In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT

1999: No. 108/ 2001 No. 79

B E T W E E N:

LISA S.A.

Plaintiff

- and -

LEAMINGTON REINSURANCE COMPANY LTD.

First Defendant

- and -

AVICOLA VILLALOBOS S.A.

Second Defendant

JUDGMENT

Dates of Trial: June 23-July 4, July 8-July 10, 2008
Date of Judgment: September 5, 2008

Mr. Narinder Hargun and Mr. Paul Smith,
Conyers Dill & Pearman, for the Plaintiff
Mr. John Riihiluoma, Appleby, for the First Defendant
Mr. Jan Woloniecki and Ms. Shade Subair,
Attride-Stirling & Woloniecki, for the Second Defendant

Introductory

1. "*Strong parents have strong children and strong children have strong opinions, and that usually leads to conflicts that they have difficulty in reconciling*", Atlanta Mayor Andrew Young recently observed in relation to a litigious dispute between

members of his city's most famous family. This observation might well explain the emotional underpinning of the present dispute. The trial of the present action, which commenced almost a decade ago, arises out of a commercial family falling-out amongst members of a prominent Guatemalan family, a dispute which has also spawned litigation in at least three other forums.

2. In my Ruling of February 10, 2006[1], I described the history of the present actions as follows:

> "*1. On March 26, 1999, the Plaintiff issued a Generally Indorsed Writ of Summons in Civil Jurisdiction 1999: 108 against the Defendants herein. The claim was a derivative proprietary claim against the First Defendant on behalf of the Second Defendant, who was joined to meet the procedural requirements under Bermuda law in relation to derivative claims brought by a shareholder on behalf of the company whose shares the Plaintiff holds.*
>
> *2. On the day the Writ was issued, Mitchell J granted a Mareva injunction. The First Defendant ("Leamington") provided discovery on April 28, 1999. The Plaintiff ("Lisa") applied ex parte for leave to serve the Second Defendant ("Avicola") out of the jurisdiction on May 14, 1999, but did not obtain such leave until Simmons J's Order was granted on December 23, 1999. In the meantime, Leamington had both applied to set aside the Mareva injunction on October 15, 1999, and obtained directions in relation to its application from Wade-Miller J on November 4, 1999.*

[1] On the trial of a preliminary issue and the Plaintiff's application for leave to re-amend its Statement of Claim.

3. On January 26, 2000, Leamington applied to strike-out the action, with directions being ordered by Storr AJ on February 10, 2000. On March 22, 2000, Lisa filed its Statement of Claim, and on July 31, 2000 applied ex parte to renew its Writ. The renewal order was granted that day by Simmons J, but Avicola applied to set aside that Order on July 31, 2001. Directions were given by Meerabux J on February 1, 2001. Lisa sought to sidestep a potentially fatal attack on action 1999: 108 by issuing a similar Generally Indorsed Writ in Civil Jurisdiction 2001: 79 on March 2, 2001, in which fresh action both Defendants in due course entered appearances. On March 26, 2001, Lisa applied for leave to serve Avicola outside the jurisdiction, which application was granted by Mitchell J on April 5, 2001. On April 9, 2001, Lisa applied to consolidate both actions.

4. This fancy legal footwork bore fruit when on June 7, 2001, Mitchell J set aside the ex parte writ renewal order on Leamington's application, but also granted Lisa's consolidation application. On November 8, 2001, Ward CJ granted Lisa's June 25, 2001 application for leave to amend its Statement of Claim. On February 15, 2002, Leamington filed its Amended Defence and Avicola its Defence. One year and nine months later, after filing a Notice of Intention to Proceed on October 3, 2003, Lisa applied on November 20, 2003 for Further and Better Particulars of Leamington's Amended Defence. I granted this application on December 4, 2003, and the relevant particulars were given on January 2, 2004. It was only after these numerous initial interlocutory skirmishes, that battle was joined on the issues which presently fall for determination.

5. On September 3, 2004, the Defendants applied for the trial of two preliminary issues, and after ordering directions on September 23, 2004, Ground CJ granted the application on December 2, 2004. On February 17, 2005, Lisa applied for leave to re-amend its Statement of Claim, again with a view to fending off a potentially lethal attack on its claim by the Defendants. And on April 6, 2005, Wade-Miller J ordered, inter alia, that both applications should be heard together.

6. *The three parties, musketeer-like, have moved their legal sword-play from one battleground to the next, with various interlocutory applications being heard over nearly seven years by eight different first instance judges. None of the interlocutory applications to date appear to have given rise to either a considered judgment or any appeal. The above summary does not include related proceedings which have taken place in the British Virgin Islands, Florida and (it seems[2]) Guatemala as well. The Defendants assert that they have been more proactive than the Plaintiff in this litigation, and invite the Court, in addition to other arguments, to have regard to the law of limitation and the doctrine of laches, or delay.*"

3. On March 10, 2006, I resolved a preliminary issue in favour of the Defendants, but granted leave to amend to the Plaintiff in the following terms :

> "*137. The Plaintiff is granted leave to re-amend to assert those claims which I have found to be arguable, but not in the form of the draft RASC presently before the Court. The theory of direct liability on which the Plaintiff now relies should be*

[2] The Defendants' Counsel suggested that Lisa had filed over 100 suits against Avicola and related entities in Guatemala; proceedings in the other two jurisdictions were directly referred to in evidence.

incorporated into a further draft RASC to meet the concerns which I have sought to clearly identify above…"

4. The Defendants appealed against this Ruling, and the Plaintiff cross-appealed against my decision that it had no standing to pursue a personal claim against the First Defendant, having heard extensive evidence on Guatemalan law. On November 22, 2006, the Court of Appeal dismissed the Defendants' appeal against my decision to permit the Plaintiff to amend its Statement of Claim, and allowed the Plaintiff's cross-appeal against my resolution of the preliminary issue in favour of the 1st Defendant based on the Amended Statement of Claim. The Court of Appeal apparently took the view that since various claims against the 2nd Defendant were going to be tried, it was undesirable to decide the overlapping issue of the 1st Defendant's liability in isolation from the totality of the evidence to be adduced at trial against the 2nd Defendant, although they expressed doubt as to whether the preliminary issue had any further relevance. To my mind my February 10, 2006 Ruling on the standing of Lisa to advance a personal claim against Leamington based on the pleadings as they were prior to the RASC has no present significance whatsoever. The merits of the claims against Leamington fall to be determined on their merits based on the case advanced in the RASC.

5. The 2nd Defendant did not contend before me in March 2006, nor (seemingly) the Court of Appeal in November, 2006, that the amendments should be refused because the averments were liable to be struck-out on the grounds asserted in the strike-out applications it filed on June 14, 2007. The attempt to strike-out the Re-Amended Statement of Claim altogether was, save for one pleading complaint which could not have been previously raised, difficult to comprehend. The Re-Amended Statement of Claim ("RASC") was filed on March 15, 2006, so the 2nd Defendant had an adequate opportunity to contend before the Court of Appeal last November, that the amendments ought to have been refused because the proposed re-amended pleading was itself liable to be struck-out on abuse of process or other grounds. These points were not taken. It may have been reasonable for the 2nd

Defendant to simply focus on dismissing the subsequently abandoned derivative claim, but these strike-out points, if serious, could have been advanced by the 1st Defendant at an early stage of the action. And if these issues only became relevant to Avicola when the personal claim was first asserted, it was first asserted in February 2005, when the application to re-amend was filed.

6. The second limb of the total strike-out application was, however, based on an averment only made in the Plaintiff's Reply to the Re-Amended Defence of the 1st Defence filed on February 22, 2007. But the Plaintiff voluntarily gave further and better particulars of this aspect of its case, with a view to meeting the 1st Defendant's complaints.

7. The partial strike-out application was, delaying tactics apart, no easier to comprehend. The complaint that three "background" frauds were not relevant to the Plaintiff's claim sought to strike-out portions of the RASC which had been pleaded from the outset in 1999. This point was not taken before me or the Court of Appeal in 2006, let alone in the previous six years of the litigation. The paragraphs of the RASC attacked, 8-11 and 15(i),(iii), were pleaded in the original Statement of Claim served in 2000. At the very latest, this point ought to have been taken, assuming it to be serious, as part of the 2nd Defendant's opposition to the Plaintiff's application for leave to re-amend.

8. Although the 2nd Defendant consented to pre-trial directions on March 13, 2007, it was less surprising that its new separate attorneys, who came on the record on April 26, 2007, should raise a point which had not previously been taken by the Defendants' joint attorneys, less than two months after the point could first have been taken. The original case, from 1999 until February 2007, was that the operating companies in the Avicola group were subsidiaries of the 1st Defendant, and that the Plaintiff was defrauded because they diverted funds which ought to have been "up-streamed" to the Plaintiff as dividends through the 2nd Defendant. The Plaintiff belatedly conceded that the operating companies, which are said to

have obtained fraudulent policies from the 1st Defendant, are not in fact subsidiaries of the 2nd Defendant. The 2nd Defendant was clearly entitled to know how the Plaintiff now put its case, on these materially different facts.

9. The third issue I was required to decide was whether the Plaintiff was entitled to obtain full disclosure in relation to the business operations of various companies in support of its case on the three "background" frauds. The 2nd Defendant complained, by way of alternative to its partial strike-out application, that the discovery requested was oppressive. The Plaintiff eventually agreed to adjourn its application in this regard, conceding that the request as formulated was oppressive.

10. The fourth issue I was required to decide was the 1st Defendant's application for further and better particulars of its case that the reinsurance policies issued by the 1st Defendant to operating affiliates of the 2nd Defendant. It was essentially agreed that the Plaintiff had not yet received and/or considered full discovery from the Defendants, and the Plaintiff undertook to advise the 2nd Defendant of whether it can supply the requested particulars without the need for a formal order, within 28 days.

11. On June 26, 2007, I resolved these issues as follows: (a) I dismissed the 2nd Defendant's total strike-out application, (b) I dismissed the 2nd Defendant's partial strike-out application, (c) I granted the Plaintiff's application for discovery in part, and reserved the position on the need to give effect to a narrower version of the oppressive discovery request, and (d) I reserved the issue of whether the Plaintiff should be ordered to give further particulars in relation to the reinsurance policies, because the scope of any potential order was presently unclear. I handed down Reasons on July 3, 2007. I refused leave to appeal against the strike-out rulings, and the Court of Appeal likewise refused leave.

12. At the pre-trial review, the scope of the trial fell to be considered. On June 9, 2008, I agreed with the 1st Defendant ("Leamington") that the Plaintiff's ("Lisa's") damages fell to be determined by reference to its pleaded claim to loss suffered by it as a shareholder of the 2nd Defendant ("AVSA") (i.e. the Avicola Group of Companies). Lisa had previously abandoned any independent claim as an indirect shareholder of Leamington through Villamorey. I also indicated that it was improbable that I would make positive findings that any criminal offences had been committed under Guatemalan law. However, I left open the possibility of deciding whether Lisa's indirect interest in Leamington had been sold to the extent that the parties had prepared to argue this point and had addressed it in their evidence.

13. In the event, the trial required the Court to consider whether Lisa was able to prove one or more causes of action under Bermuda and/or Guatemala law, having regard to not only ordinary factual evidence, but also considering expert evidence accounting evidence, expert evidence as to insurance practice and expert evidence as to foreign law.

Pleadings: Lisa's case

14. Lisa's case is essentially pleaded in the Re-amended Statement of Claim ("RASC") as read with the Further and Better Particulars of the Plaintiff's Re-Amended Statement of Claim and Replies ("FBPs"). Lisa's original RASC claim was based on the premise that AVSA was the parent of a group of 19 companies, including AVSA ("the Avicola Group"). Its ultimate claim was that AVSA is the *de facto* parent of a group which has always been regarded as a single economic unit. As a result, the RASC may for all economic or compensatory purposes be read as if references to "Avicola" are references to the Avicola Group.

15. Paragraph 5 of the RASC provides in material part as follows:

"*…From inception, Avicola has been owned by the Gutierrez family comprised of Lisa representing the 25% shareholder interests of Don Arturo and his family. Trucha, S.A., a company incorporated in Panama, represents the 25% interest of Jean Luis Bosch Gutierrez ("Jean Luis") and his family. San Cristobal, S.A., a company incorporated in Panama, represents the 25% interest of Dionisio Gutierrez Mayorga ("Dionisio") and his family. Villamorey owns the remaining 25% shares in Avicola and Villamorey itself is owned equally by Lisa, Trucha, S.A. with the result that Lisa is a 1/3 owner of Avicola…*"

16. Paragraph 7 of the RASC avers that in 1982 Don Arturo (who established the Avicola Group) and his family emigrated from Guatemala to Canada. Day to day control was assumed by Dionisio, Juan Jose Gutierrez, Juan Luis, Konrad Losen ("Losen"), Fernando Rojas ("Rojas"), Mauricio Bonifasi ("Bonifasi") and Roderico Rossell ("Rossell") who are described as the "Controllers". All of the foregoing individuals, Rossell apart, are also defined as the "administrators" of Avicola. Paragraph 8 alleges that soon after they assumed control of various family businesses, "*the Controllers embarked on a systematic scheme to defraud the Plaintiff of its share of the corporate profits of Avicola…*"

17. Various "background" or "feeder" frauds are then alleged by way of setting the scene for the substantive claims. The Pollos Vivos (Live Chickens) Fraud is said to have been admitted in a videotaped meeting by Rojas and Rossell in August 1998 (RASC paragraph 9). It involved not reporting live chicken sales and distributing the resultant Avicola profits to all shareholders save Lisa. The Los Cedros Fraud operated in a similar manner in relation to the sale proceeds of chicken manure and oranges (RASC paragraph 10). The Ancona Fraud is alleged to have involved the laundering of the proceeds of the two other background frauds and to have been admitted in the same manner (RASC paragraph 11).

18. It is then alleged, uncontroversially, that Leamington was incorporated in Bermuda on July 23, 1997 and that Rossell was at all material times its director and secretary[3]. The averment that Leamington is 100% owned by Villamorey is disputed, however (RASC paragraph 12). Leamington is a captive insurance company only reinsuring the risks of the Avicola and Multi Inversiones group of companies which were issued policies by fronting companies including El Roble Seguros Y Fianza ("El Roble"), a Guatemalan insurance company (RASC paragraphs 13-14). Paragraph 15 (excluding the Particulars of Fraud) provides as follows:

> "*15. The Plaintiff accepts that part of the risks reinsured by Leamington represent bona fide risks in respect of which Leamington has levied premiums at commercial rates. However, the Plaintiff contends that a substantial part of the reinsurance risks underwritten by Leamington are in respect of (i) non-existent risks; or (ii) risks which bear no relationship to the reinsurance premiums charges by Leamington. The Plaintiff contends that the primary object of ~~Leamington has been used in~~ this fraudulent scheme was to use Leamington as a vehicle to make distributions to the shareholders of Avicola ~~so as to (i) launder the proceeds of the illegal sales of live chickens; (ii) reduce the profits of Avicola; and (iii) reduce the dividends which would otherwise be payable to the Plaintiff.~~ The fraudulent payments made to Leamington were intended by the Controllers and Avicola to be distributions of profits to the shareholders of Avicola. However, in making these distributions to the shareholders, the Controllers and Avicola have deliberately and unlawfully excluded Lisa from receiving its appropriate share of these profits of Avicola. Leamington received the fraudulent payments from Avicola with the knowledge that they*

[3] Rossell himself admitted to being Treasurer and Secretary, and this was not apparently challenged by Lisa.

were intended by Avicola to be distributions to Avicola's shareholders. ~~*Further, the*~~ *The Controllers have ensured that any dividends paid by Leamington to Villamorey are not further distributed to Lisa as a shareholder of Villamorey by increasing the expenses of Villamorey which bear no relationship to the activities of Villamorey.* *During 1992 to 1998, Avicola used the fraudulent payments to Leamington as a means of making distributions to the shareholders of Avicola in the amount of US$1,964,691.92 in 1993, US $2,713,888.32 in 1994 US$6,184,486.88 in 1995, US$6,075,000.90 in 1996, US$6,324,431.00 in 1997 and US$6,594,894.00 in 1998. The controllers and Leamington have deprived Lisa of its share of these distributions made by Avicola to its shareholders.* "

19. The dollar amounts were, Mr. Hargun clarified in his closing submissions, intended to be read in Quetzales. The consequences of the fraud alleged in paragraph 15 are pleaded in paragraph 16 as follows:

"*16.* ~~*As a matter of Guatemalan law, Avicola is obliged to declare, by way of dividends, all its profits on an annual basis.*~~ *Further or in the alternative, as a matter of Guatemalan law, Avicola is obliged by Article 134 of the Guatemalan Commercial Code to hold an annual general meeting each year, at which true and accurate financial information about the condition of the company (including its profit/loss statement and balance sheet) is provided to the shareholders and at which (in the light of such financial information) the shareholders take appropriate decisions about the distribution of profits. Avicola has held no annual general meeting since 1982 and true and accurate financial information has not been provided to the shareholders.* ~~*The shareholders have thereby been prevented from exercising their rights under Guatemalan law to take appropriate decisions to distribute the profits of the company to themselves.*~~ *The Controller and/or Avicola failed to hold annual gerenal*

meetings as required by Guatemalan law in order to cover up the frauds set out above and/ or as part of their fraudulent scheme and conspiracy to defraud Lisa of its ~~true entitlement as a share holders of share of~~ the distributions made by Avicola. The effect of the fraudulent activities set out in ¶15 above is that ~~profits which would have been distributed to Lisa SA were retained in Avicola and partly transferred to Leamington in Bermuda~~ Lisa was deprived of its share of the distributions made by Avicola though the device of Leamington. Leamington knowingly participated in this fraudulent scheme. As a matter of ~~Bermuda and/or Guatemalan~~ law, Lisa has a personal and proprietary claim to the funds which ~~Avicola~~ Lisa should have ~~declared by way of dividends~~ received as its share of the distributions made by Avicola to its shareholders but has failed to do so. Lisa is entitled to maintain those personal and proprietary claims against Leamington."

20. The following additional and alternative causes of action are pleaded in paragraphs 17-19 of the RASC:

"*17. Further, and in the alternative, the matters complained of in paragraph 15 and 16 hereof were committed by Leamington pursuant to a conspiracy between the Controllers (and in particular Rossell) and Leamington ~~and (by reason of the matters set out in paragraph 17C and 17F below) Avicola~~ to defraud Lisa of its true entitlement ~~as a shareholder of Avicola~~ of the distributions made by Avicola. The parties to the conspiracy included Losen, Rojas, Bonifasi, Rossell, ~~Avicola~~ and Leamington. Leamington joined the conspiracy after its incorporation on 23 July 1997.*

17A. Further, and in the alternative, the Controllers and/or Leamington and/or Avicola are obliged under Guatemalan law to compensate or infemnify Lisa for the damage causes to Lisa by the said frauds and

conspiracy, which amount to intentional wrongdoing within the meaning of Articles 1646 ~~and/or 1653~~ of the Guatemalan Civil Code.

17B. Further, and in the alternative, the Controllers and/or Leamington have been wrongly enriched, without legitimate reason, by reason of the said frauds and/or conspiracy and are obliged under Article 1616 of the Guatemalan Civil Code and/ or Bermuda law to indemnify Lisa in respect of that wrongful enrichment.

17C. Further, and in the alternative, Leamington and/or Avicola are liable for the acts of the Controllers in committing the said frauds and/or conspiracy, ~~under Article 1664 of the Guatemalan Civil Code and/or~~ by reason of the Gautemalan doctrine of simulation and Article 1284 of the Guatemalan Civil Code.

17D. ~~Further, and in the alternative, the said frauds and/or conspiracy amount to wrongful abuse of corporate personality by Leamington and/or Avicola and/or the Controllers, which under Guatemalan law are tortious acts and for which Leamington and/or Avicola are liable to Lisa in damages.~~

17E. Further and in the alternative, ~~Leamington and/or~~ Avicola ~~and/or the Controllers are~~ in liable to Lisa for the said frauds and/ or conspricy under Articles ~~171, 172 and/or~~ 176 of the Guatemalan Civil Code.

17F. ~~Further and in the alternative, Leamington and/ or Avicola are liable for the said frauds and conspiracy as the alter ego of the Controllers.~~

18. Lisa SA asserts that the knowledge of Rossell, as president, director and secretary of Leamington, is to be attributable to Leamington

and/or Rossell has been at all material times the controlling mind of Leamington.

19. In the premises, all monies received by the fronting companies as premiums and transferred to Leamington as reinsurance premiums on account of non-existent risks or on account of grossly inflated premiums were and are held, up to the amount of Lisa's share of the distributions made by Avicola, by ~~the First Defendant~~ Leamington as a trustee for Lisa ~~Avicola and as a consequence of the fraud committed by the Controllers, Avicola has suffered loss and damages. The Plaintiff is unable to give full particulars of loss and damage until the completion of discovery.~~"

21. In Lisa's Closing Submissions, the causes of action relied upon were summarised as follows:

"*81.1 Against both Leamington and Avicola, conspiracy by unlawful means, with the intention of injuring Lisa (Bermuda common law and/or Article 1645 of the Guatemalan Civil Code);*

81.2Against both Leamington and Avicola for simulation (Article 1284 of the Guatemalan Civil Code (¶17C of RASC));

81.3Against Leamington only for equitable fraud in that Leamington has participated in a fraudulent scheme to defraud Lisa of its share of the corporate profits of, inter alia, Avicola (¶s 8 & 15 of RASC);

81.4Against Leamington only as a constructive trustee as a result of its dishonest assistance in Avicola's breach of trust or fiduciary duty to Lisa (¶s 16 & 19 of RASC). Furthermore, Leamington is liable as a constructive trustee as a result of its knowing receipt of monies from the Avicola group of companies, which should properly have been paid to Lisa ((¶s 16 & 19 of RASC);

81.5 Against Avicola only under Article 176 of the Commercial Code (¶17E of RASC)".

Pleadings: Leamington's Defence/AVSA's Defence

22. Leamington, in its Re-Amended Defence ("RAD"), denies each of Lisa's claims against the reinsurer, denies liability for the acts of the Controllers and in any event does not admit that Leamington is liable by virtue of the doctrine of simulation.

23. AVSA in its Amended Defence ("AD") also denies liability for each cause of action asserted against it and does not admit that it is liable by virtue of the doctrine of simulation.

Factual Evidence: Overview

24. Lisa's live factual witnesses were its principal, Mr. Juan Guillermo Gutierrez Strauss ("Juan Guillermo"), an accountant Mr. Lawrence Rosen and a translator, Esther Cecilia Crespo. A hearsay notice was served in respect of the now deceased Mr. Mario del Aguila Cancinos ("del Aguila") and in respect of the transcript of the August 20, 1998 Toronto meeting ("the Toronto Transcript").

25. Leamington called no live factual (i.e. non-expert) witnesses save, belatedly, Hector Rene Lopez Sandoval, who also gave expert evidence as to Guatemalan notarial practice. It served hearsay notices in respect of five witnesses who were

"*beyond the seas*", Lionel E. Asencio ("Asencio"), Hector Rene Tercero Soto ("Tercero"), Roderico Rossell Anzueto ("Rossell"), Jesus Briz Barillas ("Briz"), and Luis Fernando Villaverde ("Fernando").

26. AVSA called no live fact witnesses at all, serving hearsay notices prior to trial in respect of the following five persons who were also "*beyond the seas*": Silvia Maria Rossbasch Rheinbolt ("Rossbasch"), Luis Arturo Gutierrez Strauss ("Luis Arturo"), Jose Fernando Ramon Rojas Camacho ("Rojas"), Rene H. Perez Ordonnez ("Perez") and Alberto Antonio Morales Velasco ("Morales"). At the trial, further affidavits by Mario Rene Archila Cruz ("Archila") and Ana Lucrecia Palomo ("Lucrecia") were served to deal with an issue which arose in the course of the trial.

27. Juan Guillermo as the partisan *de facto* representative of Lisa's side of this family dispute was obviously a witness whose evidence needed to be treated with considerable care. In general terms, he was a credible witness whose evidence provided background to Lisa's central case rather than supporting it directly. Despite skilful and vigorous cross-examination by Mr. Woloniecki, I found his contention that he had not personally seen the "dividend" cheques before trial (and merely knew of their existence) to be credible. The Toronto Transcript supported his contention that this was the position when the August meeting took place. Although he initially is recorded as having said that he "*saw*" cheques were being made payable to the bearer, later in the Transcript he clarified what he meant by this stating: *"Fine, but I don't see the checks…That is, I see Carlos Vasquez'…report."*[4] On the other hand, under withering cross-examination by Mr. Riihiluoma, Juan Guillermo was simply not credible when he testified that at the recorded Toronto meeting, he did not admit having seen minutes related to a Villamorey sale of shares and made reference to this transaction by way of fishing for information:

> *"24 Q Can we now start from the premise that at*

[4] Vol. E, page 369.

25 this point in time in the meeting you were having a
540
1 discussion with Mr. Rossell and Mr. Rojas about
2 minute books?
3 A We were discussing the minute books, yes.
4 Q And I will pick it up MV1 in the middle of
5 the page. "So on what date is the stockholder
6 meeting held?"
7 It has to be held, by law it has to be
8 prior to October. But those, um, they're going to
9 be available, right, um. Unless once again, you
10 want to ask for as many photocopies as there may
11 be."
12 The next voice, MV1, is you. "In any
13 event, we expected to receive at least the minutes
14 of the stockholders meetings, because we have never
15 seen the minutes for the stockholders meeting for, I
16 don't know, 15 years." Do you accept that that is
17 what you said?
18 A Yes. We haven't seen any minutes for --
19 in those days probably 15 years. Now it will be 20
20 years.
21 Q And you accept that MV1 is you; you are
22 the speaker?
23 A Yes.
24 Q "I don't know, 15 years, well, um, I saw a
25 couple there, that were related to, um, transaction
541
1 of what was done in February on Villamorey. I think
2 when the shares were transferred, when the sale in
3 '95 was made, right." You saw the minutes of

4 Villamorey.
5 A I didn't see the minutes of Villamorey.
6 If you read a little later in the next -- after that
7 paragraph you just read -- I believe it is MV3,
8 Mr. Rossell, probably he says, "no, I don't know.
9 Juan Guillermo, but if you want they can be made for
10 you."
11 Q Sir --
12 A That means the minutes were not made.
13 Q Sir, you said -- "I saw a couple there
14 that were related to the transaction that was done
15 in February, Villamorey, I think when the shares
16 were transferred, when the sale -- when the sale in
17 '95 was made." That is what you said.
18 A Remember that I was questioning them, and
19 I asked -- I made that comment to see what the
20 reaction was. In the next paragraph they say that
21 the minutes didn't exist. So I actually didn't see
22 my minutes. I was simply fishing for information.
23 Q Sir, that is a shameful answer, if I may
24 so say so. That is exactly what you said. You saw
25 the minutes of Villamorey, when, in February 1995
542
1 when the transfer was made.
2 A You can call my answer shameful, but that
3 is the truth. I was just fishing for information,
4 sir."[5]

28. Mr Rosen's evidence must also be treated with some caution, for the straightforward reason that having been employed as a forensic accountant by Lisa,

[5] Day 4, pages 539-542.

he has the entirely understandable emotional interest in Lisa's success that any professional person in his position might be expected to have. That said, he was a generally credible witness. One narrow aspect of his evidence, under cross-examination by Mr. Woloniecki, was unsatisfactory, however. This was the detailed description of a conversation Rosen said he had with del Aguila in Guatemala in late 1998 about banking arrangements for the proceeds of live chicken sales contained in his witness statement prepared almost ten years later but not recorded in any of his contemporaneous notes:

"25 Q So you say that that sentence "he told me
687
1 that these cash sales were never reported to Lisa
2 S.A, that Lisa didn't receive any shares of the
3 sales proceeds, "was written by you?
4 A Yes. Was signed by me.
5 Q Signed by you. Are you saying that you
6 put that in of your own initiative without any
7 discussion with anyone else?
8 A I certainly don't recall being pressured
9 to put it in, if that is what you are asking.
10 Q I am not asking you whether you were
11 pressured. I am asking whether you had a discussion
12 with anyone about that sentence.
13 A I would say, like I have signed hundreds
14 of affidavits, there is all back and forth between
15 lawyers and myself. And do I have perfect
16 recollection of those? The answer is no.
17 Q And, yet, you say you have perfect
18 recollection of Mr. del Aguila telling you this at
19 some meeting ten years ago, and it does not appear
20 in any of your notes?
21 A If you look at the notes, there are all

22 sorts of things that could have been there that were
23 not, because you're not doing a fraud investigation
24 at this point. I am trying to do a business
25 valuation."

29. Ms. Crespo the interpreter was cross-examined about some very narrow aspects of her translation of the Transcript. Her astonishing attempt to tell Mr. Woloniecki how to conduct his cross-examination appeared to me to be consistent with the fact that she was an experienced and extremely fastidious translator who was unaccustomed to having her work questioned or challenged and was genuinely offended by the suggestion that she might have made a mistake. I found her to be entirely credible and reject any suggestion that she was influenced in her work by having been employed from time to time by Lisa.

30. As far as those witnesses who could have been called by the Defendants but were not, the fact that their written evidence was not subjected to cross-examination obviously diminishes the weight to be attached to their evidence, on matters which are not supported by any other evidence. However, I bear in mind that it is for the Plaintiff to prove its case. And while in certain circumstances the Court may be entitled to draw adverse inferences from the failure to call a witness, the Defendants are not obliged to assist Lisa to bolster its case through cross-examination.

Expert evidence: overview

31. The Plaintiff and the Defendants called expert evidence as to forensic accounting matters (Joseph Gardemal and Maria Yip, respectively), insurance matters (Daniel Spragg and William Bailie, respectively), Guatemala law (Professor Michael Wallace Gordon and Marcos Jose Alfredo Ibarguen Segovia, respectively) and Guatemala notarial practice (Ida Rebecca Permuth Ostrowiak and Hector Rene

Lopez Sandoval, respectively). Mr. Lopez also gave factual evidence about the 1995 Villamorey shareholders meeting which he notarized.

32. In general terms I found all of the experts credible and not unreasonably reluctant to depart from the crucial opinions set out in their respective reports.

Legal and factual findings: was Lisa's indirect interest in Leamington through Villamorey sold in 1995?

33. This issue was addressed in argument and by way of evidence and is a discrete issue which may conveniently be dealt with at the outset. The following points arise for consideration: (a) did the Villamorey shareholders resolve on February 14, 1995 to sell that company's shares in Leamington to La Brana; (b) was an agreement for the sale of Lisa's Leamington stake consummated in or about 1995; and assuming the answers to both (a) and (b) are affirmative, (c) are there any Bermuda law impediments to this Court affirming such conclusions?

34. I find that Mr. Lopez did notarize a Villamorey shareholders meeting which approved the sale of the Leamington shares to La Brana in 1995, doubts about the precise accuracy of the recorded length of this related meeting notwithstanding. Bearing in mind that Villamorey is a Panamanian company and no expert evidence was adduced as to Panamanian law, I decline to hold that that resolution had no legal effect under Panamanian law. Applying Bermudian/English conflict of law rules, whether or not a company has validly passed a resolution is an internal corporate management question which falls to be governed by the law of the place of incorporation of the relevant company: Lawrence Collins (ed.), Dicey & Morris, '*The Conflict of Laws*', Rule 156[6]. No basis for departing from this principle was advanced in argument. I am bound to assume that Panamanian law is the same as Bermudian law and Bermuda law would not nullify the Villamorey resolution in question because of notarial irregularities under Guatemala law. The fact that, as Ms. Permuth's evidence strongly suggests, the notarization of the

[6] 12th edition (Sweet & Maxwell: London, 1993), Volume 2 page 1111.

Villamorey meeting may well be invalid under Guatemala law is not determinative in this regard. The same applies to her opinion that under Guatemala law foreign currency transactions were prohibited, especially since the Minutes only purport to approve the sale of shares in a Bermuda company, not to effectuate the sale itself.

35. Not only did I believe Mr. Lopez as a factual witness. Juan Guillermo's admission during the August 1998 Toronto Meeting that he may have seen Villamorey Minutes when the February 1995 sale occurred makes it impossible to believe that the Villamorey meeting did not take place at all. However, it is far from clear that the sale did take place for the nominal consideration of US$1 stated in the Minutes. Other share sales notarized by Mr. Lopez on the same day were either "*at the price and under the agreed conditions with the buyer*" (Inversiones Nuevas SA, Hornbill Investment Limited), or were supported by sale agreements dated February 15, 1995 for substantial sums (US$12 million, Lomax Investment Corporation, and US$13 million Crystal del Pacifico). The nominal consideration referred to in the Villamorey Minutes is not plausibly explained (in terms consistent with the sale having been consummated), although the letter of intent which contemplated the sale of various entities by Lisa provided for a total consideration of $23 million. It is true that Juan Guillermo swore an affidavit on February 15, 1999 admitting that Lisa had sold various companies including its interest in Leamington, and that Lisa has seemingly commenced no proceedings to set aside this sale[7].

36. The proper law of a contract for the sale of shares in Leamington, a Bermuda company, seems obviously to be the place of incorporation of the company: *Banco Atlantico SA-v- The British Bank of the Middle East* [1990] 2 Lloyd's Rep 504. In my judgment the public policy importance to Bermuda's international insurance regulatory regime of clarity as to who ultimately owns Bermuda insurance and reinsurance companies impacts on the way this issue ought to be

[7] First Defendant's Skeleton Argument, paragraph 59.

addressed. Where, as is clearly the case here, Leamington has represented in its audited financial statements and its insurance returns that Lisa post-1995 was one of its ultimate beneficial owners, clear evidence is required to establish that these representations are incorrect. It also seems curious that lawyers in civil law jurisdictions such as Guatemala and Panama would be content to consummate a sale of shares without executing a written sale agreement. The suggestion that the failure to report the change in ultimate beneficial ownership of Leamington which purportedly occurred in 1995 cannot be explained by reference to extreme confidentiality concerns. The purported change merely involved Lisa's principals dropping out of the picture, with the "new" ultimate beneficial owners being otherwise the same as the "old" owners.

37. Bearing in mind how sensitive Lisa was about getting fair (or, according to the Defendants, unfair) value for all of its interests, it seems extraordinary to suggest that Lisa with full knowledge and consent agreed to finally dispose of its interest in Leamington for only nominal consideration. Bills of sale exist for the sale of other interests which total the $23 million referred to in the earlier letter of intent, which leaves no consideration for the sale of Leamington at all. No obvious or straightforward explanation has been proffered as to why this should have happened. More significantly still, the recorded August 1998 Toronto meeting reveals discussions about Leamington which make no sense whatsoever if Lisa's indirect Leamington interest had already been sold three years previously. Rossell is recorded in the Transcript as saying at this juncture:

> "*You are going to start to receive all the profits… because we had left Levington [phonetic] a little over time… in order to strengthen the company and we hadn't distributed dividends…*"[8]

38. In my judgment there is no sufficient evidence before this Court to displace the statutory presumption which arises under section 68 of the Companies Act that

[8] Volume J1, page 154.

the registered shareholder, Villamorey, is the shareholder of Leamington. I find that Juan Guillermo was simply mistaken when he swore in 1999 that Lisa's Leamington interest had been sold by Villamorey. Such a mistake is consistent with the propensity Juan Guillermo has demonstrated in these proceedings for being wrong when he has testified on matters of detail outside of his own direct knowledge. And the evidence of Mr. Lopez, Leamington's own witness, supports the view that Juan Guillermo's father was the one who conducted the 1995 negotiations rather than Juan Guillermo himself:

> "***17*** *Q. Yes. And was Mr. Juan Arturo Gutierrez*
> ***18*** *present at these meetings?*
> ***19 A. Look, he was in the negotiations, he was***
> ***20 present for most of the negotiations. He was there, 10:17***
> ***21 he did participate in the negotiations. We would all***
> ***22 see him come in with his bodyguard. All of the***
> ***23 employees were aware of the fact that he was arriving***
> ***24 and that he would be negotiating with his nephews.***"[9]

39. On balance it appears that the sale of Lisa's indirect interest in Leamington was contemplated by way of an agreement in principle but was never consummated as Lisa contends. This view is further, and most cogently, supported by a December 7, 1995 letter from Asensio to Mr. Baker of the Managers indicating that "*Mr. Juan Arturo Gutierrez has decided to sell his equal part of Leamington's shares*" and indicating that La Brana has been formed to hold all of the shares on behalf of the other two family members. While the English words used by a Spanish speaker might carry less weight than the same words used by someone for whom English is their native tongue, the terms of the December 7, 1995 letter as a whole give the distinct impression of an incomplete transaction. The suggestion that Mr. Baker proceed to the BMA was seemingly never pursued[10]. Briz, the President of

[9] Day 9, page 1445.
[10] Volume K8, page 410.

Leamington from incorporation in 1987 until 2000, long after the purported 1995 sale, in his Witness Statement signed on October 24, 2007 and filed on behalf of Leamington, concludes by stating:

> "*11.During the time that I was president of Leamington….Leamington paid dividends exclusively to Villamorey as the sole shareholder of Leamington.*"

40. I find (to the extent that this may be relevant for the purposes of the present proceedings and Lisa's claims for loss attributable to its shareholding in the Avicola companies) that Lisa's indirect shareholding in Leamington was not sold in 1995.

Legal and factual findings: is AVSA the de facto parent of the Avicola Group (Lisa's claim against Leamington)?

41. Another discrete issue which it is convenient to dispose of at the outset is whether AVSA has been proven to be the *de facto* parent of the Avicola Group. It is necessary to distinguish two questions in this regard. Firstly there is the pleading issue of whether Lisa's pleaded case embraces a claim for loss suffered by Lisa solely as a shareholder of AVSA, which must be proven to be either an actual or de facto parent of the Group, on the one hand. Or, alternatively, does Lisa's claim embrace loss suffered by the Plaintiff in respect of the Avicola Group as a whole irrespective of whether or not AVSA is shown to be the de facto Group parent. Secondly, there is the separate issue as to whether or not AVSA is jointly liable with the non-party Avicola operating companies who were in fact the primary insureds on the grounds that AVSA was at all material times the controlling *de facto* parent company. This narrower issue will be addressed separately below.

42. As far as the scope of loss claimed is concerned, the issue was argued on the basis that Lisa's claim pivotally depended on proof of the averments set out in the FBPs served to avoid a strike-out application once it was appreciated that AVSA was

not in fact the parent company of the Avicola Group. By the end of the trial it seemed to me that this was ultimately a very technical argument as far as the quantum of loss was concerned, because Lisa's case from the outset was and remained that it was defrauded of its share of the profits of the Avicola Group being monies which were unlawfully paid to Leamington under bogus reinsurance policies in relation to which AVSA itself was not a primary insured. As between Lisa and Leamington, it seemed to me by the end of the trial, the status of AVSA in relation to the primary insureds was largely irrelevant it being common ground that Lisa's shareholding in the primary insured operating Avicola companies was the same percentage as its shareholding in AVSA (25%). The quantum and recoverability of Lisa's loss from Leamington did not appear to be affected by the *de facto* parent issue at all.

43. My Ruling at the pre-trial review to the effect that Lisa's claim was limited to loss suffered by it as a shareholder of AVSA was in substance merely confirming that Lisa's claim as pleaded had always been based on the premise that it had suffered losses attributable to profits generated by the Avicola Group, not profits generated by Leamington/Villamorey, claims which Lisa explicitly abandoned years ago. The position with respect to the status of AVSA within the Avicola Group is primarily of concern to Lisa's claim against AVSA even though both Leamington and AVSA averred (paragraph 6 of the RAD and AD, respectively) that AVSA was not the parent company of the Avicola Group. Lisa's Reply to the RAD of the First Defendant (and AD of the Second Defendant) was as follows:

> "2. …*Lisa accepts that the operating companies are not strictly speaking subsidiaries of Avicola Villabos S.A. under Guatemalan law. However, for purposes of reporting and the payment of distribution to shareholders of Avicola, the income of all the operating companies is consolidated and is treated and distributed as group income. Furthermore, at the videotaped meeting on 20 August 1998 the controllers represented to Juan Guillermo that they would be*

providing to him all the relevant financial information of all the operating companies."

44. The Reply was dated February 22, 2007. By Summons dated May 16, 2007, Leamington applied for Further and Better Particulars but not in relation to paragraph 2 of Lisa's Reply. On June14, 2007, however, AVSA issued its partial and total strike-out applications. It sought to strike-out the entirety of Lisa's claim on the grounds that the above-quoted plea could not be understood. When the *de facto* parent argument was set out in the FBPs, the particulars were for all practical purposes provided to explain Lisa's case against AVSA, not Leamington at all[11]. It is true that in formal terms the original plea as well as the particulars were advanced against both Defendants, but prior to the trial it was not obvious that any or any serious issues were joined between Lisa and Leamington on the *de facto* parent argument at all. The FBPs themselves contain three main paragraphs, all three of which explicitly refer to AVSA alone and not Leamington. Paragraph 1 opens by stating: "*Avicola Villabos S.A ('Avicola') is the de facto parent company of and/or the de facto principal of and/or the de facto controller of a group of numerous operating companies.*" These matters are in reality all advanced to explain the nature of the case against AVSA, not the loss recoverable from Leamington.

45. Mr. Riihiluoma was unable to advance a coherent case in closing as to why this issue was relevant to Leamington's case. Leamington's only proper concern was to know what quantum of loss formed the basis of Lisa's claim. The profits generated by the relevant insured members of the Avicola Group remain the same irrespective of the corporate hierarchy of Group members. I find that Lisa's pleaded case against Leamington, sensibly read, embraces the profits of the Avicola Group as a whole, and no need in this context to determine whether or not AVSA was the *de facto* parent arises.

[11] See paragraphs 22-25 of this Court's Reasons for Decision dated July 3, 2007.

Legal and factual findings: is AVSA the de facto parent of the Avicola Group (Lisa's claim against AVSA)?

46. Mr. Woloniecki opened AVSA's closing submissions by asking the following rhetorical question: "*Why are we here?*" Lisa's Closing Submissions relied upon the following portions in Juan Guillermo's Witness Statement:

> "*20.Even though these companies are legally distinct entities, in practice they form separate divisions of a larger consolidated chicken production operation. Some of the operating companies run fattening farms, some slaughter houses and one provides the IT services to the entire Group...*
>
> *21. The operating companies are certainly not separate and distinct entities as a matter of fact. I believe that as a matter of fact and as a matter of practice, Avicola is the company that, by itself and Multi Inversiones SA, directs and controls the actions of all 19 companies, which are all treated as one single Avicola Group. All the financial reporting and accounting for the entire Group is consolidated. The information provided to shareholders has always been consolidated for the entire Group* (emphasis added).
>
> ...
>
> *24(b) All 19 companies are managed by the same Group executives. This appears to be confirmed by the fact that Jose Fernando Ramon Rojas Camacho himself admits, at ¶3 of his own Affidavit of 18 June 2007, that he was, until 2002, 'the CFO of 19 Guatemalan companies... which, together, are known as the Avicola companies'.*

> *24(g) I do not believe that the fraud could have operated without the companies in the Avicola Group operating as one enterprise. As I understand it, the fraud required records to be falsified throughout the production chain* (emphasis added)."

47. This is some evidence supportive of the Plaintiff's case. I accept that, as a matter of Bermuda and/or Guatemala law, it is legally possible for a controlling corporate entity to be vicariously liable for the torts of the companies it controls[12]. But this testimony as to AVSA's control is based in large part on Juan Guillermo's recollection of how AVSA operated prior to 1982. There is no cogent support for this proposition in the voluminous documentary record relating to the Leamington insurance programme. These assertions support Lisa's case in a largely abstract way, without any tangible support for them when one closely analyzes the relevant transactions. It is not enough for AVSA and the relevant Avicola operating companies to have common officers and/or accounting practices. It must be demonstrated that the relevant officers were acting on behalf of AVSA when they were directing the operating companies in making the allegedly fraudulent insurance and reinsurance arrangements. The estoppel case (i.e. the submission that AVSA is estopped by its conduct from denying that it is a de facto parent) is also not sufficiently proved.

48. Bearing in mind the high standard of proof required for allegations of fraud, I am not satisfied that AVSA was either the *de facto* parent or controller of the operating Avicola companies so as to render AVSA liable for any frauds which such companies and/or Leamington may have committed. Even if AVSA alone could declare dividends and the operating companies were just cost centres, it does not follow that AVSA was the controlling corporate entity. It seems more plausible that a company wholly owned by the other two branches of the Gutierrez family such as Multi Inversiones was in reality the controlling corporate

[12] The submissions set out at paragraphs 108-112 of Lisa's Closing Submissions are accepted.

entity, if there was one. For example, in notes recording negotiations between the parties in Toronto on February 21, 1998, Juan Guillermo himself described the two sides as "*Lisa's side*" and "*Multi-Inversiones' side*". And paragraph 3 of these notes record Rossell indicating that "*Multi-Inversiones provides strategic planning, legal advise* [sic], *fiscal strategy and high level administration services to the Avicola Companies.*"[13] This is admittedly far from conclusive in terms of ascertaining which corporate entity played a controlling role before Lisa sold its interest in Multi-Inversiones, however. This is because Juan Guillermo suggests that this sale happened as late as 1997.

49. The del Aguila Affidavit suggests that AVSA had some prominence in the Poultry Group, and he left AVSA in 1996 before Lisa's interests in various companies (including Multi-Inversiones) were sold. He worked for AVSA for many years and was ideally placed to explain precisely what role AVSA played in relation to the Avicola Group of companies between 1978 and 1996 as Chief Internal Auditor of AVSA "*and its affiliates and subsidiaries*"[14]. Although he defined AVSA as "*a conglomerate of horizontally and vertically integrated corporations*", del Aguila did not explicitly aver that AVSA itself was the dominant corporation. I accept that this may be inferred. His February 3, 1999 Affidavit is mainly concerned with how off-the-books sales occurred. In the penultimate paragraph of his Affidavit, del Aguila describes false invoices being presented to AVSA to divert money to the Panamanian Ancona Finance, SA as part of a general scheme of diverting AVSA monies to offshore entities. Del Aguila deposed: "*These invoices would be prepared by Multi-Inversiones, the holding company of the Bosch-Gutierrez and Gutierrez-Mayorga interests…*" This supports, in a very general way, the assertion made by Rossell to Juan Guillermo in 1998, that Multi-Inversiones played a high level consultative role in relation to the Avicola Group as a whole, including AVSA itself.

[13] Vol. D1, page 136A.
[14] Vol. D1, page 172.

50. I therefore find that AVSA may only properly be held to be liable for breach of any legal duties to Lisa to the extent that it is proved to have directly participated in the conduct complained of. Lisa's case based on the vicarious liability of AVSA for the acts of its officers and/or its corporate agents is dismissed. It follows that since AVSA was not itself an insured and there is no or no sufficient evidence tying AVSA to the Leamington programme, claims against AVSA and Leamington (conspiracy, simulation) in relation to the Leamington programme must be dismissed as against AVSA. These claims are clearly based on the unsubstantiated premise that AVSA is jointly liable with the operating poultry companies and/or vicariously liable for the acts of their common principals or for the acts of the poultry companies themselves.

51. A claim under Article 176 of the Guatemalan Commercial Code was asserted against AVSA alone. This was what Mr. Hargun's own Closing Submissions stated in this regard:

> "*Article 176 is not an independent cause of action but allows other causes of actions to be asserted, for example, claim for simulation and for intentional wrongdoing (conspiracy). Given that claims for simulation and conspiracy to defraud are otherwise asserted, Article 176, in the context of these proceedings, adds little to causes of action already pleaded.*"

52. It follows that this claim against AVSA stands or falls with substantive claims asserted against both Leamington and AVSA, namely the tort of conspiracy (Bermuda law) and simulation (Guatemala law). For the reasons set out above, these claims have not been proved as against AVSA and must accordingly be dismissed.

The "background" or "feeder" frauds

53. I indicated in my June 9, 2008 Ruling following the pre-trial review that I considered it improbable that any positive findings as to breaches of Guatemalan tax law would be made at trial. It remains to consider whether this Court should accept Lisa's submission that the Leamington reinsurance fraud was motivated by a desire to launder monies which were the fruits of a large-scale tax fraud.

54. In the absence of expert evidence as to Guatemalan tax law it is not possible to properly make any findings that specific tax offences were committed by AVSA and/or the Avicola operating companies. It is possible, however, to determine whether Lisa has established by way of background a plausible motive for Leamington being used as an instrument of fraud. The most cogent evidence that those controlling Avicola and Leamington had a motive to funnel false premiums through an offshore reinsurance programme may be summarised as follows.

55. It seems clear beyond serious argument that the Avicola companies conducted business on a regular basis using official accounting records which recorded only a portion of the Group's true income. Lisa's Opening Submissions cite the following extracts from the Transcript in which Rojas made the following admissions:

> "*And live chickens was something that didn't get too… too much attention before Juan Guillermo [phonetic], but you can see that starting in '94-'95 and, in particular, this last '96-'97, you can see that it went…well it… it went up rather significantly.*"[15]
>
> "*Then, it started to… to… to… gain importance and there… we… we also ran into a problem, which… which also partially gave rise to what happened with… uhm… with Campero [phonetic] during the last two years, and it's that nobody works with… with… with… with invoices!*

[15] Vol. E, pages 70-71.

With invoices. That's why… that's something I was going to mention to you. That's why the black area you see [here] is sixty-three million quetzales in '97-'98 generated through the sales of live chickens is black. There's no way to invoice that. Those to whom you sell the live chickens don't give you any type of receipt or anything and…that's why, in fact, part of this… and that was part of the confusion we had the last time… we had to pass it on to Avicola [phonetic] as white money, in order to maintain the sales history and tax payments plan… because if you fail to pay taxes at any time…at the level you are in… the Treasury gets on your case and, we… we'd have found ourselves in trouble. We're going to address that later on."[16]

56. The term "*black money*" has been defined to mean as follows: "*Income, as from illegal activities, which is not reported to the government for tax purposes.*"[17] It seems obvious that the terms "black" and "white" used extensively in their context in the Transcript in relation to money, accounts and/or transactions, were intended to refer to off-books and on-books money respectively. There was clearly a less than enthusiastic attitude towards paying taxes, as Rojas went on to explain: "*We already had a …a scare once….This thing with fiscal terrorism is ever present, right?*"[18]. There was also a willingness to take extensive steps to minimize the tax exposure. As Rossell went on to explain:

"*The idea for all this within our tax planning, which is something that we handle with Multi [phonetic], is to increase sales, turn this around, try to catch it right here instead of sales dropping here to…return this in order for sales to hold their trend and also for the tax level to stay on the same trend. Thus, avoiding having any unusual problems in the eyes of the*

[16] Idem.
[17] http://www.thefreedictionary.com/black+money.
[18] Vol. E, page 85.

Treasury which would subject us to an audit. That's why this whole thing is so complex."[19]

57. Rojas and Rossell clearly admitted in a meeting which was secretly recorded that a substantial portion of the income generated by the Avicola Group, in particular cash generated from the sale of live chickens, chicken manure and oranges was kept off the books and used to fund distributions to shareholders. It was effectively admitted at trial that after Lisa revealed the existence of the Transcript, revised tax filings were submitted and further taxes paid by the Avicola companies[20]. They did not expressly admit defrauding Lisa of its share of these distributions however; and alleged admission of the Ancona fraud is far less clear. Lisa also relies on the following admission made in paragraph 9 of the Lozada expert accounting report filed on behalf of the Defendants in respect of the first two feeder frauds:

> "*The Xela Operation consisted of an "off-book accounting system to account for the cash flows from the sale of live chickens (Pollos Vivos), oranges and chicken manure (Los Cedros) and a subsequent net distribution of profits (Utilidades) to all shareholders including Lisa.*"

58. The reliance placed on the feeder frauds is explained in paragraph 24 of Lisa's Closing Submissions as follows:

> "*The existence of the Pollos Vivos fraud and the Los Cedros fraud is relevant and probative because when considered with the Leamington fraud, it renders it more likely that the Leamington fraud took place. If it assists in this regard, the evidence is admissible on the ground of similar fact evidence. See JP Morgan Chase Bank and others v Springwell Navigation Corporation [2005] EWCA Civ. 1602:-*

[19] *Ibid*, page 94.
[20] Volume D 2, pages 194-196.

‘71. That puts the test for the relevance of any evidence, and conspicuously for the relevance of similar fact evidence, far too high. Cross & Tapper, Evidence (9th edition), p55, suggest that as a definition of relevance is it not possible to improve on article 1 of Stephen's Digest:

"any two facts to which [the term] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other [emphasis supplied]"

72. A fact may therefore be probative either on its own or because it renders a conclusion more likely when taken in conjunction with other facts. The latter is essentially the role of similar fact evidence. The relationship of Chase with the other Greek families, taken on its own, clearly cannot prove anything about the relationship between Springwell and Chase. But it might explain, illuminate or put in context evidence about that latter relationship that would otherwise be ambiguous or difficult to understand.’ ”

59. I accept the evidence of Juan Guillermo and Mr. Rosen that the disclosures about the off-books profits were made by the Controllers in the context of attempts being made by Lisa to value the Avicola Group for the purpose of sale of Lisa’s interest in it. I find that they were genuinely surprised by the disclosures initially made at the April Toronto meeting even if they had previously received copies of statements which in fact represented the so-called “Special Results”. This prompted Juan Guillermo to arrange for a secret filmed recording of the meeting at which further disclosures about the off-books business were made. The extensive explanations which were made by Rojas and Rossell as to how Avicola operated are inconsistent with any rational suggestion that Juan Guillermo was fully aware of the “black money” all along. The Transcript suggests that the Controllers were explaining what the “real world” was like in the “old country” to

a naïve émigré who was living in a far more comfortable developed world. It seems highly improbable that Juan Guillermo wrote the following letter to them in December, 1998 referring to his father in disingenuous terms:

> "*I'm not even going to start listing the series of activities and facts I've come to know about recently here, which have had a significant impact on me and dishonour my Dad's memory. I can't conceive that the companies that you presently manage can be involved in activities of this nature. The interests and net worth of Lisa, SA have been damaged by your inadequate conduct, as was admitted by your representatives.*"[21]

60. Rossell in his first Witness Statement does not explicitly refute the admissions relied on in relation to the off-the books business. In his Second Witness Statement, he avers that Lisa was well aware of the live chicken business and that he personally travelled to Toronto in 1994 to discuss the various operations. At this stage Lisa expressed no objections to the operations. In essence, it is implied that Lisa was aware of the off-books aspects of the Avicola business. This is not made explicit by Rossell who (a) does not expressly admit that off-business occurred at all, though he admits a tax rectification was made in 1999, and (b) does not even explicitly assert that Lisa's principals were aware that the live chicken business was off-books at all (as opposed to simply being aware of the existence of the income stream). Rojas in his first Witness Statement does not deal with the "feeder frauds" at all. In his Second Witness Statement, Rojas does not deny the off-the books business at all, and essentially refutes any suggestion that Lisa had been defrauded and denies that he admitted Lisa was defrauded.

61. Luis Arturo Gutierrez Strauss's November 14, 2007 Witness Statement exhibits his June 2, 2000 Affidavit. He admits that he is estranged from his siblings as a result of a disagreement in particular with Juan Guillermo. He strongly supports the honesty and efficacy of the dealings of the Controllers as far as the

[21] Volume J3, page 164.

commercial interests of all shareholders and profitability are concerned and denies that Lisa has been defrauded. He worked within the Group until 1994 and was Lisa's representative. He does not admit being aware of the off-the books nature of any part of the Group's business; nor does he contend that Juan Guillermo was aware of this either.

62. In my judgment there is no or no sufficient evidence that any admissions were made by either Defendant to the effect that the "feeder frauds" constituted a fraud on Lisa as opposed to being designed to conceal from the revenue authorities in Guatemala what the Poultry Group's true earnings were. The Transcript supports the untested evidence of the Defendants in this regard. I am not satisfied having regard to all of the evidence in any event that Lisa was defrauded as alleged in relation to the Pollos Vivos and Los Cedros frauds.

63. I reject Lisa's submission that these background "frauds" are admissible as similar fact evidence on the grounds that they make it more probable that the Leamington fraud occurred. They are, however, admissible as potentially making it more probable that the Transport Policies issued by Leamington were not genuine reinsurance, but for this limited purpose alone.

Factual and legal findings: were the Leamington reinsurance policies genuine reinsurance?

64. A commercial court sitting in the world's leading captive domicile is bound to approach a claim that a local captive insurer has issued non-existent policies with a degree of caution that might not be required elsewhere. Bermuda public policy clearly requires a delicate balance to be struck between avoiding unwarranted attacks on an important segment of the national economy and granting appropriate relief where captive arrangements are proven to have been used as an instrument of fraud. While Leamington is not entitled to any "home court" advantage, Lisa cannot expect a Bermudian Court to lightly conclude that captive insurance or

reinsurance contracts are of no legal effect based on generic criteria which could apply to countless existing contracts issued by other Bermudian captives.

65. While it is legally permissible for this Court to determine the validity of the Transport Policies based on expert opinion evidence, it is in my view preferable to use the expert opinions as a lens through which the factual evidence is viewed. In that way any formal conclusions reached will be fact specific and should not undermine the stability of contractual relationships beyond the scope of the present case. Moreover, the unique fact pattern of the present case is such that the crucial judgments turn not just on the formal structure of the reinsurance arrangements, but on the underlying intent of the Controllers and Leamington. As far as the evidence of Mr. Gardemal, whose expert financial evidence goes primarily to support Lisa's compensatory claim, is concerned, I have placed no reliance on his generic "*indicia of fraud*". He fairly conceded that he is not an insurance expert, and I found this aspect of his evidence too general to be of assistance in the specialist area of captive insurance arrangements.

66. The general weight of Lisa's expert's insurance evidence is obviously diminished by the fact that Mr. Spragg's captive insurance experience is substantially US-based. Most of the analysis in his main report was based on criteria used for US tax purposes for the purposes of determining whether premiums ceded to a captive may be deducted for tax purposes. Under cross-examination, Mr. Spragg creditably admitted that he had no real familiarity with the Latin American view of such matters generally, let alone Guatemala in particular. It is unclear whether Lisa was unable to retain a local captive manager expert because none was willing to proffer the desired opinions or because none was willing to break ranks with local professional colleagues. I draw no inferences one way or another in this regard and assess Mr. Spragg's evidence on its merits.

67. Mr. Bailie's extensive experience of Bermuda captive insurance for over 20 years made his evidence generally particularly cogent. But I accept Mr. Spragg's

observation that Bailie too had no reliable basis for expressing opinions as to Guatemalan premium rates for transport polices. And it seems obvious that greater weight should be attached to his opinions as to captive management practice generally than to his opinions as to the underlying facts. Of course in many cases the primary findings made by a court may be based substantially on expert opinion evidence. Where issues of fraud and deliberate breach of duty are alleged, the crucial findings will typically relate to the state of mind of the primary actors at the material time. I accept the following opinions expressed by Mr. Bailie: (a) the level of involvement of captive managers in their clients' underwriting programmes was lower in the 1980's and 1990's than it is today, (b) outside of US tax requirements, there is no general insurance requirement for captive/parent relations to be at arms length, (c) numerous factors influence premium levels for captives, making the process quite distinct from ordinary commercial insurance where the insurer determines the premium level, (c) it is normal for captives to maximise premium income and the tax benefit for their shareholders who may also be policyholders, (d) loss reserves are often kept by insurers instead of retained earnings because in some jurisdictions (but not Bermuda), the latter are taxable but the former are not. In the Bermudian context the tax-driven incentives for keeping loss reserves do not exist, (e) retroactive approval of dividends which have been previously paid is not good practice but nor is it an indication of fraud, (f) the absence of underwriting files is not unprecedented for the period of time in issue, (g) the direct payment of premiums to Leamington is not necessarily an indicator of fraud as Gardemal suggests as there is no evidence that the fronting companies did not receive their commissions, (h) lending to related parties is not uncommon for captives, (i) the use of fronting companies is a normal practice and not an indicator of fraud as Gardemal seems to suggest, (j) the fact that no claims were made on the Transport Policies over several years is unusual but not unprecedented, and, finally, I note (k) that Bailie's view that the reinsurance was genuine was necessarily based on a

detached review of the relevant transactions rather than based on direct knowledge of the underlying facts[22].

68. Under cross-examination by Mr. Riihiluoma, Mr. Spragg fairly conceded that there was no specific basis for believing that the primary policies issued by El Roble did not transfer any risk in the sense that if claims had been submitted they would not have been paid. Juan Guillermo also agreed that if a valid claim had been submitted to El Roble it probably would have been paid. Nor is there any dispute as to whether or not the purportedly insured risks might potentially exist and warrant insurance cover. But this questioning was extremely hypothetical as it was common ground at trial that over a 13-year period, no claims were actually made or paid under the primary transportation policies. It is open to this Court to conclude, looking at the insurance and reinsurance arrangements as a whole in light of all the evidence, that the risks at both levels (although the reinsurance level is most directly relevant) were non-existent in the sense that the Avicola companies had a fixed intention from the outset which they never diverted from not to make any claims even if losses occurred. Mr. Spragg further opined that "*Leamington was a sham captive that happened to write some legitimate policies later in life*"[23]. And under re-examination by Mr. Hargun he opined that no risk transfer occurred under the reinsurance Transport Policies[24].

69. I agree with Mr. Spragg's view that the Transport Policies were not genuine reinsurance but that the later Property Policies were genuine. I find that the reinsurance policies did not involve the transfer of any genuine risk. In reaching this finding, I do not rely on all of Mr. Spragg's supportive technical reasoning and instead concur with his conclusion primarily based on my own assessment of the underlying facts. And these findings are reached in circumstances where (a) the crucial question turns on the view the Court takes of the genuineness of contracts the formal validity of which has not been in question and (b)

[22] Day 10, pages 1627-1628.
[23] Day 5, pages 751-754.
[24] Day 5, page 854.

Leamington, a Bermuda company, called no live factual witness to support the proposition that there was a transfer of risk under the Transport Policies.

70. In his closing oral argument, Mr. Riihiluoma forcefully argued that Lisa's pleaded case of "non-existent" risks was not proved because it was clear that genuine risks of chicken losses did factually "exist". The no transfer of risk argument was a wholly distinct and un-pleaded new allegation. In my judgment the term "non-existent risks" read in a commonsense manner in the light of the RASC as a whole encompasses both (a) risks which do not really exist because they are wholly fictitious, and (b) risks which do not really exist because no real or genuine risk was transferred under the impugned insurance and/or reinsurance contracts.

71. In the context of a secretly recorded meeting at which extensive admissions were made about elaborate attempts to conceal off-books income from the Guatemalan tax authorities (including moving documents to avoid detection in an anticipated audit), the following statements[25] cannot easily be explained away as describing legitimate reinsurance in colourful terms:

"

"*MV2* (*Rojas)*	*Rather, then, let's go on to what we expect to, uhm… what's it called? … to distribute this year…*
MV1(Juan Guillermo ("JGG"))	*Uh-huh*
MV2 (Rojas)	*Profits, dividends, Levington [phonetic], Ancona [phonetic]… Ancona [phonetic], Multi [phonetic] and Abejemol [phonetic], right?*
MV1(JGG)	*Okay. So, what you mean is that here's where… then, let's see… that is, what says 'profits'… comes from live chickens.*

[25] Lisa's Outline Submissions, pages 13-14; Volume E page [ ].

MV2 (Rojas) *Uh-huh.*

MV3 (Rossell) *Exactly. The dividends come from the fiscal portion.*

MV1 (JGG) *This is fiscal.*

MV3 (Rossell) *Levington [phonetic] comes from a… a… figure that perhaps we hadn't told you… they're insurance [policies] that… don't exist… see? They're just false premiums that are paid and then Levington returns them and they're distributed…*

(Interrupts. Voices overlap.)

MV1 (JGG) *Okay.*

MV3 (Rossell) *That is… let's say…*

MV1 (JGG) *Let's say Levington [phonetic] distributes…*

MV3 (Rossell) *We insure everything nobody else in the world insures… but it's not an actual policy, right?*

MV1 (JGG) *Oh, okay.*

MV3 (Rossell) *Then, uhm… we charge a premium to Avicola [phonetic], it passes it on to us and we distribute it.*

MV2 (Rojas) *And Levington [phonetic] is that company that… uhm…*

MV3 (Rossell) *Yeah… That's where it's going to start to you… because we have started its liquidation… it's going… we're going to be sending you about… three hundred thousand dollars, perhaps… a little more.*

MV2 (Rojas) *It... It… has a small cost… There are some… there are some shelters that involve costs… other don't involve costs. This one has a cost on the part of the insurance company because you have to contract a fronting, as… as that's called. And a commission that Levington also charges, right?*

MV1 (JGG) *Okay.*

MV3 (Rossell) *What's important is that from these ninety-… this is what will… reach the stockholders' hands.*"

72. It is difficult to comprehend why Rossell would have referred to policies that "*don't exist*" and "*false premiums that are paid and then Levington returns them and they're distributed…*" [emphasis added] if risks were genuinely transferred under the Transportation Policies as well as under the later Property Policies. It is true that Mr. Bailie supported Rossell in his attempt (via his written evidence) to sanitise these words as simply trying to explain complex concepts in simple terms by indicating that such explanations are not unheard of in the captive world outside of professional captive management circles. It is also true that the admissions relied upon by Lisa can only be construed as such in relation to one portion of the reinsurance programme, and that, to that extent at least, Rossell's explanation as to why he used this language carries some weight. Such words coming from the mouth of a captive owner or officer in the context of a corporate group the activities of which were otherwise beyond reproach would be one thing. But when the officer has admitted to institutionalised practices designed to deceive his local tax authorities on the part of the primary insureds, the relevant policies ran for some 13 years with not a single claim, the officer is unwilling to have his exculpatory account tested by cross-examination, and an executive incentive plan rewards the managers of the primary insureds by giving them a share of the captive's profits based on the amount of premiums ceded, one is dealing with an entirely different scenario. It is also significant that the financial record indicates that Leamington, after an initial period during which no dividends were paid, was effectively used as a "cash cow" with premiums frequently flowing in and distributions flowing out in rapid succession. In addition, even though transport risks were supposedly known to be low, it seems a curious coincidence that Leamington itself sought no reinsurance protection of its own.

73. Asensio and Briz (in their written evidence) give stock explanations for the creation of the Leamington programme while the broker Tercero gives a more detailed account of how the programme worked. Briz significantly notes, however, that no income tax was payable on dividends distributed by Leamington under Guatemalan law. Briz's assertion that some claims were made on the Transport Policies was not substantiated at trial. Donald Baker's Witness Statement in relation to Jardine Pinehurst Management Company Limited and its management of Leamington from 1994 until he left Jardine in 1996 adds little of substance. Rojas, CFO of AVSA, dealt with the executive incentive programme and it is unclear what basis he had for his understanding that genuine risks were transferred by the primary insureds. None of these witnesses were available for cross-examination. Briz and Asensio, nearly 20 years earlier, had visited Bermuda and in their trip report recorded the following approach to the reinsurance programme:

> "*It was decided to submit claims to Leamington sporadically in order to maintain an appropriate image for the authorities. With such claims, the equity of some of the members of the Poultry Farming division can be redeemed.*"[26]

74. At this stage, December 4-7 1989, only the Transport Policies existed and no claims were ever submitted. But the report does suggest that these policies were not genuine risk-transferring instruments where either (a) claims would or (b) would not arise, and the "authorities" would assess the programme on its merits. It is consistent with the concerns expressed in the 1989 trip report that genuine Property Policies were issued in the mid-1990's under which claims were "sporadically" submitted. At the primary insurance level it is possibly theoretically correct to say that El Roble was on risk even if the primary insureds unilaterally decided not to submit claims. At the reinsurance level where those

[26] Volume G 4, page 136.

paying the premiums (the Avicola companies notionally on behalf of El Roble) and Leamington receiving them had an implicit understanding that no claims would be made, the position at first blush seems markedly different in practical terms. But on closer analysis, there is in the context of a 100% reinsurance of a fronting company's risk no practical distinction at all between the liability of the reinsured and the liability of the reinsurer. Because if a claim was improbably made at the primary level, one would reasonably expect that the claim would be passed on to the captive reinsurer.

75. No claims were in fact submitted by the time the programme was terminated after the commencement of the present litigation, even though the trip report suggests that submitting claims was considered in 1989. It would be highly artificial in the unique circumstances of the present case to hold that genuine risks were transferred merely because it was theoretically possible at one time for the Avicola insureds to make claims which would have triggered claims on Leamington by El Roble under the Transport Policies. What is unique about the present case is that the decision on whether or not to make claims does not appear, in light of the Transcript, to have been made on *bona fide* commercial grounds for reasons which I will come to. Mr. Bailie, when cross-examined about the trip note compiled only two years after Leamington's incorporation, made the following pertinent observations:

> "*Q. Isn't this an indication that they are suggesting that they would be making false claims in order to give the right appearance?*
>
> ***A. Well, I don't know, he hasn't said they were deciding to submit false claims, he was deciding** [to] **submit claims. They may have. They may have been having claims all this time. I expect they probably were, give the nature of the risks.***

Q. So you think they had claims but simply hadn't bothered to submit them and this is an indication that it's about time we submitted some?

A. That's a theory, it's possible. You know there might be claims and that they may not be submitted because it's more tax efficient not to."[27]

76. These answers I find to be very insightful. I accept the judgment of Mr. Bailie that the trip note is probably not evidence of consideration being given to filing false claims. People planning to submit false claims do not ordinarily discuss doing so with their captive managers and keep a written record of their fraudulent intent. Rather, I infer the following from Mr. Bailie's judgment that the nature of the risks were such that he would have expected claims and his educated guess that claims were perhaps not made for tax purposes. It is more likely than not a feature of captive insurance practice for the claims submission process to be affected by judgments as to tax efficiencies. How far one manipulates the claims submission process is a matter of judgment raising potential questions of adverse tax treatment in the parent's domicile and adverse regulatory comment in the captive's domicile. A simple form of such claims submission 'manipulation' occurs daily in the motor insurance market when drivers decide whether or not to file a claim based on a judgment as to the comparative commercial disadvantages of (a) claiming and losing their no-claims bonus, and (b) bearing the cost of the relevant loss. Mr. Bailie conceded that various attributes of the Leamington programme during the period in question represented the use of such companies in an "*aggressive*" manner for tax purposes. It is therefore not implausible that a corporate group that regarded tax collectors as "terrorists" would set up reinsurance policies that in practical terms involved no risk transfer, because a decision was made at the outset, and adhered to subsequently, not to submit any claims whatsoever.

[27] Day 9, page 1568.

77. Alternatively, even if the decision not to submit claims was not fixed and irrevocable so there was some hypothetical or minimal risk transfer, and notwithstanding the fact that Lisa has not proved in commercial terms that the premiums received bore no relationship to the risks assumed, I would find that this alternative limb of its attack on the Transportation Policies was made out. Accepting that captive insurance has unique characteristics and cannot be expected to mirror precisely ordinary insurance and reinsurance contractual relations, under section 1(1) of the Insurance Act 1978 *"insurer" means a person carrying on insurance business"*. The same section also provides:

> "*"insurance business" means the business of effecting and carrying out contracts —*
>
> > *(a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or*
> >
> > *(b) to pay a sum of money or render money's worth upon the happening of an event, and includes re-insurance business..*"

78. As a licensed Bermuda insurer, the legitimacy of Leamington contracts which purport to be insurance contracts fall to be tested against that statutory standard. Where the predominant function of what purports to be a reinsurance contract entails neither (a) protecting (in the captive context at least) the underlying insureds against potential losses, nor (b) paying a sum to the actual insured on the occurrence of a contingency, it must be open to this Court to find that the relevant contractual arrangements are not genuine reinsurance.

79. In concluding that the Transport Policies were not genuine reinsurance policies as contended by Lisa, I also have regard to the "*working hypothesis*" of the elements

of reinsurance set out by the learned authors of O'Neill and Woloniecki. '*The Law of Reinsurance in England and Bermuda*', 2nd edition, at pages 34-35[28]:

> "(1) *A reinsurance contract is a transaction involving the transfer of risk acquired through providing insurance to another or others which is governed by the legal principle of uberrima fides.*
> *(2)The transferor (the reinsured) transfers risk to one or more transferees (the reinsurer/s) in consideration for the payment of money (the reinsurance premium).*
> *(3)The risk which the reinsured transfers may arise either (a) under a contract or contracts of insurance, or a contract or contracts of reinsurance, which contracts the reinsured has entered into before the making of the reinsurance contract; or (b) following the making of the reinsurance contract, under future contracts of insurance or reinsurance, which are in the contemplation of the parties at the time the reinsurance contract is made.*
> *(4)The reinsurance contract under which the risk is transferred is separate and distinct from the insurance or reinsurance contract or contracts under which the reinsured has assumed the risk.*
> *(5)The reinsurer may assume 100 per cent of the risk which the reinsured has assumed, or will in the future assume, under a contract or contracts of insurance or reinsurance.*
> *(6)The nature and extent of the obligation of the reinsurer to pay money to the reinsured is defined solely by the terms of the particular insurance contract.*
> *(7)There will frequently be elements of reinsurance which do not constitute an acceptance of the reinsured's "insurable interest" in the underlying subject-matter.*

[28] (Sweet & Maxwell: London, 2004). The highlighted portion of the quoted passage was put to Mr. Bailie in cross-examination.

We submit that it is preferable to avoid inquiries into what is the 'subject matter' of the original insurance, and to focus on the commercial purpose of reinsurance. The search for a comprehensive definition of reinsurance is not merely elusive, but may also prove illusory. It is unnecessary to postulate whether reinsurance is a form of insurance, or a particular form of liability insurance. ***The essential elements, common to insurance and reinsurance, are the transfer of risk and the principle of uberrima fides or utmost good faith.****"*[emphasis added]

80. If the reinsurance contracts are legally separate and distinct from the underlying contracts with El Roble, the validity of the Transport Policies between El Roble and Leamington does not stand or fall with the underlying contracts. The mere fact that genuine risks were transferred at the primary level does not automatically mean that genuine risks were transferred at the reinsurance level, even in the case of a 100% reinsurer such as Leamington. Such an analysis would be highly technical and factually inappropriate in the present case. In the present case the most realistic view of the entire insurance and reinsurance arrangements in relation to the transportation policies is that risks were non-existent at both primary and reinsurance levels because the individuals controlling the primary insureds never intended to submit any claims, even though it seems probable that the fronting El Roble had no knowledge of this fact.

81. And if there were some very ethereal risk which was transferred, as the trip note relied upon by Lisa in fact suggests (i.e. the making of claims was contemplated but never pursued), the premiums paid clearly bore no relationship to the *de minimis* risk transferred. Mr. Spragg's conclusion as to the premium levels being wholly unrelated to the risks transferred, properly analysed in light of the unusual

circumstances of the present case,[29] does not require reference to the usual commercial rates.

Factual findings: did Leamington and /or AVSA intend to and in fact injure Lisa?

82. In my judgment the overwhelming weight of the evidence suggests that the Controllers were primarily concerned with avoiding and/or evading tax obligations when Leamington was established and the transportation insurance and reinsurance programme was set up. Lisa has failed to prove the highest level of its pleaded case, namely that the predominant purpose of the scheme was to launder the proceeds of the off-books live chicken sales and to deprive Lisa of its share of all of this unreported income. However it seems more likely than not that some of the "black money" was "whitened" by being used to pay the premiums which were then distributed as purportedly legitimate corporate profits, and that the Controllers intended to deprive Lisa of its rightful share of the profits generated by Avicola.

83. Lisa's position on injury is set out in Mr. Hargun's closing Submissions in salient part as follows:

> "*72.Lisa refutes the contention that there was no intention to injure or that Lisa was in fact not injured in relation to the Avicola's reinsurance program with Leamington. Lisa refers to the following facts:-*
>
> *72.1At the Toronto Meeting, Rossell advised Juan Guillermo that Leamington had not declared any dividends since Leamington was building up its reserves. The fact that Rossell made this statement at the Toronto Meeting has not been challenged. That statement was untrue on both counts. First, during the*

[29] In particular, the fact of no claims being submitted at all over 13 years for policies in relation to which Mr. Bailie felt losses would have occurred after only two years.

period 1996 – 1998, Leamington declared US$10 million by way of dividends to its registered shareholder Villamorey. This is admitted in ¶22 of the Re-Amended Defence of Leamington. Secondly, Leamington was not building up its reserves at all. Leamington was declaring dividends as fast as its premium income permitted and, as stated above, had declared $10 million in dividends in the previous two years. Again, this evidence is unchallenged (see ¶s 34 - 37 above).

72.2Until recently, Lisa believed that Villamorey had not distributed the $10 million received from Leamington by way of dividends during 1996 - 1998 because of the dramatic increase in Villamorey's expenses. Those expenses included the payment of "black salaries" to the executives. However, according to the witness statement of Villaverde, filed on behalf of Leamington, the dividends declared by Leamington during 1996 – 1998 and paid to Villamorey, were in fact transferred by Villamorey to La Brana for distribution for the benefit of the Gutierrez Mayorga and Bosch Gutierrez families. Accordingly, the end result is that all the dividends declared between 1996 and 1998 by Leamington were paid to the other two branches of the family to the exclusion of Lisa. This is the clearest evidence of injury to Lisa and the underlying facts are unchallenged.

72.3In their witness statements, Villaverde and Rossell maintain that all the dividends declared by Leamington were paid to Villamorey, as the registered shareholder, and thereafter to the three branches of the family, including Lisa. They maintain that the only reason why Lisa did not receive any dividends from Villamorey, in respect of the dividends

declared by Leamington, after 1995 was because Lisa had sold its shareholding in Leamington to La Brana. This assertion is wrong on two counts. First, even in respect of the pre-1995 period, it is now accepted by the Defendants that Lisa did not receive its proportionate share of the dividends declared by Leamington. It is accepted by Maria Yip, the expert on behalf of the Defendants, that Lisa did not receive its share of the dividends declared prior to 1995. Indeed, in anticipation of this trial, La Brana has tendered, by letter dated 30 April 2008 payment of US$229,301.61 (representing US$105,607 plus interest) in respect of dividends declared by Leamington pre-1995. Secondly, the contention by the Defendants that Lisa had sold its indirect shareholding in Leamington in 1995 is, it is respectfully submitted, false. The Defendants admit that but for the contention that Lisa sold its indirect shareholding in Leamington in 1995, Lisa would have received, with interest, $5,947,164. Lisa's contention that the suggestion of the alleged sale is false is further analysed in ¶s 65 - 70 below.

72.4Even if the true position is that Lisa had sold its shareholding in Leamington in 1995, Lisa would still be entitled to its share of the "premiums" paid in respect of the transportation policies to Leamington as a result of its direct shareholding in Avicola and indirect shareholding through Villamorey. At the Toronto Meeting, Rossell advised Juan Guillermo that Lisa would start to receive dividends from Leamington. Subsequent to the Toronto Meeting, Lisa did indeed receive three payments after the Toronto Meeting. Rossell now contends that two of those payments were not made to Lisa in its capacity as a indirect shareholder of Leamington, but they

were ex gratia payments on par with the "incentive" payments made to the executives of the Avicola companies. Rossell says "In as much as the Poultry Companies paid premiums for Transport Policies reinsured by Leamington, Multi-Inversiones directors agreed to make ex gratia payments related thereto in favour of the other stakeholders in the poultry companies, including Lisa". What is clear is that Lisa did not receive these payments after the alleged sale in 1995 and despite the subsequent promise in August 1998, has only received a small portion of it. The Defendants appear to admit that had Lisa received the entirety of the "ex gratia payments", Lisa would have received an additional $1,900,085 exclusive of interest. This is confirmed by Rossell when he says that Avicola commenced making these payments in 1998 but had not finished doing so when these proceedings were commenced in Bermuda. Lisa has not received any payment from any entity associated with the Avicola Group since 1998, despite maintaining one third economic interest in Avicola. Again, none of these facts are challenged by the Defendants.

72.5 *Rojas confirms that the executives of the Avicola operating companies were paid "ex gratia payments" or "bonuses" by reference to the net amount of the premiums ceded to the Leamington transportation policies and their percentage share in the underlying Avicola companies. Villaverde confirms that these payments in relation to the Leamington programme to the executives were in fact made by Villamorey. Villaverde has confirmed that all the premiums received by Villamorey from Leamington after 1995 were transferred to La Brana for the benefit of the Gutierrez*

Mayorga and Bosch Gutierrez families. The only other source of funds available to Villamorey was its shareholding in the Avicola companies. It appears, therefore, that the "distributions" made by Avicola (whether on the books or off the books) to Villamorey were used, in part, to make the incentive payments to the executives of the Avicola operating companies. Lisa, being a one third shareholder of Villamorey, was necessarily injured as a result of those payments."

84. Leamington submitted in paragraphs 15 to 18 of its Skeleton Argument as follows:

15. The essence of Lisa's claim is that the first defendant Leamington, a Bermudian Class I reinsurance captive, was a fraudulent vehicle used to distribute AVSA's funds to AVSA's other shareholders to the exclusion of Lisa. Lisa claims that Leamington perpetrated this alleged fraud by means of issuing policies covering non-existent risks at grossly inflated premiums. Lisa appears to be suggesting that Leamington was used as a vehicle for laundering "off-book" cash generated in Guatemala through the alleged background frauds. However, Lisa offers no explanation as to why a perpetrator of such a fraud would want to remit "cash" proceeds to a closely regulated corporate vehicle operating in a heavily scrutinized jurisdiction, a vehicle in which Lisa moreover, prior to 1995, had an equivalent interest. This suggestion accordingly makes no sense.

16. It is important to emphasise that fraud is the essence of Lisa's claim. Unless it can establish that the whole purpose of the Leamington reinsurance programme was to deprive it of sums which it would otherwise have received in its capacity as a

shareholder in AVSA, its pleaded claim will fail. If, for example, the most that Lisa could establish was that companies in the Poultry Group paid inflated re-insurance premiums to Leamington with a view to say, minimising tax paid in Guatemala and/or building up reserves in a tax friendly environment such as Bermuda, that would get Lisa nowhere: it had after all the same shareholding in Leamington as it had in the poultry companies, at any rate until 1995 when it disposed of its indirect interest in Leamington. Lisa has accordingly to go further and show that the whole purpose of the Leamington reinsurance programme was to deprive it of sums it would otherwise have received as distributions in its capacity as a shareholder in AVSA.

17. In this regard, Lisa's case faces a number of insuperable difficulties:

(i) It is common ground between the parties that Leamington only wrote two kinds of re-insurance business: transport policies and all-risks property policies. Lisa's Re-Amended Statement of Claim acknowledged (paragraph 15 – Trial Bundle ref) that Leamington wrote some genuine re-insurance business, but without any indication of which business was genuine and which was alleged to be fraudulent. Although Lisa was pressed to give particulars of which policies it was challenging, it was apparently unable to do so before service of its experts' reports. Accordingly, and for this reason, Kawaley J ordered sequential service (rather than simultaneous exchange) of experts' reports on24 August 2007. From the relevant reports (see in particular), it is apparent that Lisa is not challenging the bona fides of the all-risks property polices, as opposed to the transport policies. However, the only reinsurance that AVSA itself ever purchased was property all-risks reinsurance. Accordingly, unless

it can make good its new case on the "de-facto" group, its claim will fail even if it is able to establish that the premiums paid by the other Poultry Companies in respect of transport re-insurance were grossly inflated.

(ii) Prior to its sale of its indirect interest in Leamington in 1995, Lisa in fact received dividends from Villamorey totalling some $816,660, which reflected Lisa's share of the dividends declared by Leamington. Even after that sale, Lisa received ex gratia payments by reference to the profits that had been generated by Leamington on business with companies in which Lisa still had a shareholding interest. The result of such dividends and ex gratia payments is wholly inconsistent with the thrust of Lisa's case; namely, that Leamington was used as a vehicle to defraud it of sums that it would otherwise have received by way of dividends qua shareholder in AVSA.

18. Further, Lisa's case as regards the alleged Leamington fraud is riddled with inconsistencies:

(i) Lisa's principal witness of fact, Juan Guillermo Gutierrez, goes to great lengths to stress that Leamington's operations cannot be justified simply on the basis that tax advantages arose from its use. Yet Lisa's expert on insurance matters, Mr Spragg, appears to base many of his manifold criticisms of Leamington on the very fact that it appears, in his view, to have been used primarily as a mechanism for reducing tax payable in Guatemala.

(ii) AVSA would not have enjoyed any tax advantage from the Leamington programme if it had been used to launder "off book" cash from the sale of live chickens. On Lisa's case such cash sales were, in fact, being effected in order to avoid paying tax in

> *Guatemala. Conversely, there might well be tax advantages to be gained from the Leamington re-insurance programme to the extent that "on the books" legitimate profits that would have been subject to tax in Guatemala were reduced though the payment of premiums to Leamington.*

85. In Leamington's Headline Points for Closing, it is submitted that Lisa cannot maintain a claim for any loss it suffered otherwise than as a shareholder of AVSA, a broad contention which has already been rejected above. This is a point which can validly be advanced by AVSA itself, but has no or no material bearing on Leamington's liability for any damage it has caused since Lisa has from the outset explicitly sought to recover losses referable to Avicola as a whole. Leamington's Headline Points for Closing do not directly address the following issues at all: (a) whether Leamington intended to injure Lisa, (b) whether Lisa in fact was injured as an Avicola Group shareholder. Leamington's case, based on its Skeleton Argument, may be summarised as follows. There was no intention to damage Lisa because (a) Lisa has failed to show that "*the whole purpose of the Leamington reinsurance programme was to deprive it of sums it would otherwise have received as distributions in its capacity as a shareholder in AVSA*"; (b) prior to the sale of its Leamington interest in 1995, Lisa received its share of dividends (and an accidental shortfall was later tendered) and after the sale it received an *ex gratia* payment equivalent to that received by the Avicola executives. This is inconsistent with a fraud on Lisa; and (c) Lisa's expert evidence suggests Leamington was used for tax purposes, which is inconsistent with Juan Guillermo's assertion that it was a money laundering vehicle.

86. Subject to considering the legal elements of the conspiracy and other claims, which are dealt with separately below, I reject the broad submission that Lisa can only complain of loss if it proves that the entire purpose of the Leamington programme was to defraud Lisa. However, I accept the narrower argument advanced by Mr. Riihiluoma that the averments that Leamington was primarily a money laundering vehicle have not been proved. In my judgment Leamington was

established primarily for tax purposes and Lisa itself was forced to concede that the Property All Risks programme was legitimate reinsurance.

87. The crucial evidential question is whether or not Leamington may be said to have injured Lisa as a shareholder of the Avicola Group. This may helpfully be considered in relation to three main scenarios: (1) post-1995 assuming Lisa's Leamington interest was not sold by Villamorey to La Brana; (2) post-1995 assuming Lisa's Leamington interest was sold by Villamorey to La Brana. I consider the latter scenario in case my primary finding that Lisa did not sell its indirect interest in Leamington is held to be wrong; and (3) whether Lisa suffered actionable injury under Guatemalan law?

Injury to Lisa: the post-1995 period assuming Lisa's Leamington interest was not sold by Villamorey to La Brana

88. The principal evidence which supports an intention to deliberately injure comes from two facts which cannot be disputed. Firstly, in the August 20, 1998 meeting, Rossell, an officer of Leamington, represented that substantial dividends had not yet been distributed by Leamington:

> "*You are going to start to receive all the profits... because we have left Levington [phonetic] a little over time…in order to strengthen the company and we hadn't distributed dividends…So, from today forward the money will start to come in to you…today I believe that, umh…ninety-five was cleared, I think it was? But throughout the rest of the year, we're going to send you all the pending amounts to get up-to-date on…on Levington…*"[30]

89. Secondly, it is clear that Lisa had received some of its dividend entitlement for the period 1990 to 1994 so that Rossell must have been speaking about the period 1995 onwards. Moreover, the phrase "*You are going to start to receive all the*

[30] Volume E, pages 192-193.

profits" in the present continuous tense is clearly prospective and cannot sensibly be read as a statement limited to what overdue amounts from the pre-1995 era. This rebuts the notion that Lisa's interest in Leamington had been sold in 1995, in which case no commitment to pay Lisa a dividend for 1995 (already "approved") and other "pending" dividends would have arisen for discussion. But more importantly, it is admitted that approximately $10 million was in fact declared and distributed by Leamington through Villamorey between 1996 and 1998 so this excuse for non-payment of Lisa was plainly false. Ms. Yip does not dispute Mr. Gardemal's assertions in his November 29, 2007 Report where he outlines the following sample dividend payments:

(i) February 2, 1996, Leamington distributed a $1.2 million dividend to Villamorey, less than a month after a similar amount was paid into Leamington by Ancona by way of premium;

(ii) April 28, 1997, Leamington distributed $3 million to Villamorey by way of dividend;

(iii) February 23, 1998, Leamington declared a dividend for $3 million which was paid on February 1, 20 and March 12, 1998 in equal instalments.

90. Rossell by his own account has been General Manager and a director of Multi-Inversiones "*in charge of coordinating risk management for Multi-Inversiones and its affiliated or related companies*" (Witness Statement, paragraph 3). He has also been Leamington's Secretary and Treasurer since 1993 who "*held periodic meetings with Lionel Asensio and representatives of the Poultry Companies as to risks to be insured and the best use of Leamington*" (Witness Statement, paragraph 4). He must have known at the August 20, 1998 Toronto meeting that these and other substantial distributions had been made by Leamington.

Leamington's discovery documents show that requests for these distributions were typically made during this time period by Alameda with which Briz (Leamington's President) was associated. For example Briz spoke to Don Baker of Leamington's Insurance Managers about the availability of cash for dividends on November 10, 1995. Briz was then informed that on November 15, 1995 a $1.1 million dividend had been paid to Villamorey. In each case Briz was faxed at Alameda[31]. Alameda consistently gave the dividend instructions during this period although Asensio often signed the relevant correspondence[32]. Briz himself on January 22, 1996 requested "*a Declaration of Dividends to be paid as soon as possible to VILLAMOREY, S.A.*", writing on Alameda letterhead and using the title "General Manager"[33]. The link between Leamington's President, Briz, and Alameda, may explain why instructions from Asensio in relation to matters unrelated to the reinsurance programme (e.g. dividend and capital structure matters) appear to have been routinely accepted by Leamington's Bermuda-based agents. According to Gardemal's Report, Briz himself in a June 23, 1994 letter characterised Alameda as the "*functional division and office in charge of insurance and reinsurance*" for Multi-Inversiones[34].

91. Briz as the Multi-Inversiones treasurer would likely have worked under the general supervision of the General Manager Rossell. Briz was also at all material times President of Leamington and General Manager of Multi-Inversiones controlled Alameda. This constellation of facts not only illustrates why the best available evidence strongly points to Multi-Inversiones (and not AVSA) being viewed as the corporate entity which controlled Leamington. It also demonstrates that Rossell was in real terms a key agent and directing mind of Leamington, whose admissions and knowledge may properly be attributed to the First Defendant.

[31] Volume K8, pages 434, 443.
[32] Volume K [ ], pages [ ].
[33] Volume K8, page 383.
[34] Volume G 1, page 20, paragraph 2.

92. So Rossell was deliberately misleading Juan Guillermo on August 20, 1998 when he represented that Leamington had made no distributions since 1994, a 1995 dividend had merely been approved and further dividends were pending, while acknowledging that Lisa was entitled to participate in distributions which in fact had been made. His knowledge that Lisa had not received its share of these distributions and collusion in concealing the true position from Lisa is attributable to Leamington, which I find intended to injure Lisa and did injure Lisa to this extent. Leamington was allowing itself to be used as a vehicle to defraud Lisa by making distributions to Villamorey which were not being distributed (or promptly distributed) to Lisa but which had been, as Mr. Gardemal found without contradiction, actually distributed to the other two Villamorey shareholders at the date of the August 20, 1998 Toronto meeting . Of course, there is no suggestion whatsoever that any of these facts could possibly have come to the attention of Leamington's Bermuda-based insurance and/or legal representatives.

93. It is perhaps somewhat unclear whether Lisa would have received some or all of its entitlement had the present proceedings not been commenced and the secret recording not been revealed, as Rossell promised in Toronto in August 1998. On any view at that juncture, Lisa in fact had not received what is now admitted to be its full entitlement in respect of pre-1995 dividends, and was prejudiced by the delay in receiving the post-1995 dividends which had been distributed to Avicola's other shareholders. Dividing a Villamorey dividend into three is far from high science, yet Lisa was only offered its full pre-1995 dividend share in April 1998, ten years after it began investigating the financial position. Assuming Villamorey is indeed still the sole shareholder of Leamington, there is no doubt that Lisa has been injured by being deprived of its rightful third share of the post-1995 dividends described above. The position in economic terms is essentially the same as Lisa would any event have been entitled to one-third of the profits of the Avicola Group and Villamorey even if the Leamington interest had been sold.

94. Lisa cannot complain of being deprived of its share of the Villamorey dividends directly in the present proceedings because it abandoned any such claim years ago. But Lisa can complain that if the premiums which generated those profits, essentially through bogus reinsurance arrangements (the Transportation Policies) were not funnelled out to Leamington in that way, Lisa would as a shareholder of Avicola have participated in those monies in any event. The Plaintiff's primary case is that those profits ought to have been distributed by the Avicola companies themselves, and not channelled through Leamington at all.

Injury to Lisa: the post-1995 period (assuming Lisa's Leamington interest was sold by Villamorey to La Brana)

95. I now consider the position on the hypothesis that Lisa's indirect Leamington interest was indeed sold in 1995 as Leamington contends, in circumstances where the Transportation Policies were not genuine reinsurance and were a vehicle to gain illicit tax advantages for the two branches of the Gutierrez family to the exclusion of Lisa.

96. On this hypothesis, which clearly was not advanced by Lisa at all, the case for construing the transportation aspects of the Leamington programme as calculated to injure Lisa is, it seems to me, even stronger[35]. The financial record shows that the overwhelming majority of dividend payments were made after the purported sale. This would suggest even more strongly that once Lisa sold its interest in Leamington, the Controllers decided to exclude Lisa altogether from the Avicola-generated profits by distributing them through a corporate vehicle (Leamington) in which Lisa had no interest at all. It would also suggest that Lisa was misled into selling its interest in the highly profitable Leamington for nominal consideration, because Rossell's 1998 explanation of how Leamington worked strongly suggests that Rossell had reason to believe that Lisa at that late stage did not fully understand the role played by Leamington.

[35] It is possible that the loss calculation is more complicated and it seems obvious that accepting that the sale of a valuable interest for nominal consideration in fact took place in 1995 is contrary to Lisa's commercial interests.

97. If Lisa's interest was sold for nominal consideration shortly before Leamington started to distribute the bulk of its dividends generated by Avicola "premium" income, I would have found that from this point (if not from the outset) a substantial purpose of Leamington was to defraud Lisa of its share of the Avicola Group profits.

98. But for the reasons I have already stated, my primary finding is that a proposed sale of Lisa's interest in Leamington was never consummated, and that defrauding or injuring Lisa was only a subsidiary function of the purported Transportation Policies which were predominantly used for tax evasion/avoidance purposes.

Legal and factual findings: did Lisa suffer actionable injury under Guatemalan law?

99. Professor Gordon very robustly asserted that Lisa could sue a third party such as Leamington for damage suffered by it in relation to its AVSA shareholding. Such injury would be direct injury and not merely reflective of Avicola's loss (Reply Report, paragraph 21). Mr. Ibarguen very firmly asserted that Lisa could not assert a claim against AVSA or Lisa under the Commercial or Civil Codes of Guatemala because it could only complain of suffering direct or personal loss in respect of AVSA dividends which had been declared but not paid.

100. I have already found that Lisa's case against AVSA based on the theory that it was the *de facto* parent of those Avicola companies which were reinsured by Leamington under the Transportation Policies has not been proved. No need to consider the position as regards AVSA arises. Had I been required to decide the liability of AVSA under Guatemalan law, I would have accepted the opinions expressed by Mr. Ibarguen in his oral evidence and, in particular, paragraphs 22 - 23 of his Third Affidavit and held that the claims against AVSA failed under Guatemalan law because no direct injury was suffered.

101. What is relevant is whether as regards the double actionability rule Lisa has proved that the tort of conspiracy claim is maintainable against Leamington under both Bermuda law and Guatemalan law on the assumption that the tort was substantially committed in Guatemala. This was decided as a preliminary issue by me (and subsequently affirmed by the Court of Appeal) as follows:

> *"46.The Defendants correctly assert that to justify an action in Bermuda for a tort committed abroad, the claim must be both actionable in Bermuda and the place where the tort was committed: Chaplin –v-Boys [1971] A.C. 356. The Plaintiff answers that the claims under paragraphs 15 and 16 are for equitable fraud, not tort at all. And the tortious conspiracy cause of action is based on acts committed by Leamington in Bermuda, not on torts committed abroad. Further and in any event, all claims would be actionable in Guatemala as causing intentional or negligent harm under Article 1645.*
>
> *47.I accept Mr. Hargun's submission that Lisa's claims under paragraphs 15 and 16 do not engage the double actionability rule at all, because they are not foreign tort claims. As far as the conspiracy claim is concerned, the crucial test advanced by the Plaintiff's Counsel is the following dictum of Slade LJ in Metal & Rohstoff-v- Donaldson Inc. [1990] 1 Q.B 391 at 446:*
>
> *"In our judgment, in double locality cases our courts should first consider whether, by reference exclusively to English law, it can properly be said that a tort has been committed within the jurisdiction of our courts. In answering this question, they should apply the now familiar 'substance' test…If on the application of this test, they find that the tort was in substance committed in this country, they can wholly disregard the rule in Boys v. Chaplin …; the fact that some of the relevant acts occurred abroad will thenceforth have no bearing on the defendant's liability in tort. On the other hand, if they find that the tort was in substance committed in some foreign country, they should apply the rule and impose liability in tort*

under English law, only if both (a) the relevant events would have given rise to liability in tort in English law if they had all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed. We appreciate that the application of the substance test may give rise to difficult problems on the facts of some cases…"

48. It is far from clear, having regard to the Plaintiff's pleaded case alone, where the tort was in substance committed. The conspiracy case is particularized in reliance on paragraphs 1-15 of the ASC, which embraces three frauds admittedly committed abroad. On balance, it seems to me that the alleged tort was in substance committed abroad, thus engaging the double actionability requirement.

49.I am satisfied that although the double actionability rule is engaged as regards paragraph 17 of the ASC, the acts complained of would be actionable in Bermuda and under Guatemalan law, in particular, under article 1645 of the Civil Code. To the extent that the pleading suggests that relevant acts may have occurred in El Salvador and Honduras[36]*, in the absence of expert evidence, this Court is entitled to rely on the presumption that foreign law is the same as Bermudian law. So I would reject the objection to Lisa's standing based on the application of the double actionability rule."*[37]

102. Having regard to the evidence adduced at trial, I find that the conspiracy complained of was partly committed in Bermuda (where the dividends were formally declared), but substantially committed in Guatemala where the controlling minds of Leamington were primarily based. How was the conspiracy actionable under Guatemalan law? I accept the evidence of Mr. Ibarguen that

[36] The domicile of two of the fronting companies according to paragraph 14 of the ASC.
[37] Volume B2 TAB 27; [2006] Bda LR 9.

simulation requires both parties to the transaction to intend it to be a sham[38]. Mr. Ibarguen agreed that in general terms Lisa's case would give rise to an action against the Administrators[39]; but this would be a shareholder claim, not a claim against a third party such as Leamington. Mr. Ibarguen was bound to admit in general terms that where a legal person causes direct injury to another, they would be liable under Article 1645 of the Civil Code[40]. Professor Gordon was therefore in my judgment right to assert quite confidently that the conspiracy to defraud claim against Leamington (and AVSA) if proved would be actionable under Guatemalan law:

> "*…Article 1645. Any person who has caused damage or injury to another, intentionally or negligently, is obligated to repair it, except where it is established that the damage or injury was produced by the fault or negligence of the victim…This provision is common to every civil law tradition nation law dealing with negligent or intentional injury…The possible examples are endless. The common thread is that (1) a person...(including artificial persons) has (2) caused (3) injury (4) intentionally or negligently (5) to another…It is my opinion that Lisa has a separate cause of action under Guatemalan Civil Code Article 1645 against Avicola or Leamington…Guatemala has no provisions which directly create conspiracy as a civil action. However, Article 1645 applies to collective actions by more than one person, and conspiración is recognised in the civil law as two persons joining together for an unlawful purpose.*"[41]

Legal and factual findings: conspiracy to defraud claim

103. In terms of identifying the legal elements of the tort of conspiracy to defraud, it is necessary to distinguish two main scenarios. Firstly, where the conspiracy involves unlawful means, an intention to injure the claimant is all that need be

[38] Day 8, pages 1316-1317, 1364-1367.
[39] Day 8, page 1346.
[40] Ibid, pages 1380-1382.
[41] Report, paragraphs 20-21.

proved: '*Clerk & Lindsell on Torts*', 14th edition (Sweet & Maxwell: London, 2006), paragraph 25-123. Ancillary to this point is the requirement that where the illegality relied upon involves the contravention of a statutory provision, as opposed to fraudulent means alone, the relevant statute must be construed to determine whether civil action is permissible for the contravention in question: *Clerk & Lindsell*, paragraphs 25-130-25-136. Where the conspiracy is effected by lawful means, the predominant purpose of the conspiracy must be shown to have been to injure the claimant: *Clerk & Lindsell*, paragraphs 25-130-25-136. In determining whether or not Leamington participated in the conspiracy, this Court must ascertain whether the Plaintiff has proved that its participation took place with the requisite knowledge of the unlawfulness of the conspiracy [42].

104. The conspiracy to defraud claim is, as previously set out above, pleaded as follows:

> "*17. Further, and in the alternative, the matters complained of in paragraph 15 and 16 hereof were committed by Leamington pursuant to a conspiracy between the Controllers (and in particular Rosell) and Leamington ~~and (by reason of the matters set out in paragraph 17C and 17F below) Avicola~~ to defraud Lisa of its true entitlement ~~as a shareholder of Avicola~~ of the distributions made by Avicola. The parties to the conspiracy included Losen, Rojas, Bonifasi, Rossell, ~~Avicola~~ and Leamington. Leamington joined the conspiracy after its incorporation on 23 July 19*[8]*7."*

105. The primary plea was a conspiracy to defraud. However, the particulars relied upon under paragraph 15(i) cross-refer to the Pollos Vivos, Los Cedros and Ancona Frauds. It is true that these "background frauds" make reference to

[42] See *Walsh and Taal –v- Horizon Bank International* [2008] Bda LR 16; [2008] SC (Bda) 20 Com, paragraphs 114-120, 130

breaches of Guatemalan tax law and laundering which have not been adequately proven, but the main thrust of the allegations is a fraudulent exclusion of Lisa from its share of the Avicola profits. It follows that the main thrust of the pleaded case on the Leamington fraud is that the reinsurance programme (limited at trial to the Transportation Policies programme) was fraudulently used as a means to exclude Lisa from its rightful share of the Avicola profits. The central allegation is that the policies were not genuine. The conspiracy alleged was neither a lawful means conspiracy nor was it an unlawful conspiracy requiring construction of the statutes allegedly contravened.

106. Although I am not satisfied that the predominant purpose of the conspiracy was to injure Lisa, the Plaintiff has proved that there was an intention to injure Lisa in relation to a conspiracy involving the use of (fraudulently) unlawful means. Lisa has also proved that the conspiracy involved the Controllers and was joined by Leamington after its incorporation in 1987. It is clear that Rossell, in particular, had actual knowledge of all of the facts which made the conspiracy unlawful. The most cogent evidence of this is his frontline role at the August 20, 1998 meeting in misleading Lisa's principal about the distributions made by Leamington from which Lisa had been indirectly excluded. His knowledge may be imputed to Leamington because "*an officer of a company must surely be under a duty, if he is aware that a transaction into which his company or a wholly owned subsidiary is about to enter is illegal or tainted with illegality, to inform the board of that company of the fact. Where an officer is under a duty to make such a disclosure to his company, his knowledge is imputed to the company": Belmont Finance Corporation–v- Williams Furniture Ltd*. (No.2) [1980] 1 All ER 393 at 404 (per Buckley LJ). Rossell was admittedly (a) both secretary and treasurer of Leamington from 1993, (b) in charge of coordinating risk management for Avicola, (c) in charge of Lionel Asensio, who ran Agencia de Seguros Empresariales, S.A., an insurance brokerage company, under his supervision and (d) at all material times also an officer of Multi-Inversiones. As such Rossell (and Leamington's President Briz) knew that no genuine transfer of risk took place

under the Transport Policies and that the profits generated were not being distributed to Lisa.

107. The Plaintiff has proved its tortious conspiracy to defraud claim.

Legal and factual findings: Lisa's equitable fraud claim

108. In its Closing Submissions, Lisa submitted as follows:

> "*130. The factual allegations in relation to Lisa's case on equitable fraud are set out in ¶s 8 & 15 of the Amended Statement of Claim. Lisa contends that Leamington was a participant in this fraudulent scheme to launder monies (whether on or off the books), to reduce the profits of Avicola and to reduce the dividends which would otherwise be payable to the Plaintiff. Lisa also asserts that knowledge of Rossell, as president, director and secretary of Leamington, is to be attributable to Leamington and that Rossell has been at all material times the controlling mind of Leamington (¶18). Lisa puts this case under equitable fraud in two ways.*
>
> *131. First, on the basis of the plea that the transportation reinsurance contracts in substance were a sham and a fraud, Bermuda law will in those circumstances impose a constructive trust on Leamington as the fraudulent recipient of the premium. Equity will recognise the proprietary interest of the party defrauded.*
>
> *132. Second, Lisa puts its case on the basis of dishonest assistance/knowing receipt – see further below.*
>
> *133. In terms of remedies for equitable fraud, Lisa claims constructive trust (¶1 of the relief), return of the monies held upon trust, (¶2), accounting (¶5) and payments of monies due upon the taking of account (¶6).*"

109. This claim, which relies on the same facts as the conspiracy to defraud claim in respect of a more straight forward cause of action, has also been proved. I find that the Transportation Policies were in substance a sham and a fraud because (a) they were not genuine reinsurance, and (b) were used in part to defraud Lisa of its rightful share of the Avicola profits. It bears repeating that the policies were valid on their face and that this finding is not based on a technical analysis of the reinsurance arrangements which Leamington's Bermuda-based insurance managers or lawyers ought to have carried out. Rather it is based substantially on an analysis of the surrounding evidence as to (a) the motivations of the controlling minds of Leamington, as partially evidenced by their own admissions, and (b) the fact that after Leamington's dividends were declared in Bermuda, Lisa was excluded from participating in the distributions made by Leamington's Panamanian shareholder, Villamorey.

110. I further find that Lisa's 1/3rd share of the premiums received by Leamington in respect of the Transportation Policies were received by Leamington with knowledge of that fraud constituting the First Defendant a constructive trustee in the Plaintiff's favour of the sums received. For the reasons already set out above, the relevant knowledge of Rossell and Briz as controlling minds of Leamington is attributable to Leamington.

Legal and factual findings: Lisa's claim for dishonest assistance/knowing receipt

111. This claim which relies on the same facts as applicable to the two aforementioned claims is also proved as against Leamington. Lisa's closing Submissions stated as follows:

> "135. *As set out above in ¶s 130 - 134, there was a constructive trust on Leamington as the fraudulent recipient of the false reinsurance premiums.*

136. In addition, Leamington (by Rossell at the very least) well knew that the "premiums" received by it ultimately from Avicola were not bona fide insurance premiums but were fraudulent in nature. Leamington (by Rossell at the very least) was party to the scheme to launder the monies of Avicola (whether on or off the books) through Leamington by false insurance premiums. In those circumstances, the party defrauded (Lisa) is entitled to enforce a constructive trust over the proceeds of the fraud on the basis of dishonest assistance and/or knowing receipt (see El Ajou v Dollar Land Holdings PLC [1994] 2 All ER 685).

137.The elements giving rise to the cause of action for dishonest assistance are:

137.1A trust or other fiduciary relationship;

137.2A breach of trust or other fiduciary duty on the part of the trustee or other fiduciary;

137.3A causal link between the breach and the loss to the beneficiaries,

137.4Assistance by the defendant in the breach;

137.5A dishonest state of mind on the part of the assistant.

See Underhill & Hayton, The Law of Trusts & Trustees, 17th ed, at para 100.18.

138. The elements giving rise to the cause of action for knowing receipt are:

138.1Property held on trust or subject to some other fiduciary duty;

138.2Misapplication the property by the trustees or fiduciary in breach of trust or fiduciary duty;

138.3Receipt of the property or its traceable proceeds by the defendant;

138.4A causal link between the defendant's receipt and the breach of trust or fiduciary duty;

138.5A dealing with the property by the defendant for its own benefit, and not in his character as agent for another party;

138.6Knowledge by the defendant that the property has been transferred in breach of trust or fiduciary duty, either at the time of receipt or at any other time prior to his dealing with the property for his own benefit.

See Underhill & Hayton, The Law of Trusts & Trustees, 17th ed, at para 100.52.

139.These elements are all made out on the present facts. In particular, claims under these causes of action are not limited to situations where an express trustee has misappropriated trust property. They can also lie against defendants who have assisted in or received property misappropriated by other

fiduciaries who have voluntarily assumed responsibility for managing the property or where a defendant has received or helped a constructive or resulting trustee to misapply the trust property: see Bank Tejerat v Hong Kong & Shanghai Banking Corporation (CI) Ltd [1995] 1 Lloyds' Rep 239 and Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511. Avicola and the Controllers are here liable as constructive trustees for the misappropriation of Avicola's assets. Leamington is liable for its role in receiving those assets by way of fraudulent reinsurance premiums and/or assistance in laundering those assets.

140. The pleas of equitable fraud and relief of constructive trust seek to obtain restitution from Leamington. As a matter of Bermuda conflict rules, the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation. The proper law of the obligation is (if the obligation arises otherwise than in connection with a contract or land) the law of the country where the enrichment occurs (see Rule 200 of Dicey & Morris: The Conflict of Laws, 13th Edition. Furthermore, only Bermuda law is relevant on the basis that the acts complained of took place in Bermuda."

112. I find that Leamington knowingly assisted a misapplication of the Transportation Policies by its receipt and distribution of the premiums paid in respect of the Transportation Policies and that the elements of the claim as delineated in the above submissions have been made out. Two points require further analysis as regards both constructive trust claims, and which arise from the above submissions.

113. In relation to the tortious conspiracy claim, I have found that the tort was substantially committed in Guatemala where it seems to me the tortious acts substantially occurred. It was there that the relevant instructions were given, implemented in Bermuda, which caused Lisa loss. Is it possible to find in the context of these alternative constructive trust claims that Bermuda law governs the obligation to make restitution because this is where the enrichment occurred? The discussion in *Dicey and Morris* on Rule 200 suggests: (a) where a restitutionary obligation is created following the commission of a tort, the law which governs the tort should also govern the equitable obligation to make restitution; (b) although the law where the enrichment occurs generally determines a constructive trust claim, this principle is not overwhelmingly supported by clear judicial authority, and factual variations may justify a different approach. The need to consider the constructive trust claims only arises in the present case on the hypothesis that no tort has in fact been committed at all (either because I am wrong in holding that the elements of the tort have been proved under Bermuda law or wrong in holding that the conduct complained of is actionable in Guatemala). In any event, I have found that Bermuda law governs the tort claim because the tort was partially committed abroad and the double actionability rule is met. In terms of looking at where the unjust enrichment occurs in relation of the constructive trust claims, however, the unjust enrichment complained of (as opposed to the acts causing it) substantially occurred in Bermuda to the extent that the premiums were (a) received by a Bermuda company, and (b) distributed with the approval of Board resolutions passed at meetings held in Bermuda.

114. The second issue which is not self-evident is the requirement that the constructive trustee knew of the breach of trust either (a) when the monies were received, or (b) before they were distributed in breach of trust. It is clear that the knowledge of Rossell can be attributed to Leamington from 1993 when he became an officer of Leamington and became deeply involved with the Avicola risk management programme. It is unclear precisely when in 1993 Rossell became involved, and

$200,000 was declared that year. The vast majority of dividends were declared after 1993, and although $2.5 million was paid before 1993, it is common ground that Lisa was partially paid its share of all pre-1995 monies and the entitlement of Lisa to the shortfall is not in dispute. It therefore is not necessary to consider the pre-1993 position in terms of what knowledge can properly be attributed to Leamington.

115. Although the preponderance of the evidence does suggest that Briz, admittedly Treasurer of Multi-Inversiones from 1984 to 2003, had actual knowledge of any breach of trust before the Leamington dividends were distributed, it accordingly matters not that the position prior to 1993 is ambiguous. Not only was Briz President of Leamington at all material times. Although he omits mention of this in his Affidavit, he was intimately involved with the dividend process. Firstly, as already mentioned when discussing the broad question of a fraud on Lisa above, he held himself out to be General Manager of Alameda. This was a company of which Lionel Asensio was Operations Manager, and Asensio was involved in both forwarding premiums and requesting the payment of dividends. Alameda, it seems obvious, was acting on behalf of the other two branches of the Gutierrez family, who owned Multi-Inversiones. Thus Briz on June 30, 1992 wrote to Leamington's insurance managers on Alameda letterhead stating: "*We hereby request a declaration of dividends to be paid to VILLAMOREY S.A. in the amount of U.S. $1,300,000.*"[43] On that date $1.3 million was paid to Villamorey, and $200,000 was lent to Alameda. The dividend was retroactively approved in November 1992 when Lisa received 1/3rd of the total "distribution", even though only $1.3 million was formally approved as a dividend. It is unclear that the comparatively small pre-1995 deficit is attributable to the pre-1993 era before Rossell entered the stage. But Briz' involvement as President of Leamington and agent for Villamorey, through Alameda, in 1992 strongly supports the inference that he knew that Leamington was acting in breach of trust in declaring dividends which were not paid to Lisa in the post-1993 period. On January 22, 1996, writing

[43] Volume K8, page 97.

as General Manager of Alameda, he requested that a dividend of $750,000 should be paid by Leamington to Villamorey[44]. A similar request had previously been made by him on November 13, 1995 for a $1.1 million dividend[45]. It seems more likely than not than Briz made these requests both with knowledge that Villamorey would exclude Lisa from its share of these monies and well-knowing that Lisa was a shareholder of Villamorey. Such knowledge on the part of Leamington's President is attributable to Leamington itself. It is in the face of these distribution requests that Briz himself admits that at all material times Villamorey was the sole shareholder of Leamington, and does not support the proposition that Villamorey sold its shareholding in Leamington in early 1995.

116. The general pattern appears to have been that before Leamington declared the dividend or made a distribution, a request came from Alameda. On a balance of probabilities it seems to me to be clear that when the request was made for a distribution, it was known how the funds were going to be disbursed. There can be no suggestion (in the absence of positive evidence to this effect) that it was only after Villamorey received the funds that a decision was made to exclude Lisa from the ultimate distribution. Briz' knowledge supports the knowing receipt claim alone, while Rossell's knowledge supports both the dishonest assistance and knowing receipt claims. In assessing the cogency of the evidence as to their knowledge generally, it is noteworthy that neither of these officers was willing to give oral evidence on oath to deny or refute the prejudicial inferences which clearly arise from the documentary and other evidence before this Court.

Legal and factual findings: Leamington's defence to the fraud and constructive trust claims

117. Leamington defended its position on three broad fronts: (a) the assertion that the Transportation Policies were not fraudulent, and (b) the following submissions set out in paragraph 5(i) of its Headline Points for Closing:

[44] Volume K8, page 383.
[45] Volume K8, page 438.

"*Lisa's case that Leamington was used as a vehicle to launder moneys generated by purported off-book sales of live chickens, oranges and manure is entirely irrelevant to the relief sought against Leamington. But, on any view, that case was shot to pieces at trial. Leaving aside the inherent improbability of AVSA or the other poultry companies using alleged off-book, untaxed monies to pay premiums on policies re-insured by Leamington (thereby gaining no tax advantage), rather than reducing their taxable profits by using on-book funds to pay the premiums (thereby throwing up profits in a low tax environment), Lisa's accounting expert freely stated that he could not determine whether on-book or off-book funds were used to pay the premiums on policies reinsured by Leamington.* ***[7/1146, line 7- 7/1148. line 10]****. It is for Lisa, as claimant, to prove its case. If it cannot do so now, after ten years of litigation, its case cannot succeed.*"

118. And (c), in its Supplemental Headline points for Closing, Leamington made the following additional points:

"*1.In essence, Leamington submits the point is this: vicarious liability can be used to make defendants other than the primary wrongdoer liable for matters that have been pleaded. It cannot be used to make a defendant liable for matters that have not been pleaded.*

2. A few simple propositions may help to explain Leamington's position. Assume that Lisa has suffered a loss of $X as a shareholder in AVSA and $Y as a shareholder in the other 18 companies. Assume also that all 19 companies are found to be co-conspirators against Lisa.

i. *There is no reason in principle why, if all 19 companies are joined as defendants each one of the 19 should not be jointly and severally liable for $X plus $Y.*

ii. *Equally, if only one of them is joined as a defendant (say, AVSA), Lisa can still hold that one defendant liable for the damage it has suffered as a shareholder in all of them – i.e. for $X plus $Y, if its claim is appropriately made. It would have to bring the claim in its capacity as a shareholder in all 19 companies, <u>not</u> just as a shareholder in AVSA; and it would have to plead the loss it had suffered as a shareholder in each.*

iii. *However, if the only loss claimed is the loss suffered as a shareholder in AVSA, the claim being brought as a shareholder in that company but not the other 18 companies, Lisa can only ever recover $X (unless, relying on the de facto parent allegations, Lisa can show that the $Y loss sustained in respect of the other 19 companies would in fact have impacted on the amount of dividends it would have received from AVSA, because the profits of the other 18 companies were paid through AVSA). In this situation, vicarious liability cannot assist Lisa – it cannot be used to make AVSA liable for unpleaded losses suffered by Lisa, suffered in a different capacity to that in which it brought the claim.*

Leamington submits that the point may seem technical, but it is not an empty pleading point. A claim for the loss suffered in any one of the other 18 companies would, in fact, be a different cause of action. It would have required Lisa to prove different facts – most obviously, its position as a shareholder in that company – than those required to be proved in the action as presently constituted.

> *If Lisa had made an appropriate amendment whilst it was still open to it to do so, expanding the claim to cover loss suffered in its capacity as a shareholder in the other 18 companies, the position may have been different. But Lisa has left it too late to do that, the relevant limitation period having expired; this is undoubtedly why Lisa has chosen to advance its claim via de facto parent allegations.*"

119. The last point will be dealt with first. I have already set out above why I reject Leamington's pleading point that Lisa is not entitled to seek relief in respect of loss suffered in respect of its shareholding in the Avicola companies generally as opposed to simply AVSA. From Leamington's perspective, the quantum of loss is unaffected because Lisa's original claim against Leamington was for the loss of its rightful share of the profits of the Avicola Group. Of course the scope of loss is favourably affected from Leamington's perspective in that it is limited only to the premiums paid by those Group members who were in fact insured under the Transport Policies. The fact that AVSA is not in fact the parent company of the Group has substantive impact on the case against AVSA, but not on the loss sought from Leamington. The suggestion that the other Avicola companies should have been joined by Lisa because it was necessary for Lisa to prove a wholly different case as regards its status of a shareholder of those companies, advanced by Leamington, is wholly unmeritorious. There is no dispute that Lisa is a shareholder of the other poultry companies which were reinsured under the Transportation Policies.

120. If Leamington would have wished to seek a contribution from a joint tortfeasor as this submission appeared to imply, it has always been open to it to serve a third party notice (a) from the outset on AVSA, and (b) from the date of the Plaintiff's voluntary Further and Better Particulars, on the other Avicola companies concerned. It is not for a Plaintiff to join every potential tortfeasor so as to minimize the exposure of any one of joint tortfeasors. This point is highly

artificial since Leamington and the non-party companies are affiliates, and Leamington and AVSA had common representation for several years. In any event, the alternative constructive trust claims can properly be maintained against Leamington alone.

121. It is true that Lisa has failed to strictly prove that Leamington was a money laundering vehicle, and that this was not an essential element of its case. But this submission is not a substantive answer to the claim that Leamington was used to defraud Lisa. The main substantive defence advanced in respect of the Leamington Fraud was to contend, based primarily on expert evidence, that the Transportation Policies were genuine reinsurance polices. This argument has been rejected above primarily on the basis of an analysis of the factual evidence of fraud which Leamington elected not to call a single witness to controvert through oral testimony. The First Defendant has, on the facts and in the face of admissions by one of its significant operational officers that the reinsurance policies were a sham, essentially put the Plaintiff to strict proof of its core allegations.

Legal and factual findings: Lisa's loss

122. Leamington did not address factual issues of quantum in its Skeleton Argument or its Headline Points for Closing, its case being clearly set out in its expert evidence. I reject as a matter of Bermuda law the broad traverse that the loss claimed is irrecoverable because it is merely reflective of loss suffered by the Avicola reinsureds. On the facts of the present case the loss complained of by Lisa has always been (since the derivative claim was abandoned) alleged to be loss it has suffered separate and apart from the shareholders of the companies as a whole. Having regard to the fact that the Avicola companies are demonstrably under the control of those who are causing the damage complained of, Lisa must be entitled to seek direct relief even if it is theoretically open to it to compel the companies to take the requisite legal action on their behalf: *Johnson-v-Gore-Wood* [2002] 2 AC 1; *Giles-v-Rhind* [2002] EWCA Civ 142.

123. As far as Guatemalan law is concerned, for the reasons previously stated, I am satisfied that the tortious conduct complained of would be actionable against Leamington at the instance of Lisa under Article 1654 of the Civil Code. The position would likely be otherwise as regards AVSA where I found Mr. Ibarguen's evidence that shareholder claims are narrowly prescribed more persuasive.

124. It remains to consider the damages Lisa is entitled to recover for its tortious conspiracy claim and/or the compensation Lisa is entitled to recover for its constructive trust claims. It was agreed that Lisa's interest in the Avicola companies was one-third, taking its Villamorey interest into account. I summarily reject the submission that Lisa should be able to recover 50% of what the other two shareholding interests have received. I also reject the submission, if it was advanced as regards Leamington at all, that Lisa should be able to recover compensation for the executive incentive payments made. This claim would only not be double recovery if it relates to premiums paid in respect of the genuine Property Policies. I am not satisfied, having regard to all the evidence, that such payments (while admittedly unusual, according to Mr. Bailie) fall within the ambit of the Plaintiff's pleaded claims and were made in whole or in part either fraudulently or in breach of trust.

125. The loss has been analysed in two segments; firstly, the pre-1995 loss and secondly the post-1995 loss. Ms. Yip initially agreed that it appeared that Lisa was entitled to $1,900,085 in respect of the post-1995 period. Mr. Gardemal contended that this was understated by 43%, and Ms. Yip agreed that this figure was understated by 41%. Mr. Gardemal's figure was based on an estimate as he was unhappy to rely on Leamington's documentation alone, and some of the underlying premium documentation could not be found. His percentage was based on an entirely logical estimation process. I find that there is no reason to doubt the accuracy of the premium income reflected in Leamington's audited financial statements on which Ms. Yip relied, and accordingly the post-1995 loss of Lisa is

$1,900,085 plus $54,019.14 as Ms. Yip agreed in her oral evidence in respect of arrears owing for the pre-1995 period (including a cheque recently tendered by La Brana in this regard). Mr. Gardemal in his Scenario Y calculated Lisa's one-third share of the premiums paid under the Transportation Policies as $4,934, 515. But this covered premiums paid by both Poultry Companies and Mills. Scenario X was Poultry Companies only, and this was $2, 388,039, using a 43% figure which I have rejected in favour of Ms. Yip's 41%.

126. Leamington objected to the production of the June 17, 2008 Update Gardemal Report. I reject that objection as it is always possible for experts to update their evidence in the course of the trial, and the Update was designed to give notice of supplementary calculations. Schedule A to Lisa's FBPs, however, lists nineteen companies which form part of the Avicola Group for the purposes of Lisa's claim. It is Leamington's case that none of these companies are Mills companies. Apart from attempting to broaden the financial scope of a claim which has clearly been substantially reduced by Leamington's success in forcing Lisa to concede the Property Policies were valid reinsurance, it is difficult to comprehend this aspect of Lisa's compensation claim. None of the Mills companies appear in Schedule A to the FBPs, and accordingly they fall outside of the scope of Lisa's pleaded case on loss, generously and purposively read. I am unwilling in these circumstances to infer as against Leamington that Avicola premiums were used to fund the policies of these companies on the grounds that AVSA has failed to make full disclosure.

127. Lisa is entitled to recover these sums plus interest at the statutory rate of 7%. Mr. Hargun invited the Court to leave the parties to calculate the interest, and no submissions were made as to the precise date from which interest should or should not run. In principle, interest should run from the date the relevant premiums were received by Leamington until payment (or possibly until tender of payment.) I will hear argument on the question of interest if necessary.

Summary

128. All claims against AVSA are dismissed on the grounds that there was no sufficient evidence that it was a participant in the Leamington Fraud.

129. Lisa's claims in tort for conspiracy to defraud and the alternative constructive trust claims succeed as against Leamington. Lisa is entitled to recover the total sum of $1,954,104.14 plus pre- and post-judgment interest at the rate of seven per cent.

130. I will hear counsel as to costs and the computation of interest if required.

Dated this 5th day of September, 2008

KAWALEY J