IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 61 OF 2010-AJEF

The Hon. Mr. Justice Angus Foster
In Open Court
23rd April to 18th May 2012

BETWEEN:

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)

Plaintiff

AND

(1) BRIAN PATRICK GILBERTSON
(2) PALLINGHURST (CAYMAN) GENERAL PARTNER LP (GP) LIMITED
(3) PALLINGHURST (CAYMAN) GENERAL PARTNER LP
(4) PALLINGHURST RESOURCES MANAGEMENT LP
(5) AUTUMN HOLDINGS ASSET INC.

Defendants

(By Original Action)

AND BETWEEN:

(1) BRIAN PATRICK GILBERTSON
(2) AUTUMN HOLDINGS ASSET INC

Plaintiffs to Counterclaim

AND

(1) VIKTOR VEKSELBERG
(2) VLADIMIR VIKTOROVICH KUZNETSOV
(3) RENOVA HOLDING LIMITED
(4) RENOVA RESOURCES PRIVATE EQUITY LIMITED

Defendants to Counterclaim

(By Counterclaim)

Appearances: Mr. Richard Millett, QC with Mr. James Eldridge and Mr. Marc Kish of Maples and Calder for the Plaintiff and the Defendants to Counterclaim

Mr. Michael Bloch, QC with Mr. David Butler of Appleby (Cayman) for the First and Fifth Defendants and the Plaintiffs to Counterclaim

JUDGMENT

Introduction

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 associated 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. In brief summary, the present claim is made by a member company of the large Russian Renova group of companies on behalf of a Cayman Islands company, of which Mr. Gilbertson was a director. The Cayman Islands company is the ultimate owner and controller of a Cayman Islands private equity fund. The economic benefit of developing, exploiting and managing the Fabergé brand was to be an investment of the private equity fund. It is alleged that, in breach of his duties as a director of the Cayman Islands company, Mr. Gilbertson wrongfully diverted that commercial opportunity away from the private equity fund to the consortium of investors which included himself. The Plaintiff claims compensation from Mr. Gilbertson to restore the private equity fund to the position in which it would now have been but for Mr. Gilbertson's alleged breach of his director's duties. There is also a claim against a company owned by a family trust of Mr. Gilbertson's, also arising out of Mr. Gilbertson's alleged breach of his duties, which acquired shares in Fabergé Limited. Mr. Gilbertson defends the claims on various grounds and also counterclaims.

2. The Parties and Dramatis Personae

2.1. For ease of reference I have set out the names of the parties and the other persons and entities mainly involved in alphabetical order, with the abbreviated names which I have used in this judgment in bold. They are as follows:

2.2. American Metals and Coal International Inc – **("AMCI")** – AMCI is a large coal marketing business owned jointly by Mr. Mende and Mr. Kundrun.

2.3. Autumn Holdings Asset Inc. – **("Autumn")** – **The Fifth Defendant and Second Plaintiff to the Counterclaim.** Autumn is a British Virgin Islands Company, which is wholly owned by Fairbairn in its capacity as trustee of the Gilbertson Family Trusts. Autumn was an off-the-shelf company acquired by Fairbairn solely for the purpose of making the payments out of the BPG Settlement by way of loan to PEL and to hold the shares in PEL, (now Fabergé Limited) all as referred to later in this judgment.

2.4. The Brian Patrick Gilbertson Settlement – **("the BPG Settlement")** – One of the Gilbertson Family Trusts settled by Mr. Gilbertson of which Fairbairn is trustee and as such is the owner of Autumn.

2.5. Cheremikin, Igor – **("Mr. Cheremikin")** - Mr. Cheremikin is the Chief Legal Officer of Renova Management AG, based in Moscow.

2.6. Gigajoule Limited - **("Gigajoule")** – An English company wholly owned by Sean Gilbertson, which was used to file numerous trademark cancellation actions against Unilever.

2.7. Fairbairn Trust Limited – **("Fairbairn")** – Fairbairn is a Jersey, trust company and is trustee of the Gilbertson Family Trusts.

2.8. Gilbertson, Brian – **("Mr. Gilbertson")** – **The First Defendant and First Plaintiff to the Counterclaim**. Mr. Gilbertson has had a long career in the mining industry and has been CEO of a number of publicly listed mining companies. He also has experience of successfully indentifying and developing business entities which were underperforming but which he determined had future potential. Mr. Gilbertson is originally from South Africa but is mainly based in

London. He met Mr. Vekselberg in 2004 and not long after that he became CEO of SUAL, with the remit to develop the company, possibly to merger. While CEO of SUAL, until late February 2007, Mr. Gilbertson was based in Moscow. He submitted a witness statement and gave oral evidence at the trial.

2.9. Gilbertson Family Trusts – **("the Gilbertson Family Trusts")** – Three Jersey, trusts settled by Mr. Gilbertson one of which is the BPG Settlement. Fairbairn is the trustee of all three of the trusts.

2.10. Gilbertson, Sean – **("Sean Gilbertson")** – Sean Gilbertson is Mr. Gilbertson's son and is himself a businessman, also with particular qualifications and interests in the mining industry. Since 2003 he has worked with his father on various mining sector matters. He is based in London. Sean Gilbertson also submitted a witness statement and gave oral evidence at the trial.

2.11. Jelinek, Milan - **("Dr. Jelinek")** – Dr. Jelinek is an acquaintance of Mr. Gilbertson and an investor and consultant to AMCI. He introduced Mr. Gilbertson to Mr. Mende.

2.12. Kalberer, David - **("Mr. Kalberer")** – Mr. Kalberer is Swiss and is the Deputy Chief Legal Officer of Renova Management. He is based in Zurich and reports to the Chief Legal Officer of Renova, Mr. Cheremikin, in Moscow. Mr. Kalberer is a transactional lawyer and is qualified both in Switzerland and in New York, USA. He submitted a witness statement and gave oral evidence in English at the trial.

2.13. K-M Investment Corporation – **("K-M Investment Corporation")** - K-M Investment Corporation is a holding company owned jointly by Mr. Mende and Mr. Kundrun, through which Mr. Mende and Mr. Kundrun provided the money initially used to purchase the Fabergé brand and business.

2.14. Kundrun, Fritz – **("Mr. Kundrun")** – Mr. Kundrun is a business partner of Mr. Mende and 50% owner with him of AMCI and of K-M Investment Corporation.

2.15. Kuznetsov, Vladimir - **("Mr. Kuznetsov")** - **The Second Defendant to the Counterclaim.** Mr. Kuznetsov is Russian and at the relevant time was Chief Investment Officer of Renova, based in Zurich. He has qualifications in economics and other finance related areas both in Russia and the USA. He has considerable experience in the investment and related fields and has worked with Renova for the past 14 years or so. Mr. Kuznetsov was, along with Mr. Gilbertson, one of the two directors of the Company. He was, also with Mr. Gilbertson, one of the two members of the Investment Committee, referred to later. Mr. Kutznetsov also submitted a witness statement and gave oral evidence in English at the trial.

2.16. Lamesa Arts Inc. **("Lamesa Arts")** – Lamesa Arts is a Panamanian company, within the Lamesa group.

2.17. Lamesa group **("Lamesa group")** – The Lamesa group comprises Mr. Vekselberg personal companies which are managed by his family office.

2.18. Mende, Hans - **("Mr. Mende")** – Mr. Mende is a successful businessman, based in the USA. His business interests are principally in coal but also metals, through various entities, including AMCI which is owned equally by Mr. Mende and Mr. Kundrun. AMCI is a subsidiary of K-M Investment Corporation, which is also owned equally by Mr. Mende and Mr. Kundrun. Mr. Mende became acquainted with Mr. Gilbertson as a result of their mutual acquaintance with Dr. Jelinek. Mr. Mende did not give evidence in person at the trial but was deposed for the purpose in the USA on 26th October 2011 and his deposition was admitted as evidence at the trial.

2.19. Pallinghurst (Cayman) General Partner LP (GP) Limited - **("the Company")** - **The Second Defendant**. The Company was incorporated in the Cayman Islands

on 15th March 2006. It is on behalf of the Company that the Plaintiff brings this action, as 50% shareholder, on a derivative basis. The holder of the other 50% shares in the Company is Fairbairn. The two directors of the Company at the relevant time were Mr. Gilbertson and Mr. Kuznetsov.

2.20. Pallinghurst (Cayman) General Partner LP - **("GPLP")** - **The Third Defendant**- GPLP is a Cayman Islands exempted limited partnership established on 10th May 2006, of which the Company is the general partner. GPLP is itself the general partner of the Master Fund.

2.21. Pallinghurst Resources Management LP - **("the Master Fund")** - **The Fourth Defendant**. The Master Fund is a Cayman Islands exempted limited partnership established on 19th May 2006, of which GPLP is the general partner. The Master Fund was established as a private equity fund. From 1st December 2006 the Master Fund was the sole shareholder of PEL. That changed in January 2007 as explained later in this judgment.

2.22. Pallinghurst Resources LLP - **("Pallinghurst LLP")** - Pallinghurst LLP is an English limited liability partnership established by Mr. Gilbertson as a management vehicle. It was investment advisor to the Master Fund pursuant to the requirements of the relevant English regulations.

2.23. Project Egg Limited - **("PEL",** now **"Fabergé Limited")** - PEL is a Cayman Islands company incorporated by or on behalf of Mr. Gilbertson on 1st December 2006 as a wholly owned subsidiary of the Master Fund. PEL was the counterparty to the Sale and Purchase Agreement with Unilever and since January 2007 the owner of the Fabergé brand and associated business. PEL changed its name to Fabergé Limited in March 2007.

2.24. Renova Group – **("Renova" or "Renova group")** – Renova is a very large Russian owned conglomerate, consisting of some one hundred or so corporate and other entities, incorporated or established in various jurisdictions. The group has

a range of major commercial business interests, particularly, although not exclusively, in oil and metals, in Russia and elsewhere. The name Renova is used both for the Renova Group as a hold and also, according to the context for one or more companies within the Renova group.

2.25. Renova Holding Limited - **("Renova Holding")** - **The Third Defendant to the Counterclaim**. Renova Holding is a Bahamian holding company and the parent of the Plaintiff. Both of these companies are part of the Renova group.

2.26. Renova Management AG - **("Renova Management")** – Renova Management is the company within Renova which is principally responsible for the overall management of Renova. It is a Swiss company which carries on business from Zurich.

2.27. Renova Resources Private Equity Limited – **("the Plaintiff")** – also **The Fourth Defendant to the Counterclaim**. The Plaintiff is also a company incorporated in the Bahamas and is wholly owned by Renova Holding. The Plaintiff is also one of the Renova group companies. The Plaintiff is a 50% shareholder in the Company and brings this action derivatively on behalf of the Company.

2.28. Siberian Urals Aluminium Company - **("SUAL")** – SUAL was a large Russian aluminum producing company. Renova held a major interest in SUAL and Mr. Vekselberg was its chairman. Mr. Gilbertson was appointed CEO of SUAL in 2004 but his position was terminated in 2007 shortly before the merger of SUAL with RUSAL, the largest state-owned aluminum producing company in Russia.

2.29. Thomas, Justin - **("Mr. Thomas")** – Mr. Thomas was, at the relevant time, the Managing Director of Fairbairn, the trustee of the Gilbertson Family Trusts in Jersey. Mr. Thomas was also a director of an associated company, Fairbairn Corporate Services Ltd, which is the sole director of Autumn. Mr. Thomas is no longer with the Fairbairn group and since October 2011 he has managed his own

private wealth planning company, which has received indirect financial support from Mr. Gilbertson, among others. Mr. Thomas submitted a witness statement and gave oral evidence at the trial.

2.30. Vekselberg, Viktor – **("Mr. Vekselberg")** – **The First Defendant to the Counterclaim** - Mr. Vekselberg is a well-known, very successful and influential Russian billionaire businessman, based in Moscow. He has very significant business interests, mainly carried on through Renova, of which he is the principal beneficiary, with an interest in excess of 80%, and its chairman. One of Mr. Vekselberg's major interests during the relevant period, held through Renova, was a substantial ownership share in SUAL of which he was the chairman and of which, from 2004 until February 2007, Mr. Gilbertson was the CEO. Apart from Mr. Vekselberg's mainly industrial and commercial business interests carried on through Renova, he also has various personal companies managed by his family office, namely the Lamesa group of companies. Mr. Vekselberg submitted a witness statement and gave oral evidence at the trial in Russian through an interpreter.

2.31. For convenience, save where I refer to individuals or entities by name, I shall refer to the Plaintiff and the Defendants to the Counterclaim together as the **"Renova Parties"** and to the First and Fifth Defendants and Plaintiffs to the Counterclaim together as **"the Gilbertson Parties"**. I shall also refer to Mr. Gilbertson and Sean Gilbertson together as **"the Gilbertsons"**.

3. The Joint Venture and the Letter Agreement

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. The Letter Agreement was expressly governed by English law and provided for disputes arising out of or in relation to it to be resolved by arbitration. As far as I have been made aware, no such arbitration has ever been initiated by either Renova Holding or by Mr. Gilbertson.

3.3. The Letter Agreement began by making reference to Mr. Gilbertson's employment with SUAL in Russia and to provisions set out later in the Letter Agreement relating to the grant to him of certain incentive units. The Letter Agreement then defined *"Investment Fund"* as an investment fund in a jurisdiction and legal form to be 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. 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")".

The Letter Agreement further provided that Mr. Gilbertson and Renova Holding, as Partners, would work together to add value to the Investment Fund and to that end Mr. Gilbertson would be appointed the Chairman of the Investment Fund and the Fund Management Vehicle. It provided that Mr. Gilbertson would *"assume responsibility for developing and implementing the strategy for the Investment Fund and for all Investment Projects"*. Mr. Gilbertson's duties with the Investment Fund and the Fund Management Vehicle were to be those customary for an Executive Chairman of a company and were to include, but not be 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"*. And then clause 2.5 of the Letter Agreement provided:

> *"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."*

3.4. The Letter Agreement also said that *"the management team of the Fund Management Vehicle"*, of which Mr. Gilbertson was to be a member, was to be entitled to a 50% interest in the Fund Management Vehicle, which was to receive all management fees paid by the Investment Fund together with 50% of any

performance fees charged to the Investment Fund, and that Mr. Gilbertson was to decide the allocation of those fees among members of the management team. The management team's participation levels were to increase if the total sum of funds invested, other than by Renova, in the Investment Fund exceeded certain thresholds.

3.5. Under the Letter Agreement the incentive units to be allocated to Mr. Gilbertson as an employee of SUAL in certain events were to be converted on completion of an investment by the Investment Fund in an Investment Project.

3.6. Lastly, by clause 8.2 the Letter of Agreement provided:

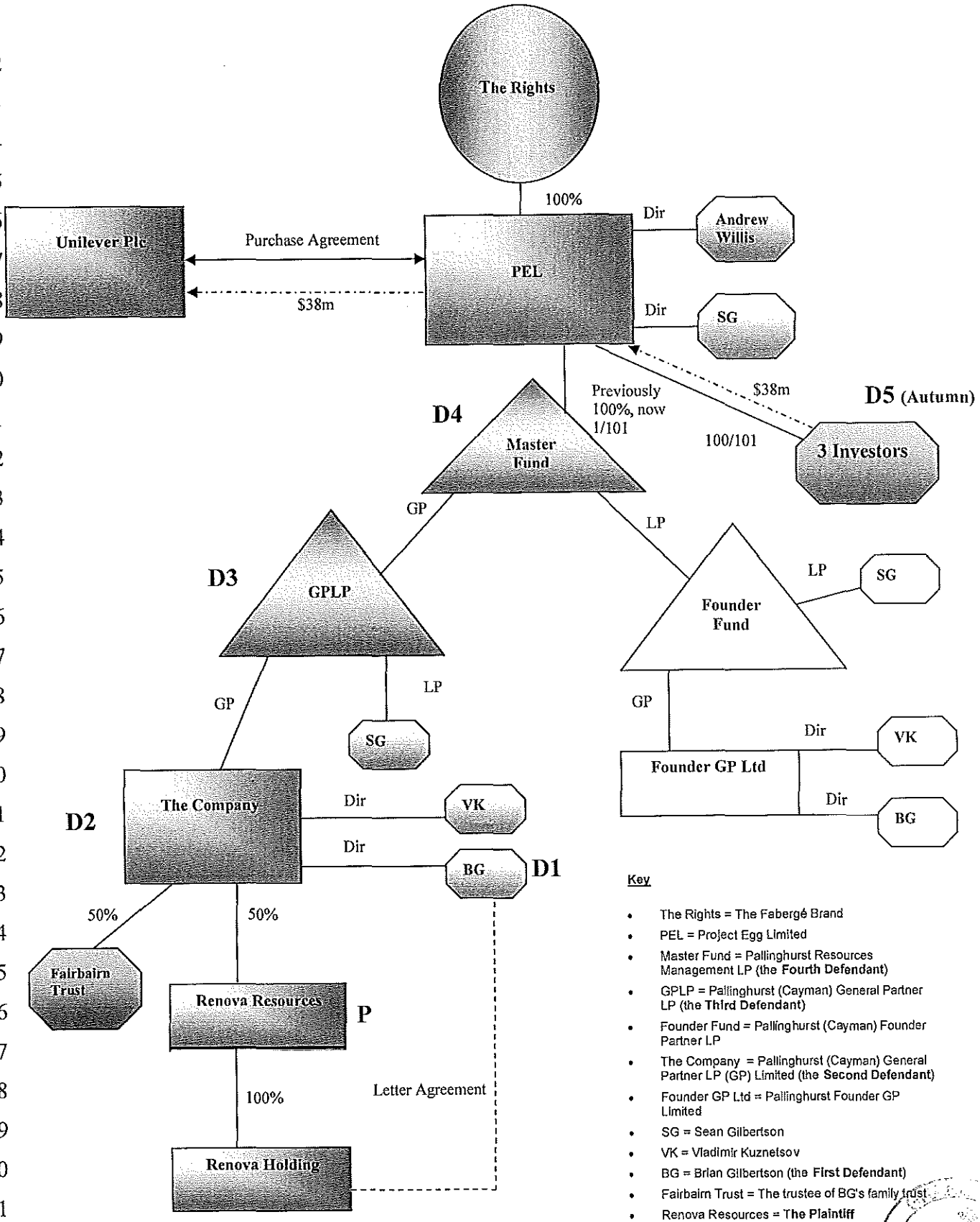
> *"This letter and its terms shall automatically terminate and become null and void if the Investment Fund and the Fund Management Vehicle are not established and operating in a way reasonably satisfactory to each of the Partners within 16 months of the last signature to this letter. In this regard, 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".*

4. <u>The Pallinghurst Structure</u>

4.1. The structure which was established pursuant to the Letter Agreement consisted of the Company as general partner of GPLP, which was in turn general partner of the Master Fund. These were all Cayman Islands entities. This tripartite string of entities was known as the Pallinghurst Structure.

4.2. As I will explain below, the Gilbertson Parties, unknown at the time to the Renova Parties, on 1st December 2006 incorporated another Cayman Islands

company, PEL, as a wholly owned subsidiary of the Master Fund. For convenience a diagram of this structure, also showing other relevant entities and individuals, which was attached to the Plaintiff's Statement of Claim, is set out below. It also identifies the parties to the main action but not all the defendants to the Gilbertson Parties' counterclaim.



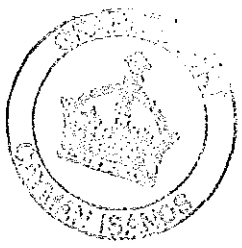
Key

- The Rights = The Fabergé Brand
- PEL = Project Egg Limited
- Master Fund = Pallinghurst Resources Management LP (the **Fourth Defendant**)
- GPLP = Pallinghurst (Cayman) General Partner LP (the **Third Defendant**)
- Founder Fund = Pallinghurst (Cayman) Founder Partner LP
- The Company = Pallinghurst (Cayman) General Partner LP (GP) Limited (the **Second Defendant**)
- Founder GP Ltd = Pallinghurst Founder GP Limited
- SG = Sean Gilbertson
- VK = Vladimir Kuznetsov
- BG = Brian Gilbertson (the **First Defendant**)
- Fairbairn Trust = The trustee of BG's family trust
- Renova Resources = **The Plaintiff**

4.3. Following their establishment, short-form partnership agreements were entered into in respect of GPLP and the Master Fund in May 2006. Thereafter negotiations took place over a considerable time with regard to long-form amended and re-stated limited partnership agreements. These were eventually finalised by September 2006. They were never in fact signed but were accepted by the parties as agreed.

5. Project Egg

5.1. Project Egg was the name given to the project for the acquisition of the Fabergé brand and its 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 that it would nonetheless 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 on 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.



5.2. The contract entitling PEL as a Pallinghurst owned entity to purchase the Fabergé brand, including the associated business (referred to in this case together as "the **Rights**") from Unilever, the subsequent purchase and ownership of the Rights by Autumn, K-M Investment Corporation and Dr. Jelinek through PEL, procured by Mr. Gilbertson, all outside and unrelated to the Pallinghurst Structure, rather than the economic benefit of the development, exploitation and management of the Rights being held by the Master Fund, within the Pallinghurst Structure, is the subject of the dispute behind these proceedings.

5.3. The particular facts which have led to this litigation require to be set out in detail in order to make clear the issues which arise for decision in this case. However, before setting out the facts of the dispute, in order to understand their relevance it may be helpful to bear in mind the general nature of the parties' respective cases, which I now set out in brief summary.

6. Brief Summary of the Parties' Cases

6.1. As an initial general point, it is in my view, worth emphasising that this is not a claim by Renova or by Mr. Vekselberg or any of his personal companies, to ownership of the Fabergé brand or to somehow restore the Rights or the title to the Fabergé brand to any of them. Nor is this a claim by Mr. Vekselberg for breach of any agreement which he contends he made with Mr. Gilbertson. Nor is it a claim by Renova Holding or any other of the Renova Parties for breach of the Letter Agreement by Mr. Gilbertson. The Plaintiff's principal claim, on behalf of the Company is to reconstitute the Master Fund to the position in which it is said it would have now been but for the alleged breach of duty by Mr. Gilbertson as a director of the Company.

6.2. The claim which the Plaintiff makes, as a shareholder of the Company, is a derivative one on behalf of the Company, as ultimate owner and controller of the Master Fund. The Plaintiff 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 the Plaintiff as 50% shareholder in the Company or 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. The Plaintiff 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 those duties to the loss of the Master Fund and thus the Company.

6.4. The Gilbertson Parties dispute the Plaintiff's claims. In summary, their principal defence is that Mr. Gilbertson's duties were established by the terms of the joint venture as set out in the Letter Agreement. They argue that the Company was set up as a vehicle by which the joint venture established by the Letter Agreement was implemented and that the Letter Agreement established the relationship between the parties. It was contended in particular, that Mr. Gilbertson had no fiduciary duties to the Company in respect of potential Investment Projects of the Master Fund which were never formally approved by the Investment Committee and/or which he was entitled to veto in his own interests, as was the case with

Project Egg. Furthermore, Mr. Gilbertson contends that by insisting at the last minute that he should own the title to the Fabergé brand himself through a Lamesa group company outside the Pallinghurst Structure, Mr. Vekselberg/Renova fundamentally and unilaterally changed the basis upon which the parties had been proceeding in respect of the Fabergé brand until then. There was accordingly a proposed new structure, the terms of which were never agreed and so Mr. Gilbertson was entitled to take the Fabergé brand for himself. Also it was said that the insistence of the Renova Parties that Lamesa should own the Fabergé brand and also that the Master Fund's entitlement to the economic benefit of the brand should be pursuant to a licence, the terms of which were never agreed, from Lamesa, as proposed owner of the title to the Fabergé brand, amounted to a veto of or a failure to unanimously consent to the new structure for the brand as an Investment Project. Mr. Vekselberg's failure to be ready to pay the purchase price of the brand to Unilever on the due date and his refusal to pay unless his conditions were met, Mr. Gilbertson says, was a repudiation which left him with no alternative but to secure the brand by paying for it himself with the assistance of his consortium. He contended that in the circumstances he was entitled to pursue the brand for himself, although he only did so fairly when it was clear that negotiations had broken down.

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) and also for the interest it earned on the loans it made by way of contribution to the purchase price of the Fabergé brand and for working capital, on the ground that it knew or ought to have known that Mr. Gilbertson was acting in breach of fiduciary duty in procuring the purchase of the brand as he did and in procuring the issue of the new shares in PEL. Autumn, it is said, is liable to account for them. Alternatively, the Plaintiff contends in respect of the shares that since Autumn did not pay for them it was a volunteer and on that basis also a constructive trustee in respect of those shares.

6.6. The Gilbertson Parties of course dispute any breach of fiduciary duty by Mr. Gilbertson but in any event contend that Autumn did not have the requisite knowledge to render it liable for knowing receipt or as a constructive trustee and that anyway in the circumstances it was not a volunteer.

6.7. Mr. Gilbertson and Autumn also counterclaim against not only the Plaintiff but also against Mr. Vekselberg, Mr. Kuznetsov and Renova Holding from whom, in effect, they seek indemnity on various grounds for any liability which they are found to have in respect of the Plaintiff's claims. It is therefore a contingent counterclaim. The Renova Parties contend that the counterclaims are not well founded and should be dismissed.

7. The Evidence in the Case

7.1. I also consider that, before explaining and considering the history and circumstances of the dispute, I should say something about the evidence.

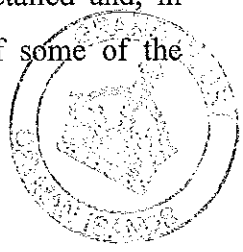
7.2. Apart from the witness statements and the oral evidence of the individuals to whom I have already referred, most of the evidence in the case consisted of a large number of e-mails, sometimes with attachments, produced on discovery almost entirely by the Gilbertson Parties. However, only a relatively small number of these were the subject of written or oral evidence and submissions and I propose to refer in this judgment only to the relatively few which were specifically referred to and relied upon.

7.3. I should also mention that virtually no internal documents such as e-mails, notes and memoranda were produced on discovery by the Renova Parties. Their discovery, and the apparent inadequacy thereof, has been the subject of several applications and consequent rulings in these proceedings. I have been generally critical of this lack of discovery and made consequent orders. Nonetheless, in the circumstances I do not consider it necessary, having regard to the manner in

which the parties cases were presented at the trial, to go into the details of the history of discovery in this judgment; there are several written rulings which can be referred to if required. However, I should mention that in July 2011 the Gilbertson Parties applied for orders that the Plaintiff's writ and statement of claim and the Renova Parties' defences to the Counterclaim should be struck out on the ground, in summary, that the failure of the Renova Parties to comply with discovery orders and their failure to give proper discovery as a result of their destruction of documents following a computer crash at their Zurich offices, made a fair trial of the issues in this case no longer possible.

7.4. After a 4 day hearing I issued a Ruling on 5th August 2011 in which I concluded that, while I considered that there had been a culpable failure by the Renova Parties to comply with their discovery obligations, I was not satisfied that in the circumstances there was consequently a substantial risk that a fair trial would not be possible. I therefore refused the Gilbertson Parties' application. I did, however, point out that the Court may, as a result of such failure in respect of discovery, draw such inferences as it considered appropriate in the circumstances in reaching its final conclusion at trial. In the event, there was no great emphasis on this at the trial by Leading Counsel for the Gilbertson Parties and I was not pressed to draw any specific inferences in respect of any specific documents alleged to be discoverable and missing. There was a general submission that the Gilbertson Parties should not be prejudiced as a result of such failure in respect of discovery but the lack of discovery was not addressed in cross-examination with the Renova Parties' witnesses. I shall address this in more detail in the context of submissions made about the Renova Parties' conduct, later in this Judgment.

7.5. Whether Mr. Gilbertson owed fiduciary duties to the Company and, if so, what fiduciary duties depends on the particular circumstances. Accordingly it is necessary to consider, and in so far as disputed, determine what the precise circumstances were. The history of the dispute is inevitably detailed and, in particular, the state of knowledge and some of the evidence of some of the



individuals concerned was disputed. The most significant circumstances arose during the short period between about mid December 2006 and mid January 2007. It seems to me convenient and, I believe easiest, to follow the detail and to consider and establish the relevant circumstances in chronological stages, namely in the period up to December 2006, then from December 2006 up to and including 3rd Janaury 2007 and, thirdly, in the period after 3rd January 2007.

8. **The Circumstances in the Period to December 2006**

8.1. I have already explained briefly how, from as early as 2002, Mr. Gilbertson had identified the Fabergé brand as being of interest as a potentially profitable investment generally. I have explained too how, at a relatively early stage in their discussions about a private equity fund, Mr. Gilbertson suggested to Mr. Vekselberg that the Fabergé brand and business would be a good potential investment project for the proposed equity fund which eventually became the Master Fund, and that Mr. Vekselberg had been enthusiastic about the idea in light of his personal interest in Fabergé.

8.2. In about April 2005, an initial approach was made to Unilever by GigaJoule about the possibility of purchasing the Fabergé brand. No price was mentioned. Also, during 2005, discussions and negotiations took place, including by the parties' respective London solicitors, concerning the structure, which eventually became the Pallinghurst Structure, and various draft documents were produced and exchanged.

8.3. On 27 October 2005, Pallinghurst LLP was established in England by the Gilbertsons for the purpose I have already explained. Then, on 24 November 2005, the Letter Agreement (initialled by Mr. Kuznetsov) was sent to Mr. Gilbertson.

8.4. From November 2005, through GigaJoule, Sean Gilbertson, with the assistance of the Gilbertson Parties' London solicitors, Clifford Chance, initiated a number of cancellation actions in respect of various Fabergé trademarks, relating particularly to jewellery, held by Unilever in the USA, Japan and several European jurisdictions, on the ground of non-use. This was a tactic, the intention behind which, along with certain other similar applications relating to other Fabergé luxury goods, was that it should reduce the value of the Fabergé brand and hence the purchase price which Unilever might expect to obtain for it. It was intended to strengthen the negotiating position in relation to the proposed purchase of the Fabergé brand.

8.5. On 20th January 2006 there was a meeting of the "Pallinghurst Resources Private Equity Fund". It was attended by, among others, Mr. Gilbertson, Sean Gilbertson and Mr. Kuznetsov. The agenda included several "Investment Projects" including Project Egg. A briefing document circulated prior to the meeting by Sean Gilbertson reported, with regard to Project Egg, that meetings with appropriate persons at Unilever had taken place since April 2005 but without success. Clearly Project Egg was being explored and pursued as an opportunity and potential Investment Project in accordance with the terms of the Letter Agreement.

8.6. Leading Counsel for the Gilbertson Parties submitted that this meeting and the agenda and briefing document could not be taken to indicate that Project Egg was an approved Investment Project of the Master Fund since the Letter Agreement had not been finally signed and the Master Fund had not been established. 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.

8.7. As already mentioned, on the same day as the meeting, 20th January 2006, the Letter Agreement (signed by Mr. Carl Stadelhofer on behalf of Renova Holding) was given to Mr. Gilbertson and on 24th January 2006, he countersigned the Letter Agreement. Then, not long after that, in March 2006, the Company was incorporated in the Cayman Islands with Mr. Gilbertson and Mr. Kuznetsov as the two directors, and the Plaintiff and Fairbairn as the two equal shareholders.

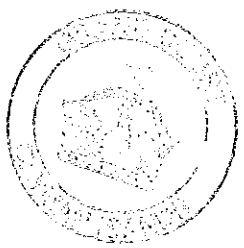
8.8. On 9th March 2006 Sean Gilbertson sent out to Mr. Kalberer, Mr. Kuznetsov and Mr. Gilbertson an update on what was referred to as the Pallinghurst Resources Private Equity Fund setting out the latest summary of the arrangements, the Structure and responsibilities ("the March Update"). With regard to Mr. Gilbertson the March Update expressly reiterated his duties as set out in the Letter Agreement, including searching for and introducing Investment Projects to the Investment Committee and providing strategic advice on Investment Projects. The March Update expressly provided that these were duties that Mr. Gilbertson would owe to the Company.

8.9. On 24th April 2006 a meeting of the "Establishment Steering Committee" took place. The meeting was attended by Mr. Gilbertson, Sean Gilbertson, Mr.

Kuznetsov and Mr. Kalberer. The minutes of the meeting refer to "Current Investment Projects", amongst which was Project Egg.

8.10. Steps to acquire the Fabergé brand from Unilever as an Investment Project continued. The maximum amount of expenditure on an investment by Renova which could be approved by Mr. Kuznetsov, as Chief Investment Officer, without the need for detailed due diligence, a business assessment and various internal approvals was US$20m. Two weeks after the meeting on 24th April 2006, on 8th May 2006, Sean Gilbertson circulated an "Investment Proposal Outline-Project Egg" dated 7th May 2006 which, after summarising the position, requested approval by the Investment Committee, on the basis of financial backing by Renova, of an offer to Unilever of up to US$25m. Shortly thereafter it was agreed by Mr. Kuznetsov and Mr. Gilbertson to offer the sum of US$20m to Unilever for the Rights, subject to agreement on appropriate terms and conditions. Accordingly, on 17th May 2006, Sean Gilbertson wrote to UBS, who were by then representing Unilever in relation to the sale of the Rights, informing them that the Investment Committee of the "Pallinghurst Resources Fund LP" (by which he presumably meant the Master Fund) had approved US$20m to purchase the Rights, subject to agreeable terms and conditions. The letter was expressly approved by Mr. Kuznetsov on behalf of Renova. Shortly after that, Unilever requested a comfort letter in respect of the ability to pay US$20m and in due course such a letter was arranged and provided by another Renova group company, Renova Oil and Gas Ltd. However, the offer of US$20m was subsequently declined by UBS on behalf of Unilever.

8.11. In my view 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.



8.12. On 25/26 July 2006 another meeting of the "Establishment Steering Committee" took place in Frankfurt, Germany. The meeting was attended, amongst others, by Mr. Gilbertson, Sean Gilbertson and Mr. Kuznetsov. Several Investment Projects for the private equity fund were discussed, including Project Egg. The minutes of the meeting record, under the heading "Project Egg – Brand Acquisition":

> *"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."*

8.13. On 8th August 2006 Mr. Kalberer sent to Mr. Sean Gilbertson a series of draft documents relating to the Pallinghurst long-form agreements with comments and proposed changes, for his review. Sean Gilbertson expressed some exasperation to his father, Mr. Gilbertson, about the number of documents and proposed changes involved. Mr. Gilbertson, in an e-mail to Sean Gilbertson later that day said:

> *"Buy the Egg, and I'll pull the plug on 'em"*

It was argued by Leading Counsel for the Renova Parties that this was an indication that, notwithstanding that the Rights were a proposed Investment Project introduced by Mr. Gilbertson pursuant to the Letter Agreement and that they were being actively pursued as an Investment Project for the Master Fund, Mr. Gilbertson nonetheless apparently considered that he had the right to acquire the Rights for himself and for his own benefit. In cross-examination Mr. Gilbertson played down the significance of his comment, which he said was

written in a moment of exasperation with the time it was taking to finalise the documentation with Renova. However, he did admit that he would not have said what he did unless he thought he had the right to do what he had suggested, namely to take the Rights for himself if he wanted to. Although I accept that his remark was made in the heat of a moment of frustration, in my assessment 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. In my view his conduct in early January 2007, as explained below, is reflective of the attitude he expressed in his brief e-mail of 8th August 2006.

8.14. Mr. Kuznetsov's evidence was that, following the meeting in Frankfurt on 25/26 July 2006, he did indeed speak to Mr. Vekselberg about the possibility of seeking to acquire the Fabergé brand at a price over the US$20m, which was the limit of what Mr. Kuznetsov was prepared to recommend Renova should pay. He said that Mr. Vekselberg indicated to him that he would be prepared to pay US$30m for the Fabergé brand from his personal funds. Based on this, Mr. Kuznetsov agreed to an increased offer to Unilever of US$30m, which was made in a letter from Sean Gilbertson dated 22nd August 2006. However, the increased offer of US$30m was subsequently also rejected by UBS on behalf of Unilever and it became clear that Unilever were looking to obtain a price in the region of US$40m. 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. Although Mr. Vekselberg was challenged in cross-examination about his approval of the offer made to Unilever (subsequently rejected) of US$30m, I am satisfied that it was understood by the Gilbertsons that such approval was being given on behalf of Mr. Vekselberg personally and not on behalf of Renova. Mr. Kuznetsov had been quite clear at the Frankfurt meeting on 25/26 July 2006 that Renova could only support an investment of US$30m with a detailed analysis and business plan, which did not exist, and that accordingly he would approach Mr. Vekselberg to ascertain whether he would be prepared to use his personal funds to

pay the purchase price. 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.

8.15. Eventually, at a meeting between Sean Gilbertson and UBS in November 2006, UBS expressly pressed for a purchase price of US$40m. Mr. Gilbertson informed Mr. Kuznetsov of this and on 29th November 2006 he also e-mailed Mr. Vekselberg asking him whether he was *"on board or not, up to the maximum of $40 million"*.

8.16. As already mentioned, the long-form agreement documents for the Pallinghurst Structure exempted limited partnerships were finalised in mid-September 2006. Although these documents were never executed and therefore never legally binding upon the parties, the parties nonetheless proceeded on the common understanding that the drafts were final and agreed. Furthermore, both the Renova Parties and Mr. Gilbertson proceeded as though the Master Fund and the Pallinghurst Structure generally were operational well before the events of December 2006 and January 2007 referred to below. 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.

9. **The Circumstances during December 2006 up to and including 3rd January 2007**

9.1. In a telephone conversation on 1st December 2006 Mr. Vekselberg agreed with Mr. Gilbertson that he should proceed to acquire the Fabergé brand for a price not exceeding US$40m and Mr. Gilbertson confirmed that understanding in an e-mail to Mr. Vekselberg, copied to Mr. Kuznetsov, later the same day.

9.2. Mr. Gilbertson was keen to attract further investors to the Master Fund and he said in evidence that he had hoped to establish a fund of US$1bn. During 2006 he had discussions with Mr. Mende to whom he had been introduced by his friend Dr. Jelinek. Mr. Mende, jointly with his associate Mr. Kundrun, owns and controls *inter alia* the world's largest coal related investment fund group, AMCI. He was interested in possibly investing in the Master Fund, including Project Egg, although he was not as attracted to the latter as much as one of the other Master Fund Investment Projects, Project Charlie. Project Charlie was a proposal for the acquisition of an Australian manganese mining company, Consolidated Minerals Limited. Mr. Gilbertson also had discussions with a very large investment fund specialising in energy related projects called First Reserve. First Reserve and AMCI were possible investors up to a total amount of US$850m between them, which with Renova's investment of US$150m, would have brought the Master Fund investment to the US$1bn level.

9.3. On 6th December 2006 there was a meeting at the Pallinghurst LLP offices in London attended by Mr. Gilbertson, Sean Gilbertson, Mr. Kuznetsov, Mr. Mende and representatives from First Reserve. The purpose of the meeting was to further discuss the possibility of AMCI and First Reserve becoming investors in the Master Fund. A certain amount of work had already been carried out in relation to possible co-operation agreements between GPLP, AMCI and First Reserve providing for the terms upon which AMCI and First Reserve might become such investors. 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 in investing in the Master Fund being particularly interested in Project Charlie but First Reserve subsequently dropped out as a potential investor.

9.4. A week later, on 13th December 2006, an informal meeting took place late in the evening between Mr. Kuznetsov and Mr. Gilbertson in the bar at the Swissotel, Moscow. There is a difference of recollection between Mr. Kuznetsov and Mr. Gilbertson as to precisely what was discussed and particularly what Mr. Kuznetsov told Mr. Gilbertson. There is no disagreement that Mr. Kuznetsov confirmed to Mr. Gilbertson that the purchase price for the Rights up to an amount of US$40m would be paid by Mr. Vekselberg personally, although Mr. Vekselberg had of course already confirmed that to Mr. Gilbertson on the telephone on 1st December 2006 (see para 9.1 above). The difference of recollection was whether Mr. Kuznetsov also told Mr. Gilbertson that Mr. Vekselberg required to own the actual title to the Fabergé brand himself outside the Pallinghurst Structure 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. Mr. Kuznetsov was adamant that he did so inform Mr. Gilbertson; Mr. Gilbertson was equally adamant that Mr. Kuznetsov did not tell him that.

9.5. Mr. Gilbertson's evidence was that he did not know that Mr. Vekselberg was insisting that one of his personal companies should own the title to the Fabergé brand outside the Pallinghurst Structure, with the economic benefit of developing, exploiting and managing the brand to remain with the Master Fund within the Pallinghurst Structure, until just after a telephone conversation between Sean Gilbertson and Mr. Kalberer a week later, on 20th December 2006, which is referred to below. According to the evidence of Mr. Gilbertson and Sean Gilbertson, what Mr. Kalberer told Sean Gilbertson on 20th December was an unexpected, surprising and unintended change to the previous arrangements.

However, the evidence of the Renova Parties was overall to the contrary. Mr. Vekselberg's evidence was not entirely satisfactory, in my view at least partly because of the difficulty of his giving evidence in Russian and the inevitable loss of nuances in translation and, on occasion, obvious misunderstandings and partly because he is clearly not a man for details. However, although Mr. Vekselberg said several times that he could not remember precisely when, the upshot of his evidence, which he repeated emphatically several times, was that he had definitely agreed with Mr. Gilbertson that one of his personal companies would own the title to the Fabergé brand, while the economic benefit of developing, exploiting and managing the brand would continue to be held in the Master Fund as part of the Pallinghurst Structure. He initially said he had agreed this with Mr. Gilbertson some eight months or so before the sale and purchase agreement ("the SPA") with Unilever was signed on 22nd December 2006. Later in his evidence he said that the agreement was made some six months before his discussion with Mr. Gilbertson on 1st December 2006 concerning an offer price of up to US$40m. In either case that would mean that, according to Mr. Vekselberg, his agreement with Mr. Gilbertson was sometime in May or June 2006 and he did say on one occasion that he thought it had been in the summer of 2006. Mr. Vekselberg was, of course, extensively challenged on this in cross-examination and I think it fair to say that his recollection about dates was hazy. It was very clear that he is an extremely busy person as head of a very large business empire and consequently focused on broad issues. He is not, as I have already said, one for details. He recollected his conversation with Mr. Gilbertson in which he agreed that Mr. Gilbertson could offer up to US$40m for the Rights, although he could not recollect when the conversation took place. He did state more than once that he discussed his requirement that he would own the Fabergé brand himself with Mr. Gilbertson before that conversation. It does seem to me rather unlikely that Mr. Vekselberg would agree to pay up to US$40m for the Rights personally and not seek to get anything in return, such as personal ownership of the brand, in which he was very interested, as Mr. Gilbertson well knew. In my view, it is not inconceivable that in the telephone conversation on 1st December when he agreed

to pay up to US$40m for the Rights himself, Mr. Vekselberg said that in return for paying for Fabergé he would take title to the Fabergé brand himself, while the economic benefit of developing, exploiting and managing the brand could remain with the Master Fund, with the consequent benefits to Mr. Gilbertson, both as Partner and as a member of the investment management team. However, that was not suggested to Mr. Gilbertson and was not referred to in his e-mail confirming the conversation. Mr. Gilbertson himself was adamant that he did not know of Mr. Vekselberg's intentions until after the phone call on 20th December 2006 between Sean Gilbertson and Mr. Kalberer.

9.6. On the other hand, the evidence of Mr. Kuznetsov was to the effect that he was first informed by Mr. Vekselberg of his proposal that he would own the title to the Rights himself through one of his personal companies when he reported to Mr. Vekselberg on the meeting with Mr. Mende and First Reserve on 6th December 2006 at the offices of Pallinghurst LLP in London. If Mr. Vekselberg had agreed with Mr. Gilbertson that he would own the title to the Fabergé brand outside the Pallinghurst Structure sometime in the summer, it seems to me improbable that Mr. Vekselberg would not have told Mr. Kuznetsov of that agreement well before early December 2006, six months later. Mr. Kuznetsov, of course, says that he told Mr. Gilbertson of this proposal at the meeting in the Swissotel, Moscow on 13th December 2006. In his witness statement Mr. Kuznetsov said that he told Mr. Gilbertson at that meeting that the structure that would be used for the acquisition of the Rights was that Mr. Vekselberg would fund it himself out of his family office rather than the Renova group doing so and that the family office would hold the title to the Fabergé brand, with the economic benefits and management of the brand to be enjoyed by the Pallinghurst Structure. He says he had the clear impression that Mr. Gilbertson accepted this at their meeting and was prepared to proceed on that basis. His oral evidence was that Mr. Gilbertson took this information:

"in his, I would say, usual way, without expressing any sign of displeasure. He just took this information in..... He accepted – as far as I am concerned, he accepted it; and I didn't want to put additional emphasis on the matter. I told him how this project would be structured, he accepted it and then we moved on..... He did not say anything to the contrary. So, for me, the matter was set and my impression was the next step was that the teams would start drafting the documentation on that basis. Because clearly if it were of any surprise to him or anything that went contrary to his prior understandings, or that there would be something that he would have any displeasure with, I would expect him to tell me that. It absolutely was not the case..... I have a very good recollection of that meeting, as a matter of fact..... In this part [of the conversation] *I was very specific. I was very factual. I said that a company of Mr. Vekselberg's group – I don't recall whether I mentioned Lamesa or not, but clearly I said the family office of the private side of the Group will be holding the Rights for the Fabergé brand; and that agreement will be structured between this company and the Pallinghurst Fund, so that all benefits and all economic rights will flow into the Fund. And that is probably the extent of details I went into"*

9.7. In cross-examination Mr. Kuznetsov made it clear that his negotiation practice was that if the other party did not react or say anything or raise any questions concerning a matter which Mr. Kuznetsov was proposing or requiring he would assume it was agreed and not go into it any further. It appears that at his meeting with Mr. Gilbertson, when Mr. Gilbertson did not react or respond to the information which Mr. Kuznetsov says he gave him concerning Mr. Vekselberg's requirements, he assumed that meant that Mr. Gilbertson had agreed to it.

9.8. Mr. Gilbertson was also cross-examined at length about that meeting with Mr. Kuznetsov and about the brief manuscript note which he took at the time. The relevant part of the note, as transcribed, states:

"Formalise deal [arrow]
willing to put in USD40 million.
No.1Option Deal between Pallinghurst & co_ _.
V2 pref 100% [arrow] *willing to giveaway 25%.*
Good for
Up to US$40. OK"

Mr. Gilbertson was unable to explain the reference in his note to *"Deal between Pallinghurst & co."* and said he could not exclude the possibility that it was a reference by Mr. Kuznetsov to a proposed arrangement between Pallinghurst, that is the Master Fund, and a separate company outside the Pallinghurst Structure (that would be, on this hypothesis, a personal company of Mr. Vekselberg's). There was also considerable cross-examination of Mr. Gilbertson about the reference in his note to Mr. Vekselberg's preference for 100% but his willingness to give away 25% (presumably to another investor such as Mr. Mende). Mr. Gilbertson's evidence was that he did not understand that to be a reference to 100 % direct ownership of the Fabergé brand by Mr. Vekselberg as opposed to a 100% share through the Master Fund, although it was not entirely clear to me precisely what he meant by that. This meeting did follow only a week after the meeting of 6th December in London at which the possible investment in the Master Fund by AMCI (Mr. Mende's company) and First Reserve was discussed and which was a matter of considerable significance to Mr. Gilbertson, who was keen that Mr. Mende/AMCI should get 25% of the Rights by way of investment. Mr. Gilbertson also said that, when it came to payment, he did not distinguish between Mr. Vekselberg personally and the Renova group. I was not wholly convinced by that, given that Mr. Gilbertson is a very experienced businessman with many years experience of directing and dealing generally with companies as a result of which he must have been well aware of the important distinction between Mr. Vekselberg personally on the one hand and the corporate Renova group on the other.

9.9. At the end of his cross-examination about his note of the meeting Mr. Gilbertson was persuaded to accept that the reference in his note to formalising the deal could have been a reference to formalising a deal between the Master Fund and one of Mr. Vekselberg's private companies outside the Pallinghurst Structure, although I felt that Mr. Gilbertson was rather muddled by that point. It seems to me possible that Mr. Gilbertson was confused at the meeting at the Swissotel and that he and Mr. Kuznetsov were at cross-purposes. Mr Kuznetsov clearly did not spend much time on the point at the meeting. He apparently just assumed from Mr. Gilbertson's lack of reaction that he agreed with the proposal. It is equally possible that Mr. Gilbertson's lack of reaction was because he was confused and did not understand or take on board what was meant.

9.10. I find it improbable that, if Mr. Gilbertson had really understood that the structure of which Mr. Kuznetsov says he told him was to be established, namely on the basis that the title to the Fabergé brand would be owned by Mr.Vekselberg through one of his personal companies outside the Pallinghurst Structure, with the economic benefit of developing, exploiting and managing the business of the brand remaining with the Master Fund, he and Sean Gilbertson would have reacted the way they did to Mr. Kalberer explaining that to Sean Gilbertson on the telephone on 20th December 2006. Sean Gilbertson obviously worked closely with his father on Project Egg. It seems to me unlikely that if Mr. Gilbertson had really understood that the title to the Fabergé brand was to be owned by Mr. Vekselberg through one of his personal companies outside the Pallinghurst Structure he would not have immediately told Sean Gilbertson of that. Although I was not always so sure about Mr. Gilbertson, I found Sean Gilbertson to be a generally credible and reliable witness and I accept that he knew nothing of Mr. Vekselberg's requirements until he spoke to Mr. Kalberer on 20th December 2006. It may be that, as a result of the discussions in London in the previous week concerning the possibility of further significant investment in the Master Fund by other investors, thereby reducing Renova's overall proportionate interest, at the meeting in the Swissotel Mr. Gilbertson misunderstood what he noted Mr.

Kuznetsov was saying about Mr. Vekselberg's preference to have 100%, albeit he was willing to give away 25%. In my opinion, having regard to the evidence and surrounding circumstances overall, the Plaintiff has not established on a balance of probability that Mr. Gilbertson understood and agreed to Mr. Vekselberg's requirements at or as a result of the meeting in the Swissotel with Mr. Kuznetsov on 13th December 2006. 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.

9.11. On 15th December 2006 two days after his father's meeting in Moscow, Sean Gilbertson agreed a purchase price for the Rights with UBS/Unilever of US38m and later that same day Mr. Gilbertson e-mailed Mr. Kuznetsov informing him of this.

9.12. Later on 15th December 2006, Mr. Kuznetsov emailed Mr. Gilbertson, copying Sean Gilbertson and Mr. Cheremikin to congratulate him on agreeing the purchase price and said:

> *"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)."*

There is 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 contend that the reference to the right group company would or should have been understood by the Gilbertsons as meaning a company within the Renova Group or even a company within Mr. Vekselberg's family office (Mr. Kuznetsov could not remember if he mentioned the Lamesa group by name at the meeting two days previously in the Swissotel). The Gilbertsons, on the other hand, contend that they understood that the reference to *"the right group*

company" was to a company within the Pallinghurst Structure. Of course what the Gilbertsons understood by the reference the *"the right group company"*, would largely depend on whether they knew by then of the intention that Mr. Vekselberg would himself own the title to the Fabergé brand through one of his personal companies or whether they remained under the impression that the Rights as a whole, including the title to the brand, would be owned and held by the Master Fund as originally intended. It would be somewhat strange to describe the Pallinghurst Structure as a group of companies; the Master Fund and GPLP were partnerships and the only company within the Structure was the Company, so there was no choice of companies within the Pallinghurst Structure. The Gilbertsons are experienced businessmen and in my view unlikely to consider the Pallinghurst Structure to be a group of companies. It would also be odd that Mr. Kuznetsov requested that they communicate with Mr. Cheremikin, the head of the Renova legal and corporate department, about which group company should be used. Mr. Cheremikin had had nothing to do with the Pallinghurst Structure and accordingly would not seem to have been the appropriate person to determine the right company within the Pallinghurst Structure, if that was what was meant. However, nevertheless on balance, it seems to me that the answer to this particular issue does really depend on whether the Gilbertsons were or were not aware by that date of Mr. Vekselberg's requirements. Sean Gilbertson's response later that day seems to me to confirm that they did not understand Mr. Kuznetsov to be referring to anything other than the Pallinghurst Structure.

9.13. In Sean Gilbertson's response later the same day by e-mail to Mr. Cheremikin, with a copy to Mr. Kuznetsov, he informed them that on the advice of Clifford Chance they had already incorporated a Cayman Islands company called Project Egg Limited ("PEL") as a wholly owned subsidiary of the Master Fund to acquire the Rights. PEL had been incorporated on 1st December 2006 with Sean Gilbertson and Mr. Willis, an employee of Pallinghurst LLP, as its directors. Rather surprisingly, the Renova Parties were not made aware of the incorporation of PEL until Sean Gilbertson's e-mail. If they had been consulted at the time

perhaps the confusion may not have arisen. The incorporation of PEL was arguably inconsistent with Mr. Vekselberg's requirements and, unless it is to be considered as a knowing and deliberate breach of those requirements by the Gilbertsons, which was not suggested in cross-examination and of which there is no evidence, it seems to me to be a further indication that Mr. Gilbertson did not understand what Mr. Vekselberg was requiring until 20th December 2006 as I have concluded.

9.14. Three days later, on 18th December 2006, Sean Gilbertson emailed Mr. Kalberer as follows:

> *Further to our discussion earlier today, I tried to get UBS/Unilever to agree to a deal whereby we sign the deal this week, but have "completion" and payment on Friday 12th January 2007. UBS accepted this, but then called me to say that Unilever insisted on doing it all this year, and preferably by Friday of this week* [i.e. Friday 22nd December 2006]. *I am awaiting their response as to whether we can sign this week and "complete" next week (i.e. still within the year, but giving us slightly longer to get our ducks into a row).*
>
> *As mentioned, we have incorporated a Cayman Islands based limited company called Project Egg Limited ("SPV") [i.e. PEL] which, based on advice from Clifford Chance, should acquire the portfolio of trademarks. I am awaiting KPMG's sign-off on this, especially in respect of possible VAT charges. The SPV is a100% subsidiary of our fund "Pallinghurst Resources Management L.P." [i.e. the Master Fund]. At present, Andrew Willis and I are the directors of the SPV.*
>
> *Given your suggestion this morning, Andrew Willis is pulling out all the stops to try and get bank accounts set up with HSBC for Project Egg Limited in order to facilitate payment.*

I would appreciate any further thoughts you have, as well as on documents that Renova may wish to see as part of this process.....

9.15. The following day on 19th December 2006 Unilever's English solicitors, Slaughter and May, e-mailed Sean Gilbertson proposing that the SPA with Unilever should be signed that week but that they would defer completion (i.e. payment) until 3rd January 2007. The e-mail concluded:

"I hope this is acceptable, but please give me or John [John McElroy at UBS] a call if there is any problem."

The terms of the e-mail from Slaughter and May suggested to me that, contrary to the earlier indication given by Sean Gilbertson in his e-mail of 18th December 2006, whilst Unilever was insisting on both completion and payment, as well as the signing of the SPA before the end of 2006, it was in fact willing to complete in 2007 as long as the SPA itself was signed by the end of 2006. In my view the inference from Slaughter and May's comment is that Unilever may have been willing to agree a date later than 3rd January 2007 for completion if that date caused "any problem". I was not directed to any evidence that Sean Gilbertson did call either Slaughter and May or John McElroy at any time before 3rd January 2007 to request an extension of time for completion, notwithstanding that the tone of Slaughter and May's e-mail does suggest that a request for a short extension of time for completion may have been sympathetically considered.

9.16. On 20th December 2006 Mr. Kalberer and Sean Gilbertson spoke on the telephone. Sean Gilbertson made a brief note of the discussion in his note book, which in transcribed form says *inter alia*:

".....

DK allocated not pleasurable task to inform of

(1) VV talk with EXCom, VK, Private Side etc

(2) VK asked

(3) Rights shall be purchased by a vehicle of the private side + VK will do comm.. agreement with us subsequently.

(4) Eggs are kept in a Panamanian Company.

(5) Is Panama as feasible

(6) Management the asset by Pallinghurst Team

....."

This was an important conversation because, as I have already explained, it is contended by Mr. Gilbertson and Sean Gilbertson that this was the first time that they were informed that the Rights would be purchased by one of Mr. Vekselberg's private companies and held by a Panamanian company (which was Lamesa Arts Inc). There is a dispute as to what Mr. Kalberer meant by having been *"allocated not pleasurable task to inform"*. It was contended on behalf of the Gilbertson Parties that Mr. Kalberer considered his task to be *"not pleasurable"* because he well understood that what he was saying was a significant change to the previous arrangements and that the Gilbertsons would be unhappy about it. In his evidence Mr. Kalberer sought to place a different interpretation on his comment and contended that he was referring to Sean Gilbertson's e-mail two days earlier, on 18th December, and the indication that Mr. Willis, one the two directors of PEL, was urgently setting up bank accounts for PEL in order to facilitate payment by PEL to Unilever. Mr Kalberer said his not pleasurable task was to tell Sean Gilbertson that Mr. Willis should not be doing that. However, although I found Mr. Kalberer's evidence generally plausible, I did not find his explanation on that particular point convincing. It seemed to me that the more probable interpretation of why he thought the information he was passing on was not pleasurable was because he correctly thought he was passing on bad news which the Gilbertsons would not be happy about. Of course it is possible that, although Mr. Gilbertson was already aware of Mr. Vekselberg's requirements as a result of his discussions previously with Mr. Vekselberg, or the week before at the Swissotel with Mr. Kuznetsov, he had not

passed that information on to Sean Gilbertson. However, as I have already said, 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.

9.17. Shortly after their telephone conversation, Mr. Kalberer provided Sean Gilbertson with details of the entity selected, namely Lamesa Arts Inc. He also provided a copy of a power of attorney by that company in his, Mr. Kalberer's, favour.

9.18. The same day as the telephone conversation between Sean Gilbertson and Mr. Kalberer, 20th December 2006, Mr. Gilbertson's friend Dr. Jelinek e-mailed Mr. Gilbertson as follows:

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

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 the following day, 21st December, Mr. Gilbertson responded by e-mail to Dr. Jelinek as follows:

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

9.19. Also on 21st December, Sean Gilbertson responded to Mr. Kalberer's e-mail, with a copy *inter alia* to Mr. Kuznetsov, in which he said that Mr. Gilbertson was waiting for a call from Mr. Kuznetsov and went on to say:

> *"..... 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 also said that Unilever/UBS/Slaughter and May were waiting to hear about signing the SPA.

9.20. Later the same day, 21st December, Sean Gilbertson e-mailed Mr. Kalberer again, with a copy to Mr. Kuznetsov, and informed him that UBS were eager to have the SPA signed that day. He also said:

> *"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 (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)".

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. As explained later, that did not in fact happen, contrary to that agreement.

9.21. Still later on the same day, Thursday 21st December 2006, Sean Gilbertson again emailed Mr. Kalberer, with a copy to Mr. Kuznetsov and Mr. Vekselberg, attaching a one page draft "Implementation Agreement" **("the First draft IA")**. Sean Gilbertson said:

"Further to my earlier e-email, 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%....."

9.22. The First draft IA attached to Sean Gilbertson's e-mail provided that the Rights would be purchased forthwith by PEL on the terms negotiated between Pallinghurst LLP (the Gilbertsons' English LLP) and Unilever. 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. The document also provided that an entity nominated by Mr. Vekselberg would pay the purchase price pursuant to the SPA (i.e. the US$38m). It further provided that the parties agreed that a documented transaction would be entered into after completion of the SPA whereby not less than 75% of the ownership of PEL would be transferred to an entity nominated by Mr. Vekselberg; and 25% of PEL would be offered to AMCI (Mr. Mende's company) at a corresponding percentage of the purchase price. The economic benefits and the decision making rights attributable to the Pallinghurst team in relation to the Rights and all commercial opportunities arising from them were not to be any less than those contemplated in the agreements relating to the Pallinghurst Structure (namely the long form agreements, which were agreed but not signed).

9.23. Very shortly after that Mr. Kalberer e-mailed Sean Gilbertson and Mr. Gilbertson, with copies to Mr. Kuznetsov and Mr. Vekselberg, as follows:

> *"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 Fabergé rights were purchased by Pallinghurst Resources Management L.P.* [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 2business 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"."

9.24. Approximately two hours later on the same day, 21st December 2006, Mr. Gilbertson emailed Mr. Kalberer with copy 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 to 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!"

In my view, 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.

9.25. Still later the same day, Thursday 21st December 2006, Mr. Gilbertson spoke to Mr. Vekselberg on the telephone. There is no contemporaneous written record of that conversation but both Mr. Vekselberg and Mr. Gilbertson gave evidence about it. Mr. Vekselberg's evidence was that he did not actually recall the

conversation but did not dispute that it may have taken place. Mr. Gilbertson also had no independent recollection of the conversation but had followed it up with an e-mail to Mr. Vekselberg later that day, with copies to Mr. Kuznetsov and Mr. Kalberer in the following terms:

> *"Dear Viktor,*
>
> *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 Swisshotel 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 a 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 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.

9.26. The following day, Friday 22nd December 2006, the SPA was signed in London by Unilever and by PEL, being 100% owned by the Master Fund. However, in its executed form, the SPA included Pallinghurst LLP (the Gilbertsons' English LLP) as a party in the capacity of guarantor of the obligations of PEL. That was not, of course, in accordance with what had been agreed by Sean Gilbertson in his discussions with Mr. Kalberer on 20th December as confirmed in his e-mail on 21st December, namely that the Master Fund would be the guarantor of PEL's obligations under the SPA and would consequently be a party itself to the SPA.

9.27. Sean Gilbertson, who signed the SPA on behalf of PEL and on behalf of Pallinghurst LLP, was cross-examined about this change of guarantor at some length. In a letter dated 26 February 2007 from the Gilbertson Parties' London Solicitors, Clifford Chance, to the Renova Parties' London Solicitors, Jones Day, Clifford Chance said that, as subsequently explained to Mr. Kalberer, Pallignhurst was not the intended guarantor and was named as such in the SPA *"as a result of a clerical error"*. In his evidence Sean Gilbertson agreed that Pallinghurst LLP had been named and was a party to the SPA as a result of clerical error and that he had so informed Mr. Kalberer. Sean Gilbertson accepted that the intention was that the Master Fund should be the guarantor and said he was proceeding on that basis, which he had agreed with Mr. Kalberer and which he had provided for in the First draft IA which he had produced. His evidence was that when he received the final SPA documentation for execution, either from Slaughter and May or Unilever or UBS he saw that the SPA wrongly included Pallinghurst LLP as a party as guarantor. Somewhat surprisingly Sean Gilbertson nonetheless proceeded to execute the SPA on behalf of Pallinghurst LLP, of which he was a director, as well as on behalf of PEL, of which he was also a director. He 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. In fact this change of intention was reflected in the minutes of a meeting of the directors of PEL on 21st December 2006, the previous day, which expressly referred to the SPA between PEL as purchaser, Pallinghurst LLP as guarantor, and Unilever as seller, which the meeting resolved that PEL should enter into. Similarly at a meeting of the directors of Pallinghurst LLP also on 21st December, the directors resolved to enter into the SPA, with Pallinghurst LLP as guarantor. If the reference in the SPA to Pallinghurst LLP as guarantor was a clerical error, so the reference in the

Board Minutes of PEL and the Board Minutes of Pallinghurst were also clerical errors. It is true that the names of Pallinghurst LLP (Pallinghurst Resources LLP) and the Master Fund (Pallinghurst Resources Management LP) are similar but clearly Sean Gilbertson, who is not a lawyer, recognised the error in the execution copy of the SPA. 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. It is also surprising that he did not mention this change to Mr. Kalberer before signing the SPA in light of their agreement but just proceeded to execute the erroneous document. He said he had not thought it was a matter of concern to Mr. Kalberer or to the Renova Parties, which I did not understand in light of the fact that the agreement that the Master Fund would be the guarantor (with Renova money behind it) had been made with Mr. Kalberer and he was unilaterally departing from it. As I have said already, I generally found Sean Gilbertson to be a reliable and credible witness and I did not conclude that his motives in doing what he did were duplicitous or scheming. However, I did find his attitude and his actions perplexing and difficult to understand.

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. He accepted that in no sense was PEL acting as his own nominee or agent in entering into the contract for the Rights. He accepted that following the execution of the SPA the entitlement to acquire the Rights was owned by PEL, which was in turn owned by the Master Fund as part of the Pallinghurst Structure. 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. It was submitted on behalf of the Plaintiff that, in circumstances where the entitlement to the Rights was owned by PEL, which in turn was wholly owned by

the Master Fund, there was no way in which Mr. Gilbertson could acquire title to the Rights himself, at least without the assistance of PEL. That seems correct to me. 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.

9.29. Also on 22nd December 2006 Mr. Kalberer emailed Sean Gilbertson, with copies to Mr. Kuznetsov and Mr. Gilbertson and said:

> *"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....."

Sean Gilbertson's evidence was that this email was stuck in his spam filter and not seen by him until 28th December 2006, some six days later. It was accordingly not seen by him before he signed the SPA. It was not clear whether Mr. Gilbertson saw it at the time it was sent but if he did, he apparently did not pass on its content to Sean Gilbertson.

9.30. The following day, 23rd December 2006, Mr. Gilbertson e-mailed Mr. Vekselberg, with copy to Mr. Kuznetsov, Mr. Kalberer and Sean Gilbertson, in the following 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 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 [my emphasis].

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 internationalinterest, 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 [my emphasis]. *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".

9.31. Not long after that, on the same day, 23rd December 2006, Mr. Gilbertson e-mailed Mr. Mende with a copy to Dr. Jelinek as follows:

"Dear Hans

Please see the e-mail below [i.e. his e-mail the same day to Mr.Vekselberg above] *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. [my emphasis] *Most recently, Viktor's consigliere,* [Mr. Kuznetsov], *has re-confirmed their willingness to bring youin 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......"*

Mr. Gilbertson was clearly informing Mr. Mende and Dr. Jelinek by this e-mail that he had agreed with Mr. Vekselberg that he was willing to implement 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. Mr. Gilbertson had indeed agreed this and confirmed it again in his e-mail earlier that day to Mr. Vekselberg, copied *inter alia* to Mr. Kuznetsov and Mr. Kalberer. 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 Rights would remain with the Master Fund within the Pallinghurst Structure.

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.

9.33. On Tuesday 26th December 2006 Sean Gilbertson, on behalf of Mr. Gilbertson, sent Mr. Kuznetsov and Mr. Kalberer, with a copy to Mr. Vekselberg, a further draft Implementation Agreement ("the Second draft IA"). This referred to PEL as "OpCo", as the acquirer of the Fabergé brand and to the Fabergé brand being owned by a company controlled by Mr. Vekselberg, referred to as "BrandCo", with the economic benefits and decision making rights remaining with OpCo. The Second draft IA also provided that BrandCo would pay the purchase sum due under the SPA on 3rd January 2007 and that ownership of the Fabergé brand

should be transferred to BrandCo as soon as practicable thereafter 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. It expressly referred to Opco managing and operating the Rights as a portfolio company of the Master Fund pursuant to the Pallinghurst agreements (meaning the unsigned but agreed long form agreements) and it confirmed 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. In addition to various other terms and conditions the Second draft IA also provided for 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 of the commercial opportunities arising from and relating to it by OpCo. It also provided that the parties should use their best endeavours to draw AMCI into the Master Fund and that AMCI should have the right to purchase up to 25% of BrandCo subject to certain conditions relating to its involvement in Project Charlie. Sean Gilbertson provided in the Second draft IA that it should be signed *inter alia* by Mr. Gilbertson and Mr. Kuznetsov on behalf of the Company.

9.34. On 29th December 2006 Mr. Kalberer emailed Sean Gilbertson, with copies to Mr. Kuznetsov and Mr. Gilbertson, attaching his mark-up of the Second draft IA showing his proposed changes. Later that same day Mr. Kalberer e-mailed Sean Gilbertson saying that, subject to agreement regarding his proposed changes to the Second draft IA, they would prefer to transfer the US$38m purchase price to Unilever direct on behalf of PEL and requested that they be provided with Unilever's bank details.

9.35. Mr. Kalberer's mark-up of the Second draft IA provided that the Master Fund, represented by Mr. Kuznetsov and Mr. Gilbertson as members of the "Executive Committee", (meaning 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. The mark-up also provided that BrandCo, would be a Lamesa company and would pay the purchase price due to Unilever on 3rd January 2007 to OpCo (ie PEL) to enable it to pay the purchase price on the due date. That was to be on conditions that OpCo transferred the title to the Fabergé brand to BrandCo or its nominee (i.e. a Lamesa group company) for nominal consideration and also that the replacement of the directors of OpCo at the time be replaced by a director or directors nominated by the Master Fund and an equal number nominated by BrandCo. 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 (i.e. the Company). The mark-up provided as well that, upon the transfer of the title to the Fabergé brand to BrandCo, it 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. The terms of the licence were to include, *inter alia* 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"*. It further provided that the Fabergé brand should be owned by Lamesa Arts but should in all respects be treated as if it was an investment of the Master Fund. Accordingly, it would be managed and operated as a portfolio company of the Master Fund pursuant to the Pallinghurst agreements as agreed. The licence was to include various other terms relating to OpCo's entitlements and BrandCo's obligations.

9.36. The next day, 30th December 2006, Sean Gilbertson emailed to Mr. Kalberer, with copies to Mr. Kuznetsov and Mr. Vekselberg, a further draft Implementation Agreement ("the Third draft IA"). Mr. Kalberer was on holiday in Brazil at this time but that evening he e-mailed Sean Gilbertson to say that he would go through the Third draft IA the next day and revert with his comments.

9.37. The Third draft IA provided *inter alia* 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"*. 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. The Third draft IA provided that the parties should negotiate in good faith a written licence agreement to give effect to this and other specified terms. The document accordingly contemplated further negotiations between the parties with regard to the licence. It went on to provide similar terms to those contained in the Second draft IA, including 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. It also expressly recognised that the Pallinghurst agreements had not been signed at that date but that nonetheless they should apply to the Fabergé brand, albeit that the Fabergé brand itself would be owned by BrandCo.

9.38. Mr. Gilbertson's evidence was that he awoke on New Years day, 1st January 2007, with, he said, the realisation that agreement was not going to be reached in time to make the payment to Unilever on 3rd January 2007. He decided then to proceed to implement his plan to acquire the Rights himself with the assistance of his consortium of investors and not through or with Mr. Vekselberg/Lamesa/Renova. He therefore proceeded right away to finalise the arrangements which he had already discussed and put in place with Mr. Mende and Dr. Jelinek over approximately the previous two weeks. Accordingly, that morning, having tried to text Mr. Mende, Mr. Gilbertson e-mailed him, with a copy to Dr. Jelinek, as follows:

"Hello Hans

I have tried to send you this message by sms twice today, but it won't show "DELIVERED", so I am now trying by e-mail:

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-optimise 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? [my emphasis]

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.
Brian Gilbertson" [my emphasis]

The reference to Alrosa was to the largest Russian diamond producer, with which Mr. Gilbertson hoped to make an agreement in relation to marketing Fabergé diamonds.

9.39. Mr. Mende then emailed his business partner Mr. Kundrun as follows:

"Fritz,

happy and a healthy 2007.

Pls read the email below [i.e. the e-mail above from Mr. Gilbertson to Mr. Mende]. *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 [sic] *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* [sic] *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. Best Hans"* [my emphasis]

9.40. Following that, also on 1st January 2007 Mr. Gilbertson again emailed Mr. Mende, this time with Mr Kundrun, with a copy to Dr. Jelinek and Sean Gilbertson as follows:

"Thank you Hans. Greatly appreciate your support. This opportunity could be worth serious money for us after only a few months;[my emphasis] *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 fordecades.*

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). [my emphasis]

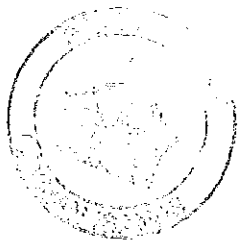
I am available on my SA mobile at any time to answer your questions.
BPG".

That evening Mr. Mende replied to Mr. Gilbertson by e-mail, with a copy to Mr. Kundrun, confirming that Mr. Kundrun had agreed to the proposal in principle and confirming that they could move fast if the funds were needed on Wednesday, 3rd January (i.e. just over a day later).

9.41. 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, at the same time Sean Gilbertson was communicating with Mr. Kalberer, with a copy to Mr. Kuznetsov, with some further comments on the Third IA in response to a voicemail from Mr. Kalberer the previous evening. In that e-mail Sean Gilbertson referred *inter alia* to the *"Pallinghurst principles as already modified for Project Egg...."*, which seems to me to indicate that the Gilbertsons' were accepting the modification of the structure for Project Egg as an Investment Project, as required by Mr. Vekselberg. Also, later in the evening of 1st January 2007, Mr. Gilbertson himself e-mailed Mr. Kalberer, with a copy to Mr. Kuznetsov, making a further comment in addition to Sean Gilbertson's points about the Third draft IA made earlier that day.

9.42. Early on Tuesday, 2nd January 2007 Mr. Gilbertson responded to Mr. Mende's e-mail of the previous day, with a copy to Mr. Kundrun and Dr. Jelinek, as follows:

> *"Hans*
>
> *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 $9.5Million,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.*

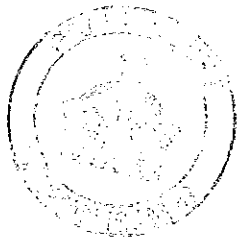
Shortly thereafter, I propose that each of the 4 parties pay an additional $500000 into "Project Egg Limited" as a loan to give it $2M working capital while we negotiate with Mr. Vekselberg, and in parallel, with Alrosa.

If you are in agreement with this, I shall draft a simple letter confirming these arrangements, for you to modify as you deem fit." [my emphasis]

Mr. Mende then responded to Mr. Gilbertson's e-mail, with a copy to Mr. Kundrun and Dr. Jelinek, confirming that they would wire transfer US$38m 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 also said 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 said to him, Mr. Kundrun and Dr. Jelinek in that e-mail.

9.43. Also on 2nd January 2007 Mr. Kalberer e-mailed Sean Gilbertson from Brazil, with a copy to Mr. Gilbertson and Mr. Kuznetsov, attaching his revision of the Third IA ("the Fourth draft IA"). Shortly after that Mr. Kuznetsov also e-mailed Mr. Kalberer, with a copy to Sean Gilbertson, setting out some brief comments of his own on the Fourth draft IA.

9.44. The Third draft IA was the last draft IA which Mr. Gilbertson saw before, early on 1st January 2007, he decided to and did finalise the arrangements for the purchase of the Rights by Mr. Mende, Mr. Kundrun, Dr. Jelinek and himself and before he told any of the Renova Parties, including his co-director and co-Investment Committee member, Mr. Kuznetsov, that he was so-doing and still less that he had done so. The Fourth draft IA was accordingly produced and circulated by Mr. Kalberer before he or Mr Vekselberg or Lamesa or any of the Renova Parties were aware of Mr. Gilbertson's actions. The Fourth draft IA did not change significantly 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. It did remove the words "perpetual" and "irrevocable" from the licence to be negotiated in good faith between BrandCo and OpCo. The most significant change was the insertion of a new 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 was wound-up pursuant to the Pallinghurst agreements. This 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.



9.45. Also on 2nd January 2007, in light of his agreement with his consortium to contribute 25% of the purchase price for the Rights with his own money, Mr. Gilbertson contacted Mr. Thomas of Fairbairn, the trustee of the Gilbertson Family Trusts, in Jersey by telephone, to request the necessary funds (US$9.5m) from the BPG Settlement. A transcript of the telephone conversation was produced and referred to at the trial. As it is quite lengthy I have only set out below those extracts from the transcript which seem to me 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.*

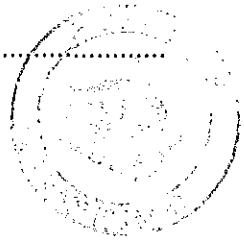
.....

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 ... - 9.5million 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".*

.....

9.46. In the afternoon of 2nd January 2007, Mr. Kalberer and Sean Gilbertson had a telephone conversation about the Fourth draft IA as a result of which a number of the disputed terms were resolved. Notwithstanding Mr. Gilbertson's discussions with Mr. Mende, Mr. Kundrun and Dr. Jelinek and with Mr. Thomas, nothing was said by Sean Gilbertson about what Mr. Gilbertson was doing in relation to alternative funding of the purchase of the Rights by other investors, including the BPG Settlement.

9.47. In the evening of that same day, 2nd January 2007 Mr. Gilbertson sent a very significant e-mail to Mr. Vekselberg, with a copy to Mr. Kuznetsov and Mr. Kalberer:

"Dear Viktor

I am sure you are aware that I have been trying, ever since Pallinghurst bought the Fabergé Brand on the evening of 21December, 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.

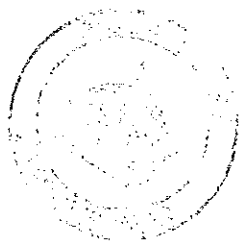
This morning I turned on my computer to find 90 odd lines of proposed amendment to the text that we had previously exchanged. [This was a reference to the Fourth draft IA] *Some of these, 7 in total, were completely unacceptable, with clause 2e being perhaps the most glaring example. In a telephone conversation 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 Pallinghrst 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 there from, should you or your colleagues so wish.

In the meantime, I offer you my best wishes for 2007".



Mr. Gilbertson's statement that it became clear to him that day, 2nd January 2007, *"that there was little likelihood of reaching an agreement in time"* is again not strictly correct. 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. Nor, for that matter, could it have been correct that it was the proposals contained in the Fourth draft IA received by him that morning which caused him to "trigger alternative arrangements" as 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.

9.48. On 3rd January 2007 the purchase of the Rights from Unilever by PEL was completed by payment of US$38m by Mr. Mende's and Mr Kundrun's company, K-M Investment Corporation. The minutes of a PEL board meeting on 3rd January 2007 record the approval of a loan to PEL of USD$38m from Autumn, K-M Investment Corporation (Mr Mende's and Mr Kundrun's company) 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, plus interest at USD LIBOR +1.5% compounded monthly. The minutes also record approval of the issuance of 100 new shares in PEL at par value to the lenders, pro-rata to their contribution to the loan. The Master Fund held one share. The Register of Members of PEL, held by its registered office, Walkers, attorneys-at-law, Grand Cayman, shows such shares being issued to Autumn, K-M Investment Corporation and Dr. Jelinek on 3rd January 2007 in accordance with the board approval recorded in the minutes of that date. The Register shows a transfer of 25 shares each on that date to Autumn and Dr. Jelinek and of 50 shares to K-M Investment Corporation. The issue of these shares on 3rd January 2007 was subsequently confirmed in a letter dated 26th February 2007 from the Gilbertson Parties' London solicitors, Clifford Chance.

Notwithstanding the terms of the minutes and of the Register of Members and their solicitor's letter, in their Amended Defence the Gilbertson Parties pleaded that it was not in fact until some two weeks later, on 19th January 2007 that the said shares in PEL were issued.

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"*. [my emphasis] 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.

9.50. On the evening of the same day, 3rd January 2007, Mr. Gilbertson emailed Mr. Kuznetsov, with a copy to Mr. Vekselberg, Ms Irina Vekselberg (Mr. Vekselberg's daughter, who was taking a particular interest in the Fabergé brand)

and Mr. Kalberer, with a proposed public announcement about the acquisition of the Fabergé brand and requested their comment.

10. **The Circumstances in the Period after 3rd January 2007**

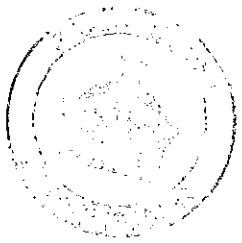
10.1. On 4th January 2007 Mr. Kalberer responded to Mr. Gilbertson by email, with copies to Sean Gilbertson and Mr. Kuznetsov, concerning the proposed draft press release sent by Mr Gilbertson the previous day, and said, *inter alia*:

> *"In view of the developments of the last two weeks we have to internally discuss the Pallinghurst project of Renova and we will get back to you respectively....."*

He also requested them not to publish any press releases or to contact the press regarding Project Egg or any of the Pallinghurst projects. Later that day Mr. Gilbertson responded to Mr. Kalberer, with a copy to Mr. Kuznetsov, confirming that he had stopped the press release about acquisition of the Fabergé brand from being issued.

10.2. Twelve days later, on 16th and then on 17th January 2007 Mr. Gilbertson and Mr. Vekselberg met in Moscow and discussed Project Egg. The meeting was unsuccessful.

10.3. Thereafter, after further communications, on 21st January 2007 Sean Gilbertson, on behalf of Mr. Gilbertson, e-mailed Mr. Vekselberg and Mr. Kuznetsov with a proposed omnibus agreement relating not only to the Pallinghurst Structure and agreements and the Rights but also to Project Charlie and to Mr. Gilbertson's employment with SUAL. For the first time it was proposed, by Mr. Gilbertson, in that draft agreement 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]"

Accordingly, from 21st January 2007 the discussions between the parties departed from the proposals reflected in the draft IAs exchanged prior to 3rd January 2007. Certain negotiations concerning the Rights followed after 21st January 2007 but without any obvious involvement of the Master Fund. In my view, the details of those negotiations are not relevant to the Plaintiff's claim in the present case. I therefore consider it sufficient to record that the subsequent negotiations and discussions concerning the Rights were not successful and, following an unsuccessful final meeting in Claridges Hotel, London on 5th May 2007 between Mr. Gilbertson, Mr. Vekselberg and Mr. Kuznetsov, on 27th May 2007 Renova Holding gave written notice of termination of the Letter Agreement pursuant to clause 8 thereof.

11. Fiduciary Duty

11.1. The relevant law on fiduciaries and their duties was not greatly disputed by Leading Counsel for the parties, although, of course, they strongly disagreed over whether Mr. Gilbertson was, in the circumstances, a fiduciary in relation to the Company and had the duties to the Company in respect of Project Egg and the Rights which the Plaintiff contended he did.

11.2. With regard to the general principles, I was referred to various cases but a helpful guide is to be found in Bristol & West Building Society v Mothew [1998] Ch 1, a decision of the English Court of Appeal. In that case Millett LJ set out a statement of fiduciary duties and what the characteristics of a fiduciary are. He said:

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work "Fiduciary Obligations" (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

I note that Millett LJ also said:

"The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity".

11.3. I was also referred to *Bhullar and Others v Bhullar and Another* [2003] 2 BCLC 241, again in the Court of Appeal in England. At paragraphs 27 and 28 of his judgment Jonathan Parker LJ said:

"I agree with Mr. Berragan that the concept of a conflict between fiduciary duty and personal interest presupposes an existing fiduciary duty. But it does not follow that it is a prerequisite of the accountability of a fiduciary that there should have been some improper dealing with property 'belonging' to the party to whom the fiduciary duty is owed, that

is to say with trust property. The relevant rule, which Lord Cranworth LC in Aberdeen Rly Cov. Blaikie Bros. (1854) 1 Macq. 461 at 471 described as being 'of universal application', and which Lord Herschell in Bray v. Ford [1896] AC 44 at 51, described as 'inflexible', is that (to use Lord Cranworth's formulation) no fiduciary - 'shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect'.

28. In a case such as the present, where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgment, is not whether the party to whom the duty is owed (the company, in the instant case) had some kind of beneficial interest in the opportunity: in my judgment that would be too formalistic and restrictive an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule. As Lord Upjohn made clear in Boardman v Phipps [1966] 3 All ER 721 at 726, flexibility of application is of the essence of the rule. Thus, he said:

"'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.'"

Later in his speech Lord Upjohn gave this warning against attempting to reformulate the rule by reference to the facts of particular cases:

"The whole of the law is laid down in the fundamental principle exemplified in Lord Cranworth's statement [in Aberdeen Rly Co v. Blaikie Bros.]... But it is applicable, like so many equitable principles which may affect a conscience, however innocent, to such a diversity of different

cases that the observations of judges and even in your lordships' House in cases where this great principle is being applied must be regarded as applicable only to the particular facts of the particular case in question and not regarded as a new and slightly different formulation of the legal principle so well settled."

Then at paragraph 31 of his judgment Jonathan Parker LJ referred to the opinion of Lord Wilberforce in the Privy Council decision in *New Zealand Netherlands Society etc v Kuys* [1973] 2 ALL ER 1222 at 1225 where he said:

"The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords in Boardman v Phipps. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship."

Finally, at paragraph 36 Jonathan Parker LJ said:

"In so far as reference to authority is of assistance in applying the rule to the facts of any particular case, the authority which (of those cited to us) is nearest on its facts to those of the instant case is the decision of Roskill J in Industrial Development Consultants Ltd v. Cooley [1972] 2All ER 162. In that case, a commercial opportunity was offered to the defendant, who was at the time the managing director of the plaintiff company, in his private capacity. The defendant subsequently obtained his release by the

company in order to exploit that opportunity for his own benefit. Had the company known that he had been offered that opportunity, it would not have agreed to release him. He was held accountable for the benefits he had received by exploiting the opportunity. The opportunity was not one which the company could itself have exploited."

11.4. The Plaintiff particularly relied on *Gwembe Valley Development Co. Ltd v Koshy and others* [2004] 1 BCLC 131, which is also a decision of the English Court of Appeal. It concerned self-dealing, fair dealing and secret profits.

At paragraphs [44] and [45] Mummery LJ, under the heading *"The no profit rule"* said:

"The relevant principle was forcefully expressed and elegantly explained in the joint judgment of Rich, Dixon and Evatt JJ in the High Court of Australia in Furs Ltd v Tomkies (1936) 54 CLR 583 at 592 as:

"…… the inflexible rule that, except under the authority of a provision in the articles of association, no director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution a general meeting approves of his doing so or all the shareholders acquiesce. An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which the company itself could not have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company. If, when it is his duty to safeguard and further the interest of the company, heuses the occasion

as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability. The consequences of such a conflict are not discoverable. Both justice and policy are against their investigation.

[45] That is the same equitable doctrine of accountability for unauthorized profits as was applied by the House of Lords in Regal [Hastings] Ltd v Gulliver [1942] 1 All ER 378, to the directors of a company, who, while not express trustees of the property of the company, occupy a fiduciary position towards the company, but, in conflict with that overriding duty, use their powers as directors to make an unauthorized profit for themselves. As Lord Russell of Killowen said at 386:

"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bonus fides; or upon such questions or considerations as well as the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account".

In the same decision at paragraphs [55] and [56] Mummery LJ went on to say:

"Mr. Koshy's second ground of appeal under this head also emphasised the special joint venture character of GVDC [that was the company]. *It was submitted that none of the members of the board of GVDC would*

expect other members of the board to disclose their principal's profits from the transactions with GVDC. The Board was made up of representatives of the investors. They would protect the interests of the shareholders who appointed them, rather than the interests of the shareholders generally. It was not intended to be an independent board. The directors did not owe fiduciary obligations to GVDC in respect of transactions between the principals they represented and GVDC. In particular, it was argued that the directors of GVDC were well aware that Mr. Koshy had a conflict of interest and was making a personal profit. It was to be implied from all the circumstances that the fiduciary's duty of disclosure of interest in relation to transactions with the company was excluded."

"[56] This argument should be rejected. It has no valid factual or legal basis. The articles constituted an express contract between the members of GVDC. The articles contained express provisions for the relaxation of strict duties of the directors in equity. There was no evidence of any other express agreement modifying the fiduciary duties owed to GVDC by its directors. It is not possible to imply from the surrounding circumstances any additional or different agreement modifying the scope of the fiduciary duties owed by the directors to GVDC as a joint venture company. Kelly v Cooper [1994] 1 BCLC 395, which was cited by Mr. Page, was a different case. The court there was able to imply into an express contract of agency a term entitling an estate agent to act for numerous other competing principals selling similar properties and to keep confidential information received from each principal. It was known to the principal that the estate agent would be so acting in the course of its business. The effect of the implied term was to modify the normally strict fiduciary duties owed by an agent to the principal not to put himself into a position where his duty and interest conflicted, not to profit from his position (for example, by earning commissions from selling properties for

rival principals) and to make disclosure of confidential information to the principal."

11.5. I was also referred by Leading Counsel for the Plaintiff in his oral submissions to the decision of Patten J in *Halton International Inc. (Holdings) SARL v Guernroy Ltd* [2005] EWHC 198 (Ch). That case concerned whether a contractual voting agreement gave rise to fiduciary duties. The Judge referred to the judgment of Millett LJ in *Bristol & West Building Society v Mothew* [supra] and then at paragraphs 147 and 148 he said:

> *"147. Although I have rejected the case of deliberate disloyalty on the facts, the allegation of breach of fiduciary duty based on an undisclosed profit remains. It is therefore necessary to begin by considering the first and most fundamental point which is whether the voting agreement gave rise to any of the fiduciary duties alleged.*
>
> *" The Claimants approach to this question is to stress what they say are the essential features of the arrangements contained in the voting agreement: i.e. the grant to Guernroy of the voting rights belonging to the granting shareholders and the trust and confidence placed in Guernroy that the powers would be exercised in their best interests. A critical and usually determinative feature of any fiduciary relationship is the agreement of the fiduciary to act in the interests of the principal in the exercise of the power which is granted or in relation to the principal's property or business affairs. But absent express agreement to operate on these terms, it is always necessary to examine the terms of the contract between the parties in order to discover whether the powers conferred on the agent are circumscribed in this way. In a later passage in his judgment in the Hospital Products case,* [Hospital Products v United States Surgical Corp (1984) 156 CLR 41] *Mason J explains the issue in these terms:*

> *"'But entitlement to act in one's own interests is not an answer to the existence of a fiduciary relationship, if there be an obligation to act in the interests of another. It is that obligation which is the foundation of the fiduciary relationship, even if it be subject to qualifications including the qualification that in some respects the fiduciary is entitled to act by reference to his own interests. The fiduciary duty must then accommodate itself to the relationship between the parties created by their contractual arrangements. And entitlement under the contract to act in a relevant matter solely by reference to one's own interests will constitute an answer to an alleged breach of the fiduciary duty. The difficulty of deciding under the contract when the fiduciary is entitled to act in his own interests is not in itself a reason for rejecting the existence of a fiduciary relationship, though it may be an element in arriving at the conclusion that the person asserting the relationship has not established that there is any obligation to act in the interests of another.'"*

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).

12. **Did Mr. Gilbertson owe fiduciary duties to the Company?**

12.1. The Plaintiff's case was that as a director of the Company Mr. Gilbertson owed fiduciary duties to the Company as a matter of established law on the duties of directors. In the *New Zealand Netherlands Society* case, referred to by Jonathan Parker LJ in the *Bhullar and Others* case referred to above, Lord Wilberforce said that the obligation not to profit from a position of trust, applies in principle *"whether the case is one of a trust, expressed or implied, of partnership, of directorship of a limited company.."* [my emphasis]. Also, in the *Gwembe Valley Development* case, Mummery LJ cited the *Regal (Hastings)* case and referred *"to the directors of a company, who... occupy a fiduciary position towards the company..."*. 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. Leading Counsel for the Plaintiff argued that Mr. Gilbertson owed these fiduciary duties to the Company as a *de jure* director.

12.2. However, it is also established that by provision in a company's Articles of Association or by agreement of the shareholders or by clear implication from the particular circumstances of the case, the obligations of a director to the company may be modified so as, for example, to enable the director to act in his own interests or the interests of another in relation to a particular matter, which may not necessarily be the same as the company's interests in relation to the particular matter. In the *Gwembe Valley Development* case (supra) Mummery LJ cited the judgment in the Australian *Furs Ltd* case which referred to"..... *the inflexible*

rule that, except under the authority of a provision in the Articles of Association, no director shall obtain for himself a profit..."[my emphasis].

12.3. Leading Counsel for the Gilbertson Parties relied upon a case from the Western Australian Supreme Court: *Japan Abrasive Materials Pty Ltd v Australian Fused Materials Pty Ltd* [1998] WASC 60. That was a case concerning a joint venture in the mining industry in which there was a shareholders' agreement. At page 9 of the transcript of the judgment the Judge said, in referring to the shareholders agreement, to which the company concerned was itself a party:-

> *It is provided by cl 4.1 that the Board shall consist of six members. Clause 4.2 provides that each shareholder shall nominate two natural persons to be directors of the company...."*

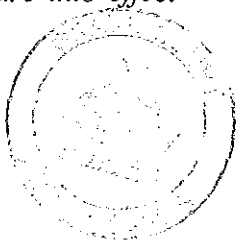
Then, after pointing out that notice of Board meetings and of the detailed agenda was to be given to the shareholders as well as the directors, the Judge referred to clause 4.7 and said:

> *"Pursuant to clause 4.7, the directors nominated by each of the shareholders who are present at Board meetings in person or by their alternates are to have between them the same total number of votes as their shareholder would have at a general meeting of the company..... The clause continues, it is the intention of the parties that wherever possible the directors will achieve a consensus to achieve a directive which is in the best interests of the company. 4.10 provides that 'notwithstanding anything in this agreement the resolution of a Board or of a general meeting of a company in respect of any of the following matters shall require a unanimous vote.'"*

And then the shareholders' agreement set out a list of 10 matters which required unanimity such as disposal of the whole or any of the major assets of the company; granting of a charge over the company's assets; winding up the company; diversification into activities other than production and sales of minerals and associated activities, making loans etc.

At page 11, the Judge went on:

> *"Considering the shareholders' agreement as a whole, it appears to be in the nature of a joint venturers agreement, the company being the vehicle by which the joint venture is to be carried into effect. Equality as between the joint venturers is achieved by the equal shareholdings in the company through the plaintiff and the second and third defendants and by the provisions which entitle them to nominate two members of the Board. The provisions which require notice of board meetings to be given to shareholders and directors well in advance of the meetings appear to have been intended to ensure that the joint venturers have ample time in which to consider proposed business and to inform the nominee directors of their respective wishes. It is therefore immaterial whether the business of the company is conducted by the board or by the shareholders in general meeting. Ultimately the decisions are taken by the joint venturers. This, I think, explains clause 4.10, which requires the unanimous approval of the shareholders or of the directors in relation to various matters having the potential to effect substantial changes to the relationship between the joint venturers or their financial obligations. In a commercial context, it is only to be expected that such matters would require unanimous approval and that in relation to them joint venturers who had established a corporate entity to carry a joint venture into effect*



would be free to vote as shareholders entirely in accordance with their own interests."

The Judge pointed out that it is well-settled that shareholders voting at general meeting do not exercise any power of fiduciary character and he then said:

"By providing that resolutions relating to the cl 4.10 matters shall require a unanimous vote, whether at a general meeting or a Board meeting, cl 4.10 equates shareholders and directors. It follows, I think that cl 4.10 permits the directors to vote in accordance with the wishes of the joint venturers who have appointed them, so that the same result is achieved as if the joint venturers had voted as shareholders at a general meeting".

The *Japan Abrasive Materials* case was mentioned in passing as one of several Australian cases referred to by the Judge below by the English Court of Appeal in *Re Neath Rugby Ltd. (No. 2); Hawkes v Cuddy & Others (No. 2)* (2009) 2 BCLC 427 but it was not analysed. The *Neath Rugby Ltd* case was an appeal relating to an unfair prejudice winding up on the just and equitable ground. However, the court also considered the duties of a director of another rugby club, Ospreys, who had been nominated by Neath Rugby Club ("Neath") as part of a joint venture between two individuals to take over the two rugby clubs, Neath and Ospreys, and to divide the management of the clubs between them. Leave to appeal his decision was given by the Judge at first instance (Lewison J) on two issues, the first of which was: what duty does a nominee director of a company (Ospreys) owe to (a) the company and (b) to his appointor (Neath)? In the course of the Judgment of the Court of Appeal Stanley Burnton LJ said:

"[32] In my judgment, the fact that a director of a company has been nominated to that office by a shareholder does not, of itself, impose any duty on the director owed to his nominator. The director may owe duties to his nominator if he is an employee or officer of a nominator, or by

reason of a formal or informal agreement with his nominator, but such duties do not arise out of his nomination, but out of a separate agreement or office. Such duties cannot however, detract from his duty to the company of which he is a director when he is acting as such [my emphasis]

[33] As the Australian cases to which the Judge referred indicate, an appointed director, without being in breach of his duties to the company, may take the interests of his nominator into account, provided that his decisions as a director are in what he generally considers to be the best interests of the company; but that is a very different thing from his being under a duty to his nominator by reason of his appointment by it". [my emphasis]

12.4. The Gilbertson Parties' submission was that the *Japan Abrasive Materials* case is an example of the proposition that in appropriate circumstances it is possible to vary or dispense entirely with a director's fiduciary duties to the company of which he is a director and, for example, entitle him to act in his own interest, or the interest of a third party in relation to a particular matter or matters, rather than the interest of the company. The Gilbertson Parties contend that in the present case the Letter Agreement was such an agreement and that its terms 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 interest of the Company.

12.5. It is made very clear in the cases that, as Lord Upjohn said in the *Boardman v Phipps* case the relevant rules *"can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case".* He reiterated later in his judgment that the principle that no fiduciary may have a personal interest conflicting with the interest of his principal is applicable only to the particular facts of the particular case in question. While the *Japan Abrasive*

Materials case may be an example of a particular shareholders' agreement which was interpreted by the judge as enabling each director nominated by a shareholder to vote according to the instructions of the nominating shareholder in its own interests, the judge's conclusions are clearly based on the precise wording of the shareholders' agreement and the particular surrounding circumstance of that case. The terms of the shareholders agreement in that case were entirely different from the terms of the Letter Agreement and the surrounding circumstances entirely different from those in the instant case.

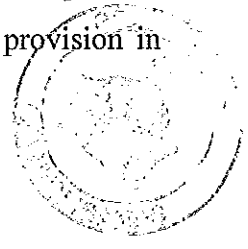
12.6. Although the facts and circumstances of the *Japan Abrasive Materials* case are obviously distinguishable from the present case, I did not understand Leading Counsel for the Plaintiff to dispute the principle that in certain circumstances, whether by the Articles of Association or an appropriate shareholders' agreement or otherwise, it is possible to modify or vary a director's fiduciary duties to the company so as to entitle him to act in his own interest, rather than the company's interest, in relation to a particular matter. However, the Plaintiff's position was that the Letter Agreement was not a shareholders' agreement, that its terms did not have that effect anyway and that it was simply background as far as Mr. Gilbertson's fiduciary duties to the Company were concerned. The Plaintiff's case was that the source of Mr. Gilbertson's fiduciary duties was the *de jure* role that he occupied as a director of the Company. The only question then was whether there was anything in the arrangements, expressed or implied, which operated to qualify or limit those fiduciary duties, which, Leading Counsel for the Plaintiff contended, there was not. In any event, he argued, even if Mr. Gilbertson was entitled somehow to act in his own interests, then, on the principle outlined by Mason J in the *Hospital Products* case cited by Patten J in the *Halton International Inc* case (supra), that was not an answer to the existence of a fiduciary relationship, as long as there was an obligation of loyalty towards and a duty to act in the interests of the Company. The Plaintiff contended that there was such 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.

12.9. As I have said, the Gilbertson Parties' principal submissions are based upon the terms of the Letter Agreement. They rely in particular upon the provision in



paragraph 2.5 of the Letter Agreement that *"approval to proceed with an Investment Project via the Investment Fund at an agreed value, shall require the unanimous consent of the Investment Committee"*. They say that that provision relates to the rights of the Investment Committee, of which Mr. Gilbertson and Mr. Kuznetsov were the two members. It provided each of them with a right effectively to veto proceeding with any Investment Project. That right, 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.

12.10. The Plaintiff disputes this analysis in several respects. It was argued that not only do the Articles of the Company not attenuate the fiduciary duties owed by the Company's directors as a matter of law but that there is also no agreement between the shareholders of the Company providing that the directors' *de jure* fiduciary duties should be moderated, reduced or dispensed with, notwithstanding the joint venture nature of the Company's business. It was submitted that the Letter Agreement was clearly not akin to a shareholders' agreement of the kind in the *Japan Abrasive Materials* case and it may not be treated as such. It was emphasised that the Letter Agreement was not an agreement between the shareholders of the Company. It was an agreement between Mr. Gilbertson personally and Renova Holding, neither of whom were shareholders of the Company. It was emphasized that there was no evidence that Mr. Gilbertson sought the approval of Fairbairn, as trustee of the Gilbertson Family Trusts, which was one of the two shareholders, to enter into the Letter Agreement or, for that

matter that he even sought Fairbairn's approval to be nominated by him as a shareholder. Mr. Gilbertson did not act as Fairbairn's agent or nominee in entering into the Letter Agreement, even if Fairbairn may have known about it, which was not clear. It was submitted that the rules of privity of contract applied and that the separate identities of the signatories to a contract governed by English law, as the Letter Agreement was, cannot simply be ignored.

12.11. On the other hand, in the context of its claim against Autumn, to which I will refer later in this judgment, the Plaintiff contended that Autumn, which was wholly owned by Fairbairn, was in practice controlled by Mr. Gilbertson. This contention was based mainly on the evidence of Mr. Gilbertson's comments and actions in relation to Fairbairn as trustee of the Gilbertson Family Trust at a time before Autumn was acquired by Fairbairn (albeit it was accepted by the Gilbertson Parties for purposes of the Plaintiff's claim against Autumn that such evidence could be treated as applicable also to Autumn). In light of that evidence and the Plaintiff's contentions it seems to me that, in considering the Plaintiff's argument based on privity the distinction which the Plaintiff seeks to draw between Mr. Gilbertson on the one hand and Fairbairn on the other is somewhat inconsistent with its submissions in relation to Mr. Gilbertson's control of Autumn. Also, although the other shareholder of the Company was the Plaintiff and not Renova Holding, the fact is that the Plaintiff is a 100% owned subsidiary of Renova Holding and both are members of the Renova group, as is Renova Management which nominated Mr. Kuznetsov as a director to represent the interests of the Renova group generally. In my opinion the arguments regarding privity are somewhat artificial in light of the commercial realities of the situation. Nonetheless, the circumstances in relation to the directors and the shareholders of the Company were clearly not as straightforward as was they were in the *Japan Abrasive Materials* case (supra). At the time when the Letter Agreement was entered into the Company did not even exist. Indeed the Pallighurst Structure, of which the Company was to become part, had not even been devised. Accordingly, the Letter Agreement did not contain any provisions in relation to the Company,

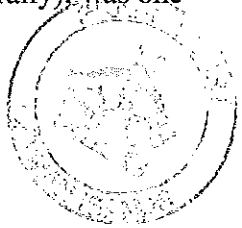
or its shareholders' or directors' rights or any terms of the kind contained in the shareholders agreement in the *Japan Abrasive Materials* case. Furthermore, it is clear from the comments of Mummery LJ in the *Gwembe Valley Development* case (supra) that the mere fact that a company is of a joint venture 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.

12.12. Having regard to the terms of the Letter Agreement, it is important, in my view to note that "Investment Projects" had the meaning described in clause 2.1, which provided that *"the purpose of the Investment Fund will be to explore, acquire and develop opportunities in the metals and mining industry (the "Investment Projects").* Accordingly, Investment Projects were opportunities and the purpose of the Investment Fund was to explore, acquire and develop such opportunities. An opportunity could therefore be at the stage of exploration but still constitute an Investment Project. 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 Investment Project for himself.

12.13. I consider that 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 as defined, in order to enable him to pursue that Investment Project for himself. 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.

12.14. In the circumstances it seems to me that the Company and the Master Fund, as part of the Pallinghurst Structure, were entitled to expect, in relation to such 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. Once Project Egg had been introduced by Mr. Gilbertson to the Investment Committee as an opportunity and was being explored and proceeded with on the consent of the Investment Committee, Mr. Gilbertson was entrusted with the task of pursuing it in the interests of the Master Fund and thereby the Company. The Company and the Master Fund were reliant upon and trusted him with the project in their interests and not his own interests; they were entitled to his loyalty and good faith in respect of that project. In my judgment, Mr. Gilbertson was subject to fiduciary duties to the Company as a director in respect of such an opportunity in such circumstances. Whether the correct approach is that adopted by the Plaintiff, namely 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 detracting from such duties or whether the correct approach is to determine if the particular circumstances, including any relevant agreements, were such that he was subject to obligations to the Company which were of a fiduciary nature, does not, in my opinion, in this particular case affect the ultimate conclusion. There was, in my view, nothing in the Letter Agreement which would entitle Mr. Gilbertson to take for himself an Investment Project which he himself had brought to the Investment Committee for consideration as an Investment Project of the Master Fund and which the Investment Committee had agreed to pursue and, which was being actively pursued. 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. Indeed, it seems to me that the provisions of the Letter Agreement tend to support my view that Mr. Gilbertson owed fiduciary duties as a director of the Company in respect of an Investment Project in the circumstances explained above.

13. **The Investment Committee**

13.1. It was suggested on behalf of Mr. Gilbertson that the Investment Committee in fact never did unanimously consent to Project Egg and therefore it was never an approved Investment Project in the sense required by the Letter Agreement. Having regard to the terms of the Letter Agreement and the circumstances generally I did not find that to be a persuasive argument. 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.

13.2. It should also be noted that Project Egg was not the only Investment Project of the Master Fund. Various potential projects were considered some of which were vetoed but some of which were consented to by Mr. Gilbertson and Mr. Kuznetsov and proceeded with. The most noteworthy of those, which became known as Project Charlie, was a proposal for the acquisition of an Australian manganese mining company and was a major project for the Master Fund. Another Investment Project was the Angola Project in respect of which the sum of US$780,000 was paid by Renova on behalf of the Master Fund with the consent of the Investment Committee in December 2006. I was not shown any evidence of formal written unanimous consents by the Investment Committee in respect of these projects either; they were also proceeded with on the informal consent of the Investment Committee.

13.3. In my opinion Project Egg was clearly consented to as an Investment Project, as defined in the Letter Agreement, by the Investment Committee and proceeded with as such.

14. <u>The Agreement with Mr. Vekselberg</u>

14.1. The telephone conversation during which Mr. Kalberer informed Sean Gilbertson that Mr. Vekselberg was requiring that one of his personal companies should own the title to the Fabergé rights outside the Pallinghurst Structure was on 20th December 2006 and Mr. Gilbertson spoke to Mr. Vekselberg about this the following day, 21st December 2006. Mr. Vekselberg's requirements, of course, represented a change to the structure through which the Rights as an Investment Project were to be further pursued. The question therefore arises whether this change had any effect on the nature or extent of the fiduciary duties which Mr. Gilbertson owed to the Company as I have found them to be. The nature and

extent of the duties owed by a director depend upon the circumstances and this arguably represented a change in circumstances.

14.2. It was submitted by Leading Counsel for the Gilbertson Parties that what was said by Mr. Kalberer on 20th December and Mr. Vekselberg on 21st December 2006 and reflected in the draft IAs which followed, did not involve the Master Fund at all but amounted to an entirely new and separate arrangement outside the Pallinghurst Structure and that the economic benefit of developing exploiting and managing the Rights was to what he referred to as "the Pallinghurst Team". It was said that the Pallinghurst Team comprised Mr. Gilbertson, 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 Rights, although that was a matter for him. It was their benefits and entitlements through managing the Rights in respect of which Mr. Gilbertson was seeking commitments from the Renova Parties. This purported distinction between the so-called "Pallinghurst Team" and the management under the Pallinghurst Structure and Letter Agreement was not foreshadowed in the Gilbertson Parties' pleadings, or their written evidence or their written opening submissions. However, quite apart from that, this belated argument was not consistent with the evidence. Mr. Vekselberg, although hazy about the timing of his agreement with Mr. Gilbertson, was nonetheless adamant and reiterated several times that the agreement was that, while one of his personal companies would own the title to the Fabergé brand, the economic benefit of developing, exploiting and managing the brand would remain with the Master Fund within the Pallinghurst Structure. 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 Rights would be outside the Pallinghurst Structure, or the Pallinghurst agreements; that was 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.

14.3. Perhaps more significantly, the evidence of Mr. Gilbertson himself was not consistent with this submission on his behalf. As far back as his first affidavit in these proceedings, sworn on 29th January 2009, Mr. Gilbertson deposed that he:

> *"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"* [my emphasis].

In the same affidavit Mr. Gilbertson referred to the ownership of the Rights by Mr. Vekselberg's company *"provided that the rights of the Pallinghurst Structure (or what was referred to as "Pallinghurst Team") were protected"*. He clearly equated the "Pallinghurst Team" with the Pallinghurst Structure. In my assessment, after 20th December 2006 Mr. Gilbertson clearly understood that the economic benefits and the management thereof 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 by one of his personal companies outside the Pallinghurst Structure. The suggested distinction between the Pallinghust Team on the one hand and the Pallinghust Structure on the other hand, which was first made during the trial, was not, in my view, justified or valid.

14.4. The was no reason from 20th December 2006 through January 2007 to suppose that the economic benefits and management of the Fabergé brand would not be of significant commercial value to the Master Fund, even if, as proposed in the later draft IAs, the entitlement of the Master Fund in that respect would be pursuant to

a licence from one of Mr. Vekselberg's personal companies as owner of the brand. Mr. Vekselberg never proposed to remove the whole Rights, including the economic benefit of developing, exploiting and managing them, from the Master Fund; what he was proposing would remain of obvious commercial benefit to the Master Fund and the Pallinghurst Structure of which it was part. Indeed, even under the original proposed structure within which Project Egg was to be pursued the benefit to the Master Fund would have been the commercial benefit derived from developing, exploiting and managing the investment and, for Mr. Gilbertson's team, the benefit of managing such development and exploitation of the brand would be the fees and other benefits they would receive pursuant to, originally, the Letter Agreement and latterly the Pallinghurst agreements. I can 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. It was clearly in the interests of the Company as part of the Pallinghurst Structure that the Master Fund should have that commercial benefit. Nonetheless, if clause 2.5 of the Letter Agreement is to be interpreted as the Gilbertson Parties contend, Mr. Gilbertson may have been entitled to decline to consent to the new structure for the Investment Project which was being put forward, even though that would not have been in the interests of the Company. However even if he had done that it seems to me, having regard to the authorities to which I have referred above, he would still not have been entitled without the informed consent of the Company to simply take the Rights for himself. However, Mr. Gilbertson did not do that; he consented to and proceeded upon the basis of the new structure which Mr. Vekselberg and the Renova group required.

14.5. It was also pointed out by Leading Counsel for the Plaintiff that Mr. Gilbertson at no time treated the "deal" which he and Mr. Vekselberg agreed on the telephone on the evening of 21st December 2006 as conditional. He agreed that Mr. Vekselberg would be "*the global Mr. Fabergé*". In his e-mail to Mr. Vekselberg two days later, on 23rd December, Mr. Gilbertson congratulated him

unconditionally on the entrenchment of his interest in the Fabergé brand and he did not purport to reserve any right to "unentrench" Mr. Vekselberg's interest. In any event, he had no such right. There was nothing contingent or conditional about what Mr. Gilbertson said in that e-mail. He accepted in cross-examination that he had no entitlement to withhold for himself the Rights which he had procured PEL, which was a Pallinghurst company, to contract to purchase under the SPA the previous day, even if Mr. Vekselberg's commitments were not forthcoming. There was some suggestion on behalf of the Gilbertson Parties that if Mr. Vekselberg's commitments were not honoured, the entitlement to the Rights would somehow revert to Mr. Gilbertson personally. However, that does not seem to me to accord with the evidence, including that of Mr. Gilbertson himself. In my view, it was clear that Mr. Gilbertson's agreement with Mr. Vekselberg involved the Master Fund from the outset. The First draft IA produced by Sean Gilbertson involved the Master Fund as guarantor of PEL and he provided that the agreement was to be signed by Mr. Gilbertson, not in his personal capacity, but in his capacity as a director of the Company. The Master Fund and the Pallinghurst Structure, including the Company, was clearly involved and the "deal" was not, as submitted by Leading Counsel for the Gilbertson Parties, simply an agreement between two individuals, Mr. Vekselberg and Mr. Gilbertson, with no relation to the Master Fund.

15. **Mr. Gilbertson's Position following 20th December 2006**

15.1. Mr. Gilbertson contended that Mr. Vekselberg's insistence on changing the structure to enable him to own the title to the Fabergé brand outside the Pallinghurst Structure amounted to Mr. Vekselberg rejecting and "walking away' from the original agreement with Mr. Gilbertson. He said in evidence:

> *"But if he* [Mr. Vekselberg] *walked away from our deal, well then we didn't have a deal and I was entitled to develop it in my own best interest".*

He also said:

> *"I was trying very hard to get the agreement with Mr. Vekselberg's empire, as encapsulated in the Letter Agreement. If that broke down and we couldn't get the agreement then I think all bets were off and I could do whatever I thought was proper in my own interest".*

However, subsequently when questioned about when he claimed that Mr. Vekselberg "walked away" from their "deal" he said that it was in mid January 2007. He then went on to say that the symptom of that was actually Mr. Vekselberg's refusal to proceed with Project Charlie which was not until after a meeting in March 2007. Whichever of those dates is correct, according to Mr. Gilbertson, Mr. Vekselberg had not "walked away" at any time in December 2006.

15.2. In fact, as I have already pointed out, the evidence is that Mr. Gilbertson accepted Mr. Vekselberg's proposed change to the structure through which the Rights as an Investment Project were to be pursued and held. In his e-mail of 21st December 2006 immediately following his telephone conversation with Mr. Vekselberg Mr. Gilbertson confirmed to Mr. Vekselberg that he would work closely with his team to achieve a structure that suited Mr. Vekselberg's needs. He knew, of course, that Mr. Vekselberg's needs were that he would own the title to the Fabergé brand outside the Pallinghurst Structure. He informed Mr. Vekselberg that he would advise him as soon as he was officially the global "Mr. Fabergé". Mr. Vekselberg could only have been seen as the global "Mr. Fabergé" if he was himself the owner of the Fabergé brand (or owned the brand through one of his personal companies run by his family office); not through the industrial conglomerate of Renova. In his e-mail to Mr. Vekselberg two days later on 23rd December 2006 confirming that the purchase of the Fabergé brand was complete (meaning the SPA had been executed), Mr. Gilbertson expressly confirmed that he was

discussing with Mr. Kuznetsov arrangements to transfer the ownership of the title to the Fabergé brand to one of Mr. Vekselberg's companies. He confirmed his willingness to do that against a commitment that the economic benefits and management rights that the Pallinghurst management team, headed by him as originally provided by the Letter Agreement, would retain their rights under the Pallinghurst Structure and agreements; in other words a confirmation that apart from the actual ownership of the title to the Fabergé brand being held outside the Pallinghurst Structure, everything else would remain as before. In my opinion, in no sense could the requirements of Mr. Vekselberg be seen as a veto of the opportunity to exploit the economic benefit of the Rights as an Investment Project of the Master Fund and the evidence is that Mr. Gilbertson did not see it or treat it that way either. There was no rejection of it or refusal to consent to it by Mr. Gilbertson. He consented to the revised structure and acted upon it. He continued after 20th December 2006 to pursue the economic benefits of the Rights for the Master Fund and to seek confirmation of the entitlements of his management team as referred to in the Letter Agreement and as stipulated in the Pallinghurst agreements. As I have already pointed out, he accepted that Mr. Vekselberg and Renova did not "walk away" nor, in my opinion, can it be said that Mr. Vekselberg, Mr. Kuznetsov or Renova Holding vetoed the opportunity to exploit the economic benefit of the Rights as an Investment Project of the Master Fund.

15.3. It was when he awoke in the morning of 1st January 2007 that Mr. Gilbertson decided to proceed to secure the Fabergé brand himself with the assistance of his consortium and thereafter *"negotiate with the Russians from a position of strength"*. That 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. The essential part of that strategy required the diversion of the Rights from the Master Fund by diluting its 100% ownership of PEL by the issuing of further shares in PEL to Mr. Gilbertson and his consortium to give them almost 100% ownership of PEL and so out of the Pallinghurst Structure. 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. Mr. Gilbertson committed to this strategy at a time when he knew and accepted that Mr. Vekselberg had not "walked away" and at a time when he knew or ought to have known that he was not entitled to pursue the Rights for the benefit of anybody but the Master Fund, least of all for himself. Mr. Gilbertson kept the benefit of the Rights by not only procuring PEL to purchase them with financing from his consortium and himself through Autumn but also by separately gratuitously procuring the issue of the new shares in PEL to Autumn and the other members of the consortium, thereby diluting the interest of the Master Fund in PEL and, therefore, the Rights to virtually nothing. This would not only give himself and the consortium complete ownership of PEL and the Rights but would also serve his purpose of negotiating with Mr. Vekselberg from a position of strength in order to extract financial profit for himself and the rest of his consortium from Mr. Vekselberg.

15.4. However, at the same time as Mr. Gilbertson was implementing his strategy he continued to purport to negotiate with the Renova Parties during the period of time between the morning of 1st January 2007 and the late evening of 2nd January 2007. Those two days cover the period of time between Mr. Gilbertson's decision upon his awakening on 1st January 2007 to put and then putting in place his strategy and the time when he told Mr. Vekselberg that he had purchased the Rights by alternative means and without Mr. Vekselberg/Lamesa/Renova. Of course even then he did not tell Mr. Vekselberg of the proposed issue of the new shares in PEL to Autumn, which was wholly owned by the BPG Settlement, and the other consortium members. It was submitted on behalf of the Plaintiff that having repeatedly said that he had come to a firm decision on the morning of 1st January 2007 that negotiations had reached the point that no deal would be done in time, there is no honest and rational explanation for Mr. Gilbertson continuing to discuss terms on behalf of the Master Fund with Mr. Kalberer and Mr. Kuznetsov and for not telling them, particularly Mr. Kuznetsov his fellow director, what he was proposing to do. To my mind, the inference to be drawn

from Mr. Gilbertson's actions are that he was deliberately keeping the Renova Parties in the dark about his true intentions. If Mr. Gilbertson was concerned about the forthcoming due date for payment of the purchase price to Unilever, the obvious, appropriate and honest course for him to adopt was not to negotiate alternative financing in secret whereby he, and others with no interest in the Pallinghurst Structure, would acquire the Rights on the basis which he procured, but to openly discuss the timing problem with the Renova Parties, and Mr. Kuznetsov in particular, with a view to resolving the problem on an agreed basis having regard to the interests of the Master Fund and thereby the Pallinghurst Structure, including the Company. I did not find Mr. Gilbertson's evidence that he was simply acting to "save" the Rights at all plausible. His comments, to Mr. Mende copied to Mr. Kundrun and Dr. Jelinek about the acquisition of the Rights enabling them to negotiate with Mr. Vekselberg from a position of strength and about the potential profit for them made it clear to me that Mr. Gilbertson was expecting significant profit from what he was doing in secret. It must also have been obvious that involving third parties, particularly by procuring the gratuitous issue to them of shares in PEL and who he told they could expect significant profit, would encourage their financial expectations, in addition to his own, and make any future negotiation with Mr. Vekselberg much more complicated but, no doubt, in Mr. Gilbertson's mind nonetheless lucrative. There was no good commercial justification for issuing the PEL shares and no need to do so unless to make a profit; it was clearly contrary to the interests of the Master Fund and the Company to dilute the Master Fund's interest in PEL, and thus the Rights, to virtually nothing. There was no need and no good commercial reason for subsequently agreeing an interest rate of 25% on the loans to PEL and it was clearly not in the interests of PEL to do so except to make extra profit for Autumn and the rest of his consortium.

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. 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. Although his evidence that agreement could have been achieved by the completion date of 3rd January was clearly over-optimistic, it does seem 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.

15.6. The evidence also suggested to me that Mr. Gilbertson knew very well that what he was doing was inappropriate and wrong and that Mr. Vekselberg and the Renova Parties would justifiably consider it to be contrary to the agreement which they had made and not in accordance with the loyalty and good faith towards the Company as part of the Pallinghurst Structure which they and the Company were entitled to expect from him. He clearly appreciated that Mr. Vekselberg would be most annoyed and upset. In my view, there was no legitimate reason for Mr. Gilbertson not to discuss his stated concern about possible failure to pay the purchase price on the due date, and for him not to seek to resolve it with the Renova Parties and with Unilever and in my view his duty was to do so, not to secretly take the Rights for himself with a view to making a profit.

15.7. There was some suggestion on behalf of the Gilbertson Parties that Mr. Gilbertson effectively vetoed Project Egg within the meaning of clause 2.5 of the Letter Agreement by his decision to implement his strategy for alternative financing through his consortium and then doing so. However, any such veto, if there was one, was never communicated until it was too late. I have already expressed my view that if an Investment Project was to be vetoed under the terms of the Letter Agreement by a party in order to take an Investment Project for himself, then it had to be done openly and with full disclosure and informed consent. In this context it was suggested that the reality was that at no stage prior to his acquisition of the Rights could Mr. Gilbertson afford an open veto of Project Egg;

as such a veto would have released Renova or Mr. Vekselberg thereafter to compete with Mr. Gilbertson for the Rights and Mr. Gilbertson said that he feared that. For that reason, Mr. Gilbertson may have been unwilling to tell Mr. Vekselberg or his fellow director what he was proposing to do until he had actually done it and secured the Rights for himself and his consortium. The argument was that in order to meet and overcome that fear Mr. Gilbertson led the Renova Parties to think that he was continuing negotiations while behind their backs he was acquiring the Rights for himself and his consortium. However, Mr. Gilbertson's alleged fear that Renova or Mr. Vekselberg would compete with him to acquire the Rights for themselves was not put to Mr. Vekselberg or any of the other Renova Parties' witnesses and there was no evidential basis for Mr. Gilbertson's alleged concern. In any event, it does not seem to me to be relevant to Mr. Gilbertson's duties to the Company.

15.8. In the circumstances as I have found them to be and in light of my analysis and comments above, I have concluded that Mr. Gilbertson remained in the same fiduciary relationship with the Company after 20th December 2006 as he did before that date. In my judgment he had the same fiduciary duties to the company as he had before. The change to the structure through which the Rights were to be pursued as an Investment Project whereby Mr. Vekselberg would own the title to the Fabergé brand outside the Pallinghurst Structure did not amount to a veto of the Investment Project and anyway that change to the structure was accepted and pursued by Mr. Gilbertson. His fiduciary duties in respect of the Investment Project as modified continued notwithstanding the modification. 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.

16. **Mr. Gilbertson's Other Defences**

The other defences in relation to the liability of Mr. Gilbertson for breach of fiduciary duty were put forward as follows:

16.1 **Availability of Derivative Relief**

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 relevant 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.

16.2 **Articles 131 and 132 of the Company's Articles of Association**

16.2.1 In the Amended Defence it is pleaded that Mr. Gilbertson can rely on the exoneration provisions of Article 131 of the Company's Articles of Association ("the Articles") and on the indemnity contained in Article 132. The Articles provide as follows:

> *"131. Every Director (including for the purposes of this Article any alternate Director appointed pursuant to the provisions of these Articles), Secretary, Assistant Secretary, or other officer for the time being and from time to time of the Company (but not including the Company's auditors) and the personal representatives of the same shall be indemnified and secured harmless out of the assets and funds of the Company against all actions, proceedings, costs, charges, expenses, losses, damages or liabilities incurred or sustained by him in or about the conduct of the Company's business or affairs or in the execution or discharge of his duties, powers, authorities or discretions, including without prejudice to the generality of the foregoing, any costs, expenses, losses or liabilities incurred by him in defending (whether successfully or otherwise) any civil proceedings concerning the Company or its affairs in any court whether in the Cayman Islands or elsewhere.*

132. No such Director, alternate Director, Secretary, Assistant Secretary or other officer of the Company (but not including the Company's auditors) shall be liable (a) for the acts, receipts, neglects, defaults or omissions of any other such Director or officer or agent of the Company or (b) for any loss on account of defect of title to any property of the Company or (c) on account of the insufficiency of any security in or upon which any money of the Company shall be invested or (d) for any loss incurred through any bank, broker or other similar person or (e) for any loss occasioned by any negligence default, breach of duty, breach of trust, error of judgment or oversight on his part or (f) for any loss, damage or misfortune whatsoever which may happen in or arise from the execution or discharge of the duties, powers authorities, or discretions of his office or in relation thereto, unless the same shall happen through his own dishonesty.

16.2.2 I also considered this argument in detail in my Ruling dated 14th April 2009 by which I gave the Plaintiff leave to continue this derivative action. After an analysis of the judgments in Re: Bristol Fund Ltd. (In Official Liquidation) and *Re: Beacon Hill Master Ltd (In Official Liquidation)* 2nd May 2008 (unreported) and *Armitage v Nurse* [1998] Ch. 241 in particular, I concluded that this argument was not sufficiently compelling to justify the refusal of leave to the Plaintiff to proceed with this action. There was no appeal against my Ruling on this argument (or, as I have said, any of my Rulings).

16.2.3 There was very little reliance upon this purported defence at the trial. It was only very briefly mentioned in a short paragraph in the Gilbertson Parties' written opening submissions but was not otherwise referred to at

the trial at all and noticeably not in any of the closing submissions, written or oral.

16.2.4 In fact nothing that has emerged since my Ruling, whether in the process of discovery, the witness statements or the oral evidence at the trial has altered my analysis of the position. In fact, having now considered all the written and oral evidence in the case, I remain of the view that the circumstances are such that Mr. Gilbertson cannot rely on the provisions of the relevant Articles, particularly since I consider, as explained above, that his conduct did fall below the objective standard of an ordinary honest director. In the Gilbertson Parties' brief written opening submission on this issue, they sought to compare the position of Mr. Gilbertson with that of his fellow director, Mr. Kuznetsov. The Gilbertson Parties' counterclaim, to which I shall refer later, did originally claim for breach of fiduciary duty by Mr. Kuznetsov but that was expressly abandoned during the trial. In any event, no allegation of dishonesty was made against Mr. Kuznetsov. Furthermore, whether or not Mr. Kuznetsov was in breach of any fiduciary duty is not, in my opinion, relevant to the claims against Mr. Gilbertson. In the circumstances as I have found them to be, I see no basis for changing my previously expressed opinion that Mr. Gilbertson is not entitled in the circumstances to rely upon Articles 131 and 132 of the Company's Articles of Association.

16.3 **Conduct of the Plaintiff**

16.3.1 In their Amended Defence the Gilbertson Parties pleaded *inter alia*:

> *"Further and alternatively, Mr. Gilbertson and Autumn will contend that the Company is not entitled to any such relief as it might otherwise be directly or derivatively entitled against since it*

would be contrary to the principles set out in Nurcombe v Nurcombe ([1985] 1 WLR 350) *and unjust to award the Company any such relief, having regard to the facts and matters and alleged in this Amended Defence and Counterclaim concerning the conduct of Renova and those associated with it."*

16.3.2 The contention by the Gilbertson Parties that the conduct of Renova and those associated with it renders it inequitable to allow the claim brought by the Company at the instance of the plaintiff to succeed by reference to the *Nurcombe v Nurcombe* case (supra) was also argued at length at the hearing in late February 2009 of the plaintiff's application for leave to continue with this derivative action, which resulted in the Ruling of 14th April 2009 to which I have already referred. *In Nurcombe v Nurcombe* Browne-Wilkinson LJ, by reference to the case of *Towers v Africa Tug Co* [1904] 1Ch. 558 said:

"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 shareholders' 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."

Following the hearing in February 2009, I concluded as set out in the Ruling, that while the particular circumstances relied upon by the Gilbertson Parties to found such a defence might be material for cross-examination if the case were to proceed to trial, they did not constitute conduct of a kind which sufficiently impacted on the bona fides and equity

of the Plaintiff's case such as to satisfy me that the Plaintiff should not have leave to continue this derivative action.

16.3.3 It was pointed out by Leading Counsel for the Plaintiff that *Nurcombe v Nurcombe* was a case decided at a time before there was a leave requirement for a derivative action provided by the rules of court in England (and such requirement was not included in the GCR until even later) and thus there was no procedural filter for such actions. Accordingly, at that time all questions of locus standi such as the equity of the Plaintiff's conduct would have to be addressed at trial if the defendant chose not to apply to strike out the claim beforehand. It was submitted that the considerations to which Browne-Wilkinson LJ was referring would nowadays all be addressed at the leave stage and not at the trial if leave to proceed were granted. As I have pointed out, these considerations were indeed considered in the present case at the leave stage and addressed in the Ruling against which there was no appeal. However, 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.

16.3.4 In their written opening submissions the Gilbertson Parties set out a list of features of the dealings between Mr. Gilbertson and the Renova Parties which they contended would make it unjust for the Plaintiff to succeed in this action. However, 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. Furthermore some of the matters on which they

relied were not put to the Renova Parties' witnesses in cross-examination. For example, in their written opening submission the Gilbertson Parties submitted the following:

> *"In so far as there is any defence which Mr. Gilbertson might have been able to make good by reference to the documents which the Vekselberg Parties* [i.e. the Renova Parties] *have destroyed, it would be unjust for Renova to profit from its own wrong."*

As I have already mentioned earlier, 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 e-mails 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, as also explained earlier in this judgment, 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.

16.3.5 Leading Counsel for the Gilbertson Parties did submit that the Plaintiff's claims against the Gilbertson Parties were of no commercial benefit to the Renova Parties and were motivated solely by malice towards Mr. Gilbertson. Certain steps taken or, it was alleged, procured by Mr. Vekselberg towards Mr. Gilbertson, in particular the termination of Mr. Gilbertson's employment by SUAL in February 2007 and certain alleged comments by Mr. Kuznetsov to Mr. Gilbertson at a time not long before that, were alleged to demonstrate malice towards Mr. Gilbertson on the part of Mr. Vekselberg. However, the factual allegations were strongly

denied by Mr. Vekselberg and by Mr. Kuznetsov and 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. Vekselberg'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.

16.3.6 While it is a slightly different point, it was also submitted on behalf of Mr. Gilbertson 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 this context, at one point in his telephone conversation with Mr. Thomas Mr Gilbertson used the expression negotiating *"with a gun to his head"*. Quite apart from whether this allegation is relevant, as to which I am doubtful, I did not anyway find it particularly convincing. While Mr. Vekselberg is undoubtedly a very wealthy and influential businessman and, at least indirectly in practical terms, he was Mr. Gilbertson's employer at SUAL, Mr. Gilbertson is himself a very experienced, seasoned and successful businessman. My impression of him was that he is a tough individual, exacting, and perfectly capable of standing up for himself and looking after his own interests and considerable ambitions. For example, he clearly anticipated

deriving significant financial benefit at the expense of Mr. Vekselberg from what he considered would be a strong negotiating position once he had covertly acquired the Rights in early January 2007. He did not hesitate to discuss with Mr. Mende the potential profit they could anticipate by taking advantage of Mr. Vekselberg's obvious enthusiasm for the Fabergé brand. Indeed, in my view, to a less hardened and ruthless person the whole venture of acquiring the Rights for himself, in the way he did without Mr. Vekselberg's knowledge when he obviously knew Mr. Vekselberg would be extremely displeased about it, would have been too much of an obvious risk. 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.

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.

17. **The Claims against Autumn**

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. Autumn is also said to be liable to account for the profit it made on its loan to PEL/Fabergé Ltd, namely the interest on the money lent.

17.2 **Autumn as knowing recipient**

There is no dispute between the parties that the essential elements of liability for knowing receipt are as set out by Hoffman LJ 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."*

17.3 The parties dispute whether the three elements identified by Hoffman LJ have been made out in this case:

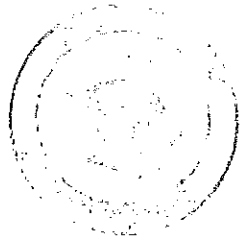
(i) The Plaintiff's case, of course, is that Mr. Gilbertson committed a breach or breaches of fiduciary duty in early January 2007 by secretly procuring the consortium, which included Autumn, to lend PEL the money to purchase the Rights and also by procuring the gratuitous issue of the new shares in PEL to Autumn and the other members of the consortium, thereby diluting the Master Fund's previous 100% interest in PEL to virtually nothing. The Plaintiff contends that there has been a disposal of assets of the Master Fund, and thereby of the Company, by Mr. Gilbertson in breach of fiduciary duty.

(ii) Assuming a breach or breaches of fiduciary duty by Mr. Gilbertson, the Gilbertson Parties nonetheless contend that the issue of the new shares in PEL did not amount to a disposal of assets of the Master Fund. They submit that the unissued shares per se were not assets of the Master Fund or PEL and that there is no authority in which it has been held that the unissued shares of a company belong in equity to the company or its shareholders. They say that the new shares issued by PEL did not constitute property of PEL prior to their issue and that accordingly their issue did not amount to a disposal of assets. Reference was made in the Gilbertson Parties' written closing submissions to a case in the High Court of Australia: Pilmer and Others v Duke Group Ltd (In Liquidation) and Others [2002] 2 BCLC 773 in which it was said:

> *"[20] Before the shares in question were issued, they did not exist as an item of property whether of the company or anyone else (Federal Commissioner of Taxation v St Helens Farm Pty Ltd (1981) 146 CLR 336 at 427 per Aickin J). It was the act of issuing the shares and agreeing*

to allot them which created the relevant item of property – property which was never owned by the company....."

(iii) The consequence of the issue of the new shares in PEL was that the interest of the Master Fund in PEL was reduced from 100% of that company to just under 1%. It was contended on behalf of the Plaintiff that the asset of the Master Fund was its 100% ownership and control of PEL and it was that which was effectively disposed of in favour of Autumn (and the other members of the consortium) by means of the issue to them of the new shares in PEL. It was contended that the new shares were simply fungible items of property which represented ownership and control of PEL, in other words the new shares were in reality simply a "currency of ownership and control" which had passed from the Master Fund to Autumn. The Plaintiff's claim is a multiple derivative one in respect of the alleged diversion by the Company's director, Mr. Gilbertson, of a commercial opportunity, ultimately of the Company through its subsidiary, the Master Fund. It was argued for the Plaintiff that, but for Mr. Gilbertson's breach of duty, the Master Fund would have owned 100% of PEL, the owner of the economic benefit of the Rights. Accordingly, the Company, as the Master Fund's ultimate holding company and trustee of its assets, suffered loss as a result of the transfer of the Master Fund's 100% ownership and control of PEL, through the issue of the new shares, to Autumn. It was submitted that commercially there would be no difference between either effecting a transfer of the Rights in specie from PEL to Autumn or leaving the Rights in PEL but issuing new shares in PEL to Autumn. It was said that in equity there should be no difference either.



(iv) It was also emphasised on behalf of the Plaintiff that the role of the directors of PEL themselves was not in issue or impugned on the basis of any defect in their performance as such directors. The Plaintiff's claim is that it was Mr. Gilbertson who procured the issue of the new PEL shares and that he did so in breach of his fiduciary duties to the Company. It is Mr. Gilbertson's duty to the Company that is in issue.

(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.

(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. However, as I have already explained, the Gilbertson Parties contended that the

> new shares in PEL were not in fact issued until 19th January 2007, some 16 days after the purchase of the Rights from Unilever on 3rd January 2007, which, the Gilbertson Parties suggested, constituted the alleged breach of fiduciary duty by Mr. Gilbertson, if there was one. Accordingly, they argued, even if the issue of the new shares constituted a disposal of the assets of the Master Fund that is not traceable to any breach of fiduciary duty by Mr. Gilbertson. In fact, as I have already explained, the documentary and other evidence is to the effect that the new shares were indeed issued on 3rd January 2007 and not on 19th January 2007 and, as explained above, I have so concluded.

I should also say that, even if my conclusion about the date of issue of the new PEL shares is unjustified and they were issued on 19th January as pleaded by the Gilbertson Parties, that date 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. Alternatively, Mr. Gilbertson's procurement of the issue of the new PEL shares, even if not effective until 19th January 2007, was not disclosed and was unknown to the Renova Parties and it may be argued that this was simply a perpetuation of Mr. Gilbertson's breach of duty.

In light of the above, the new PEL shares are, in my opinion traceable as representing assets which ought to properly have belonged to the Master Fund. 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.

17.4 **Autumn's Knowledge**

The key question is whether Autumn had the requisite knowledge. Autumn itself is an off-the-shelf BVI company which was acquired on 2nd January 2007 by Fairbairn as trustee of the BPG Settlement. Mr. Thomas was a director of Fairbairn. Autumn was acquired specifically as a special purpose vehicle through which to make the loan by the BPG Settlement to PEL to meet Mr. Gilbertson's share of the purchase price of the Rights and to hold the new PEL shares which Mr. Gilbertson procured to be issued to it. Autumn was wholly owned by Fairbairn and Fairbairn's associated company, Fairbairn Corporate Services Limited ("FCSL"), became Autumn's sole director. Mr. Thomas was also a director of FCSL and therefore in practical terms also the sole director of Autumn.

17.5 There are arguably two different ways in which Autumn could be said to have the requisite knowledge: (a) by imputation to it of Mr. Gilbertson's actual knowledge, or (b) through what Mr. Thomas knew or should have known.

17.6 Firstly, it was argued on behalf of the Plaintiff, that Autumn was to be imputed with Mr. Gilbertson's actual knowledge on the basis that he was effectively Autumn's directing mind and will for the purposes of the loan and the PEL share issue, and that his knowledge is attributable to Autumn. It was said on behalf of the Plaintiff that it was clear that Autumn was for practical purposes from the outset a "Gilbertson" vehicle rather than a company which was in reality independently operated by the trustee of the BPG Settlement. It was contended that this was made clear by the following matters:

(i) The fact that Clifford Chance, Mr. Gilbertson's English solicitors, said in their letter dated 7th March 2007 to the

Renova Parties' English solicitors that Autumn was *"in practice, an entity controlled by* [Mr. Gilbertson]".

(ii) The fact that Mr. Gilbertson represented to Mr. Mende and the other members of his consortium that his share of the purchase price for the Rights was being made with his own money. Also, at no stage was Fairbairn involved with the commercial discussions which were all led by Mr. Gilbertson on his own initiative;

(iii) The fact that Mr. Thomas carried out minimal due diligence on the loan transaction and was able to agree to make the payment, which was substantial, (US$9.5m) within 48 hours of being told by Mr. Gilbertson that he needed the money to pay for his *"Christmas present"*. It was clear from the evidence that Mr. Thomas placed great faith and trust in Mr. Gilbertson and that in reality he relied on him entirely as to whether it was a sound and appropriate investment for the trust to lend such a significant sum for the purchase of 25% of the Rights. There was no evidence that Fairbairn as trustee gave any consideration to the interests of the other beneficiaries of the BPG Settlement. Mr. Gilbertson himself, in his e-mail to Mr. Mende described Fairbairn's role as simply *"processing paperwork"*.

(iv) It was evident that Mr. Gilbertson's own assessment of the BPG Settlement, of which he was the settlor, was that he was free and able to direct Fairbairn as the trustee to apply the funds in that trust exactly how and when he wanted and that he expected Mr. Thomas to act upon his request to procure Fairbairn to transfer a large amount of money from the trust to him or for his benefit within a very short space of time. He told Mr. Mende that he would refund him

promptly with the US$9.5m, which was his share of the purchase price for the Rights, the following day or at least within a few working days as he had to extract it from a trust in Jersey. He said he could do so within a few days. In his oral evidence he said he was "confident" that he could extract the money from the BPG Settlement in Jersey. In the event his confidence was justified as he had no difficulty in doing so within the few days which he had told Mr. Mende it would take.

(v) It was Mr. Gilbertson, with the assistance of Sean Gilbertson, who in effect made all the decisions with regard to the loan and its terms and Mr. Thomas did not seriously question what he was being asked to do with a substantial amount of trust money. Furthermore, the period of time between Mr. Gilbertson's first call to Mr. Thomas on 2nd January 2007 and his e-mail to Mr. Vekselberg informing him that same evening that he had triggered alternative arrangements and bought the Rights was only about 8 hours. There is no evidence that during that time Mr. Thomas had reverted to Mr. Gilbertson and agreed to make the payment. Mr. Gilbertson cannot have been in any doubt that Fairbairn would pay the money which he had told Mr. Thomas he needed only a short time before.

(vi) There was no evidence to suggest that at any time during his discussions and negotiations after 3rd January 2007 Mr. Gilbertson discussed any of the proposals or possibilities with Mr. Thomas even though Autumn had made a substantial loan and also held equity in PEL, latterly Fabergé Limited.

(vii) It was also pointed out that from the outset of these proceedings Autumn has shared a single defence and a

single legal team with Mr. Gilbertson and has wholly aligned itself with him. It has not been separately represented. Autumn did not produce its own list of documents on discovery separate from those of Mr. Gilbertson and he himself verified Autumn's discovery on oath.

17.7 The Plaintiff contends that all of these factors demonstrate 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. It was argued that the trustee was simply going through the motions in relation to his request for the money but in reality was acting on Mr. Gilbertson's instructions. Accordingly, Mr. Gilbertson's knowledge of all the relevant background and circumstances is to be imputed to Autumn. As I mentioned earlier in this judgment, it was pointed out by Leading Counsel for the Gilbertson Parties that most of these matters took place prior to Autumn's acquisition by Fairbairn but he accepted that for this purpose, insofar as they related to Fairbairn as trustee of the BPG Settlement and to Mr. Thomas, they could be considered applicable to Autumn.

17.8 I should mention that the Plaintiff pleaded and, until late in the trial was apparently maintaining, a claim against Mr. Gilbertson for an account of the profits of Autumn, apparently on the basis that Autumn was Mr. Gilbertson's alter ego for those purposes. Leading Counsel for the Plaintiff expressly abandoned the claim against Mr. Gilbertson personally to account for Autumn's receipts *"because we accept that we cannot lift the veil of incorporation as between him and Autumn"*. But he went on to say *"but that is not the same thing as saying that he is not the directing mind and will of Autumn.... to be clear, we do maintain a case that Mr. Gilbertson's knowledge should be attributed to Autumn on the footing that*

he is its directing mind and will. And our submission is that you do not have to lift the veil of incorporation in order to attribute knowledge."

17.9 Leading Counsel for the Gilbertson Parties' position was that in order to establish 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. He argued that 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 Gilbertson Parties say that therefore the only issue in this regard has to be Autumn's knowledge through Mr. Thomas.

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 over-riding 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.

17.11 With regard to Autumn's knowledge through Mr. Thomas, the question is whether Mr. Thomas knew, or should have known if he had made appropriate independent enquires, that the Rights were being acquired by Mr. Gilbertson in circumstances which amounted to a breach of his fiduciary duties. In this regard the knowledge concerned is that referred to

in the third element set out by Lord Hoffmann in *El Ajou v Dollar Land Holdings* (supra), namely *"knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty"*. The defendant here is, of course, Autumn (by its indirect director Mr. Thomas) and the knowledge is that the assets (the new shares in PEL) were traceable to a breach of fiduciary duty by Mr. Gilbertson.

17.12 The Plaintiff contended, first that Mr. Thomas knew all about the Pallinghurst Structure and he knew that Renova had an interest in it. Fairbairn was after all a 50% shareholder in the Company, the other 50% being owned by Renova Holding. The structure chart, which Mr. Thomas said he saw, made that clear. All the Pallinghurst documents had been sent to Fairbairn on 7th September 2006 with the structure chart.

17.13 Secondly, the exchange referred to earlier in Mr. Thomas' telephone conversation with Mr. Gilbertson on 2nd January 2007, is particularly relevant in this context:

"JUSTIN THOMAS:	*What would Viktor 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]."*

Mr. Thomas obviously knew enough to enquire about Pallinghurst and Mr. Vekselberg. He understood the connection and he was given an answer that would, in my view, have alerted an objective and independent trustee to the fact that there seemed to be a problem. Mr. Gilbertson's answer 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. It is not clear why Mr. Thomas did not follow-up on Mr. Gilbertson's reply. His reaction of laughter seems to me to confirm that Mr. Thomas was somewhat in awe and in the thrall of Mr. Gilbertson and did not want to question why Mr. Vekselberg would be "pissed off". That does not seem to me to be the response of a cautious objective trustee who was being asked out of the blue by one of the beneficiaries to make an urgent payment of US$9.5m or US$10m out of the trust. The fact that he had been told by Mr. Gilbertson that he was acquiring the Fabergé brand for himself as a Christmas present should, in light of his knowledge of the Pallinghurst Structure and Mr. Vekselberg's interest and likely reaction, in my view, have alerted Mr. Thomas and caused him to at least make further independent enquires. My impression was that he did not do so because he did not feel able or willing to seriously challenge or question what Mr. Gilbertson wanted.

17.14 Leading Counsel for the Gilbertson Parties submitted that there was no evidence that Mr. Thomas knew that Mr. Gilbertson was a director of the Company. Mr. Thomas' own evidence about that was somewhat vague but I find it hard to believe that he did not realise that given his familiarity with the Pallinghurst Structure, which he expressly confirmed, and the fact that Fairbairn was a 50% shareholder of the Company. In my view the probability is that Mr. Thomas knew that Mr. Gilbertson was a director of the Company.

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.

17.17 The Plaintiff's case is that Autumn is liable to account as a constructive trustee for the PEL shares it received. It is said that Autumn was not a bona fide purchaser for value without notice because it knew or ought to have known of Mr. Gilbertson's breach of fiduciary duty. Anyway, Autumn did not pay for the PEL shares and accordingly is not a purchaser in any event. Thus, it is argued, Autumn holds its shareholding in what was PEL, now Fabergé Limited, on constructive trust for the Master Fund/GPLP/the Company and is liable to account for those shares. In all the circumstances I am inclined to agree with that.

17.18 **Autumn as a volunteer**

The Plaintiff submits that as Autumn did not pay for the shares in PEL/Fabergé Ltd; it received them as a volunteer. It is correct that Autumn never paid for them. It appears to have received them at the same time as but not as part of the loan transaction whereby it lent the sums of US$9.5m and then US$0.5m at interest. The board resolution of PEL on 3rd January 2007 refers to the issue of the shares as *"in addition to the loan"*. There is no apparent commercial connection between the loan and the issue of the shares. No satisfactory justification for the issue of the shares was given in the evidence, particularly since the loan was not only at interest but also conferred on Autumn and the other members of the consortium the right to compel PEL to transfer to them the whole Rights in specie on 7 days' notice. It is also consistent with the issue of the PEL shares being gratuitous that when the loan was repaid by Fabergé Limited with interest in September 2007 Autumn retained the shares, as did the other members of the consortium. It is apparent that the shares were a gift from the start and they were treated as such when the loan was repaid.

17.19 The Gilbertson Parties said two things with regard to the Plaintiff's claim that Autumn should be treated as a volunteer. Firstly, they argued 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. However, that does not seem to me to accord with the evidence to which I have already referred. Secondly, the Gilbertson Parties submitted that either Autumn paid for the new shares, which in fact it did not, or that 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. I also consider that this argument does not accord with the circumstances here. 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.

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 its shareholding in Fabergé Limited 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.

17.21 **The Claim for profits**

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.

17.22 **Autumn's reliance on the Company's Articles of Association**

Autumn relies in its pleaded defence on what it contends is Mr. Gilbertson's exoneration from liability for breach of fiduciary duty under Article 131 of the Company's Articles of Association ("the Articles"), and submits that accordingly Autumn can have no liability arising from such breach either. Clearly Autumn was not a party to the Articles and therefore may not rely on them or seek to enforce them directly. However, in my

view, Autumn may not rely on Article 131 indirectly either. For the reasons I have already explained earlier in this judgment, in my opinion Mr. Gilbertson cannot have the protection of Article 131 in the circumstances of this case. If that is correct and Mr. Gilbertson is not exonerated from liability for his breach of fiduciary duty, by Article 131 then *a fortiori* nor is Autumn.

17.23 In any event, even if Mr. Gilbertson could be exonerated by Article 131, the liability of Autumn would not be affected for the following reasons:

(i) The claim against Autumn is to account as a constructive trustee, and not, as in the case of the claim against Mr. Gilbertson, for equitable compensation for breach of fiduciary duty. Claims for account of assets or profits are not covered by Article 131.

(ii) The fact that a claim for breach of fiduciary duty might not be actionable against the fiduciary himself by virtue of the Articles does not preclude a claim against a third party recipient of property transferred in breach of such fiduciary duty. The effect of Article 131 is not that the acts of Mr. Gilbertson did not amount to a breach of fiduciary duty at all. It operates in effect only as an undertaking to him alone that he will be excused liability for any such breach of fiduciary duty. Accordingly, even if the effect of the Article was to excuse Mr. Gilbertson from liability for breach of fiduciary duty, it would not operate to excuse Autumn from a claim based upon the consequences of such breach of duty.

I therefore do not accept the submissions on behalf of Autumn that it may rely in any way on the Company's Articles.

18. **The Counterclaims**

18.1 With their defence to the Plaintiff's claim the Gilbertson Parties served a counterclaim, which was subsequently slightly amended by their Amended Defence and Counterclaim served pursuant to an order made on 30th November 2011. There are several individual claims in the counterclaim, all of which are said to be expressly conditional and contingent upon the Plaintiff establishing liability in respect of the relief it is claiming against the Gilbertson Parties. The counterclaim is accordingly not a stand-alone claim. The introductory paragraph to the counterclaim states as follows:

> *"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."*

18.2 The individual claims pleaded in the counterclaim are as follows:

(a) A claim for damages against Renova Holding on the ground that Renova Holding acted in repudiatory breach of the Letter Agreement (counterclaim paras 59 and 60);

(b) A claim in tort against Mr. Vekselberg and Mr. Kuznetsov for damages for inducing or procuring Renova Holding to act in

repudiatory breach of the Letter Agreement (counterclaim paras 61 - 63);

(c) A claim in tort against all the defendants to counterclaim (Mr. Vekselberg, Mr. Kuznetsov, Renova Holding and the Plaintiff) for damages for conspiracy, by both lawful means and unlawful means (counterclaim paras 64 and 65);

(d) 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 and who, it is alleged must share the blame for the loss to the Company (counterclaim para 66); and

(e) A reservation of rights by Fairbairn as 50% shareholder in the Company to bring a derivative action against the defendants to counterclaim for the claims for conspiracy and the claim for indemnity and contribution (counterclaim para 67);

In each case, other than (e), which is simply a reservation of alleged rights by Fairbairn, the claim for damages is in the same amount as the Gilbertson Parties are found liable for if the Plaintiff's claims are successful.

18.3 By Summons dated 29th September 2009 the four defendants to the counterclaim applied, pursuant to GCR O.14, r. 12 for an order that the whole of the counterclaim should be dismissed and summary judgment entered for them on the ground that the Gilbertson Parties as plaintiffs to the counterclaim had no prospect of success at trial. They also applied pursuant to GCR O.18 r.19 for orders, *inter alia* that certain specific paragraphs of the counterclaim 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 15th April 2010, I declined to strike out any part of the counterclaim on a summary basis.

18.4 On 11th 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 lawful means conspiracy and for breach of fiduciary duty by Mr. Kuznetsov and that they were accordingly 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. I should also say that in respect of the reservation of right by Fairbairn to bring a derivative action against the defendants to the counterclaim as pleaded in the counterclaim at subparagraph (e) above, no such action has in fact been brought and there has been no indication that any such action will be brought. Accordingly, it does not seem necessary for me to address that particular counterclaim any further. The only counterclaims which I therefore propose to consider are the claim against Renova Holding in respect of alleged repudiatory breach of the Letter Agreement; the claim in tort against Mr. Vekselberg and Mr. Kuznetsov for allegedly inducing or procuring Renova Holding to act in repudiatory breach of the Letter Agreement and the claim in tort against all the defendants to counterclaim for conspiracy by unlawful means.

18.5 Before turning to analyse these three remaining individual counterclaims, 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.

18.6 The first remaining individual counterclaim as pleaded is in respect of the alleged repudiatory breach of the Letter Agreement by Renova Holding by:

> *"59.1 Insisting on the Rights being owned otherwise than through the Master Fund within the Pallinghurst Structure (namely, by an entity of Mr. Vekselberg's choosing outside the Pallinghurst Structure); and*
>
> *59.2 Refusing to procure the funding which it was obliged to provide pursuant to clause 2.4 of the Letter Agreement unless Mr. Gilbertson agreed to its non-contractual demand as set out in paragraph 59.1 above*
>
> *60 By reason of such breach, Mr. Gilbertson was obliged to pursue Project Egg in the way he did, without reference to Renova Holding and/or the Plaintiff in order to preserve the opportunity to acquire the Rights and/or prevent PEL from incurring liability for failing to complete the agreement with Unilever. If and to the extent that such action has resulted in the Company suffering any loss and having a claim against Mr. Gilbertson in respect of such loss, Mr. Gilbertson will contend that his consequential liability to the Company is the result of Renova Holding's own breach of the Letter Agreement as aforesaid and that Renova*

Holding is accordingly liable to him for damages for breach of contract to the same extent that he may be held liable to the Company."

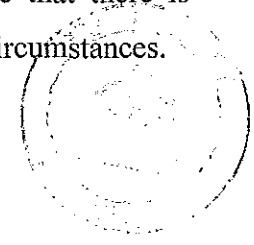
18.7 Rather surprisingly, in light of this pleading, in his opening submissions Leading Counsel for the Gilbertson Parties said:

> *"But, for the avoidance of doubt, we accept it was open to Renova to say that it would only approve a particular project on the basis that it was held in a different structure to other projects. As a matter of construction* [of the Letter Agreement], *that was open to it. And we also accept that it was open to Renova to propose that a project be taken forward with the involvement, for example, of Lamesa.*
>
> *The timing in this case, we say, was, to say the least, unfortunate. It may not have been fair. It may not have been gentlemanly. We say it wasn't fair. We do say that it was not gentlemanly. But, as a matter of principle, it was open to Renova to do what it did as long as one accepts that the Investment Committee is the gateway or, as it were, the gatekeeper to the Fund ..... What we are concerned with here is the interpretation of the Letter Agreement. What the Vekselberg parties were free to do as a matter of law, and what they were free to do as a matter of decency, are not the same thing. They did move the goalposts at the eleventh hour. Mr. Gilbertson did feel he was being expected to negotiate with a gun to his head. But there is no law against playing hardball."*

In my view, this concession was inconsistent with the Gilbertson Parties' case that Renova Holding was in breach of the Letter Agreement or that

Mr. Vekselberg and Mr. Kuznetsov induced or procured such breach, as pleaded in the second remaining individual counterclaim. It is also inconsistent with pleading that such a breach of the Letter Agreement could form the basis of an unlawful means conspiracy by the defendants to the counterclaim.

18.8 Furthermore, even assuming hypothetically that Renova Holding was in repudiatory breach of the Letter Agreement, it is clear from the evidence of Mr. Gilbertson himself that he did not accept any such repudiation. Mr. Gilbertson clearly regarded the Letter Agreement as continuing in effect in early 2007 and, indeed, up until its formal termination in May 2007. Mr. Gilbertson said as much during his oral evidence under cross-examination at the trial. In fact the overall evidence is clear that Mr. Gilbertson repeatedly and unequivocally affirmed the Letter Agreement and pressed for its performance in numerous different respects until its mutual termination pursuant to its terms in late May 2007. Nor was the contrary put to any of the Renova Parties' witnesses and Mr. Kuznetsov's evidence in his witness statement that the Letter Agreement was terminated by consent on 25th May 2007 was not challenged. In fact, it was common ground that the Letter Agreement was terminated by consent under Clause 8.2 thereof and accordingly treated as being null and void by mutual consent of both parties. In my opinion therefore, even if, which does not seem to me to be the case anyway, Renova Holding repudiated the Letter Agreement by "moving the goalposts" such alleged repudiation was not accepted by Mr. Gilbertson and the alleged breach did not bring, and was never treated as bringing, the Letter Agreement to an end prior to its contractual termination by mutual consent. At that point, the Letter Agreement having been terminated under Clause 8.2, it was as if it had never been entered into, thereby nullifying any accrued claim, if there was one, for its breach. I accordingly conclude that there is no merit in this particular claim in the counterclaim in the circumstances.



18.9 The second remaining specific counterclaim is, as I have mentioned, the claim against Mr. Vekselberg and Mr. Kuznetsov for alleged inducement and/or procurement of Renova Holding's alleged breach of the Letter Agreement. The short point here is that for the reasons set out above, there was no breach of the Letter Agreement and, even if there was, the Letter Agreement is itself null and void ab initio as a result of its mutual termination pursuant to clause 8.2 and accordingly there is no basis for a claim for inducement and/or procurement of a breach of it. Furthermore, it was pointed out by Leading Counsel for the Renova parties, firstly, that it is well-established that if the contract is void (as is the case in respect of the Letter Agreement as a result of its consensual termination) then no claim for the tort of procurement of its breach will lie in law (see *Joe Lee Limited v Lord Dalmeny* [1927] Ch 300 at p. 306-7). Secondly, it is also 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 the circumstances, I am of the view that there is no merit in this claim either.

18.10 The last remaining specific counterclaim is against the four defendants to the counterclaim for the tort of conspiracy by unlawful means. The relevant pleadings of the alleged conspiracy is as follows:

> *"64.2 To commit unlawful acts against the Master Fund and hence Mr. Gilbertson, namely:*
>
> *64.2.1 By insisting on the transfer of the ownership of the Rights outside the Pallinghurst Structure in breach of the Letter Agreement as aforesaid and in breach of Mr. Kuznetsov's fiduciary duty to the Company as set out in paragraph 66.1.1 below; and/or*

64.2.2 By refusing to provide funding to the Master Fund in breach of the Letter Agreement as aforesaid.

65 Accordingly, Messrs. Vekselberg. Kuznetsov, Renova Holding and the Plaintiff are liable to Mr. Gilbertson for damages for the tort of conspiracy to injure and/or to commit unlawful acts, the measure of damages being the same as that claimed at paragraphs 60 and 63 above."

18.11 It will be noted that paragraph 64.2.1 is based on alleged breach of the Letter Agreement and alleged breach of Mr. Kuznetsov's fiduciary duty to the Company. As I have explained above, it was effectively conceded that there was no breach of the Letter Agreement and the original specific counterclaim in respect of the alleged breach of Mr. Kuznetsov's fiduciary duty to the Company has been abandoned.

18.12 Secondly, the Gilbertson Parties' pleading at paragraph 64.2 avers that the alleged conspiracy was "*to commit unlawful acts against the Master Fund and hence Mr. Gilbertson*". Accordingly, the plea is that the Master Fund was the target of the alleged intended injury and consequently Mr. Gilbertson. However, it was submitted, in my view correctly, that Mr. Gilbertson's economic interest in the Master Fund was not enough to give him a cause of action. 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.

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 Fabergé 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. Arguably, the intentions of Mr. Vekselberg and Mr. Kuznetsov were also to protect the interest of the Pallinghurst Structure and the Master Fund insofar as the economic benefits and management of the Rights were concerned, while providing Mr. Vekselberg with the legal title to the Fabergé brand as the price for personally funding the purchase from Unilever and giving him, in Mr. Gilbertson's own words, the ability *".....to be able to hang on your wall the certificate that says: I am the owner of the Fabergé Rights.....".*

18.14 For the various reasons above I have concluded that the three remaining specific counterclaims by the Gilbertson Parties are not made out and should be dismissed.

19 Quantum

19.1 The financial relief sought by the Plaintiff against Mr. Gilbertson in respect of his alleged breach of fiduciary duty as set out in its Amended Statement of Claim is, firstly, an account of the profits received by Mr. Gilbertson as a result of his acquisition of the Rights and, secondly and alternatively, payment to the Company (and/or GPLP and/or the Master Fund) of equitable compensation for the loss of the Rights. An account of profits and equitable compensation are alternative and inconsistent remedies and a plaintiff must elect between them. During the course of the trial the Plaintiff's claim for an account of profits against Mr. Gilbertson was abandoned and accordingly the Plaintiff elected to pursue its claim against Mr. Gilbertson for equitable compensation for his breach of fiduciary duty.

19.2 Equitable compensation may be payable in respect of loss caused by breach of an equitable duty, such as a fiduciary duty. It is compensation calculated to put a plaintiff back into the position in which he would have been at the time of the trial had he not sustained the wrongfully caused loss. In the present case that means the monetary value of the loss to the Pallinghurst Structure incurred as a result of the diversion from the Master Fund of the economic benefit of development, exploitation and management of the Fabergé brand. The Plaintiff's claim is not for loss of the opportunity on the part of the Master Fund to enjoy such benefits. It is a claim to reconstitute the Master Fund to the position in which it would now have been but for Mr. Gilbertson's breach of duty.

19.3 In his oral closing submissions Leading Counsel for the Plaintiff said:

> *"My Lord, the case that we advance is by the Company in order to reconstitute the Master Fund and the relief that is set out in the*

pleadings is that an order for payment is made to the Master Fund and/or GPLP and/or the Company. It is a re-constitution claim."

At an earlier stage in his closing he had said:

"All we are asking your Lordship to decide is that, had Mr. Gilbertson not walked away and had complied with his fiduciary duties, the parties would have ended up where they had aimed to end up, which is that the full economic benefit of the Rights – and I emphasize the word "full" – would have lain with the Fund and that Mr. Vekselberg would have ended up with a piece of paper which said "Rights" on it and that that is what the parties were trying to achieve".

19.4 The case proceeded on the basis that the appropriate time at which the reconstitution of the Master Fund should be considered was at the time of the trial. It was the monetary compensation required to restore the Master Fund to the situation in which it would have been at the date of the trial that was in issue and not the position in which the Master Fund would have been at the time of Mr. Gilbertson's breaches of duty in late December 2006/January 2007. Leading Counsel for the parties proceeded on that basis, as did the expert witnesses who addressed value as at the time of the trial.

19.5 In summary the Plaintiff's case on quantum was that the Master Fund owning the full economic benefits and management of the Rights equated in practical terms with owning the whole Rights, including the title to the Fabergé brand outright. The Plaintiff therefore contended that the amount of equitable compensation payable was equivalent to the whole present monetary value of Fabergé Limited (formerly PEL), as the present owner

of the whole Rights. Accordingly, the opinion and evidence of the Plaintiff's expert focused almost entirely on the current value of the company Fabergé Limited, whose sole asset is the whole Rights. In brief, the Gilbertson Parties accepted that the current value of Fabergé Limited was the starting point in assessing the position, although their expert valued Fabergé Limited at a considerably lower figure than the Plaintiff's expert did. However, they did not accept that the value to the Master Fund of the economic benefits and management of the Fabergé brand equates to the value of the whole Rights. That is because, in these circumstances, the whole Rights themselves would not have been owned by the Master Fund and, they argued, the value of the economic benefits and management of the Rights without ownership of the income producing asset itself, namely the Fabergé brand, is considerably less than the value of owning the whole Rights, including the brand itself. They also argued that the Master Fund would not, on this hypothesis, own the whole unrestricted economic benefits of the Rights in any event since such ownership would be pursuant to the terms of a licence from the owner of the title to the brand, Lamesa Arts Inc. They also contended that the financial position of Fabergé Limited is such that it is a loss-making business in which more has been invested than it is worth. The upshot of their contentions is that Mr. Gilbertson's actions have caused no loss to the Master Fund, that nothing is required to put it into the financial position it would have been in today and accordingly no equitable compensation is payable.

19.6 The Plaintiff's expert witness was Ms. Elizabeth Gutteridge, a partner of Deloitte LLP in London. In her first report Ms. Gutteridge, identified three generally accepted methods for valuing companies, namely a market-based approach using the company's share prices, an income-based approach and an asset-based approach. After explaining and discussing each approach, she concluded that in the case of Fabergé Limited the market-based valuation method was the most appropriate.

This extrapolated the value of the company from the prices at which transactions in its shares had taken place ("subject company transactions"). She specifically rejected the income based method of valuation known as Discounted Cash Flow ("DCF"), which estimates the value of a business by calculating the present value of the anticipated future cash flows of the business. She argued that Fabergé Limited is at a relatively early stage of growth with only modest revenues, which are yet to result in profits, and therefore significant assumptions about future cash flow would be required which would be potentially unreliable. She considered the evidence produced by subject company transactions would be a better and more reliable basis for valuation. Her approach was supported by the valuations of Fabergé Limited by its own directors and also by the directors of Pallinghurst Resources Limited, an English company substantially owned and controlled by Mr. Gilbertson, which is the majority shareholder in Fabergé Limited, owning directly or indirectly 49.1% of its shares.

19.7 Ms. Gutteridge expressed her opinion of the value of Fabergé Limited as at 31st January 2012 as being US$177m. Her assessment of the value was based upon dealings in the shares of Fabergé Limited, which the directors had themselves used to value the company in March 2011 for the purpose of the company's audited financial statements to 31st March 2011. The same share transaction was also used by the directors of Pallinghurst Resources Limited, the majority shareholder. That valuation was made for inclusion in the interim report of Pallinghurst Resources Limited dated 30th June 2011. The valuations of Fabergé Limited arrived at by both the directors of Fabergé Limited itself and the directors of Pallinghurst Resources Limited were also US$177m., extrapolated from the same share transaction. Ms Gutteridge also relied upon the fact that the valuations by the directors of Fabergé Limited and by the directors of Pallinghurst Resources Limited were subject to review by their respective auditors and

she saw no evidence to suggest that the respective auditors questioned those valuations.

19.8 Ms. Gutteridge, as did the directors of Fabergé Limited and the directors of Pallinghurst Resources Limited, based her assessments of value on that implied by a past transaction in the shares of Fabergé Limited on the basis of a share price of US$88.07 per share. This was derived from a capital raising by Fabergé Limited in September 2009. In my view of Ms. Gutteridge, as well as in the view of the Gilbertson Parties' expert, Mr. Chris Osborne, share transactions involving non-shareholders are of considerably greater assistance in this context than share transaction involving existing shareholders. The most recent non-shareholder transaction was as a result of the capital raising by Fabergé Limited in September 2009 when an investment of US$100,000.00 was made at a share value of US$88.07 by a third party, who was not an existing shareholder. Notwithstanding that the total capital raising at that time by way of the issue of new shares at that price was US$35m, so that by far the greater part of the subscription for new shares was made by the existing shareholders, Ms. Gutteridge relied heavily upon the non-shareholder investment of US$100,000.00 in concluding that the shares of Fabergé Limited at that time had a value of US$88.07. She used that to arrive at a valuation of the company of US$177m. She considered that her opinion was supported by the assessments of value by the directors of the company and by the directors of Pallinghurst Resources Limited who, as I have already explained, had adopted the same approach. Ms. Gutteridge also identified several other factors which, while not considered primary grounds for establishing a value, she nonetheless contended supported her opinion of the value of Fabergé Limited in January 2012 as being US$177m.

19.9 The Gilbertson parties' expert was Mr. Osborne, a senior managing director in the London office of FTI Consulting Limited, a firm specialising, *inter alia*, in litigation support and valuation. In his report he estimated the value of Fabergé Limited as at 10th February 2012 as being not more than US$120m using the DCF method of valuation. This was of course a method which was rejected by Ms. Gutteridge, the Plaintiff's expert.

19.10 In his first written report Mr. Osborne determined that Fabergé Limited was, from a practical point of view, a start-up business when it was first acquired from Unilever on 3rd January 2007. In Mr. Osborne's opinion the most widely adopted and recognised valuation method for a going concern is the DCF method, although he acknowledged that start-up businesses are notoriously difficult to value because they have no significant record of past performance. Nonetheless, he ruled out the subject company transactions method of valuation used by Ms. Gutteridge, on the ground that Fabergé Limited had been a loss-making business since acquisition by PEL in January 2007, so that using a single small share transaction as a basis for expressing the value of the company was of very limited or no assistance. Mr. Osborne accordingly valued Fabergé Limited using what he called in his first report a *"simplified DCF module"*. His estimate of the cash flows of Fabergé Limited were based on the 2011 Financial Forecast of the company but applying a discount rate of 20% for anticipated risks with the cash flows and assuming that from 1st February 2012 Fabergé Limited would meet the 2011 Financial Forecast. He assumed that by 2015 Fabergé Limited would have reached a more mature stage of development and he therefore estimated the value of cash flows after that date as a multiple of the sales forecast for 2015. Based on these assumptions and his consequent calculations, Mr. Osborne expressed the view that the current value (at 10th February 2012) of Fabergé Limited was approximately US$120m, although he also said he

regarded this estimate of the value as *"potentially high"*. Mr. Osborne went on to explain that there were several reasons, for this view. They included the accepted need for further significant investment in the business, the apparent risk of under performance by reference to the 2011 Financial Forecast and the fact that the value of the principal comparable business used as a factor in assessing the value of Fabergé Limited, namely Bulgari, was itself high for reasons specific to that business. He said that, assuming a more realistic lesser terminal value of 2 times for Fabergé Limited's forecast sales rather than the 3.8 times which he had applied in his valuation, would result in a valuation of Fabergé Limited of US$56m rather than US$120m. For those reasons, amongst others, he felt a valuation of US$120m was definitely on the high side.

19.11 Leading Counsel for the Renova Parties was critical of Mr. Osborne's expert report for not referring in detail to the alternative valuation methods considered by Ms. Gutteridge and for not explaining sufficiently why he considered the subject company transactions method to be inappropriate and the DCF method to be more appropriate in this case. Mr. Osborne was criticised for using the DCF method. However, in her evidence Ms. Gutteridge did say that at an early stage in her consideration of the value of Fabergé Limited she had herself carried out a DCF assessment and had reached conclusions on value similar to those of Mr. Osborne. She had nonetheless disregarded that as she considered the DCF method to be inappropriate in valuing Fabergé Limited in the circumstances. However, the cross-examination of Mr. Osborne was almost entirely confined to challenging his suggested failure in his report to explain and consider the different valuation methods or to explain in detail why he had used the DCF method; he was not cross-examined to any significant extent on the substance or detail of his valuation or how and why he had reached the conclusions which he did.

19.12 In May 2010 Fabergé Limited had entered into a loan agreement with Pallinghurst Resources Limited for US$25 million in order to provide Fabergé Limited with sufficient finance to enable it to continue as a going concern. During the second half of 2010 Fabergé Limited started to draw down funds under this loan agreement in order to continue operations. In April 2012 Fabergé Limited made the final draw-down against this loan.

19.13 In November 2010 Fabergé Limited undertook a further capital raising seeking to raise a total of US$40 million. The share price for the potential issue was at a 9.7% discount on the previous share price of US$88.07, namely US$79.50. The directors' report of 31st March 2011 states that this discount was *"aimed to attract a new potential strategic investor"*. However, this capital raising was not successful and two target closing dates in November 2010 and a further one in December 2010 all lapsed. Eventually the process was abandoned.

19.14 During the course of the trial the Gilbertson Parties gave further discovery in relation to quantum. This, it was said, was as a result of Fabergé Limited's continuing attempts to raise further funding to enable it to continue its business. A second witness statement by Sean Gilbertson dated 30th April 2012, together with two further supplemental lists of documents of the same date were produced. A few days previously a copy of the consolidated financial statements of Fabergé Limited for March 2012 was also produced. The import of this additional evidence was that on 10th April 2012, at about the time of its final drawdown of its loan from Pallinghurst Resources Limited, Fabergé Limited had initiated a US$50 million rights issue inviting existing shareholders to take up their pro rata rights and to apply for additional shares, at a share price of US$79.50 per share, that is at the same share price as the unsuccessful capital raisings in November and December 2010. As the response to this rights

issue in April 2012 was poor, after further discussions, a revised offer at the significantly discounted price of US$50 per share was sent to Fabergé Limited's shareholders on 27th April 2012 with a request for responses no later than Friday 11th May 2012. No application for leave to adduce any further evidence relating to the outcome of that rights offer was made prior to the conclusion of the trial on 18th May 2012 or has been since.

19.15 These further unsuccessful attempts by Fabergé Limited to raise a further US$50 million in equity funding during April and May 2012, initially at US$79.50 per share and latterly at US$50 per share are not of the same evidential value as a share acquisition by an independent non-shareholder investor. The latest capital raising attempts have been directed to existing shareholders and, secondly, the outcome of the latest attempt at US$50 per share was not put before the court. However, it does nonetheless seem to me somewhat artificial to ignore entirely the level at which these latest attempts to raise capital at significantly reduced share prices have been pitched in assessing the probable present value of Fabergé Limited. Mr. Osborne was of a similar view.

19.16 In his second report Mr. Osborne said:

> *"Ms. Gutteridge's valuation is based on the same methodology as that used in* [Pallinghurst Resources Limited's] *interim financial statements to 30th June 2011 and is apparent from the accounts themselves. That valuation is based upon the price at which share transactions took place in September 2009. 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. The fact that the directors of [Pallinghurst Resources Limited] *will have considered those same questions in 2011 does not, in my opinion, relieve Ms. Gutteridge of her obligation to form an independent view."*

I should point out that Mr. Osborne's comments were of course made before he knew about the unsuccessful capital raising at US$79.50 per share in April 2012 and the latest attempt at capital raising at US$50 per share. Although Ms. Gutteridge, and indeed the directors of Fabergé Limited and the directors of Pallinghurst Resources Limited decided slightly more than a year ago that there was no basis for changing the valuation which they arrived at in reliance upon the share transaction in September 2009, now almost three years ago, the court requires to determine the probable value of Fabergé Limited in all the circumstances at this time. I agree with Mr. Osborne that it is unrealistic in light of the current circumstances of Fabergé Limited to rely almost wholly upon such a single small historic share transaction for this purpose. It is, of course argued on behalf of the Plaintiff that in saying what he does, Mr. Osborne is saying something which is not said by either the auditors or directors of Fabergé Limited nor by the directors of its principal shareholder. However, they were not carrying out quite the same exercise for the same purpose as the court is required to do and were doing so before the recent unsuccessful capital raisings at significantly reduced share prices. In my view, to ignore the evidence of the fundamental financial difficulties which Fabergé Limited clearly now faces and to rely almost wholly on a single small company share transaction which is now some three years ago is not persuasive.

19.17 In cross-examination, I 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 to the valuations, using a similar approach, by the directors of Fabergé Limited and the directors of Pallinghurst Resources Limited. She was unwilling to consider any adjustment to her US$177m valuation in light of any of the factors identified by Mr. Osborne in reaching his valuation of not more than US$120m or in light of any of the more recent capital raising attempts or in light of any of Mr. Osborne's comments on the company's actual and forecast financial performance.

19.18 Both experts agreed that, in round figures, US$115m of equity and US$25m of debt, that is a total of US$140m, has so far been invested in Fabergé Limited as at 31st March 2012. Although the outcome of the latest attempt to raise further equity capital at a price of US$50 per share was not put before the Court prior to the end of the trial, the evidence to-date strongly suggests that the current investors in the company are at least reluctant and possibly unwilling to invest further. I also note the latest evidence of Sean Gilbertson that even he and Mr. Gilbertson, had they been directly involved personally in setting the share price of US$50 for the latest offering would probably themselves have recommended a price of US$55 to US$60 per share. Mr. Gilbertson therefore, the greatest enthusiast for the Fabergé brand (other than perhaps, for different reasons, Mr. Vekselberg) recognised that a very substantial discount from the price of US$88.07 per share in 2009 was appropriate at this time.

19.19 While Mr. Osborne accepted that under the DCF valuation method a wide 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.

19.20 However, as I have already said, in quoting Leading Counsel for the Plaintiff, this is a claim for reconstitution of the Master Fund to the financial position in which it would now be but for Mr. Gilbertson's breach of fiduciary duty and there is an important dispute between the parties as to how that should be calculated and what it amounts to. As I have already summarised, the Plaintiff contends that prior to 3rd 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 Rights, that is the commercial benefit of developing, exploiting and managing the Fabergé business, would remain with the Master Fund within the Pallinghurst Structure. The Plaintiff contends that in economic terms the division of interests in the Rights between the interest in the title to the Fabergé brand on the one hand and the interest in the economic benefit of developing, exploiting and managing the Fabergé brand on the other hand is not material to the value of the whole economic benefit of developing, exploiting and managing the Rights to the Master Fund, or at least it would make only such a negligible difference that it can be ignored for valuation purposes, accordingly, it was argued, the loss to the Master Fund and the amount required to reconstitute it to the financial position in which it would be today is the whole current value of the Rights, as now owned by Fabergé Limited as its only asset, worth, on the Plaintiff's case US$177m or no more and possibly less than US$120m as I have determined the current value of Fabergé Limited to be. The Plaintiff's argument was that economically it would make no difference to the Master Fund that the actual title to the Fabergé brand was not owned

by it, provided that the Master Fund had the whole economic benefit of the Rights, which the Plaintiff says was the agreed intention. Leading Counsel for the Plaintiff submitted in his closing:

> *"My Lord, we say it's either not different or, if it is different, it is negligibly different. The aim of the parties – and we say where the parties would have ended up had Mr. Gilbertson not committed his breach of fiduciary duty – is that the Pallinghurst Structure, the Fund, would have ended up with the full economic benefit of the Rights and their control. And if there is any value to be shaved off in favour of Lamesa because there is a split and Lamesa has the piece of paper which says "Rights" on it then that diminution in value so far as the value is concerned is negligible."*

So the argument was therefore that in order to reconstitute the Master Fund to the financial position in which it would be today an amount equal to the full current value of Fabergé Limited should be paid by way of equitable compensation by Mr. Gilbertson in respect of his breach of fiduciary duty.

19.21 The Plaintiff's Leading Counsel reiterated the Plaintiff's position later in his closing submissions:

> *"My Lord, I am not, I think, in a position to push too hard the suggestion that there is a zero deduction in circumstances where there is no evidence about precisely how much one should or should not deduct in light of the split* [between the title to the brand and the economic benefit of the brand]. *But our submission is – I have said it before and I will say it again – if Mr. Gilbertson had not breached his fiduciary duty then the parties would have continued to negotiate to the end point by which they would*

have achieved what they had started out trying to achieve, which is that the full economic benefits ended up with the Fund. I can see that if it was done by a way of a licence that might not have objectively produced that result. But so far as it was different in quantification terms, it's negligible and we say to be ignored."

19.22 On the other hand, Leading Counsel for the Gilbertson Parties, in his oral submissions said:

"But, My Lord, the value of the company is just the beginning of the calculation that needs to be done in relation to any equitable compensation. Because, of course, that is the highest figure from which one has to identify the value of what it is that is said to have been lost. There are two aspects to the next stage of the analysis..... The first question is: what is the value to be attached to the full economic benefit of the Rights? The second question is: has it been shown, either on the balance of probability, or on the basis of some loss of a chance analysis, that the Company or the Fund would have obtained the full economic benefit of the Rights but for the breach of duty which is alleged against Mr. Gilbertson."

19.23 As is clear from the extract from Leading Counsel's submissions above, the Gilbertson Parties disagree with the Plaintiff's approach, as did their expert Mr. Osborne. They contend that in assessing and calculating appropriate reconstitution of the Master Fund in this case the proper approach is to identify exactly what it is, if anything, that has been lost to the Master Fund at this time and the present value of that. The first issue is: what is the value to be attached to the full economic benefit of the Rights, when that economic benefit is split from the actual ownership of the Fabergé brand itself? What, if any, is the level of discount which

should be applied to the value of an otherwise similar venture holding the whole Rights themselves. Mr. Osborne's evidence was that it is most unlikely that an independent investor would have valued a company holding only the full economic benefit of the Rights but not owning the brand itself, that is the actual income producing asset, at more than half the value otherwise placed on an entity holding and owning the entire Rights. That evidence was not challenged in cross-examination, nor was it dealt with in any detail by Ms. Gutteridge, who was apparently instructed not to deal with that issue in detail in her reports. That is, of course, a very significant discount and, on the basis of Mr. Osborne's opinion of the current value of Fabergé Limited of not more than US$120m, which I have accepted, would place the current value of the company if it owned only the economic benefit of developing, exploiting and managing the Fabergé brand but not the brand itself at US$60m. It is noteworthy that, although for entirely different reasons, as I have already mentioned, Mr. Osborne also expressed the opinion that a present value of Fabergé Limited as it is of US$56m was possible and indicated that his value of US$120m was probably too high anyway.

19.24 Ms. Gutteridge did recognise that under the Pallinghurst agreements the life of the Master Fund was to be only ten years, which would clearly affect the current value of Fabergé Limited if it was now an asset of the Master Fund. As Mr. Osborne said, in such circumstances, where the economic business of the Fabergé brand has already been loss-making for the more than five years since acquisition in January 2007, the real value will only arise once it starts to generate significant profit which is unlikely for another few years. That will be getting close to the time when the Master Fund would terminate. Therefore, so it was argued, the history of the Master Fund since early 2007 would be about six or seven years of losses and then, if the Financial forecasts are met, about three years of profit before the business of the Master Fund, including its investment in

the economic development, exploitation and management of the Fabergé brand, was sold or otherwise terminated. As I have said, the Court should of course be considering value at present and not in the future, but in those circumstances it seems clear that the value of the economic business and management of the Fabergé brand today would be significantly affected by such considerations.

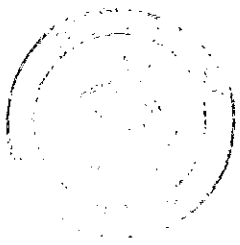
19.25 It does appear improbable that any potential purchaser would pay the same amount for a business, the principal income producing asset of which does not actually belong to it and which has a limited life span, as it would pay for a business that actually owns the principle asset and does not have 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.

19.26 The second issue, and to my mind also a significant one, is 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 the circumstances . In seeking to answer that, it seems to me, it is appropriate to have regard to what the position would probably have been had Mr. Gilbertson not acquired the Rights himself with his consortium but had continued to negotiate to final agreement with the Renova Parties as he had been purportedly doing until 2nd January 2007. It was, as noted above, on 30th December 2006 that Sean Gilbertson e-mailed with the Third draft IA. That remained the latest draft IA over 1st January 2007 while Mr. Gilbertson finalised arrangements with the members of his consortium and with Mr. Thomas to pay the purchase price for and to acquire the Rights. It was early on 1st January 2007 that Mr. Gilbertson, according to his own evidence, awoke and decided to proceed with and implement such alternative financing. It was therefore only after Mr. Gilbertson had made that final decision and committed to it (albeit he had been discussing it previously with the members of his consortium), that he and Sean Gilbertson received the Fourth draft IA from Mr. Kalberer the following day, 2nd January 2007. Leading Counsel for the Plaintiff generally disputed that it was appropriate to have regard to the draft IAs in determining what would probably have happened but for Mr. Gilbertson's acquisition of the Rights for himself and his consortium. However, if it is appropriate to do so, he contended that it is the Third draft IA that should be considered and not the Fourth draft IA. He argued that Mr. Gilbertson's breach of duty largely occurred before the Fourth draft IA was sent out and that therefore the Fourth draft IA is not relevant.

19.27 There is a conflict between the parties as to precisely when Mr. Gilbertson made his decision and committed to pay for and acquire the Rights himself with his consortium and, indeed, as to whether or not that decision anyway actually constitutes the breach of fiduciary duty by Mr. Gilbertson, if there was one. However, even if the analysis of the facts by Leading Counsel for the Plaintiff is correct, I do not anyway accept his argument. In my

opinion, in order to ascertain what probably would have occurred but for Mr. Gilbertson's alleged breach of duty and thus determine the correct basis for the contended restitution of the Master Fund as claimed, I consider it relevant and appropriate to have regard to what actually happened before the Renova Parties became aware of what Mr. Gilbertson had done. What actually happened is that following the provision of the Third draft IA by Sean Gilbertson on 30th December 2006 the Renova Parties responded with the Fourth draft IA on 2nd January 2007, at which time they were unaware of Mr. Gilbertson's actions with regard to alternative funding. Accordingly, in my view, the probability is that the parties, would, but for what Mr. Gilbertson actually did in breach of his fiduciary duties prior to the knowledge of the Renova Parties, have probably concluded their negotiations with an agreement along the lines of the Fourth draft IA (except clause 2e). As I have previously pointed out, the evidence of Mr. Kuznetsov was that in his view as at 2nd or 3rd January 2007 another one or two rounds of negotiation between the parties would have resulted in a concluded agreement and, if that is correct, it seems unlikely that there would have been any significant changes from the Fourth draft IA, other than the removal of the obviously un-commercial provisions of clause 2e, which Mr. Kalberer admitted was clearly a mistake. I did not find the argument on behalf of the Plaintiff that, at the end of the day, the Master Fund would have ended up with the full economic benefit of the Rights persuasive, in light of the nature of the detailed negotiations reflected in the later draft IAs, the last of which, before the Renova Parties became aware of Mr. Gilbertson's actions was the Fourth draft IA. It seems most improbable to me that the further couple of rounds of negotiation which Mr. Kuznetsov envisaged would have taken such a significantly different course that the Master Fund would have ended up being entitled to the full economic benefit of the Rights, without the licence provisions in particular.



19.28 The Fourth draft IA perpetuated the concept of the separation of the ownership of the brand (by Lamesa Arts Inc or its nominee, referred to as "Brandco") from the economic benefit of developing, exploiting and managing the business of the brand by the Master Fund through PEL (described as "Opco") with Opco's entitlement to do so being pursuant to a licence granted by Brandco as the owner of the brand. Mr. Osborne's opinion was that in the absence of complete and permanent alignment between the rights of Brandco and the rights of Opco and that being understood to be the case by any potentially interested investor, such investor would only invest, if it all, on onerous terms. The precise terms of the proposed licence were to be the subject of negotiation but it appears from the terms of the fourth draft IA that the Renova parties were not willing to agree to a perpetual and irrevocable licence. It is clear that the parties agreed to the concept that the entitlement of the Master Fund/Opco to the economic benefit and management of the Fabergé brand would be pursuant to a licence from the actual owner of the brand, Brandco/Lamesa. It was, after all, Sean Gilbertson, who instigated that concept in the Third draft IA which Mr. KalbereR then followed in the Fourth draft IA Mr. Kalberer's removal of the provision that the licence would be perpetual was logical since the life of the Master Fund was not perpetual. As to whether the licence should be revocable it seems to me probable that the parties would have been able to agree whether it could be revoked in the certain obvious circumstances and I have already explained why it was inevitable that clause 2e would have been removed by agreement. In my judgment, but for the actions of Mr. Gilbertson in later 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. 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.

19.29 The Plaintiff produced a spreadsheet with its closing submissions setting out its calculations of the equitable compensation which it claimed, which totalled some USD82.38m. It was, of course based on the Plaintiff's valuation of Fabergé Limited/the Rights at US$177m. It did make allowance for the sums invested in Fabergé Limited since acquisition, which, as I have said, the experts have since agreed totals US$140m and which obviously reduces the sum of US$177m significantly. However, the Plaintiff added various other sums to its claim, including the purchase price of US$38m paid for the Rights, to bring its claim to US$82.38m. Obviously the Plaintiff's calculations are based on the Plaintiff's own case. 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 the circumstances, if the Master Fund was to be put in the position in which it would now be 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 financial position in which it would now have been but for Mr. Gilbertson's breach of fiduciary duty and that no equitable compensation is payable.

19.30 **Quantum in respect of Autumn**

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.

20 Conclusions

20.1 For the reasons set out and explained above I have reached the following conclusions in relation to the Plaintiff's claims against Mr. Gilbertson in the particular circumstances of this case, namely, firstly, that Mr. Gilbertson owed the Company during the whole of the relevant period the usual fiduciary duties of a director in respect of Project Egg/the Rights and the economic benefits and management thereof; secondly, that Mr.

Gilbertson, in acting as he did in late December 2006 and in January 2007, was in breach of his fiduciary duties; and, thirdly, that nonetheless the Company has as at this date suffered no loss as a result of Mr. Gilbertson's breaches of his fiduciary duties and I therefore refuse the Plaintiff's claim for equitable compensation.

20.2 In relation to the Plaintiff's claims against Autumn, I have concluded that in the circumstances Autumn must account for the shares it now holds in Fabergé Limited and also for the interest it received on the loans it made to PEL on behalf of Mr. Gilbertson. Interest shall be payable on sums due by Autumn as a result of these conclusions at the relevant rates pursuant to the Judicature Law with effect from 3rd January 2007.

20.3 I shall therefore make orders in accordance with these conclusions. I direct that Counsel shall submit a draft Order agreed as to form and content reflecting these conclusions for approval by the court. With regard to costs, if counsel are unable to agree costs in light of these conclusions, I shall hear their submissions on costs as soon as practical.

Dated this 15th day of August 2012

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The Honourable Mr. Justice Angus Foster
JUDGE OF THE GRAND COURT