IN THE ROYAL COURT OF JERSEY
(SAMEDI DIVISION)

File No: 2009/127

16th November 2012

Before: Howard Page QC, Commissioner,
and Jurats Kerley and Marett-Crosby

Between **(1) The Federal Republic of Brazil**

(2) The Municipality of Sao Paulo **Plaintiffs**

And **(1) Durant International Corporation**

(2) Kildare Finance Limited **Defendants**

And **(1) Deutsche Bank International Limited**

(2) Deutsche International Custodial Services Limited

(3) Deutsche International Corporate Services Limited

(4) Deutsche International Trustee Services (CI) Limited

Parties Cited

JUDGMENT

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I. Introduction

The parties and the claim

1. The action is a claim by The Federal Republic of Brazil and The Municipality of Sao Paulo ("the Municipality") to certain moneys, of the order of US$10.5 million plus interest, currently held in bank accounts in Jersey in the name of the defendants, Durant International Corporation ("Durant") and/or Kildare Finance Limited ("Kildare"): accounts which, since 30th March 2009, have been the subject of a freezing order granted by the Royal Court.

2. The Municipality is the substantively aggrieved party, the first plaintiff being constitutionally a necessary party to any claim brought outside Brazil by a public authority. The agency of the Municipality responsible at the material time for the

supervision of public roads and other works and through which funds for such projects were made available was Empresa Municipal de Urbanizacao ("EMURB").

3. The funds currently in the hands of Durant and Kildare are said by the plaintiffs to include the traceable proceeds of bribes, secret commissions or other fraudulent payments ("kick-backs" to use the term employed by witnesses) received by Paulo Salim Maluf ("Paulo Maluf") and/or his son Flavio Maluf ("Flavio Maluf") in early 1998 in connection with a major public works contract in Sao Paulo for the construction of the Avenida Agua Espraiada, the main contractor for which was a company by the name of Mendes Junior Engenharia S/A ("Mendes Junior").

4. Between January 1993 and December 1996 Paulo Maluf was Mayor of the Municipality of Sao Paulo. He is a prominent politician and businessman who between 1979 and 1983 was also the Governor of the State of Sao Paulo. The payments in question are said to be but one part of a fraud originating at the time when Paulo Maluf was Mayor. Despite a contention to the contrary late in the day, it was conceded from the outset, that Paulo Maluf at all material times owed the plaintiffs fiduciary duties of loyalty: see the defendants' Answer paragraph 6 (and corresponding paragraphs in their Amended Answer) and admissions in the defendants' second skeleton argument.

5. Durant and Kildare are companies registered in the British Virgin Islands and are alleged by the plaintiffs to be owned or controlled in practice by Paulo Maluf and/or Flavio Maluf via Sun Diamond Limited, the trustee of the Sun Diamond Trust. Kildare is a wholly owned subsidiary of Durant. It was accepted by the defendants that Flavio Maluf, who was a businessman and President of Eucatex SA, a Maluf-family company with substantial trading interests in Brazil, was at all material times a director of Durant and of Sun Diamond Limited.

6. The parties cited (to whom we shall refer collectively, for convenience, as "Deutsche Bank") are a bank and associated corporate and trustee service providers with whom the moneys in question are currently deposited. Two of their officers gave evidence in the form of short statements which, by agreement of counsel, were read to the Court. Apart from this, and being one source of documentary evidence concerning the ownership and control of the defendants, they (Deutsche Bank) played no part in the litigation.

7. The plaintiffs' case, in summary, is

> (i) that for some years in the mid-to-late 1990s a wide-scale fraud was in operation the purpose and effect of which was the extraction from the Municipality and misappropriation of very large sums of money, the generation of a slush fund, and the payment of kick-backs of one kind or another to a number of persons including, in particular, payments to Paulo and/or Flavio Maluf in late 1997 and early 1998 in a total amount of R$ 13,512,885, the equivalent at then-prevailing rates of exchange of US$ 11,157,278 (Schedules 1 & 2 of the Order of Justice);

(ii) that moneys from that slush fund to the value of US$10,500,055.35 can be traced into thirteen specific credits made to a bank account called "Chanani" at Safra National Bank in New York ("Safra Bank") between 9th January and 6th February 1998, their removal from Brazil and conversion into US dollars having been facilitated by black market currency dealers known as *doleiros* (Schedule 3 to the Order of Justice);

(iii) that the Chanani account was beneficially owned and controlled by the Malufs;

(iv) that moneys thus credited to the Chanani account were subsequently transferred to an account with Deutsche Bank in Jersey in the name of Durant (Schedule 4 to the Order of Justice) and thence to Kildare (Schedule 5 to the Order of Justice); and

(v) that Durant and Kildare were at the material time beneficially owned and controlled by the Malufs, that the Malufs' knowledge is to be attributed to those entities and that the moneys credited to the bank accounts of those companies were accordingly received by them with knowledge of their tainted origin or, at least, knowing that they had no entitlement to them.

8. The claim is not one for damages against the perpetrators of the fraud but for recovery of moneys from the defendants on the ground that they are personally accountable as constructive trustees of the funds received by them with knowledge of their tainted origin; alternatively on grounds of unjust enrichment; alternatively on the basis of a proprietary claim by the plaintiffs to such funds.

9. Other public works projects may also have been affected by similar (alleged) frauds but we are only concerned with that said to have operated in relation to the Avenida Agua Espraiada and with a limited number of payments alleged to have been received by the Malufs and the defendants in the space of a few weeks in late 1997 and early 1998.

10. Nor are we concerned with other legal proceedings involving the Malufs that are or have been on foot in jurisdictions other than Jersey except to note, for the record, that the present action was originally part of wider-ranging proceedings in Brazil but was hived off with the consent of the courts there as more suitable for trial in this jurisdiction as recounted in the judgment of the Royal Court handed down on 6th September 2010.

11. The Order of Justice was served in March 2009, the delay in the matter coming to trial being accounted for in part by a challenge by the defendants to the jurisdiction of the Royal Court and issues of *forum conveniens* which was not finally resolved in the plaintiffs' favour until late November 2010, by a multiplicity of subsequent interlocutory applications of one kind and another and by adjournment of the date fixed for the trial from January to July this year. The plaintiffs were represented by Advocates Baker and Jordan and the defendants by Advocate Steenson. Although Mr. Steenson avoided saying

as much expressly, it was difficult to avoid the strong impression that his instructions derived from the Malufs.

The nature of the evidence

12. The evidence in the case was led almost entirely by the plaintiffs. The defendants' approach to the case was minimalist: a pleading that consisted for the most part of non-admissions, a pre-trial skeleton argument that ran to no more than three pages (though supplemented in the course of the trial by a second skeleton produced on Day 5 of the trial and largely devoted to issues of law) and an all-embracing submission that it was for the plaintiffs to prove their case. Apart from a hearsay notice with respect to the evidence of one witness and two other statements which were handed up, the defendants sought to adduce no evidence of their own, contenting themselves with challenging the authenticity or significance of documents or the weight to be given to hearsay evidence relied on by the plaintiffs until shortly before the start of the trial when they sought leave to amend their pleading in fundamental respects and to adduce evidence – an application which was refused by this Court and in respect of which leave to appeal was refused by McNeill J.A.

13. Mr. Baker said from the outset that for the most part his clients' case would be made good by reference to documentary evidence. Mr. Steenson countered that such evidence came nowhere near establishing the plaintiffs' pleaded case. But on one point both were agreed: that one particular document was of crucial significance to the plaintiffs' case. For much of the trial that document was referred to, rather unsatisfactorily, as "the De Oliveira document". At this stage it is unnecessary to say more than that it was a one-page set of financial figures headed "POSIÇÃO EM 05.02.98" which, on the plaintiffs' case, evidenced a direct link between the slush fund and payments to the Malufs but which, the defendants submitted, was of indeterminate provenance, could well have been a fabrication and showed no such thing. It will be necessary to consider this document in detail in due course.

14. The plaintiffs would, however, have wished to call a number of witnesses, either in person in Jersey or by way of video-link from Brazil. In practice only one witness gave evidence in person. Some who might have done so were not prepared to co-operate, or proved unwilling to travel to Jersey, or in one case made unacceptable demands as the price for giving evidence, or were said to be uncontactable.

15. In the absence for the most part of witnesses in person the plaintiffs sought to rely on hearsay evidence identified in a series of notices served pursuant to Article 4 of the Civil Evidence (Jersey) Law 2003 and RCR 6/21, the evidence in question taking the form of depositions and the like made, and documents exhibited, in legal proceedings of one kind or another in Brazil or in the form of witness statements prepared for the purposes of the present litigation in the expectation or hope that the witnesses in question would be giving evidence in person when it came to the trial. Such statements were led by the plaintiffs from eight witnesses employed at the relevant time either by EMURB, Mendes Junior or by one or other of two sub-contractors to Mendes Junior and from two *doleiros*.

For their part, the defendants put in evidence further statements from two of the Mendes Junior employees and one from a former employee of Safra Bank in New York.

16. Whether and to what extent the plaintiffs should be entitled to rely on evidence in the form of hearsay statements was a heavily contested issue from the first point at which the plaintiffs served a hearsay notice in relation to potential witnesses in November last year. It then became even more hotly contested in the light of the Court of Appeal's ruling in January this year upholding the defendants' objection to two potential witnesses being permitted to give evidence by video-link from Brazil. The protracted saga is recounted in a series of judgments of this Court and the Court of Appeal between 20th December 2011 and 11th May 2012. In a number of instances such statements were disallowed or only admitted in a redacted form; but for the most part challenges by the defendants to the admission of evidence in this form were dismissed, the weight to be given to them being left to the trial court to decide.

17. It is right that we record as fairly as we can the reasons forcefully expressed by Mr. Steenson on behalf of the defendants for seeking to exclude evidence of this kind, and indeed to exclude evidence by video-link. His root objection was that in a case of self-evident importance involving serious allegations of wrong-doing by a prominent public figure in Brazil, it was wrong in principle that evidence from witnesses should be given other than by them appearing in person in the witness box in the trial court in Jersey and that only in this way could their evidence be properly tested and evaluated by the Court. In addition, he said, allowing the plaintiffs to lead evidence by video-link or by hearsay statements was a far cry from what had been envisaged at the time of the jurisdiction hearing in 2009 when Mr. Baker had indicated that he expected to call a number of witnesses from Brazil.

18. We acknowledge of course the gravity of the allegations against Paulo Maluf and Flavio Maluf entailed in the plaintiffs' claim; but large scale misappropriation of public funds, if true, is also a matter of no small consequence. The issue of jurisdiction has long since been the subject of ruling by the Royal Court and a Judge of the Court of Appeal; and any force that Mr. Steenson's point about anticipated witnesses might otherwise have had was undermined by the fact he too had spoken, at that time, of calling witnesses from Brazil, including the Malufs, whereas in the event not one was called. We accept that there may still be much to be said for witnesses appearing in person at the trial court wherever possible. But taking advantage of modern technology to allow evidence by video-link where the attendance of a witness in person is impracticable or would be disproportionately expensive is now a relatively common occurrence and a facility to be welcomed. Where, as here, witnesses are flatly unwilling to undertake the necessary journey or to take the necessary time to attend court, and the party hoping to have the benefit of the evidence is in no position to compel them to attend (as here), taking evidence by video-link plainly affords a valuable alternative. And the admission of hearsay evidence having been sanctioned by legislation in civil proceedings since 2003 in the clearest of terms, it requires very strong reasons to exclude it *in limine*.

19. As it was, one result of the pre-trial interlocutory skirmishes was that although the plaintiffs themselves were not permitted by the Court of Appeal to have the evidence-in-chief of two witnesses (Sergio Santoro and Vivaldo Alves) given by video-link from Brazil, they *were* permitted to adduce hearsay evidence from those same witnesses in the form described above. In those circumstances, the plaintiffs informed the defendants that they would continue to hold available facilities for the defendants to cross-examine Messrs. Santoro and Alves on their statements by video-link if they wished to avail themselves of the opportunity. A similar offer was made at a later stage in respect of another witness, Richard van Otterloo. None of these offers was taken up.

20. We turn now to the facts. It is instructive to start with the Jersey end of things.

II. Durant and Kildare

The Sun Diamond Trust structure

21. For the most part, the evidence here was provided in part by documents disclosed by the defendants in the course of discovery in 2011 and in part from documents obtained by the plaintiffs as a result of a *Norwich Pharmacal* application in 2007 for disclosure by Deutsche Bank entities. There were also written witness statements from two Deutsche Bank officers, Anita Joan Finch ("Joan Finch") and John Boothman which, with the consent of Mr. Steenson, were read to the Court without requiring them to attend for cross-examination. While some matters remained less than transparent, a considerable body of important evidence emerged with clarity from this material.

22. The Sun Diamond Trust was settled as a BVI trust by Declaration of Trust made by Sun Diamond Limited (as trustee) on 7th September 1996, the arrangements being put in place by Brunschwig Wittmer, a Geneva firm of lawyers, one of the partners of which, Mr. Jacques Wittmer, had, it seems, previously acted for Paulo Maluf.

23. The trust was established on the instructions of Paulo Maluf and his wife Sylvia Lutfalla Maluf. It was Paulo Maluf who contributed the initial funds and in December 1996 added further assets to the trust. It was originally planned that Flavio Maluf and one of his sisters would be treated as co-settlors, but following advice from English counsel this was changed to record Paulo Maluf as the settlor. The initial protector was to be Sylvia Lutfalla Maluf.

24. The precise history as regards beneficiaries of the trust is unclear, the available documentation not being consistent on the point. In particular, according to a first Memorandum of Wishes by Paulo Maluf dated 7th September 1996 (as attached to a briefing memorandum from Jacques Wittmer to London counsel dated 8th January 1997), Paulo Maluf and his wife were to be the "principal beneficiaries" during their lifetime; but in a second Memorandum dated 10th March 2007 Paulo Maluf asked "that during my lifetime my four children [as named] be appointed as beneficiaries"; and in a third Memorandum, dated 16th January 1998, he wrote "During my lifetime I wish to be considered the primary beneficiary of the trust". The significance of the last one for

present purposes is that it was executed the day after the crediting to Durant's account with Deutsche Bank of the first of the six transfers of funds from the Chanani account alleged by the plaintiffs to be the proceeds of fraud (Schedule 4 to the Order of Justice).

25. The issued share capital in Sun Diamond Limited was represented by a single certificate in bearer form for 50,000 shares. Paulo Maluf insisted on retaining personal custody of this, a state of affairs which was evidently of some concern to Brunschwig Wittmer but which appears to have remained unchanged up until the summer of 1999 (see further below). In the same way, the sole certificate representing Sun Diamond Limited's shareholding in Durant (being the entire issued share capital of that company) is recorded as having been received by Paulo Maluf from Brunschwig Wittmer on 10th March 1997.

26. At about that time, in March 1997, the corporate services department of Deutsche Bank was approached by Brunschwig Wittmer on behalf of the Maluf family with a view to assisting them in investing funds of the order of US$75 million held outside Brazil into Eucatex SA. Eucatex was said to be one of the largest companies in Brazil, engaged in the timber, pulp and packaging business. It was proposed that a number of offshore funds should be established, including funds based in Jersey, which could act as conduits for the proposed investment. In May 1997 Deutsche Bank's custody department accordingly set up the necessary accounts and custodian agreements for Durant and Kildare. Authorised signatories on the Durant account included Flavio Maluf and one Hani B. Kalouti, both listed as directors, while the sole authorised signatory on the Kildare account was Mr. Kalouti. According to Joan Finch, who worked in the custody department at the time and was responsible for these accounts, instructions in relation to Durant would usually be received from Hani Kalouti but signed by Flavio Maluf or one of the other authorised signatories.

Deutsche Bank's 1999 and 2000 questions

27. Some two years later on 6th May 1999, prompted in part by the prospective implementation of the Proceeds of Crime (Jersey) Law, Joan Finch, who by then was director of the Deutsche Bank custody services department, wrote to Jacques Wittmer concerning Durant and Kildare (and another company, Macdoel Investments Ltd.) explaining that as part of its annual relationship review the bank needed certain information. She also noted that, by coincidence, the corporate services department had asked for confirmation that due diligence had been carried out on Kildare's account into which "additional business is being injected". The request was for full details of the beneficial ownership of each company and confirmation that Brunschwig Wittmer had carried out their own due diligence; for certified copies of the passports of each of the beneficial owners; for the name of the existing bankers of each individual or another referee acceptable to the bank who are able to provide an up-to-date reference on the beneficial owners; and for "Any other information which has come into your possession since these clients were adopted in 1997 or which you feel may assist".

28. This request was followed on 4th August 1999 by a separate letter, addressed this time to Hani Kalouti, noting

> "A review of the accounts of the four companies, being Sun Diamond (now closed) Durant, Macdoel, and Kildare, shows a considerable flow of funds which has clearly gone beyond what would be regarded as normal for a safe custody arrangement. It is normal banking practice to know the financial affairs of clients sufficiently to be able to understand the transactions, which go over their accounts. The attached lists of payments indicate that some US$200m has been received and US$80m paid on the basis from and to third parties."

The letter went on to observe that these figures ignored transactions known to involve investments in Eucatex or other securities and that the receipt of funds had in most cases not been accompanied by the name of the remitting party or any explanation for the payments. A request was made, therefore, for "details of the remitter of funds to the accounts and an explanation of the underlying transactions and the purpose of the payments to third parties and why such activities should take place over the accounts of the trust and company structure."

29. The attached lists of payments included, among others, the six credits to the Durant account in January 1998 in issue in these proceedings.

30. Satisfactory responses to these lines of inquiry were, however, far from readily forthcoming with the result that Deutsche Bank was obliged to continue to press for information and, over the course of the ensuing fifteen months, a significant body of documentation was generated consisting of further correspondence between Deutsche Bank, Brunschwig Wittmer (and its successor Schellenberg Wittmer) and Hani Kalouti, internal Schellenberg Wittmer memoranda, attendance notes of meetings with Flavio Maluf in Sao Paulo and Paulo Maluf in Monte Carlo, and telephone conversations with Flavio Maluf.

31. Prompted no doubt by Deutsche Bank's inquiries, steps were also taken during 1999 to establish a new special purpose BVI trust, eventually to be called "the Maitland Trust", for the purpose of holding the shares in Sun Diamond Limited; and in November 1999 Flavio Maluf – not Paulo Maluf – formally assigned his right, title and interest in the 50,000 shares in Sun Diamond Limited evidenced by the bearer share certificate formerly held by his father to Maitland Trustees Limited ("Maitland Trustees") to hold on behalf of the new special purpose trust. Exactly when and why the bearer share certificate was transferred from Paulo Maluf to Flavio Maluf was not explained: it appears to have happened at some point between 18th June 1999, at which time a Schellenberg Wittmer 'Note Interne' referred to the share being held by Paulo Maluf, and 26th August 1999 when Flavio Maluf, in a manuscript letter to Jacques Wittmer, described himself as holder of the share certificate and gave instructions for the setting up of a new special purpose trust. It seems likely that the reason was that Paulo Maluf did not want to be on the record as assignor.

32. On 27th August 1999 Flavio Maluf and Hani Kalouti wrote to Joan Finch enclosing versions of the lists of payments enclosed with Deutsche Bank's letter of 4th August annotated with their explanatory comments. In many cases, however, the comments were short on detail, as for example "From an entity controlled by Flavio". In the body of the letter itself it was said:

> "Payments to third parties represent: (1) trust distributions to a principal beneficiary paid to or to the order of that beneficiary; or (2) loan draw downs on a loan (expressed as a credit line) made to a principal beneficiary. The principal beneficiary in question in all cases [is] Flavio Maluf.
> Payments from third parties represent: (1) moneys settled into the trusts whether by Paulo Maluf, or Flavio Maluf; or (2) repayments on the loan to Flavio Maluf.
> The reason the payments are made over the body of the trust and company structure is to execute an investment and management policy, according to the trustees' discretion having regard broadly to the wishes of the settlors."

33. Contemporaneously with this letter, Paulo Maluf executed a document headed "Indemnity and Release" in which he expressly approved the letter to Deutsche Bank "which appropriately reflects an investment management policy in line with my wishes as settler of the Sun Diamond Trust", indemnified Hani Kalouti and Flavio Maluf as regards all acts done by them in their capacities of directors of Sun Diamond Limited and released them from all claims resulting from such acts.

34. The letter from Flavio Maluf and Hani Kalouti, together with a response from Brunschwig Wittmer in September 1999 dealing with the trust structure, appears temporarily to have satisfied Deutsche Bank. But on 15th March the following year, the Bank, this time in the person of David Endacott, Director of Compliance, felt obliged to take up once again, in strong terms, the matter of the source of funds reaching the custody accounts. The information supplied so far, he wrote, did not address the bank's concerns. The bank required among other things "An explanation of the source of the funds in each case and the reasons for transfer with full details and supporting documentation". The letter enclosed a schedule listing the credits in question "with columns for completion", gave notice that if necessary Deutsche Bank would have to apply to the courts in Jersey for guidance as to the administration of the accounts in question, and notified Brunschwig Wittmer that in the meantime the bank had been advised by its lawyers to freeze all accounts maintained by it for the entities in question. The accompanying schedule included the six payments in question in these proceedings, identifying each by date and amount.

35. Deutsche Bank's persistence was plainly unwelcome. On 11th April 2000 Jacques Wittmer replied saying, among other things,

> "As you can no doubt appreciate we have had some difficulty taking instructions and advising in this complex and grave matter. As is often the case with private clients, the Maluf family's requirement for confidentiality is paramount, and we must deal directly with the concerned family members, none of whom is a lawyer

– to explain the nature and import of your requests for information, before they in turn communicate with their lawyers."

"A considerable amount of work has been done by Marcus Staff of this firm in conjunction with Paul Gully-Hart (of another Geneva law firm, who is soon to join us as a partner) in researching the credits about which you have asked. Before writing to you on the subject they would like to have the opportunity of meeting with you to discuss the clients' response, and to find out what further or other things you may need to draw your enquiries to a close."

36. A little over a week later, on 27th April 2000, a meeting took place in Monte Carlo between Paulo Maluf and Messrs. Wittmer, Gully-Hart and Staff. Much of the meeting appears to have been devoted to an exposition by Paulo Maluf of his background, family and business interests and explanations about a recently publicised court case in which he had been involved. The meeting concluded (according to Mr. Gully-Hart's file note) with Paulo Maluf endorsing Schellenberg Wittmer's strategy of meeting Deutsche Bank representatives in the course of the coming week and attempting to resolve the matter amicably.

37. The Monte Carlo meeting was duly followed on 2nd May 2000 by a meeting in Jersey between David Endacott, Joan Finch and other representatives of Deutsche Bank and Messrs. Gully-Hart and Staff of Schellenberg Wittmer. The Deutsche Bank team was taken through the draft of a schedule that Schellenberg Wittmer proposed to send in response to the Bank's latest requests for information. Discussion took place as regards the level of detail that would be provided. David Endacott emphasised the need for a final report in the next two to three weeks, following which a decision would be made in conjunction with a senior Deutsche Bank compliance officer in London.

The 9th June 2000 Schellenberg Wittmer letter

38. Over the course of the next four weeks Schellenberg Wittmer engaged in a number of communications, either by fax or by telephone, with Flavio Maluf and Hani Kalouti in an endeavour to compile the information necessary to complete the promised report to Deutsche Bank. Eventually, on 9th June 2000, Paul Gully-Hart and Marcus Staff wrote at length to David Endacott enclosing, among other things, a diagram depicting the Sun Diamond Trust structure, showing Maitland Trustees at the apex (which was an accurate reflection of the then-position, but not at the point in time to which Deutsche Bank's questions were directed) and a ten-page "Table of Credits Enquired About by Deutsche Bank International Limited". The letter explained that the credits in which Deutsche Bank was interested had been grouped together in a number of distinct categories each of which had been assigned a code.

39. Code (3 a, b & c) was described as

"credits from accounts not controlled by the Maluf family representing commissions earned by Flavio for acting in corporate acquisitions. There are 4

such acquisitions in question. Each is described in turn below. Flavio as president of Eucatex SA has extremely good contacts in the Brazilian business community which enables him to take advantage of opportunities such as the deals described below."

40. Code 3 (c) was headed "Enterpa" and was explained in these terms:

> "Credits coded "c" represent brokerage commission paid to Flavio by the sellers in a deal whereby a Brazilian incorporated garbage company called Enterpa Ambiental SA was acquired by a subsidiary of the Argentinian Macri Group."

41. In the accompanying table, the entries against each of the six payments to Durant with which we are concerned (Nos. 31 to 36), read "3rd party" (under the column "From a/c (number, name & bank)"), "Enterpa" (under the column "Deal") and "FM" – Flavio Maluf - (under the column headed "Source of information").

42. Under the heading "Payment Mechanism", Schellenberg Wittmer also set out at some length a description, based on information supplied by Flavio Maluf, of the part commonly played by agents operating in the field of tourist currency exchange in facilitating substantial transactions for businessmen and private individuals wanting to arrange for payments to or from entities outside Brazil. This black, or parallel, market was said to be tolerated by the Brazilian authorities because of the beneficial influx of foreign capital that it facilitated and it was common practice for people such as Flavio Maluf to use such facilities. This section of the letter was said to be of relevance to, among others, the transactions classified as Code 3.

43. The letter concluded "Flavio and Paulo Maluf are extremely upset by what has happened, and we would encourage you to do your utmost to bring this unfortunate episode to a satisfactory conclusion."

44. It will be necessary to return to this letter in due course. For the present it is sufficient to note that it was written following protracted, detailed consultation with Flavio Maluf, as well as Hani Kalouti, and, we have no doubt, with the knowledge and concurrence of Paulo Maluf given that the latter had specifically approved the terms of the letter of 27th August 1999 from Flavio Maluf and Hani Kalouti to Deutsche Bank and had been personally involved in discussing the strategy of how to deal with the Bank's subsequent insistence on further information and freezing of the accounts of Durant and Kildare in Monte Carlo in May 2000.

Attribution of knowledge

45. The key question to which this examination of the control and workings of the structure of which Durant and Kildare were part is whether, if the six payments received by Durant from Safra Bank in January 1998 were known by Paulo Maluf and/or Flavio Maluf to be tainted, that knowledge is to be attributed to Durant and to the extent that

those receipts were paid on to Kildare, whether that knowledge is to be attributed to Kildare.

46. Attribution of knowledge in the case of corporate bodies can be a difficult subject, as the judgments of the Court of Appeal in England in *El Ajou v. Dollar Land Holdings Plc* [1994] 1 BCLC 464 and the Privy Council in *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 2 A.C. 500 demonstrate. But the difficulties only tend to arise where the relevant act (which may include the acquisition of knowledge) or omission potentially giving rise to liability has been committed by an officer or employee without the knowledge or involvement of the board of directors or other high-level governing body: by, for example, the chief investment officer and senior portfolio manager in *Meridian*, the shop manager in *Tesco Supermakets Ltd v. Nattrass* [1995] 1 A.C. 153, the ship's master in *The Lady Gwendolen* [1965] P. 294 (the latter two being among the cases discussed by Lord Hoffmann giving the judgment of their Lordships in *Meridian*). But where the relevant act, in this case the receipt of funds with knowledge of their source (assuming that to be the case), is the act of persons as intimately associated with the ultimate ownership and control of the company as Paulo Maluf and Flavio Maluf common sense suggests that there is no room for debate: as Mr. Baker put it, "Who else's knowledge could possibly count?", a question to which no answer was ever suggested by the defendants.

47. The answer, it might be said, is that the companies' boards of directors at the material time included Hani Kalouti (members of the family other than Flavio having been removed in March 1997), and that there is no evidence of him having any relevant knowledge (which for present purposes we shall assume to be true). But it is clear, from both *El Ajou* and *Meridian*, that this would by no means necessarily be an end of the matter. The classic test of attribution of actions or knowledge in relation to companies has long been to ask who is the "directing mind and will" of the company, a phrase that comes from the speech of Lord Haldane L.C. in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, it being recognised that "different persons may for different purposes satisfy the requirements of being the company's mind and will" (Hoffmann L.J., as he then was, at 474). But in *Meridian*, having noted that in the ordinary way the primary rules of attribution in the case of a company are to be found in its articles of association and in rules of company law and that, together with general principles of agency and vicarious liability, they will usually be sufficient to allow one to determine its rights and obligations, Lord Hoffmann, giving the judgment of the Board, continued:-

> "In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself", as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to a company?

> One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law *was* intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

48. Having examined other cases in the light of this statement of principle, Lord Hoffmann went on (at the pp. 509 and 511) to explain that, on a proper analysis, the purpose for which Lord Haldane had been using the notion of directing mind and will in *Lennard's Carrying* was "to apply the attribution rule derived from section 502" of the Merchant Shipping Act 1894 to the particular defendant in that case; that that phrase was one that did not always fit the facts; and that their Lordships thought that, while it would often be the most appropriate description of the person designated by the relevant attribution rule, "it might be better to acknowledge that not every such rule has to be forced into the same formula".

49. The long passage from the *Meridian* judgment set out above does not of course sit easily with the circumstances of the present case because the Privy Council was primarily concerned there with situations in which statutory provisions imposing liability of one kind or another are expressed in terms more readily applicable to natural persons than to corporate bodies: hence the repeated references to "interpretation" of the relevant rule. But the passage is of relevance to the present case in two respects. First, because of the reference in the second sentence to a unanimous agreement of the shareholders, which usefully points up the principle, recognised in *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd* [1983] Ch. 258, that the unanimous decision of all the shareholders of a solvent company is regarded in law as the decision of the company. Secondly, because of the importance, when interpreting the relevant rule of liability, of having regard to underlying policy considerations, as noted in the final sentence of the extract quoted above and in Lord Hoffmann's references (at 508-C), to "the policy of consumer protection" in the *Tesco Supermarkets* case and the policy of immediate disclosure of certain matters in fast-moving financial markets in *Meridian* itself.

50. Whichever approach is adopted, the result in the present case appears to us to be the same. On the basis of *Multinational Gas*, or analogous principle, the knowledge of Paulo Maluf as, in all probability, the one and only shareholder of the ultimate holding company at the material time must be taken as those of Durant and Kildare. Alternatively, if the test is taken as that of the controlling mind and will, it is plain from the evidence that that concept could not be personified more strikingly than it was by Paulo Maluf and Flavio Maluf: the former as regards strategic matters (as witness the way in which Schellenberg Wittmer turned to him, as the patriarchal figure, for instructions in Monte Carlo at a time when the whole trust structure was threatened by the unwelcome probing of Deutsche Bank), and the latter as, in effect, managing director. And if the critical factor is regarded as the policy considerations underlying the judge-made rules of constructive trusteeship and unjust enrichment (relied on by the plaintiffs here) – namely to permit, wherever this can fairly be done, those who have been deprived of property by fraud or breach of trust to recover it from those into whose possession it has come and who have no entitlement to it – it would seem incontestable, on the facts revealed above, that any knowledge that Paulo Maluf and Flavio Maluf may have had of the tainted nature of funds flowing into Durant and Kildare should be attributed to those companies: any other conclusion would be an affront to justice, all the more so given the scant regard for the niceties of corporate governance that appears to have attended these companies' affairs.

51. At this stage we have of course not yet addressed the question of Paulo Maluf's and Flavio Maluf's actual state of knowledge. But it is to be noted that the defendants did not call anyone as a witness to counter the force of the plaintiffs' case on attribution of knowledge: not even Hani Kalouti, let alone Paulo Maluf or Flavio Maluf themselves.

52. Before leaving this part of the case, there are two other matters to be mentioned. The first concerns the evasive way in which the extent to which Paulo Maluf and Flavio Maluf had any interest in the defendants at the material time was dealt with in the defendants' pleading. In their Answer they initially admitted that "*Paulo Maluf, inter alia, had an interest directly or indirectly in the Defendants*" but said nothing about Flavio Maluf (paragraph 25 of the defendants' Answer). The defendants refused to answer further and better particulars of this paragraph. Following an interlocutory hearing on 24th February 2011 at which they were ordered to provide the further and better particulars sought in relation to this admission, the defendants served an Amended Answer. However, rather than comply with the Court's order, the defendants deleted this admission, failed to plead anything in its place in relation to Paulo Maluf but admitted for the first time that Flavio Maluf was a beneficiary of the Sun Diamond Trust at the material time as well as being a director of Durant and Sun Diamond Limited (paragraph 26 of the Amended Answer). In response to a further order that they clarify their case on the subject of Paulo Maluf's interest, the defendants pleaded "*Paulo Maluf was never appointed a beneficiary of the Sun Diamond Trust, nor was he a Director of Sun Diamond Limited nor of the Defendants*" (paragraph 6 of the Further and Better Particulars of the Amended Answer). It is of course difficult to square this assertion with the terms of Paulo Maluf's 16th January 1998 Memorandum of Wishes in which he said

"During my lifetime I wish to be considered the primary beneficiary of the trust"; but the point to which we draw attention here is the vacillation in the defendants' case on what should have been a very simple, straightforward matter.

53. The second matter to note, to which Mr. Baker drew our attention, is that in August 2001 Flavio Maluf and other members of the family (apart from Paulo Maluf and his wife) executed a formal declaration in connection with a police investigation in Brazil into funds "located in a financial institution in Jersey", that "they do not own and no-one they know owns any amounts or current accounts in any financial institution on the island. They have never been there and they neither have, hold nor possess anything there as owners or proprietors"; and that Paulo Maluf and Sylvia Lutfalla Maluf similarly made a formal declaration "that they do not hold and nor does any of their acquaintances any amount in a current bank account at any financial institution in [Jersey], a place where they have never been to, have nothing there, do not hold nor own, and are not the owners or holders of anything there" (in translation in each case).

54. The next question is for whose benefit the Chanani account was opened and operated and what was the explanation for the relevant transfers between that account and Durant's account with Deutsche Bank in January 1998.

III. The Chanani account

Beneficial ownership of the account

55. There is no real dispute that the account was opened by Safra Bank in October 1997 on the instructions of one Vivaldo Alves and his wife Vera Alves as a joint US dollar account and was allocated the number 6100546 and the title "Chanani"; that it was closed sometime in 1999; that while it existed a considerable number of payments in very substantial amounts were received into it and made from it; and that the six payments listed in Schedule 4 to the Order of Justice were made from the Chanani account to the Durant account with Deutsche Bank in Jersey in the amounts and on the dates shown in that schedule.

56. On the contested issues, however, the defendant's pleading was once again anything but straightforward. Originally, in response to the plaintiffs' pleaded contention that the account had been opened by Vivaldo Alves "at the request of Flavio Maluf" and "on behalf of Paulo Maluf and/or Flavio Maluf" (paragraph 17 of the Order of Justice) the defendants had responded that this was denied, without elaboration (Answer paragraph 17). No positive case about the nature of the account was advanced by the defendants until Mr. Steenson, in his oral submissions at the trial, suggested that it was plainly a *doleiro* account belonging to Mr. Alves.

57. But documents generated in the course of dealing with Deutsche Bank's inquiries in 1999 and 2000 together with a number of documents from earlier periods of time appear

to us to provide compelling evidence that, while Vivaldo Alves almost certainly was a *doleiro*, the true beneficial owners of the Chanani account were the Malufs.

58. Schellenberg Wittmer's letter of 9th June 2000 was designed to convey the impression that the account from which the Schedule 4 payments came was one which was controlled by a third party independent of the Malufs, as was the earlier draft shown to the Deutsche Bank representatives at the meeting with Schellenberg Wittmer on 2nd May 2000. But, as Marcus Staff's own file note of that meeting records, David Endacott queried the suggestion that Chanani was a third party: "Last year the bank had been told that it was an account from a group of companies run by FM. MST [Mr. Staff] explained that this represented nothing more sinister than a perhaps unthorough response to intial enquiries". Whether Mr. Staff was simply repeating what his clients had said or whether he was speculating we cannot say. But, on any view the explanation is anything but satisfactory.

59. The letter of explanation supplied to Deutsche Bank on 27th August 1999 had been accompanied by schedules prepared by Schellenberg Wittmer which addressed transfers from or to the Chanani account in three places in the following terms: "FM is the controller of Chanani" (the first schedule); "From an entity [Chanani] controlled by Flavio" (second schedule); and "To an entity [Chanani] controlled by Flavio" (third schedule). As noted earlier, the covering letter was signed by Flavio Maluf and Hani Kalouti and the letter, together with its enclosed schedules, is recorded in a contemporaneous memorandum by Paulo Maluf as having been approved by him. These statements are, moreover, consistent with manuscript notes, almost certainly in Hani Kalouti's handwriting, on lists of the transactions about which Deutsche Bank wanted information which were faxed by Hani Kalouti to Marcus Staff the previous day, the notes specifically referring to Chanani in three separate places as being "controlled by Flavio".

60. There was also a letter from Deutsche Bank to Hani Kalouti dated 15th May 1998, faxed by Hani Kalouti to Marcus Staff the same day (for reasons which were not apparent) with a list of transactions in respect of Kildare, on which Hani Kalouti had written: "Dear Marcus, a total of 9mm USD was transferred by Flavio to Chanani, a company controlled by him. Also, 235,000 was transferred by him to AGATA which is also controlled by him."

61. That Paulo Maluf had a personal interest in Chanani appears from the Safra Bank records for the Chanani account. These reveal the transfer in May 1999 of a sum of US$56,385 to Chase Bank in favour of Sotheby's New York in settlement of two items, important gold chronographs, purchased at auction by Paulo Maluf through his company called William Goldberg Diamond Corp.

62. We would, therefore, have reached the conclusion that we did as regards the beneficial ownership and control of the Chanani account on the documentary evidence alone, without reference to the testimony of any of the witnesses the subject of hearsay notices. As it is, the evidence of Vivaldo Alves more than confirms that conclusion and

that of another witness, Richard van Otterloo, affords further corroboration. As with all other witness evidence specifically admitted as hearsay, for reasons discussed later on, considerable caution is required in assessing what weight to give to it; and the evidence of persons who may well have been engaged in illegal activities, calls for even more caution than usual.

Vivaldo Alves

63. Vivaldo Alves was someone the plaintiffs had originally hoped to call as a witness in person, his anticipated evidence-in-chief taking the form of a witness statement dated 21st July 2011. This was, however, self-evidently based almost entirely on a number of depositions made by him between July 2005 and September 2006 in proceedings in Brazil.

64. According to his evidence, Vivaldo Alves used to work as a stockbroker on the Sao Paulo and Rio de Janeiro exchanges for a brokerage firm called Sistema Corretora de Valores Mobiliaios Ltda ("Sistema") and for Bank BCN S/A. Another broker working for Sistema was a man called Sergio Beyrute, a good friend of Alves whom he had known since 1969. From 1990 onwards he became self-employed and acquired three outlets in Sao Paulo from which he provided foreign exchange services. He was, he said, in effect a *doleiro.* At some point in the mid-1990s, Beyrute disclosed that he was responsible for sending funds abroad for the Maluf family and, it seems, described how it was done via *doleiros.* In 1996 Beyrute died and his widow put Flavio Maluf in touch with Mr. Alves. He was subsequently approached by Flavio Maluf himself in the second half of 1997 with a proposal that Vivaldo Alves should act as his fund manager for funds held abroad: this he agreed to do and in return was paid by Flavio Maluf. Flavio Maluf was, he said, the only client for whom he provided such fund management services. Following his discussion with Flavio Maluf, Vivaldo Alves was contacted by one Laercio Brandao Teixeira ("Laercio" as Mr. Alves referred to him), an employee of Safra Bank, suggesting that he open an account with the bank in New York. Laercio then brought the necessary documentation to Mr. Alves's home for completion and the Chanani account was established. Flavio Maluf held a transfer order, signed by him but otherwise left blank in case of his death. Subsequently, when the account was closed in May 1999, he opened two other accounts with Safra Bank, one named Ugly River and the other Madison Hill Ventures.

65. According to Vivaldo Alves the funds in all three accounts belonged to Paulo Maluf and Flavio Maluf and all transactions on the account were arranged by him on the instructions of Flavio: "the declarant states that all of funds credited, debited and operated by the declarant were done by order by phone and fax requested by the investigated Flavio Maluf". In the case of transfers from the account he would receive the instructions by fax from Flavio Maluf; but in the case of incoming funds Flavio Maluf would telephone him at his home in Brazil with the requisite details and he would call Safra Bank to check that the funds had been received.

66. Payments from the account arranged by Mr. Alves included, among others, US$ 2 million on 14th April 1998 in favour of Falcon Composites, an account with Delta Bank Miami described by Mr. Alves as belonging to Flavio Maluf; US$ 56,385 to Sotheby's in November 1998 as already mentioned; US$ 500,000 to Maria Aparecida Feitosa Coutinho Torres, Flavio Maluf's mother-in-law at the time; and various bills of Flavio Maluf requiring payment in Brazil.

67. At no point did Vivaldo Alves ever meet Paulo Maluf himself, though he was aware who he was. But he did, according to his testimony, recall making a number of payments from the Chanani account to persons who, according to Flavio Maluf, assisted Paulo Maluf with his political campaign for the Governorship of Sao Paulo State in 1998.

Laercio Brandao Teixeira Filho

68. As against this, the defendants adduced two written records of evidence given by "Laercio Brandao Teixeira Filho": the first in the form of a statement made to the Sao Paulo police on 15th June 2005, the other consisting of a record of evidence given in judicial proceedings in Brazil on 4th October 2005. The witness described himself as the account manager with Safra Bank of New York responsible for the Chanani account throughout the period of its existence which suggests that he was one and the same person as the "Laercio" referred to by Vivaldo Alves (Filho meaning no more than 'son', which is how he was described in his police statement: "Laercio Brandao Teixeira Filho, a Brazilian citizen, son of Learcio Brandao Teixeira").

69. The essence of his evidence was he had opened the account at the request of Vivaldo Alves and his wife and that it had been given the code name Chanani for purposes of protecting the client; that neither Paulo Maluf nor Flavio Maluf had ever been involved in transactions on the account and Mr. Alves had never suggested that they were so involved; that he became friendly with Mr. Alves and, when he had asked about the origins of funds being credited to the account, had been told by Mr. Alves that they were not his but were owned by third party clients whose names he did not disclose; that transfers into the account came from first class banks; and that instruction for transfers out from the account came via fax from Mr. Alves or his wife. In his evidence on 4th October 2005, but not in his earlier statement to the police, he added – and here we quote from the English translation supplied by the defendants -

> "As far as he can remember, both Vivaldo and Vera had a credit card associated with the CHANANI account but again as far as he can remember, such credit card was used only by Vera. The credit card was paid by the CHANANI account. He did not find that strange because Vivaldo might be one of the investors and he had total control over the account. He concluded that Vivaldo centralized funds from various investors into the CHANANI account and then channelled such investments into different investment institutions."

70. But none of this begins to be of sufficient cogency to displace the evidence and vacillating pleadings of the defendants to which we have referred above all of which

points to the inescapable conclusion that the account was held and operated by Vivaldo Alves as agent for the Malufs and the Malufs alone. Laercio Filho's evidence, taken at face value, is that he did not have any first hand knowledge of who the true beneficial owners were, but had merely engaged in surmise; and the hint, in the passage quoted above, that Chanani was in fact Mr. Alves's own account through which he channelled a number of clients' moneys, was plainly no more than speculation. The reference to a credit card similarly appears to have been a matter of less than wholly clear recollection: nor does Mr. Filho disclose how he came to learn about this, given that more than once in his evidence he made the point that the paper-work was handled by back-room staff. On the other hand, Vivaldo Alves's evidence, if believed, suggests that Laercio Filho's approach to him in November 1997 was engineered by Flavio Maluf and that Laercio Filho probably knew the true position perfectly well from the start.

Richard van Otterloo

71. Mr. van Otterloo is, again, someone whose hearsay evidence has to be approached with more than usual caution given the somewhat murky world of the *doleiro* in which he evidently functioned and his admitted conviction in the past of an offence of financial crime which resulted in a prison sentence of some eight years. According to his deposition of 4th April 2006 he had been involved "in the financial market" since 1990 through two companies one of which had premises in the Iguatemi Shopping Centre in Sao Paulo; he was the attorney of a company called Sherborne S/A which in March 1997 had opened a bank account named "Jazz" with MTB Bank of New York; in the course of 1997 he was contacted by Vivaldo Alves to say that he had a new client; that Mr. Alves had "made some operations with the JAZZ and CAMPARI accounts, both managed by the declarant, by depositing values that he supposes were paid to him by Flavio Maluf and Paulo Maluf ", the Campari account also being with MTB Bank of New York. In October 1997 Mr. Alves had opened the Chanani account at Safra Bank of New York "to exclusively receive values on behalf of Paulo Salim Maluf and Flavio Maluf"; between December 1997 and October 1998 the Jazz account had received between US$ 30 and 40 million from the Chanani account in instalments which had been "converted into reals and delivered to "BIRIGUI" in Brazil" ("BIRIGUI" evidently being Vivaldo Alves) in cash "inside green (or other colors) bags, inside Iguatemi Shopping Center, in Sao Paulo".

72. He also described a meeting that he said he had had with Flavio Maluf in (it seems) 2002:-

> "The declarant explains that when he heard the news that SIMEÃO DAMASCENO DE OLIVEIRA had revealed the scheme of deviation of funds from the Municipality of São Paulo, in the beginning of 2002, he contacted VIVALDO in order for him to contact FLÁVIO MALUF, with the purpose of scheduling a meeting. Such meeting was held at the lobby of Blue Tree Park Hotel, on the corner of Av. Juscelino Kubitschek with Av. Brigadeiro Faria Lima, in this capital, at night, around 7 PM, on a date which he does not remember. In the meeting in which RAUL SROUR and FLAVIO MALUF also took part, the

declarant showed his concern in relation to SIMEÃO DAMASCENO DE OLIVEIRA, who had declared to the Department of Justice that he had made deposits relative to the deviation of funds from Água Espraiada Avenue, constructed by the companies MENDES JUNIOR and OAS, in the CAMPARI account. FLÁVIO MALUF said that everything was under control and that the issue did not have any importance. Thus, it became clear that the money belonged to FLÁVIO MALUF, with whom he had never talked before that occasion."

73. The plaintiffs originally served a hearsay notice in respect of this deposition, with, it appears, no expectation of being able to call Mr. van Otterloo in person. Shortly before the trial Bakers wrote to Walkers informing them that contact had been made with Mr. van Otterloo, that the plaintiffs themselves did not intend to call him in person but he could be made available for the defendants to cross-examine by video-link if they wished to do so. The invitation was not taken up.

IV. The immediate source of funds received by Chanani

The defendants' explanations

74. So much for ownership and control of the Chanani account itself. When it came to explaining the transactions relied on by the plaintiffs in relation to that account, the defendants' pleading was a thing writ in water. In paragraph 19 of their original Answer dated 1st November 2010, in one of the very few positive averments in their pleading, the defendants said

> "Paulo Maluf participated in various legitimate business deals, as a businessman and not as a serving politician, as particularised in a letter from Messrs Schellenberg Wittmer dated 9 June 2000, for which he received the payments particularised in Schedule 3" (i.e. the 13 payments alleged by the plaintiffs to have been received into the Chanani between 9th January and 6th February 1998)."

But Schellenberg Wittmer's letter of 9th June 2000 had spoken only of commission received on business deals involving Flavio Maluf, not Paulo Maluf.

75. In Further and Better Particulars of their Answer served on 11th February 2011, the defendants sought to correct this statement, saying that it related not to payments into the Chanani account (Schedule 3) but to the payments listed in Schedule 2 to the Order of Justice, in other words the fifteen payments alleged by the plaintiffs to have been received by Paulo Maluf and/or Flavio Maluf from Mendes Junior.

76. Finally, in their Amended Answer, served a month later, on 15th March 2011, the defendants sought to correct the Schellenberg Wittmer 9th June 2000 letter, saying

> "These payments represented brokerage commissions to be paid to Paulo Maluf (not Flavio Maluf) in respect of the acquisition of Enterpa Ambiental SA by a

subsidiary of the Argentinian Macri Group towards the end of 1997 / beginning of 1998 as indentified on page 9 of the Schellenberg Wittmer Letter.....For the avoidance of doubt , Flavio Maluf is mistakenly referred to in the Schellenberg Wittmer Letter and did not participate in the said deal."

To add to the confusion the defendants further amended their pleading to indicate that when they spoke of "These payments" they were talking about the payments listed in the plaintiffs' Schedule 4, i.e. the six payments made from the Chanani account in New York to Durant's account in Jersey.

77. In the ordinary way one might put these shifts of position down to regrettable but innocent misunderstandings somewhere along the line between client and counsel caused, perhaps, by pressure of time. But, while counsel no doubt pleaded what they understood their instructions to be, it is not as if their clients, in providing those instructions, were starting from scratch or as if their pleading had to be produced in haste. The source of funds flowing into the Durant from the Chanani account at the relevant time had already been fully explored and documented back in 1999 and 2000 for the purpose of satisfying Deutsche Bank's inquiries. And, by 6th September 2010, when, having lost their challenge to the jurisdiction of this Court, the Defendants were eventually obliged to plead to the plaintiffs' claim, they had been in possession of the Order of Justice for some eighteen months but were still given six weeks by the Deputy Bailiff to plead their Answer and a further two-week extension by consent of plaintiffs; and there was an interval of four and a half months between the Answer eventually served on 1st November 2010 and the amended one served on 15th March 2011.

78. In any event, what explanation is to be given for the supposedly erroneous reference to Flavio rather than Paulo in Schellenberg Wittmer's letter of 9th June 2000? The letter was as specific as it could be that it was Flavio Maluf who brokered the deal in question because it was his position "as president of Eucatex SA" and his contacts in the Brazilian Business community that enabled him "to take advantage of opportunities such as the deals described below"; drafts of the schedules that were in due course to accompany the 9th June 2000 letter had been faxed direct to Flavio Maluf by Marcus Staff on 2nd May 2000 and spoke expressly of "brokerage commissions earned by FM for acting in corporate acquisitions" (on page 2) and of the specific nature of Flavio Maluf's claimed involvement in the deal (in a foot-note on page 13); David Endacott had made it abundantly clear that Deutsche Bank was particularly concerned to understand the nature of and the participants in the brokerage deals that were said to have generated commission payments to Flavio Maluf; and it is unthinkable that the terms of a letter on which the Maluf family's entire relationship with Deutsche Bank depended at that point would not have been approved by both Paulo Maluf and Flavio Maluf before it was sent out.

79. In any event, no evidence of any kind, documentary or oral, was adduced by the defendants to support their pleaded case. It was asserted in the Amended Answer that the so-called Enterpa deal and Paulo Maluf's role in it were not the subject of a written contract. A file note by Marcus Staff of a telephone conversation with Flavio Maluf on

22nd May 2000 records the latter as saying that "approaching the contracting parties in the brokerage deals has of course excited some nervousness", that trying to obtain documentation after the event was extremely difficult, and "The transactions about which the bank is asking for information, are in any event very sensitive". Notwithstanding an earlier fax to Flavio Maluf on 2nd May 2000 in which Mr. Staff had written "We are following the principle that the bank will probably be satisfied if Paul [Gully-Hart] and I have seen the documents and are willing to state they exist, without actually disclosing them," there was nothing to suggest that Schellenberg Wittmer were, in practice, ever shown any such documentation. The Court was left, in the end, with nothing more than the inconsistent assertions examined above: not even any written or oral evidence from Schellenberg Wittmer confirming that they, at least, had seen convincing supporting material. The inference that the defendants' pleaded explanation of the Schedule 4 payments was fictitious was overwhelming.

The immediate source of the funds

80. It is evident from bank records that from time to time substantial funds flowed into the Chanani account in New York from the bank accounts of Durant and Kildare in Jersey, as well as the other way, and that this occurred on instructions faxed by Flavio Maluf to Hani Kalouti and forwarded by the latter to Deutsche Bank. But if we leave those aside and concentrate on funds credited to Chanani from other sources in the period between 9th January and 6th February 1998, the documentary evidence was as follows:-

(i) Safra National Bank records showed that, by contrast with the period 15th October 1997 to 8th January 1998 when there were four credits to the Chanani account to a total value of some US$ 2.6 million, in the four week period from 9th January to 6th February 1998 there were twenty-two credits to a total value in excess of US$ 18 million, including the thirteen credits totalling US$ 10,500,055 listed in Schedule 3 to the Order of Justice.

(ii) Of those twenty-two credits, eleven were expressed to have been made either "BO" (by order of) or "FR" (from) "Venus".

(iii) Of the thirteen credits listed in Schedule 3 to the Order of Justice, eight were made by order of, or from, Venus and five by order of one or other of "Syata Enterprise Corp", "Carlten", "Otalan", "Bigs", and "Minister".

(iv) The remitting banks were MTB Bank, New York ("MTB") in the case of payments by order of Venus; Union Planters Bank in the case of Syata; Banestado Bank, New York in the case of Carlten; and Citibank in the case of Otalan and Bigs.

(v) In the case of MTB, while Venus appears, therefore, to have had some connection with the account at MTB from which funds in question were drawn, it is evident from a fax dated 30th March 1998 sent by Flavio Maluf to Hani Kalouti that Agata also had an account at that same branch of MTB, the ABA reference

026012894 (sort code) being the same on that fax as on four MTB transaction confirmation slips recording transfers of funds from MTB in January 1998 by order of, or from, Venus.

(vi) According to the schedule to the Flavio Maluf/Hani Kalouti letter to Deutsche Bank of 27th August 1999, Flavio Maluf was the controller of Agata.

(vii) Venus and General Star Corp at least were, it seems, code-names used to identify either a transaction or series of transactions made through a *doleiro* with whom Flavio Maluf was fully familiar or an account operated or controlled by him, the same names being among those also used to identify payments from the Chanani account to Durant. This much is evident from a combination of the schedule accompanying the Flavio Maluf/Hani Kalouti letter of 27th August 1999, a Schellenberg Wittmer file note of a telephone conversation between Marcus Staff, Flavio Maluf and Hani Kalouti on 9th May 2000 and the terms of Schellenberg Wittmer's letter of 9th June 2000. It may reasonably be inferred that the other names listed above also served a similar purpose.

(viii) The section of Schellenberg Wittmer's letter of 9th June 2000 headed "Payment Mechanism", which was said to be based on information supplied by Flavio Maluf and to be of relevance "as background to the credits described under Codes 3, 5 & 6", leaves little room for doubt that Flavio Maluf was accustomed to using "travel agents" operating so-called "tourism" accounts: black market foreign exchange operations designed to facilitate the transfer of funds in and out of Brazil, usually via a combination of real-denominated accounts in Brazil and US$ accounts abroad. The section in question, which ran to almost four pages, concluded:-

> "As a matter of context the volume of transactions which Flavio has put through the tourism market has been high, however he keeps only a limited amount of cash in the system because it would be difficult to pursue the travel agent if it defaulted or diverted the moneys. However, over the years Flavio has had no bad experiences in using the system and is reasonably confident in it in spite of the lack of formal accountability and written records."

81. There can, accordingly, be little doubt that both Flavio Maluf and Paulo Maluf would have been well able to give evidence in these proceedings of the true source of all credits to the Chanani account had they been minded to do so.

82. Further accounts of the working of the "tourism" foreign exchange system were given by, among others, Vivaldo Alves, Richard van Otterloo and Monica Semeraro.

83. According to Vivaldo Alves, the immediate sources of funds credited to the Chanani account were other banks outside Brazil: in other words the funds were already abroad. Flavio Maluf never explained their original source and, he said, Mr. Alves never asked.

Nor did he ever meet the persons responsible for those accounts. However, the plain implication of his evidence was that he was well aware that the funds probably had their origin in Brazil and had been remitted abroad if not by him then via other *doleiros*. This is consistent with the documents referred to in paragraph 80 (iv) and (v) above.

84. Mr. Baker candidly admitted that he was unable to demonstrate precisely how the funds alleged to have been misappropriated had reached the Safra Bank in New York. It was, he submitted, in the nature of fraud and black market operations that documentation is kept to a minimum and details of transactions are difficult to pin down (as Flavio Maluf was well aware, according to the passage from Schellenberg Wittmer's letter of 9th June 2000 referred to in paragraph 80 (viii) above indicates). This part of the plaintiffs' case accordingly rests for the most part on inference: an inference, however, which Mr. Baker submits is irresistible. Its implications as regards the tracing of funds are considered in Section IX below.

V. The fraud

The plaintiffs' case

85. The fraud affecting the Avenida Agua Espraiada project is said by the plaintiffs to have operated in the following way. Sub-contractors to Mendes Junior were prevailed upon to issue false invoices to Mendes Junior: false in the sense that they either claimed payment for work and materials that had not in fact been done or supplied or payment in excess of that to which the sub-contractors were contractually entitled. Payment against such invoices having been received by the sub-contractors via Mendes Junior, the subcontractors would keep a relatively small percentage of the money for themselves and the balance, usually but not always amounting to 90%, would almost immediately be clawed back by certain employees at Mendes Junior by the device of blank cheques on the sub-contractors' bank accounts (of which they had been given possession) which they were able to fill in as required and which were then signed by a duly authorised representative of the sub-contractors. The cheques, denominated in Brazilian reals, were then either made payable to cash or to bearer or made out in favour of a named beneficiary. By this means a slush fund outside Mendes Junior's official books of account was created and distributed to a variety of persons. The recipients, the plaintiffs contend, included Paulo Maluf who, in the period with which we are concerned, normally received 20% of each payment. Either he or Flavio Maluf on his behalf, made arrangements for his ill-gotten gains to be remitted abroad via one or more *doleiros*.

86. All other matters apart, the documentary evidence leaves no room for doubt that during the relevant period huge amounts were repaid to Mendes Junior without any evident good reason from moneys received by sub-contractors only a day or so previously.

87. Administration of the slush fund within Mendes Junior is said to have been handled for the most part by two employees in its Sao Paulo office at the material time: Simeão

Damsceno De Oliveira ("Simeão De Oliveira") and Joel Guedes Fernandes ("Joel Fernandes"), director of finance and chief cashier respectively.

88. Mr. Baker submitted that cogent evidence of these arrangements is to be found to a large extent in contemporaneous documents but in part, also, in the hearsay statements of a number of witnesses, the most significant witnesses being the following: Sergio Lima Santoro ("Sergio Santoro"), a former part-owner of Planicampo Terraplanagem Ltda. ("Planicampo"), one of the sub-contractors to Mendes Junior, and at the material time the company's designated representative in connection with the Avenida Agua Espraiada project; Aureo Da Assumpcao Figueiredo ("Aureo Figueiredo"), who was responsible for the accounts of TECLA Terraplanagem e Construcoes Ltd ("TECLA"), another sub-contractor to Mendes Junior; Joel Fernandes and Simeão De Oliveira.

Monica Semeraro

89. But before turning to those witnesses it is convenient to deal with the evidence of Monica Semeraro, a technical assistant in the office of the Justice Attorney of the State of Sao Paulo (or as it appears sometimes to be referred to the "Public Prosecutor's Office"). As a result of certain rulings in interlocutory proceedings earlier in the year her evidence in chief was of limited scope. She explained that her role was to examine financial documents relating to alleged financial misconduct, money laundering and embezzlement and that for the past ten years she had worked with Dr. Silvio Marques, a State Prosecutor, and others on the investigation of alleged kick-backs arising out of the Avenida Agua Espraiada project; she verified records of payments received by Mendes Junior from EMURB between 24th January 1997 and 19th November 2000 as having been provided by a director of Mendes Junior, Angelo Marcus de Lima Cota, to Dr. Marques on 29th April 2002; she spoke of the understanding that her work had given her of the way in which *doleiros* operate (using a real-denominated account in Brazil and dollar account, in the United States, for example); and explained that, having reviewed many bank documents in the course of her work she had come to know that the account known as Venus was controlled by a well known *doleiro* named Antonio Peres de Almeida. Her evidence under cross-examination by Mr. Steenson was given in English, of which she appeared to have a good command, and is considered later on.

Sergio Santoro

90. Sergio Santoro, like Vivaldo Alves, was someone whom the defendants could have cross-examined by video-link had they chosen to do so. His evidence consisted of a formal signed deposition given to the Public Prosecutor's Office in Sao Paulo on 18th March 2002, apparently of his own free will; a signed witness statement in the present proceedings dated 20th July 2011; and a second such statement dated 21st August 2011 explaining one particular aspect of his earlier statement in more detail. It is apparent that his main witness statement draws heavily on his 2002 deposition.

91. In it he explained by way of background that he was at one time a part-owner of Plainicampo but in 1994 had sold his interest to another equity owner, Luiz Ferraro (since

deceased); that Simeão De Oliveira was a close personal friend of his; that, at Simeão De Oliveira's suggestion, and with Luiz Ferraro's agreement, Planicampo became involved in the Avenida Agua Espraiada project as a sub-contractor to Mendes Junior, with Sergio Santoro acting as "attorney" for the project. He then recounted how Planicampo had been induced to take part in the fraud by Simeão De Oliveira on the basis that if it had not done so it would not have secured the sub-contract; how Planicampo had issued inflated invoices for which it had received payment from Mendes Junior; how Planicampo had retained part of these funds but returned the rest to Mendes Junior; how this had been accomplished by Joel Fernandes filling in the requisite amount to be recouped, but not the payee's name, on blank Planicampo cheques - cheques that Sergio Santoro had previously left with him - using a Mendes Junior typewriter. Sergio Santoro would then sign the cheques. The percentage returned to Mendes Junior varied according to what expenses Planicampo had incurred but could be as much as 90%. All this professed to be first-hand knowledge. He added that cheques, once signed by him, were delivered to Simeão De Oliveira, though whether he actually witnessed this he did not say. And although he said he learned through Simeão De Oliveira that some cheques were passed to *doleiros*, who would come to Mendes Junior's offices to collect them, he himself never had any contact with them. He understood from Simeão De Oliveira that the purpose of the scheme was to create a 'slush fund' but did not know for whose benefit.

Aureo Figueiredo

92. Evidence from another firm of sub-contractors was supplied by Aureo Figueiredo, his testimony consisting of a single, signed statement made to the Federal Prosecutor's Office on 22nd March 2002, four days after Sergio Santoro's deposition, accompanied by a lawyer. The gist of it was that he himself had not been involved in the fraud but had learned about the system of over-invoicing by TECLA and returning funds to Mendes Junior from Joao Teixeira, his uncle, who was in charge of TECLA; this had come about following reports in the press about the Avenida Agua Espraiada project and Simeão De Oliveira having (reportedly) supplied certain information to the Public Prosecutor's Office. He had then checked the paperwork for himself and found irregularities evidencing over-invoicing followed by return to Mendes Junior of 90% of the funds. It appears, though the detail is confused, that prior to his deposition he had made one or more statements to the Federal Tax Authority in connection with an inspection carried out in 2001 and that it was these that had prompted him to ask Joao Teixeira what was going on.

Joel Fernandes

93. The evidence of Joel Fernandes was far more extensive. Between January 2002 and February 2006 he is recorded as having given evidence in one form or another on no less than eight occasions in connection with either police investigations or judicial proceedings in Brazil. In his later 2005 evidence he sought to withdraw certain assertions made in his earlier statements and in 2006 modified his earlier evidence in one respect. There was also a signed witness statement in the present proceedings dated 30th July 2011, though, as with other such statements it was based almost entirely on the content of

the earlier statements. It appears that the plaintiffs had at one time had hopes of calling him as a witness (hence the witness statement); but by January 2012 he had made it clear that he was no longer prepared to co-operate unless he received R$200,000, a demand which the plaintiffs properly refused.

94. The essence of his evidence was as follows. He had worked for Mendes Junior from May 1985 to April 2000. At the material time he was employed as a cashier and had been one of a number of co-signatories on the company's bank accounts. He had known Simeão De Oliveira, who was in charge of the company's regional office in Sao Paulo and to whom he had reported, for many years: they had worked together in adjoining rooms at Mendes Junior.

95. Part of his work consisted of maintaining records of all payments made by Mendes Junior to sub-contractors, with details of date of payment, amount in reals, the name of the contractor, the Mendes Junior cheque number and the name of the Mendes Junior bank on which it was drawn. He kept both manuscript and typed versions as described and verified in his deposition of 13th June 2002 and exhibited to his 30th July 2011 witness statement.

96. At some point he became aware that there was a scheme in operation involving the diversion of funds for the Avenida Agua Espraiada project. He described the scheme in much the same terms as Sergio Santoro, concluding that Mendes Junior was, in effect, paying sub-contractors commission to issue "cold" invoices. His own role was, first, to co-sign Mendes Junior cheques making payment to sub-contractors of the amounts invoiced by them and to keep a record of this; then, the same or the following day, in respect of each such payment, to fill in a series of blank cheques previously supplied by sub-contractors to Simeão De Oliveira with amounts, expressed in reals, sufficient to effect the necessary rebate to Mendes Junior (usually 90%): this he did in his office, using a beige FACIT-model typewriter, but leaving the payee still blank. The amounts for which the individual cheques were made payable were supplied to him by Simeão De Oliveira and were chosen at random but so that in aggregate they amounted to whatever sum needed to be recouped from the sub-contractor in question.

97. In his deposition of 23rd January 2002, his first, Joel Fernandes identified photocopies of some sixty such cheques, drawn on bank accounts of various sub-contractors as having been filled in by him in this way, including thirty-one filled in on a single day in January 1996 and another twenty-two filled in on a single day on 17th April that year. And, by way of a complete example of how the system worked, he also identified a photocopy of a Mendes Junior cheque dated 16th April 1996 made payable to the sub-contractor Planicampo in an amount of R$3,540,233-27 as having been drawn and signed by him (in payment of a Plainicampo invoice); explained that from this he had deducted 10% (as shown in manuscript note adjacent to the photocopied cheque) and had then filled out the twenty-two cheques dated 17th April 1996 referred to above, amounting in total to R$3,186,209-95 representing 90% of the payment made by Mendes Junior to Planicampo the previous day.

98. In his witness statement of 20th July 2011, Joel Fernandes gave a further example of multiple Planicampo cheques in random amounts: in this case eight cheques each dated 27th January 1998, amounting in aggregate to R$772,5012-45, completed by him for the purpose of recouping 90% of the moneys paid to sub-contractors but with the payee left blank. In this case no copy of the Mendes Junior cheque appears to have been exhibited, but payment of R$858,336-06 was recorded in the schedules maintained by Joel Fernandes as referred to above, and photocopies of the eight cheques were identified by him in his deposition of 23rd January 2002 and exhibited to his witness statement of 20th July 2011.

99. Having filled in sub-contractors' cheques in this way, Joel Fernandes would give them, he said, to Simeão De Oliveira. His understanding was that the latter would then usually arrange, via one or other *doleiro*, for the cheques either to be converted into cash (US dollars or Brazilian reals) or otherwise utilised to make payments to third parties. Joel Fernandes, himself, had no dealings with *doleiros*.

100. If the cheques were used to generate cash, the bank notes would, however, be given to him (Joel Fernandes) to count and divide into parcels in accordance with instructions received from the current Regional Manager. Having done this he would give the parcels, sometimes disguised as a present or hidden in cases of whisky, boxes of chocolates or diaries, depending on the amount involved, to that same manager. He did not know for whom they were intended or what happened to them.

101. Of more immediate significance to the present action, in his 13th June 2002 deposition Joel Fernandes commented on a clutch of documents of a different kind from those discussed above. It seems from the terms of that deposition that they were produced and shown to him by representatives of the Public Prosecutor's Office, having been received by them from someone who did not want to be identified. But the clear impression given by the terms of the deposition, as signed by Joel Fernandes himself, was that he was entirely familiar with both of them.

102. The first was a single sheet of paper reading "SAFRA NATIONAL BANK OF N.Y. - ABA 026 003 023 – C/C 061 00546 FAV. CHANANI" (the ABA number being the American Banking Association equivalent of a sort code) evidently accompanied by a photocopy of a fax transmission dated 21st January 1998 from an entity called Lespan S.A. ("Lespan"); this appeared to reproduce a bank notification of the transfer of an amount of US$ 843,233-56 from an account of Lespan with Citibank New York to the Chanani account with Safra National Bank of New York "By Order of OTALAN". The formal addressee of the fax was not identified and the name following a manuscript notation "ATTN" was scratched through and illegible. (This transfer is Item 8 in Schedule 3 to the Order of Justice.). Commenting on these in his deposition of 13th June 2002, Joel Fernandes described Chanani as an account "to where some remittances were made by MENDES JUNIOR", transfers being made by Simeão De Oliveira via *doleiros* with funds derived from subcontractors' cheques as described earlier. He referred to Lespan as an entity "used by "doleiros" to make remittances" but said that Otalan was unknown to

him. Much the same was repeated in his witness statement of 20th July 2011 (other than his comment on Otalan).

103. The second document was a copy of a fax dated 21st January 1998 from Banestado New York which, again, appeared to reproduce confirmation of a transfer of funds to Safra Bank for the account of Chanani: this time in an amount of US$ 381,405 (Item 5 in Schedule 3 to the Order of Justice). Once again the addressee of the fax was not shown. The copy of the document in evidence was clipped at the left-hand margin, partially obscuring some of the detail; but there was an entry towards that margin that read "CARLTEN CALLE", which almost certainly identified the account or customer from which the funds in question were being transferred. Below the bank confirmation, the fax bore a manuscript note saying "AS REQUESTED" above the signature and stamp of, one Hugo Munoz. Commenting on this in his later deposition of 29th July 2005, Joel Fernandes is recorded as saying that Simeão De Oliveira gave it to him to make a copy, which he did, and that he believed Hugo Munoz to have been a supervisor at Banestado in New York; an assertion that was repeated in his witness statement of 20th July 2011.

104. In his 20th July 2011 witness statement Joel Fernandes also referred to a number of other documents at pages 68 and 69 of the bundle of exhibits to his statement. These are four MTB Bank debit notification slips (as already mentioned above) recording transfers of funds from or by order of Venus to the Chanani account on dates in January 1998 (being the first four payments listed in Schedule 3 to the Order of Justice). Joel Fernandes refers to these also as copies of "faxes" that he made "at the time at the request of Simeão".

105. One of these documents, recording the transfer of an amount of US$1,666,667-00 to Chanani, also bears, on the copy in evidence, the following series of figures arranged in a column and in a style that suggests the output of an old fashion adding machine: 500,000; 824,059.4; 1,300,000; 1,666,667; and 4,290,726.4 (the total of the four previous figures). The first four figures correspond precisely to the amounts recorded in the four MTB confirmation slips, and probably represent the US dollar proceeds of multiple cheques in random amounts which were used to effect the desired total payment.

106. As will be seen when we come to it, each of the transactions reflected in these documents also appears in the De Oliveira document.

107. The obvious, but unanswered, question that these documents pose, as Mr. Baker understandably returned to again and again, is: What possible reason could there have been for an employee of Mendes Junior, be it Simeão De Oliveira or Joel Fernandes or anyone else for that matter, to have had in his possession documents of the kind represented by the fax from Banestado and the MTB debit notification slips relating in each case to the transfer of funds to an account – Chanani – which had nothing to do with Mendes Junior? The same goes for the fax from Lespan S.A. which evidently did not cause Joel Fernandes any surprise and which he had no difficulty in explaining even if, unlike the others mentioned, it was not one that he was asked to copy (in this case he does not specifically say that he was).

108. It is difficult not to conclude that the reason was that Simeão De Oliveira or someone else within Mendes Junior privy to what was going on was in the habit of seeking and receiving written confirmation by fax from banks outside Brazil that transfers of funds to the Chanani account at Safra Bank had been safely received.

109. Reference has already been made to Joel Fernandes' fifth deposition of 29th July 2005 in connection with the Banestado fax. In addition,

> (i) he confirmed there that a two-page manuscript list of sums of money and dates from 27th January 1997 to 30th November 1998, recorded payments by cheque drawn on one particular bank, Banco do Estado de Goias, made to three particular sub-contractors, Planicampo, Fomento and Concilliacao The list, he said, was written by him and represented sums paid by Mendes Junior for the purchase of false invoices from the companies in question; and
>
> (ii) he stated that on a number of occasions he had contacted "the black market currency dealer Vivaldo Alves, by recommendation of Simeão De Oliveira" in order to inquire about dollar exchange rates, and that Vivaldo Alves was "an old partner of Simeão De Oliveira in dealings with the company Mendes Junior S/A."

110. That, however, is not the end of Joel Fernandes' evidence. On 24th October 2005 he appeared as a prosecution witness in proceedings before the Court of the Judicial District of Santa Rita do Sapucai-MG in which Paulo Maluf, Flavio Maluf, Simeão De Oliveira and Vivaldo Alves were all defendants. According to a three-page transcript of his evidence under oath on that occasion put in evidence by Mr. Steenson, Joel Fernandes acknowledged his signature on earlier depositions but asserted that he had not received a copy of his last one; he confirmed that there was a slush fund exactly as he had previously testified, but now denied, among other things, knowing anything about "financial transactions abroad" or having heard of accounts named Chanani or Lespan; and, questioned by Flavio Maluf's counsel, he affirmed that he had no knowledge of moneys diverted from the Avenida Agua Espraiada project having been passed to Paulo Maluf. While it is understandable that at his level of employment within Mendes Junior Joel Fernandes may well not have had first hand knowledge of the identities of those sharing in the slush fund and that any indication by him to the contrary might well have been based on nothing more than rumour or speculation, his denial of ever having heard of Chanani or Lespan is hard to credit, given the specific terms of his earlier signed statements and his subsequent signed statement of 20th July 2011 in which he reiterated his knowledge of Chanani and Lespan.

111. Finally, there was a deposition made on 21st February 2006 in which Joel Fernandes spoke of having received a telegram from Simeão De Oliveira's lawyer in November 2005 asking him to correct the evidence that he had given on 24th October 2005. The telegram suggested that the reference made by Joel Fernandes to "Vivaldo" (Vivaldo Alves) as a money changer whom he did not know personally but to whom he had spoken from time to time in order to ascertain the dollar exchange rate should have been to someone called "Nivaldo". The telegram had asked him to approach the magistrate

before whom his evidence had been given in order correct this mistake. Commenting on this in his deposition of 21st February 2006, Joel Fernandes confirmed that he did know a Mr. Nivaldo (not recalling his family name) who had worked for a firm called Turist Cambio; that Simeão De Oliveira used to purchase a lot of dollars for Mendes Junior from that firm; that he could not say whether Simeão De Oliveira knew "the dollar dealer Vivaldo Alves, known as "Birigui", or not"; and that he maintained what he had previously said in earlier statements.

Simeão De Oliveira

112. Here again there was a multiplicity of hearsay statements of one kind or another: three depositions between February and May 2002 made in response to investigations by the Public Prosecutor's Office; a voluntary deed of declaration executed on 27th February 2003; and the formal record of evidence given on 22nd September 2005 in criminal proceedings.

113. The essence of Simeão De Oliveira's evidence in his initial, 27th February 2002, deposition so far as directly relevant to the present action is that he had worked for Mendes Junior for sixteen years under Superintending and Regional Officers; that he had been forced to do things of which he had not approved but was powerless to change; that there was a fraudulent scheme involving the issue by sub-contractors of false or inflated invoices and the filling in by Joel Fernandes of sub-contractors' cheques designed to return 90% of the invoice amount (much as described by Messrs. Fernandes and Santoro); that the scheme was controlled by one Sidney Lobo Da Silva Lima, the Mendes Junior Regional Officer; that kickback payments varied from 1% to 37% (of the amounts paid by EMURB); that, in the latter case, 20% would go to Paulo Maluf and 17% to his advisers; that payments to Paulo Maluf were made in cash (sometimes US dollars, sometimes reals) usually delivered, initially via one Reynaldo De Barros; that from 1998 onwards, Flavio Maluf became involved and arranged for such payments to be deposited abroad via *doleiros* in US dollars, the transactions being made by cable by Simeão De Oliveira himself and subsequently confirmed with Sidney Lima; that he had had personal contact with Paulo Maluf on three occasions but had never delivered any money to him.

114. Dealing more specifically with the transmission of money abroad, the deposition reads

> "The scam of Paulo Maluf used the Banks Safra of Geneva, Citibank of Geneva and MTB Bank of New York, in accounts indicated by Reynaldo De Barros and Flavio Maluf. The informer [i.e. Simeão De Oliveira] doesn't have the accounts' numbers because they were informed to the Regional Officer (Sidney Lima). The transfer was made by "doleiros" (every time a different person) residing in Brazil, at the request of the board of officers of Mendes Junior, by means of the informer himself (by cable). The "doleiros" went to Mendes Junior head office and discussed with the informer how the transfer should be conducted. When the kickback payment was made in reals, the suppliers of the invoices (the above mentioned companies) were responsible for performing the banking reserve in the

bank where they had their accounts. Mr. Joel Guedes Fernandes went to the branch to fetch the money. Sometimes, Mendes Junior drew a cashier's cheque, which was later endorsed; with this title, numerous other cashier's cheques were "bought"; they were, in turn, cashed or placed in the name of "doleiros"or even in the name of the concerned party himself.

The informer only received orders from the board of officers usually Mr. RENATO ALVES VALE who was later replaced by Mr. SIDNEY SILVEIRA LOBO. If we add up the amounts paid as kickback [sic] by MENDES JÚNIOR and OAS, one may state that many millions of American dollars were transferred abroad, related only to the public work Av. Água Espraiada. Merely in 1998 nearly US$ 1,500,000.00 (one million five hundred thousand dollars) to US$ 3,000,000.00 (three million dollars) were delivered monthly. Such amounts were sent abroad, that is, to Switzerland and United States, basically. .....Mr. Paulo Maluf received kickbacks of 20% until 1998;....."

115. In his second deposition on 19th April 2002, having been recalled for further questioning about an account number that the Public Prosecutor's Office had, it seems, been sent anonymously, Simeão De Oliveira said this:

"When faced with the number 7202-1 code "Sintaxe ABA 026 012 894", New York/MTB Bank" [original emphasis] deponent affirmed that it regards the account of a "doleiro" existing in New York, United States. Said account was used by MENDES JÚNIOR to make the remittances abroad, from 1993 to 1998. This number was given to Mr. SIDNEY SILVEIRA LOBO DA SILVA LIMA by Mr. REYNALDO EMGYDIO DE BARROS, former Secretary of Public Works of São Paulo, mainly at the time when Mr. PAULO SALIM MALUF was the mayor of São Paulo.

As declared in the previous deposition, the company MENDES JÚNIOR used to pay the subcontractors for services not rendered or partially rendered. Afterwards, the subcontractors (TECLA, PLANICAMPO, FOMENTO etc) issued bearer checks, which deponent exchanged for dollars with the "doleiros". Deponent remembers the "doleiro" VIVALDO, owner of a currency exchange bureau inside Iguatemi Mall, Av. Faria Lima, in this Capital. He does not remember the full name of said "doleiro". The "doleiros" may have used brokerage firms, but he ignores [does not know] their names."

116. On 20th May 2002 Simeão De Oliveira appears to have been recalled by the Public Prosecutor's Office once again, this time to be asked, among other things, about a package of documents also received from, it seems, an anonymous source. There was no dispute that the documents referred to are those that appear in trial bundle 7 accompanying the copy of Mr. De Oliveira's deposition, paginated in manuscript in the bottom right-hand corner from 1 to 22.

117. Under the heading "Scam of remittances abroad", Simeão De Oliveira's evidence in relation to these documents was recorded in these terms:-

> "Deponent initially clarifies that he was forced to make transactions on behalf of MENDES JÚNIOR, under pain of being dismissed. As per his previous deposition, deponent entered the company to perform the job as financial-administrative coordinator, and around 1987 was forced to conduct transactions for the slush fund of MENDES JÚNIOR.
>
> The documents received by the Public Prosecutor's Office are basically positions of the slush fund, calculation charts to determine each kickback and to control the cable remittances abroad. Such operations were performed after the receipt of the subcontractors' cheques. [Original emphasis.] The deponent himself controlled the said items and later delivered them to Mr. SIDNEY SILVEIRA LOBO DA SILVA LIMA (Regional Officer), by his express order. Therefore, only Mr. SIDNEY had the "client" (REYNALDO DE BARROS, FLÁVIO MALUF and CALIM EID, this latter only during the political campaigns of PAULO SALIM MALUF). No document was faxed or recorded on the computers of MENDES JÚNIOR. At that time (from 1993 to 1998), the company had computers, but nothing was done through them."

118. According to the deposition, Simeão De Oliveira then proceeded to comment individually on the twenty-two documents, all of which are of similar content in as much as they appear to be financial statements of one kind or another, consisting for the most part of figures and computations expressed in Brazilian reals or US dollars, exchange rates and sometimes dates, arranged under various headings.

119. Page 10 of these documents is the so-called 'De Oliveira document'. Simeão De Oliveira's commentary on it is to the effect that it records corrupt payments made to Paulo Maluf by Mendes Junior out of funds received from EMURB in total of R$13,512,885-34 between 1st and 29th January 1998. The document requires detailed scrutiny, but for the moment it is convenient to complete the review of Simeão De Oliveira's hearsay evidence.

120. On 27th February 2003, nine months after his 20th May 2002 deposition, Simeão De Oliveira executed a formal two-page, court-registered deed which opened as follows:-

> "I have never had any contact, not even personally, with Mr. Paulo Salim Maluf, former mayor of the city of Sao Paulo. Thus, I cannot state that the same Paulo Salim Maluf requested, applied for or received, even through third parties, any amount in cash or equivalent assets, under any title at all, particularly as bribery, mainly in relation to the works of Avenida Agua Espraiada.
>
> I clarify, so that the truth prevails, that in all depositions that I have given, the transcriptions recorded interpretations and presumptions based on suggestive

conjectures, there being only a correspondence with facts disseminated by the press, not ratified by myself.

Further, I clarify that at the time of those declarations I had not the necessary serenity to reflect and check the accuracy of the records, as I was involved in an unbearable state of constraint, not only due to the pressure exercised by the media, but also by the psychological trauma generated by the failure on the part of the former employer to fulfil major obligations related to my labor claim."

121. The explanation for this, however, appears in part at least to lie in the fact that by this stage the Paulo Maluf had either instituted or threatened to institute legal proceedings against Simeão De Oliveira, which he was anxious to bring to an end. The declaration, accordingly, continued

"Therefore, I would like, and I shall request, when required, that the ordinary action for pain and suffering proposed against me by Paulo Salim Maluf in the jurisdiction of this Capital be dismissed since I never had the intention of causing any pain and suffering to him. Eventually, I request the issuance of the Deed of Declaration so that it may have all effects related to civil and criminal responsibility/liability once, with this, I will do whatever is required before the competent public and judicial entities."

122. Whether this declaration achieved the result desired by Simeão De Oliveira was not apparent, but the record of evidence given by him in judicial proceedings three and a half years later demonstrates that, while he remained unwilling to implicate Paulo Maluf personally as the recipient of any corrupt payments, he adhered to the substance of his earlier evidence about the existence and manner of execution of a fraudulent scheme of diversion of state funds destined for the Avenida Agua Espraiada project.

123. The occasion in question was the interrogation of Simeão De Oliveira on 22nd September 2005 in criminal proceedings in which Paulo Maluf, Flavio Maluf and he himself were all defendants, in the presence of counsel representing each of his co-defendants. The record was a document of some 2,500 to 3,000 words in part written in the third person but including extensive passages in the form of quotations expressed in the first person. In essence it was to the following effect:

(i) A fraudulent scheme involving false invoices issued by sub-contractors and 90% rebates to Mendes Junior had existed as recounted in his earlier evidence.

(ii) He himself was not responsible for the false invoices or dealing with the sub-contractors: Sidney Lima dealt with that.

(iii) He could not say where the 90% rebate went and was not responsible for contacts with dollar exchangers: "who could explain where the 90% were transferred would be Sidney Lima, who gave me orders related to the payment".

(iv) Part of the funds generated by the scheme would be transferred to dollar exchangers and the other part withdrawn in reals; "sometimes a foreign exchange was made in parallel dollar"; but he was not the main operator of the parallel account. He knew of Vivaldo only through media reports, although on one occasion, at Sidney Lima's request, he had sent subcontractors' rebate cheques to a currency exchange said to be owned by Vivaldo ("at the time I did not remember his name and this happened only once"); he did not know if the Chanani account had been opened by Vivaldo.

(v) He had been repeatedly pressed by prosecutors to name the recipients of funds generated in this way, but he had insisted that he could not do so "based on hearsay":

> "under the direction of Mr. Sidney Lima, defendant made remittances abroad; "I received bills ftom Mr. Sidney where there was the account number and fictitious name, below there was a telephone number and the name of the person with whom I had to be in touch"; a part of such amounts returned by the subcontractors were remitted abroad as mentioned; "I could not tell who were the beneficiaries because they always had a fictitious name"; they were irregular remittances; "document, fact, I can tell you that the remittances were made, but I cannot identify the beneficiary"; the amounts were sent to accounts with codenames, "in the first three statements that I provided to the State Prosecutor I quoted the account "Pera", "Maria Rodrigues" and "Campari"; the defendant cannot tell who were the holders of such accounts; the defendant does not remember having sent remittances ordered by Sidney Lima to the Chanani, Ugly River and Madison Hill accounts; "when I provided my last statement to the Federal Police, Marshal showed me a slip (slip is proof of remittance abroad) regarding Chanani account and this slip presented was very similar to those received by Mendes Junior after the remittance abroad, the context was very similar, regarding the amount and these things"; I received the voucher and delivered in hand to Mr. Sidney Lima, I do not know what he did with these vouchers".

(vi) The statements previously made by him had been supplied because of pressure from the State Prosecutor and in the context of having been promised that the investigation instigated against him by Mendes Junior alleging an attempt to extort money would be terminated and that they (the prosecutors) would provide him with all documents necessary to pursue his own lawsuit against Mendes Junior.

(vii) The prosecutors had said that they knew that payments had been made to Paulo Maluf and EMURB personnel. "I emphasised at the time that I was trying to correlate the name of the beneficiaries with the codes contained in the payments, I argued at the time that there were thousands of names and I was told that those other names would not matter, Maluf's being the only one that

mattered." He had said "I am not sure, I have no proof". He could not say for sure that the beneficiaries of transactions on the Chanani account were Paulo Maluf and Flavio Maluf. They had never been to Mendes Junior and he could not say whether either of them had had telephone conversations with the company's president. Nor had they tried to influence his evidence.

124. On the strength of the "retractions" reflected in this record of evidence given on 22nd September 2005 and in the deed of declaration of 27th February 2003, Mr. Steenson argued that Simeão De Oliveira's earlier evidence should be treated as worthless. But the position is obviously nothing like as straightforward as that. It is clear that, Simeão De Oliveira's later position was indeed to resile from, ostensibly at least, his earlier specific identification of recipients of kickbacks, including in particular Paulo Maluf, and to minimise the extent of his own contact with *doleiros* and his knowledge of accounts abroad to which funds had been remitted. But, far from disavowing any knowledge of the fraud being perpetrated on EMURB and the fact that part of the proceeds were from time to time transferred abroad via *doleiros*, he reaffirmed these things only too clearly in his evidence of 22nd September 2005.

125. Nor did he, in any part of that evidence, suggest that contrary to his deposition of 20th May 2002 he had no knowledge of the twenty-two documents on which he had commented there in detail. On the contrary again, speaking in the course of his evidence of 22nd September 2005 of one occasion on which he was interviewed by prosecutors, he is recorded as having told them "Hey guys, I do not know where I can help; all I know is regarding Mendes Junior and the documents that you are showing me [that] came anonymously, the prosecutors said; I know them, I can opine on them (evidences), but I cannot provide names based on hearsay". We turn now to page 10 of those documents, the so-called "De Oliveira document".

VI. The De Oliveira document

126. The document is headed "POSIÇÃO EM 05.02.98" and is arranged in five sections: "01 – RECEBIMENTOS", "02 - RESTITUIÇÕES DE ISS", "03 - LÍQUIDO RECEBIDO", "04 – TOTAL A PAGAR", and "05 – OPERAÇÕES". Because of its importance and the difficulty of conveying the full sense of it in words, the document is reproduced in its entirety as an *Appendix* to this judgment, the only difference from the original being that the six US dollar figures referred to in the documents discussed at paragraphs 101-107 above and 133 below are shown in bold type in the fourth column of section 05.

127. The first section, 01 – RECEBIMENTOS (Receipts), consists of a list of eight sums of money denominated in Brazilian reals totalling R$ 57.292.411,20 against dates ranging from 14th December 1997 to 2nd February 1998. There can be no doubt whatever that these represent payments in connection with the Avenue Agua Espraiada project made by EMURB to Mendes Junior and onwards by Mendes Junior to subcontractors on or very close to the dates listed. Mr. Baker took the Court through a painstaking analysis of a multiplicity of contemporaneous records of EMURB and Mendes Junior - invoices,

payment authorisations, cheques, receipts and logs, demonstrating (with *de minimis* exceptions) the undoubted source of the figures in this section: an exercise made necessary by the defendants' unwillingness to agree any of the figures, but which, in the end, Mr. Steenson did not challenge.

128. The second section, "02 - RESTITUIÇÕES DE ISS" (Returns of tax), consists of three amounts totalling R$ 814.254,48, apparently reflecting potential tax liabilities on the part of Mendes Junior. The figures in this section were not in contention.

129. The third section, "03 - LÍQUIDO RECEBIDO" consists of a single figure of R$ 56.478.156,72, being the total amount in the first section net of the total of the second section.

130. The fourth section, "04 – TOTAL A PAGAR", consists of two sub-headings and related figures together with a total:

"DIVIDA PASSADA - R$ 2.217.254,00
DIVIDA ATUAL - R$ 11.295.631,34
TOTAL GERAL - R$ 13.512.885,34"

The first of these developed into potentially the most contentious part of the whole document.

131. The fifth section, "05 – OPERAÇÕES" (Operations) is a table consisting of fifteen lines of figures together with totals arranged in six columns:

- a series of dates (between 8th January and 4th February 1998);
- figures totaling R$13,512,885.34, i.e. the same as the total figure in "04";
- a series of R$/US$ exchange rates;
- US$ equivalents of the figure in Column 2, totaling US$11,157,278. 18;
- another date (between 15th January and 8th February 1998); and
- the letter 'C' in all but the final line where the letter 'P' is recorded.

Set out below, by way of illustration, are the entries in the first three lines and the totals in the final line (with column numbers added as an aid to the discussion that follows).

1.		2.		3.		4.		5.	6.
08.01.98	-	R$ 2.000.000,00	-	R$ 1,200	=	US$ 1,666,666.67	-	15.01.98	C
13.01.98	-	R$ 549.000,00	-	R$ 1,220	=	US$ 450,000.00	-	20.01.98	C
13.01.98	-	R$ 465.314,00	-	R$ 1,220	=	US$ 381,405.00	-	20.01.98	C
.....		.....		.....		.....		.....	
.....		.....		.....		.....		.....	
TOTAL GERAL		R$13.512.885,34				US$11,157,278.18			

132. Three aspects of this document are, as Mr. Baker demonstrated, incontestable. The first we have already mentioned: the origin of the figures with which the document opens

in section 01. The second is that the figure of R$ 11,295,631.34 against rubric DIVIDA ATUAL in section 04 of the document is, arithmetically, precisely 20% of the net amount given in the section 03. The third is that, in thirteen out of fifteen cases, the figures in column 4 of section 05, correspond exactly with US dollar credits to the Chanani account, with the exception of the first item where the amount actually credited to the Chanani account appears to have been rounded up to US$ 1,666,667.

133. Moreover, in the case of five of the payments, the date in column 5 tallies exactly with dates on the Lespan and MTB faxes referred to in paragraphs 101 – 107 above; and in the sixth case the date of the Banestado fax is within a day of the corresponding item in column 5.

134. At the heart of the plaintiffs' case is the contention that this, the De Oliveira document, is a definitive statement of account prepared by Simeão De Oliveira recording kickback payments to Paulo Maluf in the course of January and early February 1998. The document, they say, sets out a progressive calculation showing, first, the total of amounts received from EMURB and paid to subcontractors appropriately adjusted to allow for sums to cover tax; next a note of an amount already owing to Paulo Maluf from an earlier period (the DIVIDA PASSADA item of R$ 2.217.254,00 in section 04 of the document) followed by the additional amount now due to Paulo Maluf, R$11.295.631,34, calculated at the rate of 20% of the net figure in section 03 (as described in Mr. De Oliveira's evidence), making a total payable of R$13.512.885,34; and, finally, showing conversion of the individual amounts making up that total into US dollars at prevailing exchange rates and payment of the corresponding US dollar amounts into the Chanani acccount on dates in January and February 1998.

135. In support of this submission, the plaintiffs relied on the De Oliveira document itself coupled with Simeão De Oliveira's pre-retraction depositions, including his evidence that payments equivalent to 20% of the funds received from EMURB were paid over to Paulo Maluf and what he had to say about the twenty-two documents received anonymously by the Public Prosecutors' Office. As noted earlier, Mr. De Oliveira had described those documents in his deposition of 20th May 2002 as "basically positions of the slush fund, calculation charts to determine each kickback and to control the cable remittances abroad." As to page 10 of those documents, his evidence is recorded as follows:

> **"Document 10** represents "Recebimentos" ***[collections]*** of "R$ 57,292,411.20" by MENDES JÚNIOR from EMURB. The term "Restituições" ***[returns]*** means the aggregate (R$ 814,254.48) to be paid as ISS ***[tax on services]*** by MENDES JÚNIOR. On this particular, deponent clarifies that as per his first deposition, there was a scam for the payment of kickbacks in an affair involving a debt of MENDES JÚNIOR before the Municipality of São Paulo, on the approximate sum of R$ 40,000,000.00, at that time.
> Several administrative proceedings were cancelled after the payment of approximately R$ 2,500,000.00 to the persons involved, paid in instalments, as follows: I – R$ 1,100,000.00 in the first instalment; II – R$ 500,000.00 in the second one; and the remaining in the third payment. Deponent herein asks the

Public Prosecutor's Office to enter a lawsuit in order to reopen such administrative proceedings which led to the subtraction of nearly R$ 40,000,000.00 from the Municipal Treasury, due to the "scam made by MENDES JÚNIOR with local officials and politicians".
"Líquido a receber" ***[net receivables]*** relates to the amount (R$ 56,478,156.72) on which should be calculated the percentage (11%) of bribery to the former mayor PAULO SALIM MALUF. Actually, as per item 5 of the same document ("operações" ***[operations]***), the aggregate amount of R$ 13,512,885.34 (equivalent to US$ 11,157,278.18) was paid between January 1, 1998 and January 29, 1998, by cable (represented by letter "C") and another part in cash (represented by letter "P").

136. What the passage in the middle concerning the cancellation of administrative proceedings is about is not obvious. And the figure of 11% is inconsistent with references elsewhere by Simeão De Oliveira to 20% as the percentage payable to Paulo Maluf, and makes no sense in relation to the figures to which he is referring: one can only conclude that the former figure is an aberration of some kind, an incorrect transcription of Mr. De Oliveira's evidence at this point or slip on his part. But, for the rest, the gist of this commentary is clear and the detail suggestive of one who speaks with authoritative, first hand knowledge. On its face, coupled with this testimony, the document is a striking one, which plainly commands serious consideration.

137. The defendants' position in relation to the De Oliviera document, as it revealed in the course of the trial, was essentially twofold. First, that the evidence adduced by the plaintiffs did not substantiate the claim made for it by the plaintiffs: its provenance was obscure, there was no reliable evidence that it was the work of Simeão De Oliveira. Secondly, that the document could perfectly well be an *ex post facto* construction by anyone with an axe to grind and access to EMURB or Mendes Junior accounting records and to details of credits to the Chanani account: a case that only emerged as a full-blown, positive suggestion in the course of Mr. Steenson's oral submissions on Day 8 of the trial.

138. The first limb of this stance, turned in part on the fact that Simeão De Oliveira had failed to appear in person to verify and explain the document and the plaintiffs had been reduced to relying on hearsay evidence - which Mr. Steenson characterised as being inherently unsatisfactory and unreliable, in particular having regard to Mr. De Oliveira's later retractions – and in part on the specific terms of his own commentary on the document in his 20th May 2002 deposition. As to this last point, Mr. Steenson relied on the fact that, whereas the final sentence of the commentary on document no.7 in the series read "When asked, deponent declared that he actually prepared such a document for Sidney Lima, under his express order", there was no equivalent statement in Mr. De Oliveira's commentary on document no.10.

139. One drawback to the parties' habit of using the term "the De Oliveira document" was that it tended to suggest that it was a single stand-alone document, rather than one of a series, as it plainly was: a series, moreover, with a number of features common to all, or at least many, of the documents - the typeface, the headings and layouts, the conversion

of Brazilian reals to US dollars - every page of which, as previously noted, Simeão De Oliveira evidently had no difficulty in explaining in precise, detailed terms.

140. The weakness of Mr. Steenson's contention that Simeão De Oliveira did not say that he was the author of document no. 10 is that it fails to allow for the fact that all three of documents nos. 7, 9 and 10 are described by Mr. De Oliveira as involving the calculation of sums payable to the same person, Paulo Maluf, and for the possibility – the probability, we would say – that, having expressly established with the deponent that he was the author of document no.7, those interrogating him did not consider it necessary to repeat the question in relation to documents nos. 9 and 10.

141. Apart from being nothing more than speculation, Mr. Steenson's proposition that the De Oliveira document could very well have been fabricated was in our view implausible. He suggested for a start that there was something suspicious about the fact that throughout the document dates were written in the European style (day, month, year). But the same applies to all of the other twenty-two documents and to the schedules of payments and examples of sub-contractors' cheques exhibited by Joel Fernandes to his deposition of 13th June 2002. He also drew attention to the fact that the date in column 5 of the penultimate entry in section 05 of the document, "08.02.98", was later than the date in the document heading, "05.02.98". But there is nothing in the least remarkable about that once one understands, as previously noted, that the dates in column 5 show when confirmation of payments abroad were made, whereas those in column 1 – all of which are earlier in time than 5th February 1998 – almost certainly represent the dates when the R$ payments in column 2 "accrued due" and would be the material ones for the purpose of a statement of the "POSIÇÃO EM 05.02.98"

142. Mr. Steenson's main argument turned on the DIVIDA PASSADA item of R$2,217,254.00 in section 04 of the document. Anyone with access to the figures in the first section of the document (payments made by EMURB to Mendes Junior) and knowledge of the credits made to the Chanani account at Safra Bank in New York would have been able, he suggested, to construct a document of this kind by a three-stage process. First, by recording, as column 4 of the 05-OPERAÇÕES section of the document, the US dollar Chanani credits, and then converting those sums into reals and listing them, with a total of R$ 13.512.885,34, as column 2 of that section; secondly, by compiling sections 01 and 02 from the relevant EMURB and Mendes Junior records, adding the net figure as 03, and then inserting at 04 as DIVIDA ATUAL an amount corresponding to 20% of 03, R$ 11.295.631,34; and, finally, by taking the arithmetical difference between the figure of R$ 11.295.631,34 and the figure of R$ 13.512.885,34 – i.e. R$2.217.254,00) – and inserting it in 04 with a fictitious heading, DIVIDA PASSADA, a label designed to disguise what was in truth no more than an arithmetical balance as a true record of an amount already owing from an earlier period.

143. The thesis hinged, for any credibility that it might have had, on the premise – vigorously asserted by Mr. Steenson – that there was no evidence anywhere of the source of the entry "DIVIDA PASSADA - R$2.217.254,00": nothing whatever to show that it was an authentic rather than a concocted figure. In confirmation of this assertion he relied

in particular on his cross-examination of Monica Semeraro. In answer to Mr. Steenson, Ms. Semeraro had explained that her role in the State Prosecutor's Office was that of financial analyst: she was not a lawyer. She had agreed that she had been working on the investigation into the alleged Avenue Agua Espraiada project fraud for some ten years in the course of which she had examined many thousands of documents. Asked specifically by Mr. Steenson whether she had ever found any reference to the DIVIDA PASSADA item of R$2.217.254,00 she had said she could not remember.

144. But, as Mr. Baker pointed out in reply, the origin of the item was to be found close by, in document no.17 of the collection of which the De Oliveira document (no.10) was part. In the case of document no.17, the main heading is "POSIÇÃO EM 08.04.97", some ten months earlier than document no.10. And although there are only three sections, 01–RECEBIMENTOS, 02–PAGAMENTOS and 03–TOTAL DEVIDO, the substance and purpose of the document are plainly the same as those of the document no.10. It includes a figure of R$ 7.477.131,00, equivalent to 20% of the total RECEBIMENTOS, and a total under PAGAMENTOS of R$ 5.529.877,00. The arithmetical difference is then logged in the final line, against TOTAL DEVIDO, as R$ 2.217.254,00, which is precisely the figure that is later carried forward into the subsequent accounting period, represented by document no.10, as "DIVIDA PASSADA".

145. Mr. Steenson protested that the link between these documents had not featured in Mr. Baker's opening speech, which was true. Mr. Baker countered that it was only with Mr. Steenson's belated development of his fabrication thesis, elaborated by calculations demonstrating how document no. 10 might have been compiled, that attention had been focused on the DIVIDA PASSADA component of the document. How it was that the obvious link between these two documents had not been spotted by the defendants' team, and had not been noticed or recalled by Monica Semeraro, was not explained: it may well be attributable to over concentration on document no.10 to the exclusion of other documents in the collection, a tendency to which we have already referred.

146. Whatever the explanation, the DIVIDA PASSADA item is plainly of undeniable provenance - unless one were going to contemplate the possibility of document no. 17 also being a fabrication, a suggestion that Mr. Steenson did not seek to canvas. And one has only to look at the detail of the series of documents as a whole to dismiss any idea that they might all be inventions. Seeing document no.10 in the context of the others also tends to confirm its authenticity and to bear out the plaintiffs' case, not least because eight of the twenty-two pages include calculations which involve taking 20% by values of specified R$ amounts and are described by Simeão De Oliveira as representing calculations of amounts payable to Paulo Maluf.

147. Document no.17, as it happens, is also instructive for another reason. Each of the five payments recorded under "PAGAMENTOS" has, against the US dollar figure (shown as converted from Brazilian reals, as in document no.10), an entry in the far right column reading "CAMPARI" (in three cases) or "CAMPARI/P" (in one case) or "PERA" (in one case). Commenting on this in his 20th May 2002 deposition, Simeão De Oliveira is recorded as having said "The expressions "Campari" and "Pera" are fantasy names of

"doleiros". Deponent does not know their real names." However, as noted earlier, Richard van Otterloo, in his deposition of 4th April 2006, described Campari as one of two accounts with MTB Bank of New York managed by him, the other being Jazz. (Apart from confirming the practice of using *doleiros* to transfer funds from Brazil to the United States, this document also causes one to wonder whether Simeão De Oliveira was right when, in his commentary on document no.10, he explained the letters 'C' and 'P' as indicating payment by cable and payment in cash when an equally plausible explanation might be that they were the first letters of Campari and Pera.)

148. All in all, this excursion into the source of the DIVIDA PASSADA item only served to support rather than undermine the plaintiffs' case as to the authenticity of document no.10. We have little doubt that the document is indeed genuine, that it was in all probability compiled by Simeão De Oliveira himself and if not by him by someone else in Mendes Junior familiar with what was going on not long after the date that it bears, and that Simeão De Oliveira believed it to be a statement of account as at 5th February 1998 of amounts 'due' to Paulo Maluf and payments made.

149. As regards the conclusions that can legitimately be drawn from the content of the De Oliveira document, another of Mr. Steenson's recurring themes was that there was no evidence anywhere connecting the Brazilian real amounts in the left-hand column of section 05 – OPERACOES, with the alleged Avenue Agua Espraiada fraud. In this he was correct in the sense that there is no match between the precise figures there and any other documentary record in evidence. But if the evidence of Mr. Fernandes is accepted, this would not, perhaps, be surprising as the figures inserted by him on sub-contractors' cheques using his Facit typewriter would have been chosen at random (except to the extent that they amounted in aggregate to whatever total payment was required on that occasion). Alternatively, such cheques might, it seems, have been used to generate cash which was then handed over to a *doleiro* and used to arrange the transfer abroad of an equivalent amount in US dollars.

150. Either way, the exact arithmetical relationship (20%) between the total of the figures in the left-hand column and the figures for RECEBIMENTOS in section 01 after adjustment for tax DIVIDA PASSADA is unlikely to be a mere coincidence, particularly as the same exact percentage can be seen to have been used in a number of the other statements of account associated with the De Oliveira documents. And, as Mr. Baker repeatedly observed, what innocent explanation could there possibly be for a statement of account that includes and links payments received by Mendes Junior from EMURB in Sao Paulo and moneys paid into a bank account in New York controlled and beneficially owned by the Malufs in the course of a few weeks in late 1997 and early 1998?

151. It is also true, as Mr. Steenson pointed out and Mr. Baker accepted, that in the case of two of the US dollar figures in the fourth column of section 05, there is no record of any obviously corresponding credit to the Chanani account; but it is evident that that was by no means the only offshore account maintained by the Malufs and inability of the plaintiffs to say where those two amounts went does not detract from the force of their case on the other thirteen payments. Nor is it possible in every case to effect a perfect

reconciliation between the dates in section 05, though the great majority tie up. Such discrepancies as there are, suggested Mr. Baker, and we accept, likely to do no more than reflect the mechanics of banking operations or dates when payments were notified or recorded.

152. The remaining question is how it is that the author of that document, whether Simeão De Oliveira himself (as seems likely to have been the case) or someone else within Mendes Junior, had access to more or less precise details of the amounts of credits made to the Chanani account but not necessarily the exact dates when such credits were posted to that account. As noted earlier, the answer suggested by the evidence is that it was the practice of the *doleiros* handling the transfer of funds abroad to arrange for confirmation of the remittance of funds from intermediate accounts to their ultimate destination – in the present case the Chanani account – to be faxed or otherwise transmitted to Simeão De Oliveira or someone else at Mendes Junior: hence the Banestado fax, the Lespan fax and the four MTB transaction notifications referred to by Joel Fernandes in his evidence. Someone, after all, had to keep a record of what had been distributed, where and when. (No comparable faxes corresponding to the other transactions recorded in section 05 appear to have come to light, but it is reasonable to assume that similar notifications would have been sent and received in one form or another.) And it was the date when notification of this kind was received that was entered, in each case, in column 5 of section 05 the De Oliveira document.

153. The timing of the credits to the Chanani account in question also needs to be seen, not just in relation to the dates on which funds are recorded as having been received by Mendes Junior (from EMURB), but also in the context of the Chanani account having been opened just three months previously and Paulo Maluf's third Memorandum of Wishes executed on 16th January 1998 saying "During my lifetime I wish to be considered the primary beneficiary of the trust".

154. Once the derivation of the figures is understood, in the absence of any plausible reason for thinking that document no.10 is a fabrication, it becomes, even without reference to any hearsay witness evidence, compelling evidence of two things: first, the existence of a direct link between funds received by Mendes Junior and moneys credited to the Chanani account, and, secondly, the quantum of the moneys so credited having been calculated at the rate of 20% of payments received by Mendes Junior (adjusted for tax). Add to this the fact, as we have found, that the Chanani account was controlled and moneys in it beneficially owned by the Malufs together with the absence of any conceivable reason why the Malufs should be receiving sums of money equivalent in value to a substantial percentage of funds made available to Mendes Junior by the Municipality of Sao Paulo – and receiving such money within a matter of days of funds being received by Mendes Junior – and the inference of involvement on the part of the Malufs in defrauding the Municipality is, on those grounds alone, a powerful one. We have, of course, also found that the defendants' explanation of the payments into the Chanini account in question, unsupported by evidence of any kind, does not begin to be credible.

155. But the plaintiffs' case is of course strengthened and leant colour by much of the evidence adduced as hearsay if and to the extent that that evidence can properly be regarded as reliable and meriting weight. We therefore turn at this point to consider the factors to which we should have regard in evaluating that material.

VII. Evaluation of hearsay statements

156. Article 6 of the Civil Evidence (Jersey) Law 2003 provides

> "(1) In estimating the weight (if any) to be given to hearsay evidence the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence"

Paragraph (2) then proceeds to set out a number of factors to which "Regard may be had, in particular". We consider each of those in turn and also a number of other factors peculiar to the present case.

157. *(a) Whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness.* With the exception of the two Deutsche Bank witnesses, both of whom were in Jersey and whose statements were admitted without objection by Mr. Steenson, all the deponents were resident overseas, most if not all in Brazil. Of the principal witnesses, Simeão De Oliveira was unwilling to give evidence for the plaintiffs; Messrs. Santoro and Alves made it plain that, while they were ready to give evidence by video-link from Brazil, they were not prepared to make the journey to Jersey; Joel Fernandes, having originally been co-operative later proved to be unwilling to give evidence except on terms that the plaintiffs were, quite properly, unwilling to accept. As to the others, the plaintiffs' original hearsay notice said that they had been unable to contact them; in the case of Richard van Otterloo, they evidently succeeded at a later stage in making contact and establishing that he would have been willing to give evidence by video-link, but left it to the defendants to call and cross-examine him if they wished to do so. Mr. Baker's main point was that none of these persons was employed by or otherwise within the control of the plaintiffs. With the possible exception of Mr. van Otterloo, there appears to be little more that the plaintiffs could have done to secure that witness testimony was given in person. In any event, not only were the defendants offered the opportunity to cross-examine Messrs. Santoro and Alves by video-link arranged by the plaintiffs, but they were in all cases granted leave pursuant to RCR 6/22 themselves to call and cross-examine all or any of the witnesses whose evidence was admitted as hearsay.

158. In the case of the defendants there was some confusion in that they originally served a hearsay notice in respect of Learcio Texeira Filho's deposition of 15th June 2005, Simeão De Oliveira's testimony of 22nd September 2005 and Joel Fernandes' testimony of 24th October 2005. Subsequently they withdrew the second and third, saying that they relied on them solely for the purpose of showing inconsistency with the deponents' earlier statements and that it was only the deposition of Learcio Filho that was relied on

for the purposes of establishing the truth of its contents. The other two documents on which, in the event, they also relied – the record of Learcio Filho's evidence in judicial proceedings on 4th October 2005 and Simeão De Oliveira's deed of declaration of 27th July 2003 – were never the subject of any formal hearsay notice but were simply handed up by Mr. Steenson without objection from Mr. Baker. Here again it was understandable that Mr. De Oliveira was not called, having, it seems, also declined to appear on behalf of the plaintiffs. As regards Learcio Filho, he was not resident in Jersey and was not within the control of the defendants. Whether he was unwilling to come to Jersey or to give evidence by video-link we were not told.

159. *(b) Whether the original statement was made contemporaneously with the occurrence or existence of the matters stated.* The principal depositions of Messrs. Simeão De Oliveira, Fernandes and Santoro were recorded in the first half of 2002, some four years after the events in question; others in 2005 and 2006. The intervening interval is material but not unusual in terms of witness evidence in litigation and not such as to be likely, of itself, to render the evidence inherently unreliable, especially when the subject matter is of the kind that it is.

160. *(c) Whether the evidence involves multiple hearsay.* As a matter of generality it is right to say that the depositions and other forms of statement in question include substantial amounts of double hearsay (in the sense of the deponent speaking of what others told him or her) or, in some cases, statements the source of which is unclear. But, on the key elements of the case – the mechanism of the alleged fraud itself, the proliferation of parcels of cash, the transmission of funds abroad via *doleiros* and control of the Chanani account - the principal witnesses, Messrs. Simeão De Oliveira, Fernandes, Santoro and Alves spoke to a large extent from first-hand involvement as active participants in events. It is on those aspects of their evidence that we have for the most part concentrated.

161. (d) *Whether any person involved had any motive to conceal or misrepresent matters.* This, certainly, is a consideration that we have borne well in mind. To the extent that Messrs. Simeão De Oliveira, Fernandes, Santoro, Figueiredo were, however reluctantly, engaged in or contributing to dishonest activities in one way or another, they may well have motives, while revealing some things, for being less than wholly truthful in others. The same goes for Messrs. Alves and van Otterloo. Mr. Baker acknowledged this.

162. We are also alive to the possibility that one or more of these people may have had an axe to grind. Both Simeão De Oliveira and Joel Fernandes appear to have parted from Mendes Junior's employment in circumstances that left them feeling aggrieved; Mr. De Oliveira subsequently sued Mendes Junior seeking to recover certain employment benefits of which he claimed to have been wrongfully deprived and in turn became the subject of criminal proceedings instigated by Mendes Junior in which he was accused of attempted extortion. On the other hand, it is not obvious why middle-ranking company executives such as those involved here would go out of their way to incriminate themselves and implicate a prominent, powerful figure such as Paulo Maluf in fraudulent activities for no good reason.

163. Of particular concern, for obvious reasons, are the later statements of Simeão De Oliveira and Joel Fernandes in which they retract certain aspects of their earlier deposition evidence. It is fairly obvious that, having originally been co-operative with those conducting inquiries, they subsequently became anxious to play down the extent of their involvement and knowledge. In the case of Simeão De Oliveira, the motivation for his February 2003 deed of declaration appears clear enough: a desire to make peace with the Malufs and secure an end to the proceedings that they had brought against him (the detail of which we were not told, but which we assume were in the nature of a claim for defamation based on what Mr. De Oliveira had said about their involvement in fraudulent activities). By October 2005 he was also a co-defendant with the Malufs to criminal proceedings.

164. As recounted earlier, Simeão De Oliveira claimed in his October 2005 evidence that in making his earlier depositions he had been under considerable stress, had been leant on heavily by prosecutors to "name names" and in particular to confirm that Paulo Maluf was involved in the fraud. We have no means of knowing whether anything of that kind occurred.

165. But as observed earlier, the essence of the retractions was limited. There was no going back on accounts of the basic mechanism by which the alleged fraud was said to have taken place. To the extent that earlier suggestions that Paulo Maluf was a beneficiary of the fraud were withdrawn, the impact on the plaintiffs' case is minimal. Even if Paulo Maluf's name were excised completely from Simeão De Oliveira's depositions, the remainder would still constitute cogent evidence in support of the plaintiffs' case. The De Oliveira document speaks for itself as regards the connection between funds received by Mendes Junior and the Chanani account; and it is impossible to reconcile Simeão De Oliveira's later professed ignorance of that account and where money was sent with the detailed content of his earlier statements. The same goes for Joel Fernandes's later denials of any knowledge of Chanani. In these respects at least we look upon the so-called retractions with a severely sceptical eye.

166. (e) *Whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose.* The depositions are self-evidently not verbatim transcripts but appear to be records of witnesses' evidence as understood and written down by an official of the Public Prosecutor's Office for the purpose of investigations into possible criminal activity. They are formal records, signed by the deponent and by two Public Prosecutors, and are expressed for the most part to be given "under the penalties of law", as the English translation puts it. In the case of the evidence given by Simeão De Oliveira and Joel Fernandes in the course of judicial proceedings on 22nd September and 24th October 2005 respectively, the records are expressed in part as direct quotation of the witness's evidence and in part in the third person. On any view, all are records of a kind that deserve to be taken seriously.

167. *(f) Whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.* Mr. Steenson protests

that the plaintiffs' reliance on hearsay evidence, without producing witnesses in person in the witness box in Jersey, is wholly unsatisfactory. But we have already addressed the reasons why the plaintiffs have been obliged to have resort to hearsay evidence. There is, in our view, no basis whatever for thinking that there has been any attempt by the plaintiffs to prevent proper evaluation of the weight of the evidences of witnesses.

168. Other factors did however make evaluation of some aspects of these statements less than straightforward: the variable quality of the translations (of the Portugese originals into English) with which the Court was presented; the difficulty on occasions of being sure what documents were being discussed or the context in which the deposition was made; the interspersing of evidence material to the present proceedings with other matter.

169. It is, of course also necessary to bear in mind, as we do, that whatever the circumstances that have obliged the parties to rely on hearsay evidence (and it is, of course, not just the plaintiffs but also the defendants), the fact is that none has been tested in cross-examination in this court. That this is not in itself a bar to according weight to such statements is, however, inherent in the terms of Article 3(1) of the Civil Evidence (Jersey) Law 2003 as previously noted and is also consistent with judicial observations of high authority in relatively recent English cases.

170. In *Polanksi v. Condé Nast Publications Ltd* [2005] UKHL 10, Baroness Hale, having referred to the extensive case management powers of the English court delineated in the CPR, commented:

> "But it would be a strong thing indeed to use such case management powers to exclude the admissible evidence of one of the parties on the central facts of the case. There may be circumstances in which this could be done. The unreasonable refusal of that party to subject himself to cross-examination may be one of them. It might be grossly unjust to a party, even contrary to his right to a fair trial under art. 6 of the European Convention on Human Rights, to decide a claim principally on the untested evidence of a party who had not been subject to cross-examination of any sort."

And in *Welsh v. Stokes* [2007] EWCA Civ. 796 the Court of Appeal referred to the need for caution where the case turns on hearsay evidence alone.

171. But

> (i) the example given by Baroness Hale in *Polanski* of a circumstance that might justify exclusion of otherwise admissible hearsay evidence was that of a *party* unreasonably refusing to submit to cross-examination: not, as here, witnesses over whom the plaintiffs have no control; moreover, in commenting that it might be grossly unjust to the other party to decide a claim on evidence untested by cross-examination of any sort, she was speaking of cases where the claim depends "principally" on evidence of that nature;

(ii) a majority of the members of the House of Lords in *Polanski* considered that the Court of Appeal had gone too far in suggesting that, if leave to give evidence by means of video-link (or 'VCF') had not been granted and the plaintiff had failed to present himself in court for cross-examination, the court would have been *bound* to exclude the plaintiff's witness statement notwithstanding that it would otherwise have been admissible as hearsay under s. (1) of the Civil Evidence Act 1995: per Lords Nicholls and Hope at [36] and [67] and Baroness Hale at [70];

(iii) the members of the Court of Appeal in *Welsh v. Stokes* were unanimous in rejecting the proposition that where hearsay evidence is the only evidence on which a claim is based it must necessarily be accorded no weight; as Dyson LJ (with whose judgment Richards and Thomas LJJ agreed) observed

> "22. Even if the hearsay evidence were the only evidence on which the claim was based, I would not accept that this was necessarily a reason for giving it no weight. It would depend on all the circumstances. I accept that there will be cases where it is so unfair to hold a defendant liable solely on the basis of hearsay evidence that a court should place little or no weight on the evidence. Consideration of the factors stated in section 4(2) will point the way, but will not necessarily be determinative. In some cases the defendant may be able to adduce evidence to contradict, or at least cast doubt on, the hearsay evidence. But there will also be cases, like the present, where the defendant is not in that position. Apart from the unidentified motorist and the claimant, there were no witnesses to the accident. In such a case, there may be said to be unfairness to the defendant in having to face hearsay evidence which he cannot directly challenge. On the other hand, there would be unfairness to the claimant to place no weight on the hearsay evidence, since without it her claim would inevitably fail.
>
> 23. The decision what weight (if any) to give to hearsay evidence involves an exercise of judgment. The court has to reach a conclusion as to its reliability as best it can on all the available material. Where a case depends entirely on hearsay evidence, the court will be particularly careful before concluding that it can be given any weight. But there is no rule of law which prohibits a court from giving weight to hearsay evidence merely because it is uncorroborated and cannot be tested or contradicted by the opposing party. I do not consider that the statements in the authorities relied on by Miss Rodway in her skeleton argument support such an extreme proposition."

(iv) in noting that "a court will be particularly careful before concluding that it [hearsay evidence] can be given any weight", the Court of Appeal in *Welsh v.*

Stokes was speaking of a situation "Where a case depends entirely on hearsay evidence".

172. The plaintiffs' case in the present proceedings is far from dependent solely on the hearsay statements. The passing up by the defendants of opportunities to cross-examine at least two of the more important witnesses via video-link as recounted earlier is also difficult to understand: whatever one's views on the efficacy or otherwise of evidence given by video-link, the opportunity to cross-examine via such a facility must be better than no opportunity at all. The failure of the defendants to avail themselves of these opportunities tends to suggest that their sustained objection to evidence being given in this way had more to do with preventing witnesses appearing for the plaintiffs than any real desire to cross-examine them.

173. Taking all these factors into account, and despite apparent inconsistencies of detail both internally and in relation to other statements, there is, quite plainly, substantial consistency across the board on major matters - consistency between witnesses as well as consistency with contemporaneous documents and information subsequently supplied by Flavio Maluf to Schellenberg Wittmer – and it appears to us that the hearsay evidence adduced can properly be regarded as reliable and accorded considerable weight at least to the extent that the witnesses speak from first-hand knowledge on the following topics: (1) the existence in late December 1997 and early 1998 of a scheme entailing the fraudulent diversion of funds supplied by the Municipality in the belief that they were required for the purpose of the Avenue Agua Espraiada project and the process by which that diversion was accomplished and a 'slush fund' created (Messrs. Santoro, Figueiredo, Fernandes, and Simeão De Oliveira); (2) the distribution from such fund of kickbacks to a number of persons who had no entitlement whatever to any part of the moneys made available by the Municipality (Messrs. Fernandes and Simeão De Oliveira); (3) in some cases the transfer of such kickbacks abroad via *doleiros* (Messrs. Simeão De Oliveira and Alves); (4) the involvement of Flavio Maluf in sending money abroad (Messrs. Simeão De Oliveira, Alves and van Otterloo); (5) the opening, control and beneficial ownership of the Chanani account (Vivaldo Alves); and (6) the explanation of the De Oliveira document and its companion documents (Simeão De Oliveira).

174. References made by Joel Fernandes and others to large amounts of cash being passed around are also echoed in the depositions of a number of other employees of Mendes Junior and EMURB.

(1) *Marleide Maria Gutierrez:* According to her deposition, made on 15th July 2002, Mrs. Gutierrez had worked as a kitchen assistant to the "directorate" of Mendes Junior and reception assistant between May 1998 and July 2002; she had recently resigned, having been removed from her position with the "directorate"; while performing her duties as kitchen assistant she had witnessed Sidney Da Silva Lima emerging with wrapped packages of money in the form of boxes of sweets, whisky etc. as well as with a black bag; "Within the company, staff called the suitcase "Dr. Sidney's black bag". At times, not all of the packages fitted inside Mr Sidney's suitcase and he carried these wrapped in his hands, the declarant witnessed this event (Dr. Sidney leaving with packages of cash)

on tens of occasions"; sometimes Simeão De Oliveira left with him. It is evident, however, that Mrs. Guiterrez had no first-hand knowledge of what the packages contained but was only told that they contained money by Joel Fernandes whom she believed to be in the habit of collecting cash from the bank in plastic bags accompanied by the company chauffeur; she also claimed to have known that representatives of *doleiros* visited the headquarters of Mendes Junior to deliver cash, but does not say that she saw them herself, how she knew they were *doleiros* or how she knew why they were there. Cash would not, she said, have been required to pay Mendes Junior employees as they were all paid by cheque. She had no grievance against Mendes Junior and had received her "labour benefits".

(2) *Armando Neto*: His evidence took the form of a deposition made on 25th May 2004, apparently recording information volunteered by him "in relation to the misappropriation of public funds" in connection with the Avenida Agua Espraiada project and another major project involving the construction of the Ayrton Senna Tunnel. According to his statement he worked at the Secretaria de Obras Publicas from 1993 to 1996 as the personal secretary to Reynaldo de Barros, former Municipal Secretary [and President of EMURB]. In the case of the Ayrton Senna Tunnel he claimed to know of bribes being paid to De Barros and to Paulo Maluf (who was Mayor of Sao Paulo at the time) in the form of large parcels of cash hidden in boxes of Johnny Walker Red Label whisky (at least US$100,000 in each box) wrapped in dark green paper and participated in deliveries to De Barros and Paulo Maluf on at least thirty occasions. He used to witness, he said, the opening of the boxes of whisky. He did not, however, explain who supplied the cash or give details of how supposed deliveries to Paulo Maluf were made. In the case of the Avenida Agua Espraiada project he referred to sub-contractors issuing fake invoices, to 30% of funds generated in that way being misappropriated by De Barros and Paulo Maluf and to Flavio Maluf supervising remittances abroad and is recorded as having said he "heard many conversations between Reynaldo Emygdio de Barros with the representatives of the companies Mendes Junior and OAS re the payment of bribes to the former Secretary and Paulo Salim Maluf." Such meetings were said to have occurred periodically (at least once a month) at De Barros's home or at the work sites of Avenida Agua Espraiada.

(3) *Marcos Feliciano De Oliveira*: Here again there was just one deposition, made voluntarily on 2nd July 2004. His evidence was that between 1979 and 1996 he was a driver and secretary to Reynaldo de Barros and for about seven or eight years lived at his home; that between 1993 and 1996 he saw "many times (practically every Thursday)" contractors' agents deliver boxes (without bottles) of Johnny Walker Red Label whisky or black folders to De Barros's home, some of which remained there and the rest De Barros himself, driven by the deponent, took to Paulo Maluf's home; "in principle" he did not know what the boxes and folders contained, but did on one occasion see De Barros "place inside the bottles of whisky some packs of dollars".

175. Taken in isolation we would not think it safe to give weight to any of these three depositions. But it is difficult to ignore the consistent theme of large amounts of cash being handled within Mendes Junior and EMURB to no obvious legitimate purpose, even

allowing for the fact that one witness, Gutierrez, speaks of a time subsequent to that with which we are concerned (from May 1998 onwards), two speak of a significantly earlier period of time (1993 to 1996) and one, Neto, speaks of parcels of cash in the context of a project other than Avenida Agua Espraiada. It is also of note that these statements represent the experiences of staff from several levels of employment different from those whose evidence we have considered so far but reflect a common theme. If nothing else they suggest, cumulatively, the existence within these organisations in the 1990s of an illicit culture of corrupt transactions and tend to corroborate the evidence of Joel Fernandes and Simeão De Oliveira concerning distributions of cash. To this extent they merit some weight, we think (after making due allowance for factors of the kind discussed above concerning the weight to be given to hearsay). Even Mr. Steenson was ready to recognise that the Court might well conclude that some sort of fraudulent activity was going on.

176. On the other hand, as regards references in statements making direct reference to Paulo Maluf, few of those relied on by the plaintiffs appear to be based on first-hand evidence and then only in terms that are insufficiently detailed or directly in point as regards the payments in issue here (as in the depositions of Armando Neto and Marcos Feliciano De Oliveira); and, indeed, as indicated earlier we would hardly expect those involved in administering the system to have had direct contact with Paulo Maluf on this subject. Our conclusions as to his involvement are a matter of compelling inference, principally on the basis of the De Oliveira document and Simeão De Oliveira's related testimony, the beneficial ownership and control of the Chanani account and the Sun Diamond Trust, and the absence of any plausible innocent explanation for the credits to the Chanani account with which we are concerned.

VIII.
The basis in law of the plaintiffs' claims and the process of tracing

177. The defendants contended that, even if the plaintiffs were to succeed in establishing the fraud alleged, their case against the defendants faced an insuperable obstacle because the plaintiffs would not have had an equitable proprietary interest in kickbacks of the kind in question, an interest of this kind being necessary in order to found a claim and to enable the plaintiffs to trace the money into and through mixed bank accounts (ones in which proprietary funds have been mixed with funds belonging to others) into the hands of the defendants.

178. The plaintiffs' case, in this respect, was put in three ways:-

> (i) there having been a disposal of their assets in breach of fiduciary duty – Paulo Maluf being in the position of a fiduciary vis à vis the plaintiffs – English law principles governing constructive trusts and 'knowing receipt' claims as adopted by Jersey mean that the plaintiffs had an equitable proprietary interest in those assets;

(ii) the decision of the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 A.C. 324, an appeal from Hong Kong, to the effect that a fiduciary who accepts a bribe in breach of his duty holds it on trust for the person to whom the duty was owed should be followed by the courts of Jersey in preference to that of the English Court of Appeal in *Sinclair Investments (UK) Ltd. v. Versailles Trade Finance Ltd & Ors* [2011] EWCA Civ 347 applying *Lister v. Stubbs* (1890) 45 Ch 1; and

(iii) in any event, the plaintiffs have a proprietary claim in Jersey law which entitles them, in effect, to trace their property into the defendants in accordance with the equitable rules of tracing "because on the facts the bribe monies came from the Municipality's money. The plain inference is that the bribes or secret commissions to Paulo and Flavio Maluf derive from the overpayments paid from public monies. The mechanism of the fraud as described by the witnesses involved the distribution of the very monies invoiced to, and received from, the Municipality. These were not payments pursuant to the contract because they were overpayments pursuant to inflated invoices for work which was never performed" (paragraph 7.3.2.2 of the plaintiffs' skeleton argument served in November last year).

179. In order to succeed on a claim of knowing receipt in Jersey law it is said, substantially on the basis of English case law, to be necessary for a plaintiff to show, first, a disposal of his assets in breach of trust or fiduciary duty; secondly the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly knowledge on the part of the defendant of the breach of trust or fiduciary duty such as to render it unconscionable for the recipient to retain the benefit of what he has received: *Bagus Investments Limited v. Kastening* [2010] JLR 355 at paras. 49 to 56. Such a claim is a personal claim and admits of no change-of-position defence (ibid. at para. 45(v)) - not that any such change is alleged in the present case.

180. By contrast, in order to succeed on a claim for restitution based on unjust enrichment, guilty knowledge on the part of the recipient is, unlike the position in English law, not a necessary ingredient: *Re Esteem Settlement* [2002] JLR 53, in which the then Deputy Bailiff, Birt D.B., said (at paragraph 157)

"We hold that, under the law of Jersey, where property in respect of which a person (a beneficiary) has an equitable proprietary interest (because the property has been taken from the beneficiary by a person who is in a fiduciary position towards that beneficiary) is received by an innocent volunteer, the beneficiary has a personal claim in restitution against the recipient even where the recipient has not been guilty of any "fault" in receiving the property. In other words, the state of mind required for a "knowing receipt" claim under English law is not required in Jersey. It is a strict restitutionary liability. However, the claim is based upon unjust enrichment and, accordingly, the beneficiary can only succeed to the extent that the recipient remains unjustly enriched. A defence of change of position is

therefore available. We emphasize that the liability is a personal one; the recipient is not a constructive trustee for the beneficiary."

181. As to the plaintiffs' assertion of a proprietary tracing claim the position in Jersey law is that stated in *Esteem* at paragraphs 82 to 91 following observations of Lord Browne-Wilkinson in *Westdeutsche Bank* v. *Islington L.B.C.* [1996] 669 A.C. In short, where property is obtained by fraud (at least where there is a fiduciary relationship between fraudster and victim), equity imposes a constructive trust on the fraudulent recipient allowing the plaintiff to trace his stolen property in accordance with the established rules of tracing in equity.

182. Mr. Steenson's first line of response to these arguments turned on the fact that, by the time of the particular payments with which we are concerned, Paulo Maluf was no longer Mayor of Sao Paulo or otherwise the holder of any relevant public office. But the point was not open to the defendants to take. The plaintiffs had from the start pleaded "Paulo Maluf at all material times owed the Plaintiffs fiduciary duties of loyalty" and this had been admitted in the defendants' Answer (without any change in their subsequently amended pleading). Mr. Steenson argued that this averment had to be read in the context of the immediately preceding reference to Paulo Maluf's governorship of the State of Sao Paulo between 1979 and 1983 and the office of Mayor of the Municipality of Sao Paulo between January 1993 and December 1996 and that the defendants' admission was intended to do no more than admit the existence of fiduciary relationships during those periods. But the argument was an obvious one to spell out if the defendants had wanted to take the point. It also blithely ignored the several passages in the defendants' own skeleton argument of 11th July 2012 in which the existence of a material fiduciary relationship between Paulo Maluf and the plaintiffs was expressly acknowledged (paragraphs 21.2, 23 and 32).

183. As to the law in relation to bribes, Mr. Steenson submitted that *Sinclair*, in which the English Court of Appeal declined to follow *Reid* and held that there is normally no proprietary claim to a bribe by the party to whose detriment it has been paid, was the sounder of the two decisions and the more appropriate one for Jersey law to follow.

184. Were it necessary for us to decide the point we would have been inclined to agree with Mr. Baker and would have applied *Reid*, this court not being constrained in the way that Lord Neuberger M.R. and the other members of the court in *Sinclair* evidently felt bound by a long line of authority including five Court of Appeal decisions. Moreover, the composition of the court in *Reid* (Lords Templeman, Goff, Lowry and Lloyd, and Sir Thomas Eichelbaum) reflected a notable breadth of jurisprudential experience. As Lawrence Collins J., later a Justice of the Supreme Court, put it in *Daraydan Holdings & Ors. v. Solland International Ltd.* [2005] Ch. 119 (a pre-*Sinclair* decision), in declaring that he would have followed *Reid* had he not been able to distinguish *Lister v. Stubbs*, "There are powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty....." (para. 86).

185. But the dichotomy posed by these two decisions has no bearing on the present case. In both *Sinclair* and *Reid* the bribe came from a source other than the victim's assets. Here, whether they are described as bribes, commission or something else, the simple fact is that the funds that the plaintiffs seek to trace were obtained by theft of the Municipality's own property. The significance of the point is reflected in the closing words of the passage in which Lord Neuberger, M.R. summarised the court's conclusions in *Sinclair* (at para. 88):

> "In my view, Lewison J was right to reject TPL's proprietary claim to the proceeds of sale of the shares. It is true that the decisions in *Reid* [1994] 1 AC 324, *Sugden* 2 Sm & G 192 and (at least arguably) *Pearson's case* LR 5 Ch D 336 go the other way. However, there is a consistent line of reasoned decisions of this court (two of which were decided within the last ten years) stretching back into the late 19th century, and one decision of the House of Lords 150 years ago, which appear to establish that a beneficiary of a fiduciary's duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, *unless the asset or money is or has been beneficially the property of the beneficiary* or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary." (Emphasis added.)

186. The defendants contended that, the contract price having been paid by EMURB to Mendes Junior, property in the funds passed to Mendes Junior; that "Mendes Junior, unlike Paulo Maluf, was not a fiduciary with respect to the Plaintiffs" (11th July 2012 skeleton argument paragraph 21); and that the italicised words above are not in point. In support of this contention Mr. Steenson relied on the case *Cadogan Petroleum PLC & Ors. v. Mark Tolley & Ors.* [2011] EWHC 2286 (Ch) in which Newey J., having said that he considered himself bound to follow *Sinclair* rather than *Reid*, had occasion to consider the qualification expressed by Lord Neuberger.

187. The claimants in *Cadogan* had argued that the qualification entitled them to recover because the defendants in question had received funds or assets which "were indirectly derived from" or "which had originally come from" the claimants (paras. 7 and 31). Newey J. disagreed:

> "36. For my part, I cannot see that it could matter that an alleged bribe or secret commission had been paid from funds which could be tracked back to money which had once belonged to the Claimants. The position might have been different if the contracts in respect of which the bribes and secret commissions were allegedly paid had been rescinded (compare e.g. *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, at 734; reversed on other grounds). I am told, however, that the Claimants have entered into settlement agreements affirming the contracts relevant to the Smith and GPS Claims. Further, Mr Morgan said that the contract to which the Ribelant Claims relate has not been rescinded and that the Claimants still have the shares in Radley Investments Limited which were

transferred under it; no claim for rescission of the contract is, moreover, to be found in the Re-Amended Particulars of Claim. In the circumstances, the Claimants cannot assert any proprietary interest in the money which they paid pursuant to their contracts: it became the payees' rather than theirs both at law and beneficially. It follows that any bribes or secret commissions paid from sums derived from the payments were not paid from the Claimants' money. Absent rescission, the money which the Claimants paid "cannot be said to be the money of the [Claimants]" (to adapt words of Cotton LJ in *Lister & Co v Stubbs*, at 12). Put in slightly different words, I do not think the mere fact that the money used to pay bribes or secret commissions derived from payments made by the Claimants could suffice to justify a proprietary entitlement which the Claimants would not otherwise enjoy when the Claimants (a) made their payments on an out-and-out basis and (b) have not elected to rescind the contracts pursuant to which the payments were made."

188. In practice, it is plain that English judges have on more than one occasion viewed the requirement for rescission in such circumstances as an obstacle to justice and have resorted to a degree of artifice in order to circumvent this problem: see, for example the observations of Millett LJ in *Bristol and West Building Society v. Mathew* [1998] Ch. 1 at 23 referring back to his earlier observations in *El Ajou v. Dollar Land Holdings plc & Anor.* [1993] 3 A.E.R. 717 at 734 and Rimer J.'s finding of an implied rescission in *Shalson v. Russo & Ors.* [2003] EWHC 1637.

189. But it seems to us that Mr. Baker is clearly right in saying that the present case is distinguishable from *Cadogan* on the facts and closer to those of *Daraydan* in which Lawrence Collins J. found that the bribe derived directly from the claimants' property. To speak of the funds made available to Mendes Junior via EMURB having been paid on an "out-and-out basis" or of Mendes Junior having "acquired title" to them, echoing Newey J.'s words, would be wholly artificial. The reality must surely be that they were not paid pursuant to a contract of any kind but were extracted from EMURB by a ruse the purpose and effect of which was the theft – with the aid of bogus paperwork – of all but a small percentage of the money. As Mr. Baker put it in his supplementary skeleton argument, "Mendes Junior was effectively receiving the monies on behalf of Paulo Maluf (in so far as these related to monies paid to him). Accordingly, it is no different than if the monies had been paid directly to Paulo Maluf in the first place". In short the funds in the hands of both Mendes Junior and, to the extent of kickbacks passed to him, Paulo Maluf, were stolen money to which he obtained no title of any kind. This, at least, was what the evidence *prima facie* suggested; and had the defendants wanted to put forward a contention to the contrary as deserving of serious consideration they should, for a start, have adduced expert evidence of Brazilian law to support such an argument.

190. As it was, the unchallenged expert evidence adduced by the plaintiffs from Professor Pierpaulo Cruz Bottini, Professor-Doctor of Criminal Law at the University of Sao Paulo, was that on the basis of allegations contained in the Order of Justice the plaintiffs have a proprietary claim to money received by Paulo Maluf and/or Flavio Maluf by way of bribes and/or secret commissions. His report was served last year and no attempt was

made by the defendants to serve expert evidence of their own to any other effect. Nor, for that matter, did the defendants set up any issue as to the existence or otherwise of a proprietary interest in their pre-trial skeleton argument. That, in practice, is an end of the matter.

191. The qualification expressed by Lord Neuberger in *Sinclair* is, accordingly, directly in point in the present case, with the consequence that the plaintiffs are entitled to assert a proprietary interest in the kickbacks received by Paulo Maluf. He was in breach of his fiduciary duty to the plaintiffs from, at latest, the moment that funds from which he was to receive kickbacks were successfully extracted from the Municipality and the fact that he did not have a fiduciary relationship with Mendes Junior, as opposed to the Municipality, is neither here nor there. The first requirement of a knowing receipt claim is, accordingly, satisfied; the second, tracing through to the defendants, is considered further below; and the third requirement is on any view also satisfied.

192. Moreover, from a different legal perspective the plaintiffs have an unassailable proprietary claim in Jersey law to their stolen funds. The then Deputy Bailiff, Birt, D.B., giving judgment in *Esteem*, expressed the matter, under the heading "Proprietary Tracing Claim", as follows (at para.82):

> "(i) Does the victim of fraud have an equitable proprietary interest in the proceeds of the fraud?
>
> Under English law and many other common law jurisdictions, the position is clear. As Lord Browne-Wilkinson put it in *Westdeutsche Bank* v. *Islington L.B.C.* (29) ([1996] A.C. at 716):
>
> > "I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust [as had been argued]. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity."
>
> See also the dicta of O'Connor, J. in the High Court of Australia in *Black* v. *Freedman (S.) & Co.* (4) (12 C.L.R. at 110) which was approved by Lord Templeman in *Lipkin Gorman* v. *Karpnale Ltd.* (19) ([1991] 2 A.C. at 565). Thus a person in the position of Sheikh Fahad, who, as a director, defrauds the company of which he is a director, holds the proceeds on constructive trust for the company, which has an equitable proprietary interest in the property in question."

And later (at paras. 89 and 90)

> "The question then arises as to whether Jersey law should follow English law in holding that a constructive trust exists in circumstances such as the present. As already mentioned, art. 29(4) clearly envisaged the courts recognizing

constructive trusts in other situations and we think that there are strong arguments for holding that such a trust exists in the case of fraud.

The constructive trust has been used by the courts of England and other jurisdictions as a mechanism to assist in fashioning appropriate remedies to deal with problems of commercial fraud. It accords with the interests of justice. If the fraudster does not hold the property on constructive trust, the victim has to prove his claim alongside ordinary creditors of the fraudster because the assets belonging to the fraudster and would be available to such creditors. We have no doubt that Jersey law should draw on the experience of English law and other jurisdictions to impose a constructive trust in a case such as the present. We think that in Jersey too, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient so that the victim has a proprietary interest in such property".

193. The concept of a constructive trust and equitable interest arising in this way may be one that does not yet command universal approbation among English judges and commentators. Rimer J. in *Shalson v. Russo*, which post-dated *Esteem* but in which the latter appears not to have been cited, evidently felt uncomfortable with the observations of Lord Browne-Wilkinson to which Birt D.B. had referred and difficulty in rationalising the position conceptually or by reference to the particular authorities cited by Lord Browne-Wilkinson: "It is either trust money or it is not. If it is not, it is not legitimate artificially to change its character so as to bring it within the supposed limits of equity's powers to trace: the answer is to develop those powers so as to meet the special problems raised by stolen money" (paragraph 110).

194. But it is one of the characteristics of the way in which judge-made law is made that, it can sometimes appear to strain at a gnat in one area while happily swallowing a camel in another. The willingness of the courts to admit of the possibility of tracing 'property' through any bank account let alone a mixed one, for example, represents a remarkable suspension of all conventional notions of property in the interests of achieving a just result where otherwise legal principle would deny one. Yet the combined effect of precedent and incompatible conceptual considerations means that English law continues to struggle with far lesser problems, such as those thought to be attendant in this area on the fact that money sought to be recovered has been stolen. Jersey law can and should, we suggest, not hesitate to take advantage of the fact that it is not burdened with the same historical limitations, adopting those features of English law that have proved their worth but not those that have proved intractably problematic, and continuing to develop its own law of recovery and restitution of misapplied property and related liabilities in ways that accord, wherever possible, with good sense and notions of justice: as, for example, in the court's ground-breaking recognition in *Esteem* of a personal claim in restitution against a fault-free but unjustly enriched recipient and its formulation of a victim's proprietary right of recovery where fraud has occurred.

195. Consider the matter from a slightly different but related angle. The decision of the Royal Court in *Esteem* established beyond doubt that the technique of tracing is part of the law of Jersey:

> "The upshot is that there is no Jersey authority which suggests that tracing should not be part of our law, and such authority as there is suggests that tracing does form part of Jersey law. Although accepting that our law of property has very different roots from that of England, there would appear to be no practical difficulty or any objection of principle to recognizing tracing of movable property. On the contrary, in our judgment, there are strong policy reasons for doing so. Tracing offers an effective method of vindicating and safeguarding proprietary rights, particularly in cases of fraud. It has proved a useful tool in English law" (para.102).

196. At the same time, the court questioned the need or wisdom of incorporating in Jersey law the distinction long maintained in English law between common law tracing (or 'following') and equitable tracing:

> "The rules to be applied should, as a starting point, be those established in English law. However, the court is not bound by any English rule of tracing and is free to depart from such a rule if convinced that there is a better alternative. When we talk of the rules of tracing, we are, for the purposes of this case, speaking of the rules of equitable tracing because we are dealing with an equitable proprietary interest on the part of GT. There is much debate in England as to whether the time has come for the common-law tracing rules to be subsumed into the more flexible rules of equitable tracing. In particular, this would allow tracing through a mixed fund. We have not heard argument on this and therefore offer no definitive view. We express the preliminary view, however, that the differences between the two systems of tracing in England have an historical origin which has no application in Jersey. On the face of it, there would seem to be little reason to incorporate such technical distinctions into Jersey law and there would seem to be some advantage in applying the more flexible rules of equitable tracing (as constituting the Jersey rules of tracing) to all tracing actions"(para. 105).

197. While recognising that there have in more recent times been both judicial and academic voices in England calling for the abandonment of this historic distinction and the adoption of those of equitable tracing as a single, all-purpose set of rules - notably Lords Steyn and Millett in *Foskett v. McKeown & Ors.* [2001] 1 A.C. 102 - the defendants in the present case contended that the distinction was crucial and that equitable tracing was only available where the claimant had an *equitable* as opposed to a "merely" legal, proprietary interest in the property to be traced.

198. For our part we respectfully agree with the view expressed by the learned Deputy Bailiff in *Esteem.* We see no merit whatever in burdening Jersey jurisprudence with a distinction that serves no useful function, that only makes for complexity and uncertainty, and that has its roots in a legal system which for historical reasons has resulted in

competing concepts devised by judges with differing philosophical views and jurisprudential backgrounds for which there is no equivalent tradition in Jersey: competing concepts, moreover, which in the field under discussion remain unresolved after innumerable attempts by judges and academics of great distinction to effect a satisfactory synthesis.

199. And if one set of tracing rules is sufficient, one is compelled to ask what justification there can be for insisting on a plaintiff showing that he has an *equitable* proprietary interest in the property in question – as opposed a legal title - as a pre-condition to any right to trace. Historically the requirement in English law of an *equitable* interest was no more than the means to the important end of allowing property to be traced through a mixed bank account: once a single all-purpose tracing regime is accepted as appropriate, it must surely be allowed to operate in relation to all forms of proprietary interest. A person with both legal and beneficial title to money or other property may not, as a matter of conceptual analysis in English law, enjoy an *equitable* interest in that property: "The legal title carries with it all right. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title", per Lord Browne-Wilkinson in *Westdeutsche* at 706. But viewed from the vantage point of the second decade of the 21st century one may be forgiven for finding a little perverse the proposition that, when it comes to tracing, someone with unimpeachable legal title to property that has been stolen from him is unable to trace its value through bank accounts into the hands of a recipient with full knowledge of its pedigree because he is not regarded as having any *equitable* proprietary interest in it.

200. The emphasis on "fraud" in paragraphs 82, 89 and 90 of the Esteem judgment (as set out earlier) appears to us to be quite deliberate, indicating that in Jersey law at least victims of fraud are to be treated as cloaked with the sufficient proprietary interest in property of which they have been defrauded to allow tracing of it according to rules of equity and its ultimate recovery. And for good reason. As is evident from the comments of Birt D.B. at paragraph 90 of his judgment (cited above), the constructive trust concept has proved a useful mechanism to assist in fashioning appropriate remedies to deal with the problems of commercial fraud and "accords with the interests of justice"; and effective mechanisms for deterring and, where necessary, responding to fraud are, if anything, doubly important in this jurisdiction. In *Macdoel Investments Ltd, Sun Diamond Ltd, Durant International Corporation and Kildare Finance Ltd v, Federal Republic of Brazil & Ors.* [2007] JLR 201, the related *Norwich Pharmacal* proceedings that preceded the current action, Jones J.A., giving the judgment of the Court of Appeal said this:

> "38. In any event, whilst the cases in which the *Norwich Pharmacal* jurisdiction has been developed in England and Wales provide useful guidance on how Lord Reid's statement of principle may be applied, the courts of Jersey are in no sense bound by the scope of the jurisdiction that may have been delineated de facto by the circumstances of these cases. Nor are these courts constrained by the limits which may be placed on the application of the principle in the different social and economic conditions that may prevail from time to time in England and Wales

(see, generally, *State of Qatar* v. *Al Thani* (15)). They will have regard to, amongst other things, the policy considerations which shape the law of Jersey and the social and economic context in which it operates.

39. We are conscious that, as the Court of Appeal of Jersey remarked in *Durant Intl. Corp v. Att. Gen.* (2006) JLR 112, at para. 1, *per* Sumption, J.A.:

> "Over the last half-century, Jersey has become a major financial centre, providing trust and banking facilities for an extensive international clientele . . . It has for some time been the policy of the legislature and of the executive agencies exercising statutory powers that the commercial facilities available in Jersey should not be used to launder money or mask criminal activities here or anywhere else."

Although these remarks were made in the context of an action that concerned the provision of assistance by the authorities in Jersey to foreign prosecutors, they have relevance in the sphere of civil litigation, where the courts are conscious that Jersey's reputation as a major financial centre might suffer if it were not willing to assist victims of wrongdoing to obtain redress."

201. Whether, notwithstanding the head-note in *Esteem*, that case, properly understood, is also authority for the proposition that a pre-existing fiduciary relationship is not a necessary ingredient of a proprietary tracing claim is debatable. The learned editors of the 8th (2011) edition of Goff & Jones plainly think that the view expressed by Lord Browne-Wilkinson in *Westdeutsche* - which commended itself to Birt D.B. in *Esteem* - has this effect, noting as they do "At least in the English cases, it has been offered as a way of getting round the problem that equity's more generous tracing rules have been historically limited – erroneously – to cases where some form of initial fiduciary relationship can be shown" (paragraph 8-16, Note 28). We are inclined to agree with the description of the insistence on such a relationship as a necessary ingredient of the ability to trace in equity as "absurd" (*Hood, Principles of Lender Liability* (OUP, 2011) at para.8.158). But the specific point was not explored sufficiently for it to be right for us to express any concluded view on the matter. Nor, given our finding that it is not open to the defendants to contend that Paulo Maluf was not a fiduciary vis-à-vis the plaintiffs, is it necessary for us to do so.

202. So far as may be necessary to the plaintiffs' alternative proprietary claim, we accordingly hold that as a matter of Jersey law the plaintiffs had sufficient proprietary interest in the kickbacks in question to found such a claim and, in principle, to permit tracing of their property into the Chanani account and, thence, on into Durant and Kildare. The same goes for the other two ways in which the plaintiffs put their case.

IX. Tracing into the Chanani account

203. Even if the plaintiffs are to be regarded as having originally had a sufficient proprietary interest in any kickbacks to permit tracing in principle, Mr. Steenson submitted that their inability to show exactly how the funds credited to the Chanani account were derived from the alleged Avenue Agua Espraiada fraud made tracing in practice impossible. On the plaintiffs' own case, he said, the immediate source of the funds had been one or more *doleiros*; the Court knew nothing for certain about who they were, how exactly they operated, how they were put in funds in Brazil or what bank accounts were used to transfer money abroad in the present case. The plaintiffs' suggestion that one could treat their involvement as if it entailed nothing more than effecting foreign exchange transactions or acting as correspondent banks was dismissed as unrealistic (with which we agree); the evidence suggested that a *doleiro* might have one or more bank accounts of his own through which the funds of multiple clients passed (which we accept could be the case); and without knowing the state of those accounts at the material time, the rules governing the tracing of money into or through accounts where it has been mixed with other money could not be applied (see *Esteem* paras.105 – 111). Depending on the nature and state of those accounts and what other debits and credits there had been, any right to trace into or through them might well have been lost. Similar considerations applied, he said, to the Mendes Junior and sub-contractors' accounts, of which nothing was known.

204. None of this is in our view a bar to the plaintiffs' claim. In English law, whether a claimant does or does not have an equitable proprietary interest in the subject of the claim is a matter of property law. Tracing, on the other hand is regarded as a matter of evidence. As Lord Steyn put it in *Foskett* at 113:

> "In arguing the merits of the proprietary claim counsel for the purchasers from time to time invoked "the rules of tracing." By that expression he was placing reliance on a *corpus* of supposed rules of law, divided into common law and equitable rules. In truth tracing is a process of identifying assets: it belongs to the realm of evidence. It tells us nothing about legal or equitable rights to the assets traced."

See also Lord Browne-Wilkinson at 109-D ("Tracing is a process whereby assets are identified"), Lord Hope of Craighead at 120-D ("Whether the [claimants'] money was also used to pay a part of the 1988 premium, and if so how much of it was so used will require to be resolved by evidence"), and Lord Millett at 128 C-D:

> "Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset."

205. The same distinction is, we think, appropriate and helpful to maintain in Jersey law. It is true that in the course of discussing the subject of tracing in *Esteem,* the learned Deputy Bailiff spoke of tracing being "part of the law of property", but that was in the context of considering whether Jersey law should adopt the same solution as English law – the process of tracing in equity – "to the problem that arises when the thing in question can no longer be located because it has been substituted by something else". He was not concerned to address the distinction between the substantive nature of property rights and the evidential nature of the exercise of tracing.

206. With this distinction in mind, it follows that, while the initial burden will usually be on a plaintiff to adduce sufficient evidence to make out a prima facie case, once he has done this the evidential burden will shift to the defendant to displace the conclusion that would otherwise naturally follow.

207. In the present case, the plaintiffs having adduced evidence from which, in the absence of any other explanation, a court would be more than justified in concluding that funds stolen from the Municipality had found their way, within a matter of days, into the Chanani account, the evidential burden shifts to the defendants to displace that conclusion. No countervailing evidence having been adduced by the defendants to demonstrate that the inferred link with the Chanani account is unfounded or that the plaintiffs' original proprietary interest in the stolen money was lost by reason of the rules relating to tracing through mixed bank accounts, the plaintiffs are entitled to invite the court to conclude that the credits to the Chanani account in question represent funds in which the plaintiffs continued to have an unbroken thread of proprietary interest even though they are unable to show – because they have no means of knowing - the exact route by which the funds reached their destination.

208. That this conclusion accords with elementary notions of justice is, moreover, underlined by the fact that the plaintiffs' inability to trace the movement of funds step by step is the consequence of the Malufs' (and thus the defendants') deliberate creation of what Mr. Baker referred to as a 'black hole' or 'maelstrom' of coded bank accounts and *doleiros* designed to obscure transactions in which they had an interest. The terminology originates in the judgment of Lewison J. in *Sinclair* [2011] 1 BCLC 202 at para.145: "All the witnesses agreed that it is not possible to trace any of TPL's money through VTFL. VTFL was variously described as a 'black hole' or a 'maelstrom'". Commenting on the submission mounted by the defendants' counsel in that case to the effect that this meant that even if TPL would otherwise have the ability to trace into such an account, they could not claim such a remedy, Lord Neuberger said

> "I reject this argument. I do not doubt the general principle, reiterated by Lord Millett in *Foskett* [2001] 1 AC 102, that, if a proprietary claim is to be made good by tracing, there must be a clear link between the claimant's funds and the asset or money into which he seeks to trace. However, I do not see why this should mean that a proprietary claim is lost simply because the defaulting fiduciary, while still holding much of the money, has acted particularly dishonestly or cunningly by

> creating a maelstrom. Where he has mixed the funds held on trust with his own funds, the onus should be on the fiduciary to establish that part, and what part, of the mixed fund is his property. Unless constrained by authority, I should therefore be very reluctant to accede to the defendants' case on this point. In fact, it seems to me that authority actually supports my view."

He then proceeded to examine a line of judicial opinion, stretching from *Lupton v. White* 15 Ves Jun 432, through *Cook v. Addison* (1869) LR Eq 466 and *In re Tilley's Will Trusts* [1967] Ch. 1179 to *Foskett* and concluded at para. 141

> "It seems to me to follow from this that both principle and authority establish that, as Lewison J concluded, once it is shown that money held on trust for TPL was paid into a "maelstrom" account, the administrative receivers, representing VTFL for this purpose, bear the burden of showing that money in that account is not that of TPL" (the standard of such proof being, in the normal way, the balance of probabilities).

209. The judgment of Lewison J. at first instance also makes clear that, if a defendant is going to suggest that the state of an account is such as to defeat in whole or in part the ability to trace incoming funds, the point needs to be pleaded. Having referred to VTL as a "black hole" or a "maelstrom" he observed

> "In addition, as I have said, I ruled that it was not open to VTFL on the pleaded case to assert that its accounts were overdrawn or stood at a particular credit balance at any particular moment. There was no application to amend. So one common defence to this kind of claim (namely that the balance of the mixed fund cannot exceed the lowest intermediate balance) does not fall to be considered" (paragraph.145).

210. The context in *Sinclair* was, it is true, simply that of funds mixed in a single account; but the principle appears to us to be equally applicable to the wider circumstances of the present case. It is important to recall that Marcus Staff's file note of his conversation with Flavio Maluf on 9th May 2000 and Schellenberg Wittmer's letter of 9th June 2000 make it clear that the use by the Malufs of coded bank accounts and *doleiros* was deliberate, common and, in part at least, avowedly designed to screen the family's personal accounts from third parties. And, while it might fairly be said that if the Malufs were in fact innocent, they would be in no better position than the plaintiffs to explain where funds of which the Municipality had been defrauded had gone, the same cannot be said when it comes to explaining exactly *where the funds credited to the Chanani account had come from and why*. As it was, the only explanation offered varied from moment to moment, was unsupported by any evidence and was, as we have already held, wholly unconvincing.

211. Somewhat surprisingly, there seem to be no other reported decisions in which courts have had occasion expressly to address the matter of tracing into or through 'black hole' type situations deliberately created by a defendant: certainly no others were cited to us.

But the view expressed by Lord Neuberger appears to us, with respect, to accord with both justice and good sense and to be one which the courts of Jersey should be very ready to follow.

212. For these reasons we are satisfied that the plaintiffs are indeed entitled to trace the portion of the moneys fraudulently extracted from the Municipality represented by the figures in column 5 of section "05" of the De Oliveira document into the Chanani account.

X. Tracing into Durant and Kildare

213. The only point taken by the defendants in relation to this limb of the tracing exercise, was that the sequence in which relevant credits and debits to the Chanani account occurred means that the total amount traceable into Durant's account with Deutsche Bank in Jersey is limited to an amount of US$ 7,708,699.10 as against the US$ 10,500,050.35 claimed by the plaintiffs. The basis of this contention was twofold.

214. The first rested on the simple fact that the last three credits to the Chanani account (nos. 11, 12 and 13) occurred after 23rd January 1998 which was when the final payment in favour of Durant was debited to that Chanani (Schedules 3 and 4 to the Order of Justice). This raises the question whether "backwards tracing", as it has been called, is permissible in Jersey law and appears to be the first occasion on which the matter has arisen for decision in this jurisdiction.

215. The second limb of the defendants' argument depended on an application to the Chanani account of the so-called 'lowest intermediate balance rule' as expounded, for example, by Sargant J. in *James Roscoe (Bolton) Ltd.v. Winder* [1915] 1Ch. 62 As it happens, both arguments result in the same maximum traceable figure: US$ 7,708,699. Here, too, it appears that this is the first time that a Jersey court has had to consider this matter.

216. Both limbs arise out of a situations in which money sought to be traced (which for convenience we will refer to as "the plaintiffs' funds") has been mixed in a bank account with the account-holder's own money and both are aspects of the same problem: to what extent the rules of tracing in equity require strict adherence to the idea that successful tracing depends on being able to identify the property in question "at every stage of its journey through life" (per Buckley L.J. in *Borden (UK) Ltd. v. Scottish Timber Products Ltd.* [1981] Ch, 25 at 46). The defendants argued that this requirement was not fulfilled because there was a discontinuity of identity between credits of the plaintiffs' funds to the Chanani account and supposedly related debits to that account in favour of Durant because of (i) the 'belated arrival' of credits nos. 11,12 and 13, and (ii) the fact that at two points in time on 20th and 23rd January 1998 the aggregate of the payments out, to Durant, exhausted the aggregate of relevant payments into the Chanani account, thereby reducing the notional balance available for further tracing to nil and resulting in part of the plaintiffs' funds being lost forever because, it is said, to be impossible to trace

through a bank account in which the relevant funds have ceased to exist. As to this second contention, it is unnecessary to set out exactly how it was said to work in the present case. Both parties produced tables of figures illustrating it and were agreed on the result: that on this approach the maximum traceable would be US$ 7,708,699. Whether either party's calculation was in fact a true application of the 'lowest intermediate balance' rule is questionable. But for present purposes we assume that they were. The only issue was whether that rule was one that should be adopted in Jersey law.

217. It was largely common ground that English law on the subject of backwards tracing is not settled. Judicial and academic opinion is divided. Much of the debate is conducted by reference to legal concepts of one kind or another, though some see it as more of a practical matter. For present purposes it is sufficient to make reference to an article by Dr. Mathew Conaglen, Senior Lecturer and Fellow of Trinity Hall, Cambridge entitled *"Difficulties with Tracing Backward"* (2011) 127 LQR 432 which was relied on by Mr. Steenson. The article is in large measure a response to Professor Lionel Smith, author of the *Law of Tracing* (OUP, 1997) and Professor of Law at McGill University who has argued in favour of the backwards tracing in a number of publications. Dr. Conaglen concludes in his article that, while there is nothing theoretically impossible about the idea of backwards tracing, in conceptual terms the argument is weak, as is case law support for it. In those circumstances, he suggests, the question becomes "not whether the law could allow backwards tracing, but rather whether it ought to do so: in short a matter of legal policy". At that level his chief concern is the impact of allowing such a mechanism on unsecured creditors of the account-holder. There might, he suggests, be room for allowing it, dependent on the defendants' intentions. "However, the evidential difficulties inherent in a test that is focused on the defalcating trustee's intentions provide yet further reasons for concluding that the balance is appropriately struck by refusing to recognise backwards tracing."

218. At a conceptual level the subject appears to us to be one that is incapable of wholly satisfactory resolution one way or the other and at the level of policy is unlikely to be settled short of the Supreme Court. In the meantime English law is likely to remain in a state of uncertainty.

219. As noted earlier, Birt D.B. observed in *Esteem* that this court is not bound by any English rule of tracing and is free to depart from such a rule if convinced that there is a better alternative" (para.105). For our part we see no reason for Jersey law to set its face against accepting that 'backward tracing' can be legitimate. The appropriate way for the courts of this jurisdiction to address the subject is, we suggest, not by reference to any pre-conceptions of what is or is not conceptually possible or arguably supported by English authority, but, once again, as a matter of evidence – at least in cases, where, as here, the account in question remains in credit throughout the relevant period, there is no question of possible insolvency and prejudice to unsecured creditors, and there is no suggestion of any intervention of a bona fide purchaser for value. The question is, or should be, simply whether there is sufficient evidence to establish a clear link between credits and debits to an account, irrespective (within a reasonable timeframe) of the order in which they occur or the state of the balance on the account. It is unnecessary to posit

any limitation on how, as a matter of evidence, the necessary link can be proved: it might be by means of bank documentation, as in the example given below, or by reference to the defendant account-holders' intentions or in some other way. Nor is there any cause to diminish the effect of such a link, once recognised, by introducing the concept of a 'lowest intermediate balance rule'. As a matter of judicial policy, this approach appears to us to accord most closely with considerations of justice and practicality. Apart from anything else, to do otherwise would, as Mr. Baker observed, confer on any sophisticated fraudster the ability to defeat an otherwise effective tracing claim simply by manipulating the sequence in which credits and debits are made to his bank account.

220. Take, for example, a situation in which a debit on one day and a credit a few days later are each accompanied by a bank notification advice unequivocally indicating that they relate to one and the same transaction. Is it to be said in such circumstances that the later credit cannot be traced into the earlier debit simply because of the order in which the two items appear on the bank statement or because at some point between the two the balance on the account fell, say, to zero before being replenished by new funds? As Professor Andrew Burrows observes in his treatise on *The Law of Restitution*, 3rd Ed.

> "Indeed it would seem that 'backward tracing' must be accepted if one is to explain tracing into and through 'in credit' bank accounts. This is because if one is tracing funds into a bank account, the account is often credited before the banks has received the relevant funds. In other words, the debt owed by the bank to the customer, which is treated as a substitute for the funds, exists in advance of the funds being received."

221. Whether the approach that we have advocated should extend to situations in which the account in question is overdrawn at the point when the money sought to be traced is received into it, or becomes overdrawn subsequently, is not a question that is necessary for us to decide on this occasion. So far as English law is concerned, Professor Burrows doubts that this could be justified (ibid. at p.143). But Sir Richard Scott V-C in the Court of appeal in *Foskett v. McKeown* [1998] Ch 265 at 283-284 said that he regarded the point as still open, believing that equitable remedies should depend upon the substance of the transaction and not the order in which things happen; and Rimer J. in *Shalson v. Russo* (at para.141) was ready to accept the concept, following the view of Dillon L.J. in *Bishopsgate Investment Management Ltd. v. Homan* [1995] Ch.211 at 217.

222. In the present case the plaintiffs suggested that there is a strong inference that the proceeds of the fraud were always intended to be invested through Kildare into Eucatex shares, given the coincidence in timing and of payments into the Chanani account and investments made into Eucatex shares and debentures in that period, and that that intention supplies the necessary link. There may be something in this, but we are not wholly persuaded. The more telling and conclusive point in the plaintiffs' favour is, as Mr. Baker pointed out, that the defendants' own pleaded case is that all the relevant payments into Durant were linked with one another (allegedly as commissions earned in connection with the sale of Enterpa) as well as with the payments into the Chanani

account: see paragraphs 20 and 21 of the defendants' Amended Answer, the latter of which reads

> "As to paragraph 21 of the Order of Justice, it is admitted that the commissions referred to in paragraph 20 hereinbefore were paid from the Chanani account to the bank account of Durant held with [Deutsche Bank] as particularised in Schedule 4 of the Order of Justice."

223. As a matter of evidence, the link between the payments so listed in Schedule 3 and Schedule 4 could not be clearer. And although there was no corresponding formal admission in their pleading, the defendants did not in practice contest the plaintiffs' case that the funds in question were subsequently transferred from Durant to Kildare. We accordingly conclude that there is no impediment to the plaintiffs tracing the full amount of US$ 10,500.055.35 into Durant and from there into Kildare.

XI. Inference and Standard of Proof

Adverse inference from non-appearance of witnesses

224. Mr. Baker drew the Court's attention to the decision of the English Court of Appeal in *Wisniewski v. Machester Health Authority* [1998] EWCA Civ 596, [1998] PIQR 324 where Brooke L.J. (with whom Aldous and Roch L.JJ. agreed) summarised, as follows, what he described as "the principles in the context of the present case" which could be derived from earlier authorities:-

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on the issue. (4) If the reason given for the witness's silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

In the present case, there is, Mr. Baker submitted, no satisfactory explanation for the defendants not to have called Paulo and Flavio Maluf as witnesses: in their absence the natural inference must be that their presence in the witness box would only have served to strengthen the plaintiffs' case.

225. Mr. Steenson suggested, more or less *en passant*, that there might be all sorts of reasons for a prominent politician not wanting to travel across the world to be cross-examined when already the subject of legal proceedings in Brazil. But that was as far as any explanation went. It is true, as we understand it, that the Malufs are currently defendants to proceedings in that country in relation to the Avenue Agua Espraiada project. But a plea of privilege against self-incrimination – if that was what Mr. Steenson's suggestion was meant to be - would have required something much more definite and would have had to be taken in person by the witness in the face of the court at the point when he was asked to answer specific questions to which he objected: *Trant v. Att. Gen* [2007 JLR 221 CA (Beloff, Smith and Jones JJ.A.). Even if it were not Mr. Steenson's intention to go that far, the court was offered nothing more than indeterminate speculation by counsel as to what the Malufs' reasons for not giving evidence might be. It appears to us, therefore, that the plaintiffs would be well justified in inviting the court to draw an adverse inference of the kind proposed at the very least as regards the defendants' case concerning the source of the (relevant) payments into the Chanani account. But it is hardly necessary for the plaintiffs to invoke the principles propounded in *Wisniewski* as a separate ground of support for their case given that its strength is not dependant solely or even largely on silence on the part of the Malufs but is built on substantial documentary evidence coupled with the fact that, other than the hearsay statement of Laercio Filho, no evidence of any kind was tendered by the defendants whether in the form of witness testimony or documentary material.

Inference of facts from other facts

226. As to inferences of fact drawn from positive evidence of other facts (as opposed to silence), there is in principle nothing impermissible or, as Mr. Steenson suggested, "dangerous" about relying on such a process of reasoning where the evidence warrants it. The process is an established feature of litigation in this Court – as in English law and practice – and a common one in cases of fraud where direct evidence can be hard to come by.

Standard of proof

227. Mr. Steenson was at pains to emphasise the gravity of the allegations against the Malufs made by the plaintiffs and came close to inviting the Court to apply a standard of proof higher than the balance of probabilities: paragraph 26 of his skeleton argument. In *In re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 A.C. 11, Lord Hoffmann noted that a degree of confusion had been caused in the past by dicta in a number of cases which suggested that the standard of proof can vary with the gravity of the misconduct alleged or the consequences for the person concerned and, having examined those authorities including the observations made by Lord Nicholls of Birkenhead in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C. 563 at 586 concerning the inherent probability or improbability of an event having occurred, sought to lay the matter to rest in this way: "I think the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not" (para.13). He continued

"14. Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, in the passage I have already quoted, that —

> "the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

15. I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

Baroness Hale of Richmond expressed herself in similarly emphatic terms:

> "My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies." (paras. 70,71).

The other members of the House agreed. The case was, of course, immediately concerned with one particular legislative provision, but it is evident that the observations cited above were regarded as being of general application in civil proceedings. No purpose would be served by trying to précis or reformulate them.

228. As regards the inherent probability or improbability of the facts alleged by the plaintiffs, while Lord Nicholls may have observed in *Re H* (at 586) that fraud is usually less likely than negligence (as Mr. Steenson pointed out), he was under no illusion that

fraud is a rarity: "Unhappily, commercial fraud has flourished over the last 20 years. Pension funds and company funds have been misapplied and misappropriated, sometimes on a massive scale" (*'Knowing Receipt: The Need for a New Landmark', Restitution: Past, Present and Future'*, 1998). Common experience also tells us that the holding of public office and corrupt behaviour are not mutually exclusive. But even if we were to start from the premise that it is improbable that someone of the prominence of Paulo Maluf would become involved in fraudulent activity of this kind, the weight of the evidence in the present case is such that the balance of probabilities test is more than satisfied.

XII. Conclusions

229. For these reasons we unhesitatingly conclude that the plaintiffs' claim succeeds. Specifically, we find and hold in summary:-

(i) that in late 1997 and early 1998 the Municipality was the victim of a fraud substantially as alleged;

(ii) that Paulo Maluf was a party to that fraud at least to the extent that in the course of January and February 1998 he or others on his behalf received or were credited in Brazil with a series of fifteen secret payments to the value (in total) of R$ 13,512,885.34;

(iii) that Flavio Maluf, knowing of the nature of such payments, on the instructions of Paulo Maluf or with his concurrence, arranged for funds equivalent in value to at least thirteen of the fifteen such payments to be transferred out of Brazil, for their conversion into US dollars to the value of US$10,500,055.35 at then-current rates of exchange (probably via one or more *doleiros*) and for their payment into bank account no. 6100546 known as Chanani with Safra International Bank of New York, that account being controlled by Flavio Maluf and beneficially owned by him and/or Paulo Maluf;

(iv) that such payments are traceable to and through the Chanani account to the bank account of the first defendant, Durant, with Deutsche Bank in Jersey and thence into the bank account of the second defendant, Kildare, with Deutsche Bank in Jersey in an amount of US$10,500,055.35;

(v) that the knowledge of Paulo Maluf and Flavio Maluf that such payments were the proceeds of a fraud on the plaintiffs is attributable to each of the defendants and such payments were, therefore, received by each of Durant and Kildare with knowledge of their source;

(vi) that each of the defendants is, accordingly, liable to the plaintiffs as constructive trustee of such payments to the extent of US$10,500,055.35;

(vii) further, that the knowledge of Paulo Maluf and Flavio Maluf that the defendants had no entitlement to such payments is attributable to each of the defendants; and to the

extent that either defendant remains enriched by such payments it is liable to the plaintiffs on the basis of unjust enrichment to the extent of US$10,500,055.35;

(viii) further, that the plaintiffs have a proprietary claim to the sum of US$10,500,055.35 from the funds currently held in frozen bank accounts with Deutsche Bank by Kildare and Durant.

230. We will hear further argument as to the exact nature of the relief to be granted to the plaintiffs and appropriate terms of the order of be made, including the extent to which they are entitled to recover interest and the quantum thereof.

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APPENDIX

The De Oliveira document

POSIÇÃO EM 05.02.98

01 – RECEBIMENTOS

24.12.97	-	R$	8.337.335,31
26.12.97	-	R$	208.433,38
30.12.97	-	R$	12.542.198,43
02.01.98	-	R$	600.115,71
09.01.98	-	R$	11.481.085,02
16.01.98	-	R$	10.136.000,00
23.01.98	-	R$	7.528.081,16
02.02.98	-	R$	6.459.162,19
TOTAL		R$	57.292.411,20

02 – RESTITUIÇÕES DE ISS

26.12.97	-	R$	208.433,38
30.12.97	-	R$	322.380,00
09.01.98	-	R$	283.441,10
TOTAL	-	R$	814.254,48

03 – LÍQUIDO RECEBIDO

Ítem 01-02	R$	56.478.156,72

04 – TOTAL A PAGAR

DÍVIDA PASSADA	-	R$	2.217.254,00
DÍVIDA ATUAL	-	R$	11.295.631,34
TOTAL GERAL		R$	13.512.885,34

05 – OPERAÇÕES

08.01.98	-	R$	2.000.000,00	-	R$	1,200	=	U$	**1,666,666,67**	-	15.01.98	-	C
13.01.98	-	R$	549.000,00	-	R$	1,220	=	U$	450,000.00	-	20.01.98	-	C
13.01.98	-	R$	465.314,10	-	R$	1,220	=	U$	**381,405.00**	-	20.01.98	-	C
13.01.98	-	R$	610.000,00	-	R$	1,220	=	U$	**500,000.00**	-	20.01.98	-	C
14.01.98	-	R$	1.595.100,00	-	R$	1,227	=	U$	**1,300,000.00**	-	20.01.98	-	C
14.01.98	-	R$	1.034.647,58	-	R$	1,227	=	U$	**843,233.56**	-	21.01.98	-	C
15.01.98	-	R$	1.011.120,89	-	R$	1,227	=	U$	**824,059.40**	-	20.01.98	-	C
15.01.98	-	R$	613.500,00	-	R$	1,227	=	U$	500,000.00	-	21.01.98	-	C
15.01.98	-	R$	592.300,10	-	R$	1,227	=	U$	482,722.16	-	21.01.98	-	C
20.01.98	-	R$	1.021.426,00	-	R$	1,225	=	U$	833,817.14	-	21.01.98	-	C
20.01.98	-	R$	504.115,68	-	R$	1,225	=	U$	411,523.00	-	26.01.98	-	C
20.01.98	-	R$	501.658,32	-	R$	1,225	=	U$	409,517.00	-	22.01.98	-	C
28.01.98	-	R$	1.505.616,23	-	R$	1,190	=	U$	1,265,223.72	-	29.01.98	-	C
04.01.98	-	R$	1.291.832,44	-	R$	1,159	=	U$	1,114,609.53	-	08.02.98	-	C
TOTAL		R$	13.295.631,34	-	R$	1,220	=	U$	10,982,777.18				
28.01.98	-	R$	217.254,00	-	R$	1,245	=	U$	174,501.00	-	28.01.98	-	P
TOTAL GERAL		R$	13.512.885,34	-				U$	11,157,278.18				