

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

BEFORE

**The Rt Hon Sir John Chadwick, Justice of Appeal
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal**

ON APPEAL FROM THE GRAND COURT

FSD 0061 of 2009

(The Hon Justice Angus Foster)

BETWEEN

CICA 21 of 2012

AUTUMN HOLDINGS ASSET INC

Fifth Defendant/Appellant

- and -

RENOVA RESOURCES PRIVATE EQUITY LIMITED

(suing as a shareholder of the Second Defendant/Respondent, Pallinghurst (Cayman)

General Partner LP (GP) Limited)

Plaintiff/Respondent

PALLINGHURST (CAYMAN) GENERAL PARTNER LP (GP) LIMITED

PALLINGHURST (CAYMAN) GENERAL PARTNER LP

PALLINGHURST RESOURCES MANAGEMENT LP

Second, Third and Fourth Defendants/Respondents

AND BETWEEN

CICA 22 of 2012

RENOVA RESOURCES PRIVATE EQUITY LIMITED

**(derivatively on behalf of Pallinghurst (Cayman) General Partner LP (GP) Limited,
Pallinghurst (Cayman) General Partner LP and Pallinghurst Resources Management LP)**

Plaintiff/Appellant

VIKTOR VEKSELBERG

VLADIMIR VICTOROVITCH KUZNETSOV

RENOVA HOLDING LIMITED

RENOVA RESOURCES PRIVATE EQUITY LIMITED

Defendants to Counterclaim/Appellants

- and -

BRIAN PATRICK GILBERTSON

AUTUMN HOLDINGS ASSET INC

First and Fifth Defendants/

Plaintiffs to Counterclaim/Respondents

**Mr Michael Bloch QC with Mr David Butler of Appleby (Cayman) Ltd for Autumn Holdings
Asset Inc (Appellant in Appeal No 21 of 2012) and Brian Patrick Gilbertson and Autumn
Holdings Asset Inc (Respondents to Appeal No 22 of 2012)**

**Mr Richard Millett QC with Mr James Eldridge of Maples and Calder for Renova Resources
Private Equity Limited and the other Respondents to Appeal No 21 of 2012 and for Renova
Resources Private Equity Limited and the other Appellants in Appeal No 22 of 2012**

Hearing: 18, 19, 22 and 23 July 2013

Judgment: 12 September 2017

JUDGMENT

Sir John Chadwick, Justice of Appeal:

1. This appeal and cross-appeal are from an order made on 6 November 2012 by Justice Foster in proceedings brought in the Financial Services Division of the Grand Court by Renova Resources Private Equity Limited (“Renova”) against Brian Patrick Gilbertson (“Mr Gilbertson”), Autumn Holdings Asset Inc (“Autumn”) and others.
2. Renova is (or was at the material time) a company incorporated in the Bahamas. It is a wholly owned subsidiary of Renova Holding Limited (“Renova Holding”), also a company incorporated in the Bahamas. Renova and Renova Holding are members of the Renova group of companies, described by the judge as “a very large Russian owned conglomerate, consisting of some one hundred or so corporate and other entities, incorporated or established in various jurisdictions” and as having “a range of major commercial business interests, particularly, although not exclusively, in oil and metals in Russia and elsewhere”. At the relevant time the chairman and principal beneficial owner of the Renova group was Mr Viktor Vekselberg, whom the judge described as “a well-known, very successful and influential Russian billionaire businessman, based in Moscow”. The overall management of the Renova group was carried on from Zurich through a Swiss company, Renova Management AG (“Renova Management”). The Chief Investment Officer of the Renova group was Mr Vladimir Kuznetsov, a Russian national based in Zurich. Mr Vekselberg, Mr Kuznetsov and Renova Holding were, with Renova, defendants to the counterclaim in the proceedings.
3. The judge explained that one of Mr Vekselberg’s major interests during the relevant period, held through the Renova group, was a substantial share in a large Russian Aluminium producing company, Siberian Urals Aluminium Company (to which the judge referred as “SUAL”). At the relevant time Mr Vekselberg was the chairman of SUAL. Mr Gilbertson was Chief Executive Officer of SUAL between 2004 and 2007. The judge went on to say this (at paragraphs 3.1 and 3.2 of his judgment):

“3.1 During the later part of 2004 and 2005 Mr. Gilbertson discussed with Mr. Vekselberg a proposal by Mr. Gilbertson to set up a private equity fund, which Mr. Gilbertson would establish and manage and which would be financed by Renova, with the profits effectively to be shared equally between them. The fund was to invest in assets with potential in the mining sector, and the fund by Mr. Gilbertson was to have responsibility for sourcing and proposing opportunities for investment by the fund. This proposal developed into what was in effect a joint venture in which, as Mr. Vekselberg described it, he and Mr. Gilbertson would be partners.”

3.2 After a lengthy period of negotiation the terms of the arrangement were set out in a letter from Renova Holding to Mr. Gilbertson known as the Letter Agreement. It was signed by Renova Holding on 20th January 2006 and by Mr. Gilbertson on 24th January 2006, although the letter itself was dated 24th November 2005. . . .

3.3. . . . The Letter Agreement then defined “*Investment Fund*” as an investment fund in a jurisdiction and legal form agreed between Mr. Gilbertson and Renova Holding. The “*Fund Management Vehicle*” was to be the vehicle charged with establishing, marketing and managing the Investment Fund and the “*Initial Capital*” meant a founding capital of US\$4m in cash at the establishment of the Fund Management Vehicle. The “*Investment Committee*” meant a committee comprising Mr. Gilbertson or his nominated representative on the one hand and the CEO of Renova Management or its nominated representative on the other hand. In the event the Investment Committee comprised Mr. Gilbertson and Mr. Kuznetsov. . . .”

4. The judge explained in his judgment that the structure established pursuant to the Letter Agreement comprised three Cayman Islands entities: Pallinghurst Resources Management LP (“the Master Fund”), a Cayman Islands exempted limited partnership established on 19 May 2006; Pallinghurst (Cayman) General Partner LP (“GPLP”), a Cayman Islands exempted limited partnership established on 19 March 2006; and Pallinghurst (Cayman) General Partner LP (GP) Limited (“the Company”), a company incorporated in the Cayman Islands on 15 March 2006. The Company was the general partner of GPLP; and GPLP was the general partner of the Master Fund. Together the three entities were known as “the Pallinghurst Structure”.
5. Renova is (or was at the material time) the owner of 50% of the issued shares in the Company. The other 50% of the issued shares in the Company were held by Fairbairn Trust Limited (“Fairbairn”), a Jersey based trust company, as trustee of the Brian Patrick Gilbertson Settlement (“the BPG Settlement”), a settlement established by Mr Gilbertson. At the material time the two directors of the Company were Mr Gilbertson and Mr Kuznetsov. These proceedings were brought by Renova as a shareholder of the Company; and so are, in form, a derivative action. The Company, GPLP and the Master Fund were joined as co-defendants (with Mr Gilbertson and Autumn). The judge referred, in his judgment, to Renova, the Company, GPLP and the Master Fund (collectively) as “the Renova Parties” and to Mr Gilbertson and Autumn (collectively) as “the Gilbertson Parties”: it will be convenient if I adopt those descriptions in this judgment.
6. The background against which these proceedings were brought was explained by the judge at paragraphs 1 and 5.1 of his judgment:

“1. This case concerns the well-known Fabergé brand, renowned for high quality jewellery and originally for the famous Fabergé jewel encrusted eggs made in Imperial Russia. The brand name and business have changed hands since then on several occasions and in 1989 the brand and business were acquired by the large English company, Unilever Plc. The brand and business were then sold by Unilever Plc in early January 2007 to a consortium of investors, which included indirectly and which was arranged and set up by Mr Brian Gilbertson. He is the principal beneficial owner and controller of Pallinghurst Resources Limited, an English company which is now the largest investor in Fabergé Limited, the owner, developer and manager of the Fabergé brand and business. . . .”

“5.1 Project Egg was the name given to the project for the acquisition of the Fabergé brand and business from the then owner, Unilever Plc. The evidence of Mr. Gilbertson, which was not disputed in this respect, was that from about 2002, he had identified the Fabergé brand as an asset and business which was not then being exploited to its full potential and which he thought would make a good investment for profitable development and exploitation. Although the Fabergé brand was not obviously an investment project “in the metal and mining industry” as contemplated by the Letter Agreement, Mr. Gilbertson, after meeting Mr. Vekselberg, correctly thought it would be of considerable interest to him. Mr. Vekselberg was a collector of Fabergé items and had recently acquired a very significant and expensive collection of imperial Fabergé eggs, which had been very well received in Russia. He was very interested in Fabergé and its Russian heritage. Accordingly, Mr. Vekselberg was enthusiastic when Mr. Gilbertson, early in his proposals with regard to a private equity fund, suggested the Fabergé brand and business as a potential investment for the private equity fund which subsequently became the Master Fund within the Pallinghurst Structure. From the start, therefore, Project Egg was one of a number of investment opportunities sourced and put forward by Mr. Gilbertson as potential Investment Projects.”

7. As I have said, the defendants to Renova’s claim in these proceedings included Mr Gilbertson and Autumn. Autumn, a company incorporated in the British Virgin Islands, was owned by Fairbairn, the trustee of the BPG Settlement (and other Gilbertson family trusts). It was a member of the “consortium of investors” (“the Consortium”), to which the judge made reference in paragraph 1 of his judgment (in the passage which I have set out). Other members of the Consortium were Dr Milan Jelinek, an acquaintance of Mr Gilbertson, and K-M Investment Corporation (“K-MIC”), the holding company of American Metals and Coal International (“AMCI”), a large coal marketing business owned jointly by Mr Hans Mende (known to Mr Gilbertson through their mutual acquaintance, Dr Jellinek) and Mr Fritz Kundrun. Dr Jellinek, K-MIC, Mr Mende and Mr Kundrun are not parties to the proceedings.
8. The Fabergé brand and business (“the Fabergé Rights”) were acquired from Unilever Plc (“Unilever”) by Project Egg Limited (“PEL”), a Cayman Islands company incorporated for that purpose by Mr Gilbertson on 1 December 2006, under a sale and purchase agreement (“the SPA”) signed on 22 December 2006. The acquisition price was US\$38

million. The acquisition was completed on 3 January 2007 with funds provided by way of loan by Autumn, Dr Jellinek and K-MIC. On the same day, 100 shares were issued by PEL: 25 shares to each of Autumn and Dr Jellinek and 50 shares to K-MIC. In March 2007 PEL changed its name to Fabergé Limited.

9. The effect of the acquisition of the Fabergé Rights by PEL and the issue by PEL of shares to Autumn, Dr Jellinek and K-MIC - steps which, it is said, were procured by Mr Gilbertson - was that (save as to the 1/101 interest which remained in the Master Fund as the continuing owner of the one share in PEL issued on incorporation) the economic benefit of the development, exploitation and management of those Rights passed to Autumn, Dr Jellinek and K-MIC, all of whom were outside and unrelated to the Pallinghurst Structure; and was no longer held by the Master Fund within the Pallinghurst Structure as had been originally intended,
10. In section 6 of his judgment (under the heading “Brief Summary of the Parties’ Cases”), the judge explained that Renova’s principal claim in the proceedings - a claim which it advanced on behalf of the Company, as one of the ultimate owners of the Master Fund - was for reconstitution of the Master Fund to the position in which it is said it would have been but for the alleged breach of duty by Mr Gilbertson as a director of the Company. At paragraphs 6.2 and 6.3 of his judgment, the judge summarised the basis on which that claim was advanced:

“6.2 . . . [Renova] claims that Mr. Gilbertson, who was at all material times a director of the Company, acted in breach of his fiduciary duties to the Company by, at the last minute, diverting away from the Master Fund and thus ultimately from the Company, for his own benefit the valuable economic benefit of developing exploiting and managing the Fabergé brand, and doing so covertly without the knowledge of his fellow director Mr. Kuznetsov or of [Renova] as 50% shareholder in the Company or any of any of the other Renova Parties. Mr. Gilbertson, it is said, did this by secretly arranging alternative financing of the purchase price of the Rights by his own trust and the other investors to enable the acquisition and ownership of the Rights ultimately for his own personal benefit and that of his fellow investors, rather than for the benefit of the Master Fund. He further procured the gratuitous issue of new shares in PEL, as the acquirer of the Rights, to his own trust and to the other investors, thereby virtually eliminating the interest of the Master Fund in PEL and hence in the economic benefit of developing, exploiting and managing the Fabergé brand.

6.3 [Renova] contends that as a director of the Company Mr. Gilbertson owed fiduciary duties to the Company, including the duty to act in good faith, in the best interests of the Company, not to place himself in a position where his duties to the Company and his own interests might conflict, to refrain from self-dealing and not to make a secret profit. By his actions he was in breach of these duties to the loss of Master Fund and thus the Company.”

Renova’s claim against Autumn - as the judge explained at paragraph 6.5 of his judgment -

was for an account of the shares in PEL which (it was said) Autumn had received gratuitously; and for an account of the interest which Autumn had earned on the loans which it made by way of contribution to the funding of the purchase price of the Fabergé Rights and for working capital. Those claims were advanced on the basis that Autumn knew or ought to have known that Mr Gilbertson was acting in breach of fiduciary duty in procuring the purchase of the Fabergé Rights as he did and in procuring the issue of the new shares in PEL. Alternatively, it is said that, in the circumstances that Autumn did not pay for the PEL shares, it received them as a volunteer; and that, on that basis also, Autumn held those shares as a constructive trustee.

11. The judge went on to explain (at paragraph 6.7 of his judgment) that Mr Gilbertson and Autumn counterclaimed in the proceedings, not only against Renova but also against Mr Vekselberg, Mr Kuznetsov and Renova Holding, on various grounds for damages by way of indemnity for any liability which they were found to have in respect of Renova's derivative claims. As the judge pointed out, the counterclaim was contingent on Renova succeeding on its derivative claims.
12. The judge held (at paragraphs 15.8 and 20.1 of his judgment) that Mr Gilbertson owed the duties of a fiduciary as a director of the Company throughout the relevant period; and that he was in breach of those duties in acting as he did in late December 2006 and January 2007. But he went on to hold (at paragraph 19.29 of his judgment) that Mr Gilbertson's breach of fiduciary duty had caused the Master Fund "no significant economic loss". He said this:

“5.19 . . . In the circumstances, if the Master Fund was to be put in the position in which it would now be [but for Mr. Gilbertson's breach of fiduciary duty] it would be in a significantly negative financial position. I must therefore conclude that it would be of no benefit to put the Master Fund into the position in which it would now have been but for Mr. Gilbertson's breach of fiduciary duty and that no equitable compensation is payable”.

Accordingly, the judge dismissed the claim for equitable compensation brought against Mr Gilbertson.

13. The judge held (at paragraphs 17.17, 17.20 and 20.2 of his judgment) that Autumn held the 25 PEL shares issued to it in January 2007 on a constructive trust for "the Master Fund/GPLP/the Company" - on the ground that, when it received those shares, it was not a *bona fide* purchaser for value without notice: in that (i) it knew or ought to have known of Mr Gilbertson's breach of fiduciary duty and (ii) it received the shares gratuitously, as a volunteer - and was liable to account for them. He held, also, (at paragraph 20.2 of his

judgment) that Autumn was liable to account for the interest which it had received on the loans which it made to PEL for the purpose of funding the acquisition of the Fabergé Rights.

14. As the judge recorded (at paragraph 18.4 of his judgment) two of the five counterclaims brought by the Gilbertson Parties - those for lawful means conspiracy and for breach of fiduciary duty by Mr Kuznetsov - were abandoned during the course of the trial. For the reasons which he gave (in paragraphs 18.6 to 18.13 of his judgment) the judge concluded that the remaining specific counterclaims - those for repudiatory breach of the Letter Agreement, for inducement and/or procurement of breach of the Letter Agreement and for unlawful means conspiracy - were without merit and should be dismissed.

The Order of 6 November 2012

15. By the order which he made on 6 November 2012 (filed on 13 November 2012) the judge declared (under paragraph 1) that Autumn held 25,000 ordinary shares in Fabergé Limited (formerly PEL) as constructive trustee for the Master Fund; and directed (at paragraph 2) that Autumn should transfer forthwith those shares to the Master Fund. The reference to “25,000 ordinary shares in Fabergé Limited” gave effect to the judge’s intention that the shares in respect of which Autumn was held to be constructive trustee were the 25 shares in PEL issued in January 2007 (which had become 25,000 shares in Fabergé Limited following a sub-division in 2008 and the change of name) and did not include any shares in Fabergé Limited subsequently acquired by Autumn. At paragraph 3 of that Order, the judge directed that that Autumn should pay to the Master Fund the sum of US\$2,306,320.35 (inclusive of pre-judgment interest from 3 January 2007 to the date of the Order in the amount of US\$507,347.35). At paragraphs 4 and 5, respectively, he dismissed the claim for equitable compensation against Mr Gilbertson and the counterclaims against the Renova Parties. At paragraph 6 the judge directed that each party should bear its own costs of the proceedings (so far as such costs were not already the subject of orders in favour of one or other of the parties).

The Appeal and Cross-Appeal

16. On 27 November 2012 Autumn filed Notice of Appeal (Appeal No. 21 of 2012) from the Order of 6 November 2012. The Renova Parties are the respondents to that appeal. The relief sought was an order that the appeal be allowed, that paragraphs 1, 2 and 3 of the Order be set aside; and that the Renova Parties pay Autumn’s costs of the appeal and in the court below. The grounds of that appeal are set out in the Memorandum of Grounds of

Appeal filed on behalf of Autumn on 1 February 2013 under six main heads:

- A. The judge misdirected himself and erred in law in entertaining and granting relief in respect of derivative claims that were not before him.
- B. The judge misdirected himself and erred in law and/or fact in holding that Mr Gilbertson owed or was in breach of any fiduciary duty in relation to the Fabergé Rights and so in holding that there was any substratum on which to found a claim against Autumn.
- C. The judge misdirected himself and erred in law and/or fact in holding that, notwithstanding the rule in *Nurcombe v Nurcombe*, the conduct of the Renova Parties was not such as to disentitle Renova to any relief.
- D. The judge misdirected himself and erred in law and/or fact in holding that, having regard to its relationship with Mr Gilbertson, the property which it received, the person from whom it received the property and its state of knowledge at the time of receipt, Autumn was liable in knowing receipt.
- E. The judge misdirected himself and erred law and/or fact in holding that Autumn was liable as a volunteer.
- F. The judge misdirected himself and erred in law and/or fact in granting relief against Autumn (i) by way of an account of profits (comprising the interest which Autumn received on the loan it made to PEL) and (ii) in respect of pre-judgment interest (from 3 January 2007) on the interest payment which Autumn received from Fabergé Limited on 28 September 2007.

17. Also on 27 November 2012 Renova (derivatively on behalf of the Company, GPLP and the Master Fund), as plaintiff in the action, and Mr Vekselberg, Mr Kuznetsov, Renova Holding and Renova (on its own account), as defendants to the counterclaim, filed Notice of Appeal (Appeal No. 22 of 2012) from the Order of 6 November 2012. Mr Gilbertson and Autumn are the respondents to that cross-appeal. The relief sought by the cross-appeal was (i) that so much of the Order as dismissed Renova's claim against Mr Gilbertson for equitable compensation be quashed and that either judgment be entered for Renova against Mr Gilbertson in the sum of US\$82,582,000 and interest under statute, or (in the alternative) that it be declared that Autumn holds a further and additional 16,190,575 ordinary shares in Fabergé Limited as constructive trustee for the Master Fund and ordered that Autumn shall forthwith transfer full legal title in those further shares to the Master Fund; (ii) that Mr Gilbertson and Autumn pay Renova's costs of the proceedings in the court below on the standard basis; (iii) that Mr Gilbertson and Autumn pay the costs of the

defendants to counterclaim in the court below on the indemnity basis; and (iii) that Mr Gilbertson and Autumn pay the cross-appellants' costs of the cross-appeal on the standard basis. The grounds of the cross-appeal are set out in the Memorandum of Grounds of Appeal filed on behalf of Renova and the other cross-appellants, also on 1 February 2013, under three heads:

- A. The judge erred in law and/or in principle and/or misdirected himself as to the evidence in valuing at nil the loss which Mr Gilbertson was liable to make good to the Master Fund by way of equitable compensation.
- B. Alternatively, the judge erred in law and/or in principle and/or misdirected himself as to the evidence in failing to hold that the entirety of Autumn's shareholding in Fabergé Limited (and not only the 25,000 shares which represented the 25 shares issued by PEL in January 2007) should be held on constructive trust for (and transferred to) the Master Fund.
- C. The judge erred in law or exercised his discretion outside the ambit within which reasonable disagreement is possible in making no order as to the costs of the action and the counterclaim.

18. In those circumstances the questions for determination by this Court are these:

- (1) Was the judge wrong to entertain (and grant relief in respect of) derivative claims that were not before him.
- (2) Was the judge wrong to hold that Mr Gilbertson owed and was in breach of fiduciary duties in relation to the Fabergé Rights.
- (3) Was the judge wrong to hold that, notwithstanding the rule in *Nurcombe v Nurcombe*, the conduct of the Renova Parties was not such as to disentitle Renova to any relief.
- (4) Was the judge wrong to value at nil the loss which Mr Gilbertson was liable to make good to the Master Fund by way of equitable compensation.
- (5) Was the judge wrong to hold that Autumn was liable as a constructive trustee of the shares issued by PEL in January 2007 (a) because it was in "knowing receipt" having regard to its relationship with Mr Gilbertson, the property which it received, the person from whom it received the property and its state of knowledge at the time of receipt and/or (b) because it received those shares as a volunteer.
- (6) Was the judge wrong in failing to hold held that the entirety of Autumn's shareholding in Fabergé Limited (and not only the 25,000 shares which represented

the 25 shares issued by PEL in January 2007) should be held on constructive trust for (and transferred to) the Master Fund.

- (7) Was the judge wrong to grant relief against Autumn by way of an account of profits (comprising the payment which Autumn received on 28 September 2007 in respect of interest on the loan which it had made to PEL on 3 January 2007); and, if not, was the judge wrong to award pre-judgment interest from 3 January 2007 (rather than from 28 September 2007) on the payment which Autumn received.
- (8) Did the judge exercise his discretion outside the ambit within which reasonable disagreement is possible in making no order as to the costs of the action and the counterclaim; and, if so, what orders as to costs should be made.

Whether the judge was wrong to entertain (and grant relief in respect of) derivative claims that were not before him

- 19. It is said on behalf of the Gilbertson Parties that the judge misdirected himself and erred in law in entertaining a derivative claim or derivative claims on behalf of the GPLP or the Master Fund notwithstanding that no such claim or claims were contained in the originating process and the only derivative claim for which leave had been granted was a claim brought on behalf of the Company; and that, had the judge directed himself properly, he should have refused to grant any relief on the derivative claim brought by Renova on behalf of the Company.
- 20. The judge addressed the availability of derivative relief at paragraphs 16.1 and 16.1.1 of his judgment (re-dated and re-issued on 5 November 2012). He said this:

“16.1 In their pleading and opening submissions the Gilbertson Parties raised again the derivative nature of the Plaintiff’s claim and contended that the Plaintiff was not entitled, on behalf of the Company, to claim for alleged loss sustained by the Master Fund. I say that they raised this issue ‘again’ because the entitlement of the Plaintiff to pursue this action derivatively on behalf of the Company (including by way of multiple derivative action also on behalf of GPLP and/or the Master Fund) in respect of loss sustained by the Master Fund was addressed in the Ruling dated 14th April 2009 giving leave to the Plaintiff to proceed with this action. The question was fully argued at the hearing which resulted in that Ruling by reference to the authorities, including and particularly *Waddington Limited v Chan Chun Hoo Thomas* 8th September 2008 (unreported) in the Court of Final Appeal in Hong Kong, and the judgment of Lord Millett NPJ, as well as the other authorities referred to in the Ruling.

16.1.1 The uncontroversial facts necessary to enable this court to rule on this issue were before me at that hearing and in my view no facts relevant to this relatively limited legal argument have emerged since. As I have already said, there was no appeal from any part of the Ruling, including the decision on this particular issue, which, although made in the context of the Plaintiff’s application for leave to proceed with this action, is nonetheless, in my view, a

conclusive and not a summary ruling on this particular issue. There having been no appeal against the Court's decision on this particular issue, in my opinion it was not open to the Gilbertson Parties to revisit it at the trial. Accordingly, I reject the Gilbertson Parties' submissions in this regard."

The judge's ruling of 14 April 2009 is reported at 2009 CILR 268. The judgments of the Hong Kong Court of Final Appeal in *Waddington v Chan Chun Hoo Thomas* [2008] HKCFA 63, to which the judge referred in his ruling (and in the passage of his judgment of 5 November 2012 which I have just set out) are reported at [2008] HKCU 1381; [2008] CFAR 370; (2009) 4 HKC 381.

21. These proceedings were commenced by Writ of Summons issued on 20 May 2008. The plaintiff was described in that writ as "Renova Resources Private Equity Limited (A company incorporated in the Bahamas suing as shareholder of the Second Defendant, Pallinghurst (Cayman) General Partner LP (GP) Limited)". Pallinghurst (Cayman) General Partner LP (GP) Limited (the Company), as the party on whose behalf the derivative action was brought, was joined as a defendant to the proceedings; as would be usual in such circumstances. But it is important to have three matters in mind, First, GPLP and the Master Fund were also joined as defendants to the proceedings. Second, the relationship between the Company, GPLP and the Master Fund was set out at paragraph 3 of the statement of claim as filed on 20 May 2008:

"3. The Second Defendant (the 'Company') is a company incorporated in the Cayman Islands and is the general partner of a Cayman Islands limited partnership called Pallinghurst (Cayman) General Partner LP (the Third Defendant). The Third Defendant ('GPLP') is in turn the general partner of the Fourth Defendant, a Cayman Islands limited partnership called Pallinghurst Resources Management LP (the 'Master Fund')"

Third, relief was sought in the proceedings for the benefit of the Company, GPLP and the Master Fund collectively or in the alternative. Paragraphs 32 and 33 of the statement of claim, as filed, were in these terms:

"32. As a result of the matters set out above, the Company, including in its capacity as general partner of GPLP and, in turn, the Master Fund, is entitled to, and the Plaintiff hereby seeks on behalf and in the interests of the Company, the following relief against the First and Fifth Defendants:

- 32.1 a declaration that the entry into and/or closing of the Rights Purchase Agreement was effected without the proper and due authority of the Company, or of either GPLP or the Master Fund;
- 32.2 a declaration that Autumn holds its PEL shares (i.e. the 25% holding) on constructive trust for the Company and/or GPLP and/or the Master Fund;
- 32.3 an order that Mr Gilbertson takes all steps to procure that Autumn deals with its shares in PEL as constructive trustee for the Company and/or GPLP and/or the Master Fund;
- 32.4 further or alternatively, an account to the Company and/or GPLP and/or the Master Fund of profits received by Mr Gilbertson and/or Autumn

and/or by individuals or entities associated with them, namely an account of the value of the 25% PEL shares;

32.5 further or alternatively, an order for payment by Mr Gilbertson to the Company and/or GPLP and/or the Master Fund of equitable compensation for breach of fiduciary duty arising from Mr Gilbertson's failure to obtain the prior approval of the Board of the Company to the acquisition of the Rights and/or thereafter to agree to the terms of the Third Draft IA or Fourth Draft IA and/or an agreement on substantially similar terms and/or to continue to negotiate terms in good faith notwithstanding that such terms were reasonable and in the best interests of the Company and/or his actions which led to the dilution of the Company and/or GPLP and/or the Master Fund's economic interest in PEL;

32.6 further or alternatively, an order for payment by Autumn to the Company and/or GPLP and/or the Master Fund of equitable compensation for knowing receipt of property traceable to a breach of fiduciary duty.

33 Further, the Plaintiff seeks an order that the First and Fifth Defendants pay the Company and/or GPLP and/or the Master Fund interest (including compound interest with yearly rests) on all sums found to be due to it pursuant to section 34 of the Judicature Law and/or the rules of equity for such period and in such amount as the Court considers appropriate."

22. By summons issued on 29 July 2008 Renova sought leave, pursuant to Order 15, Rule 12A(2) of the Rules of the Grand Court, to continue the action on behalf of the Company. In the skeleton argument filed in support of that application, Renova indicated (at paragraph 24) that, if such leave were granted:

"... it will similarly formally be able to procure that the Company proceed in the name of the GPLP, which in turn will be able formally to procure that the Master Fund proceed on its own behalf."

Leave to continue these proceedings was granted by the judge for the reasons which he set out in his ruling of 14 April 2009. In the event Renova did not think it necessary to make any further application (on behalf of the Company) for leave to proceed in the name of GPLP; or, if such leave were granted, any further application on behalf of GPLP for leave to proceed in the name of the Master Fund.

23. It is clear from paragraph 1 of his ruling of 14 April 2009 that the judge appreciated that the application before him was an application under GCR O.15, r.12A(2) for leave to continue a derivative action brought by Renova on behalf of the Company. Sub-rules (1) and (2) of that rule, to which the judge referred (at paragraph 2 of his ruling), are in these terms:

"(1) This rule applies to every action begun by writ by one or more shareholders of a company where the cause of action is vested in the company and relief is accordingly sought on its behalf (referred to in this rule as a 'derivative action').

(2) Where a defendant in a derivative action has given notice of intention to defend, the plaintiff must apply to the Court for leave to continue the action."

An application by Renova for leave to continue a multi-derivative action on behalf of the Master Fund (or on behalf of GPLP) would not have been within the scope of GCR O.15, r.12A; for the reason that, if (and so far as) the relevant cause of action was vested in the Master Fund (or in GPLP), it was not vested in a company of which Renova was a shareholder. Nevertheless, the question whether Renova could pursue proceedings in circumstances where (upon a true analysis) the cause of action was vested in the Master Fund (and not in the Company) was in the judge's mind. At paragraph 3 of his ruling, in identifying the issues which arose for determination, the judge said this:

“3. . . . Thirdly, there is the question whether a derivative action may be brought by a shareholder in the holding company of the company (or in this case the exempted limited partnership) which is its ultimate subsidiary and in which, at least arguably, the cause of action against the defendant(s) is vested. Such an action is usually described as a multiple derivative action.”

24. The judge addressed that question in the section of his ruling (paragraphs 62 - 66) headed “The multiple derivative action”. He explained that it had been argued on behalf of the Gilbertson Parties that the relevant exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 - that is to say, the exception on which the power to entertain a derivative action was founded - arose only in the context of loss or damage suffered by the company of which the plaintiff was a shareholder; and that, in the present case, the loss alleged was suffered not by the Company but by the Master Fund, whose shareholding in PEL was diluted as a result of Mr Gilbertson's actions from 100% to a nominal amount. He referred to the facts in *Waddington v Chan Chun Hoo Thomas* [2008] HKCFA 63, in which (as he said) it appeared that the appellant/defendant, who was a director of the ultimate holding company as well as of the subsidiary company and the sub-subsidiary companies, had made the same (or a similar) submission to that which had been advanced on behalf of the Gilbertson Parties in this context. He referred to the conclusion of Lord Millett, sitting as a Non-Permanent Judge of the Hong Kong Final Court of Appeal in that case (at paragraph 70 of his judgment), that:

“70. . . The only question is whether the action, which may be brought by a member of the company, may be brought by a member of its parent or ultimate holding company. This is simply a question of *locus standi*.”

And he referred to Lord Millett's observations at paragraphs 74 and 75 of his judgment in *Waddington*:

“74 . . . On a question of standing, the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. The answer in the case of person wishing to bring a multiple derivative action is plainly “yes”. Any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders. In either case the loss is merely reflective loss mirroring the loss directly sustained by the subsidiary

and as such it is not recoverable by the parent company or its shareholders for the reasons stated in *Johnson v. Gore Wood* ([2002] 2 AC 1, 61). But this is a matter of legal policy. It is not because the law does not recognise the loss as a real loss; it is because if creditors are not to be prejudiced the loss must be recouped by the subsidiary and not recovered by its shareholders. It is impossible to understand how a person who has sustained a real albeit reflective loss which is legally recoverable only by a subsidiary can be said to have no legitimate or sufficient interest to bring proceedings on behalf of the subsidiary.

75. This is not to allow economic interests to prevail over legal rights. The reflective loss which a shareholder suffers if the assets of his company are depleted is recognised by the law even if it is not directly recoverable by him. In the same way the reflective loss which a shareholder suffers if the assets of his company's subsidiary are depleted is recognised loss even if it is not directly recoverable by him. The very same reasons which justify the single derivative action also justify the multiple derivative action. To put the same point another way, if wrongdoers must not be allowed to defraud a parent company with impunity, they must not be allowed to defraud its subsidiary with impunity."

At paragraph 66 of his ruling of 14 April 2009 the judge concluded:

"66. In my opinion, Lord Millett's analysis and conclusion also represents the law in this country and I can see no reason why, in appropriate circumstances, a multiple derivative action should not be permitted. In the present case, the company is the general partner of and therefore controls the exempted limited partnership, GPLP. GPLP is itself the general partner and therefore controls the master fund. The master fund is, in my view, no different from a sub-subsidiary of the company for these purposes. On the plaintiff's case, the master fund has sustained significant loss as a result of the dilution of its 100% shareholding in PEL, procured by Mr. Gilbertson without the knowledge, still less the consent, of the master fund or GPLP or the company. In the circumstances, a multiple derivative action on behalf of the company in respect of Mr. Gilbertson's actions is not, in my judgment, objectionable."

25. It is said on behalf of the Gilbertson Parties that the judge was wrong to hold (in paragraph 16.1 of his judgment of 5 November 2012) that, when giving leave to Renova to proceed with this action, he had addressed the issues whether Renova was entitled, on behalf of the Company, to claim for alleged loss sustained by the Master Fund and to pursue this action derivatively on behalf of the Company (including by way of multiple derivative action also on behalf of GPLP and/or the Master Fund) in respect of loss sustained by the Master Fund. In particular, it is said that:

(1) There is "no room for serious dispute" that the issue whether Renova was entitled to pursue this action by way of multiple derivative action on behalf of GPLP and/or the Master Fund was not before the judge; given that Renova had indicated in the skeleton argument filed in support of its application under GCR O.15, r. 12A(2) that, if that application were successful, it would make further applications (i) on behalf of the Company for leave to proceed in the name of GPLP and (ii) on behalf of GPLP for leave to proceed in the name of the Master Fund. Renova would

not have contemplated that there would be a need for it to make such further applications if it had thought that an application for leave to proceed by way of multiple derivative action on behalf of GPLP and/or the Master Fund was already before the judge.

- (2) The persons with an interest in GPLP and the Master Fund were not the same as those who (as members of the Company) had an interest in the Company. A consequence of the irregular manner in which the judge dealt with the issue of leave to proceed was that those who were the partners in GPLP and the Master Fund were deprived of the opportunity to oppose the proceedings. The judge was wrong to take the view (as, it is said, he appears to have done) that the fact that those with an interest in GPLP and the Master Fund were not the same as the members of the Company was a technicality of little or no significance. The unpleaded claim that Mr Gilbertson owed a fiduciary duty to the Master Fund was not only an essential ingredient of any claim in an action pursued by the Master Fund itself; it was also a prerequisite of a multiple derivative action pursued on behalf of the Master Fund. It is impossible to understand the rights and obligations owed by the parties to one another without understanding the nature and extent of the interests at stake.

In those circumstances, it is said, the judge was wrong to hold that - if, following the order which he made on Renova's application of 29 July 2008, Autumn wished to object to Renova pursuing this action on behalf of the Master Fund - it should have appealed from that order. The flaw in the judge's reasoning (it is said) is apparent on its face.

26. I do not find those submissions persuasive. I accept that, in the summons issued on 29 July 2008 (before the judgments in the Hong Kong Final Court of Appeal in *Waddington* had been delivered), Renova did not seek leave to proceed by way of multiple derivative action on behalf of GPLP and/or the Master Fund; but it is important to have in mind, first, that it was not required to do so under GCR O.15 r.12A (which, in the restrictive form in which that order had been made, had no application to multiple derivative actions) and, second, that there was no other rule of practice which required that leave was required to bring a multiple derivative action under the general law. It is clear, from the judgments in *Waddington* and from the observations of Mr Justice Briggs in *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348, that the practice under the general law in relation to the pursuit of derivative claims - which predated the introduction of GCR O.15 r.12A - was abrogated by that rule in relation to single derivative actions but continued to apply (after the introduction of that rule) in relation to multiple derivative actions. As Mr Justice Ribeiro PJ pointed out in *Waddington* (at paragraphs 13

and 14 of his judgment):

“13 . . . Procedurally, there is no requirement at common law for a person seeking to sue derivatively first to obtain the leave of the court. . . .

14 The time-honoured practice at common law is for the plaintiff to issue proceedings ‘on behalf of himself and the other shareholders other than the defendants’, naming the company on whose behalf the proceedings are brought as one of the defendants. A challenge to the plaintiff’s locus generally takes the form of an application by the relevant defendants to strike out the claim or to have the court determine as a preliminary issue that the plaintiff has no locus to sue on the company’s behalf. . . .”

27. I accept, also, that it is reasonably clear that, when preparing and filing the skeleton argument in support of Renova’s application of 29 July 2008, its advisers took the view that the appropriate course, in the case of a multiple derivative claim, was to proceed incrementally by a series of linked single derivative claims. But that view was based on a misunderstanding of the premise underlying the court’s willingness to entertain a derivative claim for relief; as explained by Lord Millett NPJ in *Waddington* and by Mr Justice Briggs in *Universal Project Management Services*. As Mr Justice Briggs put it in the latter case (at paragraphs 26 and 44 of his judgment):

“26 In my judgment the common law procedural device called the derivative action was . . . clearly sufficiently flexible to accommodate as the legal champion or representative of a company in wrongdoer control a would-be claimant who was either (and usually) a member of that company or (exceptionally) a member of its parent company where that parent company was in the same wrongdoer control. I would not describe that flexibility in terms of separate forms of derivative action, whether headed “ordinary”, “multiple” or “double”. Rather it was a single piece of procedural ingenuity designed to serve the interests of justice in appropriate cases calling for the identification of an exception to the rule in *Foss v Harbottle*.”

“44 . . . the court could permit a person or persons with the closest sufficient interest to litigate on behalf of a company by seeking for the company relief in respect of a cause of action vested in it. Those persons would usually be a minority of the company’s members, but might, if the company was wholly owned by another company, be a minority of the holding company’s members. These were not separate derivative actions, but simply examples of the efficient application of the procedural device, designed to avoid injustice, to different factual circumstances.”

The judge appreciated - as he said at paragraph 3 of his ruling of 14 April 2009 - that it was, at the least, arguable that the cause or causes of action which Renova sought to pursue against Mr Gilbertson and/or Autumn were vested in the Master Fund (and not in the Company). In those circumstances it was necessary - in order to determine whether to allow the action, as constituted, to go forward - that he address the question whether Renova could bring multiple derivative proceedings for loss said to have been suffered by

the Master Fund. In my view, there is no doubt that that question was properly before the judge in April 2009; and no doubt that he intended to and did decide it.

28. The judge explained (at paragraph 36 of his ruling of 14 April 2009) that the members of the Company (each holding 50% of its shares) were Renova and Fairbairn. Fairbairn (he said) was “effectively controlled by the first defendant, Mr. Brian Gilbertson”. He explained (at paragraph 37 of his ruling) that the Company was the general partner of GPLP; and that GPLP was, in turn, the general partner of the Master Fund. A diagram of the Pallinghurst Structure was attached to the statement of claim which was before him. That diagram showed that Mr Sean Gilbertson, Mr (Brian) Gilbertson’s son, was the only person (other than the Company) with an interest (as limited partner) in GPLP; and that Pallinghurst (Cayman) Founder Partner LP (“the Founder Fund”) was the only person (other than GPLP) with an interest (also as limited partner) in the Master Fund. It appeared, also, from that diagram that the general partner of the Founder Fund was Pallinghurst Founder GP Ltd (“Founder GP”); and that Mr Sean Gilbertson was the sole limited partner of the Founder Fund. A more complete analysis of the position under the short form agreements pursuant to which the Pallinghurst Structure was established (shown diagrammatically in the appendix to the written submissions of the Gilbertson Parties prepared for this appeal) indicates that the persons interested in Founder GP were Renova and Fairbairn (as to 50% each): that is to say, the persons interested in Founder GP were the same persons as those who held the shares in the Company. In those circumstances the Gilbertson Parties are correct to point out that the members of the Company were not, themselves, the only persons interested in GPLP and the Master Fund. In addition to Renova and Fairbairn - which, together, held (in equal shares) indirect interests equivalent to 50% of GPLP (through the Company) and 50% of the Master Fund (as to 25% through GPLP and 25% through Founder GP and the Founder Fund) - Mr Sean Gilbertson held 50% interests in GPLP and the Master Fund (in the latter case, indirectly through GPLP, as to 25%, and the Founder Fund, as to the other 25%). But, as it seems to me, the submission that those who were the partners in GPLP and the Master Fund were deprived of the opportunity to oppose these proceedings is not well founded. The Company, GPLP and the Master Fund were joined as defendants with Mr Gilbertson and Autumn (a company of which Fairbairn, a Gilbertson family trust controlled by Mr Gilbertson, was the owner); the Company was the general partner of GPLP and GPLP was the general partner of the Master Fund; and Mr Gilbertson and Mr Kuznetsov were the directors both of the Company and of Founder GP. Mr Sean Gilbertson was closely involved in the circumstances which gave rise to the claims brought on behalf of the Master Fund: he made

a witness statement and gave oral evidence at the trial. In substance this was litigation between Renova interests and Gilbertson interests. Those on the Gilbertson side with an interest in resisting the claims made in the litigation were well able to do so.

29. In my view, the judge was correct to hold (at paragraph 16.1.1 of his judgment of 5 November 2012) that, having chosen not to appeal from the order which he had made some three and a half years earlier, it was not open to the Gilbertson Parties to challenge, at trial, the standing of Renova to advance claims in the action on behalf of GPLP and the Master Fund; including, in particular, a claim founded on the unpleaded contention that Mr Gilbertson had acted in breach of fiduciary duties which he owed to the Master Fund.

Was the judge wrong to hold that Mr Gilbertson owed and was in breach of fiduciary duties in relation to the Fabergé Rights

30. As I have said, in section 6 of the judgment issued on 5 November 2012, the judge explained that Renova's principal claim in the proceedings - advanced on behalf of the Company, as one of the ultimate owners of the Master Fund - was for reconstitution of the Master Fund to the position in which (it is said) it would have been but for the alleged breach of duty by Mr Gilbertson as a director of the Company. At paragraph 7.5 of his judgment, the judge observed that the question whether Mr Gilbertson owed fiduciary duties to the Company - and, if so, what fiduciary duties - turned on the particular circumstances. Accordingly, he said, it was necessary to consider - and, in so far as disputed, determine - what those circumstances were. He addressed that task at sections 8, 9 and 10 of his judgment. He made findings of fact by reference to three successive periods: (i) the period up to December 2006 (section 8), (ii) the period from December 2006 to 3 January 2007 (section 9) and (iii) the period after 3 January 2007 (section 10). But he observed that "the most significant circumstances arose during the short period between about mid-December 2006 and mid-January 2007".

The judge's findings of fact

(i) *the period up to December 2006*

31. At paragraph 8.1 of his judgment the judge reminded himself that he had already explained (earlier in that judgment) that, from as early as 2002, Mr Gilbertson had identified the Fabergé brand as a potentially profitable investment; that, at a relatively early stage in their discussions about a private equity fund, Mr Gilbertson had suggested to Mr Vekselberg that the Fabergé brand and business could be an investment project in that context; and that, given his personal interest in Fabergé, Mr Vekselberg's response to that suggestion had been positive. The judge went on to explain (at paragraph 8.2) that, during 2005, an initial

approach was made to Unilever as to the possibility of purchasing the Fabergé brand; that discussions and negotiations took place in respect of the structure which eventually became the Pallinghurst Structure; and that, in the course of those discussions and negotiations various draft documents (“the Short Form Agreements”) were produced and exchanged. At paragraph 8.3 of his judgment he noted that, on 27 October 2005, Pallinghurst Resources LLP (“Pallinghurst LLP”) was established in England by Mr Gilbertson as an investment management vehicle; and that, on 24 November 2005, the Letter Agreement (initialed by Mr Kuznetsov) was sent to Mr Gilbertson. At paragraph 8.4 he explained that, from November 2005, Mr Sean Gilbertson initiated a number of cancellation actions in respect of various Fabergé trademarks, on the ground of alleged non-use, with a view to reducing the value of the Fabergé brand and so strengthening the negotiating position in relation to the proposed purchase of that brand from Unilever.

32. At paragraph 8.5 of his judgment, the judge referred to a meeting on 20 January 2006 of the “Pallinghurst Resources Private Equity Fund” attended by Mr Gilbertson, Mr Sean Gilbertson and Mr Kuznetsov. He noted that the agenda for that meeting included several “Investment Projects”, including the purchase of the Fabergé brand and business (which was described as “Project Egg”); and that a briefing document circulated prior to that meeting by Mr Sean Gilbertson reported, with regard to Project Egg, that meetings with Unilever had taken place since April 2005 but without success. The judge held that:

“8.5 . . . Clearly Project Egg was being explored and pursued as an opportunity and potential Investment Project in accordance with the terms of the Letter Agreement.”

The judge rejected (at paragraph 8.6 of his judgment) the submission, made on behalf of the Gilbertson Parties, that (notwithstanding the agenda and briefing document) the meeting on 20 January 2006 could not be taken to indicate that Project Egg was an approved Investment Project of the Master Fund because (it was said) the Letter Agreement had not been finally signed and the Master Fund had not been established. The judge said this:

“8.6 . . . While it is no doubt correct that Project Egg was not at that stage an approved Investment Project of the Master Fund, it seems to me that the commercial reality was that it was by then being treated de facto as a potential Investment Project of the equity fund which became the Master Fund. Although the Letter Agreement had not been formally signed, it had been delivered to Mr. Gilbertson on 24th November 2005 and was signed by him only 4 days after that meeting. By the time of the meeting it must have been in final form because it was signed on that day on behalf of Renova Holding. The proposed Investment Projects which were discussed at the meeting were all sourced and put forward by Mr. Gilbertson in accordance with the Letter Agreement as proposed Investment Projects. Mr. Gilbertson himself gave evidence to the effect that at that time they,

meaning he and Mr. Kuznetsov, were not concerned with the legal niceties, which the lawyers were working on, but simply wanted to get on with the proposed Investment Projects. While the acquisition of the Fabergé brand was clearly at an early stage, in my view it is equally clear that it was nonetheless being considered as an Investment Project of the proposed Investment Fund, which became the Master Fund.”

33. The judge had referred to the terms of the Letter Agreement earlier in his judgment (at paragraphs 3.3 to 3.6). As he had said, the Letter Agreement defined “Investment Fund” as an investment fund in a jurisdiction and legal form to be agreed between Mr Gilbertson and Renova Holding; “Fund Management Vehicle” as the vehicle charged with establishing, marketing and managing the Investment Fund; and the “Initial Capital” as a founding capital of US\$4m in cash on the establishment of the Fund Management Vehicle. The “Investment Committee” meant a committee comprising Mr Gilbertson or his nominated representative on the one hand and the CEO of Renova Management or its nominated representative on the other hand. In the event, the Investment Committee comprised Mr Gilbertson and Mr Kuznetsov. Mr Gilbertson and Renova Holding were defined in the Letter as “Partners”. The Letter Agreement provided for Renova Holding to establish the Investment Fund and the Fund Management Vehicle with the Initial Capital. It provided that the purpose of the Investment Fund was “to explore, acquire and develop opportunities in the metals and mining industry (the ‘Investment Projects’)”.

34. The judge had gone on to explain (at paragraph 3.3 of his judgment) that the Letter Agreement further provided that the Partners would work together to add value to the Investment Fund; and that Mr Gilbertson would “assume responsibility for developing and implementing the strategy for the Investment Fund and for all Investment Projects”, including, but not limited to “searching for and introducing Investment Projects to the Investment Committee”, “supervising of the implementation of the approved Investment Projects” and “providing strategic advice on corporate development of the Investment Fund, Fund Management Vehicle and Investment Projects”. Clause 2.5 of the Letter Agreement was in these terms:

“2.5 Any of the Partners may bring a proposed Investment Project for consideration by the Investment Fund and Fund Management Vehicle. Approval to proceed with an Investment Project via the Investment Fund, at an Agreed Value, shall require the unanimous consent of the Investment Committee. It is contemplated by the Partners that each approved Investment Project will be pursued through the most appropriate structure, and that equity or other interests in such Investment Projects may be allocated to other minority partners (including managing partners) as agreed by the Investment Committee on a case by case basis.”

And, as the judge explained (at paragraph 3.6 of his judgment) clause 8.2 of the Letter Agreement provided that:

“8.2 This letter and its terms shall automatically terminate and become null and void if the Investment Fund and the Fund Management Vehicle are not established and operating in a way reasonably satisfactory to each of the Partners within 16 months of the last signature to this letter. In this regard, the Partners, using their best endeavours, agree to do (and procure the doing by other parties) of all acts necessary and to refrain (and procure that other parties will refrain) from any acts hindering the successful establishment and operation of the Investment Fund and the Fund Management Vehicle.”

35. The judge found (at paragraph 8.7 of his judgment) that the Letter Agreement (already signed on behalf of Renova Holding) was given to Mr. Gilbertson on 20 January 2006 (the day of the meeting to which he had referred); and was countersigned by Mr Gilbertson on 24th January 2006. On 9th March 2006 Mr Sean Gilbertson sent out to Mr David Kalberer (the Deputy Chief Legal Officer of Renova Management), Mr Kuznetsov and Mr Gilbertson an update on what was referred to as the “Pallinghurst Resources Private Equity Fund” setting out a then current summary (“the March Update”) of the arrangements, the Pallinghurst Structure and the various responsibilities. The March Update described Mr Gilbertson’s duties under the terms of the Letter Agreement; and contained an express statement that these duties would be owed by Mr Gilbertson to the Company. Shortly thereafter, on 15 March 2006, Pallinghurst (Cayman) General Partner LP (GP) Limited (the Company) was incorporated in the Cayman Islands. As the judge had said, Mr Gilbertson and Mr Kuznetsov were the two directors of the Company; and its shares were held, equally, by Renova and Fairbairn.
36. Project Egg was included amongst “Current Investment Projects” referred to in the minutes of meeting of the “Establishment Steering Committee” held on 24 April 2006 and attended by Mr Gilbertson, Mr Sean Gilbertson, Mr Kuznetsov and Mr Kalberer. The judge held (at paragraph 8.10 of his judgment) that steps to acquire the Fabergé brand from Unilever as an Investment Project continued. On 17 May 2006, Mr Sean Gilbertson wrote to UBS (who were, by then, representing Unilever in relation to the sale of the Fabergé Rights, informing them that the Investment Committee of the “Pallinghurst Resources Fund LP” (by which, as the judge said, he must be assumed to mean the Master Fund) had authorised an offer of US\$20 million to purchase those Rights, subject to agreeable terms and conditions. That letter was expressly approved by Mr Kuznetsov on behalf of Renova. As the judge found, US\$20 million was the maximum expenditure on a single investment which could be approved by Mr Kuznetsov without the need for detailed due diligence, a business assessment and various internal approvals. Although that offer was supported (at

the request of Unilever) by a comfort letter confirming the prospective purchaser's ability to pay US\$20 million, the offer was refused. But the fact that it was made led the judge to conclude (at paragraph 8.11 of his judgment) that:

“ 8.11 . . . the agreement between Mr Kuznetsov and Mr Gilbertson to offer US\$20m and the terms of Sean Gilbertson's offer letter of 17th May 2006, indicated that Mr. Gilbertson was actively pursuing Project Egg, with the agreement of Mr. Kuznetsov, as an Investment Project of the Master Fund.”

37. A further meeting of the “Establishment Steering Committee”, attended by Mr Gilbertson, Mr Sean Gilbertson and Mr Kuznetsov was held on 25 and 26 July 2006. Project Egg was among the several Investment Projects that were discussed at that meeting. It was recorded in the minutes of that meeting, under the heading “Project Egg - Brand Acquisition”, that:

“After an overview of the present status and reiteration of the recommendation that an offer of US\$30m be submitted, VK [Mr. Kuznetsov] noted that the fund could only make an investment decision based on a detailed analysis and business plan. Hence he suggested that VV [Mr. Vekselberg] be approached with a view to risking his personal funds as this would not require the usual rigour. It was agreed that the project would still fall within the Pallinghurst structure. VK would revert with VV's view.”

The judge found (at paragraph 8.14 of his judgment) that, following that meeting, Mr Kuznetsov obtained Mr Vekselberg's support for an increased offer of US\$30 million for the Fabergé brand - which Mr Vekselberg was willing to pay from his own funds - and that, on that basis, an offer of US\$30 million was made to Unilever on 22 August 2006 in a letter from Mr Sean Gilbertson. In particular, the judge held that:

“8.14 . . . Mr. Gilbertson was clearly aware sometime between 26th July and 22nd August 2006 that Mr. Vekselberg was willing to pay the purchase price for the Rights himself out of his personal resources rather than Renova doing so. . . . I am satisfied that it was understood by the Gilbertsons that such approval [to the increased offer] was being given on behalf of Mr. Vekselberg personally and not on behalf of Renova. . . . The circumstances were, in my opinion, clearly consistent with Mr. Gilbertson being aware and understanding that the offer to Unilever of US\$30m had been approved on behalf of Mr. Vekselberg personally and not on behalf of Renova.”

The offer of US\$30 million was rejected by Unilever. Eventually, at a meeting between Mr Sean Gilbertson and UBS in November 2006, UBS expressly pressed for a purchase price of US\$40 million. On 29 November 2006 Mr Gilbertson (who had informed Mr Kuznetsov of this development), sent an e-mail to Mr Vekselberg asking him whether he was “on board or not, up to the maximum of \$40 million”.

38. In the meantime, on 8 August 2006, Mr Kalberer sent to Mr Sean Gilbertson a series of draft documents relating to the proposed exempted limited partnerships under the Pallinghurst Structure (“the Long Form Agreements”), with comments and proposed

changes, for his review. The judge found (at paragraph 8.13 of his judgment) that Mr Sean Gilbertson expressed some exasperation to his father about the number of those documents and proposed changes involved. Mr Gilbertson, in an e-mail to Mr Sean Gilbertson sent later that day, wrote:

“Buy the Egg, and I’ll pull the plug on ‘em.”

The judge accepted that that remark was made “in the heat of a moment of frustration” generated by the time it was taking to finalise the documentation with Renova but held that, in his assessment:

“8.13 . . . Mr. Gilbertson did seem to consider Project Egg as his own idea, which indeed it was, and that it was basically his project to do with as he wished. . . . his conduct in early January 2007 . . . is reflective of the attitude he expressed in his brief e-mail of 8th August 2006.”

39. The Long Form Agreements had been finalised in mid-September 2006. The judge found (at paragraph 8.16 of his judgment) that, although those documents were never executed - and therefore never became legally binding on the parties - the parties nonetheless proceeded on the common understanding that the drafts were final and agreed; and that both the Renova Parties and Mr Gilbertson proceeded on the basis that the Master Fund, and the Pallinghurst Structure generally, were operational well before the events of December 2006 and January 2007. He said this:

“8.16 The meetings, discussions and actions of Mr. Gilbertson and Mr. Kuznetsov in particular even before the execution of the Letter Agreement pursuant to which the Master Fund and the Pallinghurst Structure were subsequently established, including the approval in July 2006 of the Angolan Project and what became known as Project Charlie as Investment Projects of the Master Fund and thereafter, all, in my opinion, clearly show that the Master Fund and the Pallinghurst Structure of which it was part, were being treated by the parties as real and effective.”

(ii) the period from December 2006 to 3 January 2007

40. On 1 December 2006 Mr Vekselberg - in response to Mr Gilbertson’s email of 29 November 2006 - agreed in a telephone conversation that Mr Gilbertson should proceed to acquire the Fabergé brand for a price not exceeding US\$40 million. Mr Gilbertson confirmed that understanding in an email, copied to Mr Kuznetsov, later on that day.
41. On 6 December 2006 there was a meeting in London attended by Mr Gilbertson, Mr Sean Gilbertson, Mr Kuznetsov, Mr Mende (a joint owner, with Mr Kundrun, of AMCI) and representatives of First Reserve (a very large investment fund specialising in energy related projects) to discuss further the possibility (discussed earlier in the year) of AMCI and First Reserve becoming investors in the Master Fund. The meeting also considered the status of the various projects which were being pursued as Investment Projects for the Master Fund,

including Project Egg. Mr Mende/AMCI remained interested - particularly in relation to Project Charlie, a proposal for the acquisition of an Australian manganese mining company - but First Reserve subsequently dropped out.

42. On 13 December 2006, Mr Kuznetsov and Mr Gilbertson met, informally, at the Swissotel, Moscow. The judge found - resolving a difference of recollection between them - that, although Mr Kuznetsov was adamant that he had told Mr Gilbertson at that meeting that Mr Vekselberg required (as a condition of supporting the bid for the Fabergé Rights) that one of his own companies would own the actual title to the Fabergé brand (outside the Pallinghurst Structure, but on the basis that the economic benefit of the business of developing, exploiting and managing the Fabergé brand would remain with the Master Fund within the Pallinghurst Structure), Renova had not established that Mr Gilbertson did understand and agreed to Mr Vekselberg's requirements at, or as a result of, that meeting. After reviewing the evidence and surrounding circumstances, the judge said this (at paragraph 9.10 of his judgment):

“9.10 . . . On balance it is my overall assessment that Mr. Gilbertson first fully understood Mr. Vekselberg's requirements following the telephone conversation between Sean Gilbertson and Mr. Kalberer on 20th December 2006.”

It was in the course of that telephone conversation, as the judge explained later in his judgment (at paragraph 9.16) that Mr Sean Gilbertson first learnt of Mr Vekselberg's requirements. As the judge observed:

“9.16 . . . I consider it improbable that, if Mr. Gilbertson was already aware of or understood Mr. Vekselberg's requirements, he would not have passed that information on very quickly to Sean Gilbertson. I therefore conclude that if Sean Gilbertson did not know of Mr. Vekselberg's requirements until Mr. Kalberer told him, which I accept is the case, then Mr. Gilbertson did not know or understand them either until that point.”

43. On 15 December 2006 (two days after the meeting between Mr Gilbertson and Mr Kuznetsov in Moscow) Mr Sean Gilbertson agreed with UBS/Unilever a purchase price of US\$38 million for the Fabergé Rights. Mr Gilbertson informed Mr Kuznetsov that the price had been agreed. Later on that day (15 December 2006), Mr Kuznetsov sent an email to Mr Gilbertson, with copies to Mr Sean Gilbertson and Mr Igor Cheremykin (the Chief Legal Officer of Renova Management, based in Moscow), to congratulate him on reaching agreement as to the purchase price. That email included the sentence:

“It is very important that we use the right group company for the purchase so could you please communicate with Igor Cheremykin, the head of our legal and corporate department on this (chiv@renova-cons.ru).”

The judge explained that there was a dispute as to what the Gilbertsons understood, or should have understood, by the reference to “the right group company for the purchase”: the Renova Parties contending that the Gilbertsons would or should have understood “the right group company” as a reference to a company within the Renova Group (or a company within Mr Vekselberg’s family office) and the Gilbertsons contending that they understood “the right group company” to be a reference to a company within the Pallinghurst Structure. The judge accepted - on the basis of his finding that, on 15 December 2006, the Gilbertsons did not know of Mr Vekselberg’s requirement that he would, himself, own the title to the Fabergé Rights through one of his personal companies - that they did not understand Mr Kuznetsov to be referring to anything other than the Pallinghurst Structure. That view, he held, was confirmed by Mr Sean Gilbertson’s response, by email to Mr Cheremykin, with a copy to Mr Kuznetsov, sent later the same day, in which he informed them that a Cayman Islands company, Project Egg Limited (PEL) had been incorporated as a wholly owned subsidiary of the Master Fund to acquire the Fabergé Rights. The judge observed (at paragraph 9.13 of his judgment) that PEL had been incorporated on 1 December 2006, with Mr Sean Gilbertson and Mr Willis, an employee of Pallinghurst LLP, as its directors; but that “rather surprisingly”, the Renova Parties were not made aware of that until Mr Sean Gilbertson’s e-mail of 15 December 2006.

44. On 18 December 2006 Mr Sean Gilbertson notified Mr Kalberer by email that Unilever was insisting on completion of the purchase of the Fabergé Rights before the year end. But, on the following day (19 December 2006), Unilever indicated (through its solicitors) that, provided that contracts were exchanged before 31 December 2006, it was content to defer completion until 3 January 2007.

45. At paragraph 9.16 of his judgment, the judge returned to the telephone conversation between Mr Sean Gilbertson and Mr Kalberer on 20 December 2006 to which he had referred earlier. He described that as “an important conversation” in that (as the Gilbertson Parties contended and the judge accepted) it was the first time that the Gilbertson Parties had been informed of Mr Vekselberg’s requirement that the Fabergé Rights would be owned by one of his private companies. Shortly after that telephone conversation Mr Kalberer identified the company that was to own the Fabergé Rights as Lamesa Arts Inc, a company incorporated in Panama; and provided Mr Sean Gilbertson with a copy of a power of attorney in his (Mr Kalberer’s) favour executed by that company. On the following day (21 December 2016) Mr Sean Gilbertson responded with an email to Mr Kalberer, copied to Mr

Kuznetsov, which - after stating that Mr Gilbertson was waiting for a call from Mr Kuznetsov - included the following observation:

“Clearly switching entities in this fashion at the 11th hour is not in the spirit of the arrangements with the Pallinghurst team and it is thus crucial that this call take place so that we might understand what arrangements [Mr. Kuznetsov] has in mind”.

He went on to say that that Unilever, UBS and their solicitors were waiting to hear about the signing of the sale and purchase agreement (“the SPA”).

46. As I have said, that email was sent by Mr Sean Gilbertson on 21 December 2006. The judge found that, on the previous day (20 December 2006), Mr Gilbertson had received an email from Dr Jelinek. The email was in these terms:

“I have spoken to Hans [Mr Mende] and convinced him to express his interest and being ready to cover abt 15 MIL to secure the brand name. He will do it outside AMCI and with my silent contribution either half or one third depending if Kudrun wants to participate. . .”

The judge observed (at paragraph 9.18 of his judgment) that:

“Clearly Mr. Gilbertson must have spoken to Dr. Jelinek prior to this e-mail about purchasing the Fabergé brand and, in turn, Dr. Jelinek had spoken to Mr. Mende to ascertain whether he would be interested in contributing about US\$15m to the purchase price. Dr. Jelinek was saying that he would contribute either half or one third of the price depending on whether Mr. Kundrun wanted to participate. It seems to me that this clearly shows that Mr. Gilbertson was actively setting up a consortium consisting of Dr. Jelinek, Mr. Mende, possibly Mr. Kundrun and, secretly, himself, to purchase the Fabergé brand, without any participation or involvement by Mr. Vekselberg, Lamesa or Renova.”

Early on 21 December 2006, Mr Gilbertson had responded by e-mail to Dr Jelinek:

“Many thanks, Milan. That is very helpful indeed!
I will have my phone conversation with Viktor later today and will keep you informed”.

47. The judge found that a number of other relevant events took place on 21 December 2016:
- (1) Later on that day Mr Sean Gilbertson sent an email to Mr Kalberer, again copied to Mr Kuznetsov, to inform him that UBS was eager that the SPA be signed forthwith. That email contained the following paragraph:

“We are in the meantime preparing a draft of a one page agreement that could be signed by BPG, VK and VV to give comfort that at least 75% of ‘Project Egg Limited’ will be purchased by VV’s vehicle and that the Pallinghurst team’s rights will be protected. I will also send the necessary resolution of the ‘GP of the GPLP’ [the Company] authorising that BPG [Mr Gilbertson] (or VK, if you prefer) sign the sale & purchase agreement on behalf of Pallinghurst Resources Management LP [the Master Fund] (this is, as discussed with you yesterday, in connection with this vehicle guaranteeing the obligations of Project Egg Limited under the sale and purchase agreement)”.

The judge explained that Mr Sean Gilbertson's reference to discussions between Mr Kalberer and himself on the previous day concerning Mr Gilbertson (or Mr Kuznetsov) signing the SPA on behalf of the Master Fund confirmed the parties' agreement that the Master Fund would be the guarantor of the obligations of PEL and would sign the SPA as such.

- (2) Still later on the same day (21 December 2006), Mr Sean Gilbertson sent a further email to Mr Kalberer, copied to Mr Kuznetsov and Mr Vekselberg, attaching a one page draft "Implementation Agreement" ("the First Draft IA"). He wrote:

"Further to my earlier e-mail, please find attached the proposed one page agreement relating to implementation of Project Egg (allowing Mr VV to retain at least 75%). UBS are pushing hard to complete signature of the sale and purchase agreement today and your assistance in this regard would be appreciated. I see no reason why we cannot accomplish this, particularly if we sign the attached agreement giving comfort to all parties. BPG confirms that Hans Mende is very enthusiastic to join VV in this initiative and committed earlier today to taking the remaining 25% . . ."

The judge observed that the First Draft IA attached to Mr Sean Gilbertson's email provided that the Fabergé Rights would be purchased forthwith by PEL on the terms negotiated between Pallinghurst LLP (the investment management vehicle established in England by Mr Gilbertson to which he had referred at paragraph 8.3 of his judgment) and Unilever; that Mr Kuznetsov and Mr Gilbertson were to be deemed to have signed an attached resolution enabling the Master Fund to become a party to the SPA as guarantor of the obligations of PEL; and that an entity nominated by Mr Vekselberg would pay the purchase price (US\$38 million). The First Draft IA also provided that a documented transaction - under which not less than 75% of the ownership of PEL would be transferred to an entity nominated by Mr Vekselberg and 25% of the ownership of PEL would be offered to AMCI (Mr Mende's company) at a corresponding percentage of the purchase price - would be executed after completion of the SPA. The intended effect, he said, was that the economic benefits in relation to the Fabergé Rights and the decision making rights attributable to the Pallinghurst team and all commercial opportunities arising from them were not to be any less than those contemplated in the Long Form Agreements.

- (3) Mr Kalberer replied by email, sent to Mr Sean Gilbertson and Mr Gilbertson with copies to Mr Kuznetsov and Mr Vekselberg, in these terms:

"Following a telephone conversation with VK [Mr. Kuznetsov] of a moment ago I gather the following:

1. We would agree to the Pallinghurst Team getting the economic benefit of Project Egg as if the Faberge rights were purchased by Pallinghurst Resources Management LP [the Master Fund] and the remuneration

mechanics set out in the last drafts [of the Long Form Agreements] agreed by Renova were applied.

2. As to Project Egg Ltd. [PEL], we request that 75% of its shares are transferred to Lamesa Arts Inc. within the next 2 business days after signing of the agreement regarding the Fabergé rights or, if ever possible before. Please confirm (i) who controls and (ii) how: (1) the shareholder and (2) the directors of this company.
3. The remaining 25% in Project Egg Ltd can be purchased by AMCI at the corresponding percentage of the purchase price for the Fabergé rights under the following cumulative conditions:
 - a) Project Charley [sic] is closed within the next 6 months by Renova and AMCI (at a relation of 43% to 50% by Renova and 50% to 57% by AMCI;
 - b) Renova obtains a firm commitment from an AMCI vehicle with the respective substance that it will take up, at Renova's discretion, between 50% to 57% in Charley.

If one of the conditions is not met Renova has the right to purchase the 25% in Project Egg Ltd. at USD 0.25. I could not talk to VK regarding the decision making and management issues as the acoustic quality of the call was very bad”.

- (4) Some two hours later (but still on 21 December 2006), Mr Gilbertson sent an email to Mr Kalberer, copied to Mr Kuznetsov and Mr Vekselberg:

“The acoustic quality of your line to VK must have been bad indeed for these proposals to emerge at this late stage.

The Management issue is critical, and VK confirmed in response to my specific question during our telecon earlier this afternoon that the management arrangements, now long-established between Pallinghurst and Viktor, would not be diluted. Even if he had not done so, there are no grounds to seek any change at this late stage.

Regarding item 3: It is not reasonable to now require a new set of negotiations with AMCI in the Egg arrangements. I cannot reasonably do this in the time scale to which we are working. Also, VK made no mention of these conditions in our telecom this afternoon, neither during our meeting last week in the Swisshotel in Moscow. On the contrary, he welcomed the idea of an international investor. How can you seek such changes in the last hours? Just accept that you have a good partner, in a partnership that will lead to much bigger things in future. If he does not, you lose nothing.

Regarding item 2: Two days is simply too short, particularly over this time of the year. But we will accept the principle of a rapid transfer against appropriate assurance, in the transfer agreement, on item 2 and on the Management arrangements. In response to your questions in item 2, 100% of the equity in Project Egg Ltd is held by Pallinghurst Resources LP, and the directors are Sean and Andrew Willis, as we have previously advised you.

After 18 months of negotiation by Pallinghurst, the deal is now there for the taking. Let us get on with it!”

- (5) Still later the same day, 21 December 2006, Mr Gilbertson spoke to Mr Vekselberg on the telephone. He followed up that conversation with an email to Mr Vekselberg, with

copies to Mr Kuznetsov and Mr Kalberer, in these terms:

“Further to our conversation of 45 minutes ago, I have as yet received no call from Mr Kuznetsov.

As I said to you, the lawyers on the other side are actually sitting in the London office, waiting to sign the documentation that Pallinghurst has painstakingly drafted and negotiated over the past months, and which will secure the Fabergé brand for us. Unilever wish to book the transaction in their 2006 financial year, with payment on 3rd January 2007. If they fail to achieve that, we do not have a deal, and they may re-approach the other parties with whom they have been in negotiation. We have in the last 10 minutes had confirmation that Unilever have signed, and that their lawyers are waiting to exchange documents.

I have just tried to phone you, unsuccessfully; you will find the missed call on your phone. Acting on the assurances that you gave me during this evening’s telephone conversation, namely that you want me to buy the brand on the basis of the arrangements that we have established between us over the past many months, I will therefore now trigger the Unilever-Pallinghurst transaction to conclude the deal. Project Egg Ltd, a Pallinghurst company, will be the owner of the Fabergé brand. I confirm that I shall work closely with your team to conclude payment and to achieve a structure that suits your needs, in particular an arrangement whereby there is no Third Party involvement, though the latter will be a little complicated in view of developments since I met with Mr Kuznetsov in the Swissotel last week, when he believed you would welcome an international partner with a 25% stake. (At some stage soon, you should meet Mr Mende of AMCI: you will like him, and he will be an excellent partner in Charlie, so you should try hard to ensure that he is not offended by being excluded from Fabergé, in which he has already agreed to invest).

I shall advise you as soon as you are officially the global ‘Mr Fabergé’”

The judge observed (at paragraph 9.24 of his judgment) that, in his view:

“9.24 . . . it is clear from all of this that Mr. Gilbertson had not refused to consent to or vetoed Mr. Vekselberg’s requirements for re-structuring the way in which the Rights should be pursued as an Investment Project for the Master Fund. Indeed he was proceeding on the basis that Mr Vekselberg’s structure was being pursued.”

And, at paragraph 9.25, he said this:

“9.25 . . . The confirmation by Mr. Gilbertson that he would work closely with Mr. Vekselberg ‘to achieve a structure that suits your needs’ clearly indicates, in my opinion, that Mr. Gilbertson was not refusing to consent to or vetoing the structure which Mr. Vekselberg wished to be pursued in respect of the Rights as an Investment Project. Furthermore, his reference to Mr. Vekselberg as becoming the global ‘Mr. Fabergé’ can only have been a reference to Mr. Vekselberg’s ownership of the title to the Fabergé brand; it clearly was not a reference to ownership of the title to the Fabergé brand by the Master Fund as part of the Pallinghurst Structure. It was, it seems to me, an indication of Mr. Gilbertson’s acceptance of that.”

48. On the following day, 22 December 2006, the SPA was signed in London by Unilever and by PEL. The judge observed that Mr Gilbertson accepted, in the course of his evidence, that when he procured PEL acting by Mr Sean Gilbertson to sign the SPA he acquired the contractual entitlement to the Fabergé Rights for the Master Fund and entities within the

Pallinghurst Structure and not for himself personally; he accepted that in no sense was PEL acting as his own nominee or agent in entering into the contract for the Fabergé Rights; and he accepted that, following the execution of the SPA, the entitlement to acquire the Fabergé Rights was owned by PEL, which was in turn owned by the Master Fund as part of the Pallinghurst Structure. The judge went on to say this (at paragraph 9.28 of his judgment):

“9.28 It seems to me to follow that, even if the precise terms on which the Master Fund was to hold the economic benefit of the Rights could not be finally agreed with the Renova Parties, Mr Gilbertson would not in any event be entitled to withhold the Rights for himself.”

The judge accepted the submission (made on behalf of Renova) that, in circumstances where the entitlement to the Fabergé Rights was wholly owned by PEL there was no way in which Mr Gilbertson could acquire title to the Fabergé Rights himself without the co-operation of PEL. Furthermore, he said, Mr Gilbertson accepted that it was PEL that had contracted to purchase the Fabergé Rights from Unilever; and that it had done so on the basis that the acquisition would be funded by Renova money for the benefit of the PEL/Master Fund/Pallinghurst Structure: the acquisition was not a Gilbertson transaction for the Gilbertsons’ benefit.

49. On the same day (22 December 2006) Mr Kalberer sent an email to Mr Sean Gilbertson, copied to Mr Kuznetsov and Mr Gilbertson, in these terms:

“After a conversation with VK we have to insist and make it a condition precedent that the agreement (‘Agreement’) regarding the transfer of 100% of the shares in Project Egg Ltd. (‘PEL’) is finalized and signed prior to the closing of the purchase agreement regarding the Fabergé rights, i.e. the payment of the USD 38m.

For the Agreement we envisage the following provisions:

1. All of the shares shall be transferred to Lamesa Arts Inc, the details of which I provided you earlier.
2. Clear references regarding the preparation and taking of decisions and the ongoing the [sic] process of taking decision as to the management of PLE [sic] and any other decisions relating to it.
3. Clear references and description as to how the various entities of the Pallinghurst structure economically benefit from PEL and its business and how these rights terminate with what consequences.
4. That the directors of PEL are nominee directors provided by a service provider, which are instructed by the Executive Committee of the GP and of the GPLP.

To ensure a smooth closing please assure that I get a first draft of the Agreement early next week, I will have to review and discuss with VK . . .”

The judge observed that Mr Sean Gilbertson had said in evidence that he did not see this email until 28 December 2006.

50. On 23 December 2006 Mr Gilbertson sent an email to Mr Vekselberg, copied to Mr Kuznetsov, Mr Kalberer and Mr Sean Gilbertson, in these terms:

“I am happy to be able to tell you that we have received confirmation from our attorneys, Clifford Chance, that Pallinghurst is now the owner of the Fabergé brand. I hope you will be as pleased about this outcome as I am, for I believe that there is great future potential and value to be realised. I congratulate you on this entrenchment of your interests in this revered brand name [emphasis supplied by the judge].

The purchase agreement incorporates a pre-agreed Press Release by Unilever and Pallinghurst, which is quite brief and which your colleagues have seen. I am sure you will wish to make your own personalised Press Release, for the news will almost certainly attract strong international interest, and possibly headlines in major world newspapers, I am happy to draft this for you if you wish, but your own PR machine will no doubt be more aware than I of your requirements.

Mr Kuznetsov and I have discussed arrangements to transfer 100% of the ownership of the brand to one of your companies and I confirm to you my willingness to do so against binding commitments that the Pallinghurst team will retain all of the economic benefits and management rights that it would have under Pallinghurst’s agreements with Renova [emphasis supplied by the judge]. Payment of the US\$38million is due on 3rd January, 2007. I MUST HAVE written confirmation from Messrs Kuznetsov and Kalberer by the middle of next week that this will be done.

If you need any further action or information, please let me know”.

Also on 23 December 2006, Mr Gilbertson sent an email to Mr Mende copied to Dr Jelinek:

“Please see the e-mail below [that is, the email sent to Mr Vekselberg just set out] which I sent off in the early hours this morning.

You will note that the Fabergé purchase is done, and the trademark is currently owned by Pallinghurst, (subject to payment of the \$38million on 3rd January) but Viktor’s crowd played hard-ball during the final hours, and there were some tense moments. Along the line, Viktor insisted that 100% of (only) the trade-mark should be owned by one of his companies (though not necessarily its harvesting, exploitation and development) and I have agreed that I am willing to implement that, but only against binding commitments that the management control and economic benefits should lie with Pallinghurst in accordance with the previously agreed arrangements. [emphasis supplied by the judge] Also recently, Viktor’s consigliere, [Mr. Kuznetsov], has re-confirmed their willingness to bring you in as a 25% partner, on condition that AMCI joins in the broader initiative, including Charlie. Clearly there is still some boxing that must take place before we have finality, and before Viktor’s empire makes payment on the 3rd January. I have told [Mr. Kuznetsov] that unless I have binding assurances, well in advance, that they will pay on time, I will finance the \$38million from other sources. I do not think they could live with losing a brand that Viktor now wants so much, so am fairly confident we will get to a good outcome . . .”

The judge observed that it was clear that, by the second of those emails, Mr Gilbertson was informing Mr Mende and Dr Jelinek that he had agreed with Mr Vekselberg (as, indeed he had) that effect would be given to Mr Vekselberg’s requirement that 100% of the Fabergé brand should be owned by one of his companies (although not “its harvesting, exploitation

and development”), against a commitment that the management, control and economic benefits should remain with the Master Fund as part of the Pallinghurst Structure in accordance with the previous arrangements.

51. The judge went on (at paragraph 9.31 of his judgment) to say this:

“9.31 Clearly Mr. Gilbertson was aware at this time, only a day after Sean Gilbertson’s telephone conversation with Mr. Kalberer, that under the new structure for the Investment Project required by Mr. Vekselberg and the Renova Parties, although title to the Fabergé brand would be held outside the Pallinghurst Structure, the economic benefits of developing, exploiting and managing the Fabergé Rights would remain with the Master Fund within the Pallinghurst Structure.”

And, at paragraph 9.32 of his judgment, he observed that:

“9.32 In his e-mail to Mr. Mende Mr. Gilbertson also told Mr. Mende and Dr. Jelinek that he had told Mr Kuznetsov that unless he had binding assurances that they would pay on time he would finance the \$38 million from other sources. That was not strictly true. Mr. Gilbertson had said emphatically in his previous e-mail to Mr. Vekselberg, copied to Mr. Kuznetsov and Mr. Kalberer, that he must have written confirmation by the middle of the following week that payment of the US\$38 million would be made on 3rd January 2007 and later that day, 23rd December 2006, Mr. Kalberer e-mailed Mr. Gilbertson, with copies to Mr. Vekselberg, Mr. Kuznetsov and Mr. Gilbertson, confirming that Lamesa Arts had arranged for sufficient funds to pay the purchase price of US\$38 million. However, in his evidence Sean Gilbertson asserted that this e-mail was also stuck in his spam filter and not seen by him until 28th December 2006, some 5 days later. At one point, Mr. Gilbertson did however say that he would have to make alternative arrangements if it was not confirmed that the US\$38 million would be paid on 3rd January 2007. The overall evidence of the Renova Parties was that Mr Gilbertson did not specify the nature of such alternative arrangements and that they were not made aware that Mr. Gilbertson was arranging and subsequently had arranged to make the payment to Unilever with other investors, including his own trust, until after he had actually done so and the payment had been made. In fact Mr. Kuznetsov said he thought Mr. Gilbertson would seek an extension of time from Unilever. Mr. Gilbertson’s statement in his e-mail to Mr. Mende that he had told Mr. Kuznetsov that if he did not receive the assurances he was seeking he would use finance from other sources to pay US\$38m was at least disingenuous if not deceptive.”

52. On 26 December 2006 Mr Sean Gilbertson, on behalf of his father, sent to Mr Kuznetsov and Mr Kalberer, with a copy to Mr Vekselberg, a further draft Implementation Agreement (“the Second Draft IA”). In this draft, PEL (as the entity by which the Fabergé brand had been acquired under the SPA) was referred to as “OpCo”; and the company controlled by Mr. Vekselberg (as the entity by which the Fabergé brand was to be owned, but with the economic benefits and decision making rights remaining with OpCo) - was referred to as “BrandCo”. The Second Draft IA provided:

(1) That BrandCo would pay the purchase monies payable under the SPA on 3 January

2007; that ownership of the Fabergé brand should be transferred to BrandCo as soon as practicable after completion of the purchase for a nominal consideration; and that BrandCo should own and hold the Fabergé brand until the winding up of the Master Fund pursuant to the Pallinghurst agreements.

- (2) That Opco would manage and operate the Fabergé Rights as a portfolio company of the Master Fund pursuant to the Pallinghurst agreements (which, as the judge said, meant the unsigned but agreed Long Form Agreements); and that OpCo would be the beneficiary of all proceeds arising from its right to develop and pursue all commercial opportunities arising from the Fabergé brand.
- (3) That there would be a payment by BrandCo on the eventual winding up of the Master Fund in respect of the enhancement of the value of the Fabergé brand as a result of the successful implementation of the development and pursuit by OpCo of the commercial opportunities arising from and relating to it; and that the parties should use their best endeavours to draw AMCI into the Master Fund.
- (4) That AMCI should have the right to purchase up to 25% of BrandCo, subject to certain conditions relating to its involvement in Project Charlie.

The draft provided for the second Implementation Agreement to be signed by Mr Gilbertson and Mr Kuznetsov on behalf of the Company.

53. On 29 December 2006 Mr Kalberer sent an email to Mr Sean Gilbertson, copied to Mr Kuznetsov and Mr Gilbertson, attaching a copy of the Second Draft IA, marked-up to show the changes which he proposed. Those proposed changes included the following:

- (1) That the Master Fund, represented by Mr Kuznetsov and Mr Gilbertson as members of the “Executive Committee” (which, as the judge said, meant the Investment Committee) of the Company, as the General Partner of GPLP, should be parties to the agreement; as should PEL and a Lamesa group entity.
- (2) That BrandCo would be a Lamesa company; and that it would pay to OpCo (PEL) the purchase price due under the SPA on 3 January 2007, in order to enable OpCo to pay the purchase price to Unilever on that date.
- (3) That payment by BrandCo to OpCo was to be on conditions (i) that OpCo transferred the title to the Fabergé brand to BrandCo or its nominee (which, as the judge said, was to be a Lamesa group company) for nominal consideration and (ii) that the directors of OpCo be replaced by a director or directors nominated by the Master Fund and an equal number nominated by BrandCo.
- (4) That the new directors of OpCo were to act upon the written instructions of the Master Fund given through the Investment Committee of the General Partner of GPLP (which,

as the judge said, meant the Company).

- (5) That, upon the transfer of the title to the Fabergé brand to BrandCo, BrandCo would conclude a licence agreement with OpCo for as long as the Fabergé brand was managed and held as an investment of the Master Fund.
- (6) That the terms of the licence were to include, *inter alia*, (i) a provision that OpCo would be responsible for developing and pursuing all the commercial opportunities arising from and relating to the Fabergé brand and should have the benefit of the proceeds so arising; and should be the vehicle “in which all revenues, accruals and expenditures arising from the Fabergé brand shall vest”; (ii) a provision that the Fabergé brand should be owned by Lamesa Arts but should in all respects be treated as if it were an investment of the Master Fund; and (iii) a provision that, accordingly OpCo would be managed and operated as a portfolio company of the Master Fund pursuant to the Pallinghurst agreements as agreed.

Later on that day (29 December 2006) Mr Kalberer sent a further email to Mr Sean Gilbertson in which he wrote that, subject to agreement regarding his proposed changes to the Second Draft IA, they would prefer to transfer the US\$38 million purchase price to Unilever direct, on behalf of PEL.

54. On 30 December 2006, Mr Sean Gilbertson sent an email to Mr Kalberer, copied to Mr Kuznetsov and Mr Vekselberg, to which he attached a further draft Implementation Agreement (“the Third Draft IA”). The Third Draft IA provided, *inter alia*:

- (1) That BrandCo (a Lamesa group company) would, upon the transfer to it by OpCo of the Fabergé brand (in return for Lamesa Arts procuring payment of the purchase price to Unilever), grant OpCo “a royalty free, exclusive, world-wide, sub-licensable, perpetual and irrevocable licence to use and exploit the Fabergé Brand”.
- (2) That the licence was to be valid until the winding-up of the Master Fund pursuant to the Pallinghurst agreements; at which time BrandCo could terminate the licence on 90 days notice; and that the parties should negotiate in good faith a written licence agreement to give effect to this and other specified terms.
- (3) That OpCo should be managed and operated as a portfolio company of the Master Fund pursuant to the Pallinghurst agreements and should be the legal and beneficial owner of all revenues, accruals and expenditures arising from the Fabergé brand.
- (4) That, although recognizing that the Pallinghurst agreements had not been signed, nonetheless, they should apply to the Fabergé brand (albeit that the Fabergé brand itself would be owned by BrandCo).

Mr. Kalberer (who, as the judge said, was on holiday in Brazil at this time) replied, by email

sent to Mr Sean Gilbertson on that evening, stating that he would go through the Third Draft IA the next day and revert with his comments.

55. The judge noted (at paragraph 9.38 of his judgment) that it was Mr Gilbertson's evidence that he awoke on 1 January 2007 with a realization that agreement was not going to be reached in time to make the payment to Unilever on 3 January 2007; and so decided to implement his plan to acquire the Fabergé Rights himself with the assistance of his consortium of investors and not through or with Mr Vekselberg/Lamesa/Renova. He noted, further, that it was Mr Gilbertson's evidence that he then proceeded, without further delay, to finalise the arrangements which he had already discussed and put in place with Mr Mende and Dr Jelinek over the previous weeks. Mr Gilbertson sent an email to Mr Mende, copied to Dr Jelinek, which was in these terms (so far as material):

“ . . .

Good Morning Hans, and a happy New Year to you. I would like to phone you today to wish you all the best, and also to brief you on the status of Project Egg. Deal now being pushed by the Russians will seriously sub-optimize for us. I think you, Milan and I should do it 20:10:10. then negotiate with Russians from a position of strength. Is there a good time to call you about this?

Frankly I don't see how we can lose by such a strategy, and could have very much to gain. Our exposure need be only a few months, as we manoeuvre through the Alrosa negotiations.” [emphasis supplied by the judge]

The judge explained that the reference to “the Alrosa negotiations” was to discussions with a major Russian diamond producer with whom Mr. Gilbertson hoped to make an agreement in relation to marketing Fabergé diamonds. The judge found that Mr Mende then emailed his business partner Mr Kundrun, with a copy to Mr Gilbertson:

“ . . .

Renova/Vechselberg [sic] came back at the end and wanted to put some conditions into the agreement that would have limited our rights. Brian feels that it is best to negotiate out of position of strength with Vechselberg and buy the name outright and then deal with him. We would have to close on Wednesday, [3rd January 2007] BG is so convinced he would put up USD 10 Mio [sic] of his own money and Milan Jelinek also USD 10 Mio and they would you and me do the rest [sic], i.e. 20 Mio together. PP is 38 Mio for the brand name from Unilever. Vechselberg wants the name but we don't have much leverage unless we own it, that is why BG thinks we need to only bridge finance it for few months before we sell down. I am okay with this provided you join as well. Need to know urgently. Pls call Brian in case you want to hear from him directly as well.” [emphasis supplied by the judge]

On receipt of that email, Mr Gilbertson sent a further email to Mr Mende and Mr Kundrun, copied to Dr Jelinek and Mr Sean Gilbertson, in these terms:

“Thank you Hans. Greatly appreciate your support. This opportunity could be worth serious money for us after only a few months: We need those few months - and the brand name - to negotiate with Alrosa, and/or to develop the non diamond-angle, and we would add substantially to the current brand valuation which Unilever

has BADLY mis-managed for decades.

We cannot lose. Viktor will be willing to buy us out at the \$38m + at any time. (I told him some months ago that he/we would have to pay \$100M for the name: he winced, but said he could live with it. Remember that he paid \$120M for the eggs. The brand gives him serious cred in Russia/the Kremlin).” [emphasis supplied by the judge]

The judge found (at paragraph 9.40 of his judgment) that Mr Mende replied to Mr Gilbertson, by an email sent that evening (1 January 2007), with a copy to Mr Kundrun, confirming that Mr Kundrun had agreed to the proposal in principle; and that they could move fast if the funds were needed on 3 January 2007.

56. Early on 2 January 2007 Mr Gilbertson responded to Mr Mende’s email of the previous day, with copies to Mr Kundrun and Dr Jelinek:

“You are an absolute star. Many thanks. I await your call.

We need to deliver proof of transfer of funds by noon London time tomorrow, Wednesday. I ask that you pay the full \$38 million. The Unilever payaway details appear below. For your comfort, I attach hereto a copy of the Sale and Purchase Agreement between ‘Project Egg Limited’ and Unilever. . . .

I (and I am sure Milan [Dr. Jelinek]) will refund you promptly \$9.5 Million, hopefully tomorrow, but more realistically it will take a few working days (as I have to extract it from a set of Trusts in Jersey), so say by Tuesday at the latest. Obviously I will refund your loss of interest over those days. Please let me have the appropriate payaway instructions to your account.

Shortly thereafter, I propose that each of the 4 parties pay an additional \$500000 into ‘Project Egg Limited’ as a loan to give it \$2M working capital while we negotiate with Mr. Vekselberg, and in parallel, with Alrosa.

If you are in agreement with this, I shall draft a simple letter confirming these arrangements, for you to modify as you deem fit.” [emphasis supplied by the judge]

Mr Mende replied to that email, with copies to Mr Kundrun and Dr Jelinek, confirming that they would wire transfer US\$38 million to Unilever that day and that Dr Jelinek and Mr Gilbertson would repay their share amounting to US\$9.5m each within 7 days. He wrote that they understood that Mr Gilbertson felt confident that he could work out a solution with “the Vekselberg group” which would give the consortium “optimal economic benefits”. An hour later, Mr Gilbertson confirmed his agreement with what Mr Mende had written.

57. The judge observed (at paragraph 9.41 of his judgment) that “While Mr Gilbertson was communicating in this way with Mr Mende and copying Mr Kundrun and Dr Jelinek about financing the purchase price payable to Unilever and the profit they would make . . .”, Mr Sean Gilbertson was sending to Mr Kalberer, with a copy to Mr Kuznetsov, some further comments on the Third Draft IA in response to a voicemail from Mr Kalberer on the

previous evening; in particular, he observed that, in an email sent on 1 January 2007, Mr Sean Gilbertson referred *inter alia* to the “Pallinghurst principles as already modified for Project Egg . . .”. The judge said that that seemed to him to indicate “that the Gilbertsons were accepting the modification of the structure for Project Egg as an Investment Project, as required by Mr. Vekselberg”. He found that, later in the evening of 1 January 2007, Mr Gilbertson sent an email to Mr Kalberer, copied to Mr Kuznetsov, adding a further comment to those made by Mr Sean Gilbertson earlier that day on the Third Draft IA. The judge explained (at paragraph 9.44 of his judgment) that the Third Draft IA was the last draft Implementation Agreement seen by Mr Gilbertson before, early on 1st January 2007, he decided to and did finalise the arrangements for the purchase of the Fabergé Rights by Mr Mende, Mr Kundrun, Dr Jelinek and himself (the Consortium).

58. On 2nd January 2007 Mr Kalberer sent an email to Mr Sean Gilbertson from Brazil, copied to Mr Gilbertson and Mr Kuznetsov, attaching his revision of the Third IA. The revised draft (“the Fourth Draft IA”) was produced and circulated by Mr. Kalberer before he, Mr Vekselberg, Lamesa or any of the Renova Parties were aware of the steps which Mr Gilbertson had taken to finalise the arrangements for the funding of the purchase of the Fabergé Rights by the Consortium. Shortly after that Mr Kuznetsov sent an email to Mr Kalberer, with a copy to Mr Sean Gilbertson, setting out some brief comments of his own on the Fourth Draft IA. The judge held that the Fourth Draft IA made no significant changes to the provisions of the Third Draft IA with regard to the payment of the purchase price to Unilever by Lamesa Arts, the transfer of the Fabergé brand to BrandCo (Lamesa) for nominal consideration and the change of the directors of OpCo (PEL). It removed the words “perpetual” and “irrevocable” from the licence to be negotiated in good faith between BrandCo and OpCo. And it inserted a new clause (clause 2e) which provided that BrandCo should have the right to terminate the licence on 60 days notice without having to pay anything to OpCo if the Master Fund disposed of OpCo or if the Master Fund were wound-up pursuant to the Pallinghurst agreements. The judge observed (at paragraph 9.44 of his judgment) that:

“9.44 This [the new clause 2e] was clearly an uncommercial provision as far as the Master Fund was concerned and obviously was not going to be acceptable. It was also not consistent with clause 8 which made specific provisions, as in the Third draft IA, for the circumstances contemplated and provided for the payment of a ‘value-add’ in respect of enhancement of the value of the Fabergé brand by the Master Fund on its termination. Mr. Kalberer’s evidence was that he inserted clause 2e by mistake and that its provisions were unintended. He freely accepted that it should not have been in the draft and that he would have agreed to remove it in any future discussions of the terms of the Fourth draft IA. In my opinion, it would have been, and indeed was, obvious to the Gilbertsons that the terms of proposed clause

2e were uncommercial and inconsistent with the rest of the Fourth draft IA and that it could not have been thought through or intended by Mr. Kalberer, as indeed was the case.”

59. Also on 2nd January 2007 - and in order to fund his commitment to the other members of the Consortium to contribute 25% of the purchase price for the Fabergé Rights with his own money - Mr Gilbertson telephoned Mr Justin Thomas (the managing director of Fairbairn, the trustee of the Gilbertson Family Trusts), to request the necessary funds (US\$9.5m) from the BPG Settlement. A transcript of that telephone conversation was produced and referred to at the trial. The judge set out (at paragraph 9.45 of his judgment) those extracts from the transcript which (as he said) seemed to him to be the most relevant and significant:

“Brian Gilbertson:	Now, the reason I'm calling you so early in the New Year is I have bought myself a Christmas present.
Justin Thomas:	Okay.
Brian Gilbertson:	And I need some money to pay for it.
Justin Thomas:	[laughter] Okay.
Brian Gilbertson:	Shall I give you the background?
Justin Thomas:	Yes please, Brian, fire away. What have you bought yourself?
Brian Gilbertson:	Um, we have bought from Unilever - all the rights to the Fabergé brand.
.....	
Brian Gilbertson:	Okay, so we have signed an agreement with them [Unilever] about 10 days ago.
.....	
.	
Brian Gilbertson:	And it required payment to be made tomorrow.
.....	
.	
Brian Gilbertson	Payment to be made, be presented tomorrow. Now the original intention up until yesterday, today, was that the payment would be made out of Pallinghurst, Are you familiar with Pallinghurst?
Justin Thomas:	Yes, I am, yes, yeah
Brian Gilbertson:	But a complication came in, and the complication is that Victor Vekselberg, the Russian oligarch is really taken by this idea and, rather than do it through Pallinghurst, as was the original intention, he has insisted that, in order for him to pay he wants the brand to be transferred to one of his companies which would then license it on to Pallinghurst to develop.
.....	
Brian Gilbertson:	And so we will negotiate with him [Mr. Vekselberg] after we have acquired and paid for the brand.

.....

Brian Gilbertson: So that leaves the problem of paying for the brand.

.....

Brian Gilbertson: And the purchase price is 38 million dollars.

.....

Brian Gilbertson: And to that I have added 2 million dollars worth of working capital into the company that has negotiated and signed the agreement.

.....

Brian Gilbertson: And there are a consortium of four of us who will put up that money.

.....

Brian Gilbertson: Um, myself, and then three other relatively wealthy gentlemen who - and one of them will make the full payment tomorrow.

.....

Brian Gilbertson: But I need to refund him very promptly after that with 10 million dollars or ... - 9.5 million dollars.

.....

Brian Gilbertson: I'm not unhappy with it being held by the trust.

Justin Thomas: Okay. So we could make this as an investment rather than a distribution, okay.

.....

Brian Gilbertson: Project Egg Limited is a Cayman Islands registered company.

.....

Brian Gilbertson: It's a subsidiary of Pallinghurst.

.....

Justin Thomas: What would Victor Vekselberg's thoughts be if you do this without using Pallinghurst?

Brian Gilbertson: He'll be extremely pissed off I would think.

Justin Thomas: [laughter]

Brian Gilbertson: But we'll come back to the table and we'll negotiate something else.

.....

Brian Gilbertson: But not with a gun to my head, you know.

Justin Thomas: No.

Brian Gilbertson: Tomorrow's the deadline, if they don't do it we lose the transaction and he can step in and take it, and I'm not going to have that happen".

.....

60. The judge found that, in the afternoon of 2 January 2007, Mr Kalberer spoke to Mr Sean Gilbertson on the telephone about the Fourth Draft IA and that, in the course of that

conversation, a number of the disputed terms were resolved; but that Mr Sean Gilbertson said nothing to Mr Kalberer as to Mr Gilbertson's plans for alternative funding of the purchase of the Fabergé Rights by other investors, including the BPG Settlement.

61. In the evening of the same day (2 January 2007) Mr Gilbertson sent to Mr Vekselberg, copied to Mr Kuznetsov and Mr Kalberer, what the judge described (at paragraph 9.47 of his judgment) as “a very significant e-mail”:

“I am sure you are aware that I have been trying, ever since Pallinghurst bought the Fabergé Brand on the evening of 21 December, to achieve an agreement with your colleagues, Messrs Kuznetsov and Kalberer that would satisfy the basic understanding that you and I struck that evening. I believe that I have leaned over backwards to accommodate the (extraordinary) requirement from your side that one of your companies should own the brand outside of the Pallinghurst structure that we have so carefully negotiated, over so long a period, but which yet remains unsigned.

This morning I turned on my computer to find 90 odd lines of proposed amendment to the text that we had previously exchanged [The judge found this to be a reference to the Fourth Draft IA]. Some of these, 7 in total, were completely unacceptable, with clause 2e being perhaps the most glaring example. In a telephone conversation between Mr Kalberer and Sean this afternoon, less than 22 hours from the payment deadline, a number of the conflict issues were resolved, but late today we are told that a 25%-plus participation of 3rd parties in Pallinghurst Fabergé initiatives (I am NOT referring to your 100% ownership of the brand itself, which we had accepted) was a deal breaker.

The background will explain why it became clear to me today that there was little likelihood that we could reach an agreement in time that would satisfy the requirements of both Parties. I could not take the risk that payment would not be made under Pallinghurst's Sale and Purchase agreement with Unilever. Accordingly I have triggered alternative arrangements, so that payment has now been made, and Pallinghurst now owns the Fabergé brand.

I reconfirm to you my desire to reach an agreement with your team that will accommodate your wishes as well as mine. I hope that, with the looming payment dead-line removed, and the vacation season soon to end, we will be able to make orderly progress towards such an outcome.

I am available at your convenience to discuss any of the above, or matters arising therefrom, should you or your colleagues so wish.

...”

The judge made two comments on that letter. First, he pointed out that Mr Gilbertson's statement that it became clear to him that day, 2 January 2007, “that there was little likelihood of reaching an agreement in time” was “again not strictly correct”. The judge said this:

“9.47. . . . As I have already mentioned, his evidence was that it was when he first awoke the previous day, 1st January 2007, that he decided that agreement would not be reached in time and that he would therefore implement and did implement his strategy of purchasing the Rights himself with his consortium, as he had already been putting in place before then.”

Second, he pointed out that that it could not have been correct that it was the proposals contained in the Fourth Draft IA, received by Mr Gilbertson that morning, which caused him to “trigger alternative arrangements”; as the judge said:

“9.47. . . . it was, according to his own evidence, early the previous morning, before the Fourth draft IA had been sent out, that he decided to and did proceed with the alternative financing arrangements.”

62. The judge found (at paragraph 9.48 of his judgment) that the purchase of the Fabergé Rights from Unilever by PEL was completed on 3 January 2007 by payment of US\$38 million by K-MIC (the holding company owned by Mr Mende and Mr Kundrun). He found, also, that:

- (1) The minutes of a PEL board meeting held on 3 January 2007 recorded the approval of a loan to PEL of US\$38 million from Autumn, K-MIC and Dr Jelinek, repayable on 7 days’ notice either (at the lenders’ option) in cash or by the transfer of all PEL’s assets to a vehicle nominated by the lenders, with interest at USD LIBOR + 1.5% compounded monthly.
- (2) The minutes also recorded approval of the issuance of 100 new shares in PEL at par value to the lenders, pro-rata to their contribution to the loan.
- (3) The Master Fund held one share in PEL. The Register of Members of PEL showed that the additional 100 new shares were issued to Autumn, K-MIC and Dr Jelinek on 3 January 2007 in accordance with the board approval recorded in the minutes of that date.
- (4) The Register showed a transfer (*sic*) of 25 shares each on that date to Autumn and Dr Jelinek and of 50 shares to K-MIC.
- (5) The issue of those 100 shares on 3 January 2007 was subsequently confirmed in a letter dated 26 February 2007 from the Gilbertson Parties’ London solicitors, Clifford Chance.

The judge noted (at paragraph 9.48 of his judgment) that, notwithstanding the record in the minutes and the Register of Members and the confirmatory statement in their solicitors’ letter, the Gilbertson Parties pleaded in their Amended Defence that it was not in fact until 19 January 2007, some two weeks after the date recorded, that the additional 100 shares in PEL were issued. He rejected that contention.

(iii) the period after 3 January 2007

63. On the evening of the same day, 3 January 2007, Mr Gilbertson had sent an email to Mr Kuznetsov, copied to Mr Vekselberg, Ms Irina Vekselberg (who, the judge explained, was Mr Vekselberg’s daughter and was taking a particular interest in the Fabergé brand) and Mr Kalberer, with a proposed public announcement about the acquisition of the Fabergé brand.

In that email he requested their comment. On 4 January 2007, in an email sent to Mr Gilbertson and copied to Mr Sean Gilbertson and Mr Kuznetsov, Mr Kalberer responded to that request. After explaining that, given the developments of the previous two weeks, Renova needed to discuss the Pallinghurst project internally; he asked them not to publish any press releases or to contact the press in relation to Project Egg or any of the Pallinghurst projects in the meantime. Later that day Mr Gilbertson confirmed that he had stopped the issue of the press release about acquisition of the Fabergé brand. Mr Gilbertson and Mr Vekselberg met in Moscow on 16 and 17 January 2007 to discuss Project Egg; but that meeting was not fruitful. On 21 January 2007, after further communications, Mr Sean Gilbertson, on behalf of Mr Gilbertson, sent an email to Mr Vekselberg and Mr Kuznetsov with a proposed omnibus agreement relating not only to the Pallinghurst Structure and agreements and the Fabergé Rights but also to Project Charlie and to Mr Gilbertson's employment with SUAL. That draft agreement contained the proposal (made for the first time) that:

“1. The partnership between Renova and Pallinghurst envisaged by the unsigned Pallinghurst agreements shall be abandoned, and Pallinghurst shall be further developed independently by [Mr Gilbertson]”.

64. From 21 January 2007 the discussions between the parties departed from the proposals reflected in the draft IAs exchanged prior to 3 January 2007. Certain negotiations in relation to the Fabergé Rights took place thereafter; but without any obvious involvement of the Master Fund. The judge took the view that the details of those negotiations were of no relevance to Renova's claims in these proceedings; and that it was sufficient to record that the subsequent negotiations and discussions in relation to the Fabergé Rights were not successful. Following a meeting in London on 5 May 2007 between Mr Gilbertson, Mr Vekselberg and Mr Kuznetsov, Renova Holding gave written notice of termination of the Letter Agreement (under clause 8) on 27 May 2007.

The judge's findings as to the applicable principles of law

65. At section 11 of his judgment the judge considered the applicable principles of law. He referred to passages in judgments delivered in three cases before the Court of Appeal of England and Wales: first, in the judgment of Lord Justice Millett in *Bristol & West Building Society v Mothew* [1998] Ch 1, second, in the judgment of Lord Justice Jonathan Parker in *Bhullar and others v Bhullar and another* [2003] 2 BCLC 241 and, third, in the judgment of Lord Justice Mummery in *Gwembe Valley Development Co Ltd v Koshy and others* [2004] 1 BCLC 131. He referred, also, to observations of Mr Justice Patten, sitting in the High Court of England and Wales in *Halton International Inc (Holdings) SARL v*

Guernroy Ltd [2005] EWHC 198 (Ch). He went on (at paragraph 11.6 of his judgment) to say this:

“11.6 The cases make it clear, and Leading Counsel for the parties did not disagree, that whether or not someone is a fiduciary depends on whether he is acting for or on behalf of another ‘in a particular matter in circumstances which give rise to a relationship of trust and confidence’ see: *Bristol and West Building Society v Mothew* (supra); *Boardman v Phipps* per Lord Upjohn as cited in *Bhullar and Others v Bhullar and Another* (supra). The first question therefore is whether in the particular circumstances of this case Mr. Gilbertson was in a relationship of trust and confidence with the Company, with the core obligation of loyalty to the Company and the consequent fiduciary duties as outlined by Lord Millett in the *Bristol and West Building Society* case (supra). In other words, was there an obligation on Mr. Gilbertson to act in the interests of the Company in the circumstances? see *Hospital Products v United States Surgical Corp* cited in the *Halton International Inc* case (supra). If Mr. Gilbertson was subject to such obligations to the Company he was a fiduciary; see the reference to Dr. Finn’s *Fiduciary Obligations* (1977) referred to in *Bristol and West Building Society* (supra).”

The judge’s reasoning and conclusions on the question whether Mr Gilbertson owed fiduciary duties to the Company

66. At section 12 of his judgment the judge addressed the question: “Did Mr Gilbertson owe fiduciary duties to the Company”. At paragraph 12.14 of his judgment, he concluded that, in the circumstances of the present case and in relation to an investment opportunity which Mr Gilbertson had, himself, brought to the Investment Committee established pursuant to the Letter Agreement, that the answer to that question was “Yes”.
67. The reasoning which led the judge to that conclusion may, I think, be summarised as follows:
- (1) The judge explained (at paragraph 12.1 of his judgment) that Renova’s case was that, as a director of the Company, Mr Gilbertson owed fiduciary duties to the Company. He said this:
- “12.1 It is a well established principle of law that a director of a limited company owes fiduciary duties to the company of which he is a director, those duties principally being to act in the best interests of the company and the consequent duties referred to in the cases cited above, such as the duty to avoid a conflict of interest between his own interest and that of the company, not to make a profit for himself from his position as a director (at least without the informed consent of the company) and so on.”
- It was submitted on behalf of Renova, he said, that Mr Gilbertson owed these fiduciary duties to the Company as a *de jure* director.
- (2) The judge went on to observe (at paragraph 12.2) that it was also established that - by a provision in a company’s articles of association, by agreement of the shareholders or by clear implication from the particular circumstances of the case - the obligations of a

director to the company might be modified so as (for example) to enable the director to act in his own interests or in the interests of another in relation to a particular matter notwithstanding that those interests might not necessarily be the same as the interests of the company in relation to the particular matter. At paragraph 12.3, he referred to observations in the judgment in *Japan Abrasive Materials Pty Ltd v Australian Fused Materials Pty Ltd* [1998] WASC 60 - a case before the Supreme Court of Western Australia, on which reliance had been placed in argument on behalf of the Gilbertson Parties - and on a passage in the judgment of Lord Justice Burnton, sitting in the Court of Appeal of England and Wales, in *Re Neath Rugby Ltd (No.2): Hawkes v Cuddy and others (No. 2)* [2009] 2 BCLC 427. The judge explained, at paragraph 12.4, that it was submitted on behalf of the Gilbertson Parties that that principle - that, in appropriate circumstances, it was possible to vary or dispense entirely with a director's fiduciary duties to the company of which he was a director - was applied in the *Japan Abrasive Materials* case; and that, in the present case, the Letter Agreement was such an agreement. In particular, it was submitted that the terms of the Letter Agreement were such as to entitle Mr Gilbertson to act in his own interest in relation to an Investment Project which required his consent to pursue - or which, put another way, he was entitled to veto - and not necessarily in the interests of the Company.

- (3) Nevertheless, as the judge observed at paragraph 12.5 of his judgment, the terms of the shareholders' agreement in the *Japan Abrasive Materials* case, "were entirely different from the terms of the Letter Agreement and the surrounding circumstances in that case were entirely different from the circumstances in the present case". Renova's case - as the judge explained at paragraph 12.6 of his judgment - was that the source of Mr Gilbertson's fiduciary duties to the Company was "the *de jure* role that he occupied as a director of the Company"; that the Letter Agreement was not a shareholders' agreement; that in any event, the terms of the Letter Agreement did not have the effect of modifying Mr Gilbertson's fiduciary duties to the Company; and that the only question was whether there was anything in the arrangements between the Renova Parties and the Gilbertson Parties which did have that effect.
- (4) At paragraphs 12.6, 12.7 and 12.8 of his judgment, the judge summarised the arguments which had been put him:

"12.6 . . . The Plaintiff contended that there was . . . an obligation of loyalty on Mr Gilbertson as a director and a duty to act in the interests of the Company and, through the Company, the Master Fund. That, it was argued, was the foundation of the fiduciary relationship in the present case, even if it could have been qualified, although, in the present case it was not even qualified.

12.7 On the other hand, the case for the Gilbertson Parties was that careful

consideration of the nature of the Company's business and of the provisions of the Letter Agreement demonstrated that Mr. Gilbertson did not owe the Company any fiduciary duties with regard to Investment Projects which he was free to withhold his consent to or veto in his capacity as a member of the Investment Committee. Project Egg, they said, fell into that category. Mr. Gilbertson was, they contended, entitled in the circumstances to act as a director of the Company in his own interests.

12.8 The Gilbertson Parties argued that the Pallinghurst Structure, including the Company, was established pursuant to the Letter Agreement. They said that the Letter Agreement reflected a joint venture between Mr. Gilbertson and Renova Holding, although the principles were agreed between Mr. Gilbertson and Mr. Vekselberg, who owns and controls the Renova group. They submitted that the Company was of a joint venture character and that the directors, Mr. Gilbertson and Mr. Kuznetsov, were in effect nominated by the Partners of the joint venture, as defined in the Letter Agreement, namely Renova through Renova Holding and Mr. Gilbertson. Similarly, the shareholders were so nominated by the partners in the joint venture. In Mr. Gilbertson's case he nominated Fairbairn as trustee of the Gilbertson Family Trusts and Renova Holding nominated Renova Resources, as the two shareholders respectively. They say that accordingly any duties Mr. Gilbertson owed as a director of the Company are to be derived from the Letter Agreement, which reflects the joint venture and is the source of the agreement between the joint venturers and the surrounding circumstances."

At paragraph 12.9 the judge referred to the provision (at clause 2.5 of the Letter Agreement) on which, as he said, the Gilbertson Parties placed particular reliance: "approval to proceed with an Investment Project via the Investment Fund at an agreed value, shall require the unanimous consent of the Investment Committee". He went on to say this:

"12.9 That right [to veto proceeding with any Investment Project], they say, may be exercised by either of them in their own interest, without regard to the interests of the Master Fund and the Company. Accordingly, they contend that it follows that Mr. Gilbertson had no duty to act in the best interests of the Company, as opposed to his own personal interest, with respect to any Investment Project. The Letter Agreement, they say, constituted the agreement between the Partners of the joint venture which *inter alia* governed Mr. Gilbertson's rights and obligations with regard to investment opportunities and accordingly governed Mr. Gilbertson's relationship with the Company to be. If he was clearly entitled to act in his own interest in relation to Investment Projects he clearly had no duty to act in the interests of the Company in relation to such Investment Projects."

- (5) At paragraphs 12.10 and 12.11 of his judgment the judge rejected - as "somewhat artificial in the light of the commercial realities of the situation" - the contentions, advanced on behalf of Renova, that the Letter Agreement (which had been made between Mr Gilbertson personally and Renova Holding, neither of whom was a member of the Company) was not an agreement between the shareholders of the Company; was "clearly not akin to a shareholders' agreement of the kind in the *Japan Abrasive Materials* case"; and was not to be treated as such. But he accepted that the

circumstances in relation to the directors and the shareholders of the Company were not as straightforward as they were in the *Japan Abrasive Materials* case in that, at the time when the Letter Agreement was entered into, the Company did not exist and the Pallinghurst Structure of which the Company was to become part had not been devised. He said that, accordingly, “the Letter Agreement did not contain any provisions in relation to the Company, or its shareholders’ or directors’ rights or any terms of the kind contained in the shareholders’ agreement in the *Japan Abrasive Materials Case*”. And he went on to point out that it was clear from the comments of Lord Justice Mummery in the *Gwembe Valley Development* case that: “the mere fact that a company is of a joint venture character is not enough to justify an implication that the directors’ fiduciary duties are modified so as to entitle them to act in their own interests rather than in the interests of the company concerned.”

- (6) At paragraph 12.12 the judge emphasized that - having regard to the meaning given to the term “Investment Project” in clause 2.1 of the Letter Agreement - it was important to keep in mind that Investment Projects were opportunities and that the purpose of the Investment Fund was to explore, acquire and develop such opportunities. An opportunity, he said, could be at the stage of exploration but still constitute an Investment Project. He went on:

“12.12 In these circumstances, it seems to me that the mere fact that approval to proceed with an Investment Project required the unanimous consent of the Investment Committee did not mean that Mr. Gilbertson owed no fiduciary duty at all in respect of an opportunity which he had brought for consideration by the Investment Fund and Fund Management Vehicle and which was being explored. In my view, Mr. Gilbertson had a fiduciary duty as a director of the Company in respect of any potential Investment Project which was being explored by him with the agreement of Mr. Kuznetsov as the other member of the Investment Committee, at least until such time as there was clearly no longer unanimous consent to proceed with it or it was actually vetoed. Indeed, in accordance with the authorities referred to earlier, any such veto would have to be on the basis of full information being disclosed by or to Mr. Gilbertson or by or to Mr. Kuznetsov, as the case may be. In my opinion once an opportunity was in the process of being explored or acquired as an Investment Project, even if Mr. Gilbertson then vetoed it as a member of the Investment Committee, nothing less than a fully informed and express consent by the Company could possibly permit Mr. Gilbertson to pursue such an Investment Project for himself.”

And, at paragraph 12.13 - after observing that, in his view, it would be contrary to the overall intent, as reflected in the Letter Agreement, for a party to seek to veto or withdraw consent to an Investment Project in order to enable him to pursue that Investment Project for himself - the judge said this:

“12.13 The Letter Agreement expressly provided that the Partners would work together to add value to the Investment Fund, that Mr. Gilbertson would be the chairman of the Investment Fund and the Fund Management Vehicle and that

he would assume responsibility for developing and implementing the strategy for all Investment Projects. The Letter Agreement also provided that the duties owed by Mr. Gilbertson to the Investment Fund and the Fund Management Vehicle (which would subsequently include the Company) would be those customary for an executive chairman of a company and would include *inter alia* searching for and introducing investment projects to the Investment Committee and supervising the implementation of approved Investment Projects. He was also to provide strategic advice on Investment Projects. All of this is, in my opinion, consistent with the proposition that once a proposed Investment Project had been brought by Mr. Gilbertson for consideration by the Investment Committee and proceeding with it had not been consented to by Mr. Kuznetsov, Mr. Gilbertson as a director of the Company, was subject to the fundamental principles of loyalty and good faith in relation to that Investment Project, including not making a profit for himself out of his position, not placing himself in a position where his interest may conflict with that of the Company and not acting for his own benefit or exploiting the opportunity for himself, at least without the informed consent of the Company, all as explained in the English cases cited above.”

The judge went on to say (at paragraph 12.14 of his judgment) that, in his view, it was immaterial whether the correct approach was that advanced on behalf of Renova (that is to say, to start from the premise that Mr Gilbertson had fiduciary duties to the Company as its director as a matter of legal principle, subject to any agreement or implication from the circumstances abrogating or modifying such duties) or that advanced on behalf of the Gilbertson Parties (that is to say, to ask if the particular circumstances, including any relevant agreements, were such that Mr Gilbertson was subject to obligations to the Company which were of a fiduciary nature.): whichever approach were adopted, the conclusion was the same.

68. At section 13 of his judgment the judge addressed the submission, advanced on behalf of the Gilbertson Parties at the trial, that, because the Investment Committee never consented to Project Egg, it never became “an approved Investment Project” in the sense required by the Letter Agreement. He rejected that submission.
69. At section 14 of his judgment the judge addressed the question whether Mr Vekselberg’s requirement that the Fabergé Rights should be owned by a Lamesa company, outside the Pallinghurst Structure - which, as he said, represented a change to the structure through which those Rights as an Investment Project would be held - had any effect on the nature or extent of the fiduciary duties which (as he had held, at section 12 of his judgment) Mr Gilbertson owed to the Company. He concluded, at paragraph 14.4 of his judgment, that he could “see no reason why the fiduciary duties to the Company which Mr. Gilbertson owed as a director should have been any different after 20th or 21st December 2006 from his fiduciary duties before that time”.

The judge's reasoning and conclusions on the question whether Mr Gilbertson was in breach of fiduciary duties which he owed to the Company

70. At paragraph 15.8 of his judgment, after re-stating his conclusion that Mr Gilbertson remained in the same fiduciary relationship with the Company after 20 December 2006 as he did before that date, the judge went on to say this:

“15.8 . . . In such circumstances, it was not open to Mr. Gilbertson to take the Rights for himself or to seek thereby to make a profit for himself and the other members of his consortium. In my opinion that was inconsistent with and amounted to a breach of his fiduciary duties. This was exacerbated by the fact that he diverted the Rights, including the economic benefit of developing, exploiting and managing the Fabergé brand, from the Master Fund as part of the Pallinghurst Structure to himself covertly without any disclosure to the Company until after the event and even then, it was not full disclosure. In summary therefore I am of the opinion that in the circumstances Mr. Gilbertson owed the duties of a fiduciary as a director of the Company throughout the relevant period and that he was in breach of those duties in acting as he did in late December 2006 and January 2007.”

71. In reaching that conclusion the judge had held (i), at paragraph 15.3 of his judgment, that it was an essential part of Mr Gilbertson's strategy - that is to say, his strategy to “negotiate with the Russians from a position of strength” after having taken the Fabergé Rights out of the Pallinghurst Structure - to divert those Rights from the Master Fund by diluting its 100% ownership of PEL by the issue of further shares in PEL to Autumn and the other members of the Consortium so as to give them almost 100% ownership of PEL; and (ii), at paragraph 15.6, that there was no legitimate reason for Mr Gilbertson not to discuss with Mr Vekselberg his stated concern about possible failure to pay the purchase price under the SPA on the due date. It was, the judge held, Mr Gilbertson's duty to seek to resolve that concern with the Renova Parties and with Unilever; and not “to secretly take the Rights for himself with a view to making a profit”.

The submissions advanced on behalf of the Parties

72. It is said in the Memorandum of Grounds of Appeal filed on behalf of Autumn on 1 February 2013 that the judge misdirected himself and erred in law and/or fact in holding that Mr Gilbertson owed or was in breach of any fiduciary duty in relation to the Fabergé Rights or the Brand; and in holding that there was any substratum on which to found a claim against Autumn. More particularly, it is said that the judge misdirected himself: (i) as to whether Mr Gilbertson owed fiduciary duties to the GPLP and/or the Master Fund; (ii) in holding that Mr Gilbertson owed fiduciary duties to the Company which he did not owe; (iii) in such findings as he made that Mr Gilbertson breached any fiduciary duties; and (iv) in relation to the issue of shares in PEL to members of the Consortium. Those submissions were developed in extensive written submissions filed

on 24 May 2013; and in oral submissions at the hearing of the appeal.

73. In response to those submissions it is said on behalf of the Renova Parties that, “despite the length and complexity of Autumn’s Written Submissions the response to them can be boiled down to [a number of] short propositions”. In the present context, the relevant propositions are these:

- (1) Mr Gilbertson was a *de jure* director of the Company. The fiduciary duties that he owed to the Company extended to protecting its assets and interests, including ensuring that the assets and interests owned or controlled by the entities in the Pallinghurst Structure beneath the Company (and, principally, the assets and interests of the Master Fund) were safeguarded and exploited for the ultimate benefit of the Company. Those interests included the opportunity to acquire the Fabergé Rights; and, once the Fabergé Rights were secured by PEL (a Pallinghurst Structure company) on 22 December 2006, to keep them there.
- (2) The content and scope of Mr Gilbertson’s fiduciary duties were never attenuated, in particular either (a) by the terms of the Letter Agreement, or (b) by the fact that on 20 December 2006 Renova introduced the requirement that the Fabergé Rights be held by a Lamesa company (with the full economic benefit being held within the Pallinghurst Structure), or (c) by the nature or proposed terms of (and the parties to) the draft Implementation Agreements or the fact of their negotiation. Mr Gilbertson was at all times precluded by his duties of loyalty to the Company, and to the GPLP and the Master Fund, from having regard to his own interests.
- (3) Mr Gilbertson acted in breach of the fiduciary duties which he owed to the Company and the Master Fund by procuring that his Consortium (of which Autumn was a 25% member) acquire 99% ownership of PEL. Indeed, it is said that “Autumn all but concedes that, if Mr Gilbertson owed the Company or GPLP or the Master Fund duties which precluded him from having regard to his own interests, then he breached those duties”.

74. Before addressing the substantive question whether the judge was wrong to hold that Mr Gilbertson was in breach of fiduciary duties which he owed to the Company, it is convenient to consider, first, whether there is any substance in the submissions - numbered (i) and (iv) in the summary of the Memorandum of Grounds of Appeal which I have just set out - that the judge misdirected himself as to whether Mr Gilbertson owed fiduciary duties to the GPLP and/or the Master Fund and in relation to the date on which 100 new shares in PEL were issued to members of the Consortium.

Whether Mr Gilbertson owed fiduciary duties to the GPLP and/or the Master Fund

75. In support of the submission that the judge was wrong to hold that Mr Gilbertson owed fiduciary duties to the GPLP and/or to the Master Fund - and by way of particulars - it is said on behalf of the Gilbertson Parties that:

- (1) The judge erred in law in failing to address the question whether, on its case as pleaded, it was open to Renova to contend that Mr Gilbertson owed fiduciary duties to the GPLP and/or the Master Fund; and that, had he done so, he ought to have held that there was no or no properly pleaded case before him with respect to GPLP and/or the Master Fund and refused to award either of them any relief.
- (2) In so far that the judge held that, or proceeded on the basis that, Mr Gilbertson owed fiduciary duties to the GPLP and/or the Master Fund in relation to the Fabergé Rights or the Fabergé Brand at any time (and, in particular, at such time as the judge may have held that he was in breach of such duties), the judge misdirected himself and/or erred in law and/or fact in so doing, given Renova's failure to plead any such fiduciary duties properly or at all.

76. In the previous section of this judgment I addressed the question whether the judge was wrong to entertain (and grant relief in respect of) derivative claims that were not before him. I concluded - for the reasons which I set out in that section - that the judge was correct to take the view (at paragraph 16.1.1 of his judgment of 5 November 2012) that, having chosen not to appeal from the order which he had made some three and a half years earlier (in his Ruling of 14 April 2009), it was not open to the Gilbertson Parties to challenge, at trial, the standing of Renova to advance claims in the action on behalf of GPLP and the Master Fund; including, in particular, a claim founded on the unpleaded contention that Mr Gilbertson had acted in breach of fiduciary duties which he owed to the Master Fund. In those circumstances it is unnecessary to revisit the question whether - on the basis of the alleged defects in Renova's pleaded case - the judge was wrong to hold that Mr Gilbertson owed fiduciary duties to the GPLP and/or to the Master Fund.

77. In any event, as it seems to me, the judge did not need to hold that Mr Gilbertson owed fiduciary duties to the GPLP or to the Master Fund which were independent of the fiduciary duties which (as a director) he owed to the Company; and, as I shall explain later in this judgment, on a proper analysis of his judgment of 5 November 2012 (read with his Ruling of 14 April 2009) he did not do so.

The issue of shares in PEL to members of the Consortium

78. As I have said, the judge found (at paragraph 9.48 of his judgment) that the minutes of a PEL board meeting held on 3 January 2007 recorded the approval of the issuance of 100 new shares in PEL at par value to Autumn, K-MIC and Dr Jelinek; that the Register of Members of PEL showed that those additional shares were issued pursuant to the board approval; and that the issue of those 100 shares on 3 January 2007 was subsequently confirmed in a letter dated 26 February 2007 from the Gilbertson Parties' London solicitors, Clifford Chance. He rejected the contention, pleaded by the Gilbertson Parties in their Amended Defence that, as a matter of fact, those additional 100 shares were not issued by PEL until 19 January 2007, or thereabouts. He did so for the reasons which he set out at paragraph 9.49 of his judgment. He said this:

“9.49. Section 48 of the Companies Law (2011 Revision) provides that the Register of Members ‘*shall be prima facie evidence of any matters by this Law directed or authorized to be inserted*’ [emphasis supplied by the judge]. Accordingly PEL’s Register of Members recording that the new shares were issued to the members of the consortium on 3rd January 2007 is prima facie evidence of that. That evidence is supported by the Minute of the PEL board meeting on 3rd January 2007 and by the Letter dated 26th February 2007 from Clifford Chance. The evidence of the witnesses in this regard was not particularly satisfactory. Mr. Gilbertson said that the new shares were not issued on 3rd January 2007 but he was unable to say when they were issued. He suggested that the Minute of the PEL board meeting had been backdated, although that would obviously be inappropriate since the Minutes clearly say that the meeting concerned took place on 3rd January 2007. It seems improbable to me that the registered office of PEL, Walkers, Attorneys-at law, would be party to any backdating of an entry in the Register of Members maintained by them. Unfortunately, Sean Gilbertson, who was a director of PEL at the time, was not cross-examined on this point. On balance, in the circumstances I am not satisfied that the *prima facie* evidence of the Register together with the other supporting evidence has been displaced. In my judgment the probability is that the new shares in PEL were indeed issued on or with effect from 3rd January 2007 and I so find.”

79. In their Memorandum of Grounds of Appeal the Gilbertson Parties challenge the judge’s conclusion that the 100 new shares were issued by PEL on 3 January 2007. In developing the submission that the judge misdirected himself, it is said on behalf of the Gilbertson Parties that:

- (1) The judge erred in law, in that (i) he relied on a presumption or rule of evidence that shares in a Cayman Islands company are issued on the date of issue entered in the Register of Members and (ii) he held that any such presumption or rule of evidence was not displaced on the evidence before him.
- (2) The judge erred in fact in failing to hold that the PEL Shares were not issued on 3 January 2007 but, on the balance of probabilities, were issued on 19 January 2007.

In particular, it is said, that the judge was wrong in failing to give weight to the unchallenged evidence of Mr Sean Gilbertson (a director of PEL), said to be supported by contemporaneous documents, that PEL did not issue any shares on 3 January 2007.

80. In my view the judge was entitled to reach the conclusion that he did. I reject the submission that he erred in law. He was entitled - indeed, bound - to have regard to the direction, in section 48 of the Companies Law (2011 Revision), that the Register of Members shall be *prima facie* evidence of the date of issue of the shares; and he was entitled to take the view that the evidence of the Register of Members was not displaced by the other evidence that was before him. As he said (at paragraph 9.49 of his judgment) “the evidence of the witnesses in this regard was not particularly satisfactory.”

Whether Mr Gilbertson owed fiduciary duties to the Company in relation to Project Egg

81. I turn, therefore, to address the substantive question: whether the judge was wrong to hold that Mr Gilbertson was in breach of fiduciary duties which he owed to the Company in relation to the acquisition of the Fabergé Rights (Project Egg)..
82. In reaching his conclusion (at paragraph 12.14 of his judgment), that - in the circumstances of the present case and in relation to Project Egg) - Mr Gilbertson did owe fiduciary duties to the Company, the judge said this:

“12.14 . . . it seems to me that the Company and the Master Fund, as part of the Pallinghurst Structure, were entitled to expect, in relation to . . . an Investment Project the ‘single-minded loyalty’ of Mr. Gilbertson, whose relationship with the Company (and the Pallinghurst Structure generally), was one of trust and confidence in the sense explained in the *Bristol and West Building Society* case. . . .”

In that context “the Pallinghurst Structure” comprised - as the judge had explained (at paragraph 4 of his judgment) - the three Cayman Islands entities established pursuant to the Letter Agreement dated 24 November 2005 to which he had referred at paragraph 3.2. “Investment Project” had the meaning given to that expression in the Letter Agreement: that is to say (as the judge explained at paragraph 12.12), an opportunity which it was the purpose of the Master Fund to explore, acquire and develop.

83. The three entities which comprised the Pallinghurst Structure were the Master Fund (Pallinghurst Resources Management LP), GPLP (Pallinghurst (Cayman) General Partner LP) and the Company (Pallinghurst (Cayman) General Partner LP (GP) Limited). GPLP

and the Master Fund were exempted limited partnerships established under the Exempted Limited Partnership Law (Law 11 of 1991, as amended). Section 4(2) of that Law provided that an exempted limited partnership should consist of one or more persons called general partners and one or more persons called limited partners. General partners were liable, in the event that the assets of the exempted limited partnership were inadequate, for all debts and obligations of the partnership. Section 4(3) required that a general partner “shall act at all times in good faith in the interests of the exempted limited partnership”. Section 7(1) required that a limited partner should not take part in the conduct of the business of the exempted limited partnership.

84. It was not in dispute - and, in any event the judge so found - that the Company was the sole general partner of GPLP and that GPLP was the sole general partner of the Master Fund. The judge noted (by reference to the diagram of the Pallinghurst Structure which he set out at paragraph 4.2 of his judgment) that Mr Sean Gilbertson was a limited partner of GPLP and that the Founder Fund (Pallinghurst (Cayman) General Partner LP) was a limited partner of the Master Fund. But there was no evidence to suggest that existence of those limited partners affected GPLP’s power (as the general partner of the Master Fund) to control the Master Fund; or which affected the Company’s power (as the general partner of GPLP) to control GPLP; or which affected the Company’s power (through GPLP) to control the Master Fund. Nor was there any evidence to suggest, that, in the exercise of their powers in relation to the Master Fund, GPLP (and, through GPLP, the Company), did not owe the duties (imposed by section 4(3) of the Exempted Limited Partnership Law) “to act at all times in good faith in the interests of the exempted limited partnership”.
85. As Lord Millett had observed, in his judgment in *Waddington v Chan Chun Hoo Thomas* [2008] HKFC 63 (to which the judge referred at paragraph 16.1 of his judgment of 5 November 2012), “if wrongdoers must not be allowed to defraud a parent company with impunity, they must not be allowed to defraud its subsidiary with impunity”. The judge held (at paragraph 66 of his ruling of 14 April 2009) that, by reason of the Company’s power to control the Master Fund, the position of Master Fund was analogous to that of a sub-subsidiary. In my view, he was right to reach that conclusion: the submission that the judge needed to hold that Mr Gilbertson owed fiduciary duties to the GPLP or the Master Fund which were independent of the fiduciary duties which he owed to the Company - or that he did so - is not well-founded. If and in so far as the judge was correct to conclude that Mr Gilbertson owed duties of loyalty and good faith to the

Company in relation to the pursuit of Project Egg as an Investment Project, he was correct to hold that such duties entitled GPLP and the Master Fund to rely upon his loyalty and good faith in relation to that project.

86. As I have said, the judge addressed and rejected (at section 13 of his judgment) the submission, advanced on behalf of the Gilbertson Parties, that Project Egg never became an approved Investment Project for the purposes of the Letter Agreement; and so never became a project in relation to which Mr Gilbertson owed fiduciary duties, whether to the Company or, more generally, to the Pallinghurst Structure. The Gilbertson Parties challenge that conclusion on this appeal. It is said in this Court - as it was said below - that the judge was wrong to hold that Project Egg could become an approved Investment Project in the absence of unanimous consent of the members of the Investment Committee (Mr Gilbertson and Mr Kuznetsov).

87. In rejecting the submission that Project Egg never became an approved Investment Project for the purposes of the Letter Agreement; and so never became a project in relation to which Mr Gilbertson owed fiduciary duties, the judge said this (at paragraph 13.1 of his judgment):

“13.1 . . . The overall evidence clearly indicated to me that the Investment Committee, that is Mr. Gilbertson and Mr. Kuznetsov, operated in an informal way. They had meetings and discussions and both clearly acted from the start on the basis that Project Egg, which was initially proposed as an Investment Project by Mr. Gilbertson, should proceed as an opportunity to be explored and then acquired at an agreed price by the Master Fund. It is clear that at the outset Mr. Gilbertson introduced Project Egg and then explored it and implemented the strategy for the acquisition of the Rights as an Investment Project of the Master Fund. He procured PEL, as a wholly owned subsidiary of the Master Fund, and thus a Pallinghurst Structure company to enter into the SPA with Unilever to acquire the Rights, all as an Investment Project for the Master Fund, and all as agreed by Mr. Kuznetsov, as the other member of the Investment Committee. The purchase offers to Unilever made by Sean Gilbertson were made with the knowledge and consent of the Investment Committee. Agreement was reached on the price for the Rights as an Investment Project. The initial offer of US\$20m by Renova and then the offer of US\$30m and the final offer price of up to US\$40m both to be paid by Mr. Vekselberg, all had the consent of the Investment Committee. In my view, Mr. Gilbertson would have done or procured none of this to be done if he did not consider that he had the consent of Mr. Kuznetsov and therefore the Investment Committee. I do not consider it is now open to him, in all the circumstances, to contend that Project Egg was never an approved Investment Project of the Master Fund.”

88. I am of opinion that, for the reasons which the judge gave in paragraph 13.1 of his judgment, he was entitled to find that, in the events to which he referred, Mr Gilbertson would not have acted as he did in procuring the acquisition of the Fabergé

Rights by PEL on 22 December 2006 “if he did not consider that he had the consent of Mr. Kuznetsov and therefore the Investment Committee”; and was entitled to hold that, “it is [not] now open to [Mr Gilbertson], in all the circumstances, to contend that Project Egg was never an approved Investment Project of the Master Fund”.

89. I should add that I am also of opinion that, if the judge were correct in his view that, prior to the issue of the additional shares, PEL was “a wholly owned subsidiary of the Master Fund”, the question whether or not Project Egg had become an approved Investment Project for the purpose of the Letter Agreement prior to the purchase of the Fabergé Rights by PEL from Unilever under the agreement of 22 December 2006, was of little importance after that date. If, at the time when PEL became the contractual purchaser of the Rights, it was wholly owned by the Master Fund, then, as it seems to me, whatever fiduciary duties may have been owed by Mr Gilbertson to the Company (or, more generally, to the Pallinghurst Structure) in relation to Project Egg (as an Investment Project) under the terms of the Letter Agreement had become subsumed in the fiduciary duties which he owed as a director of the Company in relation to the assets of the entities (including the Master Fund) which it controlled. Those assets included PEL and (through PEL) the contractual interest as purchaser of Fabergé Rights.

90. As I have said, Project Egg Limited (PEL), a Cayman Islands Limited Company, was incorporated on 1 December 2006 by Mr Gilbertson as a special purpose vehicle for the purpose of acquiring the Fabergé Rights from Unilever. The directors of PEL were Mr Sean Gilbertson and Mr Andrew Willis (an employee of Pallinghurst LLP). In taking the view throughout his judgment - and, in particular, at paragraph 13.1 (in the passage which I have set out) - that, until the issue of the additional shares, PEL was a 100% subsidiary of the Master Fund, the judge made no reference to the corporate records of PEL itself. He seems to have taken that premise to be common ground between the parties. There was material before him to support that conclusion:

(1) On 18 December 2006, Mr Sean Gilbertson sent an email to Mr Kalberer in the terms set out by the judge at paragraph 9.14 of his judgment. In that email he wrote:

“As mentioned we incorporated a Cayman Island based limited company called Project Egg Limited (“SPV”) which, based on advice from Clifford Chance, should acquire the portfolio of trademarks. . . . The SPV is a 100% subsidiary of our fund ‘Pallinghurst Resources Management L.P.’ . . .”

It is plain that the judge took the view, understandably if I may say so, that the

fund to which Mr Sean Gilbertson referred as “our fund ‘Pallinghurst Resources Management L.P.’” was the Master Fund: that that was his view can be seen from his addition to the passage of the email set out at paragraph 9.14 of his judgment, by way of annotation to those words, the comment “[i.e. the Master Fund]”.

- (2) Paragraph 1 of the First Draft IA - sent by Mr Sean Gilbertson to Mr Kalberer (with copies to Mr Kuznetsov and Mr Vekselberg) on 21 December 2006 - recorded that:

“The parties agree that the Fabergé brand name and associated rights (the ‘Rights’) be purchased forthwith by ‘Project Egg Limited’ (the ‘SPV’, presently a 100% subsidiary of Pallinghurst Resources Management L.P.) upon terms negotiated between Pallinghurst Resources LLP and Unilever . . .”

- (3) The Second Draft IA - which (as the judge found at paragraph 9.33 of his judgment) was sent by Mr Sean Gilbertson, on behalf of Mr Gilbertson, to Mr Kuznetsov and Mr Kalberer (with a copy to Mr Vekselberg) on 26 December 2006 - referred to PEL (Opco) managing and operating the Fabergé Rights “as a portfolio company of the Master Fund pursuant to the Pallinghurst Agreements”.
- (4) The intended parties to the Third Draft IA - sent by Mr Sean Gilbertson to Mr Kalberer (with copies to Mr Kuznetsov and Mr Vekselberg) on 30 December 2006 - included “Project Egg Limited a 100% subsidiary of PRM”. PRM was identified as “Pallinghurst Resources Management LP” (the Master Fund).
- (5) The Fourth Draft IA - sent by Mr Kalberer to Mr Sean Gilbertson (with copies to Mr Gilbertson and Mr Kuznetsov) on 2 January 2007 - also identified PEL (an intended party) as a 100% subsidiary of the Master Fund.

91. Nevertheless, it is, I think, pertinent to note that not all the material before the judge supported his assumption that it was common ground between the parties that, until the issue of the additional shares, PEL was a 100% subsidiary of the Master Fund. There was also material before him which was difficult to reconcile with that assumption:

- (1) If, from the date of its incorporation, PEL were wholly owned by the Master Fund, it is surprising (i) that - as the judge found at paragraph 9.13 of his judgment - it was not until receipt of an email sent by Mr Sean Gilbertson to Mr Cheremykin (copied to Mr Kuznetsov) on 15 December 2006 that the Renova Parties first became aware of its incorporation and intended purpose; and (ii) that neither of the directors of PEL (Mr Sean Gilbertson and Mr Andrew Willis) were nominees of the Renova Parties.
- (2) Mr Sean Gilbertson’s description of PEL in his email sent on 18 December 2006

as a 100% subsidiary of “our fund Pallinghurst Resources Management L.P.” is difficult to reconcile with Mr Gilbertson’s response to Mr Kalberer’s request - in an email sent to him (and to Mr Sean Gilbertson) on 21 December 2006) - for confirmation as to who controlled PEL and how. As the judge recorded (at paragraph 9.24 of his judgment) Mr Gilbertson responded to that request on the same day - in an email sent to Mr Kalberer (and copied to Mr Kuznetsov and Mr Vekselberg) - in these terms:

“In response to your questions in item 2, 100% of the equity in Project Egg Ltd is held by Pallinghurst Resources LP, and the directors are Sean and Andrew Willis, as we have previously advised you.”

- (3) Mr Sean Gilbertson’s description of PEL as a 100% subsidiary of Pallinghurst Resources Management L.P. is not easy to reconcile with the description of the party joined as “Guarantor” to the acquisition agreement dated 22 December 2006 (the SPA) as “Pallinghurst Resources LLP (Company Number 0C31585) having its registered office at 54 Jermyn Street, London . . .”).

92. **As to the third of those points**, the judge recorded (at paragraph 9.26 of his judgment) **that** it had been agreed between Mr Sean Gilbertson and Mr Kalberer in the course of a telephone conversation on 20 December 2006 that the guarantor of PEL’s obligations under the SPA would be “Pallinghurst Resources Management LP”. The judge addressed (at paragraph 9.27 of his judgment) the question whether Mr Sean Gilbertson had, indeed, changed his intention in relation to the identity of the guarantor of PEL’s obligations under the SPA; but accepted the explanation, recorded in a letter from the Gilbertson Parties’ then solicitors, Clifford Chance, that Pallinghurst LLP had been named as guarantor “as a result of a clerical error”. He said this:

“9.27 [Mr Sean Gilbertson] said in evidence that he did not believe that it made any practical difference for Pallinghurst LLP to be the guarantor rather than the Master Fund and that he did not point out the change to Mr. Kalberer or Mr. Kuznetsov at the time because he did not consider it to be a matter of relevance for them. Sean Gilbertson did not appear to recognise that signing the SPA in its incorrect form amounted to a change of intention on his part, namely that Pallinghurst LLP should be the guarantor rather than the Master Fund. . . . The impression I got from his evidence was that Sean Gilbertson did not appreciate the significance of this change and the reason why it had been intended and agreed that the Master Fund should be the guarantor rather than a Gilbertson entity.”

And he went on (at paragraph 28 of his judgment) to say this:

“9.28 In his evidence, Mr. Gilbertson accepted that when he procured PEL, acting by Sean Gilbertson, to sign the SPA with Unilever on 22nd December 2006 he acquired the contractual entitlement to the Rights for the Master Fund and entities within the Pallinghurst Structure and not for himself personally Furthermore, Mr. Gilbertson accepted that not only was it a subsidiary of the Master Fund

(namely PEL) which contracted to purchase the Rights from Unilever but that Unilever must have considered that it was contracting to sell the Rights to PEL, ultimately for Renova money, and not to Mr. Gilbertson for Gilbertson money. Accordingly Unilever still required to see Renova money behind PEL and accordingly to have the Master Fund as guarantor. It was clearly a PEL/Master Fund/Pallinghurst Structure for their benefit; it was not a Gilbertson transaction for the Gilbertsons' benefit."

The judge must, as it seems to me, have treated the statement, in Mr Gilbertson's email of 21 December 2006, that 100% of the equity in PEL was held "by Pallinghurst Resources LP" as a further example of "the clerical error" which had led to the inclusion of Pallinghurst LP, rather than the Master Fund, as the guarantor named as party to the SPA.

93. There was, if I may say so, obvious potential for confusion between "Pallinghurst Resources LLP" (the English limited partnership established by Mr Gilbertson on 27 October 2005 as an investment management vehicle, to which I have referred earlier in this judgment as "Pallinghurst LLP") and "Pallinghurst Resources Management L.P." (the Cayman Islands exempt limited partnership, to which the parties referred as "the Master Fund"). Be that as it may and whatever the true position, there is no challenge on this appeal to the judge's assumption that it was common ground that, until the issue of additional shares in January 2007, PEL was a wholly owned subsidiary of the Master Fund. In those circumstances, as it seems to me, it is not open to this Court to question whether the judge was right to proceed on that basis.

94. It follows that I am satisfied that, whatever fiduciary duties may have been owed by Mr Gilbertson to the Company (or, more generally, to the Pallinghurst Structure) in relation to Project Egg (as an Investment Project) under the terms of the Letter Agreement, the judge was correct to accept - and the Renova Parties are correct to submit in this Court - that, *prima facie*, Mr Gilbertson owed fiduciary duties as a director of the Company in relation to the assets of the entities (including the Master Fund and, from and after its incorporation on 1 December 2006, PEL) which it controlled; and that, from and after the execution of the SPA on 22 December 2006, those assets included the contractual interest of PEL as purchaser of the Fabergé Rights and, after completion of the purchase under the SPA on 3 January 2007, as owner of those Rights. The further question for the judge - as he recognised - was whether the fiduciary duties which, *prima facie*, Mr Gilbertson owed as a director of the Company in that context were modified or attenuated so as to enable him to act in his own interests (or in the interests of the Consortium) in relation to the Master

Fund's ownership (through PEL) of the rights acquired under the SPA. It is to that question that I now turn.

Whether, in the events which happened, the fiduciary duties which Mr Gilbertson owed to the Company in relation to Project Egg were modified or attenuated

95. As I have said, the judge accepted (at paragraph 12.2 of his judgment) that the obligations of a director to the company might be modified so as to enable the director to act in his own interests or in the interests of another in relation to a particular matter, notwithstanding that those interests might conflict with the interests of the company in relation to that matter. Such a modification or attenuation, the judge accepted, might be found in the company's articles of association, in an agreement between the shareholders or (by clear implication) in the particular circumstances of the case. In the course of setting out the respective submissions of the parties, he observed (at paragraph 12.9) that the Gilbertson Parties relied principally upon the terms of the Letter Agreement. He held (at paragraph 12.14) that there was nothing in the Letter Agreement which would entitle Mr Gilbertson to take for himself a project which he had brought to the Investment Committee for consideration as an Investment Project of the Master Fund; which the Investment Committee had agreed to pursue; and which was being actively pursued. He went on to say this:

“12.14 . . . Even if Mr. Gilbertson may have been entitled, pursuant to the Letter Agreement, to withdraw his consent to or to veto proceeding with such an Investment Project, in my opinion it does not follow that he was entitled to take that Investment Project for himself without the informed consent of the Company, the ultimate owner and controller of the Master Fund. At the very least, as long as proceeding with such an investment had the unanimous consent of the Investment Committee, Mr. Gilbertson was subject to the fiduciary duties which I have outlined in respect of that Investment Project. In my view, those duties on the part of Mr. Gilbertson as a director of the Company were not attenuated by anything in the Letter Agreement or by implication from the surrounding circumstances.”

96. The judge's conclusion that there was nothing in the Letter Agreement, or by implication from the surrounding circumstances, which would entitle Mr Gilbertson to take for himself a project which he had brought to the Investment Committee is challenged by the Gilbertson Parties in this Court. It is said on their behalf that the judge erred in law and/or in fact in failing to hold that, on the evidence of context and circumstances which was before him at trial, Mr Gilbertson was released from such fiduciary duties (if any) as he did owe to the Company (or, more generally, to the Pallinghurst Structure) in respect of Project Egg or the Fabergé Brand or the Fabergé Rights (meaning, respectively, the name Fabergé itself and the rights in that name) before he did

anything that might otherwise have constituted a breach of fiduciary duty.

97. The context and circumstances (referred to in the Memorandum of Grounds of Appeal as “the Context and Circumstances”) which, it is said, ought to have led the judge to the conclusion Mr Gilbertson was released from such fiduciary duties (if any) as he did owe to the Company in respect of Project Egg included the dealings between the relevant parties in relation to the acquisition and/or exploitation of the Fabergé Rights and the Fabergé Brand. In particular, the Context and Circumstances included (i) “the veto by the Renova Parties of the acquisition of those Rights for Project Egg as envisaged”, (ii) “the failure of the Investment Committee to approve pursuit by the Master Fund of any interest in the Fabergé Brand prior to the conclusion of the Implementation Agreement in accordance with the terms of the Agreement or Understanding” and (iii) “the fact that Mr Gilbertson’s consent to Mr Vekselberg’s scheme for the acquisition of the Rights and the exploitation of the Brand was conditional on the parties entering into an Implementation Agreement and PEL being put in funds to complete the purchase of the rights”. For convenience I will refer to those as “the veto point”, “the mutual understanding point” and “the failure of condition point”. In advancing the veto point the Gilbertson Parties rely upon what is said to be Mr Vekselberg’s refusal to fund the acquisition of the Fabergé Rights and/or his insistence that, if he were to fund the acquisition of those Rights, the Fabergé Brand would have to be held by one of his privately owned companies (Lamesa Arts Inc) outside the Pallinghurst Structure. The “Agreement or Understanding” was defined in the Memorandum of Grounds of Appeal to mean “an oral agreement or understanding reached between Mr Gilbertson and Mr Vekselberg on or about 21 December 2006, the terms and performance of which became a matter of dispute”. In advancing the failure of condition point the Gilbertson Parties rely upon what is said to be “the failure of the Renova Parties to honour the Agreement or Understanding”.

(i) the veto point

98. It is submitted on behalf of the Gilbertson Parties that Mr Gilbertson owed no relevant fiduciary duties to the Company (or, more generally, to the Pallinghurst Structure) in respect of potential Investment Projects after 20 December 2006. In support of that submission it is said, first, that any fiduciary duties that a member of the Investment Committee may have owed to a Fund entity in respect of a potential Investment Project ceased once the Project had been vetoed by the other member of the Investment Committee; and, second, that - in the events which happened - Project Egg was the subject

of such a veto by or on behalf of Mr Kuznetsov.

99. In developing the first of those submissions - that such fiduciary duties as a member of the Investment Committee may have owed to a Fund entity in respect of a potential Investment Project ceased once the Project had been vetoed by the other member of the Investment Committee - it is accepted on behalf of the Gilbertson Parties that a member of the Investment Committee could not divest himself of any fiduciary duty that he might otherwise have owed to a Fund entity in respect of a potential Investment Project by vetoing it himself. But it is submitted that the position is different where the veto is exercised by the other member of the Investment Committee. There is no express restriction on a party to the Letter Agreement pursuing a project that has been vetoed by the other party; and there is no reason to read any such restriction into the Letter Agreement as a matter of business efficacy.
100. In developing the second of those submissions - that, in the events which happened, Project Egg was the subject of such a veto by or on behalf of Mr Kuznetsov - it is said that Mr Vekselberg's insistence (on 20 December 2006) and thereafter that he should own the Fabergé Rights through a Lamesa company did amount to a veto of Project Egg. In particular it is said that, given that the Letter Agreement did not lay down any formalities in relation to the exercise of a veto, the expression by one member of the Investment Committee that he is willing to proceed with an Investment Project if, but only if, the terms can be improved in some way may or may not amount to a veto; and that whether it does amount to a veto turns on whether the project in the modified form proposed falls within the scope of the potential Investment Project that the Investment Committee had agreed to explore.
101. In response to the submission that the judge ought to have held on the evidence that, before Mr Gilbertson did anything that might otherwise have constituted a breach of such fiduciary duties (if any) as he did owe to the Company (or, more generally, to the Pallinghurst Structure) in respect of Project Egg and the acquisition of the Fabergé Rights, he was released from such fiduciary duties by "the veto by the Renova Parties of the acquisition of those Rights for Project Egg as envisaged" it is said on behalf of the Renova Parties that the judge was correct to reach the conclusion (at paragraph 12.14 of his judgment) that he did. In particular, it is said that Mr Gilbertson owed fiduciary duties to the Company in relation to any potential Investment Project unless and until it was actually vetoed by Mr Kuznetsov (on behalf of Renova) on the basis of full disclosure by Mr Gilbertson. That, it is said, is followed from the following

propositions which had been advanced by Renova at the trial and which were relied upon in this Court:

- (1) The members of the Investment Committee could exercise their right of veto (or more accurately, their right not to agree to proceed) in their own interests, but that self-interest was not unconstrained. They could not exercise the veto for the purposes of allowing them to take, or compete for, the Investment Project for their own benefit. As I have said the Gilbertson Parties do not dissent from this proposition.
- (2) If, before the Fabergé Rights had been acquired by the Pallinghurst Structure, Project Egg had been actively vetoed by one member of the Investment Committee (say, Mr Kuznetsov) after full disclosure by the other member (say, Mr Gilbertson), that other would have been free to pursue the opportunity to acquire the Fabergé Rights in his own interests. But, unless and until Project Egg was actively vetoed, it remained a business opportunity of the Pallinghurst Structure and both Mr Gilbertson and Mr Kuznetsov, as directors of the Company, had a duty to pursue it in the interests of the Pallinghurst Structure: neither was free to pursue the acquisition of the Fabergé Rights in his own interests.
- (3) Once the Fabergé Rights had been acquired for the Pallinghurst Structure - through any sub-structure under the Company that the parties might agree - neither party was free to divert that asset or project or opportunity to himself or exploit it for his own benefit (whether by using the veto or otherwise); the exercise of a “veto” once the Fabergé Rights had been acquired was limited to a refusal to agree the manner in which those Rights were to be developed and exploited.

The Renova Parties point out that, in the course of his oral evidence at trial (transcript, 3 May 2012, page 42, lines 6-19), Mr Gilbertson agreed with the second limb of the proposition numbered (2) above - that, unless or until one member of that Investment Committee (say, Mr Kuznetsov) had actively vetoed Project Egg,, it remained a business opportunity of the Pallinghurst Structure and the other member (say, Mr Gilbertson) was not free to pursue that opportunity in his own interests.

102. The judge was not persuaded that either Mr Kuznetsov or Mr Gilbertson had vetoed Project Egg before 3 January 2007. In particular, he held (at paragraph 15.2 of his judgment) that:

“15.2 . . . in no sense could the requirements of Mr. Vekselberg [that the Fabergé Rights and the Fabergé Brand be held in a Lamesa Company (subject to the economic benefit and management rights remaining within the

Pallinghurst Structure] be seen as a veto of the opportunity to exploit the Rights as an Investment Project of the Master Fund and the evidence is that Mr. Gilbertson did not see it or treat it in that way either. There was no rejection of [Mr. Vekselberg's requirement] or refusal to consent to it by Mr Gilbertson.”

The Renova Parties submit that the judge was correct to take that view.

103. In support of the submission that “the simple point is that Project Egg was pursued as an Investment Project of the Pallinghurst Structure throughout until Mr Gilbertson’s waking decision on 1 January 2007 to divert it to himself and try to use it to extract from Mr Vekselberg in excess of the US \$38m he had procured to be paid for it” it is said on behalf of the Renova Parties to be clear from the evidence that:

- (1) Project Egg was, from the outset, an Investment Project of the Pallinghurst Structure: in May 2006 the Investment Committee was prepared to, and did, approve the making of a bid of US\$20 million to acquire the Fabergé Rights.
- (2) When the price that Unilever required for the Fabergé Rights rose above that which Renova would (or could) fund without a detailed business plan and analysis, it was accepted that Mr Vekselberg might provide the funding privately; but that the opportunity would still fall within the Pallinghurst Structure. That possibility was discussed between the parties in July 2006 and it was not suggested that it would have the effect that Project Egg could be treated as vetoed. Indeed, as the judge found (at paragraph 13.1 of his judgment), the subsequent offer of US\$30 million (to be funded by Mr Vekselberg) had the approval of the Investment Committee.
- (3) Had Mr Gilbertson been minded to treat the message given by Mr Kalberer to Mr Sean Gilbertson in the course of the telephone conversation on 20 December 2006 (to which the judge had referred at paragraph 9.16 of his judgment and which is described by the Gilbertson Parties in their Written Submissions as the “Not Pleasurable Conversation”) - that the acquisition cost (US\$38 million) would be provided by one of Mr Vekselberg’s companies on the basis that the Fabergé Rights would be held outside the Pallinghurst Structure (but that the economic benefits of those Rights would be held within it) - as a veto by the Investment Committee he would have needed to make it clear to Renova that “the line had been crossed”. He did not do so.
- (4) After a number of email exchanges and telephone conversations on 21 December 2006 - including a telephone conversation between Mr Gilbertson and Mr Vekselberg - (i) Mr Gilbertson sent an e-mail to Mr Vekselberg stating that he

would trigger the “Unilever-Pallinghurst transaction to conclude the deal” so that PEL, “a Pallinghurst company, would be the owner of the Faberge brand” and that he would advise “as soon as you are officially the global ‘Mr Fabergé’” and (ii) Mr Gilbertson did as he had said he would do; in that he procured that PEL execute the SPA the next day.

- (5) In an e-mail sent to Mr Vekselberg on 23 December 2006 Mr Gilbertson wrote: “Pallinghurst is now the owner of the Fabergé brand . . . I congratulate you on this entrenchment of your interests in this revered brand name”.

In those circumstances, it is said that it is impossible for Mr Gilbertson to suggest that he was treating the change of plan on 20 December 2006 as a veto by Renova, or to treat his own reaction to that change of plan as a veto by himself: on the contrary, he was proceeding, as Mr Sean Gilbertson described the position to Mr Kalberer in the email which he sent on 1 January 2007, on the basis of “the Pallinghurst principles as already modified for Project Egg” If Mr Gilbertson were free, after the Not Pleasurable Conversation on 20 December 2006, to pursue the Fabergé Rights for himself, then - in procuring PEL to execute the SPA on 22 December 2006 on behalf of the Pallinghurst Structure (and not for his own personal benefit) - he must be taken to have waived of any such right. His email of 23 December 2006 was “an unequivocal and outward manifestation” of Mr Gilbertson’s acceptance that, whatever right he might have had as a member of Investment Committee to veto, or to treat Renova as having vetoed, Project Egg, he was proceeding on the basis that there had been no such veto and Project Egg remained an Investment Project.

104. In my view the judge was correct to reject the veto point. For the reasons which he gave in his judgment - and for the reasons advanced on behalf of the Renova Parties in this Court - the evidence does not support the contention that Mr Kuznetsov (or, more broadly, the Renova Parties through Mr Vekselberg or Mr Kalberer) did anything which could be construed as a veto of Project Egg; or that, at the relevant time, Mr Gilbertson sought to treat anything done as having that effect.

(ii) the mutual understanding point

105. The judge referred (at paragraph 14.2 of his judgment) to the submission advanced on behalf of the Gilbertson Parties that what had been said to Mr Sean Gilbertson by Mr Kalberer on 20 December 2006, agreed (informally) between Mr Gilbertson and Mr Vekselberg in their telephone conversation on 21 December 2006 and reflected in the draft Implementation Agreements which followed did not involve the Master Fund at

all but amounted to an entirely new and separate arrangement (“the Lamesa Project”) outside the Pallinghurst Structure. The judge rejected that submission. The Gilbertson Parties submit in this Court that the judge was wrong to do so.

106. In support of their submission that, in the course of their telephone conversation on 21 December 2006 (to which the judge referred at paragraph 9.25 of his judgment), Mr Gilbertson and Mr Vekselberg reached a mutual understanding (the Agreement or Understanding) as to the acquisition, development and exploitation of the Fabergé Rights and the Fabergé Brand which constituted a new and separate arrangement outside the Pallinghurst Structure (and in relation to which the Master Fund had no part) it is said on behalf of the Gilbertson Parties that:

- (1) The telephone conversation on 21 December 2006 followed the earlier conversation (the Not Pleasurable Conversation) between Mr Sean Gilbertson and Mr Kalberer on 20 December 2006 in which, as the judge found (at paragraph 9.16 of his judgment), the Gilbertson Parties had learnt for the first time of Mr Vekselberg’s requirement that the Fabergé Rights would be purchased by a Lamesa company.
- (2) On learning of the Not Pleasurable Conversation Mr Gilbertson felt that Mr Vekselberg was acting unscrupulously. The Renova Parties had, as he saw it, changed their position at the eleventh hour. He felt that he was entitled to take Project Egg for himself; but he also felt he had no option but to look to do a deal with Mr Vekselberg. Reliance is placed on the following passage (transcript, 3 May 2012, page 180, lines 5-24) in his oral evidence at trial:

“Q. Now, he [Mr Vekselberg] says that his belief, at the time, was that you were negotiating the deal with Unilever, acting in the best interests of the Fund. And that’s right. You were, weren’t you?

A. No, I was negotiating with Mr Vekselberg directly as the two partners in the Letter Agreement.

Q. It may be my fault. Let me ask the question again. You were negotiating this deal with Unilever and, in doing so, acting or purporting to act in the best interests of the Fund.

A. (Pause). The deal with Unilever had reached a certain stage. The lawyers were sitting there ready to sign. It was ongoing. However, the fundamental agreement between me and Viktor Vekselberg was in -- had been breached. I needed to establish from him that we could go forward. I was discussing with Viktor not as representing a fund or representing anything else; I was discussing with Viktor as the partner against his being a partner in the Letter Agreement. Viktor, we are the counterparties. What are we going to do?”

- (3) Evidence of what was said in the conversation on 21 December 2006 is found in the email - set out by the judge in paragraph 9.25 of his judgment (and earlier in

this judgment) - which Mr Gilbertson sent to Mr Vekselberg shortly after it had taken place.

- (4) The “deal” between Mr Vekselberg and Mr Gilbertson was made between the two of them. Neither will have thought that it was made under the Letter Agreement; neither will have thought it was made on behalf of the Company or the Master Fund. Both regarded themselves as the real players; and both saw the Letter Agreement and the Pallinghurst Structure from that perspective.
- (5) The judge seems to have assumed (as appears from paragraph 14.5 of his judgment) that the Agreement or Understanding was to be treated as an act of the Investment Committee and that, as a result of the Agreement or Understanding, Mr Gilbertson is to be taken to have consented to the Lamesa Project being treated as a potential Investment Project of the Master Fund. Yet none of this will have been dealt with expressly in the conversation between Mr Gilbertson and Mr Vekselberg and it is hard to see on what basis it could be implied.
- (6) In the circumstances that Unilever was pressing for the SPA to be executed, Mr Gilbertson had to decide what to do. In his email to Mr Vekselberg, sent shortly after their telephone conversation on 21 December 2006, Mr Gilbertson recorded that he had received an “assurance” from Mr Vekselberg and that he, Mr Gilbertson, would work closely with Mr Vekselberg’s team to agree a structure that suited Mr Vekselberg’s purposes: thereby acknowledging that he did not have a binding commitment from Mr Vekselberg and that he would be flexible about the structure of the deal that remained to be worked out. In effect, he was seeking to re-assure Mr Vekselberg that there was nothing sinister about the use of PEL; and that “we can still agree whatever we want to agree”.

It is said that, taking Mr Gilbertson’s evidence as a whole, it is clear that, although after 21 December 2006 he thought he was entitled to pursue Project Egg for himself, it never occurred to him to do so in that, until 3 January 2007, he was seeking to come to an agreement with Mr Vekselberg.

107. The Gilbertson Parties submit that, in reaching the conclusion that he did in relation to the mutual understanding point - that is to say, in rejecting their contention that the Agreement and Understanding amounted to an entirely new and separate arrangement outside the Pallinghurst Structure - the judge erred in that he failed to consider the significance of the difference between Project Egg and the Lamesa Project. In particular, it is said, the judge failed to appreciate that, the effect of the Agreement or Understanding was that, under the Lamesa Project, what was described as “the

Pallinghurst Team” (comprising Mr Gilbertson, Mr Sean Gilbertson and the two employees of Pallinghurst LLP, namely Mr Willis and Mr Priyank Thapliyal, who Mr Gilbertson intended would be involved in the actual management of the Fabergé Rights) - rather than the Pallinghurst Structure - would enjoy the economic benefit of developing exploiting and managing those Rights. It is said that, had the judge appreciated that, under the Lamesa Project, the Pallinghurst Team - rather than the Pallinghurst Structure - were to enjoy the economic benefit of developing, exploiting and managing the Fabergé Rights, he would have held that, from and after 21 December 2006, “the discussions were simply as between Mr Vekselberg and his people on the one hand and Mr Gilbertson and his people on the other hand”; that the entities within the Pallinghurst Structure had no interest in the Fabergé Rights; and that, therefore, Mr Gilbertson owed those entities no fiduciary duties.

108. In response to the mutual understanding point, it is submitted on behalf of the Renova Parties that, properly understood, the Agreement or Understanding did not have the effect that it was the Pallinghurst Team - and not the Pallinghurst Structure - that would benefit from the acquisition of the Fabergé Rights. It is said that the distinction between “Pallinghurst Team and “Pallinghurst Structure - and the purpose for which it was advanced - was not only a new point introduced at trial but was wholly inconsistent with the evidence as to how Mr Gilbertson himself saw the position at the time. The Renova Parties point out that, although, in the email which he sent to Mr Vekselberg on 23 December 2006 (which the judge set out at paragraph 9.30 of his judgment), Mr Gilbertson had referred to the Lamesa Project in these terms

“Mr Kuznetsov and I have discussed arrangements to transfer 100% of the ownership of the brand to one of your companies. and I confirm to you my willingness to do so against binding commitments that the Pallinghurst team will retain all of the economic benefits and management rights that it would have under Pallinghurst’s agreements with Renova. . . .”,

he accepted in his oral evidence at trial (transcript, 4 May 2012, page 33, lines 5-24) that the reference to “the Pallinghurst team” in that context was to the Pallinghurst Structure. In that respect his oral evidence was consistent with his pleaded case and his written evidence: which were to the effect that his intention at the time of the Agreement and Understanding was that the Pallinghurst Structure would retain the economic benefit of the Fabergé Rights. Further, it is said that it was clear that all parties understood that the way that the Pallinghurst Team - defined in the Draft IAs to mean the Gilbertsons and the individuals who worked for them - would be rewarded was by the economic benefits of the Fabergé Rights being held in the

Pallinghurst Structure: the “Pallinghurst Team” would be rewarded through their limited partnership interest in the GPLP.

109. At section 14 of his judgment the judge addressed, and rejected, the submission that the effect of the Agreement or Understanding was that the Pallinghurst Team - rather than the Pallinghurst Structure - would enjoy the economic benefit of developing exploiting and managing the Fabergé Rights. He observed (at paragraph 14.2) that the “purported distinction between the so-called ‘Pallinghurst Team’ and the management under the Pallinghurst Structure and Letter Agreement” had not been raised by the Gilbertson Parties in their pleadings, their written evidence or their written opening submissions. He pointed out (at paragraph 14.3) that Mr Gilbertson, in his affidavit of 29 January 2009, had sworn that

“I managed to secure the contract for the purchase of the Rights for the benefit of the Master Fund; simultaneously however, I continued to explore with Mr. Vekselberg the possibility of an arrangement whereby ownership of the Rights might be transferred to one of Mr. Vekselberg’s entities outside the Pallinghurst Structure, but with the Pallinghurst Structure retaining the economic and management benefits and entitlements that we had hitherto envisaged that it would have” [emphasis supplied by the judge]

and that, in the same affidavit, Mr Gilbertson, in referring to the ownership of the Fabergé Rights by one of Mr Vekselberg’s companies, had added the qualification “provided that the rights of the Pallinghurst Structure (or what was referred to as ‘Pallinghurst Team’) were protected”; so equating the “Pallinghurst Team” with the Pallinghurst Structure. The judge went on to observe that the case that the Pallinghurst Team, rather than the Pallinghurst Structure, would enjoy the economic benefit of developing exploiting and managing the Fabergé Rights - which, as he said, the Gilbertson Parties sought to advance for the first time at trial - was contradicted by the evidence given on behalf of the Renova Parties. Mr Vekselberg (he said), was adamant that his agreement with Mr Gilbertson was that, while one of his personal companies would own the title to the Fabergé Rights, the economic benefit of developing, exploiting and managing those Rights would remain with the Master Fund within the Pallinghurst Structure; and the evidence of Mr Kuznetsov and Mr Kalberer was to the same effect. There was no intention or suggestion that the economic benefits of managing the Fabergé Rights would be outside the Pallinghurst Structure or the Pallinghurst agreements; those benefits were to remain with the management team headed by Mr Gilbertson as provided by the Letter Agreement and through the Pallinghurst Structure pursuant to the Pallinghurst agreements as always intended.

110. The judge found (at paragraph 14.3 of his judgment) that, after 20 December 2006, Mr

Gilbertson clearly understood that the economic benefits and the management of the Fabergé Rights were intended to remain with the Master Fund (as they would have done under the previous arrangements); and that, in practical terms, the only change to the previous structure which Mr Vekselberg was requiring was that the title to the Fabergé Brand itself would be owned outside the Pallinghurst Structure. In those circumstances the judge concluded (at paragraph 14.3) that:

“14.3 The suggested distinction between the Pallinghurst Team on the one hand and the Pallinghurst Structure on the other hand, which was first made during the trial, was neither justified nor valid”.

111. In my view the judge was correct to reject the mutual understanding point. For the reasons which he gave in his judgment - and for the reasons advanced on behalf of the Renova Parties in this Court - the evidence does not support the contention that what had been said to Mr Sean Gilbertson by Mr Kalberer on 20 December 2006, agreed (informally) between to Mr Gilbertson and Mr Vekselberg in their telephone conversation on 21 December 2006 and reflected in the draft Implementation Agreements which followed did not involve the Master Fund at all but amounted to an entirely new and separate arrangement outside the Pallinghurst Structure.

(iii) the failure of condition point

112. At section 15 of his judgment the judge addressed the question whether the fiduciary duties which (as he had held) Mr Gilbertson owed to the Company (and, more generally to the Pallinghurst Structure) in relation to Project Egg before the execution of the SPA between PEL and Unilever on 22 December 2006 were affected by the Agreement and Understanding. He recorded (at paragraph 15.1 of his judgment) that Mr Gilbertson had suggested, in the course of his oral evidence at trial, that - notwithstanding his agreement with Mr Vekselberg on 21 December 2006 that PEL would enter into the SPA with Unilever on the following day (and so become the contractual purchaser of the Fabergé Rights - the effect of the Understanding or Agreement was that “if Mr Vekselberg walked away from our deal” he (Mr Gilbertson) could take whatever steps he thought fit to acquire those Rights for his own benefit. He went on (at paragraph 15.3) to explain that, on 1 January 2007, Mr Gilbertson had decided to proceed to secure the Fabergé brand for himself with the assistance of his Consortium and thereafter to “negotiate with the Russians from a position of strength”. This, the judge said, meant that the Fabergé brand would be paid for by Mr Gilbertson and his Consortium and owned by them in all respects and not in any way by the Master Fund or through the Pallinghurst Structure. He pointed out that:

“15.3 . . . The consequence of that was that if further negotiations with Mr. Vekselberg then failed, Mr. Gilbertson and his consortium would keep the Rights, as indeed happened.”

113. The suggestion which Mr Gilbertson had made in his evidence at trial - that, notwithstanding his agreement with Mr Vekselberg that PEL would enter into the SPA with Unilever the effect of the Understanding or Agreement was that “if Mr Vekselberg walked away from our deal” he (Mr Gilbertson) could take whatever steps he thought fit to acquire those Rights for his own benefit - was advanced on his behalf as a submission in this Court.

114. The response of the Renova Parties to that submission is twofold: it is said (i) that the submission as to the effect of the Agreement and Understanding is not supported by the evidence and (ii) that, in any event, at the time that Mr Gilbertson took the steps that he did to acquire the Fabergé Rights for his own benefit, Mr Vekselberg had not “walked away from the deal”.

115. As I have said the judge found that Mr Gilbertson decided that PEL would acquire the Fabergé Rights from Unilever by entering into the SPA as a result of his telephone conversation with Mr Vekselberg on 21 December 2006. The basis upon which he reached that decision appears from the email which he sent to Mr Vekselberg (with copies to Mr Kuznetsov and Mr Kalberer) later on that day. In that email (the terms of which the judge set out at paragraph 9.25 of his judgment), Mr Gilbertson wrote:

“Acting on the assurances that you gave me during this evening’s telephone conversation, namely that you want me to buy the brand on the basis of the arrangements that we have established between us over the past many months, I will therefore now trigger the Unilever-Pallinghurst transaction to conclude the deal. Project Egg Ltd, a Pallinghurst company, will be the owner of the Fabergé brand. I confirm that I shall work closely with your team to conclude payment and to achieve a structure that suits your needs . . .”

There is nothing in that email to support the contention that, if it proved impossible “to conclude payment and achieve a structure that suits your needs”, the effect of the Agreement or Understanding (arising out of “the assurances that you gave me during this evening’s telephone conversation”) was that Mr Gilbertson would be entitled to take whatever steps he thought fit to acquire the Fabergé Rights for his own benefit; *a fortiori*, nothing to support the contention that Mr Gilbertson would be entitled to procure the issue of shares by PEL to Autumn and the other members of his (then undisclosed) Consortium so as to deprive the Master Fund of its 100% ownership of PEL. Nor was there any other evidence to support those contentions. Further:

(1) Mr Gilbertson accepted in evidence (as the judge found at paragraph 9.28 of his judgment) that in “. . . no sense was PEL acting as his own nominee or agent when entering into the contract for the Rights” and that “. . . it was clearly a PEL/Master Fund/Pallinghurst Structure for their benefit; it was not a Gilbertson transaction for the Gilbertson’s benefit”.

(2) Mr Gilbertson knew very well (as the judge found at paragraph 15.6 of his judgment) that what he was doing - in pursuing arrangements for Autumn and the other members of the Consortium to fund the purchase of the Fabergé Rights through PEL and procuring PEL to issue 100 new shares to them without informing Mr Vekselberg, Mr Kuznetsov or Mr Kalberer - was “inappropriate and wrong” and that Mr Vekselberg and the Renova Parties would justifiably consider it to be contrary to the agreement (the Agreement or Understanding) that had been reached on 21 December 2006.

116. Nor was there evidence to support the contention that, at the time that Mr Gilbertson took the steps that he did to acquire the Fabergé Rights for his own benefit, Mr Vekselberg had “walked away from the deal”; in the sense that he had abandoned the agreement (the Agreement or Understanding) that had been reached on 21 December 2006. The Agreement or Understanding required that Mr Gilbertson (or Mr Sean Gilbertson on his behalf) should work with Mr Kuznetsov and Mr Kalberer (as members of Mr Vekselberg’s team) “to achieve a structure that suits your [Mr Vekselberg’s] needs”. Those needs included the transfer of the Fabergé Brand to a Lamesa company on terms that the economic benefits of developing, managing and exploiting the Fabergé Rights should be enjoyed by the Pallinghurst Structure (through the Master Fund). In Section 9 of his judgment the judge described the negotiations - and the exchange of the First, Second, Third and Fourth Draft IAs - which took place between 21 December 2006 and 2 January 2007. He found nothing to suggest that the negotiations had stalled or that they had identified a “deal breaker”. At paragraph 9.47 the judge set out the terms of the email sent by Mr Gilbertson to Mr Vekselberg (with copies to Mr Kuznetsov and Mr Kalberer) on 2 January 2007; in which - after stating that, although he had been trying, ever since PEL bought the Fabergé Brand on the evening of 21 December, “to achieve an agreement . . . that would satisfy the basic understanding that you and I struck that evening”, it had become clear to him “today” that there was little likelihood that “we could reach an agreement in time that would satisfy the requirements of both Parties” - Mr Gilbertson informed Mr Vekselberg and his team that:

“I could not take the risk that payment would not be made under Pallinghurst’s

Sale and Purchase agreement with Unilever. Accordingly I have triggered alternative arrangements, so that payment has now been made, and Pallinghurst now owns the Fabergé brand.”

As I have said, the judge observed, first that Mr Gilbertson’s statement that it became clear to him on that day, 2 January 2007, “that there was little likelihood of reaching an agreement in time” was “not strictly correct”: in that, as the judge pointed out, Mr Gilbertson’s evidence was that it was when he first awoke the previous day, 1st January 2007, that he decided that agreement would not be reached in time “and that he would therefore implement and did implement his strategy of purchasing the Rights himself with his consortium, as he had already been putting in place before then”. And, second, that it could not have been correct that (as Mr Gilbertson had suggested in his email) it was the proposals contained in the Fourth Draft IA, received by him that morning, which had caused him to “trigger alternative arrangements”: - in that Mr Gilbertson’s evidence was that he decided to and did proceed with the alternative financing arrangements “early the previous morning, before the Fourth draft IA had been sent out”. Further, the judge recorded (at paragraph 15.1 of his judgment) that Mr Gilbertson’s evidence was that it was in mid-January 2007 that Mr Vekselberg “walked away” from their “deal”; and (at paragraph 15.5) that Mr Kuznetsov’s “unchallenged evidence” was that “only one or two more rounds of negotiation following the Fourth Draft IA would have resulted in agreement”. As to the need to complete the purchase of the Fabergé Rights on 3 January 2007 under the terms of the SPA, the judge said this (at paragraph 15.5):

“15.5 There was no provision in the SPA with Unilever making time of the essence and as I have already mentioned before the 3rd January completion date was agreed it was made clear on behalf of Unilever that if that date was not convenient, Sean Gilbertson, who was negotiating with them, should let them know. That was never done. . . . Although [Mr Kuznetsov’s] evidence that agreement could have been achieved by the completion date of 3rd January was clearly optimistic, it does seem to me probable that only a few more days would have sufficed. The evidence suggested to me that a request for such a short extension would have been sympathetically considered by Unilever.”

117. In my view the judge was correct to reject the failure of condition point. The evidence supports neither the contention that the effect of the Agreement and Understanding was that “if Mr Vekselberg walked away from our deal”, Mr Gilbertson could take whatever steps he thought fit to acquire the Fabergé Rights for his own benefit, nor the contention that, at the time that Mr Gilbertson took the steps that he did to acquire the Fabergé Rights for his own benefit, Mr Vekselberg had “walked away from the deal”.

Whether Mr Gilbertson acted in breach of the fiduciary duties which (as the judge held) he owed to the Company or the Master Fund

118. It is submitted on behalf of the Renova Parties that, once the contract to purchase the Fabergé Rights had been executed on 22 December 2006, Project Egg was no longer simply an investment opportunity: for the reasons that have been explained, the effect of the SPA was that the Master Fund (through its 100% ownership of PEL) became the contractual purchaser of those Rights. The fiduciary duties owed by Mr Gilbertson, as a director of the Company, included duties to preserve and exploit that asset for the benefit of the Master Fund (and, more generally, for the Pallinghurst Structure).

119. It is submitted, further, that Mr Gilbertson accepted, in the course of his oral evidence at trial (transcript, 3 May 2012, page 195, line 6, to page 196, line 2, page 199, lines 1-9), that - whatever might have been the position prior to the execution of the SPA by PEL - that asset belonged to the Pallinghurst Structure through the Master Fund's 100% shareholding of PEL: he accepted that the execution of the SPA was "a crossing of the Rubicon" because the Pallinghurst Structure had "bought the Egg". The asset did not belong to Mr Gilbertson: it was not his to do with as he pleased. Any suggestion, that in acquiring the right to purchase the Fabergé Rights, PEL was somehow acting as Mr Gilbertson's agent, trustee or nominee was repeatedly and unequivocally denied by Mr Gilbertson in his evidence (transcript, 3 May 2012, page 195, line 25, to page 196, line 2). In those circumstances it is impossible to contend (as Mr Gilbertson did at paragraph 44 of his amended Defence and Counterclaim) that ". . . the Company's interest in PEL was of no or no substantial value as long as PEL merely held the legal interest in the [Unilever SPA] subject to Mr Gilbertson's beneficial interest in it. . .": at no stage did Mr Gilbertson have a beneficial interest in the SPA.

120. It is submitted that it is also impossible for the Gilbertson Parties to contend that, in the event that the Agreement or Understanding reached on 21 December 2006 did not lead to an agreement with Mr Vekselberg (or with Lamesa), it was open to Mr Gilbertson to take the benefit of the SPA for himself. On a true analysis, if no Implementation Agreement could be agreed, the default position was that it would be open to Mr Gilbertson to attempt to procure that PEL borrowed funds, on terms acceptable to Renova, with which to fund the completion payment. If he could not procure borrowed funds on terms which were acceptable to Renova, then (*prima facie*, at least) PEL would be unable to complete the purchase of the Fabergé Rights under the SPA. In those circumstances, if Mr Gilbertson wished to acquire the Fabergé Rights for himself – and could assert that Renova's refusal to permit

borrowing was a veto of Project Egg – it would be open to him to seek a new purchase contract from Unilever.

121. It is said on behalf of the Renova Parties that, rather than taking that course – which would or might give rise to the risk that he would be in a competition with Mr Vekselberg for the Fabergé Rights, which he would lose - Mr Gilbertson chose “to stultify Mr Vekselberg in a fake round of negotiations for two days on and after 1 January 2007 while he raised money from his funding consortium, completed the SPA and had the new shares in PEL issued to the funders, thus achieving his goal of positioning himself to ‘negotiate with the Russians from a position of strength’”. But that goal was achieved at the expense of the Pallinghurst Structure: it was not a goal which could be pursued *bona fide* in the best interests of the Pallinghurst Structure.
122. In those circumstances, it is said, Mr Gilbertson acted in breach of the fiduciary duties which he owed to the Company and the Master Fund by procuring that his Consortium (of which Autumn was a 25% member) acquire 99% ownership of PEL. Indeed, it is said that “Autumn all but concedes that, if Mr Gilbertson owed the Company or GPLP or the Master Fund duties which precluded him for having regard to his own interests, then he breached those duties”.
123. The judge accepted that, in acting as he did, Mr Gilbertson was in breach of the fiduciary duties which he owed to the Company and the Master Fund. The Gilbertson Parties challenge that conclusion. It is said on their behalf that the judge erred in law in that:
 - (1) There was no, or no sufficient evidence that Mr Gilbertson caused or was party to or was aware of the issue of the PEL shares (whether on 3 January 2007 or a later date); and, in particular, the judge ignored the failure of the Renova Parties to put to Mr Gilbertson, at trial, any allegation that he did cause, or was party to, or was aware of the issue of the PEL shares.
 - (2) The judge assessed Mr Gilbertson’s conduct by reference to a notional set of facts based on his finding that the PEL shares were issued “with effect from” 3 January 2007; had he directed himself properly, the judge should have assessed Mr Gilbertson’s conduct by reference to the facts as at the later date (19 January 2007) on which the PEL shares were actually issued.
 - (3) If the judge had assessed Mr Gilbertson’s conduct on the basis that the PEL shares were issued on that later date, he should have found that Mr Gilbertson was not in breach of any fiduciary duties, having regard to the dealings between the parties in the period after 3 January 2007 and to the fact that no entity within the

Pallinghurst Structure was involved in the proposals that the parties were entertaining: in particular, (i) he should have had regard to the basis on which the parties were then negotiating - as evidenced by the proposal which Mr Vekselberg and Mr Kuznetsov made to Mr Gilbertson on 18 January 2007 - and (ii) he should have found on the evidence (a) that the parties were proceeding on the basis that the Master Fund had no separate interest in Fabergé Rights, (b) that Mr Kuznetsov, in particular, was negotiating on that basis, and (c) that Mr Gilbertson was entitled to do so also.

124. In my view there is no substance in any of those points. On the facts found by the judge it is, if I may say so, fanciful to suggest that the decision to issue the 100 new PEL shares in January 2007 – although implemented by Mr Sean Gilbertson and Mr Andrew Willis (as the directors of PEL) - was not a decision taken by Mr Gilbertson as a necessary element in his scheme to obtain control of the Fabergé Rights (by diverting effective ownership of PEL from the Master Fund to his Consortium) in order, thereafter, to “negotiate with the Russians from a position of strength”. When Mr Gilbertson wrote in the email which he sent to Mr Vekselberg on the evening of 2 January 2007 (with copies to Mr Kuznetsov and Mr Kalberer) – the terms of which were set out by the judge at paragraph 9.47 of his judgment – that “ . . . I have triggered alternative arrangements . . . and Pallinghurst now owns the Fabergé brand” he was not suggesting that the “alternative arrangements” which he had made triggered had had the result that the ownership of Fabergé Rights had passed to the Master Fund as part of the Pallinghurst Structure: he was asserting that the ownership of those Rights had passed to “Pallinghurst” companies which he controlled. And that could only have occurred because he and the members of his Consortium had taken control of PEL. It was the issue of the 100 new PEL shares which had that effect. As I have said, I take the view that the judge was correct to conclude that those shares were issued on 3 January 2007 (as recorded in the Register of Members); but, as the judge appreciated, his conclusion that the new shares were issued on 3 January 2007 rather than on 19 January 2007 (or on some later date) is not of significance in relation to his conclusion that Mr Gilbertson was in breach of his fiduciary duties. In that context, the significant date is the date on which Mr Gilbertson took the decision (which the directors of PEL could be relied upon to implement) that the new shares PEL shares should be issued.

125. For the reasons which I have set out in this section of my judgment, I am satisfied that the judge was correct to hold (at paragraph 15.8 of his judgment) that Mr Gilbertson owed the duties of a fiduciary as a director of the Company throughout the relevant period and that

he was in breach of those duties in acting as he did in late December 2006 and January 2007.

Was the judge wrong to hold that the conduct of the Renova Parties was not such as to disentitle Renova to any relief, having regard to the rule in Nurcombe v Nurcombe

126. It is said on behalf of the Gilbertson Parties that, had the judge directed himself properly, he should have held that the conduct of the Renova Parties rendered it unconscionable to grant Renova the relief sought in these proceedings (or any relief); and that he should have applied the rule in *Nurcombe v Nurcombe* [1985] 1 WLR 350 to refuse relief.

127. The so-called rule in *Nurcombe v Nurcombe* derives from a passage in the judgment of Lord Justice Browne-Wilkinson in that case. After referring to the earlier decision of the Court of Appeal of England and Wales in *Towers v Africa Tug Co* [1904] 1 Ch. 558, he said this (*ibid*, 378/9):

“In my judgment, that case established that behaviour by the minority shareholder, which, in the eyes of equity, would render it unjust to allow a claim brought by the company at his instance to succeed, provides a defence to a minority shareholder’s action. In practice, this means that equitable defences which would have been open to defendants in an action brought by the minority shareholder personally (if the cause of action had been vested in him) would also provide a defence to those defendants in a minority shareholder’s action brought by him.

. . . Since the wrong complained of is a wrong to the company, not to the shareholder, in the ordinary way the only competent plaintiff in an action to redress the wrong would be the company itself. But, where such a technicality would lead to manifest injustice, the courts of equity permitted a person interested to bring an action to enforce the company’s claim. The case is analogous to that in which equity permits a beneficiary under a trust to sue as plaintiff to enforce a legal right vested in trustees (which right the trustees will not themselves enforce), the trustees being joined as defendants. Since the bringing of such an action requires the exercise of the equitable jurisdiction of the court on the grounds that the interests of justice require it, the court will not allow such an action to be used in an inequitable manner so as to produce an injustice. The *Towers* case [1904] 1 Ch. 558 shows that ‘all personal objections against the individual plaintiff’ must be considered. It is for this reason that, in my judgment, a court of equity will not allow a minority shareholder to succeed in a minority shareholder’s action where there are equitable defences which, as between the shareholder personally and the defendants, the defendants could properly rely on in equity, eg, the duty to elect between conflicting rights, acquiescence, or laches of the minority shareholders.”

Lord Justice Lawton, who agreed with Lord Justice Browne-Wilkinson, commented that:

“Since the procedural device [of the derivative action] has evolved so that

justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing so for the benefit of the company and not for some other purpose.”

And, in *Barrett v Duckett* [1995] 1 BCLC 243, Lord Justice Peter Gibson observed that an action brought for an ulterior purpose would not be allowed to continue.

128. In the course of his Ruling on 14 April 2009 the judge had considered the question whether that principle should lead him to refuse Renova the leave to pursue these derivative proceedings which it had sought by its summons of 29 July 2008. In a section of that ruling, under the heading “Conduct of the Plaintiff”, he had said this:

“42 Mr. Gilbertson also contends that the conduct of the Renova Group renders it inequitable to grant leave to the plaintiff, a member of that group, to continue these proceedings. As explained above, Mr. Gilbertson argues that the position taken by the plaintiff in these proceedings (that Mr. Gilbertson diverted the rights away from the Pallinghurst structure) is inconsistent with the position taken by Renova Holding in 2007, and particularly in its letter of May 25th, 2007. He says that this *volte face* demonstrates that the plaintiff has not brought this action *bona fide* for the benefit of the company or the Pallinghurst structure.

43 It is said also on behalf of Mr. Gilbertson that the conduct of Mr. Vekselberg as the ultimate principal of the Renova Group and thus of the plaintiff, in seeking to procure the transfer of the ownership of the rights outside the Pallinghurst structure, itself resulted in breaches of duty to the company by Mr. Kuznetsov, Mr. Gilbertson’s fellow director. It was contended that it was Mr. Kuznetsov who acted in breach of his fiduciary duties to the company by pursuing Mr. Vekselberg’s personal agenda rather than the best interests of the company and the Pallinghurst structure. It was submitted that the Renova Group have been the authors of their own misfortune by insisting that the rights should be owned outside the Pallinghurst structure and that a court of equity should not assist a party who has brought about the very matters complained about.”

And, after referring to Lord Justice Browne-Wilkinson’s observations in *Nurcombe*, the judge went on:

“44 The defendant argues this conduct by the plaintiff shareholder or those behind it renders it inequitable to allow a claim brought by it on behalf of the company to proceed.

45 The plaintiff argues that the contentions on behalf of Mr. Gilbertson are a misinterpretation of the facts and that it was always intended by the plaintiff and the Renova Group that the economic benefit and management of the rights should remain within the Pallinghurst structure and that it was the actions of Mr. Gilbertson which diverted that economic benefit and control away from the Pallinghurst structure, and thus the company, in breach of his duties to the company. What is more, the plaintiff says, the Gilbertsons clearly initially agreed with this proposal and entered into negotiations about the precise terms of a draft agreement giving effect to it. There was no suggestion by them at the time that it was not in the best interests of the Pallinghurst structure or of the company, or that Mr. Gilbertson was somehow released from his duties as a director of the company as a result. Indeed, there was nothing to indicate, until Mr. Gilbertson’s email of January 2nd, 2007, that everything was not proceeding on this basis and that the

Pallinghurst structure, with the company at its head, would not shortly be the owner of the economic benefit and the manager of the rights.

46 The plaintiff contends that Mr. Gilbertson's real intention from a much earlier stage was to acquire the rights himself and, as he said himself in an email, to "warehouse" them with a view to then negotiating about the possible return of the rights to the Pallinghurst structure from a position of strength. As far as the letter of May 25th, 2007 is concerned, the plaintiff argued that it is simply not relevant in determining the true position which must be derived from the contemporary communications, documentation and actions of the parties and not *ex post facto* at a time when the Renova Group were negotiating months later to resolve a situation caused by Mr. Gilbertson's breaches of duty. The plaintiff contends that the letter does not provide an equitable defence to Mr. Gilbertson of the kind envisaged in *Nurcombe* and that what matters is the conduct of the parties at the relevant time. The plaintiff says the case it pleads represents its position as it was at the material time.

47 In my view, the letter of May 25th, 2007, and indeed, the comments of Renova Holding in March 2007, while no doubt material for cross-examination if the case were to proceed, do not constitute conduct of a kind which, at least at this stage and for this purpose, sufficiently impacts on the *bona fides* and equity of the plaintiff's case such as to satisfy me that in the light of it the plaintiff should not have leave to continue the action."

129. Nevertheless, as the judge explained at paragraph 16.3.3 of his judgment of 5 November 2012, he rejected the submission (advanced on behalf of the Renova Parties) that the issue was not open to reconsideration at the trial. He said this:

"16.3.3 . . . I am conscious of the fact that at the leave stage in the present case, while affidavit evidence had been filed and was relied upon, the court had obviously not seen or heard all the evidence, written and oral of the witnesses at trial. Accordingly, I have considered whether in light of all that evidence the conduct of the Plaintiff was such as to provide an equitable defence to the action as submitted on behalf of the Gilbertson Parties."

130. At paragraph 16.3.4 of his judgment the judge referred to the features listed by counsel for the Gilbertson Parties in their written opening submissions which, it was said, would make it unjust for Renova to succeed in this action. But, he said, "most of the matters on which they rely are inevitably based on their own interpretation of particular facts or circumstances before any evidence was heard and much of which, in the event, I did not accept"; and that "furthermore some of the matters on which they relied were not put to the Renova Parties' witnesses in cross-examination". He went on to address two further points which had not, I think, been advanced at the 2009 hearing: first, the submission that Renova's claims against the Gilbertson Parties were of no commercial benefit to the Renova Parties and were motivated solely by malice towards Mr Gilbertson; and, second, the submission that, as a result of his broader relationship with Mr Vekselberg through his employment at SUAL and his

financial expectations, both consequent upon that employment and pursuant to the Letter Agreement, Mr Gilbertson was under considerable pressure in dealing with Mr Vekselberg and the Renova Parties generally. In relation to the first of those points, the judge said this (at paragraphs 16.3.5 and 16.3.7 of his judgment):

“16.3.5 . . . it was never put to Mr. Vekselberg that the present proceedings were solely motivated by malice on his part. While it was clear to me that Mr. Vekselberg was upset and annoyed and felt he had been wronged by what he described as Mr. [Gilbertson’s] ‘violation’ of the agreement which he said he had made with Mr. Gilbertson, it does not seem to me that it can therefore inevitably be inferred that Mr. Vekselberg had procured the present proceedings to be brought solely out of malice. No doubt many plaintiffs are aggrieved and motivated by what they see as the wrong done to them by the defendant. It does not follow, in my view, that their motives in bringing court proceedings are therefore necessarily inequitable such that their claims should be refused on that ground. In the present case, the Plaintiff has pleaded and put forward a perfectly arguable case on the merits of its claim and also in relation to loss.”

“16.3.7 Although Mr. Vekselberg was annoyed and upset as a result of Mr. Gilbertson’s covert actions, it does not follow, in my opinion, that these proceedings were actuated by malice. In fact Mr. Vekselberg is anyway not the Plaintiff. Even if the reality is that, as the principal owner and chairman of the group of which the Plaintiff is a member, he procured the Plaintiff to bring these proceedings, a circumstance which was never put to Mr. Vekselberg in cross-examination, it does not follow that the Plaintiff’s conduct in this case is inequitable in the *Nurcombe v Nurcombe* sense so as to provide a defence to the Plaintiff’s claims. I therefore reject the submissions of the Gilbertson Parties in that respect.”

And, in relation to the second of those points, the judge said this (at paragraph 16.3.6):

“16.3.6 Mr. Gilbertson clearly knew Mr. Vekselberg well. He knew what Mr. Vekselberg’s expectations were but he nonetheless did not hesitate to act as he did in order to make a profit at Mr. Vekselberg’s expense. In my assessment, that is consistent with my overall impression of Mr. Gilbertson as a hardened and ambitious businessman quite capable of looking after his own interests and taking advantage of any opportunity available to him to benefit financially, knowing very well that Mr. Vekselberg, his supposed partner and his employer, would be extremely annoyed. I do not accept the suggestion that Mr. Gilbertson was brow-beaten or pressured into agreeing with Mr. Vekselberg’s wishes as he did; my clear impression of Mr. Gilbertson is that he was perfectly capable of refusing to do so had he wished.”

The submissions advanced on behalf of the Parties

131. It is said in the Memorandum of Grounds of Appeal filed on behalf of Autumn on 1 February 2013 that the judge misdirected himself and erred in law and/or fact in not applying the rule in *Nurcombe v Nurcombe* to refuse Renova relief in that it was unconscionable for Renova to be granted relief, having regard to the following, amongst other (unspecified) matters:

- (1) The conduct of Mr Kuznetsov, in relation to whom it is said that the judge should have found that he was acting at all material times in the interests of Mr Vekselberg and the Renova Group, rather than of the Company, the GPLP and/or the Master Fund.
- (2) The crisis caused by the Renova Parties and their ultimate veto of the approval of Project Egg as an Investment Project on 20 December 2006.
- (3) The oppressive terms that the Renova Parties sought to impose in the draft Implementation Agreements prior to 3 January 2007.
- (4) The attempts of the Renova Parties to procure Mr Gilbertson's agreement to the proposal that the Fabergé Rights should be owned outside the Pallinghurst Structure and exploited pursuant to an arrangement which did not involve the Master Fund at all.
- (5) The Renova Parties pursuit of their own interests without regard to any interests of the Master Fund; and, in particular, their appropriation of the shares acquired in connection with Project Charlie.
- (6) The conduct of the Renova Parties - found by the judge to be "culpable and blameworthy" - in destroying relevant documents; such conduct being inconsistent with the equitable relief sought and the indulgence to pursue derivative proceedings which they had been granted.

Had the judge directed himself properly, it is said, he should have held that the conduct of the Renova Parties rendered it unconscionable to grant Renova the relief which it sought.

132. In development or amplification of those submissions it is said on behalf of the Gilbertson Parties in their Memorandum of Grounds of Appeal that, although the judge stated (at paragraph 16.3.3 of his judgment) that he had considered "whether in light of all that evidence the conduct of the Plaintiff was such as to provide an equitable defence to the action as submitted on behalf of the Gilbertson Parties", he failed to make any findings with regard to six matters on which the Gilbertson Parties had relied at trial: (i) the complicity of the Renova Parties in Mr Gilbertson's negotiating with them on his own behalf; (ii) the inconsistency between the Renova Parties' own conduct with the case which they advanced in these proceedings; (iii) the conduct of the Renova Parties in relying on Mr Gilbertson's appropriation of Project Egg to justify their appropriation of the profits of Project Charlie and, then, resiling from the set off; (iv) the attempt by the Renova Parties to intimidate Mr Gilbertson; (v) Mr Vekselberg's conduct in causing SUAL to withhold the bonus which Mr Gilbertson should have received in connection with the merger with RUSAL and

to terminate his employment (notwithstanding that he had made a profit in excess of US\$1 billion for Mr Vekselberg as a result of that merger); and (vi) the fact that these proceedings were not being pursued for the benefit of the Company.

133. In response to those submissions it is said on behalf of the Renova Parties that there is no separate *Nurcombe v Nurcombe* defence to Renova's claims. The judge was right to conclude that, although Mr Vekselberg may have been "upset and annoyed" at Mr Gilbertson's actions, his irritation does not debar Renova from pursuing those claim on behalf of the Company and the Master Fund; even if the action had been motivated (whether solely or partly) by some personal animus on the part of Mr Vekselberg – and no such suggestion was put to him at the trial – that would be irrelevant in circumstances where the claims were good claims on the merits; and the same can be said for Renova's unfortunate failures in the discovery process. The points advanced on behalf of the Gilbertson Parties in this context were fairly considered and rejected by the judge at paragraph 16.3 of his judgment. No error in the judge's detailed analysis has been identified.

134. In addressing those submissions it is, I think, important, to keep in mind that - as the judge observed at paragraph 16.3.2 of his judgment - the contention that the conduct of Renova and those associated with it in relation to the claims made on behalf of the Company in these derivative proceedings rendered it inequitable to allow Renova to pursue those claims as plaintiff had already been argued at length at the hearing of Renova's application for leave to continue and had been rejected by the judge in his Ruling of 14 April 2009. There was no appeal from that Ruling. In those circumstances, in revisiting that contention at the trial, it was not open to the judge to depart from his earlier Ruling unless persuaded that the evidence given by the witnesses at trial provided good reasons for doing so.

135. It is important, also, to keep in mind the basis of the *Nurcombe v Nurcombe* defence as explained in the authorities to which the judge referred. The underlying principle is that, in permitting a derivative action to be brought by a person (say, A) in whom the cause of action is not vested (and who is not the "proper" plaintiff) for the benefit of the person (say, B) in whom the cause of action is vested (and who would be the "proper" plaintiff), the court is exercising an equitable jurisdiction on the grounds that justice so requires. Four propositions follow from that underlying principle. First, the jurisdiction is exercised on the application of A only in circumstances where A has an interest (recognised by the law) in the pursuit of the cause of action for B's benefit: such

circumstances are likely to exist where, for example, A is a shareholder of B (and so has an interest in the outcome of litigation which, if successful, will benefit B and, indirectly, B's shareholders. Second, the need for the exercise of the equitable jurisdiction to avoid injustice arises because the circumstances are such that B is not able to bring the action itself (usually because B is under the control of the wrongdoer who would be the defendant). Third, the jurisdiction is not exercised unless A's purpose in seeking to pursue the cause of action is to benefit B; although, consistently with the second proposition, it is no bar to the exercise of the jurisdiction that A may benefit indirectly (say, for example, as a shareholder of B) if the outcome of the litigation is successful. Fourth, the jurisdiction will not be exercised where to do so would lead to injustice. Circumstances in which the exercise of the jurisdiction on the application of A would lead to injustice would include those in which A would benefit indirectly (say, as a shareholder of B) from the successful pursuit of a claim to which (as between A and the defendant) the defendant would have had an equitable defence on which he would have succeeded if (on the hypothesis that A had been a proper plaintiff) the action had been brought by A in his own right. As Lord Justice Browne-Wilkinson pointed out in the *Nurcombe* case, such equitable defences would include A's obligation to elect between conflicting rights, acquiescence or laches.

136. It is convenient to address the submissions advanced on behalf of the parties under two heads, reflecting the third and fourth of the propositions which I have just set out, and to ask, first, whether (on a true analysis of the position) Renova is not pursuing this derivative action for the benefit of the Company (or, more generally, the Pallinghurst Structure) but, rather, is pursuing the action for some other - or ulterior - purpose; and, second, whether the other matters (or any of them) upon which the Gilbertson Parties rely in support of their challenge to the judge's conclusion that the conduct of the Renova Parties was not such as to disentitle Renova to any relief, having regard to the rule in *Nurcombe v Nurcombe*, would have given rise to an equitable defence on which the Gilbertson Parties would have succeeded if the action had been brought by Renova in its own right.

Ultrior purpose

137. In developing their submissions under this head it is said on behalf of the Gilbertson Parties that the judge failed to make any findings with regard to "(vi) the fact that these proceedings were not being pursued for the benefit of the Company"; and, further, that these proceedings have been brought and pursued for a collateral purpose in that "this is not the Master Fund's dispute, let alone the Company's. . . . it is and

always has been Mr Vekselberg's".

138. The submission that the judge made no finding on the issue whether these proceedings were being pursued for the benefit of the Company, but for a collateral purpose might be thought to overlook the judge's observations at paragraphs 16.3.5 and 16.3.7 of his judgment (to which I have referred earlier in this section of this judgment). But, in relation to the judge's observations at paragraph 16.3.5, it is said on behalf of the Gilbertson Parties that he was wrong to take the view that malice was of no relevance in the context of the *Nurcombe* defence, save where it was the sole factor driving the proceedings. In the present case, it is said that Mr Vekselberg was using the proceedings as an indirect means of asserting what he chose to believe to be due to him and "was seeking to enforce in the name of the Company an unenforceable agreement made with him personally". Although it is accepted that "this may not necessarily be sufficient to found a *Nurcombe* defence in itself, it is said to be "something that the court should weigh in the balance". Further, it is submitted that the judge was wrong "to overlook the fact that [these proceedings] might have been brought and pursued out of enmity; and wrong to take the view that "it was sufficient to dispose of the issue that Mr Vekselberg had a genuine sense of grievance".
139. In response, it is said on behalf of the Renova Parties that in the circumstances that (as the judge held after hearing evidence at the trial) the derivative claims brought by Renova on behalf of the Company (or the Master Fund) were good on their merits, then the fact that Mr Vekselberg was angered or upset by what Mr Gilbertson had done was irrelevant to the question whether Renova was an appropriate claimant; or, at the least, not a sufficient reason to conclude that it was not. The judge was plainly correct to take the view (expressed at paragraph 16.3.5 of his judgment) that a finding that Mr Vekselberg was angered and upset by what Mr Gilbertson had done did not, of itself, justify a finding that Mr Vekselberg was acting out of malice. The judge did not overlook the possibility that proceedings might be brought out of enmity: rather, he considered that possibility and rejected it. Further, it is said that the allegation that the action was actuated by malice - which was advanced at trial by counsel on behalf of the Gilbertson Parties in the course of his opening submissions - was of such a serious nature (in that it amounted to an allegation that the action had been brought in bad faith and for a collateral purpose) that it was necessary (if it were to be pursued) that it be put to Mr Vekselberg. As the judge noted (at paragraph 16.3.5) that allegation was never put to Mr Vekselberg. And, it is said, the contention that Mr Vekselberg was seeking, for his own purposes "to enforce in the name of the

Company an unenforceable agreement with him” cannot be sustained: Mr Vekselberg is not the derivative plaintiff and is not seeking to enforce any agreement made with him. He was joined in the action as a defendant to counterclaims which were wholly unsuccessful and, in the event, for the most part abandoned.

140. In my view the judge was entitled to reject the contention that these proceedings were not brought and pursued by Renova for the benefit of the Company (or, more generally, for the benefit of the Master Fund and the other entities within the Pallinghurst Structure), but for the benefit of Mr Vekselberg personally. There was no direct evidence to support that contention. Not only was the contention never put to Mr Vekselberg himself; it was not put to Mr Kuznetsov or Mr Kalberer. There was no indirect evidence from which it could be inferred that Renova had brought, and was pursuing, the action for the benefit of Mr Vekselberg; rather than for the benefit of the Company or the Pallinghurst Structure. In particular, the judge was entitled - indeed, in my view, correct - to hold that his conclusion that “Mr. Vekselberg was upset and annoyed and felt that he had been wronged by what he described as [Mr. Gilbertson’s] ‘violation’ of the [Agreement and Understanding]” was an insufficient basis upon which to infer that Mr Vekselberg (or others in control of Renova) had caused Renova to bring and pursue this action for an ulterior purpose: that is to say, for a purpose which was not that on the basis of which permission to bring derivative proceedings had been sought and obtained.

Equitable defences

141. I have explained that the jurisdiction to permit a person who is not the “proper” plaintiff (in that he or it is not the person in whom the relevant cause of action is vested) to bring a derivative action for the benefit of the person whose cause of action it is (the “proper” plaintiff) will not be exercised where to do so would lead to injustice. The purpose of the rule in *Nurcombe v Nurcombe*, in this context, is to avoid the injustice which would arise from allowing the derivative plaintiff to benefit from the pursuit of a claim in relation to which his, or its, own conduct has been inequitable; or, to put the point another way, to avoid the injustice which would arise if the defendant were to be denied the benefit of an equitable defence which would have been available to him if the claim made against him had been made otherwise than in derivative proceedings.
142. There are, as I have said, six matters in relation to which it is said that the judge misdirected himself and erred in law in failing to have proper regard to what I have described as the fourth proposition which follows from the principle underlying the

jurisdiction to permit a person who is not the “proper” plaintiff to bring and pursue a derivative action: that is to say, the proposition that the jurisdiction will not be exercised where to do so would lead to injustice. Three of those matters were elaborated further in the course of the submissions advanced on behalf of the Gilbertson Parties:

(1) *The conduct of Mr Kuznetsov.*

It is said that the judge should have found that Mr Kuznetsov was acting at all material times in the interests of Mr Vekselberg and the Renova Group, rather than of the Company, the GPLP and/or the Master Fund. In advancing the case that they did, it was inconsistent for the Renova Parties to ignore the fact that (as the Gilbertson Parties had pointed out at the trial), Mr Kuznetsov recognised no conflict which precluded him from promoting the interests of Mr Vekselberg and Lamesa where they conflicted with those of the Pallinghurst Structure, notwithstanding that he was a member of the Investment Committee and a director of the Company. The judge was wrong to make no finding in relation to that alleged inconsistency.

(5) *The Renova Parties’ pursuit of their own interests without regard to any interests of the Master Fund; and, in particular, their appropriation of the shares acquired in connection with Project Charlie.*

(i) In developing the first limb of this submission, it is said that, although the Renova Parties complain in this action that Mr Gilbertson was not adhering to the “no-conflict” and “no-profit” rules, they were happy to negotiate with Mr Gilbertson in relation to the Lamesa Project - and did so without making any such complaint at the time - notwithstanding (i) that they had contended, in their pleadings and written opening submissions at trial, that Mr Gilbertson was acting in his capacity as a director of the Company in his negotiations with them in relation to the Lamesa Project and, accordingly, was obliged to get the best deal he could for the Company or, perhaps, the Master Fund, without regard to his own interests or those of his team, and (ii) that Mr Kuznetsov and Mr Kalberer knew - as they each acknowledged in the course of their oral evidence (transcript, 1 May 2012, page 82, line 23 to page 83, line 3; 2 May 2012, page 60, lines 8-16) - that they were negotiating with Mr Gilbertson in relation to the Lamesa Project on the basis that they would need to come to an agreement which was acceptable to Mr Gilbertson and his team.

(ii) In developing the second limb of this submission, it is said that, in the events which happened, Project Charlie progressed further than Project Egg: in that (i) it was the subject of a formal Investment Committee minute, (ii) shares were purchased on behalf of the Master Fund, and (iii) profits were made on behalf of the Master Fund.

Those profits were, it is said, retained by the Renova Parties for their own benefit on the ground that- as Mr Kuznetsov acknowledged in his oral evidence (transcript, 2 May 2012, page 80, to page 81, line 3) although subsequently denied - they were keeping Project Charlie profits because Mr Gilbertson had kept Project Egg. It is accepted (i) that Project Charlie was not the subject of any detailed consideration at the trial; and that the judge was not asked to rule either on the set off that the Renova Parties purported to exercise or on their entitlement to do so and (ii) that “the Renova Parties will have no difficulty in presenting a thicket of fine distinctions . . . to explain how the Renova Parties might be entitled to keep the profits from Project Charlie and Mr Gilbertson not be entitled to keep the [Fabergé] Rights”. But, it is said that that is not how the Renova Parties saw the matter at the time; they treated the two projects as comparable. Notwithstanding that they retain the fruits of the one; they seek, in these proceedings, to recover the fruits of the other. If and insofar as there is any merit in their arguments in relation to the Fabergé Rights, the Renova Parties come before the court as wrongdoers; and that this Court is not precluded, when assessing what may be just between the parties, from taking into account the justice that the parties sought for themselves in relation to the two projects.

(6) *The conduct of the Renova Parties . . . in destroying relevant documents*

Although the judge found (at paragraph 62 of his ruling on the application to strike out the statement of claim) that the destruction of documents by the Renova Parties was “blameworthy and culpable”, he attached no significance to this finding. The judge failed to have regard (i) to the nature of the prejudice that the destruction of documents on a wholesale scale may have to the judicial process, (ii) to the sense of injustice caused to other litigants and (iii) to the distortion of the court process that it implies. It is said that the conduct of the Renova Parties was inconsistent with the equitable relief sought and the indulgence to pursue derivative proceedings which they had been granted.

In addition to those numbered submissions, the Gilbertson Parties submit that the judge failed to make any findings with regard to two other matters on which the Gilbertson Parties had relied at trial:

The attempt by the Renova Parties to intimidate Mr Gilbertson.

There is no challenge to the judge’s finding (at paragraph 16.3.6 of his judgment) that “the suggestion that Mr Gilbertson was brow-beaten or pressured into agreeing with Mr Vekselberg’s wishes as he did” was not made out on the evidence: indeed, it is said that no such suggestion was advanced at the trial. But the Gilbertson Parties do rely on Mr Gilbertson’s evidence (in his witness statement) that, during the course of

negotiations following the Not Pleasurable Conversation, Mr Kuznetsov had advised him to submit to Mr Vekselberg's wishes rather than to make an enemy of him; and to Mr Kuznetsov's evidence, when that statement was put to him in cross-examination (transcript, 2 May 2012, page 146, line 18, to page 147, line 4; page 147, line 9 to page 148, line 9) that he did no more than offer "friendly advice". It is said that to advise someone to submit to another's demand lest he makes an enemy of him might be seen as a threat: *a fortiori*, in circumstances where that other is a Russian oligarch and, in substance, the employer of the advisee.

Mr Vekselberg's conduct in causing SUAL to withhold the bonus which Mr Gilbertson should have received in connection with the merger with RUSAL and to terminate his employment.

Shortly after Mr Kuznetsov had offered his "friendly advice", Mr Gilbertson's employment at SUAL was terminated; and a bonus to which he claimed to have been entitled (having generated profits for Mr Vekselberg in excess of US\$1 billion) was withheld. Mr Vekselberg's evidence (transcript, 1 May 2012, page 56, lines 2-11) was that the employment was terminated and the bonus withheld because he was not happy with Mr Gilbertson's performance. That evidence was described by counsel for the Gilbertson Parties as "chilling". The judge was wrong to see the termination of Mr Gilbertson's employment and the withholding of the bonus "simply as part of the fall out from the breakdown in the relationship between Mr Gilbertson and Mr Vekselberg, but otherwise unrelated to it"; he should have recognised that "the mere fact that the break down in the relationship between the two men over the Lamesa Project should have led to Mr Gilbertson being fired as he was" was itself "a harsh illustration of the fact that the operative relationship in all the dealings of Project Egg and the Lamesa Project was that between Mr Gilbertson and Mr Vekselberg, a personal relationship which both men felt personally". There is no challenge to the judge's observation (at paragraph 16.3.7 of his judgment), that it would have been obvious to Mr Gilbertson that he would be taking a risk in angering Mr Vekselberg. But it does not follow that the way in which Mr Vekselberg vented his anger in the past is of no relevance to the question whether the court should assist him in doing so in these proceedings.

143. In response to the submissions advanced on behalf of the Gilbertson Parties, the Renova Parties emphasise the points to which I have already drawn attention: (i) that the judge gave leave to bring this derivative claim in 2009, after a two day hearing in the course of which the Gilbertson Parties deployed many of the arguments now advanced and (ii) that there was no appeal from his order. The Renova Parties accept

that, in a case where new evidence emerges during the trial which casts significant doubt on the earlier decision to grant leave, the trial judge may revisit that decision; but, it is said, this is not such a case. More particularly - and in response to the numbered submissions to which I have referred in the preceding paragraph of this judgment - it is said on behalf of the Renova Parties:

(1) *The conduct of Mr Kuznetsov.*

There is no basis on which the Gilbertson Parties can advance a submission that, if Mr Gilbertson was in breach of his fiduciary duties to the Company, so also was Mr Kuznetsov. The allegation that Mr Kuznetsov was in breach of his fiduciary duties to the Company was pleaded in these proceedings in the context of a counterclaim for contribution against Mr Kuznetsov; but the counterclaim was not pursued and it was abandoned before closing submissions (as the judge recorded at paragraph 18.4 of his judgment). The allegation cannot be revived in this Court.

(5) *The Renova Parties' pursuit of their own interests without regard to any interests of the Master Fund; and, in particular, their appropriation of the shares acquired in connection with Project Charlie.*

(i) Even if Mr Vekselberg's insistence that - if he were funding the purchase - the Fabergé Rights were to be held in Lamesa Arts Inc represented a departure from the original structure contemplated, that was acceptable to Mr Gilbertson in principle subject to the negotiation of terms to be set out in an agreed implementation agreement reflecting Pallinghurst principles "modified for Project Egg". The negotiation of terms was proceeding towards a mutually acceptable conclusion when Mr Gilbertson decided, unilaterally, to bring negotiations to an end by depriving the Master Fund of its 100% ownership of PEL and to secure the Fabergé Rights for himself and his Consortium. The process of negotiating mutually acceptable terms upon which Mr Vekselberg would fund the purchase of the Fabergé Rights cannot be treated as justifying Mr Gilbertson's breach of duty, in unilaterally preferring his own interests to those of the Master Fund.

(ii) The complaint as to Mr Vekselberg's retention of the profits of Project Charlie is of no substance. The point "barely feature[d]" at the trial; it was not pleaded as a point which should lead to the refusal to grant relief in this case; Autumn simply purported to reserve the right of the Fairbairn Trust to bring a derivative claim.

(6) *The conduct of the Renova Parties . . . in destroying relevant documents*

The complaint that the judge erred in failing to refuse relief - on *Nurcombe*

grounds - on the basis of his criticism of Renova's conduct in relation to discovery is not well founded, in that the judge had already refused to strike out the action on the grounds of Renova's failure to give discovery; holding (at paragraphs 59-62 of his ruling of 5 August 2011) that - notwithstanding that failure - it remained possible to have a fair trial in which, if and so far as necessary, inferences adverse to Renova could be drawn from the absence of documents.

And, in response to the allegation that the judge failed to make findings in relation to the two other matters to which I have referred in the preceding paragraph, it is said:

Attempt at intimidation

There is no substance in the complaint as to "friendly advice": the judge was entitled to have regard to Mr Kuznetsov's evidence, in which he rejected the suggestion that he had threatened Mr Gilbertson with reprisals if he did not submit to Mr Vekselberg's demands. But, in any event, as the judge found, Mr Gilbertson was tough and exacting and perfectly capable of standing up for himself. There is no basis upon which this Court can properly reject that finding by a judge who, having seen Mr Gilbertson and Mr Vekselberg in the witness box, was entitled to make that assessment.

Mr Vekselberg's conduct in relation to SUAL. The attempt by the Renova Parties to intimidate Mr Gilbertson.

The complaint is "no more than an attempt to paint Mr Vekselberg as a bully who got no more than he deserved".

144. In my judgment none of the matters upon which the Gilbertson Parties rely in support of their challenge to the judge's conclusion would have given rise to an equitable defence on which the Gilbertson Parties would have succeeded if the action had been brought by Renova in its own right. I am satisfied that the judge was correct to take the view that there was no reason, under this head, to refuse Renova the equitable relief which it sought in this derivative action. In rejecting the submissions which have been advanced on behalf of the Gilbertson Parties, I have had regard to the position as it was at the time when the conduct which has led to the conclusion that Mr Gilbertson acted in breach of fiduciary duty took place; and, in particular, to the following factors:

- (1) The conclusion that Mr Gilbertson acted in breach of fiduciary duty is founded on his conduct in causing or procuring the issue by PEL of 100 new shares. Whether or not those shares were issued on 3 January 2007 as the judge found (correctly in my view) or some two and a half weeks later (as the Gilbertson Parties contend),

there is no doubt that they were issued pursuant to the decision taken by Mr Gilbertson on 2 or 3 January 2007 that he would secure the Fabergé Rights for himself (or for the benefit of his Consortium) by divesting the Master Fund of its ownership and control of PEL.

- (2) At the time when Mr Gilbertson took that decision, PEL was the contracting purchaser of the Fabergé Rights. The terms of the SPA required payment of the purchase price (US\$38 million) to be made on 3 January 2007. But time was not of the essence; and there was evidence to suggest that, if payment were not made on 3 January 2007, Unilever would not have treated the SPA as having determined forthwith (even if it would have been entitled to do so as a matter of law).
- (3) Mr Gilbertson had caused PEL to enter into the SPA on 22 December 2006 in circumstances when (as he knew) neither PEL nor the Master Fund (which, it appears, was the intended guarantor) had - or had obtained an unconditional commitment from Mr Vekselberg (or from anyone else) in respect of - the US\$38 million which would be needed to complete the purchase on 3 January 2007.
- (4) The position immediately before PEL entered into the SPA (agreed on 21 December 2006 between Mr Gilbertson and Mr Vekselberg) was that Mr Vekselberg would provide the funds to complete the purchase provided that title to the Fabergé brand was transferred to a Lamesa company. That was acceptable to Mr Gilbertson, provided that terms (in the form of an implementation agreement) could be agreed which would provide for the Master Fund (or some other entity within the Pallinghurst Structure) to benefit from the promotion, management and exploitation of the Fabergé Rights.
- (5) That remained the position from 21 December 2006 until 3 January 2007. In particular, it remained the position at the time when Mr Gilbertson took the decision to cause or procure PEL to issue the 100 new shares. At the time when that decision was taken negotiations as to the terms of the intended implementation agreement were continuing; and Mr Vekselberg was not in breach of any agreement or understanding in relation to the provision of the funds required for the completion of the purchase by PEL of the Fabergé Rights.

In those circumstances, as it seems to me, none of the matters relied upon by the Gilbertson Parties in support of their challenge under this head - that is to say, the conduct of Mr Kuznetsov, the “crisis” caused by the Renova Parties, the terms that the Renova Parties sought to impose in the draft Implementation Agreements, the attempts of the Renova Parties to procure Mr Gilbertson’s agreement to the proposal that the Fabergé

Rights should be owned outside the Pallinghurst Structure, the Renova Parties' pursuit of their own interests and their appropriation of the shares acquired in connection with Project Charlie, the conduct of the Renova Parties in destroying relevant documents, the attempt by the Renova Parties to intimidate Mr Gilbertson and Mr Vekselberg's conduct in relation to SUAL - would have provided equitable defences to the claim against Mr Gilbertson in respect of his breach of fiduciary duty. Put shortly, none of those matters, even if made out on the facts, would have led to the conclusion that it was inequitable for Renova to pursue that claim, had it been able to do so in its own right.

145. In reaching that conclusion I have not overlooked the detailed and extensive submissions advanced on behalf of the Gilbertson Parties in support of their contention that the judge erred in failing to hold that the destruction of documents by the Renova Parties was a matter which led to the conclusion that it was not in the interests of justice that Renova be permitted to pursue a derivative action. In addition to the submissions to which I have already referred, it was said that he did not consider whether it was right that the Gilbertson Parties were obliged to speculate as to what the documents that had been destroyed would show; and he did not consider whether it was right for the court to grant derivative relief on the basis of equity to a claimant who was in culpable disregard of its rules in such a manner. Rather, it is submitted, the judge appears to have taken the view that it was sufficient for him to consider the destruction of documents in the context of the specific findings that he needed to make. But, as it seems to me, those submissions overlook, first, the judge's earlier ruling (not challenged on appeal) that a fair trial of a derivative action was possible notwithstanding that (as he had found) there had been serious failures of document preservation, and, second, that there was no sensible basis to dismiss the action, after a trial which was not, in the event unfair, on the ground that (by reason of those failures) Renova was not a proper derivative claimant. It is important to have in mind that, in referring to his earlier ruling (at paragraph 16.3.4 of his judgment) the judge said this:

“16.3.4 . . . As I have already mentioned . . . , during the course of this action there have been several contested applications concerning discovery and the destruction of certain back-up tapes, which may have contained relevant emails and other documents, by the Renova Parties following a computer crash at their administrative offices in Zurich. In that respect I have made it clear more than once that as a result, if appropriate and justified, the court could draw inferences against the Renova Parties at the trial in light of their destruction of potentially discoverable documents. However . . . apart from the question of the alleged motivation of the Plaintiff in bringing the present claim, which was not clearly put to the Renova Parties' witnesses, I was not invited to draw any specific inferences.”

If Renova were otherwise a proper person to bring the action on behalf of the Company (or, more generally, the Master Fund and other entities in the Pallinghurst Structure), its failure to comply with its discovery obligations might expose it to the court's procedural sanctions, including striking out. But, where the judge - properly, and upon authority - had refused to strike out the action because he considered that a fair trial was possible and was not persuaded that the trial that he had subsequently conducted was unfair, he was correct to recognise that the past failures in relation to discovery provided no ground upon which the action should be dismissed. In particular, he was correct to recognize that the principle underlying the decision in *Nurcombe v Nurcombe* did not lead to a different conclusion in a derivative action.

146. For the reasons which I have set out in this section of my judgment, I am satisfied that the judge was correct to hold that the conduct of the Renova Parties was not such as to disentitle Renova to equitable relief in this action on *Nurcombe* grounds.

Was the judge wrong to value at nil the loss which Mr Gilbertson was liable to make good to the Master Fund by way of equitable compensation

147. In its amended statement of claim Renova sought an account of the profits received by Mr Gilbertson as a result of his acquisition of the Fabergé Rights in breach of fiduciary duty; or, in the alternative, payment to the Company (and/or to GPLP and/or to the Master Fund) of equitable compensation for the loss of those Rights. During the course of the trial Renova abandoned its claim for an account of profits; and so elected to pursue its claim against Mr Gilbertson for equitable compensation.
148. At paragraph 19.2 of his judgment the judge explained that equitable compensation in respect of loss caused by breach of fiduciary duty was to be assessed as the monetary amount required to put a plaintiff back into the position in which he would have been at the time of the trial if he had not sustained that loss. Renova's claim, he said, was for compensation in the amount required to reconstitute the Master Fund to the position in which it would have been, at the date of judgment, but for Mr Gilbertson's breach of fiduciary duty: it was not a claim for compensation in the amount required to put the Master Fund into the position in which it would have been (but for Mr Gilbertson's breach of duty in January 2007) at the time of that breach. The court's task was to determine the monetary value of the loss suffered by the Pallinghurst Structure as a result of the diversion from the Master Fund of the economic benefit of development, exploitation and management of the Fabergé Rights. He recorded that the trial proceeded on that basis.

149. The Renova Parties contended at trial that the value of the economic benefit of development, exploitation and management of the Fabergé Rights was to be treated as equal to the value of full ownership of those Rights; and that, accordingly, the equitable compensation payable by Mr Gilbertson was to be assessed at an amount equal to the whole monetary value of Fabergé Limited (formerly PEL) - the sole asset of which was the Fabergé Rights - as at the date of assessment. On that basis, Renova initially sought payment to the Master Fund of US\$177 million by way of equitable compensation: that being the value attributed to Fabergé Limited as at 31 January 2012 in the report of Ms Elizabeth Gutteridge, a partner of Deloitte LLP, London, on whose expert opinion Renova invited the judge to rely.

150. The Gilbertson Parties did not accept the value (US\$177 million) attributed to Fabergé Limited in Ms Gutteridge's report. They contended that the value to be attributed to Fabergé Limited as at 10 February 2012 was no more than US\$120 million: a figure based on the first report of Mr Christopher Osborne, a senior managing director (in the London office) of FTI Consulting Limited, but which Mr Osborne himself regarded as "potentially high". As between the figure in Ms Gutteridge's report (US\$177 million) and that in Mr Osborne's first report (US\$120 million), the judge preferred the latter. He said this, at paragraph 19.19 of his judgment:

"19.19 While Mr. Osborne accepted that under the DCF valuation method a wider range in value will result from only small changes in assumptions made, I nonetheless found his approach and analysis more persuasive overall in the circumstances than Ms. Gutteridge's. While the valuation of Fabergé Limited is clearly a matter of opinion and not of absolute certainty, having regard to all of the factors identified in their reports, including their report of their meeting on 1st May 2012, which I directed, together with their oral evidence and also that of Mr. Gilbertson and Sean Gilbertson, I found the opinion of value by Mr. Osborne more plausible and probable. I therefore prefer his opinion that the current value of Fabergé Limited is not more than US\$120m and possibly significantly less for these purposes."

151. Nevertheless, that conclusion did not lead the judge to assess equitable compensation at an amount equal to the then current value (US\$120 million) attributed to Fabergé Limited in Mr Osborne's first report. As the judge explained, at paragraph 19.20 of his judgment, it had been contended on behalf of the Renova Parties that, prior to 3 January 2007, Mr. Gilbertson had agreed that, while the actual title to the Fabergé brand itself would be owned by one of Mr Vekselberg's private companies within the Lamesa group, the full economic benefit of the Fabergé Rights - that is to say, the commercial benefit of developing, exploiting and managing the Fabergé business - would remain with the Master Fund within the Pallinghurst Structure. In those circumstances the judge thought it

necessary to ask whether the value of what (absent the change in the ownership of Fabergé Limited resulting from Mr Gilbertson's breach of fiduciary duty) would have accrued to the Master Fund was properly to be equated with the full ownership of the Fabergé Rights: that is to say, to ask whether, in assessing equitable compensation, it was appropriate to apply some discount to the current value of Fabergé Limited (as, in the events which happened, the full owner of the brand and the rights) to reflect the separation of the right to develop, exploit and manage the rights from the ownership of the brand which (absent Mr Gilbertson's breach of duty) was in contemplation. After setting out the arguments advanced on behalf of the parties the judge concluded (at paragraph 19.25 of his judgment) that:

“19.25 It does appear improbable that any potential purchaser would pay the same amount for a business, the principal income producing asset of which does not actually belong to it and which has a limited life span, as it would pay for a business that actually owns the principal asset and does not have such a limited period of likely profitability. Mr. Osborne's opinion on this aspect of the matter, and as I have said, his evidence on this was not really challenged in cross-examination, was that it is most unlikely that an investor would value a company owning only the full economic benefit of the Rights at more than half the value such a potential purchaser would be likely to pay if the business had owned the income-producing asset as well as the right to develop, exploit and manage it. I found that opinion plausible and persuasive. It follows that, if, as I have accepted, the current value of Fabergé Limited when it does own the entire Rights, is no more and possibly less than US\$120m, the value of the company if it owned only the economic benefit of the Rights but not the brand itself would be only approximately US\$60m or possibly less. Having regard to the amount already invested in the company and its business, which the experts both agreed was US\$140m in total, the position is that more has been invested in the company than it may be worth. That of course ignores the further investment which the company obviously requires and has recently been seeking.”

152. That, as the judge said, was the first of two issues of principle as to the methodology applicable to the assessment of equitable compensation. He identified the second of those issues at paragraph 19.26 of his judgment: “whether, in the circumstances, the Master Fund would in fact anyway have actually obtained the full economic benefit of the Rights but for Mr. Gilbertson's breach of fiduciary duty”. In order to answer that question, he said, it was necessary to consider what (on the balance of probability) the position would have been if Mr Gilbertson had not acquired the Fabergé Rights for his consortium (as, in the event, happened), but had continued to negotiate to final agreement with the Renova Parties as, until 2 January 2007, he had been doing (at least purportedly). After examining the evidence (at paragraphs 19.26 and 19.27 of his judgment), the judge concluded (at paragraph 19.28) that “but for the actions of Mr. Gilbertson in late

December 2006 and January 2007 the Master Fund would most probably have had the economic benefit of developing and exploiting the Fabergé brand and the management thereof on the terms of the Fourth draft IA or very similar terms”; and that, “accordingly the amount, if any, appropriate to reconstitute the Master Fund and to put it in the position in which it would now have been would be the present financial value of that”.

153. The judge explained, at paragraph 19.29 of his judgment that, although the Renova Parties had (in opening their claim at trial) sought payment of equitable compensation in an amount equal to the full value of Fabergé Limited (which they had put at US\$177 million), they did not maintain that position in their closing submissions. Rather, he said, Renova produced a spreadsheet with its closing submissions in which the calculations of the equitable compensation claimed was shown at US\$82.38 million. That calculation was based on Ms Gutteridge’s valuation of Fabergé Limited at US\$177 million; but after (i) making allowance for sums invested in Fabergé Limited since acquisition - an amount which the two experts agreed at US\$140 million - and (ii) adding various other sums, including the US\$38 million paid on the acquisition of the Fabergé Rights. The judge rejected the claim in that revised amount. He said this:

“19.29 However, I have found the current value of Fabergé Limited to be no more than US\$120m and Mr. Osborne has explained why in his opinion that figure is probably too high and that the value may be as low as US\$56m, which I also accept. Furthermore the Plaintiff’s calculations are obviously based also on their contention that the present value to the Master Fund would not be affected by the fact that the Master Fund would not own the income producing asset, the Fabergé brand, itself but solely the economic benefits and management of it with which I have disagreed. Nor has the Plaintiff’s calculation taken account of the fact that the Master Fund would only be entitled to such economic benefits pursuant to a licence from the owner of the income producing asset and on terms the same or very similar to those in the Fourth draft IA as I have determined would probably be the case. Mr. Osborne’s opinion which, as I have said, I accepted, was that the consequence of only owning the economic benefit would be to reduce the value of the Rights (or Fabergé Limited) by half, namely to US\$60m on his valuation figure. Although no figure was put forward in relation to the consequence of the qualifications to the economic benefit implicit in the licence arrangement and likely other terms, it is in my opinion probable that even if that did not warrant a further specific reduction in value, it would undoubtedly go to substantiate Mr. Osborne’s US\$60m assessment. Also, having regard to the fact that Fabergé Limited has been a loss making business from the start and still is at present and clearly requires significant further investment, it seems to me that the submission on behalf of the Gilbertson Parties that the Master Fund has in reality sustained no significant economic loss is correct.”

In those circumstances, the judge concluded that, but for Mr Gilbertson’s breach of fiduciary duty, the Master Fund would have been in a significantly negative financial

position as at the date of trial; that it would be of no benefit to the Master Fund to put it into the financial position in which it would have been at the date of the judgment but for Mr Gilbertson's breach of fiduciary duty; and that, accordingly, no equitable compensation was payable.

The Parties' submissions on the cross-appeal

154. The Renova Parties cross-appeal (Appeal No. 22 of 2012) from so much of the order of 6 November 2012 as dismissed the claim for equitable compensation. As I have said, it is submitted (in support of that cross-appeal) that the judge erred in law and/or in principle and/or misdirected himself as to the evidence in valuing at nil the loss which Mr Gilbertson was liable to make good to the Master Fund. More particularly, it is submitted (i) that the judge was wrong to conclude that the value of Fabergé Limited at the date of trial was US\$120 million, or less, rather than (as Renova had contended) US\$177 million; (ii) that the judge was wrong to apply a discount of 50% to the value (US\$120 million) which he had placed on Fabergé Limited in order to reflect his (incorrect) finding that (had Mr Gilbertson not acted in breach of fiduciary duty) the Master Fund would not have become the owner of the Fabergé Rights, but would have been entitled only to develop, exploit and manage those rights (through OpCo) under licence for a limited period; and (iii) that the judge was wrong in treating US\$38 million (the price paid on acquisition of those Rights) as a cost that would have been paid by the Master Fund - given that, had Mr Gilbertson not acted in breach of fiduciary duty, the acquisition price would have been paid by Lamesa Arts Inc and not by the Master Fund - in calculating the total figure to be discounted (if, which is denied, any discount were appropriate).
155. In response to those submissions it is said on behalf of the Gilbertson Parties that the judge's approach - and the conclusions which he reached - were correct. It is pointed out that neither the judge's approach - to assess the value of Fabergé Limited (PEL) as at the date of the trial and, having made a finding as to that value, to consider the extent to which it should be discounted - nor the performance figures for the business carried on by Fabergé Limited following the acquisition of the Fabergé Rights were in dispute. Having described the steps which led the judge to the conclusion which he reached - in substantially the same terms as those in which I have analysed the judge's reasoning; but emphasizing, in particular, that the judge's finding that the parties would have concluded their negotiations with an agreement along the lines of the Fourth Draft IA, excluding clause 2(e), was consistent with Renova's pleaded case - the Gilbertson Parties

addressed those submissions under four main heads: (i) assessing the value of Fabergé Limited, (ii) the discount that should be applied to reflect the judge's finding that the Master Fund would not have become the owner of the Fabergé Rights, (iii) the allocation of the discount and (iv) the proper treatment of the acquisition price.

156. For convenience, I will address the submissions advanced on behalf of the parties under the three heads adopted on behalf of the Renova Parties - to which I will refer, respectively, as "the undiscounted value point", "the discount point" and "the acquisition and development cost point". Under the third of those heads - the acquisition and development cost point - I will address the questions how (if at all) the development costs and the acquisition price should be taken into account (heads (iii) and (iv) of the analysis adopted on behalf of the Gilbertson Parties).

The undiscounted value point

157. In developing the first of those submissions - that the judge was wrong to conclude that the value of Fabergé Limited at the date of trial was US\$120 million, or less, rather than (as Renova had contended) US\$177 million - it is said on behalf of Renova that:

- (1) The judge was wrong to accept the opinion of Mr Osborne - that a DCF methodology was the most appropriate valuation methodology - in preference to the opinion of Ms Gutteridge that a subject company transaction methodology was the most appropriate. The judge ought to have preferred the opinion of Ms Gutteridge, in that: (i) the subject company transaction basis of valuation of Fabergé Limited had been used by the board of that company and by the board and auditors of Pallinghurst Resources Limited (which, at the relevant time, held 49% of the shares in Fabergé Limited) in their most recent available reports and accounts, expressly in preference to a DCF valuation; (ii) Mr Osborne had selected the DCF valuation methodology in an unfair and imbalanced way, without conducting a rational and transparent comparison of the available methodologies (as Ms Gutteridge had done) and without explaining the reasons for his choice of DCF methodology (other than by *a posteriori* reasoning in reliance on the result of that choice); (iii) Mr Osborne had rejected Ms Gutteridge's subject company valuation methodology on the flawed and illogical basis that the results were not compatible with the results of his own chosen DCF methodology; (iv) Mr Osborne had failed to adopt the approach (which, as was common ground, was consistent with International Financial Reporting Standards) that DCF valuations should be used with caution when valuing unlisted investments, that another methodology (such as a subject company

transaction valuation) should be used as a guide to value, and that the result of a DCF approach should be cross-checked against the results of another approach; (v) Mr Osborne's own evidence was that it is "uniquely difficult" to apply a DCF valuation methodology to a start-up company (such as Fabergé Limited) with a limited track record of past performance; (vi) at the time that the trial began (and, if relevant, at all times thereafter), the board of Fabergé Limited and the auditors and the board of Pallinghurst Resources Limited (of which Mr Gilbertson himself was Chairman} considered that a value of US\$88.06 per share (that is to say, US\$177 million in aggregate) remained the most appropriate value for Fabergé Limited and that Mr Osborne did not criticise their approach as unreasonable; and (vii) Mr Osborne's DCF valuation was based on a Financial Forecast that was, as the Gilbertson Parties accepted in their oral evidence, no more than a "back of the envelope calculation" done for a different purpose.

- (2) The judge was wrong in failing to take any or any adequate account of the manifest failings of Mr Osborne as an independent expert witness; in that, in particular, (i) he showed an imbalanced and one-sided approach to his work and (ii) he did not show all of his workings in a clear and transparent manner.
- (3) The judge was wrong in failing to fix the date for valuation of Fabergé Limited as the first day of the trial (as he ought to have done); but admitted and gave weight to evidence (which, as a matter of law, he should have ignored) of events purportedly affecting the value of Fabergé Limited that had occurred during the trial: that is to say, (i) the failure of the share offer by Fabergé Limited to existing shareholders at US\$79.50 per share, and (ii) the subsequent offer at US\$50 per share ("the April 2012 offers").
- (4) Notwithstanding that he had held (correctly, at paragraph 19.15 of his judgment) that the April 2012 offers were "not of the same evidential value as a share acquisition by an independent non-shareholder investor", the judge was wrong to give that evidence weight equal to or greater than the evidence that underpinned the valuation of Fabergé Limited by Ms Gutteridge, the boards of Fabergé Limited and Pallinghurst Resources Limited and the auditors of Pallinghurst Resources Limited, at US \$88.06 per share on a subject company transaction basis (which was based on a share acquisition by an independent non-shareholder investor); and, further, was wrong then to rely on the evidence of the April 2012 offers (the prices of which offers were not market-tested, but offered only to the nineteen existing shareholders) when preferring Mr Osborne's valuation to that of Ms Gutteridge notwithstanding that both Mr

Osborne and Ms Gutteridge agreed that the factors which would affect the decision of an existing shareholder whether or not to buy at a particular price are necessarily different from the factors which govern the decision of an independent non-shareholder.

158. The Gilbertson Parties prefaced their submissions in support of the judge's assessment of the value of Fabergé Limited by explaining why - as they submitted - the judge was correct to prefer the evidence of Mr Osborne to that of Ms Gutteridge. They pointed out that (at paragraph 19.17 of his judgment) the judge had observed that he found Ms Gutteridge "somewhat inflexible and dogmatic in her insistence that the value of [Fabergé Limited] should be determined by reference to the single small share transaction in September 2009. . . ." and in her unwillingness ". . . to consider any adjustment to her [US\$177 million] in light of the factors identified by [Mr Osborne] . . .". He might also, it is said, have mentioned: (i) the weight which she gave in her oral evidence (transcript, 8 May 2012, page 149, line 21, to page 150, line 4; page 155, line 6, to page 157, line 7) to ". . . the wholly exceptional sales multiple" at which Hermes' shares trade (on which she relied to support her valuation, notwithstanding the obvious difference between a struggling start up and one of the most established and successful luxury goods brands ever); (ii) her refusal (transcript, 8 May 2012, page 140, line 17, to page 141, line 4) to acknowledge the importance of sales to a business trying to take off; and (iii) her unwillingness (transcript, 8 May 2012, page 167, line 9, to page 172, line 19) to acknowledge "the obvious fact" that a potential new investor would be concerned if asked to pay a higher price for the shares than that at which the existing investors had been prepared to take them. By contrast, they pointed out, the judge had said (at paragraph 19.19 of his judgment) that he found Mr Osborne's approach and analysis more persuasive overall in the circumstances than that of Ms Gutteridge; and that the judge had noted (at paragraph 19.11 of his judgment) that Mr Osborne was not cross-examined to any significant extent on the substance or detail of his valuation or on how and why he had reached the conclusions that he did.

159. After explaining why (it was said) the judge was right to prefer the evidence of Mr Osborne to that of Ms Gutteridge, the Gilbertson Parties addressed two issues under this head: (i) whether the judge was correct to take the date for assessment of equitable compensation as at the date of the judgment (rather than as at the commencement of the trial) and so take into account the attempts by Fabergé Limited to raise funding in April 2012 and (ii) whether the judge was correct to accept Mr Osborne's valuation of that

company, made on the basis of DCF methodology, and to reject the related party valuations made by the boards of both Fabergé Limited and its principal shareholder, Pallinghurst Resources Limited and by the auditors of Pallinghurst Resources Limited.

160. In addressing the first of those two issues it is pointed out on behalf of the Gilbertson Parties that Renova itself had submitted (at paragraph 115(b) of its Written Opening Submissions at trial) that equitable compensation was to be assessed as at the date of judgment (and had relied upon observations in *Target Holdings v Redfern* [1995] UKHL 10; [1996] 1 AC 421, 434C-D, 437, 440 and in Snell's Principles of Equity at paragraph 40-016 in support of that submission), had not opposed the introduction of evidence in relation to the take up of the then pending share offer and had cross-examined Mr Gilbertson, Mr Sean Gilbertson and Mr Osborne on that evidence.

161. In addressing the second of those issues it was pointed out on behalf of the Gilbertson Parties that the judge was presented with two materially different approaches to the valuation exercise: (i) that adopted by Mr Osborne - described as "a DCF analysis based on the fundamentals of the business" - which, for the reasons that he described in his oral evidence (transcript, 9 May 2012, page 70, line 8, to page 72, line 11, and page 145, line 5 to page 146, line 9), led him to conclude that the value of Fabergé Limited at the relevant date could not exceed US\$120 million - and (ii) that adopted by Ms Gutteridge which - for the reasons which she described, shortly, in her oral evidence (transcript, 8 May 2012, page 162, lines 15-22) - led her to dismiss the DCF analysis as an appropriate methodology in this case and to conclude (on the basis of valuations made by others, described as "related party valuations" or a "subject company analysis") that the value was US\$177 million. It is submitted that, although Renova had contended that

". . . it would take a serious and fundamental error of approach on the part of the boards of Fabergé Limited and PRL and their auditors to justify the Judge's departure from the approach and result used by Fabergé Limited, PRL and their auditors . . .",

it had cited to no authority (nor referred to any academic writing) in support of that proposition; Ms Gutteridge had not adopted it in her own evidence, in the course of which she had said this (transcript, 8 May 2012, page 111, lines 5-13)

"I was forming a view of my own and looking around at the available material to allow me to form that type of view. And when one is aware that other informed people have expressed a view, and that that view has been tested, I considered it reasonable that that was further affirmation and confirmation of my view";

Renova had not put its case so high at the trial; and, in principle, the proposition cannot

be correct (given that, although the directors of a company or its principal shareholder may well possess information concerning the company that puts them in a better position than others to value it, they may well have an interest in the outcome). Further, it is said that, as the judge observed at paragraph 19.16 of his judgment, the directors and auditors were “not carrying out quite the same exercise for the same purpose as the court is required to do”: in that the judge was required to determine the value of Fabergé Limited on the balance of probability on the basis of the evidence before him, whereas the directors of Fabergé Limited and Pallinghurst Resources Limited “were required to reiterate the valuation that they had previously placed on the company, unless they considered there was conclusive contradictory evidence to either increase or decrease the value” and the auditors’ task was to consider and comment on the reasonableness of the valuations made by the directors. The Gilbertson Parties draw attention to Mr Osborne’s evidence that the most recent transaction on which Ms Gutteridge could base her assessment of value was the issue of shares to the value of US\$100,000 to a prospective director of PEL in 2009. They rely on the view expressed at paragraph 4.2 of his second report

“In adopting that approach, Ms Gutteridge ought in my opinion to have given greater consideration to two questions in particular than it appears that she has. The first of those is whether any new information since September 2009 argues for a revision to the valuation; and the second is whether the valuation remains plausible, having regard to the current forward projections.”

and on his answer (transcript, 9 May 2012, page 100, lines 17-23) - rejecting the suggestion that “a fair and open minded valuer of Fabergé Limited, valuing as at today, would take into account the conclusions of the Board and of the auditors of PRL” - that

“The guidelines require an independent valuer to be concerned about the extent to which the 2009 capital raising continues to be of relevance And the directors have concluded, I think it’s fair to say, cautiously that it does. And my own conclusion is that it does not. And I think that’s a conclusion that I’m entitled to reach; and it’s the conclusion that I have reached.”

In reaching that conclusion, Mr Osborne had expressed the view (at paragraph 4.6 of his second report) that “the 2009 transaction price on which the recent company valuations are based is, in practice, of diminishing relevance to a current valuation of Fabergé Limited” and, in his oral evidence (transcript, 9 May 2012, page 147, lines 5-8) that “the relevance of the 2009 transaction price has diminished to the point where it cannot be used as the primary valuation approach”; and, further (transcript, 9 May 2012, page 147, line 25, to page 148, line 3), that “there are no plausible assumptions that could be

applied to current forward projections in a Discounted Cash Flow sense that would give rise to a valuation of USD 177 million”. It is said that the weight to be put on related person valuations in the circumstances of the case was a matter for expert evidence. Both experts addressed the question; and “the judge was entitled and required to form his own view in the light of that evidence”.

162. I reject the submission, advanced on behalf of Renova, that the judge erred in principle in failing to fix the date for valuation of Fabergé Limited as the first day of the trial. In my view, in reaching his conclusion the judge was entitled (for the reasons advanced on behalf of the Gilbertson Parties) to have regard to the April 2012 offers. The assessment of the undiscounted value of Fabergé Limited was essentially a matter for the judge to determine on the evidence before him at the trial. In carrying out that task, the judge had to evaluate the opinion evidence of the two expert witnesses, Ms Gutteridge and Mr Osborne. For the reasons that he gave, the judge preferred the evidence of Mr Osborne. In challenging the judge’s determination of the undiscounted value of Fabergé Limited, Renova seeks to persuade this Court to take a different view. An appellate court must recognize that, where (as in this case) the expert witnesses have given oral evidence at trial, it should be cautious before rejecting the trial judge’s evaluation of that evidence, unless satisfied that he failed to take advantage of seeing and hearing the evidence tested under cross-examination. In my view there is nothing to suggest that the judge failed to do so. I reject Renova’s challenge to the judge’s determination that the undiscounted value of Fabergé Limited as at the date of trial was not more, and possibly significantly less, than US\$120million.

The discount point

163. In developing the second of those submissions - that the judge was wrong to apply a discount of 50% to the value (US\$120 million) which he had placed on Fabergé Limited (rather than, as Renova had contended, no discount or a nominal discount) in order to reflect his (incorrect) finding that, had Mr Gilbertson not acted in breach of fiduciary duty, the Master Fund would not have become the owner of the Fabergé Rights, but would have been entitled only to develop, exploit and manage those rights under licence for a limited period - it is said on behalf of the Renova Parties that the judge erred in law and/or misdirected himself as to the evidence in that: (i) he failed to pay sufficient regard to his earlier finding that the parties intended and agreed that the Master Fund would end up with the full economic benefit of the Fabergé Rights, and not only with a portion of that economic benefit; (ii) he ought to have assumed that, had Mr Gilbertson acted fairly and honestly and in the best interests of the Master Fund (and but for his breach of

fiduciary duty), the parties would have arrived at a legally binding agreement which enshrined that intention and understanding; (iii) he wrongly assumed, as the basis for his conclusion that the Master Fund would not have obtained the full economic benefit of those Rights, that (contrary to his own earlier findings) the detailed terms of the Fourth Draft IA would have reflected the final terms on which the Master Fund would have enjoyed the Fabergé Rights; (iv) he ought to have proceeded on the basis that, had Mr Gilbertson not acted in breach of his fiduciary duty, the Fourth Draft IA would not have represented the final agreed terms on which the Master Fund was to enjoy the economic benefit of the Fabergé Rights; but, rather, (a) that Mr Gilbertson would, consistently with his fiduciary duties to the Pallinghurst Structure (which was the relevant assumption on which the judge was proceeding), have insisted that the terms were those contained in Mr Sean Gilbertson's amended Third Draft IA (in that those most closely reflected the basic agreement that the full economic benefit would be enjoyed by the Master Fund), and/or (b) that the parties would have concluded their discussions with an agreement which gave the Master Fund the full economic value of the Fabergé Rights (or, at the least, allowed for that possibility when assessing the probable terms on which the Fabergé Rights would have been held by the Master Fund); (v) he failed to pay any attention to the fact that it was entirely possible to have a license arrangement or split between "Brandco" and "Opco" that left the full economic benefit of the Fabergé Rights with Opco (that is to say, with the Master Fund), and that this would have been the likely outcome had Mr Gilbertson not breached his fiduciary duty; and, in any event (vi) he failed to pay any or any adequate attention to the unchallenged view of Ms Gutteridge (as expressed in section 5 of her second report) that clause 8 of the Fourth Draft IA, on its true construction, would not have created a risk such as to justify any or any significant discount to the value of Opco (even if the Fourth Draft IA had represented the final terms of the agreement on which the Master Fund would have enjoyed the Fabergé Rights), given that there was no basis for the judge's implicit rejection of Ms Gutteridge's opinion on that point in the absence of any finding by the judge that clause 8 was ambiguous (which, it is said for the avoidance of doubt, it was not).

164. In response to those submissions the Gilbertson Parties point out that Mr Osborne's evidence - which, they say, was not challenged, in that Ms Gutteridge provided no comparable figure because she was instructed not to consider the issue - was that the appropriate discount to be applied to the assessed value of Fabergé Limited in order to reflect the difference between ownership of the Fabergé Rights and a terminable licence was 50% or thereabouts. Further, it is said that the Fabergé business had been

loss making in each year since acquisition; so that, if the licence had been granted at the beginning of 2007, the first 5 years of the contemplated 10 year term would have been loss making and the expectation was that it would continue to make losses for another 3 years. In those circumstances the Renova Parties had not, at trial, pressed an argument that there should be no discount (transcript, 10 May 2012, page 80, lines 10-19); and the argument advanced on their behalf on the appeal - that, as the parties intended the Master Fund to enjoy the economic benefit of the Fabergé Rights, the Court should value the Master Fund on the basis that it owned those Rights, since any difference between its value with and without the Rights would be contrary to what the parties intended should happen - should be rejected as “sophistry”, being, it is said, contrary to the Renova Parties’ pleaded case (at paragraph 27.2 of the Amended Statement of Claim), contrary to the terms that the parties were actually negotiating and based on the (false) assumption that there was any concluded agreement or understanding between the parties.

165. It is submitted on behalf of the Gilbertson Parties that, in the absence of any concluded agreement or understanding between Mr Gilbertson and Mr Vekselberg as to the terms on which the Master Fund would have been entitled to enjoy the economic benefit of the Fabergé Rights, the judge had to consider (as he did at paragraph 19.27 of his judgment) what would have been the likely outcome of the negotiations had they continued. He did so on the basis of implicit assumptions which (it is said) were favourable to the Renova Parties, in that: (i) he assumed that, although - given Mr Gilbertson’s right to veto the proposed project - it was “far from clear” that the project that was in negotiation would have gone ahead, Mr Gilbertson would negotiate on the basis that he would choose to close a deal for the benefit of the Master Fund; (ii) he found (at paragraph 19.28 of his judgment), in favour of the Renova Parties, that Lamesa(BrandCo) would have not have pressed for the inclusion of clause 2(e) in the Fourth Draft IA and that the parties would have closed a deal in the same or similar terms to the Fourth Draft IA without clause 2(e) (notwithstanding Renova’s pleaded case that the terms of the Fourth Draft IA (including clause 2(e)) were reasonable and that the subsequent implementation agreements discussed between the parties would have excluded the Master Fund entirely); (iii) he assumed that Lamesa or Renova would have provided the necessary funding to enable the business to carry on without external participation in the form of an investment in the Master Fund (which would have had the likely effect that the interests of the Company and GPLP in the Master Fund would have become nominal and that the constitution of the Master Fund would

itself change); (iv) he assumed that Lamesa would have left the project with the Master Fund and continued to fund it, notwithstanding that it was loss making (an assumption which - given the breakdown in confidence between the Renova Parties and the Gilbertson Parties that had already taken place, the unwillingness of either side to cede control of the venture to the other and the need (to which it would give rise) for them to agree at every stage if the Master Fund were to continue to function - might well be considered highly optimistic). Further, it is said that:

- (1) Given that the Renova Parties were in a position to veto further investments by the Master Fund, they were in a position to bring the Fund to a close whenever they chose. Accordingly, if the project had started to generate profits, the Renova Parties would have been able to choose whether profits should (in the future) be applied for the benefit of the Gilbertson Parties or be allocated between Lamesa and Renova as Mr Vekselberg thought fit.
- (2) The Renova Parties had contended, at trial, that the Lamesa Project should be valued by reference to the value of Fabergé Limited; and the judge adopted that approach. The argument that the judge was wrong to have regard to the terms of the Draft IAs is now advanced on behalf of the Renova Parties only because they now recognize that the terms that were actually in the course of negotiation would not have given the Master Fund the “full economic benefit of the Rights”.
- (3) Both the ownership of rights themselves and the ownership of a licence to exploit those rights are assets: a discount is appropriate to reflect the difference between the value of ownership of the assets themselves and the value of a business based upon the exploitation of those assets under licence. The application of a discount to the value of the assets in themselves is a tool to measure the gross value of the business as carried on by a rights-licensee: it is not concerned with measuring any investment that he may have made in connection with that business, whether wisely or unwisely. In explaining why a discount was appropriate in principle, Mr Osborne had said this (at paragraph 3.15 of his first report):

“The level of discount applicable to OpCo when compared to the value of an otherwise similar venture holding the Rights themselves cannot be assessed precisely. Increased risk warrants higher discount rates applied to future economic benefits, reducing their perceived present value. Liquidity discounts, which have been subject to much academic research, albeit generally in different contexts, are generally assessed as lying in the range of 20% to 50%. The impact of transaction costs is impossible to assess precisely, but could be substantial. I consider it unlikely on any basis that a rational investor would have valued OpCo at more than half the value otherwise placed on an entity holding the Rights themselves.”

166. As the judge appreciated, the court's task was to determine the monetary value of the loss suffered by the Pallinghurst Structure as a result of the diversion from the Master Fund of the economic benefit of development, exploitation and management of the Fabergé Rights. He had concluded that, but for the actions of Mr Gilbertson in late December 2006 and January 2007, the Master Fund would probably have had the economic benefit of developing and exploiting the Fabergé brand and the management thereof on the terms of the Fourth Draft IA or on very similar terms. In my view, that was a conclusion that the judge was entitled to reach on the evidence at trial; and I reject Renova's challenge to that conclusion. Accordingly, as the judge held, equitable compensation was to be assessed in an amount equal to that required to put the Master Fund in the position in which it would have been at trial if (through OpCo) it had had the economic benefit of developing and exploiting the Fabergé brand and the management thereof on the terms of the Fourth Draft IA or on very similar terms: the question for his determination was, as he said, what would be the present financial value of that.

167. In order to answer that question, the judge thought it necessary to ask whether the value of what (absent the change in the ownership of Fabergé Limited resulting from Mr Gilbertson's breach of fiduciary duty) would have accrued to the Master Fund was properly to be equated with the full ownership of the Fabergé Rights. In my view, the judge was correct to conclude that the answer to that question was "No". He went on to ask himself whether, in assessing equitable compensation, it was appropriate to apply some discount to the current value of Fabergé Limited (as full owner of the brand and the rights) to reflect the separation of the right to develop, exploit and manage the rights from the ownership of the brand which (absent Mr Gilbertson's breach of duty) was in contemplation. Again, the judge was correct to conclude that some discount from the value of full ownership was appropriate.

168. The only evidence before the judge as to the appropriate discount from the value of full ownership in the circumstances of this case was that of Mr Osborne. His evidence, at paragraph 3.15 of his first report (as the Gilbertson Parties point out), was that it was unlikely that a rational investor would have valued the Master Fund (as the holder of a licence to develop, exploit and manage the Fabergé Rights) at more than half the value otherwise placed on an entity having full ownership of those Rights themselves. On the basis of that evidence, which (again, as the Gilbertson Parties point out) was not challenged, the judge was entitled to conclude that a discount of 50% from the value of full ownership was appropriate.

The acquisition and development cost point

169. In reaching his conclusion that the loss which Mr Gilbertson was liable to make good to the Master Fund by way of equitable compensation was nil, the judge took into account (as he said at paragraph 9.25 of his judgment) that the amount already invested in PEL (Fabergé Limited) and its business was US\$140 million, or thereabouts. Given that, as the judge held, the current value of Fabergé Limited (having full ownership of the Fabergé Rights) was no more, and possibly less than, US\$120 million, and that the value of the Master Fund (if it had owned, through OpCo) only the economic benefit of those Rights but not the brand itself) would be only some US\$60 million, he concluded that the amount invested was more than the relevant value (whichever of those two figures was taken to be the relevant value); so that, on a proper analysis, the Master Fund had suffered no loss in respect of which it should receive equitable compensation. As the judge said (*ibid*) “the position is that more has been invested in the company than it may be worth”.
170. The judge went on to explain (at paragraph 19.29 of his judgment) that, in the course of his closing submissions, counsel for Renova had produced a spreadsheet in which the calculations of the equitable compensation claimed was shown at US\$82.38 million. Renova advanced that figure after allowing, as a deduction from Ms Gutteridge’s valuation of Fabergé Limited (US\$177 million, being the amount which it had claimed in opening its case), development expenses - being the US\$139.8 million for equity and debt that (as Ms Gutteridge and Mr Osborne agreed) had been injected into Fabergé Limited since January 2007 less the US\$38 million paid on the acquisition of the Fabergé Rights - and adding interest or other sums. The position at the end of the trial, therefore, was that Renova accepted that development expenses (but not the acquisition cost of the Fabergé Rights) were a proper deduction from the current value of Fabergé Limited in determining the amount of the loss which Mr Gilbertson was liable to make good to the Master Fund by way of equitable compensation.
171. In this Court Renova submits that, even if any discount greater than nominal was justified (which the Renova Parties deny), the judge was wrong to deduct from the discounted figure which he treated as representing the value of Fabergé Limited the full amount of the debt and equity raised by that company (so arriving at a negative figure); rather that to apply the discount (if any) to a net figure representing the value of Fabergé Limited after taking account of the debt and equity raised (and so arriving at a positive figure). It is said that, in adopting the (flawed) approach that he did, the judge erred in

principle and misdirected himself as to the evidence in that he failed to apply the discount fairly and equitably across the board to both the value of Fabergé Limited and the amount of debt and equity raised, and so failed to apply consistent assumptions about each; and failed to take account of the evidence (a) that, had the Master Fund acquired the Fabergé Rights, the purchase price (US\$38 million) would have been provided by Lamesa and would not have been raised by the acquiring party (as it was in the case of the acquisition by PEL (Fabergé Limited)) and (b) that the funding of the expenses and future investment incurred in respect of the development, exploitation and management of the Fabergé Rights (had they been held by the Master Fund) would not have been borne by the Master Fund but by Lamesa (outside the Pallinghurst Structure) and repaid by the Master Fund only on a sale of those Rights by the Master Fund (as contemplated by clause 8 of the Fourth Draft IA).

172. That submission raises two issues: (i) in assessing equitable compensation what (if any) acquisition and development expenses should be deducted from the current value of the asset to which the Master Fund would have been entitled but for Mr Gilbertson's breach of fiduciary duty and, if so, (ii) should the discount (which is appropriate to reflect the difference in the value of full ownership of the Fabergé Rights themselves and the value of a business based upon the exploitation of those Rights under licence) be applied before or after the deduction of acquisition and development expenses.
173. The first of those issues itself raises two questions: (a) whether the judge was wrong in treating US\$38 million (the price paid by PEL on the acquisition of the Fabergé Rights) as a cost that (but for Mr Gilbertson's breach of fiduciary duty) would have been paid by the Master Fund and (b) whether the judge was wrong in treating the expenses and future investment incurred in respect of the development, exploitation and management of the Fabergé Rights as costs which (had those Rights been developed, exploited and managed by the Master Fund (through OpCo) under licence, as would have occurred but for Mr Gilbertson's breach of fiduciary duty) would have been funded by the Master Fund.
174. In relation to the first of those questions - whether the acquisition price was a cost that would have been paid by the Master Fund - it is said on behalf of the Renova Parties that the judge was wrong in failing to give effect to the evidence that, but for Mr Gilbertson's breach of fiduciary duty, the purchase price for the Fabergé Rights would have been paid by Lamesa. Had he given effect to that evidence, it is said, he would have reduced the amount of debt and equity to be deducted from the value of Fabergé Limited by US\$38 million. He was wrong to take the view (expressed at paragraph 19.29 of his

judgment) that - having concluded that Fabergé Limited was worth no more than US\$120 million and that he should apply a discount of 50% to that value (with the consequence that the discounted value of Fabergé Limited was greatly exceeded by the total amount that had been invested whether or not the cost of acquisition was taken into account) - he did not need to decide the correct treatment of the purchase price paid for the Fabergé Rights. In response to that submission it is said on behalf of the Gilbertson Parties to be “of academic interest only”; in that, unless the discount is applied after (and not before) the deduction of acquisition costs (which, it is said, is wrong in principle), it is immaterial whether the amount of debt and equity to be deducted is US\$140 million or US\$102 million (that is to say US\$140 million less US\$38 million).

175. Further, it is said on behalf of the Gilbertson Parties, Renova’s submission fails to take account of the documents, is contradicted by the evidence of Ms Gutteridge and cannot be sustained. Clause 8 of the Fourth Draft IA was in these terms:

“8. Upon the earlier of: (a) a disposal by PRM [the Master Fund] of OpCo, or (b) the winding up of PRM pursuant to the Pallinghurst Documents, PRM shall in case of a disposal by PRM of OpCo to a third party receive the respective consideration and in case of a transfer to BrandCo or one of its affiliates or the winding up of PRM pursuant to the Pallinghurst Documents a cash sum (the ‘Value Add’) equivalent to the enhancement of the value of the Fabergé Brand by PRM, exceeding the Purchase Price, as mutually agreed by BrandCo and PRM or, failing agreement, as quantified by a valuation of an assessor mutually agreeable to the parties, or failing agreement, by KPMG United Kingdom, taking into account any reasonable incurred expenses (including but not limited the Purchase Price) related to the Fabergé Brand of BrandCo and its affiliates.”

It is said that, since the exercise is concerned to identify the net additional value of the enhanced Rights, it would plainly have taken into account the initial value of the Rights; and it was no part of the Renova Parties’ case at the trial that the Rights were worth less than what PEL had paid for them. If Lamesa had directly or indirectly funded the acquisition of the Fabergé Rights and a Master Fund entity had exploited those Rights (under licence) on the same or similar terms to those of the Fourth Draft IA (other than clause 2(e)), then the cost of acquisition would not have appeared as a payable on the Master Fund’s balance sheet (because that cost would not have been a liability of the Master Fund) but would, nevertheless, have affected the value of the Master Fund’s business (because it would have affected the payment that the Fund was to receive under clause 8 of the Fourth Draft IA on the termination of the licence or the sale of the business). Ms Gutteridge confirmed that analysis in her oral evidence (transcript, 10 May 2012, page 14, lines 5-17), both as to the US\$38 million and in relation to any further investments:

“My reading of the agreement in draft, as it stood, was that the overriding imperative in the introduction was that economic benefits should flow to OpCo, the licensee, if you like, in the analogy; and that the value add provision provided for in clause 8 was such that one was able to consider the increment, the enhanced value at the end of the term, and that that would be divided between the parties in the way that it is provided for within that document, namely, as I understood it, net of the purchase price that we spoke about and of further investments; but that that enhanced value would recognise the efforts and commercial exploitation of getting it to the point at which it was in the positive cash flow situation you’ve described.”

176. In relation to the second of those questions - whether the development costs would have been funded by the Master Fund - it is said on behalf of the Renova Parties that the judge was wrong in failing to give effect to the evidence that, but for Mr Gilbertson’s breach of fiduciary duty, the funding of the expenses and future investment incurred in respect of the development, exploitation and management of the Fabergé Rights would have been borne by Lamesa or by Renova (outside the Pallinghurst Structure) and repaid by the Master Fund only on a sale of those Rights by the Master Fund (as contemplated by clause 8 of the Fourth Draft IA); and that:

“... there would have been no need for Fabergé Limited to raise any debt or equity because the costs of the future development of the Rights would have come from Lamesa.”

In response to that submission, it is said on behalf of the Gilbertson Parties that the argument that the additional monies would have come from Lamesa is quite separate from the argument in relation to the US\$38 million. The argument raised in relation to Lamesa’s additional funding was not raised at trial and it was not to be found in the Renova Parties’ grounds of appeal. If the argument were correct, it would lead to the conclusion that any and all of the additional investment should be ignored; which is not a contention that the Renova Parties have hitherto advanced. Even now, the only specific expense incurred by Fabergé Limited that Renova suggests the Master Fund would not have had to incur is the cost of acquiring the Fabergé Rights, that is, US\$38 million.

177. The true position, it is said, was that neither Lamesa nor Renova had committed itself to providing the necessary funding. Mr Kuznetsov’s evidence (at paragraphs 27 to 29 of his witness statement) was that Renova would have been prepared to commit funds, but he also confirmed that there was no understanding between Lamesa and Renova as to how this might have been done, and he failed to explain why Renova should have been willing to provide funds in excess of US\$100 million or more when it was unwilling to put up the initial US\$38 million. In his oral evidence he said this (transcript,

1 May 2012, page 98, lines 5-24):

“Let me be very clear. The project, Egg, . . . was developing and developed by December 2006, consisted of two parts. One part was ownership -- acquisition and ownership of the Rights. And the other part, which was by far more interesting from a business standpoint, was business development related to the Fabergé brand. And whereas Renova, indeed, was not prepared to commit 38 million for acquisition of the brand, and ultimately Lamesa company either committed or at least, through Mr Vekselberg, made it known that they would be prepared to put 38 million for acquisition of the brand, Renova was very happy to commit to inclusion of the business part of the Project Egg or the acquisition of Fabergé brand to the Fund. And, clearly, initial investments into the first part were 38 million. However, subsequent investments in development of the business related to Fabergé were expected to be significantly higher. And this is a part to which Renova was prepared to commit funds, of course based on further investigation and further development of the business case.”

And, in answer to a question whether the licence revenues to which he had referred could have justified an investment of many tens of millions of dollars, he replied (transcript, page 104, lines 22-25):

“Absolutely not.”

In those circumstances it is said on behalf of the Gilbertson Parties that, if the additional funding were to have come from Renova, it would have appeared as a cost of investment to the Master Fund. If it were to have come from Lamesa, it would have been taken into account under clause 8 of the Fourth Draft IA. Moreover, unless it is being suggested that Lamesa was going to invest in excess of US\$100 million over the lifetime of the Fund's exploitation of the Fabergé Rights without seeking any interest, the cost of the investment was bound to be reflected in the books of the Master Fund in some way. The fact that it is unclear quite how it would have been reflected in the Fund's books reflects the fact that it was wholly unclear what arrangements (if any) the parties might have been able to put in place. But as 75% of the Master Fund was owned by the Gilbertson Parties, it is safe to assume that Lamesa would not have provided the funding without demanding participation in the Fund (as an investor) or a commercial return on its monies.

178. In addressing the second issue - should the discount (which is appropriate to reflect the difference between the value of full ownership of the Fabergé Rights themselves and the value of a business based upon the exploitation of those Rights under licence) be applied before or after the deduction of acquisition and development expenses - it is said on behalf of the Gilbertson Parties that the contention that any discount should be applied to the net value of the business (after deducting the expenses incurred in developing it), rather than to the actual current value of the business, was not advanced at trial on behalf of the

Renova Parties. Renova's submission that, in adopting the approach that he did, the judge erred in principle, in that he failed to apply the discount fairly and equitably across the board to both the value of Fabergé Limited and the amount of debt and equity raised, is said to be "manifestly" flawed, in that "there is no basis in law, fact or logic to justify discounting the expenses incurred in developing a business of a rights-licensee simply because the business in which the expenses were incurred is worth less than it might have been as that of a rights-owner".

179. In my view the judge was correct to adopt the approach that he did: in assessing the loss (if any) which the Master Fund had suffered by reason of Mr Gilbertson's breach of fiduciary duty - and in respect of which equitable compensation should be awarded - he was correct, first to apply the appropriate discount to the current value of Fabergé Limited (as the full owner of the Fabergé Rights) in order to determine the (hypothetical) current value of the business which (but for Mr Gilbertson's breach of duty) the Master Fund would have carried on as licensee since January 2007; and, second, to deduct from the current value of that business, the costs and expenses which would have been incurred by the Master Fund in carrying on that business under licence since that date. I am satisfied, also, for the reasons advanced on behalf of the Gilbertson Parties, that the costs and expenses to be deducted included the post-acquisition expenses and future investment incurred in respect of the development, exploitation and management of the Fabergé Rights: that is to say, an amount of US\$102 million or thereabouts. It follows, in my view, that the judge was correct to hold that he did not need to decide how the acquisition cost of the Fabergé Rights (US\$38 million) should be treated. His conclusion that - after deducting post acquisition costs of US\$102 million from the (hypothetical) current value of the business which (but for Mr Gilbertson's breach of duty) it would have carried on since January 2007 - the Master Fund had suffered no loss was the same whether or not the acquisition cost of the Fabergé Rights was included in the costs and expenses to be deducted.

180. For the reasons set out in this section of my judgment I would uphold the judge's decision that the loss which Mr Gilbertson was liable to make good to the Master Fund by way of equitable compensation should be valued at nil. It follows that I would dismiss Renova's appeal from the judge's order dismissing its claim to equitable compensation.

***Was the judge wrong to hold that Autumn was liable as a
constructive trustee of the shares issued by PEL in January 2007***

181. The judge explained (at paragraph 17.1 of his judgment) that Renova's claim against

Autumn was for an order that Autumn account as a constructive trustee for the shares in PEL issued to it in January 2007, or their value, on the ground that Autumn knowingly received those shares as property misapplied or procured to be misapplied by Mr Gilbertson in breach of his fiduciary duties to the Company; or, in the alternative, on the ground that it was a volunteer (in that it provided no consideration for the issue of those shares in PEL).

182. The judge recorded (at paragraph 17.2) that there was no dispute between the parties that the elements which needed to be established in order to found a claim based on liability for knowing receipt were set out by Lord Justice Hoffmann in *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685, at 700:

“... the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.”

Each of those elements was in dispute; but the judge was able to approach the claims against Autumn on the basis that, as he had held earlier in his judgment, Mr Gilbertson had acted in breach of fiduciary duty in procuring the issue to members of the Consortium (including Autumn) of PEL shares in January 2007, thereby diluting the previous interest of the Master Fund in PEL (as owner of all of the issued shares) to a virtually nil (as owner of less than 1% of the issued shares).

183. The judge addressed the first element - whether the issue of PEL shares to Autumn in January 2007 had been a disposal of assets of the Master Fund - at sub-paragraphs (i) to (v) of paragraph 17.3 of his judgment. He explained that the Gilbertson Parties disputed Renova's case that the dilution of the previous interest of the Master Fund in PEL from 100% to less than 1% constituted a disposal of the assets of the Master Fund. As he said (at sub-paragraph (ii)) it was their contention that there had been no disposal of any assets of the Master Fund: in that the new shares issued by PEL in January 2007 did not constitute property of PEL (or of anyone else) prior to issue and that, accordingly, the issue of those shares could not constitute a disposal of assets. In support of that contention, the Gilbertson Parties had relied (in their written closing submissions) on observations in the judgments of the High Court of Australia in *Pilmer and Others v Duke Group Ltd (In Liquidation) and others* [2002] 2 BCLC 773, to which the judge referred. The judge rejected that contention. At sub-paragraph (v) of paragraph 17.3 he said this:

“17.3 (v) In my view the position taken on behalf of the Gilbertson Parties, in the circumstances of this case, is unduly restrictive and strict. This is an equitable concept and it does not seem to me that the reference to disposal of assets in Lord

Hoffman's first requirement for liability for knowing receipt in *El Ajou v Dollar Land Holdings* (supra) would have been intended to or did restrict the terms 'a disposal of his [the plaintiff's] assets' or 'assets which are traceable as representing the assets of the plaintiff' to mean pre-existing tangible items of property already legally and beneficially owned by the Plaintiff. The court must look at the particular circumstances concerned in order to achieve a fair and equitable result. In the present case, in my opinion, the issue of the new PEL shares which had the effect of reducing the Master Fund's ownership and control of PEL from 100% to just under 1% did amount in the circumstances to disposal of an asset of the Master Fund (and, derivatively, the Company) in the sense required to comply with the first principle in the *El Ajou* case."

184. Having reached that conclusion, the judge was able to address the second of the three elements identified by Lord Justice Hoffmann in the *El Ajou* case - whether the issue of shares in January 2007 to Autumn constituted a receipt by Autumn of assets traceable as representing assets of Master Fund which had been disposed of in breach of fiduciary duty - without further elaboration. He said this (at sub-paragraph (vi) of paragraph 17.3):

"17.3 (vi) It follows, in light of my views above, that the second element identified by Lord Hoffman, namely that the defendant has beneficially received assets which are traceable as representing assets of the Plaintiff, is in principle also made out."

And he went on to explain that he would have been of the same view even if he were wrong in holding (earlier in his judgment) that the new PEL shares had been issued on 3 January 2007 (rather than on a later date - 19 January 2007 - as contended by the Gilbertson Parties). He rejected the argument, advanced on behalf of the Gilbertson Parties, that the issue of shares on 19 January 2007 (some 16 days after Mr Gilbertson's breach of fiduciary duty on 3 January 2007, if any) - even if constituting a disposal of the assets of the Master Fund - could not be said to be the disposal of assets traceable to any breach of fiduciary duty by Mr Gilbertson. He said this:

"17.3 . . . that date [19th January 2007] is in my view sufficiently close to 3rd January 2007 and the share issue sufficiently related to the actions of Mr. Gilbertson at about that time to satisfy me that in the circumstances the assets received by Autumn in the form of the new shares may be said to be traceable to Mr. Gilbertson's breach of fiduciary duty. . . ."

In the alternative, he said, Mr. Gilbertson's procurement of the issue of the new PEL shares, even if not effective until 19 January 2007, was not disclosed and was unknown to the Renova Parties and it might be argued that that was simply a perpetuation of Mr. Gilbertson's breach of duty. The judge concluded that the PEL shares issued to Autumn in January 2007 were "traceable as representing assets which ought to properly have belonged to the Master Fund" and that "the issue of the PEL shares provided Autumn with a gratuitous share of the Rights through a shareholding in PEL which belonged to and should have remained with the Master Fund".

185. The judge then turned to what he described as “the key question”: whether Autumn had the requisite knowledge. He addressed that question at paragraphs 17.4 to 17.16 of his judgment. He explained (at paragraph 17.4) that Autumn was an “off-the-shelf” BVI company which had been acquired on 2 January 2007 by Fairbairn, as trustee of the BPG Settlement, as a special purpose vehicle through which the BPG Settlement would make a loan by to PEL in order to fund Mr Gilbertson’s share of the purchase price of the Fabergé Rights and to hold the new PEL shares which Mr. Gilbertson would procure to be issued to it; that Autumn was wholly owned by Fairbairn and Fairbairn’s associated company, Fairbairn Corporate Services Limited (“FCSL”); that Mr Thomas was a director of Fairbairn; that Mr Thomas became Autumn’s sole director; and that Mr Thomas was also a director of FCSL. He went on to say (at paragraph 17.5) that there were, arguably, two different ways in which Autumn could be said to have the requisite knowledge: (i) by imputation to it of Mr Gilbertson’s actual knowledge, or (ii) through what Mr Thomas knew or should have known.

186. At paragraph 17.6 of his judgment the judge set out (in seven numbered sub-paragraphs) the factors on which Renova relied in support of its submission that “Mr Gilbertson was in reality and in practice the directing mind and will of Autumn which was an entity effectively controlled by Mr Gilbertson”; that Fairbairn (through Mr Thomas) “was simply going through the motions in relation to his request for the money but in reality was acting on Mr Gilbertson’s instructions”; and that, accordingly, Mr Gilbertson’s knowledge of all the relevant background and circumstances was to be imputed to Autumn. At paragraph 17.9 he explained that it was submitted on behalf of the Gilbertson Parties that, in order to hold that Mr Gilbertson was in practical terms the directing mind and will of Autumn, it was necessary to conclude that “Mr Thomas had failed in his duties in respect of Autumn as a matter of fact”; and that (it was said) the evidence of Mr Thomas demonstrated that he took his duties very seriously and that there was no basis for the suggestion that he allowed Mr Gilbertson to override him. The judge rejected that approach. He said this (at paragraph 17.10 of his judgment):

“17.10 From my own assessment of the evidence, I consider that the reality is, as I have already said, that Mr. Gilbertson is a forceful and tough businessman and he is no doubt the source of the funds in all three of the Gilbertson Family Trusts. He was not, in my view, the kind of man who would readily take no for an answer. Mr. Thomas would not want to upset or disagree with his client. My impression was that he was very ready to comply with Mr. Gilbertson’s requirements and to place great reliance upon him in doing so. There was no question of Mr. Gilbertson overriding him; there was little or nothing to override. Mr. Thomas went through the motions but there was never any doubt that he would comply with Mr. Gilbertson’s request and Mr. Gilbertson knew and relied upon that.”

187. The judge directed himself (at paragraph 17.11 of his judgment) that the answer to the question whether Autumn could be said to have the requisite knowledge as a consequence of what Mr Thomas knew or should have known turned on whether Mr Thomas knew, or should have known if he had made appropriate independent enquiries, that the Fabergé Rights were being acquired by or for the benefit of Mr Gilbertson in circumstances which amounted to a breach of his fiduciary duties; and that the “requisite knowledge”, in that context, was knowledge that the shares issued by PEL in January 2007 were traceable to a breach of fiduciary duty by Mr Gilbertson. He explained (at paragraph 17.12) that Renova’s case was that Mr Thomas knew all about the Pallinghurst Structure and knew that Renova had an interest under that structure: as he said, the structure chart (which Mr Thomas had seen) made that clear. He referred (at paragraph 17.13) to the evidence of the telephone conversation between Mr Thomas and Mr Gilbertson on 2 January 2007; in the course of which, he said, Mr Thomas enquired about the relationship between Pallinghurst and Mr Vekselberg and received an answer from Mr Gilbertson which “clearly indicated that Mr. Vekselberg would think Mr. Gilbertson was doing something which he was not entitled to do with regard to Mr. Vekselberg and the duties which Mr. Gilbertson owed in respect of the Pallinghurst Structure”. That telephone conversation, he said, “should . . . have alerted Mr. Thomas and caused him to at least make further independent enquires” ; but “he did not do so because he did not feel able or willing to seriously challenge or question what Mr. Gilbertson wanted”. He explained (at paragraph 17.14) that it had been submitted on behalf of the Gilbertson Parties that there was no evidence that Mr Thomas knew that Mr Gilbertson was a director of the Company; but said that it was hard to believe that he did not, given his familiarity with the Pallinghurst Structure and the fact that Fairbairn was a 50% shareholder of the Company, and that, in his view, the probability was that Mr Thomas did know that Mr Gilbertson was a director of the Company. He went on to say this (at paragraphs 17.15 and 17.16 of his judgment):

“17.15 With regard to the issue of the new shares in PEL to Autumn, Mr. Thomas knew PEL was a Pallinghurst company, wholly owned by the Master Fund and indirectly owned through the Company which was owned 50% by the Plaintiff, Renova Resources, and 50% by Fairbairn itself. Mr. Thomas must have realised that the Master Fund’s, and thus indirectly the Company’s, interest in PEL was going to be diluted as a result of the issue of such shares which would be seriously prejudicial to the Master Fund and the Pallinghurst Structure in which Renova, and so indirectly Mr. Vekselberg, had an interest. Mr. Gilbertson’s answer to his question about Mr. Vekselberg’s likely reaction to Mr. Gilbertson purchasing the Fabergé brand as a Christmas present for himself should have alerted him to the fact that there would be a problem as a result of what Mr. Gilbertson was doing.

17.16 It was argued on behalf of the Gilbertson Parties that Mr. Vekselberg would be ‘extremely pissed off’ because Mr. Vekselberg wanted to acquire the Rights for himself. That is, of course, a rather incomplete description of Mr. Vekselberg’s

position in that he also took the position that the economic benefits and management of the Fabergé brand should remain with the Master Fund. However, the fact is that that suggestion was anyway not made entirely clear to Mr. Thomas in the telephone conversation. In my view, the only interpretation available to Mr. Thomas of Mr. Vekselberg's likely reaction, in light of his own knowledge of the Pallinghurst Structure and what he had otherwise been told by Mr. Gilbertson, was that Mr. Gilbertson was doing or proposing to do something contrary to the interests of the Master Fund, which was indirectly owned by the Company, of which Mr. Gilbertson was a director and Fairbairn was a 50% shareholder, as part of the Pallinghurst Structure, in which Renova and Mr. Vekselberg had an interest. Mr. Thomas knew, or at least should have known, that he should at least make further enquires, in relation to Mr. Gilbertson's actions or proposed actions. In my view, Mr. Thomas must or ought to have realised that Mr. Gilbertson was or was likely to be in breach of his director's duties and that proceeding to implement Mr. Gilbertson's request in the circumstances without more information and without the knowledge of Renova and/or Mr. Vekselberg would be inappropriate for a prudent trustee."

188. At paragraphs 17.18 to 17.20 of his judgment, the judge addressed the question whether Autumn was to be treated as a constructive trustee of the PEL shares issued to it in January 2007 (independently of "knowing receipt") because it received those shares as a volunteer. He explained (at paragraph 17.18) that Autumn never paid for those shares: it received them at the same time as, but not as part of, the loan transaction whereby it lent PEL the sum of US\$9.5 million (and then the further sum of US\$0.5 million) at interest. He noted that the board resolution of PEL on 3 January 2007 described the issue of the shares as being "in addition to the loan"; and said that there was no apparent commercial connection between the loan and the issue of the shares. It was apparent, he said, that "the shares were a gift from the start and they were treated as such when the loan was repaid". He rejected (at paragraph 17.19) the submissions advanced on behalf of the Gilbertson Parties that "whatever the precise circumstances in which the new shares were issued, such issue was part of the wider commercial transaction and should not be separated from the loan transaction"; and that, if (as he held) Autumn did not pay of the PEL shares, "as a result of its acquisition of the shares it is a debtor of Fabergé Limited in respect of the shares and accordingly not a volunteer". He rejected each of those contentions on the ground that they did not accord with the evidence or the circumstances. He said this:

"17.19 . . . The new shares were issued in January 2007, some 5½ years ago, and there is no evidence that any demand for payment in respect of the shares has ever been made nor any indication that Autumn (or for that matter any of the other members of the consortium) is expected to pay for the new shares or is considered a debtor in respect of them. Nor, as far as I am aware, has Autumn or any of the other members of the consortium ever made any offer to pay for the shares. In my opinion, the evidence clearly indicates that Mr. Gilbertson procured PEL (now Fabergé Ltd) to issue the new shares gratuitously for no consideration or expected consideration."

And he went on, at paragraph 17.20, to say this:

“17.20 Accordingly, the Plaintiff argues, Autumn was never a bona fide purchaser for value without notice. Equity will not assist a volunteer: see *Re Diplock* [1947] Ch 716 per Wynn Parry J at 781-784. Therefore, on this basis also, Autumn holds the shares concerned in Fabergé Limited (formerly PEL) on constructive trust for the Master Fund/GPLP/the Company and is liable to account for them. In the circumstances I agree with that submission.”

189. The judge gave effect to his conclusion by declaring, at paragraph 1 of his order of 6 November 2012, that Autumn held the shares issued to it by PEL in January 2007 (which had become 25,000 ordinary shares in Fabergé Limited, following a change of name and a sub-division of shares in 2008) as constructive trustee for the Master Fund; and by directing (at paragraph 2) that Autumn should forthwith transfer those 25,000 ordinary shares to the Master Fund.

The Parties' submissions on this appeal

190. Autumn appeals against that declaration and the order to transfer. The grounds on which that appeal is advanced are that the judge misdirected himself and erred in law and/or fact (i) in relation to the issuance of shares in PEL to members of the Consortium, (ii) in holding that Autumn was liable in knowing receipt having regard to its relationship with Mr Gilbertson, the property which it received, the person from whom it received the property and its state of knowledge at the time of receipt and (iii) in holding that Autumn was liable as a volunteer. In resisting Autumn's appeal, it is submitted on behalf of Renova that the judge was correct to make the findings of law and of fact that he did.

191. It is said on behalf of Autumn, by way of introduction, that a claim that it holds the PEL shares which it received as a constructive trustee cannot arise unless there was a relevant breach of fiduciary duty by Mr Gilbertson. But (given the judge's finding that Mr Gilbertson was in breach of fiduciary duty), it is submitted that it is important to keep in mind that (prior to the issue of the PEL shares) Autumn was not a fiduciary in relation to the Master Fund; and that, in this context, there is a significant difference between claims against fiduciaries and claims against third parties. A fiduciary may be required to account for an asset or opportunity that it acquires for itself in breach of duty notwithstanding that the beneficiary had no proprietary claim to that asset. A third party can only be required to account as a constructive trustee for an asset to which the beneficiary does have a proprietary claim; although (it is accepted) it is unnecessary for the beneficiary to show that it has suffered loss.

192. It is pointed out that, in the present case, Renova had pleaded a claim against Autumn based on the premise that Autumn was Mr Gilbertson's *alter ego*: on that premise Renova was able to formulate a non-proprietary claim against Autumn for an account of profits. But, it is said, Renova did not pursue its pleaded allegation that Autumn was Mr Gilbertson's *alter ego* and, in those circumstances, there was no longer any basis for a non-proprietary claim for an account of profits: in order to obtain the relief which it sought, it was necessary for Renova to advance a proprietary claim against Autumn. The proprietary claims advanced were (i) a claim in knowing receipt and (ii) a claim for the return of property acquired as a volunteer. The elements of the two proprietary claims are not the same; but, it is said, the requirement that Autumn was the recipient of property, or the traceable proceeds of property, of the Master Fund is common to both.

193. Properly analysed, as it seems to me, the requirement common to both proprietary claims is that Mr Gilbertson's breach of fiduciary duty to the Company (and, more generally, to the Master Fund and the other entities within the Pallinghurst Structure) caused Autumn to receive property of the Master Fund, or the traceable proceeds of such property. If that condition is satisfied, then Autumn is required to account to the Master Fund as a constructive trustee for what it received; unless it can rely upon circumstances which lead to the conclusion that such an order would be inequitable. Those circumstances include receipt of the property (or proceeds) as a *bona fide* purchaser without notice. A claim on the basis of "knowing receipt" is a claim that the recipient knew (or ought to have known) of the breach of fiduciary duty; and so cannot assert that it would be inequitable to require it to account as a constructive trustee.

194. In those circumstances, it is convenient to address the submissions of the parties under four heads: (i) whether the judge was wrong to make the findings of fact that he did in respect of the issue of the new PEL shares in January 2007; (ii) whether, upon the issue of the new PEL shares in January 2007, Autumn was the recipient of property of the Master Fund, or the traceable proceeds of such property; (iii) whether Autumn received the new PEL shares as a volunteer and not as a purchaser for value and so held those shares as a constructive trustee for the Master Fund; and (iv) whether, if (and notwithstanding that) Autumn received the new PEL shares as a purchaser for value, it held those shares as a constructive trustee for the Master Fund on the basis of "knowing receipt".

(i) *Whether the judge was wrong to make the findings of fact that he did in respect of the issue of the new PEL shares in January 2007*

195. It is said on behalf of Autumn that the judge misdirected himself and erred in law and/or in fact in holding:

(1) That the new shares issued by PEL were issued on 3 January 2007.

Had the judge directed himself properly, it is said, he should have found (i) that the new shares were issued at a later date (said, on the evidence before the judge, to be 19 January 2007) and (ii) that, on that basis, Mr Gilbertson was not in breach of any fiduciary duty he owed to the Company, given the evidence as to the dealings between the parties in the period after 3 January 2007.

(2) That Autumn had not given value for the new PEL shares.

Although the judge may have been correct to find that neither Autumn nor the other members of the Consortium paid for the shares; nevertheless, it is said, the issue of the shares served a clear commercial purpose - in that the issue was “clearly calculated to cause the Consortium to forbear from demanding repayment” of the monies lent to fund the acquisition of the Fabergé Rights and by way of working capital and such forbearance may be seen as giving value in equity. Further, it is said, the new PEL shares served as a form of alternative security. In all the circumstances, it is said that, far from giving no value, the value Autumn and the other members of the Consortium gave was what enabled PEL to survive.

(3) That Mr Gilbertson had procured the issue of the new PEL shares.

In the circumstances that, it is said, the judge referred to no evidence to support a finding that Mr Gilbertson procured the issuance of the new PEL shares, he appears to have been content to assume that Mr Gilbertson must have done so. There was no basis for this assumption.

196. As I have said, earlier in this judgment, the judge found (at paragraph 9.48 of his judgment) that the Register of Members of PEL showed that the new shares were issued on 3 January 2007; and he rejected the contention, pleaded by the Gilbertson Parties in their Amended Defence, that, as a matter of fact, those additional 100 shares were not issued by PEL until 19 January 2007, or thereabouts. I have already explained why I take the view that the judge was entitled to reach the conclusion that he did. It is unnecessary to revisit that point under this head. But I should add, for completeness, that I agree with the judge - and I accept the submission advanced on behalf of Renova on this appeal - that, in any event, success on its contention that the new PEL shares were not issued until 19 January 2007, or thereabouts, would not assist Autumn in the present context. I reach that conclusion for three reasons:

- (1) There is no dispute that 100 new PEL shares were issued in January 2007 (whether on 3 January 2007 or on a later date), and that 25 of those shares were issued to Autumn: the actual date upon which those shares were issued is irrelevant to the question whether the 25 new PEL shares issued to Autumn in January 2007 could be the subject of a proprietary claim in these proceedings.
- (2) As I have explained, Mr Gilbertson's breach of fiduciary duty occurred when he decided that new PEL shares should be issued to his Consortium in order to obtain control of the Fabergé Rights for his own benefit (or for the benefit of the Consortium): the actual date upon which the shares were issued is irrelevant to the question whether or not there was a breach of fiduciary duty upon which Renova can rely in these proceedings. Even if (which I do not accept) the evidence of events which took place after 3 January 2007 would, or should, have led the judge to find that, by 19 January 2007, the parties were negotiating on the basis that the Master Fund had no separate interest in the Fabergé Rights, there was no evidence to support the view that that finding would, or should, have led to judge to conclude that Mr Gilbertson took the decision which led to the issue of the new PEL shares later than 3 January 2007.
- (3) For the reasons which I shall explain in this section of my judgment, Autumn had knowledge of that decision - and knowledge that it gave rise to a breach of duty by Mr Gilbertson - on, or just before, 3 January 2007 when, following the telephone conversation between Mr Gilbertson and Mr Thomas on 2 January 2007 and the transfer by Fairbairn, as trustee of the BPG Settlement, of US\$ 9.5 million to enable Autumn to re-imburse K-MIC in respect of 25% of the US\$38 million loan to PEL by means of which the cost of acquiring the Fabergé Rights from Unilever was funded: the actual date upon which the new shares were issued by PEL is irrelevant to the question whether or not Autumn had the requisite knowledge in the context of the claim in these proceedings based on knowing receipt (save, perhaps, that - if the new shares were not issued until 19 January 2007, as Autumn contends - there was all the more reason for Mr Thomas to make enquiries as to the reason for the time that had elapsed following the acquisition of the Fabergé Rights some two and a half weeks earlier).

197. In developing the submission that the judge was wrong to find that the members of the Consortium had not given value for the PEL shares that were issued to them in January 2007, it is said on behalf of Autumn that:

- (1) The directors of PEL must be taken to have thought that those to whom the new PEL

shares were issued were giving value for those shares: in that they caused those shares to be entered in the Register of Members as fully paid. The entry in the register is, it is said, *prima facie* evidence that Autumn paid for the shares. Mr Thomas was unable to recall one way or the other; and the Renova parties elected not to cross-examine Mr Sean Gilbertson on the issue.

- (2) Mr Thomas gave evidence to the effect that he had expected Autumn to receive shares by way of security. It is true that the loan documentation simply provided the Consortium with a lien over the Fabergé Rights by way of security; but the loan documentation was “only part of the story”. The monies to fund the acquisition of the Fabergé Rights were raised in a hurry: formal arrangements took time to catch up.
- (3) The lien over the Fabergé Rights and the issue of the new PEL shares should be seen as complementary: the PEL shares “were no more than Autumn had expected it would have when the transaction was initially put to it”. Autumn advanced - and refrained from seeking to recover - US\$9.5 million on the basis that its interests were sufficiently protected by its ownership of PEL shares.

198. In response to those submissions it is said on behalf of Renova that:

- (1) It is well established that it is for a third party who has acquired property as a result of a breach of trust by a fiduciary - and who seeks to resist a constructive trust claim - to satisfy the Court that it was a *bona fide* purchaser of the property acquired for value and without notice. In support of that proposition reliance is placed on observations of Sir Richard Henn Collins, Master of the Rolls, and of Lord Justice Cozens-Hardy in *In re Nisbet & Potts’ Contract* [1906] 1 Ch 386, at pages 403 and at page 410; and in *Lewin on Trusts* (18th Edn, 2008) at paragraphs 41-114; 42-22, 23. Autumn bears the burden of proving that it gave value for the new PEL shares that were issued to it in January 2007. On the evidence before the judge it cannot discharge that burden.
- (2) Autumn appears to accept that the Consortium gave no consideration for the new PEL shares in the sense in which the term is used at common law. If it gave no consideration sufficient even to support a contract, then it must follow that it gave no value in the context of the *bona fide* purchaser defence to a constructive trust claim. In support of that proposition Renova relies on observations of Mr Justice Neuberger in *Nurdin & Peacock plc v D B Ramsden & Co Ltd* [1999] 1 EGLR 199, at page 123:

“Second, it was contended that the payment of £1 under the 1995 transfer

constituted sufficient value to render Nurdin a ‘purchaser for value’. In the field of contract it is well established that the court does not inquire into the adequacy of consideration: once it has established that some consideration has moved, that is enough for establishing the essential prerequisite of a contract. However, the doctrine of consideration has been developed in the context of the common law, whereas the concept of a ‘purchaser for value’ in a case such as this has a very different history, being solidly based on equity. In this connection it is worth remembering that equity looks at the substance and not at the form. It seems to me that, particularly in the context of an intra-group transfer, the substance of a payment of £1 does not render a transferee a ‘purchaser for value.’”

Accordingly, even if, on the basis of the Register of Members, Autumn were presumed to have paid the par value for the new PEL shares issued to it in January 2007, such a nominal consideration (far below the commercial value of the new shares) does not support a defence of “purchaser for value”.

- (3) Further, equity requires that value is actually paid. In support of that proposition, Renova relies on the decision in *Storey v Windsor* (1743) 2 Atk 630 and the commentary in *Megarry & Wade, The Law of Real Property* (7th Edition) at paragraph 8.008. The evidence given by Mr Thomas at trial (transcript, 7 May 2012, page 94, lines 11-21) was that he could not recall that Autumn ever paid for the new PEL shares.
- (4) The submissions that the new PEL shares were issued as security for the loans or to persuade the lenders not to demand repayment of the loans - advanced on behalf of Autumn in this Court - were not advanced at trial and are “manifestly contrary to all the evidence”. In particular:
 - (i) The board resolution of 3 January 2007 contains an express statement that the share issue was “in addition to the loan” made to enable PEL to pay Unilever.
 - (ii) In their evidence at trial Mr Gilbertson (transcript, 4 May 2012, page 199, lines 16-24, page 204, lines 9-18 and page 208, line 23 to page 209, line 3) and Mr Thomas (transcript, 7 May 2012, page 79, line 4, to page 80, line 21) accepted, without equivocation, that the issue of the new PEL shares was not a term or condition of the loan by Autumn. The draft Loan Agreement (which post-dated both the making of the loan and the issue of the shares, which was never finalised or executed and which contained a term as to security) made no reference to the issue of the new PEL shares.
 - (iii) There was no evidence of any discussion that the issue of the shares would be taken to be in substitution of the grant of security; and such a discussion

would be inconsistent with the order in which events occurred.

- (iv) The Consortium did not need security for their loans because the terms of the loans (as recorded in the board minutes of 3 January 2007) entitled its members to call for repayment of the loan within seven days either in cash or (at their discretion) by the transfer of all of the assets, contracts and receivables of PEL to a vehicle nominated by them. It was for that reason that clause 11 of the subsequent draft loan agreement took the form that it did.
 - (v) In his evidence at trial (transcript, 5 May 2012, page 89, lines 2-13) Mr Thomas accepted that he had been wrong to say (in his witness statement) that he had expected to receive shares by way of security.
- (5) As all the evidence shows, the loans and the issue of new PEL shares were separate transactions. The new PEL shares were not consideration for the loans: they were simply a gift, “to sweeten the deal for the Consortium and to enable Mr Gilbertson to follow through on his plan to ‘negotiate with the Russians from a position of strength’”. The shares were not accepted by the Consortium as the price of its forbearing to demanding security for the loan.

199. I reject the submission that the judge was wrong to find that the members of the Consortium had not given value for the PEL shares that were issued to them in January 2007. The description in the Register of Members of the new shares as “fully paid” is no more than a statement that there is no liability on the holders of those shares to pay future calls: it is not a statement that the persons to whom the shares have been issued have paid (or otherwise given value) for those shares. Nor is there any evidence that the new PEL shares were issued by way of security for repayment of the monies lent by members of the Consortium in order to fund the purchase of the Fabergé Rights. As the minutes of the Directors’ meeting held by telephone conference call on 3 January 2007 record, the loans were made on terms that the lenders might, at any time, call for repayment within seven days; such repayment to be made either in cash or (in the sole discretion of the lenders) by the transfer of all the assets, contracts and receivables of PEL “to a vehicle nominated by the Lenders”. In those circumstances, ownership of the new PEL shares provided no additional security for the repayment of the loan - in that, if the loans were not repaid on demand, those shares would become worthless. Further, there was no provision for the redemption - by cancellation (or re-transfer to PEL) - of the new shares in the event that the loan were repaid.

200. I have addressed, in an earlier section of this judgment, the submission that the judge was wrong to hold that Mr Gilbertson had procured the issue of the 100 new PEL shares in January 2007. For the reasons that I have already set out, it is fanciful to suggest that the decision to issue those shares – although implemented by Mr Sean Gilbertson and Mr Andrew Willis (as the directors of PEL) - was not a decision taken by Mr Gilbertson as a necessary element in his scheme to obtain control of the Fabergé Rights (by diverting effective ownership of PEL from the Master Fund to his Consortium) in order, thereafter, to “negotiate with the Russians from a position of strength”. It is unnecessary to revisit that point.

(ii) *Whether, consequent upon the issue of new PEL shares in January 2007, Autumn was the recipient of property, or the traceable proceeds of property, of the Master Fund*

194. Autumn reminded the Court of Lord Justice Hoffmann’s observation in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700g (cited earlier in this judgment); and submitted that “opportunities” must be distinguished from “assets”. In support of that distinction Autumn relied on passages in *Cook v Deeks* [1916] AC 554 (PC); *Competitive Insurance Society Co. Ltd v Davies* [1975] 1 WLR 1240; *Belmont Finance Corporation v Williams Furniture (No. 2)* [1980] 1 All ER 393; *Charter plc v City Index Ltd* [2008] 3 All ER 126; and, by contrast, *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 1 BCLC 385 and *Commonwealth Oil & Gas Co Ltd v Baxter* (2009) SCLR 898.

195. Renova recognizes the distinction between opportunities and assets; but submits that what it describes as “the controversial issue about whether corporate opportunities or information are property for the purposes of a proprietary claim” does not arise in the present case. That issue does not arise, it is said, because the assets in respect of which Renova’s proprietary claim is advanced are the new PEL shares issued to Autumn in January 2007; and those new shares are “the traceable product of either the Rights, or the contractual right to the Rights under the SPA”. This, it is said, differs from the more usual corporate opportunity case - of which *Satnam Investments* provides an example - in which the asset in respect of which the proprietary claim is advanced was acquired (by the defendant) by the use or exploitation of a commercial opportunity wrongfully diverted from the claimant. Properly understood, the new PEL shares issued to Autumn represented substantially the whole of the value of an asset (the Fabergé Rights) which, at the time the shares were issued, was owned by PEL and so, indirectly, owned by the Master Fund as the owner of 100% of PEL. The Fabergé

Rights were not a “corporate opportunity” - comparable to the confidential information in the *Satnam* case - they were themselves an asset. So, also, was the Master Fund’s holding (immediately prior to the issue of the new shares) of 100% of the issued share capital of PEL.

196. It is submitted on behalf of Autumn that the Master Fund had no proprietary interest in the new PEL shares issued in January 2007: in that, until those shares were issued by PEL they did not exist. In support of that submission Autumn relies on observations in the judgment of the majority in *Pilmer v Duke Group Ltd* [2001] 2 BCLC 773 at [20] (a decision of the High Court of Australia). It is pointed out that, before the issue of the new PEL shares to members of the Consortium in January 2007, the Master Fund was the owner of one PEL share; and that that, after the issue of the new PEL shares to members of the Consortium, the Master Fund remained the owner of that PEL share. What changed was not the identity of the asset owned by the Master Fund, but the characteristic of that asset in relationship to the ownership of PEL. The effect of the issue of the new shares to members of the Consortium was that the proportionate interest in PEL associated with ownership of that one share changed from 100% to less than 1%. Those submissions are, if I may say so, self-evidently correct; and they are not, I think, in dispute. But they provide no answer to what (as Renova submits) is the relevant question for determination under this head: whether consequent upon the issue of new PEL shares in January 2007, Autumn was the recipient of the traceable proceeds of property of the Master Fund.

197. It is accepted on behalf of Autumn that there is a sense in which the Master Fund may be said to have owned the Fabergé Rights, albeit indirectly; and that what was diverted to Autumn (and the other members of the Consortium) was that indirect ownership. But, it is said, although “indirect ownership” might be sufficient to describe that in relation to which the Master Fund may have suffered any loss; “indirect ownership” short of equitable title does not constitute an asset. Upon acquisition of the Fabergé Rights by PEL from Unilever (on completion of the SPA on 3 January 2007), PEL became the legal owner of those rights. It is not suggested - and could not be suggested - that PEL held those rights as trustee for the Master Fund. Again, as it seems to me, those submissions are correct; but, again, they provide no answer to the question for determination under this head.

198. As I have said, the question for determination under this head is not (or not limited to) whether assets of the Master Fund were diverted to Autumn: the question for

determination includes whether Autumn was the recipient of the traceable proceeds of property of the Master Fund: As Autumn accepts, a proprietary claim is not confined to the initial property, since the claimant's interest in the initial property may be traced into other property that the defendant holds in its place. But, it is said correctly, in order to trace into substitute property, it is first necessary to identify the initial property for which the substitute property is to be a substitute. In the present case, as it seems to me, the relevant question in this context is whether the Master Fund's holding (immediately prior to the issue of the new shares) of 100% of the issued share capital of PEL can be traced into the PEL shares issued to Autumn (and, so far as material, to the other members of the Consortium). It is said on behalf of Autumn that the answer to that question must be "No"; but it is significant that the reason given by Autumn for that conclusion is not that, at all relevant times, the Master Fund remained the holder of the single share in PEL (so that it could not be said that that share had been diverted to Autumn, or to any other entity); rather, it is said that the single PEL share owned by the Master Fund "hardly offers an auspicious starting point for any claim by Renova on behalf of the Master Fund, since, if Renova had had its way, the Rights would not have been acquired in the name of a Fund entity and the share would have remained of no more than nominal value". If I may say so, that ignores the undisputed fact that, immediately before the 100 new PEL shares were issued, PEL, as contractual purchaser under the SPA (into which it had entered with the knowledge and consent of Renova), had acquired the Fabergé Rights from Unilever.

199. It is said on behalf of Renova that the judge was correct, for the reasons which he set out at paragraph 17.3 of his judgment, to conclude that the answer to the question whether the Master Fund's holding (immediately prior to the issue of the new shares) of 100% of the issued share capital of PEL can be traced into the PEL shares issued to Autumn was "Yes". The short point, it is said, is that "tracing" in equity is concerned with value, not with assets *in specie*. In support of that proposition Renova submits:

- (1) It is common ground in this Court that a claim against a non-fiduciary third party for an account as a constructive trustee is a proprietary claim. When Lord Justice Hoffmann referred, in the *El Ajou* case ([1994] 2 All ER 685, 700) to "assets traceable as representing the assets of the plaintiff" he chose his words with care. He was referring to the need for the asset in the hands of the defendant to be such as would entitle the plaintiff to trace into it at law or in equity. In other words, the defendant need not be shown to have received *in specie* the actual asset which was previously owned beneficially by the plaintiff; it is enough if what he received

was “traceable as representing” that asset. It is plain that Lord Justice Hoffmann had equitable tracing in mind.

- (2) There is a difference between “following” and “tracing”. Tracing is concerned not with locating the asset formerly owned by the plaintiff but with identifying whether there is an asset in the hands of the defendant in which the value of the original asset is now located. That equitable tracing is about tracing value is clear from the speech of Lord Millett in *Foskett v McKeown* [2001] 1 AC 102, at 127 and 128:

“The process of ascertaining what happened to the plaintiffs’ money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. . . .”

“ . . . The claimant claims the new asset because it was acquired in whole or in part with the original asset. What he traces, therefore, is not the physical asset itself but the value inherent in it.

Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property.”

200. In the present case, it is said:

- (1) As at 22 December 2006, the Master Fund owned 100% of the share capital of PEL. It did so by holding the single issued share, which it had acquired on 1 December 2006.
- (2) From that date, PEL had a valuable contractual right under the SPA; that is to say, the right to purchase the Fabergé Rights from Unilever on payment of US\$38m at completion. It acquired that right with the intention that it, and through it the Master Fund, would keep the full economic benefit of the Fabergé Rights at completion.
- (3) On 3 January 2007, PEL completed the SPA and acquired the Fabergé Rights unconditionally. In order to do so PEL incurred a loan liability to members of the Consortium who had funded the purchase, and a liability for interest on that loan. At that point, the Master Fund owned 100% of PEL, which held the Rights and owed US\$38m. Any upside value of the Rights over and above US \$38m would accrue for the benefit of the Master Fund.
- (4) Also on 3 January 2007, according to its records, 100 new PEL shares were issued

to the members of Mr Gilbertson's consortium; in particular 25 new PEL shares were issued to Autumn. The Master Fund's interest in PEL was thereby diluted from 100% to less than 1%. The effect of the share issue was that, although the Master Fund still owned its single PEL share, the value of its holding in PEL was reduced by over 99%. The value lost to the Master Fund was transferred to the Consortium as the holders of the new shares.

- (5) By this means (as was intended) the value of the 100% ownership of PEL (formerly represented by the single share held by the Master Fund) came to be represented by the 101 shares in PEL which existed post-dilution. Given that only one of those 101 shares was then held by the Master Fund, in excess of 99% of the value of the ownership of PEL was transferred to the members of the Consortium.

In those circumstances, it is said, it is easy to see how the new PEL shares represent virtually the whole of the value of the formerly single PEL share owned by the Master Fund. It matters neither that the new shares are newly created property nor that the Master Fund still holds its one share. The value in the single share has moved and can be traced to the new shares in the hands of the recipients: they are in all senses its substitutes in value. The new shares thus represent the single share; or rather, represent the value of the economic and control rights inherent in ownership of the single share. If this analysis were wrong it would enable corporate form to defeat commercial substance. It would be anomalous if equity would (as it would) permit a tracing claim where Mr Gilbertson procured PEL to transfer the Rights (or to assign the SPA) to the Consortium, or procured the Master Fund to transfer PEL itself to the Consortium, each of which transactions which would undoubtedly give rise to a proprietary claim against the Consortium, but would not permit a tracing claim if he resorted to the simple expedient of procuring PEL to issue the Consortium with 100 new shares in PEL. This anomalous conclusion is avoided if one follows Lord Millett's analysis in *Foskett v McKeown* and treats the tracing exercise as an exercise in the tracing of value and not an exercise in the following of property *in specie*.

201. I accept Renova's submission that the judge was correct to conclude that the value of the Master Fund's holding (immediately prior to the issue of the new shares) of 100% of the issued share capital of PEL can be traced into the PEL shares issued to Autumn in January 2007. In the events which happened, the position immediately before the issue of the 100 new shares was that PEL was the owner of the Fabergé Rights; and as the holder of the single share then in issue, the Master Fund was the owner of 100% of the issued capital of PEL. The position immediately after the 100 additional shares were issued was

that PEL remained the owner of the Fabergé Rights but that the issued capital of PEL was owned as to 100/101 by the members of the Consortium and as to 1/101 by the Master Fund; or, to put the point another way, substantially the whole of the value of the Master Fund's interest in PEL and (indirectly, through PEL) in the Fabergé Rights had been transferred to the members of the Consortium as owners of the new shares. In those circumstances, as it seems to me, the effect of the issue of the new PEL shares was that 100/101 parts of the Master Fund's ownership of the whole issued share capital of PEL was transferred to the members of the Consortium; and, in particular, 25/101 parts of the Master Fund's ownership of the whole issued share capital of PEL was transferred to Autumn. The value of what was transferred was represented by the new shares held by Autumn and the other members of the Consortium; and can be traced accordingly. As Renova points out, to hold otherwise would be to allow corporate form to defeat commercial substance. It cannot be doubted that, had the transaction been carried out (as a matter of corporate form) in a slightly different way - by subdividing the existing single share in PEL into 101 new shares and then causing the Master Fund (as the owner of those 101 new shares) to transfer 100 of those shares to members of the Consortium - the 100 shares so transferred could be followed into the hands of the transferees and could be the subject of a proprietary claim. To deny a proprietary claim in circumstances where what is, as a matter of commercial substance, the same transaction is carried out by the issue of new shares (rather than the creation of new shares by the subdivision of an existing share) would, indeed, be anomalous.

(iii) Whether Autumn received the new PEL shares as a volunteer and not as a purchaser for value and so held those shares as a constructive trustee for the Master Fund

202. As I have said, earlier in this section, it is submitted on behalf of Autumn that the judge was wrong to hold that it received the new PEL shares issued in January 2007 as a volunteer and not as a purchaser for value. In particular, it is said that the evidence established (contrary to the judge's finding) that the new PEL shares were issued as security for the repayment of the loan which Autumn made to PEL; and that, had the judge directed himself properly, he should have concluded that Autumn did provide adequate consideration for the issue of the new shares. I have already rejected those submissions.

203. Nonetheless, the submission that the judge was wrong to hold that Autumn was liable to account as a constructive trustee for the PEL shares which it received in January 2007 is pursued on the ground that, even if Autumn (and the other members of the Consortium) gave no consideration (in the sense in which that term is generally understood) for the

shares that were issued to them, the issue of those shares served a clear commercial purpose - in that it was clearly calculated to cause the Consortium to forbear from demanding repayment of the monies lent - and such forbearance may be seen as giving value in equity. It is said, correctly, (i) that PEL required monies to pay for the acquisition of the Fabergé Rights and by way of working capital; (ii) that the Consortium lent PEL the monies required on terms that entitled them to require PEL to transfer the Fabergé Rights to them in the event that PEL was unable to repay those monies within 7 days of demand; (iii) that the issue of the new PEL shares had the effect that the Consortium had no motive to demand repayment of the monies within seven days; and, accordingly, (iv) that PEL was given the time it required to raise the monies needed to repay the loans by the issue of further shares. It is said, further, that - had there been a claim by PEL to recover the shares, founded on the allegation that, in causing the new shares to be issued, the directors of PEL had acted in breach of duty - the remedy sought would have been an order setting aside the issue of the new shares and that, in answer to that claim, Autumn would have been able to rely upon “change of position”. Autumn would have been able to assert that, by accepting the shares issued in January 2007, it changed its position because it forbore from insisting on the security rights which it was promised under the loan agreement. A defence of change of position ought also to be available in a case brought against Autumn directly by (or on behalf of the Master Fund) as a shareholder in PEL.

204. Renova accepts that Autumn did lend money to PEL to assist PEL to pay Unilever, and provided further loan funds (US\$0.5 million) for working capital. But, in response to the submission that the new PEL shares were issued “to cause the Consortium to forbear from demanding payment” of the monies lent, it is said on behalf of Renova that to issue the shares for that purpose would make “no sense at all”; because “that would have turned the loan into the price for the shares, which it was clearly not”. Further, if the new shares had been issued for that purpose, when the Consortium later came to demand repayment in September 2007, “they were doing something they were not entitled to do (and, what is more, in any event they held on to their existing shares)”.

205. In my view it is unnecessary, in the circumstances of the present case, to address the question whether, in principle, a change of position defence could have been advanced in response to the claim against Autumn as a volunteer. It is unnecessary to address that question because there was no evidence to support the contention that, in making no call

for repayment of the loans, the members of the Consortium did change their position. It is clear from the evidence at trial that the members of the Consortium were assured by Mr Gilbertson that the loans were required as short term funding while the terms of an advantageous sale of the Fabergé Rights to Mr Vekselberg (whom, they were assured, was a ready and willing purchaser) were negotiated. There is nothing in the evidence to support the conclusion that the members of the Consortium ever considered calling for repayment of the loans; or that they forbore from doing so in reliance on a belief that their position as the holders of the PEL shares issued in January 2007 was unchallenged.

206. In those circumstances I reject the submission that the judge was wrong to hold that (whether or not it had knowledge of Mr Gilbertson's breach of fiduciary duty in relation to the issue of the new PEL shares in January 2007) Autumn was liable to account for those shares as a constructive trustee.

(iv) Whether, if (and notwithstanding that) Autumn received the new PEL shares as a purchaser for value, it held those shares as a constructive trustee for the Master Fund on the basis of "knowing receipt".

207. In developing the second of its grounds of appeal - that the judge was wrong to hold that Autumn was liable as a constructive trustee on the basis of knowing receipt - it is said on behalf of Autumn that the judge was wrong to hold, or to proceed as if he had held, that the Master Fund had a sufficient proprietary interest in the new PEL shares to found a claim for knowing receipt. It is unnecessary to address that submission under this head. I have already held that the judge was entitled to take the view that the Master Fund had a sufficient proprietary interest in the new PEL shares to found a claim that Autumn account as a constructive trustee for the shares that were issued to it.

208. It is said, further, that the judge was wrong to hold, or to proceed as if he had held, that the issue of the new PEL shares by the directors of PEL involved a breach of their fiduciary duty such that the transaction could be impugned. Had the judge directed himself properly, it is said, he would have held that Renova had failed to plead any such case; and that any such case would have been hopeless in any event. It is unnecessary to address that submission under this head. Renova's claims in these proceedings (and, in particular, its claim that Autumn account as constructive trustee for the PEL shares issued to it in January 2007) are not founded on an allegation that - in causing those PEL shares to be issued - the directors of PEL (Mr Sean Gilbertson and Mr Willis) were in breach of the fiduciary duties which (as directors) they owed to that company; they are founded upon the allegation that - in causing the directors of PEL to give effect to his decision that the new

PEL shares be issued - Mr (Brian) Gilbertson was in breach of the fiduciary duties which he owed (as a director of the Company) to the Company and (more generally) to the Master Fund or and the other entities within the Pallinghurst Structure. I have already accepted that the judge was entitled to take the view that that allegation is well-founded.

209. It is also submitted under this head that Autumn lacked the requisite knowledge to make it unconscionable for it to retain the PEL shares issued to it in January 2007. Renova's primary response to that submission is that (as the judge held) Autumn was a volunteer in respect of those PEL shares; and that, as such, its knowledge (or alleged lack of relevant knowledge) of the circumstances in which they were issued is irrelevant. Equity does not aid a volunteer. I have already explained why I take the view that Renova is correct: on a true analysis it is unnecessary to address the issue whether Autumn knew or ought to have known of Mr Gilbertson's breach of fiduciary duty in relation to the issue of the new PEL shares in January 2007. Nevertheless (although not strictly necessary) it is, I think, appropriate to do so.

210. As the judge found (at paragraph 2.3 of his judgment) Autumn was a special purpose vehicle set up by the professional trustees of one of Mr Gilbertson's family trusts to hold the investment in PEL on behalf of a family trust. He held that Autumn had the requisite knowledge of Mr Gilbertson's breach of fiduciary duty on the basis that there was to be attributed to it (a) Mr Gilbertson's own knowledge and/or (b) the knowledge of Mr Thomas. It is said on behalf of Renova to be common ground that the relevant enquiry was whether Autumn had such knowledge of the circumstances in which the new PEL shares were issued in January 2007 that it would be unconscionable for it to retain those shares. In support of that proposition Renova relies on observations in *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437. It is submitted that the judge applied the right test; and that his analysis of the evidence of knowledge (at paragraphs 17.4 to 17.16 of his judgment) was correct.

(a) The attribution to Autumn of Mr Gilbertson's own knowledge

211. It is, of course, accepted on behalf of Autumn that Mr Gilbertson possessed the requisite knowledge of his own actions. The judge imputed Mr Gilbertson's knowledge to Autumn on the basis of a number of factors - set out at paragraph 17.6 of his judgment - and concluded (at paragraph 17.10) that Mr Thomas "was very ready to comply with Mr. Gilbertson's requirements" and that "there was never any doubt that he would comply with Mr. Gilbertson's request and Mr. Gilbertson knew and relied upon that". In effect, it is said, the judge held that Mr Gilbertson controlled Autumn and was its directing

mind and will. It is submitted on behalf of Autumn that that finding was “plainly wrong as a matter of fact and as a matter of law”, in that:

- (1) As Lord Justice Hoffmann observed in the Court of Appeal of England and Wales in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 705-707 - and (as Lord Hoffmann) when delivering the opinion of the Judicial Committee of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, the answer to the question whether a person is the directing mind and will of a company depends upon the proper application of the rules of attribution in any given case. The directing mind and will of a company is either the person who is given the relevant responsibility by the constitution of the company or one who, by reason of the particular function he carries on within the company or by what he did with the acquiescence of the company, can be said to be the directing mind and will for the purposes.
- (2) Mr Gilbertson was not given any relevant responsibility in relation to Autumn by the constitution of that company; nor did he have such responsibility by reason on any particular function he carried on within that company; nor, given that the loan was not authorised by Mr Gilbertson, can Autumn be said to have acquiesced in his authorisation of it.
- (3) In those circumstances, the facts found by the judge would not be sufficient to justify the attribution of Mr Gilbertson’s knowledge to Autumn, even assuming them to be true. It is said that:
 - (i) It may well have been the case that “Mr Thomas would not want to upset or disagree with his client”; but “the vast majority of professionals will feel the same way”.
 - (ii) It may well have been the case that Mr Thomas was “very ready to comply with Mr Gilbertson's requirements”; but, as the settlor and a beneficiary, “Mr Gilbertson was entitled to expect Mr Thomas to have regard to his wishes insofar as it was proper to do so without fettering his discretion”.
 - (iii) It is true that Mr Thomas was willing “to place great reliance upon [Mr Gilbertson]” (as he accepted in evidence); but, “on the basis of his past dealings with Mr Gilbertson Mr Thomas had the highest regard for him”.
 - (iv) The judge was wrong to hold that that there “was little or nothing to override”; in that there was unchallenged evidence before the court that Mr Thomas had refused to make a loan on an interest free basis.
- (4) To find that a professional trustee had allowed his will to be suborned to that of a beneficiary to such an extent as to justify treating the acts of the trustee as acts of

the beneficiary and, thus, attributing the knowledge of the beneficiary to the trust is a serious matter. It implies a degree of impropriety on the part of the professional trustee which the court should not find in the absence of compelling evidence. The judge referred to no such evidence to support his finding and the evidence was in fact to the contrary.

- (5) For the court to hold that the independent mind and will of Autumn was defeated in the circumstances of this case would be to impose an unrealistic and unwarranted standard of independence on trustees.

212. In response to those submissions, it is said on behalf of Renova that the judge was right to conclude (at paragraph 17.10 of his judgment) that Mr Gilbertson's knowledge could be imputed to Autumn, in that:

- (1) In asking whether Fairbairn (as the director of Autumn) and Mr Thomas (as the director of Fairbairn) deferred to Mr Gilbertson in respect of the relevant decision (whether to accept the new PEL shares issued to the members of the Consortium), instead of exercising autonomy, the judge (correctly) applied the principle identified in *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500.
- (2) There was a "a wealth of evidence" to support the judge's conclusion that the answer to that question was "Yes":
 - (i) Autumn was a special purpose vehicle established solely for the purposes of making the loan to PEL to pay Unilever under the SPA and to receive the new PEL shares. It had no pre-existing business, and no other function. It was established as an immediate consequence of Mr Gilbertson's demand of the trustees of his family settlement, the BPG Discretionary Settlement, for urgent payment. That was its *raison d'être*.
 - (ii) This was all Mr Gilbertson's deal. As he told Mr Thomas in the telephone conversation on 2 January 2007 "I have bought myself a Christmas present . . . and I need some money to pay for it."
 - (iii) It is plain that Mr Gilbertson never doubted that the settlement trustees would do as he asked. He told Mr Mende in his email of 2 January 2007 (to which the judge referred at paragraph 9.42 of his judgment) that he had to "extract it [the payment] from a set of Trusts in Jersey"; and (as the judge noted at paragraph 17.6(iii)) he described the role of the trustees as simply "processing paperwork".
 - (iv) Autumn was described by Clifford Chance (solicitors acting on Mr

Gilbertson's instructions) in a letter dated 7 March 2007 as "in practice an entity controlled by [Mr Gilbertson]". Mr Gilbertson's complete confidence at the time that (as he told Mr Mende) he would be able to "extract" US \$9.5m from the trust within a few days, and the fact that he did so, bears that out entirely.

- (v) As the judge noted, during the time between Mr Gilbertson's first call to Mr Thomas on 2 January 2007 and his email to Mr Vekselberg (in which he wrote that he had triggered alternative arrangements and bought the Fabergé Rights) - a period of only some eight hours - Mr Thomas had not got back to him to confirm that he would make the payment. Mr Gilbertson's confidence that the trustees would do as he asked was such that he felt no need for such confirmation.
- (vi) Fairbairn, as the director of Autumn, was content to let Mr Gilbertson lead the commercial discussions with the other members of the Consortium about the loan and the payment to Unilever: at no stage did Fairbairn (or Mr Thomas) have any direct contact with the other members of the consortium.
- (vii) Mr Thomas was prepared to sanction paying away US\$9.5m of trust money at Mr Gilbertson's request, without a signed or even finalised loan agreement, and without having carried out even minimal due diligence into the standing of PEL or the value of the Fabergé Rights.
- (viii) Autumn and Mr Gilbertson shared a single defence team and a joint defence. Autumn did not produce its own discovery list and did not verify on oath such discovery as it made. Notwithstanding that there was an obvious conflict of interest between Mr Gilbertson and Autumn in relation to the issues in this case - not least in that it was in Autumn's interests to deny all knowledge of any breach and in Mr Gilbertson's interests to say that he had made full disclosure to Autumn (or the trustees) - Mr Thomas confirmed in his evidence at trial (transcript, 7 May 2012, page 71, lines 7-9) that Autumn had not taken its own independent legal advice. Not to do so would, he said, be cheaper and would simplify the process of getting the legal advice.

In those circumstances it is hard to see what further evidence Renova needed to adduce or rely upon in order to establish that Mr Gilbertson was the directing mind and will of Autumn in relation to the loan and the receipt of the new PEL shares. Autumn's suggestion that Mr Thomas's independence of mind is demonstrated by his refusal to make the loan on an interest free basis is not well-founded: the evidence is

clear that it was Mr Sean Gilbertson (and not Mr Thomas) who actually proposed that interest on the loan be paid at the rate of 1½% - in order to make the loan “look commercial” - and that Mr Thomas agreed to that proposal.

213. In my view, the submissions advanced in respect of this issue on behalf of Renova are to be preferred to those advanced on behalf of Autumn. I am satisfied that the judge was correct to hold (at paragraph 17.10 of his judgment) that there was never any doubt that Mr Thomas would comply with Mr Gilbertson’s wishes in relation to the funding of the acquisition of the Fabergé Rights and the receipt of the new PEL shares. In relation to that transaction Mr Gilbertson was the directing mind of Autumn; and, accordingly, his knowledge is to be attributed to Autumn in that context.

(b) The attribution to Autumn of Mr Thomas’s knowledge

214. In advancing the submission that the judge was wrong to conclude that Autumn could be said to have the requisite knowledge as a consequence of what Mr Thomas knew or should have known - and, in particular, to hold that Mr Thomas should have known, if he had made appropriate independent enquiries, that the Fabergé Rights were being acquired by Mr Gilbertson in circumstances which amounted to a breach of his fiduciary duties - Autumn invites the Court to have regard to the chronology of events (which it summarised as follows): (i) on 2 January 2007 Mr Gilbertson telephoned Mr Thomas to request that the trust make an investment of US\$9.5 million to acquire the Fabergé Rights for PEL plus a further US\$0.5 million working capital; (ii) later on that day Mr Sean Gilbertson had a conversation with Mr Thomas in which he explained to Mr Thomas that the “investment” the trust was being asked to make was a loan; (iii) on 3 January 2007 Mr Thomas approved the loan, indicating that he anticipated that it would be on commercial terms; (iv) on 4 January 2007 Mr Sean Gilbertson sent an email to Mr Thomas indicating that the loan would not be on commercial terms; but would be a one-year interest free arrangement, secured against the assets and receivables of PEL. (v) later on that day, Mr Sean Gilbertson spoke to Mr Thomas - and to Mr Daniel Hawson (a co-director of the corporate trustee) - on the telephone. They agreed a commercial rate of interest; (vi) later, but also on 4 January 2007, Mr Thomas committed Autumn to making the loan and instructed that the funds be wired to the K-MIC account, the details of which he had been given; (vii) on 5 January 2007 Mr Thomas informed Mr Gilbertson that he could “confirm that the USD9.5 million was sent yesterday for value yesterday” and that he had authorised the payment “on the

basis that the Loan Agreement will stand as currently drafted (allowing for some minor amendments).” With that chronology in mind, it is said on behalf of Autumn that:

- (1) In the course of the telephone conversation on 4 January 2007 (before authorizing the loan), Mr Thomas had asked Mr Sean Gilbertson whether PEL (which, as he observed, had been established as recently as 1 December 2006) was a “shell company, without anything else in it?”. Mr Sean Gilbertson’s response was:

“That is absolutely correct, it is an absolute fresh start and I can’t even remember how many shares were issued, I mean it’s probably one or two or something along those lines and there is -- it would have been issued to a thing called Pallinghurst Resources Management LP, which is our fund entity.”

Mr Thomas then asked “who’s the sort of shareholders behind that?” and was told:

“Well, there aren’t shareholders per se, I mean it’s - it’s literally a fund entity, so basically it’s the fund entity into which the various investors of our fund would come into. At this point in time, there are basically zero investors, because the documentation - you’ve got all the documentation, Daniel has had the unfortunate task of having to trawl through it all, but the documentation is not signed and there are no technical investors in the fund entity itself. However, um, Brian serves as the chairman of that fund and it’s by virtue of all the groundwork that we’re doing that we’re able to put this transaction into that structure, which obviously makes the fund that much more appetising.”

It was not suggested to Mr Thomas at the trial that he should have disbelieved what he was told by Mr Sean Gilbertson in that telephone conversation.

- (2) In those circumstances, it should not be in dispute that Mr Thomas had reason to believe (i) that PEL had no substantial shareholders, (ii) that there were no investors in the Fund; (iii) that the Fund documentation was yet to be effected; and (iv) that Mr Sean Gilbertson and his father, Mr Gilbertson, saw themselves as free to acquire the Rights in PEL as an attraction to a potential investor in the Fund.
- (3) There was nothing complicated or obscure in what Mr Sean Gilbertson told Mr Thomas; nothing of which it could sensibly be contended that it was unconscionable of Mr Thomas not to have enquired further; and the judge was wrong to have ignored that conversation on 4 January 2007 and to focus his attention on the earlier conversation (on 2 January 2007) in which Mr Gilbertson explained that Mr Vekselberg would be “pissed off” to discover that Mr Gilbertson had acquired the Rights without doing a deal with him.
- (4) The judge was wrong to hold (at paragraph 17.16 of his judgment) that Mr Thomas knew, or could be taken to know, that Mr Gilbertson was a director of the Company or that the Company had a place in the Pallinghurst structure; and wrong to

hold (implicitly) that Mr Thomas knew, or could be taken to know, that Mr Vekselberg represented an interest in the Fund and that the explanation for Mr Vekselberg being “pissed off” was likely to reflect a breach of fiduciary duty to the Master Fund, rather than any agreement or understanding he may have had with Mr Gilbertson personally or, perhaps, simply the fact that he had not got his own way. None of those propositions could be sustained, in that:

- (i) It was quite unrealistic to think that Mr Thomas would know that Mr Gilbertson was a director of the Company. It was not alleged that Mr Thomas had been told that Mr Gilbertson was a director of the Company; or that he had seen any document which indicated that Mr Gilbertson was a director of the Company.
 - (ii) It was quite unrealistic to think that Mr Thomas would have understood the place of the Company in the Pallinghurst Structure, or that (even if he did understand the Company’s place in the structure) he would have understood that that place in the structure gave the Company an interest in any opportunity which might be exploited by the Master Fund. Indeed, had Mr Thomas acquainted himself with the full suite of documentation that Mr Hewson was sent by Mr Sean Gilbertson on 7 September 2006, he would have seen that the Company was only to receive US\$20,000 per year to cover its administrative expenses and that it was to have an Executive Committee, the members of which were charged with dealing with Restricted Matters.
 - (iii) The judge identified no basis on which he might have found that Mr Thomas knew anything of significance about Mr Vekselberg.
 - (iv) The judge identified no basis on which he might have found that Mr Thomas knew that the relationship between Mr Gilbertson and Mr Vekselberg was governed within the Pro Forma Structure rather than, for example, a separate agreement such as the Letter Agreement.
- (5) The judge’s view (expressed at paragraph 17.16 of his judgment) that Mr Thomas should have made further enquiries is difficult to reconcile with the fact that the further enquiries that Mr Thomas did make provided him with the assurance that the judge expected him to seek and obtain. If Mr Thomas failed to make further enquiries that, it was not because he wilfully failed to do so, or closed his eyes to the obvious: rather it was because, in the light of what he had been told by Mr Sean Gilbertson - which he had no reason not to believe - there was no need for any further enquiries.
- (6) Mr Gilbertson and Mr Sean Gilbertson considered themselves to be acting

perfectly properly. Even if the judge were correct to hold otherwise - it cannot sensibly be said that the matter was so obvious that Mr Thomas should have dismissed the assurances given to him by Mr Sean Gilbertson. Indeed, it is unclear what Mr Thomas might have been expected to do which would have caused him to reject what Mr Sean Gilbertson told him, short of instructing lawyers to carry out an exhaustive due diligence or demanding to speak directly to Mr Vekselberg.

- (7) The judge appears to have assessed the conduct of Mr Thomas on the basis of a presumption that had no relevance to his actual state of mind; in that the judge found (at paragraph 9.49 of his judgment) that the new PEL shares were issued on “or with effect from” 3 January 2007. The relevant date for assessing the knowledge of Mr Thomas must be the actual date of receipt of the new PEL shares by Autumn (said to have been on or about 19 January 2007): for the judge to have assessed Mr Thomas’s knowledge on an earlier (and notional) date of issue was wrong in principle.
- (8) Equity operates on the conscience; and that the “mere fact that Mr Thomas failed to join up the dots as the learned judge would have had him do” does not show him to have acted unconscionably. Mr Thomas knew Mr Gilbertson and Mr Sean Gilbertson well enough to have formed a view of them; and the view that he had formed was favourable. In the circumstances, Mr Thomas relied upon what they told him; and, it is said, there was nothing so inherently implausible in what they told him that he can fairly be criticised for having done so.

215. In response to those submissions it is said on behalf of Renova that the judge was right to conclude (at paragraph 17.16 of his judgment) that Mr Thomas’s knowledge was sufficient to support the view that it would be unconscionable for Autumn to retain the PEL shares issued to it in January 2007. In particular:

- (1) The judge’s conclusion, it is submitted, was consistent with the evidence at trial, in that:
 - (i) The draft Pallinghurst Structure documents had been sent to Mr Thomas’s colleague, Mr Daniel Hawson, on 7 September 2006 under cover of a note stating that the Pallinghurst Structure entities had all been set up except the feeder fund. Mr Thomas accepted in evidence that he had discussed the structure of the fund with Mr Hawson in broad terms; and that he recalled looking at the structure chart and flow of funds (transcript, 7 May 2012, page 16, line 22, page 17, line 5). Further (as the judge noted at paragraph 9.45 of his judgment), when Mr Thomas was asked by Mr Gilbertson in the telephone

conversation on 2 January 2007 whether he was “familiar with Pallinghurst”, his answer was unqualified: “I am, yes, yeah”.

- (ii) Mr Thomas would have seen from the structure documents that the BPG Discretionary Settlement had a 50% shareholding in the Company. It is probable, given that he had seen all the structure documents, that he knew that Mr Gilbertson was a director of the Company. He was unwilling to accept that in evidence (transcript, 7 May 2012, page 43, line 5, to page 45, line 4); stating that he could not recall whether he knew that Mr Gilbertson was a director of the Company. In the light of that evidence, the judge was entitled to take the view (at paragraph 17.14 of his judgment) that he found it hard to believe that Mr Thomas did not know that Mr Gilbertson was a director of the Company and to conclude that he probably did.
- (iii) Mr Thomas could see that the other 50% shareholder of the Company was Renova; and so would know that Renova had an interest in the Pallinghurst Structure.
- (iv) During their telephone conversation on 2 January 2007 Mr Gilbertson told Mr Thomas:
 - (a) that the original intention had been to acquire the Fabergé Rights “through Pallinghurst”, but that Mr Vekselberg had insisted that (if he were to fund the purchase) he wanted the brand transferred to one of his private companies which would then license it on to “Pallinghurst” to develop;
 - (b) that the Fabergé Rights had been purchased by PEL under the SPA;
 - (c) that PEL was “a subsidiary of Pallinghurst”;
 - (d) that the reason why Mr Gilbertson wanted the funds from his trust was to be able to finance part of the completion payment himself as part of a consortium “rather than as Pallinghurst”; and
 - (e) that it was necessary to establish a corporate vehicle (which became Autumn) - through which to make the investment - because the trust was not being asked simply to lend to PEL/Pallinghurst but to invest in the Fabergé Rights *per se*.

It was against that factual background that Mr Thomas asked Mr Gilbertson in the course of the telephone conversation on 2 January 2007 what Mr Vekselberg’s thoughts would be “if you do this without using Pallinghurst”; a question to which Mr Gilbertson’s response was “He’ll be extremely pissed off I would think”.

- (2) It is said that it was completely understandable (indeed, that it was positively desirable) in those circumstances that Mr Thomas would want to know what Mr

Vekselberg's reaction would be to the course proposed by Mr Gilbertson: in that he (Mr Thomas) knew and understood, at the very least, that Mr Vekselberg and Mr Gilbertson were in business together, that the proposed acquisition was contrary to the express wishes of Mr Vekselberg (in that what Mr Vekselberg wanted was to take the Fabergé Rights into one of his own companies and license them back to the Pallinghurst Structure), that Mr Vekselberg was not aware of what Mr Gilbertson was proposing to do and that the acquisition involved third parties. Mr Thomas asked the question that he did because, as he accepted in evidence (transcript, 7 May 2012, page 50, line 19, to page 51, line 19), he knew that the original intention had been to buy the Fabergé Rights "through the Pallinghurst fund" and that what Mr Gilbertson was proposing was contrary to that proposal. He knew, or ought to have appreciated, that the effect of what Mr Gilbertson was proposing was that the Pallinghurst Structure, having obtained the benefit of the Fabergé Rights as purchaser under the SPA, would end up without any interest (even as licensee) in the value of those rights. It follows that Mr Thomas knew, or ought to have realised, that the reason why Mr Vekselberg would be "extremely pissed off" was because Mr Gilbertson was doing something he was not entitled to do vis-à-vis Renova and the Pallinghurst Structure and that the Pallinghurst Structure would lose out.

- (3) In those circumstances, it is submitted, the judge's conclusions (at paragraph 17.16 of his judgment) are supported by the evidence as to what Mr Thomas knew of (i) Mr Gilbertson's role as director of the Company, (ii) Mr Vekselberg's interest in the Pallinghurst Structure and (iii) the adverse effect of Mr Gilbertson's proposed course on the interests of the Pallinghurst Structure. The judge was right to hold that Mr Thomas should, as a minimum, have asked how or why it was thought that the Pallinghurst Structure would benefit if the Master Fund's interest in PEL was to be reduced from 100% ownership to less than 1% ownership.
- (4) It is said that Autumn's reliance on what Mr Thomas was told by Mr Sean Gilbertson in the course of their telephone conversation on 4 January 2007 is misplaced. There was nothing in that conversation to explain to Mr Thomas why Mr Vekselberg would have been "pissed off" if the purchase from Unilever was completed "without using Pallinghurst"; and nothing in that conversation to explain to Mr Thomas how or why it was thought that the Pallinghurst Structure would benefit if the Master Fund's interest in PEL was to be reduced from 100% ownership to less than 1% ownership. Further, (as Mr Thomas must have realized, because he could see from the structure documents that Renova had a share in the

Pallinghurst Structure) what Mr Sean Gilbertson told him in that conversation was inaccurate and incomplete: in that there was no mention of Renova, no mention of the fact that Renova had spent US\$3.5 million in setting up the Pallinghurst Structure, and no mention of the fact that the Pallinghurst Structure entities existed and had already conducted some business (the May 2006 offer for the Rights, the Angola deal and Project Charlie).

- (5) For Autumn to suggest that the “mere fact that Mr Thomas failed to join up the dots as the learned judge would have had him do” does not show him to have acted unconscionably is wrong. Properly understood, the criticism of Mr Thomas’s conduct was not that he “failed to join up the dots”. The dots, it is said, were joined up for him by what Mr Gilbertson had told him; and if Mr Thomas “genuinely did not see the ugly shape made by the dots” then that was sufficiently culpable to constitute unconscionable conduct. *A fortiori* in circumstances where Mr Thomas was in a position of trust and had a duty to act independently and to make proper inquiry; and where he knew, as he did, that the new shares were in essence a gift. It is no answer for Autumn to suggest, in answer to the criticism that “Mr. Thomas would not want to upset or disagree with his client”, that “the vast majority of professionals will feel the same way”; or, in answer to the criticism that Mr Thomas was “very ready to comply with Mr. Gilbertson's requirements”, that (as the settlor and a beneficiary of the BPG Settlement), “Mr Gilbertson was entitled to expect Mr Thomas to have regard to his wishes insofar as it was proper to do so without fettering his discretion”; or, in answer to the criticism that Mr Thomas was willing “to place great reliance upon [Mr Gilbertson], that “on the basis of his past dealings with Mr Gilbertson Mr Thomas had the highest regard for him”.

216. Again, I take the view that the submissions advanced in respect of this issue on behalf of Renova are to be preferred to those advanced on behalf of Autumn. I am satisfied that the judge was correct to hold (at paragraph 17.16 of his judgment) that Mr Thomas knew, or ought to have realized, that what Mr Gilbertson was asking him to do on behalf of Autumn in relation to the funding of the acquisition of the Fabergé Rights and the receipt of the new PEL shares was, or was likely to be contrary to the interests of the Master Fund; and so was likely to be in breach of his (Mr Gilbertson’s) fiduciary duties as a director of the Company; and that “proceeding to implement Mr Gilbertson’s request in the circumstances without more information and without the knowledge of Renova and/or Mr Vekselberg would be inappropriate for a prudent

trustee. In so far as Mr Thomas's own knowledge was of relevance - given the judge's finding (with which I concur) that Mr Gilbertson was the directing mind of Autumn in this context - it is not, I think, in dispute that his knowledge is to be attributed to Autumn.

217. It follows that if (and notwithstanding that) Autumn received the new PEL shares as a purchaser for value, it held those shares as a constructive trustee for the Master Fund on the basis of "knowing receipt".

218. More generally, it follows, also, that - for the reasons set out in this section of my judgment - I reject Autumn's contention that the judge was wrong to hold that it was liable to account as a constructive trustee for the PEL shares which it received in January 2007.

Was the judge wrong in failing to hold held that the entirety of Autumn's shareholding in Fabergé Limited (and not just the 25,000 shares which represented the 25 shares issued by PEL in January 2007) should be held on constructive trust for (and transferred to) the Master Fund.

219. As I have said, the judge gave effect to the conclusion which he had reached at paragraph 17.20 of his judgment - that Autumn held the shares issued to it by PEL in January 2007 (which had become 25,000 ordinary shares in Fabergé Limited, following a change of name and a sub-division of shares in 2008) as constructive trustee for the Master Fund - by the declaration which he made in paragraph 1 of his order of 6 November 2012 and the direction (in paragraph 2 of that order) that Autumn transfer those 25,000 shares to the Master Fund. In a ruling delivered on 5 November 2012 (following a post-trial hearing held on 26 October 2012), the judge made it clear that he did not intend to include in that declaration or in that direction any shares in Fabergé Limited subsequently acquired by Autumn. The relief sought by the Renova Parties in their cross-appeal (Appeal No 22 of 2012) includes an order that it be declared that Autumn holds a further and additional 16,190,575 ordinary shares in Fabergé Limited as constructive trustee for the Master Fund, and that Autumn shall forthwith transfer full legal title in those further shares to the Master Fund.

220. It is, I think, common ground between the parties - although not pleaded in Renova's amended statement of claim - that, following the sub-division of the original shares issued to it by PEL in January 2007 and the change of name, Autumn acquired further shares in Fabergé Limited in the amounts and on the various dates between 13 February 2008 and

17 November 2010 set out in the table to which Mr Thomas had referred at paragraph 25 of his expert report; and that those acquisitions were funded by, or through, Autumn in an amount of US\$1,455,466. It is said that the purpose and effect of those acquisitions was to maintain Autumn's proportionate interest in the share capital of Fabergé Limited. Save that the judge referred at paragraph 19.8 of his judgment - albeit, not in this context - to a rights issue in September 2009, he made no findings of fact as to the number of further shares acquired by Autumn, the circumstances in which those further shares were acquired or the cost of acquisition.

221. In advancing their claim that Autumn holds a further and additional 16,190,575 ordinary shares in Fabergé Limited as constructive trustee for the Master Fund, it is said on behalf of the Renova Parties that the judge erred in that he failed to pay any or any adequate attention to the fact that Renova had argued in its opening at trial (at paragraphs 135 and 136 of its skeleton opening submissions) and in its closing written submissions (at paragraph 215) that Autumn's entire holding of shares in Fabergé Limited should be the subject of a constructive trust; failed to pay any attention to the fact that Renova's arguments in support of that claim had not been addressed by the Gilbertson Parties in their closing submissions; and failed to give any reasons for rejecting Renova's arguments. In particular, it is said that, notwithstanding that the claim was expressly brought to his attention at the post-judgment hearing on 26 October 2012, following which he made certain changes to the written judgment which he had issued, the judge did not amend that judgment to explain why he was rejecting those arguments.

222. In response to the criticism that the judge failed to address Renova's claim that Autumn's entire holding of shares in Fabergé Limited should be the subject of a constructive trust, it is said on behalf of Autumn that the judge was correct to take the view that that claim was not before him. The claim had not been pleaded (as Renova acknowledged at the post-trial hearing on 26 October 2012); and counsel for the Renova Parties expressly disclaimed any intention of applying to amend the pleading in order to raise it; rather, counsel submitted (at that post-trial hearing) that it was sufficient that Renova had raised the issue in its opening skeleton and that the Gilbertson Parties allowed the claim into the action by failing to raise any objection to it at that time. But that submission could not be sustained in the circumstances that the Gilbertson Parties had noted in their written opening that "Renova had not formulated any claim in respect of [the] later acquired shares" and that Renova did not seek leave to amend to add any such claim, "even though it appreciated that it had no such claim on its pleadings".

223. In summarising Renova's claim (at paragraphs 6.5 and 17.1 of his judgment delivered on 5 November 2012) the judge had said this:

"6.5 With regard to Autumn, the Plaintiff claims that it should account for the shares that it was given gratuitously and now holds in Fabergé Limited (formerly PEL)"

"17.1 The Plaintiff's claim against Autumn is to account as a constructive trustee for the new shares in PEL issued to it or their value, on the ground that it knowingly received them as property misapplied or procured to be misapplied by Mr. Gilbertson in breach of his fiduciary duties to the Company. Alternatively, Autumn is said to be liable to account as a constructive trustee on the ground that it was a volunteer, since it did not pay for the new shares in PEL."

He made it clear, at paragraph 2.4 of the supplemental ruling which he gave on the same day (following the post-trial hearing on 26 October 2012), that he took the view that no claim in respect of the additional 16,190,575 ordinary shares in Fabergé Limited was before the court at trial. He said this:

"2.4 In the instant case I consider that it is clear from the judgment as a whole that the court was considering, and only considering, the position in relation to the 25 shares in PEL, which it has found were gratuitously procured to be issued to Autumn by Mr. Gilbertson on or with effect from 3rd January 2007. The Court was not considering and did not consider any further or other shares in that company which were subsequently purchased by Autumn. Paragraphs 6.5 and 17.1 of the judgment summarizing the Plaintiff's claim make that clear, as do other paragraphs of the judgment, such as paragraphs 17.3 and 19.30."

In my view there is no doubt that the question whether a claim in respect of the additional 16,190,575 ordinary shares in Fabergé Limited were held by Autumn as constructive trustee for the Master Fund had been before the court at the trial was an issue at the hearing on 26 October 2012; and that it is clear that the judge held that the answer to that question was "No". Given that the Gilbertson Parties had pointed out, in their written opening submissions, that the claim had not been pleaded and that, nevertheless, Renova had declined to seek leave to amend its pleading in order to raise it, I find it impossible to see how it could be said that the judge was wrong to reach that conclusion. In any event, the Renova Parties have not appealed that ruling. In my view, it is not open to Renova to contend, on this appeal, that the Gilbertson Parties allowed the claim in respect of the additional 16,190,575 ordinary shares in Fabergé Limited into the action by failing to raise any objection to it at the appropriate time.

224. On the basis that the claim in respect of the additional shares in Fabergé Limited was not before the court at the trial, the judge cannot be criticized for failing to address arguments advanced in support of that claim in the course of Renova's opening and closing submissions.

225. Nevertheless - notwithstanding that (understandably in the circumstances) the judge made no relevant findings of fact in respect of Renova's unpleaded claim in respect of the additional 16,190,575 ordinary shares in Fabergé Limited - the Renova Parties seek to pursue that claim in Appeal No. 22 of 2012 . It is said on their behalf that the judge would have been wrong to give Autumn and/or Mr Gilbertson an allowance in respect of the sums paid by Autumn in order to maintain its proportionate shareholding - in that (it is said), as a matter of law, those sums were spent maintaining the dishonestly diverted property and so neither Mr Gilbertson nor Autumn was entitled to an allowance in respect of them - and that the judge ought to have held that the additional 16,190,575 ordinary shares in Fabergé Limited were simply accretions to the 25,000 shares already held on constructive trust. In developing those submissions it is said on behalf of the Renova Parties that:

- (1) It is necessary to have in mind that all but US\$100,000 of the monies paid by Autumn in acquiring additional shares in Fabergé Limited were paid after the date of the commencement of these proceedings (20 May 2008); and so were paid by Autumn at a time when it knew that an adverse claim in relation to its existing holding of Fabergé Limited shares was being pursued. Given that Autumn was (as the judge held) a constructive trustee of the PEL shares issued in January 2007 - and given, critically, that Autumn could only acquire the additional shares by the exercise of rights attached or incidental to the shares which it held on constructive trust - the additional shares which it acquired should be treated as accretions to the shares which it already held; were themselves property traceable to the original single share in PEL by the Master Fund and were received by Autumn with the requisite knowledge of Mr Gilbertson's breach of fiduciary duty. Accordingly, Autumn must hold the entirety of its present shareholding in Fabergé Limited on constructive trust for the Master Fund. In support of that proposition, reliance is placed, by way of analogy, on observations in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.
- (2) The judge failed to appreciate that he had not ordered Autumn to account *in personam* as constructive trustee for the value of the 25 PEL shares issued in January 2007; but, rather, had declared that Autumn held those shares *in specie* on constructive trust for the Master Fund. It was on that basis that he made the order for the transfer of the 25,000 Fabergé Limited shares to the Master Fund. That was a proprietary remedy which recognised the Master Fund's restitutionary rights; and was appropriate, given that a proprietary claim (including a tracing claim) had been clearly pleaded by Renova in its amended statement of claim (at paragraphs 31.2 to 31.4 and 32.2 and 32.3). In those circumstances the judge was wrong to make no order for the transfer

of the additional 16,190,575 shares in Fabergé Limited.

- (3) Neither Mr Gilbertson nor Autumn was entitled to an allowance in respect of the costs of acquisition of the additional shares. As a matter of equitable principle there is no allowance to be given by way of compensation for work and effort done by a defaulting fiduciary where the defaulting fiduciary comes to court without clean hands. In support of that proposition reliance is placed on *Guinness plc v Saunders* [1990] 2 AC 663. Neither Autumn nor Mr Gilbertson had clean hands.

223. In response to the claim in respect of the additional Fabergé Limited shares, it is said on behalf of Autumn, first that there is no foundation of fact upon which a tracing claim in respect of the additional shares can be advanced on appeal; and, second, that - even if Renova could demonstrate that the Master Fund could establish a right to trace in respect of those shares - it would be wrong, as a matter of law, for this Court to grant the relief sought save upon terms which required the Renova Parties to reimburse to Autumn the monies (US\$1,455,466) which it had expended in acquiring those additional shares. In developing those submissions it is said that:

- (1) In seeking to trace into the additional 16,190,575 Fabergé Limited shares, the Renova Parties are obliged to contend that the right to acquire those shares was a right attached, or incidental, to the PEL shares issued to Autumn in January 2007; so that the constructive trust to which (as the judge held) the 25,000 Fabergé Limited shares were subject extends to the additional shares acquired by the exercise of that right. But Renova failed to plead, or to establish at trial, that any such right was attached, or incidental, to the PEL shares issued in January 2007; the judge made no finding to that effect; and there is no appeal from his failure to do so. Further, it is said, the fact that Fabergé Limited shares carried no pre-emption rights until the articles of association were amended in 2009 suggests that the factual position differed from time to time.
- (2) It would have been wrong, as a matter of law for the judge to order the transfer of the additional 16,190,575 ordinary shares in Fabergé Limited to the Master Fund - or for this Court now to do so - save on terms that the Master Fund reimburse Autumn for the price which Autumn paid for those shares, in that:
 - (i) an allowance may be given for work and effort done to maintain trust property by an innocent constructive trustee; and monies properly expended by a constructive trustee (innocent or otherwise) may be allowed as a deduction on the taking of an account; and
 - (ii) where new property is acquired using trust property and non-trust property, it may be possible for those interested under the trust to claim part of, or an

interest in, the new property on a *pro rata* basis; but it is not possible for them to claim the whole of the new property, *a fortiori*, not possible for them to claim the whole of the new property without giving credit for the non-trust property by the use of which it has (in part) been acquired.

In support of the first of those propositions, Autumn relies on observations in *Boardman v Phipps* [1967] 2 AC 46, and *Ultraframe (UK) Limited v Fielding* [2005] EWHC 1638 (Ch) at [1513], [1514] and on the statement in *Snell's Equity* (32nd Edition) at paragraph 7-055 that the obligation to account is to account for actual or net profits. In support of the second, Autumn relies on the statement in Underhill and Hayton, *The Law of Trusts and Trustees* (18th Edition), Article 90.1(2) (at pages 1150, 1151).

- (3) The decisions in *Guinness plc v Saunders* [1990] 2 AC 663; and *A-G for Hong Kong v Reid* [1994] 1 AC 324 (PC) - on which the Renova Parties seek to rely - provide no support for the propositions advanced. The issue in the *Guinness* case was whether a consultant (Mr Ward) should receive an allowance, against a claim by Guinness plc for re-payment of monies which he had received for services which he had rendered in connection with the takeover of the Distillers' Company plc, by way of compensation for his work and effort in that context. The Renova Parties seek to equate compensation for work and effort with reimbursement of monies paid to acquire property which would not otherwise have become subject to the trust. There is no true analogy. The issue in the *Reid* case was whether monies acquired by a senior public official (Mr Reid) by way of a bribe (and so in breach of fiduciary duty) were held on constructive trust for the Crown and traceable into the properties that, it was alleged, Mr Reid had used those monies to acquire. There was no evidence that any of the monies that he invested in those properties had their source otherwise than from the bribe. The *Reid* case, also, affords no true analogy with the present case.
- (4) The reason why Renova did not include a claim in respect of the additional 16,190,575 shares in Fabergé Limited in the relief sought in these proceedings was that the Master Fund had no interest in taking those shares on terms that it reimburse Autumn for the price which Autumn had paid for those shares; in that (amongst other considerations) by the time these proceedings were commenced the additional shares were not worth the amount that Autumn had paid for them. It is pertinent to have in mind that the Renova Parties did not offer (at trial) - and have not offered (in the context of their cross-appeal) - to accept a transfer of the additional 16,190,575 shares on terms that recognise that Autumn has invested US\$1,455,466 of its own monies in

acquiring those shares.

In those circumstances, it is said on behalf of Autumn, that - in the absence of a relevant pleading, appropriate evidence, necessary findings or a willingness to make any allowance for the cost of Autumn's acquiring the additional 16,190,575 Fabergé Limited shares - the Renova Parties are obliged to contend that it makes no difference whether those shares were acquired by the exercise of a legal right; whether that right (if any) had any value; or whether Autumn acquired those additional shares by payment (and in what amount) out of its own monies. It is accepted that their claim might be arguable if the Renova Parties were willing to recognize the fact that Autumn should be reimbursed for the monies spent in acquiring the additional Fabergé Shares; but, as it stands, "it is just frivolous and plain greedy".

226. In my view the judge was correct in refusing to hold that the additional 16,190,575 shares in Fabergé Limited acquired by Autumn were held upon constructive trust for (and should be transferred to) the Master Fund. I agree that the material before him at the trial did not enable the judge to make the findings of fact which would have been necessary in order to support Renova's claim to those additional shares. Nor is this Court in a position to do so.

Was the judge wrong to grant relief against Autumn by way of an account of profits (comprising the payment which Autumn received on 28 September 2007 in respect of interest on the loan which it had made to PEL on 3 January 2007); and, if not, was the judge wrong to award pre-judgment interest from 3 January 2007 (rather than from 28 September 2007) on the payment which Autumn received

227. At paragraph 3 of his order of 6 November 2012 the judge ordered that Autumn pay to the Master Fund the sum of US\$2,306,320.35. It is stated in the order that that sum included pre-judgment interest of US\$507,347.35 from 3 January 2007 until the date of the order. The balance (US\$1,798,973.00) represented a payment in respect of interest made by Fabergé Limited to Autumn on 28 September 2007; being interest on loans (amounting in aggregate to US\$10 million) which had been made by Autumn to PEL (as Fabergé Limited then was) in January 2007, at the time of the acquisition of the Fabergé Rights. In its appeal from paragraph 3 of the order of 6 November 2012, Autumn challenges each of the elements which make up the sum which it was ordered to pay.

The payment in respect of interest received by Autumn in September 2007

228. The judge treated the payment received by Autumn in September 2007

(US\$1,798,973.00) as monies for which Autumn was liable to account in respect of profits. At paragraph 17.21 of his judgment (under the heading “The Claim for Profits”), he explained that:

“17.21 Apart from its gratuitous receipt of the new PEL/Fabergé Limited shares, Autumn made profits on the loan to PEL, namely the interest that it was paid. In his witness statement Mr. Thomas explained that on 28th September 2007 the sum of US\$11,798,973.00 was paid by Fabergé Limited to Autumn, representing the loan of US\$9.5m together with the further loan of US\$0.5m for working capital advanced to PEL/Fabergé Limited, together with interest on those sums. His evidence was that the initial interest on the loan was US LIBOR plus 1.5% which at the time would have been a total interest rate of about 7%. However, in May 2007 the interest rate on the loans, including Autumn’s loan, was unilaterally increased by Fabergé Limited to 25% per annum pursuant to a proposed call-option agreement. There was no reasonable explanation by the Gilbertson Parties’ witnesses for this unusually high rate of interest. The total interest paid on the loans was a profit to Autumn in respect of funding of the acquisition of the Rights and the further working capital. The Plaintiff’s argument is that since the acquisition of the Rights was an economic opportunity diverted away from the Pallinghurst Structure by Mr. Gilbertson in breach of fiduciary duty, such profit is directly traceable to that breach. Accordingly, the Plaintiff contends that Autumn is also liable to account for the amount of that interest.”

The judge accepted that argument. At paragraph 19.30 of his judgment (under the heading “Quantum in respect of Autumn”), he said this:

“19.30 As I have already explained, the Plaintiff’s claim against Autumn is for an account in respect of the interest which Autumn received on the loan which it made to PEL out of the BPG Settlement on behalf of Mr. Gilbertson and in respect of the shares which it holds in what is now Fabergé Limited, which were procured to be gratuitously issued to it by Mr. Gilbertson. For the reasons I have already explained, I consider that such account should be given in each case.”

And, at paragraph 20.2, he said this:

“20.2 In relation to the Plaintiff’s claims against Autumn, I have concluded that in the circumstances Autumn must account for the shares in PEL (now called Fabergé Limited) which Mr. Gilbertson gratuitously caused to be issued by PEL to Autumn in January 2007 and also for the interest it received on the loans it made to PEL on behalf of Mr. Gilbertson. . . .”

229. In challenging paragraph 3 of the judge’s order - in so far as it relates to the payment received by Autumn in September 2007 in respect of interest on the loans which it had made to PEL in January 2007 - it is submitted on behalf of Autumn that the judge misdirected himself and erred in law and/or fact in ordering an account of profits comprising that payment. Had the judge directed himself properly, it is said that he should have refused to accede to, or grant any relief in respect of, the claim to the monies paid to it as interest on the loans. In developing those submissions, it is said on behalf of Autumn that:

(1) Autumn and the Gilbertson Parties were entitled to know (from Renova’s pleaded

case) what claims they had to meet at trial. Once Renova had abandoned its contention that Autumn was Mr Gilbertson's *alter ego*, there was no pleaded claim in respect of which relief could be granted in respect of the monies paid to Autumn in respect of interest on the loans which it had made to PEL. In particular, there was no pleaded claim that the Master Fund had any proprietary interest in those monies which could found a claim in knowing receipt. In their written opening submissions at trial (at paragraph 324) the Gilbertson Parties had put the Renova Parties and the court on notice of their objection to any such claim (on the grounds that it had not been pleaded); but Renova made no application to amend its pleaded case in the course of the trial. There was no basis on which the judge could fairly disregard the fact that no claim for knowing receipt of the monies paid as interest on the loans had been pleaded. In support of that submission, reliance was placed on observations in *Rolled Steel Ltd v British Steel Corporation* [1986] 1 Ch 246, at 309G and on Note 18/7/4 in *The Supreme Court Practice 1999*.

- (2) Not only was there no pleaded claim that the payment to Autumn had been made out of the assets of the Master Fund - or that Autumn was in knowing receipt of monies into which assets of the Master Fund could be traced - there was no evidence to support such a claim. In those circumstances, the judge ordered an account of profits against a party (Autumn) which was not in knowing receipt of monies misapplied in breach of trust, and was neither itself a fiduciary nor the *alter ego* of a fiduciary (Mr Gilbertson). He was wrong to do so: there was no juridical basis upon which he could properly hold that Autumn was liable to account to the Master Fund for the monies which it received as interest on the loans which it had made to PEL.
- (3) The judge was wrong to take the view (expressed at paragraph 17.21 of his judgment) that the acquisition of the Fabergé Rights was an economic opportunity of the Master Fund; and wrong to take the view that there was a sufficient nexus between the acquisition of the Fabergé Rights and the receipt of interest on the loans. The Master Fund had no interest in the economic opportunity of earning interest on loans made to PEL in January 2007 (at a time when, it is important to have in mind, the Master Fund owned the whole of the issued share capital of PEL and had no funds of its own out of which to make such loans). Although the opportunity to earn a high rate of interest on a loan could constitute a corporate opportunity - and it may be said that the opportunity to earn the interest would not have arisen unless PEL had taken the US\$9.5 million loan in order to fund the acquisition of the Fabergé Rights - the applicable test for the purposes of tracing is not a "but-for" test: the test is one of nexus and there was no basis on which the

judge could find a sufficient nexus in this case.

230. Further (and in the alternative) it is submitted that - even if he were right to find a sufficient nexus between the acquisition of the Fabergé Rights and the making of the loans to PEL - the judge erred in holding that Autumn should account for the whole of the interest received on those loans. As there was no evidence that Autumn had acted dishonestly, had the claim been properly pleaded by Renova, Autumn would have claimed an equitable allowance in respect of the costs which it incurred in making the loans. Had the judge directed himself properly, it is said that he should have allowed those costs.

231. In response to the submissions advanced on behalf of Autumn in support of its challenge to the judge's order that it account for the monies which it received in September 2007 as interest on the loans which it had made to PEL in January 2007, it is said on behalf of Renova that the receipt of those monies was a profit on funding the acquisition of the Fabergé Rights; and that, given that (as the judge held) the acquisition of the Fabergé Rights was an opportunity diverted away from the Pallinghurst Structure in breach of fiduciary duty, that profit is directly traceable to that breach. It is submitted that, although it may be said that the interest was not paid with the Master Fund's own monies, the test is one of nexus; and that it is clear that there was a sufficient nexus between Mr Gilbertson's breach of fiduciary duty and the receipt of the interest payment. At the least, it is said, there is a sufficient nexus between Mr Gilbertson's failure to disclose to the Company, or to the Master Fund or GPLP, that the loan (at interest) was to be made by a special purpose vehicle controlled by his family trust. Furthermore, the interest was paid by Fabergé Limited out of monies that could be traced back to the Fabergé Rights; in that Fabergé Limited had no monies out of which to pay the interest other than the monies raised by it in September 2007 by way of a rights issue based on its underlying ownership of the Fabergé Rights. Accordingly, it is said, the monies paid to Autumn by way of interest (at 25%) on its loans are directly traceable to the Fabergé Rights and the economic control over them represented by the shares issued by PEL in January 2007.

232. In my view, the judge was wrong to order that Autumn account as a constructive trustee for the payment of US\$1,798,973.00 which it received in September 2007 in respect of interest on the loans made to PEL on 3 January 2007.

233. I accept that (as Autumn submits) the juridical basis on which the judge held that an obligation to account arose in respect of that payment is unclear; in particular, I accept that

there was no sufficient basis on the pleadings for a claim for such an account. But, in the light of the judge's observations at paragraph 17.21, 19.30 and 20.2 of his judgment (to which I have referred earlier in this section), I think it must be assumed that, in reaching the conclusion that he did, the judge accepted Renova's submission that the payment was a profit derived from the funding of the acquisition of the Fabergé Rights which was "directly traceable" to the "economic opportunity" of acquiring those rights which was "diverted away from the Pallinghurst Structure by Mr Gilbertson's breach of fiduciary duty". I am satisfied that he was wrong to do so.

234. At the time when the loans were made (on 3 January 2007) the "economic opportunity" of acquiring the Fabergé Rights lay with PEL as the contracting purchaser from Unilever plc under the SPA dated 22 December 2007. The loans did not have the effect of diverting the economic opportunity of acquiring the Fabergé Rights away from PEL: the effect of the loans was that PEL was able to take advantage of that economic opportunity by using the funds lent to it to complete the purchase. Nor did the loans have the effect of diverting the economic opportunity of acquiring the Fabergé Rights away from the Master Fund (or, more generally, away from the Pallinghurst Structure). As I have mentioned, earlier in this judgment, the judge recorded (at paragraphs 9.26 and 9.27 of his judgment) that it was the common intention of the Gilbertson Parties on the one hand and the Renova Parties on the other hand (as had been agreed between Mr Sean Gilbertson and Mr Kalberer in the course of a telephone conversation on 20 December 2006) that the role of the Master Fund would be as guarantor of PEL's obligations under the SPA; it was not intended (at least, not intended from and after 20 December 2006) that the Master Fund would, itself, be the purchaser of the Fabergé Rights. The judge did not find that Mr Gilbertson was in breach of his fiduciary duty in failing to procure that the Master Fund lent monies to PEL to fund the completion of the purchase: there was no evidence that the Master Fund was in a position to do so.

235. Immediately before the loans were made on 3 January 2007, the interest of the Master Fund in the acquisition of the Fabergé Rights by PEL was as the owner of 100% of the issued capital of PEL. The making of the loans did not alter that position. What did alter that position was Mr Gilbertson's breach of fiduciary duty (as the judge found) in procuring the dilution of the Master Fund's ownership of the share capital of PEL by the issue of 100 new PEL shares to the members of the Consortium. But - as the judge found, in the context of addressing the question whether Autumn received the new PEL shares as a volunteer and not as a purchaser - the terms of the loans were agreed without regard to

the decision to issue the PEL new shares. In those circumstances, although it can be said that the payment by PEL to Autumn in September 2007 of interest on the loans made in January of that year was a profit derived from the funding of the acquisition of the Fabergé Rights and that the “economic opportunity” to fund the acquisition arose from PEL’s rights as contractual purchaser under the SPA, there is no basis on which it can be said that the opportunity to fund the acquisition or PEL’s rights as contractual purchaser were “diverted away from the Pallinghurst Structure by Mr Gilbertson’s breach of fiduciary duty”. Properly understood, what was diverted away from the Pallinghurst Structure by Mr Gilbertson’s breach of fiduciary duty was substantially the whole (more precisely, 100/101 parts) of the ownership of PEL (and so, indirectly, substantially the whole of the value of the Fabergé Rights after deduction of the cost of acquisition); not the right to receive interest paid by PEL on the loans which enabled it to acquire those Rights.

Pre-judgment interest from 3 January 2007

236. As I have said, Autumn challenges each of the elements which make up the sum which it was ordered to pay under paragraph 3 of the order of 6 November 2012. In challenging the second of those elements - pre-judgment interest pursuant to section 34 of the Judicature Law (2007 Revision) on the payment received by Autumn in September 2007 - it is submitted, first, that - given that (for the reasons advanced in support of the challenge to the first element) it was not open to the judge to hold that Autumn was liable as a “knowing recipient” of the monies which it received by way of an interest on the loans - there was no basis on which he could have awarded pre-judgment interest on that sum; and, second, that - assuming (which is not admitted) that the judge was right to hold that Autumn was liable to account as a “knowing recipient” for those monies - no claim against Autumn based on “knowing receipt” could arise before the payment was actually received by Autumn and so there was no sensible basis on which the judge could have awarded pre-judgment interest in respect of a period before the date (28 September 2007) on which the cause of action accrued.

237. I have explained, in the earlier paragraphs of this section of my judgment, why I take the view that the judge was wrong to hold that Autumn was liable as a “knowing recipient” of the monies which it received by way of an interest on the loans. It follows that I would hold that Autumn is entitled to succeed in its challenge to the order for payment of pre-judgment interest on the first of the grounds advanced: there was no basis on which the judge could have awarded pre-judgment interest on monies which, although claimed in these proceedings, were not, themselves, either paid or properly the subject of an order for

payment. Nevertheless, in case others take a different view, it is necessary that I address the second of the grounds advanced: that there was no basis on which the judge could have awarded pre-judgment interest in respect of a period before the date on which the cause of action in respect of the monies in respect of which Autumn was said to be a “knowing recipient” accrued.

238. In developing that second ground, Autumn pointed out that the statutory provision under which the judge purported to award pre-judgment interest - section 34 of the Judicature Law (2007 Revision) - was in these terms (so far as material):

“34. (1) Subject to rules of court, in proceedings (whenever instituted) before the Grand Court . . . for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest at such rate as the court thinks fit, not exceeding the rate prescribed from time to time by rules of court, on all or any part of the debt or damages in respect of which judgment is given or payment is made before judgment, for all or any part of the period between the date when the cause of action arose, and -

- (a) in the case of any sum paid before judgment, the date of payment; and
- (b) in the case of the sum for which judgment is given, the date of the judgment.”

It is said that if - as the judge thought - the amount which he ordered to be paid by Autumn to the Master Fund on the taking of an account in respect of the monies received by Autumn in September 2007 by way of interest on the loans made in January 2007 was payable as a “debt or damages in respect of which judgment [was] given” for the purposes of section 34(1) of the Law, the power of the court to award pre-judgment interest under that section was limited to interest in respect of “all or any part of the period between the date when the cause of action arose” and (in this case) “(b) ... the date of the judgment”. Accordingly, it is said, the judge was “plainly wrong” to award pre-judgment interest from 3 January 2007, in that:

- (1) The cause of action for knowing receipt is predicated upon receipt. As Sir Terence Etherton, Chancellor, observed, when delivering the judgment of the Privy Council in *Arthur v A-G of the Turks and Caicos Islands* [2012] UKPC 30:

“[31] A Defendant incurs an equitable liability for knowing receipt when he or she acts unconscionably by receiving and retaining trust property with the knowledge that it was transferred in breach of trust. Liability for knowing receipt can also be incurred when property is transferred in breach of a fiduciary duty other than a breach of trust.”

- (2) As Lord Scott of Foscote made clear in *Criterion Properties UK plc v Stratford UK Properties LLC* [2004] 1 WLR 1846, at paragraph [27], “receipt”- in the context of a claim founded on equitable liability for knowing receipt - is to be distinguished from a contractual right to receive:

“[27] . . . The word ‘receipt’ in the expression ‘knowing receipt’ refers to the receipt by one person from another of assets. A person who enters into a binding contract acquires contractual rights that are created by the contract. There may be a ‘receipt’ of assets when the contract is completed and the question whether there is ‘knowing receipt’ may become a relevant question at that stage. But until then there is simply an executory contract which may or may not be enforceable. The creation by the contract of contractual rights does not constitute a ‘receipt’ of assets in the sense that a ‘knowing receipt’ involves a receipt of assets. The question whether an executory contract is enforceable is quite different from the question whether assets of which there has been a ‘knowing receipt’ are recoverable from the recipient. . . .”

- (3) The judge held (at paragraph 17.21 of his judgment, accepting Mr Thomas’s evidence) that Autumn received the payment in respect of interest on the loans on 28 September 2007. That was the date on which the cause of action arose. There was no power under section 34(1) of the Law to award pre-judgment interest in respect of a period prior to that date. Had the judge directed himself properly, he should have held and ordered that pre-judgment interest (if any) should run from 28 September 2007.

239. In response to the submission that the judge was “plainly wrong” to award pre-judgment interest from 3 January 2007, it is said on behalf of the Renova Parties that the judge was entitled and correct to award pre-judgment interest from that date; in that 3 January 2007 was the date when the loans were made to PEL and the contractual right to interest on the loans arose. Although Autumn did not receive payment until September 2007, the relevant chose in action - representing the profit for which Autumn was liable to account - accrued on 3 January 2007. A secret profit is no less a secret profit if the payer is bound to pay it but has not yet done so: the profit is not earned only upon its conversion to cash. It is said that Autumn’s reliance on the observations of Lord Scott in *Criterion Properties UK v Stratford UK Properties LLC* - in support of the proposition that a mere contract cannot be an asset for the purpose of knowing receipt - is misplaced; in that (i) the judge was not shown that case (either at the trial or at the post-trial hearing on 26 October 2012, when he was asked to amend his judgment) and so never had an opportunity to consider it and (ii) the decision in the *Criterion* case was on an appeal from an order made on an application for summary judgment and not after a trial. Further, it is said, Lord Scott referred to no authority to support his view; and it is difficult to accept that executory contracts (for example, cheques, or insurance policies) cannot be assets capable of being traced in equity or received for the purposes of knowing receipt. The Renova Parties invite this Court to decline to follow Lord Scott’s approach; or, at the least, to distinguish that approach on the basis that contractual

rights as against third parties can form an asset capable of being transferred in breach of trust.

240. If (contrary to my view) the judge was correct to hold that Autumn was liable to account as a “knowing recipient” for the monies which it received in September 2007, then I am satisfied that, in awarding pre-judgment interest on the amount (US\$1,798,973.00) for which he held Autumn was accountable, he was wrong to include in the sum awarded (US\$507,347.35) an amount (said to be US\$95,407.18) in respect of interest attributable to the period from 3 January 2007 to 27 September 2007. Even if, as the Renova Parties contend, a debt owed to the defendant by a third party can be the subject of a claim for an account in equity on the basis of “knowing receipt”, it seems to me impossible to hold (on the facts of this case) that, on 3 January 2007, the amount of the interest on the loans for which Autumn was liable to account as a “knowing recipient” was equal to the amount (US\$1,798,973.00) which it received in September 2007. In that context it is relevant to have in mind (i) that the terms of the loan (as recorded in the minutes of the meeting of the directors of PEL held on 3 January 2007) provided for interest on the loan at USD LIBOR plus 1.5%, compounded monthly and payable at repayment of the loan, (ii) that (as the judge recorded at paragraph 17.21 of his judgment) that rate would have been equivalent to about 7% per annum, (iii) that, although (as the judge also recorded, *ibid*) the rate of interest was increased to 25% per annum in May 2007, there was no evidence that the terms as to the payment of interest on the loan were otherwise altered between 3 January 2007 and 28 September 2007 - or that any demand for repayment of the loan was made before 28 September 2007 and (iv) that, in the events which happened, the accrued interest (US\$1,798,973.00) was paid at the same time as the loans were repaid. In those circumstances, as it seems to me, it was not open to the judge to hold that Autumn was liable to account for interest on the loans in the amount of US\$1,798,973.00 (or at all) as a “knowing recipient” before 28 September 2007; it was on that date - and not before that date - that the relevant cause of action (if any) for the purposes of article 34(1) of the Judicature Law (2007 Revision) arose.

Whether, in making no order as to the costs of the action and the counterclaim, the judge exercised his discretion outside the ambit within which reasonable disagreement is possible; and, if so, what orders as to cost should be made.

241. Paragraph 6 of the order dated 6 November 2012 provided that, subject to any earlier orders which required the costs of one party or parties to be paid by another party or other parties, each party should bear its own costs of the proceedings (including any

costs which had been ordered to be in the cause). The judge set out the reasons which led him to make an order for costs in those terms at paragraphs 3.1 to 3.12 of the ruling which he delivered on 5 November 2012, following the post-trial hearing on 26 October 2012.

242. After recording that the Renova Parties had contended that the appropriate order should be that the Gilbertson Parties pay the costs of the action on the standard basis and the costs of the Counterclaim on the indemnity basis and that the Gilbertson Parties had contended that they should be awarded their costs of the action (while accepting that the Renova Parties should have their costs of the Counterclaim but on the standard basis) and reminding himself of the provisions in Order 62, rules 4(2) and 4(5), of the Grand Court Rules, the judge said this:

“3.4. Accordingly the objective of O.62 is that the successful party should recover its reasonable costs or, to put it as in r.4(5), costs should follow the event. However, both rules contemplate that the Court may order otherwise and that must mean that it may do so in the exercise of the generally accepted discretion which it has in relation to costs having regard to the circumstances of the particular case.

3.5. The obvious first question therefore in seeking to apply the general objective is to determine which party was the successful one or, as put in r.4(5), to determine the event which costs should follow. The Renova Parties contend that they succeeded overall and were successful on ‘the main issue’. They say that in the end of the day there was a finding of serious wrong-doing by Mr. Gilbertson and a significant award on liability against Autumn. They contend that the overriding objective should be followed and that they are the successful parties and should accordingly be awarded the costs of the proceedings. They relied on *National Trust for the Cayman Island v Planning Appeals Tribunal* [2002] CILR N.24 and *Banks v Arch* [2004-05] CILR N.40. The Renova Parties submit that the onus is on the Gilbertson Parties to show why the Court should depart from the usual order.

3.6 The Gilbertson parties argue that the Renova Parties did not succeed in obtaining any relief against Mr. Gilbertson and that they effectively lost the principal part of the action. They refer to *Texaco Ltd v Arco Technology Inc* (unreported – The Times, 13th October 1989). The Gilbertson Parties also argue that the relief obtained against Autumn is, in the circumstances, nominal and that the Plaintiff has in effect lost the whole action. In the alternative they rely upon GCR O.62 r.4(5) and submit that in the particular circumstances of this case the Court is entitled to depart from the usual rule in its discretion and award costs as it sees fit. As a final alternative they propose that a fair outcome would be for the parties to each bear their own costs.

3.7 The Renova Parties and the Gilbertson Parties each submitted detailed skeleton arguments which I have considered and taken into account. They also supplemented these in oral submissions which I have also taken into account.

3.8 I have been the judge assigned to and have dealt with the entirety of these proceedings since they were commenced over four years ago in May 2008, culminating in a four week trial in April and May this year. During the course of the proceedings there have been several hotly contested and

significant interlocutory hearings, which have resulted in four substantial written rulings and an *ex tempore* written ruling. A significant issue has been the Renova Parties' discovery, to which I refer below. The issues argued by both parties at the trial departed in several respects from their respective pleadings.

3.9 There is in my view in this case no one obvious event for costs to follow; there has been no one clearly successful party overall. Each party has had victories and defeats on various claims and issues. The Plaintiff has succeeded in establishing Mr. Gilbertson's breach of fiduciary duty but has failed in establishing any consequential loss, notwithstanding the very substantial claim in respect of equitable compensation which it made. If the reasoning of Phillips J. (as he then was) in the *Texaco* case (*supra*) is adopted, the Plaintiff therefore lost the case. The Plaintiff also abandoned its claim against Mr. Gilbertson to account himself for the profit made by Autumn. Although the Plaintiff has established liability against Autumn to account for the gratuitously issued shares, it seems to me that the net gain to the Plaintiff as a result can fairly be said to be minimal in the context of what was claimed. I also consider that, although legally separate, it is somewhat artificial for these purposes in these proceedings to distinguish between Mr. Gilbertson and Autumn in light of my acceptance in the judgment of the Plaintiff's claim that Mr. Gilbertson was the directing mind and will of Autumn. Of course, the Gilbertson Parties' own counterclaims were either withdrawn or have been dismissed, although in the end of the day the counterclaims accounted for a very limited part of the trial and earlier in the proceedings I declined to strike them out. I see the counterclaims as part of the ebb and flow of each parties' various successes and defeats.

3.10. In all the circumstances, I am of the view that there has been no clearly overall wholly successful party. I consider that this is a case in which the overriding objective is either not applicable at all or that it should be departed from and some other order made in light of the circumstances of the case.

3.11. Notwithstanding that discovery did not ultimately feature significantly at the trial, I consider that I should at least have some regard in considering the overall costs of the proceedings, to the Renova Parties' failure to comply with their discovery obligations. I expressly found that to be blameworthy and culpable, although in the end of the day I did not consider that it precluded the possibility of a fair trial. Nonetheless, it seems to me that, in exercising my discretion in relation to the costs of the proceedings, blameworthy and culpable conduct of one of the parties in relation to a very important part of the proceedings is at least a factor which I am entitled to take into account, at least to some extent, in reaching my overall decision.

3.12 In my view it would not be fair or appropriate to award the costs of the whole proceedings to either party. On the other hand an issue by issue allocation of costs would, in my opinion, be very difficult to apply in practice in this case and would be likely to result in interminable argument and debate, which would not be desirable. In any event the costs payable by each party on an issue by issue basis would, in this case, probably largely cancel each other out. In all the circumstances, I consider that the fairest approach in light of the conduct of these proceedings over the past four years and their eventual outcome after trial is that each party should bear their own costs of the proceeding, and I so order. That is, of course, subject to all orders for costs in favour of one or other party which have already been made and which shall stand and be complied with."

243. In its notice of appeal in Appeal No. 21 of 2012 Autumn seeks an order that the Renova Parties pay Autumn's costs of the proceedings in the Grand Court (including any costs ordered to have been costs in the cause) on the standard basis, to be taxed if not agreed. An order in those terms is sought, also, in paragraph 41(4) of Autumn's Memorandum of Grounds of Appeal filed on 1 February 2013; but no grounds for making such an order are advanced in that Memorandum. An order in those terms is amongst the relief listed at paragraph 304 of the Written Submissions dated 24 May 2013 served behalf of Autumn in support of its appeal; but, again, the basis upon which that order is sought is not explained. At paragraph 120 of the Written Submissions dated 21 June 2013 served on behalf of the Gilbertson Parties in opposition to Renova's cross-appeal (Appeal No. 22 of 2012) it is said that:

"120. The Gilbertson Parties urged the learned judge to award costs against the Renova Parties to reflect, amongst other things, the court's disapproval of the Renova Parties' deliberate destruction of documents in the course of the proceedings. But, the learned judge did not go any further than to find it 'a factor which [he was] entitled to take into account, at least to some extent, in reaching [his] overall decision.'"

And, at paragraph 142 of those Written Submissions, it is said that:

"142. In the circumstances, the learned judge could have quite properly made a costs order in favour of the Gilbertson Parties, as the Gilbertson Parties urged him to do."

In those circumstances, although Autumn has not formally withdrawn its appeal against the judge's order as to costs (made in its notice of appeal in Appeal No. 21 of 2012), this Court may, I think, proceed on the basis that it does not seek to challenge the judge's view that the appropriate order is that (subject to any earlier orders which required the costs of one party or parties to be paid by another party or parties), each party should bear its own costs of the proceedings (including any costs which had been ordered to be in the cause). Mr Gilbertson has not appealed from the judge's order.

244. In Appeal No. 22 of 2012 the Renova Parties also seek an order that the judge's order in respect of costs be set aside; but they invite this Court to substitute an order that the Gilbertson Parties pay their costs of the action on the standard basis and their costs of the counterclaims on the indemnity basis; that (it is said) being the only just order to make in all the circumstances. It is said that, in making no order as to the costs of the action and the counterclaims, the judge exercised his discretion outside the ambit within which reasonable disagreement is possible; and that, in those circumstances, this Court should set aside his order and make the order that the judge should have made. In that context this Court was referred to the well-known observations of Lord Fraser of Tullybelton in *G v G*

(*Minors: Custody Appeal*) [1985] UKHL 13; [1985] 1 WLR 647 at page 652.

The costs of the action

245. The Renova Parties draw attention to GCR Order 62, rule 4(5):

“4(5) . . . the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs”

They rely in this Court (as they did before the judge) on the principle, recognised in this jurisdiction in *National Trust for the Cayman Islands v Planning Appeals Tribunal* and *Banks v Arch* (to which the judge referred), that the burden lies on the party seeking a departure from the usual order to show why such departure is justified.

246. In developing their submission that, in departing from the usual order that costs should follow the event, the judge exercised his discretion in a way which fell outside the ambit within which reasonable disagreement is possible, it is said on behalf of the Renova Parties that the judge was wrong to conclude that there was no clear overall winner and that there was no one obvious event which his order for costs should to follow. He ought to have concluded that the relevant event or events to be followed for the purposes of GCR Order 62, rule 4(5) were the finding against Mr Gilbertson for dishonest breach of fiduciary duty and the finding that Autumn was liable to account as constructive trustee for the new PEL shares issued to it in January 2007 and for the payment in respect of interest on the loans which it received in September 2007. In particular, it is said that:

- (1) The judge should have addressed the position of Autumn separately from that of Mr Gilbertson.
- (2) As between Renova and Autumn there was no reason why Autumn should not pay the whole of Renova’s costs. In that context, the relevant “event”, for the purposes of GCR O.62, r.4(5), was the liability of Autumn to account as constructive trustee for the Fabergé Limited shares. On that issue there was only one winner: Renova.
- (3) The judge was wrong to take account of - or placed too much weight on - the facts (i) that (as he held) Renova had failed to establish any loss as against Mr Gilbertson and (ii) that Renova abandoned its claim against Mr Gilbertson for an account of profits.

247. In advancing the first of those three points - that, in determining what order to make as to costs the judge should have addressed the position of Autumn separately from that of Mr Gilbertson - it is said on behalf of the Renova Parties that the facts (i) that (as the judge

held) Renova had failed to establish any loss as against Mr Gilbertson and that (ii) Renova abandoned its claim against Mr Gilbertson for an account of profits did not provide a basis for failing to make a costs order against Autumn. Autumn and Mr Gilbertson had argued strongly that it was not permissible to pierce the corporate veil; and, indeed, it was in response to (and in recognition of the force of) that argument that Renova had abandoned its attempt to do so and, in consequence, had been led to abandon its claim for an account of profits as against Mr Gilbertson. If, as the Gilbertson Parties contended (and Renova accepted), Mr Gilbertson and Autumn were to be treated as legally separate and distinct in that context, they should be treated as separate and distinct in the context of liability for costs.

248. In advancing the second of those three points - that, as between Renova and Autumn, there was no reason why Autumn should not pay the whole of Renova's costs - it is said on behalf of the Renova Parties that the judge was wrong to characterise the liability of Autumn to account as "minimal". Even on the judge's own findings, Autumn's liability was substantial: the cash component was US\$2.3 million and the shares ordered to be transferred to the Master Fund were worth a further US \$1.5 million or thereabouts (even if Fabergé Limited was to be valued, as the judge held, at no more than US\$120 million). But, even if recoveries of some US\$3.8 million could be described as "minimal" in the context of the claims advanced by Renova in the action, the judge erred in law in treating that factor as a reason for refusing Renova an order for costs. In support of that submission, the Renova Parties rely on the observation of Justice Sanderson in *Banks v Arch*, that it is no answer to a claim for costs for the defendant to say that the award was only marginal and that therefore the plaintiff should not have his costs.

249. In advancing the third of those three points - that, in failing to make an order for costs against Mr Gilbertson, the judge placed too much weight on the facts that (as he held) Renova had failed to establish any loss as against Mr Gilbertson and that Renova abandoned its claim against Mr Gilbertson for an account of profits - it is said on behalf of the Renova Parties that the judge failed to take into account, or gave too little weight to the following factors: (i) that it was Mr Gilbertson's dishonest conduct which gave rise to these proceedings; (ii) that the main issue at trial - on which Renova was successful - was whether Mr Gilbertson had dishonestly diverted the Fabergé Rights to Autumn (and others) in breach of his fiduciary duties; (iii) that that issue was common both to the claim against Mr Gilbertson and to the claim against Autumn; (iv) that success against Mr Gilbertson on that issue, in relation a claim for breach of fiduciary duty, was a legitimate

end in itself (as Mr Justice Phillips had held in *Texaco Ltd v Arco Technology*); Autumn was a company in which he had an obvious financial interest; (v) that the only substantive issue which the judge decided against Renova (the quantum of loss in respect of which equitable compensation should be awarded) occupied a relatively small part of the time at trial; (vi) that the claim against Mr Gilbertson for equitable compensation - although ultimately unsuccessful at trial on the issue of loss - was never unreasonable or lacking a sensible basis; the judge found (at paragraph 16.3.5 of his judgment) that Renova had “put forward a perfectly arguable case on the merits of its claim and also in relation to loss”; (vii) that late evidence on quantum (which was disclosed to Renova only during the trial) formed a significant part of the judge’s conclusions on equitable damages (as appears from paragraphs 19.14 and 19.15 of his judgment); and (viii) that the claim against Mr Gilbertson for an account of profits (which Renova abandoned in the course of the trial) took up little or no time at any stage in the proceedings and added little to the costs of the proceedings in that, had that claim not been advanced, no less evidence (factual and expert) would have been adduced.

250. Further, it is said on behalf of the Renova Parties that, in determining what order to make in respect of costs, the judge was wrong to take account of his conclusion, at an earlier stage in the proceedings, that Renova’s failure to comply with its discovery obligations was “blameworthy and culpable”. That conclusion was irrelevant in relation to the question where the costs of the proceedings should fall, in that: (i) the Gilbertson Parties’ strike-out application of 27 April 2011 (founded on the alleged failure by Renova to give discovery) failed on the basis that the matter could be pursued at trial and adverse inferences drawn, if necessary; (ii) at the trial no questions about discovery - nor, indeed, any questions relevant to the allegation as to intention to harm (to which the documents not disclosed by the Renova Parties were said to be germane) - were put to any of Renova’s witnesses (amongst whom was Mr Vekselberg); (iii) the Gilbertson Parties made no submissions at trial as to deficiencies in Renova’s (or any other Renova Party’s) discovery and did not ask the judge to draw any adverse inferences from the absence of documents; (iv) the judge (correctly) did not draw any adverse inferences against the Renova Parties from any failure to give discovery; (v) the Gilbertson Parties’ application against Mr Vekselberg for specific discovery of his TNK-BP documents was also rejected by the Court at the interlocutory stage; and (vi) the documents that were the subject of the Gilbertson Parties’ applications based on non-disclosure went solely to the counterclaims, which were barely pursued and were either abandoned or ultimately dismissed. And it is said that, in taking account of his conclusion

that Renova's failure to comply with its discovery obligations was "blameworthy and culpable" (as he did), the judge was wrong in failing, also, to take into account the following matters (each of which was a relevant matter which he should have taken into account), that is to say: (a) that he had ordered the costs of the Gilbertson Parties' failed strike-out application and the specific discovery application against Mr Vekselberg to be costs in the cause; (b) that the relevant cause (namely the counterclaims) was, on any view, won by the Renova Parties; and (c) that, the effect of making no order for costs following the trial was that the Renova Parties were unjustly deprived of the (very substantial) costs of resisting those failed applications to which they should have been entitled, given that the Gilbertson Parties failed properly to pursue the counterclaims, abandoned some of them late in the day and had the remainder dismissed.

251. For those reasons, it is said on behalf of the Renova Parties that the only fair order was that Renova should have its costs of the action; whether those costs were awarded against both Mr Gilbertson and Autumn jointly or against Autumn alone.

252. In response to the submissions that, in determining what order to make as to costs, the judge should have addressed the position of Autumn separately from that of Mr Gilbertson and that the liability of Autumn as constructive trustee could not be seen as "minimal" - it is said on behalf the Gilbertson Parties that each is inconsistent with the position adopted by the Renova Parties in the proceedings, in that:

- (1) At the hearing on 26 October 2012 - at which the parties made their respective submissions as to costs - the Renova Parties urged the judge to treat the Gilbertson Parties as one and the same. They cannot now complain that, in addressing the question of costs, the judge failed to treat Mr Gilbertson and Autumn as separate and distinct.
- (2) The Renova Parties obtained leave to continue the action on the basis that the Company and/or the GPLP and/or the Master Fund had suffered a substantial loss; which they put at US\$82 million. The judge found that the true loss should be assessed at nil. Although the Renova Parties now complain that the judge did not give weight to the proposition that establishing that Mr Gilbertson had acted in breach of fiduciary duty was a legitimate end in itself; that was not how the case had been presented to him when the Renova Parties sought leave to bring the action at the outset.

253. Further it is said on behalf of the Gilbertson Parties that the judge was entitled to take into account the "blameworthy and culpable" destruction of documents by the

Renova Parties. The Court's attention was directed to the judge's observations, in the course of his ruling on the application to strike out Renova's statement of claim, that the destruction of the documents was deliberate and on a wholesale scale. The judge had said this (at paragraphs 24 and 52 of that ruling):

"24 . . . it is accepted that the Renova IT department took a series of very significant decisions in the period January 2008 to December 2010 which has resulted in the effective eradication of all potential sources of any relevant electronic documentation saved on the crashed Zurich server. The evidence of the Gilbertson Parties' independent IT experts, which is not disputed in this respect by the Renova Parties' own independent IT experts, is that it would not have been difficult or expensive for the Renova Group to make different decisions at the time which would have ensured that all of the potential sources of data concerned were preserved for expert forensic examination, particularly given that these proceedings were clearly in contemplation at the time of the Zurich computer crash and commenced shortly thereafter, and given also that the Renova Group had already received legal advice prior to the server crash that they should preserve all relevant documentation for the purposes of these proceedings. Notwithstanding that advice the Renova Group took deliberate steps, in most instances after these proceedings had commenced, which destroyed any prospects of recovering for discovery purposes e-mail and other electronic data from any potential sources apparently without any regard for their discovery obligations and the need to preserve any potentially relevant e-mails and other documents."

"52 My overall impression of the evidence filed by the Renova Parties in response to the Gilbertson Parties' strike out application is that, notwithstanding the legal advice concerning discovery given to them in January 2007 and again in October 2009 (which itself seems to me to have been surprisingly late in the day), there was a complete disregard by the Renova Group of the need to preserve all relevant documents, including the potential sources of such documents for discovery purposes. The Zurich server crash shortly before these proceedings were commenced was obviously unfortunate. However the steps taken thereafter to destroy over time all the possible alternative sources of e-mail or other electric data, some of which may well have been relevant to these proceedings, to my mind amounts to a complete lack of consideration for and disregard of the need to preserve all potential sources of relevant documents."

It is pointed out that the Renova Parties have not challenged those observations. It is said, also, that the Renova Parties are wrong to submit that the judge erred in taking their destruction of documents into account in the circumstances that (in the event) the documents which the judge found they had destroyed would have had no relevance to the issues in the proceedings. The submission is wrong, both as a matter of principle - in that the serious nature of the Renova Parties' disregard of the court's process is not to be assessed only in the light of its consequences - and as a matter of fact - in that the wholesale nature of the destruction (and the sense of injustice and distortion of the court process which resulted from that destruction) had an impact on the trial which was both far reaching and regrettable; notwithstanding that there was limited scope to test or pursue

those concerns in the course of the trial. A court has jurisdiction to mark, by an appropriate order for costs, its disapproval of conduct that disregards or serves to undermine the integrity of its process. The steps taken by the Renova Parties in relation to electronic documents (as described by the judge in the passages cited) were, on any view, a glaring example of such conduct. The contention that the judge should have taken no account of such conduct (on the ground that there is no jurisdiction to do so) is contrary to principle, misconceived and should be rejected.

254. More generally, it is said on behalf of the Gilbertson Parties that, in determining whether to make any (and, if so, what) order as to costs, the judge was entitled to take the view that the action was out of all proportion to the dispute. It is pointed out that the judge queried the purpose of the action at the outset of the trial (transcript, 25 April 2012, page 118, lines 6-15):

“... now that the openings have finished, and I, of course, have listened to them carefully, I do consider that a further serious attempt should be made to settle this matter with a view to saving time, cost and court time as well, having regard, in particular, to the overriding objectives of the court rules, which I’m sure you’re familiar with. And I would request that you pass that message to your clients ... with the ability to give instructions how to deal with the matter.”

And, it is said, the judge can only have been confirmed in his view as to the disproportionate nature of the proceedings after his determination that the Master Fund had suffered no loss. Although the judge does not allude to this in his costs decision, it would have been open to him to find the proceedings oppressive and to award, or decline to award, costs accordingly. In particular, it is said that:

- (1) The Renova Parties should have appreciated (not later than at the time that Renova received Mr Osborne’s report) that there was no realistic prospect that Renova would be awarded equitable compensation in an amount which was proportionate to the costs of the proceedings and the amount of court time that was occupied.
- (2) Further, the proceedings were disproportionate having regard to the fact that, on the basis of the Short Forms, the Renova Parties are only entitled to 25% of the relief awarded against Autumn, the other 75% going to Mr Sean Gilbertson and Fairbairn Trust Limited (in its capacity as trustee of a Gilbertson family settlement).
- (3) Renova’s claim against Mr Gilbertson was in excess of US\$80 million. It was calculated to ruin all but those of the most exceptional wealth. It is reasonable for a party that faces such a claim to investigate and even take points that it would not be proportionate to take in other circumstances and, where the enormous claim turns out to have nil value, the court may well consider that the costs were incurred as a result of the extravagance of the claim.

- (4) Renova had originally pleaded that the terms of the Fourth Draft IA were reasonable; and were terms that Mr Gilbertson should have been prepared to agree. But, in the course of his opening submissions at trial, it was said by counsel that one of the clauses in that draft IA was, in fact, wholly absurd and uncommercial. Renova made an eleventh hour change to its pleaded case on equitable compensation, abandoning the claim by reference to the Fourth Draft IA; thereby recognizing that the long standing pleaded case, in which it had relied on the Fourth Draft IA, had always been unsustainable.
- (5) There is good reason to think that the judge would never have given leave to continue the action had he appreciated how disproportionate the dispute was likely to prove.

255. In my view there is no proper basis upon which this Court can, or should, interfere with the judge's order in relation to the costs of the action. As the judge recognised, correctly, the starting point for his consideration was GCR Order 62, rule 4(5): costs should follow the event, "except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs". A proper reason for "some other order" - as, again, the judge recognised - was that, in the circumstances of this case - there was no single "event" which the costs should follow. Although it is said on behalf of the Renova Parties that the judge ought to have concluded that the relevant event or events to be followed were the finding against Mr Gilbertson for dishonest breach of fiduciary duty and the finding that Autumn was liable to account as constructive trustee; that is to overlook the important findings that the Master Fund suffered no loss in respect of which Mr Gilbertson should be ordered to pay equitable compensation and that the assets for which Autumn was liable to account as a constructive trustee were substantially less (and very substantially less in value) than Renova had claimed. The judge was plainly entitled to take the view that this was a case in which it was appropriate to depart from the rule that costs should follow the event; and that some other order was required.

256. Renova abandoned its claim against Mr Gilbertson for an account of profits and failed in its claim against him for equitable compensation: it succeeded in its claim against Autumn, but to an extent which the judge described as minimal. It would have been open to the judge to make an order which differentiated (on the basis of outcome) between the claims against Mr Gilbertson and the claims against Autumn: in particular, it would have been open to him to order that Renova pay to Mr Gilbertson the costs attributable to the claim

against him for an account of profits and for equitable compensation and that Autumn pay to Renova the costs attributable to the claims against it for an account as constructive trustee on which Renova was successful. But the judge was entitled to take the view that a “differential order” of that nature would not be appropriate: first, for the reason that he gave at paragraph 3.9 of his ruling of 5 November 2012 (that it would be artificial to do so in the light of his acceptance of Renova’s contention that Mr Gilbertson was the directing mind and will of Autumn); and, second, because there was an important issue (whether Mr Gilbertson was in breach of fiduciary duty) which was common to both those claims.

257. The judge, again correctly, recognised (at paragraph 3.12 of his ruling on costs) that this was a case in which it would be open to him to make an issue based order: that is to say, an order either that each party pay to the other the costs attributable to discrete issues (which would require separate, issue by issue, assessments of such costs) or an order that one party pay to the other a proportion of the overall costs (such proportion to reflect success on some issues and failure on others). In that context he would have had regard to Renova’s success (broadly, at least) on the following issues; (i) whether Mr Gilbertson owed fiduciary duties of care to the Company (and, more generally, to the Master Fund and the Pallinghurst Structure), (ii) whether (in so far as it was in dispute), in procuring the issue of 100 new shares in PEL in January 2007, Mr Gilbertson was in breach of those duties, (iii) whether Renova should be denied equitable relief on *Nurcombe v Nurcombe* grounds, (iv) whether the 25 PEL shares issued to Autumn in January 2007 were assets into which the Master Fund was entitled to trace, (iv) whether Autumn received those shares as a volunteer, (v) whether (in so far as relevant) Autumn received those shares with relevant knowledge of Mr Gilbertson’s breach of trust and (wrongly, as I would hold) (vi) whether the interest payment received by Autumn in September 2007 was also an asset into which the Master Fund was entitled to trace; and to its failure on the issues (vii) whether the Master Fund had suffered loss by reason of Mr Gilbertson’s breach of duty, and (viii) whether the additional shares issued to Autumn after January 2007 were traceable assets. The judge rejected an issue based order for the reasons which he gave (at paragraph 3.12): that an issue by issue allocation of costs would be very difficult to apply in practice in this case, would be likely to result in interminable argument and debate, which would not be desirable, and in any event the costs payable by each party on an issue by issue basis would probably largely cancel each other out. As the judge who (as he observed at paragraph 3.8 of his ruling) had dealt with the entirety of these proceedings since they were commenced in May 2008 - and, in particular, over a four week trial - the judge was well placed to form that judgment: this Court must, I think, respect his view.

258. The judge directed himself (at paragraph 3.11 of his costs ruling) that he should have some regard, in considering the overall costs of the proceedings, to the failure of the Renova Parties to comply with their discovery obligations; which, as he said (*ibid*) he had found blameworthy and culpable. In giving himself that direction, he did not err in principle; but it is difficult to find, in his ruling, any indication that, having regard to the defects in the compliance with discovery obligations of the Renova Parties, led him to make an order for costs after trial which he would not otherwise have made. That is not, in my view, a matter for criticism: in determining the strike out application made on the basis of culpable non-discovery, the judge had ordered that the costs of that application be costs in cause: nothing had occurred during the trial which could have led him to vary that order (assuming that, absent an appeal, he would have had power to do so); there was no need for him to revisit the point.

259. For those reasons, I would reject the submission (advanced on behalf of the Renova Parties) that, in making no order as to the costs of the action, the judge exercised his discretion outside the ambit within which reasonable disagreement is possible. **I should add that I am not persuaded that the fact that (as I would hold) the judge was wrong to treat the interest payment received by Autumn in September 2007 as an asset into which the Master Fund was entitled to trace is a sufficient reason for this Court, itself, to make a different order in respect of the costs of the action.**

The costs of the counterclaims

260. It is submitted on behalf of the Renova Parties that the judge ought to have awarded the costs of the counterclaims to the Renova Parties in any event. It is said that he was wrong to treat the costs of the counterclaims as “part of the ebb and flow of each parties’ successes and defeats”; and that, in exercising his discretion, he failed to take the following matters into account: (i) that the counterclaims were not made against, or made only against, Renova; but were made against persons who were not parties to the proceedings and had to be joined for that purpose; (ii) that they raised very serious allegations against individuals of intention to harm (and in the case of Mr Kuznetsov, allegations of disloyalty and “moral guilt”); (iii) that they were advanced in a perfunctory manner in the Gilbertson Parties’ Written Opening Submissions; (iv) that they were barely mentioned at all in oral openings; (v) that they were not then pursued in cross-examination of any of the witnesses called by the Renova Parties; (vi) that, when evidence was closed (and only after being pressed by the Renova Parties), the Gilbertson Parties expressly abandoned their counterclaims for lawful means conspiracy and breach of fiduciary duty by Mr Kuznetsov;

(vii) that the remaining counterclaims (two of which were for torts of intentional harm) were not pursued with any genuine vigour in the Gilbertson Parties' oral submissions or Written Closing Submissions; and (viii) that those remaining counterclaims were dismissed by the judge.

261. It is said, further, that not only should the judge have awarded the costs of the counterclaims to the Renova Parties but that he should have done so on the indemnity basis; in that they were pursued improperly, unreasonably and negligently within the meaning of GCR Order 62 rule 11(4) or rule 11(2). In support of that submission it is said that (in addition to the matters mentioned in the immediately preceding paragraph) the judge ought to have taken into account that:

(1) There was no rational explanation for the slow collapse of the counterclaims other than that the Gilbertson Parties sought "to hang on to the counterclaims, good bad or indifferent", in order to maximise the pressure on the Renova Parties. In that context it is pertinent to have in mind that the case was opened on behalf of the Gilbertson Parties on the basis that the action had been brought out of malice (transcript, 25 April 2012, page 68, line 24, to page 69, line 8); but that this very serious allegation was not then put to Mr Vekselberg in cross-examination. The Gilbertson Parties were "willing to wound and yet afraid to strike". As the judge said (at paragraph 18.5 of his judgment):

"18.5 . . . I think it right to say that the overall impression which I gained during the course of the trial was that the counterclaims were pursued on behalf of the Gilbertson Parties with increasingly less enthusiasm. Apart from the fact that the specific claims which I have mentioned were expressly dropped, it seemed to me that the detailed basis of the counterclaims changed to some extent from the Gilbertson Parties' pleadings as well as varying somewhat also between the Gilbertson Parties' written and oral opening submissions on the one hand and their closing submissions on the other hand. Also not all of the alleged facts on which the counterclaims are based were put to the Renova Parties' witnesses in cross-examination. In summary, I was left with the distinct impression that counsel for the Gilbertson Parties were less than convinced themselves of the merit of the remaining individual counterclaims."

(2) In similar circumstances, in *Sagicor General Insurance Cayman Limited v Crawford Adjusters (Cayman) Limited* [2008] CILR 482, Justice Henderson made an indemnity costs order against plaintiffs who pursued a case of fraud and dishonesty for two years before abandoning it on the eve of the trial. After noting that:

" . . . such allegations have a detrimental effect on the reputations involved and that such allegations should never be made lightly. . . "

Justice Henderson went on to observe (at page 484):

“ . . . From the failure of these plaintiffs to pursue their case, I infer that they have never been in possession of a body of evidence capable of establishing fraud or conspiracy. These few comments, without more, provide ample justification for an award of indemnity costs”.

Those comments are in point in the present case: in that, although the counterclaims did not allege dishonesty, they did allege conspiracy and other torts involving an intention to harm. Those are serious allegations to make against individuals (Mr Vekselberg and Mr Kuznetsov).

- (3) The allegations of conspiracy and intention to harm should never have been made - in that there was never evidence to support them - and should not have been maintained once the Gilbertson Parties had chosen not to put them to Mr Vekselberg or to Mr Kuznetsov in cross-examination. It should be inferred that the counterclaims were only made in order, improperly, to bring pressure to bear against, in particular, Mr Vekselberg personally. As Chief Justice Smellie said in *AHAB v Saad Investments Company Limited & Ors* (Unreported, CIGC, 28 November 2011) at paragraph [21]:

“[21] The institution and maintenance of a patently speculative and weak case merely with the opportunistic intention of embarrassing or compelling an opposite party to comply with a claim will be conduct coming within the embrace of GCR O.62 r.11(4) as being ‘improper’ and ‘unreasonable’ ”.

262. In response to those submissions, it is said on behalf of the Gilbertson Parties that:

- (1) The judge’s view that the costs of the counterclaims were “part of the ebb and flow of each party’s various successes and defeats.” was a perfectly proper view for him to take. The counterclaims were all contingent on liability in the main action; and specific counterclaims were contingent on such liability arising in particular ways. The relief sought on behalf of Autumn was by way of contribution or indemnity in respect of any liability in the main action; as, in substance, was the relief sought on behalf of Mr Gilbertson. In those circumstances, it was reasonable for the judge to see the counterclaims as part of the Gilbertson Parties’ defences.
- (2) The Renova Parties’ complaint that Mr Vekselberg and Mr Kuznetsov were joined as parties without proper cause is misconceived. Mr Vekselberg and Mr Kuznetsov were witnesses which Renova needed to call in order to establish its case (which, as developed at trial - in particular, in relation to the Agreement or Understanding and the negotiations of the implementation agreements - depended on the evidence of Mr Vekselberg and Mr Kuznetsov). It cannot be suggested that any, or any substantial part, of their evidence went exclusively to the counterclaims.
- (3) At paragraph 27 of his ruling on the strike out application the judge said this:

“27. Mr. Vekselberg has been less than enthusiastic in complying with [his discovery obligations]. I am somewhat cynical about the explanation which he has given for his contention that such e-mails are not within his possession, custody or power.”

It is true that, at the subsequent hearing of the specific discovery application, Mr Vekselberg successfully maintained his contention that the emails of which discovery was sought were not in his possession, custody or power; but the fact that the Renova Parties were able to avoid giving any further discovery on behalf of Mr Vekselberg is not a ground on which they can seek an order for costs in relation to the counterclaims generally, let alone costs on an indemnity basis.

- (4) The contention that the counterclaims were hopeless was determined by the judge on the application to strike them out. At paragraph 19 of his ruling on that application the judge said this:

“19. As I have said above, a consideration of the evidence to which I was referred by both leading counsel does not cause me to believe that the plaintiffs to counterclaim have only a faint possibility of success in the claims which they make. On the contrary, this seems to me to be very much a case which should go to trial in the usual way and is not one in which judgment on any of the respective claims of the parties should be granted summarily. I would, had I considered that I had jurisdiction to consider the applications of the defendants to counterclaim pursuant to GCR 0.14, r. 12, have refused to grant them summary judgment on the counterclaim or any part thereof. In my opinion, this is undoubtedly a case which should go to trial and the respective claims of the parties determined after full discovery and oral evidence with cross examination in the usual way.”

- (5) The criticism of the Gilbertson Parties for having abandoned some of the counterclaims is misconceived. It is perfectly proper for a party to abandon claims in the event that the course of the evidence makes it appropriate. The Renova Parties abandoned their claim for an account of profits against Mr Gilbertson in the course of oral closing. And this was but one of the ways in respect of which the Renova Parties changed their case at trial.

264. In my view there is force in the submission that the judge ought to have awarded the costs of the counterclaims to the Renova Parties (other, perhaps, than to Renova itself). In seeking to justify his decision not to make a separate order for the costs of the counterclaims - for the reasons that (as he said at paragraph 3.10 of his ruling on 5 November 2012) (i) the counterclaims accounted for a very limited part of the trial, (ii) he had declined to strike out the counterclaims at an earlier stage in the proceedings and (iii) he saw the counterclaims “as part of the ebb and flow of each parties’ various successes and defeats” - the judge overlooked three important factors: first, that three of the defendants to the counterclaims (Mr Vekselberg, Mr Kuznetsov and Renova Holdings) were not claimants in the action;

second, that (whether or not the counterclaims had occupied time at trial) there had been costs incurred in interim applications to which they were parties; and, third, that he had made orders that the costs of those interim applications should be costs in cause.

265 As I have said, earlier in this judgment, the judge explained (at paragraph 6.7 of his judgment) that Mr Gilbertson and Autumn counterclaimed in the proceedings, not only against Renova but also against Mr Vekselberg, Mr Kuznetsov and Renova Holding, for an indemnity on various grounds for any liability which they were found to have in respect of Renova's derivative claims. They did so by serving with their defence to Renova's claim a counterclaim (subsequently slightly amended by their Amended Defence and Counterclaim served pursuant to an order made on 30 November 2011) which included the following paragraph by way of introduction:

“57. If, contrary to the primary case set out in the Defence, Mr. Gilbertson and Autumn are liable in respect of any of the relief claimed against them in the name of the Company (whether in its own right and/or on behalf of the Master Fund), Mr. Gilbertson and Autumn will counterclaim as set out below.”

In the events which happened Autumn was held liable in respect of relief claimed against it on behalf of the Master Fund, so the counterclaims (in so far as they had survived to trial) had to be addressed.

266. As the judge explained (at paragraphs 18.2 and 18.3 of his judgment) the pleaded counterclaims included: (i) at paragraphs 59 and 60, a claim for damages against Renova Holding - on the ground that Renova Holding acted in repudiatory breach of the Letter Agreement - (ii) at paragraphs 61 to 63, claims for damages against Mr. Vekselberg and Mr. Kuznetsov - on the ground that they had induced or procured Renova Holding to act in repudiatory breach of the Letter Agreement - (iii) at paragraphs 64 and 65, a claim for damages against Mr. Vekselberg, Mr. Kuznetsov and Renova Holding (and against Renova itself) - on the ground of conspiracy, by both lawful means and unlawful means - and (iv) at paragraph 66, a claim against Mr. Kuznetsov for indemnity or contribution as a co-director of Mr. Gilbertson for breach of his fiduciary duties to the Company. By summons dated 29 September 2009 the defendants to the counterclaims applied, pursuant to GCR O.14, r. 12 for an order that each of the counterclaims should be dismissed and summary judgment entered for them on the ground that the Gilbertson Parties, as plaintiffs to the counterclaims, had no prospect of success at trial. They also applied pursuant to GCRO.18 r.19 for orders, *inter alia* that certain specific paragraphs of the counterclaims should be struck out on the ground that they disclosed no reasonable cause of action. After a three day hearing in early March 2010 and a further hearing on 15 April

2010, the judge declined to strike out any part of the counterclaims on a summary basis. It was in that context that he made the observation, on which the Gilbertson Parties rely: that this was undoubtedly a case which should go to trial and the respective claims of the parties determined after full discovery and oral evidence with cross examination in the usual way”; and, consistently with that view, he directed that the costs of the application to strike out should be costs in the cause.

267. The judge went on to explain (at paragraph 18.4 of his judgment) that, on 11 May 2012, during the course of the trial, it was confirmed on behalf of the Gilbertson Parties that they were no longer pursuing the specific counterclaims for damages for lawful means conspiracy and for indemnity and contribution by Mr. Kuznetsov for breach of fiduciary duty; and that, accordingly, they were only pursuing the specific counterclaims for repudiatory breach of the Letter Agreement, for procuring that breach of the Letter Agreement and for unlawful means conspiracy. In those circumstances, as the judge observed (*ibid*), the only counterclaims which he needed to address were (i) the claim for damages against Renova Holding in respect of alleged repudiatory breach of the Letter Agreement; (ii) the claims for damages against Mr Vekselberg and Mr Kuznetsov for allegedly inducing or procuring Renova Holding to act in repudiatory breach of the Letter Agreement; and (iii) the claim in tort against all the defendants to counterclaim for conspiracy by unlawful means.

268. Before turning to address those counterclaims, the judge made the observations at paragraph 18.5 of his judgment on which the Renova Parties rely: that his overall impression (gained during the course of the trial) was that the counterclaims were pursued on behalf of the Gilbertson Parties with increasingly less enthusiasm; that not all of the alleged facts on which the counterclaims were based were put to the Renova Parties’ witnesses in cross-examination; and that he was left with the distinct impression that counsel for the Gilbertson Parties were less than convinced themselves of the merit of the remaining individual counterclaims.

269. At paragraphs 18.6 to 18.8 of his judgment, the judge addressed the first of the counterclaims that remained outstanding; the claim against Renova Holding for damages in respect of alleged repudiatory breach of the Letter Agreement. He concluded, in the circumstances which he set out and for the reasons which he gave, that there was “no merit in this particular claim in the counterclaim”. At paragraph 18.9 he addressed the second of the outstanding counterclaims; the claim for damages against Mr Vekselberg and Mr Kuznetsov for allegedly inducing or procuring Renova Holding to act in repudiatory breach

of the Letter Agreement. He observed (*ibid*) that it was “a crucial ingredient of the tort that the defendant should have intended that the contract be breached. That was not put to any of the Renova Parties’ witnesses”. In those circumstances, he said, “I am of the view that there is no merit in this claim either”. At paragraphs 18.10 to 18.12, the judge addressed the third of the outstanding counterclaims; the claim for damages against all the defendants to counterclaim for conspiracy by unlawful means. He pointed out that the pleaded claim included (at paragraph 64.2) the allegation that the alleged conspiracy was “to commit unlawful acts against the Master Fund and hence Mr. Gilbertson”. He accepted the submission, advanced on behalf of the Renova Parties, that Mr Gilbertson’s economic interest in the Master Fund was not such as to give him a cause of action. He said this (at paragraph 18.12):

“18.12 . . . Only the Master Fund (or GPLP or the Company) could sue in respect of alleged unlawful acts against the Master Fund. Mr. Gilbertson has no standing to sue in respect of an alleged conspiracy to commit unlawful acts against the Master Fund”.

In those circumstances the judge concluded (at paragraph 18.14) that “the three remaining specific counterclaims by the Gilbertson Parties are not made out and should be dismissed”. There has been no appeal against that part of his order.

270. For my part, I am content to accept that the judge was entitled to take the view that the counterclaim made against Renova for damages for conspiracy (by lawful or unlawful means) - which was the only counterclaim made against Renova - could properly be regarded “as part of the ebb and flow” of the “various successes and defeats” of the claims in the action (that is to say, the claims made by Renova against Mr Gilbertson and Autumn); and that, on that basis, if it was appropriate to make no order for the costs of the action, then it was also appropriate to make no order for costs (as between Renova and the Gilbertson Parties) in respect of the costs of that counterclaim. But I am not persuaded that that reasoning can be applied to the costs as between the Gilbertson Parties and the other three defendants to the counterclaims). In my view, the judge erred in failing to distinguish between the position of Renova, on the one hand, and the other co-defendants to counterclaim (Mr Vekselberg, Mr Kuznetsov and Renova Holding), on the other hand. Had he done so, he would have appreciated that it was necessary, in the circumstances of this case, to make a separate order as to the costs of the counterclaim.

271. In the circumstances that the judge erred in making no separate order as to the costs of the counterclaim, it is necessary for this Court to consider what order should be made. In my view, having the provisions of Order 62 rule 4(5) in mind, the costs of the counterclaims

(as between the Gilbertson Parties and the three defendants, other than Renova) should follow the event: that is to say, those costs should be paid by the Gilbertson Parties. There can be no doubt that, in relation to all the counterclaims against them, Mr Vekselberg, Mr Kuznetsov and Renova Holding were the successful parties. The effect of that order will be that they will be entitled to receive not only their costs (if any) of defending the counterclaims at trial (including those that were abandoned) but also costs which they incurred in pursuing, or resisting interlocutory applications and in respect of which there are existing orders for costs in cause. In that context, as between the Gilbertson Parties and Mr Kuznetsov and Renova Holding, the relevant “cause” is that brought by the counterclaim.

272. I turn, therefore to consider the basis upon which the costs payable to Mr Vekselberg, Mr Kuznetsov and Renova Holding should be assessed: an issue which, given that he made no order for costs, the judge did not need to (and did not) address. The receiving parties seek an order that such costs should be assessed on an indemnity basis. They rely upon GCR Order 62 rule 11(4), which enables the court make such an order where claims have been pursued improperly, unreasonably or negligently. In considering that application it is pertinent to have in mind not only the submissions which they advance (and, of course, those advanced by the Gilbertson Parties in response), but also the judge’s observations at paragraphs 18.5 and 18.13 of his judgment. Reference has already been made to his observations at paragraph 18.5. At paragraph 18.13 the judge said this:

“18.13 As I have also mentioned, Leading Counsel for the Gilbertson Parties, as plaintiffs to the counterclaim, cross-examined the Renova Parties’ witnesses, including Mr. Vekselberg and Mr. Kuznetsov, the first and second defendants to the counterclaim. I accept the submission of Leading Counsel for the Renova Parties that the essential factual elements of the three remaining specific counterclaims were not put to those witnesses. In particular in this context it was not put to either Mr. Vekselberg or Mr. Kuznetsov that their purpose, whether predominant or otherwise, was to harm the Master Fund and thereby Mr. Gilbertson. Furthermore, the evidence in the case simply does not support any contention that the intention of Mr. Vekselberg and Mr. Kuznetsov, by their insistence on ownership of the title to the Faberge brand by one of Mr. Vekselberg’s private companies outside the Pallinghurst Structure or their alleged refusal to provide funding to the Master Fund through PEL for the purchase of the Rights, was intended to harm Mr. Gilbertson. At most, and on the Gilbertson Parties’ best case, the intentions of Mr. Vekselberg and Mr. Kuznetsov were to further and protect the interest of Mr. Vekselberg in owning the title to the Fabergé brand. . . .”

273. In my view there is force in the submissions made on behalf of the Renova Parties that Mr Vekselberg Mr Kuznetsov and Renova Holding were joined as parties without proper cause; that there was no rational explanation for the slow collapse of the counterclaims

other than that the Gilbertson Parties sought “to hang on to the counterclaims, good bad or indifferent”, in order to maximise the pressure on the Renova Parties; that the allegations of conspiracy and intention to harm should never have been made - in that there was never evidence to support them - and should not have been maintained once the Gilbertson Parties had chosen not to put them to Mr Vekselberg or to Mr Kuznetsov in cross-examination; and that it should be inferred that the counterclaims were only made in order, improperly, to bring pressure to bear on Mr Vekselberg personally. The submission advanced on behalf of the Gilbertson Parties - that the complaint that Mr Vekselberg and Mr Kuznetsov were joined as parties without proper cause is misconceived; in that Mr Vekselberg and Mr Kuznetsov were witnesses which Renova needed to call in order to establish its case - is, itself, misconceived. If Mr Vekselberg and Mr Kuznetsov were witnesses on whose evidence Renova would need to rely in any event, there was no reason why they should be joined as parties to the proceedings so that they could be cross-examined by the Gilbertson Parties. In my view, the costs which Mr Vekselberg, Mr Kuznetsov and Renova Holding are entitled to receive should be assessed on an indemnity basis.

Conclusions

274. For the reasons which I have set out in the preceding sections of this judgment, I take the view that:

- (1) The judge was right to entertain the derivative claims advanced by Renova. In particular, he was correct to hold (at paragraph 16.6.1 of his re-issued judgment dated 5 November 2012) that, having chosen not to appeal from the order which he had made some three and a half years earlier, it was not open to the Gilbertson Parties to challenge, at trial, the standing of Renova to advance claims in the action on behalf of GPLP and the Master Fund; including, in particular, a claim founded on the unpleaded contention that Mr Gilbertson had acted in breach of fiduciary duties which he owed to the Master Fund.
- (2) The judge was right to hold that Mr Gilbertson owed and was in breach of fiduciary duties in relation to the Fabergé Rights. In particular, he was correct to hold (at paragraph 15.8 of his judgment) that, as a director of the Company, Mr Gilbertson owed the duties of a fiduciary to the Company (and, more generally, to the Master Fund and the Pallinghurst Structure) throughout the relevant period and that he was in breach of those duties in acting as he did in late December 2006 and January 2007.
- (3) The judge was right to hold that, notwithstanding the so-called rule in *Nurcombe v Nurcombe*, the conduct of the Renova Parties was not such as to disentitle Renova

to equitable relief in this action.

- (4) The judge was right to value at nil the loss which Mr Gilbertson was liable to make good to the Master Fund by way of equitable compensation. In particular, he was correct to hold on the evidence before him that the current value (as at the date of trial) of the right to manage and exploit the Fabergé Rights as licensee (to which the Master Fund (through OpCo) would probably have been entitled but for Mr Gilbertson's breach of fiduciary duty was less than the costs (other than acquisition costs) and expenses that would have been incurred in funding the development of those Rights.
- (5) The judge was right to hold that Autumn was liable to account as a constructive trustee of the shares issued by PEL in January 2007 (i) because it received those shares as a volunteer and (ii) because, in any event, it was in "knowing receipt" having regard to its relationship with Mr Gilbertson, the property which it received, the person from whom it received the property and its state of knowledge at the time of receipt. In particular, the judge was correct to hold that the value of the single share in PEL held by the Master Fund before the issue of 100 new PEL shares on 3 January 2007 could be traced (in part) into the 25 new PEL shares issued to Autumn on that date; correct to hold that Autumn gave no value for those 25 new PEL shares; and correct to hold that the knowledge of Mr Gilbertson (and, so far as relevant the knowledge of Mr Thomas) as to the circumstances in which those new PEL shares were issued was to be attributed to Autumn.
- (6) The judge was right to hold that Autumn was not liable to account as constructive trustee for shares (other than the 25,000 shares which represented the 25 shares issued by PEL in January 2007) which it held in Fabergé Limited at the date of the trial; and so did not have to transfer such additional shares to the Master Fund. In particular, the judge was correct to reject Renova's claims in respect of the additional 16,190,575 shares in Fabergé Limited in that the material before him at the trial did not enable the judge to make the findings of fact which would have been necessary in order to support that claim.
- (7) The judge was wrong to hold that Autumn was liable to account (by way of an account of profits) for the payment (US\$1,798,973.00) which it received on 28 September 2007 in respect of interest on the loans which it had made to PEL on 3 January 2007. In particular, he was wrong to hold that the value of any asset held or formerly held by the Master Fund could be traced into that payment. It follows that he was wrong, also, to award pre-judgment interest - in the amount of US\$507,347.35 or in any other amount - on an amount equal to that payment. If (contrary to my view) the judge was

not wrong to hold that Autumn was liable to account for the payment of US\$1,798,973.00 which it received on 28 September 2007, he was nevertheless wrong to include in the sum awarded (US\$507,347.35) as pre-judgment interest an amount (said to be US\$95,407.18) in respect of interest attributable to the period from 3 January 2007 to 27 September 2007. He was wrong to do so because, on the material before him, it was not open to him to hold that Autumn was liable to account for interest on the loans in the amount of US\$1,798,973.00 (or at all) as a “knowing recipient” before the date (28 September 2007) on which the relevant cause of action for the purposes of section 34(1) of the Judicature Law (2007 Revision) arose.

- (8) It cannot be said that, in making no order as to the costs of the action - or (as between the Gilbertson Parties and Renova) in making no order as to the costs of the counterclaim - the judge exercised his discretion outside the ambit within which reasonable disagreement is possible: there is no proper basis upon which this Court can, or should, interfere with the judge’s order in relation to those costs. Nevertheless, in relation to the costs of the counterclaims, the judge erred in failing to distinguish between the position of Renova, on the one hand, and the other co-defendants to counterclaim (Mr Vekselberg, Mr Kuznetsov and Renova Holding), on the other hand. Had he done so, he would have appreciated that it was necessary, in the circumstances of this case, to make a separate order as to the costs of the counterclaim. In those circumstances it falls to this Court to make an appropriate order in respect of the costs incurred by the three other co-defendants to counterclaim. The appropriate order, having the provisions of Order 62 rule 4(5) in mind, is that the costs of the counterclaims (as between the Gilbertson Parties and the three defendants, other than Renova) should follow the event: , those costs should be assessed on an indemnity basis (if not agreed) and paid by the Gilbertson Parties.

275. It follows from the conclusions which I have reached that I would dismiss Autumn’s appeal from paragraphs 1 and 2 of the order of 6 November 2012; but would allow its appeal from paragraph 3 of that order. I would dismiss Renova’s cross-appeal from paragraphs 4 and 6 of that order; and I would dismiss Renova’s appeal from paragraph 6. I would allow the appeals of Mr Vekselberg, Mr Kuznetsov and Renova Holding from paragraph 6 of the order. As between the Gilbertson Parties and the three defendants to counterclaim just mentioned, I would vary paragraph 6 of the order by setting aside that paragraph in so far as (and only in so far as) it relates to their costs of defending the counterclaims and by adding a direction that the Gilbertson Parties pay the costs of the counterclaims incurred by Mr Vekselberg, Mr Kuznetsov and Renova Holding (including

costs ordered to be costs in cause), such costs (if not agreed) to be assessed on the indemnity basis. I would stand over further consideration of the costs of the appeal and cross-appeal for determination on an application made to the Court of Appeal: such application (or applications) to be made in writing within 28 days of the delivery of this judgment and to be supported (if so advised) by short written submissions. I would give liberty to apply to the Court of Appeal for such further directions as may be required.

I agree.

Elliott Mottley, JA

I agree.

Ian Forte, JA