Neutral Citation Number: [2014] EWHC 387 (Ch)

Case No: HC11C02586

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Royal Courts of Justice
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 20/02/2014

Before :

MR JUSTICE NEWEY

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Between :

CONSTANTIN MEDIEN AG	**Claimant**
- and -	
(1) BERNARD ECCLESTONE	**Defendants**
(2) STEPHEN JOHN MULLENS	
(3) BAMBINO HOLDINGS LIMITED	
(4) GERHARD GRIBKOWSKY	

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- -

Mr Philip Marshall QC, Mr David Blayney QC, Mr James Mather and Miss Emma Hargreaves (instructed by **Peters & Peters Solicitors LLP**) for the **Claimant**
Mr Robert Miles QC and Mr Richard Hill QC (instructed by **Herbert Smith Freehills LLP**) for the **First Defendant**
Mr Tom Smith (instructed by **Hogan Lovells International LLP**) for the **Second Defendant**
Mr Mark Hapgood QC and Mr Michael Bools QC (instructed by **Edwards Wildman Palmer UK LLP**) for the **Third Defendant**

Hearing dates: 29-31 October, 1, 4-8, 11-15, 18, 19 & 25-29 November & 2-4, 9-11 & 13 December 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Newey :

1. This case arises out of payments totalling $44 million that were made for the benefit of the fourth defendant, Dr Gerhard Gribkowsky, in 2006-2007. The claimant, Constantin Medien AG ("Constantin"), alleges that these payments ("the Payments") represented a bribe. Dr Gribkowsky worked at the time for Bayerische Landesbank ("BLB"), which had a large stake in the Formula One group of companies. According to Constantin, the first defendant, Mr Bernard (or "Bernie") Ecclestone, had made a corrupt agreement with Dr Gribkowsky in the previous year under which he (Dr Gribkowsky) was to be rewarded if he facilitated the sale of BLB's shares to a purchaser congenial to Mr Ecclestone, and the $44 million was paid, in part at the expense of Mr Ecclestone himself and in part at the expense of a trust for the benefit of Mr Ecclestone's family, once the BLB shares had been duly sold, as Mr Ecclestone wished, to CVC Capital Partners ("CVC"). Those complicit in this arrangement are said to have included not only Dr Gribkowsky and Mr Ecclestone, but the second defendant, Mr Stephen Mullens, and the third defendant, Bambino Holdings Limited ("Bambino"), which is a company owned by the relevant Ecclestone family trust.

2. It is Constantin's case that it has suffered substantial loss as a result of the corrupt arrangement it alleges. Constantin maintains that, in consequence of the arrangement, BLB's shares were sold for far less than they were worth. This is said to have caused loss to Constantin as well as BLB because Constantin had a contractual right to an "overage" payment if the shares were sold for more than a specified sum.

3. Mr Ecclestone, Mr Mullens and Bambino all deny that there was any bribe or corrupt arrangement. They contend that the Payments were made because Mr Ecclestone was being blackmailed (or "shaken down") by Dr Gribkowsky. In essence, what is said is that Dr Gribkowsky was insinuating that he would tell HM Revenue and Customs ("HMRC") that Mr Ecclestone controlled the family trust, with potentially disastrous consequences. The $44 million represented – in Mr Ecclestone's words - "quite a cheap insurance".

The parties

4. *Constantin* is a German media company. It is the legal successor to the rights and liabilities of EM.TV & Merchandising AG ("EM.TV"), itself a German media company.

5. *Mr Ecclestone* has been involved in motor sport throughout his adult life, as a driver, manager, team owner, race promoter and series promoter. His main business activity has for many years been managing the commercial exploitation of the FIA Formula One World Championship motor racing series ("Formula One"). Although now 83 years of age, he remains a key figure in Formula One.

6. *Mr Mullens* is a solicitor. From 1986 to 1999, he was a partner in Marriott Harrison, where he specialised in tax law. He was introduced to Mr Ecclestone in the 1980s. Both Mr Mullens and his then firm thereafter undertook work for Mr Ecclestone and companies associated with him, and they acted for Bambino from its incorporation in 1997. In 1999, Mr Mullens left Marriott Harrison and started his own practice, with Bambino as his principal client. He also assisted Mr Ecclestone's former wife, Mrs Slavica Ecclestone, in relation to a tax investigation that was conducted by HMRC between 1999 and 2008. As Bambino's representative, he was a non-executive director of a number of the Formula One companies until 2011.

7. Mr Mullens had office facilities in a number of places. The address given on his headed paper was that of an office in Sloane Street in London. He also rented a room in the building in Princes Gate where the Formula One group of companies is based.

8. Relations between Mr Mullens and Mr Ecclestone had soured by 2009, by which time Mrs Ecclestone had initiated divorce proceedings. Mr Mullens and Mr Ecclestone were not speaking, and Mr Mullens no longer used the room at Princes Gate. It is symptomatic of the state of his relationship with Mr Ecclestone that, when Mr Mullens and his family were the victims of a horrific robbery in April 2009, it "went through [his] mind for one second" that Mr Ecclestone might have been responsible. Mr Mullens observed in cross-examination that it also crossed his mind that "a very large number of other people with whom [he had] had dealings professionally and personally may have been involved". Following the robbery, Mr Mullens thought of "giv[ing] up practice and leav[ing] the country". Such matters are perhaps indicative of the fact that Mr Mullens' career has not in all respects been that of a typical solicitor.

9. Mr Mullens and Mr Ecclestone resumed dialogue in 2010, when the divorce proceedings had been concluded. In the middle of the same year, Mrs Ecclestone brought proceedings to recover a loan that had been made for the benefit of Mr Mullens, and in the autumn Mr Mullens ceased to act as Bambino's adviser. Mr Mullens was removed from the boards of the Formula One companies of which he was a director a year or so later.

10. *Bambino* was incorporated in Jersey on 13 October 1997. It is wholly owned by the Bambino Trust, of which Mrs Ecclestone and her two daughters (but not Mr Ecclestone) are beneficiaries. The trustee of the Bambino Trust is Corfiducia Anstalt, a Liechtenstein entity controlled by a Miss Cornelia Konrad.

11. Bambino's present directors are Mrs Emmanuèle Argand-Rey, Miss Frédérique Flournoy and Mr Charles de Bavier. All three are partners in de Pfyffer, a Geneva law firm. Mr de Bavier has been a director of Bambino since 2000, and Mrs Argand-Rey became one in 2002. Miss Flournoy was not formally appointed to the board until 2011, but she had been thought to be a director (as well as company secretary) from the 1990s. In practice, day-to-day work would be undertaken by Miss Flournoy and

Mrs Argand-Rey. Mr de Bavier has never been involved with Bambino's affairs on a day-to-day basis

12. Another partner in de Pfyffer, a Mr Luc Argand, was until recently a director of Bambino. Mr Argand, who is Mrs Argand-Rey's husband, had belonged to Bambino's board from the outset, but he has now resigned. Mr Brian Powers, the current chairman of Hellman & Friedman, an American private equity firm, was also a director of Bambino between December 2001 and December 2005.

13. *Dr Gribkowsky* worked for Deutsche Bank for more than a dozen years before joining BLB, where he was a member of the management board and responsible for the bank's risk division. The evidence indicates that he has (or had) a strong personality and considerable self-confidence. In evidence to the German authorities, someone else from BLB said:

> "Across the bank [it] was always that Mr Gribkowsky was convinced of his own abilities and did not hide the fact that he knew everything better."

In the present proceedings, Mr Donald Mackenzie of CVC described Dr Gribkowsky as "a very dominant character".

14. Dr Gribkowsky took no active part in the present proceedings, and Constantin obtained a default judgment against him in December 2011. In the circumstances, references in this judgment to "the defendants" relate, unless the context indicates otherwise, only to Mr Ecclestone, Mr Mullens and Bambino (the first, second and third defendants), not to Dr Gribkowsky.

Factual history

Formula One

15. Formula One's governing body is the Fédération Internationale de l'Automobile ("FIA"). Mr Max Mosley was the president of the FIA between 1993 and 2009.

16. Commercial rights associated with the sport have been granted by the FIA to companies in what is called the "Formula One group". One such contract was entered into in 1995 between the FIA and Formula One Management Limited ("FOM"). That contract was novated in 1999, and an amended version made between the FIA and Formula One Administration Limited ("FOA") on 9 September 2002 gave FOA rights up to the end of 2010.

17. By 2002, SLEC Holdings Limited ("SLEC"), which had become the main holding company for the Formula One group, had entered into contracts known as "the 100

Year Agreements". Under one of these, the "Umbrella Agreement", SLEC acquired from the FIA for $313 million the commercial rights relating to Formula One for the 100-year period between 2011 and 2110. The $313 million was advanced to SLEC by its then (direct and indirect) shareholders, Bambino and Formel Eins Beteiligungs GmbH ("FEB"), in the ratio of their shareholdings. FEB thus lent $235 million and Bambino the other $78 million. It was agreed between Mr Mullens and the Kirch group (to which FEB belonged) that:

> "In the short term until otherwise agreed, the FIA funding moneys will be treated as interest free loans by the relevant parties to SLEC repayable on demand, the repayment of which and other terms relating to which will not be made/varied without the consent of both Bambino and Kirch".

18. The relationship between the FIA, the Formula One group and the teams participating in Formula One has been governed by a series of agreements called "Concorde Agreements". These provide for the teams to take part in Formula One for defined periods in return for certain payments. A Concorde Agreement was entered into in 1998 in respect of the period to 31 December 2007.

The Formula One group

19. Until 1997, the Formula One group was wholly owned by Mr Ecclestone. In 1997, however, Mr Ecclestone gave his shares to a company owned by Mrs Ecclestone. The group came to be owned by SLEC, a Jersey company. SLEC was itself wholly owned by Bambino, which, as already mentioned, is owned by the Bambino Trust.

20. During the period principally relevant to these proceedings, the main operating companies in the Formula One group were FOA and FOM, each of which is incorporated in this jurisdiction. FOA and FOM were both subsidiaries (in the case of FOM, indirectly) of Formula One Holdings Limited ("FOH"), which is also an English company. FOH was wholly owned by SLEC.

21. Mr Ecclestone has throughout been the chief executive officer of the Formula One group.

Changes in the ownership of the Formula One group between 1999 and 2003

22. Between 1999 and 2001, Bambino's stake in the Formula One group was reduced to 25%. Bambino sold 12.5% of the shares in SLEC to Morgan Grenfell Private Equity Limited ("MGPE") in late 1999. MGPE held its interest through Speed Investments Limited ("Speed"), a Jersey company, which was also granted the benefit of an option to acquire a further 37.5% of SLEC's shares. In 2000, SLEC purported to issue shares in favour of vehicles for Hellman & Friedman, but EM.TV soon afterwards acquired both those shares and Speed. By the end of the year, however, EM.TV was in severe

financial difficulties. It therefore agreed to arrangements under which the Kirch media group would gain control of SLEC. Accordingly, in 2001 FEB, a company in the Kirch group, acquired 77.7% of the shares in Speed, and Speed exercised its option to purchase more shares in SLEC. SLEC thus came to be owned as to 75% by Speed, in which FEB had a 77.7% interest and EM.TV a 22.3% interest. Bambino held the remaining 25% of the shares in SLEC.

23. At this stage, Dr Dieter Hahn, who had worked for the Kirch group since 1993, became a director of SLEC and a number of other companies associated with Formula One. Dr Hahn already knew Mr Ecclestone.

24. The Kirch group borrowed money from three banks ("the Banks") to fund its investment in Speed. The largest of the loans was made by BLB. It lent $987.5 million. Lehman Commercial Paper ("Lehman") advanced $300 million, and a comparable sum came to be lent by JP Morgan Chase ("JP Morgan"). Security for the indebtedness was conferred by a package of agreements entered into with BLB as security trustee for all the lenders. The security included security interests in accordance with the Security Interests (Jersey) Law 1983 over both FEB's and EM.TV's shares in Speed.

25. By May 2002, the Kirch group was in financial difficulties. BLB, Lehman and JP Morgan served notices of default on FEB under their respective loan agreements, and in June 2002 FEB went into provisional administration in Germany. A Dr Michael Jaffé became FEB's insolvency administrator. The Banks took steps to enforce their security, and at the end of 2002 FEB's shares in Speed were sold to the Banks in proportion to the loans they had made by means of a "credit bid" process.

26. EM.TV disputed the Banks' right to enforce against the shares it held in Speed. Litigation ensued in Jersey, in the course of which interim injunctive relief was granted in December 2002. On 17 February 2003, however, the proceedings were compromised. One of the agreements giving effect to the settlement provided for EM.TV to sell its shares in Speed to a subsidiary of BLB, but EM.TV was granted the overage rights on which Constantin relies in the present proceedings. In broad terms, these provided for a payment to be made to EM.TV if BLB sold its interest in Speed for more than $1,057.4 million before 31 December 2007. If the proceeds of sale amounted to between $1,057.4 million and $1,119 million, EM.TV was to receive 5% of the excess over $1,057.4 million. If the proceeds came to more than $1,119 million, EM.TV would be paid 10% of the excess over that sum and 5% of the difference between the figure and $1,057.4 million. The agreement stipulated that this right was to "take effect exclusively as a claim for an amount due" to EM.TV and that EM.TV was not to have "any encumbrance, right of security, lien or other right or interest in or to" the shares in either Speed or SLEC. The agreement also stated that nothing in it was to give EM.TV any right to prescribe the manner and timing of any share sale and that it was governed by Jersey law.

27. At this stage, the Banks became the registered holders of all Speed's shares. BLB held 62.2% of the shares, and Lehman and JP Morgan each had 18.9% of the shares. That remained the position until the sales to CVC described in paragraphs 43-65 below.

SLEC shareholders' agreement

28. In 2000, when SLEC was owned by Bambino and Speed, they entered into a shareholders' agreement in respect of the company. Clause 14 of the agreement served to confer a degree of protection on Bambino for so long as it held at least 5% of SLEC's shares.

The Team Payments

29. In May 2001, Bambino made payments totalling some $40 million ("the Team Payments") to individuals associated with four of the teams participating in Formula One. The individuals in question were Mr Flavio Briatore (in respect of the Benetton team), Mr Eddie Jordan (in respect of the Jordan team), Mr Alain Prost (in respect of the Prost team) and Mr Tom Walkinshaw (in respect of the Arrows team), each of whom received $10 million (or a sterling equivalent). The payments were made in accordance with agreements by which the payees undertook, among other things, that they and their teams would not make claims in connection with arrangements "relating to support a flotation of SLEC".

30. Mr Mullens explained the basis on which these payments were made in these terms in his witness statement:

> "The history of the team payments began in 1998, when it had been felt that an IPO should be pursued in order to create permanent value for the Ecclestone family trusts and other stakeholders. However, the teams were not in favour of an IPO at that time. At the time, SLEC was a wholly owned subsidiary of Bambino, and Bambino negotiated with each of the teams separately in order to obtain their agreement to the proposal, by offering them each a share in the IPO, or of the proceeds from an IPO.
>
> In the event, the IPO did not happen, and SLEC instead arranged a bond issue in 1999 as a means of finance. The teams, who had thought they would benefit if an IPO went ahead, were upset and a number brought claims against SLEC. McLaren and Williams brought a claim by way of an arbitration, and Ferrari made some informal claims. Separately, four of the smaller teams threatened to claim for compensation for the 'lost' IPO, and SLEC concluded that it made commercial sense for it to make payments to extinguish any potential liability. Any such claims could also have a negative impact on SLEC's compliance with its covenants under the

> bond, which may have been damaging for the Formula One business.
>
> In some cases, therefore, payments were negotiated in exchange for the waiver of claims against SLEC. Specifically, payments were made by Bambino to four of the Formula One teams in May 2001."

31. It was suggested to Mr Ecclestone in cross-examination that the Team Payments were improper. The evidence before me does not warrant any such conclusion. Apart from anything else, I am in no position to assess what arrangements there were between the recipients of the $40 million and their teams in relation to the money. For all I know, the payments could, for example, have been used to reduce amounts the individuals were owed by their teams.

32. Bambino maintained that it was to be treated as owed the $40 million by SLEC. Mr Argand referred to the point in correspondence with Kirch in late 2001, and Bambino returned to the subject from time to time in subsequent years. In December 2003, for instance, Mr Mullens told Dr Gribkowsky of Bambino's wish to clarify its entitlement to the "much discussed '$40m'".

The BLB team dealing with Formula One

33. In 2002, BLB set up a team devoted to Formula One matters. The team was initially led by a Dr Thomas Fischer, but Dr Gribkowsky took the helm in 2003. During the period he was in charge of it, the other key members of the team were a Mrs Alexandra Irrgang, a Mr Harald Glöckl and a Mr Michael Krowarz. All three worked on Formula One on a full-time basis.

Disputes with the Banks

34. Before Kirch became insolvent, the boards of FOA and FOM each comprised Mr Ecclestone and two representatives of Kirch. However, the Kirch representatives resigned as directors during the second half of 2002, and Mr Mullens was appointed to both boards. Kirch representatives also resigned as directors of FOH, and Bambino purported to appoint Mr Argand and his wife as directors of that company. Had those appointments been effective, FOH would by the end of October 2002 have had eight directors, of whom four would have been the Argands, Mr Mullens and Mr Ecclestone. Since the company's articles barred it from having more than eight directors, Speed would have been unable to exercise majority control over FOH and its subsidiaries despite owning 75% of the shares in FOH's immediate parent, SLEC. Further, on 29 October 2002 FOH's board passed a resolution for FOA's articles to be amended so as to confirm that that company could have no more than three directors.

35. The Banks disputed the validity of the Argands' appointments as directors of FOH, and English proceedings challenging them were eventually issued with Speed and SLEC as the claimants. Bambino initiated proceedings of its own in Switzerland in which it sought to establish the effectiveness of the disputed appointments. On 6 December 2004, however, Park J concluded that Speed and SLEC were entitled to summary judgment in their proceedings and declared that the Argands were not directors of FOH. Minutes of a meeting of BLB's supervisory board on 7 December were optimistically headed, "Victory in proceedings against Ecclestone".

36. During the evening of Friday 17 December 2004, however, Mr Mullens summoned a board meeting of FOA for 9am on Monday 20 December. The meeting was stated to be "to consider all appropriate steps to ensure that [Mr Ecclestone's] position as a director and CEO is maintained and to take whatever action may be considered necessary by the Board to achieve this". At the meeting, Mr Ecclestone and Mr Mullens caused a resolution to be passed for a share in the company to be issued to Mr Ecclestone. Mr Mullens explained the decision in these terms in a letter to the Banks of 20 December:

> "In view of the serious possibility of damage to the interests of [FOA], its business and the group, we felt that it was in the best interests of FOA and the group to remove all doubt as to Mr Ecclestone's position which we felt had been seriously undermined in the run up to and subsequent to the recent [FOH] decision in the High Court. Suggestions that he might be removed as a director of FOA and no longer have authority to negotiate on behalf of the group's business, have threatened seriously to undermine his position and damage the interests of FOA and the group. Accordingly the ordinary share in FOA has been issued.
>
> It is my intention and I believe Mr Ecclestone's, that the share received will only be used defensively for the benefit of FOA and the group. Mr Ecclestone has agreed that he will hold all dividends and distributions for the benefit of FOH and has agreed that, in the event of his ceasing to be a director, he will transfer the share to or to the order of FOH.
>
> If, as indicated during today's board meeting, it is the intention of Speed, SLEC and FOH to allow Mr Ecclestone to get on and do the job he is charged with doing, then today's board meeting should be of no consequence."

37. On 5 January 2005, FOH, Speed and SLEC issued proceedings challenging the issue of the share to Mr Ecclestone. Bambino and Mr Ecclestone were defendants to the claim, and they each filed a defence. The more substantial of these was Mr Ecclestone's, which was settled by leading and junior counsel and verified by Mr Ecclestone. It explained that Mr Ecclestone and Mr Mullens had "resolved to issue the voting share to Mr Ecclestone to enable Mr Ecclestone to prevent the Banks (through FOH) from either appointing additional directors of FOA or removing Mr Ecclestone

as a director or CEO of FOA". The defence went on to explain that Mr Ecclestone's and Mr Mullens' "substantial or principal purpose was to protect FOA from serious economic harm, which they honestly and reasonably believed would result (or that there was a real risk that it would result) if either of those courses had been adopted by the Banks". The defence also stated that Mr Ecclestone was not prepared to accept limits on his authority such as he feared that the Banks wished to impose. The shorter defence filed by Bambino pleaded that the resolution to issue the share was "a bona fide decision of the board of directors of FOA taken in the honest and reasonable belief that it was necessary to preserve FOA from serious economic harm" and cross-referred to Mr Ecclestone's defence.

38. The proceedings were expedited, with the result that they were fixed to come on for trial during May 2005. On 16 March, however, after Bambino had sent a letter to the same effect the day before, Mr Ecclestone told the Banks that he was willing to cooperate with whatever steps were required to return or cancel the disputed share. There followed a settlement meeting on 6 April at Munich Airport. Those attending included Mr Ecclestone, Miss Flournoy, Dr Gribkowsky and other representatives of the Banks. Minutes of the meeting record that it was agreed that the share issued to Mr Ecclestone should be treated as void ab initio and that board representation on all operating companies in the Formula One group should be in proportions reflecting Bambino's and Speed's shareholdings in SLEC. Under the heading "Corporate Governance/ The position of Mr. Ecclestone", the minutes said this:

> "Bambino made clear that its agreement to the Board composition was dependent upon corporate governance arrangements being satisfactorily dealt with (in particular, it said that it was prepared to accept the new board compositions mentioned above if this issue was resolved).
>
> Rick Gildea [of JP Morgan] explained that what Speed had in mind was not to interfere with day to day management but for the boards to be involved at an appropriately early stage and with proper information on the important decisions which had to be made. Ensuring proper mechanisms were in place for the provision of financial information and budgets was also highlighted. These were necessary not just for the proper running of the group but also to ensure that Speed and its officeholders wanted to be much more involved in shaping the strategy and having the data in order to do that effectively.
>
> This was agreed in principle by Mr. Ecclestone who made it clear that what was important from his perspective was to have day to day control in order to take advantage of the many opportunities which arose at short notice. In this regard, Dr Gribkowsky suggested that if urgent decisions were to be taken Mr Ecclestone should call the directors of the relevant Board to obtain their consent."

The minutes state that Dr Gribkowsky raised as an issue "finding additional management support for Mr. Ecclestone", proposing that "SLEC should mandate an executive search firm immediately"; it was "agreed that this issue could not be resolved by April 30".

39. On 25 May 2005, Mr Krowarz and Mr Glöckl of BLB met Mr Ecclestone and Miss Sacha Woodward Hill, the general counsel to the Formula One group. According to the note of the meeting that Mr Krowarz and Mr Glöckl prepared, Mr Ecclestone let them know that "he felt threatened that he would be dismissed". Mr Ecclestone also said that he "didn't want someone looking over his shoulder every half an hour, but wanted to largely retain his traditional way of working" and that he "was only able and willing to work with an addition who had been accepted by him". On the other hand, Mr Ecclestone was "aware of the requirements [BLB] saw with respect to corporate governance" and proposed that a Mr Piccinini would be a suitable recruit. Mr Ecclestone concluded by saying more than once that more had been achieved that day than at any previous meeting; in particular, "the meeting in Munich on 06.04.05 was, from his perspective, a pure waste of time".

40. The litigation between the Banks, Mr Ecclestone, Bambino and others was finally disposed of pursuant to a settlement agreement dated 25 August 2005. Among other things, this provided for Mr Ecclestone to be chief executive officer of all operating companies in the Formula One group and for Bambino, so long as it retained at least a 5% interest in SLEC, to be able to block his being removed as such "for any reason other than a failure to comply with a lawful direction of the board of a company of which he is Chief Executive Officer which is likely to have a material effect on the business or becoming of unsound mind". Mr Ecclestone was to have authority to bind companies of which he was the chief executive officer in respect of matters in the ordinary course of business, but the matters set out in a schedule were "agreed not to be in the ordinary course of business" and to be "matters authority for which is reserved to the board". It is also relevant to note that SLEC confirmed in the agreement that it would "reimburse US$40m which Bambino alleges it has paid to various teams for the benefit of SLEC on receiving from Bambino proof that the said sum was paid by Bambino, and that it was paid to settle claims against SLEC". This provision related, of course, to the Team Payments (mentioned in paragraphs 29-32 above).

The possibility of a breakaway series

41. By 2002, manufacturers involved in Formula One were threatening to set up a rival motor racing series. The "Grand Prix World Championship" group, which originally comprised BMW, Daimler-Chrysler, Ferrari, Ford and Renault, set up a company called GPWC Holdings BV ("GPWC") in pursuit of this objective. In April 2003, GPWC and the Formula One teams entered into a memorandum of understanding in which the teams recorded their support for a plan to launch a new Grand Prix motor racing series by no later than 2008, while also stating that further discussions should take place with SLEC's shareholders "in order to find out whether a solution can be found and implemented prior to 2008". A meeting between GPWC, Mr Ecclestone

and SLEC's shareholders in December 2003 led to the preparation of a memorandum of understanding and term sheet. The latter document envisaged that the teams would in future receive 50% of total EBITDA (i.e. earnings before interest, taxes, depreciation and amortisation), that a trust for the teams would hold up to 6.6% of SLEC's shares and that GPWC would have a "special share" in SLEC. In the event, for whatever reasons, this scheme foundered. In April 2004, GPWC gave formal notice that it would no longer pursue the transaction contemplated by the memorandum of understanding. In the latter part of 2004, GPWC confirmed its intention to launch a breakaway world championship series by 2008.

42. In January 2005, Ferrari, which had traditionally been the most important team in Formula One, broke ranks with the other members of GPWC and agreed to subscribe to a new Concorde Agreement. Mr Ecclestone hoped that other teams would follow, and two independent teams, Red Bull and Jordan, did so quite quickly. However, on 16 February other teams and manufacturers entered into a further memorandum of understanding by which they agreed on "the establishment of a new framework for their participation in Grand Prix motor racing post 2007". A new association called the Grand Prix Manufacturers Association ("GPMA") was formed.

CVC becomes involved

43. CVC is a leading private equity firm. It was purchased in 1993 by a group of six individuals of whom one was Mr Mackenzie. Mr Mackenzie has been a managing partner at the firm ever since. By 2005, it had for some time been the owner of Dorna, which held the commercial rights relating to the Moto GP motorcycle racing series.

44. Mr Mackenzie met Mr Ecclestone for the first time at a lunch in early August 2005. They were introduced by a Mr Eric Hersman, who brokers business deal opportunities. As Mr Mackenzie remembers events, he told Mr Ecclestone in the course of the lunch that CVC would make a better shareholder than the Banks for the Formula One group. After lunch, Mr Mackenzie and Mr Ecclestone went to the Princes Gate office where they talked generally about the Formula One business and the problems associated with it. Asked whether he thought that Bambino and the Banks would be willing to sell their shares, Mr Ecclestone said that this would depend on the price.

45. Soon after meeting Mr Mackenzie, Mr Ecclestone telephoned the chief executive officer of Dorna, a Mr Ezpeleta, and asked him what CVC was like to work with as a shareholder. Mr Ezpeleta was very positive. During his oral evidence, Mr Ecclestone spoke of having consulted Mr Mosley of the FIA as well.

46. At some point, Mr Ecclestone arranged for Mr Mackenzie to meet Dr Gribkowsky. Mr Ecclestone may have been present initially, but Mr Mackenzie and Dr Gribkowsky seem to have met on their own at the Four Seasons hotel in London at the end of August 2005.

47. At much the same time, Mr Ecclestone introduced Mr Mackenzie to Mr Mullens and also to Mr Duncan Llowarch, the chief financial officer of the Formula One group. At Mr Ecclestone's request, Mr Llowarch provided Mr Mackenzie with an overview of the group's finances.

48. Mr Mackenzie and Mr Llowarch met again on 5 September 2005. On that occasion, Mr Mackenzie was supplied with some more detailed financial information.

49. Also on 5 September 2005, CVC supplied Mr Mullens with a standard form draft confidentiality agreement. This document was never, however, signed.

50. On 7 September 2005, Dr Gribkowsky wrote to Mr Werner Schmidt, the chairman of BLB's management board, about the possibility of his receiving a "special premium" in the event of a sale of BLB's stake in Formula One.

51. The first offer CVC made for the shares held by the Banks and Bambino was of $1 billion. As Mr Mackenzie told the German authorities (when they were investigating the Payments), this was not a serious offer, but was intended to trigger a conversation. On a subsequent occasion, Mr Mackenzie insisted that Mr Ecclestone suggest a price at which the shareholders would sell. Mr Ecclestone wrote $2 billion on a piece of paper. Mr Mackenzie's immediate reaction was that the figure was impossible, to which Mr Ecclestone said that if CVC could not afford it, it should not waste his time.

52. At some stage, CVC asked Barclays Bank whether it would be prepared to fund the acquisition of the Formula One group, but it was not in the end willing to do so. Mr Mackenzie gave this evidence to the German prosecution authorities about what happened as regards funding:

> "I then met Bernard Ecclestone in his office and explained again about the difficulties which an offer of USD 2 billion would cause us. CVC itself could only raise a maximum of USD 1 billion. He then called the CEO of Royal Bank of Scotland, Sir Fred Goodwin, and asked him, in front of me, whether Royal Bank of Scotland … was prepared to provide the debt capital for our acquisition …. The CEO indicated he would assess our application for credit favourably. We then held meetings with RBS. After a few negotiations, RBS indicated that it would lend us around USD 600-650 million."

53. On 9 September 2005, CVC submitted an "indicative non-binding offer" for the interests of BLB and Bambino in the Formula One group. The offer valued the Formula One group as a whole at $2 billion and explained that CVC understood BLB and Bambino to have respectively 49% and 25% interests in the group. The offer was stated to be conditional on the group having no net debt at completion, on Mr Ecclestone continuing as the group's chief executive, and on Bambino reinvesting $100 million in return for a 10% stake in the company CVC would use as the

acquisition vehicle. BLB was to have the option of investing $100 million on the same basis, but it would not be obliged to do so. The letter also stated that CVC "would wish to support [Mr Ecclestone's] plans for developing the business" and that it endorsed proposals to buy "Paddy McNally's business" (as to which, see paragraphs 99-106 below). A period of exclusivity was proposed if BLB and Bambino wished to take the offer forward.

54. Mr Mackenzie took the offer letter with him to the Belgian Grand Prix held in Spa on 11 September 2005. He met Dr Gribkowsky there and handed him the letter. Dr Gribkowsky showed him round.

55. On 19 September 2005, CVC submitted a revised offer. Two changes are noteworthy. First, CVC said that it would pay $1.5 billion for the combined holdings of Bambino (25%) and BLB (46.65% rather than the 49% given in the previous letter). As CVC pointed out, this represented an improvement on its previous offer. Secondly, CVC now envisaged Dr Gribkowsky continuing as a director of SLEC. CVC explained its position in these terms:

> "We would wish, with your agreement, that Dr Gerhard Gribkowsky remain a Director of SLEC Holdings Ltd. We believe Dr Gribkowsky's continuing role would be important to enable a period of continuity of management and to enable us to benefit from his knowledge and understanding of the Formula One companies."

56. On 19 September 2005, Bambino's board resolved to give Mr Mullens authority to negotiate on its behalf with CVC. On the following day, BLB responded to CVC's offer. Its letter stated that the bank was willing to agree to a six-week exclusivity period. Within a couple of days, CVC, BLB, Bambino and FOA entered into confidentiality and exclusivity letters. These imposed restrictions on CVC's use of information, but also gave it exclusivity for six weeks. At the end of October, the exclusivity period was extended to 16 November.

57. Once the confidentiality and exclusivity letters had been agreed, CVC embarked on a due diligence process, with assistance from Ernst & Young ("EY") and Freshfields Bruckhaus Deringer ("Freshfields").

58. On 3-4 November 2005, CVC set up Alpha Topco Limited ("Alpha Topco"), a Jersey company, and Alpha Prema UK Limited ("Alpha Prema"), an English company, as vehicles for the proposed acquisition.

59. On 8 November 2005, Alpha Prema, BLB and Bambino, among others, entered into a preliminary agreement for the purchase by Alpha Prema of BLB's and Bambino's shares. BLB was to be paid about $829 million for its shares, while the price of Bambino's shares was set at about $445 million. The agreement required the approval of BLB's management and supervisory boards, and this was given in the following

week. The supervisory board gave its approval on 15 November. It also decided against exercising its option to reinvest.

60. On 9 January 2006, BLB, Bambino and Alpha Prema entered into a formal share sale agreement. Other documents, including the "Keep Well Agreement" referred to below (see paragraph 71), were also finalised.

The other Banks

61. Going back in time a little, on 23 November 2005 Mr Mackenzie wrote to Lehman and JP Morgan indicating interest in buying their shares in Speed. On 2 December, Alpha Prema and JP Morgan entered into a conditional contract for the purchase by Alpha Prema of JP Morgan's shareholding for $208 million. Soon afterwards, Alpha Prema entered into a similar agreement with Lehman. With Lehman, the full purchase price was to be reinvested in Alpha Topco, which was to own Alpha Prema. For its part, JP Morgan agreed to reinvest $42 million in Alpha Topco.

62. The price at which CVC was able to buy from JP Morgan and Lehman represented a 17% discount as compared with the price at which it was purchasing from BLB and Bambino. It had been agreed between the Alpha companies, Bambino and BLB that, if Alpha Prema managed to acquire JP Morgan's and Lehman's shares at a discount, Alpha Prema would pay 25% of the "saving" to each of Bambino and BLB. As matters turned out, Bambino and BLB each received about $8.6 million pursuant to this arrangement.

Completion

63. On 20 March 2006, the European Commission announced that it would not oppose the sale to CVC provided that the company divested itself of Dorna. Completion took place shortly afterwards, on 24 March. At that point, Alpha Prema acquired both Bambino's 25% shareholding in SLEC and all the shares in Speed, which held all the other shares in SLEC. To varying degrees, Bambino, JP Morgan and Lehman reinvested in Alpha Topco, but BLB did not do so.

64. The cash cost of the transaction to CVC was of the order of $2 billion. Some $815 million of this appears to have been funded by bank lending.

65. Dr Gribkowsky was one of those appointed to the board of Alpha Topco, at an annual remuneration of $50,000. He resigned as a director of other Formula One companies.

The FEB Loan

66. As already mentioned (paragraph 17), FEB made a loan of $235 million ("the FEB Loan") to SLEC in 2002. By 2005, there was dispute as to who had the benefit of the loan. Dr Jaffé, FEB's administrator, claimed that he alone was entitled to collect the loan. However, a company called MH Movie Consulting AG ("MH Movie") contended that it had acquired the loan as assignee of Faller Stiftung, a foundation associated with the Kirch family to which the right to the loan was said to have passed by subrogation. The detail is not important for present purposes.

67. In August 2005, MH Movie announced its intention to sell its claim to the FEB Loan at a public auction on 14 September. In the event, the auction was private rather than public, but I gather that those present included representatives of Dr Jaffé, BLB and Bambino. The claim was bought for just $5 million by Kamos Finanz AG ("Kamos"), a company in which members of the Kirch family and Dr Hahn were involved.

68. When Mr Mullens met CVC and their solicitors on 5 October 2005, he was told that CVC did not "expect the FEB situation to be resolved in the short term" and so was "expecting that there will be some form of escrow arrangement for a period of time". CVC's "Final Investment Recommendation" ("the FIR") said this about the FEB Loan and the $78 million loan Bambino made to SLEC at the same time ("the Bambino Loan", as to which see paragraph 17 above):

> "Given a lack of clarity on whether this loan will ever need to be repaid, we have decided to withhold $225m (Bambino $78m & BLB $146m, pro rata share of the loan) from our consideration, which is to be placed into escrow until the issue is resolved to our satisfaction. In addition, RBS require that we also place an additional $89m into escrow, to cover JPMorgan and Lehman's pro-rata share of this contingent loan."

69. In a letter to CVC of 1 November 2005, Mr Mullens suggested an alternative approach. Mr Mullens proposed that, rather than money being placed in escrow, Bambino:

> "should be contracted to resolve the issue and that to this end, an amount of $313m be paid to Bambino, subject to Bambino providing appropriate guarantees in order to indemnify Jersey Topco and SLEC in respect of any claim in relation to the so-called debt."

Mr Mullens noted that Bambino could provide security by depositing $313 million with RBS and that Dr Gribkowsky had approved the arrangement in principle on behalf of BLB.

70. By this stage, Mr Ecclestone had told Dr Hahn that Bambino would be interested in buying Kamos' rights to the FEB Loan. As Dr Hahn remembers events, Mr Ecclestone suggested to him at a breakfast meeting on 28 October 2005 that Dr Jaffé's interest in the loan could be bought off for $10-20 million and indicated that, once matters had been resolved with Dr Jaffé, Bambino might be willing to pay Kamos $100 million for the loan.

71. Mr Mullens' proposal was taken forward by way of a "Keep Well Agreement". Freshfields, who were CVC's solicitors, distributed a first draft of this agreement on 2 November 2005. This envisaged that CVC would pay $313 million to Bambino, which, in return, would agree to hold SLEC harmless against any liability in respect of the FEB Loan and would arrange for a letter of credit to be issued in support of that obligation.

72. The FEB Loan is adverted to in a draft consultancy agreement that was faxed to Dr Gribkowsky on 4 November 2005. The draft ("the November Draft Agreement") envisaged that the parties to the agreement would be Bambino (referred to as "The Client") and an unidentified Austrian company (referred to as "The Consultant"). Given the importance that Constantin attaches to this document, I think I should set its terms out in full. They read as follows:

> "1. The Consultant has significant expertise in financial matters and has or will have the benefits of the services of suitably qualified persons with expertise in the acquisition/disposal and/or realization of debt/quasi debt and other financial instrument.
>
> 2. The Client has acquired certain obligations of SLEC Holdings Limited towards the Client and others for a consideration of USD million and wishes to acquire any claims of parties other than the Client against SLEC Holdings Limited with a view to making a profit.
>
> 3. The Consultant has agreed to advise the Client in connection, the acquisition of debt claims against SLEC Holdings Limited other than those of the Client with a view to motive a profit.
>
> 4. The Client agrees to pay to the Consultant a fee for the services of the Consultant of an amount equal to fifty percent of the profit realized by the Client in connection with the acquisition and disposal of the debt claims referred to above. The Client shall pay to the Consultant on account of the fee referred to in this clause a minimum non returnable amount of USD million which shall be paid at the date of the acquisition by the Client of the debt obligations of

> SLEC Holdings Limited. The total fee payable perused to this clause shall not exceed a USD million.
>
> 5. The fee payable pursuant to this Agreement shall be inclusive all charges and taxes and the Consultant shall meet all its expenses relating to the performance of services out of the fee paid.
>
> 6. The Consultant agrees that it has no authority to make commitments on behalf of the Client and will not purport to exercise any such authority nor to make any agreement on behalf of or otherwise commit the Client to any arrangement in respect of the subject matter of this agreement without the … consent in writing of the Client.
>
> 7. The Consultant shall at all times keep confidential the terms and nature of this agreement and any information received by it in connection with the performance of services. The Consultant agrees that it will not at any time make any statement concerning the Client or the subject matter of this agreement unless previously approved in writing by the Client.
>
> 8. The Consultant shall not be able to assign the benefit of this Agreement without the consent in writing of the Client.
>
> 9. This Agreement shall be governed by and construed in accordance with the English law. Any dispute or difference between the parties in connection with this Agreement shall be settled under the rules of conciliation and of arbitration of the international chamber of commerce by a sole arbitrator. The arbitration shall be held in Geneva."

The draft also contained clauses providing for the agreement to be governed by English law and requiring "The Consultant" to keep confidential "the terms and nature of this agreement and any information received by it in connection with the performance of services". Someone, seemingly Dr Gribkowsky, has written the word "Both!" next to the confidentiality clause, presumably because he thought that "The Client" (i.e. Bambino) should also be subject to a confidentiality obligation.

73. When giving evidence in Germany in July 2012, Dr Gribkowsky denied being the source of the November Draft Agreement and said that it had been faxed to him by Mr Mullens. Mr Mullens, Dr Gribkowsky said, had told him beforehand that he would be sending the document.

74. Mr Mullens had himself had the November Draft Agreement put to him by the German authorities when he had attended for interview in May 2011. He responded that the draft did not come from him and that the language of the document was not that of someone who spoke English as his first language. The suggestion was made on his behalf that the bar at the top of the document (indicating that it had been faxed from "SJM") could easily have been manipulated.

75. Mr Mullens gave evidence to similar effect in his witness statement in these proceedings. He said that he had no recollection of producing the November Draft Agreement and that it contains a number of errors that indicate that it was produced by someone else and possibly a non-native English speaker (e.g. Americanised spelling, incorrect use of singular/plural and stilted language). Mr Mullens further said that he did not recognise the document or recall either sending it to Dr Gribkowsky or warning him in advance that he would be sending it.

76. During his oral evidence in the present proceedings, Mr Mullens said that he was not sure whether the November Draft Agreement had been faxed from his office. He went on:

> "I saw this agreement for the first time in Germany. I didn't recognise it. I didn't prepare it. And I don't understand how it comes to say from SJM."

77. In the course, however, of cross-examination, Mr Mullens accepted that a fax machine he had at the time produced "SJM" on transmissions and that the November Draft Agreement appears to have been faxed from his office in Sloane Street. He also accepted that he sometimes may have used "z" rather than "s" in the American style; that is in fact plain from manuscript amendments he made to a document in March 2006, which feature "realized" and "realization". He said, too, that the only people who worked at the Sloane Street office were himself and, from time to time, a secretary.

78. In my view, there can be no doubt but that the November Draft Agreement was faxed from Mr Mullens' Sloane Street office by him or on his instructions. Since the German authorities obtained the document from a file that Dr Gribkowsky had entrusted to his then tax advisers (apparently describing the file as the "special document"), it is also reasonable to infer that the fax was sent to Dr Gribkowsky.

79. Mr Tom Smith, who appeared for Mr Mullens, submitted that Mr Mullens is unlikely to have been the author of the November Draft Agreement. He suggested that Dr Gribkowsky was the draftsman of the document. In support of that submission, he pointed out, among other things, that Dr Gribkowsky was not a native English speaker, that he can be seen to have used "z" in place of "s" in words such as "realize" and that he could already have seen drafts of the agreement with Mr Ecclestone mentioned in paragraph 85 below.

80. On balance, however, I think it likely that the November Draft Agreement had been drafted at least in part by Mr Mullens. My reasons include these:

i) It is hard to see why Mr Mullens would have wanted the November Draft Agreement to be faxed to Dr Gribkowsky if the document was entirely Dr Gribkowsky's work;

ii) The errors in the November Draft Agreement are not obviously attributable to the author being a non-native English speaker. When arguing otherwise, Mr Smith made specific reference to the "acquired certain obligations of SLEC Holdings Limited" (in clause 2), the "with a view to motive a profit" (in clause 3), the "total fee perused to this clause" (in clause 4) and the "shall not exceed a USD million" (also in clause 4). Even, however, if Dr Gribkowsky's command of English was less than perfect, he is unlikely to have thought that, say, "with a view to motive a profit" or "total fee perused to this clause" was good English. These and other mistakes smack of poor typing and/or editing. The word "perused", for example, can be explained as "pursuant" misspelled. Similar points can be made in relation to the presence in the document of, for instance, "consultantcy" (rather than "consultancy", in the title), "in connection, the acquisition" (in clause 3), "inclusive all charges" (in clause 5) and "without the … consent" (in clause 6). The last of these quotations would be consistent with the typist having been unable to make out a word on a tape;

iii) Analogies can be drawn between the November Draft Agreement and the agreement with Mr Ecclestone that Mr Mullens accepts he drafted (see paragraph 85 below). Clauses 6, 7 and 9 of the November Draft Agreement can be compared with clauses 3, 7 and 11 of the agreement with Mr Ecclestone;

iv) Some of the provisions in the November Draft Agreement (notably, clauses 5-8) appear to have been inserted for the protection of Bambino. The natural person to have done that is Mr Mullens, not Dr Gribkowsky. The addition in manuscript of "Both!" tends to confirm that, had Dr Gribkowsky been the source of the confidentiality clause, it would have imposed a confidentiality obligation on Bambino.

81. The FEB Loan also features in file notes Mr Mullens made following conversations with Dr Gribkowsky on 16 and 24 November 2005. The 16 November note records, among other things, that Dr Gribkowsky commented that Dr Jaffé "would probably be concerned to take some money, leaving it to a third party to try to deal with Kirch," and that Dr Gribkowsky "indicated that [Dr Jaffé] has been given 10 days to make up his mind about what he is going to do". The relevant part of the 24 November note is in these terms:

> "In relation to the 313 issue, and in particular the FEB liquidator, there has been a discussion with the Banks who are

> concerned about Dieter Hahn's position. It seems that Lehman wish to fund Jaffe to resist any action. It seems that Dieter Hahn may be looking for a declaration against the liquidator that there is security. Gerhard [Gribkowsky] indicated that BLB don't want to put up funds. JP Morgan were ambivalent and Lehman were very keen. Gerhard thinks now is the time to approach the liquidator. When I asked what was the process with the liquidator and would he be obliged to consult with the creditor banks and what consents were required, Gerhard said that the liquidator should consult but he does not have to abide by the decision of the creditors. When I asked him what he thought we should offer, he thought something in the region of 30. Gerhard believes that it is the Lehman view that they should attach importance to this particular issue and try to maintain the status quo on the basis that repayment of the loan is something that they can trade with Bambino at some future date."

82. Shortly after this, on 28 November 2005, Dr Hahn spoke to Mr Ecclestone and Mr Mullens about the FEB Loan when they met at the Princes Gate office. Dr Hahn's note of the meeting records that Mr Mullens indicated that the loan was pretty worthless because it would not have to be repaid. For his part, Dr Hahn referred to legal advice confirming Kamos' entitlement to the loan and did not accept that the loan could remain outstanding indefinitely. Mr Ecclestone suggested that legal proceedings were not in anyone's interests, and Mr Mullens agreed that the issues were probably best resolved by agreement.

83. Mr Ecclestone raised the FEB Loan with Dr Hahn again early in 2006. During January, Mr Ecclestone telephoned Dr Hahn and indicated that CVC would be prepared to pay Kamos $120 million for its interest in the loan. Mr Ecclestone rang Dr Hahn once more on 1 February and offered $150 million. On 17 February, Bambino sent a letter to both Dr Jaffé and Kamos in which it formally offered to pay $150 million to whoever was entitled to the loan. In late April, Bambino increased its offer to $210 million.

84. On 3 July 2006, Kamos issued proceedings against SLEC and Bambino for the full $235 million plus interest or damages.

Mr Ecclestone's commission

85. On 15 November 2005, BLB, Bambino and Mr Ecclestone entered into a written agreement by which BLB and Bambino agreed to pay Mr Ecclestone an amount equal to 5% of what they received for their shares in SLEC/Speed if the sale went through. The agreement had been prepared by Mr Mullens and he circulated a draft of it by fax on 6 November 2005.

86. A paper prepared for BLB's management board on 11 November 2005 explained the proposed payment to Mr Ecclestone in part on the following basis:

> "BE [i.e. Mr Ecclestone] arranged the contact with CVC and showed to be very cooperative in the context of the present development of the transaction. Without this collaboration, it would not have been possible to carry out the entire due diligence process as required (BE controls the relevant staff in the operating companies and has all sensitive information, which we could have been able to make accessible to a potential acquirer at that time – if at all – only with difficulty). Besides, BE was extremely helpful in view of the necessary coordination with Bambino."

87. Mr Ecclestone himself justified the commission in this way in his witness statement:

> "I received a 5% commission from BLB and Bambino in recognition of my help with the sale of their shares, which amounted to approximately $63.6 million (before tax). I recall that I told Gribkowsky that I wanted $100 million in commission. He then offered me 2% and we finally agreed on 5%. From the start of the discussions with CVC, I made clear to Gribkowsky and Bambino (via Stephen Mullens) that I expected to be paid a commission if the transaction happened. In my view, BLB and Bambino would not have been able to sell their shares to CVC without my support, because the FIA needed to approve any change of control. If I was going to leave or be removed as the Representative, or if I had not thought that the new owner was suitable for Formula 1, the FIA would have been very concerned and would be likely to refuse its approval. I provided warranties which exposed me to a personal liability of up to $100 million, because BLB would not agree to give the same warranties unless I was giving them. In order for the sale to go through I also had to sign up to a new, more restrictive service agreement, which committed me to Formula 1 for a minimum of three years but which said that my employment could be terminated without cause."

88. Mr Mullens said in cross-examination that the agreement with Mr Ecclestone was described as a consultancy agreement for VAT reasons.

89. Following the completion of the sale to CVC, BLB and Bambino respectively paid Mr Ecclestone $41.4 million and $22.2 million.

The Team Payments (again)

90. As mentioned above (paragraph 40), the settlement agreement of 25 August 2005 provided for SLEC to reimburse the $40m that Bambino paid in 2001 "on receiving from Bambino proof that the said sum was paid by Bambino, and that it was paid to settle claims against SLEC".

91. In March 2006, Bambino and BLB entered into a written agreement under which BLB undertook that, subject to the sale to CVC being completed, it would pay Bambino $25 million in full settlement of Bambino's claims in respect of the $40 million payments.

92. When the share sale was completed, Alpha Prema paid $25 million to Bambino on BLB's behalf and deducted that amount from the amount due to BLB for its shares in Speed.

Arrangements with Mr Ecclestone after completion

93. On 24 March 2006, Alpha Prema and Mr Ecclestone entered into a written service agreement under which it was agreed that Mr Ecclestone would be employed as the chief executive officer of Alpha Prema and other group companies for an initial period of three years and thereafter until either side gave the other 12 months' notice. Alpha Prema was also to be entitled to terminate Mr Ecclestone's employment immediately for cause: if, for example, Mr Ecclestone failed to comply with a lawful direction of a board of a group company which was likely to have a material effect on the business of a group company. Mr Ecclestone was to have a salary of £2.5 million a year, and Alpha Prema was to bear the costs associated with his private plane.

Further negotiations with the teams/manufacturers

94. On 24 November 2005, the Williams team joined Ferrari, Red Bull and Jordan in agreeing an extension of the Concorde Agreement.

95. On the following day, Mr Ecclestone and Dr Gribkowsky wrote to a range of teams/manufacturers with revised proposals for a new commercial agreement. They suggested team payments amounting to 60% of EBITDA from 2008 or, if the teams preferred, 50% of EBITDA from 2006. Professor Göschel of BMW replied on 19 December. He said that he was "somewhat encouraged" and expressed a wish to meet Mr Ecclestone and Dr Gribkowsky during January 2006.

96. A meeting took place in Munich on Sunday 26 February 2006. Those attending included representatives of the teams/manufacturers, Dr Gribkowsky, Mr Ecclestone and Mr Mackenzie.

97. Further negotiations ensued before, on 14 May 2006, a memorandum of understanding was concluded between FOA, Alpha Topco, BMW, Honda, McLaren, Renault and Toyota. This envisaged that the teams would continue to participate in Formula One on the basis of a 50% EBITDA share from 2006. The substance of the memorandum was, however, expressly stated not to be legally binding.

98. In 2009, further threats were made to break away from Formula One. A new Concorde Agreement was, however, concluded in August of that year.

APM and Allsport

99. In 1998, FOA licensed a company called Allsopp Parker & Marsh Limited ("APM") to exploit various intellectual property and other rights associated with Formula One in return for APM paying an annual licence fee and providing certain services. This enabled APM to generate advertising and sponsorship revenues from Formula One. The original agreement was to run until 2008, but in 2000 it was extended to 31 December 2010. At the same time, the licence fee was fixed at $52,725,035 a year (subject to increases in line with inflation).

100. APM was managed by a Mr Patrick (or "Paddy") McNally. Mr McNally was also the only shareholder of Allsport Management SA ("Allsport"), which provided corporate hospitality packages at Formula One events in exercise of rights sub-licensed to it by APM.

101. APM and Allsport proved very profitable. In 2003, their income totalled $230 million, giving rise to EBITDA of $99 million. By 2005, the companies' revenue had increased to $285 million and their EBITDA to $125 million.

102. From time to time, there was reference to the possibility of buying APM/Allsport or their businesses and integrating them into the Formula One group. For example, in September 2001 Dr Hahn wrote to Mr McNally on behalf of SLEC to express interest in acquiring the business and/or shares of APM and Allsport, and minutes of a SLEC board meeting the following month refer to Mr McNally having indicated his willingness to sell APM/Allsport. Following a meeting with Mr McNally in September 2003, Dr Gribkowsky sent Mr Mullens a draft term sheet for the acquisition of APM. In December 2003, the memorandum of understanding with GPWC provided for "APM business" to be "integrated into the SLEC Group as soon as possible". Going forward to 2005, the minutes of the settlement meeting at Munich Airport on 6 April record that Dr Gribkowsky raised with Mr Ecclestone the issue of "how to ensure that all F1 revenues flowed into the group" and "emphasised that the APM business needed to be integrated into the SLEC Group as soon as possible in order to have a competitive offer for an extension of the Concorde Agreement". When Mr Ecclestone and Dr Gribkowsky wrote jointly to Formula One teams/manufacturers on 22 August, they said that there seemed to be agreement that "all future revenues associated with Formula One should be included within the Formula One Group", that

"[t]hese revenues should include those currently generated by APM" and that they were "taking initial steps to address this".

103. By this point, the idea had evidently arisen that APM/Allsport could be bought for $400 million or so. In June 2005, a proposal under which a company owned by a trust for the teams would have acquired the shares in SLEC (as to which, see further paragraphs 242 and 268(v) and (vi) below) contemplated that "the rights/obligations of APM and Allsport Management SA" would be "novated to SLEC for estimated consideration of $400m". Mr Llowarch used the same figure in models he distributed in August 2005, though he noted that "APM/ASM acquisition cost is dependent on the results of yet to be started due diligence". Under the 25 August settlement agreement, Bambino consented to the business of APM and Allsport being purchased "at such price (not exceeding US$400 million) and by such method and by such company in the SLEC Group as the board of SLEC decides", although not until after May 2006.

104. On 2 November 2005, solicitors acting for APM/Allsport circulated draft agreements for the grant to FOA of options to acquire APM's business and Allsport. A few days earlier, CVC's FIR had recorded that FOA was negotiating to secure an option to acquire APM/Allsport with an agreed price of $400 million. A disclosure letter that Mr Ecclestone provided to CVC on 11 November stated:

> "FOA has … agreed in principle to enter into an option agreement with APM/Allsport pursuant to which FOA may elect to purchase the business of APM/Allsport on exercise of the option. The option price of US$10m payable by FOA in respect of this option has not been paid by FOA but if agreement is formalised, will likely be set-off against APM/Allsport's fourth quarter licence fee."

105. In the event, no agreement was concluded with APM/Allsport at this stage. At the end of February 2006, however, CVC was seeking investment committee approval for the purchase by Alpha Topco or FOA of APM's business and Allsport for a total of $400 million. The "Final Investment Recommendation" for the transaction stated:

> "The APMG / Allsport investment should be viewed as a good investment opportunity, which improves the likelihood of Formula One agreeing New Concorde with the Teams, as well as being an attractive new investment in its own right."

106. On 30 March 2006, CVC reached agreement to acquire APM for $400 million, and I understand that the transaction was completed at the end of May.

Draft agreements with Dr Gribkowsky

107. During February 2006, Dr Gribkowsky prepared a draft "advisory agreement", drawing to an extent on the November Draft Agreement. Dr Gribkowsky's document envisaged an agreement between, on the one hand, Bambino and Mr Ecclestone as "the mandator" and, on the other hand, GG Consulting GmbH ("GG Consulting") as "the advisor". It is appropriate, I think, to set out the terms of the draft in full:

> "1. The mandator holds an interest in Formula One motor racing.
>
> 2. The advisor has significant expertise in financial matters, knowledge and background in Formula One motorsport and relationships with its key constituents.
>
> 3. The mandator seeks the advisors services in the context of Formula One in general as well as in related financial matters in particular including – but not limited to – certain obligations of SLEC Holdings Limited.
>
> 4. The advisor agrees that it has no authority to bind the mandator in any respect and will not be made reliable in any way for decisions made by the mandator. Nor shall the advisor purport to have any authority to make any commitments on behalf of the mandator unless written consent of the mandator has been provided.
>
> 5. The mandator agrees to pay to the advisor a fee for the services of the advisor. The amount shall be determined by the value created from the services of the advisor and shall equal 50% thereof. The mandator shall pay the advisor a minimum non returnable amount of USD 50 million with the maximum caped at USD 75 million.
>
> 6. Half of the minimum fee shall be payable ten business days, the second half 60 days after signing of this agreement. The exceeding amount up to the maximum shall be payable after completion of advisory services referred to under clause 3 of this agreement.
>
> 7. The fees payable under this agreement shall be inclusive all charges and taxes and the advisor shall meet all its expenses relating to the performance of services.
>
> 8. The mandator and the advisor shall at all times keep confidential the terms and nature of this agreement and any information received by them in connection

> with the performance of services. The mandator and the advisor agree that they shall not at any time make any statement concerning the subject matter of this agreement unless previously approved in writing by the other party. This provision shall remain in force notwithstanding the termination the agreement.
>
> 9. This agreement shall have an initial term of one year starting with the date of signing of this agreement.
>
> 10. This agreement shall be governed by and construed in accordance with the English law. Any dispute or difference between the parties in connection with this agreement shall be settled under the rules of conciliation and of arbitration of the international chamber of commerce by a sole arbitrator.
>
> 10.1 The arbitration shall be held in Geneva.
>
> 10.2 The arbitrator shall be appointed by the parties or, failing agreement, by the Vice President for the time being of the Law Society of England and Wales.
>
> 10.3 If either party fails to comply with any procedural order made by the arbitrator, the arbitrator shall have the power to proceed in the absence of that party and deliver the award."

108. GG Consulting was an Austrian company formed in November 2005. It was set up pursuant to a deed dated 2 November and entered in the commercial register on 25 November. Dr Gribkowsky was the company's only shareholder. Mr Agamar Kühnel, who was Dr Gribkowsky's accountant at the time, was appointed as the company's managing director, later to be replaced by Professor Gerald Toifl (as to whom, see further paragraph 130 below). The company was dissolved and liquidated in 2008.

109. Dr Gribkowsky gave the draft agreement to Mr Ecclestone at the Bahrain Grand Prix on 12 March 2006. Dr Gribkowsky has given the following account of events:

> "At lunch on the Saturday, a conversation took place between Mr. Ecclestone and myself in the motorhome belonging to FOA/FOM. During this conversation, Mr. Ecclestone enquired first of all whether I had received a bonus from the bank for the sale to CVC. I said that I had not, which Mr. Ecclestone commented with the words 'fucking bank'. Mr. Ecclestone then asked me about my further plans for the future. I took this to be a hint and reference to our agreement back in April / May 2005, and I told him that I could imagine working as a consultant in Formula One and that I had already spoken to Mr. Mullens about it. Mr. Ecclestone commented this latter phrase with the

> words, 'Forget Stephen' and challenged me to 'tell me a number', whereupon I told him 50. To me it was clear that that meant USD 50 million. The conversation ended with Mr. Ecclestone saying that he would think about it.
>
> On the Sunday before leaving for the airport, I handed over to Mr. Ecclestone in an envelope the draft contract which I had drawn up and taken with me."

110. For his part, Mr Ecclestone said in evidence that FOA and FOM did not have a motor home in Bahrain and that there was no discussion there as to the amount of any payment to Dr Gribkowsky. Mr Ecclestone accepted that he had been given an envelope by Dr Gribkowsky, but said that he had no idea what was in it. In cross-examination, Mr Ecclestone said:

> "[Dr Gribkowsky] gave me an envelope, but I don't know what was in the envelope. In fact, I was busy during the race and left it and somebody ran after me afterwards and said, 'You've left this here', whatever it was …. [I]t wasn't addressed to me. It was addressed to Mr Mullens and I gave it to Mr Mullens."

111. On 13 March 2006, Mr Mullens faxed to Mrs Argand-Rey a version of the draft agreement incorporating amendments he had made in manuscript. The fax read, "You may wish to consider the enclosed." Mr Mullens' changes to the agreement included the removal of references to Mr Ecclestone (so that the parties were to be Bambino and GG Consulting) and the substitution of "various interests in companies and other assets" for "an interest in Formula One motor racing". The other references to Formula One were also excised. Clause 3 was to become:

> "The mandator seeks the advisors services in general as well as in related financial matters in particular including – but not limited to – certain obligations of SLEC Holdings Limited towards parties other than the mandator."

The new clauses 5 and 6 read as follows:

> "5. The mandator agrees to pay to the advisor a fee for the services of the advisor. The amount shall be determined by the value created from the services of the advisor and shall equal 50% of any realized by the mandator in respect of the obligations referred to in para 3 above. The mandator shall pay the advisor a minimum non returnable amount of USD 20 million with the maximum capped at USD [] million.
>
> 6. The minimum fee shall be payable at a time agreed between the mandator and the advisor. Any additional

> fee shall be payable 30 days after the realization of the gain by the mandator."

112. A typed version of the draft agreement reflecting Mr Mullens' suggestions was prepared, perhaps within the offices of de Pfyffer. Mr Mullens, however, provided de Pfyffer with a copy on which he had marked further changes in manuscript. Clause 3 was no longer to include any mention of SLEC but was instead to read as follows:

> "The Mandator seeks the Advisor's services in general as well as in relation to financial assets in which the Mandator is interested at the date of this agreement. The Advisor agrees to provide Service as requested by the Mandator on the terms of this Agreement."

The agreement was now to last for 12 months from 1 June 2006 unless terminated under clause 9, which allowed either party to terminate by notice if the other party failed to perform its obligations. As regards payment, clause 5 was revised to the following:

> "The Mandator agrees to pay to the Advisor a fee for the services of the Advisor. The Mandator shall pay to the Advisor an initial sum of $4m not later than 30 days after the commencement date. Provided the agreement continues the Mandator shall … unless otherwise agreed pay on the last day of each month commencing July 2006 for 10 months the sum of $1.6m."

GG Consulting was now, therefore, to receive by instalments a set total (viz. $20 million) rather than a percentage of a "realized gain".

113. In early April 2006, Mr Mullens faxed, seemingly to Dr Gribkowsky, a version of the draft agreement which largely corresponded to that mentioned in the first sentence of the previous paragraph. However, a new clause 4 stated:

> "The Advisor agrees that the services will be performed by suitably qualified personal worked to the Mandator and that neither this agreement nor any part shall be assignable."

Mr Mullens is recorded as having said this about the draft during an interview with the German authorities:

> "The draft allows two interpretations. On the one hand, it looks like a payment is guaranteed that is not dependent on success. Conversely, on the other hand you can take the point of view that even the minimum payment is related to added value and therefore only has to be paid if there is success. I deliberately worded it so that it was open to interpretation."

(It is perhaps worth noting that in clause 4, which appears to have been drafted by Mr Mullens, "personal worked" was used in place of "personnel working".)

114. On 3 May 2006, Mr Mullens sent Mrs Argand-Rey a fax giving Dr Gribkowsky's address and bank account details for GG Consulting. Within a short time afterwards, Mr Mullens asked that a signed copy of the agreement with GG Consulting be provided before 10 May; Mrs Argand-Rey made a note to this effect on Mr Mullens' 3 May fax. By 10 May, Mrs Argand-Rey had, as requested, signed and sent to Mr Mullens a version of the agreement reflecting the manuscript amendments he had made in March, as mentioned in paragraphs 111 and 112 above.

115. On 10 May 2006, Dr Gribkowsky had dinner with Mr Ecclestone and Mr Mullens at the Rib Room restaurant in London. On the following day, Mr Mullens sent Mrs Argand-Rey a fax in these terms:

> "Financial Consultancy Proposal
>
> I have been considering this proposal in the light of my meeting yesterday.
>
> I do not believe that there is any merit in such a contract and would not advise your client to enter into such an arrangement."

The fax was accompanied by the agreement Mrs Argand-Rey had signed, by now with a line across it.

116. Mrs Argand-Rey and Miss Flournoy understandably found Mr Mullens' fax confusing. Mr Mullens, however, explained on the telephone that he did not think that Bambino itself should be a party to the agreement. Miss Flournoy accordingly attached a post-it to the fax reading, "Should be signed by another entity but not by Bambino."

117. It was suggested in the course of the trial that the last word on the post-it was "Bernie", not "Bambino". The point could not be checked by reference to the original post-it since this is held by the German authorities. It seems clear, however, from the record of Miss Flournoy's interview with the German prosecutor's department that the note ended "Bambino".

118. In June 2006, Bambino's directors took steps to obtain a company which could enter into the agreement with GG Consulting in Bambino's place. The idea was at first to ask an agent in Mauritius, First Island Trust Company, to incorporate a new company, but by 9 June it had been decided that an existing company should be acquired off the shelf. The company in question was First Bridge Holding Limited ("First Bridge"), which had been incorporated in Mauritius on 22 February 2006.

119. On 16 June 2006, Dr Gribkowsky sent Mr Mullens and Mr Ecclestone a chasing letter. It read:

> "In our conversation on May 10th, 2006 in London we discussed among other issues some arrangements to be made. It is my understanding that [agreed] terms and conditions included a starting date of June 1st.
>
> As I haven't seen the relevant documents yet, may I kindly ask you to check whether anything has gone wrong with the mail or let me know whether there is any other difficulty that needs solving?"

120. On 5 July 2006, Mr Akash Doolaub of First Island Trust Company sent GG Consulting copies of the advisory agreement signed on behalf of First Bridge. On 11 July, Mr Kühnel sent back a copy signed on behalf of GG Consulting.

Payments made by First Bridge

121. First Bridge paid the following sums to GG Consulting:

i) $4 million on 25 July 2006;

ii) $7 million on 8 August 2006;

iii) $1.6 million on 30 August 2006;

iv) $7 million on 14 September 2006; and

v) $1.6 million on 25 September 2006.

122. In total, therefore, First Bridge paid GG Consulting $21.2 million, $1.2 million more than the $20 million for which the agreement provided. Miss Flournoy gave the following explanation of this in her witness statement:

> "The contract required First Bridge to make an initial payment of $4million by 31st July 2006 and payments of $1.6million on the last day of every month for 10 months following that initial payment. However, after the first payment … Stephen [Mullens] contacted Luc [Argand] to tell him that Dr Gribkowsky was getting extremely nervous about receiving all the agreed payments and wanted the payments to be sped up. As a result two payments of $7million were made on 8th August

> and 14 September …. A scheduled payment of $1.6million was made on 30th August 2006 ….
>
> Following the second $7million payment, we did not realise that the next payment needed to be reduced from $1.6million to $0.4million to make the total payments up to the agreed $20million. Accordingly the full $1.6million was paid to GG Consulting on 25th September 2006. This meant that we had paid him $1.2million more than agreed. When we realised our mistake we briefly considered whether it would be worth trying to recover the money from Dr Gribkowsky but we quickly came to the decision that there would be no chance of us getting the overpayment back, we would run the risk of creating further tension with Dr Gribkowsky and it would be better to document the overpayment and formalise the deal reached …."

123. On 7 November 2006, First Bridge sent GG Consulting a letter in which it was proposed that the consultancy arrangement between them should be extended by two months.

CVC refinances

124. The $815 million that CVC borrowed to finance the purchase of shares in Speed and SLEC represented a minority of the total cost of the transaction. The background can be seen from CVC's FIR, prepared on 27 October 2005. This explained that RBS and Barclays had "struggled to get to terms with the relative uncertainty surrounding the New Concorde Agreement in January 2008", as a result of which it had been decided "to focus their assessment of the business on the cash generated to the end of 2007 (when the current Concorde Agreement expires)". The banks had therefore been "looking to provide a short term (30 month) senior A facility that is repaid out of contracted cash flows of the business, followed by a full refinancing onto 'normal' leveraged terms once New Concorde Agreement is signed".

125. By August 2006, steps were being taken to effect a refinancing. At the end of that month, RBS indicated its willingness to underwrite a financing package involving debt of $2,750 million, allowing CVC to be paid a dividend of $2,010 million (or about 150% of its initial equity requirement). The proposal was conditional on, among other things, "Receipt and reliance on independent valuation for a minimum of $5.0bn" and "Fully binding terms with no outs / Signed Concorde". As to the latter, the proposal stated:

> "We appreciate that at this stage only heads of terms have been agreed with the teams which cover all the commercial terms of the next Concorde. We need to understand that there are 'no outs' for the teams and would also welcome a full

> understanding of the steps / timeline for Concorde to be signed."

126. EY were instructed to carry out work in connection with the proposed refinancing. Among other things, they were asked to provide an "independent view on value". On 1 November 2006, they reported that, on the basis of management's cash flow forecasts for 2006-2012 and some specified valuation assumptions, their discounted cash flow indicated a value for the group in the region of $5,914 million.

127. On 24 November 2006, RBS and Lehman made loans totalling $2,920 million by way of refinancing.

128. Mr Llowarch gave this summary of events in a witness statement:

> "I had always understood from my discussions with [CVC] personnel at the time of its acquisition, and during the APM/ASM acquisition work, that they intended to try to refinance the Group as a whole once the situation with the teams and manufacturers had been resolved. The objective was to refinance the two separate loans made to support CVC's acquisition and the APM/ASM acquisition into one long term capital structure, with one covenant package and to increase the level of debt now that some of the risks had been addressed. Subsequently, a refinancing of the Group was undertaken in November 2006, in the course of which a debt package of $2.85 billion was arranged by RBS and subsequently widely syndicated in the market."

129. Mr Mackenzie said in evidence that CVC's investment in the Formula One group was one of its top ten most successful investments in pure financial terms. He observed, "It is a successful investment apart from the adverse publicity."

Agreement with GREP

130. By 2007, Dr Gribkowsky was in contact with Professor Toifl, an Austrian tax consultant and lawyer who at the time was the managing partner of LeitnerLeitner. On Dr Gribkowsky's instructions, LeitnerLeitner set up Sonnenschein Privatstiftung, an Austrian private foundation, and GREP GmbH, an Austrian company wholly owned by Sonnenschein Privatstiftung. Professor Toifl was appointed as GREP's managing director. The company's name is apparently derived from an abbreviation of "Gribkowsky Real Estate and Participation".

131. In the middle of 2007, GREP entered into a written agreement with Lewington Invest Limited ("Lewington"). Lewington was defined as "the Mandator" and GREP as "the Advisor". The agreement largely corresponded to that made the previous year

between First Bridge and GG Consulting. This agreement was, however, expressed to start on 1 June 2007 and stated as follows as regards payment:

> "The Mandator agrees to pay to the Advisor a fee for his services. The total fee is USD 25 (twentyfive) million. The fee is payable in five equal instalments at the dates of August 30th, September 15th, September 30th, October 15th and October 30th, 2007."

132. Lewington, a British Virgin Islands company, had been acquired by a Mr Jean-André Favre, who carries on a company administration and tax advice business in Switzerland. Mr Favre appears to have known Mr Ecclestone for many years. According to Mr Favre, Mr Ecclestone consulted him early in 2007 about money that he said that he owed to Dr Gribkowsky and said that he "did not want his [i.e. Mr Ecclestone's] name to appear in any circumstances". Mr Favre bought Lewington in response.

133. The following sums were paid to GREP pursuant to its agreement with Lewington:

i) $10 million on 9 October 2007;

ii) $7,770,870 on 2 November 2007;

iii) $5 million on 5 December 2007.

With the first and second payments, the money seems to have come from Mr Flavio Briatore. The third payment appears to have been made by Mr Favre from money that Mr Ecclestone had arranged to have transferred to him.

134. In total, therefore, Lewington paid GREP about $22.8 million, $2.2 million less than the $25 million for which the agreement provided.

135. Mr Ecclestone said this in his witness statement about the payments:

> "I am aware that payments totalling approximately $22.7 million were made to Gribkowsky on my behalf between October and December 2007. I have very little recollection regarding any specific arrangements relating to these payments. I recall that at some stage Gribkowsky told me that he did not want a direct payment coming from me to him or for money to come to him from the UK. For this reason, I asked Flavio Briatore, a friend and business associate who held funds outside the UK and who owed me some money at the time, to pay some money on my behalf to Gribkowsky …. I also recall that I had

> some contact with Andre Favre, a contact of mine in Switzerland, and that he assisted in arranging the payments. However, although I knew that payments were made on my behalf, I did not know any details about how they were made or see any documents that were drawn up in relation to the payments."

136. On 14 December 2007, Professor Toifl sent Mr Ecclestone a letter complaining of underpayment. Having referred to the agreement between Lewington and GREP, Professor Toifl pointed out that there was still a balance of $2,229,130 outstanding and asked both for immediate payment of that amount and for compensation for interest and devaluation losses. The letter was copied to Mr Favre.

137. On receipt of this letter, Mr Ecclestone telephoned Professor Toifl. Dr Yvonne Schuchter, who was working for Professor Toifl's firm, gave evidence in Germany to the effect that she had been told by Professor Toifl that Mr Ecclestone had said:

> "Hello Mr. Toifl, do you hear this noise? I'm shredding your letter."

For his part, Dr Gribkowsky gave evidence to the following effect to the German prosecution authorities:

> "Dr. Toifl explained to me that Mr Ecclestone had called him and asked if he could hear this noise. In the background the noise of a paper shredding machine could be heard and Mr Ecclestone said that he was currently shredding the demand from us. Subsequently we decided not to pursue the outstanding remaining amount any further."

138. Asked about this in cross-examination, Mr Ecclestone accepted that he had probably told Professor Toifl that he was shredding his letter. Mr Ecclestone explained:

> "[Professor Toifl] said I owed them more money. I said, 'I don't' and shredded the letter."

Mr Ecclestone also commented:

> "I said I get a lot of nonsense letters, daily. And they all get shredded like that one."

139. Lewington was removed from the register on 29 April 2008. According to Mr Favre, he arranged for Lewington to be liquidated on Mr Ecclestone's instructions.

Investigations in Germany

140. In February 2010, Dr Gribkowsky was interviewed by the German authorities about a transaction relating to Hypo Group Alpe Adria ("HGAA"), an Austrian banking group. On 27 December, Dr Gribkowsky himself requested a meeting with the prosecutor, explaining that a reporter had suggested that there was a connection between the HGAA transaction and the Austrian foundation with which he and Professor Toifl were concerned. At a meeting with the prosecutor on 29 December, Dr Gribkowsky said that he wanted to challenge the reporter's suspicion. Dr Gribkowsky claimed that in 2006 and 2007 he had guided purchases and sales of companies as a result of which GG Consulting and GREP had received fees totalling $50 million. Dr Gribkowsky identified Bambino and Mr Ecclestone as the clients and referred to the involvement of Mr Kühnel and Professor Toifl.

141. Over the next week or so, the German authorities met Mr Kühnel, Mr Glöckl and other individuals from BLB. On Wednesday 5 January 2011, Dr Gribkowsky was arrested.

142. News of Dr Gribkowsky's arrest quickly reached both CVC and the British press. During the evening of 5 January 2011, the Daily Telegraph published a story including this:

> "Gerhard Gribkowsky was on Wednesday taken into custody on charges of corruption, tax fraud and breach of trust toward his former employer.
>
> The former risk manager of BayernLB was in charge of managing the sale of the bank's F1 stake to London-based private equity firm CVC Capital Partners in 2006.
>
> Bernie Ecclestone, who is president and chief executive of Formula One Management, runs the sport on behalf of CVC Capital Partners.
>
> Prosecutors say Gribkowsky led the bank to sell it 'without evaluation of its current value' which, in turn, earned him 'two consultancy contracts totalling $50 million'."

CVC had already put out a statement confirming that it had no knowledge of, nor any involvement in, any payment to Dr Gribkowsky or anyone connected with him in relation to its acquisition of Formula One.

143. Mr Llowarch and Miss Woodward Hill had also hitherto had no knowledge of the payments that had been made for Dr Gribkowsky's benefit. Within a day or two, Mr Llowarch touched on the subject with Mr Ecclestone, who made no reference to his having any connection with the payments. He (Mr Ecclestone) said that he was aware that Dr Gribkowsky had brought some business ideas to Bambino.

144. On 8 January 2011, the German magazine Bild reported on an interview it had been given by Mr Ecclestone. The report included this (in English translation):

> "NOW THE FORMULA 1 BOSS TALKS TO BILD:
>
> **BILD: Mr Ecclestone, have you anything to do with the millions paid to Mr Gerhard Gribkowsky?**
>
> Bernie Ecclestone: 'No, the speculation in the German press or the suspicions of the public prosecutor are not true. That is complete nonsense. I didn't bribe him. I know Mr. Gribkowsky as the Chairman of the [BLB] and since then I have seen him perhaps four times during the year as along with me he was part of the management of the Formula 1 firm Delta Topco. But I have got nothing to do with these payments to Gribkowsky. I also didn't know why I should have given him money. He was indeed on my side during the negotiations. I didn't need to win him over. As there was a dispute with the car manufacturers, the [BLB] even tried to get us to the negotiating table with BMW.'
>
> ….
>
> **BILD: Do you know of a firm by the name of First Bridge Holding Ltd. in Mauritius?**
>
> Ecclestone: 'No, I don't know of this firm.'
>
> **Have you concluded consultancy contracts with Gribkowsky or do you know anything about consultancy contracts and his Austrian firm 'GG Consulting'?**
>
> Ecclestone: 'No, I never made any consultancy contracts with Gribkowsky or his firm. I can remember, however, that he once told me at a management meeting of Delta Topco that he is very much involved in the welfare support of children with cancer.'
>
> **BILD: This foundation also has a role in the story. Who could have transferred the 50 million dollars to Gribkowsky?**
>
> Ecclestone: 'I don't know. As a member of the board of Delta Topco he only received modest payment. I know that because I was the chairman of the board. You should ask the banks involved whether they might have paid him money.'
>
> **BILD: [BLB] knows nothing about payments and CVC Capital Partners has also said that they paid nothing to Gribkowsky.**

> Ecclestone: 'If CVC says that it has nothing to do with the payments, then you can be absolutely certain that CVC is telling the truth. I can assure you of that.'
>
> ***Ecclestone continues: 'If German newspapers are stating that I had something to do with the payments to Mr. Gribkowsky, then that is absolute nonsense and if necessary I will take legal action against them.'"***

145. In the course of cross-examination, Mr Ecclestone agreed that he had said much of what Bild reported him as saying. He sought to explain his answers on the basis that he was being asked about whether money had been paid to Dr Gribkowsky in connection with the sale of BLB's shares to CVC. He also said that he had wanted to keep matters out of the public domain because he did not want to "ring bells" with HMRC. He said that he had been quite happy to talk about the payments made to Dr Gribkowsky, but had not been prepared to say that the payments had been made because Dr Gribkowsky was "shaking [him] down concerning some allegations that he could say to the Revenue that I controlled our family trust, which would have been extremely expensive".

146. Mr Mackenzie also spoke to Mr Ecclestone about the allegations against Dr Gribkowsky. Until 2 February 2011, Mr Ecclestone consistently maintained that he had no knowledge of the matters in question.

147. Mr Argand and Miss Flournoy seem to have met Mr Ecclestone in London on 10 January. If they did not meet on that day, they did so quite soon afterwards. Miss Flournoy said in cross-examination that it was her recollection that she and Mr Argand had been in London for other reasons and had briefly called in to the Princes Gate office to speak to Mr Ecclestone. She said that she and Mr Argand had explained that they thought that they should volunteer to give information to the German authorities.

148. On 13 January 2011, a board meeting of Delta Topco was held to discuss the recent events regarding Dr Gribkowsky. Those participating included Mr Mackenzie, Mr Ecclestone, Mr Mullens and Mr Llowarch. It was resolved that an extraordinary general meeting should be called with a view to Dr Gribkowsky's removal as a director of the company. As Mr Llowarch remembers events, those involved in the meeting were asked to comment on what they knew about the allegations against Dr Gribkowsky. Mr Ecclestone indicated that the press stories were incorrect without providing any detailed explanation. Mr Mullens' position was that he would need to speak to Bambino before making any comment.

149. On 22 January 2011, Süddeutsche Zeitung, the German newspaper, published the letter referred to in paragraph 136 above by which Professor Toifl complained to Mr Ecclestone of late payment.

150. On 2 February 2011, Mr Mackenzie met Mr Ecclestone and Miss Woodward Hill at Mr Ecclestone's request. At this meeting, Mr Ecclestone said that he had been reminded by a colleague, a Mr Bruno Michel, that he had made payments to Dr Gribkowsky, and he apologised for having forgotten this. Mr Mackenzie was very angry, but Mr Ecclestone said that he had never lied to Mr Mackenzie. Mr Ecclestone also told Mr Mackenzie of the consultancy agreement under which he (Mr Ecclestone) had himself received some $41 million from BLB. Mr Mackenzie told Mr Ecclestone that he was extremely unhappy that the arrangement had not been disclosed before, taking the view that that was "a clear breach of our purchase contract, which required him, Bambino and BLB to disclose all arrangements between themselves that may affect Formula One".

151. On 4 February 2011, Dr Gribkowsky was removed as a director of Delta Topco at an extraordinary general meeting. Later that day the board resolved to conduct a fact-finding exercise under the supervision of three of the company's directors.

152. The German authorities were continuing with their investigations. In the course of these, they conducted numerous interviews. Those interviewed included Mr Ecclestone (on 6 April 2011), Mr Mullens (on 5, 11 and 25 May), Mr Mackenzie (on 10 May), Miss Flournoy (on 19 and 20 May) and Mr Argand (on 10 June).

The criminal proceedings against Dr Gribkowsky

153. On 14 July 2011, the German authorities filed an indictment against Dr Gribkowsky accusing him of corruption, breach of fiduciary duty and tax evasion. The trial began on 24 October and continued until 27 June of the following year, with hearings conducted on 46 days. Mr Ecclestone (on 9 and 10 November), Miss Flournoy (on 23 November) and, as I understand it, Mr Argand (on 25 November), among many others, gave evidence in the course of the trial.

154. On 20 June 2012, Dr Gribkowsky admitted the charges against him. He made a statement to the Court in which he accepted that "[t]he allegations of the prosecution are essentially correct" (to quote from a summary prepared by the prosecution authorities). On 27 June, Dr Gribkowsky was sentenced to an overall term of imprisonment of 8 years and 6 months. The Court considered that a sentence of 7 years and 9 months was appropriate for the offences of corruptibility (bribery) and breach of fiduciary duty and that a sentence of 6 years and 6 months was reasonable for the tax evasion offences.

155. Following his conviction, Dr Gribkowsky was interviewed extensively by the German authorities. He gave evidence on 10, 16, 18, 19 and 25 July 2012.

Issue of the present proceedings

156. The proceedings before me were issued on 29 July 2011.

Other proceedings

157. On 10 May 2013, the German authorities filed an indictment against Mr Ecclestone. Under German law, the next step is for a judge to decide whether there is "sufficient suspicion" for "main proceedings" to be opened. During the trial before me, no decision had yet been taken on whether the indictment against Mr Ecclestone should be allowed to proceed, although I understand that that position has now changed.

158. An indictment against Mr Mullens was, I gather, filed in Germany while he was giving evidence in these proceedings. So far as I am aware, it has not so far been decided whether that indictment should be taken forward.

159. Related civil proceedings were also brought in New York State. The plaintiff in the proceedings was Bluewaters Communications Holdings LLC ("Bluewater"), which alleged against Mr Ecclestone, Dr Gribkowsky, BLB, CVC and others that its efforts to buy the Formula One group were thwarted as a result of a conspiracy to rig the bidding process in respect of the sale of the group. I understand that the proceedings have recently been dismissed on forum non conveniens grounds.

Witness evidence

160. Six witnesses of fact gave oral evidence in these proceedings: in chronological order, Dr Hahn, Mr Llowarch, Mr Ecclestone, Mr Mullens, Miss Flournoy and Mr Mackenzie. Taking these briefly in turn:

i) *Dr Hahn*

Dr Hahn's evidence is of quite limited significance: he has relatively little personal knowledge of matters bearing on the central issues. I accept, however, that his evidence (which is not without importance) accorded with his recollections.

ii) *Mr Llowarch*

Mr Llowarch appeared to me to be an honest witness giving evidence in accordance with his recollections.

iii) *Mr Ecclestone*

Mr Robert Miles QC, who appeared with Mr Richard Hill QC for Mr Ecclestone, did not maintain that Mr Ecclestone's evidence had invariably been accurate. He blamed some of Mr Ecclestone's answers on a tendency to answer questions too fast: he suggested that Mr Ecclestone was inclined to say things quickly that might, on reflection, not be right. He also stressed that many of the relevant events happened a long time ago and that Mr Ecclestone is 83 years old; it is thus, Mr Miles said, not surprising that Mr Ecclestone's recollection of some things should be poor. I recognise that there is force in these points. Even, however, making allowances for the lapse of time and Mr Ecclestone's age, I am afraid that I find it impossible to regard him as a reliable or truthful witness. I refer later in this judgment to some of the specific respects in which I cannot accept Mr Ecclestone's evidence.

iv) *Mr Mullens*

Mr Mullens was a far less expansive witness than Mr Ecclestone. He gave the impression of wishing to give little away. His answers to questions were often limited or qualified. To take just a few examples, when asked about when he made notes, Mr Mullens initially answered merely, "I make notes when I feel it's appropriate to make notes"; asked whether the possibility of investment from Mr Robert Tchenguiz had come to fruition, he said, "I don't believe it did", even though he must have known that it had not; asked about whether Mr Ecclestone had disliked it when representatives of the Kirch group involved themselves in the day-to-day business of the Formula One group, he said that he was "not sure" that that was the case even though he could be expected to have known what the position was. Of course, the mere fact that a witness is unforthcoming need not cast any doubt on his reliability: in particular, someone facing very serious accusations may legitimately consider that he should say no more than he has to. I am afraid, however, that I cannot view Mr Mullens as a reliable, or even a truthful, witness. I have already explained why I do not accept evidence Mr Mullens gave about the November Draft Agreement (paragraphs 72-80 above). Some of the other respects in which I find myself unable to accept his evidence will become apparent later in this judgment. On top of these, I find it, for instance, inconceivable that Mr Mullens was not aware that he was questioned in Germany as a suspect rather than merely a witness (yet Mr Mullens said in cross-examination that he was "not sure" on this point), and Mr Mullens' claims that Bambino kept notes of their meetings and that he handed over files of papers to Bambino are supported by neither Miss Flournoy's evidence nor Bambino's disclosure.

v) *Miss Flournoy*

I shall have to give further consideration to Miss Flournoy's evidence later in this judgment. I should, however, record at this stage that, as she gave her

evidence, Miss Flournoy struck me as a witness in whom I could have some confidence. My impression at the time was that she was giving evidence in accordance with her recollections.

vi) *Mr Mackenzie*

Mr Mackenzie appeared to me to be an honest witness giving evidence in accordance with his recollections. As with other witnesses, I must of course bear in mind that a considerable amount of time has passed since the key events. I do not, however, agree with Constantin that I need to approach Mr Mackenzie's evidence with any particular caution.

161. I also had the benefit of expert evidence:

i) On German law, from Professor Helmut Köhler (called by Constantin), Dr Matthias Birkholz (called by Mr Ecclestone) and Professor Peter Kindler (called by Bambino); and

ii) On valuation matters, from Miss Diane Hughes (called by Constantin), Mr Michael Pilgrem (called by Mr Ecclestone) and Mr Simon Ziff (called by Bambino).

162. I have available to me as well numerous transcripts and other records of evidence given in Germany, including a certain amount of evidence given at Dr Gribkowsky's trial. The relevant witnesses include Mr Ecclestone, Mr Mullens, Miss Flournoy and Mr Mackenzie, but there is also evidence from many individuals who have not been called as witnesses in these proceedings. As regards this material, the defendants understandably stress that I have not seen the people concerned and that they (the defendants) have had no chance to cross-examine them. There is clearly considerable force in such submissions, but they do not seem to me to rob the material of all value. All the parties have made extensive reference to it.

163. The evidence before me includes, too, the following witness statements in respect of which hearsay notices were served:

i) A witness statement of Mr Krowarz dated 28 May 2004. The witness statement was made for the purposes of the proceedings brought in 2004 by Speed and SLEC;

ii) A witness statement of Dr Gribkowsky dated 12 January 2005. The witness statement was made for the purposes of the proceedings FOH, Speed and SLEC issued that month; and

iii) A witness statement of Mrs Argand-Rey dated 8 May 2013. The witness statement was made for the purposes of the present proceedings. The hearsay notice explained that Mrs Argand-Rey was unable to give oral evidence for medical reasons.

Constantin's case in brief outline

164. As I indicated at the beginning of this judgment, Constantin alleges that the Payments were a bribe. According to Constantin, the Payments were made as a result of Dr Gribkowsky having entered into a corrupt agreement with Mr Ecclestone in May 2005. Constantin contends that, but for the illicit arrangement between Dr Gribkowsky and Mr Ecclestone (in which Mr Mullens and Bambino are also said to have been complicit), BLB's shares in Speed would have been sold for much more than they in fact were and, in consequence, Constantin would have received a large sum pursuant to its overage rights. In the circumstances, Constantin has (so it is said) claims against Mr Ecclestone, Mr Mullens and Bambino under §826 of the German Civil Code or, if the applicable law is English rather than German, for the torts of unlawful means conspiracy and causing loss by unlawful means.

Burden and standard of proof

165. The burden of proof plainly rests on Constantin. The standard of proof is the ordinary civil standard (viz. balance of probabilities), but, if and to the extent that what is alleged is inherently improbable, that is a factor to be taken into account when deciding whether the event in question is more likely than not to have occurred.

Factual issues

166. The key factual issues can be addressed under the following headings:

i) Why were the Payments made?

ii) Would BLB's shares have been sold for more but for the illicit arrangement Constantin alleges?

iii) Were the defendants aware of the overage rights on which Constantin's case is founded?

167. I take these points in turn below.

Why were the Payments made?

168. The parties differ fundamentally on why the Payments were made. Constantin maintains that they were a bribe. The defendants, on the other hand, attribute them to the fact that Mr Ecclestone was being blackmailed (or "shaken down") by Dr Gribkowsky.

The rival versions of events

Dr Gribkowsky's evidence

169. Constantin's case for the most part reflects evidence that Dr Gribkowsky gave in Germany after admitting the charges against him.

170. According to Dr Gribkowsky, he met Mr Ecclestone in London in April or May of 2005 at Mr Ecclestone's suggestion. Dr Gribkowsky was in a confident mood, believing that "he had won and everything was fine for him/[BLB]". Mr Ecclestone, however, said words to the effect of, "I'll tell you how the world works and what you really control, not a thing", and claimed to have full control over Formula One's assets. The English translation of Dr Gribkowsky's evidence states:

> "[Mr Ecclestone] made it clear to me that given the situation, there were two possibilities: either he presented me with a buyer and I helped him get the sale through, or he would kick us out."

Dr Gribkowsky is also reported as having said this:

> "Basically, what Mr Ecclestone said at this meeting was that if I helped him then – literally – 'I will take care of you!'
>
> I took the phrase 'I will take care of you' to be an offer to change sides and to join him. At the time I understood that Mr Ecclestone was offering me a job, namely to transfer to Formula1 as an advisor, in conjunction with a fee of course. And that would be in return for me not obstructing a sale….
>
> It was clear from the course of the meeting so far that the help referred to was in relation to selling [BLB's] stake in Formula1. As I understood it, Mr Ecclestone wanted to pick out a [buyer] who was agreeable to himself and whom he could accept, and I was to ensure that the sale went through and was accepted by [BLB]….
>
> Money was not talked about, either in relation to the purchase price or in relation to 'my remuneration'….

> In my opinion, as far as looking for a purchaser was concerned, Mr Ecclestone by making me this proposal was creating a basis on which he could offer the potential buyer a controlling interest in Formula1."

171. Dr Gribkowsky said that, following his meeting with Mr Ecclestone, he contacted Mr Kühnel on how and where to set up a consultancy firm.

172. Dr Gribkowsky said that, in the period after his meeting with Mr Ecclestone, "no activities relating to a sale took place as far as [he] could perceive", but he and Mr Ecclestone "conducted numerous talks to appease the situation with the teams and manufacturers, during which outwardly we acted in remarkable unity again". Dr Gribkowsky expressed the view that at this stage Mr Ecclestone was not principally concerned about the settlement agreement ultimately concluded on 25 August 2005 but with "finding a buyer for the stake in Formula1 who was agreeable to himself". Dr Gribkowsky suggested that there were three reasons for this:

> "First: Owing to the litigation and the difficulties with the teams and manufacturers, Mr Ecclestone's role was no longer uncontested. As I saw it then and still see it now, his interest in that respect was therefore to re-establish his role of unrestricted and absolute controller of Formula1.
>
> Second: The litigation and the threat of the manufacturers introducing their own series also had an impact on Formula1's business, because contracts with circuits, television companies and sponsors could no longer be conducted up to the terms previously applying, or for shorter terms.
>
> Third: From my personal knowledge of Mr Ecclestone, it was in character for Mr Ecclestone to want to earn money, and selling the shareholding offered better chances of that."

173. Dr Gribkowsky said that Mr Ecclestone telephoned to tell him about CVC in August 2005. In early September, Mr Ecclestone rang Dr Gribkowsky and asked him to come to the Belgian Grand Prix "because Mr Mackenzie would be coming as well". Dr Gribkowsky understood that Mr Ecclestone "was now going to produce the buyer he had announced in May"; it "finally became clear to [Dr Gribkowsky] that CVC was the buyer Mr Ecclestone wanted". Either in the telephone conversation or at the Belgian Grand Prix, Mr Ecclestone told Dr Gribkowsky:

> "'It's all you need!' (or words to that effect), and literally he said, 'It's as good as it will get!'"

174. Dr Gribkowsky said that, after Mr Mullens had agreed with CVC that there should be a "Keep Well Agreement" in relation to the FEB and Bambino Loans, he telephoned him. Dr Gribkowsky explained:

> "In my telephone conversation with Mr Mullens he then made me the offer, that in the role of advisor I should look after the future of the SLEC loan and handle the repayment claims, and also look after the implementation of the Keep-Well Agreement. I asked him what exactly I was meant to do and what might come out of it. Mr Mullens replied that he estimated that a fee somewhere between USD 500,000 and USD 50 million might arise from it. In this context, I should mention again that under the agreement reached on granting the SLEC loan, repayment of the sum of USD 235 million hinged on approval from the second lender, Bambino. Mr Mullens wanted to get Bambino's approval bought. I was to assist him here, and if it worked out I would get an appropriate consultation fee for my support.
>
> For one thing, it was not clear to me to start with what exactly I could or should have done. For another thing, I put this offer from Mr Mullens – who of course was a close confidant of Mr Ecclestone – in the context of the conversation I had had with Mr Ecclestone in April/May 2005. So now here for the first time I was being offered a more specific job in or in connection with Formula1, and above all for the first time an actual offer of payment was being put forward."

Dr Gribkowsky went on:

> "After my telephone conversation with Mr Mullens, I informed my German tax consultant Mr Kühnel that the offer of an advisory post that had been made in May now appeared to be taking shape. Mr Kühnel had meanwhile thought up various things, including as far as I can remember a company in Malta, in Switzerland and in Austria. I decided ultimately in favour of Austria, and a short time afterwards in early November I incorporated GG Consulting. Mr Ecclestone and Mr Mullens were both informed about this. It was clear to both of them that this was to be the company through which the prospective consultancy assignments were to be handled.
>
> In the wake of that, Mr Mullens on 4 November faxed me a draft Consultancy Agreement between Bambino and a still un-named Austrian company."

175. Dr Gribkowsky referred to a conversation with Mr Mullens in early 2006. Dr Gribkowsky initially said that the conversation took place in January 2006 on the occasion of a meeting with the teams at Heathrow Airport. In a later interview, he said that he was no longer sure that Mr Mullens was at the meeting with the teams and that the conversation could have taken place shortly before the meeting. At all events, Dr Gribkowsky said this:

> "Mr Mullens asked me whether I had already thought about the consultancy agreement he had drafted in the version dated 04.11.2005. I replied, 'No.' During the course of February, I then revised the draft along my own lines. The revisions consisted of the subject-matter of the consultancy services, and the fact that Mr Ecclestone should be my contractual partner."

176. Moving on to the Bahrain Grand Prix in March 2006, Dr Gribkowsky, as I have already explained, said this:

> "At lunch on the Saturday, a conversation took place between Mr Ecclestone and myself in the motorhome belonging to FOA/FOM. During this conversation, Mr Ecclestone enquired first of all whether I had received a bonus from the bank for the sale to CVC. I said that I had not, which Mr Ecclestone commented with the words 'fucking bank'. Mr Ecclestone then asked me about my further plans for the future. I took this to be a hint and reference to our agreement back in April/May 2005, and I told him that I could imagine working as a consultant in Formula1 and that I had already spoke to Mr Mullens about it. Mr Ecclestone commented this latter phrase with the words, 'Forget Stephen' and challenged me to 'tell me a number', whereupon I told him 50. To me it was clear that that meant USD 50 million. The conversation ended with Mr Ecclestone saying that he would think about it.
>
> On the Sunday before leaving for the airport, I handed over to Mr Ecclestone in an envelope the draft contract which I had drawn up and taken with me.
>
> Even if I denied it and turned a blind eye to it at the time, it was clear to me that this was the reward for my supportive involvement – along the lines Mr Ecclestone had wanted – in the sale to CVC of [BLB's] stake in Formula1."

177. With regard to the dinner at the Rib Room restaurant on 10 May 2006, Dr Gribkowsky said this:

> "Part of this meeting was spent discussing the issue of Formula 1 and part the prospective payments to be made to me by Mr Ecclestone. Mr Ecclestone said that I would receive 45 million. He meant US dollars, as was usual with Formula 1. Mr Mullens was apparently going to take care of everything else, i.e. the contractual agreements and the processing of these. In this discussion, we also established that the Advisory Agreement between myself and Mr Ecclestone would begin on 1 June 2006."

178. In relation to the agreement between GREP and Lewington, Dr Gribkowsky said:

> "According to my memory, I had a personal conversation with Mr Ecclestone in April/May 2007…. During this discussion, Mr Ecclestone named Mr Jean-André Favre as the contact person for the second agreement. When I asked who Mr Favre was, Mr Ecclestone responded that I need not to worry, and said: 'He is a good operator'. I was, furthermore, to contact Mr Favre and meet with him, and he gave me his contact details. The meeting between Mr Favre and myself took place, if I remember correctly, in May/June 2007 at Geneva Airport. It lasted approximately half an hour. It essentially involved the exchange of draft agreements and identifying a contact person for Mr Favre. I gave Mr Favre the details for GREP GmbH and Dr Toifl. Further processing took place directly with Dr Toifl."

179. Dr Gribkowsky suggested that by the middle of 2006 Mr Ecclestone had achieved his objective. He took Mr Ecclestone's goal to be "the sale to CVC and the avoidance of disruption by [Dr Gribkowsky] in the agreement process with the manufacturers". Dr Gribkowsky's attempts "to breathe life into the Advisory Agreements 2006 and 2007 were of no interest to Mr Ecclestone".

Mr Ecclestone's evidence

180. Mr Ecclestone gave a considered account of events in his witness statement. After explaining that Dr Gribkowsky had tried to interest him in business propositions, he said:

> "Ever since I had first met Gribkowsky, from comments and insinuations he had made it seemed that he assumed that I ran the trust which had been settled by my wife, although I never said or did anything to give him that impression. After the sale of BLB's shares to CVC had gone through and I had not taken him up on any of his suggested business ideas, Gribkowsky made further insinuations that he might create difficulties for me with the UK tax authorities in relation to the trust. Gribkowsky was aware (both because it was generally known, and also from conversations I had with him) that both myself and my wife were the subject of an ongoing tax investigation at that time. Although I cannot remember the specific words, he would say things such as 'if I was asked if you run the trust, I would have to say yes'. As an example he mentioned advice I had given about Paul Ricard, which is a race circuit in France owned by Bambino. However, I had only given advice about the circuit and its facilities, in the same way that I have given advice about many other circuits.

> I presumed that, with the sale to CVC complete, Gribkowsky was becoming more desperate to remain involved in some way. I became quite concerned about the situation and what Gribkowsky might do. It was true that Gribkowsky had spent quite a lot of time around me, my wife and Stephen Mullens over the previous few years, and because he held a senior position at a bank, I was concerned that HMRC would have been likely to take any false allegations made by him seriously. I remember that I discussed the matter with Stephen Mullens and he shared these concerns."

Mr Ecclestone went on to explain that, if HMRC had made an assessment on the basis that he controlled the Bambino Trust, the potential liability would have been billions of pounds or dollars.

181. In cross-examination, Mr Ecclestone spoke of having been "shaken down" by Dr Gribkowsky. He summarised matters in these terms:

> "I made a payment to Dr Gribkowsky because he was shaking me down concerning some allegations that he could say to the Revenue that I controlled our family trust, which would have been extremely expensive. And what I paid him was a very small amount, what I called an insurance policy. It is quite a cheap insurance, as it happened."

Mr Ecclestone also said:

> "There was never a bribe. I made a payment to Gribkowsky for completely different reasons. I had no reason to bribe him. I paid him money not to do what he said that he could and was capable of doing, which was informing the English Revenue that I was running the trust."

182. Asked about what Dr Gribkowsky had said, Mr Ecclestone said:

> "I suppose it was a build up over quite a time, actually. Basically, he wanted to leave the bank and he wanted to start-up in his own business. He wanted me to be partner with him in his own business. He wanted to borrow money to start the business. So it was a complete build up over, as I said, a bit of time. And then he said – then the next thing came out. He said, 'Well, why don't you tell the trust?' I said, 'Well, I don't have anything to do with the trust'; and I said, 'You know full well that. You know better than I know'. So I said, 'So you ask the trust. You should ask the trust and ask them. Why are you asking me?' 'Well', he said, 'I would like some help because', he said, 'in the event that someone had asked me: do you

> control the trust? I'd say "yes".' I said, 'Why would you say that?' He said, 'Well, they own a race circuit in the south of France and you help this race circuit quite a lot'. 'Yes', I said, 'and you know the reason why', because we had, at that time, I think, 17 race circuits which I looked after and that was the reason I helped."

183. Mr Ecclestone spoke of having obtained advice, perhaps informally from an in-house accountant, on the consequences of Dr Gribkowsky contacting HMRC. When giving evidence in the main proceedings against Dr Gribkowsky, Mr Ecclestone referred to having discussed the matter with an English Queen's Counsel, but in cross-examination in the present proceedings he doubted whether he had discussed the point with the individual concerned, Mr Ali Malek QC. Mr Ecclestone also said in cross-examination that he had not talked to his then wife about the subject.

184. Mr Ecclestone said that he was not involved in matters relating to the FEB and Bambino Loans in 2005-2006. Asked about the basis for the "Keep Well Agreement", he said:

> "I don't remember because I wasn't involved."

Mr Ecclestone said that he had no knowledge of the November Draft Agreement and was not aware of a suggestion that Dr Gribkowsky could take on the role of advisor in relation to the FEB and Bambino Loans and receive a fee of between $500,000 and $50 million.

185. With regard to whether he asked Dr Gribkowsky whether he had received a bonus from BLB for the sale to CVC, Mr Ecclestone said:

> "what actually happened was, at some stage, when he was asking me for loan of money, and wanting to join him in his businesses and everything else. And he said, '… you can't believe it. All these things I've done to sell these and the banks haven't given me anything'. I said, 'Well, it depends what your agreement with the bank was.' If he had an agreement, he should have sued them."

186. In cross-examination, Mr Ecclestone said that it was agreed at the Rib Room dinner that Dr Gribkowsky would be paid a total of $45 million and that Mr Mullens would deal with the contractual arrangements.

187. Mr Ecclestone also said during cross-examination that Lewington's payments to GREP were made by way of a loan. He stated, too, that it had been Dr Gribkowsky, and not he, who had not wanted his name to feature in relation to the transaction. He said:

> "if Dr Gribkowsky had done exactly what I suggested, taken a cheque [or] a bank transfer, I would have been delighted to do that. That would have solved an awful lot of trouble. But he insisted it shouldn't look as if I'd paid him anything."

188. It was a theme of the evidence Mr Ecclestone gave in cross-examination that he had not been concerned about the identity of the owners of the Formula One group. He said, for instance, "I wasn't the slightest bit bothered who owned the shares in the company" and "I do not care who the shareholders are and who is on whatever boards." It was not the case, he said, that he could not stand the Banks, and he "didn't care whether they sold [their shares] or didn't sell them." Further, there was "never any bad blood" between himself and the Banks.

Mr Mullens' evidence

189. In his witness statement, Mr Mullens said that he became aware in around October 2005 that Dr Gribkowsky was apparently holding himself out as being able to assist Bambino to make a profit from the FEB and Bambino Loans. In the next paragraph, he said:

> "Dr Gribkowsky was aware – as it had been reported in the press – that HMRC were looking into Mr Ecclestone's affairs, and Mr Ecclestone told me at some point prior to CVC coming on the scene that Dr Gribkowsky had goaded him about this and said that HMRC would be very interested in his views that Mr Ecclestone and Bambino were one and the same. It was not the case that Mr Ecclestone and Bambino were one and the same. However, … it was concerning that Dr Gribkowsky was insinuating that he might seek to suggest differently to HMRC."

190. When giving evidence to the German authorities, Mr Mullens said that Mrs Ecclestone told him in October 2005 that Dr Gribkowsky was "dangerous". The English translation of the note of Mr Mullens' evidence records that Mr Mullens went on to explain as follows:

> "Her husband, i.e. Bernie Ecclestone, was worried about Gribkowsky. Her husband was being pressurised by Gribkowsky. And her husband [had] asked her in turn to ask the trustees to be benevolent towards Gribkowsky. Therefore when Gribkowsky talked to me and when I then talked to the trustees, they told me that I should do the favour for him."

In the course of his oral evidence in the present proceedings, Mr Mullens said:

> "Mrs Ecclestone led me to believe that Gribkowsky was dangerous and not to antagonise him. I had known for a

> considerable period of time that Gribkowsky was making insinuations about Mr Ecclestone and Bambino and the trust."

Mr Mullens also said that he thought that Mr Ecclestone had referred Dr Gribkowsky to him and that he (Mr Mullens) had then contacted Bambino.

191. Later in his witness statement, Mr Mullens said:

> "on 10 or 11 January 2006, I spoke to Mr Ecclestone, who informed me that Dr Gribkowsky was being difficult and that he was looking to receive a payment so as not to interfere in the tax investigation. I flew to Geneva on 12 January 2006 to report to Bambino. However, at that stage Bambino was not inclined to make any payment to Dr Gribkowsky."

192. This evidence is consistent with evidence that Mr Mullens gave to the German authorities. Asked when he first heard for definite that money would be paid, he said (according to the English translation of the note of his evidence):

> "I heard about it first from Mr Ecclestone. It must have been around 10 or 11 January 2006. This is because on 12.01.2006 I flew to Geneva in order to report to the people from Bambino …. In the conversation there was mention of an amount of USD 50 million. Mr Ecclestone expressed the expectation that the trust would accept USD 20 million of this."

During cross-examination, however, Mr Mullens said that, while it was his best recollection that he could have spoken to Mr Ecclestone on 10 or 11 January 2006, it could also have been in the middle of March. Later in his cross-examination, Mr Mullens said that he thought it more likely that the $50 million figure was raised in March, following the Bahrain Grand Prix.

193. Mr Mullens said in his witness statement that on 13 March 2006 Mr Ecclestone provided him with a copy of the draft advisory agreement that he (Mr Ecclestone) had been given by Dr Gribkowsky at the Bahrain Grand Prix. Up to this point, Mr Mullens had "no knowledge of GG Consulting or of the draft agreement".

194. Mr Mullens said in cross-examination that, when he realised that the draft agreement had Mr Ecclestone as a party, he had a discussion with him. Mr Mullens said that he thought that it was at this point that Mr Ecclestone indicated to him that he (Mr Ecclestone) was "very concerned about Gribkowsky interfering in the tax investigation".

195. According to Mr Mullens, on 10 May 2006, before the dinner at the Rib Room restaurant, Mr Ecclestone told Mr Mullens "about his worries about Dr Gribkowsky,

whom he still saw as a problem", and was "keen for Bambino to come to an arrangement with Dr Gribkowsky". During the dinner, it was "difficult for [Mr Mullens] to follow the detail of the conversation", but "it became clear from what [he] could hear of the conversation that Dr Gribkowsky was keen to have a consultancy agreement put in place".

196. Mr Mullens then stated as follows:

> "At one point during the meal, Dr Gribkowsky turned from Mr Ecclestone to me and suggested Bambino should finalise an arrangement. By this point in time, there did not appear to be much Dr Gribkowsky could do for Bambino by way of consultancy. However, he appeared to be obsessed with being a consultant for Bambino, and said he knew lots of people in Germany and could help Bambino by putting investment opportunities Bambino's way.
>
> It was a crude kind of sales pitch, but it appeared to me that the undertone was that Dr Gribkowsky wanted things to proceed his way, and that if his offer was not taken up there could be issues for Mr Ecclestone and Bambino in relation to the tax investigation. I said I would take Bambino's instructions.
>
> Contrary to what the Claimant alleges, the eventual agreement that was entered into was not intended to conceal the payments to Dr Gribkowsky from anyone; nor were the payments to Dr Gribkowsky in any way connected to the sale of Formula One to CVC. The payments were made primarily to obviate the risk that Dr Gribkowsky might follow through on his threats and speak to HMRC, albeit that Bambino hoped, and it was not impossible, that Dr Gribkowsky might provide some useful investment proposals."

197. Mr Mullens explained in cross-examination that he told Bambino's directors that, were Dr Gribkowsky to go to HMRC, that could have a significant impact on the tax investigation, which had taken on a new dimension in 2005 with a change of personnel at HMRC. Mr Mullens further said that he advised Bambino's directors against entering into a contract in Bambino's own name. That, he said, "would have enabled [Dr Gribkowsky to] go round Europe and the world saying, 'I am the consultant [to] Bernie Ecclestone and Bambino. I continue to be involved in Formula One.'"

198. In cross-examination, Mr Mullens said that he had the impression at the Rib Room restaurant that Dr Gribkowsky was looking for money from Mr Ecclestone as well as Bambino, but he had "no idea whatsoever" what Mr Ecclestone was going to do. Further, he did not know how much money Dr Gribkowsky was looking for from Mr Ecclestone, and he had no knowledge of Lewington or any arrangement with Lewington.

199. Mr Mullens stated in the course of cross-examination that he had not viewed what Dr Gribkowsky did as blackmail. He said that Dr Gribkowsky had not said "unless Bambino pays me money, I am going to the Inland Revenue" but had rather applied "subtle pressure". Mr Mullens explained:

> "[Dr Gribkowsky] had been making insinuations probably since about 2003/2004 that he knew that Mr Ecclestone was the settlor, that Mr Ecclestone was Bambino. We then experienced Dr Gribkowsky's employer, BLB, in the litigation, adopting a strategy whereby they made allegations about Mr Ecclestone, about Bambino, the trust, in order to put pressure on Mr Ecclestone to settle proceedings. We saw a further situation where, after the litigation was settled, Dr Gribkowsky continued to refer to Mr Ecclestone as the trust."

What Dr Gribkowsky said and did was "tantamount to a threat".

200. Mr Mullens also said:

> "Someone comes along and says, in the context of what Gribkowsky had insinuated, 'I want a consultancy agreement' …. He wanted money in the form of a consultancy agreement. He, quite clearly, wanted to provide some services pursuant to the consultancy agreement. Was it the reason why money was paid? No. Money was paid to minimise the risk that Gribkowsky would go to the tax authorities in the United Kingdom."

Bambino's evidence

201. Miss Flournoy explained in her witness statement that the first time the possibility of Bambino entering into any arrangement with Dr Gribkowsky was raised with its directors was in January 2006, when Mr Mullens visited following the execution of the agreement with CVC. She had no knowledge of the November Draft Agreement until she was shown it by the German authorities in 2011.

202. According to Miss Flournoy:

> "[Mr Mullens] said that Dr Gribkowsky had approached him and offered to assist Bambino with the arrangements regarding the FEB loan. Stephen [Mullens] explained that Dr Gribkowsky had indicated to him that he was disappointed that after the sale to CVC he clearly was not going to have as big a role in Formula 1 as he had hoped and that he had been saying that he was going to leave the bank and do something else."

203. Bambino's directors decided to reject Dr Gribkowsky's offer of help, but on 13 March 2006 Mr Mullens rang and said:

> "that Dr Gribkowsky had approached Mr Ecclestone at the Bahrain Grand Prix that weekend, that he had handed Mr Ecclestone a draft agreement for payment to him of $50 million and that he had told Mr Ecclestone that, in light of HMRC's investigation into him, the agreement would be in his interests."

Miss Flournoy continued:

> "From what Stephen [Mullens] told us, my understanding was that it was not what I think of as blackmail – 'Give me $50 million or I will ensure you get a billion dollar tax bill' – it was more subtle than that. It was a suggestion that Mr Ecclestone would not want Dr Gribkowsky to interfere in HMRC's investigation and so should help Dr Gribkowsky to set up his consultancy which would then act as Mr Ecclestone's financial consultant."

Miss Flournoy said in cross-examination that she was "a bit surprised and maybe a bit shocked" when she learned of the draft agreement Dr Gribkowsky was putting forward.

204. Miss Flournoy explained as follows in her witness statement:

> "I recall that Stephen [Mullens], who always seemed to be very relaxed and what I consider 'English' in his manner, was clearly very worried by Dr Gribkowsky's approach. This made us extremely worried as both Mr Mullens and Mr Ecclestone (and particularly Mr Mullens as a lawyer dealing with the tax investigation) were in a better position than us to know whether or not to be worried.
>
> We had no direct involvement in the tax investigation. All we knew was what Stephen told us about it. He had said that there was an investigator at the Revenue who was really going after Mr Ecclestone. If something was sent to the Revenue that indicated a link between the Trust(s) and Mr Ecclestone, then that could be enough to trigger the revenue to consider issuing a tax bill against Mr Ecclestone for, potentially, billions of dollars….
>
> Although we did not really know what Dr Gribkowsky was proposing to do, or even what he was threatening to do, it was clear to us that, regardless of whether he was in fact in a position to cause difficulties for Mr Ecclestone in the long run, given the sensitivity of his position and HMRC's interest in

> him as a public figure, it was not in the Trust's interests to have someone like Dr Gribkowsky raising questions about the trust's status….
>
> Given the potential impact we agreed that it would be better to play Dr Gribkowsky's game than run even the slightest risk that the Trust be destroyed. While $20 million is of course a huge amount of money, compared to the total assets of the Trusts and the potential impact of a tax bill being issued against Mr Ecclestone in respect of the Trusts' funds, $20 million was a *relatively* small price to pay. At that time it represented approximately two months' interest on the assets held by all the Trusts. It also had to be looked at in the context of the world of Formula 1 and, in that respect, it was less than 1% of the amount Bambino has received from the sales of its shareholding in SLEC."

205. Miss Flournoy said that on the first of the two occasions she met him, at the meeting at Munich Airport on 6 April 2005, Dr Gribkowsky had made a remark along the lines of "Ah, Bambino really does exist." She explained in cross-examination:

> "Mr Gribkowsky was making insinuations for a very long period of time without seemingly wanting anything in exchange. And then at some point, he simply said that he was going to be a consultant and he wanted to start up his consultancy and he would need some help; and he would very much want to be a consultant for Bambino. That is how I understood things were put. But … I never had a discussion with Mr Gribkowsky."

206. As regards the fact that it was First Bridge that entered into the agreement with GG Consulting, Miss Flournoy said that Mr Mullens had had "concerns about Dr Gribkowsky knowing too much about the structure of the Bambino Trust and the funding for it and the possibility of him using his knowledge of Bambino's involvement in this against Mr Ecclestone and/or the Trusts again". In cross-examination, Miss Flournoy referred to not wanting Dr Gribkowsky "to have his name on a document with Bambino and running all around the place with that saying he's a Bambino consultant".

207. Miss Flournoy added that, while Bambino "would not have entered into such an agreement without Dr Gribkowsky's intimations regarding the HMRC and certainly would not have paid anything like that amount of money for financial advice, the agreement was not an attempt to conceal the payments". She also observed that she "had no knowledge of the arrangements between Mr Ecclestone and Dr Gribkowsky but assumed that Mr Ecclestone would be making some form of payment as well". During her oral evidence, she said that she "didn't know what Mr Ecclestone was doing or not doing on his part"; Bambino's directors learned of the payments made on Mr Ecclestone's behalf only in January 2011. Asked about the meeting she and Mr

Argand had with Mr Ecclestone that month, she said that the Bambino directors "were a bit puzzled by the amounts that were shown in [press reports]" because "it was obvious that Bambino had never made payments in the amounts that were reported in the press".

208. Mrs Argand-Rey's witness statement contained evidence along the same lines.

Aspects of Dr Gribkowsky's account

Mr Ecclestone's attitude towards the Banks

209. As I have said, Mr Ecclestone was insistent that he did not mind who owned the Formula One group. Were that true, it would gravely undermine Dr Gribkowsky's evidence that Mr Ecclestone wanted to ensure that BLB's shares were sold to a buyer acceptable to him (Mr Ecclestone). There is, however, abundant evidence that Mr Ecclestone was not indifferent to the identity of the Formula One group's owners. I refer to some of this evidence in the paragraphs that follow.

210. At about the time that the Kirch group gained control of Speed and SLEC in 2001, a Miss Robin Saunders, who was then working for Westdeutsche Landesbank Girozentrale, wrote to Mr Ecclestone (as well as Mr Mullens) about the possibility of filing "an injunction against EMTV/Kirch … prohibiting Kirch's investment in Speed" and explaining that, if that did not work, "we have another poison pill idea". A month or so later, Miss Saunders wrote to Mr Ecclestone to say that she was "sincerely disappointed that the equity ownership [of the Formula One group] has reached the current position, despite all our efforts to have the equity placed with appropriate owners" and offered her "personal apology". It is most unlikely that she would have written in these terms if she had not understood from Mr Ecclestone that he was concerned about the ownership of the Formula One group.

211. On 29 October 2002, when the Banks were taking steps to gain control of the Formula One group, Mr Ecclestone seconded a proposal for FOA's articles to be amended to confirm that it could have no more than three directors. It was explained in his defence to the proceedings that FOH, Speed and SLEC brought in 2005 (as to which, see paragraph 37 above) that Mr Ecclestone voted in favour of the resolution to protect FOA from the "serious economic harm" which he believed could be caused by additional directors being appointed to FOA and using their powers to impose limits on his authority. The defence, which was verified by Mr Ecclestone, also referred to the prospect of "damage to the business of FOA if it were run (or there were a perception that it was so run) subject to the close control of directors who had no relevant experience in the business and whose only involvement in the business was a result of enforcing the Banks' security against Kirch with a view to the realisation of that security".

212. It was also in October 2002 that Bambino purported to appoint Mr Argand and his wife as directors of FOH. Mr Ecclestone was not a party to the ensuing litigation, but he provided a witness statement in support of Bambino. In any case, I find it hard to suppose that Bambino would have approached matters as it did without Mr Ecclestone's support.

213. When giving evidence to the German authorities, Mr Mullens said that by October 2002 "we had got to know the banks and could not stand them at all". (Mr Mullens said in cross-examination that he did not think that he would have used these words, but the record of his German evidence is likely to have captured at least the thrust of what he was saying.) He explained that:

> "We thought that it would be a catastrophe if the banks had too much say in the negotiations with the constructors."

214. Within a fortnight of Park J ruling that the Argands were not directors of FOH, Mr Ecclestone and Mr Mullens passed a resolution for a share in FOA to be issued to Mr Ecclestone. As mentioned above (paragraph 37), Mr Ecclestone explained in the proceedings that followed that the decision had been taken "to enable [him] to prevent the Banks (through FOH) from either appointing additional directors of FOA or removing [him] as a director or CEO of FOA" and that he was not prepared to accept limits on his authority such as he feared that the Banks wished to impose.

215. On 21 January 2005, Dr Hahn and Mr Kirch had lunch with Mr Ecclestone. On 25 February, Dr Hahn gave this account of what Mr Ecclestone had said:

> "BE [i.e. Mr Ecclestone] intimated that his tactic in the forthcoming trial of the action brought by the banks … will simply be to frustrate the banks. BE acknowledges that ultimately he will be unsuccessful. BE believes that he will be able to drag the dispute with the banks out for 1 to 2 years. If the banks' perception of the value of Formula 1 can be reduced during that period then they will eventually agree to sell their shares. It would be BE's intention to buy back Formula 1."

216. As mentioned above (paragraph 39), on 25 May 2005, by which point it had been accepted that the share in FOA issued to Mr Ecclestone should be treated as void and that Speed should have board representation proportionate to its shareholding in SLEC (see paragraph 38 above), Mr Ecclestone told Mr Krowarz and Mr Glöckl of BLB that he "felt threatened that he would be dismissed", "didn't want someone looking over his shoulder every half an hour, but wanted to largely retain his traditional way of working" and "was only able and willing to work with an addition who had been accepted by him".

217. Mr John Gregg of Bluewater gave evidence to the German authorities to the following effect about a meeting he had with Mr Ecclestone during the second quarter of 2005:

> "[Mr Ecclestone] told me that he was tired of working with the banks and that he did not need the banks to operate Formula 1…. He thought that the banks were holding back Formula 1 and would constitute another bureaucratic layer which he had to answer to. There was a lot of bad blood between him and the banks, they had even sued each other over the operation of Formula 1. When asked about his plans he said that he wanted to get rid of the banks and that he wanted to operate Formula 1 himself as before."

218. The truth, I think, is that Mr Ecclestone was most unhappy that the Banks (and specifically BLB) had shares in the Formula One group. Perhaps he would not have minded if he had believed them to be willing to leave him to run the group's affairs as he had in the past. That, however, was not his perception. He saw the Banks as a very real threat to his ability to manage the group as he wished.

The alleged May 2005 agreement

219. At the end of March 2005, Mr Glöckl prepared a submission to BLB's management board in which three "basic strategic options" were identified as regards the Formula One group: sale of BLB's shareholding; "Strategic alliance with Bambino / [Mr Ecclestone]"; and "Strategic alliance with contractors / teams". It was proposed that the board should decide on the third option. This, it was explained, would involve:

> "End of the BE [i.e. Mr Ecclestone] era (removal as CEO at FOA, FOM and removal from the boards of the future main companies FOAM and FOWC)".

The submission, which was counter-signed by Dr Gribkowsky, said as regards Mr Ecclestone:

> "BE headed up and continues to head up the predominantly non-transparent and unnecessarily complex [Formula One group] like 'a lord of the manor'. His business methods are not transparent and on occasion in a very grey area. BE makes it quite clear with his actions and active press work that this should also remain the case. An honest willingness to design the future with the teams with the participation of the banks cannot be identified."

220. At the beginning of April 2005, BLB's management board decided to look further into the following options:

i) "Sale of the stake subject to the fundamental proviso that serious buyers approach [BLB] who assume a liability exemption for [BLB] from old business and an appropriate price is achievable"; and

ii) "Commencement of discussions regarding a strategic alliance with the manufacturers/teams".

On 7 April, BLB's supervisory board:

> "unanimously agreed to the suggested course of action that after regaining control of the operative businesses of Formula 1 the basic strategy that will be followed is that of entering into a strategic alliance with the manufacturers/teams and implementing the associated measures accordingly. In parallel to this, the option 'Sale of the shareholding' will continue to be consistently pursued."

221. A letter Dr Gribkowsky sent to Mr Ecclestone on 1 June 2005 arguably evinces a more positive attitude towards Mr Ecclestone. Dr Gribkowsky said in the letter that ("if that is fine with you") he was planning to attend several races "to demonstrate unity and to support you as far as needed" and that he would be happy to introduce his wife to Mr Ecclestone. Dr Gribkowsky also said:

> "Once we have put the corporate governance issue to bed and agreed end of any litigation between Bambino and Speed we should go through potential names of truly independent non executive directors for our group as discussed in London."

222. Constantin suggests that the cordial tone of this letter is attributable to the fact that Mr Ecclestone had made his offer to "take care" of Dr Gribkowsky at a meeting in London in May 2005. It is pointed out that the letter indicates that Mr Ecclestone and Dr Gribkowsky had recently had discussions in London.

223. Any change of approach on the part of BLB between April and June of 2005 is also, however, capable of innocent explanation. On 19 April, representatives of BLB had had a disappointing meeting with a Dr Reul and a Mr Köfer on behalf of the manufacturers. Not only did there appear to be disunity among the manufacturers, but "the proposals communicated by Dr Reul and Mr Köfer with respect to the economic model" were unacceptable to BLB. Thereafter, in a memorandum of 13 May Mr Glöckl expressed this view:

> "at this point we must ask the question about the remaining viability of the aforementioned board resolution, and whether or not one would have to modify it in the foreseeable future (apart from the 'sale' option)."

224. Some of the other matters that Constantin says demonstrate a change of relations between Dr Gribkowsky and Mr Ecclestone after May 2005 also seem to me to provide no significant support for Dr Gribkowsky's evidence about an April/May conversation with Mr Ecclestone. Of more help, I think, to Constantin is evidence that

Mr Kühnel gave to the German authorities. He said that "around the middle of May 2005":

> "Dr Gribkowsky came to see me and told me that he would maybe have the opportunity to obtain an interesting consultancy contract. This activity, Dr Gribkowsky told me, would take place abroad. At that time a company founded by Dr Gribkowsky did not yet exist in any form. We talked about how one would be able to administer any money Gribkowsky might earn from these consultancy contracts in the most advantageous way from a tax point of view…. It was clear that it involved Formula 1. I think he had already mentioned Bernie Ecclestone. I do not know though when exactly he came across with this. This subject, Dr Gribkowsky told me in those exact words was so 'sexy' that he would have to handle it very discreetly. One would have to be very careful because of press interest in Formula 1, and therefore also in this matter."

Mr Kühnel also said:

> "There was a time where we were wondering what to do with incoming consultancy fees from a tax point of view. We followed a number of different trains of thought as to whether one should for example contact a consultancy firm in Ireland, Switzerland, Liechtenstein or Austria. The problem was that transaction tax law would have applied in Ireland. I even acquired two books on the subject…. In the end Dr Gribkowsky decided to do it in Austria."

In similar vein, Mr Kühnel said:

> "I first suggested the idea of Ireland to him. He did not want to do this though. I then mentioned Malta, which he did not want to do either, as it was too far away for him. In the end he decided in favour of Austria. This took quite a few months."

Asked what kind of fees Dr Gribkowsky was expecting, Mr Kühnel said:

> "Dr Gribkowsky explained at the time of founding the company that the total could lie between 500,000.00 and 50 million Euros."

225. While I must of course bear in mind that the defendants have had no opportunity to cross-examine him, the evidence from Mr Kühnel tends to confirm that by "around the middle of May 2005", and "quite a few months" before steps were taken to set up GG Consulting in Austria on 2 November, Dr Gribkowsky believed there to be a prospect of his receiving consultancy fees from something related to Formula One. During his oral evidence, Mr Ecclestone suggested that Dr Gribkowsky might have

had in mind a deal with the manufacturers, but there is no evidence that there was any question of Dr Gribkowsky entering into a consultancy contract with any manufacturer.

The November Draft Agreement

226. Dr Gribkowsky's evidence about the November Draft Agreement and its origins fits with my finding that the document was drafted at least in part by Mr Mullens (see paragraph 80 above) and with the fact that GG Consulting was set up on 2 November 2005. Further, Dr Gribkowsky's reference to a possible fee of between $500,000 and $50 million is consistent with evidence given by Mr Kühnel, except that Mr Kühnel spoke of between 500,000 and 50 million *euros*.

227. As I have said (paragraph 184 above), Mr Ecclestone denied having been involved in matters relating to the FEB and Bambino Loans and said that he was not aware of the November Draft Agreement or any suggestion that Dr Gribkowsky should be an advisor in relation to the FEB and Bambino Loans. As, however, I have also said (paragraphs 70, 82 and 83 above), Mr Ecclestone told Dr Hahn in late October 2005 that Bambino would be interested in buying Kamos' rights to the FEB Loan, and he also spoke to Dr Hahn about the loan on 28 November and twice in early 2006. Moreover, Mr Mullens said that he thought that Dr Gribkowsky had been referred to him by Mr Ecclestone and that he had understood from Mrs Ecclestone that her husband was being pressurised by Dr Gribkowsky and would like Bambino to be benevolent towards him. In contrast, Mr Ecclestone said that he had not talked to his wife about threats or insinuations from Dr Gribkowsky.

228. Mr Mullens' evidence differs from that of Miss Flournoy and Mrs Argand-Rey as well as Mr Ecclestone's. Mr Mullens said that he thought that he had contacted Bambino after having Dr Gribkowsky referred to him. However, Miss Flournoy and Mrs Argand-Rey each said that Bambino's directors had no knowledge of any proposal to enter into an arrangement with Dr Gribkowsky until January 2006 and, when they had considered the idea, rejected it.

229. I have explained earlier my reasons for concluding that, contrary to Mr Mullens' evidence, he drafted all or part of the November Draft Agreement. Both the November Draft Agreement and the conversations about the FEB Loan that Mr Mullens is recorded as having had with Dr Gribkowsky on 16 and 24 November 2005 (see paragraph 81 above) strike me as improper regardless of whether they reflected an earlier offer by Mr Ecclestone to "take care" of Dr Gribkowsky. Since BLB was a creditor of FEB, it was in its interests that FEB's administrator, Dr Jaffé, should realise as much as possible from the loan it had made to SLEC. Its interests thus conflicted with those of Bambino, whose profits from the "Keep Well Agreement" arrangement depended on its settling with Kamos and Dr Jaffé for as little as possible. That did not prevent Mr Mullens from asking Dr Gribkowsky, an officer of BLB, about the Banks' thinking in relation to the loan and what Dr Jaffé might be offered by way of settlement.

January 2006

230. According to Dr Gribkowsky, he spoke to Mr Mullens about the November Draft Agreement in early 2006. That chimes to an extent with the evidence given by Miss Flournoy and Mrs Argand-Rey that they first heard of a possibility of Bambino entering into an arrangement with Dr Gribkowsky when Mr Mullens visited Geneva in January 2006 following the execution of the agreement with CVC. This account accords with evidence Mr Mullens gave to the German authorities, but he also spoke of a conversation about Dr Gribkowsky with Mr Ecclestone a day or two earlier. No reference to such a conversation is, however, to be found in Mr Ecclestone's evidence.

The Bahrain Grand Prix

231. It is common ground that Dr Gribkowsky gave Mr Ecclestone an envelope containing the draft advisory agreement he had prepared in February 2006 at the Bahrain Grand Prix in the following month. In cross-examination, Mr Ecclestone denied having had any idea as to what was in the envelope, which, he said, was addressed to Mr Mullens. I have to say that I find that evidence implausible.

232. It can be seen from the documents that, as Dr Gribkowsky said, the draft agreement handed over at the Bahrain Grand Prix was based in part on the November Draft Agreement. For example, clauses 7 and 10 of the February draft correspond closely to clauses 5 and 9 of the November version (including as to the omission of "of" between "inclusive" and "all charges" and the insertion of "the" between "in accordance with" and "English law"). The February document is not, however, tied to the FEB and Bambino Loans to the same extent as the November one. I agree with Constantin that a possible explanation for the change is that the prospects of Bambino making a substantial profit from the "Keep Well Agreement" arrangements had markedly deteriorated (see paragraphs 82-84 above).

The Rib Room dinner

233. There is no dispute that there was discussion at the Rib Room dinner as to what Dr Gribkowsky was to be paid. Mr Ecclestone, like Dr Gribkowsky, said that it was agreed that Dr Gribkowsky should be paid $45 million and that Mr Mullens would deal with the contractual arrangements. For his part, Mr Mullens maintained that he had found it "difficult … to follow the detail of the conversation", that he did not know how much money Dr Gribkowsky was looking for from Mr Ecclestone and that he had no knowledge of the arrangements later put in place with Lewington. This evidence does not sit comfortably with either Dr Gribkowsky's or Mr Ecclestone's, and it strains credulity. If, as Dr Gribkowsky and Mr Ecclestone have said, it was agreed at the dinner that Dr Gribkowsky should receive a total of $45 million, Mr Mullens is likely to have heard that. There were only three people at the table, and Mr Mullens would surely have wanted to know what, if anything, Mr Ecclestone would be paying. It is also noteworthy that, when Dr Gribkowsky wrote on 16 June 2006 to

chase for "relevant documents" given that it was his understanding that the "[agreed] terms included a starting date of June 1st", the letter was addressed to both Mr Ecclestone and Mr Mullens and referred to "our" conversation in London on 10 May at which "we" discussed "some arrangements to be made".

Coherence

234. Mr Miles drew attention to variations between the account Dr Gribkowsky gave to the German court on 21 June 2012 and evidence he later gave to the German authorities. "This man," Mr Miles said, "is making it up." While, however, it is possible to identify potential inconsistencies or ambiguities, it seems to me that a reasonably coherent version of events emerges from the totality of Dr Gribkowsky's evidence.

Other matters bearing on the bribery allegation

235. Various other matters were put forward in submissions as indicating that the Payments were, or were not, bribes. I shall refer to some of them.

Other bribery allegations

236. There are to be found in the documents references to other occasions when Mr Ecclestone is said to have offered bribes. In December 2004, Dr Gribkowsky told the Munich police that at the French Grand Prix in July 2004 Mr Ecclestone had offered him €10 million in an attempt "to influence his opinion in this matter". Dr Gribkowsky repeated this allegation in evidence he gave in Germany in 2012, except that he gave the amount he was offered as $10 million rather than €10 million.

237. Mr Glöckl gave evidence to the German authorities that Dr Gribkowsky had once told him that "Ecclestone had offered him a suitcase of money with $20 million for Gribkowsky to 'decide in his favor'". In similar vein, Mr Krowarz said this when asked whether Dr Gribkowsky had mentioned being offered a bribe by Mr Ecclestone:

> "I remember a time when we were on a trip with Mr Gribkowsky…. This was during the time when the legal disputes were ongoing and therefore it must have been in 2004. I think we were in London. Mr Glöckl asked Mr Gribkowsky whether there was not a degree of personal temptation involved in a business that was worth so much money. Mr Gribkowsky replied 'of course', and that he had once seen a suitcase containing 20 million Dollars lying on a table in Bernie Ecclestone's mobile home in Melbourne …. According to Gribkowsky he did not accept the money, but notified the incident to compliance."

238. In his evidence to the German authorities, Mr Glöckl also observed that Mr Ecclestone is someone who, in his business dealings, puts "sausages in front of your nose". When pressed as to what he meant by this, he stated that Mr Ecclestone "had given him the hope that he would 'come out well'".

239. The defendants derided such claims. Among other things, it was suggested that $20 million could never have been fitted into a suitcase. It was pointed out, too, that BLB could find no trace of Dr Gribkowsky having informed compliance of such an incident.

240. It is also, of course, important to note that Dr Gribkowsky, Mr Glöckl and Mr Krowarz did not give evidence in the present proceedings. The defendants have therefore had no opportunity to test their claims.

241. In all the circumstances, I do not think I would be justified in attaching any substantial weight to the claims.

The Team Trust Proposal

242. In late June 2005, Mr Ecclestone and Mr Llowarch had a meeting with Credit Suisse First Boston to discuss a proposal ("the Team Trust Proposal") under which a company owned by a trust for the teams would have acquired the shares in SLEC (which would already have purchased APM/Allsport). Following the meeting, Mr Llowarch circulated a document reflecting the proposal to, among others, BLB, which expressed interest in the idea and asked Mr Ecclestone "to transform the idea into a more detailed proposal that addresses all the structural issues sufficiently". The idea was, however, abandoned after a letter dated 30 July was received from some of the teams and manufacturers in which they stated that they were not interested in acquiring any equity in SLEC.

243. Mr David Blayney QC, who, led by Mr Philip Marshall QC, appeared with Mr James Mather and Miss Emma Hargreaves for Constantin, suggested that Mr Ecclestone might have found the Team Trust Proposal attractive because he "obtained a shareholder structure that was essentially impotent and in perpetuity". In contrast, Mr Miles argued that the proposal was hard to square with the bribe theory. My own feeling is that the proposal provides no real guidance as to whether or not the Payments represented a bribe.

6 September 2005 meeting

244. There was a meeting of BLB's management board on 6 September 2005. Although Dr Gribkowsky (a) had already met Mr Mackenzie by this stage and (b) referred at the meeting to rumours in the media about a potential offer from a division of Hutchison Whampoa, he does not appear to have mentioned the possibility of an offer from

CVC. In fact, notes made by one of the attendees can be read as indicating that Dr Gribkowsky spoke in terms of BLB selling its shares only after an extension to the Concorde Agreement had been agreed. Mr Miles suggested that Dr Gribkowsky would have been unlikely to say this had he agreed to support a sale to a buyer of Mr Ecclestone's choosing. On the other hand, it is not clear from the notes who (if anyone) made the remark on which Mr Miles relies, there is no reference to this point in the minutes of the meeting, and the note-taker seems to have told the German authorities that he could not remember anything about the meeting. Perhaps anything Dr Gribkowsky did say was in some way linked (like, perhaps, his failure to mention CVC) to his hopes of persuading BLB that he should receive a "special premium" in the event of BLB's stake in Formula One being sold (see paragraph 50 above).

Dr Gribkowsky's continuing role

245. Dr Gribkowsky continued to be involved with Formula One even after BLB, for which he worked, had sold its shares to CVC. CVC's revised offer of 19 September 2005 expressed the wish that Dr Gribkowsky should remain a director of SLEC, and he was subsequently appointed to the board of Alpha Topco.

246. It was suggested that these arrangements pointed towards the existence of a corrupt agreement. However, Mr Mackenzie explained CVC's thinking in these terms:

> "[Dr Gribkowsky] said to us that he had been involved – closely involved with the negotiations on the Concorde agreement and he was close to the German teams. And that he would be a good point of continuity … if these discussions were to continue. We felt, on reflection, that that could be true. But we also felt that we wouldn't want him outside, if you like, outside of our group working, potentially, for the break away teams or the German teams advising them on what Formula One group had considered agreeing to, including the commercial terms. So we thought it would be better to keep him inside with the confidentiality that would come as being a director. But we saw him only as a non-executive director. And we disclosed that, obviously, to BLB, so that there was no conflict of interest."

247. In the light of this evidence, which I accept, I do not think Dr Gribkowsky's continuing role in Formula One casts any light on why the Payments were made.

The exclusion of Mr Powers

248. Although he was a director of Bambino until December 2005 (as well as an officer of Hellman & Friedman), Mr Powers was not informed of CVC's interest in buying its shares in SLEC. During cross-examination, Miss Flournoy explained this on the following basis:

> "[W]e didn't think it appropriate to have a board and mention the CVC offer when, effectively, the CVC offer was submitted to confidentiality. And specifically one of the issues was that it wouldn't be given to a competitor. So we would have been immediately in breach of that just by the mere fact of telling Mr Powers that there was an offer and what the level of that offer was."

For his part, Mr Mackenzie said that he "would have considered it a serious breach of our confidentiality and exclusivity agreement if Hellman & Friedman had been given details after we had signed that exclusivity agreement". In the circumstances, I do not think I can draw any inference adverse to the defendants from the fact that Mr Powers was not told of CVC's offers.

Mr Ecclestone's commission

249. Mr Marshall argued that the agreement providing for Mr Ecclestone to be paid a commission in relation to the sale to CVC is explicable only as part of the corrupt arrangement it alleges. I do not agree. I can well understand why, when he learned of the arrangement in 2011, Mr Mackenzie was unhappy that it had not been disclosed to CVC, but I do not think the existence of the arrangement provides any real support for the bribery allegation. Dr Gribkowsky himself gave evidence to the effect that there was "no direct link" between the contract relating to Mr Ecclestone's commission and the November Draft Agreement; they "coincided timewise," he said, "due to the fact that by this time the sale was at the final stage and Mr Mullens wanted to fix all the issues that were still outstanding". In short, I do not exclude the possibility that the commission was paid *as a result of* any corrupt agreement, but I do not think that its payment provides *evidence* of such an agreement.

The Team Payments

250. Mr Marshall argued that the fact that Bambino was paid $25 million in respect of the $40 million Team Payments indicated bribery. Again, I disagree. Bambino had long maintained that it was owed $40 million, the August 2005 settlement agreement provided for the money to be reimbursed on appropriate proof being provided, and it made sense that the issue should be dealt with before the sale to CVC was completed. As to this, Miss Flournoy said:

> "Effectively, we wanted this situation to be solved. We had been paying 40 million to the team for an obligation that had been entered into by SLEC. And we felt that we therefore had a claim for this amount, which we had been asking for reimbursement or settlement for a long time already, even though there was maybe no money for the reimbursement to occur. So we did want this situation to be solved before we sold our 25 per cent.

> In addition to that, CVC had clearly expressed, in their offer, that they were only going to buy at that price if all the debts of SLEC had been paid. And, therefore, as this was an outstanding debt, it was an issue that had to be solved anyway, one way or another."

Motivation in 2005

251. Mr Miles argued that Mr Ecclestone had no reason to bribe Dr Gribkowsky to facilitate a sale of BLB's shares since (a) Mr Ecclestone thought that BLB already wanted to sell its shares and (b) he had more control over Formula One with the Banks as owners than he was likely to have with a new owner. In support of this submission, Mr Miles referred, among other things, to Mr Ecclestone's understanding that the FIA wanted him to remain as the "Representative" (within the meaning given to that term in the "Commercial Agreement" concluded between the FIA and FOA on 9 September 2002), to the fact that the 25 August 2005 settlement agreement allowed Bambino to veto his removal as chief executive officer and to the limits on his job security under the arrangements put in place after the sale to CVC. In the light, however, of matters such as those mentioned in paragraphs 209-218 above, Constantin can, I think, credibly argue that Mr Ecclestone was keen that the Banks should sell their shares and that he saw CVC as a more congenial owner.

Timing

252. The defendants stress that Dr Gribkowsky was not paid anything (and, on Dr Gribkowsky's account, the amount he was to receive was not settled) until after the sale to CVC had been completed. Mr Miles suggested that I should ask myself the question, "Why would Mr Ecclestone have agreed at that stage to pay Dr Gribkowsky these substantial sums of money?" Since Mr Ecclestone would already have achieved what he is alleged to have wanted, he would (so it was argued) have been unlikely to accept that Dr Gribkowsky should receive the $45 million agreed at the Rib Room dinner.

253. On the other hand, common sense suggests that either briber or bribed will often have to take a risk where a bribe is to be paid; it may not be possible for payment of the bribe and performance of the service for which it is paid to happen simultaneously. It is also conceivable that Mr Ecclestone knew Dr Gribkowsky to be in a position to make mischief (for example, with the November Draft Agreement) if he was not paid. A further possibility is simply that Dr Gribkowsky believed he could trust Mr Ecclestone to fulfil his promises. It is noteworthy that Mr Glöckl expressed this view to the German authorities:

> "Ecclestone was someone with whom a handshake agreement was valid. If he promised something, he also abided by that promise."

254. On balance, it seems to me that matters of timing favour Constantin rather than the defendants. The agreement Mr Ecclestone is alleged to have reached with Dr Gribkowsky (in April/May 2005) would have been made soon after Mr Ecclestone had accepted defeat in his litigation with the Banks. The November Draft Agreement was sent just before the preliminary agreement for the sale to CVC was concluded (on 8 November). There was, according to Dr Gribkowsky (and also Mr Mullens), further discussion of what Dr Gribkowsky was to be paid immediately after the formal share sale agreement had been entered into (on 9 January 2006). The Rib Room meal (on 10 May) happened not that long after the sale to CVC had been completed (on 24 March).

Dr Gribkowsky's confession

255. Mr Marshall maintained that Dr Gribkowsky would not have been likely to admit to having received a bribe if he had not in fact done so. The defendants suggest that he did so in the hope of minimising his sentence. It was, Mr Miles argued, too late for Dr Gribkowsky to have changed tack and said that he had obtained the Payments by blackmail. A late change of case to an admission of blackmail could, it was suggested, only have the consequences of (a) running a substantial risk of not being believed at all (because the change might have looked late and opportunistic) and/or (b) Dr Gribkowsky facing a custodial sentence anyway, and with a good chance of it being longer than was offered by way of plea bargain.

256. For my part, I do not find this attempt to explain away Dr Gribkowsky's confession all that compelling. Apart from anything else, it is by no means clear that Dr Gribkowsky would have been guilty of blackmail on the defendants' case. Both Mr Ecclestone and Mr Mullens eschewed the word "blackmail", referring instead to "insinuations". Miss Flournoy spoke of Dr Gribkowsky having "used an opportunity to obtain arrangements in a strange kind of way".

Blackmail (or "shakedown")

257. The defendants contend that the Payments were made because Mr Ecclestone was being "shaken down" by Dr Gribkowsky.

258. A variety of matters can be said to cast doubt on this claim:

i) Neither Mr Ecclestone nor Mr Mullens identified any specific threat from Dr Gribkowsky. Each instead referred to "insinuations". When giving evidence in Germany, Mr Ecclestone said that Dr Gribkowsky "never specifically stated or threatened that any given event would take place" and that there was no threat along the lines of "Either you pay or I go the tax office." In the present proceedings, Mr Ecclestone explained in cross-examination that Dr Gribkowsky never said what he would tell HMRC and accepted that Dr

Gribkowsky did not give any details of how he would substantiate any claim that Mr Ecclestone was to be identified with the Bambino Trust;

ii) The evidence indicates that Dr Gribkowsky is unlikely to have been in a position to give HMRC information that could cause Mr Ecclestone or Bambino any serious difficulties. Neither Mr Ecclestone nor Mr Mullens has identified any such information. More than that, questions relating to Mr Ecclestone's involvement with the Bambino Trust had been raised before, including by BLB. When giving evidence in Germany, Mr Ecclestone said that he had been aware that BLB's lawyers had been trying to make a connection between him and Bambino for the purposes of the litigation about the boards of FOH and FOA and the share in FOA issued to Mr Ecclestone. Had Dr Gribkowsky known anything showing such a connection, it would surely have been deployed in that litigation;

iii) In November 2005, solicitors acting for Linklaters sought Mr Ecclestone's assistance in connection with proceedings that had been brought by the Williams and McLaren teams. On 23 November, the solicitors sent Miss Woodward Hill an email in which they thanked her and Mr Ecclestone for meeting them the previous day and went on:

> "Mr Ecclestone kindly provided me with some contact details for Mr Gribkowsky and I have now spoken to him and he is happy to provide a statement confirming Mr Ecclestone's evidence – that he has no control or influence over the trust and, to the contrary, that Mr Ecclestone has often had a differing position to that of the Trust."

Five days later, Mr Ecclestone and Dr Gribkowsky each made a witness statement for the purpose of the Linklaters proceedings. Dr Gribkowsky's included this:

> "I have been told … that allegations have been made that Mr Ecclestone controls or controlled SLEC. I also understand it is alleged by the Claimants that any appearance of a separation between Mr Ecclestone and the Ecclestone Family Trust (which holds shares in a company which is a shareholder in SLEC) and/or SLEC itself is a charade. I have had involvement and dealing with Mr Ecclestone and SLEC over the past 3 years. I can say from my own experience and knowledge that I have never seen any sign or indication that Mr Ecclestone exerts any control or influence or has attempted to exert any control over SLEC or any of the shareholders in SLEC or the Trustees of the Ecclestone Family Trust. In particular, I can confirm that during my three years' involvement in the affairs of SLEC, I have never known Mr Ecclestone to attempt to control or influence SLEC, and indeed can confirm that he does not in fact have any influence or control over SLEC. I have never

known Mr Ecclestone to attempt to influence the conduct, the action or the decision-making process of SLEC."

When asked about this witness statement in cross-examination, Mr Ecclestone denied having known anything about the document. This strikes me as improbable. However, the matters referred to in this sub-paragraph tend to undermine the "shakedown" claim (and to support the bribe allegations) even if Mr Ecclestone was not aware of Dr Gribkowsky's witness statement. In the first place, it is, I think, unlikely that Mr Ecclestone would have provided Dr Gribkowsky's contact details if Dr Gribkowsky had been making the alleged "insinuations" at this stage. It is, moreover, difficult to see that he would have done so unless he knew that (a) he had already arrived at a corrupt agreement with Dr Gribkowsky as Constantin alleges or (b) Dr Gribkowsky did not have any embarrassing information. Further, I find it hard to imagine that Dr Gribkowsky would have felt himself to be in a position to make "insinuations" once he had stated unequivocally in a witness statement that he had never seen any sign of Mr Ecclestone controlling or influencing the family trust;

iv) Not only were Dr Gribkowsky's alleged "insinuations" not reported to the police, but the defendants do not appear to have spoken to anyone but themselves about them. In the course of cross-examination, Mr Ecclestone initially suggested that he had spoken to a Mr Datoo of Blinkhorn Lyons, but he retreated from that claim. At one point, he raised the possibility that he had asked Mr Malek QC about the problem; when giving evidence in Germany, he had similarly referred to discussing the matter with a "very highly regarded Queen's Counsel". In the end, however, Mr Ecclestone said that he did not think he had spoken to Mr Malek. His final position was that he had gone to an in-house accountant called "Makesh" for an informal view, but he had not mentioned "Makesh" when asked in the German proceedings about whether he had spoken to anyone about his concerns, and I do not accept that he consulted "Makesh". On that basis, Mr Ecclestone will, on his case, have decided that as much as $45 million should be paid in response to mere "insinuations" without consulting (or even telling) anyone other than Mr Mullens. I find it particularly striking that Miss Woodward Hill knew nothing of the payments until 2011;

v) The accounts given by the defendants do not wholly tally. I have noted inconsistencies in paragraphs 209-234 above.

259. Mr Marshall attached a good deal of weight to the untruthful explanations that Mr Ecclestone was said to have given at the beginning of 2011. For my part, I accept that Mr Ecclestone was not truthful in all that he said at this stage. In particular, he was evidently far from frank with Delta Topco's board on 13 January, and I (like Mr Mackenzie) cannot see that Mr Ecclestone will have "forgotten" the payments to Dr Gribkowsky, as he told Mr Mackenzie on 2 February. I do not think, however, that such matters are of much assistance when assessing whether the payments were made by way of bribe or as a result of a shakedown. Mr Ecclestone might have wished to conceal the payments even if they had been made on the latter basis rather than the

former. In cross-examination, Mr Ecclestone said that the last thing he had wanted to do was ring bells with HMRC.

260. Constantin referred to the evidence that Mr Ecclestone shredded Professor Toifl's letter complaining of underpayment (see paragraphs 136-138 above). I find the explanation Mr Ecclestone gave for this (paragraph 138 above) unconvincing. A linked point is that I find it hard to accept Mr Ecclestone's evidence that he told Mr Favre that Dr Gribkowsky did not want his (Mr Ecclestone's) name to appear (rather than it being the case that, as Mr Favre has said, Mr Ecclestone "did not want his [Mr Ecclestone's] name to appear in any circumstances") and that Mr Ecclestone suggested that Dr Gribkowsky should simply take a cheque or bank transfer. The chances are, I think, that it was Mr Ecclestone who did not want his name to be linked to the payments for the benefit of Dr Gribkowsky. I doubt, however, whether that is of much help on the question of whether the payments were made by way of bribery or as a result of a shakedown.

261. I need, I think, to address specifically the evidence given by Miss Flournoy. As I have mentioned, her position was that Bambino's directors decided that GG Consulting should be paid in the light of Dr Gribkowsky's "intimations regarding the HMRC", of which they had learned from Mr Mullens. The defendants suggest that I should accept this evidence. Constantin, on the other hand, contends that I should reject it. In fact, it maintains that Miss Flournoy was a "thoroughly dishonest witness" who had been complicit not only in a fraudulent conspiracy but the fabrication of certain documents.

262. One such document is a memo dated 5 August 2004 in which there is reference to Bambino having received "a proposal from BLB to acquire their participation (49%) in SLEC for US$ 350'000'000". When asked about this document in cross-examination, Miss Flournoy said that she "sometimes made notes of things that would become or possibly become the basis or the beginning of the basis of a board minute" and that "[t]his note apparently never became a board minute for some reason". Although Constantin had not previously challenged the authenticity of the document, it was put to Miss Flournoy that it had been manufactured quite recently. Miss Flournoy denied the suggestion, and Bambino's solicitors subsequently provided metadata said to show that the document had been created on 9 August 2004. Constantin complains that it has not itself had an opportunity to examine the document on the computer used by Miss Flournoy and points to oddities in it. However, the oddities (such as they are) cut both ways: had the document been fabricated by someone as sophisticated as Miss Flournoy, she might have been expected to produce something that fitted perfectly with the other evidence. In all the circumstances, I am quite unable to accept that the memo has been fabricated.

263. Constantin also took issue with the authenticity of a letter from First Bridge to GG Consulting dated 7 November 2006 which contains a sentence in these terms:

> "We continue to be very interested in the Health Care project that we have been discussing with you and hope that it will be possible to take it to the next stage in a very near future."

It was suggested to Miss Flournoy in cross-examination that this document had been created much later. On the face of it, however, an email string confirms that Mrs Argand-Rey emailed a draft of the letter to First Island Trust Company on 7 November 2006. While it might theoretically have been possible to fabricate the email material, doing so would have been an elaborate exercise, and there is no good reason to believe that it was undertaken. I am satisfied that, as the email evidence indicates, the letter bearing the date 7 November 2006 existed in draft by that date. I reject any suggestion that the letter was a later invention.

264. If, contrary to Constantin's case, Miss Flournoy is to be regarded as an honest witness, the idea that money should be paid to Dr Gribkowsky (or entities associated with him) because of "intimations regarding the HMRC" must have been current by the spring of 2006. I do not think it necessarily follows, however, that Mr Ecclestone was "shaken down" as he claims. One possibility is that Bambino's directors were not told the real reason why Mr Ecclestone wanted money to be paid to Dr Gribkowsky. The idea seems the more plausible given that the evidence indicates that there were other matters of which Bambino's directors were not told. In particular:

i) According to Miss Flournoy and Mrs Argand-Rey, they were unaware of any question of Bambino entering into an agreement with Dr Gribkowsky until January 2006. Even though it provided for the payment of a fee by Bambino, Miss Flournoy and Mrs Argand-Rey were not, it would seem, told of the November Draft Agreement, which (as I have found) Mr Mullens drafted at least in part and which he faxed to Dr Gribkowsky on 4 November 2005; and

ii) The evidence given by Miss Flournoy and Mrs Argand-Rey suggests that they were unaware until March 2006 of any idea that money should be paid to Dr Gribkowsky for any reason other than the fact that he might be able to assist with the FEB Loan. However, some of Mr Mullens' evidence (as well as that of Dr Gribkowsky) indicates that it was being proposed earlier than this that Dr Gribkowsky should be paid for other reasons. Mr Mullens referred to Mr Ecclestone telling him in January that Dr Gribkowsky "was looking to receive a payment so as not to interfere in the tax investigation"; and

iii) Miss Flournoy's evidence suggests that Mr Mullens never told Bambino's directors what Mr Ecclestone was paying Dr Gribkowsky even though he (Mr Mullens) is, I think, likely to have been aware of this (see paragraph 233 above).

265. Mr Smith stressed that Constantin's pleaded case is that Mr Ecclestone, Mr Mullens and Bambino all colluded with Dr Gribkowsky. If I concluded that any one of these had not been involved in a conspiracy, the claim, he argued, must fail. It is not, he submitted, open to Constantin to depart in any way from the case it has pleaded. More particularly, it would be unfair to consider whether there could have been a conspiracy involving Mr Ecclestone, Mr Mullens and Dr Gribkowsky, but not

Bambino, since, had that been part of Constantin's pleaded case, there would have been a more intense focus on communications between Mr Mullens and Bambino.

266. On balance, I do not accept this submission. The allegation that Mr Ecclestone, Mr Mullens and Bambino colluded with Dr Gribkowsky can, I think, fairly be taken to encompass an allegation that Mr Ecclestone and Mr Mullens did so. Further, there can be no question of Mr Mullens having wished to challenge Miss Flournoy's (and Mrs Argand-Rey's) evidence that they were told by Mr Mullens of insinuations emanating from Dr Gribkowsky; he gave evidence himself to similar effect. Whether Bambino was given the real reason why Mr Ecclestone wanted Dr Gribkowsky to be paid turns, not on what was said to Bambino, but on what Mr Mullens believed the reason for the payment was, something that the Bambino witnesses could take no further and which was explored with Mr Mullens. Miss Flournoy could, I suppose, have been asked about her evidence in relation to the matters mentioned in paragraph 264(i)-(iii) above, but that evidence was, as it seems to me, of relevance to Constantin's case even if understood in the narrow way for which Mr Smith contended yet went unchallenged.

Selling at an undervalue

267. It is Constantin's case that the defendants knew that the market value of the BLB shares was higher than the price at which they were sold to BLB or, failing that, that the defendants knew that there was a risk that the shares would be sold for less than their market value because BLB would not take the steps to verify the price that it would have taken but for Mr Ecclestone's alleged agreement with Dr Gribkowsky. The points that Mr Marshall put forward in support of this allegation included these:

i) The evidence as to the origin of the $2 billion figure Mr Ecclestone gave Mr Mackenzie is unsatisfactory. Mr Ecclestone suggested in cross-examination that the figure came from Dr Gribkowsky, but Dr Gribkowsky's evidence indicates that Mr Ecclestone was the source of the figure;

ii) Mr Ecclestone would have proposed a price comfortably below the maximum that he thought that CVC would be willing to pay in order to ensure that it bought as he wished. The very fact that Mr Ecclestone was proposing to pay a large bribe to Dr Gribkowsky to bring about the sale to CVC leads to the inference that he did not think the proposed price would otherwise have been attractive to Dr Gribkowsky;

iii) The defendants all knew that transactions involving SLEC shares between 1997 and 2001 implied that the Formula One group was worth substantially more than $2 billion;

iv) FOA's 2003 accounts, which Mr Ecclestone and Mr Mullens approved as directors in June 2005, proceeded on the basis that the Formula One business

was worth $3.4 billion. That figure, moreover, was largely accounted for by goodwill, and Mr Ecclestone signed a letter to FOA's auditors confirming, among other things, that the company's directors had concluded that there had been no impairment in the carrying value of goodwill as at 31 December 2003;

v) Mr Ecclestone will have known that the prospects of renewing the Concorde Agreement were better than they were generally perceived to be;

vi) In January 2005, Mr Ecclestone spoke in terms of trying to reduce the Banks' perception of the value of their shares (see paragraph 215 above);

vii) Mr Ecclestone would have been willing to sacrifice the interests of Bambino in order to secure a sale to a congenial owner;

viii) No proper steps were taken to discover the true value of the Bambino shares; and

ix) Mr Powers' exclusion from the sale process is indicative of the fact that Bambino's other directors knew that its shares were being sold at an undervalue.

268. On the other hand:

i) Dr Gribkowsky nowhere said in his evidence that his agreement with Mr Ecclestone involved selling BLB's shares at an undervalue. According to Dr Gribkowsky, "money was not talked about" in the May 2005 conversation, he told Mr Mackenzie that "a good price would be the decisive issue" in terms of BLB's willingness to sell its shares, and he later negotiated with Mr Mackenzie over the price;

ii) Mr Mackenzie explained in cross-examination and his evidence to the German authorities that Mr Ecclestone and Dr Gribkowsky had told him that there were other people interested in buying the Formula One shares. Their aim was doubtless to obtain the best price possible;

iii) BLB and Bambino sold their shares at the same price per share. That means that, if BLB's shares were sold for less than their true value, so were Bambino's. It is inherently unlikely that the defendants intended that. Since Bambino was owned by a trust for Mr Ecclestone's family, he would knowingly have been acting to the prejudice of his family. Further, Bambino's directors would have been acting in blatant disregard of their duties as directors. Were BLB's shares to have been sold for, say, more than $1.6 billion

too little (as some of Constantin's submissions suggested), Bambino would have lost more than $800 million;

iv) Constantin sought to show that Bambino obtained much more than just the price of its shares from the sale to CVC. It pointed out that Bambino received $8.6 million from the profit-sharing arrangement mentioned in paragraph 62 above, $25 million in respect of the Team Payments, a substantial profit on its reinvestment in Alpha Topco and a considerable amount of interest on the money it was paid as a result of the "Keep Well Agreement". It was further suggested (with reason) that Bambino would originally have hoped to achieve a much larger profit by means of the "Keep Well Agreement". However, BLB received as much as Bambino from the profit-sharing arrangement. Moreover, since the payments to both BLB and Bambino depended on JP Morgan and Lehman being prepared to sell at a lower price per share, the defendants might have been expected to doubt whether Bambino would obtain anything under the arrangement if it was thought that the price at which BLB and Bambino were selling was an undervalue. With regard to the Team Payments, Bambino had paid $40 million and long claimed to be entitled to repayment (see paragraph 32 above). As for reinvestment, BLB also had the chance to reinvest, but chose not to take it, and the evidence indicates that this was a decision taken against Dr Gribkowsky's wishes rather than because of them. Further, the "Keep Well Agreement" was not proposed until the beginning of November 2005, long after the price at which CVC was to buy had effectively been settled;

v) The transactions involving SLEC shares between 1997 and 2001 were all at least four years in the past by the time the sale to CVC was under consideration. In the intervening years, no one had offered as much as CVC for BLB's shares, even though BLB was known to have acquired the shares as a result of having been a secured creditor and so could be expected to be interested in selling them. Such offers as had been made for the shares had all implied lower valuations for the Formula One group. In June 2004, Clearbrook Capital Partners LLP ("Clearbrook") expressed interest in acquiring BLB's shares for $600 million, to be made up of $400 million cash and either (a) a $200 million subordinated loan or (b) an earn-out mechanism under which BLB would receive 25% of the profit on a resale. In September 2004, Clearbrook said that it was willing to pay $350 million or to agree a profit-sharing arrangement. In April 2005, Bluewater made an offer of $500 million in cash for the shares, and in June 2005 Clearbrook put forward a similar proposal. The Team Trust Proposal under consideration in June and July of 2005 assumed that the Formula One group was worth $1 billion, implying a value of $467 million for BLB's shares. In October 2005, Bluewater offered $560 million for Speed (implying a value of $348 million for BLB's shares) and "Appropriate profit sharing of any additional profit to be agreed". On 8 November 2005, Bluewater offered to buy Speed for $800 million (implying a value of $498 million for BLB's shares) plus a 20% profit share if the shares were re-sold within two years. In October 2004, BLB had itself indicated to Bambino that it wanted $700 million for its shares, in response to which

Bambino had offered $275 million. According to a note Mr Mullens made at the time, he responded "You must be joking" to the $700 million figure;

vi) One of Constantin's responses to such evidence was to suggest that Mr Ecclestone had been trying to induce BLB to sell its shares at a low price. In this regard, it relied on evidence of links between Mr Ecclestone and Clearbrook as well as on what Mr Ecclestone told Dr Hahn on 21 January 2005 (as to which, see paragraph 215 above). While, however, it might have made sense for Mr Ecclestone to seek to reduce "the banks' perception of the value of Formula 1" in the context of an "intention to buy back Formula 1" (as the January conversation suggests was Mr Ecclestone's intention), the same logic would not have applied where what was under consideration was a sale to an outside party (especially if Bambino was to sell on the same basis), and it is Constantin's case that Mr Ecclestone entered into a corrupt agreement in May 2005 with a view to BLB's shares being sold to a third party. Further, there is no reason to suppose that Mr Ecclestone had any links with Bluewater. As regards the Team Trust Proposal, Constantin argued that this "was designed by Mr Ecclestone to explore and shape BLB's expectations as to the value of its holding", but the evidence does not appear to me to sustain the submission. So far as Mr Llowarch was concerned:

> "We were drawing up a solution to this problem that was taxing everybody. And we thought that it had a certain elegance to it, in terms of, on the one hand, being something that we thought was good for the parties we were negotiating with, ie the teams and the manufacturers. And it gave the shareholders a solution";

vii) When asked about the representation letter dealing with impairment in the carrying value of goodwill, Mr Ecclestone said that he signs things "all day long" and that he would have relied on Mr Llowarch. In the context, that strikes me as plausible. I am not surprised by the suggestion that Mr Ecclestone paid little attention to the contents of the letter. I do not think that I can draw any inference from either the letter or FOA's accounts as to the value that Mr Ecclestone perceived shares in the Formula One group to have;

viii) Miss Flournoy acknowledged that Bambino had not commissioned a valuation before agreeing to sell its shares in SLEC to CVC, but pointed out that it had not done so when disposing of such shares in the past either. She said that Bambino's directors had their "own idea of what [they] felt the value was" and "at that time [they] did not think that SLEC was worth what CVC was offering to [them]";

ix) I have commented above (paragraph 248) on Mr Powers' exclusion from the sale process;

x) I do not see why it should be the case (as was Constantin's submission) that "the aim of getting rid of the banks necessarily involved the sale of the shares at an undervalue"; and

xi) I do not remember any exploration with Mr Mullens in cross-examination of whether he knew that BLB's or Bambino's shares were (or might be) being sold to CVC at an undervalue. My impression is that Mr Smith was correct when he suggested during his closing submissions that Mr Mullens had not been asked a single question about what he had thought the value of the shares was.

269. Mr Miles complained that Mr Ecclestone, too, had not had put to him any suggestion that he intended BLB's shares to be sold at an undervalue or was aware that his alleged agreement with Dr Gribkowsky would or might have that consequence. However, matters relating to the value of the shares were aired with Mr Ecclestone to some extent. In any case, Mr Miles ultimately accepted that I should deal with the case against Mr Ecclestone on the merits.

Conclusions on the reasons for the Payments

270. The likelihood is, I think, that Dr Gribkowsky's version of events is broadly accurate. It is consistent with, and in important respects supported by, other evidence, while the evidence given by Mr Ecclestone and Mr Mullens contains inconsistencies and is otherwise unsatisfactory. Further, bribery is far more probable than the only other explanation offered for the Payments, viz. that they were made in response to a "shakedown". The blackmail/"shakedown" story is thoroughly implausible.

271. On balance, accordingly, I consider that the Payments represented a bribe. More specifically, I find that:

i) Mr Ecclestone entered into a corrupt agreement with Dr Gribkowsky in May 2005 under which Dr Gribkowsky was to be rewarded for facilitating the sale of BLB's shares in the Formula One group to a buyer acceptable to Mr Ecclestone;

ii) The November Draft Agreement was prepared in the context of Mr Ecclestone's agreement with Dr Gribkowsky;

iii) It was ultimately agreed that Dr Gribkowsky should instead receive the Payments pursuant to the agreements made between (a) First Bridge and GG Consulting and (b) Lewington and GREP; and

iv) Mr Mullens was complicit in the corrupt arrangement with Dr Gribkowsky and aware that the Payments represented a bribe.

272. In contrast, I take the view on balance that Bambino was not complicit in the corrupt arrangement. I accept Miss Flournoy's evidence that Bambino caused First Bridge to enter into the agreement with GG Consulting because it understood that Dr Gribkowsky had been insinuating that, if he were not paid, he would contact HMRC. The directors' acceptance of this (improbable) story can be explained on the basis that (a) they did not know of the events relating to the claims brought by the Williams and McLaren teams that are mentioned in paragraph 258(iii) above and (b) they tended to accept Mr Mullens' advice on matters linked to Formula One. It is noteworthy in this context that, when giving evidence to the German authorities, Mr Argand said that Mr Mullens was "the one operating 'right on the front line' here".

273. Mr Ecclestone's aim was, I think, to be rid of the Banks. He was strongly averse to their involvement in the Formula One group and was keen that their shares should be transferred to someone more congenial to him. It was no part of Mr Ecclestone's purpose (or Mr Mullens') for BLB's shares to be sold at an undervalue. I have not been persuaded that either Mr Ecclestone or Mr Mullens had any desire for BLB's (or Bambino's) shares to be sold at an undervalue or believed the price at which they were in fact sold to be below market value.

274. The more difficult question is whether there was thought to be a *risk* that the shares would be sold at an undervalue in consequence of the corrupt arrangement with Dr Gribkowsky. As I have indicated, this topic was not explored with Mr Mullens. In the circumstances, I do not think it could be right for me to decide that Mr Mullens perceived there to be a risk that the shares would be sold at an undervalue. As regards Mr Ecclestone, I have concluded, not without a degree of hesitation, that he is likely to have been conscious of a risk that the shares would be sold for less as a result of his arrangement with Dr Gribkowsky. He had, after all, asked Dr Gribkowsky to facilitate the sale of BLB's shares to a buyer of his (Mr Ecclestone's) choosing regardless of whether it might otherwise have preferred to follow a different course.

Would BLB's shares have been sold for more but for the illicit arrangement Constantin alleges?

275. It is Constantin's case that, had it not been for the illicit arrangement Mr Ecclestone had made with Dr Gribkowsky, BLB would have realised much more for its shares in Speed than it did. The most likely possibility, it is argued, is that BLB would not have sold in 2005 but waited until late 2006, by which time the Formula One group would have acquired APM/Allsport and the basis for a new Concorde Agreement would have been agreed. Supposing, contrary to that view, that BLB would have proceeded with a sale in 2005, it would (so Constantin says) have insisted on obtaining the true value of its shares, which was far higher than the amount on offer from CVC. According to Constantin, Dr Gribkowsky caused the sale to CVC to be rushed through without BLB obtaining appropriate external advice or adequately analysing

the options open to it. Had BLB either sought proper advice or undertaken sufficient analysis, it would, Constantin contends, have concluded that the sale to CVC that it in fact entered into was not in its interests. In support of these submissions, Constantin relies on, among other things, expert evidence as to the value of BLB's shares. The valuation expert called by Constantin, Miss Hughes, expressed the view that the BLB shares were worth much more than they were sold for.

276. On the other hand, there is evidence suggesting that BLB would have been disinclined to defer the sale of its shares. The paper submitted to BLB's management board at the end of March 2005 recorded that Rothschild had advised against a sale at that stage on the basis that the current structure of the business meant that it would "only be possible to sell at a major discount" and proposed that, rather than selling its shares, BLB should work to achieve an alliance with the manufacturers/teams. BLB's boards nonetheless decided that the option of selling its shares should "continue to be consistently pursued" in parallel with discussions with the manufacturers/teams. It can be seen from the minutes of the supervisory board's meeting that "[b]oth the Chairman and Deputy Chairman argued the case for a sale of the shareholding", whilst accepting that negotiations with the manufacturers/teams should be given preference because sale "would seem to be difficult at present due to a lack of potential purchasers". In evidence to the German authorities, Mrs Irrgang said that "at the time the clear intent, especially on the [supervisory] board, was to get rid of these shares". Professor Kurt Faltlhauser, the chairman of the supervisory board, said that no one at BLB had been "happy about suddenly being a shareholder in a racing circus", which was not part of the bank's business. Dr Siegfried Naser, a deputy chairman of the supervisory board, said that for BLB "Formula 1 was a kind of black box and we wanted to get rid of the shares as quickly as possible". Mr Dieter Burgmer, a member of the management board, noted that "none of the banks wanted to be a long-term shareholder in Formula 1".

277. It is also relevant that BLB was not without expertise in financial matters. It was itself a substantial bank, with staff well-used to making financial decisions. Mr Mackenzie's impression, moreover, was that BLB was "highly informed" about the Formula One group.

278. Constantin points out that BLB had sought help from Rothschild, but nevertheless failed to consult it about the proposed sale to CVC. As to this, in September 2004 BLB's management board appears to have accepted that, "[w]hen searching for a suitable buyer, for example, an investment bank could be helpful". Thereafter, BLB instructed Rothschild. By September 2005, Rothschild was seeking a fee of €300,000 for work it had carried out over the previous ten months plus a monthly retainer and provision for success fees. On about 11 November 2005, however, Dr Gribkowsky asked Mrs Irrgang to "end their involvement". Constantin suggests that, but for the corrupt agreement Dr Gribkowsky had made with Mr Ecclestone, BLB would have made more use of Rothschild. However, Mrs Irrgang told the German authorities that she had found the presentations Rothschild had given "pretty useless" and that she had "frequently tried to fob off" the relevant individual from Rothschild whom she felt "wanted to pump us for information" and as to whose role she was "never quite sure".

279. In the event, BLB obtained no external advice at all on the value of its Formula One shares. However, business owners do not invariably obtain such advice before selling them. Mr Mackenzie explained in cross-examination:

> "Quite often businesses make their own mind up about the value of the business. That happens a lot, because if you've owned a business for a long time you come to know it better than anyone else."

Moreover, the value of BLB's shareholding had been considered internally quite recently. In December 2004, BLB's Formula One team put the value of its shares at between $340 million and $390 million following assessments (a) "on the basis of the free cash flow from 2005 to 2007 plus the market value of the '100 year rights'" and (b) of "the cash flow until 2014"; the assessment methods were discussed and agreed with KPMG. Further comment on the value of BLB's stake in the Formula One group is to be found in the board paper of 26 March 2005. This put the current value at $580-840 million in the event of the Concorde Agreement being extended and a strategic alliance being concluded with Bambino and Mr Ecclestone. In the absence of the latter factor, the shares were reckoned to be worth $500 million "if sale were made soon"; the figures were stated to represent "own calculations on the basis of the best data material available". By June 2005, BLB's Formula One team was speaking in terms of its shares realising about $1.5 billion if it successfully implemented its strategy, which was:

> "to increase the value of BayernLB's holding in Speed by extending the Concorde Agreement … and to render the holding saleable through structural adjustments within the Formula 1 group (simplifying the Group structure, revising the 100 year agreement, restructuring F1 bonds etc.)."

If, on the other hand, the strategy failed, the value of BLB's holding was reckoned to be between $300 million and $500 million. This was "based on discounted cash flow up to 2012 and end value in 2012, assuming the continuation of business after 2007 against the backdrop of a competing series".

280. It is not apparent from the evidence before me that CVC could have been persuaded to pay more than it in fact did for BLB's shares. I do not remember it being suggested to Mr Mackenzie that CVC would have been prepared to pay a higher price, and the evidence he gave indicates that funding even the transaction it actually undertook was not straightforward and that CVC regarded its acquisition of the Formula One group as unusually risky. For BLB to have obtained a higher price, therefore, it would have had to find an alternative purchaser willing to pay more. It seems, however, that BLB was, with reason, pessimistic about the chances of finding such a purchaser. The 26 March 2005 submission noted that "the number of potential purchasers of our holding at more or less appropriate terms is currently very limited". There was reference to a "lack of potential purchasers" at the supervisory board meeting on 7 April. In a paper prepared on 13 May, Mr Glöckl observed that the "probability of an 'interested third party' (without proximity to [Mr Ecclestone]/Bambino) buying our shares at this stage

of the process, is probably very low". In similar vein, Mr Glöckl and Mr Andreas Dörhöfer, another BLB employee, said in a submission they prepared on 6 November:

> "At present, we do not have an alternative offer and it appears to us very unlikely that we will receive a comparable offer in the foreseeable future."

281. Such remarks will have been informed by past experience. As mentioned above (paragraph 268(v)), no one had offered as much as CVC for BLB's shares, even though BLB could have been expected to be interested in selling them. Mr Dörhöfer commented in evidence to the German authorities:

> "Every newspaper reader knew anyway at the time that the asset Formula 1 was on the market."

Mr Ziff, whom Bambino called to give valuation evidence, observed:

> "The fact that the Banks were not long-term holders of an investment in the [Formula One group] had been known for a considerable period of time. This would not have been lost on the enterprising investment banking advisory industry, who spend their lives scouring for M&A mandate opportunities."

Yet no offer as good, or nearly as good, as CVC's had emerged.

282. Mr Mackenzie was clear that the business was not in a marketable condition in 2005. He added:

> "It was the luckiest day in those bankers' lives when I walked through the door. They couldn't have sold it to anyone else. No one had the money; no one had the knowhow; and no one had, frankly, the balls to do such a risky deal."

283. One factor that will have limited the scope for effecting a sale at a higher price than that offered by CVC will have been the desirability of any purchaser having the approval of Mr Ecclestone and Bambino. In evidence to the German authorities, Mr Dörhöfer remarked:

> "Without Mr Ecclestone's approval it is not easy to sell, if at all."

Mr Mullens said in cross-examination that he thought that BLB "knew that they could not sell their shares unless Bambino sold its shares".

284. Against this sort of background, it is understandable that evidence that officers and employees of BLB gave to the German authorities indicates that CVC's offer was

considered to be a very good one. Mr Glöckl said that, when Dr Gribkowsky indicated a price range, it was "very attractive" when compared with either the book value of BLB's shares or the offers it had hitherto received for them and Mrs Irrgang "opined on leaving the office that CVC would probably, after the due diligence, considerably lower the price and therefore the offer would not ultimately be as attractive as it had at first seemed". Mrs Irrgang herself confirmed that she feared that the price was "too good to be true" and said that those at BLB were at the time "happy that the shares had been sold for an, in our view, good price". Mr Krowarz said that he could not comprehend the suggestion that BLB's shares were supposed to have been sold too cheaply. Mr Dörhöfer said that "[e]veryone was ecstatic" when the sale was agreed, commenting that "the big worry at the time was that Formula 1 could suddenly be worth nothing". Mr Theo Harnischmacher, another member of BLB's management board, said that there was concern that the shares might fall in value and the aim was "to push through the sale to counter any fall in value". Dr Rudolf Hanisch, who was also a member of the management board, said that CVC's offer "seemed appropriate" and that there was "a feeling of relief that we had succeeded taking into consideration the chances and risks, in realising this security appropriately which lay outside the bank's remit". Dr Naser said that there was felt to be "a serious risk that our Formula 1 shares could soon be worth nothing" and that CVC's offer was "great because it meant that we could get rid of our shares and all the problems in one go". Professor Faltlhauser said, "We were very satisfied with the purchase price." He is quoted as having said in a conversation on 9 November 2005, "Get rid of it as quickly as possible."

285. As Mr Glöckl noted, the amount CVC offered for BLB's shares exceeded both anything that the bank had previously been offered (as to which, see paragraph 268(v) above) and the shares' book value. Further, BLB had itself offered to sell its shares for less than CVC was offering. Perhaps the apparent reference to a proposal to sell to Bambino for $350 million could be based on a mistake or misunderstanding. The evidence indicates, however, that BLB told Bambino on 11 October 2004 that it wanted $700 million for its shares.

286. It is also to be borne in mind that BLB is unlikely to have thought that it had unlimited time to assess the value of its shares or to find another purchaser. CVC could not be relied on to wait indefinitely. It is noteworthy, too, that BLB had in the past made and responded to offers without obtaining advice such as Constantin contends would have been appropriate. BLB did not appoint any outside adviser in advance of its saying in October 2004 that it wanted $700 million for its shares. When Bluewater put forward a $500 million offer in April 2005, BLB responded (inviting Bluewater to incorporate certain points into its proposal) without first obtaining an external valuation.

287. Constantin relies on evidence suggesting that, Dr Gribkowsky apart, the members of BLB's Formula One team had only limited involvement with the proposed sale to CVC. Mr Glöckl told the German authorities:

> "Contrary to previous practice, we were not involved in this sales process at all. Ultimately we were just there on call and

> there to assist if he needed something. He did the entire sale process himself; even Mrs Irrgang was no longer at these discussions."

Mr Krowarz's evidence to the German authorities included this:

> "During the 'heated phase' Mr Gribkowsky did not involve us any more. He flew to London on his own, and I mean completely on his own, to attend negotiation meetings. I rarely spoke to him during this time …."

Mrs Irrgang, too, spoke of having been excluded from the CVC negotiations. She said:

> "I don't actually know the reason. I think I remember talking to [Dr Gribkowsky] about it once and he just said he could do it on his own. He never gave me an actual reason. My supposition was that possibly Bambino and/or Bernie Ecclestone wanted this deal to be negotiated directly with Gribkowsky. What was striking in any event was that the 'live communication' I'd had till then with the other people involved, was scaled down from a hundred to more or less zero."

288. On the other hand, Miss Sharon White of Stephenson Harwood, who acted for BLB on the sale to CVC, told the German authorities that she had dealt principally with Mr Krowarz and, to a lesser extent, Mr Glöckl and Mrs Irrgang; she did not meet Dr Gribkowsky until early November 2005. Further, Mr Mackenzie referred to his team dealing with Mr Glöckl a lot. More importantly perhaps, while Mr Glöckl referred to Dr Gribkowsky having "guided [his] pen" in relation to the sections of the 6 November board presentation dealing with Mr Ecclestone's commission and the Team Payments, he did not suggest that Dr Gribkowsky had otherwise supplied the content of that or other board presentations of which he was the principal author. As mentioned elsewhere, the recommendation in the 6 November presentation that BLB should decline to exercise the reinvestment option did not merely reflect Mr Glöckl's views but ran contrary to Dr Gribkowsky's preference.

289. A particular point arises in relation to evidence that Mrs Irrgang gave to the German authorities. Asked about how the appropriateness of the price was checked, she said this:

> "That was quite something. First, when the CVC offer had been submitted, Mr Gribkowsky came to me and said we had to do a valuation. The question then was especially whether we were to have this done internally or externally…. A short time later Mr Gribkowsky then said that we didn't need any valuation. I don't remember the exact reasons given for this. I think it was said

> that the [supervisory] board and/or … the management board now wouldn't be needing anything like that."

290. Since Mrs Irrgang did not give evidence in the present proceedings, she was not available to elaborate on what she told the German authorities. Mr Miles suggested that she was probably referring to events in the brief period between CVC making the "indicative non-binding offer" that Mr Mackenzie gave to Dr Gribkowsky on 11 September and it submitting a revised offer on 19 September, following which BLB agreed, in a letter signed by both Dr Gribkowsky *and* Mr Schmidt, that CVC should have exclusivity. By that stage, Mr Miles suggested, BLB had concluded that no valuation was needed because the price on offer was good enough.

291. Mr Marshall argued that, whatever price BLB might have accepted for its shares in the past, there had been changes in circumstances by the time the preliminary agreement was signed on 8 November 2005. In particular, it was by then apparent (so it is said) that (a) the threat to set up a rival motor racing series was merely a negotiating ploy and agreement on a new Concorde Agreement was close and (b) the acquisition of APM/Allsport, and its reintegration into the Formula One group, was a foregone conclusion.

292. So far as the first of these points is concerned, by the autumn of 2005 the Formula One group had reached agreement with Ferrari, Red Bull and Jordan, and a deal with Williams was evidently on the cards. CVC's FIR expressed the view that "the threat of a GPWC breakaway is primarily a negotiating stance to extract better terms from the FIA and FOA" and stated that the Formula One group was understood to be "close to agreement with Williams and other key Teams in respect of the New Concorde Agreement", which would "push up the valuation". The minutes of CVC's investment committee meeting on 2 November record:

> "Matters surrounding the threat of a GPWC Breakaway race series were discussed at length. It was however concluded that the risk could be considered as relatively low given that Williams and Ferrari had signed with terms set at 50% of EBITDA plus certain deferred/catch up payments (dating back to 2004 and rolled up and paid in 2008). Renault, Toyota and Honda were likely to sign up."

On 6 November, a CVC memorandum stated:

> "Now is a good time to invest in Formula One, but the key issue for CVC is that the value of these assets may increase dramatically over the next few weeks – and gaining access to the value opportunity whilst it was still 'hidden' would have been better done 12 months ago, when the uncertainty was at its greatest."

During the oral evidence, Mr Ecclestone said that he had been confident that it would be possible to extend the Concorde Agreement, and Mr Llowarch said that he "thought that a rival series would be suicide for everyone".

293. On the other hand, Mr Llowarch noted that Formula One "is a far from logical environment" and observed that the fact that a rival series might have been "suicide" for everyone "wouldn't necessarily stop people doing it". Mr Mackenzie explained that, although Mr Ecclestone and Dr Gribkowsky had assured him that it would be easy to resolve matters with the manufacturers/teams, "when we actually bought it, we found that they had been misleading us, effectively, because it turned out to be a lot more difficult than they'd said it would be". CVC's investment professionals had, Mr Mackenzie said, "grossly understated the risk they were taking because they didn't understand it". Mr Mackenzie observed too that the authors of investment recommendation documents "tend to play up the good parts and play down the bad parts". In Mr Mackenzie's view, CVC's arrival "completely transformed the negotiations". He said:

> "And Bernie and Gribkowsky and the banks, they had lost all credibility with these teams. And we came along and made a difference. But it was still extremely hard work to get them finally signed in 2009, I can tell you."

In similar vein, Mr Mackenzie told the German authorities:

> "Looking back, I would say that it was the change in ownership which made the breakthrough possible. The teams were exhausted from the endless discussions with the banks, which were also arguing with each other. With us they had just one – competent – point of contact, which could lead the discussion afresh and could make decisions."

294. Turning to evidence given to the German authorities by manufacturers, Dr Reul of BMW said that, although the threat to set up a breakaway series was "primarily a threatening gesture by teams and manufacturers", "something could definitely have grown out of this" and "we would have been able to make it". Dr Reul also said that, while there might have been indications "in the middle or at the end of 2005" that the subsequent memorandum of understanding would be concluded, the "decisive breakthrough" occurred on the sidelines of the Barcelona Grand Prix in 2006. Professor Göschel, also of BMW, said that he "would really have gone through with the rival series if there had been the necessary power for this" and that the "project of building an alternative race series foundered with the sale to CVC" and BMW "did a U-turn in our efforts".

295. With regard to APM/Allsport, the possibility of the Formula One group acquiring APM/Allsport was clearly under active consideration when the preliminary agreement with CVC was concluded. Such an acquisition had, though, been discussed "for years and years" (to quote Mr Llowarch) without anyone doing very much about it. In, it

seems, late October, Mr Llowarch and Miss Woodward Hill took the initiative and spoke to Mr McNally, and CVC "took steps to address the outstanding issue of the acquisition of APM and [Allsport]" soon after the deal with it was announced. It can be seen, however, from the FIR that CVC did not consider it appropriate to take account of the proposed acquisition of APM/Allsport in its base case forecasts, and BLB's board presentation of 6 November saw it as an advantage of selling to CVC that "[p]revious cost-intensive integration of APM … is not necessary".

296. I have not forgotten that Dr Gribkowsky has a forceful personality. I accept that it is possible that, had he decided that it was not in BLB's interests to accept the CVC offer, he would have persuaded BLB to reject it. However, Dr Gribkowsky's evidence to the German authorities does not contain any admission that, but for his agreement with Mr Ecclestone, he would have favoured the rejection of CVC's offer.

297. I have not forgotten, either, the evidence suggesting that BLB's shares in the Formula One group were worth more than it received for them from CVC. Constantin made much of the fact that in November 2006 EY reported that their discounted cash flow indicated a value for the group in the region of $5,914 million (albeit that a good deal had changed since November 2005 and Mr Mackenzie said that he and others at CVC laughed when they learned of the EY figure, which, Mr Mackenzie thought, was "not based on the reality that we were in at [the] time it was written, not anything close to it"). Miss Hughes expressed the view that BLB's shares were worth upwards of $1.6 billion at the end of 2005 and would have been worth nearly $2.5 billion a year later. Mr Pilgrem, the valuation expert called by Mr Ecclestone, and Mr Ziff each took issue with Miss Hughes' figures. Mr Pilgrem's discounted cash flow calculations produced a figure of $957.2 million for BLB's shares, and a sensitivity analysis reduced that figure to $675 million; on that basis, Mr Pilgrem concluded that the consideration BLB agreed with CVC for its holding was a reasonable estimate of the value and said that he had seen no reliable evidence that the value of the shares exceeded the sum at which Constantin would become entitled to any payment under its overage rights. Mr Ziff reckoned that a reasonable range of values for BLB's shareholding as at 8 November 2005 was $776.7 million to $1,338.4 million. It is noteworthy, too, that JP Morgan and Lehman agreed to sell their shares at a 17% discount to the price at which CVC bought BLB's shares. The ultimate question is not, however, what BLB's shares might be said to have been worth on an objective basis, but as to how BLB would have behaved had Dr Gribkowsky not entered into the corrupt agreement with Mr Ecclestone. Would it in *fact* have realised more for its shares than it did?

298. On balance, I consider that Constantin has not proved that, had it not been for the corrupt agreement Dr Gribkowsky had made with Mr Ecclestone, BLB would either have looked for an alternative buyer in 2005 or deferred the sale of its shares to a later date. Constantin has not established that the corrupt agreement made any difference in this respect: on the evidence before me, it is more likely than not that BLB would have accepted CVC's offer even if the agreement had not been made. CVC's offer comfortably exceeded both previous offers and valuations BLB had made internally (in one case, with a degree of endorsement from KPMG). Moreover, BLB had no enthusiasm for retaining its shares in the Formula One group. In the circumstances, the chances are that BLB would have seen no need to obtain external advice, to look

for another purchaser or to hold on to its shares until (say) a new Concorde Agreement was concluded.

299. A further point is that it has not been established that BLB could have found anyone willing to pay more than CVC (let alone enough for Constantin to become entitled to any payment pursuant to its overage rights) even had it decided to look for another buyer in 2005. The matters mentioned in paragraphs 268(v) and 281-283 above tend to suggest that it could not have. Miss Hughes expressed the view that a range of private equity funds, media companies, sports ownership and events companies and sovereign wealth funds could have been interested in acquiring BLB's shares, but (a) none of those named had shown interest despite the fact that BLB would have been taken to be interested in selling them and (b) there is no direct evidence that any of them would have contemplated the acquisition of BLB's shares. Miss Hughes explained that the private equity firms she had listed were "not unlike CVC", but, as she accepted, they (unlike CVC) did not have businesses comparable to Dorna, a significant distinction. Mr Mackenzie explained that, in the years subsequent to its acquisition of the Formula One group, it did not receive any serious offers for it. When giving evidence to the German authorities, he observed:

> "Obviously, the company is still perceived as a problem company after 5 or 6 years."

300. I should mention specifically offers that Bluewater claims to have made on 4 October and 15 November 2005. Each of the relevant documents contains an offer to pay 10% more than any offer from other buyers. At first sight, it is not obvious how the 4 October email fits with another email of the same date, and Mr Glöckl, Mr Krowarz and Mrs Irrgang have each denied knowledge of the 4 October and 15 November offers. Moreover, no trace of either offer has been found in BLB's records. For present purposes, it suffices to say that issues as to the offers have arisen in the American proceedings. I am quite unable to conclude that Bluewater did indeed offer to pay 10% more than anyone else.

301. It is perhaps worth adding that, had BLB decided to wait until a new Concorde Agreement was signed before selling its shares, Constantin could never have become entitled to any overage payment unless a new Concorde Agreement had been achieved before the end of 2007 (when Constantin's rights lapsed) rather than in 2009 (when a new Concorde Agreement was in fact concluded). In fact, it is conceivable that, had a new Concorde Agreement been arrived at (say) in early 2007, BLB would have decided to defer any sale until after Constantin's rights had come to an end so that it did not have to share the proceeds of sale with Constantin.

Were the defendants aware of the overage rights on which Constantin's case is founded?

302. As mentioned above (paragraph 26), the overage rights on which Constantin's case is founded were granted to EM.TV pursuant to an agreement entered into on 17

February 2003 as part of the compromise of the Jersey litigation that EM.TV had instituted.

303. It is Constantin's case that the defendants to the present proceedings were each aware of the overage rights. As regards Dr Gribkowsky, the fourth defendant, that is doubtless correct. His role in BLB means that he can be expected to have known of the rights. He is, moreover, recorded as having referred to the rights at a meeting of BLB's management board on 9 November 2005.

304. The other defendants, however, all deny having had knowledge of the overage rights. Mr Ecclestone stated in his witness statement that he knew nothing about, and had no interest in, the terms of any settlement between EM.TV and BLB and was not aware of any rights EM.TV might have had against BLB at the time of the sale to CVC. For his part, Mr Mullens said in his witness statement that he was not aware that EM.TV had retained any right to participate in any realisation of Speed's interest in SLEC and did not hear about Constantin's alleged rights until the present proceedings were issued. Miss Flournoy said in her witness statement that her understanding had been that EM.TV had nothing further to do with Formula One. All three maintained their positions in cross-examination.

305. Constantin disputes this evidence. It argues that the defendants would have followed the dispute between EM.TV and BLB closely and so learned of the relevant terms of the compromise between them. It points out that there had been reference to the overage rights in contemporary press releases and reports. It suggests too that, since BLB had acquired its interest in Speed as a result of exercising security rights, the previous owners would have been expected to have a residual interest in the sale proceeds if they exceeded the debt secured.

306. To my mind, however, Constantin has not established that Mr Ecclestone, Mr Mullens or Bambino had any knowledge in advance of the present proceedings of the overage rights granted to EM.TV. My reasons include these:

i) Bambino was not a party to the Jersey litigation between EM.TV and BLB, and SLEC had no more than a peripheral role in it. SLEC was included in part of the proceedings as a "party cited", but no substantive relief was sought against it, and it neither attended nor was represented at any hearing. The injunction initially granted to EM.TV was of concern to Bambino because of its apparent breadth, but the point was quickly dealt with;

ii) While EM.TV appears to have put out a press release in which there was reference to its having "the right to a partial interest in eventual sale proceeds exceeding the loan amount", there is nothing to indicate that Mr Ecclestone, Mr Mullens or any of Bambino's officers saw this or any other press release referring to the overage rights. In fact, I do not think it was even suggested to them in cross-examination that they had;

iii) As Mr Marshall pointed out, an article posted on the "Motorsport-Total" website on 18 February 2003 reported that EM.TV was to have "the right to a percentage share in additional proceeds accruing to the subsidiary of BayernLB through the resale of the Speed shares (debtor warrant)", and an item dated 22 April 2003 on the "Autosport.com" website referred to EM.TV standing to "benefit if the banks profit from selling on the shares". There is no compelling reason, however, to think that Mr Ecclestone, Mr Mullens or anyone acting for Bambino saw either article at the time. Although the Formula One group used a press service, it appears to have been limited to English-language, and particularly British, materials. Since the "Motorsport-Total" posting was in German, it is most unlikely to have been included, and, had it been, it would not have been readily accessible to, say, Mr Mullens, who does not speak German. As regards the "Autosport.com" article (which was in English), Mr Ecclestone said that he did not follow matters on the website and Mr Mullens explained that he never read it. I do not remember it being suggested to Miss Flournoy that she had seen the relevant article, and she said in evidence that she read "local Swiss press" and the Financial Times, but not "the German press" or "the English press";

iv) The minutes of a SLEC board meeting held on 27 February 2003 do not include any reference to the overage rights;

v) The basis on which BLB's dispute with EM.TV was disposed of was not of obvious importance to Mr Ecclestone, Mr Mullens or Bambino;

vi) BLB did not hold its shares in Speed as a mortgagee in possession. FEB's shares had been sold to the Banks on an outright basis by means of a "credit bid" process sanctioned by Jersey law;

vii) The evidence given by Mr Ecclestone, Mr Mullens and Miss Flournoy is in this respect consistent with evidence given by Mr Llowarch. Having referred to the overage rights, Mr Llowarch said this in his witness statement:

> "I did not have any knowledge that EM.TV or any successor to it had any such rights, and I did not find out that such rights existed or were claimed until around 2011 or 2012 when I first became aware that Constantin … was asserting this claim."

Legal issues

307. The key legal issues can be addressed under the following headings:

i) Choice of applicable law;

ii) English law;

iii) German law.

308. I take these matters in turn below.

Choice of applicable law

The legal framework

309. As any damage Constantin may have suffered will have been sustained before Council Regulation 864/2007/EC ("Rome II") took effect in 2009, the law applicable to its claims falls to be selected in accordance with the Private International Law (Miscellaneous Provisions) Act 1995. Section 9 of that Act stipulates that the rules in Part III of the Act apply for choosing the law to be used for determining issues relating to tort.

310. Section 11 of the 1995 Act states that the general rule is that the applicable law is the law of the country in which the events constituting the tort in question occur. Section 11(2) explains that, where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being:

> "(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred."

311. Section 12 of the 1995 Act provides for the general rule laid down by section 11 to be displaced in certain circumstance. It states:

> "(1) If it appears, in all the circumstances, from a comparison of—
>
> (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
>
> (b) the significance of any factors connecting the tort or delict with another country,

> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

312. In *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808, [2012] 2 BCLC 437, the Court of Appeal set out a number of propositions which it considered to apply in relation to section 11 of the 1995 Act. It said (in paragraph 148):

> "(1) Section 11 of the 1995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question.
>
> (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then s 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question.
>
> (3) In carrying out that exercise, it is the English law constituents of the tort that matter.
>
> (4) The analysis requires examination of the 'intrinsic nature' of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if s 12 is invoked.
>
> (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a 'value judgment' regarding the 'significance' of each of those 'elements'. 'Significance' means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation.
>
> (6) Under s 11(2)(c) (ie in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries), the applicable law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweigh

> the significance of any element or elements found in any other country."

313. These propositions were accepted as correct when the case reached the Supreme Court: see *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5, [2013] 2 AC 337, at paragraph 199 (Lord Clarke).

314. As regards section 12 of the 1995 Act, the Court of Appeal said this in the *VTB* case (at paragraph 149):

> "If s 12 has to be considered, we derive the following additional propositions from our consideration of the statute and the cases.
>
> (7) The exercise to be conducted under s 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule.
>
> (8) At this stage there has to be a comparison between the significance of those factors with the significance of any factors connecting the tort or delict with any other country. The question is whether, on that comparison, it is 'substantially more appropriate' for the applicable law to be the law of the other country so as to displace the applicable law as determined under the 'general rule'.
>
> (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the 'elements of the events constituting the tort' in s 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict.
>
> (10) In particular the factors can include: (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict."

315. In the Supreme Court, Lord Clarke, having quoted this passage from the Court of Appeal's judgment, went on to refer to an "illuminating" discussion in Dicey, Morris and Collins on The Conflict of Laws, 15th ed.. He said (in paragraph 204):

> "The editors say that the application of the displacement rule in section 12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the *tort* with the country the law of which would be applicable under the general rule … and the significance of any factors connecting the *tort* with another country…. The word tort is italicised in the text in *Dicey*."

316. Lord Clarke continued (at paragraph 205):

> "The editors note that the general rule has been displaced on very few occasions. They further observe that, although section 12 applies in all cases to which section 11 applies, it would seem that the case for displacement is likely to be most difficult to establish in the case of section 11(2)(c) because the application of that provision itself requires the court to identify the country in which the most significant element or elements of the tort are located. Importantly they stress the use of the word 'substantially', which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of factors declared relevant by section 12(2) which point to the law of the other country."

317. Although Lord Clarke was one of two dissenting judges in the *VTB* case, the majority judgments did not take issue with the paragraphs from his judgment quoted above, and they were adopted by the Court of Appeal in *Fiona Trust & Holding Corporation v Skarga* [2013] EWCA Civ 275.

318. The *VTB* case involved allegations that an English subsidiary of a Russian bank had been induced by fraudulent misrepresentations made by a company incorporated in the British Virgin Islands (but owned and operated from Russia) to lend money to fund the purchase from a Russian company of Russian businesses and companies. The claimant alleged both deceit and unlawful means conspiracy.

319. All the members of the Supreme Court concluded that the deceit claim was governed by English law. Lord Mance, for example, said (at paragraph 7):

> "Both the alleged misrepresentations on which VTB relies originated in Russia, but they reached VTB in London (very probably via VTB Moscow), and were relied upon by VTB there when it gave formal agreement to the facility agreement and interest rate swap there. Further, VTB sustained its loss by disbursing money in and from London, although, as will appear, it was in fact covered by VTB Moscow against any loss which it might otherwise make on the loan. In these

> circumstances, I address the question of the appropriate forum on the basis that, contrary to the conclusion of the judge and Court of Appeal, the law governing the alleged tort of deceit is English rather than Russian law."

Lord Clarke said (at paragraph 201):

> "The events constituting the tort of deceit are indeed the making of the misrepresentations which were known to be untrue, reliance on the misrepresentations and the loss sustained as a result. All those occurred in England. The misrepresentations were made to VTB in England, VTB relied upon them in England and incurred its loss in England. In my opinion that is plain. It is true in the case of both misrepresentations: even though the dairy representations were initially made in Russia, the critical representations which induced VTB to enter into the facility agreement were made in London and relied upon in London."

320. The Supreme Court was somewhat less clear about which system of law applied to the conspiracy claim. Lord Mance said (at paragraph 7) that he was "content to proceed on the basis that the conspiracy was, like the deceit, governed by English law", and Lord Neuberger adopted a similar approach (see paragraph 100). In contrast, Lord Clarke, with whom Lord Reed expressed agreement, decided in terms that English law applied to the conspiracy claim. He concluded (at paragraph 201) that "under the general rule in section 11(2)(c) of the 1995 Act the applicable law was English law and … the general rule was not displaced in favour of Russian law by section 12". A little earlier (at paragraph 201), Lord Clarke had said:

> "As to the alleged conspiracy, the essence of the case is that the representations were made as part of a common design. To my mind, it does not matter for the purposes of section 11(2)(c) because the essence of VTB's case remains based upon the representations made to it in London and relied upon in London by VTB entering into the facility agreement, together with the loss sustained in London."

The present case

321. It is common ground that two English torts are relevant in the present case: unlawful means conspiracy and causing loss by unlawful means. The ingredients of the former were summarised in these terms in *Kuwait Oil Tanker Co v Al Bader* [2002] 2 All ER (Comm) 271 (at paragraph 108):

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or

> agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

Unlawful means conspiracy thus requires (a) a combination or agreement, (b) unlawful action in pursuance of the combination or agreement, (c) consequential loss or damage and (d) an intention to injure.

322. The essence of the tort of causing loss by unlawful means lies in "(a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant" (Lord Hoffmann in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, at paragraph 47). The tort accordingly requires (a) wrongful interference, (b) consequential loss or damage and (c) an intention to injure.

323. It is also relevant to note that, under English law, "a person who acts with another to commit a tort in furtherance of a common design will be liable as a joint tortfeasor" (Stuart-Smith LJ in *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19, at 35). However, it is "not enough that he merely facilitates the commission of the tort unless the assistance is given in pursuance and furtherance of the common design" (see the *Credit Lyonnais* case, at 35).

324. The defendants maintain that Constantin's claims fall to be determined by reference to English law. They argue that the most significant of the elements constituting the alleged torts is the supposed combination or common design and that that would have been entered into in this country. In that regard, it is pointed out that the May 2005 agreement is said to have been made in London. Reliance is also placed on, among other things, the fact that the Rib Room dinner took place in London and Dr Gribkowsky's reference to a meeting in January 2006 at Heathrow Airport. It is said, too, that Mr Mullens would have become involved as a result of conversations in London.

325. Mr Mark Hapgood QC, who appeared with Mr Michael Bools QC for Bambino, submitted that the place in which any loss was suffered is unimportant. Loss, he argued, is an element in the vast majority of torts and not part of the "intrinsic nature" of the torts of unlawful means conspiracy and causing loss by unlawful means. Loss, so it was said, is merely a condition precedent to a cause of action, not what makes a defendant's conduct wrongful.

326. I am not convinced by this argument. I cannot see why the fact that an element of a tort is also to be found in other torts should matter. The authorities show that the Court has to focus on the "intrinsic nature" of the elements of the events constituting the relevant tort. The occurrence of loss is surely one such element in the case of both unlawful means conspiracy and causing loss by unlawful means. The fact that loss is a key ingredient of other torts as well is neither here nor there.

327. On balance, I agree with Constantin that its claims are governed by German law rather than English law. On the basis of my findings of fact, Mr Ecclestone and Dr Gribkowsky entered into a corrupt agreement in London, and I accept that it is likely that Mr Mullens also became involved in London. On the other hand:

i) The object of the corrupt agreement was to influence Dr Gribkowsky's behaviour as an employee of a German company (viz. BLB) and a member of its management board;

ii) The likelihood is that all or most of what Dr Gribkowsky did pursuant to the corrupt agreement was done in Germany; and

iii) Since BLB and Constantin are both German companies (as was EM.TV, which originally had the benefit of the overage rights), any loss would have been suffered in Germany.

In my view, these elements of the events constituting the relevant torts are more significant than the combination or common design. Further, I do not think there is any question of German law being displaced under section 12 of the 1995 Act. Lord Clarke's comments in the *VTB* case show that section 12 will not usually apply to displace the general rule in a case where section 11(1)(c) of the Act is in point, and English law is not, in my view, "substantially more appropriate" than German law in the present case.

328. I recognise that the sale to Mr Ecclestone's preferred purchaser (namely, CVC) was effected by means of agreements signed in London and drafted by English lawyers, but I do not think that is important (compare *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm), at paragraph 170). I also recognise that it is quite possible for the most significant elements of a tort to occur in a country different from that in which the damage is suffered (compare *Protea Leasing Ltd v Royal Air Cambodge Co Ltd* [2002] EWHC 2731 (Comm), at paragraphs 78 and 80). The fact, however, that the most significant elements of a tort *can* occur in a country different from that in which damage is suffered obviously does not mean that that will invariably be the case.

329. Mr Smith pointed out that Constantin had applied for permission to serve Bambino out of the jurisdiction on the basis that "the damage sustained by the Claimant resulted from acts committed within the jurisdiction". I do not think, however, that that fact precludes Constantin from arguing that its claims are governed by German law. Apart from anything else, there is no necessary inconsistency between saying (a) that damage resulted from acts within the jurisdiction and (b) that the most *significant* elements of the events constituting the relevant torts occurred outside the jurisdiction.

330. As I have said, Constantin's claims are, in my view, governed by German law.

English law

The legal framework

331. In case I am wrong in thinking that German law applies, I should briefly consider what the position would be if the applicable law were English.

332. I have already summarised the ingredients of the relevant English torts (see paragraphs 321-323 above). The only one that calls for further comment is intention to injure.

333. The authorities show that the torts of unlawful means conspiracy and causing loss by unlawful means require the same intention: see *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 (at paragraph 146), *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) (at paragraph 833) and *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] EWHC 774 (Ch) (at paragraphs 83 and 84 of Annex I). Guidance as to the requisite intention is to be found, in particular, in *OBG Ltd v Allan* and the recent decision of the Court of Appeal in *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377.

334. In *OBG Ltd v Allan*, Lord Hoffmann, having noted that there must be "an intention to cause loss", said (at paragraph 62):

> "[I]t is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching onself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

In the same case, Lord Nicholls said this:

> "164 I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.
>
> 165 Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the

> claimant, in the sense that he would prefer that the claimant were not standing in his way.
>
> 166 Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must *intend* to injure *the claimant*….
>
> 167 I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in *Sorrell v Smith* [1925] AC 700, 742:
>
> 'When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendants' success is the plaintiff's extinction, and they cannot seek the one without ensuing the other.'"

335. In *WH Newson Holding Ltd v IMI plc*, the question was whether a claim for unlawful means conspiracy could be brought against companies which had been found to have been parties to a cartel. The claimants (Newson group) argued that, since the defendants (IMI group) had intended to profit from their conduct, they must necessarily have intended to injure people who paid higher prices for the goods affected. The Court of Appeal, however, rejected this argument. Arden LJ, with whom Patten and Beatson LJJ agreed, said this:

> "38 Essentially what the judge did was to infer intent to injure flowing from the fact that the cartelists intended to benefit their own businesses. He held
>
> > '36. In my judgment, although the Defendants' purpose in entering into the cartel was to promote their own economic interests, it is wholly unrealistic to regard this as divorced from the causation of loss to

> purchasers of copper plumbing tubes, even if the loss caused to the Claimants might not correspond to the Defendants' gain. On the basis of *OBG*, I consider that this element of the tort can be established on the basis of the finding of infringement in the Decision alone.'
>
> 39 However, in my judgment, the court cannot draw that inference since it does not necessarily follow. IMI group may have absolutely no intent as regards Newson group. They may have expected Newson group to pass the price increase on. It may well be that all purchasers of copper tubes would have been in the same position, so that they were able to pass the extra prices on.
>
> 40 In my judgment, the passage which Lord Nicholls cites from Lord Sumner in *Sorrell v Smith* …, and on which the judge must have relied, does not on analysis support the judge's approach. It uses the word 'ensuing' in the sense of a transitive verb (meaning 'following'), which is now obsolete. However the sense is clear. Lord Sumner is taking the situation where loss to the plaintiff must follow from the object of the conspiracy. He was taking the case where the proved facts exclude every other inference. As Lord Nicholls puts it, the gain and the loss are inseparably linked. But it does not follow in this case that Newson group would inevitably suffer loss. That would not be so if they were able to pass on the price increases to their customers. They might even have made a profit if they were able to raise their prices in advance of becoming liable to pay price increases to IMI group.
>
> 41 [Counsel for Newson group] seeks to meet this difficulty by submitting that it matters not if IMI group were simply indifferent whether the victims were the direct or the indirect purchasers of pipes and that it is sufficient that IMI group intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted. I would reject this argument. It deprives the requirement of intent to injure of any substantial content. It is tantamount to saying that it is sufficient that the conspirators must have intended to injure anyone who might suffer loss from their agreement. If I might say so, the submission is reminiscent of the circularity of the words in The Gondoliers that 'when everyone is somebody, then no-one's anybody'."

336. It is apparent, I think, from the *OBG* and *WH Newson* cases that a relevant intention to injure will exist if a person desires to cause loss to a particular person or desires a result that he knows will cause that person loss. If the loss is, *to a defendant's knowledge, inseparably linked* to his own gain, a desire to achieve the gain will suffice. On the other hand, it is not enough for a claimant to show that loss to him was reasonably foreseeable or even that the defendant realised that there was a chance that

such loss would be caused: "a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose". Nor will it do merely to demonstrate that a defendant must have appreciated that *someone* (whether or not the claimant or members of a specific class including the claimant) would suffer loss. The law demands that a claimant must be able to say more than that "the conspirators must have intended to injure anyone who might suffer loss from their agreement".

The present case

337. The findings of fact I have made above mean that it would be impossible for Constantin's claims to succeed if (contrary to my view) the applicable law were English. Constantin could not establish that any of the defendants was liable for either unlawful means conspiracy or causing loss by unlawful means for the following reasons:

i) The defendants did not have the necessary intention to injure. None of them either desired BLB's shares to be sold at less than full value or knew that that would be a consequence of what they wished to achieve (see paragraph 273 above). Further, they had no knowledge of the overage rights granted to EM.TV (see paragraph 306 above); and

ii) No loss to Constantin has been shown to have been caused by the corrupt arrangement that I have found proved. On the evidence before me, it is more likely than not that BLB would have accepted CVC's offer even if the arrangement had not been made (paragraph 298 above). Moreover, it has not been established that BLB could have found anyone willing to pay more than CVC (let alone enough for Constantin to become entitled to any payment pursuant to its overage rights) even had it decided to look for another buyer in 2005 (see paragraph 299 above).

338. As regards Bambino, there is the further point that it has not been shown to have been complicit in the corrupt arrangement that I have found to have existed (see paragraph 272 above).

German law

The legal framework

339. I turn then to consider German law, which, as I have mentioned, I consider to be the applicable law in the present case.

340. The provisions of the German Civil Code (or "BGB") dealing with tortious liability are beguilingly brief. The key provisions are §823 and §826. §823, which is headed "Liability in damages", can be translated as follows:

> "(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.
>
> (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault."

§826, which is headed "Intentional damage contrary to good morals", can be rendered in this way:

> "A person who wilfully causes damage to another in a manner which violates good morals is bound to compensate the other for the thus caused damage."

The words "good morals" here render the German original's "guten Sitten". The term derives from Roman law's "boni mores".

341. Under §823 par. 1 BGB, liability can arise only if there has been infringement of one of the interests listed: life, body, health, freedom or "another right". Wealth is not as such a relevant interest. Compensation cannot, therefore, be recovered for economic loss unless some other right has been violated.

342. §823 par. 2 BGB applies where a statute "intended to protect another person" is culpably contravened.

343. Constantin's case is founded on §826, under which it is possible to recover for economic loss. The scope of this provision is in some respects controversial. Professor Köhler remarked that "everything to do with 826" is "heavily disputed in judicial literature". In similar vein, Professor Kindler said that there are "difficult questions related to nearly every element". "It is," he said, "one of the most complicated provisions of the German Civil Code because it is so short."

344. Before considering what is required to establish liability under §826, I should say something about some of the materials relevant to German Courts' decisions. All three German law experts gave evidence about the extent to which previous Court decisions are important under German law. There is evidently a difference of principle between the approach taken in England (and other common law countries) and that adopted in Germany. In Germany, unlike England, judicial decisions are not

a source of law in the strict sense: "[p]recedents are not sources of law but mere sources of the understanding of law" (as Professor Köhler wrote in "Gesetzesauslegung und gefestigte höchstrichterliche Rechtsprechung"). "[F]or the German judge the primary building block is the Code that has to be applied" (Markesinis, "Judicial Style and Reasoning in England and Germany", (2000) 59 CLJ 294, at 297). In practice, a German judge will generally follow a decision of a higher Court, and Germany's highest Court, the Federal Court of Justice (in German, Bundesgerichtshof, or "BGH"), "tends to stay true to its former interpretation of law even if it may not be entirely satisfactory" (to use words of Professor Köhler). Even so, past cases do not have the same significance in Germany as in England, and German judges do not need to devote as much attention as an English judge would to analysing and, where appropriate, distinguishing previous decisions: "Rarely, if ever, is this case law *scrutinised* in the way an English court would consider and redefine earlier decisional law" (to quote Professor Markesinis again).

345. The German Courts make extensive reference to commentaries on the BGB. Leading commentaries on §826 include those by Professor Wagner (in Münchener Kommentar zum BGB, 6th ed., 2013), by Professor Oechsler (in Staudinger, Kommentar zum BGB, Neubearbeitung 2009) and by Professor Hönn (in Soergel, Kommentar zum BGB, 13th ed., 2005). Another commentary to which there was reference in the evidence was by Professor Spindler (in Bamberger/Roth, Kommentar zum BGB, 3rd ed., 2012).

346. As its terms suggest, §826 requires (a) intention, (b) an action contrary to "good morals" and (c) consequential damage.

347. With regard to the first of these (intention), it is common ground that "conditional intent" ("dolus eventualis" or "bedingter Vorsatz") will suffice but "wilful negligence" ("bewusste Fahrlässigkeit") will not. With wilful negligence, a person realises that there is a risk of harm, but does not accept it and trusts that it will not materialise. Conditional intent exists if a person realises that there is a risk of harm and consciously and approvingly accepts the risk because he cannot otherwise achieve his aim. Professor Wagner explains (Münchener Kommentar zum BGB, §826, margin note 26):

> "the party with conditional intent accepts the possibility of loss which he has recognised in order to achieve a different goal, such as gaining a financial advantage for himself. The mere fact that the party would rather avoid the loss coming about because he finds it undesirable does not release him from the accusation of acting with conditional intent."

348. A defendant does not need to have been aware of the claimant's identity to have had the requisite intention. It is enough that he foresaw:

> "the direction in which his behaviour could have a detrimental effect on others, and the type of damage that would possibly occur, and accepted or approved it."

349. This requirement was not met in the case from which this quotation is taken: BGH NJW 1963, 579. There, a soldier failed to return to his family after the war, and he was assumed to be dead. As a result, the claimant granted his daughter an orphan's pension and his wife a widow's pension. The claimant sought to recover what it had paid from the soldier, but he was held not to be liable under §826. The judgment states:

> "It is well known, to be sure, that public assistance steps in for the needy. To what extent the defendant is supposed to have envisaged a need for assistance to his daughter resulting from his behaviour is all the less clear since the daughter's basic needs were, in fact, always sufficiently covered even without public assistance. More than ever there is little basis for the assumption that the defendant could have envisaged that the daughter would receive income by claiming an orphan's pension to the detriment of the carrier of the disability insurance."

The soldier will presumably have known that someone other than himself was supporting his child. That, however, evidently did not suffice. What mattered was that he could not anticipate that there would be a claim for public support. As it was put in Constantin's closing submissions, "claims on the authorities for support was not a type of risk that he could anticipate".

350. With regard to the second element (action contrary to "good morals"), the touchstone has been said to be "the sense of propriety of all good and right-thinking members of society". This formula is, however, of limited practical significance. In Professor Wagner's view, it is "a classical piece of empty rhetoric that provides no help to those who apply the law and which conceals the essential classifications instead of disclosing them" (Münchener Kommentar zum BGB, §826 margin note 9).

351. In determining whether conduct is to be considered contrary to "good morals", the Court has to focus on the particular claimant. The fact that conduct is considered contrary to "good morals" vis-à-vis one person will not necessarily render it contrary to "good morals" as regards another. As Professor Köhler said in one of his reports, "The contra bonos mores nature of an act is, according to the prevailing opinion today, not to be determined in the abstract, but with reference to the respective damaged party". "The reason for this limitation is," as Professor Köhler explained, "the risk of an excessive extension of liability arising from Sec. 826 BGB, if everyone who has suffered damage from an action contra bonos mores were entitled to claim."

352. As Professor Köhler observed, "What principles apply in the determination of conduct being *contra bonos mores* towards damaged parties is one of the most disputed questions regarding the interpretation of Section 826 BGB." The dominant view, however, is that the doctrine of "protective scope" is significant in this context. During his oral evidence, Professor Köhler accepted that, when deciding whether there has been conduct contrary to good morals, the Court has to examine the purpose of the protective rule that the defendant has breached. Professor Wagner explains matters in this way (Münchener Kommentar zum BGB, §826, margin note 21):

> "The finding of a contravention of public policy of a particular act by the tortfeasor is to be made in reference to the person of the aggrieved party and not *in abstracto*. As with section 823 (1) and (2), liability for damage contrary to public policy is restricted in accordance with the protective purpose of the behavioural norm which has been infringed …. In the case of section 826 the principle that indirectly aggrieved parties are not included in the scope of protection of the behavioural norm, which labels the act against the directly aggrieved party as contrary to public policy, is particularly true …."

Professor Oechsler expresses reservations about the "protective purpose" doctrine, but he accepts that "prevailing opinion" favours it (see Staudinger, Kommentar zum BGB, §826, margin notes 99-111).

353. Reference to protective scope is to be found in NJW 1986, 837, where shareholders in a company claimed that they had suffered loss because the defendant bank had delayed its filing for bankruptcy. The judgment includes this:

> "[T]he liability to compensation under section 826 BGB cannot be appropriately restricted through the adequacy of causation and the extent of knowledge about the damage alone. The general rule which applies for tort claims is that the obligation to pay compensation is limited to such damage falling within the *scope of protection* of the infringed duty or prohibition…. To keep the risk of liability within appropriate and reasonable limits, this limitation of liability also cannot be dispensed with in the context of section 826 BGB…. A behaviour can be classified as contrary to good morals with respect to causing specific damage, in particular also with respect to harming people, while it might not [be] classified in this way with respect to other resulting damage, which might have equally been adequately caused…. Liability for compensation in such a case is limited to the damage emanating from the area of danger that was created in a manner contrary to good morals" (emphasis added).

Purchasers of *new* shares could potentially have a claim. The Court said:

> "in individual cases particular circumstances could exist whereby the behaviour of the party delaying bankruptcy could be seen as immoral with respect to the purchasers of shareholdings of the company. Such an exceptional case might apply here in relation to purchasers of new shares as a result of the capital increase. If the Claimant's pleadings are proven correct, the issue of new shares was precisely the means by which the bankruptcy of [the company] was (further) delayed to the detriment of the purchasers of these shares."

Purchasers of *pre-existing* shares were not, however, entitled to claim:

> "There is a lack of a comparable inherent connection between the delay in filing for bankruptcy and the damage suffered by third parties due to purchasing company shares after the commencement of acts delaying bankruptcy and therefore paying an excessive price. It is a question of chance and it is also irrelevant for the aims of the bank, delaying bankruptcy whether such purchases occur during the delay of bankruptcy. Therefore, there is no sufficient, objective reason to consider the behaviour of the party delaying bankruptcy as *contra bonos mores* also with regard to such purchases, and thereby to relieve third parties from the speculative risk they should, in principle, bear themselves."

354. One of the cases mentioned in NJW 1986, 837 suggests that a person who has suffered loss indirectly faces particular hurdles. The case in question, NJW 1979, 1599, concerned a reference that a bank had given to two other banks. The claimant had not seen the reference, but maintained that he had nonetheless suffered loss as a result of it since (a) the reference had caused the two banks to discount certain bills of exchange and (b) the fact that the banks were willing to discount the bills of exchange had led the claimant to refrain from withdrawing credit from the subject of the reference and from seeking security. The claim failed. Having commented that it could not be acceptable for a defendant to be liable to *anybody* who might have suffered loss as a result of his actions, the Court noted that the requirement for intent could be used to limit liability. In general, the Court said, this makes it possible to achieve a satisfactory result since:

> "if the party causing the damage has a *concrete idea* that through his contra bonos mores action he not only damages the person directly affected, but also other persons who can at least be determined, and at least approves such [a] possibility, the verdict to have acted contra bonos mores will in most cases also extend towards the 'indirectly' damaged party" (emphasis added).

However, the Court went on to indicate a further restriction on the ability of a third party to obtain redress:

> "Such third parties merit protection and therefore are entitled to damages according to Sec. 826 BGB only if they suffered harm *not as a mere reflex* of the harm suffered by the directly damaged person but if the pecuniary harm rather is contrar bonos mores also and in particular with regard to them…. Hence, the intentional infliction of damage alone does not establish liability under Sec. 826 BGB. Rather, the verdict of contra bonos mores must also always apply to them [indirectly damaged parties]" (emphasis added).

On the facts, there was "no sufficient connection between [the claimant's] loss and the false information provided by the defendant contra bonos mores so as to give rise to liability". The Court said:

> "The causal connection with [the defendant's] damaging property disposition – which may be present – lacks the special element of abuse of trust required for the application of Sec. 826 BGB."

355. Professor Wagner cites both NJW 1979, 1599 and NJW 1986, 837 in support of these comments (Münchener Kommentar zum BGB, §826, margin note 38):

> "Indirectly affected parties will not be included in the scope of protection provided by section 826 if the act is indeed directed against another party but the defendant foresaw the possibility of damage to the third party (also). In reality, it is important that the third party's assets are not only affected reflexively as a result of damage contrary to public policy suffered by another party. Contrary to old decisions by the RG and many opinions in current academic literature, this is not a matter of ascertaining the scope of liability with regard for the range of intent which is frequently not subject to any overly large filter effect since *dolus eventualis* suffices as it always does. Even, or especially, when the defendant is aware of the possibility of damage to third parties, the context of the protective purpose must also be assessed and affirmed in order for liability to arise under section 826."

Professor Wagner goes on (Münchener Kommentar zum BGB, §826, margin note 40):

> "The considerations significant in substantiating the context of the protective purpose are the same as the most important factors regarding a contravention of public policy for determining the scope of protection. This therefore separates economic harm which is to be avoided from that which is to be accepted as not being eligible to compensation …. Contrary to widespread view within academic literature, the differentiation

> between directly and indirectly affected aggrieved parties is, in the sense of a heuristic guideline, by all means acceptable. In many cases involving section 826 it is also possible to differentiate without issue between a primary aggrieved party and other parties which merely suffer as a result of the primary breach and therefore only reflexive loss. Therefore, in the case of an unlawful strike the company is directly affected whereas its employees, purchasers and suppliers are indirectly affected."

356. It is, I think, also worth noting at this stage that the fact that a person intends to cause loss will not necessarily expose him to liability under §826. It could hardly be otherwise in societies in which (fair) competition is accepted. Professor Oechsler notes that "the fact that the intent to cause loss in a market economy dedicated to competitive rivalry does not of itself give rise to damages actually follows directly from [§]826, which only imposes sanctions where an intent to cause loss *is contrary to public policy*" (Staudinger, Kommentar zum BGB, §826, margin note 19).

357. The various principles outlined above lead Dr Birkholz and Professor Kindler to conclude that Constantin can have no claim against the defendants. At the risk of over-simplifying their evidence, their reasons can, I think, be said to include these:

i) For there to be any question of the defendants having known of and approvingly accepted a risk of loss to Constantin, they would have had to be aware that, as a result of the arrangement with Dr Gribkowsky, BLB's shares would be sold at a price lower than would otherwise be achieved. Even, however, were that proved, the defendants would not be deemed to have the requisite intention for liability under §826 unless they had knowledge of the overage rights;

ii) A German Court would not hold the defendants' conduct to be contrary to good morals vis-à-vis Constantin (as opposed to BLB) if they had no knowledge of the overage rights. Such knowledge would not, however, be sufficient to establish conduct against good morals in relation to Constantin. The mere fact that a criminal offence had been committed would not of itself render the defendants' conduct contrary to good morals as regards Constantin, and the general rule is that bribery is immoral with respect to competitors and the principal of the agent/employee bribed but not immoral against a third party in Constantin's position. Accordingly, the requirement that the (alleged) conduct of the defendants breached good morals for the purpose of §826 has not been met;

iii) Constantin has not suffered any recoverable loss. Only BLB could be said to have suffered relevant loss. There can be no shift of damages from BLB to Constantin.

358. Professor Köhler sees things rather differently. In his view, it is immaterial whether the defendants were aware of the overage rights. Constantin could say that it was within the scope of the direction of the damage that the defendants caused regardless of whether its overage rights were known to the defendants. On the basis (which he was asked to assume) that Dr Gribkowsky was bribed to procure the sale of BLB's shares to CVC without adequate marketing, valuation and negotiation, the direction of damage involved the sale of BLB's shares without a proper process, and the type of loss consisted of the difference between the actual sale price and the price at which the shares would have been sold but for the Payments. In the event, the loss has been shared between BLB and Constantin, but allowing Constantin to claim would not give rise to an "increase but only a (partial) shift of the damages (damages of [BLB] + damages of Constantin = 100 %)". "[T]he damage incurred by Constantin is not an additional consequential damage to the damage of [BLB], but is part of the primary damage which the Defendants caused", and Constantin is, accordingly, a "directly damaged party". Were Constantin to have no claim, the defendants would have no liability for part of the loss they had caused, which could not be right. With regard to the need for conduct contrary to good morals, Professor Köhler said that this emerged from "the fact that the defendants no. 1) to 3) deliberately and intentionally cooperated (collusion) with the defendant no. 4), as representative of [BLB] to the disadvantage of [BLB]". The fact that there had been a bribe added to the immorality, but that was anyway to be found in the defendants' collusion.

359. The linchpin of Professor Köhler's argument is a case I have not as yet mentioned: BGHZ 108, 134, which dates from 1989. In this case, the managing director of a company was accused of having intentionally delayed filing for bankruptcy. When the company eventually became subject to bankruptcy proceedings, employees were owed salary, and the Federal Job Agency was obliged to compensate them for the salary that had not been paid. That evidently meant that the Agency became subrogated to the employees' salary claims against the company, but these were said to be time-barred. The employees might also have been able to claim against the managing director under §823 par. 2 BGB in combination with a statutory provision dealing with delayed filing for bankruptcy (§64 Law of Limited Companies), but (a) the Agency was not itself among those protected by §64 Law of Limited Companies and (b) the statute providing for the Agency to be subrogated to pay claims did not also provide for it to inherit claims under §823 par. 2. The Agency, however, invoked §826, and it was held to be entitled to pursue a claim on this basis against the managing director. The Court said this:

> "According to the submission of the claimant which has to be assumed to be correct, it was clear to the defendant that his continued conduct could eventually lead to the company's inability to satisfy the wage and salary claims of its employees. He approvingly accepted this. Thus, the direction of his wilful intent to cause damages is sufficiently determined. Therefore, it does not matter whether he was possibly mistaken as far as the identity of the ultimately damaged party is concerned because he was not aware that the employees' wage and salary claims would be assumed by the Federal Job Agency for the last three months before the opening of the bankruptcy for social political

> reasons, so that the damages accepted by him were ultimately sustained by the Agency and not by the employees. As the bankruptcy redundancy payments are a wage substitute stipulated by law – though dependent on an application by the employee – such creditor replacement by virtue of law does not change the manner and the direction in which his unlawful conduct would have had implications on the non-satisfaction of wage and salary claims of the employees, and the [creditor replacement] is therefore not suitable to eliminate the intent of the defendant to cause damages or to substantiate the risk of an unreasonable extension of liability under Section 826 BGB…."

360. In Professor Köhler's view, there is a close analogy between BGHZ 108, 134 and the present case. BGHZ 108, 134 shows, he said, that a defendant need not have had the particular claimant in mind to be liable under §826. In BGHZ 108, 134, the managing director may not have known that the Federal Employment Agency would have to compensate employees for unpaid salary, but that did not preclude the Agency from claiming against him. That was because the employees' loss had been shifted to Agency. Similarly, Constantin's overage rights brought about a (partial) shift of loss from BLB to Constantin.

361. In contrast, Dr Birkholz and Professor Kindler maintained that BGHZ 108, 134 is of no real help. Dr Birkholz said that he disagreed fundamentally with Professor Köhler on the significance of the case. During his oral evidence, he said:

> "I don't accept Professor Köhler's reasoning that this is a case establishing some fundamental change in the German Federal court's view on 826. Were that … the case it would be cited in the commentaries at the relevant place. It is not."

Dr Birkholz thought that the rationale of the case was that the managing director's ignorance of the law (as regards the Federal Employment Agency's role) was irrelevant. Professor Kindler echoed that, but also considered it important that the judges had referred to the "social political reasons" behind the statutory assignment of the salary claims. He further expressed the view that in the present case, unlike BGHZ 108, 134, there is "no creditor replacement". As to that, he said:

> "it's the creditor replacement that justifies the claim against the Federal Job Agency. And it is one of the crucial questions of our case if there has been a creditor replacement. In our case I think it is clear that BLB can claim 100 per cent from the defendants if the alleged facts are proved to be true and if the further conditions are all met. So there is no creditor replacement in our case."

For his part, Dr Birkholz said:

> "BLB would still be entitled to claim 100 per cent. Just the fact that there is some claim … from the third party to participate in the proceeds doesn't take away the damage."

Dr Birkholz described the point as "very clear".

362. These comments raise, as it seems to me, a key issue. If, as Professor Kindler and Dr Birkholz suggested, any claim BLB had against the defendants would be in respect of the *entirety* of the difference between the price at which it sold its shares and what it would (on this hypothesis) have realised but for the Payments, without any deduction for anything payable under the overage rights, the analogy between the present case and BGHZ 108, 134 breaks down: there would, in the present case, be no creditor replacement or shift of loss. Any loss Constantin might have suffered could be said to be reflective of loss for which BLB could claim, and the defendants could potentially be exposed to liability to more than one person for the same damage. If, on the other hand, BLB's claim would be reduced to take account of the overage rights, the defendants could escape liability for a proportion of the loss they had caused unless Constantin had its own claim against them.

363. Constantin's position on this point was summarised as follows in its closing submissions:

> "The German court, when considering the compensation payable to BLB, would … consider the hypothetical situation in which it would have been had the wrongdoing not occurred. The situation would have been that (i) a sale had occurred at the correct value; (ii) this would have triggered the obligation on BLB under the [overage rights] to transfer a share of those proceeds to Constantin; (iii) BLB can be presumed to have acted lawfully and done so; thus (iv) BLB would be left with its share of the proceeds. This share of the proceeds is what BLB would be entitled to claim as compensation under section 249 BGB."

Mr Hapgood, on the other hand, submitted as follows:

> "The position is simply that BLB, on the facts alleged by Constantin, might have a claim against the Defendants for 100% of the shortfall in sale proceeds, and Constantin might then have a claim to recover from BLB a share of the damages if they take the total amount received by BLB above the Financing Amount….
>
> Dr Birkholz gave convincing evidence that a German court would award BLB 100% of its alleged loss, just as an English court would say that the position as between Constantin and BLB is res inter alios acta."

364. On balance, I prefer Mr Hapgood's submissions on this aspect of the case, on which I found the evidence of Dr Birkholz and Professor Kindler compelling. Reference to the contract giving rise to the overage rights seems to me to reinforce the opinions expressed by Dr Birkholz and Professor Kindler. The better view, I think, is that Constantin would become entitled to payment pursuant to that contract (which is governed by Jersey law rather than German) were BLB to recover damages from the defendants on the footing that, but for the Payments, its shares would have been sold before 31 December 2007 for more than $1,057.4 million. During closing submissions, Mr Hapgood argued that that would be the position, and I did not understand Mr Marshall positively to dissent from the proposition. If it is correct, it appears to imply that BLB would have to be awarded compensation for the whole of the *gross* loss, otherwise (once it had discharged its contractual obligations to Constantin) it would be left with less than the *net* loss.

365. In the circumstances, Professor Köhler's argument strikes me as flawed. Contrary to Professor Köhler's analysis, there has been no shift of loss to Constantin. The position is rather that any loss Constantin might have suffered is reflective of loss suffered by BLB, and, were both to have claims, they would overlap. I do not think the German Courts would countenance such an outcome.

366. Even had I been persuaded that any damages that BLB was entitled to recover would be reduced by reference to the overage rights, I would, on balance, have concluded that Constantin could have no claim against the defendants under §826 unless (contrary to the view I take on the facts) they had had some knowledge of the overage rights. With a degree of hesitation, I would have accepted that, in the absence of such knowledge, a German Court would have been likely to decide that the defendants had lacked the necessary intention and/or had not acted contrary to good morals vis-à-vis Constantin.

367. I should perhaps add that I do not think that reference to collusion is of any significant assistance. It is plainly the case that collusion can potentially involve conduct contrary to good morals. Thus, Professor Oechsler states that "[a]ny planned collusive joint action by a party in breach of contract is consistently in breach of public policy" (Staudinger, Kommentar zum BGB, §826, margin note 237). In that sort of case, it is the fact that the proposed conduct would involve a breach of contract that renders the "collusion" objectionable. Collusion would also, of course, be objectionable if it involved bribing or otherwise suborning an employee or agent. If, on the other hand, two people entered into an agreement to advance their own interests at the expense of someone else (say, by opening a rival shop) in an otherwise unobjectionable way, the fact that they could be described as "colluding" could not render their behaviour immoral.

The present case

368. In the light of my conclusions as to German law and my findings of fact, Constantin's claim against the defendants fails for the following reasons:

i) There has been no shift of loss to Constantin. Supposing Constantin to have suffered any loss, it would be reflective of loss sustained by BLB, and under German law Constantin could not bring a claim of its own (see paragraph 365 above);

ii) The fact that the defendants had no knowledge of the overage rights on which Constantin relies (see paragraph 306 above) is also fatal to its claim as a matter of German law (see paragraph 366 above);

iii) No loss to Constantin has been shown to have been caused by the corrupt arrangement that I have found proved (see paragraph 337(ii) above);

iv) Bambino has not been shown to have been complicit in the corrupt arrangement that I have found to have existed (see paragraph 272 above); and

v) Mr Mullens has not been shown to have had even conditional intent as regards BLB, let alone Constantin. It has not been established that he desired BLB's shares to be sold at an undervalue, believed the price at which they were in fact sold to be below market value, or perceived there to be a risk that the shares would be sold at an undervalue (see paragraphs 273 and 274 above).

The valuation evidence

369. Given the conclusions I have arrived at above, I do not need to consider the valuation evidence further.

Conclusions

370. I can summarise my conclusions as follows:

i) Since these are civil proceedings, the factual issues fall to be decided on the balance of probabilities. The criminal standard of proof (beyond reasonable doubt) does not apply;

ii) The Payments were a bribe. They were made because Mr Ecclestone had entered into a corrupt agreement with Dr Gribkowsky in May 2005 under which Dr Gribkowsky was to be rewarded for facilitating the sale of BLB's shares in the Formula One group to a buyer acceptable to Mr Ecclestone;

iii) Mr Ecclestone's aim was to be rid of the Banks. He was strongly averse to their involvement in the Formula One group and was keen that their shares should be transferred to someone more congenial to him;

iv) Mr Mullens was complicit in the corrupt arrangement, but Bambino was not. The claim fails as against Bambino for that (as well as other) reasons;

v) It was no part of Mr Ecclestone's purpose (or Mr Mullens') for BLB's shares to be sold at an undervalue, and neither Mr Ecclestone nor Mr Mullens had any desire for the shares to be sold at an undervalue or believed the price at which they were in fact sold to be below market value. Mr Ecclestone was probably conscious of a risk that the shares would be sold for less as a result of his arrangement with Dr Gribkowsky, but that has not been established as against Mr Mullens. The claim fails as against Mr Mullens for that (as well as other) reasons;

vi) No loss to Constantin has been shown to have been caused by the corrupt arrangement with Dr Gribkowsky. That fact is fatal to the claim as against all the defendants;

vii) Constantin's claim would anyway have failed as a matter of German law (which I consider to be the applicable law) because (a) any loss it might have suffered would be reflective of loss suffered by BLB and (b) none of the defendants had any knowledge of the overage rights on which Constantin's claim is founded; and

viii) Constantin's claim would also have failed had it been governed by English law.

371. I shall dismiss the claim.