Romain Zaleski v GM Trustees Limited
Royal Court
1st September, 2015

JUDGMENT
42/2015

Application for relief against the Trustee for alleged breaches of duty.

Approved Text
01.09.2015

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **ROMAIN ZALESKI** **Plaintiff**

-and-

GM TRUSTEES LIMITED **Defendant**

Hearing dates: **2nd to 6th and 9th to 12th February 2015**

Judgment handed down: **1st September 2015**

Before: **Richard James McMahon, Esq., Deputy Bailiff**
Jurats: **D P L Hodgetts Esq., LVO, N D McCathie Esq and J G Hooley Esq.**

Advocate for the Plaintiff: **Advocate St J A Robilliard**
Advocate for the Defendant: **Advocate N Kapp**

Cases & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
Midland Bank Trust Company (Jersey) Limited v Federated Pension Services [1995] JLR 352
Armitage v Nurse [1998] Ch 241
Spread Trustee Company Limited v Hutcheson [2012] 2 AC 194
Lewis v Great Western Railway Co. (1877) 3 QBD 195
The Trusts (Jersey) Law 1984
Fattal v Walbrook Trustees (Jersey) Limited [2010] EWHC 2767 (Ch)
Re Poche (1984) 6 DLR (4th) 40
The Trusts (Guernsey) Law, 1989
In re Vickery [1931] Ch 572
Lewin on Trusts, 19th ed. (2015)

Rawsthorne v Rowley [1909] 1 Ch 409n
Tolley's Administration of Trusts
Nestlé v National Westminster Bank plc [1994] 1 All ER 118
Bartlett v Barclays Bank [1980] 1 All ER 139
AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] 3 WLR 1367
Target Holdings Ltd v Redferns [1996] 1 AC 421
Re Pauling's Settlement Trusts [1961] 3 All ER 713

Introduction

1. Romain Zaleski, the Plaintiff, is an *homme d'affaires* who has amassed a considerable fortune over his lifetime as an engineer and then a businessman. As a result of his part in establishing a profitable port operation associated with manganese mined in Gabon in the 1980s, he became a beneficiary of a Guernsey trust known as the PMO Trust, through which some shares, notionally treated as beneficially owned by him and by others in specified numbers, were held. Those shares were sold in 2008. The Plaintiff believes that the price obtained was significantly lower than the value of the shares. In this action, the Plaintiff seeks relief against the trustee of the PMO Trust, GM Trustees Limited, the Defendant, alleging that there has been one or more breaches of duty.

2. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

> *"(5) A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
>
> *(a) the Jurats' findings and decisions,*
>
> *(b) any dissenting findings or decisions made by different Jurats,*
> *(c) the identity of the Jurats making dissenting findings or decisions,*
> *(d) the Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) the application of his findings, decisions and directions of law and procedure to the facts.*
>
> *(6) In this section "the Bailiff" means the person presiding over the proceedings."*

The Deputy Bailiff did not sum up to the Jurats in open Court but instead indicated that the Court would reserve its judgment and retired with the Jurats, as he is permitted to do under section 14(2) of the 2008 Law.

3. In this judgment, the findings of fact are the unanimous findings of the Jurats.

Procedural background

4. The matter first came before the Court on 7 October 2011, when it was contemplated that the matter might be heard in private. That approach was subsequently abandoned and the matter has since proceeded in the usual way in public. The Cause was tabled that day and Defences were then filed on 25 November 2011. A case management conference took place on 20 April 2012. The Cause was amended by consent at that time.

5. There were a number of occasions thereafter when the parties agreed to modify the timetable established at the case management conference. The planned review of the case was deferred on each occasion and eventually took place on 20 September 2013. Permission to adduce expert evidence pursuant to the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 was given in respect of the parties' experts, who duly attended and gave evidence to the Court at the hearing in February 2015.

6. By the summer of 2014, the Plaintiff wished to amend his Cause again. That application was opposed. Amendments were permitted in accordance with the judgment I gave on 18 December 2014. Consequential amendments to the Defences were also permitted. The issue of expert evidence as to Swiss law, which had also been raised at that time, was eventually resolved by the parties agreeing a short statement of the applicable principles.

7. When the hearing took place, the Court had the benefit of real time transcription. The Jurats have, therefore, been able to review a full transcript of the evidence given by all the witnesses called. Some of the witnesses gave evidence through an interpreter. They included Yvan Mauron, Claude Le Monnier and the Plaintiff himself (although he did also give some of his evidence in English), as well as the Plaintiff's expert, Olivier Marion. The Defendant's expert, Laurence Barchietto, and a director of the Defendant, Steven Ward, did not require the interpreter's services. The Plaintiff has also relied on a witness statement of François von Gunten dated 17 April 2014, which sets out some undisputed facts about an action the Plaintiff is pursuing in Switzerland.

8. During the hearing it became apparent that the Cause still contained a number of errors of detail. There was no objection to them being corrected. A final version of the Re-formed Cause was circulated approximately two weeks after the conclusion of the hearing. The Deputy Bailiff gave leave for those amendments to be made and the Defences have been amended to reflect the modified figures contained in it. The overall loss to the trust fund is now put at a little over £18 million. Those are the pleadings (together with the various requests for information and the Replique) on which the Court has decided this case.

9. In these proceedings, the Plaintiff has been represented by Advocate Robilliard and the Defendant by Advocate Kapp. The Court wishes to record its thanks to the Advocates for their careful submissions and manner in which the proceedings were conducted.

General directions

10. The Deputy Bailiff reminded the Jurats of their respective roles: the Deputy Bailiff remains the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them.

11. The Deputy Bailiff directed the Jurats that the burden of proof in respect of his action is on the Plaintiff throughout. The standard of proof is the civil standard of the balance of probabilities and the Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Insofar as the Defendant sought to establish any fact, the burden of proof rested on it to prove that fact to the same civil standard.

12. The Deputy Bailiff further directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts of this case, it is the Jurats' judgment alone that counts.

13. The Deputy Bailiff emphasised the need for the Jurats to have regard to the cases pleaded by the parties because these formed the basis of the dispute between them. The Plaintiff, being a beneficiary of the PMO Trust, has alleged that the Defendant Trustee, by acting in breach of duty, caused the assets of the trust to be sold at an undervalue for which it should now be found responsible. The parties have agreed that, if liability is established, the precise form of relief to be afforded to the Plaintiff should await further argument. Accordingly, the elements for consideration by the Court are whether a breach of duty has been established, whether

there is a causal link to the alleged loss and whether there has indeed been a sale at an undervalue resulting in loss to the trust fund.

The facts

14. This is a rare case in which many of the facts are agreed. The events that could be described by the Plaintiff and those he called as witnesses seldom coincided with the actual involvement of the Defendant. The Plaintiff was only peripherally aware of events prior to the sale of the trust assets, became more involved at around that time, and has been less involved, once again, in events since that time. Accordingly, the parties have agreed a significant number of facts and, for ease of reference and completeness, all the facts so agreed are set out fully in Annex 1 to this judgment.

15. The West African state of Gabon has a rich source of manganese. On 9 December 1986, the State of Gabon entered into a contract with Companie Minière de l'Ogooué ("COMILOG"), a Gabonese company, in respect of a new mineral port at Owendo. That contractual document is entitled "*Convention pour la construction du port mineralier d'Owendo*" and we will refer to it as "the Concession". It was signed on behalf of COMILOG by Michel Leveau in his capacity as Le Président-Administrateur Délégué. (The Plaintiff described M. Leveau as the chief executive officer of COMILOG.) One of the signatories on behalf of the State of Gabon was Le Premier Vice-Premier Ministre, Georges Rawiri.

16. Prior to the Concession, the manganese mined in Gabon by COMILOG was exported overland through Congo. Its mine was approximately 600 kilometres inland. COMILOG is the biggest mining company in Gabon. COMILOG is partly owned by the State of Gabon and, through a company called Eramet, by the French state.

17. The development of a mineral port at Owendo was intended to avoid the need for rail transportation from Gabon into Congo so as to keep all movements of the manganese from the mine to a port for onward sea transportation within Gabon. The term of the Concession was stated to be 20 years after the port became operational. The termination date therefore became 31 December 2009. At its termination, the works constructed would revert to being owned by the State of Gabon. Tolls were payable under the Concession for use of the port and of the railway.

18. The Concession envisaged the involvement of a third party, called "*l'Investisseur*", which was a company in the process of being formed at that time. M. Leveau was also acting on behalf of that entity. Another Gabonese company, Port Minéralier d'Owendo S.A., was duly incorporated as "*l'Investisseur*". We will refer to this company as "PMO".

19. By the 1980s, the Plaintiff was working in association with M. Leveau. It was M. Leveau who asked the Plaintiff to restructure Carlo Tassara SpA, an Italian company, which was a major debtor of COMILOG. That restructuring was completed by 1986 and Carlo Tassara had repaid its debt to COMILOG. It also paid a considerable premium to COMILOG in respect of its own shares in which COMILOG had taken direct and indirect interests just four years previously at the start of the restructuring. In 1987, the Plaintiff was asked by M. Leveau on behalf of COMILOG to manage a French company, which obtained manganese ore from COMILOG in record amounts.

20. Shares in PMO were given "*for a small amount*" or as a gift to those people such as the Plaintiff who had rendered services to COMILOG. The people to be granted this benefit were specified by M. Leveau. There were no strict conditions attaching to the interests of these people in the shares in PMO. Each would continue to benefit from them even if no longer involved with COMILOG's project. M. Leveau arranged for the shares in PMO to be held in a trust. His interest in other shares was acquired by the Plaintiff from a Gabonese personality, for which he paid what he described as "a lot". This transaction was brokered by M. Leveau. The Plaintiff had a very good relationship with M. Leveau throughout this time and trusted him. The Plaintiff has not had the same close relationship with Serge Raffet, although knew him to be someone who M. Leveau used a lot.

21. Goethe Trustees Limited declared The PMO Trust on 29 August 1989. The other party to the declaration was Société Fiduciaire Suisse, the Original Protector, to which we will refer as "SFS". (That company's name changed subsequently with the addition of "LGT" at the beginning, but we will continue to call it "SFS" throughout.) £10,000 was initially paid to the trustee to constitute the trust fund. The beneficiaries were stated to be the International Red Cross and "*such person or persons including charities as the Trustee with the prior written approval of the Protector may by instrument in writing appoint during the Trust Period being only a person or persons not resident in any part of the United Kingdom*". One of the signatories on behalf of the trustee was S.C. Parkes. It was common ground that this person is Sarah Parkes.

22. On 14 September 1989, Goethe Trustees Limited executed a Convention Fiduciaire with Port Minéralier Owendo S.A., a Swiss company. Under that contract, as "*mandataire*", Port Minéralier Owendo S.A., agreed to hold 1204 shares in PMO, representing 6.02% of that company's total share capital, in conformity with the instructions given by the trustee. Additions to the number of shares so held were made thereafter. On 23 April 1990, the first addition to the agreement showed the total number of shares in PMO held under this arrangement had risen to 4072, after which 1722, 370, 555 and 1825 shares were added in 1991, 1992, 1993 and 1995 respectively. On each occasion, the document was signed *inter alia* by S.C. Parkes on behalf of the trustee.

23. On 12 September 1995, Sacinter S.A. replaced Port Minéralier Owendo S.A. as the "*mandataire*". Sacinter was not associated with SFS but was created for the purpose of holding the shares in PMO and was the idea of M. Leveau so that he could have the powers associated with the shares. A new Convention Fiduciaire between Goethe Trustees Limited and Sacinter S.A. was then executed on 14 May 1997. Its terms are similar to those of the previous Convention Fiduciaire. The agreed statement of its meaning according to Swiss law is set out in full in Annex 2 to this judgment. We will refer to this agreement as "the Fiduciary Contract" and to Sacinter S.A. as "Sacinter". Additions were made to this Fiduciary Contract which had the effect of modifying the assets held in The PMO Trust.

24. On 27 June 1996, the Plaintiff left with SFS a handwritten declaration that he was the beneficiary of 3,582 shares in PMO as at that date. He referred to a three-letter code used for identification purposes. At the same time, the Plaintiff left with SFS handwritten instructions as to how to administer those shares in the event of his death, as well as two other letters about an account he held with SFS. The principal person with whom the Plaintiff dealt at SFS was Bernard Schwab. Another employee and authorised signatory was Yvan Mauron.

25. On 30 May 1997, Goethe Trustees Limited retired as trustee of The PMO Trust and was replaced by Channel Corporate Services Limited.

26. A letter dated 11 February 1999 on Ernst & Young headed paper refers to a meeting that had taken place shortly before that date between Mr Schwab and another of his colleagues of SFS and representatives of Goethe Management Limited. That letter appears to contain basic guidance to SFS about the responsibilities and rights of the parties in the ongoing administration of the trust. It is perhaps a little surprising that this was considered necessary nearly a decade after the Protector has been appointed. This meeting and the subsequent letter was part of a planned change of trustee. A facsimile also dated 11 February 1999 from The Monument Trust Company Limited sent to Goethe Management Limited for the attention of "*Sarah P / Emmanuelle*" also provided draft documentation for the parties to execute to achieve that change.

27. On 16 November 1999, Channel Corporate Services Limited retired as trustee of The PMO Trust and was replaced by the Defendant, on behalf of which S.C. Parkes was one of the directors signing the deed. The trust assets at that time comprised 11,696 shares in PMO and the balance of a bank account held by Sacinter.

28. The note of a meeting that took place on 25 November 1999 in Switzerland between representatives of SFS, including Messrs Schwab and Mauron, and representatives of the

Defendant, including Emmanuelle De La Buharaye, who it was accepted was frequently involved in administering The PMO Trust's affairs, records:

> "*SFS act as Protector to the Trust and would seem to have more control over the affairs of the Trust than the present Trustees as all the distributions to the beneficiairies are carried out through the account of Sacinter SA's account, which is operated by the authorised signatories of SFS, without the approval of the Trustees. In order to avoid a potential breach of trust situation, it is important that the Trust papers are examined and that a proper system of administration is established so that the Trustees do in effect have discretionary control of the Trust (with the consent of the Protector).*
>
> *No accounts have ever been recorded by the present or past Trustees and it is the intention of SFS that this Trust be transferred to Goethe Trustees Limited and all documentation put in order (ie, preparation of accounts, Trustee minutes prepared etc). …*
>
> *We also explained that, in future, SFS must obtain the prior approval of G M Trustees Limited before making any distributions, or payments of any kind, to beneficiaries. If time does not permit the sending of a fax, then a telephone call would suffice to enable us to make the necessary file note. Furthermore, we also asked for copies of the instructions letters from SFS to the bank, for our records.*
>
> *Another important objective for this meeting was to obtain the identification of each of the beneficiaries. We explained that, again, a potential breach of trust situation may exist as payments have been made to persons who are not named as beneficiaries (the only named beneficiary is the Red Cross). Mr Schwab confirmed that Letters of Wishes do exist but we advised him that this was not sufficient and that the beneficiaries should each be appointed in a formal document executed by the Trustees.*"

29. Historic accounts for The PMO Trust for the period 29 August 1989 to 26 August 1999 were prepared. They record the value of the 11,696 shares in PMO at cost as being FF11,561,465. The Notes proceed to explain the number of shares held in respect of each of the 12 beneficiaries and how the cash at the bank was held on behalf of four of them only. The Plaintiff's interest in 3,582 of the shares held equates to approximately 30.6% of the PMO shares held on trust. Only one beneficiary had a larger interest, being 4,344 shares equating to approximately 37.1% of the shares so held. Over that 10-year period, there had been distributions to persons treated as the beneficiaries of just under FF60 million.

30. On 1 December 1999, the Defendant formally appointed 12 persons as beneficiaries of The PMO Trust. They included the Plaintiff, M. Leveau, Georges Rawiri and Serge Raffet. S.C. Parkes was one of the Defendant's directors involved in each of these appointments.

31. The beneficiaries of The PMO Trust changed from time to time and the notional interest of each in a specified number of shares in PMO also changed as a result of arrangements made between themselves. By the summer of 2008, there were 14 beneficiaries. Until the acquisition of an interest in 700 shares by Serge Raffet in the summer of 2008, the Plaintiff had for a time been the beneficiary with the largest interest. However, Serge Raffet's notional shareholding just exceeded that of the Plaintiff by the autumn of 2008.

32. A further meeting with representatives of SFS took place on 1 February 2000. The PMO Trust was not the sole topic of discussion but it was noted that "*The Trust is not currently active but they [the representatives of SFS] explained that most distributions are effected only probably once a year (usually in April).*" The Plaintiff confirmed that there had been regular generous dividend payments received in respect of which he and the other beneficiaries were able to direct SFS how they should be distributed in proportion to each notional stake in PMO. Sacinter's account details show how a dividend in respect of the previous year's activity was received, fees were deducted, and then payments were debited.

33. A pattern developed of SFS forwarding by facsimile its written consent to whichever payment was sought by one or more of the beneficiaries, following which a meeting of the directors of the Defendant took place to resolve to make such a distribution, after which SFS was informed of the outcome by facsimile. On many of these occasions one of the Defendant's directors participating was S.C. Parkes. However, from time to time, payments were made before the paperwork had been completed, necessitating ratifications of actions previously performed. By way of example, on 30 April 2002 a distribution to one of the beneficiaries made on 10 May 2000 was approved by way of a formal minute of the Defendant. In the 2006 review, with which we deal in more detail in due course, it was noted that five previous distributions, three of which had taken place on 12 December 2003, had been made without authorisation and needed to be ratified.

34. At a subsequent meeting with Messrs Schwab and Mauron on 9 April 2002, the note records that Mr Mauron had confirmed that a transfer of interest that had taken place in 2000 "*was a simple purchase and sale of shares between the beneficiaries*".

35. On 21 September 2006, the Defendant enquired whether it would be possible to meet with the settlor of The PMO Trust. Mr Mauron's reply was that this was not possible at that meeting but would be discussed at a future meeting. The Defendant then wrote to SFS on 19 October 2006 as preparation for a scheduled annual review meeting on 7 November 2006. In that letter, requests for information were made. One matter related to the death of one of the beneficiaries who had been formally appointed on 1 December 1999 and the absence of paperwork relating to that person's two sons who were being treated as beneficiaries in their father's place. The Defendant noted that another of the first tranche of beneficiaries appointed had also died and enquired as to what would happen to his nominal interest. There was also reference to the exclusion of one of the beneficiaries because of the sale of his interest in 2004 when a new beneficiary had been appointed in his place.

36. These and other matters were addressed at the meeting on 7 November 2006. It was clarified by Mr Mauron that Sacinter is not a subsidiary company of the group of which SFS forms a part but rather it was wholly owned by M. Leveau. Indeed, it was explained that M. Leveau had decided to transfer his interest in the PMO shares held to his wife and that 250 of the shares previously held on trust had been transferred from Sacinter to be held by two of the beneficiaries directly. Accordingly, Mr Mauron promised to send an update of the nominal interests of each of the beneficiaries at that time, but confirmed that distributions had been correctly made in proportion to each's interest. It turned out that the acquisition of an interest in The PMO Trust in 2004, which had resulted in the exclusion of one of the beneficiaries, had actually been by a company and not an individual, thereby necessitating the relevant documents to be changed to reflect the proper position. The meeting note also states that the person who had been regarded as the settlor:

> "*… is not the real Settlor but rather is the person who the group of beneficiaries agreed would establish the Trust on their behalf. Nominally, however, he is the Settlor.*
>
> *All of the beneficiaries except the heirs of the deceased were all involved in the engineering project to build the Port at Owendo in Gabon. In recognition of their services they were each gifted a certain proportion of shares in PMO Gabon and have, since 1989 received dividends on the said shares.*
>
> *Yvan confirmed that the dividends will cease in 2009 when the shares will become worthless because the Gabon Government agreed at the time of the construction of the Port that the shares would produce dividends to the recipients for a period of 20 years after which they would revert to the Government. There may, however, be circumstances in which this period could be extended and he will keep us informed nearer the time.*"

There was a follow-up meeting held with representatives of SFS on 28 March 2007 because a number of issues remained outstanding.

37. On 18 June 2007, the President of the Republic of Gabon wrote to the State Minister of Finance about the renewal of the Concession. His letter was copied to COMILOG. Albeit that the reference to the process for renewal described in that letter is not found in the Concession itself, the President indicated that "*the negotiation procedure to extend the term of the agreement must take place three years before the termination date of the agreement*". The letter concluded with the President's direction that an extension to the Concession should be agreed[1].

38. By a letter dated 30 June 2008, Marcel Abeke, the Administrateur Directeur Général of COMILOG, wrote to Serge Raffet in the latter's capacity as the Sacinter representative on the board of directors of PMO. (Marcel Abeke is also a beneficiary of The PMO Trust.) The letter set out a proposal from COMILOG to Sacinter to purchase 14,210 PMO shares for the price of XAF550,000 per share. In addition to that basic purchase price, the letter explained that a supplementary payment would also be calculated after settlement of all the debts owed by the State to PMO pursuant to the Concession. Attached to the letter was an example of how this calculation would work. In the event that the calculation produced a negative amount, COMILOG would not seek any reimbursement from Sacinter of the basic purchase price per share.

39. On 11 July 2008, the ultimate beneficiary of the nominal shareholding acquired in 2004 wrote to the Defendant as trustee of The PMO Trust that the 1,400 shares involved were being transferred in accordance with the instructions of Serge Raffet for a total price of €1 million, "*including the eventual dividend*".

40. Serge Raffet, in his capacity as Sacinter's representative on the board of directors of COMILOG replied to the offer letter of 30 June 2008 on 13 July 2008, confirming that Sacinter consented to the sale of 14,210 shares which it held in PMO. It requested that the first payment of XFA550,000 per share be made in euros and that the supplementary payment, as and when it fell due, should also be made in the euro equivalent.

41. On 21 July 2008, Mr Mauron telephoned the Defendant to alert it to the proposal that 1,400 shares be transferred from being for the benefit of one beneficiary to being for the benefit of two different beneficiaries for €1 million. The Defendant's note of the conversation records that it was informed that the selling beneficiary was not aware that the purchasers were two existing beneficiaries and should remain in ignorance of their identities. SFS confirmed by facsimile dated 29 July 2008 that the two acquirers were Serge Raffet and Mme. Leveau. Subsequently, SFS forwarded copies of documents showing that the transfer was effected in two stages. On 11 July 2008, the 1,400 shares were transferred to Serge Raffet, who then transferred 700 of them to Mme. Leveau on 21 July 2008.

42. By a power of attorney dated 17 September 2008, Sacinter appointed Serge Raffet as its attorney to participate in the negotiations relating to the transfer by Sacinter of 14,210 shares in PMO to COMILOG, and empowering him to sign the contract relating to such a transfer and associated documentation.

43. A file note dated 23 September 2008 prepared by Emmanuelle De Le Buharaye, an employee of the Defendant, records that Mr Schwab telephoned to advise that the sale of all the shares in PMO was being negotiated, although the identity of the prospective purchaser was not disclosed. Mr Schwab told the Defendant that apart from maybe one person, the beneficiaries would be agreeable to the sale of the shares. So as to avoid subsequent claims against the Defendant, Mr Schwab was told that the Defendant needed the Protector's formal consent to any sale and also letters from each beneficiary confirming the sale was agreed. The note concludes "*GML to await further instructions*".

[1] "*Compte tenu du sérieux manifesté par les responsables de cet organisme, tout au long de cette convention et des performances appréciables, réalisées par ce port dans l'évacuation de notre manganese, je vous demande de faire procéder favorablement en accord avec les responsables de Comilog au renouvellement de cette convention.*"

44. That file note then has a handwritten addition indicating that Mr Schwab called again on Wednesday, 5 November to advise that the shares had all been sold. The explanation provided was that it had been necessary to act quickly "*to take advantage of good share price*". Mr Schwab was told that the Defendant needed written consent from all beneficiaries and relevant paperwork from Sacinter so as to be able to ratify what had taken place.

45. Because Serge Raffet could not contact the Plaintiff, he instead telephoned the French arm of the Carlo Tassara Group and spoke to M. Le Monnier about the sale of the PMO shares. M. Le Monnier then telephoned the Plaintiff. Both telephone calls took place on 23 September 2008. The Plaintiff recalled prior discussions with Serge Raffet relating to the opportunity to sell the shares in PMO to COMILOG, but the Plaintiff did not venture any opinion because he did not know any details. However, if the proposal would be good for the sellers, the Plaintiff would not object. The Plaintiff understood that he was not in a position to authorise any sale because that was a matter for the Defendant as trustee. The Plaintiff thought the share sale was the idea of M. Leveau rather than Serge Raffet.

46. The Plaintiff indicated to M. Le Monnier on 23 September 2008 that he should relay to Serge Raffet that, in principle, he did not oppose the sale of the PMO shares. The Plaintiff did not give M. Le Monnier any instruction to respond in writing. On 24 September 2008, M. Le Monnier returned Serge Raffet's call and told him that the Plaintiff was not against negotiations. Mention was made that the Plaintiff wanted Serge Raffet to do his best. Serge Raffet requested that M. Le Monnier put this in writing in a facsimile and that the words used were really those wanted by Serge Raffet. Although Serge Raffet has referred to a telephone call made by the Plaintiff to him during the course of 24 September 2008, saying that the Plaintiff was at Rome Airport bound for China, the Plaintiff did not recall this conversation. Accordingly, there is no finding that the Plaintiff said, as alleged "*Tu signes avec ta procuration et tu fais comme pour toi*" (ie, you sign with your power of attorney and you do as for yourself).

47. Pursuant to Serge Raffet's request, later on 24 September 2008, M. Le Monnier sent a fax to Serge Raffet on behalf of the Plaintiff, at whose request he confirmed that "*he leaves it to you to negotiate the transaction with regard to the OWENDO port on the best possible terms*". M. Le Monnier also asked to be kept informed.[2] A copy of the facsimile was not shown to the Plaintiff before it was sent, but he accepted that the substance of what was written was more or less in accordance with what he had explained to M. Le Monnier.

48. The sale contract relating to Sacinter's transfer of 14,210 shares to COMILOG was executed on 24 September 2008. It was signed on behalf of Sacinter by Serge Raffet and on behalf of COMILOG by Marcel Abeke. The purchase price was XAF 550,000 per share, to be paid in euros. In an annex, an example of how to calculate a supplementary payment was given, which was dependent on royalties and interest owed by the State to PMO pursuant to the Concession being paid.

49. On 24 October 2008, in a handwritten note to be passed to the Defendant, the Plaintiff provided details of the account to which payment of his share of the purchase price for the shares in PMO, representing 3,582 shares, should be remitted, less a provisional deduction of 6%. Earlier in October, the Plaintiff had met with Mr Schwab and so knew the sale of the shares in PMO had taken place.

50. Sarah Parkes sent an e-mail to Emmanuelle De La Buharaye on 13 November 2008 because Mr Schwab had been in contact and was due to see the Plaintiff the following day in relation to the issue over the amount of commission, if any, to be paid to the person negotiating the sale of the shares. In a letter dated 14 November 2008, signed by Sarah Parkes, the Defendant confirmed to Mr Schwab the content of a telephone conversation earlier that day, explaining

[2] "*A la demande de Monsieur ZALESKI, je vous confirme qu'il vous laisse le soin de négocier la transaction concernant le port d'OWENDO, et ce dans les meilleures conditions possibles.*
Vous voudriez bien m'en tenir informé."

that no proceeds of the sale should be distributed to any beneficiary until all outstanding issues had been addressed and satisfied. That letter also stated:

> "*The Trustees wish to be informed in writing of the rationale for the sale of the shares of PMO Gabon. The sale has taken place without the authority of the Trustees. The Trustees need to be able to justify the sale of the shares as being in the best interests of all the beneficiaries.*
>
> *The Protector should also provide written consent to the Trustees for the sale of the shares which should also outline to the Trustees the advantages such a sale of the shares would afford to the Beneficiaries.*"

The need for each beneficiary to sign a deed of indemnity before receiving any distribution in respect of the share sale price was also raised. A draft of a suitable document was enclosed.

51. SFS provided the Defendant with copies of the share purchase agreement, the share transfer document, a copy of the Plaintiff's remittance instruction dated 24 October 2008 and an updated statement of each beneficiary's account as at 27 October 2008 by letter dated 17 November 2008. SFS replied substantively to the Defendant by letter dated 26 November 2008, explaining that the proceeds of sale, minus 6% retained to pay the negotiator, had already been distributed to the beneficiaries of The PMO Trust. The negotiator had since consented to reduce the commission payable to 2%. It was stated that the concept and manner of the sale had not been opposed, not even by the Plaintiff, so SFS confirmed that it had proceeded in the interests of all the beneficiaries[3]. SFS further suggested that the fact of distribution meant that the Defendant should not pursue its request for written consent from each beneficiary but rather seek from each a deed of indemnity in respect of what had already been received. SFS sought guidance as to how the beneficiaries should be treated equally, whether through payment of the full amount, as sought by the Plaintiff, or allowing a 2% deduction in respect of the negotiator's commission.

52. By a letter dated 18 November 2008, written using first names, Serge Raffet wrote to the Plaintiff explaining about the importance of negotiating a good return for the supplementary payment, which he envisaged would take even longer and be more sensitive. Hence his wish to be paid fees by way of a commission of 10%[4]. Although the Plaintiff has no record of having met with Serge Raffet shortly before this, there was a prior meeting on or about 12 November 2008 at which issues relating to the share sale and the commission payable to Serge Raffet were discussed between them.

53. On behalf of the Plaintiff, Maître Gal wrote to SFS on 21 November 2008 requesting access to documentation relating to PMO, The PMO Trust and Sacinter. He wrote again on 4 December 2008 requesting that full payment be made to the account identified by the Plaintiff on the basis that SFS had not been authorised to retain any part of the share sale proceeds.

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[3] "*Par ailleurs, ni le principe, ni les modalités de la vente n'ont fait l'objet de contestation, pas même de la part de R./TZ, de sorte qu'il est unanimement reconnu qu'une telle operation a été faite dans l'intérêt de tous les bénéficiaires, ce que nous confirmons présentement.*"

[4] "*Le principal souci doit être maintenant de récupérer le maximum concenant le deuxième versement attendu mais qui n'aura rien d'automatique. Comme je te l'ai dit mercredi, la dette résidualle de l'Etat vis-à-vis de PMO se montera fin 2009, fin de la concession, à 14,441 milliards de XFA plus les intérêts, soit près de 20 milliards. Ou 30 millions d'euros.*
Ce chiffre correspond à la totalité des facturations à l'Etat depuis son dernier règlement par compensation via Comilog en 2004.
L'accord que j'ai obtenu de Comilog pour la première phase, après une négociation longue et serrée, comprend déjà une avance sur ce montant.
La négociation de cette deuxième phase sera encore plus longue (2009-2010) et beaucoup plus delicate – je m'attends à des marchandages difficiles avec Comilog et avec l'ETAT. Aussi je demande des honoraires plus en rapport avec la tâcha à accomplir: 10% au fur et à mesure des sommes que je réussirai à recueillir.
Merci de me confirmer ton accord à l'avance."

54. On 3 December 2008, the Defendant responded to the letter of 26 November 2008 from SFS raising a number of matters about the share sale and the proceeds that had been distributed. The question of the number of shares held by Sacinter as nominee for The PMO Trust had not been resolved. The Defendant understood that 125 shares each had been transferred into the direct ownership of two of the beneficiaries, being Serge Raffet and Marcel Abeke, thereby reducing the number of shares held within the PMO Trust from 11,696 to 11,446 and reducing their respective entitlements under the trust correspondingly. The Defendant also queried whether the amount referred to in the Plaintiff's handwritten remittance advice dated 24 October 2008 correctly equated to his notional holding of 3,582 shares.

55. The Defendant and SFS had a telephone conversation on 5 December 2008, the note of which sets out that Serge Raffet wished to discuss matters further with the Plaintiff in an attempt to resolve their differences. Mr Schwab confirmed that he had received a letter from "*the secretary of the right hand of*" the Plaintiff "*agreeing to the same but with no mention of the percentage to be kept*". It was not expected that Serge Raffet and the Plaintiff would reach agreement so the proposed indemnity documentation should be silent about the commission to be retained which could be covered in a separate document, which Mr Schwab did not think the Plaintiff would sign.

56. By letter dated 10 December 2008, SFS formally gave its consent to the sale of the PMO shares to COMILOG, further explaining that the benefit for the beneficiaries was the high price achieved[5]. SFS also clarified that the transfer of 125 shares by Sacinter to each of Serge Raffet and Marcel Abeke had taken place on 1 June 2005. It had been a personal and gratis transfer, justified by virtue of their functions as representative and director respectively of Sacinter.

57. A file note prepared by Sarah Parkes of a conversation she had with Serge Raffet on 11 December 2008 explains that she was told by him that the Plaintiff and Mr Raffet had met on 13 November 2008 and that they had discussed a commission of 2%, which the Plaintiff preferred to pay to Serge Raffet after having received a distribution of 100% of the sale proceeds. Mr Raffet was content to proceed that way, whilst retaining a 2% commission from the other beneficiaries, albeit he doubted that the money would be forthcoming later. Serge Raffet was requested to set out in writing his role in the negotiations of the sale of the shares, which he did by way of a letter dated 12 December 2008. Serge Raffet explained that he had been involved with the PMO project from the mid-1980s and had had to travel to Gabon several times each year for comparatively little reward, therefore the commission payment was seen by him as some form of belated recompense for the efforts involved. He noted that the sale had been achieved just in time because of the worldwide crisis that followed and the fact that the mine and port was scheduled to close for a short time over the Christmas and New Year period due to a sudden cessation of orders. He added that, at his meeting with the Plaintiff on 12 November 2008, the Plaintiff had warmly congratulated him on the success of the transaction but that a commission of 6% was excessive, so they agreed on 2%[6]. Serge Raffet also indicated that he had agreed to meeting with Mr Schwab and the Plaintiff as soon as mutually convenient in Lausanne. That meeting was originally scheduled for early January 2009, but then postponed.

58. The Defendant forwarded a copy of that letter to SFS the same day, setting out in its own letter to Mr Schwab that as trustee it would have to treat all the beneficiaries equally and that whatever Serge Raffet and the Plaintiff might agree between themselves would be outside the ambit of the way The PMO Trust needed to be administered by it. Other correspondence was

[5] "*L'intérêt évident de cette opération pour ces derniers réside dans le prix élevé que la COMILOG SA était disposée à verser en vue de l'acquisition de titres qui, selon le contrat de base, devaient lui revenir, ainsi qu'à l'Etat du Gabon, à titre gratuit à l'échéance contractuelle de 2010.*"

[6] "*Lors d'une rencontre avec M. Romain Zaleski à Paris le 12 novembre, il m'a vivement félicité d'avoir réussi cette transaction pour laquelle il m'avait fait donner d'avance son accord par écrit en s'en remettant à moi pour obtenir les meilleurs résultats pour les actionnaires. Nous avons ensuitre parlé des 6% que j'avais réservés par prudence lors de la distribution et it m'a dit qu'une rémunération de 2% pour frais et commission lui semblait parfaitement raisonnable. Je suis tombé d'accord avec lui sur ce chiffre.*"

exchanged between SFS and the Defendant and SFS and Maître Gal before the end of 2008 relating to the difficulties SFS faced because of a confidentiality clause in the share sale agreement and the provision of copies of documents.

59. Serge Raffet wrote to the Plaintiff on 9 and 13 January 2009 because the planned meeting between him, the Plaintiff and Mr Schwab was being deferred. On both occasions, he referred to the satisfied reaction of the Plaintiff when he had been informed of the outcome of the share sale, referring to it as "*unexpected astonishing results*" and "*a true miracle*". The Plaintiff's response dated 15 January 2009 paints a different picture. He bemoaned the fact that he had not been provided with documents by Mr Schwab from which he could form his own opinion, noting that Serge Raffet was clearly very pleased with himself. He further clarified that he regarded Serge Raffet's version of events, save that he, the Plaintiff, had not been consulted, as untruthful. The Plaintiff disputed Serge Raffet's entitlement to any commission payment.[7]

60. On 26 February 2009, on behalf of the Defendant, Carey Olsen sent out letters to SFS, Serge Raffet and Maître Gal, on behalf of the Plaintiff, summarising the position as it was then seen. The suggestion was that, if everyone agreed, the balance retained could, after the payment of a commission of 2% to Serge Raffet and other usual expenses had been deducted, be distributed to the beneficiaries of The PMO Trust.

61. By a letter dated 28 February 2009, Serge Raffet provided a further explanation about the share sale transaction to Maître Gal. He referred to the economic downturn, which was affecting receipts at the port, the bad press received by Gabon in France and the fact that over the years the beneficiaries of The PMO Trust had received dividends amounting to several times the capital invested. He added that the uncertainty that would follow the departure from office of the President of the Republic of Gabon would probably have major consequences for the State's debts. Because the future was uncertain, selling the PMO shares was the surest way of preserving the interests of the beneficiaries[8]. That explanation was enlarged upon in a subsequent e-mail from Serge Raffet to Maître Gal on 5 March 2009, in which he explained that the price obtained amounted to a win-win position for the beneficiaries because the dividends payable before the end of the Concession were being received plus an advance on any payment still due if the State repaid some or all of its debts to PMO. He also referred to the contact he had had with the Plaintiff in September 2008 and the message sent on the Plaintiff's behalf by M. Le Monnier[9]. He noted that each share in PMO had initially been purchased at €600 with dividends received amounting to close on six times that amount.

62. Serge Raffet subsequently set out in even more detail his position in an e-mail written in English to Carey Olsen and copied to Sarah Parkes of the Defendant on 17 March 2009:

> "*Over the years, I have been thinking of a way to get out the beneficiaries of PMO from the uneasy situation which will happen when the concession is over, Dec. 31,*

[7] "*J'ai bien reçu ton fax du 9 Janvier 2009. J'ai noté que tu étais satisfait de toi-même. Je te laisse l'entière responsabilité de cette opinion car j'ignore tout de la transaction que tu as conduit et que tu dis poursuivre, Monsieur Schwab ayant refusé de communiquer les pièces du dossier qui me permettraient de me faire une opinion.*
Je suis las de reçevoir de toi des écrits forgés de contreverités. Je t'ai toujours dit non à tes demandes de commission, et je te confirme par la présente. Je conteste en outre le contenu de ton fax daté du 13 janvier dernier, reçu hier, sauf à relever que je n'ai effectivement pas été consulté."

[8] "*L'avenir est imprévisible. Mais cet ensemble fait augurer une situation difficile pour les créanciers et confirme que la cession des parts du Port par les bénéficiaires était la voie la plus sûre pour préserver leurs intérêts.*"

[9] "*En septembre dernier, M. Zaleski connaissait la situation. Il s'est donné la peine de m'appeler de Rome avant de sauter dans un avion pour Pékin en me disant "Tu signes avec tes procurations, tu fais comme pour toi-même". Il me l'a fait confirmer par téléphone par M. Claude Le Monnier: "J'ai parlé avec M. Zaleski hier soir tard, il m'a dit qu'il souhaitait que vous fassiez pour le mieux" et confirmé par écrit par son bureau de Paris. "Le mieux": cela aurait pu aussi bien être 400 XCFA, ou 500. J'ai signé à 550. Je vous ai raconté dans quelles circonstances. Si on enlève 2%, il reste 538. Lors de notre rencontre à son bureau parisien en novembre, c'est M. Zaleski qui m'a proposé le chiffre de 2%. Je m'en tiens à sa parole et j'accepte.*"

> *2009, if the State doesn't pay its debt, which happens to be the case. In March, 2008, I have started negotiations with Eramet-Comilog to sell them the beneficiaries' equity in PMO and we have signed a sale contract six months later, on September 24, 2008. The negotiated price includes a substantial part of the debt (between 35 and 50% depending on other factors). That amount has been paid promptly and 94% of it has been distributed to the beneficiaries who were happy to accept it, including Mr Zaleski. In November 2008 I met with Mr. Romain Zaleski in his Paris' office and he told me that he was OK with a 2% fee to pay for fees and expenses. He had previously given me his OK to conduct the negotiation, by telephone then by fax. But he has now changed his mind and says he never agreed to the transaction neither to that fee. Ironically, his lawyer tells me that the price was too low but at the same time his representative in Paris apparently argued with Comilog tha [sic] the price was too high. Strange characters! The difference of 4% (6% unpaid sofar-2% fee and expenses) should cover your own expenses and fees including your counsels and I think it appropriate to retain 1% or approximately 120,000 euros to cover expenses to come when we will negotiate with the State and/or Comilog for the remaining part of the payment tied with the debt. Which means that 3% of the sale price could be distributed to the beneficiaries now, except maybe to Mr. Zaleski as long as he doesn't agree to that scheme. …*
>
> *I understand that now the State will not pay the debt but will replace it with an extension to the concession to 2017 or possibly 2025. This means that we will have to negotiate again with Comilog to receive a cash payment corresponding to that change. I expect this new negotiation to be tough and time consuming, ironically because of the recent intervention of Mr. Zaleski's representative arguing that the price for the first part was too high : Comilog will probably try to pay as little as possible for the second part.*"

The amount of the debt of COMILOG to which reference was being made by Serge Raffet was found at the end of the Concession to be XAF 18,695,836,803.

63. The first tranche of six agreements to the sale of the shares in PMO received from the other beneficiaries was forwarded by SFS to Carey Olsen on 30 March 2009. Eventually, signed agreements sent on behalf of 13 of the 14 beneficiaries were received. However, Maître Gal wrote to Carey Olsen on 2 April 2009 pointing out that it was clear to the Plaintiff that the negotiation had taken place without the Defendant having any knowledge of it and so being unable to assess whether the sale was in the best interests of the beneficiaries. He indicated that he considered the Plaintiff had been cheated and was putting Sacinter and SFS on notice that they were responsible for the damage occasioned. The Plaintiff was opposed to any commission being payable to Serge Raffet, who had kept the same secret from the Plaintiff. In their response dated 22 April 2009, Carey Olsen requested that Maître Gal explain the basis on which the Plaintiff claimed to have been cheated and invited his comments on Serge Raffet's assertion that there had been telephonic contact between them prior to the sale being finalised.

64. By an e-mail dated 7 May 2009, Serge Raffet confirmed the sequence of events he had previously given in relation to 24 September 2008. The position of SFS was set out in a letter signed by M. Schwab on 26 May 2009, in which it appears to be suggested that the negotiator, ie, Serge Raffet informed the Defendant verbally about the situation, presumably referring to the telephone conversation on 23 September 2008, and that the Defendant "*required the negotiator to obtain the agreement of at least*" the Plaintiff. It then refers to the facsimile sent on 24 September 2008 as authorising Serge Raffet to negotiate "*under the best possible terms*".

65. Maître Gal's next letter to Carey Olsen, dated 22 June 2009, refers to the Plaintiff estimating his losses as the amount of average provisional dividend that would attach to his notional shareholding in PMO for the following 20 years. The renewal of the Concession was regarded by him as inevitable. In other words, the Plaintiff's case was that the sale price for the shares was, on any analysis, too low. His view on the facsimile dated 24 September 2008

was that it conferred on Serge Raffet a mandate to negotiate a sale when the sequence of events demonstrated that the negotiation was complete and the contract was signed the same day. Maître Gal repeated that the Plaintiff regarded Sacinter and SFS as responsible for his losses and that action would be taken against them. In the light of possible action being taken in Switzerland, given the different prescription periods operating there, Carey Olsen suggested to the Defendant that it take its own advice on what it could do pursuant to Swiss law. That advice is contained in a document dated 1 September 2009. It points out that any claim against Sacinter for breach of contract carries a 10-year prescription period. However, a claim against SFS would be dealt with in tort in accordance with Guernsey law principles and so the prescription period would be six years.

66. On 14 June 2010, Maître Gal informed Carey Olsen that the Plaintiff had filed a claim at the Court in Lausanne. That claim is against SFS and Mr Schwab personally in the amount of CHF14,101,480 (converted to €8,835,236.90). The agreed evidence of Mr von Gunten explains that the action was actually commenced on 23 July 2010. In it, the Plaintiff alleges that Serge Raffet contacted him after the sale, but said he could not go into detail about the sale terms as they were covered by a confidentiality clause. Eventually Serge Raffet revealed some of the conditions of the sale agreement, including the price, which appeared to be based on the anticipated contractual payments during the remainder of the Concession plus a payment in respect of the debt due from the State of Gabon. The claim alleges that the sale price agreed did not equate to the capitalisation of the contractual payment due under the renewed Concession, which SFS and Mr Schwab knew about. It further alleges they deliberately acted prejudicially to the Plaintiff's interests. The Answer lodged on behalf of SFS and Mr Schwab on 17 December 2010 denies the claiming. It states that the price negotiated was based on a fair value of the shares in the circumstances known at the time. The Plaintiff lodged a Réplique on 1 December 2011 and the other parties lodged a Duplique dated 1 May 2012. On 23 August 2013, the judge ruled that the Plaintiff could proceed with his action. Evidence was heard from a number of witnesses on 9 January 2014. At the Plaintiff's request, a Commission Rogatoire was authorised for the hearing of evidence from other witnesses. The proceedings were, therefore, ongoing at the time of the hearing.

67. A meeting of the Defendant as trustee of The PMO Trust took place on 22 June 2010, at which consideration was given to the figures produced for it about the valuation of the shares in PMO as at 2008. Various scenarios had been modelled, depending on the Concession being extended and the income sources being either COMILOG alone, or also the State of Gabon, in each case with or without payment of local tax at 35% and with or without repayment by the State of Gabon of the debt that had accrued since 2004 (its earlier indebtedness from 1999 having been resolved through being paid by COMILOG as part of a tax settlement with the States of Gabon). The range of values for each share in PMO, using the discounted cash flow method, was €850 to €3,882, although the Defendant considered the prospect of repayment of the State of Gabon debt as remote to non-existent, with the consequence that the most likely scenario modelled was the one producing the lowest figure of €850. The Defendant also resolved that Serge Raffet should be paid commission at the rate of 2% in respect of the overall purchase up to €1,000 per share, and at 6% in respect of anything exceeding that amount. By a power of attorney dated 2 September 2010, Serge Raffet was authorised by Sacinter to negotiate the additional payment due under the contract for the sale of the shares in PMO.

68. On 26 August 2010, Serge Raffet informed Carey Olsen that a new Concession agreement had been signed, although he had not seen a copy of the agreement. He subsequently explained that the terms involved the debt of the State of Gabon being written off in return for a 22-year extension of the term of the operation of the port, under which no royalties were payable by the State of Gabon and the tax holiday enjoyed under the Concession ended, resulting in tax payable at 30-35%. However, the terms have not been capable of being verified. In relation to the renewal of the Concession, the Plaintiff stated his view that this would normally have followed because the relationship between COMILOG, PMO and the State of Gabon was very good.

69. A further meeting of the Defendant as trustee of The PMO Trust was held on 13 October 2010. It resolved not to pursue any claims against Sacinter and/or SFS in connection with the unauthorised sale of the shares in PMO. In reaching that conclusion, the Defendant took into account that there was little prospect of getting the original share sale agreement set aside in Gabon, there was little or no prospect of PMO recovering any part of the debt owed to it by the State of Gabon, there had been uncertainty surrounding the extension of the Concession, it was difficult to quantify and prove that the trust fund had suffered loss, there were litigation risks of taking action in Switzerland, in any event Sacinter (against which there was a stronger claim than against SFS) appeared to have no assets against which to enforce any judgment, 13 of the 14 beneficiaries had agreed with the sale and what they had received from the proceeds, and there was the possibility that an additional payment would be received in respect of the sale of the shares. The Defendant, though, chose not to ratify the unauthorised sale and indicated its preparedness to assign any claim it has against Sacinter and/or SFS to a beneficiary, if it was advised that was possible. In relation to the commission payable to Serge Raffet, the Defendant modified its previous position so that, in addition to the 2% payable on the original amount of €838 per share, 2% would be payable on any additional payment up to €120 per share, 4% between €121 and €250; and 6% in respect of any amount above €251. At the time of the meeting, the Defendant did not know that PMO had formally relinquished its debt claim against the State of Gabon, which had crystallised at the end of 2009 in the amount of XAF 18,695,836,805, by virtue of an agreement executed on 11 October 2010.

70. In an e-mail dated 7 April 2011, following a meeting the previous month, Maître Gal enquired of Carey Olsen whether the Defendant would transfer to the Plaintiff the right to make a claim against SFS and, if so, on what terms. The Defendant indicated its willingness in principle to do so through Carey Olsen's letter dated 13 May 2011. The Plaintiff would have to pursue Sacinter and/or SFS at his own cost and only in relation to the extent of his personal beneficial interest in the shares, unless the other beneficiaries agreed differently. The additional terms proposed were that the Plaintiff and all the other beneficiaries would have to agree that the Defendant should take no further action in connection with the sale of the share in PMO, that The PMO Trust would be terminated by distributions of the remaining assets being made in return for appropriate indemnities.

71. The dispute between Sacinter and COMILOG about the supplemental payment for the shares sold in 2008 was referred to arbitration. The ICC International Court of Arbitration gave its Final Award on 20 June 2013. Sacinter sought payment of a little over XAF 21.8 billion (converting to an amount close to CHF 50 million). COMILOG asserted that nothing more was due under the agreement of 24 September 2008. At paragraph 46 of the Final Award, the conclusion was reached on the evidence before it that:

> "*... when M. Abéké proposed by letter dated 30 June 2008 (Document W. no. 26) the purchase in the name of COMILOG of the 14,210 shares held by investors in PMO, the two parties were acutely aware of the serious doubt that existed as to the very principle of payment of the Government's debt to PMO. This doubt could only but persist on signature of the share transfer agreement on 24 September 2008.*"

In reaching that conclusion, the submission on behalf of Sacinter that "*COMILOG intended by the share transfer agreement to guarantee to SACINTER quick and effective recovery by PMO of the debt due from the Government of Gabon and its onward payment to the investors*" (see para. 43) was rejected. The Tribunal proceeded to find that when PMO agreed to the extinguishment of the debt due to it in 2010, COMILOG as its owner failed to uphold the undertaking made as part of the share sale agreement to use its best endeavours to secure payment from the State of Gabon. In doing so, COMILOG managed to avoid payment of the additional price agreed as payable to Sacinter. Having noted that the parties' experts offered widely diverging calculations of what should be paid by COMILOG, the Tribunal approached the quantification on the basis of loss of opportunity and concluded, taking into account the various elements to which it referred and "*considering the slender chances of effective recovery of the debt*", that its award should be CHF 4.5 million. After the deduction of costs

and expenses, the Defendant received CHF 3,076,805.45 from Sacinter on 13 January 2014 (which converts to approximately €2,067,380).

The exculpation clause

72. Clause 10 of the trust instrument provides that:

> "*In the professed execution of the trusts and powers hereof no Trustee shall be liable for any loss to the Trust Fund however caused or for the negligence or fraud of any agent employed unless resulting from wilful fraud or dishonesty on the part of the Trustee.*"

In a similar way to the approach taken in *Midland Bank Trust Company (Jersey) Limited v Federated Pension Services* [1995] JLR 352, the task for this Court is to construe this clause as a term of a Guernsey trust deed in the light of Guernsey law. It was accepted by the Advocates that the clause could not be applied to the present case without modification because otherwise it would exclude liability which the legislature has decreed cannot in law be excluded. Because it is couched in the broadest possible terms, its ambit is reduced by reference to legislation, rather than any principle of construction, eg, drawn from English or Jersey cases, that, as an exempting clause, it should in any event be given a restrictive meaning. The fact that the Defendant is a professional trustee has no bearing on this exculpation clause. That fact is relevant instead to the standard against which to judge its performance of its duties. The Deputy Bailiff reminded the Jurats that their task is to find the relevant facts in respect of each alleged breach and that the impact of the exculpation clause is then a matter of law pursuant to his directions.

73. Section 39(7)(a) of the Trusts (Guernsey) Law, 2007 provides:

> "*The terms of a trust may not –*
>
> *(a) relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence*".

Section 39(8)(b) further provides that "*a term of a trust is invalid to the extent that it purports to relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence*". Clause 10 of the trust instrument must be modified to reflect these requirements.

74. It was common ground that the reference to "*gross negligence*" in section 39 means that any allegation of negligent breach of duty must be pleaded as an allegation of gross negligence, otherwise the exculpation clause would operate to relieve the Defendant of any liability for what might be termed "*simple negligence*". The Deputy Bailiff identified that the Cause expressly pleads particulars of gross negligence in paragraph 42. Accordingly, the Deputy Bailiff directed the Jurats that, when considering these allegations of gross negligence, if they considered that the facts found fell short of the test for gross negligence as set out below, clause 10 of the trust instrument operates to exonerate the Defendant from liability for any negligent breach of trust.

Wilful misconduct

75. The Advocates disagreed, however, about the way section 39(7)(a) operates in respect of "*wilful misconduct*" and its impact on the Plaintiff's wilful breach of trust claims at paragraphs 43 and 44 of the Cause. (For the benefit of the Jurats, the Deputy Bailiff distinguished here paragraph 45 of Cause, which pleads the same particulars as in paragraph 43 as the basis for an allegation of gross negligence as an alternative means of establishing the Defendant's liability. The same approach to assessing those allegations in light of the test for gross negligence applies.)

76. Advocate Robilliard submitted that it was necessary to look carefully at the actual wording used in section 39(7)(a). Guernsey primary legislation must, of course, always be the Court's starting point. By referring to fraud and gross negligence distinctly from wilful misconduct, he relied on the principle that the legislature does not use surplusage (ie, unnecessary wording), the term "*wilful misconduct*" must necessarily mean something other than fraud or gross negligence. The reference to "*wilful*" meant that the misconduct, namely the breach of trust, had to be intentional, or reckless, rather than simply negligent. His submission followed a close analysis of the judgment of Millett LJ in *Armitage v Nurse* [1998] Ch 241.

77. Advocate Kapp, on the other hand, suggested that there are three broad categories of breach of trust. The first is where a trustee acts or omits to act and in doing so exceeds the limit of its trust or power. In such a case, the trustee is strictly liable to restore the assets to the trust or compensate the fund for the loss sustained. It is irrelevant whether the trustee intended to do the act or not, whether the trustee was acting in good faith or whether it was done or omitted to be done negligently. The second category is where the allegation is a breach of the duty of care and skill, ie, the obligation in section 22(1) of the 2007 Law to act *en bon père de famille*. In her submission, such a breach is a species of negligence and so has nothing to do with whether the act or omission was intentional or not, although she suggested that such breaches are frequently intentional acts. The third category involves breaches of the obligation of good faith, where a trustee consciously acts otherwise than in the interests of the beneficiaries. In this category, it is the mental state of the trustee that matters: the trustee knows, or is reckless as to whether, a breach of trust is being committed.

78. She proceeded to suggest that Advocate Robilliard had confused the concept of an account on the footing of wilful default with the concept of wilful misconduct. In her submission, the former is an example of her second category of breach of trust, whereas wilful misconduct requires a deliberate breach of trust in circumstances where there is dishonesty or bad faith. She also relied on *Armitage v Nurse*, where wilful default was used in conjunction with references to "*reasonable diligence*", hence her suggestion that such a wilful default fell into her second category of negligent breach. Consequently, the wilful misconduct referred to in section 39(7)(a) of the 2007 Law certainly did not cover wilful default for negligent omission. The Deputy Bailiff accepts the accuracy of the latter submission, but considers that Advocate Kapp's three category explanation cannot be regarded as exhaustive in the context of the present case.

79. The Deputy Bailiff's review of the differing legal submissions made on this issue, and the directions given to the Jurats arising from that review are as follows.

80. Although the minority of the Board in *Spread Trustee Company Limited v Hutcheson* [2012] 2 AC 194, particularly Lady Hale, questioned the support being given to the judgment of Millett LJ in *Armitage v Nurse*, it is important to remember that the Privy Council's decision is binding on the Royal Court and any non-binding comments made in the judgments of the members of the Board are of the most highly persuasive type. At paragraph 46 of the judgment given by Lord Clarke of Stone-cum-Ebony, the following passage from *Armitage v Nurse* (at page 253H) was quoted:

> "*The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient. As [Counsel for the trustees] pertinently pointed out in his able argument, a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.*
>
> *It is, of course, far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. What is true of a contract must be equally true of a settlement. It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one*

> *hand and fraud, bad faith and wilful misconduct on the other. The doctrine of the common law is that: "Gross negligence may be evidence of mala fides, but it is not the same thing:" see Goodman v. Harvey (1836) 4 A. & E. 870, 876, per Lord Denman C.J. But while we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree.*"

Further, at para. 51, Lord Clarke added: "*To describe negligence as gross does not change its nature so as to make it fraudulent or wilful misconduct.*" His Lordship highlighted (at para. 60) that the type of subjective misconduct to which Millett LJ was referring would amount to wilful misconduct.

81. The references to "*wilful default*" on which Advocate Kapp relied were also taken from *Armitage v Nurse*. The context is important. In the *Spread Trustee* case, Lady Hale placed considerable weight on the position set out in the Law Commission's consultation paper *Fiduciary Duties and Regulatory Rules, A Summary* (1992) (Law Com. No. 124), believing it to represent a thorough analysis of the English law position at the time. Paragraph 3.3.41 of that paper states:

> "*Beyond this, trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default. It is not, however, clear whether the prohibition on exclusion of liability for 'fraud' in this context only prohibits the exclusion of common law fraud or extends to the much broader doctrine of equitable fraud. It is also not altogether clear whether the prohibition on the exclusion of liability for 'wilful default' also prohibits exclusion of liability for gross negligence although we incline to the view that it does.*"

Having quoted that passage, Millett LJ continued (at page 252C):

> "*This passage calls for two comments. First, the expression "wilful default" is used in the cases in two senses. A trustee is said to be accountable on the footing of wilful default when he is accountable not only for money which he has in fact received but also for money which he could with reasonable diligence have received. It is sufficient that the trustee has been guilty of a want of ordinary prudence: see e.g. In re Chapman; Cocks v. Chapman [1986] 2 Ch. 763. In the context of a trustee exclusion clause, however, such as section 30 of the Trustee Act 1925, it means a deliberate breach of trust: In re Vickery; Vickery v Stephens [1931] 1 Ch. 572. The decision has been criticised, but it is in line with earlier authority: see Lewis v. Great Western Railway Co. (1877) 3 Q.B.D. 195; In re Trusts of Leeds City Brewery Ltd.'s Debenture Stock Trust Deed; Leeds City Brewery Ltd. v. Platts (Note) [1925] Ch. 532 and In re City Equitable Fire Insurance Co. Ltd. [1925] Ch. 407. Nothing less than conscious and wilful misconduct is sufficient. The trustee must be*
>
> > *"conscious that, in doing the act which is complained of or in omitting to do the act which it said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not:" see In re Vickery [1931] 1 Ch. 572, 583, per Maugham J.*
>
> *A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default.*"

82. The explanation in the judgment of Bramwell LJ in *Lewis v Great Western Railway Co.* (1877) 3 QBD 195 (at page 206) that "*'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful*", which was quoted at paragraph 55 of the judgment of Lord Clarke in the

Spread Trustee case, indicates that wilfulness must be associated with the breach and not just the act or omission. Further clarification of that position was given in the same case by Brett LJ (at page 210):

> "*In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong …*".

83. A slightly different conclusion appears to have been reached by the Jersey Court of Appeal in *Midland Bank Trust Company (Jersey) Limited v Federated Pension Services* (*supra*), which is a case concerning Article 26(9) of the Trusts (Jersey) Law 1984, as amended in 1989. That paragraph provides: "*Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence.*" It is effectively the same provision as section 39(7) of Guernsey's 2007 Law. The wording of the exoneration clause in that case (Rule 29) was that "*the trustee shall not be liable for anything whatever other than a breach of trust knowingly and wilfully committed*". The Jersey Court of Appeal considered (at page 381) that it had a choice between two constructions:

> "*either (a) the trustee FPS is liable if it knowingly and wilfully commits an act which amounts to a breach of trust; or (b) FPS is liable only if it knowingly and wilfully commits an act which at the time of its commission is known to FPS to be a breach of trust*".

It opted for construction (a) over construction (b) (see page 384). Accordingly, after analysing the position, it decided (page 391):

> "*the decision was entirely deliberate and taken with full knowledge not only of the decision itself but also of its potential consequences in terms of loss to the scheme, though not of the legal implications. The act was one "knowingly and wilfully committed" by FPS and amounted to a breach of trust. Accordingly, on the basis of construction (a), Rule 29 affords FPS no defence to the present claim.*"

Further, it explained (also at page 391) that "*wilful misconduct does not require appreciation by the person guilty of the misconduct that what this person is doing is contrary to his duty as trustee, alternatively recklessness consisting of this person's shutting his eyes to the probability that his misconduct is in breach of his duty.*"

84. The judgment of Sir Robin Auld in the *Spread Trustee* case was also referred to by Advocate Kapp. At paragraph 117, His Lordship stated:

> "*On the plain meaning of the words, and as a matter of logic and common sense, the terms "negligence" and "gross negligence" differ only in the degree or seriousness of the want of care they describe. It is a difference of degree, not of kind, as stated by Millett LJ in Armitage v Nurse [1998] Ch 241. Gross negligence, like negligence not so qualified, may be committed in good faith and, therefore, without dishonesty or wilfulness. Indeed, dishonesty – an inherent ingredient of fraudulent or wilful misconduct – is the antithesis of negligence, an inadvertent falling short of a duty to take reasonable care in all the circumstances. To describe such inadvertence, as "gross" does not turn it into fraudulent or wilful misconduct.*"

Insofar as His Lordship appears to have suggested that wilful misconduct necessarily involves proof of dishonesty, his comments in paragraph 119 suggest something different. When referring to the words in the 1989 Law ("*fraud or wilful misconduct*") as embodying a "*clear distinction between "negligence" on the one hand and misconduct or a dishonest and/or wilful nature on the other*", the implication is that His Lordship recognised that there is a

distinction between wilfulness and dishonesty. That is a distinction that the Deputy Bailiff regards as relevant to the way section 39(7) of the 2007 Law falls to be construed.

85. The nature of the dishonesty to which reference was being made is clarified by reference to *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch). In the context of an exoneration provision couched in terms that "*no trustee shall be liable for any loss to the Trust Fund arising … except wilful and individual fraud or dishonesty on the part of the trustee who is sought to be made liable*", it was said that (at para. 81):

> "*… what is required to show dishonesty in the case of a professional trustee is:*
>
> *i) A deliberate breach of trust;*
>
> *ii) Committed by a professional trustee:*
>
> *(a) Who knows that the deliberate breach is contrary to the interests of the beneficiaries; or*
>
> *(b) Who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or*
>
> *(c) Whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries.*"

86. What these different formulations tend to emphasise is that much depends on the actual wording of an exculpation clause. The precise application of the principles to which reference has been made varies from case to case depending on the situation being addressed. For example, the clause in *Armitage v Nurse* ended with the words "*unless such loss or damage shall be caused by his own actual fraud*", which led Millett LJ to the conclusion that the meaning of the clause was plain and unambiguous, "*actual fraud*" meaning what it says and requiring proof of "*a dishonest intention on the part of the trustee whose conduct is impugned*". The Deputy Bailiff reminded the Jurats that the allegations brought by the Plaintiff against the Defendant did not extend this far. The Cause does not allege fraud, whether actual or of any other type.

87. As demonstrated in the *Spread Trustee* case, dishonesty is distinct from wilfulness, and both are distinct from gross negligence (see, eg, para. 51). Support for that conclusion can also be found in other cases, including *Re Poche* (1984) 6 DLR (4th) 40, referred to in the Jersey case (*Midland Bank*). The unlawfulness of excluding liability for fraud or wilful misconduct existed in the customary law prior to the enactment of the Trusts (Guernsey) Law, 1989, the purpose of section 34(7) of that Law being "*to provide a balance between the interests of beneficiaries of a trust on the one hand and the interests of trustees on the other*" (see para. 27 of Lord Clarke's judgment). Accordingly, there is nothing novel about Advocate Robilliard's submissions as to the effect of the statute on clause 10 of the trust instrument. Part of the Plaintiff's case is advanced on the basis that the Defendant is liable for wilful misconduct where clause 10 of the trust instrument, as modified, simply does not assist it.

88. The exculpation clause itself does not refer to wilful misconduct or gross negligence. It refers only to "*wilful fraud or dishonesty*". The limitations placed on the permissible exclusion of liability derive from section 39(7)(a) and (8)(b) of the 2007 Law. The words used in those paragraphs are not qualified in any way. If a trustee can be shown to have acted fraudulently, that trustee will be liable. If it is shown that the trustee has acted grossly negligently, the trustee will be liable for that act or omission because it cannot exclude its liability in respect of it. Similarly, if it is proved that a trustee has carried out wilful misconduct, liability will follow because the trustee cannot be relieved of such liability.

89. In the light of all the authorities to which reference was made, the Deputy Bailiff directed the Jurats that the test for wilful misconduct to apply in the present case is that explained by Millett LJ in *Armitage v Nurse*, which is drawn from *In re Vickery* [1931] Ch 572, which is a case involving an exclusion clause. To that extent, the Deputy Bailiff considers that the mental element is associated with the actual breach alleged and not simply the doing of the act or the omission to act being a conscious decision. The Plaintiff must prove that the Defendant was conscious that, in reaching the decision not to take action against Sacinter and /or the Protector, the Defendant is committing a breach of his duty or is recklessly careless whether that decision was a breach of his duty or not. There is no requirement, though, for the Plaintiff to prove that the Defendant was being dishonest. Further, this test must also be distinguished from negligence, whether gross or unqualified.

90. What the Jurats were really being invited to find by the Plaintiff was that the Defendant had consciously taken the risk that loss will result to the trust fund as a result of that decision or that, having thought about the possibility of loss resulting, the Defendant was recklessly indifferent as to whether loss would arise or not from its decision. If the Jurats reached such a conclusion, it would amount to wilful misconduct on the part of the Defendant and the effect of section 39 of the 2007 Law is that it cannot exclude its liability for such wilful misconduct.

91. The first consideration, therefore, is whether or not there has been a breach of duty as alleged in the Cause. The second consideration relates to the Defendant's mental state in relation to that breach of duty. A separate question arises as to the causal link between the breach and the alleged loss. If a trustee satisfies section 22 of the 2007 Law and observes the utmost good faith and acts *en bon père de famille*, its compliance with its general fiduciary duty must be borne in mind. Accordingly, if the taking of the risk alleged was done in good faith and with the best intentions, the Defendant believing that the risk was one that ought to be taken in the best interests of the beneficiaries, this can be taken into account in assessing whether there has been misconduct before considering the Defendant's mental state at the time.

The Plaintiff's allegations

92. The Plaintiff's primary case is that the Defendant has failed to comply with its general fiduciary duties and a number of other specified duties. The particulars advanced in paragraph 42 of the Cause are alleged to constitute gross negligence. His secondary case alleges wilful breach of trust as being wilful misconduct and relates to the non-pursuit of action against Sacinter and/or the Protector.

Gross negligent breach of duty

93. The first set of duties to which the Defendant is subject (contained in paragraph 15 of the Cause) are:

(a) to observe the utmost good faith and act *en bon père de famille*;

(b) to ensure that the trust property was held or vested in it or otherwise under its control; and

(c) to preserve and enhance, so far as is reasonable, the value of the trust property.

94. The Defendant admits that these duties apply to it, subject only to referring to clause 6(k) of the trust instrument, which provides:

> "*The Trustee may permit any moneys bonds share certificates or other securities for money or documents of title to property real or personal for the time being subject to the trusts hereof to be and remain deposited with any bank trust company or like institution in any part of the world and may permit any investment securities or other real or personal property which or any share or interest wherein shall be for the time being subject to the trusts hereof to be and remain invested in the name of nominees*

or trustees in any part of the world instead of in the name of the Trustee upon such terms as to management and custody thereof as the Trustee shall think fit."

In any event, these duties are set out in sections 22(1) and 23 of the 2007 Law. The Deputy Bailiff directed the Jurats that, when considering the Plaintiff's allegations of breach or duty, they were to take into account that the Defendant is subject to each and every one of these duties.

95. Each of the duties in the second set (contained in paragraph 16 of the Cause) is denied by the Defendant. The Plaintiff alleges those duties to be:

(a) to keep the shares under its control;

(b) to obtain sufficient information so that it could properly exercise its functions in respect of the Beneficiaries and the shares; and

(c) without prejudice to the generality in (b), to carry out the duties set out in paragraph 11(3) of the Cause.

That sub-paragraph identifies a number of things the Plaintiff alleges the Defendant should have done had it made sufficient inquiry into its rights under the Fiduciary Contract. In particular, it is said that the Defendant was under a duty:

(i) to seek sufficient information as to the meaning of "*les droits patrimoniaux*" and "*les droits sociaux*" in Article 3;

(ii) to seek sufficient information so as to be able exercise its rights under (a) Article 3 and (b) Article 4 of the Fiduciary Contract; and

(iii) to take possession of the certificate referred to in Article 5 of the Fiduciary Contract.

In relation to each requirement to obtain sufficient information, this is alleged to be necessary because it would then have enabled the Defendant to give proper instructions to Sacinter regarding the voting rights attached to the shares, the appointment of any director to the board of directors of PMO or the business of PMO. The Defendant has denied that it was subject to these specific duties, but admits that it did not give any such instructions to Sacinter.

96. The Deputy Bailiff directed the Jurats that, in his view, this second set of duties should properly be regarded as elements suggested by the Plaintiff as falling within the general duties set out in paragraph 15 of the Cause, which in turn apply in Guernsey as a matter of law. Although the Defendant had denied the duty to keep the PMO shares under its control, it was clear from section 23(1) of the 2007 Law that the Defendant had the duty, subject to the terms of the trust instrument, to "*ensure that the trust property is held by or vested in [it] or is otherwise under [its] control*". Accordingly, as a matter of law, the Defendant is subject to this particular duty. The control envisaged in this subsection clearly relates to a situation where the trust property is not held or vested in the trustee but is in the hands of another person. The trust property to consider could only be the PMO shares. By virtue of clause 6(k) of the trust instrument, it was permissible for those shares "*to be and remain deposited with any bank trust company or like institution in any part of the world*". The Defendant has not suggested that Sacinter is not within the description of permitted custodians of the PMO shares. The key question for the Jurats, therefore, is whether the terms of the Fiduciary Contract (on which the agreed evidence on Swiss law is relevant) and/or the performance of the Defendant under that Fiduciary Contract mean that the Defendant had lost control of the shares. If so, the Jurats could find that there had been a breach of the duty pleaded.

97. In relation to the Plaintiff's pleaded case that there were specific duties on the Defendant to obtain sufficient information about the PMO shares and the terms under which Sacinter held them on its behalf, the Deputy Bailiff directed the Jurats that this was a matter for their

assessment rather than his. The Defendant was admittedly under a general fiduciary duty imposed by section 22(1) of the 2007 Law to act *en bon père de famille*. What was being alleged by the Plaintiff against the Defendant fell under that general duty rather than being distinct duties. The Plaintiff was, therefore, advancing these specific matters as examples of what he suggested the Defendant was required to do to comply with that general fiduciary duty.

98. The Privy Council in the *Spread Trustee* case approved the following description of the nature of the duty so imposed (at paragraph 20 of Lord Clarke's judgment):

> "*In the context of the duty of a trustee, the Guernsey Court of Appeal held at para 31 that the duty to act en bon père de famille was a duty to act as a prudent man of business. It so held on the basis that no doubt the obligation so to act implies a standard of care similar to that required of trustees in England, citing Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] 1 Ch 515. In short the duty is to act as a reasonable and prudent trustee would act, that is with reasonable care and skill. As Brightman J explained in Bartlett at p 534, in the case of a professional trustee that means with the particular care and skill expected of such a person.*"

Accordingly, it was a matter for the Jurats to assess against that statement of the particular care and skill expected of the Defendant in this case, whether a reasonable and prudent trustee was obliged to obtain the information about the PMO shares and the Fiduciary Contract and consider as a result of that information taking the steps suggested by the Plaintiff in order to satisfy its duty to act with reasonable care and skill.

99. The third set of additional duties to which the Plaintiff says the Defendant is subject (contained in paragraph 39 of the Cause), all of which are admitted by the Defendant, are:

(a) to act with due care, honesty and good faith and *en bon père de famille* in respect of its duties;

(b) to act as a reasonable prudent man of business in the investment and management of the Trust Fund;

(c) to act with the skill, care and diligence of paid professional trustees; and

(d) to consider, take and act upon appropriate professional advice.

The Deputy Bailiff noted that there was an element of repetition in relation to the first three duties and that the Defendant accepted that it was subject to the test derived from paragraph 20 of the *Spread Trustee* case. He directed the Jurats that the acknowledgement of the Defendant that it was obliged to consider, take and act upon appropriate advice should be viewed in the light of section 32(1) of the 2007 Law which empowers a trustee at the expense of the trust property to "*consult professional persons in relation to the affairs of the trust*". Further, clause 6(f) of the trust instrument provides:

> "*Power to take the opinion of legal counsel concerning any matter arising under this Declaration or on any matter in any way relating to the Trust Fund or the duties of the Trustee in connection with the Trust and in such matters to act in accordance with the opinion of such Counsel*".

In these circumstances, the Jurats were directed that what they needed to consider was whether a reasonable and prudent professional trustee would have decided to take the advice that the Plaintiff alleged the Defendant should have taken, so as to place itself in a position of being able to act in accordance with whatever that advice would have been. Consequently, the Jurats could consider the reasonableness of the Defendant to act as it did in the circumstances of its trusteeship and any relevance of weighing in the balance the costs associated with taking such advice in the context of this particular trust.

100. The Plaintiff further alleges at paragraph 40 of his Cause that it was a duty of the Defendant to take appropriate professional advice from time to time as to the value and marketability of the PMO shares. Advocate Robilliard submitted that this should have been done as part of the take-on process in November 1999 and regularly thereafter, suggesting that once every three years might be reasonable. Accordingly, it is the Plaintiff's case that carrying out no valuation of the PMO shares during the nine years or so that they formed the trust asset amounted to a complete abdication of responsibility. The Defendant has denied that there is any such duty. The competing submissions on this aspect are considered in more detail below.

101. Finally, in relation to the duties the Plaintiff says the Defendant owes, paragraph 41 of the Cause summarises the position as the Defendant being under the particular duties:

    (a) to reasonably inform itself from time to time of the value of the PMO shares, being the sole asset of the Trust Fund; and

    (b) in particular because of the matters referred to in paragraph 10 to regularly review the mandate arrangements under which the PMO shares were held and to make clear to Sacinter that it was at all times bound to carry out the Defendant's instructions.

    The Defendant has denied that the first of those particular duties attached to it, but admits the second, albeit where it has further admitted that it gave no instructions to Sacinter. Paragraph 10 of the Cause deals with the take-on meeting in Switzerland on or about 25 November 1999, about which there is no dispute because the Defendant has admitted that paragraph.

102. As is made clear in *Lewin on Trusts*, 19th ed. (2015), certain duties arise when a trustee accepts office. These are summarised in paragraph 12-034 as follows:

    > "*In general terms, the duties of a new trustee on acceptance of a trust are to ascertain what the trusts are, to inquire of what the trust property consists and take possession of it, and to look into the trust papers to see what notices of incumbrances affect the trust.*"

    The authority given for that proposition is *Hallows v Lloyd* (1888) 39 Ch D 686. More particularly in relation to the trust property, paragraph 12-036 adds that:

    > "*A new trustee should forthwith acquaint himself with the nature and particular circumstances of the trust property and should take such steps as may be necessary for its due protection*"

    Whilst accepting Advocate Kapp's submission that there was no express duty on an incoming trustee, or a continuing one, to conduct a valuation, Advocate Robilliard drew support for his contention that it was a breach of duty for the Defendant not to have carried out a market valuation of the PMO shares from two sections of the 2007 Law. Section 25 provides that "*A trustee shall keep accurate accounts and records of his trusteeship.*" Section 26 provides that a trustee must, in response to a written request from any of the persons listed, who include a beneficiary, at all reasonable times "*provide full and accurate information as to the state and amount of the trust property*". Advocate Robilliard suggested that the combination of these statutory duties meant that the Defendant should always have had at its fingertips a reasonably up-to-date valuation of the PMO shares.

103. In response, Advocate Kapp drew attention to the commentary in Underhill and Hayton, *Law of Trusts and Trustees*, where paragraph 42.25 states that there is "*no obligation upon a new trustee to make a new investigation of title to, or value of, existing securities of a nature authorised by the trust*". *Rawsthorne v Rowley* [1909] 1 Ch 409n is given as the authority for that statement. That was a case about a mortgage security. The Court of Appeal rejected the approach taken by the Vice-Chancellor where he ruled that the strict duty of the trustees was to investigate the position of that particular security to ascertain whether it should be kept on

and that "*In order to satisfy themselves about that they would, either with or without professional assistance, have investigated the title and seen whether they had title. Then they would have had to have the value investigated to see whether they had the proper margin*". The Court of Appeal, however, decided that there was no such obligation or duty on the part of the trustees. As Farwell LJ noted (at page 412), one of the consequences of finding such a duty existed was that "*in order to pay for the inquiries it would be necessary to call in the mortgage in order to raise sufficient money to pay the cost*".

104. Advocate Kapp also referred to paragraph J1.8 of *Tolley's Administration of Trusts*, which states:

> "*The STEP Guidelines provide that trustees should record assets in the balance sheet at their value at cost or value at acquisition (where gifted, unless a hold-over election has been made when the associated gain would be deducted and a note made accordingly to record this). Enhancement expenditure may be added. Where assets have devolved by death, probate value would be adopted. Where assets are purchased, cost would be taken. The exception to this is where there has been an event during the life of the trust that has resulted in a revaluation of those assets for capital gains tax purposes (such as the base cost uplift on the death of the pre-22 March 2006 life tenant of an interest in possession trust). The STEP Guidelines go on to say that market values at the accounting date, where they can be readily ascertained, should be recorded against the balance sheet assets.*"

In her submission, this indicates that the Defendant had no duty to undertake or obtain a market valuation at any time during its ownership of the PMO shares and further that by recording the value of the PMO shares settled into the PMO Trust "*at cost*" in the historic accounts it prepared in respect of 29 August 1989 to 26 August 1999, and maintaining that approach in each set of annual accounts thereafter, it was acting consistently with the STEP Guidelines, indicating that no breach of duty had occurred.

105. The Deputy Bailiff directed the Jurats that the law did not impose an absolute, or strict, duty on a trustee to obtain a market valuation of shares on entering into office as trustee. The evidence showed that the Defendant had kept accounts in respect of its trusteeship. There was no suggestion, as such, that the accounts kept were inaccurate. The Plaintiff's case was that they had been prepared on a misconceived premise. The question for their determination was whether, in the particular circumstances of this trust, the Defendant, as a reasonable and prudent professional trustee, should have done something more than record the shares in the accounts at cost. They were entitled to take into account that there had been no evidence that the Defendant had ever been requested to provide the type of information referred to in section 26 of the 2007 Law. Bearing in mind the knowledge of the Defendant, they might further wish to consider whether it would have been in a position to respond to such a request, if made, within a timeframe they regarded as reasonable, were additional information needed before a response could be given. They might also consider, in the light of the way the PMO Trust had been operated and continued to operate under the Defendant's trusteeship and the expert evidence that had been heard on valuation, whether a market value was likely to have been readily ascertainable.

Particulars of gross negligence

106. The Deputy Bailiff reminded that Jurats that the particulars of gross negligence pleaded at paragraph 42 of the Cause were:

> "*(i) failing adequately or at all, to ascertain the value of the PMO shares whilst the Defendant held them as Trustee of the Trust. The Defendant on becoming trustee, should have ascertained the value of the PMO shares and should therefore have put in place procedures to ensure that it had up to date information as to their value. At a minimum the Defendant was under a duty to prepare trust accounts and on the preparation thereof should have ensured*

they displayed accurate and up to date valuation of the PMO shares based on such enquiries as the Defendant ought to have made.

(ii) failing to appoint any, or any suitable, advisors to provide advice on the value of the PMO shares at any time over the period it held the shares,

(iii) failing to implement any, or any adequate safeguards on the Protector or Sacinter so that they could not dispose of the PMO shares without reference to the Defendant and the Plaintiff repeats paragraphs 10, 11, 12, 13 and 14 hereof,

(iv) failing to undertake any, or any adequate, review of the mandate arrangements with Sacinter as contended in paragraph 11(3) hereof, to determine whether such arrangements were appropriate and being complied with,

(v) permitting Sacinter to continue to hold the PMO shares and therefore placing the Protector and Sacinter in a dominant position in respect of the Trust, allowing it to usurp the role of trustee as contended in the paragraphs referred to in (iii) hereof; and

(vi) by failing to:

a. adequately monitor Sacinter;

b. exercise adequate control over Sacinter;

the Defendant placed Sacinter in the position where it considered it could dispose of the PMO shares without reference to the Defendant."

Because of concerns raised by Advocate Kapp that some of the content of Advocate Robilliard's Skeleton Argument did not reflect the case pleaded on behalf of the Plaintiff, the Deputy Bailiff suggested that the Jurats should always revert to the actual wording used in paragraph 42 of the Cause in order to identify how the Plaintiff's case was being put. The Deputy Bailiff further reminded the Jurats in that regard that the Advocates had grouped the allegations under slightly different headings.

107. Advocate Robilliard referred first to the alleged failure of the Defendant to acquaint itself with the attributes of the PMO shares and the Fiduciary Contract it had inherited on becoming trustee (see, eg, particular (iv)). This appears to be a direct reference to para. 12-036 of *Lewin*. As a result, the Plaintiff alleged that either or both of these failures led the Protector and/or Sacinter to believe that action without reference to the Defendant was possible, so the shares were sold without the Defendant's consent (see particular (vi)). Paragraph 42(i) and (ii) both relate to the steps the Plaintiff says the Defendant was obliged to take in relation to valuing the PMO shares otherwise than at cost. Paragraph 42(v) alleges that the terms of the Fiduciary Contract and the way the Defendant performed in relation to it left the Protector and Sacinter in a dominant position, creating them as the effective trustee of the PMO shares. In this regard, careful consideration to the true effect of clause 8 of the trust instrument (the anti-*Bartlett* clause) is required. The combination of the Defendant's alleged failures led to the loss because without them the Protector/Sacinter would not have been in a position to dispose of the PMO shares without the Defendant's consent (see again particular (vi), possibly combined with particular (iii) relating to the type of control that should on the Plaintiff's case have been exercised). Advocate Kapp, on the other hand, had approached these particulars alleging breach more directly, labelling them as allegations relating to a failure to acquaint, valuation, failure to consider and dominant position. She suggested that the allegation in paragraph 42(iii) of the Cause has not been developed in Advocate Robilliard's submissions.

108. The Deputy Bailiff directed the Jurats that in considering each allegation made by the Plaintiff they needed to bear in mind the legal test for gross negligence, as summarised in paragraph 20

of the judgment in the *Spread Trustee* case to which reference has already been made. In short, therefore, the effect of section 39 of the 2007 Law meant that the Plaintiff had to establish gross negligence, requiring proof of "*a serious or flagrant degree of negligence. It does not import any question of intentional or reckless fault*" (*Midland Bank v Federated Pension Services*). By way of further explanation, a trustee must "*conduct the business of the trust in the same manner as an ordinary prudent man of business would conduct his own*" (*Nestlé v National Westminster Bank plc* [1994] 1 All ER 118) and a professional trustee such as the Defendant is to be judged against higher standards than the ordinary prudent man of business, as explained more fully by Brightman J in *Bartlett v Barclays Bank* [1980] 1 All ER 139 (at page) 152:

> "*a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management. … the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship. … a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have.*"

In respect of each allegation, the Jurats were to consider whether the Defendant had failed to meet the requisite standard of care and skill expected and, if so, whether it amounted to a serious or flagrant breach. If the Jurats found more than one breach, in assessing the seriousness of the want of care and skill, if none of them individually were regarded as gross negligence, the Deputy Bailiff directed them that they could aggregate the breaches to decide whether collectively they demonstrated a serious failure on the part of the Defendant.

109. In relation to the Plaintiff's first complaint about the Defendant having failed to acquaint itself with the PMO shares and the terms of Fiduciary Contract, the Deputy Bailiff reminded the Jurats about what an incoming trustee is expected to do (as derived from the passages from *Lewin* to which reference has already been made). The Defendant, through Mr Ward, has invited the Court to infer from the ongoing involvement in the administration of the PMO Trust of Sarah Parkes, the managing director of the Defendant at take-on, who was shown from the documents to have been closely involved with the original trustee, Goethe Trustees Limited, that there was an appropriate level of knowledge about the terms of the Fiduciary Contract and how it should properly be operated in the context of this particular trust meaning that the Defendant has not breached its obligations in this regard. The Jurats should consider, in the light of the agreed evidence as to Swiss law, whether they accept the Plaintiff's case that the Fiduciary Contract is sufficiently unusual to warrant seeking advice in relation to it. In summary, the Jurats were directed to consider what a reasonable and prudent professional trustee should have done on becoming trustee of this trust to get an appropriate understanding of the nature of the trust asset it held (ie, the PMO shares) and the terms under which Sacinter held those shares under the Fiduciary Contract. The Deputy Bailiff highlighted the final words of clause 6(k) of the trust instrument ("*upon such terms as to management and custody thereof as the Trustee shall think fit*") and invited the Jurats to consider whether the Defendant had adequately addressed its mind to the terms of the Fiduciary Contract.

110. In relation to the Plaintiff's second complaint that the Defendant's failure to acquaint itself adequately about the shares and the Fiduciary Contract led the Protector and/or Sacinter to believe it could act on its own and dispose of the shares without the Defendant's consent, the Deputy Bailiff directed the Jurats that this aspect would seem to fall away if they were not satisfied that the Plaintiff's first complaint had been proved. However, because paragraph 42(vi) of the Cause had been couched in arguably wider terms than being dependent only on such a direct link to the first complaint, the Deputy Bailiff suggested that the Jurats might properly consider whether the extent of monitoring and control of Sacinter had led to this position. He reminded them that the Defendant had acknowledged that, up until the share sale in September 2008, it had been responsive to contacts from the Protector rather than acting on its own initiative. However, the Defendant had performed its functions in this way because of the way the PMO Trust had come to be established on the instructions of M. Leveau and it

had become the way that the Defendant was content to proceed, especially where all the beneficiaries had their individual interests effectively, albeit not formally, allocated to them and none, including the Plaintiff, had raised any questions about how the affairs of the Trust were conducted. In essence, the Jurats needed to consider whether to accept the Plaintiff's arguments that the entire course of conduct, the aspects of which had been highlighted through the evidence, showed that the Defendant had shirked its responsibilities and had become unduly reliant on the Protector and/or Sacinter to such an extent that Sacinter, acting through the Protector's officers, was able to leave Mr Raffet to negotiate the sale of shares and then to grant him a power of attorney to conclude the sale, all without reference to the Defendant. Was this something that a reasonable and prudent professional trustee was entitled to do?

111. Turning to the Plaintiff's third complaint relating to allegations that a market valuation of the shares should have been undertaken, probably through the appointment of professional advisors, the Deputy Bailiff suggested that the Jurats might wish to pay close attention to the nature of this particular settlement in order to decide what the reasonable and prudent professional trustee would have done on taking on the PMO Trust and in the years that followed. He reminded them that the Defendant had admitted that no market valuation of the type now suggested by the Plaintiff as having been needed had been undertaken, but the explanation given that it was felt by the Defendant that it would be contrary to the interests of the beneficiaries to use trust monies to perform this exercise. In part, this was because it was apparent that the beneficiaries were principally interested in the generous distributions represented by each receiving entitlement to a proportionate amount of the dividends declared. Further, amongst themselves at least, they placed a capital value on their notional respective shareholdings as shown by the various transactions evidenced by their changing entitlements recorded in the Defendant's annual accounts. No beneficiary had asked the Defendant about the value of the PMO shares. Equally, however, it was apparent from the terms of the Fiduciary Contract that fees payable to Sacinter were calculated by reference to the value of the assets, thereby implying that a value should have been given to them. On the other hand, Sacinter had not asked the Defendant to consider re-valuing the shares so as to affect its entitlement to possible increased fees. In all the circumstances of this particular trust, the Jurats were invited to consider what a reasonable and prudent professional trustee would do in this respect in order to fulfil its duties under the PMO Trust.

112. The Plaintiff's fourth complaint is that the arrangements for the administration of the PMO Trust permitted the Protector and/or Sacinter to be in a dominant position. In this regard, Advocate Robilliard submitted that the anti-*Bartlett* clause in the trust instrument did not assist the Defendant because there was no allegation from the Plaintiff that the Defendant should have involved itself in the business of PMO itself, but rather than it failed to act under the Fiduciary Contract to give instructions to Sacinter. It had been confirmed in the evidence that there was no shareholding in Sacinter among the trust assets. Clause 8 of the trust instrument provides:

> "*The Trustee shall not be bound or required to interfere in the management or conduct of the business of any company in which the Trustee hold shares, whatever the proportion of the issued share capital it holds. Unless the Trustee has notice of any act of dishonesty on the part of the directors managing such a company, the Trustee shall be at liberty to leave the conduct of the Company's business (including the decision whether or not to pay dividends wholly to the directors).*"

The Deputy Bailiff directed the Jurats to read that clause as if the closing of the parentheses came after the word "*dividends*".

113. Clause 8 has been invoked by the Defendant in response to paragraph 11 of the Cause, which contains allegations about the Defendant permitting Mr Raffet to continue in office as the Sacinter-appointed director on the board of PMO without understanding fully that the Fiduciary Contract permitted the Defendant to give instructions to Sacinter about how to exercise the rights attaching to the PMO shares. The Deputy Bailiff reminded the Jurats that the Plaintiff had made no complaints about how PMO conducted its business. To that extent,

clause 8 of the trust instrument was not engaged. Further, although Mr Raffet, as a director, formed part of the management of PMO, unless they found as a fact that what he had done in negotiating and concluding the sale of the shares held by Sacinter in PMO had been done in his capacity as part of the management, it meant that Mr Raffet had been acting in some other capacity so that clause 8 could not be engaged. In the event that they decided that Mr Raffet had been acting in his capacity as a director of PMO, they would then need to proceed to consider whether the Defendant had notice of any act of dishonesty involving Mr Raffet and, if so, whether it warranted taking steps to involve itself. In that regard, the Plaintiff had not advanced any evidence of such dishonesty, Advocate Robilliard having confined himself to the submission that, because the Defendant's shareholding was in PMO and not Sacinter, what it could do in relation to Sacinter was not in any way affected by the inclusion of clause 8 in the trust instrument.

114. In summary, the Plaintiff alleges that the Defendant actually or effectively delegated away too much of its responsibility to the Protector and/or Sacinter. In this regard, the Deputy Bailiff directed the Jurats to have regard to a number of the particulars pleaded in paragraph 42 of the Cause because this complaint appeared to him to be an amalgam of them. One element is the alleged failure to implement adequate safeguards (sub-paragraph (iii)), although there is also some overlap with the dominant position case and the consequences of failing to monitor Sacinter adequately or exercise proper control over it (sub-paragraphs (v) and (vi)). The Jurats were invited to consider whether the Defendant had failed to meet the requisite standard of care and skill in continuing the situation it inherited under which Mr Raffet was in office as the Sacinter-appointed director of PMO without active steps being taken to check on how Sacinter's appointee was operating and whether, and if so what, information flows should have been instituted. The Jurats could take into account everything they had gleaned about the way that M. Leveau had chosen to establish the structure and what they had learnt about the role played by Mr Raffet. In doing so, they were cautioned that they had not heard evidence from either gentleman and also against relying on things written by Mr Raffet which had not been tested through cross-examination. They could further take into account the nominal respective allocations each beneficiary had in the PMO shares held through Sacinter. However, they were reminded that it was common ground that the sale of the PMO shares by Sacinter had not been approved by the Defendant and that it was acknowledged as a result of the agreed Swiss law evidence that Sacinter had breached the Fiduciary Contract. Looking at everything related to the relationship between the Defendant and Sacinter and/or the Protector, the Jurats should consider what a reasonable and prudent professional trustee would have done and assess whether the Defendant failed to reach that standard of care and skill and, if so, whether it was a serious or flagrant breach.

Particulars of wilful breach of trust

115. At paragraph 43 of the Cause, the Plaintiff alleges that the Defendant's failure to take action against Sacinter is in breach of its duties derived from sections 22 and 23 of the 2007 Law. The particulars refer to the enquiries undertaken on his behalf by Maître Gal in the first part of 2009 and the correspondence exchanged at that time as demonstrating that the Defendant:

    (a) knew that the PMO shares had been sold by Sacinter at an undervalue;

    (b) knew that the sale was in breach of Sacinter's fiduciary obligations;

    (c) was unwilling to pursue Sacinter in respect of this loss so as to replenish the trust fund; and

    (d) had refused to cede its rights against Sacinter save for on unreasonable terms.

    In respect of the alleged knowledge of the sale at an undervalue, the Plaintiff pleaded that this arose because the Defendant had been alerted by Maître Gal to the fact that negotiations for the renewal of the port concession were seriously in hand for over a year before the sale of the shares, that renewal was supported by the highest authority in Gabon, and that the calculation of the sale price was based on dividends yet to be received under the then existing concession

with a small amount in respect of the unpaid debt of the State of Gabon with no consideration of the dividends to be received under a renewed concession. Further, the commencement in July 2010 of proceedings in a Swiss court against the Protector and Mr Schwab provided further support for the assertion that it was known by the Defendant that the sale was at an undervalue.

116. Similar allegations are made in paragraph 44 of the Cause in respect of the Defendant's failure to pursue any action against the Protector prior to the expiry of six years following the sale of the shares. Again, the particulars refer to the Defendant knowing that the shares had been sold at an undervalue and has shown it is unwilling to pursue the Protector in respect of this loss and adds that the Defendant knew Sacinter, which is controlled by the Protector, had sold the shares in breach of the Fiduciary Contract. The possible cause of action that the Plaintiff says the Defendant had against the Protector was finally articulated by Advocate Robilliard in closing the Plaintiff's case as a form of inducing a breach of contract. The precise basis of such a claim was not elaborated upon by him but, in the absence of any expert opinion on Swiss law, by reference to Guernsey law principles, in turn derived from English law, it appears that it is being said that, with knowledge of the terms of the Fiduciary Contract, the Protector, by virtue of supplying Sacinter's officers and administering that company, persuaded Sacinter to act in breach of the Fiduciary Contract.

117. In relation to these matters, the Deputy Bailiff directed the Jurats that, in the light of his direction about what constitutes wilful misconduct for the purposes of section 39 of the 2007 Law, when assessing whether the Defendant had breached any of its duties in relation to its approach to the question of taking proceedings against Sacinter and/or the Protector they should apply the same standard of care expected of a reasonable and prudent professional trustee in the performance of its duties. The Jurats could take into account the possible balancing exercise that a trustee has to perform when weighing up the interests of the beneficiaries when considering whether an intended or reckless breach of trust had taken place.

118. The heart of these allegations was that the Defendant reached its decision not to take proceedings despite knowing that the shares had been sold by Sacinter at an undervalue. Accordingly, the first consideration for the Jurats was whether or not the Plaintiff had proved that the Defendant had this knowledge. If it had failed to do so, the foundations of the allegations fell away. However, if the Jurats found themselves satisfied that the shares had been sold at an undervalue, they should proceed to consider the way in which the Defendant had obtained advice on the prospects of the claims the Plaintiff now suggests it ought to have made and decide whether the decision-making process, including the factors taken into account, met or fell below the standards expected of a reasonable and prudent professional trustee. It is conceded by the Defendant that there was (and is) a claim for breach of contract available against Sacinter. The position in relation to the Protector is, however, less clear. The possibility of it being a claim for inducing a breach of contract had not emerged until very near the end of the hearing. The Jurats might wish to consider the levels of uncertainty before then apparently surrounding what the Plaintiff believed the Defendant should have done in assessing the reasonableness of the decision not to institute proceedings. In relation to the terms on which the Defendant offered to cede its rights as against Sacinter and/or the Protector, the Jurats should review the terms and decide whether they were, as alleged, unreasonable or not. The terms are contained in the letter of 13 May 2011 from the Defendant's Advocate to Maître Gal.

119. As an alternative approach, the same particulars as for wilful breach of trust in paragraph 43 have been pleaded in paragraph 45 of the Cause as the particulars of an allegation of gross negligence. The Deputy Bailiff directed the Jurats that the principles to which reference has already been made would be equally applicable to those allegations.

Causation of loss

120. The Deputy Bailiff gave further directions to the Jurats on the issue of whether, if gross negligence or wilful breach of trust were proved to their satisfaction by the Plaintiff, any such breach caused the loss the Plaintiff alleges that the trust fund has suffered.

121. The starting point is section 39(1)(a) of the 2007 Law:

> "*Subject to the provisions of this Law and to the terms of the trust, a trustee who commits or concurs in a breach of trust is liable for –*
>
> *(a) any loss or depreciation in value of the trust property resulting from the breach*".

Accordingly, in respect of any breach of trust found by the Jurats, they would further need to be satisfied that the sale of the PMO shares at an undervalue, representing the loss to the trust fund, resulted from that breach. This requires proof of "*but for*" causation.

122. The Deputy Bailiff has decided that Guernsey law can properly adopt the approach to this taken by the law of England and Wales as set out in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 by Lord Toulson JSC:

> "*64 All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach (and which ought therefore properly to be held on behalf of the beneficiary). Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal.*
>
> *65 The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about. ...*
>
> *67 A traditional trust will typically govern the ownership-management of property for a group of potential beneficiaries over a lengthy number of years. If the trustee makes an unauthorised disposal of the trust property, the obvious remedy is to require him to restore the assets or their monetary value.*"

123. That case applied the earlier decision in *Target Holdings Ltd v Redferns* [1996] 1 AC 421. In the speech of Lord Browne-Wilkinson it was explained that (at page 434C):

> "*The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts [ie, of successive interests], where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate: see Nocton v. Lord Ashburton [1914] A.C. 932, 952, 958, per Viscount Haldane L.C. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: Caffrey v. Darby (1801) 6 Ves. 488; Clough v. Bond (1838) 3 M. & C. 490. Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred: see Underhill and Hayton, Law of Trusts & Trustees 14th ed. (1987), pp. 734-736; In re Dawson, decd.; Union Fidelity Trustee Co. Ltd. v.*

> *Perpetual Trustee Co. Ltd. [1966] 2 N.S.W.R. 211; Bartlett v. Barclays Bank Trust Co. Ltd. (Nos. 1 and 2) [1980] Ch. 515. Thus the common law rules of remoteness of damage and causation do not apply. However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach: see also In re Miller's Deed Trusts (1975) 75 L.S.G. 454; Nestle v. National Westminster Bank Plc. [1993] 1 W.L.R. 1260.*"

124. In accordance with those explicit references to "*but for*" causation, the Deputy Bailiff directed the Jurats that they needed to consider what the position would have been had there been no breach of trust on the part of the Defendant. In doing so, they should not take into account the principles relating to causation in ordinary common law claims for negligence on which they may previously have sat and received the presiding judge's directions because the same considerations on foreseeability of the loss, ie, remoteness of damage, do not apply to equitable compensation.

125. The Plaintiff's case is that the PMO shares were sold by Sacinter acting through Mr Raffet under the power of attorney granted to him without reference to the Defendant. The relationship between Sacinter and the Protector was a close one in that the Protector administered Sacinter. In reality, Sacinter and the Protector had been left in a position by the Defendant's lack of adequate monitoring and/or control over Sacinter where they operated the Trust and merely looked to the Defendant for formal ratification of their decisions as and when necessary. The failure of Sacinter to comply with the terms of the Fiduciary Contract links directly to the alleged loss to the trust fund because the PMO shares were sold in breach of the Defendant's duties. Because they were sold at an undervalue, there has been loss caused to the trust fund for which the Defendant is now responsible.

126. The Defendant's position is that nothing complained about in the Cause would have made any difference to the eventual sale price of the PMO shares. The Plaintiff's claim is not that the shares should not have been sold, but rather that, when sold, the shares should have attracted a higher sale price. In that regard, Advocate Kapp emphasised that these shares were not being offered for sale generally and that there was, in truth, only a single prospective purchaser, Comilog, and that all the beneficiaries, save for the Plaintiff, were supportive of the sale negotiated and concluded by Mr Raffet, who was the person best qualified to act on behalf of Sacinter and, indeed, the Trust itself. She submitted that the Plaintiff had not adduced any evidence, other than that of his own experts' figures quantifying the alleged loss to the trust fund, which demonstrated that, if the breaches alleged against the Defendant had not taken place, the shares would have been sold at a higher price. The sale price was approximately the equivalent of €838 for each share. The transaction in the summer of 2008 when one former beneficiary received €1 million in respect of the transfer of a nominal entitlement to 1,400 PMO shares suggests the value placed on each of those shares was approximately €714. The Jurats were reminded that the transferees of that entitlement were Mr Raffet and M. Leveau's wife and that they might consider it appropriate to bear in mind those who were apparently behind the decision to sale the PMO shares held in the Trust and the position at that time in relation to the proposed sale. However, at that time, the transaction terms were possibly the most up-to-date indication to the Defendant of the approximate value that the beneficiaries among themselves placed on the shares.

127. The Deputy Bailiff directed the Jurats that they were to have regard to the entirety of the evidence they had heard, both factual and expert, to decide whether the Plaintiff had proved that the losses to the trust fund alleged were sustained as a result of a breach of trust for which the Defendant was responsible. Each breach of trust found would have to be addressed separately in this way. For example, if they found that the Defendant had failed to comply with its duty to value the shares, they would have to ask themselves whether the Plaintiff had proved that that breach led to the sale of the shares at an undervalue. Similarly, if they found that the Defendant had breached its duties by failing to obtain sufficient information about the Fiduciary Contract, they would ask themselves a similar question. If they concluded that, whatever the Defendant should have done to comply with its duties, Sacinter, acting through

Mr Raffet, would have sold the shares for the price that was obtained, the Plaintiff would have failed to establish the necessary causal link.

128. Finally, if the Jurats were satisfied that there had been a breach of trust resulting in the PMO shares being sold at an undervalue, the Deputy Bailiff reminded the Jurats that, for the purposes of the present judgment, they did not need to go on to consider what relief to award to the Plaintiff. This arose because the Advocates had recognised that the Plaintiff was seeking reconstitution of the trust fund because of the formal discretionary nature of the trust instrument, whereas he was more interested in receiving some form of compensation personally. The precise calculation of the losses the Plaintiff claimed had been sustained by the trust fund, and so his pro rata share of them, had been confused by the references in the Cause to various currencies and the fact that the sale price was in respect of a larger shareholding than just those shares held by Sacinter for the Defendant as trustee of the PMO Trust. For that reason, the Advocates had agreed that the trial should be restricted to ascertaining whether there was liability on the part of the Defendant, leaving to another hearing consideration of the appropriate form of relief.

Discussion

Sale at an undervalue

129. Because the Plaintiff would not be entitled to any of the relief sought if he failed to prove any loss or depreciation in the value of the trust property, the Jurats have considered this issue first. It involves giving careful consideration to the expert valuation evidence on which both parties relied. The Plaintiff's evidence came from the written reports of Messrs Marion and Matthieu, supplemented by the oral evidence of the former. The Defendant relied on the written and oral evidence of Mlle. Barchietto. These witnesses had eventually agreed the methodology that should be used to calculate the value of the PMO shares as at the date of their sale in September 2008, but differed in respect of a number of factors to be used in producing the range of figures.

130. As the experts' joint memorandum explains, the Plaintiffs' experts approached the valuation exercise by reference to a single scenario, namely that the Concession was to be renewed on revised terms so that in future the only revenue of PMO will be from port tolls payable by COMILOG and the abandonment of the historic debt owed by the State of Gabon. They did not determine a value in the event that the Concession was not renewed or attempt to assess any uncertainty regarding the renewal of the Concession as at 2008, whereas the Defendant's expert undertook this exercise. The areas on which the experts disagreed were:

    (a) the rate of increase in turnover of PMO over the course of the renewed Concession;

    (b) the turnover to costs ratio to be applied; and

    (c) the levels of investment required to be made by PMO.

    The Plaintiff's experts have used 3.94% when assessing the annual increase in turnover, as opposed to just 1% used by the Defendant's expert. As regards the turnover cost ratio, the Plaintiff's experts have selected 96.5% and the Defendant's expert 90%. Finally, in relation to future investment, the Plaintiff's experts have used an annual amount of XAF 17 million, and the Defendant's expert has estimated this amount at between XAF 50 and 65 million. The parties' experts also disagree on the weighted average cost of capital ("WACC") and, in particular, the risk premium to be applied. They have agreed that the risk free rate component of WACC should be 4.75%, but the Plaintiff's experts say the risk premium could be 6.75% and 9% (corresponding to minimum risk with a premium of 2% representing no risk or average risk with a premium of 4.75%), whereas the Defendant's expert opts only for 9%.

131. The first expert analysis in time was completed by Baker Tilly Speiss and is dated 17 September 2010. Mlle. Barchietto was one of the authors. It was this document that

explained the difference between the way Serge Raffet had apparently based his calculations on the dividends expected for 2008 and 2009 and repayment of the debt of the State of Gabon, whereas it was known by 17 September 2010 that there would be no repayment of that debt and the Concession was being renewed on different terms. It set out the calculations for the eight scenarios that had been put forward and considered earlier in the year. Looking at the previous four years, they had assessed the free cash flow from COMILOG and the State of Gabon as being XAF 2.5 billion for each, and had used an actualisation rate of 12%, to be applied over the period from 2010 to 2032. They noted that the actual dividend per share paid in 2009 was €108, and that no dividend was paid in 2010. The range of values under their eight scenarios was, therefore, €958 to €3,990 per share.

132. The Plaintiff's experts' first report, which is dated November 2010, values PMO as at 31 December 2008. It set out two bases of value depending on whether the State of Gabon would pay its debt. As regards the risk relating to PMO as a company, the experts applied the Conan and Holder general scoring method and used a small risk premium of 2%, producing a WACC of 6.75%, and they assessed the level of general statistical risk of PMO at 0%. The low value they calculated, under which the State of Gabon would not repay its debt, ie, no earn-out figure under the sale agreement would be payable, for Sacinter's shares in PMO was XAF 21.35 billion (which compared to the sale price of XAF 7.8 billion). The high figure (ie, where the State of Gabon repaid its debt) they calculated as being XAF 25.62 billion. In both cases, the figure given was the entirety of Sacinter's shareholding, of which a fraction over 80% was held within The PMO Trust.

133. The Defendant's expert's first report is dated 19 October 2012. As Mlle. Barchietto has since agreed that the discounted cash flow method ("DCF") is the appropriate one to use, we say nothing further about her comments about the net asset value method on which she had worked when at Baker Tilly Speiss. She gave her reasons for attributing a risk premium of at least 4%, having regard to the narrow customer base of PMO, the non-payment of monies due from the State of Gabon since 2003, the unstable economic and political environment in Gabon, the very real possibility that there might be nationalisation without compensation and the short period of time before the ending of the Concession with no guarantee it would be renewed. She noted that the rate of growth in PMO's turnover shown for 2006 to 2008 had arisen because of increased railway tolls, which were not being paid by the State of Gabon anyway, and that the volume or value of manganese passing through the port was largely static. She commented that the Plaintiff's expert's view that growth on profit of 6% was appropriate was unjustified because it failed to taken into account the age of the infrastructure and no allowance for capital expenditure on maintenance and improvement had been made, there was a global decrease in the levels of manganese production worldwide, with Gabon levels stagnating rather than increasing, and there was no guarantee that extraction capabilities could reach the levels predicted. Using her assumptions of the WACC discount being 9%, with annual growth of 1% and annual growth of 1% in respect of EBIT, she calculated the value of PMO as XAF 15.117 billion. The value of all the shares held by Sacinter was, therefore, XAF 9.546 billion. She also calculated that a calculation of the value of those shares assuming there was no renewal of the Concession was XAF 6.3 billion, with the consequence that the mid-point between these two values was approximately XAF 7.9 billion, ie, a figure very close to the actual price at which Sacinter sold all its shares to COMILOG.

134. By their second report, dated 5 April 2013, which commented on the work undertaken by the Defendant's expert when generating the eight possible scenarios, the position of the Plaintiff's experts had moved a little. (The Jurats take no issue with the opening sentence of this report ("*The former shareholders of the company PMO are in dispute with their buyers, before the Royal Court of Guernsey, concerning the sale price for their holdings*"), albeit that it demonstrates quite a significant misunderstanding of the proceedings in which they were giving expert evidence.) The Plaintiff's experts commented on a number of assumptions made, using the revenue of PMO in 2009 to show that the division between its port and rail activities was that port tolls of XAF 3,830 million had been invoiced to COMILOG and rails tolls of XAF 2,287 million had been invoiced to the State of Gabon. In relation to the risk, they stated:

> "*The political risk for Gabon, measured by Ducroire, is low, at 2 out of a scale of 1 to 7. Gabon's credit rating by Standard & Poor's is BB-, stable, which places Gabon alongside Portugal, Vietnam or Nigeria among others, far ahead of most African countries.*"

Consequently, they considered the absence of any financial or operating risk for PMO, as it simply collected tolls due, combined with the low political risk, meant that "*retaining a cost of equity of 9% would appear to be a maximum*". They looked at the growth in total turnover of PMO from 2005 to 2009 and calculated the average at 3.96% per annum (which was also referred to as 3.94% on occasion). They then took the various scenarios developed by the Defendant's firm of experts, Baker Tilly Speiss, and calculated the value of PMO, and so the Sacinter shares, using discount rates of 6.25%, 9% and 12%. Each time, the value produced is significantly higher than that of the Defendant's expert. By way of example, their range of values per share start at €1,753 rather than €850, to which the dividend paid in 2009 of €108 was also added. Using their lowest figure, the total value of PMO was said to be XAF 25.866 billion. However, using a more realistic discount figure of 9% (which the Plaintiff's experts still regarded as high) and giving a 25% chance to the income of PMO being both port and rail tolls for the whole period of the extended Concession and 75% that the revenue would be confined to port tolls only, with corporation tax at 35% payable in both situations, the value attributed to PMO became XAF 37.4 billion, or €2,534 per share. The value of the shares held in The PMO Trust, therefore, was XAF 19.123 billion.

135. The third report of the Plaintiff's experts, dated 27 August 2013, refines their position once again. In it they comment on Mlle. Barchietto's report of 19 October 2012 and respond to the criticisms she offered of their approach. In relation to how to assess the appropriate risk premium, they highlight that PMO only has two customers, one of which is the other party to the Concession and the other of which is its main shareholder, referring again to their assessment of the risk being low, adding that they "*remain convinced that a rate of 9% abusively penalises the valuation approach for PMO*", albeit that they will do calculations based on it as well as their preferred rate of 6.25%. They explained that their growth forecast was based on historical data as drawn from COMILOG's annual report for 2008 and is based on volumes. They proceeded to calculate the value of PMO based on assumptions that the port toll income would grow by 3.96% per annum, that PMO's current charges to turnover (being a company without any personnel) would be 3.5%, and that the working capital requirements would be 6.4% of turnover. Tax would be payable at 35%. In this way, the value with 9% used as the discount was XAF 33.493 billion and the value using 6.25% was XAF 43.814 billion. When adding in the terminal value at the end of the concession, those figures become XAF 34.6 billion and XAF 45.64 billion respectively. The value of the shares held in The PMO Trust is XAF 17.6 billion and XAF 23.26 billion.

136. The Defendant's expert provided a second report dated 28 November 2014, in which she was invited to comment on the Plaintiff's experts' second report of 27 August 2013 and revise any figures she wished to revise in the light of it. As a result, her valuation of Sacinter's holding of shares in PMO was modified to XAF 11.611 billion. Mlle. Barchietto highlighted that from 2004 to 2008 the historic figures showed that the tolls received from COMILOG had initially dropped and then been reasonably flat. The annual variances up and down meant the overall figure was reasonably static, hence her decision to use a notional growth figure of 1%, which might even be regarded as optimistic. She regards the Plaintiff's experts' use of tonnages only as potentially misleading. As regards the turnover to cost ratio, she pointed out that the Plaintiffs' experts had overlooked the fact that the running costs of the port would be fixed but the income would decrease, coming only from COMILOG rather than also from the State of Gabon (albeit unpaid). Whilst the arithmetic difference might mean doubling the Plaintiff's experts' figure of 3.5%, she had moved to 10% because it would not be possible to achieve sustainable growth without incurring some direct costs. She criticised the Plaintiffs' experts for using a fixed annual charge for investment of just XAF 17 million without explanation, noting that the renewal of the Concession for 22 years would inevitably require additional investment over that period, so she had chosen XAF 50 million for the first three years with increases of approximately 10% every five years thereafter. As regards the

possibility of non-renewal of the Concession, she identified that the Plaintiff's experts had not challenged her "*liquidation value*" of PMO at XAF 3 billion, meaning that Sacinter's holding had a value of XAF 1.8 billion.

137. The Plaintiff's experts provided a final update to their reports dated 12 December 2014. They highlighted the growth in embarkation tolls from 2006 to 2008 as indicating that their assessment of growth of 3.94% was prudent in the circumstances and should be preferred to Mlle. Barchietto's suggestion of just 1%. They analysed the charges incurred in 2006 to 2008 to show that the average was 2.9% of turnover, justifying a prudent figure they had used of 3.5% rather than Mlle. Barchietto's suggestion that it be 10%. They referred to the significant drop in depreciation in 2009 from the preceding years as being consistent with the reduction in the net value of fixed assets from the end of 2007 to the end of 2008. That is why they had chosen to use the same figure throughout the extended Concession. They again concluded that the value of PMO in 2008 was XAF 39.6 billion, which was more consistent with the dividends paid by PMO from 2000 to 2007, which had totalled XAF 23.62 billion, which would reflect a return of some 27.8% if Mlle. Barchietto's valuation of XAF 10.6 billion were adopted.

138. During her questioning, Mlle. Barchietto was not shaken from the assumptions she had made, save to the extent that, in the light of actual information about the post-sale performance of PMO, she might have been still more prudent than she had been. The evidence of M. Marion was less clear. The Jurats accept that he may have become muddled as a result of translation between English and French and his attempts to answer directly in English, but they were concerned that M. Marion would occasionally appear to agree in one breath that there had been flaws in his and M. Matthieu's approach and at the end of a few more questions assert that their approach was fine and they had not fallen into error. For example, at one point he accepted the proposition that there were certain fixed costs associated with PMO that would be incurred whatever the turnover, and then disagreed that retaining the percentage of 3.5% costs when turnover was effectively being halved could not be correct. Although this has given rise to a degree of confusion, the Jurats have decided to overlook the apparent inconsistencies in M. Marion's answers and have regarded him as maintaining the assumptions that have been advanced on behalf of the Plaintiff.

139. The Jurats also formed the impression that the calculations done by the Plaintiff's experts had been prepared initially for the Swiss proceedings and only afterwards was it proposed to use the same material in the present Guernsey proceedings. The Court has not been privy to the instructions, or terms of reference, given to either party's experts. However, the Jurats formed the impression that the Plaintiff's experts may have been instructed to opine in relation to a different date for valuation purposes. Because the purpose of any restitutionary order is to replace a loss to the trust fund that has been brought about as a result of a trustee's breach, where the breach alleged focuses on the date of sale and the Plaintiff does not argue that the assets of The PMO Trust should have been retained, but rather that the sale should have been concluded at a higher price, the difference in price as at 24 September 2008 (or perhaps shortly before) is what must be considered. At times, M. Marion seemed to be considering the value of PMO simply upon renewal of the Concession in 2010. As such, the Jurats were not persuaded that his approach to the valuation of the shares was of as much assistance as it perhaps could have been.

140. In summary, therefore, the Jurats prefer the evidence given by Mlle. Barchietto to that contained in the Plaintiff's experts' reports, as supplemented by M. Marion's oral evidence. They do so for the following reasons.

141. The experts and the parties' Advocates agreed that it was legitimate in assessing the accuracy of the forecasts made for the Jurats to take into account what actually happened at relevant times. Because the performance of PMO in subsequent years is now known, looking at the figures recorded and comparing them to what the experts considered would, in their opinions, happen is a permissible and potentially helpful exercise. However, the Jurats recognise that valuations cannot be made in retrospect and this has not been the basis of their decision.

142. The annual reports of PMO following renewal of the Concession show how the turnover of the company has progressed by reference to the value of what is termed "*Produits d'exploitation*". In 2010, it was XAF 2.630 billion. In 2011, it was XAF 2.496 billion. No figures are available for 2012. In 2013, it was XAF 2.579 billion. The figures in reality are closer to those calculated when using the 1% growth advanced by the Defendant's expert rather than the 3.94% growth suggested by the Plaintiff's experts. Indeed, even 1% growth has been shown to be mildly optimistic.

143. Looking at the same annual reports of PMO to see the costs associated with generating these turnovers, the figure for 2010 was XAF 334 million, the figure for 2011 was, it seems, mis-transcribed in the document and should have been XAF 349 million (and not XAF 34 million because of the other figures shown) and the figure for 2013 was XAF 417 million. (When questioned, M. Marion accepted the mathematics of the apparent error in transcribing certain figures.) In each of these years, the turnover to costs ratio actually experienced by PMO had exceeded the 10% suggested by the Defendant's experts and so had significantly exceeded the 3.5% adopted by the Plaintiff's experts.

144. Turning to the level of investment required to be made by PMO under the renewed Concession, it is now known (as recorded in para. 72 of the Final Award from the 2013 Arbitration) that a 2010 study carried out by a firm of civil engineers assessed the costs of works to be undertaken at the port over the term of the renewed Concession at XAF 5.8 billion (converting to €8.8 million). This amount was, in the Jurats' view, clearly indicative that the Plaintiff's experts' estimate of flat annual expenditure of just XAF 17 million over the same period was unrealistically low. Indeed, it is out by a factor of in excess of 10. Even the Defendant's expert's showing the annual figure increasing to XAF 55 million and subsequently to XAF 65 million is quite considerably below the level of investment actually to be expected. Once again, therefore, the working assumption of the Defendant's expert is, in the Jurats' view, to be preferred to that of the Plaintiff's experts. Mlle. Barchietto explained that if the total investment of XAF 5.8 billion were introduced into her calculations, the value to be given to shares held by Sacinter would drop from XAF 11.61 billion to around XAF 10.5 billion.

145. Even without these acknowledged differences between the experts' projections and what has been shown to have happened, the basic approach of the Plaintiff's experts was, in the Jurats' assessment, misconceived. They had looked at the railway tolls and the port tolls by reference to tonnage and had also looked at smoothed tonnage and the trend over the years from 1990 to 2009. In doing so, they identified that the average growth of tonnage over 20 years showed that the trend increased by 3.96%. This was broadly reflected in PMO's increase in turnover (derived from both sources, even though the railway toll had remained unpaid for some years) over the period 2005 to 2009. However, as Mlle. Barchietto pointed out, this was seeking to compare apples and pears. The movements in tonnage and the trend associated with those movements were not indicative of themselves of PMO's turnover. The price charged as a toll could fluctuate in order to sustain turnover. She noted that the sources she had checked showed that the price of manganese globally had decreased over the decade. Whilst acknowledging that factually the tonnage in respect of which tolls were paid had increased, the Jurats accept her evidence that tonnage is just one component or factor in PMO's turnover and so cannot properly be looked at in isolation.

146. Further, as a matter of common sense, the Jurats regarded the Plaintiff's experts' approach to investment as untenable. The port had clearly been operational for a good number of years under the original term of the Concession. Whilst it was perhaps understandable that PMO would not invest as heavily towards the end of the Concession period whilst it remained uncertain as to whether there would be any return on such investment, once the Concession was renewed, it would be inevitable that a significant amount of investment would be required to keep the port operation up to the required standards. It was, therefore, unjustified for the Plaintiff's experts to have done no more than apply the low figure for 2009 for all the years ahead.

147. As regards the risks associated with PMO being a Gabonese company, the Jurats prefer Mlle. Barchietto's approach because, in their judgment, this was not a zero risk situation. Although Advocate Robilliard had tried to elicit from Mlle. Barchietto some acknowledgement that the identity of the purchaser of the shares mattered, the Jurats accept her evidence that it is not a factor to bring into account under the DCF method, which is based on figures and projections. Accordingly, the fact that the prospective purchaser of the shares was COMILOG does not have any impact on these calculations.

148. Having decided that the assumptions used by Mlle. Barchietto were preferable to those of the Plaintiff's experts, the Jurats next considered the likelihood, at the time of the sale of Sacinter's shares in PMO, of the Concession being renewed. In doing so, they accept her unchallenged valuation of XAF 1.88 billion as being the value of Sacinter's shares in the event that Concession had not been renewed and there was no repayment of the debt of the States of Gabon and her evidence that the value of the PMO shares needed to be calculated by reference to each probability and the proper value to attribute to that outcome. In her worked examples, she had used an equal likelihood, no doubt to show the process, but she acknowledged that such an assessment was beyond her areas of expertise. By way of further example, as has been mentioned, she suggested the likelihood of renewal might be 70%. The Plaintiff's experts did not even consider that the overall value had to be reduced to reflect the possibility that the Concession would not be renewed. The Plaintiff's case was that renewal was a certainty.

149. The Jurats accept that the President of the Republic of Gabon wrote to the State Minister of Finance on 18 June 2007 about the renewal of the Concession, and that that letter included the President's direction that an extension to the Concession should be agreed. There was, however, nothing within the terms of the original Concession dealing with renewal. They are persuaded, however, that the situation had been reached where the likelihood of renewal was greater than the original Concession simply coming to an end, but that there was always going to be a degree of risk that the Concession would not be renewed, meaning that it was unrealistic to suggest that renewal was a certainty. Assessing quite where on the scale between more likely than not to just below a certainty the likelihood should be fixed, the Jurats are conscious that little evidence was led in relation to what was happening at the time. Serge Raffet was tasked with negotiating on behalf of Sacinter. The Defendant was not consulted until the last minute. There was no indication offered at the time as to how likely the renewal was or indeed the terms that might be struck. It is apparent from the material supplied by Serge Raffet, although none of this has been capable of being tested in evidence, that he had proceeded on the assumption that there would be two years of dividends and repayment of the debt owed by the State of Gabon, albeit not necessarily in one tranche, hence the two phases of the purchase price. Although perhaps not the most significant factor to bear in mind, the Jurats also note that the beneficiary agreeing to transfer the interest in 1,400 shares to Serge Raffet and Mme. Leveau in July 2008 (when the COMILOG offer price was already known) was prepared to accept €1 million, ie, just under €715 per share. The implication of this informal valuation of an interest at around the same time is that the "selling" beneficiary was not confident that the Concession would be renewed and so was willing to forego the generous dividend stream to which the Plaintiff has referred.

150. In these circumstances, the Jurats have formed the view that the range of likelihoods is no higher than an 85% chance of renewal but equally no lower than a 75% chance of renewal. They are satisfied therefore, that a point somewhere around the middle of that range is the best percentage likelihood to use when assessing what the projected value of the PMO shares was in September 2008. By way of example, an 80% likelihood means that there was one chance in five that the Concession would not be renewed, which seems to the Jurats to be a fair approach to have taken.

151. The price received under the sale agreement for Sacinter's shares was XAF 550,000 per share or, when converted, €838. According to the Final Award in the 2013 Arbitration (see para. 66), had the State of Gabon repaid its debt, the additional payment would have been XAF 264,228 or €403 per share. Using Mlle. Barchietto's valuation of the Sacinter shares on the agreed basis of renewal of the Concession on revised terms of XAF 11.61 billion, each share

has a value of approximately €1,245, which is very roughly the value of the payment actually made under the 2008 sale agreement and the expected additional payment. However, the additional sum received by the Defendant under that Final Award was only CHF 3,076,805.45. The Jurats note that the costs and expenses incurred had already been deducted before the Defendant received this amount, whereas the other figures to which reference is made here refer to the actual or expected sale price per share before deductions. Using the same conversion rate as in that Final Award, the amount received equates to approximately XAF 1.36 billion (or XAF 118,866, or a fraction above €181, per share). If the Final Award of CHF 4.5 million is divided by the number of shares held by Sacinter, it equates to a fraction under CHF 317 per share (ie, XAF 140,032 or €213). The total gross price received per share held in The PMO Trust was, therefore, approximately €1,051.

152. Using the 75-85% range of likelihoods, the approximate value of each PMO share is between XAF 646,164 or €985 and XAF 714,660 or €1,088. The approximate value using 80% is XAF 680,587 or €1,037. When comparing the valuation of each share using the DCF methodology as applied by Mlle. Barchietto and using an 80% chance, or thereabouts, of the Concession being renewed, it is apparent that the total price received per share is at, or possibly a little above, the valuation derived from this evidence. (Using the total price of €1,051, this translates to a likelihood of between 81 and 82%.) For these reasons, the Jurats have not been persuaded that the Plaintiff has established that the PMO shares were sold at an undervalue.

153. Because the Jurats have found that the Plaintiff's case does not demonstrate the required loss or depreciation in value of the trust property, the Court dismisses the Plaintiff's action on this basis.

Alleged breaches

154. As a result of their findings that the Plaintiff has failed to demonstrate loss to the value of The PMO Trust, there is no strict requirement for the Court to proceed to consider the alleged breaches of trust advanced by the Plaintiff. However, the Court will briefly set out its findings in this regard as well.

155. It is simplest to take the Plaintiff's allegations of wilful breach of trust first. As the particulars pleaded at paragraph 43 of the final version of the Cause show, this allegation is predicated on the Defendant failing to pursue Sacinter in respect of the alleged loss to The PMO Trust. The Jurats are satisfied that the work undertaken on behalf of the Defendant was such that it simply did not know that the shares in PMO had been sold at an undervalue. Indeed, the conclusions reached within the Defendant, with the benefit of expert input and legal advice, was that there would probably be difficulties in seeking to prove that the shares had even been sold at an undervalue. The Jurats' findings about the loss alleged by the Plaintiff supports that conclusion. In those circumstances, the Jurats are satisfied that the Defendant's officers took proper steps to consider whether there was any merit in bringing proceedings against Sacinter and reached a conclusion open to it that there was not. Further, the Defendant offered to assign to the Plaintiff any rights it had to pursue Sacinter on terms that were, in the Jurats' opinion, reasonable terms to offer.

156. The Jurats accept that the Defendant was not obliged to take action against Sacinter but rather had to exercise its discretion as to whether to do so as a reasonable trustee would. The Jurats have noted that the other beneficiaries of The PMO Trust had indicated that they were content with the outcome. It was only the Plaintiff who was encouraging the Defendant to litigate. They have borne in mind that the financial position of Sacinter appears to be that it was without any real asset base. It had been created by M. Leveau as the vehicle for holding the shares in PMO on behalf of the trustee of The PMO Trust. It was not associated with SFS. Even if any litigation had been successful, there was no guarantee that any judgment would be capable of being enforced. In any event, although this appears to have been a clear breach of the Fiduciary Contract by Sacinter, as confirmed by the agreed statement on Swiss law (see Annex 2, para. 11), the Defendant had to bear in mind the usual risks associated with litigation.

157. These were the matters taken into account by the Defendant at its board meeting on 13 October 2010. The Jurats are satisfied, having regard to all the considerations taken into account by the Defendant, that the approach it took when resolving not to pursue Sacinter does not constitute a wilful breach of trust. In their view, to have done so would potentially have endangered the assets of The PMO Trust. This is far from being a deliberate breach of trust. The approach of the Defendant was not to take a decision deliberately contrary to the interests of the beneficiaries but to act in such a way that was consistent with its overall duty to the beneficiaries. In weighing up the pros and cons of taking action against Sacinter, there was no reckless indifference as to whether or not this was contrary to the interests of the beneficiaries. The Jurats do not find that, judged to an objective standard, the approach taken by the Defendant was so unreasonable that no professional trustee could have thought the decision taken was for the benefit of the beneficiaries as a whole.

158. Similar reasoning applies to the Defendant's decision not to pursue SFS. Any claim against SFS would have been brought for some form of tort. Just because the people involved at SFS played their parts in Sacinter does not mean that the apparent breach of contract by Sacinter selling the shares without real reference to the Defendant can somehow be attributed to SFS. In this regard, although SFS might have had some assets against which any judgment obtained could be enforced, the Jurats find that the likelihood of succeeding was significantly lower. When coupled with the willingness of the Defendant to assign such rights as it had to sue SFS to the Plaintiff on terms that were reasonable in the circumstances in which the parties found themselves, the Jurats are satisfied that the decisions taken on 13 October 2010 did not amount to a wilful breach of trust by the Defendant. Again, the Defendant undertook an appropriate balancing of the pros and cons of taking action.

159. The Plaintiff's alternative case in respect of the decisions not to take action against Sacinter and/or SFS is put in gross negligence. There is, therefore, a degree of overlap with the other allegations made against the Defendant concerning its breaches of duty. It is appropriate, at this stage, to make some general comments about the impression each witness gave to the Jurats before moving to make specific findings.

160. Mr Mauron admitted that his statement had been prepared with the assistance of lawyers. There was very little that he was able to say about what happened in relation to the sale of the shares in PMO. He was reasonably cautious about what he said and the Jurats have noted that he is no longer employed at SFS. Apart from confirming the evidence given on behalf of the Defendant and from the documents about the way the relationships between the Defendant, Sacinter and SFS worked, the Jurats did not derive much assistance from his evidence.

161. The Jurats formed the view that M. Le Monnier was uncomfortable giving his evidence. Because of the problems Serge Raffet experienced contacting the Plaintiff in September 2008, M. Le Monnier became the conduit for communications. But for that fact, he would have been unlikely to have been called to say anything in this case. Although he tried to clarify that the Plaintiff had not asked him to relay that any sale was being authorised, seeking to emphasise that it was only for negotiations, the remainder of the evidence points towards the Plaintiff having been content for Serge Raffet to strike a deal with which the latter was content. This is, of course, consistent with Serge Raffet having an interest in the shares held on trust of comparable size to that of the Plaintiff and having been much more intimately involved in PMO as Sacinter's representative on its board. The Jurats formed the view that what M. Le Monnier wrote in the facsimile sent was not just because Serge Raffet requested something written but also because it accurately reflected what the Plaintiff had said to him. As a loyal servant of Carlo Tassara and so of the Plaintiff, the Jurats are satisfied that M. Le Monnier would obey what the Plaintiff wanted and would not have been swayed into departing from his instructions by anything Serge Raffet said or requested. They considered that his demeanour when giving evidence reflected him stating what he remembered whilst also trying to lend support the Plaintiff's case. Again, the Jurats derived little assistance from anything M. Le Monnier said in oral evidence.

162. The Jurats regarded the Plaintiff as having a selective memory. When it suited him, he embellished events. He acknowledged, perhaps more reluctantly than he should have done,

that the facsimile sent by M. Le Monnier substantially reflected the instructions he had given when he spoke to him. The Jurats noted that the Plaintiff's initial concern was about the level of commission to be paid to Serge Raffet. The Plaintiff did not complain about the terms of the sale at the outset and gave directions for where his allocation of the proceeds (plus the most recent dividend) should be sent. It was only later on that, through Maître Gal, the possibility that the shares should have attracted a much higher price was raised. The Jurats believe that the Plaintiff was satisfied with the sale price in 2008 and perhaps was even surprised that Serge Raffet had managed to extract sale terms as good as he had from COMILOG. The Jurats formed the view that, in general terms, because he is a successful businessman, the Plaintiff was more likely than not to have adopted a realistic view and so would have been content with the value achieved at a time when financial markets were in meltdown. He knew the very generous dividend stream was on the verge of ending. The likelihood of ever securing payment of the debt of the State of Gabon was, at best, slim and more realistically would be non-existent. Quite what the future held was uncertain but, on whatever terms the Concession would be renewed, the investment made by the Plaintiff, including those elements gifted to him for services rendered, was reaching a natural end. Obtaining a capital amount through the share sale was, therefore, of tangible benefit to him and the other beneficiaries. Whilst the Jurats perceive that there might be more to what went on in 2008 than the Court has been told, and in particular find that only hearing Serge Raffet's version of events through documents he authored means that they have possibly been presented with an incomplete picture, they are broadly satisfied that the Plaintiff's sense of grievance arises with the benefit of hindsight because of how he feels others have let him down. The Jurats have, therefore, weighed carefully what the Plaintiff has had to say about the time when Serge Raffet was negotiating and in the immediate aftermath of the share sale.

163. The evidence on behalf of the Defendant came from Mr Ward. In general, the Jurats found him to be a convincing witness. He had the benefit of the Defendant's paperwork showing what had been done and when, even though he was, it seems, less involved prior to the Plaintiff disputing the outcome than some of his colleagues from whom the Court did not hear. For example, Sarah Parkes has been shown from the documentation produced to have been involved throughout the Defendant's trusteeship and had previously been involved with the original trusteeship. The Jurats formed the view that Mr Ward might have explained more clearly the connection between the Defendant and the original trustee and how Ms Parkes was able to rely on her previous knowledge, but that factor does not affect their overall assessment of his evidence being reliable.

164. When considering the Plaintiff's contention that the Defendant, on assuming the trusteeship of The PMO Trust, was under a duty to acquaint itself with the attributes of the assets and the provisions of the Fiduciary Contract it inherited, the Jurats regard it as significant that, although various shortcomings with the previous trusteeships were identified, the basic arrangements were those with which Ms Parkes was already familiar. Her knowledge could, therefore, be imputed to the Defendant. Consequently, when the Defendant commenced its trusteeship, it already had a good idea about what the trust assets were and how they were held.

165. It is clear to the Jurats that The PMO Trust had been structured in such a way that secrecy was paramount. It is all too easy to look back at events in the 1990s with the benefit of today's knowledge about the importance of regulatory regimes as we now know them. The PMO Trust was the brainchild of M. Leveau. Those involved understood that the identities of the beneficiaries should not be known to each other. It is only much later that the Plaintiff has been able to identify all those involved and to comment on the roles they have played. It is also clear to the Jurats that the Plaintiff trusted M. Leveau. They were colleagues and friends. Although the Plaintiff's feelings towards Serge Raffet are different and his feelings towards M. Leveau prior to the latter's death appeared to have cooled, they are satisfied that the Plaintiff had expressed no concerns about how The PMO Trust was being operated before the sale of the PMO shares by Sacinter or even in the immediate aftermath. For example, the Plaintiff did not query how the shares were held and why the payments came directly from SFS rather than the Defendant. He did not ask the Defendant, as he could have done, whether

there was any valuation of the assets of The PMO Trust. Whilst he was at pains during his evidence to say that certain matters were decisions for the Defendant, as trustee, to take and not for him, it seems that the Plaintiff was quite prepared to let SFS be the principle point of contact for him rather than the Defendant. He had an existing and ongoing relationship with Mr Schwab. It was to Mr Schwab that he turned to get clarification after the sale. The Plaintiff did not have direct contact with the Defendant at that time. It was as if the Plaintiff accepted that the role of SFS was of more importance in the administration of The PMO Trust than the Defendant.

166. Having looked at the Fiduciary Contract and considered the agreed statement on Swiss law, the Jurats are satisfied that there was nothing so exceptional about its terms as to require the Defendant to take specific advice about it. The assets of The PMO Trust were straightforward. They comprised a shareholding in PMO plus any retained balance of dividend income received and not distributed. The arrangements for holding those shares were through Sacinter under the Fiduciary Contract. Looking at the hands-off approach the Defendant took to how day-to-day administration was performed by Sacinter and SFS, the Jurats are unimpressed with the way in which paperwork was not maintained as assiduously as it might have been but, whenever something needed to be done, eventually the requisite decisions were recorded by SFS and by the Defendant. There were, in the light of the particular trust assets, sufficiently regular reviews for the Defendant to have complied with its duty to preserve and enhance the value of that trust property. The control it was able to exercise over the shares also met its obligations. The fact that Sacinter acted in apparent contravention of the Fiduciary Contract does not automatically mean that the assets were not under the Defendant's control. The Jurats are satisfied that the Fiduciary Contract gave the Defendant effective control indirectly over the trust assets. Further, having regard to the agreed statement on Swiss law, the Jurats are satisfied that the Defendant did not need to instruct Sacinter, and so Serge Raffet as its representative, how to vote on matters concerning PMO. The arrangements in place were clearly working to the satisfaction of the beneficiaries, including the Plaintiff. Each was receiving distributions from The PMO Trust of substantial amounts. The returns on their "investments" in PMO were being channelled to them indirectly through The PMO Trust in what appears to have been a deliberately private manner. The Jurats accept that, under the arrangements in place for such a relatively private trust, there was no obligation on the Defendant to involve itself further than it did with the custodian.

167. The relationship between the Plaintiff and M. Leveau is, in this regard, also relevant. Because the Plaintiff trusted M. Leveau, in the absence of any evidence of any discussions about the trust arrangements, the Jurats infer that the Plaintiff was content with Sacinter having nominated Serge Raffet to sit on PMO's board. The spread of beneficial interests in the PMO shares held in The PMO Trust shows that it was Serge Raffet and the Plaintiff who were each interested very approximately in one-third of those shares. As such, they were the two beneficiaries with the most to gain and the most to lose. It is, therefore, implicit that there was general happiness on the part of the Plaintiff with how things had gone prior to 2008. He was not asking the Defendant to take any positive steps to give instructions to Sacinter about how to vote the trust's shares. Because of his then friendship with M. Leveau and his knowledge that Serge Raffet worked with and for M. Leveau as the latter's right-hand man, the Plaintiff's subsequent concerns about how the Defendant had failed to do what he now says it should have done ring hollow to the Jurats.

168. When the Defendant became trustee of The PMO Trust it took steps to put in place a better working regime with SFS than had existed previously. In doing so, it was taking responsibility to act as a reasonable and prudent trustee would. It prepared historic accounts and produced annual accounts thereafter. In the particular circumstances of the assets held in this trust, the Jurats are satisfied that the valuation approach taken by the Defendant was appropriate and there was no evidence that there was any request made for a valuation to be undertaken. It is apparent to the Jurats that the beneficiaries were primarily interested in the income generated by the PMO shares and less interested in any possible capital growth. The pattern of additions to the trust property shows that more and more shares in PMO were being placed into the trust from when it was originally settled, until this plateaued at 11,696. Some

of those shares were then transferred from The PMO Trust into direct ownership. However, the overall picture is of an arrangement that left each beneficiary with a notional number of shares to treat as if they were owned directly and which could be transacted by them between themselves, and even bringing in third parties, as the particular beneficiary wished. Accordingly, the Jurats are satisfied that there was no obligation on the Defendant to expend trust monies to obtain any formal valuation of the PMO shares, whether on taking on the trusteeship or subsequently. Further, ascertaining such a valuation does not appear to have been a straightforward exercise. The PMO annual reports produced to the Court show that there were shifting prices for the manganese being transported and the factor applied varied from year to year to reflect this. The Jurats are satisfied that recording the shares in the balance sheet with their value at cost was the act of a reasonable and prudent trustee.

169. As already indicated, the Jurats do not find that the Defendant failed adequately to monitor Sacinter. They recognise that there have been shortcomings in how monies were being distributed from time to time. Because of the laxity prior to the Defendant assuming the trusteeship, it seems that certain bad habits occasionally continued. When matters were reviewed periodically, discoveries were made of distributions that had not been decided by the Defendant and where the consent of SFS as Protector had not been obtained. However, the Jurats note that these were reasonably isolated incidents. They were contrary to the instructions given to SFS about how to make recommendations and how to provide the Defendant with Protector consent, as required under The PMO Trust. The Jurats do not regard these incidents as supporting the Plaintiff's contention that the degree of oversight amounted to gross negligence, whether in isolation or combined with the further allegation that cumulatively the Defendant's approach left Sacinter in the position where it considered that it could dispose of the PMO shares without reference to the Defendant. Indeed, the Jurats do not regard what the Defendant did as simple negligence but, even if it were, it is not at the level of being a serious or flagrant degree or negligence, as required for gross negligence.

170. In summary, therefore, even if the Jurats had not preferred Mlle. Barchietto's evidence dealing with the question of whether the PMO shares were sold at an undervalue, they would not have found that the Plaintiff had established that the Defendant had acted with gross negligence or in wilful breach of trust. To the extent that the Defendant has actually simply been negligent, clause 10 of the trust instrument relieves the Defendant from any liability.

171. Given these findings, the Jurats have not proceeded to consider whether or not the Plaintiff could have established that any breaches found caused the loss claimed to The PMO Trust.

Concurrence

172. The final matter to address is the Defendant's argument that the Court should in any event dismiss the Plaintiff's action because he concurred in the sale of the PMO shares. In doing so, Advocate Kapp has referred to what Wilberforce J held in *Re Pauling's Settlement Trusts* [1961] 3 All ER 713 (at page 730F):

> "*... 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 round 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 benefited by the breach of trust.*"

173. Advocate Robilliard has placed this into the domestic statutory context. Section 40 of the 2007 Law provides that:

> "*(1) A beneficiary may –*
>
> *(a) relieve a trustee of liability to him for any breach of trust,*

> *(b) indemnify a trustee against liability for any breach of trust.*
>
> *(2) Subsection (1) does not apply if the beneficiary –*
>
> *(a) is a minor or a person under legal disability,*
>
> *(b) does not have a full knowledge of all material facts, or*
>
> *(c) is improperly induced by the trustee to act under subsection (1).*"

The Jurats accept that, unlike the other beneficiaries of The PMO Trust, each of whom has provided his or her written agreement to the share sale, the Plaintiff did not do so and has refused to do so. Accordingly, the Defendant cannot rely directly on section 40 because the Plaintiff has not relieved the Defendant of liability for any breach of trust.

174. Advocate Robilliard has placed further reliance on how Lewin deals with this issue, both in general (at para. 39-106):

> "*It is clearly established that where a fiduciary, who is of full age and capacity, freely consents to a breach of trust or afterwards waives the right to sue the trustee, he may not later sue for the breach. There are three principal circumstances when such conduct will found a defence to a claim for breach of trust. First, where the beneficiary participates in the breach, or gives consent before or at the time when it takes place, he is said to concur in it. Secondly, a beneficiary may formally release his claim. Thirdly, a beneficiary who does not concur at the time of the breach may later acquiesce in it such as to bar a future claim. It has been said that such acquiescence is equivalent to a release, and that it founds an estoppel.*"

and specifically (at para. 39-107):

> "*If a beneficiary, not being subject to any legal incapacity such as minority, concurs in a breach of trust, he is forever estopped from proceeding against the trustee for the consequences of the act, whether or not he knew that the act constituted a breach of trust, and whether or not he derived benefit from the breach. … The court considers all the circumstances in order to determine whether it is fair and equitable to allow the beneficiary to turn around and sue the trustee, a key consideration being whether he fully understood what he was concurring in.*"

The Deputy Bailiff directed the Jurats that they were to consider all the facts of the case to decide whether they regarded it as fair and equitable or unconscionable for the Court to entertain the Plaintiff's claim for breach of trust.

175. If the Plaintiff had satisfied the Jurats that the Defendant had been grossly negligent or had acted in wilful breach of trust, and that this had caused The PMO Trust to sustain loss because the share sale had been at an undervalue, the Jurats would also have been minded to conclude that the action should be dismissed because of the Plaintiff's concurrence. Whilst the Jurats accept that the message relayed from the Plaintiff to Serge Raffet by M. Le Monnier did not unequivocally state that the Plaintiff agreed to the selling of the shares by Sacinter, it is implicit that the Plaintiff was not objecting to Sacinter acting without referring the matter to the Defendant. The Plaintiff did not, for example, make any enquiry as to whether the Defendant, as trustee, had a view on the matter. In effect, the Defendant reposed his trust in Serge Raffet to achieve an outcome with which the latter was content. The Jurats do not consider it necessary for the Defendant to establish that there was express agreement from the Plaintiff for the shares to be sold at the price achieved.

176. Even if that level of concurrence in the actual sale by Sacinter has not been established, the Jurats note that the Plaintiff, as a man of business, accepted the sale at the price of XAF 550,000 per share because he indicated an account to which his notional share of the proceeds should be remitted. What he objected to at the time was the retention of 6% as commission

payable to Serge Raffet. The Jurats formed the impression that the Plaintiff regards Serge Raffet as having been acting on behalf of M. Leveau, whose idea it was to sell the PMO shares and that the Plaintiff's principal concern in late 2008 was that Serge Raffet had managed to benefit personally to a significant degree through receiving 6% when a lower commission, should a commission be payable, was all that should have been deducted from his share of the sale proceeds. From his discussions with Serge Raffet and with Mr Schwab, the Plaintiff knew enough about the events preceding the sale. Yet he did not complain that the shares were sold at an undervalue until well into 2009. In those circumstances, the Jurats are satisfied that the Plaintiff acquiesced in the sale at a time when he was adequately informed and that it would, therefore, be unconscionable to permit him to change his mind in the manner he has and sue the Defendant as trustee, especially where he does not really blame the trustee for the outcome.

177. Had it been necessary to consider the issue, the Plaintiff's concurrence would, therefore, have been found by the Jurats and the Plaintiff's claim would still have been dismissed.

Conclusion

178. For the reasons given, the Court dismisses the Plaintiff's action against the Defendant. The primary reason for doing so is that the Plaintiff has failed to establish that the PMO shares were sold at an undervalue on 24 September 2008. However, in any event, the Jurats would not have found any gross negligence or wilful breach of trust or, in the further alternative, would have found that the Plaintiff had concurred in any such breach of trust and so should not subsequently be permitted to sue the Defendant as trustee for that breach of trust.

179. The Deputy Bailiff invites the parties to attempt to agree the appropriate costs order, which in principle would appear to be the usual one that costs follow the event. In default of agreement, the Deputy Bailiff invites the parties to list the matter at a mutually convenient Interlocutory Court so that representations about costs can be heard.

Postscript

180. This judgment has taken longer to prepare than the Court would have liked, primarily due to the Deputy Bailiff having other matters to deal with in the meantime, for which he apologies to the parties. During the course of preparing this judgment, the Court was saddened to learn of the death of Advocate Robilliard. Fitting tributes have been paid to Advocate Robilliard elsewhere, but the Court wishes to put on record its thanks to him for the manner in which he presented the Plaintiff's case. Advocate Robilliard was an acknowledged expert in the field of trusts law. He articulated the Plaintiff's legal case clearly. The complexities of the financial side of the case were something with which everyone struggled. Switching between a number of different currencies and having experts' reports dealing with the entirety of Sacinter's shareholding in PMO rather than just the shares held under the Fiduciary Contract were only being ironed out towards the end of the hearing. The fact that the Plaintiff's case has been dismissed turns on the quality of the valuation evidence and the Jurats' findings thereon and is no reflection at all on Advocate Robilliard's conduct of the case, which was among the last in which he appeared.

ANNEX 1

AGREED FACTS

1. The PMO Trust ("the Trust") was constituted by declaration of trust made on 29 August 1989 by (1) Goethe Trustees Limited ("the Original Trustee") and (2) Société Fiduciaire Suisse ("the Protector").

2. On 30 May 1997 the Original Trustee retired as trustee of the Trust in favour of Channel Corporate Services Limited that in turn on 16 November 1999 retired as trustee of the Trust in favour of the Defendant that has been trustee ever since.

3. The Defendant is a professional trustee company and charges professional fees for its services. It has charged fees in connection with its trusteeship of the Trust.

4. On 1 December 1999 the Defendant added the Plaintiff along with thirteen others to the class of Beneficiaries of the Trust and he has remained as such ever since.

5. Since the creation of the Trust the Protector has remained continuously in office.

6. Port Mineralier d'Owendo ("PMO") is a company constituted under the law of Gabon.

7. Shares in PMO were settled onto the Trust at various times so that by November 1999 upon the Defendant becoming trustee of the Trust, the Trust Fund comprised 11,696 shares each of nominal value of CFCA 200,000.

8. The PMO shares were from the outset and at all material times held on behalf of the trustees of the Trust under "convention fiduciaire" (fiduciary contracts). At first the shares were held on behalf of the Original Trustee by Port Mineralier Owendo SA (Lausanne) ("PMO Lausanne"). On 12 September 1995 by a "convention de transfer de rapports fiduciaires" between (1) PMO Lausanne (2) Sacinter SA ("Sacinter") and (3) the Original Trustee the PMO shares were transferred to Sacinter. Sacinter is a Swiss company administered and controlled by the Protector and whose officers have been provided by the Protector at least during the period 16 November 1999 until after 1 November 2008.

9. Sacinter held the shares as "la mandataire" (the "Nominee") in accordance with a "convention fiduciaire" dated 14 May 1997 made between (1) the Original Trustee and (2) Sacinter ("the Fiduciary Contract").

10. Although there was no express agreement amending the Fiduciary Contract it is agreed that the Defendant succeeded the Original Trustee as the "la mandante" (the "Trustee") under the Fiduciary Contract.

11. Companie Minière de l'Ogooue ("Comilog") is a company incorporated in Gabon engaged in manganese mining at Moando and which utilises the port at Owendo. Prior to 24 September 2008 Comilog held 8,290 shares in PMO equivalent to 36.84% of the issued share capital in PMO.

12. A contract made on 9 December 1986 between (1) the State of Gabon; and (2) COMILOG ("the Concession") provided for the financing, construction and exploitation of an ore tanker port at Owendo.

    PMO was the investor referred to in the Concession. The Concession was due to expire on 31 December 2009. The Concession did not contain any express terms for the renewal thereof.

13. The State of Gabon failed to pay its dues under the Concession owed to PMO from 1 December 2003.

14. On 27 June 1996, the Plaintiff signed a letter in which he declared that at that date he was a beneficiary of 3,582 shares in PMO held in the PMO Trust.

15. Without the knowledge or consent of the Defendant during about July 2008 Serge Raffet ("Mr Raffet") who is also a beneficiary of the Trust had entered into negotiations with the Director General of Comilog in respect of a proposed sale by Sacinter of its shares in PMO (including the shares held by Sacinter for the Defendant).

16. Mr Raffet was the delegated member of the board of directors of Sacinter on the board of directors of PMO, a position which he already held prior to the Defendant becoming trustee of the Trust.

17. Mr Raffet was on 17 September 2008 granted a power of attorney by Sacinter, without the knowledge or consent of the Defendant, to negotiate and conclude the sale of all of the shares that Sacinter held in PMO.

18. On or about September 2008 Mr Schwab, a director of the Protector, telephoned the Defendant and informed it that negotiations were under way in respect of the shares to an unnamed third party. The Defendant informed him that they would require the Protector's consent to the sale plus a letter from every beneficiary agreeing to the sale. The Defendant's note of the telephone call ended "GML to await further instructions".

19. By a fax dated 24 September 2008 sent by the Plaintiff's secretary on the Plaintiff's instruction, the Plaintiff advised Mr Raffet "*je vous confirme qu'il vous laisse le soin de négocier la transaction concernant le port d'OWENDO, et ce dans les meilleures conditions possibles. Vous voudrez bien m'en tenir informé.*" (I confirm that I leave it to you to negotiate the transaction concerning the port at Owendo on the best possible terms. I would be grateful if you could keep me informed.)

20. Mr Raffet concluded an agreement with Comilog on behalf of Sacinter on 24 September 2008 ("the Sale Contract") for the sale of all the shares held by Sacinter for XAF 7,815,500,000 having the euro equivalent of €11,914,552.94 of which €9,597,042.43 was in respect of the Trusts PMO shares ("the Sale Proceeds").

21. In the second part of October 2008 the Plaintiff was informed by Mr Schwab on behalf of the Protector of the sale. The Plaintiff was informed that his "share" of the Sale Proceeds was €4,711,894.75 and instructed its transfer to a designated account on 24 October 2008. On receipt in his account of his "share" of the Sale Proceeds on or about 28 October 2008 he noticed that only €4,531,692.38 had been transferred. The Plaintiff was informed that the difference between his "share" of the Sale Proceeds and what was actually transferred was due to a 6% commission that Mr Raffet proposed to retain. The Plaintiff objected to this and as a result of exchanges with Mr Raffet decided to investigate the circumstances surrounding the sale. The Plaintiff appointed a Swiss Advocate, Maître Gal, to carry out an investigation.

22. Following enquiries addressed to the Protector Maître Gal corresponded with the Defendant seeking information about the Trust and in particular relating to the sale of the PMO shares.

23. The Defendant appointed Carey Olsen to respond to Maître Gal and to investigate and advise it in respect of the unauthorised sale of the PMO Shares. The Defendant also obtained Swiss law advice and a valuation of the PMO shares from Baker Tilly Spiess.

24. On 23 July 2010 in the "Cour civile du Tribunal cantonal vaudois" the Plaintiff issued proceedings against the Protector and Bernard Schwab, a director of the Protector, in connection with Sacinter's sale of the PMO shares to Comilog on 24 September 2008. He seeks damages in the sum of CHF14,101,480 in respect of his "share" of the Trust fund which

is sought against the defendants to that action, jointly and severally. The case has not yet concluded.

25. In early May 2011 Maître Gal on behalf of the Plaintiff asked Carey Olsen whether the Defendant would cede its rights to the Plaintiff against the Protector and Sacinter, in respect of the sale of the PMO shares.

26. Carey Olsen replied by letter dated 13 May 2011 that stated inter alia that the Defendant would cede those rights to the Plaintiff on a number of conditions including:

    (i) if the Plaintiff would pursue them at his own cost;

    (ii) the Plaintiff and all of the other Beneficiaries would agree that the Defendant should not take any further action against the Defendant [*sic - Protector?*] in connection with the sale of the PMO shares;

    (iii) the Trust would be terminated and documentation similar to that and indemnities be signed by all the Beneficiaries, including the Plaintiff;

    (iv) that only the Plaintiff's pro rata share of any claim against the Protector and Sacinter would be ceded to him unless all of the other Beneficiaries agreed to cede all claims to the Plaintiff, in which case there might be further conditions.

27. By an agreement between the State of Gabon and PMO dated 11 October 2010, Gabon's debt of ZAF18,695,836,803 was extinguished and the Concession was renewed to 31 December 2032.

28. Sacinter claimed that because of the renewal of the Concession in exchange for the cancellation of the State of Gabon's debt further payment was due to it under the Sale Contract. This led to an arbitration which concluded on 20 June 2013 and Sacinter was awarded CHF4,500,000. The Defendant has stated that it has received from Sacinter an amount of CHF3,076,805.45 being the Trustee's share of the award after the deduction of fees costs and expenses relating to the arbitration.

29. The Defendant has not instituted any proceedings against Sacinter or the Protector to date. the Defendant has until at least 23 September 2018 to bring an action against Sacinter under the Fiduciary Contract.

Court's notes

Whilst the 29 paragraphs set out above were stated to be agreed by the parties, the Court has noted a number of errors:

In paragraph 4, the number of beneficiaries appointed on 1 December 1999 was 12 and not 14.

In paragraph 21, the so-called share of the Plaintiff includes a dividend payment and does not solely reflect the apportionment of the sale proceeds of the shares held by Sacinter by reference to his interest in 3,582 shares. The actual share of the sale proceeds was only €3,003,372.88.

In paragraph 26(ii), the Court believes that the reference to taking further action against "the Defendant" should be to taking further action against "the Protector".

Finally, although the Gabonese currency abbreviations in paragraphs 7, 20 and 27 are all different, they are really all the same denomination. In the judgment, the Court has used "XAF" throughout. Further, when carrying out conversions between the Gabonese currency and the other currencies mentioned, no attempt has been made to use any fluctuating conversion rates depending on the dates involved. Instead, if only for convenience, the Court has adopted single conversion rates throughout based on the figures used by the parties when converting matters or as set out in the Final Award of the Court of Arbitration. This has resulted in the figures used being approximate only.

ANNEX 2

AGREED STATEMENT ON SWISS LAW

The Plaintiff and the Defendant have agreed the following statement on matters of Swiss law relating to the fiduciary contract entered into between Goethe Trustees Limited (the "**Trustee**") and Sacinter S.A. (The "**Nominee**") dated 14 May 1997 (the "**Fiduciary Contract**") under which the Nominee held title to the shares in Port Mineralier D'Owendo ("**PMO Gabon**").

1. Under Swiss law the Nominee is, as regards third parties, the full owner of the shares in PMO Gabon held under the terms of the Fiduciary Contract, but vis à vis the Trustee he cannot sell them freely without the authority of the Trustee.

2. Article 3 sets out the powers given to the Nominee under the Fiduciary Contract. It provides that (i) the Nominee undertakes to exercise the "*patrimonial*" rights vested in the Nominee as registered holder of the shares in PMO Gabon (right of control, right to dividend, right to take part in winding up, preferential subscription, right to new shares) in accordance with the instructions of the Trustee; and (ii) the Nominee is free (subject to 7 below) to exercise the "*social*" rights attached to the shares in PMO Gabon (in particular the right to vote at general meetings).

3. "*Social rights*" are rights allowing a shareholder to take part in the functioning of the company's constitutional organs, particularly the exercise of its right to vote at the general meeting of the company. "*Patrimonial*" rights include the value of the shares and the income (dividends), as well as any rights which can be expressed in monetary terms.

4. Notwithstanding the grant of the right to the Nominee to exercise the social rights attached to the shares in PMO freely, under Swiss law the Nominee remains under an obligation to return the benefit obtained as a result of the social rights to the Trustee.

5. Article 4 provides that there is an obligation on the Nominee to comply with the instructions of the Trustee and the Nominee is liable for actions taken without or contrary to the instructions of the Trustee, except where the Trustee's instructions are illegal or immoral.

6. The Trustee is required to give instructions to the Nominee if requested and to do so in good time. If the Trustee fails to give the Nominee instructions or does not give them timeously, the Nominee is entitled to act in accordance with its own conscience and in good faith. This arises by virtue of the rule under Swiss law that a Nominee has a duty to safeguard the interests of the Trustee and to take such action as it considers to be most beneficial to the Trustee's interest.

7. Notwithstanding that under Article 3 the Nominee is free to exercise the "social" rights, the Trustee would have the right to give instructions to the Nominee on all matters and not just those relating to the patrimonial rights.

8. Article 5 provides that the Trustee may ask the Nominee to provide it with a certificate relating to the investment of the shares held by the Nominee. This places an obligation on the Nominee to confirm in writing that the Trustee is the beneficial owner of the shares and that it is holding the shares on behalf of the Trustee in its capacity as Nominee.

9. Article 7 provides that the Trustee has the right at any time to request that the Nominee transfers the shares and any other assets that the Nominee may have received to the Trustee or to a third party as instructed by the Trustee. Article 7 is a clause typical of a fiduciary contract governed by Swiss law. This Article contractually prohibits the Nominee from transferring the shares to persons other than the Trustee.

10. If the Nominee transfers the Shares held under the Fiduciary Contract in accordance with the instructions of the Trustee, it is released from its obligations und the Fiduciary Contract and is entitled to a discharge.

11. Any unauthorised sale of the shares by the Nominee is valid as regards a third party purchaser, but would constitute a breach of the Fiduciary Contract by the Nominee. The Nominee is liable for any loss which such sale may cause the Trustee.

12. The Nominee is entitled to terminate the Fiduciary Contract unilaterally by returning the shares and any benefits to the Trustee or any person designated by the Trustee.

13. Article 11 is a governing law clause within the meaning of Article 116 of the Swiss Federal Code of Private International Law of 18 December 1987 which provides that Swiss law is the applicable law of the Fiduciary Contract.