under the consignment system. Payment for these goods was either by cash or cash cheque. Mr Farndale estimated that his company paid approximately \$6,000.00 to \$7,000.00 in cash to Ms Nguyen and the balance of \$33,000.00 to \$34,000.00 by cheques made out to cash.
- [149] In October 1998, when Mr Tan arrived in Brisbane, there were four AST systems that had been sold by Computer Warehouse, but for which Idea Technology had not been paid. Ms Nguyen decided to collect payment for these goods and create double invoices which she said was for the purpose of recording Man Nguyen’s commission. It should be noted however that it appears that the salesperson with whom Mr Farndale dealt was not Man but the defendant, Ms Nguyen. Two invoices numbered 9800761 dated 7 October 1998 were prepared, one showing

\$4,480.00, the other showing \$3,808.00. Ms Nguyen collected a cheque for \$4,480.00 dated 6 October and gave it to Mr Tan who said he would bank it. This cheque was made out to Idea Technology. It was banked subsequently on 30 September and, out of an abundance of caution, it should be included in the receipts attributable to the period from 1 January to 30 September 1998, thus reducing the shortfall.

- [150] Mr Cooper searched the sales summaries provided to him, which showed that there were only two sales recorded to National Computer Rental Company, one on 24 August 1998 to the value of \$1,928.78 and one on 11 September 1998 to the value of \$156.94. This difference is very telling and is another example of the failure by Ms Nguyen to records sales and receipts of cash and cash cheques.

Mary Castillo

- [151] Another example can be found in the evidence of Mary Castillo who was a customer who bought a computer from Idea Technology during the period when Ms Nguyen worked there. Ms Castillo deposed that she paid \$1,900.00 cash to a woman called Nguyen at Idea Technology for the purchase of a computer and received a handwritten invoice for \$1,900.00. The invoice does not have the name of the company on it.
- [152] Mr Cooper could find no invoice in the records of Idea Technology made out in Ms Castillo's name. There is no evidence that the \$1,900.00 was ever banked or otherwise accounted for.

Computers Used in the Office

- [153] Ms Nguyen alleged that the figures used by Mr Cooper should have taken into account the computers used in the office. When Mr Tan did a stocktake in October 1998 he did not count six computers used in the office as stock on hand. However, he did not know where the six computers had come from and so did not agree that the value of those computers should be deducted from the plaintiff's claim.
- [154] Sam Chi Nguyen gave evidence that there were about five computers used in the office. However, he said that these were used in KT Technology and that from the time when Idea Technology commenced trading, no computers were taken out of stock and used in the office. As these computers continued to be used in the office by Idea Technology, it is appropriate that they were not included in either stocktake. They have no effect therefore on the figures used in the calculations.

Amounts Erroneously Banked into KT Technology's Account

- [155] Ms Nguyen deposed that in the first few days of trading Idea Technology did not have its own bank account and amounts were therefore banked into KT Technology's account which had not been closed. She was not aware that this money had ever been paid back to Idea Technology by KT Technology. These adjustments were made by Mr Cooper in his assessment of the loss.

Return Authorisations/Faulty Stock

- [156] Ms Nguyen deposed that in February 1998 she had a conversation with Mr Lok in which he told her he wanted to reduce orders for goods for the Brisbane office from external suppliers. He said he wanted her to concentrate on selling stock from Melbourne. She complained to Mr Lok that the only thing they had in the warehouse were monitors that were brand new, but had a manufacturer's fault that made them very difficult to sell. Mr Lok told her not to worry because in the future he would be sending good quality computer systems. She deposed further that in the first few months of trading as Idea Technology the quality of stock in store which had been left over from KT Technology was problematic.
- [157] After the middle of February 1998, Mr Lok started to send better quality stock to Brisbane which sold reasonably well in the Brisbane market, even though in a number of instances the goods were technically obsolete because the manufacturers had developed later versions. However, Ms Nguyen deposed that from around August 1998 Sato Enterprise in Melbourne was again sending obsolete stock that was difficult to sell. In addition, Mr Lok would not allow Idea Technology to order the latest stock as he wanted the business to focus on selling obsolete stock from Melbourne.
- [158] Man Nguyen deposed that in his opinion almost all the stock he sold for the plaintiff was obsolete. He understood that Albert Lok was managing director of Sato Enterprise and Idea Technology and would use Idea Technology as a clearing house for Sato's obsolete stock. He recalled that there was high rate of return on stock sent from Sato, in particular Raffles Monitors in relation to which he estimated that 80-90% were faulty. I accept Sam Chi Nguyen's denial that eight or nine out of ten monitors would be returned because they were faulty.
- [159] The procedure for dealing with faulty goods was adopted from KT Technology and involved the use of a return authorisation (RA) form.
- [160] Ms Nguyen prepared a spreadsheet entitled "RA Goods Not Accounted For". This list shows, *inter alia*, 63 x 14 inch monitors, 72 x 15 inch monitors and 11 x 17 inch monitors as faulty stock. Sam Chi Nguyen said that if there were so many faulty monitors he would not have had room to stack them. He thought the number of faulty monitors that he could not fix and remained in the stock room as faulty goods was closer to 30. He later amplified this evidence to say that from the time he began work with KT Technology in July 1997 until Mr Tan arrived in Brisbane in October 1998 the total number of monitors he could not fix was about 30. He impressed as a truthful witness. Ms Nguyen's schedule was not able to be relied upon.
- [161] Mr Tan did not recall seeing large amounts of faulty stock stored in the warehouse when he arrived in October 1998, and could not understand how he could have missed seeing so much faulty stock. In particular, he said that there could not have been over one hundred faulty monitors in the warehouse that he did not see. Mr Tan believed that Mr Sam Chi Nguyen had repaired faulty monitors and

returned them to customers, so that there was no need to take new monitors from stock to replace them.

- [162] Mr Tan stated that any faulty stock should have been returned to the supplier, and if the supplier of any faulty stock was KT Technology, so that a return to the supplier was not possible, the stock should have been returned to the original importer under warranty.
- [163] Sam Chi Nguyen gave evidence as to the items he was able to fix and those he was not. He was mainly engaged in repairing Raffles monitors. He said there were about 30 of these he could not repair during 1998 and he left them in the corner. Sam Chi Nguyen said he could not repair motherboards, hard drives, CPUs, scanners, RAM, printers, VTA cards or modems. He said he could replace stickers on keyboards if they had faded, could put a new sound card into a machine and could repair the mechanical parts on a CD ROM but not the electronic parts. Apart from fixing these items, if an item was faulty he would recommend to Ms Nguyen that it be replaced.
- [164] I am satisfied that Mr Cooper took into account the correct amount of faulty stock based on the information from Sam Chi Nguyen on which he was entitled to rely and so his calculations and report have properly taken account of returns and faulty stock.

Calculation of Loss

- [165] Taking all of these factors into account, I am satisfied that the following matters should be taken into account in the assessment of damages using the methodology adopted by Mr Cooper:

Actual Income from sales 1 January – 30 September 1998

- 1) the total sales banked from 1 January 1998 to 30 September 1998 according to the bank statements was \$706,666.54;
- 2) to this should be added the sales recorded in the deposit book but incorrectly banked to KT Technology not Idea Technology, in the sum of \$15,501.51;
- 3) to this should also be added \$2,698.90, made up of \$2,095.00 for invoice No.980001 and \$603.90 for invoice No.980002, which Mr Cooper conceded were also wrongly deposited into the KT Technology bank account;
- 4) to this should also be added \$22,359.60 for sales invoices raised to Sato Enterprise set-off against purchases from Sato Enterprise and therefore never deposited;
- 5) from this should be deducted amounts banked which were moneys received for sales made in 1997 by KT Technology. This can be seen by the invoices that relate to those receipts. That amount totals \$35,960.19;
- 6) The \$4,480.00 from Computer Warehouse banked after 30 September 1998 but attributable to a sale made before that date should be added;
- 7) less sales tax of \$54,815.83:

The total adjusted income for the period was therefore \$660,480.53.

[166] Cost of purchasing goods which were sold 1 January – 30 September 1998

- 1) purchases from the purchases report from 1 January to 30 September 1998 was \$892,954.00;
- 2) from this should be deducted \$16,900.00 for the reduction in the amount actually paid to Jay Pacific and Sinthanoo;
- 3) from this should also be deducted \$18,116.50 for faulty stock included in the initial stock purchase from KT Technology which did not have the normal warranty arrangements attaching to it;
- 4) from this should be taken \$3,789.00 representing credit notes referred to in the purchases report;
- 5) from this should also be taken \$112,784.17 representing the value of the stock on September 1998;
- 6) from this should be taken obsolete stock and samples of \$2,000.00;
- 7) it is not necessary, in my view, to deduct the cost of the computers used in the office, of \$6,156.00, since these were carried over from KT Technology.

The total cost of purchasing the goods sold from 1 January to 30 September 1998 can then be calculated at \$739,364.33.

[167] Mr Cooper then calculated the expected sales figure for the period as seen in paragraph [123]. Whilst under cross-examination, Mr Cooper was prepared to concede that the mark-up percentage on the KT Technology stock might be too high. He was prepared to reduce it to 50.14%. This produced expected sales figures of \$281,588.32 for the KT Technology stock. Mr Cooper calculated the figure of stock purchases for the remaining period by deducting the KT Technology stock figure of \$205,667.00 from the total cost of purchasing goods figure of \$739,364.33, to arrive at \$533,697.33.⁷ A mark-up percentage of 13.11% was applied to this figure giving expected sales for the remainder of the period of \$603,665.05. The revised expected sales figure for the entire period was, therefore, \$885,253.37. These calculations can be represented in tabular form as follows:

⁷

Since the total cost of purchasing goods figure included a deduction of the faulty stock from KT Technology (\$18,116.50), Mr Cooper has in effect subtracted that faulty stock figure twice, resulting in an advantage to the defendant. However, since the relevant figure asked for by the plaintiff in its final submissions was \$224,772.84, I do not consider it appropriate to award any more than that amount.

Actual income from sales 1 January – 30 September 1998

Total Sales Banked as per bank statements	\$706,666.54
Plus sales recorded in Deposit book but not banked (credited to KT Technology)	\$15,051.51
Plus other sales deposited into KT Technology	\$2,698.90
Plus sales invoices raised to Sato Enterprise set-off against purchases and therefore never deposited	\$22,359.60
Plus moneys banked after 30 September 1998 attributable to sales made before 30 September	\$4,480.00
Less moneys received that were earned by KT Technology and banked into account of Idea Technology	\$35,960.19
Less sales tax	\$54,815.83
Total	\$660,480.53

Cost of purchasing goods sold 1 January – 30 September 1998

Purchases as per purchases report From 1 January 1998 to 30 September 1998	\$892,954.00
Less revised invoices from Jay Pacific and Sinthanoo Data Company	\$16,900.00
Less faulty stock included in initial stock purchase from KT Technology	\$18,116.50
Less Credit Notes as per purchases report	\$3,789.00
Less Closing Stock on 30 September 1998	\$112,784.17
Less Obsolete Stock and Samples	\$2,000.00
Total	\$739,364.33

Expected income 1 January – 30 September 1998

Initial stock purchase from KT Technology	\$205,667.00
Less faulty stock in purchase from KT Technology	\$18,116.50
Marked up by 50.14%	\$281,588.32
Stock purchases for remainder of period	\$533,697.33
Marked up by 13.11%	\$603,665.05
Total	\$885,253.37

The quantum of loss is the expected income less the actual income

Expected sales for the period 1 January 1998 to 30 September 1998	\$885,253.37
Less actual sales for the period 1 January 1998 to 30 September 1998	\$660,480.53
Total	\$224,772.84

[168] Judgment should be given in favour of the plaintiff against the defendant in the sum of \$224,772.84 together with interest. I will hear argument as to costs.