

SUPREME COURT OF QUEENSLAND

CITATION: *GSM (Operations) Pty Ltd & Anor v Suwenda & Ors (No. 2)*
[2010] QSC 201

PARTIES: **GSM (OPERATIONS) PTY LTD**
ACN 085 950 803
(first plaintiff)
and
BILLABONG INTERNATIONAL LIMITED
ACN 084 923 946
(second plaintiff)
v
SUWENDA, Suzi Ann
(first defendant)
and
SUWENDA, Rory
(second defendant)
and
SUWENDA, I Wayan Daniel
(third defendant)

FILE NO/S: SC No 6832 of 2009

DIVISION: Trial Division

PROCEEDING: Application for summary judgment

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 7 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 18 February 2010

JUDGE: Margaret Wilson J

ORDER:

1. **A declaration that the licence agreement in writing between GSM (Operations) Pty Ltd and CV Bali Balance made 24 June 2004 ('the 2004 Licence Agreement') was validly terminated by the end of 25 October 2005.**
2. **A declaration that the period of the limited licence as:**
 - (a) **granted in a Deed of Acknowledgement between GSM (Operations) Pty Ltd and CV Bali Balance (as executed by Ms Suzi Ann Suwenda on behalf of CV Bali Balance on 27 October 2005) and**

**(b) as subsequently extended by
agreement between GSM
(Operations) Pty Ltd and CV Bali
Balance;
expired on 30 June 2006.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – licence agreement between Australian company and business arrangement recognised under Indonesian law – proper law of licensing agreement Queensland law – termination provisions including deemed assignment and transfer of control so that management effectively changed – relevance of Indonesian law to questions of assignment and control – summary judgment granted

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – claim to possession or use of chattels alleged to be marketing materials – foreign movables – relevance of correspondence passing between Australia and Indonesia by various forms of communication – proper law of relevant agreement – summary judgment refused

Uniform Civil Procedure Rules 1999 (Qld), r 292

Deputy Commissioner of Taxation v Salcedo [2005] QCA 227, cited

COUNSEL: TP Sullivan SC for the applicant/plaintiffs.
M Williams for the respondent/defendants.

SOLICITORS: Clayton Utz for the applicant/plaintiffs.
Shand Taylor Lawyers for the respondent/defendants.

- [1] **MARGARET WILSON J:** The plaintiffs, both Australian companies, were engaged in the marketing and distribution of Billabong products. The defendants are “partners” in a “commanditaire vennootschap” (“CV”), a business structure recognised under Indonesian law, which was licensed by the first plaintiff to use the Billabong trademark and associated intellectual property to conduct a business in Indonesia.

The relief claimed

- [2] In this proceeding the plaintiffs seek (inter alia) declarations with respect to the termination or expiration of the licence agreement and the entitlement to possession of marketing materials.
- [3] The plaintiffs seek summary judgment against the third defendants for part of their claim. The orders they seek were refined by a draft order submitted at the hearing in the following terms:

- “1. A declaration that the licence agreement in writing between GSM (Operations) Pty Ltd and CV Bali Balance made 24 June 2004 (‘the 2004 Licence Agreement’) was validly terminated by the end of 25 October 2005.
2. A declaration that the period of the limited licence as:
 - (a) granted in a Deed of Acknowledgement between GSM (Operations) Pty Ltd and CV Bali Balance (as executed by Ms Suzi Ann Suwenda on behalf of CV Bali Balance on 27 October 2005) and
 - (b) as subsequently extended by agreement between GSM (Operations) Pty Ltd and CV Bali Balance; expired on 30 June 2006.
3. A declaration that:
 - (a) GSM (Operations) Pty Ltd was entitled to possession of or use of the marketing materials (as the term is used in clause 25.4 of the 2004 Licence Agreement), on and from 1 July 2006, to the exclusion of CV Bali Balance and each of the Defendants;
 - (b) the marketing materials included all Light Boxes which had been the property of CV Bali Balance as at 30 June 2006.
4. The Defendants pay the costs of each of the Plaintiffs to this application.”

The parties

- [4] The first plaintiff is a wholly owned subsidiary of the second plaintiff. It owns the trademark “Billabong” and associated intellectual property. Each of the plaintiffs is engaged in the business (“the Billabong Business”) of marketing and wholesale and retail distribution of surf related apparel, accessories, eyewear, wetsuits, hard goods and related products (“Billabong Products”) under the brand “Billabong” and related brands in various countries, including Australia and Indonesia.
- [5] The first defendant (“Mrs Suwenda”) was born in Australia. In about 1978 she began operating a stall at the Paddington Markets in Sydney selling items of clothing (including bikinis, shirts and board shorts) and accessories, all of which were produced in Bali according to her designs. In 1981 she married I Wayan Suwenda (“Mr Suwenda Snr”) in Indonesia, and the business Bali Balance was set up there. She managed the business from the back of a house in Kuta.
- [6] There were three children of the marriage – Daniel born in 1981 (the third defendant), Rory born in 1983 (the second defendant), and Kasey born in 1989.
- [7] CV Bali Balance (“CVBB”) came into being in 1983.
- [8] On 24 May 2004 Mrs Suwenda became a permanent citizen of Indonesia. She and Mr Suwenda Snr were divorced on 28 July 2005.

- [9] In an affidavit sworn on 12 February 2010 Mrs Suwenda said that she managed the daily internal business and external operations of the CV, her husband being “involved only in the accounting” of the business. She said she could not “be legally named as a partner” while she did not have Indonesian citizenship, but she was named as a partner after she acquired citizenship. She said her role did not change when her husband died on 6 October 2005.

What is a CV?

- [10] Under Indonesian law a CV does not have a separate legal personality. For the purposes of this application both the plaintiffs and the defendants proceeded on the basis it is akin to a limited partnership in Australian law. A CV has active and passive partners. The active partners are responsible for the day to day management and bear unlimited liability for losses. The passive partners are not involved in day to day management and are not responsible for losses beyond the capital they have contributed to the CV. Generally a CV is established by a Deed of Notary (known in Indonesia as an “Akta”). The Akta is registered in the District Court where the CV is domiciled, and Notice of Registration is published in a State Gazette. Any changes in the composition of a CV are effected by an Akta which is registered and gazetted.
- [11] Copies of relevant deeds of notary are in evidence. They are in the Indonesian language, and are accompanied by translations into English by a NAATI accredited translator. That the English translations use expressions such as “company”, “shareholder” and “director” has no bearing on the legal character of a CV. There is no equivalent arrangement in Australian law, and the translator’s choice of English words is no more than her selection of what best approximates the Indonesian concepts in the English language.

Deed of Notary 29 November 1983

- [12] By Deed of Notary made on 29 November 1983 CVBB was established to do business in ready made clothing, hotel accommodation, general merchandise and other fields of business. Mr Suwenda Snr held a 50 percent interest and was the active partner and Mr I Nyoman Kamiana held a 50 percent interest as a passive partner. Articles 5 and 9 were in the following terms:

“Article 5

In this Company the shareholders present appointed I Wayan SUWENDA as Managing Shareholder who is responsible for all matters concerning the Company, while the shareholder present, I Nyoman KAMIANA, is only a silent partner.

Apart from the capital amount which was stated in the books, the managing shareholder will fully commit to the Company his skills, diligence and labour.

The managing shareholder, I Wayan SUWENDA, in his position of ‘Director’ has the right to sign for the Company, to connect the Company to the outside world and the outside world to the Company, and to conduct all activities concerning the management as well as the release of property rights, except for the following:

- c. to obtain, to release or to burden immovable goods, machines, motor vehicles of the Company or the Company itself;
- b. to borrow or to lend for the Company or in the name of the Company;
- c. to bind the Company as guarantor (collateral or security);
- d. to use the Company's assets as collateral for debts;

In those cases the managing shareholder has to obtain prior written agreement from or to act jointly with the silent partner. If one of the shareholders wishes to leave the Company, he/she is bound to declare this matter at least 3 months previously to the other shareholder(s) prior to leaving.

Prior to leaving he/she has to give a report and accountability of the work he/she has done and a report on the finances of the Company.

Article 9

If one of the shareholders passes away, the Company is not dissolved, but it is continued by the remaining shareholder(s).

The heir(s) of the deceased shareholder, if they agree may continue in the Company as silent partner(s) for the shares of the deceased shareholder.

In such a case they are obliged to appoint an attorney who is able to look after their interests in the Company within three months after the demise of the shareholder.

If the heir(s) has/have not appointed an attorney within the allotted time, they are regarded as having left the Company at the time the shareholder concerned died and they will receive their share in the Company as determined in article 6.

If the person who has died was the managing shareholder, the remaining shareholders have to appoint a new managing shareholder.

If one or another shareholder became bankrupt, ordered to postpone payments or entered in receivership, he/she is considered to have left the Company before the event occurred.

Immediately after the books are closed and as soon as possible or within three months, computations/calculations are made about the situation of the Company.

These calculations must be based upon the figures taken from the latest accounts and have to be validated according to the rules as mentioned in article 6.

The part which belonged to the person who has left the Company or which is regarded to belong to those who have left the Company will be paid out in cash to those who have the right to receive it, within three months from the day of exit.

With the payout of that part, the remaining shareholder(s) has/have the fullest right to continue to work the Company by continuing to use its name.”

1991 Licence

- [13] In about 1991 the first plaintiff granted CVBB a licence to conduct the Billabong business in Indonesia (“the Billabong Indonesian Business”). That licence was renewed from time to time up to and including June 2004.

Deed of Notary 28 April 2003

- [14] By a Deed of Notary made on 28 April 2003 Mr Kamiana ceased to be a passive partner and the third defendant (Wayan Daniel Suwenda) became a passive partner with a 50 percent share in the CV. There was a change to its constitution as follows:

“In connection with everything mentioned above, the parties who continue this Company explain that they consider it necessary to introduce changes in the Constitution of the Company, Bali Balance, in the following way:

The party, I Wayan SUWENDA, as the manager, holds the position of Director, and is fully responsible for all matters concerning the Company. He has the right to sign for the Company, to bind the Company, to represent the Company inside or outside the Court, to manage all the assets of the Company and to perform all activities concerning the property as well as its management, except for the following:

- a. to obtain, to release or to burden immovable goods, machines, motor vehicles of the Company or the Company; itself
- b. to borrow or to lend for the Company or in the name of the Company.
- c. to bind the Company as guarantor (collateral or availst);
- d. to use the Company’s assets as collateral for debts;

(In these matters the managing shareholder) has to obtain prior written agreement from or to act jointly with the silent partner.

While Mr Wayan Daniel SUWENDA, as the silent partner is only responsible for the amount of his investment in the Company.

The stipulations in this Deed which have not been changed will continue to be valid for the Company.”

2004 Licence Agreement

- [15] On 24 June 2004 the first plaintiff granted CVBB a licence to conduct the Billabong Indonesian Business from 1 July 2004 to 30 June 2009, subject to termination rights.
- [16] It contained the following provisions:

“Assignment and Sub-licensing

17.1 Limitation on Dealings

This licence is personal to you. You cannot assign, novate, sub-license, franchise, mortgage or charge your rights under this agreement.

17.2 Assignment by Corporation ...

17.3 Assignment by Partnership

If you are a partnership, there will be deemed to be an assignment for the purposes of this clause where there is a change of control of at least a 40% interest in the partnership or 40% of the votes able to be cast at a meeting of partners. This provision applies no matter how the change of control occurs. You must supply us with the names of the individuals who form the partnership at the time of executing this agreement, together with a copy of the partnership document as lodged with the relevant local government authority.

17.4 Dealing by Us ...

Termination

25.1 When We May Terminate Agreement

We may terminate this Agreement upon complying with the procedure in clause 25.2 by notice in writing to you if:-

...

(e) you assign, sub-license, franchise, mortgage or charge this agreement or any of the rights pursuant to this agreement or attempt to do so;

...

(g) control of you is in any manner transferred so that your management is effectively changed.

25.2 Procedure to Terminate

The procedure to be followed by us prior to terminating this agreement is as follows:

- (a) if the breach is not capable of being remedied, is a breach which has been committed on more than one occasion or is a breach of an essential term, this agreement may be terminated immediately by giving you written notice;
- (b) in any other case, we must give written notice to you requiring the breach to be remedied within 28 days, after which time we may immediately terminate the agreement by giving you written notice if the breach has not been remedied.”

- [17] The proper law of the licensing agreement is Queensland law (clause 36).

Deed of Notary 28 February 2005

- [18] By a Deed of Notary made on 28 February 2005 the third defendant (Wayan Daniel Suwenda) ceased to be a passive partner and the first defendant (Mrs Suwenda) became a passive partner with a 50 percent share. The constitution of the CV was altered as follows:

“In connection with everything mentioned above, the parties explain that they consider it necessary to introduce changes in article 5, article 6, article 7 and article 8 of the Constitution of the Company, making these to read as such:

Article 5

In this company the shareholders present appointed I Wayan SUWENDA as Managing Shareholder who is responsible for all matters concerning the Company, while the shareholder present, Suzi Ann SUWENDA, is only a silent partner.

Apart from the capital amount which was stated in the books, the managing shareholder will fully commit to the Company his skills, diligence and labour.

The managing shareholder, I Wayan SUWENDA, in his position of ‘Director’ has the right to sign for the Company, to connect the Company to the outside world and the outside world to the Company, and to conduct all activities concerning the management as well as the release of property rights, except for the following:

- a. to obtain, to release or to burden immovable goods, machines, motor vehicles of the Company or the Company itself
- b. to borrow or to lend for the Company or in the name of the Company.
- c. to bind the Company as guarantor (collateral or security);
- d. to use the Company’s assets as collateral for debts;
- e. to use the Company’s capital to open a branch of the Company or a new Company, or to open a joint venture with another party;

In those cases the managing shareholder has to obtain prior agreement from or to act jointly with the silent partner.

It is the silent partner who is responsible for the amount which she/he has deposited into the Company’s capital.

If one of the shareholders wishes to leave the Company, he/she is bound to declare this matter at least 3 months previously to the other shareholder(s).

If the shareholder who wishes to leave is the managing shareholder, prior to leaving he/she has to give a report and accountability of the work he/she has done and a report on the finances of the Company.

Article 6

Each year at the end of December, the books of the Company have to be closed and as soon as possible, within a time frame of three months a balance sheet of the Company including calculations of profit and loss have to be drawn up. These have to be placed in the Company's office for the perusal of other shareholders.

The silent partner(s) have the right to hand in a letter with their objections to these calculations within 14 days.

If there are objections, the silent partner(s) at their own costs can use an accounting expert from outside the Company to conduct an audit of the Company's finances.

If nobody voices any objections the records are regarded as valid and will be signed by the managing shareholder.

Article 7

After direct costs to the Company were deducted the net profit of the Company will be divided among each of the shareholders in accordance with their share in the capital of the Company.

Prior to the division of the profits, the reserve capital is put aside in accordance with the needs of the Company. This reserve capital is regarded as undistributed profits.

The distribution and payment of the part of the profits to be distributed will be done every 3 months after the calculations have been conducted.

The withdrawal of funds by each shareholder prior to the distribution of profits can at the most be done twice, but not more than the total sum of one hundred million Rupiah (Rp. 100.000.000). This sum will be considered as part of the shares that are taken before the distribution of profits and will be subtracted in total from his/her share at the moment of the distribution of profits.

The losses of the Company will be carried by each of the shareholders, the sum of which according to the equivalent of each shareholder's share in the profits, however, the shareholders in the Private Company are not obliged to be responsible for losses the sum of which exceeds the basis of their capital.

If there are losses it is not necessary to cover these with payment of cash but these can be covered with payment from the reserve capital and if this is not sufficient, from each shareholder's share in the Company's capital as stated in the account book.

Article 8

All the work in relation to the Company will be entrusted to the managing shareholder who has the responsibility to keep the accounts and who has the right to hire and fire employees, as well as determining their salaries.

While the silent shareholder(s) are allowed to request financial reports of the Company, this is limited whenever the financial reports are not submitted to the silent partner(s) at the appointed time.

The stipulations in this deed which have not been changed will continue to be valid for the Company.”

Mr Suwenda Snr’s death

[19] On 6 October 2005 Mr Suwenda Snr died.

[20] On 13 October 2005 the CEO of the second plaintiff wrote (by facsimile) to the Indonesian lawyers acting for CVBB in the following terms:

“I refer to the recent passing of Wayan Suwenda. As you are aware Billabong is concerned about how this unfortunate event affects the current Licence Agreement between GSM (Operations) Pty Ltd and CV Bali Balance executed on or about 24 June 2004.

We require the following information from CV Bali Balance or its lawyers:

- the names of the individuals who formed the partnership at the time the Licence Agreement was executed together with a copy of the partnership documents as lodged with the relevant government authority; and
- the names of the individuals who form the partnership as at today’s date together with a copy of the most current partnership documents as lodged with the relevant government authority.

Under clause 17.3 of the Licence Agreement, the name of the individuals who formed the partnership should have been supplied to Billabong at the time the agreement was executed on 26 June 2004. We understand the information was not provided at that time.

We require this information by 5.00 pm on Friday 14 October 2005 (Australian time).”

[21] The Indonesian lawyers responded promptly with information about the changes effected by the Deed of Notary of 28 February 2005 and by the death of Mr Suwenda Snr. They said (inter alia):

“We are aware of the provision of Article 17.3 of the agreement between CV Bali Balance and Billabong. CV Bali Balance is not a partnership. CV Bali Balance is a legal entity known as a Comanditair Venootscopt. This entity is established under the commercial code of Indonesia and has no counterpart with English/Australian law. The CV has share holders not partners therefore clause 17.3 is not relevant.

The relevant clause would be clause 17.2 where notification takes place of [sic] there is a change in share holders holding more than of 40% of the shares.”

[22] On 25 October 2005 the CEO of the second plaintiff wrote again to the Indonesian lawyers. After reciting the changes in shareholding he continued:

“From this information, it is clear that a deemed assignment has taken place under 17.2 as a change in shareholders holding more than 40% of the shares in CV Bali Balance has occurred.

Under clause 25.1(e), Billabong is entitled to terminate the Licence Agreement by notice in writing to CV Bali Balance where CV Bali Balance assigns the Licence Agreement.

By this facsimile Billabong hereby exercises its right to terminate the Licence Agreement effective 21 October 2005 in accordance with the terms of the attached Deed of Acknowledgement.”

Deed of Acknowledgement

[23] The Deed of Acknowledgement, which was between the first plaintiff and CVBB, was executed by Mrs Suwenda on behalf of the CV on 27 October 2005. Its effective date was agreed as 21 October 2005. The following background was recited in the deed:

“Background

- A. The Licensor and the Licensee are parties to a Licence Agreement executed on or about 24 June 2004 for the licence of certain registered and unregistered trade marks;
- B. The licensee, being a Comanditair Venootesopt, has been deemed to have assigned its interest in the Licence Agreement as there has been a change in control of a least 40% of the beneficial ownership of shares of any class.
- C. The parties have agreed that the relationship between them will continue on the following terms:
 - (a) the Licence Agreement will be terminated in accordance with clauses 17.2 [sic] and 25.1(e); and
 - (b) the Licensor will allow the Licensee to continue to use the Trade Marks on the same terms as the terminated Licence Agreement for a period of 6 months while the Licensor reviews the distribution of the Trade Marks in the Territory;
 - (c) the Licensor may, in its absolute discretion, extend the period which the Licensee may use the Trade Marks in the Territory in accordance with the terms of this Deed.”

[24] Then the deed contained an agreement that the licence agreement was terminated at midnight on 21 October 2005. The first plaintiff granted the CV a limited licence to use the Billabong trademarks for six months from the effective date. This might be extended by the first plaintiff in its absolute discretion.

Deed of Notary 28 March 2007

[25] By a Deed of Notary made on 28 March 2007 Mrs Suwenda became the active partner with a 50 percent interest, and the remaining 50 percent was shared among the three children, all of whom were passive partners. There was another change to the constitution of the CV recorded as follows:

“It to be necessary to make modifications in the Constitution of the Private Company ‘CV Bali Balance’ in the following way:

To modify the whole of article 5, so that article 5 will read thus:

Article 5

Mrs Suzy Ann SUWENDA as Managing Shareholder holding the position of Director who is wholly responsible in all matters concerning the Company and who has the right to sign for the Company, to bind the Company, to represent the Company within and outside the Court, to manage all of the Company’s assets and to carry out all acts concerning ownership as well as management of with the exception of:

- a. acquiring, releasing or imposing on real estate, machinery, motor vehicles, or companies;
 - b. borrowing or lending money for or in the name of the Company;
 - c. binding the Company as borrower (sponsor or guarantor).
 - d. Using the Company’s assets as collateral for debts; To do this prior written consent has to be acquired from the shareholders of the private Company or the action must be taken in conjunction with the other shareholders of the Private Company. While Mr. Wayan Daniel SUWENDA, Mr. Made Rory SUWENDA (p. 6 of doc.) and Miss Kasey SUWENDA are only responsible to the extent of their input in the Company.
- II. Other stipulations which are not changed in this deed will continue to be valid for the Company.”

Principles applicable to summary judgment application

[26] Rule 292 of the *Uniform Civil Procedure Rules* provides:

“292 Summary judgment for plaintiff

- (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
- (2) If the court is satisfied that –
 - (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff’s claim; and

- (b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.”

- [27] In *Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227 at [17] Williams JA, with whom the other members of the Court of Appeal agreed, said:

“Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial.”

Termination of the 2004 Licence Agreement

- [28] The plaintiffs' case is that up until his death Mr Suwenda Snr was the active partner in the CV and that he controlled its management. They contend –

- (a) that there were two deemed assignments which triggered clause 25.1(e) – by the Deed of Notary made on 28 February 2005 and by the death of Mr Suwenda Snr on 6 October 2005;
- (b) that there was a change of control triggering clause 25.1(g) on the death of Mr Suwenda Snr: he necessarily ceased to have exclusive control of management and Mrs Suwenda took control, as subsequently recorded in the Deed of Notary of 28 March 2007; and
- (c) that in any event by the Deed of Acknowledgement the parties agreed to terminate the 2004 Licence with effect from 21 October 2005.

- [29] Counsel for the defendants submitted that clause 17.3 of the 2004 Licence Agreement is directed at substance rather than form. He submitted that it is concerned with a change of control of at least a 40 percent beneficial interest in the partnership or a change of control of 40 percent of the votes able to be cast at a meeting of partners. He submitted that it is concerned with a change in “effective control”. Relying on the contents of Mrs Suwenda's affidavit sworn on 12 February 2010, he submitted that she had been in effective control of the business before her husband's death, and that there had been no change in consequence of his death. He then submitted that whether there was a change in beneficial control turns on Indonesian law.

- [30] There is no evidence that Indonesian law recognises beneficial as distinct from legal interests. Foreign law is a matter for evidence, and the defendants read affidavits by Professor Hikmahanto Juwana, a professor of contract law, company law and international law in the Faculty of Law at the University of Indonesia in Jakarta. According to Professor Juwana, under Indonesian law, in principle, foreign citizens or foreign entities may not own shares in Indonesian business organisations including CV's. There are certain exceptions in the case of limited liability companies, but they have no relevance to the present problem. A foreign citizen or a foreign entity may not own shares in a CV.

[31] When the 2004 Licence Agreement was made on 24 June 2004 the partners were Mr Suwenda Snr, an active partner with a 50 percent interest, and Daniel Suwenda (the third defendant), a passive partner with a 50 percent interest, pursuant to the Deed of Notary of 28 April 2003. Although Mrs Suwenda had become an Indonesian citizen a month before the 2004 Licence Agreement was made, there was no change in the membership of the CV until 28 February 2005. Professor Juwana has considered the Deeds of Notary. He observed that those made in 2005 and 2007 bear no notation as to registration, but he did not say that registration was necessary for them to come into effect. He said in an affidavit affirmed on 22 January 2010:

“14. Based on my examination of the Deeds of Notary referred in paragraph 5 above, I say that:

- i. the written constitution of CV Bali Balance is that contained in the Deed of Notary dated 24 November 1983 as amended by the later Deeds of Notary.
- ii. by the 1983 Deed Wayan Suwenda was the active partner and Nyoman Kamiana was the passive partner with each partner having a 50% share.
- iii. by the 2003 Deed, Nyoman Kamiana ceased to be a passive partner and Wayan Daniel Suwenda ('Daniel') became a passive partner with a 50% share.
- iv. by the 2005 Deed Daniel Suwenda ceased to be a passive partner and Suzi Suwenda became a passive partner with a 50% share.
- v. by the 2007 Deed, Suzi Suwenda was appointed the active partner holding a 50% share and each of Wayan Suwenda's heirs being Daniel Suwenda, Rory Suwenda and Kasey Suwenda became passive partners with each holding a 16.66% share.

15. On the death of Wayan Suwenda on 6 October 2005 his heirs became entitled to his 50% share in CV Bali Balance but it ceased to have an active partner until such time as an appointment was made under article 9 of the Constitution contained in the 1983 Deed however Suzi Suwenda remained a passive partner.”

[32] So there is evidence (led by the defendants) that under Indonesian law there were changes in more than 40 percent of the interests in the CV in February 2005 and again in October 2005 when Mr Suwenda Snr died.

[33] In my view, then, there is evidence of two deemed assignments within the meaning of s 17.3 of the 2004 Licence Agreement. Those deemed assignments were triggers for termination pursuant to cl 25 of that Agreement.

- [34] Under cl 25.1(g) the first plaintiff's right to terminate would be triggered if "control of CVBB [was] in any manner transferred so that [its] management [was] effectively changed." Counsel for the plaintiffs submitted:
- (a) that pursuant to the Deeds of Notary Mr Suwenda Snr as the active partner had management powers;
 - (b) that while Mrs Suwenda may have performed management functions, legally she could have done so only with the authority of her husband;
 - (c) that there was an effective change in the management of CVBB in consequence of the death of Mr Suwenda Snr;
 - (d) that under Article 9 of the Deed of Notary of 28 November 1983, upon the death of the managing partner, the remaining partners had to appoint a new managing partner;
 - (e) that Mrs Suwenda, the only remaining partner, by her conduct, appointed herself as the new managing partner.
- [35] This submission should be contrasted with Professor Juwana's opinion that Mrs Suwenda remained a passive partner and that there was no active partner until an appointment was made under article 9 of the 1983 Deed of Notary – presumably by the Deed of Notary executed on 28 March 2007. Professor Juwana's opinion is the only evidence of when Mrs Suwenda became the active partner (or "managing shareholder") within the meaning of the Deeds of Notary.
- [36] This evidence does not answer the question of what is an effective change in management within the meaning of cl 25.1(g) of the 2004 Licence Agreement, which is governed by Queensland law. In my view there is a triable issue as to whether cl 25.1(g) properly construed refers to a legal change in management or a functional change in management.
- [37] In their amended defences, the defendants admitted that Mr Suwenda Snr continued to manage the business until his death in October 2005. That is, of course, at odds with the contents of the affidavit of Mrs Suwenda sworn on 12 February 2010 that she managed the business before and after her husband's death. For the purposes of this application, the plaintiffs did not rely on that admission in the defences.
- [38] On 27 October 2005 Mrs Suwenda executed the Deed of Acknowledgement on behalf of CVBB. It contained an acknowledgement that the 2004 Licence Agreement was terminated with effect from 21 October 2005 and a new limited licence.
- [39] Despite the defendants' pleading in their amended defences that as at 6 October 2005, under Indonesian law, Mrs Suwenda had power to attend to the day to day affairs of the CV but no authority or power to execute binding contracts (other than for day to day matters of management) on its behalf, it was accepted at the hearing that she had authority to sign this Deed of Acknowledgement (transcript 1-52).
- [40] It was faintly argued by Counsel for the defendants (transcript 1-47) that if she had been acting on a belief that the 2004 Licence Agreement had already been validly terminated, the agreement to extend it was one brought about by a mutual mistake of law [sic]. However, the evidence does not support this. In the Deed of Acknowledgement CVBB and the first plaintiff recited that the 2004 Licence Agreement had been terminated under cl 17.2 [sic] and cl 25.1(e) – that is, for

deemed assignment. The reference to cl 17.2 (which deals with corporations) rather than 17.3 (which deals with partnerships) is not of consequence in this context. What is important is that the parties believed there had been a change in the interests in the CV, and in that they were correct. They were not labouring under any mutual mistake.

- [41] I am satisfied that the defendants have no real prospect of defending the plaintiffs' claim that the 2004 Licence Agreement was terminated pursuant to the Deed of Acknowledgement with effect from 21 October 2005. Should I be wrong in that, they would nevertheless have no real prospect of succeeding at trial on the issue of termination for deemed assignment within the meaning of cl 25.1(e) of the 2004 Licence Agreement, the right to terminate having been duly exercised on 25 October 2005.
- [42] There is no need for a trial on the issue of termination of the 2004 Licence Agreement. The plaintiffs are entitled to the first declaration they seek, which by its terms accommodates either scenario.

Expiration of limited licence

- [43] Clause 3 of the Deed of Acknowledgement provided:
- “3. Use of Trade Marks after Effective Date
- 3.1 Use of Trade Marks
The Licensor grants the Licensee a limited licence to continue to use the Trade Marks in connection with the Goods in the Territory on the same terms as the now terminated Licence Agreement on a monthly basis for a period of up to six months from the Effective Date.
- 3.2 Extension of period
The Licensor may, in its absolute discretion, extend the period of grant of the limited licence to the Licensee under clause 3.1 for periods of two months from the expiry of the previous period by 30 days' written notice to the Licensee. Any such extension will be on the same terms as the now Terminated Licence Agreement.
- 3.3 Termination or Expiration of Further Term
The Licensor may, in its absolute discretion, terminate the limited licence granted to the Licensee under clauses 3.1 or 3.2 at any time on written notice of not less than 30 days.”
- [44] By letter dated 9 January 2006 to the CEO of the second plaintiff, Mrs Suwenda provided a signed copy of the Deed of Acknowledgement. She said it was her intention to cooperate fully and to comply with every provision of the Deed of Acknowledgement, and that CVBB was already making preparations for compliance with it, including a wind down and transfer of the Billabong Indonesian Business.

[45] By letter dated 6 March 2006 to Mrs Suwenda, the second plaintiff on behalf of the first plaintiff offered to vary the terms of the limited licence by extending its operation to 30 June 2006, on condition that CVBB agree to comply with terms in the letter and the limited licence, including the payment of royalties for sales of Billabong products up to 30 June 2006, immediately ceasing to use trademarks, or marketing materials, and all confidential information on expiry of the licence, and:

“on the New End Date, deliver up to us (at a location we will nominate) all your unsold existing stock of our products and associated marketing materials. We will pay you their fair market value, taking into account their condition, but no more than their landed cost. We will set off any money you owe us against the cost of this inventory.”

[46] The defendants continued to distribute Billabong Products in accordance with the terms of the limited licence as extended by this letter. In their amended defences the defendants admitted that the licence had expired on 30 June 2006, but denied that CVBB was a party to it. This was apparently on the basis of the pleaded assertion that Mrs Suwenda was not empowered to execute binding contracts, other than for day to day matters of management. But, of course, at the hearing they no longer contended that she lacked authority to bind the CV.

[47] Accordingly, the defendants have no real prospects of defending the plaintiffs’ claim for the second declaration, and there is no need for a trial about it.

Marketing materials

[48] By cl 25.4 of the 2004 Licence Agreement CVBB was obliged:

“immediately after termination [to] deliver to [the first plaintiff] all marketing materials and any other marketing materials that [the first plaintiff] provided to [it] and all Confidential Information.”

[49] The first plaintiff’s immediate right to possession of marketing materials was expressly preserved in the Deed of Acknowledgement (cl 2.2(b)(5)) and the letter of 6 March 2006. The letter provided:

“In accordance with the terms of the Licence governing what is to occur on termination you must:

...

2. from the New End Date, immediately cease using our trade marks (including our names), all marketing materials and all our confidential information;

...

4. on the New End Date, deliver up to us (at a location we will nominate) all your unsold existing stock of our products and associated marketing materials. We will pay you their fair market value, taking into account their condition, but no more than their landed cost. We will set off any money you owe us against the cost of this inventory.”

- [50] Between 21 June 2006 and 2 March 2007 there was a course of correspondence between the plaintiffs and the defendants about payment for the marketing materials, in particular “light boxes”. A light box is apparently a wooden frame with a light behind it: promotional material can be inserted into the light box. Counsel for the defendants described the light boxes as devices for displaying marketing material rather than marketing materials. Whether they are “marketing materials” depends upon the proper construction of the relevant agreement between the parties.
- [51] The plaintiffs allege that in or about September 2006 CVBB invoiced the first plaintiff for an amount equivalent to AUD\$156,815.00 for marketing materials that had been or alternatively were to be delivered up under the terms of the limited licence. As I understand the evidence and the submissions, only a small part of that amount was attributable to the light boxes. There is an ongoing dispute about whether the plaintiffs have paid for them as agreed. They contend that they have done so by way of set off, and claim a right to possession of the light boxes or to use of them if they are fixtures on someone else’s property.
- [52] There are clearly disputes about the nature of the light boxes and whether the defendants agreed to sell them. At any rate, they appear to be chattels located in Indonesia. As Counsel for the defendants submitted, they seem to be foreign movables. The agreement about them rests at least in part in correspondence which passed between Australia and Indonesia by various forms of communication. The precise terms of the agreement are in issue as is the question of whether the proper law of that agreement was Australian law or Indonesian law.
- [53] There appear to be quite complex questions of law and fact. The amount of money at issue is comparatively small. But be that as it may, I cannot conclude that the defendants do not have any reasonable prospect of succeeding on this aspect of the claim.

Conclusion

- [54] There will be orders in terms of paragraphs 1 and 2 of the draft order recited in paragraph 3 of these reasons. I will hear the parties on costs.