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IN THE CAYMAN ISLANDS LAW REPORTS ONLY

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD ___

IN THE MATTER OF THE TRUSTS DEED DATED 21ST NOVEMBER 1985
AND MADE BY A.B. Snr.
AND
IN THE MATTER OF THE TRUST LAW (2001 REVISION)

BETWEEN	1.	A.B. Jnr.	
	2.	Mme B.	PLAINTIFFS
AND	1.	M.B.	
	2.	Ab.B.	
	3.	J.de.R.	
	4.	K.B.	
	5.	J.R.	DEFENDANTS

IN CAMERA
THE 23rd April 2012 to 23rd June 2012 and 13th August 2012
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. Alan Boyle QC and Mr. John Machell QC instructed by Mrs. Linda DaCosta of Conyers Dill and Pearman and Mr. William Jeremy Alexander Gordon and Ms. Charlotte Fraser of Farrer & Co. London; for the Plaintiffs.

Mr. Christopher Nugee QC instructed by Ms. Lindsay Luttermann of Walkers and Ms. Ziva Robertson of Withers London for the 1st-3rd and 5th Defendants

Mr. Christopher Tidmarsh QC instructed by Ms. Lindsay Luttermann of Walkers and Ms. Ziva Robertson of Withers London for the 4th Defendant

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JUDGMENT

Introduction

1. The events and circumstances of this case span more than two decades. They involve a dispute over trust beneficial entitlements which have beset the family of a wealthy businessman – A.B. Snr. (or "the Settlor") – since his death on 28th October 1991. The dispute has, in different ways, engaged the courts of France and Switzerland, as well as this Court, since 1992. The principal dramatis personae have been Mme B. ("Mme B.") and her son A.B. Jnr. of the one part and of the other, the Trustees of the A.B. Trust ("the Trustees"); the trust upon which A.B. Snr. settled the bulk of his wealth before he died.

2. It was thought that a complete settlement of the dispute had been attained in 1999 by an agreement and arrangement by which Mme B. and A.B. Jnr. had their entitlements appointed out of the A.B. Trust to a trust established in Guernsey for their exclusive benefit (with possible remainder interests in their descendants).

3. In the present action Mme B. and A.B. Jnr. (together "the Plaintiffs") allege that their appointment out in 1999 was brought about by the Trustees acting in breach of fiduciary duties owed to them. These breaches, they allege, resulted in a significant diminution in the value ascribed to their shares for the purposes of their departure from the A.B. Trust.

4. The enquiry undertaken at this trial over some nine weeks, and so the inquiry to be undertaken in this judgment, necessarily goes back several years before the appointment out in 1999 and up to 2005, when this action was eventually filed. Indeed, the inquiry must extend even later than 2005, for the purpose of enquiring

into allegations of laches (in this sense "delay") on the part of Mme B. as a Plaintiff in the prosecution of this action.

This judgment is therefore necessarily discursive and detailed. An index is provided at the end.

FACTUAL BACKGROUND

5. The A.B. Trust ("The Trust") was settled in 1985 as a Cayman Islands trust which it has remained ever since. It is therefore governed by the laws of the Cayman Islands. Mme B. is the third wife of the Settlor; and A.B. Jnr. is the son of the Settlor and Mme B. He was added as a beneficiary of the Trust on 27th November, 1986 following his birth on 6th November 1986. The Settlor's mother, the Settlor's sisters, one of the Settlor's other wives (Mme R.B.B.) and his other children and some of their issue are, or were, also beneficiaries of the Trust. The beneficial entitlements as they were at the relevant times are described below.

6. After World War II, the Settlor had built up a substantial business empire, which by the time of the creation of the Trust in 1985, was held through a series of companies owned by the principal holding company S. Group based in Geneva, Switzerland ("S. Group"). Two of the most important undertakings were:

   (i) The well known S.T. Racing team, which was owned by S.T. Ltd. (based in Y Country) and in which the Trust, through S. Group, owned a 60% interest; and

   (ii) A large shareholding in S.H. Ltd.; a luxury watchmaker.

7. Prior to the sale of one-half of its 60% interest to MV Inc. in January 2000, the shares in S.T. Ltd. were owned by S. Group and by Mr. N.N. who owned the other 40%.

That sale to MV Inc. of one-half of the Trust's holdings in S.T. Ltd. (held through S. Group) is central to the present dispute, as will be explained.

8. At the time of the creation of the Trust, the Trust assets comprised:

   (i) the shares in S. Group;

   (ii) a loan of $250 million granted by the Settlor to S. Group; and

   (iii) a portfolio of securities with an estimated value of $11,785,030.65.

9. On 8th April 1987, the Settlor executed a Declaration of Trust No. 2 by which he declared that he held further assets on behalf of the Trust:

   (i) the shares in S.A.C. SA ("S. Art Ltd");

   (ii) a loan of $28,660,552.30 granted by the Settlor to S. Art Ltd. and

   (iii) a loan of FF17,500,000 granted by the Settlor to S. Art. Ltd.

10. An important aspect of the dispute between Mme B. and the Trustees arising after the Settlor's death, concerned a collection of art and furniture that the Settlor and Mme B. had put together ("the Art Collection"). This dispute was settled by an agreement dated 29th September 1997 in which Mme B. acknowledged that the Art Collection belonged to S. Art Ltd. The circumstances which attended this dispute have now, however, again come to require the attention of this Court in the context of the forfeiture provisions of the Trust and by which it is claimed by the 4th Defendant K.B., that Mme B. had forfeited her interests under the Trust. This is a claim now raised in his representative capacity on behalf of all the remaining beneficiaries in the Trust.

11. The Trust is unusual in its terms. It is not an ordinary discretionary trust. The assets of the Trust were divided into Shares, and specific numbers of Shares were allocated

to named beneficiaries. Section A, Article V, A of the Trust Deed which sets out the share entitlement as well as other key provisions, will be considered below.

12. The Shares were altered following the death of the Settlor's mother and again following the buy-out of the Shares of the Settlor's sisters.

13. It is common ground that following these adjustments:

(i) Mme B. was entitled to 78 out of a total of 1222 Shares, or approximately 6.38% of the total; and

(ii) A.B. Jnr. was entitled to 153.33 Shares out of the total of 1222 Shares, or approximately 12.55% of the total.

14. The Plaintiffs' combined entitlement thus became 18.93% (more precisely 18.927%) of the total prior to their exit from the Trust in June/July 1999, the circumstances of which are said to give rise to the allegations of breaches of duties by the Trustees.

15. It is also common ground that, in the events which happened, the first, second and fourth Defendants were (prior to the exit of the Plaintiffs from the Trust) and still remain, entitled to Shares as follows:

(i) M.B. - 153.33 Shares out of a total of 1222 Shares, 12.55% of the total;

(ii) Ab.B - 153.33 Shares out of a total of 1222 Shares, 12.55% of the total;

(iii) K.B. - 153.33 Shares out of a total of 1222 Shares, 12.55% of the total.

16. A fifth son of the Settlor, S.B. was and remains also entitled to 153.33 Shares or 12.55%. The Settlor's three daughters N, S and L each remain entitled to 6.27%, and

Mme R.B.B. remains entitled to 6.38%. The Shares of the sons, those of the daughters, surviving wives and smaller percentages appointed to certain grandchildren, represent 100% of the Shares in the Trust.

17. At the relevant times, M.B. and Ab.B were two of the three Trustees, M.B. having become successor trustee (one of three named in the Trust Deed) upon the death of his father the Settlor, in 1991.

18. The discretions vested in the Trustees related to (a) the distribution of income to beneficiaries (Section A, Article V, B2), and (b) the distribution of capital to beneficiaries (Section A, Article V, B3 and B4).

19. Of some significance to the present dispute, it is to be noted that:

    (i) on the death of a named beneficiary, the net income and capital attributable to the Share of the deceased beneficiary goes *not* to the other named beneficiaries, but to the descendants of the deceased beneficiary (Section A, Article V, B5);

    (ii) to the extent that income and capital is not distributed to a beneficiary of a Share during the trust period, the beneficiary of the Share, if still alive, becomes absolutely entitled to a pro rata share of the Trust assets (capital and undistributed income) at the end of the trust period (Section A, Article V, C) or if deceased, the entitlement to capital and undistributed income goes to the heirs of the Settlor's free estate; and

    (iii) therefore, the Trust is not simply a life interest settlement in respect of any beneficiary who has an expectation of surviving to the end of the Trust period which expires in 2065.

20. Some of the provisions of the Trust were not well drafted and after doubts had arisen, the Trustees issued proceedings on 30 November 1992 in this Court ("the 1992 Proceedings") to determine various issues. Underlaying the Trustees' intention was also the hope that the disputes that had arisen would be resolved by the Trustees being able to provide for the exit of the Plaintiffs from the Trust. A compromise of the 1992 Proceedings was arrived at (as approved by this Court on behalf of then minor A.B. Jnr. and all others under disability). The compromise provided for the replacement of the provisions relating to the distribution of capital to beneficiaries in Section A, Article V, B3 and B4 with new provisions. These became of importance in this trial and were set out in the Schedule to the Order of 18 May 1993 ("the 1993 Order") which provides in relevant part:

> ***"In lieu of the powers in paragraph B3 and B4 the trustees shall have power exercisable at their discretion at any time or times during the lifetime of any of the beneficiaries (as defined in paragraph B) and before the perpetuity date (as hereinafter defined) to pay or to transfer to such Beneficiary or to apply in any manner for the benefit of such Beneficiary the whole or any part or parts of the principal of the Shares of such Beneficiary in the trust property. Provided always that the foregoing power shall only be exercised subject to the following conditions:***
>
> ***(a) In the case of a Beneficiary of full legal capacity <u>with the written consent of that Beneficiary</u> such consent not to be unreasonably withheld.***

(b) *After appropriate valuation of the trust property and Shares of the Beneficiary who (if of full legal capacity) shall be given written particulars of such valuation by the trustees provided that (subject to an application to the Court) the whole or any part or parts of such particulars as may be indicated by the trustees to be confidential shall not be disclosed to anybody but the Beneficiary's legal and valuation advisers and copies of the same shall not be made except such as the Beneficiary may be properly advised.*

(c) *In the case of a relevant advance [an advancement to A.B. Jnr. of a value in excess of US$2,500,000 while he is under the age of 18 years] with the prior approval of the Court (such approval being in proceedings under section 45 of the Trust Law (Revised) or in any other proceedings whereby the Court determines the trustees might properly make the relevant advance), prior written notice of the application for approval to be given to [Mme B.] if still alive."* (Emphasis added.)

21. It will be noted that the 1993 Order thus provided a power to the Trustees to make advanced payment of capital and the exercise of the power of advancement was subject to three conditions:

(i) In the case of a beneficiary of full legal capacity, the written consent of the beneficiary was required, such consent not to be unreasonably withheld.

(ii) There had to be an *"appropriate valuation* of the trust property and Shares of the Beneficiary". The Beneficiary was to be given written particulars of such valuation.

(iii) In the case of advancement to A.B. Jnr. in excess of $2.5m at a time when he was under the age of 18 years, the prior approval of the Court was required, and Mme B., if still alive, was to be given notice of such application to the Court.

22. As generally described above, the Trust assets consisted of the business empire built up by the Settlor during his lifetime. After his death, the mantle for the overall running of the Trust's business fell on M.B., his eldest son by his first marriage. M.B., in addition to his trusteeship, also took on the role of Chairman of the principal holding company wholly owned by the Trust, S. Group. S. Group had many subsidiaries. Three of those subsidiaries – S.T. Ltd., S. France Ltd. and S.H. Ltd. as well as S. Art Ltd. (the latter directly owned by the Trustees on behalf of the Trust) – are of particular importance to the present dispute.

23. During his lifetime, the Settlor was the sole trustee of the Trust, and after his death the trusteeship passed to the three "initial successor trustees" defined in Section B, Article II C of the Trust Deed: M.B., J.de.R. and Z.C. Z.C. died on 4 August 1997 and was replaced as Trustee by Ab.B, the second son of the Settlor by his first marriage, again as provided in Section B, Article II C of the Trust Deed. K.B., the Settlor's third son, was also named by the Settlor as a successor trustee but he has not yet been called upon to assume that role.

24. Shortly after the death of the Settlor on 28 October 1991, M.B. and Mme B. discussed the possibility of her and A.B. Jnr. withdrawing from the Trust in consideration of a financial settlement. From an early date following the death of the Settlor, the Trustees considered that such an arrangement would be desirable if it could be structured on a basis which was fair to all parties involved. Regrettable distrust and disharmony had crept into the relationship as between Mme B. on the one part and the rest of the Settlor's family on the other, with M.B. as the eldest son being, in particular, regarded by her as her main antagonist. More about these developments will, unfortunately, have to be noted below.

25. Those earlier discussions led to a proposal for a Protocole d'Accord ("the Protocole") in July 1994 for settlement of the disputes.

26. The Protocole was eventually, however, not carried into effect but abandoned after the Trustees indicated that transactions with S.H. Ltd. necessitated a re-evaluation of Trust assets. This too will be further referenced below.

27. At various times and in various ways between 1991 and 1998, the exit of Mme B. and A.B. Jnr. from the Trust was discussed. Of special importance to the present action, are events which happened in the period between an Order of this Court made on 11 December 1998 ("the 1998 Order") and a further Order made on 30 June 1999 ("the 1999 Order"). It was during that period that the terms for the exit of both Mme B. and A.B. Jnr. were negotiated and agreed ("the 1999 Agreement"). Those terms were carried into effect and approved by this Court by the 1999 Order. These negotiations will be called "the exit negotiations".

28. The 1999 Agreement and 1999 Order provided for the Trustees to exercise the power of advancement earlier given to them by the 1993 Order and for the Trustees to transfer assets representing the value of Mme B. and A.B. Jnr.'s Shares to the trustees of a new Guernsey Trust settled for the benefit of them and their descendants ("the Guernsey Trust").

29. As already indicated, the main asset of the Trust was S. Group. There therefore had to be, in keeping with the 1993 Order (and the Plaintiffs say in keeping with the Trustees' duty) an "appropriate valuation" of S. Group. This would in turn mean that there had to be an appropriate valuation of the various businesses owned by S. Group, followed by an appropriate valuation of the Plaintiffs' Shares in the Trust.

30. An important asset of S. Group for these purposes was, of course, its 60% shareholding in S.T. Ltd. S. Group had owned this 60% stake, along with N.N. as the other 40% shareholder, since 1984.

31. In the course of the exit negotiations, it became necessary to obtain the directions of this Court and the 1998 Order was made. Pursuant to the 1998 Order, valuers respectively appointed by the Trustees (Deloitte & Touche, Geneva) and by A.B. Jnr.'s Guardian P.M. (Mazars & Guérard, Paris); prepared a Joint Report on the value of S. Group and its subsidiaries dated 5 February 1999 ("the Joint Report"). Pursuant to the 1998 Order Deloitte & Touche, Geneva ("D&T") and Mazars & Guérard, Paris ("M & G") had also been instructed to use their best endeavours to agree the terms of a letter verifying that M & G had been provided with the complete and reliable information required for the valuation exercise by the Trustees. Both

valuers were required to determine the "Indicative Fair Value" of S. Group as at December 1997.

32. The valuers were, however, unable to agree on the value of S. Group's 60% shareholding in S.T. Ltd. The value of that 60% stake was therefore one of the two main causes of contention between the parties in the exit negotiations.

33. D & T valued the 60% stake at $160 million and M & G valued it at 295 - $330 million.

34. The other main cause of contention in the exit negotiations was whether it was appropriate in valuing the Plaintiffs' Shares, to discount the value of the Trust assets to take account of the fact that the Guernsey Trust was going to receive liquid assets in circumstances where a substantial part of the Trust assets was illiquid and therefore to address any disadvantage to the remaining beneficiaries. The Trustees contended that a 25% discount for this factor (which included - at 5% - the notional costs of realizing assets) was appropriate. As events transpired, the amount of this discount expressed as a percentage of the overall value of the Trust assets, became in effect 17.33%. The nature of the discount, although described in terms of "illiquidity", also became a topic of argument in this trial.

35. The exit negotiations culminated in the 1999 Order made on 30 June 1999 whereby this Court approved terms that had been conditionally agreed between the Trustees, Mme B. and A.B. Jnr.'s Guardian. Pursuant to the 1999 Agreement and 1999 Order, assets supposedly representing the value of Mme B.'s and A.B. Jnr.'s Shares were transferred by the Trustees to the trustees of the Guernsey Trust.

36. Upon the particular insistence of Mme B. that the assets to be transferred should include the entirety of the Art Collection owned by the Trust (through S. Art Ltd.), the entire collection was transferred at an agreed value of USD92.60 million. It is acknowledged by all sides in this trial, that the value of all assets transferred to the Guernsey Trust was USD173.34 million. The difference between the value of USD92.60 ascribed to the Art Collection and the total sum of USD173.34 – USD80.74 million – having been paid in cash or the equivalent.

The Plaintiffs' case:

MV Inc. negotiations and alleged breach of trust

37. Contemporaneously with the exit negotiations between the Trustees and Mme B. and the Guardian, S. Group and N.N. were negotiating the sale, by S. Group, of half of its interest in S.T. Ltd. (i.e. 30%), and, by N.N., of a quarter of his interest (i.e. 10%), to MV Inc. (hereinafter "the MV Inc. negotiations"). The MV Inc. negotiations were, however, not disclosed to Mme B., the Guardian and their advisers. They were also not disclosed to this Court at the time of the 1999 Order in June 1999 or at any time before. This failure to disclose and its alleged consequences, is the basis of the Plaintiffs' claim for breach of trust in this action.

38. The result of these negotiations was that MV Inc. came to own 40% of S.T. Ltd., with S. Group and N.N. each owning 30%. In other words, S. Group sold half its 60% stake in S.T. Ltd. (30%) to MV Inc.., and retained the other 30%, while N.N. sold a quarter of his 40% stake (10%) and retained the other 30%.

39. The shareholdings thus went from 60/40 (S. Group/N.N.) to 40/30/30 (MV Inc../S. Group/N.N.).

40. The commercial terms agreed between S. Group, N.N. and MV Inc. were contained in a fully negotiated but non-binding Memorandum of Understanding which was signed on behalf of all three parties on 10 May 1999 ("the MOU"). By the MOU, MV Inc. agreed to pay £210 million for 40% of the shares in S.T. Ltd. This was then equivalent to USD350 million, with S. Group's pro rata share indicated at £157.5 or USD252.5 million.

41. For the purposes of the negotiations with MV Inc.., S. Group and N.N. employed Deloitte & Touche Y (in the person of that firm's senior valuer Mr. V.M.) to prepare a valuation of S.T. Ltd., and to present that valuation to MV Inc. ("the Presentation"). This took place on 17 February 1999 with N.N., who was at all material times (and remains) the CEO in daily control and the driving force behind S.T. Ltd., leading the negotiations on its behalf.

42. In the Presentation, V.M. valued the 40% of S.T. Ltd. which MV Inc. was proposing to acquire. The value which he advised for this 40% stake was £245.6 million, which was equivalent to USD409.3 million (for 40%). On a pro rata basis, this was equivalent to a value for S. Group's 60% of USD614 million. It is one of the issues to be resolved now, whether this valuation was presented to or accepted by MV Inc. as being the open market value (or "indicative fair value") of a majority (or controlling) interest or only a minority interest in S.T. Ltd.

43. The valuation (pro rata) of a 60% stake which V.M. gave in the Presentation (USD614 million) was 3.8 times greater than the value which D & T had given for

the value of the same 60% stake for the purposes of the Joint Report (USD160 million). It was also 1.86 times greater than the value which M & G had put on that stake for the purposes of the Joint Report (USD330 million).

44. D & T (a Swiss firm) and Deloitte & Touche Y are separate but affiliated firms. Mme Michele Costafrolaz was the representative of D & T who was engaged for the valuation of S. Group for the purposes of the exit negotiations. As S.T. Ltd. was (and remains) a Y Country based entity, Deloitte and Touche Y were engaged to value its assets. Mme Costafrolaz, as she explained in her evidence, was not directly involved in the valuation of S.T. Ltd. For that she relied upon the input of Mr. Romek Matyszczyk, a Deloitte & Touche Y employee who had been assigned to the S.T. Ltd engagement. The financial projections which he provided for S.T. Ltd for the years 1998-2000 came to inform Mme Costafrolaz's and M. Sardet's valuation of S.T. Ltd. Her overall valuation of S. Group was USD850-900 million.

45. One of the concerns of the Plaintiffs in this trial, is whether the Trustees (through M.B. in particular) were aware of but failed to disclose to them or to M & G, the much higher valuation of S.T. Ltd. given by V.M. in the Presentation.

46. Mme Costafrolaz's valuation of USD850-900 million came to be compared to an overall valuation of USD1000-1100 million provided by M Sardet of M & G; the difference of USD200 million in their Joint Report, mainly being reflective of their different values placed upon S.T. Ltd.

47. It is of importance to the present dispute to emphasise that both valuers had been instructed to arrive at what was described as the "Indicative Fair Value" of S. Group, as that term was specifically defined in their letters of engagement and as adopted by

them in their Joint Report. The import of this will have to be closely examined in this judgment.

48. While the discrepancy in valuations between Mme Costafrolaz and M. Sardet was large, as the Trustees came (for reasons to be explained below) to adopt M. Sardet's higher value of USD1100 million for the purposes of the exit negotiations, that discrepancy itself became of less significance in the trial.

49. What remained of central importance to the Plaintiffs' claim for a breach of trust by the Trustees, is the fact that the Trustees never disclosed to the Plaintiffs (or their legal advisers at the time or in A.B. Jnr.'s case, his Guardian at the time) the real reason why they chose to adopt M. Sardet's higher valuation of USD1100 million, as including his valuation of USD330 million for S. Group's 60% interest in S.T. Ltd. The real reason, as it has come to be explained in particular by Mr. M.B. and Mr. John McDonnell QC in this trial (the latter then the Trustees' leading lawyer for the exit negotiations); was that M. Sardet's higher valuation was intended to allow for any higher overall value of the Trust assets which might have been realised as the result of the MV Inc. purchase of one-half of S. Group's shares in S.T. Ltd. This was at the then intended MOU price (circa 23 April 1999) of £157.5 million (75% of the MOU price of £210 million) or USD252.2 million at the rates of exchange then prevailing.

50. Neither the MV Inc. negotiations nor the Trustees' thinking and approach were ever disclosed to Mme B., the Guardian or their advisers. The Trustees explain that for the reason of the uncertainty and strict confidentiality of the MV Inc. negotiations and their lack of trust in Mme B. in particular, derived from past experience; they had

decided that the negotiations were not to be disclosed to her. Linked to the MV Inc. negotiations, was an advanced proposal for a joint venture development with MV Inc. of an expensive high performance sports car. Any leak of information about these sensitive matters would have been potentially destructive to the joint venture and equity participation of MV Inc. and so very harmful to S.T. Ltd. In this regard, they were advised by Mr. McDonnell QC in particular. Mr. McDonnell QC has confirmed in his evidence that he did advise the Trustees that they could proceed to conclude the exit negotiations without disclosure of the MV Inc. negotiations and so without disclosure of the price which eventually came to be agreed with MV Inc. for the 40% stake in S.T. Ltd. As Mr. McDonnell was himself unaware of V.M.'s presentation to MV Inc.., he however, gave no advice about its disclosure or non-disclosure to the Plaintiffs.

51. As explained by M.B., the Trustees' position then taken was that as the price could not have been disclosed without disclosure of the MV Inc. negotiations, the price itself could not have been disclosed. Moreover, as Mr. McDonnell also sought to explain (and as Mr. Christopher Glover – the Trustees' valuation expert also opined for the purposes of this trial); the MV Inc. negotiations were justifiably regarded as not being material to the exit negotiations because MV Inc. was a "special purchaser" and so the MV Inc. negotiations and the MOU price were irrelevant to the valuation exercise undertaken by M. Sardet and Mme Costafrolaz, aimed as their valuation was at the "Indicative Fair Value" of the Trust Assets, a valuation which by definition, was to exclude a price that a special purchaser like MV Inc. would pay.

52. The Plaintiffs invite the Court to reject this explanation and to hold that the MV Inc. negotiations were highly material to the exit negotiations and by failing to disclose them to the Plaintiffs, the Trustees acted in breach of their duty to the Plaintiffs as beneficiaries of the Trust.

53. These are the alleged breaches of duty – defined in terms both of a breach of the fair – dealing rule and in terms of a breach of the Trustees' separate duty to give full disclosure and to ensure (as required by the 1998 Order and general principles of fairness) that there was an "appropriate valuation" of the Trust assets and of the Plaintiffs' shares.

54. These alleged breaches are relied upon as the legal basis – and only legal basis – upon which the Plaintiffs would be entitled to their claim for equitable compensation of an amount which would represent the real value of their Shares, over and above the value that was actually ascribed to their Shares for the purposes of the exit negotiations and the appointment out to the Guernsey Trust.

55. Quite apart from the actual price paid by MV Inc. (£210 million), the Plaintiffs complain that the financial projections used by V.M. for the Presentation to MV Inc. on 17 February 1999 were highly material to a true valuation of S.T. Ltd. itself, as they reveal that the valuation exercise was one really premised, not on what a special purchaser would pay, but instead aimed at arriving at the indicative fair value (or open market value) of S.T. Ltd. Thus, the valuation in the Presentation of 17 February 1999 of S.T. Ltd. really shows what its indicative fair value was at the time and is a proper basis for assessing not only the value of the 30% sold to MV Inc.., but also the remaining 30% which, on that basis, should have been ascribed at least the

same value (that is: USD252.2 million or £157.5 million) for the purposes of the exit negotiations.

56. By failing to disclose the MV Inc. price as well as the valuation exercise undertaken for the MV Inc. negotiations, the Trustees therefore misled the Plaintiffs into accepting a value for their Shares (as a proportion of the value of S. Group) of much less than they were worth.

57. As already mentioned, a further important aspect involves the question of the illiquidity discount (first proposed at 25% but actually applied at 17.33%) when the value was finally ascribed to the Trust assets for the purposes of the Plaintiffs' exit from the Trust.

58. The Plaintiffs now say that in light of the MV Inc. sale, the Trust had greater liquidity available or soon to be available to it at the time of the exit negotiations than the Trustees revealed. Had the true position been disclosed, the illiquidity discount would not have been agreed and was in fact and in principle unjustified.

59. The true loss is therefore claimed to be higher than the shortfall in the value of their Shares (relative to the sale price of 30% of S.T. Ltd.) but is also to be calculated to recompense for the illiquidity discount as well.

60. It is alleged by the Plaintiffs that both Deloitte & Touche Y's valuation of S.T. Ltd. for the Joint Report (as provided to Mme Costafrolaz); and Deloitte & Touche Y's valuation of S.T. Ltd. for the Presentation, were carried out by V.M., in his capacity as a partner in the London firm.

61. The Trustees claim not to have had direct knowledge of whether this was so but rely upon evidence in this trial that suggests that the valuation exercise of S.T. Ltd. for the

purposes of Mme Costafrolaz's work was done by Romek Matyszczyk based on information provided directly to him by D.V.

62. D.V. was then the Assistant Director of Finance of S. Finances Ltd. (a subsidiary of S. Group) and reported to the Director of Finance, Mr. J.R.

63. The evidence suggests that D.V. provided the profit forecasts for years 1998-2000 to Mme Costafrolaz (and through her to M. Sardet) while B.I. (the financial director of S.T. Ltd.) provided forecasts for years 1999-2003 to V.M. and it was the latter set of projections that informed V.M.'s valuation for the Presentation on 17th February 1999 to MV Inc.

64. Even for the years they covered in common (1999-2000), the forecasts provided to V.M. significantly exceeded those provided to M. Sardet; and the latter years' provided to V.M. for 2001-2003 were not provided to M. Sardet at all; although Mme Costafrolaz, in her evidence, testified to having been in ignorance of them as well.

65. Because he was closely in touch with N.N. who negotiated with MV Inc. on behalf of S.T. Ltd., the Plaintiffs allege that it is overwhelmingly likely that M.B. knew:

(i) that Deloitte & Touche Y (per V.M.) had been instructed to advise on the value of S.T. Ltd. for the purposes of the MV Inc. negotiations;

(ii) that Deloitte & Touche Y had prepared a valuation of S.T. Ltd. for presentation to MV Inc..; and

(iii) that they valued the 40% stake to be sold to MV Inc. on a minority basis at £245.6m.

66. The Plaintiffs point to the fact that M.B.'s own evidence in chief about his knowledge of the MV Inc. negotiations is as follows (his witness statement para 144):

> *"N.N. took the lead in all negotiations with MV Inc. and he generally kept me informed of developments. I do not recall any details of the price negotiations between N.N. and MV Inc.'s representatives, though I was informed by N.N. of those negotiations from time to time and I knew the "ball park figure". In any event, the final price was only agreed on 10 May 1999, when a non-binding Memorandum of Understanding was signed with MV Inc. and any deal with MV Inc. was, until the Summer of 1999, nothing more than a possibility ..."*
>
> [Emphasis added]

67. Nonetheless, M.B. went on to say that he did not know about the Presentation and *"have no recollection of ever being informed about this presentation at the time..."*. The Plaintiffs argue that M.B. may no longer be able to recall being told about it, but the making of the Presentation, and the value which it ascribed to the shares to be sold to MV Inc.., were crucial developments in the MV Inc. negotiations, and it is unreal to suppose that he did not know about them then.

68. Given his admission that N.N. "generally kept me informed of developments", that he was a director of S. Group, the company which was selling ¾ of the stake which was to be sold to MV Inc.., that he was a Trustee with a duty to know about the MV Inc. negotiations and the professional valuation advice given in relation to them, and that he was interested as a beneficiary with a Share of 12.55%; the right inference to draw, say the Plaintiffs, is that N.N. had told M.B. about the Presentation and the value which V.M. ascribed to the 40% stake. I am urged to find that M.B. has misled this Court and was involved in a deliberate scheme, in breach of his duties as Trustee, to mislead the Plaintiffs and their valuers about the true value of S. Group by the withholding of information that was relevant to the valuation exercise.

69. Following the Presentation on 17 February 1999, S. Group, N.N. and MV Inc. negotiated the terms of the Shareholders' Agreement that would govern the

relationship between them as 40/30/30 shareholders of S.T. Ltd. Those terms were attached to the MOU as Exhibit A and formed part of it.

70. The effect of those terms was to transform MV Inc.'s intended position from that of a mere minority shareholder (which appeared to have been the basis of V.M.'s valuation in the Presentation) into a shareholder sharing control of the business, a position which came to be called "co-control". This, say the Plaintiffs, meant that the 40% sold to MV Inc. was, in the final opinion of Deloitte & Touche Y, worth far more than the £245.6m referred to in the Presentation, when the additional rights of co-control to be conferred by the Shareholders' Agreement were taken into account.

71. On 7 May 1999, just before the MOU was signed, and at a time when M.B. had actually seen the MOU in draft, together with the Shareholders' Agreement; Deloitte & Touche Y (again acting by V.M.) advised S. Group and N.N. in a letter, that the rights which were now to be conferred on MV Inc. under the proposed MOU (40% plus the rights under the Shareholders' Agreement) were worth in the range £300 million to £325 million. This would mean that the 60% owned by S. Group, on a pro rata basis, would be worth in the range £450 million to £487.5 million. This was equivalent to a value of between USD750 million and USD812.5 million for the 60% stake owned by the Trust through S. Group.

72. The Defendants for their part reject these contentions. They say that the price of £210 million actually paid was itself a special purchaser's price, not indicative of any price that might then have been available on the open market and was indeed as V.M. is himself reported as having described it, "a very full price".

73. This report of V.M.'s view came later in February 2000, in a letter from another Deloitte & Touche Y partner, a Mr. K. P., and will be considered below.

74. Notwithstanding the advice in the 7th May 1999 letter, S. Group and N.N. chose to proceed with the transaction with MV Inc. at the price of £210m, and the MOU was signed. It is said by the Plaintiffs nonetheless to be a matter of concern, that no documents have been disclosed showing how, when, or by whom the decision of S. Group, and indeed the decision of the Trustees, to accept the negotiated terms was taken.

75. The advice in the letter of 7 May 1999 was addressed to S. Group and N.N., the 60/40 shareholders of S.T. Ltd. The Plaintiffs assert that it is therefore inconceivable that M.B. was not made aware of V.M.'s revised views on value. A commercial decision needed to be made about what price to agree in the MV Inc. negotiations on 10 May 1999, even though it was much less than the value which V.M. advised the shares were worth, and about the other important commercial terms contained in the MOU. That decision could only have been taken with M.B.'s approval and, indeed, the approval of his two co-trustees – Ab.B and J.de.R. at the time – after appropriate consideration of the professional valuation advice.

76. The Plaintiffs' case, as presented at this trial which is supported by their expert valuer, Mr Jean-Luc Guitera, is that:

(i) the right way now to value the 30% of S.T. Ltd. which was to be sold to MV Inc. is to take the actual sale price as the value, which was a price which was fully negotiated with MV Inc. at arm's length and therefore reflects the

Indicative Fair Value or Open Market Value. That value, as it transpired, was £157.5 million or $252.2 million; and

(ii) the value of the 30% retained by S. Group was worth the same amount, i.e. £157.5 million or $252.2 million.

77. This would mean that, at the dates the exit negotiations were being conducted, and were concluded, once the MV Inc. negotiations are taken into account, the true value of the 60% stake in S.T. Ltd. was neither the $160 million which Mme Costafrolaz of D & T advised for the purposes of the Joint Report, nor the $330 million which M. Sardet of M & G advised for that purpose, but $504.4 million (at the then rate of exchange adopted by Mr. Lowe QC and by Mr. McDonnell QC when advising the Trustees at the time; that is: £1 = USD1.60).

78. Thus, the price per share which was negotiated between S. Group and N.N. on the one hand and MV Inc. on the other, with the benefit of valuation advice from Deloitte & Touche Y, was greatly in excess of the value of the shares in S.T. Ltd. which either D & T or M & G had taken for the purposes of the Joint Report the higher of the latter having been, on the advice of Mr. McDonnell, QC, as explained further below; that which came to inform the price for the 1999 Agreement.

79. The MOU contemplated the sale of a 40% shareholding in S.T. Ltd. to MV Inc. under a timetable which would have involved the Share Purchase Agreement being signed on 2 June 1999; a period of due diligence between 3 June and 21 June 1999; approval by the Supervisory Board of MV Inc. on 7 July 1999, and completion of the MV Inc. transaction on 12 July 1999.

80. Under this timetable, it was contemplated that the transaction would have been completed only shortly after the hearing scheduled before this Court for 23-25 June 1999 (that at which the 1999 Order was made).

81. On 24 June 1999, at a meeting in X City, and after the terms of the Share Purchase Agreement had been fully negotiated, MV Inc. indicated that they wished to take an option to purchase the 40% stake, rather than proceed directly to an immediate and outright purchase as had been proposed in the MOU. The option was contained in an Investment Agreement which was signed by S. Group, N.N. and MV Inc. on 2 July 1999.

82. The Investment Agreement conferred on MV Inc. an option to purchase 40% of S.T. Ltd's shares on the terms set out in the attached draft Share Purchase Agreement. The option was exercised by MV Inc. on 22 September 1999, and on 19 January 2000, the acquisition by MV Inc. of the 40% shareholding was completed at the agreed price of £210m, and the Shareholders' Agreement was entered into.

83. Thus, in the end, say the Plaintiffs, the commercial terms of the eventual transaction were in all relevant respects the same as those which had been negotiated and recorded in the MOU dated 10 May 1999; and the interposition of the mechanism of an option eventually made no difference to this.

The Plaintiffs' primary contention therefore is that had the Trustees not breached their duties owed to the Plaintiffs, an alternative transaction for their exit from the Trust would have taken place in or about January 2000 upon the higher values and greater liquidity resulting then from the MV Inc. transaction and from a further transaction involving the Trust's holding in S.H. Ltd., itself to be further discussed below.

Summary of the Plaintiffs' claim

84. In conclusion, and as the arguments unfolded the Plaintiffs claim either that:

(i) the Trust assets and the Plaintiffs' Shares were worth no more than the Trustees and their legal advisers assumed, in which case their assumed value of USD330 million for the 60% of S.T. Ltd. (per M. Sardet of M & G) was fair and this claim will fail because the Plaintiffs have suffered no loss; or

(ii) as it is submitted this Court should find, having reviewed the various valuations performed by D & T and M & G in 1998 and V.M. in 1999, and having heard the expert evidence at trial; the Trust assets and the Plaintiffs' Shares were worth substantially more than the Trustees and their legal advisers assumed, in which case the only just outcome is one whereby an additional sum, representing the difference between the price paid and the fair value of the Plaintiffs' Shares, is paid from the Trust to the Guernsey Trust for the benefit of the Plaintiffs and their descendants.

85. It is the Plaintiffs' primary case that the Court has power to and should award monetary compensation to put the Plaintiffs into the financial position they would have been in had the Trustees complied with their duties.

86. On that basis, the Plaintiffs contend that, had the Trustees complied with their duties, there would have been an alternative transaction on the same terms as the 1999 Agreement and 1999 Order in early 2000 when the MV Inc. transaction was completed, except that a higher value would have been transferred to the Guernsey Trust. On the facts of this case, this, say the Plaintiffs, is the fair and practically just way in which to compensate for the legal wrong which has occurred.

87. It is asserted that the Trustees cannot be heard to say otherwise, given the basis upon which they decided to withhold from Mme B., the Guardian, their advisers and the Court the existence and terms of the MV Inc. negotiations.

88. Indeed, before the 1999 Agreement and 1999 Order were entered into, and anticipating that a deal with Mme B. and the Guardian might not be done, the Trustees were already considering a scheme whereby later in the year they would make distributions to Mme B. and A.B. Jnr. of assets in satisfaction of their Shares, after the MV Inc. transaction had gone through. This was one of the so-called "Plan B" options about which more will be mentioned.

89. The Plaintiffs, very much as their secondary case, argue that if the Court accepts that disclosure could and should have been made in the course of the exit negotiations prior to the MV Inc. deal being publicly announced as it was later in July 1999 (for example, by disclosure on strict terms directed by the Court as to confidentiality to the Guardian, his valuer M. Sardet and his counsel Mrs. Proudman Q.C., and to one of Mme B.'s lawyers and her counsel); then the transaction would still actually have occurred on 30 June 1999, with an appropriate upward adjustment of the exit payment made to the Guernsey Trust. This secondary view was given the label "the actual transaction basis" by the Court.

90. However, if even that controlled kind of disclosure would have been precluded until public announcement of the MV Inc. deal, then, say the Plaintiffs, the right way to consider the alternative transaction is to examine what would have happened following an indefinite postponement of the June 1999 hearing before this Court.

91. On that basis, following the exercise by MV Inc. of its option to acquire 40% of the S.T. Ltd. shares on 22 September 1999, the parties would have negotiated revised exit terms which would have taken the price actually paid by MV Inc. as the true value of the 30% sold, and would have reached the conclusion that the remaining 30% had the like value. The revised terms would have been entered into in or about January 2000, at the same time as the consummation of the MV Inc. transaction.

92. For the reasons mentioned above and to be more fully explained by reference to their valuer's evidence, the Plaintiffs say that the value transferable to the Guernsey Trust would then have been $54.08 million higher than the actual value transferred: $238.28 million being the value which would have been transferred, assuming an alternative transaction in January 2000, minus $173.34 million, being the value which was actually transferred (the sum of $54.08 million would then be notionally regarded as including the pro rata rebate of the discount applied). That is the amount which it is submitted the Court ought to order as compensation, to which interest must be added from January 2000. This, in effect is how the Plaintiffs say an alternative transaction would have operated.

93. In the further alternative, and on the basis that the Trustees might have refused to enter into any exit transaction when the MV Inc. transaction became known, it is the Plaintiffs' case that the Court has power to award monetary compensation to put the Plaintiffs into the financial position they would have been in had the 1999 Agreement and Order never been made. The Plaintiffs call this the "no transaction" basis.

94. This requires a valuation to be made of the respective Shares of Mme B. and A.B. Jnr. as at 30 June 1999. Again, for the reasons mentioned above the loss would be the

same (save for a small currency exchange rate difference) and it is submitted that the Court ought to assess compensation in the sum of $54.58 million: $238.81 million being the value of the Plaintiffs' Shares in June 1999, minus $173.34 million being the value which was in fact transferred pursuant to the 1999 Agreement, to which interest must be added from June 1999.

95. It became common ground that any compensatory award that the Court is minded to make should be paid from the Trust assets and not by the Trustees personally. In other words, the claim is not brought against the Trustees personally for breach of trust such as to give rise to any question whether they in turn may be entitled to personal indemnities from the Trust Fund. The claim is for outstanding beneficial entitlements from the Trust Fund itself.

More on the Period 1991 to 1998

96. Before turning to describe the Defendants' case including as to the crucial issue of valuations, I should now set out a more detailed account of the history as it unfolded after the death of the Settlor in 1991 and up to the 1998 Order (made on 11 December 1998). This will help to set the full context for the Trustees' Defences and K.B.'s counter-claim.

97. During the Settlor's lifetime, Mme B.'s relationship with the Settlor's children, including M.B., is said to have been pleasant. However, relations began to deteriorate during 1991 and, following the Settlor's death, her contact with his children became more limited.

98. Shortly after the Settlor's death, discussions started about the withdrawal of Mme B. and A.B. Jnr. from the Trust and as already mentioned, it is common ground that both

the Trustees and Mme B. believed that this would be desirable if terms could be agreed that were fair to all the beneficiaries. Whether the discussions which followed and attempts at the settlement of terms for their withdrawal evidence a "settled intention" on the part of the Trustees, is an issue now to be considered in deciding whether there would inevitably have been the "*alternative transaction*" for which the Plaintiffs primarily contend.

99. But the relevance of the events during the period between the Settlor's death in 1991 and the making of the 1998 Order is now only twofold.

100. First, they provide context to the exit negotiations that took place following the 1998 Order and that led to the 1999 Agreement and Order for the Plaintiffs' exit.

101. Secondly, the Defendants contend that the events in this period are relevant to the issue whether Mme B. had forfeited her interest in the Trust prior to the 1999 Agreement being entered into.

102. The events that provide context to the discussions that took place after the 1998 Order are as follows.

103. By an earlier Originating Summons dated 30 November 1992, the Trustees sought:

(i) the Court's approval to concur in and give unconditional effect to conditional agreements that had been made to deal with the Shares in the Trust of the Settlor's mother, M.S.B. (who died on the 25 May 1992); and

(ii) the resolution of an issue which had arisen concerning the rule against perpetuities.

104. An order was made disposing of these proceedings on 26 January 1993 ("the January 1993 Order") giving the Trustees the approval they sought in relation to the

conditional agreements and approving terms of compromise. Those terms of compromise provided for the perpetuity issue to be resolved by the substitution of the word "earlier" for the word "later" in para C of Article V of section A of the Trust Deed and by giving the Trustees the new powers of advancement in substitution for the powers in paras B3 and B4.

105. Mme B. and A.B. Jnr. were not initially parties to these proceedings of 30 November 1992 and so the January 1993 Order gave Mme B. an opportunity to intervene. This resulted in an agreement amending the terms of compromise which was approved by the Court. The amended terms of compromise are set out in the Schedule to the 1993 Order (made on 18 May 1993). The amendments provided, among other things, (and as already also explained), for an appropriate valuation of the Trust property and Shares of the outgoing beneficiary. The Schedule to the 1993 Order also confirmed the new powers of advancement earlier given by the January 1993 Order.

106. By an Originating Summons dated 20 September 1993 in Cause No 422 of 1993 (referred to in some of the documents as "the Principal Proceedings"), Mme B. took the further initiative and sought:

(i) an order authorising the Trustees to enter into negotiations with her and the Guardian for the purpose of arriving at a scheme of appropriation pursuant to the power given by the January 1993 Order with the object that the principal of the Shares be paid, transferred or applied to herself and A.B. Jnr.; and

(ii) all necessary directions for the valuation of the trust property.

107. This application was made in the light of the confirmation by D.T. (S. Group's and the Trustees' senior in house lawyer) in his affidavit of 15 April 1993 in which he said in para 24(g):

> *"Beginning shortly after the death of the settlor, M.B. and [Mme B.] discussed the possibility of her and her son withdrawing from the trust in consideration of a financial settlement. I am informed by M.B. that, from an early date, the trustees considered that such an arrangement would be desirable if it could be structured on a basis which was fair to all the parties involved." (emphasis supplied)*

108. The Trustees contend that the words in emphasis identify the all important consideration of fairness as a conditionality of any intention to be imputed to them as to an alternative transaction, should the Court find such an intention.

109. This goes to the question of whether they would ever have accepted the higher valuation prices now contended for by the Plaintiffs for the purposes of an alternative transaction and to the contention over the discount.

110. This passage from D.T.'s affidavit of 15th April 1993 is referred to in para 4 of the third affidavit of Nigel Clifford (of Hunter & Hunter, Cayman Attorneys then acting for Mme B.) made in support of Mme B.'s Originating Summons and so would have been brought to the attention of the Court at the time.

111. Following the January 1993 Order, negotiations between the parties resulted in the Protocole which provided for the withdrawal of Mme B. and A.B. Jnr. from the Trust (and the Estate) on the basis of an appointment of assets to them. The Protocole was conditional upon the approval of this Court and of the French Guardianship Judge by 28 February 1995.

112. Negotiations in relation to implementation of the Protocole continued into 1995 at which point advice was given to the Guardian by Cayman Counsel Pierre

Lamontagne QC that the proposed arrangements were not in A.B. Jnr.'s interest. This led to a renegotiation of the financial terms of the Protocole and the execution on 7 July 1995 of a further amendment which provided for an additional payment of $8m to A.B. Jnr.

113. On 29 September 1995, a Summons was issued on behalf of Mme B. seeking approval of the amended Protocole and a hearing was scheduled to take place to approve the amended Protocole on 11 December 1995.

114. In the autumn of 1995, the management of S.H. Ltd. (in which S. Group then had a 94.5% interest) proposed the sale of a significant interest to and the issuance of $110m of high yield bonds. The Trustees determined that these transactions would affect the values that had been agreed in the amended Protocole, but, because the transaction was confidential, the Trustees took the view that they could not disclose the arrangements to Mme B. and the Guardian.

115. On 20 November 1995, Maples & Calder (then acting for the Trustees) informed Hunter & Hunter that the hearing on the 11 December 1995 would have to be adjourned in the light of information that could not be disclosed at that time and, as a result, the hearing was adjourned.

116. The Plaintiffs cite this treatment by the Trustees of the S.H. Ltd. transaction, as exemplary of the manner in which the Trustees should have dealt with any proper concerns they may have had about disclosing the confidential MV Inc. negotiations in the context of the exit negotiations. Had the Trustees so dealt, the Plaintiffs contend that in all probability there would have been the alternative transaction in early 2000.

117. On 15 January 1996, Maples and Calder wrote again to Hunter & Hunter and to Ian Boxall & Co (then acting for the Guardian) disclosing and explaining the S.H. Ltd. transaction and stating that, if a fair settlement was to be achieved, the Trustees considered it necessary for a new evaluation of the Trust assets to be undertaken.

118. On 14 June 1996, D& T produced a valuation as at 31 December 1995 ("the 1996 Valuation"). The 1996 Valuation showed that S. Group had increased in value by $110m since the previous valuation undertaken in 1992.

119. Discussions then took place between the parties at which it was expressed on behalf of A.B. Jnr. that the 1996 Valuation would not be adequate. By the autumn of 1996, S.H. Ltd. had launched an IPO of its shares and the Trustees considered it unlikely that the 1996 Valuation would constitute a reliable basis for a negotiated agreement. No resolution having been reached, the Protocole was finally allowed to lapse on 30 September 1996.

120. Negotiations continued intermittently during 1997 and 1998.

121. On 11 August 1997, the Trustees issued a Summons seeking authorization from the Court to pay, transfer or apply the Plaintiffs' Shares pursuant to an arrangement intended to be presented to the Court. It was then that the Guardian again retained M & G to give valuation advice. M & G (M. Sardet) and D & T (Mme Costafrolaz) met several times and agreed that the 1996 Valuation should be updated to 31 December 1997.

122. On 30 January 1998, the Guardian issued a Summons seeking (inter alia) an order requiring the Trustees to procure the making of an "appropriate valuation".

123. On 19 August 1998, the Trustees issued a Summons seeking (inter alia) directions as to the management of the monies that became known as the G Monies. These were monies held in escrow by Maitre G (a Swiss notary) on the instructions of the Trustees and which represented the surplus of trust income distributions made for A.B. Jnr. but deemed by the Trustees to be more than his needs – monies which the Trustees were advised should be held in escrow for his benefit rather than handed over to Mme B. who, as his mother, would have had, under French Law, a claim to a usufruct over them.

124. Matters proceeded very slowly during 1998 largely as a result of disagreements as to the production of financial information to M & G. M. Sardet was finally able to produce a report on 16 November 1998 which was sent to the Guardian on 17 November 1998. M & G stated that in their opinion, as at 31 December 1997, S. Group was worth between $1,045 million and $1,135 million.

125. Also, on 17 November 1998 M. Sardet wrote two letters to the Guardian stating that:

(i) they (M&G) had been informed by D&T that S.T. Ltd.'s research and development costs over the following three years were significantly underestimated in the forecasts that they had provided to M & G and that, in the light of this information, M & G estimated S. Group to be worth somewhat less – between $1 billion and $1.1 billion; and

(ii) complete information about S.T. Ltd. had still not been produced.

126. It is the Plaintiffs' assertion that despite a letter of assurance from Mme Costafrolaz on behalf of the Trustees that complete information on which M. Sardet could rely to value S.T. Ltd. had been provided, the highly relevant information implicitly

available to the Trustees and deployed by Mr. V.M. in the Presentation of the 17 February 1999, was withheld.

The December 1998 Order

127. The Guardian's Summons dated 30 January 1998 and the Trustees' Summons dated 19 August 1998 came before this Court on 9 December 1998. On 11 December 1998 the Court made the 1998 Order by which (inter alia):

(i) Mme B. and the Guardian undertook that they would not until after 25 June 1999 or further order take any steps to execute or enforce an earlier French order of 18 June 1998 (which related to the G monies) and that they would concur with the Trustees in seeking the adjournment of hearings fixed in France to deal with the Trustees' application and appeal against the French Order of 18 June 1998;

(ii) as already mentioned (at paragraph 32 above); the Trustees and the Guardian undertook that they would respectively instruct D & T and M & G:

(a) to use their best endeavours to agree not later than 18 December 1998 the terms of a letter D & T would provide which would satisfy M & G as to the completeness and reliability of the information with which they had been provided by D & T in accordance with their Memorandum of Agreement;

(b) to use their best endeavours to agree not later than 31 January 1999 "a statement of their joint opinion as to the present value of S. Group"; and

(c) if they were unable to agree such a statement, to produce not later than 31 January 1999, a joint report stating their respective opinions, identifying the assets on which their opinions differ and summarising the reasons for any such difference;

(iii) the Trustees and Mme B. further undertook that they would respectively instruct Broker 1 and Broker 2 to use their best endeavours to agree by not later than 31 January 1999 a statement of their joint opinion as to the present value of the Art Collection and (if they were unable to agree such a statement) to produce by that date a joint report stating their respective opinions, identifying the works on which their opinions differ and summarising the reasons for any such difference; and

(iv) the Court further ordered (inter alia) that the hearing of the Guardian's summons dated 30 January 1998 and the Trustees' summons dated 19 August 1998 be further adjourned and be fixed for a final hearing together with the Trustees' summons dated 11 August 1997 on 23 June 1999:

> *"...it being intended by the Court that the said hearing will provide a final opportunity for all the matters raised in the said Summonses to be determined and that the said hearing will not be further adjourned without good cause".*

128. As events transpired, it was at this hearing (commenced on 23rd June 1999), that the Court gave its sanction of the exit settlement on behalf of A.B. Jnr. and on behalf of all other future or unborn beneficiaries; by way of the 1999 Agreement and 1999 Order.

129. The allegations of breach of trust now raised, extend to whether the Court, not only the Plaintiffs, was misled on that occasion by the Trustees' failure to disclose the

contemporaneous MV Inc. transaction and so its significance for the valuation of the Trust assets and the Shares of the Plaintiffs.

The Trustee Defendants' Defence

130. The Trustee Defendants' primary defence is that the Plaintiffs suffered no loss for which they are entitled to claim compensation. They say that the "key question" is whether the MV Inc. negotiations had any material impact on the value of S. Group taken as a whole (which ultimately comprised the majority of the value of the Trust assets) and so on the value ascribed by the parties in June 1999 to the Plaintiffs' Shares in the Trust; ultimately so as to make that value materially inadequate. In this context, not only the value of S.T. Ltd. but also the true value of trust assets including S.H. Ltd. must be considered.

131. On the basis, as the Trustees submit, that the answer to that key question is "No", then they say the Plaintiffs' claim must fail for two reasons:

(i) The Trustees were on that footing – that the values would not be materially affected - entitled to proceed to negotiate an exit with the Plaintiffs despite having decided not to disclose the MV Inc. negotiations, there being no breach of the disclosure principle (as they contend the principle is to be understood), if the MV Inc. negotiations were, as they also contend, not material to the exit settlement.

(ii) Even if that is wrong and the Trustees did infringe the disclosure principle, the Plaintiffs suffered no loss which could fall to be compensated.

132. It would follow that if the Court accepts the Defendants' arguments on the key question, none of the other questions arise and the Court will not have to decide any

of the other issues arising on the Defence such as forfeiture, or whether the Trustees have a defence that they relied on and acted within the terms of the Trust on Mr. McDonnell QC's advice, or estoppel and acquiescence (about all of which more below).

133. Against that background, the Trustees invite the Court to see the case as follows.

134. The starting point is to identify the legal wrong of which the Plaintiffs complain. This is said to be simple. The claim is squarely based on non-disclosure. The principle on which the Plaintiffs rely (which they call "the disclosure principle") is the principle that if a fiduciary enters into a transaction with his beneficiary without disclosure of material facts, that transaction is not binding on the beneficiary. This is the fundamental principle and the basis of the claim.

135. The claim is therefore based on the allegation that the Trustees entered into a transaction with their beneficiaries without disclosure of material facts.

136. Since there is no dispute that the Trustees did enter into a transaction with their beneficiaries (namely the 1999 Agreement placed before the Court at the hearing of 23 June 1999 and embodied in the 1999 Order of 30 June 1999); and no dispute that they did not disclose the MV Inc. negotiations, the issue is whether the MV Inc. negotiations were material to that transaction.

137. The only possible relevance of the MV Inc. negotiations to the transaction was that they meant that the values used for the transaction were too low. They had no other potential impact on the transaction.

138. So the issue resolves itself into the question whether the MV Inc. negotiations did have a material impact on the values used for the transaction. This is ultimately the key question.

139. If they did not, the transaction is a perfectly good one and binding on the Plaintiffs and there is no claim.

140. If they did have a material impact, the transaction is tainted by the non-disclosure and is a flawed transaction. That means the Plaintiffs cannot be held to it. This is the legal consequence of non-disclosure.

141. Subject to the Trustees' Defences (of estoppel, etc), that would have entitled the Plaintiffs to have the transaction set aside as not binding on them if they had sought rescission when *restitutio in integrum* was still possible.

142. The Plaintiffs now accept that rescission is impossible and seek equitable compensation instead. The Trustees accept (subject to their Defences) that in principle a beneficiary who enters into a transaction which is flawed as a result of breach of the disclosure principle is entitled to compensation for the loss thereby suffered. (This does not depend on whether the disclosure principle is regarded as a "duty" or a "disability", or whether breach of the disclosure principle is properly characterised as a breach of duty or not). This proposition, as a matter of the law of equity, will be examined below by reference to ***Tito v Waddell*** (below) and other cases.

143. The loss for which the beneficiary is entitled to be compensated say the Trustees, is the loss sustained by the beneficiary from having entered into the flawed transaction, as this is the wrong of which he or she complains.

144. This, say the Trustees, is the relevant inquiry. It is not relevant to inquire what other transaction might have taken place at some other time had the impugned transaction not been done. The beneficiary had no right to require the Trustees to enter into any other transaction, and it is necessarily highly speculative what might have happened in different circumstances. The question is not what might in other circumstances have taken place; the question is what loss the beneficiary suffered as a result of the transaction that did take place. Put another way, if the beneficiary is entitled to be compensated for a breach of duty, the relevant breach of duty is the entering into the impugned transaction. The Trustees were never under a duty to enter into any other transaction and never agreed to do so. So the beneficiary is not entitled to be compensated for the Trustees not entering into some other imaginary transaction.

145. This is so as a matter of principle, fairness and authority. The Plaintiffs' attempts to rely on a so-called "*alternative transaction*" of their own invention which never did take place and which no-one ever contemplated or considered, are misconceived and wrong in principle; simply intended to increase the quantum of their claim and sidestep (in a sense to be examined below) the forfeiture issue which they do not wish to face. This, the Trustees say, does not turn on the facts (although the Trustees say it is impossible in fact for the Court to make any firm finding that some particular other transaction would have happened); it turns on a proper understanding of the nature of the complaint that the Plaintiffs bring. The Plaintiffs set up a choice between being compensated on a "no transaction" and an "alternative transaction" basis, but this is a false choice that suffers from a lack of logical analysis. There is no choice: the Trustees and the Plaintiffs only entered into one transaction; if that involved a breach

of duty, the Plaintiffs are entitled to be compensated, but only for the loss suffered as a result of entering into that one transaction. (It was in an attempt to distinguish this basis for a claim from the others, that the court labelled this the "actual transaction basis").

146. The Defence says further that the Plaintiffs have one other pleaded claim other than non-disclosure (resulting in breach of the fair-dealing rule) which is that the Trustees failed to obtain "appropriate valuations". Exactly the same applies, say the Trustees: if no appropriate valuation was obtained the legal result is that the transaction was flawed, and the Plaintiffs' remedy is to be compensated for the loss (if any) suffered by them as a result of entering into the flawed transaction.

147. The Plaintiffs' contention for an alternative transaction is for a transaction which they say would have taken place in or about January 2000 had the Trustees disclosed the MV Inc. negotiations in June 1999 instead of then proceeding with the settlement of the exit negotiations.

148. It is plain say the Trustees, that the Plaintiffs so contend because they also seek to argue that in January 2000, after the sale to MV Inc. was completed, the Trust had significantly more liquidity in the form of the cash from the sale of the 30% of S.T. Ltd. to MV Inc.., as well as liquidity from the sale of S. Group's last 28.5% of S.H. Ltd..

149. This would then give the premise to the Plaintiffs' further arguments on this hypothetical alternative transaction basis, that the discount of 25% proposed and 17.33% actually applied to the value of the Trust assets in June 1999, largely by way of the so-called "illiquidity" discount; was not justified and the pro rata value of their

shares should be given back by way of the equitable compensation that they now claim.

150. This argument for a pro rata rebate of the discount would not be tenable if the Court were to approve the question of compensation by reference to the actual transaction that did take place in June/July 1999, because the value and state of the Trust assets would have to be taken as they then stood; and the justification for the discount considered in that light.

151. Indeed, on this – the actual transaction basis – the Trustees by reliance on their expert Mr. Glover, argue for a further discount of some 15% to reflect what would have been (in June/July 1999) the uncertainty of and/or delay in the completion of the MV Inc. transaction. At that point in time, while the price of £210 million had been stipulated in the M.O.U., MV Inc. had insisted upon and obtained the option to purchase exercisable within six months and which was in fact not exercised until on 22 September 1999. Completion took place in January 2000.

152. Any compensation to be awarded to the Plaintiffs now on the actual transaction basis and so to be assessed on the value and state of the Trust assets as at June/July 1999 (albeit taking account of the MV Inc. price), should therefore reflect the then existing state of relative illiquidity of the Trust assets, as well as the uncertainty or delay in the actual receipt of the proceeds of the sale to MV Inc.

153. So, say the Trustees, the relevant inquiry is in each case and on whatever basis the same: what loss (if any) did the Plaintiffs suffer by entering into the 1999 Agreement? They advise that the Court should keep this question firmly in mind throughout the

analysis or it is in danger of being led into legal error which overcomplicates the resolution of the case and runs the risk of overcompensating the Plaintiffs.

154. Their submission is that the Plaintiffs suffered no loss as a result of entering into the 1999 Agreement, as the value of what they received under the Agreement was adequate (indeed more than adequate) to the value of their interests under the Trust.

155. This is so whether one looks at the interests of all those potentially interested in the Plaintiffs' Shares, or at the Plaintiffs' own loss (what came to be called respectively, the Plaintiffs' claim on the "class basis" and the Plaintiffs' claim on the "personal basis").

156. As a matter of principle however, the Trustees contend that the Court should have regard to the value of the Plaintiffs' own interests (that is: the personal basis) as there is no proper principled basis on which the Plaintiffs can claim compensation, as they seek to do, so as to benefit some (but not all) of the class of potential beneficiaries of their Shares. Vague appeals to the flexibility of equitable relief are no substitute for a proper analysis of who is bringing the claim and what relief they are entitled to.

157. In assessing this question, the Court must inevitably consider whether Mme B. had forfeited her interest under the Trust because if so, she lost nothing as a result of entering into the 1999 Agreement (and by reason of his reversionary interest in her Shares neither did A.B. Jnr.; insofar as he also claims as her descendent on the class basis).

158. If the Plaintiffs did suffer loss by entering into the 1999 Agreement, the remaining question of substance is whether the Trustees do indeed have a defence that they relied on Mr. McDonnell's advice. In the Trustees' submission, they do.

159. Finally, in looking at the Trustee Defendants' case, the Court will have to consider the other defences – estoppel, and laches/acquiescence.

K.B.'s Defence and Counterclaim

160. K.B., as mentioned above, is joined in these proceedings in a representative capacity. He represents the beneficiaries of the Trust who remained beneficiaries after the exit of the Plaintiffs Mme B. and A.B. Jnr.

161. In that capacity he joins in the Trustees' defence to the Plaintiffs' claims and prosecutes a separate counterclaim against Mme B. for a declaration that she had forfeited her interests under the Trust by dint of her actions taken against the Trust and the Trustees at times prior to June 1999. The forfeiture claim does not directly affect A.B. Jnr.'s position but would indirectly affect his expectations of benefit as her descendant if he survives his mother.

162. K.B. contends that notwithstanding the 1999 Agreement by which Mme B. exited the Trust, the minor, unborn and unrepresented remaining beneficiaries could then not have been bound in any agreement between the Trustees and Mme B. (including the earlier 1994 Protocole and the 1999 Agreement itself). Moreover, the remaining beneficiaries (through K.B.), had specifically reserved their position as to whether she had forfeited her interests and so they entered into the 1999 Agreement without prejudice to their right to invoke the forfeiture claim in circumstances such as the present, where the 1999 Agreement has been brought into question by her.

163. The forfeiture claim seeks to invoke the provisions of Paragraph I of Section B, Article III of the Trust Deed conveniently called "the No Contest Clause" and which

provides, in the voice of the Settlor speaking in the first person, as follows (split into numbered sub-paragraphs or "limbs" for convenience):

> ***"I have intentionally and with full knowledge omitted to provide for my heirs except for such provisions as are made specifically herein. If any person who is or claims under or through a beneficiary of this Trust or any amendment thereto in any manner whatsoever, directly or indirectly,***
>
> ***(1) Contests or attacks the validity of this Trust;***
>
> ***(2) Performs any act that would frustrate the dispositive plan contemplated in this Trust, or***
>
> ***(3) Conspires or cooperates with anyone attempting to contest, attack or frustrate this Trust (an "objector"),***
>
> ***then in that event each such objector is specifically disinherited and any portion of the Trust estate not disposed of under the foregoing provisions of this Trust shall be distributed by the Trustees to other Trust beneficiaries as though said beneficiary had died before me, excluding all objectors, descendants of any objector, and all persons conspiring with or voluntarily assisting any objector;***
>
> ***provided however, that a petition, made in good faith and not objected to by the Trustee, seeking an interpretation of this instrument shall not be considered a contest of, an attack on, or an attempt to frustrate the dispositive plan of this instrument."***

164. If the No Contest Clause operated to forfeit Mme B.'s interests under the Trust, then she could now have no claim for equitable compensation because she would have been entitled to no payment under the 1999 Agreement and so would have suffered no loss as the result of the alleged breach of trust by the Trustees.

165. In this regard, the Plaintiffs say that K.B. (on behalf of the remaining beneficiaries) is estopped by having entered into the 1999 Agreement with the Trustees and by the approval by the 1999 Order of this Court in June 1999; from invoking the No Contest Clause. They say that Mme B. is no longer a beneficiary of the Trust, does not seek to rescind the exit settlement which settled, by way of res judicata the forfeiture issue; and so cannot be denied her claim to equitable compensation to which she would otherwise be entitled.

166. This then, is one of the several issues to be resolved by judgment now.

Further relevant provisions of the Trust

167. The other provisions of the Trust Deed relevant to the present enquiry are as follows.

168. During his lifetime, the Settlor was the sole trustee and was entitled to the entire net income of the Trust (Article II of Section A) and had the benefit of a power to revoke the Trust in whole or in part (Article I of Section A).

169. Following the Settlor's death (as already noted), the initial successor Trustees were M.B., J.de.R. and Z.C. (para C of Article II of Section B). Z.C. died on 4 August 1997 and was replaced by Ab.B. J.de.R. has recently retired as a Trustee and has been replaced by J.R. (a S. Group senior and longstanding employee). J.R. was added as a defendant in this action at the pre-trial review.

170. After the Settlor's death, the balance of the Trust estate, after payment of the taxes and expenses provided for in Article IV of Section A of the Trust Deed, is to be held and distributed as set out in Article V. As already mentioned, Paragraph A of Article V provides for the Trust estate to be divided into a number of equal "Shares" and for the Shares to be divided between a number of identified beneficiaries (referred to as "the Initial Beneficiaries"). The Initial Beneficiaries comprised the Settlor's mother, two of his wives (Mme R.B.B. and Mme B.) and his children.

171. Following the First Amendment to the Trust Deed, the Settlor's mother had 208 Shares, his two wives had 78 Shares each, male children had 136 Shares each and female children had 68 Shares each, making 1248 shares in total but these entitlements have changed to become those already described above (at paragraphs 15 to 16).

172. Paragraph B1 of Article V of the Trust Deed provides:

> ***"Each Share or fraction thereof shall represent an undivided interest in the assets of the Trust."***

173. This provision confirms, say the Trustees (as specifically provided in Article 111.A (see below)) that the Plaintiffs had no right to insist upon an advancement of capital as if their Shares represented divided and identifiable shares of the Trust assets. Accordingly, notwithstanding the terms of the 1993 Order and the exit negotiations, the Trustees at all times retained a discretion whether or not to advance and appoint out capital to enable the Plaintiffs to exit from the Trust. This overriding discretion was in fact, acknowledged by the Plaintiffs at trial.

174. The Trustees' power in relation to the income of the Trust is contained in para B2 of Article V, which provides as follows:

> ***"The Trustee shall pay to each Beneficiary in quarterly or more frequent instalments for the period which is the shorter of the duration of the Trust or the duration of their lives such net income of the Trust, in proportion to their respective Shares, as the Trustee may be deemed necessary to enable each Beneficiary to maintain a proper standard of living."***

175. The Trustees construed this to mean that they were obliged to pay any distribution of income to the Initial Beneficiaries pro rata to their Shares and that they were required to distribute such part of the Trust income as was necessary to enable the most needy of the beneficiaries to maintain a proper standard of living. Indeed, this had become settled practice and resulted in the Plaintiffs having between them, an annual income of USD1.6 – USD1.8 million from the Trust.

Undistributed income was, in the discretion of the Trustees, retained or applied to capital.

176. In their original form, the Trustees' powers in relation to capital were contained in paragraphs B3 and B4 but were replaced in terms of the Schedule to the 1993 Order as already set out above.

177. Paragraph 4 of the Schedule to the 1993 Order also provided for the amendment of para C of Section A (in resolution of the perpetuity issue then of concern) such that the Trustees' obligation to distribute all remaining principal and undistributed income arises on the earlier, rather than later, of (i) 80 years from the date of the Trust, that is, in the year 2065 or (ii) 20 years after the death of the Settlor's last surviving child. For all practical purposes, 2065 has therefore come to be regarded as the expected expiry of the Trust.

178. Paragraph B5 provides as follows:

> ***"After the death of a Beneficiary, the net income and principal attributable to the remaining balance of the share of the Trust estate of such deceased Beneficiary shall be distributed in accordance with sections V-B1, 2, 3, and 4 above, among the descendants of such deceased Beneficiary determined in accordance with the laws of the Kingdom of Saudi Arabia."***

179. The effect of para B5 is, therefore, for the Shares of a deceased Initial Beneficiary to pass on death, to his or her descendants to be held on the same trusts as applied to the deceased Initial Beneficiary's Shares.

180. The Trust Deed does not provide for what is to happen to the Shares of a deceased beneficiary who has no descendants under Saudi law and, in that eventuality, the benefit of the Shares, presumably, passes by way of resulting trust to the estate of the Settlor.

181. So far as Mme B. is concerned, her only natural descendant is A.B. Jnr. and (had they continued to be beneficiaries of the Trust) he would have become the beneficiary of her Shares if he survived her. Mme B. has two minor adopted daughters, but they were not beneficiaries for the purposes of the Trust.

182. These provisions may be of importance should the claim for compensation be decided on the "alternative transaction class basis", rather than the personal basis, but in light of the decision at which I have arrived in this judgment which may be regarded as based on the actual transaction basis, that will not be the case.

183. Paragraph F of Article III of Section B provides:

> ***"As used in this instrument, the terms "descendant" and "descendants" shall, as the case may be, refer to my children named herein or to their children, including persons adopted by such children prior to attending majority. ..."***

184. It is clear that the deeming provision in relation to adopted children applies only to children adopted by the Settlor's children and it follows that Mme B.'s adopted daughters would not qualify.

185. A.B. Jnr. has no children and had none in 1999.

186. Paragraph C provides as follows:

> ***"...the Trustee shall distribute all remaining capital and undistributed income of the Trust on the [earlier] of (i) eighty years from the date hereof, or (ii) twenty years after the death of the last surviving child."***

187. From all the foregoing it is to be noted, therefore, that, whilst the Trustees have powers over the application of income and capital, those powers operate by reference to the Shares held by each beneficiary that were determined by the Settlor. The interest of each beneficiary, and his or her descendants, is fixed in the sense that the Trustees have no power to override the allocation of Shares. The Trustees do not have the power (as one would normally see in a discretionary trust) to decide who is to benefit from the Trust and in what shares.

188. Article I of Section B vests in the Trustees a number of specific powers:

189. Paragraph A2 records the Settlor's intention in these terms:

> ***"It is my intention that the assets of this Trust not be sold, transferred or otherwise disposed of to a third party or Beneficiary or a descendant of a Beneficiary except as may be required by Article II, III, IV and V-B 3 and 4 unless in the Trustee's judgment, such transfer or disposition is required by commercial necessity or emergency."***

190. This provision is relied upon by the Trustees as a basis for their policy of conservation of the capital of the Trust; subject only to the need to dispose of capital as may arise to meet the needs of beneficiaries for maintenance.

191. Of importance to the Trustees' defence of reliance on the legal advice of Mr. McDonnell QC, paragraph A21 provides:

> ***"The Trustee is authorized to employ persons, corporations, or associations, including attorneys, auditors, investment advisers, literary consultants, or agents, whether or not associated with the Trustee, to advise or assist the Trustee in the performance of the Trustee's administrative duties, and the Trustee may act without independent investigation upon their recommendations. ..."***

192. And further, in this regard (and as to whether the Trustees were obliged to obtain and rely upon an "appropriate valuation" as agreed with the Plaintiffs and directed by this Court), paragraph A24 provides:

> ***"Upon any division or partial or final distribution of the principal of the Trust estate, the Trustee is authorised to value the interests in the Trust and partition, allot, and distribute all or a part of the Trust estate in undivided interests or in kind, or in money, or partly in any of them, at such valuations and according to such method or procedure as the Trustee shall, in the sole discretion of the Trustee, determine, including the power to distribute all or part of any particular asset to any beneficiary as the Trustee shall determine."*** (Emphasis added.)

193. Paragraphs B1 and B2 provide in terms emphasised by the Plaintiffs:

> ***"1. In exercising the Trustee's powers, the Trustee shall act in a manner that is reasonable and equitable in view of the interests of income and principal beneficiaries, and in the manner in which persons of ordinary prudence, diligence, discretion, and judgment would act in the management of their own affairs."***
>
> ***2. The enumeration of certain powers of the Trustee shall not limit the Trustee's general or implied powers. The Trustee, subject always to the obligations of a fiduciary, is vested with all rights, powers, and privileges which an outright owner of the same property would have.*** (Emphases added.)

194. Paragraph A of Article III provides:

> ***"No beneficiary shall have the power to sell, transfer, assign, pledge, mortgage, or alienate any part of the beneficiary's interest in the principal or income of the Trust estate in any manner whatsoever."***

195. Paragraph D provides, in terms relied upon by the Plaintiffs as confirming the individual and indefeasible entitlements in their shares, that :

> ***"Each Trust share created hereunder shall be treated as a separate Trust for all purposes and separate accounts shall be kept for each Trust. However, the Trustee may maintain and administer the assets of the Trust as a unit until such time as the Trustee is required to make distribution."***

The issues for trial

196. That being a summary of the history and of the nature of the claims, defences and counterclaims, and of the relevant provisions of the Trust Deed; the issues which arise for my decision in this trial can be described as follows and as set out in the Agreed List of Issues between the Parties.

Duties

197. What duties did the Trustees owe in connection with the exit negotiations leading to the 1999 Agreement and 1999 Order?

Breach

198. Did the Trustees act in breach of those duties? In particular:

(i) Were the MV Inc. negotiations material to the decision of Mme B. and the Guardian to enter into, and to the decision of this Court to approve, the 1999 Agreement?

(ii) Did the Trustees act in breach of duty in failing either to disclose the MV Inc. negotiations to the Court or to Mme B. and the Guardian (or their respective advisers) or to state to the Court, Mme B. and the Guardian that there was material information that they were unable to disclose and that the negotiations would have to be delayed (as in the earlier S.H. Ltd. example)?

(iii) Were the up-to-date accounts and forecasts for the S.T. Ltd. sale to MV Inc. used in the Presentation, material to the decision of Mme B. and the Guardian to enter into, and to the decision of this Court to approve, the 1999 Agreement?

(iv) Did the Trustees act in breach of duty in failing to disclose to the Court, Mme B. and the Guardian those up-to-date accounts and forecasts for the S.T. Ltd. group?

(v) Did the Trustees act in breach of duty in failing to obtain an "appropriate valuation"?

(vi) Did the Trustees act in breach of duty in entering into a transaction with their beneficiaries without satisfying the fair-dealing rules?

Remedies

199. What remedies is it open to the Court to order and on what basis? In particular:

(i) Does the Court have power to order equitable compensation and, if so, on what basis? In particular, does the Court have power to order equitable

compensation on an "alternative transaction basis"? Or is the Court limited to ordering compensation on the "no transaction basis" or the "actual transaction basis"?

(ii) Does the Court have power to grant relief for the benefit of all those who were beneficially interested in the Plaintiffs' Shares in the Trust ("the class basis")? Or is the Court limited to assessing the Plaintiffs' personal loss ("the personal loss basis")?

Quantum

200. In relation to equitable compensation, what is the quantum of the Plaintiffs' loss? In particular

(i) Alternative transaction basis:

(a) What would have happened in early 2000 had the Trustees complied with their duties?

(b) What is the quantum of the loss to be assessed?

(c) Should that assessment be on a class basis or on a personal basis?

(ii) No transaction basis:

(a) What would have happened had the Trustees failed entirely to enter into a transaction following disclosure of the MV Inc. transaction?

(b) What is the quantum of the loss to be assessed?

(c) Should that assessment be on a class basis or on a personal basis?

(iii) Actual transaction basis:

(a) What is the quantum of loss assessed on the basis that the Trustees acted properly as they should have and so had disclosed the MV Inc. transaction in relation to the 1999 Agreement when it was entered into in June 1999?

[As noted earlier and will be explained, this, the actual transaction basis, is I conclude, the only proper basis for an assessment of loss in this case].

The forfeiture issue

201. Had Mme B. forfeited her interest in the Trust prior to the 1999 Agreement and Order and, if so, what consequence (if any) does this have for the claim that is now made? In particular:

(i) Are the Trustees and beneficiaries estopped from asserting that Mme B. had forfeited her interest in the Trust?

(ii) Is the forfeiture issue relevant to the claim as it is put on the alternative transaction basis when, as it should, that basis is seen as independent of any obligation on the part of Mme B. to have rescinded the 1999 Agreement?

(iii) Is Limb 2 of the no contest provision void for uncertainty?

(iv) Is Limb 2 void for being contrary to public policy?

(v) Does Limb 2, on its proper construction, extend to acts other than Cayman court proceedings (in particular in this regard, the European Court proceedings instigated by Mme B.)?

(vi) Did Mme B. act in a way that was contrary to Limb 2?

(vii) Does Limb 2 extend, on its proper construction or as a matter of law, to acts which were "justifiable" and, if Mme B. acted in a way that was contrary to Limb 2, were the steps taken by her "justifiable"?

Reliance on legal advice

202. Could paragraph A21 of Article I of Section B of the Trust Deed, (as set out above at para 191) in principle, provide the Trustees with a defence to the Plaintiffs' claim because they acted on the advice of John McDonnell QC?

203. If so, is the provision subject to an implied condition that it only operates to give the Trustees a defence if:

(i) they acted reasonably; and

(ii) they provided the adviser (in this case John McDonnell QC) with full and proper instructions and information?

204. Does the provision, in fact, provide a defence? In particular, did the Trustees act reasonably and did they provide John McDonnell QC with full and proper instructions and information? Especially in this regard, was M.B. aware of the Presentation and V.M.'s letter of 7th May 1999 to N.N. (and apparently addressed also S. Group)? If so, was he obliged to have informed John McDonnell QC of them in order to rely on his advice as a defence now?

Other equitable defences

205. Is Mme B.'s claim barred by estoppel or laches/acquiescence?

Order of Treatment of the Issues

206. The forfeiture issue will be taken first, followed by the equitable defences. The outcome of these issues, will determine whether it is necessary to consider the issues of what duties were owed by the Trustees specifically to Mme B., whether they breached those duties and if so to what remedies she would be entitled.

207. As already noted, it is however, accepted by Mr. Tidmarsh QC that the outcome of these issues in respect of Mme B. would not affect A.B. Jnr.'s position as a plaintiff, save to the extent he would otherwise have stood to benefit as her descendant under the Guernsey Trust. Resolving the forfeiture issue and the equitable defences before turning to the other issues, will mainly serve therefore to narrow the issues but doing so will also help to explain the broader factual context for the resolution of the issues of breach of duty in particular.

Forfeiture

208. K.B. relies on five (5) different actions (or sets of actions) taken by Mme B. as having triggered the No Contest Clause (the second limb as set out above at paragraph 163). Each of these, he argues, were acts that "would (if persisted in) have frustrated the dispositive plan contemplated in the Trust."

209. The acts therefore operated a forfeiture of Mme B. interests under the Trust and, notwithstanding that she gained, by the 1999 Agreement, a hugely valuable interest under the Trust, was owed no duties by the Trustees and was entitled and remains entitled to no interest under the Trust.

210. Further, even if the 1999 Agreement and Order operated as a res judicata of the forfeiture issue, Mme B. has herself now brought the 1999 Agreement into question

and so cannot at once impugn it for the purpose of her present claim against the Trust and the Trustees, while seeking to rely upon it as a shield from a claim of forfeiture by the beneficiaries who were not bound by it.

211. The five actions or sets of actions cited by K.B. in the counterclaim are described as follows (from Mr. Tidmarsh's opening submissions as added to by me).

212. The first and second relate to *Place des Etats-Unis*, a large town house in Paris ("the Paris Property") which Mme B. occupied with A.B. Jnr. (from the time of his birth) and the Settlor; for some six years until his death in 1991, but which was held by S. France Ltd. by way of a leasehold and so was itself a Trust property. A part of the Paris Property was also used by the Settlor as his private office and so contained records that belonged to the Trust.

(1) The Claim to Diplomatic Immunity

213. Mme B. refused access to the Art Collection housed in the Paris Property and the property itself by claiming diplomatic immunity. This she did formally by letters dated 28 October 1992 and 6 November 1992; her written submissions for the hearing on 30 June 1993 and her lawyer's letter dated 28 October 1992. The Trustees were then considering whether the Art Collection could be sold and/or distributed to the beneficiaries and so Mme B.'s actions were in effect equivalent to an injunction.

214. Those were, under Limb 2 of the No Contest Clause, says K.B., acts that "would frustrate the dispositive plan contemplated in this Trust".

215. A claim of immunity from enforcement designed to prevent the Trustees from enforcing their rights is not a "justified" act for the purposes of the No Contest Clause, and within the meaning of the case law. Further, it is not justified when

Mme B.'s purpose was, as she had declared, to secure the Art Collection for herself/the Plaintiffs.

(2) The Placing of Seals

216. Six days earlier, on 22 October 1992, Mme B. had applied for and obtained the placing of judicial seals on the contents of the Paris Property. The order stated that seals "should be placed . . . concerning furniture, valuables and personality of the deceased's estate". The part of the Art Collection that was sealed was that part then within the Paris Property and so was under her control. The placing of seals was an act that was premised on the contents belonging to the Settlor's estate and so indicating Mme B.'s claim as his widow and so also as a primary beneficiary of the Estate contrary to the interests of the Trust.

217. This interfered with the Trustees' use of the Art Collection and was an act that "*would frustrate the dispositive plan contemplated in this Trust*".

218. At the time Mme B. knew that the Art Collection belonged to S. Art Ltd. which belonged to the Trust. She had received a letter dated 2 December 1991 from the Trustees identifying S. Art Ltd. as an asset of the Trust and clearly explaining the share entitlement under the Trust as well as the Trustees' income distribution policy. The Settlor had expressly settled S. Art Ltd. upon the trusts of the Trust. The placing of seals was therefore unjustified.

219. It was also unjustified given her admitted purpose to secure the Art Collection for herself/the Plaintiffs.

(3) The Raids on Companies owned by the Trust

220. On 2 December 1991 the Trustees wrote as mentioned above, to the beneficiaries explaining amongst other things that the Trust assets included all the shares of S. Group.

221. Mme B. responded with a series of letters from her Swiss lawyers on 27 December 1991 saying that they had been retained "to defend her interests". Each letter alleged that S. Group a company belonging to the Trust, formed "an integral part of the estate of the late A.B. Snr." and asked for confirmation that S. Group was being managed conservatively in the interests of all the heirs.

222. The Trustees provided Mme B. with a copy of a valuation of the Trust assets on 11 June 1992. This was followed by a letter from Me Verges on her behalf dated 19 June 1992 which asked a host of questions; followed by a further letter from Me Verges on 29 June 1992 threatening proceedings. This Court found these demands for disclosure to be unreasonable, untenable and oppressive (requiring as they did disclosure of just about every type of information about the affairs of the Trust companies).

223. Mme B. then wrote on 8 July 1992 to the Trustees asking detailed questions. This included the assertion that the sale of any assets of S. Art Ltd. must be preceded by agreement amongst all the heirs of the Estate who should have the right of first refusal. The Trustees sought to answer that letter and the queries as far as they could (see letter 10 July 1992). This Court found that the Trustees had acted properly on the matter of disclosure to those beneficiaries joined to the action (who included Mme

B. and A.B. Jnr.) – see the reasons for the Order dated 2 June 1993 reported in CILRs.

224. On 23 October 1992 M.B. wrote to Mme B. regarding arrangements for the Art Collection to be catalogued and photographed. Another of Mme B.'s lawyers, Me Villard, responded on 28 October 1992 stating that Mme B. had become a diplomatic attaché to the Z Embassy and her residence was subject to the Vienna Convention on Diplomatic Relations. Mme B. wrote to M.B. on 3 November 1992, forbidding entrance to the Paris Property, saying she had taken steps to invoke police assistance and requiring S. France Ltd. to stop using the Paris Property as offices. On 6 November 1992, she sent a letter to M.I.B. (the president of S. France Ltd. who had written to her about access for a photographic inventory of the Art Collection) forbidding him from entering the Paris Property.

225. The Trustees had continued in discussion with Mme B. but in the light of Mme B.'s actions in relation to the Art Collection and the Paris Property, the Trustees withdrew an invitation to a meeting with the Trustees and D & T intended to discuss commercially sensitive materials relating to S. Group's activities (as described by D.T. in his affidavit evidence). The Trustees also stopped paying her income from the Trust and initially stopped paying A.B. Jnr.'s as well but subsequently re-instated payments to him of US$5000 a month with the balance being paid to the Swiss notary Maitre G hence the G monies) to hold until A.B. Jnr. reached majority (see D.T. 1st Affidavit paras 47-51).

226. Mme B. then applied personally to the French court for an order appointing one M.I.P. as an agent to take an inventory of A.B. Jnr.'s interests in the Estate and the

Trust (application dated 14 December 1992) and for an order permitting him to call on the police force for assistance. The latter was made on what the Trustees regarded as a baseless assertion that M.I.P. might be refused access.

227. On 14 January 1993, Mme B. applied in her own name and as administrator for A.B. Jnr., to the Swiss court for recognition of the orders of the French Court. On 11 February 1993 M.I.P. made applications to the Swiss Court for raids to seize and copy documents at S. Group's Geneva headquarters, on the baseless assertions that (i) there was a risk that accounting and supporting documents would disappear or be moved and (ii) the Trustees' "refusal to supply information however elementary, as to the nature and make up of [the Trust] and for the valuation of the minor's rights": made a surprise raid essential.

228. The raids on companies owned by the Trust were subsequently carried out by M.I.P. on 16 February 1993. Despite the alleged urgency this was over a month after all the necessary orders were in place in France.

229. Mme B. was closely involved in the raids having applied for: the appointment of M.I.P.; the order permitting him to use the police; the recognition of the French orders in Switzerland; and her cars were used to collect seized papers.

230. The raids in France caused a significant impediment to the performance of Mr D.T.'s duties (as described by him in his first witness statement at paragraphs 59, 60). As already noted, he was at all material times the senior legal adviser to S. Group and to the Trustees. Had the raids in Switzerland been successful they would have paralyzed the operations of S. Group's financial arm – S. Finances Ltd.– in Geneva, according to D.T. By making her applications and allowing her cars to be used Mme B., K.B.

submits, "...directly or indirectly . . . perform[ed] [an] act that would frustrate the dispositive plan" of the Trust.

231. He further submits that although the raids were authorised by the French and Swiss Courts they were not justified according to the law of the Cayman Islands, because they were instigated by Mme B. for the purpose of gathering information to negotiate her and A.B. Jnr's. exit from the Trust. She was seeking information that this Honourable Court had declared it was unreasonable to require (see CILRs above) (and which the French Courts later accepted should not be obtained) and where there was no true urgency to justify the extreme steps.

(4) The Defence of the S. Art Ltd. Proceedings

232. Mme B. defended the initial proceedings taken by the Trustees in relation to S. Art Ltd. and the Art Collection (issued on 16 February 1993 and later discontinued by the Trustees to enable fresh proceedings complying with the rules regarding service on a diplomat to be issued) on the grounds of diplomatic immunity alone. That defence, K.B. submits, was an act that "would frustrate the dispositive plan contemplated in this Trust" and was not justified for the reasons given above.

233. S. Art Ltd. then issued (on 21 July 1993) fresh proceedings (complying with the rules for service on a diplomat) and Mme B. defended them on several grounds including on the grounds of diplomatic immunity. Equally, it is said that the defence was an act that "would frustrate the dispositive plan contemplated in this Trust".

234. I am invited to find that the defence of diplomatic immunity was not justified for the reasons given above. Further, that the other defences were not justified, for the purposes of the law of the Cayman Islands, because the purpose of these defences

was to secure the Art Collection for Mme B. She had from the outset of negotiations with the Trustees, expressed her determination to acquire exclusive possession of the Art Collection.

(5) The Sale of Various Items of Furniture Belonging to S. Art Ltd.

235. In November 1994 unique items of antique furniture from the Art Collection were put up for sale at auction in 16 lots by a Mme D, a "friend" of Mme B.'s. Ten lots were sold before the Trustees could stop the sale (the sale proceeds were approximately USD1 million). The Trustees obtained a court order freezing the proceeds of sale. The six remaining lots were preserved by means of an amendment to the 1994 Protocole. Mme B. has asserted that the sale was a mistake. I am invited to reject this assertion. The items were significant pieces of antique furniture which were then under judicial seal within the Paris Property at the behest of Mme B. herself.

236. It is submitted that, prima facie, the sale of the furniture engages Limb 2 of the No Contest Clause. If, however, Mme B. can show as she asserts, that the sale was an act that she did not authorize, then K.B. accepts limb 2 is not engaged.

Can Mme B.'s claim Relief from Forfeiture or an Estoppel Per Rem Judicatam?

237. In ***A.N. v Barclays Private Bank & Trust (Cayman) Ltd. 2006 CILR 365*** this Court concluded (at paragraphs 103 - 123) that there was judicial dictum that established that equity might grant relief from forfeiture where non-compliance with a condition was no fault of the applicant for relief.

238. K.B., correctly to my mind, submits that, if there has been a forfeiture; it will have been through Mme B.'s deliberate acts (and after Mme B. had seen the Trust deed as

a copy was provided to her legal advisers shortly after the Settlor's death). Forfeiture would have operated after she received the Trustees' letter of 2 December 1991, which had specifically brought the No Contest Clause to the attention of all the beneficiaries. Accordingly, Mme B. would have been on notice of the Clause, would have acted deliberately in spite of it and so cannot claim relief from forfeiture.

239. Mme B.'s primary response to the counter-claim for declaration of forfeiture is that the Trustees and the beneficiaries of the Trust (through K.B.) are estopped from so asserting.

240. Deeply unattractive, disruptive and wasteful though her behaviour towards the Trust was following the death of the Settlor, I am compelled to agree that an estoppel operates to block K.B.'s counter-claim.

241. My primary reason for this conclusion, contrary to K.B.'s assertion now that the 1999 Agreement was entered into without prejudice to the beneficiaries' right, should the need arise, to have the forfeiture issue determined by the Court; is that this issue was compromised and determined by the 1999 Agreement as approved by the 1999 Order by this Court on 30 June 1999.

242. Specifically, the 1999 Agreement was made, and approved by the Court, on the basis acknowledged by the Trustees and by K.B. (then joined both in his personal and representative capacities) that the forfeiture issue was resolved by compromise and agreement. The 1999 Order was therefore made by the Court and the 1999 Agreement approved, on the basis that Mme B. was a beneficiary.

243. This is all plainly set out in the 30 June 1999 Order as follows.

244. The Second Recital on the second page of the 1999 Order records:

> *"And the parties (including the Guardian) by their respective Counsel stating that they have agreed the conditional terms in the Second Schedule hereto with a view to compromising all of the issues raised by the said Summonses and the issue referred to in paragraph 54 of the Second Affidavit of D.T. mentioned in the First Schedule hereto and consenting to this Order."*

245. The issue referred to in paragraph 54 of D.T.'s second Affidavit was the issue whether Mme B. had forfeited her interest in these terms:

> *"Contrary to paragraph 32 of Mme B.'s Affidavit (filed in the 1999 Proceedings), it is not within the power of the Trustees to determine whether she has forfeited her interest by the steps she took against them in 1992 and 1993. As stated in paragraph 18 of my previous Affidavit, the Trustees were advised by Mr. Robert Walker QC that the "No Contest Provision" in Article 111.1 of Section B of the Trust Deed (at p.13) is valid and operates automatically. It has been asserted since May 1993 on behalf of the other adult Beneficiaries that Mme B. had forfeited her interest by performing acts that would frustrate the dispositive plan contemplated in the Trust Deed (see the Affidavit of Ab.B in Cause 100). At some stage this Honourable Court may have to decide as between her and the other beneficiaries whether that is correct, unless the issue is compromised by an agreement for her departure from the Trust."* (Emphasis supplied.)

246. The 1999 Agreement and the 1999 Order provided, among other things, exactly such a compromise for Mme B.'s departure from the Trust.

247. As to its binding effect upon those beneficiaries on whose behalf K.B. now purports to counter-claim, the 1999 Order is equally clear.

248. The Third Recital of the 1999 Order records that the Court was satisfied that the 1999 Order and the terms of the Second Schedule to it (in which were set out the directions for the advancement and transfer of capital to the Guernsey Trust) were for the benefit of A.B. Jnr. and the "Absent Persons" (being all other persons who were not parties to the proceedings who were or might have become beneficially interested in the Plaintiffs' shares, all other persons who were or might have become interested in

the Trust and all persons interested as heirs in the Estate who were not parties to the proceedings).

249. Among the provisions in the Second Schedule were the following (at paragraph 22):

> *"The terms in this Schedule are in full and final settlement of all issues, claims, questions of accounts, obligations and liabilities whatsoever existing or alleged to exist between the Plaintiff [(Mme B.)] and the Fourth Defendant [(her then minor son A.B. Jnr.)] and the other persons who are or may be or become beneficially interested in the shares to which the Plaintiff and the Fourth Defendant are entitled under the A.B. Trust or any of them of the one part and (1) the Trustees and the Trust Companies or any of them; (2) the persons (including the First, Second and Fifth Defendants [(respectively M.B., Ab.Band K.B. personally and K.B. in his representative capacity)] who are or may be or become beneficially interested in the other Shares under the A.B. Trust or any of them; and (3) the Heirs or any of them of the other part, including (without prejudice to the generality of the foregoing) all the issues raised in the five Summonses mentioned in this Order and the issue referred to in paragraph 54 of the Second Affidavit of D.T. mentioned in the First Schedule of the Order."*
> (Emphasis added.)

250. As already noted, the issue referred to in paragraph 54 of D.T.'s 2nd Affidavit was the forfeiture issue.

251. Thus, this Court approved and sanctioned the terms in the Second Schedule on behalf of A.B. Jnr. (being a minor as he then was) for the purposes of proviso (c) of paragraph 2 of the Terms of Compromise contained in the Schedule to the 1993 Order. The 1993 Order, as already mentioned above, was the Order by which the powers of advancement of capital to beneficiaries was given in substitution for those originally in paragraphs B3 and B4 of the Trust Deed and allowed for the exit of Mme B. and A.B. Jnr. from the Trust.

252. The 1993 Order also (in paragraph (b) of the Schedule) provided for an "appropriate valuation" of the trust property and in terms relevant to the present issue, requiring the prior approval of the Court for an advance of Capital in these terms:

> ***"(c) In the case of a relevant advance with the prior approval of the Court (such approval being in proceedings under Section 45 of the Trusts Law (Revised) or in any other proceedings whereby the Court determines that the Trustees might properly make the relevant advance), prior written notice of the application for approval to be given to the 5th Defendant Mme B. if still alive."***

253. It was in the context of that power given by the 1993 Order (amending the Trust Deed) that paragraphs 4 to 7 of the Second Schedule to the 1999 Order provided for the transfer of assets from the Trust to the Guernsey trustees and paragraph 8 provided that:

> ***"The payment and deliveries to the Guernsey Trustees in accordance with paragraphs 4, 5, 6 and 7 of this Schedule shall constitute the exercise by the Trustees by their power under paragraph 2 of the Terms by Compromise scheduled to the Order made the 18th May 1993 in Cause No. 428 of 1992 to apply for the benefit of [Mme B.] and [A.B. Jnr.] the whole of the principal and any outstanding income of all the Shares to which [they] are respectively entitled under the A.B. Trust."***

254. The power of advancement granted by the 1993 Order, and which was effectuated by the 1999 Order, was only exercisable in favour of a person who was a beneficiary of the Trust. The 1999 Agreement was, therefore, necessarily approved by this Court on the basis that Mme B. was a beneficiary of the Trust and that the assets being transferred to the Guernsey trustees were being transferred by the Trustees in accordance with the powers conferred by the 1993 Order.

255. Further, the trust deed by which the Guernsey Trust was created (which was annexed as a Fourth Schedule to the 1999 Order and which Mme B. was required to enter into before closing) recited that Mme B. was a beneficiary of the Trust.

256. The consequence is that the parties agreed, and this court has already determined, that Mme B. was at the time of the 1999 Agreement and 1999 Order, a beneficiary of the Trust and this was so notwithstanding the earlier concerns that her conduct had led to a forfeiture of her interest. Either Mme B. was a beneficiary at the time of the 1999 Agreement and 1999 Order or she was not. By agreeing to the 1999 Agreement and Order, the continuing beneficiaries, represented by K.B., agreed that she was a beneficiary, and that assets representing the value of the principal of her Shares should be appointed to the Guernsey Trust. This Court also so determined in approving the 1999 Agreement and in making the 1999 Order.

257. From all the foregoing, it is plain, to my mind, that an *estoppel per rem judicatam* arose and still exists.

258. The 1999 Agreement and the 1999 Order were carried into effect. Their consequences still operate. Mme B. was removed as a beneficiary of the Trust and remains a non-beneficiary. This did not come about as the result of forfeiture but because of the consensual appointments to the Guernsey Trust of the principal of her Shares for her benefit as directed by the 1999 Agreement and 1999 Order, a course of action which was legally possible and permissible only if she was then a beneficiary.

259. As forfeiture automatically eventuates disqualification, it must follow as an implication that any cause of action for a declaration of forfeiture was also then

determined by the 1999 Order. Otherwise, Mme B. could not have been treated as a beneficiary for the purposes of the appointment out to the Guernsey Trust.

260. Far from any challenge being raised, the parties then specifically acknowledged her beneficial status, with the issue of forfeiture being a central issue in the compromise and settlement of disputes.

261. The effect of an *estoppel per rem judicatam* is to prevent a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist; that is: judgment was given upon it; it is "*...merged in the judgment. If it is determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam*".

262. This is settled principle. It is what Diplock LJ (as he then was) described as "*cause of action estoppel*" in ***Thoday v Thoday [1964] 1 All E.R. 341; [1964] P 181 C.A. 197-198.***

263. In this case, the appropriate way to regard the estoppel is on the basis, not of merger, but that the cause of action for a declaration of forfeiture was determined not to exist; and the fact that this was by order of the court by consent of all interested parties makes no difference to the applicability of the principle. Judgments, orders and awards by consent are as efficacious as those pronounced after a contest in creating cause of action estoppels and merging the cause of action sued on: ***Munster v Cox (1885) 10 App. Cas. 680.*** And see generally, ***Res Judicata, Spencer Bower and Handley 4th Edition Chapters 2.16 and 7*** which discusses the principle – a principle

already widely received by the Courts of the jurisdiction. See, for example, the application of the doctrine in its widest sense in the Court of Appeal ***G.H. Leo v Bould 1994-95 CILR 361.*** And, specifically, on the application of the doctrine to bar a challenge to the status of a beneficiary of a trust where that issue was already implicitly litigated and decided, see ***In the Matter of the T Trust 2000 CILR 11.***

264. The principle of estoppel notwithstanding, the Defendants here contend that the forfeiture issue is alive and relevant because, if there was a breach of duty and compensation is awardable, then on one view of the Plaintiffs' case – the "no transaction basis" – quantum would be the amount necessary to put the Plaintiffs into the position they would have been in had the 1999 Agreement and Order never been executed. On this basis and as there has been no recission of the 1999 Agreement, the Defendants say that, if Mme B. had effectively forfeited her interest and ceased to be a beneficiary prior to the 1999 Agreement, then she cannot have suffered any loss.

265. In other words, it seems to me that the Defendants contend that they are allowed to raise the forfeiture issue now because, by its very nature, Mme B.'s claim is based on the hypothesis that the 1999 Agreement was itself invalidated by the Trustees' breaches of duty and that there is an entitlement to compensation to restore the Plaintiffs to the position they would have been in had the transaction not taken place.

266. While this misconception of the case is understandable because of the confusing "no transaction" label, it is nonetheless a misconception.

267. The 1999 Agreement and Order remain in place and so the transaction that they effectuated still stands.

268. The estoppel *per rem judicatam* operates because the transaction has not been rescinded and no claim for rescission has been made by Mme B.

269. No doubt in not seeking rescission while *restitutio in integrum* was still possible (that is: as soon as she was practically aware of the impact of the MV Inc. transaction), she would have been mindful of the fact that rescission would have given new life, not only to her interests qua beneficiary of the Trust, but also to the forfeiture issue.

270. Whether the rules of equity should operate to her detriment now for her failure to seek a remedy earlier, is the next question to be addressed; but I am satisfied that the Defendants are estopped from denying that she was a beneficiary for all the purposes of the 1999 Agreement and Order, as K.B. seeks to do now by the counter-claim for a declaration of forfeiture.

271. The parties to the 1999 Agreement agreed and the Court, by the 1999 Order determined that Mme B. was a beneficiary of the Trust. It was precisely the issue which D.T., in paragraph 54 of his 2nd Affidavit stated would be compromised by any agreement for Mme B.'s departure from the Trust. Despite K.B., in his counter-claim (at paragraphs 54-56 and 58-68) seeking to assert that the 1999 Agreement and Order were effected without prejudice to the continuing beneficiaries' rights to have the forfeiture issue determined at some future stage by the Court, the issue was indeed clearly and finally compromised by the 1999 Agreement and Order. The estoppel created by the 1999 Agreement and Order precludes the Defendants from now asserting, contrary to their terms, that Mme B. was not a beneficiary when they were made.

272. The question of the validity of Limb 2 of the No Contest Clause and of the merits of the allegations of forfeiture (whether the actions complained of operated a forfeiture) accordingly does not arise.

273. K.B.'s counter-claim is dismissed.

274. Having reached the conclusion that the counter-claim for forfeiture is estopped on the basis of *res judicata*, I am not required to resolve the related issues (i) whether the No Contest Clause was valid; (ii) whether if it is valid, Mme B.'s actions (either singly or cumulatively) operated a forfeiture or were justified or (iii) whether she should otherwise be relieved from forfeiture. But given the noteworthy industry and time taken in bringing and arguing the forfeiture issues before me, I feel obliged to express, at least in passing, the conclusions I would have reached on these issues, in the event such conclusions come to be regarded as relevant later on.

275. For the reasons very fully presented by Mr. Tidmarsh QC, I am persuaded that the No Contest Clause is valid. In particular, it meets the test of "certainty" and can and should be construed as complying with the public policy requirement of not seeking to preclude a challenge before the Court on justifiable grounds. The No Contest Clause is a valid expression of the intention of the Settlor that those who would wish to enjoy his bounty should do so on the conditions expressed in his Trust and should forfeit the right to do so if they should seek to impede or challenge the purposes of the Trust.

276. I am also persuaded that Mme B.'s conduct triggered the operation of the No Contest Clause and (but for the *estoppel per rem judicatam*), operated a forfeiture of her interests under the Trust. That is for all the reasons [set out by K.B.] involving the

sealing of the Art Collection; the unauthorized and willful sale of some of it; the invocation of diplomatic immunity thereby commandeering Trust property to her exclusive use, benefit and control; the challenges in the European courts to the proprietary entitlements of the Trust; and the breaches of the confidentiality of the affairs of the Trust compelled at her behest by judicial mandate and warrant to the point of presenting a hindrance to the operational security of the Trust companies. All this, as so fully disclosed in the evidence and arguments at this trial

277. I should also explain that my conclusion in this regard also takes account of Mme B.'s contentions (as supported by her French legal advisers Professor Fadlallah and Mme Baude-Texidor in particular) to the effect that her actions were justified and as A.B. Jnr.'s. mother perhaps even required as a matter of French law.

278. I am firmly of the impression in this respect, that Mme B.'s actions were not motivated by any sense simply of legal duty to A.B. Jnr. under French law. Her true objective in all her actions against the Trust, was to secure what she perceived to be the most advantageous position from which to obtain for herself and A.B. Jnr., as much as possible for their shares of the Trust and the Settlor's Estate.

279. This remained my firm view nonetheless, following the debate between the French law expert witnesses, Professor Aynes and Me Canat.

It follows also, in my view that Mme B. would not have been entitled to claim relief from forfeiture.

The Defences of Affirmation or Election, Estoppel and Laches/ Acquiescence

280. Although relied upon at the outset, the Defendants no longer, by the time of the conclusion of the trial, pursued the claim that A.B. Jnr.'s claim is barred by these defences or that the doctrine of election applied to bar either of the Plaintiffs' claims.

281. These, in light of the evidential requirements of the law applicable to each of these defences, were appropriate concessions.

282. There is no evidence to base a conclusion that A.B. Jnr. (a minor at the time) had, by his Guardian or by the Guardianship Judge, affirmed or elected to affirm the 1999 Agreement with the appropriate knowledge of the full implications of the MV Inc. transaction after it had come to light.

283. As such a fully informed state of mind is an absolute requirement of the doctrine of affirmation or election and in the absence of evidence providing strict proof of that state of mind in her as well, the concession is also appropriately made in the case of Mme B.

284. Moreover, it appears from the case law that affirmation of an impugned transaction is not a defence to a claim for equitable compensation arising out of loss resulting from the transaction. Affirmation may be an obvious defence to a claim for rescission of the transaction but where the right to rescind is lost through no fault of the claimant, a defence of affirmation will not bar a claim for the free-standing remedy of equitable compensation for the loss. This consideration appears in the end, to have informed the concession made by the Defendants (through Mr. Tidmarsh QC), in the event I were to conclude, as I have concluded (to be explained below); that equitable compensation can be a free-standing remedy for loss arising from an impugned

transaction, whether the right to rescind the transaction exists, has been lost or was never available.

285. It is clear that a beneficiary will not be held to have affirmed a transaction entered into by a trustee acting in breach of a fiduciary duty, unless at the time of the acts alleged to have constituted the affirmation, the beneficiary was aware of the material circumstances, including in particular the facts giving rise to his right to avoid the transaction: See, ***De Bussche v Alt (1878) LT 8 Ch. D. 286 (C.A.)*** and ***Banque Jacques-Cartier v. Banque d'Epargne de la cité et du district de Montréal (1888) LR 13 App. Cas. 111 (P.C.)*** for long-standing illustrations of this principle.

286. ***Underhill & Hayton, Law Relating to Trusts and Trustees*** (18th Edition, 2010) states the principle succinctly, at 95:15:

> *"Even where the beneficiary has executed a deed of release, however, and a fortiori where he has merely concurred or subsequently acquiesced in the breach of trust, the beneficiary must have had full knowledge for the release to be effective."*

287. The question remains to be considered whether the other defences – estoppel and laches/acquiescence - may be raised as a bar to Mme B. claim, in light of the state of knowledge I may find, as a matter of fact, that she did have at the relevant times. It is only logical that I should next consider and decide this question. I begin by setting out the relevant statements of the principles applicable to those equitable defences.

Laches and Limitations

In ***P & O Nedlloyd BV v Arab Metals Co. (No. 2) [2007] 1 WLR 288*** is to be found the most recent survey and discussion by the English Court of Appeal of the cases which establish the doctrine of laches.

288. In the judgment delivered by Moore-Bick LJ at paragraph 55, is quoted with approval the following extract from a leading text:

> *"In Meagher, Gummow and Lehane, Equity: Doctrines and Remedies, 4th Ed. Para 36-050 the authors, having considered the leading authorities on the doctrine of laches, say that:*
>
> > *"It is important to note the different senses in which the word "laches" is used. Sometimes it is used to describe the lapse of a sufficient period of time to draw the inference that the plaintiff had previously approved the status quo which, by his suit, he wishes to disturb...More often, it is used not only in the sense just mentioned but also to comprehend that degree of delay which when coupled with prejudice to the defendant or third parties, will operate as a defence in equity."*

289. I agree, as Moore-Bick LJ said (ibid), that it is just as well to keep this statement of principle in mind when considering the decided cases.

290. He went on (at paragraph 56) to say:

> *"Whatever else is meant by "laches", one factor that must be present is delay. Moreover, since laches is an equitable doctrine developed to*

enable the court to withhold relief in cases where it would be unjust to grant it. (Counsel's) submission that it can have no application in any case where a [(statutory)] limitation period applies, either directly or by analogy, immediately strikes one as doubtful."

291. Then followed in the judgment, a review of the cases relied upon by counsel in support of his "doubtful" submission; namely: ***Rochdale Carat Co. v King (1851) 2 Sim NS 78, Archbold v Scully (1861) 9 HL Cas 360, Redgrave v Hurd (1881) 20 Ch D 1*** and ***In re Paulings Settlement Trust [1962] 1 WLR 86;*** leading to this conclusion, explanatory of Moore-Bick LJ's immediate impression; (at paragraph 61):

"...if and to the extent that a limitation period is applicable to the claim, it is difficult to see why mere delay should defeat the claim until the limitation period has expired. I think [Counsel's] submission was right, therefore, being confined, as it was, to cases of that kind. I also think that the distinction between mere delay and delay which has an adverse effect on the position of the defendant or others is sufficient to explain the dicta in the cases on which he relied. Equally, however, I can see no reason in principle why, in a case to which a limitation period does apply, unjustified delay coupled with an adverse effect of some kind on the defendant or a third party should not be capable of providing a defence in the form of laches even before the expiration of the limitation period. The question for the court in each case is simply

whether, having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks." (Emphasis supplied)

292. The clear distinction in the doctrine between mere delay and prejudicial delay, Moore-Bick LJ regarded as finding longstanding support in the opinion of Sir Barnes Peacock delivered on behalf of the Privy Council in ***Lindsay Petroleum Co. v Hurd (1874) LR 5 PC 221, 239-240*** in these terms:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

293. In this case, a primary response of the Plaintiffs to the defence of laches raised on behalf of the Trustees and continuing beneficiaries of the Trust, is that their claims, being subject to the six-year statutory limitation period within which these proceedings were instituted, are preserved by section 27(3) of the Limitation Law or by its application by analogy and so cannot be barred by laches. Mere delay is therefore not enough.

294. In response, the Defendants say that while this may be correct only in the sense of laches meaning mere delay (citing ***P & O Nedlloyd BV v Arab Metals Co.*** (above)), the Defendants do not rely only on mere delay. Instead they rely on no less than a dozen considerations or circumstances which I will come below to examine.

Estoppel

295. The Defendants say that a party, here Mme B., may be estopped even where she does not know the full facts giving rise to, or of the precise nature of, the right to rescind.

296. Where legal contractual rights are being considered, a party will be estopped, or deemed to have acquiesced, if she has, by unequivocal actions or statements, led the other party to believe that she intended to affirm the now impugned transaction and the other parties have acted on the statement or acted to their detriment. See *Chitty on Contracts*, 3rd Ed., para 6-126.

297. In the case of equitable rights as asserted here, I am satisfied, having regard to the cases, that the more appropriate view is that all the circumstances must be considered to see whether it is unfair to permit a claimant to set aside a transaction or, as in this case, to bring into question the transaction, so as to be able to claim equitable compensation for loss arising from it.

298. ***Holder v Holder*** [1968] 1 Ch. 353 is relied upon by Mr. Tidmarsh particularly in this regard. At p. 394 Harman LJ, in his judgment (one of three) delivered by the Court of Appeal, approved of the earlier dictum of Wilberforce J (as he then was) on the subject in these terms:

> *"Like the [trial] judge, I should desire to follow the conclusions of Wilberforce J. who reviewed the authorities in In re Pauling's Settlement Trusts ([1962] 1 WLR) and this passage was mentioned without dissent in the same case in the Court of Appeal (1963 2 WLR 742):*
>
> > *"The result (says the judge) of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn around and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefitted by the breach of trust."*
>
> *There is therefore no hard and fast rule that ignorance of a legal right is a bar, but the whole of the circumstances must be looked at to see*

whether it is just that the complaining beneficiary should succeed against the trustee."

299. Danckwerts and Sachs LJJ were in agreement with that conclusion of Harman LJ (see respectively pp399 C-D and 403 D-E).

300. It must be understood, however, that the specific question there being addressed by the Court of Appeal was the extent to which knowledge in a claimant, of the nature of the legal right regarded as having been breached, is required before he may be treated as estopped by virtue of his words or conduct from relying upon it for his claim.

301. Knowledge in the claimant of the factual circumstances relating to the breach is also required for an estoppel to operate but it would appear from the case authorities, that the approach is the same: the court is required to consider all the surrounding circumstances to see whether, from the extent of actual knowledge of the breach said to have been acquiesced in, the claimant should be regarded as estopped from claiming. The close overlap between estoppel and acquiescence in this regard can, depending on the circumstances, be very cognisable, as explained by Sachs LJ in ***Holder v Holder*** (above) at 403 C-D:

"The Plea of acquiescence in this particular case seems to me to have a close resemblance to one of estoppel: and it is to be noted that in Halsbury's Law of England, 3rd Ed. (1956), Vol. 14, it is stated on p.638, in para. 1178:

"Acquiescence operates by way of estoppel. It is by acquiescence in such circumstances that assent may

reasonably be inferred, and is an instance of estoppel by words or conduct."

While recognising that these two pleas are not necessarily coterminous it yet seems to me that in the present case if the facts are sufficient to create an estoppel then a fortiori, a plea of acquiescence must succeed."

302. Lastly, in this regard of identifying the equitable principles, I must remind myself that what is ultimately at issue here is whether or not beneficial interests in a trust are to be treated as barred on grounds of laches, estoppel or acquiescence. As the following passage from **Spry**: ***Equitable Remedies***, 8th Ed. p.241 explains, such interests are sometimes to be regarded as "*less easily destructible*" than legal contractual rights. I consider that the passage is worthy of being cited in full:

"A *question sometimes arises whether, in order that there should be acquiescence, the plaintiff must have known of the precise nature of his rights. Here there must be great caution in referring to authorities which, although sometimes adduced in this context, in truth concern such matters as releases or elections by plaintiffs to rescind agreements or to acquiesce in breaches of trust, for in some respects those authorities raise special considerations. So although Wilberforce J once said (citing* ***In re Pauling's Settlement*** *and* ***Holder v Holder*** *(both above)) it is not always necessary that a concurring beneficiary should know that what he is concurring in amounts to a breach of trust, it must, unless a different requirement is rendered equitable by all the*

circumstances, appear "that he fully understands what he is concurring in", nonetheless in some respects the rights of a beneficiary under a trust should be regarded as less easily destructible than rights to the specific performance of an agreement.

In actions for specific performance the ultimate question is always whether or not the grant of the particular auxiliary relief that is in question would be "practically unjust" [(citing ***Lindsay Petroleum Co. v Hurd*** *(1874) L.R. 5 P.C. 221 at 239-240)]. No doubt ordinarily, a plaintiff who is aware of the material facts may be treated as being aware of their legal consequences, but there may be special considerations present that render this course inequitable, such as the existence of a fiduciary relationship, or an inequality between the parties. Similarly, it is sometimes found that a plaintiff who does not know of the material fact has been put on notice and given special ground for suspicion, and here also, in the light of prospective prejudice to the position of the defendant [(here to the continuing beneficiaries in the Trust)], it may be unreasonable to grant relief. Accordingly, it is not appropriate to attempt to set out a general rule as to the extent to which knowledge by the Plaintiff of his rights is necessary in order to give rise to a defence of acquiescence. Each case must be determined by reference to its precise circumstances, according as the balance of justice is found to incline in one way or the*

other. In general, therefore, the same considerations apply here as in cases of laches."

303. As to the extent of knowledge of the right breached required for the purposes of the doctrine of laches, the authors, at p.226-227, earlier provide an equally helpful discussion of the law. For present purposes, it will suffice to adopt the following further statement of principle from page 227:

> *"The governing consideration in regard to matters of notice, and that to which general rules must be subordinated, is that there must be "such notice or knowledge as to make it inequitable to lie by" in regard to the particular discretionary relief that is subsequently sought, in the light of all the relevant considerations tending for or against the grant of that relief"; (citing* ***Erlanger v New Sombrero Phosphate Co****. (1878) 3 App. Cas. 1218 at p. 1279, per Lord Blackburn).*

304. A more recent discussion of the extent of knowledge required on the part of a claimant before the equitable defences of laches, acquiescence and estoppel may be relied upon to bar his claim, can be found in ***Habib Bank Ltd. v Tufail [2006] EWCA Civ. 374.*** Ultimately, the Court must be concerned with the question whether, from all the circumstances, it would be inequitable to allow a claimant to set aside, or seek compensation in respect of, the transaction in which he is said to have acquiesced by word or action.

305. Accordingly, in relation to these pleas in defence of laches, estoppel and acquiescence; the first question I must consider is what facts were known to Mme B. (and for that matter her legal advisers) before the completion of the 1999 Agreement, which must

be taken, for these purposes, to include the full and final execution of that Agreement by the transfer of assets to the Guernsey Trust and the subsequent disposition of the Art Collection for the purposes of funding the Guernsey Trust.

306. A dozen sets of circumstances and events are cited in support of the equitable defences. They must be considered against all the background already described, leading up to the closing of the 1999 Agreement in June/July 1999.

307. That background includes the protracted disagreement that had attended the valuation of the assets of the Trust and of the Plaintiffs' Shares in the Trust, in which context the very question of the amount to be appointed out to the Guernsey Trust (in the form of the Art Collection and cash), had itself been the central focus of disagreements, negotiations and ultimately, compromise. The main causes of disagreement had been the value to be ascribed to S.T. Ltd. and the amount of the "illiquidity" discount.

308. In that process and over a number of years from the beginning of the first round of negotiations in 1993, all sides had been represented by their respective teams of lawyers and accountants. In that respect, there certainly was no "inequality of arms". The teams appointed for the Guardian were in close touch with those appointed for Mme B.

309. Thus, in her response to what was to come to light in respect of the MV Inc. transaction and its potential (even if still not fully disclosed) impact upon the indicative fair value of the Trust and the liquidity to become available to the Trust, Mme B. may not be regarded as having been at a disadvantage by way of any deficit of available advice.

310. It is against that background that the Defendants rely on the following:

(1) Closing of the 1999 Agreement took place on 7th July 1999. The result was the transfer of the entire Art Collection (at the agreed value of USD92.60 million) and cash of approximately USD81 million.

The process involved, not only the arrival at a compromise on the value of the Trust Fund, but also the Trustees having to certify by way of accounts and the filing of an inventory with the French court, in respect of the assets of the free Estate of the Settlor standing outside the Trust. The process also involved a "mandate" entered into between the parties for the sale or division of those assets for distribution among the heirs in accordance with the share of each in the Estate.

Thus, the 1999 Agreement purported to settle, not only the Plaintiffs' Shares in the Trust, but also their shares in the Settlor's estate.

(2) On 10th July 1999, MV Inc. announced (by Press Releases simultaneously at X City, X Country and S City in Y Country at a public event, that it had been granted an option to acquire 40% of S.T. Ltd.

(3) On 15 July 1999, the French lawyers for the Guardian (M. Bruno Quint and Batonnier Bernard du Granrut) wrote by post and fax to John McDonnell QC (the Trustees' lead lawyer) referring to press stories that MV Inc. had purchased 40% of S.T. Ltd., asking for details of "the main points of this purchase". They also observed: *"Since negotiations for such a deal (would) have necessarily started much before our own agreement being executed, with a full due diligence exercise, it has come as a real surprise for us".*

John McDonnell QC replied on the same day indicating that there had not been a purchase, but only a grant of an option and that the details remained confidential. Mr.McDonnell QC also went on however, to explain why the MV Inc. transaction would not affect the valuation exercise of the Trust assets (essentially suggesting that MV Inc. would be a special purchaser and so if the option were exercised it would not be an open market transaction based on indicative fair value which was the premise of the valuation exercise for the exit negotiations) and so expressing matters of subjective opinion.

This is a matter about which Me. Quint was later to testify in evidence at the trial before me, he did not believe Mr. McDonnell QC and so had not accepted his explanation. Mme B. in her evidence confirmed that she was of course, aware of this exchange between the lawyers and considered Mr. McDonnell's response to be "inadequate".

(4) Whether these exchanges between the lawyers should be regarded as sufficient for the purposes of the equitable defences as having put, not the Guardian, but more to the point here, Mme B., on notice of the implications of the MV Inc. transaction; must be considered against the further background of exchanges that had taken place leading up to the Court hearing on 23 June 1999 and a declaration then made by Mr. McDonnell QC at the hearing itself. That involved the 3rd Affidavit of D.T. filed in those proceedings (Cause 422 of 1993) and which had been sent in advance in draft (according to the uncontested evidence of Mr. McDonnell QC) to the lawyers for the Guardian and Mme B. At paragraphs 23-27 of that affidavit (of which Mr. McDonnell

had also reminded Messrs du Granrut and Quint in his reply of 15 July 1999) this was stated:

> *"The Present Position*
>
> *23. Unless a last-minute agreement is reached along the lines which were being discussed "without prejudice", it is unlikely that the Trustees will remain willing to exercise their power to appoint out of the Trust the Shares of Mme B. and A.B. Jnr. in the way which has been envisaged in the previous negotiations.*
>
> *24. The Trustees have been for some time under pressure from other adult Beneficiaries to make substantial appointments needed for their own future plans or those of their children. Decisions have been postponed partly because of the shortage of liquid resources within the Trust and the hope that a successful conclusion of the negotiations concerning the Shares of Mme B. and A.B. Jnr. would enable the value locked up in the Art Collection to be realised, either by enabling it to be sold for the benefit of the Trust or by appointing it out as part of their Shares and thus releasing other liquid resources so as to enable appointments to be made to other Beneficiaries.*
>
> *25. Another reason for postponing those decisions has been that the Trustees are determined, as they have been from the outset of their administration following the Settlor's death, to be entirely even-handed as between the Beneficiaries in the*

exercise of their powers, while observing the proportional scheme of Settlement (as, for example, in their interpretation of the income provisions – see my first Affidavit at pars. 5-7 – and their decision in late 1996, following the expiration of the Protocole d'Accord and the flotation of S.H. Ltd., to distribute USD$30 million to all the Beneficiaries pro rata). They have had in mind for some time proposals for a substantial restructuring of the beneficial interests (with the agreement of the adult Beneficiaries and the approval of this Honourable Court on behalf of minors and unborn Beneficiaries so far as may be necessary); but because of the difficulties which have previously been experienced with Mme B. and the French Guardians, it has always seemed prudent to try to satisfy their demands first.

26. That now seems impossible, and the Trustees are seeking other means of providing the liquidity to enable them to make the sort of proposals which they have in mind for the Beneficiaries as a whole. The Trustees believe that they will satisfy the legitimate aspirations and needs of all the Beneficiaries in a fair and above all even-handed way and that the Beneficiaries should welcome them.

27. Those proposals depend on the necessary liquid resources being made available as to which I can say nothing more at

this stage. But that is likely to entail changes within S. Group which would necessitate a revision of the valuation exercise carried out for the purpose of the last round of negotiations."

311. Those passages have been, in my view, suitably described as "Delphic" or "opaque" by witnesses and counsel in this trial, when considered from the point of view of whether they gave proper disclosure, in fulfilment of any duty of disclosure of the MV Inc. negotiations existing prior to the 1999 Agreement and then resting on the Trustees. That justified criticism arose in response to Mr. McDonnell's suggestion that paragraph 27 in particular contained an implicit reference to a transaction then pending that could affect the overall value of the Trust assets. However, when viewed in the subsequent light of the public announcement on 10 July 1999, of the MV Inc. option to purchase S.T. Ltd.'s shares, and John McDonnell's reply of 15 July 1999; these passages from D.T.'s third affidavit, assume a different significance.

312. In that subsequent light and broader context, D.T.'s third affidavit, the emphasis by way of declaration made about it at the hearing on 24th June 1999 by Mr. McDonnell and Mr. McDonnell's reply of 15th July 1999 provided in my view, that notice, of which the case law speaks, sufficient to put a beneficiary in the position of Mme B. on enquiry and to have done so in the context of her performance of an agreement which she later seeks to impugn, and one that altered not only her own, but also other beneficial entitlements irretrievably. By this, of course, I mean the carrying out of the 1999 Agreement including the appointment out of USD173.34 million of Trust assets to the Guernsey Trust; as well as her sale of the Art Collection transferred as a part of the transaction.

313. Further passages from John McDonnell's reply of 15 July 1999 are also illustrative:

> *"In the fourth place, one must draw a line at the end of the valuation exercise at some point or one would never arrive at a conclusion. The values of the various elements in S. Group are bound to fluctuate; and new projects and transactions will always be cropping up. If the Group were re-valued today, for example, it would be necessary to take account of a new valuation of S.H. Ltd. which was obtained earlier this year and which indicates that that element was overvalued in the Accountant's exercise".*

314. No matter how vague or opaque, that passage must be regarded as being at least argumentative on the subject of the possible impact of the MV Inc. and S.H. Ltd. transactions upon the ultimate value of S. Group. It invites acceptance of the notion that finality in the exit negotiations should be more important to the parties than re-opening the valuation exercise; the MV Inc. transaction then publicly disclosed, notwithstanding.

315. It is an invitation that Mme B. and her advisers were not obliged to accept and, indeed perhaps, one which was apparently ill-advisably accepted as the reply suggested that overall values could change.

316. The reference to the S.H. Ltd. element having been overvalued relative to the values ascribed in the Joint Report, was also of further significance. In the first place, that did turn out to be the case, and by a significant margin. In the second place, it became a reasonable inference therefore, that Mme B. was prepared to assume the risk that any undervalue of S.T. Ltd. would be offset at least somewhat, by any

overvaluation of S.H. Ltd., as that is the clear implication of this passage. As events transpired, that also turned out to be the case.

317. And finally, from Mr. McDonnell's reply of 15th July 1999:

> *"The real significance of the MV Inc. option is that it is one of the means by which the Trustees hope to provide the liquidity to enable them to satisfy the needs of the other beneficiaries as stated in paragraph 26 of D.T. (3) and it was one of the proposals referred to in paragraph 27 of that Affidavit. You did not ask what those proposals were at that time; and as D.T. said in paragraph 27, he would not have been able to say any more at that stage. He is still not in a position to say any more than appears in the Press Release."*

318. This passage is, if anything, even more pointedly argumentative and inviting of enquiry. The reference to liquidity goes directly to the heart of one of the two most difficult aspects of the exit negotiations – whether there should be a discount to the amount to be paid to Mme B. and A.B. Jnr. as the exiting beneficiaries, because of the large amount of liquidity required for that purpose, relative to the illiquid state of the Trust assets.

319. Here Mr. McDonnell is indicating that the assets will likely become significantly more liquid because of the MV Inc. transaction. Implicitly therefore, that if the exiting beneficiaries were to insist that the Trustees wait and see (the attitude adopted earlier by the Trustees with S.H. Ltd.) the discount for illiquidity might be reduced. And, in this context, the reference to D.T. 3 carried a still further implication because here was being presented a reaffirmation of the indication earlier given in paragraph 27, that there would likely be a significant change to the Trust assets such as could

result in a further valuation exercise. Yet this would be an exercise which would involve delay, because of the concerns for confidentiality which still prevented the Trustees from giving a fuller explanation.

320. Against the foregoing background and given the requirements of the case law, I think the appropriate question becomes, what, in all the circumstances, was the nature of the response to have been reasonably expected of Mme B. by the time of Mr. McDonnell's reply on 15 July 1999, if she had concerns about the fairness of the exit settlement?

321. I think the only proper answer must be that she was obliged immediately to act upon those concerns to require the Trustees not only to address them satisfactorily, but also to allow matters to revert to the status quo ante unless and until her concerns were resolved.

322. Fairness, not only to Mme B., but also to the continuing beneficiaries, required nothing less. That would have, of course, at least required agreement as to the preservation of the Art Collection (a uniquely irreplaceable asset) until any re-evaluation of the Trust assets was complete. Or even, in the less likely event of rescission, the *restitutio in integrum* of the assets of the Trust – all the more reason to preserve the assets intact until matters were finally resolved.

323. As events were allowed to transpire, it can only be inferred, that even if she had concerns about the fairness of her own appointment out of the Trust, she was not prepared to afford the opportunity to the Trustees to act as they might otherwise require in the interest of the continuing beneficiaries of the Trust.

(5) The Trustees further point to delay in and of itself - the passage of time before this action was instituted in 2005 – when the parties had to focus again on the past events, and with the predictable attrition upon the individual recollection of witnesses.

I have had, indeed, to pay particular attention to areas of conflict of recollections in order to form my own impression of the reliability of witnesses.

Fortunately, in some important areas of conflict, contemporaneous notes or other records have helped to inform that impression.

324. As an example, according to his evidence; on 16th July 1999 Mme B. telephoned M.B. She denied that she initiated the call. M.B. recalls the substance of the conversation but for the specific details adopts a note which D.T. made at the time from his (M.B.'s) report to D.T. of what was said between himself and Mme B. This note of D.T.'s took the form of a letter to John McDonnell on the same date of the call as follows:

> *"M.B. had a call from Mme B. this morning. She told him that she had just learned of the letter from the Batonnier and Bruno. She said that she had not been informed before the letter was sent and that she would not have authorised it to be sent. She said that she was not concerned by the S.T. Ltd. deal and she did not intend to make any problems...."*

325. The referenced letter was, implicitly, that to which Mr. McDonnell had replied on 15 July 1999 as discussed above. In her evidence at trial, Mme B. denied making that statement. She said (in the following exchanges with Mr. Tidmarsh):

A: *"Well, according to my memory, I think my memory would be better because I couldn't have said that to M.B., because I was not there [(when D.T. was making that note)], and so it's probably what M.B. told D.T. to say, because this is not possible.*

Q: *What did you say?*

A: *I did not say that I was not aware that the Batonnier would send a letter.*

Q *I see. I suggest to you that you did say that to M.B.?*

A: *What I said to M.B., I talked to him and he – about the sale of S.T. Ltd., and he swore, he swore, that this would have no impact on my exiting or my son exiting, he swore that, and I said, "Fine then".*

326. That exchange if accepted would give the impression that Mme B. was then, at the time of the conversation with M.B., content simply to take him at his word and accept the assurance proffered by him as the basis for not pressing for further information about the MV Inc. transaction.

327. For a number of reasons I am unable to accept her evidence in this regard.

328. In the first place, D.T.'s note can be relied upon as an accurate account of what M.B. told him. It is a fortunate circumstance of this case that I felt able to come to regard D.T. as a reliable and trustworthy witness. In many instances, his own recollection was made all the more reliable because of the detailed and accurate notes which he kept. While questions did arise over the lack of minutes of certain Trustees' meetings, no-one questioned the reliability of those minutes and notes that were actually taken by him.

329. And while Mr. Boyle for the Plaintiffs came to criticise D.T. as being unforthcoming in certain respects and partial in his testimony toward M.B. in particular, that was not my own impression of him. In the end though, I took the assurance I needed in support of his testimony (as indeed in support of other witnesses' testimony) to a large extent from the contemporaneous documents.

330. Secondly, Mme B.'s account of her willingness to accept M.B. at his word runs contrary to the antipathy that had come to characterise their personal relationship. Indeed, this was something she prayed in aid to justify at least some of her conduct in relation to the Art Collection and the Paris Property especially; describing her actions as necessary to protect her and A.B. Jnr.'s interests.

331. Thirdly, her account of unquestioning reliance on M.B.'s views of the significance of the MV Inc. transaction is entirely counter-intuitive to the reaction to have been expected from her and her advisers after receiving D.T. 3 and especially when paragraph 27 of it was emphasized by John McDonnell's letter of 15th July 1999.

332. Finally, on this point, and perhaps most telling, an unquestioning acceptance of assurances from M.B. simply makes no sense, when considered against all the background of the challenging and inquisitorial attitude of her legal and other advisers. What was at stake here was potentially an additional value to the Trust Fund of many millions of dollars and so a significant increase in the value of her and A.B. Jnr.'s Shares. It is incredible that she would have foregone an enquiry simply on the basis of M.B.'s assurance. It is far more likely to have been the case – and I so conclude – that she was content enough with the settlement as not to wish to have

anything disrupt it, lest the Trust assets had to be restored and the forfeiture issue resurrected.

(6) At the end of September 1999 (and so before the sale by Mme B. of most of the Art Collection in November – December 1999) the Trustees were informed that at a recent meeting (or hearing) with the Guardianship Judge (at which Mme B. and P.M. the Guardian were present), both the Guardian and the Guardianship Judge had expressed concern at the S.T. Ltd. and S.H. Ltd. sales and suggested that A.B. Jnr. had received less under the 1999 Agreement than he should have done and that a proposed sale of an asset in the Estate ought not to be approved by the Judge unless the Trust made an additional payment to A.B. Jnr. This is recorded by D.T. as having been reported by J.R. (at the time the Chief Financial Officer of S. Group) from a conversation the latter had had with M. Pierre Sardet. M. Sardet was not only the valuer engaged by Mme B. and the Guardian, but had also become charged by the Guardianship Judge (in French the "Juge des Tutelles") with oversight of certain aspects of the exit negotiations relating to the Estate. There is a contemporaneous note of this from D.T. to Mr. McDonnell QC of 6th October 1999.

334. M. Sardet in his testimony recalled a meeting with the *Juge* at which, among others, Mme B. was present and at which valuations were discussed, although he could not recall the details of what was said.

335. M. Quint recalled in his testimony at this trial, that there might have been an informal meeting with the *Juge* (such that records of it may not have been made and so none

would be available). Mme B., for her part though, insisted in her testimony that she was not at any such meeting, despite M. Sardet's specific recollection that she was.

336. I am satisfied that the meeting with the *Juge* did take place and that D.T.'s note to John McDonnell QC accurately recorded J.R.'s report of M. Sardet's account of that meeting:

> *"M. Sardet recently told J.R. that, at a meeting with the juge des tutelles last week, P.M. and the juge des tutelles both expressed outrage concerning the S.T. Ltd. and S.H. Ltd. sales. The purpose of the meeting was to approve the sale of one of the properties in Marbella and the juge supposedly refused to approve the sale unless the Trust paid A.B. Jnr. an additional $25,000,000.*
>
> *After hearing this, M.B. called Mme B., who confirmed that. P.M. (The Guardian) and the juge were on the war path. She said that she felt like she was in the dock at the hearing, as they accused her of rushing the settlement and pressuring them into accepting a lesser appointment than what the child should have received."*

(7) The significance of the reported meeting with the Guardianship Judge is contextualized by a further conversation between M.B. and Mme B. which I also find did take place on 15 October 1999. Again, there is a contemporaneous note of D.T.'s to the Trustees:

"M.B. had a further conversation today with Mme B. regarding the current attitude of the various parties with respect to last summer's settlement. He was reassured that neither Mme B., P.M. nor the juge des tutelles intends to call the settlement into question and that they simply want to get on with the liquidation of the remaining assets of the estate of A.B. Snr."

337. Mme B. sought to deny this conversation in her testimony in Court, although in her witness statement given in preparation for her testimony, she was able only to say that she could not recall the conversation.

338. Here too, I am persuaded to prefer M.B.'s recollection as supported by the contemporaneous documents. What it all amounts to is the clear inference that despite the MV Inc. transaction having become known to Mme B. and her advisers, a deliberate decision was taken not to rescind the 1999 Agreement or insist upon a preservation of the status quo - as would have been appropriate - until the full implications of the MV Inc. transaction were revealed.

(8) There instead followed further negotiations concerning the question of the European assets of the Settlor's Estate. This led to the "Quitus" and Side Letter of December 1999 which, in short, provided that Mme B. and A.B. Jnr. were to be paid USD3 million as their entitlement from the European assets with any overpayment (after final accounts) up to USD1 million to be set off and deducted from Mme B.'s share of the other assets of the Estate.

(9) The December 1999 Quitus and Side Letter were approved by the Guardianship Judge on 30 November 1999 and the USD3 million was paid on 20 December 1999.

(10) Mme B. concurred (by and pursuant to the December 1999 Quitus and Side Letter) in allowing the European Assets of the Estate to be dealt with on the basis that they were free from any claim from the Trust. A consequence was that the Trust renounced the very large debt of USD129,834,450 then owed to it by the Estate. The debt had arisen as a result of a guarantee by the Trust of a debt of the Settlor to S. Group in that amount and was included in the Trust accounts from 1993 down to 1999. As beneficiaries of the Settlor's Estate, the share of Mme B. and A.B. Jnr. in that debt was USD26,667,996. This was a great deal more than the value of their share in the Estate. But it was pursuant to these arrangements that the sum of USD3 million was paid in satisfaction of their entitlements under the Estate rather than the negative sum of minus USD23 million, which would have been factored and reflected in the overall settlement.

(11) It is posited on behalf of K.B. and M.B. in their dual capacities as heirs to the Estate and beneficiaries of the Trust (and K.B. in his representative capacity) that they would not have agreed to the December 1999 Quitus and Side Letter had the present claims then been raised by Mme B. I accept that as the reasonable probability of what would have then happened.

(12) In November and December 1999, the Art Collection was put up for sale by Broker 2's at Mme B.'s behest as one of the trustees of the Guernsey Trust.

The sale yielded proceeds of $81 million, with items worth more than $10 million retained.

(13) Early in January 2000, the Trustees distributed among the continuing beneficiaries of the Trust USD120 million of trust income. This was after the transfers of cash out to the Guernsey Trust in satisfaction of the Plaintiffs' Shares and therefore on the basis that the S. Group had enough liquidity remaining to allow those distributions. It was also aimed at helping to redress in some measure the imbalance created in favour of the Plaintiffs vis-à-vis other beneficiaries, resulting from the early advancement of capital to the Plaintiffs. The liquidity that enabled that distribution had come about mainly due to the MV Inc. purchase of S.T. Ltd. shares and the sale of the Trust's remaining 28.5% S.H. Ltd. shareholding.

M.B.'s evidence is that the Trustees would not have approved this distribution and so altered the position of the Trust, if they had been aware that the 1999 Agreement might be called into question. No assessment of equitable compensation payable to her as arising from the breaches of duty she claims against the Trustees, would be possible without having regard to the prejudicial impact that her delay in raising her claim has had upon the Trust assets and so upon the beneficial entitlements of all other beneficiaries. It is no longer possible to assess that impact.

339. I am satisfied, having regard to all the foregoing considerations, that Mme B. must be regarded as estopped by her unequivocal actions and statements to the contrary, from now bringing the 1999 Agreement into question. Having regard to all the

circumstances, and being guided by the legal principles discussed above, it would in my view be inequitable and unfair to allow Mme B. to bring the 1999 Agreement into question.

Duties and Alleged Breaches of Duties

340. Having dealt with the defences in equity concluding that Mme B. is estopped from claiming equitable compensation for breaches of duty on the part of the Trustees, I must now nonetheless, from A.B. Jnr.'s point of view, deal with this issue. I will, however, for convenience continue to refer to the Plaintiffs in the plural. It will also be convenient to assess any compensation found to be payable to the Plaintiffs jointly, then deducting any amounts that would otherwise be calculated as payable to Mme B.

341. Complicated though the background and involved though the evidence and arguments were in respect of these issues at the trial, the questions to which they give rise are not complex or difficult.

342. The first is: what duties were owed by the Trustees?

343. The second question is equally obvious: were those duties or any of them breached? Again, the answer would depend on the view taken of the materiality of the MV Inc. negotiations and potential transaction to the exit negotiations and ultimately to the 1999 Agreement and 1999 Order. If that materiality is found, then, subject to their defence of reliance on Mr. McDonnell's advice, the breach must be deemed admitted by the Trustees, as they have acknowledged throughout that they had resolved that the MV Inc. negotiations and potential transaction should not be disclosed and they were, in fact, not disclosed.

What were the Trustees' Duties?

344. As already described in passing above, the Plaintiffs submit that the duties owed by the Trustees were three-fold:

(i) As pleaded in paragraph 62 of the 6th Amended Statement of Claim: the duties imposed by the fair-dealing rule required the Trustees not to enter into a transaction with a beneficiary without making full disclosure and ensuring that the transaction with the beneficiary is fair and honest, taking no advantage of the beneficiary. See ***Lewin on Trusts, 18th Ed. par 20-135***, citing ***Tito v Waddell (No. 2) [1997] Ch. 99*** and ***Re Thompson's Settlement*** **[1986] Ch. 99** (albeit the latter dealt specifically only with the self-dealing rule).

The duty imposed by the self-dealing rule is one that requires that a trustee not seek to benefit himself in a transaction with a beneficiary and applies irrespective of the fairness of the transaction. It is said however, not to apply in relation to the purchase by a trustee of a beneficial interest in trust property (***Lewin*** op. cit. ibid).

Here, for this reason and the further reason that the Trustees being also beneficiaries under the Trust and themselves objects of the dispositive powers of the Trust, were put by the Settlor in the position of conflict between their duties to the other beneficiaries and their own self-interest and were nonetheless authorised to act; the self-dealing rule does not apply (see ***In Re Z Trust 2009 CILR 593 and Lewin on Trusts*** (op cit at para 20).

An exemption is provided to the otherwise strict rule that a fiduciary may not himself benefit from his dealings with the person to whom he owes fiduciary

duties, having acted in breach of those duties: ***Boardman v Phipps [1966] 3 All. E.R. 721.***

I do not understand the Plaintiffs to contend otherwise. Rather, the complaint here relates not to the self-dealing rule but to the fair-dealing rule as it is described above and in their 6th Amended Statement of Claim.

The fair-dealing rule goes further to provide that a transaction entered into by a trustee with a beneficiary in relation to the purchase of his beneficial entitlements, will be liable to be set aside unless the trustee can show that he has taken no advantage of his position, has made full and frank disclosure to his beneficiary and that the transaction is fair and honest: ***Lewin*** (op cit, ibid).

(ii) Paragraph 63 of the 6th Amended Statement of Claim pleads that the Trustees had a duty to act in the utmost good faith and specific duties of disclosure of material information in fulfillment of that duty in negotiating and entering into the 1999 Agreement and when seeking the approval of this Court for the 1999 Order.

This information included – as pleaded in paragraphs 54B -55 - the up-to-date accounts and forecasts of S.T. Ltd. for the years 1998, 1999 and 2000 as they were available to the Trustees for the MV Inc. negotiations before the 1999 Agreement was executed and 1999 Order made.

(iii) Paragraphs 64 and 64A plead alternative steps the Trustees could and/or should have taken (including seeking the directions of the court in accordance with paragraph 3 of the Second Schedule to the 1993 Order), in the event as

the Trustees contend, they were bound by confidentiality not to disclose the MV Inc. negotiations/transactions.

Alternatively, if the Trustees were precluded (which is denied), that they should have postponed the exit negotiations as they had when the S.H. Ltd. transaction presented similar concerns.

345. During the trial and arguments, it is fair to observe that the duties claimed to have been breached were described in varying and different ways. But, in the end, I am satisfied that these all came down to claims based on the application of the fair-dealing rule and the Trustees' possession of and failure to disclose material information

346. I conclude that these were indeed duties owed to the Plaintiffs throughout. I also conclude that the nature of the duties of commercial confidentiality perceived by the Trustees to be owed by them to MV Inc.., provided no justification for non-disclosure of the MV Inc. negotiations (or potential transaction) to the Plaintiffs. Nor did the Trustees' concerns about Mme B.'s prior conduct and demonstrated propensity to abuse or misuse Trust information, justified though they may have been; absolve the Trustees of their duty to deal fairly with their beneficiaries, a duty which has long been regarded by the law of equity as unconditional.

347. These were duties reinforced also by the 1993 and 1998 Orders of this Court in mandatory terms, based upon the undertakings given by the Trustees (and by the Guardian), mutually to ensure that the information required for the joint valuation exercise of Mme Costafrolaz and M. Sardet was complete and reliable. In particular, I am unable to accept, as the Defendants have suggested at trial, that this undertaking

was confined so as to require compliance by the Trustees only with specific requests for information from M. Sardet and that, through Mme Costafrolaz, they did so comply. To the extent that the up-to-date accounts and forecasts for S.T. Ltd. and the fact that the MV Inc. negotiations and potential transaction were known to the Trustees and were material to the exit negotiations, it can be no excuse that they were not disclosed to M. Sardet because he did not insist on having them. He could hardly now be regarded as obliged to have insisted upon getting information which he then did not know was in existence.

Breach of Duties

348. It follows, that the only questions remaining to be answered before a determination whether the duties were breached, is whether information which was not disclosed was available to the Trustees and whether it was material to the exit negotiations.

The MV Inc. Negotiations and Transaction

349. It is submitted by the Trustees that neither the fact of the MV Inc. negotiations nor the financial information that informed the Presentation and/or 7th May 1999 letter from V.M. to N.N., was material to the exit negotiations. They say the MV Inc. negotiations and related financial information were therefore not disclosable to the Plaintiffs and, it would follow, that there was no breach of duty in not disclosing them.

350. This absence (or lack) of materiality is in turn premised, say the Trustees, upon the fact that the MV Inc. purchase, being a special purchaser transaction, was not one contemplated by the parties to be the subject of the D&T/M&G valuation, as that

exercise was one agreed between the parties as intended to arrive specifically at the indicative fair value (or "open market value") for S. Group.

351. A great deal of time and effort was taken at the trial, including that taken over the competing evidence of the valuation experts Mr. Guitera and Mr. Glover, on the question whether the MV Inc. purchase was or was not a special purchaser transaction.

352. While that debate will certainly inform any view to be taken now about the ultimate value to be ascribed to S.T. Ltd. (and so the S. Group as a whole), for the purpose of valuing the Plaintiffs' shares and for the assessment of the question of any loss and compensation, I find the debate to be less relevant to the question whether there was a breach of the fair-dealing rule.

353. The reason is quite straightforward and it arises from the undeniable fact that the questions of materiality of information, were not questions for the Trustees alone. They were, as much, questions also for Mme B. and her advisers and the Guardian P.M., and his advisers.

354. This all appears to my satisfaction and with binding effect from the Terms of Compromise for the withdrawal of the Plaintiffs from the Trust, as set out in the Schedule to the 1993 Order where, in granting the power to the Trustees to advance capital for appointing out the Shares of the Plaintiffs, that power was expressly given on terms (already described above) that:

> *"Provided always that the foregoing power shall only be exercised subject to the following conditions:*

(a) In the case of a Beneficiary of full capacity with the written consent of that Beneficiary such consent not to be unreasonably withheld."

355. This must be taken to have meant the fully informed consent of the Beneficiary. Not the consent of the Beneficiary as may be informed by such information only as the Trustees may deem relevant or material to the forming and giving of that consent. This, moreover, must be the case, even if the price ascribed to the shares of the departing beneficiary was a fair price despite the non-disclosure of the information in question. This is because the consent of the departing Beneficiary, was deemed to be as germane to the fairness of the exit settlement and transaction, as was the price itself.

356. The procurement of consent by the non-disclosure of information which a beneficiary may have (however incorrectly), considered to be material to the giving of consent was, in my view, in the circumstances of this case, a breach of the fair-dealing rule.

357. Moreover, the fact that the Plaintiffs might reasonably have considered any information then available to the Trustees about the MV Inc. negotiations to be material to the giving of consent is more than amply borne out by the debate that took place at this trial between the experts about the very same issue.

358. One expert – Mr. Guitera – was as adamant that the MV Inc. price represented at least the open market value as the other – Mr. Glover – was adamant that it did not but was, instead, a special purchaser price.

359. The same could be said about the information available to V.M. for the Presentation on the basis that it was known by the Trustees to be available but was withheld. That information, if known to the Trustees, should have been disclosed because – as the

debate between the valuers also revealed – on one view it showed that V.M.'s approach in the Presentation was to arrive at and demonstrate to MV Inc.., an open market valuation for the S.T. Ltd. shares. If so, and to the extent MV Inc. relied upon it, then the MV Inc. price was one indicative of fair value, not a special purchaser price. And this would carry further significance to the question whether the retained 30% of S.T. Ltd. should have been ascribed the same value for the purposes of the exit negotiations.

360. I am, however, unable to conclude, even only on the balance of probabilities needed for present purposes; that the Trustees knew about the Presentation on the 23rd April 1999 or about the nature of the information used by V.M. to inform the values arrived at in the Presentation. The 23 April 1999 was the date on which the Trustees decided to adopt the M & G valuation and to make the offer of USD 173.34 million based on it and relying on it as allowing for any increase of value to arise from the MV Inc. transaction.

361. Despite the very extensive inquiry of the witnesses undertaken in the trial on this issue of the Trustees' knowledge, there is simply, in my view, no compelling evidence to indicate that M.B. was untruthful in his insistence that he had not seen the Presentation before the exit negotiations were concluded in June 1999. Nor is there evidence to refute his insistence that the Trustees need not have seen the Presentation, having entrusted N.N. with the conduct of the MV Inc. negotiations and with the implicit understanding that N. N. would deploy his renowned skills as a negotiator, to secure the best price attainable in the common interests of himself and S. Group. N.N., who was in charge of the management of S.T. Ltd. and so was in direct contact

with B.I., would have been better placed to be aware of information being provided to V.M. than was M.B.

362. For these reasons (and others not necessarily explained here) I find that the Trustees are not to be imputed with knowledge of the Presentation (or of the up-to-date financial information it contained) so as to conclude that they acted also in breach of trust in not having disclosed it. I arrive at the same conclusion in relation to the letter of 7th May 1999.

363. The further question to be addressed on this subject, is whether the Trustees acted in breach of duty in failing to obtain an "appropriate valuation" of the Trust property and of the Shares of the Beneficiaries, in keeping with the 1993 Order.

364. For the reasons just above explained, no such failing can be imputed to the Trustees in respect of the financial forecasts of S.T. Ltd.; at least insofar as those forecasts would have informed the valuation exercise.

365. Moreover, the compelling evidence of Mme Costafrolaz which I accept, is that she too was unaware of the Presentation (and the information in it) at the time of the exit negotiations. Mme Costafrolaz was expressly acknowledged by the Plaintiffs to be a witness of truth.

366. While she sought the financial projections required by M.Sardet for the purposes of their joint valuation exercise, she did so through Deloitte & Touche Y, in the person of Mr. Romek Matyszczyk who, in turn, it seems, communicated directly with S.T. Ltd.

367. And while it is concerning that M. Sardet was not himself allowed direct access to B.I. of S.T. Ltd. as he had wished, that consideration does not, by itself, persuade me that the Trustees were behind a deliberate blocking of M. Sardet's access to B.I.

368. Nor am I persuaded that the discrepancy between the financial projections provided to Mme Costafrolaz (and through her to M. Sardet) and those provided by B.I. to V.M. and deployed by him in the Presentation, suggests that the Trustees or those engaged by them were behind a cooking of the figures or deliberate skewing of the valuations.

369. Apart from my view that the evidence in the case simply does not support such a conclusion, that would be akin to a finding of fraud and fraud is not a part of the Plaintiffs' pleadings in this case.

370. This last conclusion does not imply, however, that the Trustees complied with their duty (as agreed with the Plaintiffs and as mandated by the 1993 Order) to procure an "appropriate valuation" of the Trust assets and the Shares of the Plaintiffs. The Trustees' assertion that they did so by the adoption of M. Sardet's higher valuation for S. Group at USD 1100 million to offset any upward impact on values to result from the MV Inc. purchase, is in my view, misconceived.

371. This is for the reason, again, that the Trustees' thinking on this (as advised by Mr. McDonnell QC) was kept secret from the Plaintiffs and an "appropriate valuation" for the purposes of the exit negotiations and the 1993 Order, may not be regarded as one about which the Plaintiffs were not fully informed so as, in turn, to inform the written consent which was required of them.

372. Faced with the dilemma they perceived of not being able to trust Mme B. or her advisers, at the very least the Trustees should have sought the directions and advice of this Court.

373. I find that the Trustees acted in breach of their duty mutually with the Plaintiffs to obtain an appropriate valuation for the exit negotiations leading to the 1999 Agreement. This was so, even if at the time the Trustees believed, that the exclusion of the MV Inc. purchase price from the expert valuation process, did not materially impact the value that ought to have been ascribed to S. Group, when compared to the value of USD1100 million that was ascribed.

Moreover, as the results show from the analysis to follow, the Trustees were wrong in concluding, as it is said in their defence that they did, that the MV Inc. transaction was not material to the exit negotiations.

374. Primarily for the foregoing reasons, I find that the Trustees breached the duties imposed by the fair-dealing rule in that:

(1) They failed to disclose to the Guardian or Mme B. or their respective advisers, or to this Court (as advised and required by the 1993 and 1998 Orders) the fact that the MV Inc. negotiations had been taking place since about June 1998, and the fact that S. Group and N.N. were about to enter into, or were at least very likely to enter into, an agreement under which MV Inc. was to be granted an option to acquire 40% of the S.T. Ltd. shares for £210 million;

(2) Alternatively, the Trustees failed (even if they were unable, for reasons of confidentiality, to disclose the MV Inc. negotiations to the Guardian or Mme B.) to:

(i) inform this court, Mme B. and the Guardian that there was material information that they were unable to disclose;

(ii) state that the exit negotiations would have to be delayed;

(iii) request an adjournment of the then outstanding summonses set to be heard on 23 June 1999; and

(iv) seek (if and to the extent necessary) MV Inc.'s consent to disclosure of the key terms of the transaction and the price.

(3) The Trustees did not obtain an "appropriate valuation":

(i) they did not ensure – by failing to disclose at least the MV Inc. price – that D & T produced a valuation showing the present value of S. Group (defined as including the valuation of S. Group as a going concern, although the values were to be determined as of 31 December 1997);

(ii) they did not ensure that D & T updated their valuation (and so updated the Joint Report produced with M & G) as at June 1999 to take account of the impact of the MV Inc. transaction on the value of the S.T. Ltd. shareholding; and

(iii) they therefore entered into a transaction with their beneficiaries without satisfying the fair-dealing rules.

Defence of Reliance on Legal Advice

375. In his evidence Mr. McDonnell QC took full responsibility for having advised the Trustees (mainly through M.B.) that the Trustees could proceed in June/July 1999 to enter into the 1999 Agreement and obtain the 1999 Order, without disclosing the MV

Inc. negotiations to Mme B. and the Guardian (or their advisers) or to this Court. This advice was given after he had himself learnt of the possible MV Inc. transaction from M.B. for the first time on 6th April 1999.

376. While this state of affairs was the subject of rigorous examination at the trial, it came to be accepted as factual by the conclusion of Mr. McDonnell QC's (and Mr. David Lowe QC's) evidence in particular, when considered with certain contemporary documents. In the most germane, those were file notes kept at the time by the several lawyers of the meetings and conversations leading up to the 1999 Agreement and Order; in particular, notes kept by D.T., Mr. Lowe QC, Mr. Neil Timms and Mr. Hartridge (the latter of Mme B.'s team). Correspondence between the lawyers also proved to be helpful in recounting the discussions and events at the time.

377. Admirable though the industry of counsel was in the conduct of the enquiry into this issue at trial before me; it would simply be untenable to attempt to recount in detail the related evidence in this judgment.

378. Those file notes kept by Neil Timms (now Queen's Counsel) at the time of Maples and Calder and a member of the Trustees' legal team, proved to be especially helpful. Mr. Timms served as the Cayman based instructing lawyer to John McDonnell QC and so was in contact by telephone on a fairly regular basis with John McDonnell QC as well as with D.T., who also kept him apprised of developments in Europe.

379. Although Mr. McDonnell QC eventually rendered in writing the oral advice which he provided to the Trustees in respect of the disclosure of the MV Inc. negotiations, that was not done until November 1999. As Mr. McDonnell explained and as appeared in the contemporaneous file notes kept by Mr. Timms, one of the reasons was that the

MV Inc. negotiations were regarded as an unfolding situation, with their ultimate ramifications not becoming certain until after the exercise by MV Inc. of the option to purchase the S.T. Ltd. shares on 22 September 1999.

380. Though written in November 1999, the McDonnell advice was back dated to 17 June 1999, as explained by him, to reflect the date when the advice was actually rendered and acted upon. That explanation, though perhaps unorthodox for a Queen's Counsel, was explicable in the circumstances under which the advice was given and nothing turned upon it at trial except the doubt, natural in the circumstances, whether the written record of the advice accurately reflected the advice which was actually given to the Trustees as and when events had unfolded during the exit negotiations in April-June/1999.

381. It is perhaps most in this regard that Mr. Timms' file notes prove helpful, notwithstanding their late disclosure after the trial had commenced.

382. Apart from one area of advice attributed to him by Mr. Timms (with which he adamantly disagreed) Mr. McDonnell QC was prepared to accept Mr. Timms' notes as a fair reflection of the advice he was giving as events unfolded in April/May/June 1999. The subject of disagreement identified by Mr. McDonnell – as to whether the Trustees faced personal liability for non-disclosure of the MV Inc. negotiations and as to whether in consequence of non-disclosure Mme B. and her son would retain their status as beneficiaries of the Trust even after an appointment out of the capital of their Shares to the Guernsey Trust and so still be able to sue the Trustees - is no longer germane to the present dispute and can be ignored. The Plaintiffs neither contend for personal liability in the Trustees nor that they remain within the Trust as

beneficiaries. Again, purely for emphasis, their claim is for equitable compensation for breach of the fair-dealing rule in the course of their exit from the Trust.

383. The following excerpts from the Timms file notes, subject to that area of disagreement, provide what I regard as the most contemporaneously reliable insight into the advice the Trustees were actually getting and indeed into the mindset of the Trustees and their advisers at the time:

> *"21st April, 1999*
>
> *Telephone call from D.T.*
>
> *D.T. told me of a potential transaction that he said might have a significant impact by increasing the value placed on the S. Group holding in S.T. Ltd. N.N. has been in discussion for some time with MV Inc. with a view to have them taking part of the shares held by N. N. and S. Group. M.B. had yesterday told D.T. and John (McDonnell) about this negotiation which is linked to a projected joint venture on a sports car. The latter sounded well advanced. The share acquisition will require approval by a supervisory board of the purchaser. If a deal goes through it is likely to be in the Summer. The discussions are subject to confidentiality terms preventing disclosure. I thought this might be material to the [(exit)] negotiations and the approach taken by the accountants although D.T. pointed out that the remaining holding [(in S.T. Ltd.)] would have a decreased value. I thought that it might be said against the Trustees that the negotiations were on a false basis unless there was disclosure and we discussed*

what had happened over S.H. Ltd. and the reason for that course. I advised the Trustees had a duty to be transparent and the agreement might be set aside if there was material non-disclosure....This may all be academic if no agreement is reached either with MV Inc. or Mme B. and John considers negotiations can continue on a wait and see basis. I advised that the Trustees must get written advice from John if matters proceeded not least because they might have personal liability."

384. That the gist of the advice given by Mr. McDonnell was to *"wait and see"* when the MV Inc. negotiations first came to his attention, and as reflected above in this file note, was acknowledged by him.

"26th April 1999

Telephone call from John McDonnell.

I asked about the S.T. Ltd. negotiations. D.T. had discussed these with John but he did not have detailed knowledge. He confirmed that they were with a view to MV Inc. taking half of the S. Group and N.N.'s shares resulting in equality of holdings. There would probably be a restrictive shareholders agreement tied in: The negotiations were commercially sensitive and subject to confidentiality terms; there was no question of divulging them. No agreement had been reached. We agreed it raised disclosure issues which would become difficult if the (exit) negotiations advance and discussions recommence. I reported my advice to D.T. and John did not disagree. He has spoken to D.T.

on this but pointed out that it was presently academic given the breakdown. He will give written advice if the issue re-emerges."

385. The reference in this note to "the breakdown" is to the impasse then (in April 1999) reached over the value to be ascribed to the Plaintiffs' shares for the purposes of their exit from the Trust. That state of affairs appeared to have reaffirmed the correctness of Mr. McDonnell's advice to *"wait and see"*.

386. Most important from this note for the present purposes, is the reference to the commercial sensitivity of the MV Inc. negotiations subjecting them to terms of confidentiality and that *"there was no question of divulging them"*.

387. The Timms file notes reveal a heightening concern on the part of the Trustees and their advisers over this issue juxtaposed with their fiduciary duties, as time went by. This next note records a telecon with Mr. McDonnell QC following the making of an offer by the Trustees to the Plaintiffs of USD75 million plus the Art Collection on the 18th May 1999. The offer had been accepted by Mme B. with the confirmation of the Guardian yet to come. As will be apparent from his written opinion and as explained by Mr. Lowe QC in his evidence, both Mr. McDonnell and Mr. Lowe were closely involved with the advice given to the Trustees resulting in the development of the offer (including the element of discount) and its presentation to the Plaintiffs' advisers.

388. By the time of this next call a counter offer from the Guardian of USD80 million had been received.

"25th May 1999

Telephone call from John McDonnell

...I asked about the status of the S.T. Ltd. discussions. They were continuing but subject to confidentiality. It was not clear how they would be resolved. If there were a compromise I assumed he would give an opinion in writing on the figures and disclosure obligations. John said he intended to. He understood my concerns. He would prefer the opinion to be a joint opinion but recognized that we might not be able to give it because we were out of the loop. I confirmed this. He agreed that if there was a S.T. Ltd. agreement after agreement between the parties, there would be a risk of personal liability for the Trustees if there was no disclosure of the possibility or approach to the Court. They might not be able to take an indemnity out of the shares of the remaining beneficiaries. He also agreed Mme B. would remain a beneficiary in the sense that any shortfall would be held on the trusts of the A.B. Trust. [(Those last two were the issues upon which Mr. McDonnell disagreed during his evidence at the trial and about which disagreement it is not necessary for me to decide now and I make no decision)].

He had already explained the issues to the Trustees at a meeting but will be giving a written opinion on precisely these issues. John hoped that events would move slowly and this was aided by the fact that P.M. [the Guardian] was apparently unobtainable because he had gone away on a yacht somewhere. John could see that the timing of the hearing [that is: that then set for 23rd June 1999 before this Court]

could be difficult in that if there was a compromise the hearing might be too early to present the parties with the terms of any potential S.T. Ltd. Agreement. This might all be irrelevant because D.T. had said at the Trustees' meeting that they would not go to $80 million [instead of $75 million] as the Guardian had counter-offered.

If there were no deal these considerations would not arise. The[Guardian] currently wanted considerably more than was on offer. We discussed what the Trustees should do should another round of negotiations be necessary. It was unlikely there would be movement [by the Trustees]. Their offer apparently factored in the potential for a S.T. Ltd. agreement and the Trustees were confident that if the deal went through it would not mean a rise of any significance in the value figure. The negotiations were for the sale of half of the holding with the other half locked in. To get to their figure, the Trustees had already taken Sardet's top figure for the Group and had applied a discount to that. John McDonnell did not know the details of the S.T. Ltd. negotiations and would not write an opinion until he did. His advice on the figures and disclosure required in the then circumstances would be recorded. He would set it all out. We agreed that there would have to be transparency".

389. Of particular note from that file note as well is reference to the approach taken by the Trustees to the question of valuation, *"factoring in"* the potential of the MV Inc. transaction, by taking *"Sardet's top figure"*. This will be discussed further below.

"31st May 1999

Telephone call from John McDonnell and D.T.

I asked for more information about the S.T. Ltd. negotiations. They are advanced but D.T. does not think he can predict if agreement will be reached. There is apparently a Board meeting of the buyer tomorrow and in two weeks time. This is seen as a target date. The aim would be to get an agreement in principle signed on 14th June with completion on 9th July. It is not certain what confidentiality provisions will be acceptable.

John said that at this stage we cannot judge the proper stance on disclosure. If a compromise is achieved and a S.T. Ltd. agreement there is likely to be recrimination that the negotiations were not disclosed. D.T. thought that would be unfair as evidently the negotiations had to be kept confidential for sound commercial reasons. I raised the same disclosure issues as in my call with John [(that is of 25th May 1999)]. He thought this was a hurdle to take later. He agreed on the risk of personal liability and inability to recover from the trust fund if they failed to give appropriate disclosure in the circumstances. He will deal with this in an opinion in due course [(These are again the areas of disagreement voiced by Mr. McDonnell in his evidence and again, I do not need to resolve this difference between Mr. Timms' note and Mr. McDonnell's recollection although

I note that they are based on the latter's firm beliefs and knowledge of the law to the contrary of the opinions attributed to him here)].

He pointed out that he would deal with the propriety of what the Trustees were doing when he knew what they were going to do. He explained to D.T. this opinion could be relied on as a defence to a claim of breach of disclosure obligations."

390. Thus, the advice to "wait and see' is seen to have continued. Significant also are the other views attributed to Mr. McDonnell, and which he acknowledges he did express. They were to the effect that his advice, to be finally given when the Trustees had themselves decided what they were going to do about the disclosure of the MV Inc. negotiations, would itself provide the Trustees with a defence to a claim for breach of disclosure obligations.

391. These it must be recognised, were the views which provided the foundation for the present defence of reliance on legal advice. But the inherent crack in it, perceptible even then, was the implication that the advice would respond to the position taken by the Trustees once it was taken, not, as one would think, the other way around with the Trustees' position being taken in consequence of the advice they received.

392. That this was the reality was frankly acknowledged by Mr. McDonnell in his evidence. This does not to my mind necessarily mean that the advice ultimately given was itself unsound but it does bring into question whether the Trustees could themselves have been satisfied that they were dealing fairly with their beneficiaries.

393. The narrative continues from the Timms file notes.

"3rd June 1999

Telephone call with John McDonnell.

We are both obviously uncomfortable with the timing of developments and how the Trustees should deal with the S.T. Ltd. negotiations. Directions [(from the Court)] are impossible before the hearing. John has decided that at this stage the appropriate course is to advert to other means of providing liquidity in D.T.'s 3rd Affidavit. He said if David Lowe was not backing his approach he would be more apprehensive. He advised we must go step by step. If there was no deal there would be no problem. There was not going to be a deal or certainty at best until the second week in July. Two days ago he was told that there was a MV Inc. Board meeting on the 23rd June so things might then be clearer. Reference to English translations of French accountants report and approach to valuation. It was difficult to allow things to happen without saying anything but John was clear that we must wait upon events. There is still no certainty that terms can be reached [ie: with MV Inc..]. There will be a discussion next Wednesday."

394. This is a particularly revealing contemporaneous note of the thinking of the Trustees and their legal advisers.

395. First, there is the noted discomfort with the then current position of non-disclosure to the Plaintiffs. It is obvious that the need to comply with the fair-dealing rule (or at least its precepts) was of concern to Messrs McDonnell, Timms and D.T. But the stated view that "directions are impossible before the hearing" (then set before this

Court for 23rd June 1999) was never explained at the trial before me, let alone justified.

396. The note suggests in this regard, quite illogically to my mind, that there were physical or logistical obstacles perceived as preventing a postponement of the hearing of 23rd June at which the sanction of the 1999 Agreement was to be obtained from this Court.

397. When asked about this at the trial no such explanation was proffered by Mr. McDonnell. Instead, he explained, it is fair to note quite frankly; that as the Counsel then responsible for advising the Trustees, he felt obliged to render his advice, difficult though the circumstances were perceived to be, rather than, in effect, advising the Trustees to surrender their discretion in the matter to this Court. He also frankly acknowledged that had an application for directions then been brought to this Court, there was no basis for anticipating an outcome other than directions for disclosure to the Plaintiffs or the postponement of the exit negotiations until the MV Inc. transaction was certain. This was a telling admission.

398. The reference in this Timms file note to "adverting to other means of providing liquidity in D.T.'s 3rd Affidavit" is also revealing. Here, it is posited as seen by Mr. McDonnell as a kind of further alternative to that of disclosure or the postponement of the 23rd June hearing.

399. Indeed, D.T. 3 was filed and presented to this Court and the parties at that hearing and the important paragraphs are 26 and 27 as set out above (at pages 92-94 above of this judgment).

400. While neither the Trustees nor Mr. McDonnell himself went so far at this trial as to suggest that D.T. 3 could be regarded as satisfying the Trustees' duty of full and frank

disclosure owed to the Plaintiffs, there was at least an implicit argument that somehow it operated to shift the burden to the Plaintiffs (then including the Guardian and his advisers) by putting them on notice and enquiry that an important transaction (or transactions) were then in the making such as could fundamentally alter the nature of the assets held by the Trust through S. Group and such as to necessitate "*a revision of the valuation exercise carried out for the purpose of the last round of negotiations*".

401. This was indeed the purpose, as asserted by Mr. McDonnell in his evidence, of having sent D.T. 3 in draft on 7th June 1999 (two weeks before the hearing on 23rd June 1999), to French lawyers of Mme B. and the Guardian (Me Veil and Mr. Hartridge).

402. I will come to explain my reasons for regarding the dilemma then perceived by the Trustees and their legal advisers and this way of responding to it, as misconceived.

403. It is only fair though, that I should here record my acceptance that the dilemma was genuinely perceived. The uncertainty of the MV Inc. transaction and concerns over its confidentiality were real. This was not merely an artifice contrived to keep the Plaintiffs in ignorance of the fact that the S.T. Ltd. shares might be more valuable than suggested by the Joint Report and that the Trust assets might soon become significantly more liquid. MV Inc. had once before backed out of a comparable arrangement of equity participation in S.T. Ltd., forfeiting an X million penalty as a result. And while there was a well-established relationship in which MV Inc. supplied the R & D resources, engines and drivers' salaries to S.T. Ltd.; that relationship could well have continued for five more years as already agreed, without

MV Inc. having to take an equity position in S.T. Ltd. Moreover, it was genuinely the case that the two important heads of divisions of MV Inc. – Dr. M and Mr. J. – did not yet see eye to eye on the S.T. Ltd acquisition and that was the important decision awaited from the Board meeting set for 23rd June 1999 – the very day on which the hearing before this Court was set. "The Project" – that for the joint development and production of a high performance sports car – was not yet a certainty. And, the fact that John McDonnell QC was genuinely influenced by these developments, clearly appears from a further Timms file note of 15 June 1999 (below).

404. Finally, from this Timms note of 3rd June 1999, I think it is important to note the reference to John McDonnell's expressed view that "*if David Lowe was not backing his approach, he would be more apprehensive*".

405. Both being fellows of Lincoln's Inn and highly regarded and experienced members of the Chancery Bar, Mr. McDonnell had advised on Mr. Lowe being engaged to provide the separate and independent advice to which K.B. was entitled as representative of the remaining beneficiaries of the Trust.

406 In Mr. Lowe, Mr. McDonnell had a colleague of equal standing in whom he felt he could repose implicit trust and confidence and whose views and advice would be allowed to influence and inform that which he would in turn (and no doubt also independently), be prepared to render to the Trustees. For these reasons, it appears that these two Counsel became something of a team and Mr. Lowe QC as K.B.'s adviser, was allowed access to such information about the MV Inc. negotiations and transaction as Mr. McDonnell himself was allowed. K.B. and Mr. Lowe were

allowed to be present at several of the meetings which followed and at which the exit negotiations and MV Inc. negotiations were discussed.

407. This stark contra-distinction with the treatment afforded the Plaintiffs as beneficiaries also of the Trust and their advisers, is explained simply on the basis of the lack of trust and confidence in Mme B., treating her, for all purposes of disclosure and so to their co-incidental detriment, as one and the same with the Guardian and A.B. Jnr.

408. To return to the Timms file notes:

> *"7th June 1999*
>
> *Telephone call with John McDonnell.*
>
> *He was completely ready to deal with the G. money and D.T. believes it should be heard at the same time as the other summonses. It might be no bad thing if the hearing went part heard until after the outcome of the S.T. Ltd. negotiations."*

409. This brief note is to be read against the background of the 23nd June Court hearing having been set to deal, at the very least, with the G Monies. This court had sent an assurance to the Guardianship Judge in that regard, and though (at USD10 million) a not insignificant issue intended to be resolved also in the context of the exit negotiations; it involved monies that were meant for the maintenance of A.B. Jnr. and which the Guardian (and potentially the Guardianship Judge) were insisting should be made available. A determination of that matter leaving as outstanding the Trustees' summonses for an order approving the 1999 Agreement, would necessitate explaining to this Court the need for an adjournment. Hence, the reason as I see it, for the view

recorded as expressed by D.T. that all summonses be taken together in the hope that *"the hearing went part heard until after the outcome of the S.T. Ltd. negotiations"*.

410. Finally, from the Timms file notes:

> *"15th June 1999*
>
> *Telephone call from John McDonnell.*
>
> *JM said it looked likely the Board of MV Inc. would decide to put back a decision on whether to acquire the S.T. Ltd. shares for six months. There was apparently some discussion in the Y Country newspapers and John had seen an article in Y Publication last Friday. He will send it. The current proposal is that MV Inc. would take an option on the shares and extend their engine commitment. The remaining shares would be subject to pre-emption terms. There would be an agreement jointly to build a new sports car vehicle which might be both expensive and high risk [ie: the Project]. On the figures being discussed JM said there would be no substantial change to valuations of the [S. Group]..."*

411. Here is a contemporaneous record of John McDonnell's view being expressed – the view which doubtless informed the advice given on various occasions to the Trustees leading to the 1999 Agreement and Order – that the MV Inc. purchase would result in no substantial change to the value of the Trust assets and so there was no duty to disclose.

412. This view became of central importance to the Trustees' Defence – both to the allegations of non-disclosure and failure to obtain an appropriate valuation. As to the latter, Mr. McDonnell's view was and remains, that ultimately the question of the valuation of the beneficial entitlements was a matter for the Trustees themselves to decide – as contemplated by paragraph A24 of the Trust Deed (see page 54 above) – even if they were themselves obliged to obtain expert valuations of the assets of the Trust as a whole; i.e. of S. Group itself.

Analysis

413. The inequality of treatment afforded K.B. as a beneficiary and his legal adviser on the one hand and the Plaintiffs and their advisers on the other over the important matter of disclosure, was in my view, in and of itself a further breach of the fair-dealing rule. The concern that Mme B. herself was not to be trusted provided no justification.

414. Her earlier conduct against the Trust and the Trustees over the years following the Settlor's death in 1991 to 1998 when the exit negotiations resumed in earnest were, as I have found, unreasonable and unjustifiable. But that by itself provided the Trustees with no basis for denying the Plaintiffs' rights to disclosure of information that was material to the exit negotiations. The Trustees – and M.B. in particular – appear simply to have presumed that Mme B. could not be trusted although any abuse by her of the information to be imparted would have been naturally and counter-intuitively detrimental to the assets of the Trust and so to her (and A.B. Jnr's) own interests. Disclosure that could harm the MV Inc. negotiations would have been contrary to her objective of extracting the highest possible value for their Shares upon leaving the Trust. Logically to my mind, her natural response to being informed about the MV

Inc. negotiations, would have been to see them come to fruition, the better to achieve a higher value for her Shares. This view is only reinforced by the fact that she (as did the Guardian) had the benefit of highly competent legal advice throughout.

415. That this presumption on M.B.'s part influenced the Trustees' position throughout, is quite apparent from their failure and neglect even to seek an understanding with MV Inc. (through N.N. if necessary), of a basis on which a limited but nonetheless informative kind of disclosure could have been made. A form of controlled disclosure, simply of the MV Inc. MOU price and of the percentage of the equity to be sold, may well have been sufficient to inform a complete, accurate and agreed evaluation as between Mme Costafrolaz and M. Sardet. This is a view I think it is safe to take notwithstanding M. Sardet's views, expressed in his evidence at trial, that he would also have considered it important to have the information deployed by V.M. in the Presentation. For reasons to be explained, I do not regard that information to have been as crucial to the Joint Report required of himself and Mme Costafrolaz as would have been the details mentioned above.

416. What I conclude happened in this regard, was in no real sense reliance by the Trustees on predicative legal advice to the effect that disclosure should be withheld from the Plaintiffs. Rather, as events happened, the legal advice was itself predicated on the position already taken by the Trustees, that disclosure could not and so would not be made of the MV Inc. negotiations The topic for advice thus rather became not whether disclosure could and should have been made, but whether the Trustees could proceed with the exit negotiations, both without disclosure of the

MV Inc. negotiations, as well as without postponing the hearing of 23 June 1999 for approval of the 1999 Agreement.

417. The advice given (and ultimately rendered in writing by Mr. McDonnell) was to the effect that the Trustees were allowed to so conduct themselves leading to the securing of the 1999 Agreement and 1999 Order. And that they did not need to postpone, lest they found themselves embroiled in another round of difficult, acrimonious, prolonged and expensive negotiations.

418. Although rendered in November and retrospectively dated 17 June 1999 to reflect the time and circumstances when it was actually given, significant passages from Mr. McDonnell's written advice will be helpful now as they describe the context both for the advice itself and for the negotiations as they had unfolded leading up to the hearing on 23 June 1999. This context included the personal negotiations or "give and take" that occurred between the parties over matters of value and discount to be applied to the Plaintiffs' shares. This process of negotiation was also important to Mr. McDonnell's advice (shared in by Mr. Lowe QC) that the ultimate question of what value was to be appropriately ascribed to the Shares of the Plaintiffs as beneficiaries of the Trust (as distinct from the value of S. Group as a whole) was not a matter for the expert valuers, but a matter for the Trustees themselves to arrive at by way of negotiation with the Plaintiffs. The advice appears to have also been that it was entirely for the Trustees in their judgment to decide what expert advice they needed. Thus, the Trustees came to rely upon the advice of Mr. McDonnell on the matter of discount; although Mme Costafrolaz had earlier been consulted also on the

question of discount. It is fair to note here, that her advice was for an even larger discount than was eventually implicitly agreed and applied.

419. In this way, it is said on behalf of the Trustees, that they were entitled to rely on Mr. McDonnell's advice and did rely upon it, not only in respect of their disclosure obligations, but also in relation to their obligations to obtain an "appropriate valuation". As events happened, his advice also foreshadowed the debate over valuations and discounts now engaged between the experts before this Court; the debate to be resolved by this judgment.

420. For all those reasons, the Advice although spanning some 10 pages and although rendered in writing later, is important enough to be set out in full:

> *"A.B. TRUST*
>
> *ADVICE*
>
> *1. This is to record and confirm the advice that I have given to the Trustees concerning negotiations between S. Group, Mr. N.N. and MV Inc. for the acquisition by MV Inc. of a stake in S.T. Ltd. and the impact of those negotiations on the negotiations which the Trustees are conducting with Mme B. and P.M. for the departure of Mme B. and her son from the Trust.*
>
> *2. The Trustees' negotiations with Mme B. and P.M. (or his predecessor, 11) have been through three phases.*
>
> *3. The first phase began in 1993. It was mainly conducted between the French and Cayman lawyers for the parties. It made a promising start with the Protocole d'Accord of 14 July 1994; but various difficulties were encountered and after a number of amendments the Protocole was allowed to expire in October 1996.*
>
> *4. The second phase began in March 1997. It was mainly conducted between the parties' Leading Counsel in London. It achieved the disposal of the French proceedings over the Art*

Collection and the acceptance of Mme B. that it is an asset of the Trust. It was also agreed that Accountants instructed by P.M. should be permitted to make their own valuation of S. Group as at 31 December 1997 (or 30th June 1998 in the case of quoted assets), with the co-operation of Deloitte & Touche who had already produced valuations for the Trustees as at 31 December 1991 and 31 December 1995. It concluded with the hearing before Smellie CJ in December 1998 when some of the general issues were ventilated and it was directed that a further hearing take place on 23 to 25 June 1999, when the Chief Justice indicated that he will proceed to hear the disputed issues unless agreed terms are ready for his approval. In the December Order the parties undertook to instruct their respective experts to use the best endeavours to reach agreement on the values of S. Group and the Art Collection.

5. *The third and present phase began in January of this year and is being conducted between D.T. and me on behalf of the Trustees and the French Avocats for Mme B. and P.M. with Sonia Proudman QC having joined P.M.'s team at the negotiating table last Monday (14 June).*

6. *During the third phase Deloitte and Touche and Mazars & Guérard have succeeded in reaching a broad agreement as to the value of S. Group S.A. on a carefully defined basis which all parties agree is appropriate for present purposes, except that they have agreed to differ over the valuation of S. Group's 60% holding in S.T. Ltd. The result is that in their Joint Report they state that Deloitte & Touche value the Group as a whole at $850-900m and that Mazars & Guérard value it at $1,000-1,100m. They have agreed between themselves not to state what values they attribute to individual assets including S.T. Ltd.; but they have stated their respective reasoning in their Joint Report, and Mazars & Guérard have supplied some of their working papers to P.M. who has disclosed them to the Trustees. It can be deduced from those working papers and from the Joint Report and correspondence between the Accountants that the S.T. Ltd. holding is valued by Mazars & Guérard at $295-330m. and by Deloitte & Touche at $136.5-160m. (the reason why the difference between the two global*

valuations is $150-200m when the difference between the values apparently placed on the S.T. Ltd. Holding is $153.5-170m. seems to be that the global valuations have been rounded to the nearest $50m).

7. *Broker 1 and Broker 2 have been less successful at reaching agreement. After exchanging quite detailed written comments on individual items in the Collection they remain surprisingly far apart. Broker 1's final valuation is $66,458,510–92,596,490 compared with Broker 2's final valuation of $48,757,250 – 65,851,600. Broker 1's believe (and D.T. and I agree with them) that the explanation is that Broker 2's originally provided a set of proposed catalogue prices in the tell-tale illustrated book which they produced for Mme B. in 1997 and they have refused to make more than marginal adjustments to those figures. So the individual figures are not assessed on the correct basis and the aggregate ignores the single owner sale factor. Thus bearing in mind that there is a well-established tendency for single owner sales at both Broker 1 and Broker 2 to produce an aggregate equivalent to double the low catalogue prices, Broker 1 considers it significant that doubling Broker 2's low figure would produce some $97.5m, which is not far off their own high figure.*

8. *The reasons for the differences between the experts over the values of S. Group and the Art Collection were discussed at length between the legal teams; and at successive meetings they were joined by the respective experts. But the experts all stuck to their positions; and not surprisingly the lawyers are unable to bridge the two gaps. Accordingly the clients met without the lawyers in Paris on 16 April; and at the end of that meeting the lawyers were called in and informed by P.M. that they all wished the lawyers to negotiate a figure between two figures which were circled on a summary sheet he had been using at the meeting; and that for his part that was "an Order". Those figures were $123.96m and $197.45m, which represented his advisers' view of the value of the respective proposals most recently put forward by the two sides.*

9. *Accordingly, at a further meeting between the legal teams on 23 April we made the following proposal. The Trustees would accept Mazars & Guérard's high value for S. Group of $1,100m and the other parties would accept the aggregate of the higher of Broker 1 and Broker 2 high value for the individual items in the Art Collection, which at that stage came to $91.407m. Adding in the agreed values of the other assets of the Trust that would produce a total of $1,202,870,000, from which must be deducted $96,302,444 for latent tax liabilities on realisation. Applying a discount of 25% to the net figure would produce a fair value for the shares of Mme B. and her son of $157,080,031. That would be satisfied by transferring to the proposed new Guernsey Trust the Art Collection and $60m., the balance being made up by releasing Mme B.'s own indebtedness to the Trust ($2,043,871 at that stage), assigning the A. K. debt of $1.2m and releasing the Trustees' claim to be re-imbursed some or all of their own costs of the litigation and negotiations with Mme B. totaling some $5m.*

[The figure of $2,043,871 mentioned here was the sum of expenses assumed by the Trust but agreed to be attributed to Mme B.'s exclusive use and occupation of the Paris Property. The A. K. debt of $1.2 million refers to monies loaned to her brother by the Trust through a Z Country entity of that name]

10. *That proposal was rejected. The counter-proposal put forward on behalf of the other parties at the meeting was that the total value of the Trust assets should indeed be treated as $1,102,870,000 but that the discount to be applied in respect of both latent tax liabilities and all other factors should be only $100m which would produce a fair value for the shares of Mme B. and her son of $208,740,204 (a figure higher than the higher of the two figures which had been treated by P.M. as the upper and lower limits). That was to be satisfied by transferring to the Guernsey Trust the Art Collection and $117m (though Maitre Weil concluded his presentation by commenting that there appeared to be $50m between us which seems to imply that $7m could be satisfied by releasing Mme B. indebtedness, assigning the A. K. debt and the contribution towards the Trustees' costs).*

11. *The difference between the two positions appeared to be too great for it to be worth-while continuing the negotiations and no further meetings were scheduled. Instead the parties commenced preparations for a contested hearing in June on the issues which had been ventilated in December 1998. However Maitre Veil telephoned me at the end of April and indicated that his client was prepared to reduce her demand from $117m (or $110 m) to $85m; and I indicated that I would recommend the Trustees to come up to $70m. Then at the Trustees' meeting on 18 May I was instructed to propose $75m. to Maitre Veil which he accepted in principle on behalf of his client. Since then we have been engaged in discussions over ancillary matters and Maitre Veil (with our assistance) has been attempting to secure the agreement of P.M.'s team.*

12. *Meanwhile negotiations have been proceeding for MV Inc. to take an equity stake in S.T. Ltd. MV Inc. has been closely associated with S.T. Ltd. since 1995 as the supplier of engines for its S.T. Racing cars and by supporting and collaborating with its research and development programme; and the current engine supply agreement continues until 2002. What is now proposed (in negotiations which hitherto have been being (sic) conducted by N.N., S. Group's 40% partner), is that MV Inc. should be granted an option to take 40% of the equity in S.T. Ltd. contributed as to 30% by S. Group and 10% by N.N., leaving each of them with 30%. One of the intentions would be that MV Inc. and S.T. Ltd. should jointly develop a new high performance road car.*

13. *Under the latest version of the draft documentation, MV Inc. would have an option expiring on 15 December 1999, and the price which MV Inc. would pay for half of S. Group's present holding (i.e. 30% out of S. Group's 60%) would be £157.5m (say $262.5m). There would also be a Shareholders' Agreement between S. Group, N.N. and MV Inc. under which there would be mutual rights of pre-emption before any shares could be sold to a third party (though S. Group would not be permitted to exercise its right if it would increase its holding above 40%), S. Group and N.N. could sell shares to one*

another (but again provided that S. Group's stake was not increased above 40%) and no shares could be sold to another motor manufacturer or unless the purchaser offered to buy all three parties' shares on equally favourable terms. The Shareholders' Agreement would also provide that any of the parties would have the right every December to call for up to 49% to be offered to the public.

14. *Finally there would be an Agreement (which I have not seen in draft) for the development of the new road car.*

15. *These negotiations are of course highly confidential from the commercial point of view and would be of the greatest interest to the Press if any leak were to occur. There is therefore no question of disclosing them to the other parties or even their lawyers before they have been made public (which of course will never happen unless the negotiations come to fruition). The present expectation (which I understand is based on the schedule of MV Inc. Board Meetings) is that if the negotiations come to fruition there will be an announcement on about 9 July.*

16. *There is thus a situation comparable to that which arose in November 1995 when the much-postponed Application to the Grand Court for approval of the July 1994 Protocole in its amended form was due for hearing on 11 December and proposals for the re-financing of S.H. Ltd. were being prepared but were still commercially confidential and not likely to become public until a week or so after the hearing.*

17. *On that occasion the Trustees were advised that the re-financing would entail substantial revision of the valuation of S. Group by BDO Binder and Deloitte & Touche on which the July 1994 Protocole had been negotiated and on which the application for the Court's approval would be based. That could not be explained to the other parties before the re-financing had been made public. So it was decided to inform the other parties that the hearing must be adjourned in the light of information which could not be disclosed. That led to the Deloitte & Touche revaluation as at 31 December 1995*

and a further 3½ years of difficult and sometimes acrimonious negotiations.

18. *The question on which I have had to advise is whether that scenario must now be repeated. I have advised the Trustees that the answer to that question is in the negative. My reasons are as follows.*

19. *First of all, unlike the situation in November 1995, it cannot be predicted that the sale to MV Inc. will ever take place. On the present proposals that may well not be known until 15 December 1999, which would currently be the last date for exercising the option; and even the Option Agreement may never be concluded. So the present position, and the position when the terms now being negotiated with Mme B. and P.M. are submitted for the Court's approval, is simply that there <u>may</u> be a sale to MV Inc. some time before the end of 1999 at an option price which has not yet been finally agreed.*

20. *Secondly, the proposed transaction with MV Inc. is not relevant to the valuation of S. Group's holding in S.T. Ltd. on the basis which has been agreed for the Accountants' valuation. The Accountants have sought to arrive at the "indicative fair value" ("valeu objective globale") of S. Group; and as part of their agreed definition have stated*

> *"we have not sought to establish the price that the purchaser would be disposed to pay by virtue of, for example, the removal of a competitor, of synergies or other strategic considerations, a price which could exceed the indicative fair value (or "valeu objective globale",) [in French original]."*

It is agreed between all parties that that is the appropriate basis for the valuation required by the terms of the Trust Deed as substituted by the Grand Court's Order of 18 May 1993.

21. *Thirdly, even if there had been a concluded sale to MV Inc. at the option price currently proposed, the Trustees would not*

accept that it affected the amount currently agreed for the proposed Appointment. As explained above, the deduction of latent taxes and a discount of 25% from Mazars & Guérard's high valuation entails a payment of $60m to the Guernsey Trust (after bringing into account some $5.75m for the A. K. debt, Mme B.'s personal indebtedness to the Trust and half of the Trustees' costs). I have no doubt that a discount of at least 25% is appropriate. A discount of 34.5% was adopted by BDO Binder and Deloitte & Touche in the 1991 Valuation and is reflected in the July 1994 Protocole. A discount of 24.5% was adopted by Deloitte & Touche in 1995; but Mme Costafrolaz (who was also responsible for the two previous Valuations) considers that the current discount should be higher.

22. *In fact the Trustees have agreed to pay $75m which implies an increase in the starting-point valuation of $105m. Since Mazars & Guérard's high figure of $1,100m included a value for the S. Group holding in S.T. Ltd. of $330m, it follows that according to the Trustees' calculations the terms actually agreed are consistent with a value of up to $435m for the 60% holding in S.T. Ltd. and $172.5m for the 30% holding which S. Group would retain after selling 30% to MV Inc. for $262.5. The Trustees consider (with justification, in my opinion) that $172.5m would be a very high value indeed to place on the 30% holding which they would retain subject to the restrictions of the proposed Shareholders' Agreement. Furthermore, it would be necessary to take into account the potential liabilities or losses of S. Group involved in the proposed deal which would include the liability to bear overruns in the projected costs of the new S.T. Ltd. works facility now under construction and the possible insolvency of S.T. Ltd. if the projected budget for developing the high-performance road car cannot be met.*

23. *Fourthly, if anticipated future transactions were taken into account it would be necessary to revise downward the element in the Mazars & Guérard high valuation of $1,100m for S.H. Ltd.. That was $250m for the S. Group holding of 1,536,130 Heuer shares. S. Group has been actively seeking a purchaser for those shares: indeed that was discussed at our meeting*

with the Avocats of the other parties in Paris on 7 April, when they were told that S. Group was seeking a purchaser but refrained from enquiring as to the price envisaged. It was also referred to in our written comments dated 13 April. In fact the price recommended by Morgan Stanley, who are acting for S. Group in the search for a purchaser, according to their Board Presentation of 7 June 1999 which I have seen (but which of course is also highly confidential), is in the region of $168-190m. That would indicate a reduction of $60-82m in the value of S. Group as a whole.

24. *Fifthly, in paras. 25-8 of D.T.'s Affidavit of 9 June (which addresses the consequences if there is no agreement with Mme B. and P.M.) we have disclosed that the Trustees have in mind proposals for a substantial restructuring of the beneficial interests under the Trust and that they are seeking means of providing the liquidity to enable them to make the sort of proposals which they have in mind for the Beneficiaries as a whole. We go on to say that those proposals depend on the necessary liquid resources being made available as to which we can say nothing more at this stage. But we say that that is likely to entail changes within S. Group which would necessitate a revision of the valuation exercise carried out by Deloitte & Touche and Mazars & Guérard. That provides as much information as the constraints of commercial confidentiality allow the Trustees to give at this stage concerning the possibility of major disposals; and it gives the other parties a fair opportunity to defer their proposed departure from the Trust and wait for the proposed changes within S. Group and the Trustees' new proposals. So far there has been no reaction; but if there is a reaction it may lead to the hearing fixed for 23 June being deferred.*

25. *Sixthly, I do not believe that it would be in the interests of the other Beneficiaries or of Mme B. and her son for the conclusion of the negotiations for their departure from the Trust to be any longer delayed. Those negotiations have been protracted and difficult; and if they were to break off and have to re-start after a further valuation exercise past experience indicates that they could take another year or more, during*

which time no doubt further proposals for the development of S. Group would be taking shape which would reproduce the present situation after a further long delay. In the present phase we have established a useful rapport with the other parties and their representatives which has given us the opportunity to achieve an overall settlement of the issues concerning both the Trust and the Settlor's free Estate. It is obvious to all concerned that no valuation of a dynamic and constantly changing business like S. Group can ever be fully up-to-date.
(Emphasis added.)

CONCLUSION

26. For all these reasons, the terms currently proposed are in my view still based on "appropriate valuation" of the Trust fund and of the Shares of Mme B. and her son notwithstanding the negotiations with MV Inc..; and they should be agreed and recommended to the Court for approval on behalf of the minor and other beneficiaries who ought to be bound (including unborn) on that basis.

John McDonnell QC
17 June 1999

421. In reciting Mr. McDonnell's advice and relying upon it for the purposes of this judgment, I am not to be understood as accepting that he gave precisely the advice noted as given in it to the Trustees at precisely the times in April, May and June 1999 when, retrospectively, the Advice would suggest that he did.

422. In this regard I accept Mr. Boyle's criticism of the Advice and the inherent dangers of accepting it as anything better than Mr. McDonnells *ex post facto* account of events that had happened several months before he wrote the Advice.

423. But none of that detracts from the fact - fully acknowledged at the trial - that the Advice given and ultimately accepted and acted upon by the Trustees (and as the

Advice itself records) was that the exit negotiations could proceed to the 1999 Agreement and Order without the disclosure of the MV Inc. negotiations.

424. What is of importance now, is the conclusion I am compelled to reach that the Advice provides no defence to a claim for breach of duty by breach of the fair-dealing rule and for equitable compensation as the consequence of that breach.

425. It will be seen nonetheless, that there were several considerations set out in the Advice which I accept had informed the Trustees' thinking, not only about the subject of disclosure, but also the subject of appropriate valuation.

426. I respond to the considerations raised in the Advice as follows:

(1) Firm though the Advice was that the Trustees could proceed, it reveals equivocation and inconsistency in at least two important respects.

In the first place, while the MV Inc. transaction was deemed a special purchaser transaction, the Advice implicitly supports the Trustees' decision to take account of it by adopting M. Sardet's higher valuation. See paragraph 22 of the Advice. The notion that the joint D&T and M&G valuation exercise was confined to arrive at "indicative fair values", therefore provided no true basis for failing to give disclosure of the MV Inc. negotiations.

Secondly, the Advice (in paragraph 25), relies on D.T. 3 paragraphs 25 and 28 (pages 91-93 above) as having put the Plaintiffs on enquiry in a way that would have been tantamount to the fulfillment of the Trustees' obligations of disclosure (prior to the actual MV Inc. announcement), even though such reliance was disavowed at this trial.

Either D.T. 3 served as meeting those obligations of disclosure or it did not.

As the Trustees admitted at trial and as I conclude, it did not. And so, to the extent that the Trustees may have relied in June 1999 upon D.T. 3 as absolving them of their obligations, they were wrong.

(2) Whether or not reliance on the Advice would serve to protect the Trustees from personal liability is not the issue before me now. I repeat, no such case is raised against the Trustees. Yet that, it is clear, was at least part of, if not the central focus of the Advice. Certainly, no-where does the Advice specifically assert that proceeding as contemplated would entirely discharge the Trustees' duty of disclosure owed to the Plaintiffs qua their beneficiaries. As noted above, the emphasis was rather upon whether, given the pre-determination that disclosure was out of the question (paragraph 15) and the uncertainty over the MV Inc. transaction itself; the Trustees were allowed to proceed nonetheless.

Further, the Advice at least implicitly proceeded on the basis that it could properly be a matter for the Trustees alone to determine what was in the best interest in the context of the exit negotiations, not only of the Trust as a whole, but also of Mme B. and A.B. Jnr. It also proceeds on the basis (as the words in emphasis in paragraph 25 suggest), that the need for an appropriate valuation could be determined by what was "obvious" to the Trustees alone, the other side having been kept entirely in the dark about the MV Inc. negotiations.

(3) In my view, the Advice may not be relied upon now by the Trustees by reference to Article A21 of the Trust Deed (see paragraph 191 of this

Judgment above) as a defence to the present claims for breach of duty, even if the Article provides a defence to any potential claim for personal liability.

The power vested by Article A21 was not one that allowed the Trustees to abrogate the rights of the beneficiaries; here specifically, the acknowledged right to disclosure of material information that would inform the beneficiaries as to the true value of their Shares for the purposes of the exit negotiations.

Paragraphs B1 and B2 of the Trust Deed (above at paragraph 193) clearly circumscribe and qualify the powers of the Trustees. In this respect B1 provides that: "The Trustee(s) "shall act" in a manner (that) is reasonable and equitable in view of the interests of income and principal beneficiaries". And in B2, it is expressly provided that the Trustees' powers are to be always exercised "subject to their obligations as fiduciaries".

(4) Disclosure of the MV Inc. negotiations was material to the exit negotiations, whether or not MV Inc. was properly to be regarded as a special purchaser. This was plainly the case because, on whichever view, the MV Inc. negotiations did have a significant impact upon the value ultimately to be ascribed to the Shares of the beneficiaries. This must follow even if Mr. McDonnell's contention that the MV Inc. transaction was a special purchaser transaction was correct. And the correctness of this propostion is readily shown from Mr. McDonnell's further contention that the Joint Report of the valuers was not meant to value the Shares of the departing beneficiaries, only the value of the Trust assets themselves.

It follows that the disclosure must have been recognised as being patently relevant to the valuation of the Shares.

The correctness of this is also implicit in the fact (as shown by paragraph 22 of the Advice) that the MV Inc. price was factored into the Trustees' calculations in arriving at the price offered for the Plaintiffs' Shares.

(5) Finally, in this regard, the concern to avoid further protraction and expense by not postponing the exit negotiations, provided no justification for failing to meet the disclosure obligations owed to the Plaintiffs.

That issue was not for the Trustees alone to decide and, as I have concluded, it is reasonably probable that the 1999 Agreement would have been reached nonetheless, had a fair and reasonable degree of disclosure of the MV Inc. negotiations been given.

427. The conclusions which follow do not depend on a finding that the Trustees themselves withheld relevant information from Mr. McDonnell. To be clear, I do not find that they withheld from him (as the Plaintiffs also contend in relation to the up-to-date S.T. Ltd. financial information), any relevant information then known to them.

428. My conclusion is that the Trustees acted in breach of the disclosure obligations owed to the Plaintiffs notwithstanding that they had the benefit of Mr. McDonnell's fully informed Advice to support their position.

429. Concerns over the confidentiality or uncertainty of the MV Inc. negotiations or over the trustworthiness of Mme B. provided no excuse. Nor, for that matter, as I have noted, did the concerns to avoid further protraction and expense of the exit negotiations. Another reasonable and obvious recourse was available to the Trustees

by way of an application for directions to this Court. Indeed, that recourse was already indicated by the 1993 Order in the event difficulties such as those perceived by the Trustees were to arise.

In this regard I should add a further comment. The Trustees' desire and decision taken on Mr. McDonnell's' advice to conclude the exit Agreement without referring the matter for directions from the Court, however well intentioned,cannot be allowed to avoid the consequences which would properly have followed from such directions. As Mr. McDonnell accepted in his testimony, an application to the Court would likely have involved the Trustees surrendering their discretion to the Court and it is clear, from the case law, that the Court would have required full disclosure of the MV Inc. negotiations to enable it to exercise the discretion properly and in the interests of the Trust and all its beneficiaries, as a whole. This in turn would likely have involved the Court itself taking a different view of what was required by way of "appropriate valuations" of the Shares and a possibly different valued arrived at. See: ***Marley and others v Mutual Security Merchant Banks and Trust Co. Ltd.*** ***[1991] 3 All . E.R. 198.***

430. It also appears that the Trustees were prepared to proceed with the exit negotiations without disclosure and without directions from this Court, by assuming the risk that Mme B. (and implicitly the Guardian) might complain after the MV Inc. transaction became public. As much appears to have been M.B.'s thinking from at least one of Mr. Lowe QC's file notes discussed at this trial; that relating to a report made to him by Mr. McDonnell of a meeting on 6th May 1999 between Mr. McDonnell, D.T. and

the Trustees in Geneva. M.B. is recorded as saying that he was prepared to do a deal, say nothing and let Mme B. sue later if she wished.

431. While I would accept as M.B. explained under cross-examination that he was only "venting his frustrations" at the positions being taken by Mme B. and the Guardian and which he thought were unreasonable, this was a calculated risk which could only have been recognised and assumed because the Trustees realised that proceeding with the exit negotiations without disclosure could be cause for complaint.

432. As events have transpired, the Trustees were correct in their recognition of the risk.

433. Breaches of duty having been established and reliance on legal advice as a defence not being available; the next question is whether equitable compensation is available as a remedy, as claimed.

Equitable Compensation – Availability as a Remedy

444. A jurisdictional objection is raised by the Defendants. It is, as I understand it, that the Plaintiffs may not raise a claim for equitable compensation, having failed to claim rescission of the 1999 Agreement, because a claim for equitable compensation can be granted by the Court only where the right to rescind a transaction exists and so in lieu of rescission. As it is conceded by the Plaintiffs that rescission is no longer available to them (there can be no restitution in integrum), the Defendants say they can claim no equitable compensation; that, having chosen not to rescind the 1999 Agreement when they could have done so in 1999, the Plaintiffs can now have no claim for compensation.

445. The Defendants' objections go further. As already noted, they argue that even if there is found to be a breach of trust for non-disclosure (or for any other reason involving

breach of the fair-dealing rule or failure to obtain an "appropriate valuation"); any compensation payable must be assessed by having regard only to the actual transaction deemed tainted by the non-disclosure, not by reference to some hypothetical "alternative transaction" that did not happen or may never have happened.

446. Thus, even if the jurisdiction exists to award equitable compensation in the absence of a right to rescind the transaction, the transactional basis must be clear: compensation can be awarded only in respect of the 1999 Agreement that took place in June/July 1999, not on the basis of what payments would have been made in early 2000 in respect of a transaction that might have taken place then but never did take place.

447. For the reasons which follow, I conclude that there is jurisdiction to award equitable compensation in this case although any right to rescind has long since been lost. This is on the basis that the breach itself of the fair-dealing rule may provide a free-standing basis for a remedy in equity by way of compensation.

448. In this sense, the main complaint is that the Trustees breached their duties owed to the Plaintiffs by failing to disclose the MV Inc. negotiations which were material to the 1999 Agreement. While that non-disclosure would have given rise to a right to rescind the 1999 Agreement, the Plaintiffs say it also gave rise to a right in them to compensation for the loss they suffered as the result of the breach – the full benefit of what they would have had had the breach not taken place. Equitable compensation should therefore be assessed on the basis of the difference between what they received and what they would have received had the breach not taken place and had

the 1999 Agreement proceeded on the basis of proper disclosure of the MV Inc. negotiations.

For reasons to be explained below, I do not however, accept that it would be appropriate to assess compensation on the basis of a putative alternative transaction that would have taken place in early 2000.

449. The same approach applies when the breach is regarded as having involved a breach by the Trustees of the fair-dealing rule or as having involved a failure to obtain an "appropriate valuation" as required by the 1993 Order.

450. Mr. Tidmarsh QC placed reliance for the jurisdictional argument primarily upon a passage from the erudite judgment of Vice Chancellor Megarry in ***Tito v Waddell (No. 2) [1977] Ch. 106 at p. 2496*** where he stated:

> ***"My conclusion, therefore, is that notwithstanding the American [textbook and case law] support that there is for Mr. Vinelott's contentions, a true analysis of the self-dealing and fair-dealing rules shows that the breaches of those rules are not subject to the six years period laid down by section 19(2) of the (Limitation) Act of 1939. I bear in mind, of course, that it is common ground that in the case before me there is no question of setting aside any transaction. It is also common ground that Nocton v Lord Ashburton [1914] A.C. 932, a case as between solicitor and client shows that in a proper case a claim for compensation in equity (as distinct from damages at common law) lies in lieu of setting aside a transaction; and the claim before me is essentially a claim for compensation in equity. It seems to me that such a claim ought to be in the same position as regards limitation as a claim to set aside the transaction: if it were not, there might be some very odd results."*** (Enphasis added.)

451. From this passage, Mr. Tidmarsh submits that the proper view of the law is that a claim of rescission for non-disclosure and the claim to compensation for non-disclosure are not independent: compensation is awarded in lieu of rescission.

452. I am unable to accept this argument as I think it misunderstands the passage from ***Tito v Waddell*** and the dictum from ***Nocton v Lord Ashburton*** cited and relied upon by Megarry VC in this passage above.

453. The dictum of Megarry VC must be considered in its proper context.

454. Having earlier in his judgment found that no relationship of trust in the true sense existed as between the plaintiffs (the native Banabans of Ocean Islands) and the defendant (Her Majesty's Attorney-General in the right of the Crown), (as distinct from a relationship of trust in the "higher sense" assumed by the Crown to be fair and just in its dealings with its subjects), Megarry VC felt obliged to consider, nonetheless, the hypothetical existence of a trust relationship owed to the plaintiffs in the event, on appeal, he was found to be incorrect in his first conclusion.

455. He then therefore had also to consider whether a limitation defence would be available to the Attorney-General (qua defendant "trustee") to the secondary claim for breach of trust raised by the Banabans, in respect of the proceeds of the royalties which they claimed were due to them from the exploitation of the phosphate resources of Ocean Islands.

456. That exploitation had taken place under licences granted by the Crown to licensees, by way of concessionary agreements with the Banaban Council, in at least one of which licensees the Crown had a direct but undisclosed financial interest. The breach of trust alleged included dealing with the Banaban Council without disclosing that interest.

457. As the phosphate deposits on Ocean Islands had long since been exhausted, there was no question of a claim for rescission of the concessionary agreements and restoration

of the Islands. Instead, the plaintiffs claimed that the rates of royalty payable under the concessionary agreements had been less than the proper rates should yield, and that in relation to those transactions, the Crown had been subject to a trust of fiduciary duty for the benefit of the plaintiffs or their predecessors. The Crown was therefore liable to the plaintiffs to make up the amounts actually paid by way of royalty to the amounts that ought to have been paid. For this proposition the plaintiffs had relied primarily upon ***Nocton v Lord Ashburton.***

458. It was on the hypothetical basis, (contrary to his primary conclusion), that such a claim for equitable compensation for breach of trust or breach of fiduciary duty could exist, that Megarry VC proceeded with his analysis, coming ultimately to the conclusion that even had such a claim existed, although not barred by statutory limitation, it would have been one that failed under the equitable doctrine of laches.

459. From that summary of his reasoning and conclusions, it seems to me that two conclusions, particularly relevant to the discussion at hand, can clearly be drawn.

460. First, Megarry VC did not find that a necessary predicate for a claim for equitable compensation must be the existence of a claim in rescission. On the facts of the case before him, a claim for rescission was not possible. He, nonetheless, found that a claim for equitable compensation on the hypothetical basis that a trust had existed and that non-fraudulent breaches of trust had occurred was maintainable, subject to being barred on grounds of laches.

461. Thus, that there can be a free-standing claim for equitable compensation for breach of fiduciary duty, whether or not the breach of duty involved a transaction which it tainted and which was still capable of being rescinded.

462. This, as I understand it, is the basis upon which Megarry VC relied upon ***Nocton v Ashburton***. I will therefore need to examine that case further below; well known and settled authority though it undoubtedly is.

463. Second, he concluded that on "a true analysis" of the self-dealing and fair-dealing rules (both of which were implicated by varying degrees in the allegations of breach of trust raised by the Banabans against the Crown), claims for equitable compensation for losses arising from breaches of those rules were not subject to any statutory limitation periods (albeit they may be subject to the doctrine of laches).

464. This, he concluded (at pp 247-248) was because by the self-dealing and fair-dealing rules what equity does is to subject trustees to "particular disabilities" (rather than duties) in cases falling within the rules. On this basis then, the statutory limitation periods that applied to actions for breaches of duties, (as distinct from laches) did not apply to actions for breaches of those rules.

465. It is correct to note that on this aspect of his conclusions, the judgment in ***Tito v Waddell*** has not found favour with the English Court of Appeal. The suggestion that the fair-dealing rule does not impose a fiduciary duty as such but rather a fiduciary "disability" has been rejected in ***Gwembe Valley Development Co. Ltd. v Koshy (No. 3) [2004] 1 BCLC 131*** as being an "unnecessary complication": whether viewed as duties or disabilities, the self-dealing rule and the fair-dealing rule are merely aspects of a fiduciary's primary obligation of loyalty. See paragraphs 104 to 108 of the ***Gwembe Valley*** judgment. See also ***Pitt v Holt [2011] 3 WLR 19*** per Lloyd LJ at [100].

466. For present purposes, the question of statutory limitation does not arise and is at best academic. This has been shown by the application of the doctrine of laches as a bar to Mme B.'s claim against the Trustees for breach of trust including breaches of the fair-dealing rule.

467. What matters in the present analysis, is the conclusion that the passage in ***Tito v Waddell*** relied upon by Mr. Tidmarsh, does not detract from the view of ***Nocton v Ashburton*** as settled authority for the proposition, that a claim for equitable compensation for loss resulting from a breach of fiduciary duty, is maintainable as being separate and apart from any other claim – such as for damages or rescission – arising from the transaction to which the breach of duty relates.

468. The facts and ratio decidendi of ***Nocton v Ashburton*** are themselves illustrative of the principle.

469. There, the solicitor Mr. Nocton advised his client Lord Ashburton, to release part of a security that the latter had held over certain properties (properties 1 and 2) which had been put up as security on a mortgage to a bank that provided the funds. The arrangement placed Lord Ashburton in the position of, in effect, direct underwriter of the loans from the bank. The funds were intended for a joint venture development of one of the properties (property 1) in which Nocton had a financial interest but one which had been disclosed to Ashburton.

470. Property 2 was owned by Lord Ashburton himself and pledged by him also to the bank as security for the mortgage financing. When the joint venture ran short of money, Nocton, wishing to raise further financing, desired to use part of Property 1 on which by then residential flats had been constructed (Block A); as security for that

purpose and in this regard advised Ashburton to release the parcel on which block A stood. Nocton gave this advice by way of a letter which implicitly also advised that the remaining security over Property 1 had been appraised by independent surveyors as being of adequate value to secure the entire outstanding loan for which Ashburton was liable. This was a misrepresentation, albeit regarded by the Court as unintentional and therefore not fraudulent but nonetheless a misrepresentation made in breach of fiduciary duty.

471. Regarded also as a breach of duty, was the failure on Nocton's part, to advise Ashburton that the releasing of security would result in the bank's security over Property 1 and his own property – Property 2 – becoming first mortgages which, together would be inadequate to secure the full indebtedness to the bank. This was notwithstanding the fact that Nocton's partners in his solicitors' practice had separately advised Ashburton of the risks involved in advancing the moneys, the inadequacy of the returns for such risks, reminding him also that Nocton had a large financial interest in the venture and strongly urging him to take independent advice. Ashburton ignored their warnings.

472. Lord Ashburton's full exposure became apparent when the joint venture defaulted on the loans; the bank demanded payment and the remaining security which he held over the properties proved wholly inadequate to meet the indebtedness.

473. In his statement of claim against Nocton, Ashburton primarily alleged fraud. However, implicit in his pleadings were allegations also of breach of fiduciary duty for which compensation was sought to cover the liability for which he had become exposed to the bank, plus his costs.

474. Nocton, by his defence, denied all allegations of fraud and pleaded the Statute of Limitations on the basis that the original transaction, even if it involved a negligent breach of fiduciary duty, had occurred more than six years before the action was filed and so was statute barred.

475. This, in the final outcome before the House of Lords, proved to be an inadequate response because of further allegations raised by Lord Ashburton in his pleadings. These were that subsequently to the original transaction and so within the six year limitation period, Nocton, as his solicitor, had improperly and in bad faith advised and induced him to release from the mortgage a valuable part of the security, knowing that the security would thereby be rendered insufficient, and that this was done by Nocton for his own benefit. He was alleged to have represented untruly that the remaining security would be sufficient, and it was further alleged that it was (as it turned out to be) insufficient, and that loss – both of security for the principal sum and of interest – had occurred in consequence of the ill-advised release.

476. The Courts below erroneously saw the case as one based upon allegations of fraud alone, with the trial judge concluding that the evidence did not support a finding of fraud and the Court of Appeal disagreeing, concluding that fraud (in the sense of deceit) had been made out. As an action for fraud was not statute barred, Lord Ashburton succeeded before the Court of Appeal on those allegations.

477. The House of Lords disagreed with the Court of Appeal on the finding of fraud, finding no basis for departing from the trial judge's assessment of the evidence. There were, however, the further allegations of negligent misrepresentation made in breach of fiduciary duty in respect, not of the original mortgage transaction, but of the

release in respect of which the action had been filed within the statutory limitation period and which provided Lord Ashburton with a viable claim which the House of Lords could enforce.

478. Lord Haldane, who delivered the judgment for the majority of the House of Lords, explained the basis in the following introductory passage to his judgment (at pages 954-955):

> *"The Courts had also power to rescind contracts of many kinds obtained by an innocent misrepresentation, so long at least as the contract had not been superseded by being carried into effect. The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free the defendant might have been from any intention to deceive; he was not allowed to retain what he had obtained from the plaintiff by a material misstatement on which the latter was entitled to rely as being true. This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.*
>
> *But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to rescission, the Courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the*

circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled." [Emphasis supplied.]

479. And later at pages 945-946:

> *"But where I differ from the learned judges in the Courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to treat the action as one of mere negligence at law unconnected with misconduct. This alternative they thought was precluded by the way the case had been conducted. I am not sure that, on the pleadings and on the facts proved, they were right even in this. The question might well have been treated as in their discretion and as properly one of costs only, having regard to the unsatisfactory evidence of the appellant. But I do not take the view that they were shut up within the dilemma they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been an impression that the necessity which recent authorities have established of proving moral fraud in order to succeed in an action in deceit has narrowed the scope of this remedy. For the reasons which I am about to offer to your Lordships I do not think that this is so."*

480. And further (at pages 956 to 957):

"When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him".

481. Lord Shaw, who took a different approach, came nonetheless to the same result in his judgment. He regarded the appropriate starting point as to identify whether the nature of the relationship between the claimant and defendant was one giving rise to a fiduciary duty of care. He said (at page 972):

"...the principle to be found running through this branch of the law is, in my opinion, this: That once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misinterpretation in any statement made will attach to

the adviser or informer, although the information and advice have been given not fraudulently but in good faith.

It is admitted in the present case that misrepresentations were made; that they were material; that they were cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I accordingly think that that situation is plainly open for the application of the principle of liability to which I have referred, namely liability of the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled."

482 It is in that full context of the decision in ***Nocton v Ashburton*** that Vice Chancellor Megarry's dictum from ***Tito v Waddell*** quoted above (from p. 249 G) must be understood.

483. And so where he said that ***Nocton v Ashburton*** shows that in a proper case a claim for compensation in equity (as distinct from damages at common law) lies in lieu of setting a transaction aside, he is not to be understood as positing that such a claim will lie only where the transaction could be set aside by a claimant who elects compensation instead.

484. The claim for compensation may lie instead of setting aside a transaction (rescission) even if rescission were still available or, if no longer available, as a separate and free-standing claim.

485. Many cases coming before the Courts of the Commonwealth of Nations since ***Nocton v Ashburton*** show that equitable compensation is now widely recognised as a potential remedy for breach of fiduciary duty.

486. I am indebted to Counsel for their thorough research and treatment of this subject. Many other cases were cited and discussed in their submissions in argument. This already voluminous judgment does not admit of a full recitation of all the cases. Following are a few that I regard as most on point.

London Loan & Savings Co v Brickenden [1933] SCR 257
(Supreme Court of Canada)

487. A solicitor acting in a mortgage transaction failed to disclose to his client certain material facts, including the full extent of his personal interest in the transaction. The client sought compensation from the solicitor for the loss it suffered as a result of the transaction. All five judges of the Supreme Court agreed that the solicitor had acted in breach of duty and that a money award could be made. As to the nature of the money award to be made, the judges were split three against two, but the award favoured by the majority was clearly a compensatory one. The decision of the majority was subsequently affirmed by the Privy Council, [1934] 3 DLR 465.

488. Smith J, giving the majority judgment, said:

> ***"I am of opinion that the appellant Loan Company should be placed as nearly as possible in the position in which the appellants would have been had there been no breach of duty on the part of Brickenden; that is, that the appellant Loan Company is entitled to the full amount of damages sustained. Nocton v. Lord Ashburton.***

Under this case, I do not think the amount to which the appellant is entitled can be limited to the amount that the respondent received out of the transaction, but is to be measured by the amount of loss sustained by the appellant."[Emphasis added]

Target Holdings Ltd v Redferns **[1996] AC 421 (HL)**

489. This was an application for summary judgment in relation to a claim for equitable compensation for breach of trust. The application ultimately failed in the House of Lords for reasons to do with assessment of loss, but the key point for present purposes is that the House of Lords clearly considered that equitable compensation was an available, indeed the appropriate, remedy.

Lord Browne-Wilkinson said at para 439B:

"Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach."[Emphasis supplied.]

Rama v Millar **[1996] CLC 186 (PC)**

490. The Privy Council assumed (although liability was not established on the facts) that equitable compensation could be awarded for breach of fiduciary duty.

Swindle v Harrison **[1997] 4 All ER 705 (CA)**

491. The defendants wanted to purchase a hotel and restaurant intended to be run as a family business. To that end the second defendant borrowed money on the security

of a mortgage over her home. It was intended that the balance of the purchase price would be raised by way of a bank loan secured by a charge on the restaurant. The defendants instructed the plaintiff firm of solicitors to act for them in relation to the transactions. As the property purchase neared completion, it became apparent that the second of the two proposed loans would not be forthcoming. The plaintiffs stepped in and offered to make a bridging loan to the defendants, to be secured by a charge on the restaurant. They however failed to disclose that they stood to make a profit from the transaction and that they had been aware that the second loan would not have been granted. The defendants accepted the offer and the purchase of the hotel and restaurant went ahead. Subsequently the restaurant business failed and the second defendant's home was repossessed and sold.

492. The plaintiffs commenced proceedings for possession of the restaurant and the defendants counterclaimed for equitable compensation for breach of fiduciary duty, contending that the plaintiffs had failed to disclose material facts relating to the transaction. It was apparent that the defendants were significantly worse off than they would have been if the transaction had not taken place, but no worse off than they would have been if the plaintiffs had made proper disclosure (since the defendants would have accepted the bridging loan in any event). The defendants' claim to recover compensation to put them back in the position they would have been in had the transaction not taken place failed for that reason.

493. However, what is material for present purposes is that two out of the three judges of the Court of Appeal (Evans and Mummery LJJ) clearly accepted that the remedy of equitable compensation is in principle available for breach of fiduciary duty.

Hobhouse LJ appears to have taken the contrary view, although his judgment is not entirely clear.

***Longstaff v Birtles* [2002] 1 WLR 470 (CA)**

494. The defendants were solicitors who invited their former clients (the claimants) to buy into a partnership in which they were partners. The claimants bought into the partnership but the partnership business was not a success and the claimants lost money. The claimants claimed damages for breach of fiduciary duty, professional negligence and misrepresentation against the defendants. The Court of Appeal held that the defendants had acted in breach of fiduciary duty owed to the claimants as their clients by failing to ensure that the claimants took independent legal advice before transacting. It was held at para 36, citing **Swindle v Harrison** (above) that the claimants were entitled to recover equitable compensation for the loss they had suffered.

***Hurstanger Ltd v Wilson* [2007] 1 WLR 2351 (CA)**

495. The defendants applied to the claimant for a loan. The loan was arranged by a broker, acting as agent for the defendants. Neither the claimant nor the broker disclosed to the defendants that as part of the transaction the broker would receive a commission of £240. The defendants failed to repay the loan and the claimant brought proceedings. The defendants argued that the broker had acted in breach of fiduciary duty and that accordingly they were entitled to rescind the loan agreement with the claimant.

496. The Court of Appeal held that the defendants were not entitled to rescind but were entitled to equitable compensation in the sum of £240 for breach of fiduciary duty (or

rather, since the party held liable was the claimant, for being an accessory to a breach of fiduciary duty). In effect, ordering a disgorgement of profits from the breach of duty.

497. In the present case, the Plaintiffs' claim is for breach of the fair-dealing rule, including, as I understand the rule, as it applies to this case, specific breaches by way of non-disclosure and failure to obtain an appropriate valuation. Equitable compensation therefore is an available remedy as there is no basis for suggesting that breaches of the fair-dealing rule are to be treated differently from other breaches of fiduciary duty so far as the availability of equitable compensation is concerned: see Underhill & Hayton, The Law of Trusts and Trustees (18th edition, 2010) at para 87.7 and Snell's Equity (32nd edition, 2010) at paras 7-051, 7-058 and 20-018.

498. It is also noteworthy that Matthew Conaglen's book, Fiduciary Loyalty (2010),(Hart Publishing), which contains perhaps the most focused analysis of the issue, expresses the view that equitable compensation may be awarded for breach of the fiduciary fair-dealing rules (see pages 87 to 90 citing among other cases, Swindle v Harrison above)

499. Indeed, the text books generally seem to envisage that equitable compensation may be awarded for breach of fiduciary duty independently of any right to rescind. The clearest example of this is Snell's ***Equity*** *(32nd Ed, 2010 at para 20-031:*

> *"The circumstances conferring a right to rescind may also give rise to a right to claim damages or equitable compensation. In such cases the right to rescind is independent of, and cumulative with, the right to*

reparative relief. The claimant may claim rescission or damages or both...."

500. Moreover, several of the cases which have recognised the availability of equitable compensation for breach of fiduciary duty have been cases of non-disclosure by fiduciaries in dealings with their principals: see, for example, London Loan and Savings and Swindle v Harrison both referred to above. In those cases, the breach of duty consisted primarily of a failure on the part of a fiduciary to disclose his interest in the transaction as opposed to a failure on the part of an openly interested fiduciary to disclose facts material to the transaction as in the present case. But that cannot be a material distinction.

501. In the present case, the Trustees appear to accept that equitable compensation can in principle be ordered in a case of this kind, but they contend (see their Defence paras 11A.1 and 11A.2) that:

(ii) the remedy of equitable compensation is available only as a substitute for rescission and as rescission is not available (because the Plaintiffs have elected to affirm the 1999 Agreement and/or are estopped from claiming rescission and/or are barred from claiming rescission by laches/acquiescence) equitable compensation cannot be ordered; and

(iii) if equitable compensation is available, it is to be assessed not by reference to the position the Plaintiffs would have been in had the Trustees discharged their duties but rather by reference to the

position the Plaintiffs would have been in had the tainted transaction not taken place at all [(i.e: the no transaction basis).

In the arguments at trial, they contended further, that compensation can at most be available only in respect of the actual transaction that did take place. In this respect the Defendants (per Mr. Nugee QC) emphasised the principle that the fair-dealing rule is a rule about the validity of transactions, therefore having no applicability to hypothetical transactions such as that proposed by way of the Plaintiffs' putative alternative transaction: citing ***Lewin on Trusts*** (op cit at paras 20-135 to 20-140).

502 My conclusions on the jurisdictional issue are as follows:

503. First, in exercising its equitable supervisory jurisdiction over trusts, the Court has a remedial armoury flexible enough to fashion an appropriate response to a wrong that has been committed. If this Court reaches the conclusion, as it is submitted by the Plaintiffs it should, that the division of the Trust fund was not fair because the Trust assets and the Plaintiffs' Shares had been undervalued then, I accept, it has power to correct the wrong by ordering an appropriate sum to be paid from the Trust to the Guernsey Trust.

504. Secondly, the Court's power to order equitable compensation is not doctrinally limited in the way that the Defendants suggest. The Court has power, which it may exercise in this case if there has been a breach, to award compensation to put the

Plaintiffs into the position they would have been in had the Trustees complied with their duties.

505. There is no doubt from the case authorities, that the Court has power to make an order for equitable compensation to put a wronged party into the position he would have been in had the tainted transaction not been tainted or had been transacted properly. Such an award is properly regarded as restitutionary or quasi-restitutionary in nature, since rescission of a tainted transaction itself is generally regarded as a restitutionary or quasi-restitutionary remedy: see *Burrows, The Law of Restitution (3rd edition, 2011)* at pages 16-21 and ***Mahoney v Purnell** [1996] 3 All ER 61 (QB)* and ***O'Sullivan v Management Agency and Music Ltd. [1985] QB 428 (CA)***.

506. The specific question in the present case is whether the power of the Court to order compensation is limited to cases of that kind (referable strictly to a tainted transaction) and, as will be evident from the authorities discussed above, the answer is that it is. The remedy is a true compensatory or restitutionary remedy; referable to an impugned transaction between a fiduciary and the objects of his powers to which the complaint relates. But that does not mean that the remedy is available only when rescission of the impugned transaction is still available and in lieu of rescission.

507. Given that the source of the Court's power lies in its equitable jurisdiction to provide a remedy for injustice, one might conclude the present discussion with a rhetorical question: in a situation where rescission of a transaction would have been available to a beneficiary for breach of the fair-dealing rule by a trustee in a transaction with his beneficiary but for only the impossibility of restitution in integrum, why should the Courts not be able to grant relief by way of equitable compensation instead?

508. As the inability to grant relief could result in such circumstances in manifest injustice, no acceptable answer to that question appears and the weight of the case authorities rests heavily in favour of the availability of the remedy.

The Basis for Assessing Compensation

509. Having decided that the remedy is available to A.B. Jnr., the next question becomes: on what basis is it to be assessed and calculated?

510. Both sides acknowledged that the answer to this question would have to be the outcome of judicial discretion and judgment. This is for the obvious reason that the Court must now, contrary to the events that did happen, judge on the reasonable balance of probabilities, what would likely have happened had the Trustees acted in fulfilment of their obligations owed to the Plaintiffs. This exercise, "counter-factual" though it was fittingly described by Mr. Boyle QC; can now be undertaken on the basis of the conclusions already reached that the Trustees had only two choices reasonably open to them, if they were to have fulfilled their obligations to the Plaintiffs as beneficiaries of the Trust.

511 One choice was to postpone the exit negotiations with the Plaintiffs, until the MV Inc. transaction became certain. The other choice was to provide a suitable (if limited) degree of disclosure to the Plaintiffs sufficient to have allowed the exit negotiations to then proceed and conclude on its proper footing.

512. As explained above, the Plaintiffs' primary case is that in either scenario, the probability would have been a postponement of the exit negotiations until the MV Inc. purchase was complete (that is: until circa January 2000) at which time the basis for the final valuation of the Trust and the Shares of beneficiaries would have been

settled and a transaction, alternative to the one actually entered into, would have been entered into. This again, is the so-called "alternative transaction basis" and the basis pleaded, as I understand it, at paragraph 68A (b)(ii) and (d) of the 6th Amended Statement of Claim.

513. The "no transaction basis" is also described at paragraph 68A (d) contemplating the hypothetical scenario where the Trustees had refused to continue to negotiate, the MV Inc. transaction having been disclosed and the Plaintiffs having demanded a significantly greater sum than offered.

514. Then, plead the Plaintiffs, as there had been a settled intention on all sides including the Trustees, that the Plaintiffs be allowed to depart the Trust; no transaction would have taken place with the Trustees but with replacement trustees appointed by the Court instead. The Trustees' recalcitrance, to be deemed unreasonable in that scenario, would not have been allowed to prevail and the appointment out on appropriate values would have taken place in an altogether different transaction resulting in the same higher sum as in the scenario of the alternative transaction.

515. But neither of those two alternative scenarios seem appropriate to me, if I am to view the situation retrospectively, with the benefit of hindsight and on the basis that both sides might be expected to have behaved reasonably and with fairness to all beneficiaries as the guiding principle.

516. On that basis, which I consider would have involved – in light of the perceived dilemma then facing the Trustees because of confidentiality – the seeking of directions from this Court contemplated by paragraph 2 of the 1993 Order; I can now

see no good reason why the transaction actually entered into by the parties, would not have happened, but on its proper basis.

517. This, as pleaded also in paragraph 68A (b)(i) of the 6th Amended Statement of Claim would have meant, subject to the assessment of the loss to follow that:

> *"The 1999 Agreement would have been made and approved by the Court on 30 June 1999, but the value transferable to the Guernsey Trustees would have been higher than that provided in the 1999 Agreement."*

518. This is again the "actual transaction basis"; and it accords both with my view of the facts of this case and with the principles derived from the case law as discussed above.

519. In rejecting both the alternative transaction and no transaction bases, my primary factual reason is the lack of a reasonable premise for concluding that one or the other would have followed from the 1999 Agreement not actually having taken place as it should have in June 1999.

520. To take but a few considerations: it is clear from the contemporaneous notes kept by Mr. Lowe QC and D.T. in particular (and important in the absence of Minutes of Trustees' meetings at the time) that the Trustees had come to the end of their patience in responding to Mme B. and the Guardians' demands. The additional sum of USD15 million extracted by Mr. McDonnell and so allowing the offer of the cash element of the settlement to rise from USD60 million to USD75 million, was difficult to persuade and only very reluctantly agreed by M.B. The contemporaneous notes reveal that he regarded USD75 million plus the Art Collection (together the sum of

USD173.34 million) to be too generous an offer. This was an element of the "frustration" that he admitted in cross-examination and to which he attributed his then willingness to proceed and let Mme B.'s "sue later if she wished."

521. The evidence also shows that the Trustees had very much in mind the fact that under the Trust, beneficiaries were not entitled to advancements of capital but were entitled instead only to undivided aliquot shares in the Trust, taken as a whole. The Trustees were thus obliged only to provide distributions of trust income as needed for the maintenance of beneficiaries (or to sell assets if necessary for that purpose).

522. J.R.'s scheme presented to the Trustees and which involved all beneficiaries being paid out for their Shares ("Plan B"), was by 24th June 1999; already an alternative recourse under consideration by the Trustees. Faced with an unrelenting position on the part of the Plaintiffs considered to be unreasonable by the Trustees, I am told that the Trustees may well have considered Plan B as a way of ensuring fairness to all the beneficiaries. Had that happened, the exit settlement offered to the Plaintiffs may well have been significantly smaller.

523. While this scenario is unlikely given the stated intention on the part of the Trustees to keep the Settlor's Trust intact for posterity, I cannot entirely discount the possibility of Plan B in such circumstances. As M.B. and Ab.B explained in their evidence, had the exit negotiations failed and had to be reopened, other beneficiaries may have wished to have capital payments as well. This is also a factor mentioned in D.T. 3 (at pages 92-94 above). Nor may I discount the re-emergence of the forfeiture issue and the possibility (or even probability) that it would have been deployed to the detriment of Mme B. or at least to reduce her bargaining position. It is at least likely that K.B.,

on behalf of the other beneficiaries, would have then urged the Trustees to deploy the issue to secure their best position in the face of any demands for a higher sum regarded as unreasonable by the remaining beneficiaries. This is a point that was clearly explained by Mr. Lowe QC in his evidence.

The Global Discount and S.H. Ltd.

524 And finally, in this regard, the Plaintiffs would argue relying on their valuation expert, that under the alternative transaction in January 2000, the liquidity provided by the MV Inc. transaction together with the S.H. Ltd. sale going through, would have been such as to make the discount unjustifiable. But that does not follow when the discount is rationalized in terms not only of "illiquidity" but also in terms of the other factors identified at the time, including fairness to the remaining beneficiaries. To take but one aspect in this regard: As M.B. explained, there is inherent in the nature of S.T. Ltd.'s business, a high degree of risk. S.T. Racing, is a very risky undertaking. So also was the Project just then about to be joint ventured with MV Inc. and which involved the further risk of having to develop the new S.T. Ltd. factory at Y City in Y Country for those purposes. This is as explained at paragraph 22 of the Advice along with other factors explaining the Trustees' thinking on the issue of discount at the time.

M.B. expanded upon this in his evidence. He explained that the financial crisis of that time had, by early 2000, already had a significant impact upon the value of Trust assets, including even the securities portfolio. The Trust had also recently embarked upon the expansion of its aeronautical business through S.A. Ltd., with significant outlays to acquire Y Airport from the Y Country Government, as well as aircraft

525. In those circumstances, demands from the Plaintiffs for a larger settlement by way of a reduced discount or otherwise, would not have been recommended and the idea of an alternative transaction being agreed in 2000 based on a larger payment should now be regarded as so uncertain as to be rejected by the Court.

526. For the reasons Mr. McDonnell explains in the Advice and those others also explained by M.B. in his evidence and supported by the experts Mr. Glover and Mme Costafrolaz, it is in my view, highly improbable that the Trustees would have resiled from their position on the issue of discount, irrespective of the transactional basis assumed for the exit of the Plaintiffs from the Trust and irrespective of when it is now assumed likely to have happened.

527. A further reason for assuming that the Trustees would not have resiled from their position in relation to the discount, is that I am now persuaded, with the benefit of hindsight, that a discount was, in principle, fair. And the extent of the discount to be now regarded as appropriate, must also be a matter for consideration now.

528. The appropriateness of a discount is founded in all the reasons mentioned above, as well as in what Mr. Guitera, the Plaintiffs' valuation expert, elegantly described as "freedom". Freedom in this sense refers to the unfettered ability in the trustees of the Guernsey Trust (one of whom is Mme B. herself) to invest the capital appointed out to them as they would see fit in the best interests of Mme B. and A.B. Jnr., free from the strictures imposed upon the Trust by the nature of its undertakings and the policies of the Trustees.

529. Freedom in this sense is itself a very significant benefit vis-à-vis the position of the remaining beneficiaries in the Trust.

530. The earlier capitalisation of the Plaintiffs' Shares and the advancement of capital, meant that they were no longer to be tied to the Trustees' limited and conservative income distribution policies. As the Trustees' expert Mr. Glover demonstrated, an advancement of USD173.34 million of capital invested without risk in U.S. Treasury Bonds at the rates then applicable in 1999, would have secured USD10.4 million per annum in dividend yield or nearly six times the yearly dividend income that the Plaintiffs had been receiving while in the Trust (USD1.6 – 1.8 million). And this, while no longer being dependent upon the continued success of S. Group with the high risk S.T. Ltd. as an important component of its business (a kind of risk which was in this sense later demonstrated in X Year by S.T. Ltd. having to forfeit its S.T. Racing prize and further penalized for improper conduct against another entity). And, for that matter, with the several other illiquid assets then forming parts of the Trust (eg: real estate in the United States and a hotel in Q Country, assets which were eventually sold at a significant loss to the Trust). Indeed, Mr. Guitera, in his supplementary report of 5 May 2012, accepted (at paragraph 3.1.2) that a discount of 10% to the value of the Trust's non-income producing real estate assets of USD184 million, was appropriate.

531. For the foregoing, amongst other reasons explored in the arguments, I find that had the Trustees not acted in breach of trust, it is very probable that they would have sought the directions of this Court for appropriate disclosure of the MV Inc. negotiations to the Plaintiffs.

532. Such disclosure would have included the information about the MV Inc. negotiations that would have been material to the exit negotiations. The information would

certainly have included the price – then tentatively set in the MOU but which became the actual price of £210 million for 40% or £157.5 million for the Trust's 30% shareholding in S.T. Ltd.

533. The information disclosed would most probably also have included that which was relevant to ascertaining the indicative fair value of the remaining 30% of S. Group's shares and there would likely have been a debate over whether that should have been regarded as the sum obtained for the 30% sold to MV Inc. (that is: £157.5 million) or some other sum.

534. That debate would likely have involved the valuers (then M. Sardet and Mme Costafrolaz) being engaged on the subject and the same differences of opinion emerging as emerged at the trial before me, both as between them and as between Messrs. Guitera and Glover. The pending sale by the Trustees of the remaining S.H. Ltd. shares would also have been factored into the discussions, as well as the further liquidity it would provide. I accept though that, retrospectively, allowance must also be made for the fact that some $60 million less than expected was eventually realised from the sale of these S.H. Ltd. shares and for the latent taxes then - in June/July 1999 - which would have been anticipated as payable in respect of them. With all relevant information about the pending S.H. Ltd. sale having been disclosed, as well as that relating to the MV Inc. transaction, there is no reason to suppose that the parties would not have agreed a settlement, subject to the understanding that the expected income from those pending sales had to be realised. A simple way of achieving this would have been to provide the bulk of the advancement of capital for appointment out to the Guernsey Trust at or about the time when the appointment did take place,

with a suitable portion withheld to allow for any adjustments necessary once the MV Inc. and S.H. Ltd. transactions were complete, with an agreement to pay interest on any net amount withheld in the meantime.

535. The situation would likely have developed therefore, into the fairly narrow issue of valuation of shares remaining for resolution now and would likely have been resolved by the Court in June/July 1999, so as to have allowed for the conclusion of the 1999 Agreement and exit of the Plaintiffs from the Trust; that is: on the basis of the actual transaction completed well before the end of 1999. The transaction would also have involved for the reasons explained, a reasonable discount to the value of the shares paid to the Plaintiffs.

536. Thus defined, I still accept that the debate would have required a determination of the question whether the MV Inc. purchase was a special purchaser transaction or, put in terms of the D&T and M&G Joint Report; whether the MV Inc. price was one driven by "strategic considerations" peculiar or unique to MV Inc. and making it a special purchaser transaction. This would have been necessary primarily for the purpose of valuing S. Group's 30% shareholding retained in S.T. Ltd.

537. Mr. Guitera and Mr. Glover were in divided and deeply entrenched positions on this issue. Mr. Guitera opined that if MV Inc. was a special purchaser, it was so in a negative sense, being able to pay and so did pay less than market value for the shares because of its existing strategic position with S.T. Ltd. – a position which afforded it leverage in the negotiations which other buyers would not have had.

538. Mr. Glover, taking the opposite view that MV Inc. already having tied its fortunes to S.T. Ltd. by engine and sponsorship arrangements and about to become even more

committed by virtue of the Project; was willing to pay a premium and did pay a premium for the shares to ensure that it had equity participation and a significant share of the control of S.T. Ltd. S. Group would therefore not have been able to sell its shareholding to any other buyer at the price offered by MV Inc.

539. These considerations, plus the restriction agreed by the Shareholders Agreement between MV Inc../S. Group/N.N. against the free disposal of the remaining 30% of S. Group's shares, meant that MV Inc. was very much a special purchaser and so the value to be ascribed to the remaining 30% should not be the same or anything like the same, as that paid by MV Inc. for the 30% sold.

540. Thus, the question of most significance to the debate between the valuers – and that which remains of significance to my mind now – is whether or not the price paid by MV Inc. was representative of the "indicative fair value" of the 60% S.T. Ltd. shareholding of S. Group.

Owner Value or Beneficiary "Class" Value

541. The other major issue of disagreement between the valuers Mr. Guitera and Mr. Glover, was the method of calculating the value of the Plaintiffs' Shares.

542. Mr. Glover presented, as already mentioned, a very credible argument for what is described as the "owner value basis", as derived from his valuation of the prospective income which the Shares could have been expected to yield to the beneficiary during his or her lifetime. His rationale is that under the Trust Deed, no beneficiary had the power to sell or otherwise dispose of his/her Share so the market value concept – the price the shares would fetch if sold and that used to value the Trust and the Shares in the exit negotiations – was clearly inappropriate. He defined "owner value" as being

equivalent to deprival value, that is: the adverse consequences both direct and indirect, for the owner if deprived of the property in question. As the Plaintiffs were entitled solely to maintenance-determined income payments and had no entitlement to the capital of the Trust and no capital payments were generally in prospect, the owner value has to be a function of the prospective income payments alone.

543. Taking that approach, Mr. Glover valued the Plaintiffs' shares at USD120 million; the sum which, if invested in secure U.S. Treasury Bonds at the 6% rate than obtainable in 1999, would have yielded annual income of USD10.4 million or nearly six times the income of USD1.6 - 1.8 million which the Plaintiffs had been receiving at that time.

544. This, when compared to the settlement of USD173.34 million that the Plaintiffs actually received demonstrates, says Mr. Glover, that theirs was indeed a very generous settlement.

545. Mr. Guitera criticises this approach of Mr. Glover's on the basis that it is wrong to value the Plaintiffs' Shares solely by reference to the Plaintiffs themselves and the benefit they were likely to receive during their lifetimes. That he should have valued the Plaintiffs' Shares by reference to the benefits accruing not just to Mme B. and A.B. Jnr. but also to the other remoter members of the beneficiary class, that is: the Plaintiffs' descendants or, failing them, the heirs of the Settlor's Estate (as the Trust Deed would have required at the expiry of the Trust period. See paragraph B5 at p51 and paragraph C at p52-53 above).

546. This is the approach Mr. Guitera says he adopted and that which, in his view, the parties had adopted in 1999. Taking into account the MV Inc. transaction which he

opines should have added a further USD58 – 60 million to the value of the Plaintiffs' Shares, he applied a value of USD225.7 million (after a 6.5% discount which he conceded was overall applicable to the valuation).

547. While I do not accept Mr. Guitera's contention that the "Beneficiary class basis" was precisely the approach taken by the parties to the exit negotiations, it is clear that what they sought to arrive at was a capital value for the Shares of the Plaintiffs, based on the overall capital value of the Trust and expressed as 18.927% of that overall value, less the amount of discounts then also implicitly agreed and applied.

548. This was the approach taken although the Trustees had insisted upon the Guernsey Trust adopting similar provisions to those of the Trust, to reflect Remainder Interests. Indeed this was what led to the creation of the Guernsey Trust.

549. Nonetheless, the approach taken for valuing the Plaintiffs' shares was as just described above.

550. That, as Mr. Glover recognised at paragraph 13.16 of his report of 20 January 2012, was a methodology that "could nevertheless produce an acceptable result" taking into account (i) some adjustments to the Trust assets value and (ii) a discount sufficient to "produce a net value approximately equivalent to the Plaintiffs' owner value".

551. Apart from such considerations, I am satisfied that the approach adopted by the parties remains an acceptable approach and one which, for present purposes, I am prepared to assume would have continued to be taken by them to the completion of the 1999 Agreement on the basis of the appropriate disclosure of the MV Inc. negotiations. Nothing in principle prevented the parties, as a function of the negotiation process engaged between them in 1999, from taking the approach which

they did. In willingly engaging in the process which they did, it is implicit that Mme B. and the Guardian's advisers all shared the view expressed by Mr. McDonnell QC at the time, (and supported by Mr. Lowe QC); that the valuation of the Plaintiffs' Shares as distinct from the overall indicative fair value of the Trust assets, was a matter, including the issue of discount, for the Trustees and so a matter for them to negotiate with the Plaintiffs and their advisers at the time. This is the only fair inference to draw from the fact that the M&G higher valuation having been accepted by the Trustees, the Plaintiffs did not, through their advisers, insist upon separate expert valuations of their Shares.

552. And so, while I would acknowledge that Mr. Glover's methodology – the owner value basis – is a logical and perhaps more appropriate way of valuing the beneficial capital entitlements under this Trust, there is no basis now for using it to supplant the method agreed between the parties and sought to be applied by them in 1999. The result of Mr. Glover's valuation nonetheless, to my mind, remains a useful check on the fairness of the ultimate outcome now to be reached.

553. .It follows that one returns to the same essential question: did the failure to disclose the MV Inc. negotiations, falsify that process of negotiation between the parties in a material way so as to require the payment of compensation now?

554. If the answer to the question is "no" then I take the view, as expressed also by Mr. Nugee and supported by Mr. Glover, that there would be no basis for altering the outcome reached after negotiations between the parties. If the answer is "yes", then the question becomes: how much compensation is payable as a result?

MV Inc.: Special Purchaser or Not?

555. I have already mentioned some of the main reasons why the valuers Mr. Guitera and Mr. Glover take very different views on this issue.

556. I do not intend to recount the debate in full. It will suffice if I simply identify the other main competing points relied upon for the different conclusions before stating my own.

557. The reality is that there can be no certain answer to the question; was MV Inc. a special purchaser or not? No person who was privy to the MV Inc. negotiations testified as a witness in this trial. And despite Mr. Boyle's forceful efforts to persuade me to infer – from the Defendants' failure to call Mr. N.N. and Mr. V.M. to testify - that their testimony would have confirmed that MV Inc. was not a special purchaser, I do not consider such an approach to be safe as it is itself only speculative.

558. My task then is to arrive at an answer to this question – certainly by having due regard to the competing opinions of the experts – but also importantly by my own process of deduction as to the reasonable significance of the information that was available to the persons involved in the MV Inc. negotiations.

559. It is in this context – quite apart from whether the information made available to V.M. for the Presentation should also have been made available to M. Sardet – that the Presentation itself is said by the Plaintiffs to be important. I accept this proposition but only to the extent I now explain.

560. Most significant, in the Presentation V.M. presented to MV Inc.., a forecast for pre-tax profit ("PBT") for S.T. Ltd. of £30.7 million for 1999. This was a forecast which he obtained from B.I. of S.T. Ltd. and which he used to arrive at his own forecast for

maintainable earnings by using as a comparable, the profit earnings ratio of Manchester United (the well-known British Football Club) and which was available publicly. Manchester United was in 1999 and remains a publicly traded company, and as a major renown sports enterprise, adopted as a suitable comparable to S.T. Ltd. although the latter was and remains privately owned.

561. That PBT of £30.7 million forecast for 1999 became of central importance and found its way into the MV Inc./S.T. Ltd. Sale and Purchase Agreement attached in Schedule V in these terms regarded as a form of warranty which fairly reflected S.T. Ltd.'s Management's view of the prospects of the S.T. Ltd. Group of companies (of which there were a number including S. Audio) for the period under forecast (expressed in £ millions):

YEAR	REVENUE	YEAR TO YEAR GROWTH	PROFIT BEFORE TAXATION	YEAR TO YEAR GROWTH
1999	138.3		30.7	
2000	146.5	6%	31	1%
2001	160	9%	34.3	10%
2002	169.2	6%	45.5	33%
2003	165.8	-2%	47.9	5%

562. By reference to Manchester United as a comparable, V.M. had proposed in the Presentation that a multiple of 20 years' maintainable earnings be applied to the PBT of £30.7 million to arrive at the value of £614 million which he ascribed to 100% of S.T. Ltd. for the purposes of the MV Inc. negotiations. He also presented in the letter of 7th May 1999 to N.N. arguments for an even higher value to be ascribed to the shares MV Inc. would be acquiring. By the time of this letter, it had become clear that MV Inc. wished to have better than a mere minority position on the S.T. Ltd.

Board to be ascribed to their 40% Shareholding and hence the voting rights which they obtained. But, – for the reason already mentioned that neither V.M. nor N.N. testified to what happened in the negotiations – the factors set out in the letter of 7th May 1999 cannot be reasonably regarded by me now as having influenced the MV Inc. negotiations. Certainly, the still higher prices proposed in it by V.M. bear no relationship to the price MV Inc. eventually paid and, as N.N. had justifiably cautioned, the Presentation was to have been their only chance to get the best price.

563. In the result, MV Inc. negotiated the P.E. multiple down from 20 to 17.1 which would have produced a notional value for S.T. Ltd. of £525 million and did produce the agreed value in the Shareholders' Agreement for the 40% acquired by MV Inc. of £210 million as shown in this table:

FORMULA PRICE	IN £ MILLION
PBT	30.7
Multiple	17.1
Total S.T. Ltd. value (PBT x multiple)	525
% of Shares sold to DCAG	40%
40% of S.T. Ltd. value (525 x 40%)	210
30% of S.T. Ltd. value (525 x 30%)	157.5

564 In the Shareholders' Agreement in speaking to the future circumstances under which shares could be sold and transferred between the parties:

(1) "Formula Price" was defined to mean "*the relevant Shareholder's Proportion of M multiplied by PBT where: M is 17.1; and PBT is the average profit before tax of the (S.T. Ltd.) Group for each of the three previous accounting reference periods determined in accordance with the principles set out in Schedule 9*"; and

(2) Schedule 9 provided that for the purposes of calculating the Formula price -

> *"PBT is the average profit before tax of the Group for each of the three prior accounting reference periods and, for the purposes of the agreement, the PBT for each of the accounting reference periods ended on 31 October 1997, 31 October 1998 and 31 October 1999 shall be deemed to be £30,700,000"*

566. All of the foregoing was relied upon by Mr. Boyle QC in arguments (supported by the opinion of Mr. Guitera) that not only was the price paid by MV Inc. shown to be based upon open market considerations and criteria, but it was also the value to be ascribed to the remaining 30% shareholding of S.T. Ltd. retained by S. Group. This is as suggested by the Shareholders' Agreement meaning of "Formula Price", as any future transaction involving those shares was to be based on the same values arrived at by reference to the same PBT forecast and P.E. multiples.

567. While, for reasons which follow, I do not accept this latter argument; I do accept that the entire MV Inc. transaction was the outcome of a negotiation process which not only referenced and adopted open market information (with Manchester United as the exemplar) but also involved highly skilled and experienced professionals acting for all sides. For S.T. Ltd.; N.N., V.M. and the lawyer, Nigel Carrington of Baker & McKenzie, the well known London firm. And for MV Inc..; Ursula Gruss, a Merger and Acquisitions expert from Lovell & White as well as their investment bankers and advisers, Morgan Stanley. The evidence shows that Morgan Stanley produced further comparable evidence of open market value by reference to certain other U.S. motor

sport companies. It is clear that MV Inc. scrutinised and accepted as reliable, the PBT forecast of £30.7 million before adopting it.

568. A letter dated 12 February 1999 – one week before the Presentation was actually given and conveying the Presentation to N.N. – also records V.M. as saying as follows to N.N.:

> *"In view of the amount of financial information we can currently safely divulge, this valuation presentation is somewhat different to that I generally give. I have, therefore, (sought) to progressively build up the profit multiple case on various foundations of what I consider to be strong current market evidence. I consider this to be the most effective and persuasive approach."*

569. There is therefore every reason to think that the MV Inc. negotiation process, conducted in that way entirely at arms length, was one aimed at arriving at a fair and objective value – one indicative of the true market value – for the S.T. Ltd. shares. There is every reason to think that both sides would have been in earnest to secure the best price to be obtained, with MV Inc. concerned to pay as little as they reasonably could, having regard to their already significant contribution to S.T. Ltd. (in terms of engines, R & D and drivers' salaries) and N.N., as the consummate negotiator he is reputed as being; concerned to achieve the highest possible price for the 40% of S.T. Ltd. And, I accept, in this respect, his interests were entirely the same as S. Group's – the way in which M.B. saw their mutual interests.

570. The same letter of 12 February 1999 from V.M. to N.N. underscored their joint intention to achieve the best price:

"I realise just how important the matter is to you and I am open to all ideas as to how my suggested presentation can be improved."

571. This came against the background of N.N. having earlier cautioned V.M. as mentioned above; that they would have but one opportunity – the Presentation of 17 February 1999 – to get it right.

572. To my mind, this was therefore a classic scenario for arriving at "indicative fair value"; in the sense also intended for the valuation exercise for the exit negotiations.

573 It detracts nothing from this conclusion that the Manchester United valuation used in the MV Inc. negotiations as the exemplar was arrived at in the context of a publicised takeover bid for Manchester United by BSkyB and which was a bid for all the issued shares in Manchester United (a bid which ultimately failed for want of regulatory approval).

574. Mr. Glover cited the BSkyB bid valuation of Manchester United as an indication that MV Inc. may well have willingly paid "over the odds" for the S.T. Ltd. shares. At least one indication of this he thought was the apparent fact that the bid for Manchester United (apparently adopted as the exemplar) was for 100% of its shares whereas the MV Inc. bid was for only 40% and so for a minority interest in S.T. Ltd.

575. This, as well as the reason that the profit forecasts used by V.M. in the Presentation were overly optimistic, led Mr. Glover to regard the Presentation not as a formal objective valuation of S.T. Ltd., indicative of true market value, but rather in the nature of a "sales pitch" by V.M. and N.N.

576. For, these, among other reasons, Mr. Glover advised that this Court should not regard the MV Inc. price as representing the indicative fair value of the shares sold.

577. While I appreciate the logic of this argument, I think it rather misses the point.

578. The importance of the Manchester United exemplar was not that it provided an exact precedent for the valuation of the S.T. Ltd. shares, but rather an objective measure by which the parties to the MV Inc. negotiations could arrive at what they agreed to be a fair price. The comparable was in the commonality of their enterprises – both involved in sporting activities having universal appeal and interests to audiences across the globe. Thus, whatever the original intent behind the Presentation, the actual outcome was that MV Inc. acquired the 40% shareholding after intensive negotiations and on the basis of conditionalities that effectively gave MV Inc. a position on the Board of S.T. Ltd. similar or tantamount to an influential, although not over-riding, majority interest. When viewed beside the rights retained by S. Group and N.N. in relation to their respective 30% retained, the position as between the three shareholders amounted to what has fairly been, in my view, described by Mr. Guitera as "co-control".

579. I am satisfied that the price paid by MV Inc. was one which resulted from a process of negotiations at arms length between a willing buyer and a willing seller such as fell within the meaning of "indicative fair value" as defined for the purposes of the valuation exercises for the exit negotiations.

580. It was neither a special purchaser's price within the meaning of the Joint Report for the valuation exercise and so more than indicative fair value as Mr. Glover opined; nor a "negative" special purchaser's price as posited by Mr. Guitera, and such as would suggest that the true indicative fair value of the shares was more than MV Inc. paid.

581. That the MV Inc. price was thought to be a "very full price" is confirmed by another letter that received considerable attention during the trial. This was that letter of 4th February 2000 from K.P. to N.N., in which the former, as a partner/colleague of V.M.'s, reminded N.N. of that as being V.M.'s opinion of the purchase price earlier privately expressed to N.N. by V.M. Indeed, the whole tenor of this letter suggests that notwithstanding in the end the MV Inc. price was significantly less than that pitched by N.N. and V.M. in the Presentation, it was nonetheless a full and fair price. This recount of events by K.P., being a near contemporaneous record of the thought processes of active participants in the MV Inc. negotiations at the time, deserves to be especially noted.

582. This conclusion as to the indicative fair value of the 30% of S. Group's shares sold to MV Inc.., does not however, mean that the 30% retained must be ascribed the same value. That is the position contended for by the Plaintiffs supported by Mr. Guitera but which I do not accept.

583. On this issue, I preferred Mr. Glover's approach and opinion. I conclude that it would be inappropriate to take the value of the remaining 30% simply as one half of the price (£315 million) indicated for the 60% (that is: £157.5 million).

584. I also conclude that it would be wrong to take the value of the remaining 30% as having been objectively and accurately indicated by the warranties in the MV Inc. transaction or the Formula Price therein adopted for the future transaction of S.T. Ltd. shares. An important reason is that over time and as would be expected the PBT forecasts have been proven by subsequent events to have been inaccurate. It must also be borne in mind that the Formula Price related to possible future transactions

between those parties themselves on S.T. Ltd. Shares in certain pre-defined circumstances. Unlike in the case of the actual MV Inc. transaction that did take place, it would be wrong therefore to treat the Formula Price by itself as being indicative of the true open market value of the retained 30% of S. Group's shares in S.T. Ltd. Indeed, as subsequent events showed, far from MV Inc. acquiring more of S.T. Ltd.'s shares, when they eventually decided to promote their own S.T. Racing team in D Year (by purchasing Auto Inc.); MV Inc. sold its S.T. Ltd. shares to S.T. Ltd. at a price determined by reference to the circumstances prevailing at the time and without any reference to the formula price.

585. Another main reason, is that the 60% original S. Group shareholding was a controlling interest which the remaining 30% was not. This difference in position is clearly demonstrated by two factors in particular when viewed from the perspective of the positions on the S.T. Ltd. Board as they were before the MV Inc. Shareholders' Agreement. First, under the original 1984 Agreement, in the event of disagreement as between S. Group and N.N. on any aspect of the corporate plan, S. Group's views would have predominated over that of N.N. Second, if material differences arose between the projected and actual financial situations of the company, S. Group and N.N. were required to meet and agree but, failing agreement, S. Group was entitled to make revisions to the accounts.

586. These were significant aspects of financial control over the affairs of S.T. Ltd. which were relinquished under the 1999 MV Inc. Shareholders' Agreement for the tri-partite position of co-control.

587. Perhaps even more important in this regard were certain restrictions introduced in 1999 which would have impacted S. Group's ability to realise open market value for its remaining 30%. Thus, for a four-five year period, the shares could not have been offered for sale to anyone but to N.N. or MV Inc. and no shares were to be sold to another automotive company without the approval of MV Inc. and N.N. and then the entirety of the shareholdings had to be sold as MV Inc. would no longer participate. Bearing in mind that the transaction with MV Inc. was itself one with a car manufacturer and so the only proven evidence of the existence of an indicative open market for the shares (and hence their open market value), that restriction was a significant damper on any prospect of an open market sale for the retained 30%.

588. Arguments to the contrary and to the effect that other non-automotive buyers (such as possible private investors not wishing to have direct equity participation) would have been available, I regard as merely speculative. The effective removal of other automotive companies from the potential pool of buyers was a significant restriction, in and of itself.

589. I also accept the views expressed by Mr. Glover that the price per share of a minority interest in a company (even one to be regarded as sharing "co-control") stands at a significant discount to the price per share of a controlling interest in that company (even if not an outright or absolute controlling interest which was arguably the case under the 1984 Shareholders Agreement as explained above).

590. Mr. Glover in his first report (and consistently throughout) advised that in the case of an influential minority interest such a discount would be upwards of 40% and could

well be more than 60%, but he would propose a discount of 25% as appropriate to the influential minority (or co-control) interest that the S. Group's retained 30% became.

591. This is the level of discount that I conclude is appropriate and adopt to be applied to the value of S. Group's retained 30% for the present purposes of assessing the true value of S. Group in July 1999 and so for assessing the true value of A.B. Jnr.'s shares and equitable compensation; otherwise taking the same approach as did the parties at the time.

592. In taking this approach, I am not unmindful of Mr. Guitera's views that a similar discount was already reflected in the indicative fair value of $330 million assessed by M. Sardet and so included as part of the overall value of USD1100 million for S. Group adopted by the parties for the 1999 Agreement. But I take the same view of this as does Mr. Glover. The 30% discount applied by M. Sardet (described as his "illiquidity" discount) was applied to reflect two things in particular. The first, the fact as he saw it – having himself also adopted Manchester United as a comparable for his valuation exercise – nonetheless, that the S.T. Ltd. shares were not as marketable as Manchester United's shares, the latter being a publicly traded stock.

593. The second, to take account of what he called "the N.N. Factor"; that is: the fact that S.T. Ltd. was uniquely and overly dependent on N.N. as its moving force and could veto disposition of shares in certain circumstances. In effect, for those reasons, M. Sardet had discounted the S.T. Ltd. shares by 30% by adopting a P.E. multiple of 20 instead of the 29 then applicable to Manchester United.

594. The 25% discount in value that I adopt is for the different considerations discussed by Mr. Glover above, although akin to the concerns over non-marketability as a factor embodied in what M. Sardet described as the "N.N. factor".

595. To be clear, this 25% discount reflects the difference that I ascribe to the value of the 30% of S.T. Ltd. retained by S. Group as compared to the value of the 30% sold to MV Inc. It is clear that MV Inc. paid for and obtained co-control – something significantly more than a mere minority interest. And so this 25% discount involves not only concerns about illiquidity or non-marketability , but also as explained above, the diminution in S. Group's influence on the S.T. Ltd. Board, commensurate with and proportionate to the influence ceded to MV Inc.

596 .In Mr. Glover's opinion as mentioned above, this is a discount which could have been justified in the exit negotiations at levels as high as 40% - 60%. This was a proposition with which, under cross-examination by Mr. Nugee, Mr. Guitera did not disagree when viewed in respect of an hypothetical minority interest in a company which is being liquidated. What is sought here is however, to arrive at the value to be ascribed to an influential minority interest in S.T. Ltd. as a going concern and I regard the lesser discount of 25% to be reasonable in this respect. This 25% discount would have yielded the appropriate value to be ascribed to the S.T. Ltd. shares for the purposes of the 1999 Agreement as follows:

	£ Million
30% sold to MV Inc.	157.5
30% retained (157.5 – 25%)	118.125
Total value of S. Group's 60%	275.625

	USD Million
Value of S. Group's 30% sold	252.5
Total value of S. Group's 60% in USD millions (at rates then applicable)	441.78

597. This result, for the sake of fairness and consistency, must be compared to that described at paragraph 22 of the Advice by Mr. McDonnell (page 144 above). There, by a process of ex post facto deduction, he had cited the sum of USD435 million as the value of S. Group's 60% shareholding which he regarded as having justified the additional $15 million that the Trustees had offered to take the cash component of the settlement up to $75 million (from the earlier offer of $60 million). As the amount obtained for the 30% shareholding sold was (at the rates of exchange he applied in the Advice) $262.5 million, that would have meant a value of $172.5 million (or £107.8 million) for the retained 30% shareholding.

598. This process of deduction giving the value of USD435 million is different from but comparable to the process described by Mr. Lowe QC in his evidence as adopted by the Trustees; when they decided to authorise Mr. McDonnell to raise the offer of cash to USD75 million on 18th May 1999. For that process according to Mr. Lowe, it seems that the Trustees and their advisers had been prepared, in May/June 1999, to treat the value of the 60% shareholding as twice that then to be paid by MV Inc. for 30%, that is: USD252.2 million x 2 = USD504.4 million. This was at the rate of exchange which Mr. Lowe reported was adopted by Mr. McDonnell and himself at the time in giving their advice; that is: £1 = USD1.60.

599. However, both Mr. Lowe QC and Mr. McDonnell QC explained in their evidence, that in the making of the offer of USD75 million (then to Maitre Veil on behalf of

Mme B.), the additional USD15 million had not been attributed to any particular head or factor, such as a perceived value for the retained 30% of S.T. Ltd. The USD15 million was merely an increase on the USD60 million which had been offered to bridge the gap then existing between the two sides. Together with the Art Collection this additional sum of $15 million (plus USD60 million) was offered with the reluctant agreement of the Trustees and eventually met with the reluctant acceptance of the Guardian as well.

600. I am nonetheless urged by the Trustees to compare the overall figures and to view the issue of compensation globally, in the sense, as Mr. Nugee emphasized, that if it turns out that the amount paid out to the Plaintiffs was fair, in light of the now known factors, no basis for a further award could be justified. This is again what Mr. Nugee described as the "key issue", irrespective of any finding of breach of duties by the Trustees.

601. On this basis and as events transpired, says Mr. Nugee, the additional USD15 million payment taken on top of the first offer (which was itself calculated by reference to M. Sardet's valuation of USD1100 million for the Trust assets - and implicitly USD330 million for the 60% S.T. Ltd. shares – was more than sufficient to cover the increase in value that actually resulted from the MV Inc. transaction.

602. This would mean therefore that no compensation is now payable in light of the appropriate valuation to be assessed by the Court. I disagree, for reasons to be explained below. For the moment I will however, first complete my treatment of the discount issue.

603. Mr. Glover advised in his First Report (paragraph 11.9 and as earlier mentioned) that a further discount of 15% is applicable on the basis that there would have been in June 1999, the risk or uncertainty that the MV Inc. transaction might not be completed and to reflect the payment then of USD 173.34 million (or whatever appropriate greater amount) as being six months earlier than the MV Inc. sale proceeds were actually received by S. Group in January 2000.

604. This hypothesis contemplates the parties having been willing to conclude the exit negotiations on the basis of appropriate disclosure of the MV Inc. negotiations in June 1999 and the actual payment out having taken place when it did nonetheless in June/July 1999.

605 .In light however, of the results reached in this judgment, I do not think that the amount of additional liquidity which would have been required in June/July 1999 to meet the true entitlement of A.B. Jnr. would have fundamentally altered the attitude of the Trustees so as to have led them to await the actual liquidation of the S.T. Ltd. and S.H. Ltd. shares in early 2000. Again, any such concerns could and likely would in any event, have been addressed by an understanding of the kind already described.

606 In keeping with the fundamental premise of this judgment that compensation should be referable to the transaction that actually took place between the parties and calculated using as near as practicable the same approach (including as to the rates of exchange), I therefore do not see the justification for this further discount of 15% as proposed by Mr. Glover.

Further on the Global Discount

607. Taking that approach and for reasons already explained, I remain convinced that the discount to the global values applied in 1999 by the parties was reasonable. As explained by Mr. McDonnell QC at paragraph 22 of the Advice (and in his evidence), the discount implicitly applied came to 17.33% (instead of the 25% proposed by the Trustees). This was a percentage of the overall value of the Trust assets when the effect of the additional USD15 million was factored in to reflect the MV Inc. transaction; although, as noted above, that additional sum was not explained to the Plaintiffs on that basis.

608. In taking this approach, I recognise however, that had the MV Inc. negotiations been disclosed, the Plaintiffs would likely have insisted upon the issue of discount itself being revisited.

609. I accept nonetheless, that even in that scenario the Trustees would have insisted upon a discount and would likely have prevailed in respect of the global discount of 17.33%. In that respect, their position would have been quite reasonable, for all the reasons already discussed.

610. With the issue of discount thus resolved, I disagree that no compensation is payable as the result of the additional $15 million paid in July 1999 regarded privately by the Trustees as enough to reflect the impact of the MV Inc. negotiations upon the overall value of S. Group and the Plaintiffs' Shares. This will be shown by the calculations which follow based upon the assessment in this judgment of the value of the S.T. Ltd. shares.

611. As the foregoing examination of the issues in this judgment will indicate, the equitable compensation will be for breach of trust in its simple sense, without the imputation of deliberate wrong-doing.

612. As the evidence of Mr. McDonnell and Mr. Lowe in particular explained, and as I accept; there was no intention on the part of the Trustees in any sense to defraud the Plaintiffs of any entitlement. Rather, the short-coming, in what was from the Trustees' point of view an earnest attempt to negotiate a settlement that was fair to all sides, was in not disclosing material information which would have enabled the Plaintiffs to be completely assured of the fairness of the settlement.

613. The appropriateness of this conclusion is to my mind also assured not only by D.T. 3 (as set out at pages 92-94 above) but also by Mr. Timms' file notes which provide contemporaneous insight into the state of mind of the Trustees. In particular in this regard, the file note of 25th May 1999 of Mr. Timms' telephone conference with Mr. McDonnell QC (above at pages 123-125):

> *"...The (Guardian) currently wanted considerably more than was on offer. We discussed what the Trustees should do should another round of negotiations be necessary. It was unlikely there would be movement (by the Trustees). Their offer apparently factored in the potential for a S.T. Ltd. agreement and the Trustees were confident that if the deal went through it would not mean a rise of any significance in the value figure. The negotiations were for the sale of half of the holding with the other half locked in. To get to their figure, the Trustees had*

already taken Sardet's top figure for the Group and had applied a discount to that...."

614. After this lengthy trial with the benefit of extensive legal and valuation expert enquiry, while the results do show a "rise" of "(some) significance in the value figure", it is not one approaching the order of magnitude claimed by the Plaintiffs of USD 50-60 million.

615. Given, however, that the award is to be seen as that greater amount that would have been the probable outcome of the settlement transaction had it taken place on the basis of full material disclosure in 1999, it nonetheless is an award of equitable compensation for the breach of duty of disclosure and, in that sense, of the fair-dealing rule.

The resultant calculations for the purposes of this judgment are as follows:

Assessment of value of A.B. Jnr.'s
Share of the Trust as at date of closure of exit Settlement on 7th July 1999

		USD Millions	
1	S.T. Ltd. 30% sold	245.30	(252.5 at rates of exchange adopted in 1999 but less 7.2 for S. Audio as stipulated by MV Inc..)
2.	S.T. Ltd. 30% retained	189.37	(252.5 – 25%)
3.	Proceeds from 28.5% S.H. Ltd. (net sum agreed at trial)	213.70	
4.	Cash/Marketable Securities	299.00	(per JG Supp Report dated 5 May 2012 para 50)
5.	Aeronautical Assets	37.00	(op. cit. para 51)
6.	Real Estate	184	(op. cit. para 60)
7.	Art Collection (No discount allowed for commissions paid)	92.60	
8.	Other Assets	11.46	
9.	Gross Trust Assets	1272.43	
10	Latent Taxes referable to S.H. Ltd. (as agreed by Plaintiffs in closing)	91.36	
11	Net Trust Assets	1181.07	
12	Rate of discount actually applied in July 1999	-17.33%	

13	18.927% of discounted Net Trust Assets being the value of the Plaintiffs 'shares	976.39 x18. 927% = 184.50
14	Less amount paid in 1999	-173.34
15	Difference between what was paid and what was due	11.46
16	A.B.'s share of difference (10.68x66% or 12.55/18.927)	7.56

616. This is the sum – USD7.56 million – that I conclude is payable to A.B. Jnr. as equitable compensation in this case. I award pre-judgment interest at the rates payable and at the rests applicable since 1999 pursuant to the Judicature Law. Interest is payable because I regard the equitable compensation payable as money that was due to A.B. Jnr. and so should have been paid at the time of closure of the exit settlement on 7th July 1999. Interest will therefore be calculated as of that date.

617. I will hear submissions on the question of the costs of these proceedings absent agreement between the parties.

SUMMARY OF CONCLUSIONS

(i) While on the basis of her conduct after the death of the Settlor Mme B. would have forfeited her interests under the Trust, the Defendants, on the basis of K.B.'s counter-claim raised on behalf of the remaining beneficiaries of the Trust, are estopped from raising a claim for forfeiture now.

(ii) They are however, entitled to and have successfully raised in turn against Mme B., defences of estoppel and laches/acquiescence, having regard to her failure to complain about the 1999 Agreement while it was still possible to restore the Trust assets and so while it was still possible to avoid prejudice to the remaining beneficiaries of the Trust. In this regard Mme B. had sufficient

notice of her rights in 1999 as deemed necessary by the equitable doctrines to enable her to complain and so as now to regard her as estopped from complaining.

(iii) Estoppel does not apply to A.B. Jnr. and he has successfully shown that the Trustee Defendants owed him a duty to observe the fair-dealing rule in respect of the 1999 Agreement which they breached.

(iv) The Trustees are not entitled to rely upon the legal advice of Mr. McDonnell QC by reference to Article 21 of the Trust Deed by way of a defence to A.B. Jnr.'s claim for equitable compensation referable to that breach of duties.

(v) Equitable compensation is a remedy available at law and which this Court may award for loss resulting from a breach of the fair-dealing rule. For these purposes, while the claim must relate to the impugned transaction said to be tainted by the breach of the fair-dealing rule, equitable compensation may nonetheless be awarded even if the right to rescind the impugned transaction has been lost or the opportunity to rescind no longer exists. In this sense, equitable compensation is a free-standing remedy independent of the right to rescind.

(vi) The appropriate basis for the calculation of equitable compensation in this case is to enquire into whether or not a loss resulted from the failure of the Trustees to disclose the MV Inc. negotiations in the context of the exit settlement when it did take place in June/July 1999. It would be inappropriate, both as a matter of the law of equitable compensation and the facts of this case, to enquire into what settlement would have been reached

had an alternative transaction taken place in January 2000 after the MV Inc. transaction for the purchase of the S.T. Ltd. shares had been completed.

(vii) For the purposes of the enquiry as so appropriately defined, MV Inc. was not a special purchaser and the price paid by MV Inc. for the S.T. Ltd. shares was neither an enhanced special purchaser price nor a "negative" special purchaser price, but one indicative of the open market price then attainable in 1999 for the 30% of the shares in S.T. Ltd. sold to MV Inc. by S. Group.

(viii) This did not mean however, that the 30% of shares in S.T. Ltd. retained by S. Group on behalf of the Trust had the same value as the 30% sold. The true indicative fair value of those shares was somewhat less and, in this regard, a discount of 25% from the value attained for the 30% sold is justified for the present purposes of valuation and assessment of compensation.

(ix) The global discount of 17.33% applied to the overall value of the Trust assets by the Trustees and implicitly accepted by the Plaintiffs for the purposes of the exit settlement in June/July 1999 was and remains, a fair and reasonable discount for the purposes of assessing the equitable compensation to be paid to A.B. Jnr. now.

(x) With all the foregoing (and other factors reflected in the calculations) in mind, the amount of equitable compensation payable to A.B. Jnr. is assessed at USD7.56 million. Pre-judgment interest is payable on that sum.

(xi) Submissions as to the costs of these proceedings will be taken unless costs are agreed.

Hon. Anthony Smellie
Chief Justice

13th August, 2012

Further redaction on 18th December, 2012