
**Hilary Term**
[2015] UKPC 11
**Privy Council Appeal No 0072 of 2013**

# JUDGMENT

# Central Bank of Ecuador and others (Appellants) *v* Conticorp SA and others (Respondents) (The Bahamas)

## From the Court of Appeal of the Commonwealth of The Bahamas

**before**

**Lord Mance**
**Lord Clarke**
**Lord Sumption**
**Lord Carnwath**
**Lord Toulson**

## JUDGMENT DELIVERED BY LORD MANCE ON

## 23 March 2015

**Heard on 10, 11, 12 and 13 November 2014**

| *Appellants* | *Respondents* |
| --- | --- |
| Richard Salter QC | Julian Malins QC |
| Matthew Parker | Ruth Jordan |
| (Instructed by K&L Gates LLP) | (Instructed by Sheridans) |

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**LORD MANCE:**

***Outline***

1. The central issue on this appeal is the probity of three transactions entered into by the appellant, Interamerican Asset Management Fund Limited ("IAMF") incorporated and based in The Bahamas, in December 1995 and January and March 1996 with the first respondent, Conticorp SA ("Conticorp"), an Ecuadorian company. Conticorp was the owner of Grupo Financiero Conticorp SA ("GFC"), whose principal subsidiary was Banco Continental SA ("Banco Continental"), which in turn owned Banco Continental Overseas NV ("BCO Curacao"). GFC and Banco Continental were both also Ecuadorian companies, while BCO Curacao was a Netherlands Antilles company. The Board will call GFC and its subsidiaries "the GFC group". BCO Curacao had invested its assets heavily in equity participations in IAMF. Conticorp had other subsidiaries or related companies, not part of the GFC group, and the Board will refer to these as "Conticorp-related companies". The personal respondents were three of Conticorp's principal shareholding owners and officers. IAMF's case is that they and through them Conticorp controlled all IAMF's decisions and affairs, and that, although IAMF was presented to the world as an independent investment management fund, Mr Michael Taylor, its sole director and nominated investment adviser, was never more than an instrument executing the respondents' instructions.

2. IAMF's assets originated from funds raised by BCO Curacao from Ecuadorian depositors. Prior to the three transactions, the assets included portfolios of loans granted to Conticorp and Conticorp-related companies, cash and shareholdings, to a total face value of about USD 192m. By the three transactions IAMF transferred or surrendered such cash, portfolios and shareholdings to Conticorp. IAMF's case is that Conticorp gave IAMF in exchange under the first two transactions global depository receipts ("GDRs") representing shares in GFC and under the third simply shares in GFC, which were not or could not honestly have been thought to have value, or at least value in any way commensurate with that of the cash, loans and shares which IAMF was surrendering and the risks it was incurring by accepting the GDRs and shares in place of its previous assets.

3. The three transactions took place during a period of ever increasing financial difficulties affecting both Banco Continental and BCO Curacao. Very heavy withdrawals in November 1995 were followed by public

rumours of financial collapse in early December 1995. To meet the run on both banks, they were forced increasingly to rely on borrowings at stringent interest rates (c 50% per annum) from the Central Bank of Ecuador. Eventually, in March 1996, the Central Bank of Ecuador was obliged to rescue them by an extensive subordinated loan. This loan was accompanied by a transfer of control over GFC under a trust agreement, it was supplemented in 1996 by further lending and it was ultimately converted, following a default in repayment, into new equity, with all old equity being cancelled. In these circumstances, IAMF claims the whole value of the cash, loans and shares which it transferred to Conticorp, primarily on the basis that the respondents were, by bringing about the three transactions, all involved in dishonestly assisting breaches of trust by Mr Taylor in agreeing, on their instructions, the documentation by which the three transactions were implemented. The trial judge, Adderley J, and the Court of Appeal rejected IAMF's challenge to the probity of the transactions on a variety of grounds. For the reasons given in this judgment, the Board has reached a contrary conclusion and will humbly advise Her Majesty as summarised in para 176 below.

***The law***

4. In the light of the rejection of IAMF's case in both courts below, IAMF faces a heavy onus in seeking to persuade the Board to reach a conclusion that the respondents were guilty of a lack of probity. First, the Board will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances. The well-established position remains as stated in *Devi v Roy* [1946] AC 508, where the Board said:

> "(4.) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

> (5.) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.
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> (6.) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice."

5. Second, quite apart from the settled rule relating to concurrent findings, any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ: see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LJ, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325, para 46.

6. The Supreme Court of the United Kingdom recently re-emphasised the force of the second point in *McGraddie v McGraddie (AP)* [2013] UKSC 58, citing a well-known passage from Lord Thankerton's speech in *Thomas v Thomas* [1947] AC 484, 487-488:

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory

> conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

As the Supreme Court pointed out, the reasons justifying this approach are not limited to the fact that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. As mentioned by the United States Supreme Court in *Anderson v City of Bessemer* 470 US 564 (1985), 574-575, they include the considerations that

> "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the "main event" … rather than a "try-out on the road."

The considerations mentioned in this passage are of course of particular importance when considering whether permission to appeal should be given, in a context where that does not exist as of right. But, even when an appeal is before the Board, they serve as a reminder that the Board cannot be expected to devote unlimited resources to re-examining every aspect of the trial process.

7. Third, the need for caution is yet further heightened when an appellate court is invited to upset the decision of a trial judge exonerating a party of a want of probity. Such a decision "should not be displaced on appeal except on the clearest grounds": *Akerhielm v de Mare* [1959] AC 789, 806. The Board recently restated this point in *Mutual Holdings (Bermuda) Ltd v Diane Hendricks* [2013] UKPC 13, when it said:

> "28. An appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness. There are particular reasons for caution in a

> case like this. The allegation was one of fraud, which fell to be proved to the high standard on which the courts have always insisted, even in civil cases. The critical issues were (i) what was said at an informal and undocumented meeting eight years before the trial, and (ii) what the four personal defendants believed to be the exposure of the Hendricks and AMPAT to losses that penetrated through the stop loss layer. Any findings about these matters necessarily had to be based on the oral evidence of those defendants and of Mr Bossard and Mr Agnew. The judge had to assess their character, the honesty and candour of their evidence, and the quality of their recollection. As Lord Hoffmann observed in *Biogen Inc v Medeva plc* [1997] RPC 1, 45,
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> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

8. Fourth, these principles do not mean that an appellate court is never justified, indeed required, to intervene. They only concern appeals on fact, not issues of law. But they also assume that the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities. In this connection, a valuable coda to the above statements of principle is found in a passage from the judgment of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, 56-57. Robert Goff LJ noted that Lord Thankerton had said in *Thomas v Thomas* that:

> "It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, according to the individual case in question."

Robert Goff LJ then added this important practical note:

> "Furthermore it is implicit in the statement of Lord MacMillan in *Powell v Streatham Manor Nursing Home* at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth."

The Board considers that these points may have particular relevance where evidence is being given through an interpreter, especially if it appears that the interpretation is imperfect. As the respondents' own closing submissions before the judge said: "However good an interpreter …., meanings and subtleties are bound to be lost or misunderstood". In *The Ocean Frost* itself, Robert Goff LJ continued:

> "I have been driven to the conclusion that the judge did not pay sufficient regard to these matters in making his findings of fact in the present case."

On this basis, the Court of Appeal in *The Ocean Frost* took a different view from the trial judge. It found not only that a three-year charter was so extraordinary as to put one party (Armagas) on notice of the want of authority of Mr Magelssen, Mundogas's chartering manager, to enter into it, but more importantly it also held that various documents had been forged after the event to make it appear that Mundogas had known all along about the charter, and that the judge's acceptance of the evidence of Mr Johannesen, Armagas's agent, that Mundogas had been sent such documents and known about the charter could not stand in the light of the objective facts and probabilities. It relied in this connection on the extraordinary nature of the transaction itself, the inherent improbabilities

of Mr Johannesen's evidence and the difficulties of explaining his reactions after a dispute about the three-year charter had arisen.

9. It is common ground that whether the respondents procured or assisted in any breach of trust in a manner which the law will regard as dishonest must be assessed in the light of the conduct to which the respondents were party and their actual state of knowledge at the relevant times. But it also common ground that, if objectively no honest person would in that light have acted as they did, it is unnecessary to show that the respondents actually recognised that what they were doing was dishonest: *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, para 10. There, the Board affirmed the correctness of a judge's direction that:

> "… Dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1, [2003] 1 AC 469. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."

In short, a defendant must be conscious of those elements of the transaction which make his participation transgress ordinary standards of honest behaviour, but there is no requirement that he should have thought about what those standards were (*Barlow Clowes*, paras 15 and 16).

### *The three transactions*

10. Until December 1994 Banco Continental was directly owned as to 99.99% by Conticorp. Conticorp, together with Conticorp-related and other companies were owned or controlled by the Ortega Trujillo family, prominent in the Ecuadorian business world. The Ortega Trujillo family owned at all material times 51% or more of Conticorp. Core to the family

success, the judge found, were six Ortega brothers, all lawyers, among whom were the second, third and fourth respondents, Drs Leonidas, Luis and Jaime Ortega, and their sister, Snra Maria Carmen Ortega de Vélez, a banker. From December 1994 as a result of the new General Law on Institutions in the Financial System in Ecuador dated 12 May 1994 ("the General Law on Financial Institutions"), GFC was interposed as a wholly owned subsidiary of Conticorp, to hold the shares in Banco Continental, which was its principal asset. Dr Leonidas Ortega was executive president and Drs Luis and Jaime Ortega were directors of Conticorp. Dr Leonidas Ortega was also executive president of GFC and Banco Continental, while Dr Luis Ortega was executive president or managing director of BCO Curacao. Dr Jaime Ortega was active as a partner in the family law firm, Ortega Moreira & Ortega Trujillo SA.

11. In autumn 1995 25.48% of the share capital of Banco Continental was ostensibly placed with some 222 outside investors. Their subscriptions were payable in two instalments (each of about USD 22m) on 30 December 1995 and 28 March 1996. In the event, their subscriptions were supported by loans, the funding or securing of which was to a significant extent facilitated by arrangements in which Banco Continental and BCO Curacao were involved. In the case of the first instalment, these loans were then taken over by IAMF as part of its loan portfolio. In the case of the second instalment, payment of which was in the event accelerated to 31 January 1996, the effect of the arrangements was that the loans were from the outset in IAMF's name. In May 1996 the supervisory authorities investigated and insisted on the reversal of the capitalisation on the grounds that it had involved Banco Continental and/or BCO Curacao giving financial support for the purchase of Banco Continental's own shares in breach of article 128(b) of the General Law on Financial Institutions.

12. BCO Curacao was, it appears, owned directly by GFC from 3 July 1995 but became a wholly owned subsidiary of Banco Continental as from 15 November 1995. In addition to Dr Luis Ortega as its executive president or managing director, Mr Henrik Schutte was also managing director. BCO Curacao was incorporated in the Netherlands Antilles and regulated by that territory's Central Bank, the Bank van de Nederlandse Antillen ("BNA"). It had its own management, carried on dollar-denominated business from separate counters in Banco Continental's branches in Ecuador and was used by Ecuadorians for offshore investment. Under article 64 of the General Law on Financial Institutions Banco Continental was ultimately responsible for ensuring that BCO Curacao had the funds to meet its commitments.

13. IAMF was established on 21 April 1995 as a fund, with an information memorandum stating that its aim was to provide investors with professional and dynamic management of a mixed portfolio in order to optimise total returns whilst preserving capital and that, initially, the portfolio would consist of debts, loans and obligations of Ecuadorian companies. Investors were to receive participating shares. The net asset value of their shares was to be determined monthly by reference to the market value of its assets, and shares were redeemable at net asset value. BCO Curacao was named as custodian of its assets. In short, it was in appearance an offshore mutual fund, open to any investor. In the event, however, its only assets came from or through BCO Curacao in return for equity participations, and, so far as appears, it never had any real presence on the open market. Its managing shares were at all material times held in the name of Ark Ltd, a nominee company of Ansbacher, the Bahamian branch of an international merchant bank. The Board can refer to Ark and Ansbacher compendiously as Ansbacher. Ansbacher in turn held them as nominee for interests associated with the respondents. IAMF's "ultimate parent company" was thus, according to the respondents' written case, Conticorp, though at trial IAMF was described as owned by nominee companies on behalf of Conticorp shareholders, ie the Ortega family. Which is correct is, in the Board's view, immaterial. Ansbacher was named as IAMF's administrator and Mr Michael Taylor, a Bahamian accountant, as IAMF's sole director and investment adviser. As will appear, IAMF has at various stages been attributed with a greater or lesser degree of independence from the respondents, which the Board concludes on all the evidence that it did not in reality possess. Mr Taylor was paid 2500 Bahamian dollars a year for his services, and was, by letter dated 5 July 1995 notified by Dr Luis Ortega of the five individuals who were authorised "to give full instructions" to him "regarding the operation" of IAMF. They were Dr Luis Ortega himself, Dr Jaime Ortega and Mr Baquerizo, together with Mr Xavier Santillan and Mr Martin Costa of PanAmerican Services PAF SA ("PanAmerican"), a company owned indirectly by the Ortega brothers. Ansbacher was paid an annual fee of USD 50,000 and annual expenses of about the same amount. As Dr Luis Ortega confirmed, Ansbacher never gave any advice in relation to the transactions, instructions for which they simply received from Ecuador for communication to Mr Taylor as contemplated by the letter of 5 July 1995.

14. The loans to Conticorp and Conticorp-related companies which IAMF held prior to the three transactions originated as stated in paragraph 2 in funds received by BCO Curacao from Ecuadorian depositors under so-called "memorandum accounts". In 1994, the BNA introduced new regulations which restricted related-party lending by banks incorporated in the Netherlands Antilles to 20% of their equity. BCO Curacao had as a

result to take steps to present a balance sheet eliminating or showing substantially reduced related-party lending. Two transfers ultimately took place. First, in September and December 1994 BCO Curacao's loan portfolio was transferred to Banco Continental Overseas (Bahamas) Ltd ("BCO Bahamas"), a Bahamian company owned and controlled by the Ortega family. BCO Bahamas issued in return "obligation certificates" representing a liability to pay BCO Curacao the corresponding amounts plus interest. Then, on 21 April 1995 IAMF was incorporated in The Bahamas and the loan portfolio was transferred to it by BCO Bahamas, under arrangements which gave BCO Curacao 114,203,759 share participations in IAMF and cancelled the obligation certificates issued by BCO Bahamas. At the same time, it was resolved (as evidenced by a memorandum dated 23 June 1995 headed "Accounting framework for BCO and procedure to be used" and addressed by Xavier Santillan as manager of BCO Curacao to Dr Luis Ortega and Mr Baquerizo, that the memorandum accounts should no longer be treated as liabilities of BCO Curacao, but as direct investments by depositors with IAMF, and so be at such depositors' risk and expense. This decision was reflected in the 1995 accounts of BCO Curacao and IAMF, prepared in early 1996. However, as soon as this accounting approach came to the attention of the Superintendent of Banks, Dr Intriago, in January 1996, he recommended, and the Monetary Board then on 30 January 1996 ordered, that it be reversed, on the grounds that it did not reflect a correct analysis of the position.

15. The three transactions involved agreements by IAMF to sell the bulk of its loan portfolios and shares to Conticorp, with options for Conticorp to pay by delivering GDRs to equivalent assigned values. GDRs are a means of making shares more marketable internationally. An institution is engaged to hold a company's shares and to issue GDRs guaranteeing title therein to purchasers. In the present case, Conticorp engaged Bankers Trust on or about 28 September 1995 to act and issue GDRs, to the extent of 167,000 GFC shares, out of a total of 400,000 shares (reduced in, it appears, early 1996 to 371,000 shares) in issue by GFC.

16. The first transaction in December 1995 and the second in January 1996 involved loans to total face values with accrued interest of respectively USD 51,128,812.46 and USD 42,527,174.70. In each case, the sale was ostensibly for cash, but in each case there was a parallel agreement by which Conticorp agreed to sell IAMF GDRs reflecting entitlement to respectively 115,752 and 51,248 shares in GFC on which values were put of respectively USD 55,595,685.60 (so valuing each GFC share at USD 480.30) and USD 39,387,000 (valuing each GFC share at USD 768.56). In each case, the cheques delivered in ostensible payment for the GDRs were simply endorsed back to pay for the transfer of the loan portfolios.

In the case of the first transaction, IAMF further transferred USD 4,466,873.14 to meet the difference between the face value of the loans and the value put on the GDRs received in return.

17. The third transaction in March 1996 had two parts. By the first IAMF agreed to sell to Conticorp loans with a face value of USD 45,265,660 plus accrued interest, in return for payment of USD 46,202,807.20, which Conticorp had an option to pay through delivery of GDRs representing 76,695 shares in GFC. By the second IAMF and Conticorp agreed a set-off of various debts, resulting in a net payment due from Conticorp to IAMF of USD 9,658,576, and IAMF agreed to sell shares in several property companies to Conticorp for USD 37,969,273.56, making a total payment due from Conticorp of USD 47,627,850, which Conticorp had the option of paying either in cash or by delivery of GDRs representing 79,060 shares in GFC, to which that value was assigned. The assigned value of GFC shares under each part of the third transaction was therefore USD 602.43 per share.

18. Throughout the period November 1995 to March 1996 Banco Continental and BCO Curacao were as stated in para 3 above experiencing increasingly severe financial difficulties. Ultimately, on 20 March 1996 Banco Continental had to enter into a subordinated loan agreement under which it borrowed USD 166m from the Central Bank of Ecuador, to be capitalised if not repaid within one year, while Conticorp on 23 March 1996 entered into a trust agreement, under which the Central Bank of Ecuador was put in possession of the GDRs and other shares in GFC and Banco Continental for the duration of the loan. Since the loan was not repaid, it was capitalised and the shares of all existing shareholders in GFC and Banco Continental were cancelled in 1997.

19. The third transaction would have involved the issue, which never occurred, of further GDRs representing a total of 155,755 GFC shares over and above the original GDRs representing 167,000 GFC shares delivered under the first two transactions. It is common ground that the loan portfolio and shares were transferred to Conticorp under the third transaction. The respondents' case is also that Conticorp performed its side of the third transaction by holding 155,755 GFC shares, and delivering these to the Central Bank under the trust agreement, on behalf of IAMF, and that Conticorp had and has therefore no further potential obligations to IAMF. The litigation has been conducted on the basis that Conticorp completed the third transaction by delivering GFC shares and the Board is content to proceed on the same basis.

***The litigation to date***

20. The case was pursued below on a substantially more wide-ranging basis than that now before the Board. This considerably complicated the judge's task (just as Robert Goff LJ noted that a similar problem had done in *The Ocean Frost*, p 64(2)). It may well in the present case explain a lack of focus below on points important to any judgment about the probity of the three transactions. In both courts below, there were additional claims by additional parties, including the Central Bank itself, Banco Continental and BCO Curacao, and, at least at the outset, claims against additional defendants, including Ansbacher, as well as additional heads of claim. None of such additional claims survives or is now pursued. But it is also true that, from the outset in 1996 when the collapse of Banco Continental was first investigated, the three transactions on which this appeal focuses were identified as problematic and were alleged by the Ecuadorian authorities to have been irregular.

21. IAMF's current case has always been and is, in essence, that all three transactions were agreed in disregard of IAMF's interests, and for the benefit of Conticorp and Conticorp-related companies, whose debts were being in effect largely forgiven, and through them for the benefit of the respondents. The primary basis in law on which the case is advanced is, as stated, that Mr Taylor of IAMF was in breach of fiduciary duty in agreeing the three transactions, in that he simply followed instructions given him by the respondents through Ansbacher without further thought, and that the respondents dishonestly procured or assisted in that breach. Further or alternatively, IAMF asserts that the respondents were and are liable in deceit and/or conspiracy. But, in submissions before the Board, IAMF focused its case on the allegations of dishonest procurement or assistance, no doubt for good reason, and the Board will do the same.

22. After a trial taking place over some 42 days, between 18 January and 1 April 2010, the judge, Adderley J, issued a judgment extending to 333 paragraphs with commendable speed on 3 June 2010. Under cover of a letter dated 20 July 2010 he later issued a slightly altered version which he explained as being to correct "slips/mistakes which came to the Judge's attention and ... to supersede and replace the previous copy". The respondents say that they did not receive the latter version, and before the Court of Appeal only the former was relied upon and referred to in that Court's judgment. The respondents submit that the changes go beyond the correction of "slips/mistakes", and that reference should be made only to the original version. Helpfully, the Board has been provided with a schedule comparing the later with the original version, which include the insertion of a new paragraph numbered 279 and the deletion of an original

paragraph 315, resulting in a difference in numbering between those two paragraphs. The Board is satisfied that differences are not, either individually or collectively, decisive of the issues on this appeal.

23. By his judgment Adderley J dismissed all the claims made by the plaintiffs, including IAMF, as well as a counterclaim which had been made by the respondents against the Central Bank and which is no longer pursued. After a seven-day hearing, in November 2011, the Court of Appeal on 22 November 2011 dismissed the plaintiffs' appeals in a 97 paragraph judgment, which drew extensively on, but in certain respects went further than, the judge's findings and conclusions. Against the dismissal of its appeal, IAMF now appeals to the Board.

24. The judge, after outlining the nature of and background to the issues which he had to decide turned to the law in para 111 onwards. He identified the burden of proof on the plaintiffs and directed himself that "the more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established" and that "the more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it" – quotations from respectively Lord Nicholls in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] QB, 586 563 and Ungoed-Thomas J in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455.

25. The judge then in paras 119 to 132 considered the causes of action on which the plaintiffs relied: dishonest assistance, deceit, conspiracy and breach of statutory duty under the Fraudulent Dispositions Act 1991 (the last of no potential relevance before the Board). The claim in dishonest assistance depended, he noted, on two relevant aspects in relation to IAMF: first, its director, Mr Taylor, must have acted in breach of fiduciary duty, and, second, the defendants must dishonestly have assisted him in so doing. On that basis, the judge examined Mr Taylor's duties as director. He assimilated them to those accepted in England: in short, a director must act bona fide in the best interests of the company; he must positively apply his mind to the question what the company's interests are; he must exercise independent judgment and not fetter his discretion; and a nominee director is in no different position. In the last connection, he cited Lord Denning's statement in *Boulting v Association of Cinematograph et al* [1963] 2 QB 606, 626-627, that there is nothing wrong with a director being nominated by a shareholder to represent his interests:

> "… so long as the director is left free to exercise his best judgment in the interests of the company which he serves.

> But if he is put upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful …."

He also cited Ungoed-Thomas J's conclusion in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1577-1578 that a director "who acts without exercising any discretion, at the direction of a stranger to the company [is] fixed with the stranger's knowledge of the nature of the transaction."

26. As to the requirement that the defendants must dishonestly have procured or assisted any breach of fiduciary duty, the judge correctly directed himself by reference to the principles in *Barlow Clowes*, to which the Board has already referred in para 9 above. The judge then proceeded to outline the principles governing liability in tort for deceit and conspiracy, in terms which the Board need not summarise.

27. On this basis, and after dealing with other issues no longer directly relevant, the judge addressed the probity of the three transactions in paras 235 onwards in his judgment. In paras 235 to 247, he considered a central plank of the respondents' defence, namely "that the transactions complained of formed part of a plan to convert debt in Banco Continental and BCO Curacao to equity using the GDRs as a vehicle". This was a plan which the respondents alleged was approved by the Ecuadorian authorities in particular Dr Intriago, who was the Superintendent of Banks from 23 October 1995. The judge concluded this section of his judgment by finding as follows:

> "246 ... Even though they [Dr Leonidas Ortega and Dr Intriago] might not have agreed on the minute details of how the plan would be effected, I find on a balance of probability that there was a plan agreed between them on what to do, and that the defendants were in the process of carrying out that plan by the transactions complained of. At least the defendants honestly and reasonably believed that such a plan had been agreed.
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> 247. Insofar as the defendants claim that the whole plan originated with Dr Intriago, I was not persuaded that they were telling the truth. Clearly as pleaded in paragraph 22 of the re-amended defence and counterclaim [Dr Leonidas Ortega] approached Dr Intriago to agree a plan. …."

28. In the next section of his judgment, headed "the GDR Program", the judge continued:

> "248. So, although I find that Dr Intriago sanctioned the plan some aspects of it were advanced by the time he agreed. …"

The judge then examined "the genesis of Conticorp's GDR Program", which he connected with a memorandum dated 15 August 1994, proposing transfer of debts held by BCO Curacao "to a mutual fund to be constituted in The Bahamas". The judge went on:

> "The idea was to convert these debts into equity by the use of the facility of the GDR thereby eliminating loan interest going forward" (para 248).

The Board will have to consider whether the judge had any basis for the connection which he evidently made between the GDR programme and one or both of the transfers (from BCO Curacao to BCO Bahamas and from the latter to IAMF) mentioned in para 14 above or between the GDR programme as originally conceived and the conversion of "debt to equity".

29. In the same section of his judgment, the judge recited some aspects of the evidence of Drs Leonidas, Luis and Jaime Ortega. He recorded that it had been put that Banco Continental had no value and that "the GDR debt-equity plan was fraudulent … because it had no apparent commercial purpose". He noted that, prior to the first transaction, there had been a Conticorp board meeting on 21 December 1995 (attended by the respondents and other Ortega family members as well as some others) at which "Conticorp agreed to the valuation of the GFC shares to be acquired by IAMF" by a majority "after a long discussion on the calculations and values of the companies that make up the [GFC] …". The judge added that:

> "No evidence was tendered to show that the majority decision of the board was not *bona fide*." (para 253)

30. He went on to record that the position of the management of Banco Continental was that the bank had value at the time of issue of the GDRs, that there had been evidence to the effect that IAMF was "the last step in

the program by which loans would be converted to equity" and that "the GDR was created as an instrument to do what they had planned, as this would allow investors to easily trade in the GDRs without the need for there to be any transfer in the underlying ownership of the shares in GFC" (para 256).

31. In paras 261-263, the judge described the three transactions, and in paras 264-267 he reached two significant conclusions. First, he had no doubt, on the authorities, that Mr Taylor was in breach of his statutory and fiduciary duty role in relation to the three transactions – it mattered not "that his remuneration was USD 2500 per annum and that he was a nominee director for many other IBCs as was the usual practice in the industry". Second, Mr Taylor, called to give evidence at the plaintiffs' behest, had said that he had relied on Ansbacher, and in particular on a Mr Cole, in agreeing and signing the documents to give effect to the three transactions. The judge saw this evidence as

> "an admission by the plaintiffs that Mr Taylor relied on the representations of Mr Cole and Ansbacher rather than on the representations of the defendants" (para 267).

The Board notes, in passing, that the fact that a witness called by one party gives certain evidence does not make that evidence an "admission" by that party. But the more important question is the effect of a conclusion that Mr Taylor relied on Ansbacher, to which the Board will return.

32. The judge next listed in para 269 what he described as "the primary reasons" for which IAMF had submitted that the three transactions were fraudulent:

> "(1) There was a conflict of interest for the defendants because they were managing the investors' funds through BCO Curacao while at the same time selling their GFC shares to them.
>
> (2) [Dr Luis Ortega] had sent the documents to Taylor to sign but had never explained the program to him.
>
> (3) Because of the liquidity crisis of the bank no one would honestly have believed that it was in IAMF's best interest to purchase the GDRs.

(4) There was no negotiation on the price and the price was too high having regard to the state of Banco Continental GFC's, its primary asset.

(5) [Dr Leonidas Ortega] had admitted there was no immediate market for the GDRs.

(6) The program was reportedly to encourage foreign investors but there were none at the time so it was unnecessary to use the GDRs.

(7) The cheques sent to Banker's Trust with the contracts ostensibly for cash payment when insufficient funds were in the bank account was a fraud on Banker's Trust because the defendants always intended to use their option to pay in GDRs, not cash.

(8) If the transactions were according to the alleged debt/equity swop plan it should have been postponed in the circumstances.

(9) The January 1996 transactions were fraudulent because of all of the above and also that the price per GDR increased from US$480 to US$769 per share for no good reason.

(10) This jump in price made the quoted price in the December 1995 GDR Information Memorandum a misrepresentation.

(11) The March 1996 transactions ($82.4m) were fraudulent because

> (i) [Dr Leonidas Ortega] misled Mr de Ia Torre by his letter dated 17 June 1996 in which he confirmed he was completing delivery of 115,755 shares in GFC by Conticorp to the Trust. In fact he had to deliver shares in GFC directly instead of GDRs and had sought the agreement of IAMF on 3 April, 1996, after the Central Bank had taken over, by a letter backdated to 7 March to obtain IAMF's agreement

> through Mr Taylor to be paid for its loans directly in GFC shares instead of GDRs.
>
> (ii) GDRs were sold at a price of US$602 per share in GFC with no apparent justification and no negotiations except by Pan American Services an allegedly Ortega controlled company.
>
> (12) Although other smaller loans were left with IAMF all of the loans owned by Conticorp to IAMF were released."

(In sub-paras (2), (5) and (11(i)), the Board has inserted in brackets references to Drs Luis and Leonidas Ortega which reflect the evidence and documents, and correct the judge's used incorrect acronyms to identify the individuals concerned.)

33. The judge recited in para 270 that the respondents' explanation was that "these agreements were necessary in order for Conticorp to give control over Banco Continental to the Central Bank in accordance with their agreement", and in para 271 that Dr Intriago had admitted that "he may have made it clear that he wanted supervisory control over the entire Banco Continental Group". However, he did not anywhere in his judgment analyse the rival submissions set out in paras 269-271 or the evidence bearing on them, or at this stage express even the most general conclusions on the issue of probity to which they were directed.

34. Instead, in the next section of his judgment, headed Valuation of the GDRs, paras 272-282, the judge turned to a subject which he evidently regarded as by itself potentially dispositive of the case. He commenced this section with the words:

> "272. It seems to me central to the claim of fraud that the GDRs were worthless and that this was a fact known to each of the defendants when Conticorp exchanged its debts for GDRs. If the GDRs were valuable or on the facts known to them reasonably believed to be valuable by the defendants it seems to me that he substratum of the claim of fraud falls away. In the former case the plaintiffs will have failed to prove loss and damage. In the latter case it would also mean that even if the defendants had made a representation to Mr Taylor they would have believed it was true and fraud would not have been proved."

35. On this basis, the judge in this section of his judgment examined the rival experts' opinions of Mr Croft called for IAMF and Mr Abboud called for the respondents. He stated in para 281 that the experts' evidence showed "the difficulty of deciding on the value of the GDRs at the time the transactions were taking place" – transactions which he said "were occurring in an atmosphere of extreme urgency". He concluded that it could not be said on the evidence that the respondents "knew that they were valueless, especially since they had reason to believe that the Central Bank would continue to provide funding until they passed what they considered a temporary crisis" (para 281). He ended this section of his judgment with the conclusion:

> "I find that the defendants honestly believed that the GDRs had value and were not worthless as pleaded by the plaintiffs." (para 282)

36. In the next section of his judgment, headed Summary, paras 283-291 (original) or 282-290 (revised), the judge further summarised the rival cases, before proceeding to a final section headed Ruling, para 291 (or 290) onwards, in the course of which he addressed the significance of IAMF's abandonment (on the penultimate day of the hearing) of any case based on piercing the corporate veil (paras 295-296 or 294-295), the claim in deceit (paras 297-299 or 296-298), the claim based on dishonest assistance (paras 300-304 or 299-303) and conspiracy (paras 305-309 or 304-308). Paras 310-318 (or 310-318) and 321-330 deal with claims and the counter-claim which are no longer relevant. In paras 319-320 the judge added to his previous findings exonerating the respondents the observation that in his view their conduct before, during and after the take-over by the Central Bank did

> "not appear to be the actions of fraudulent men. The constant efforts of the defendants especially [Dr Leonidas Ortega] appeared to be directed at trying to save the Bank during admittedly a serious economic and financial crisis …."

37. In relation to the plaintiffs' abandonment of any case based on piercing the corporate veil, the judge saw the consequence as being (paras 35 and 41)

> "to abandon their claim that the Ortegas effectively controlled the various companies in question including

> IAMF, BCO Curacao and Banco Continental, and to accept the principle in *Salomon v Salomon* that each company had its own board of directors who controlled their property and made their own independent decisions in the interests of their various companies"

The judge related this conclusion to two specific heads of claim which referred expressly to lifting the corporate veil (D2 and D5), and not to the more generally formulated claims about the transactions. But it seems that he may also have seen it as having some wider implications on the basis that an ability to lift the corporate veil was an "underlying assumption" behind evidence adduced by the plaintiffs from Dr Intriago and other regulators about the respondents' failure to disclose that IAMF and BCO Curacao were not independent and that they effectively controlled it. Mr Richard Salter QC for the plaintiffs had submitted in this connection that the respondents had exercised de facto control over IAMF and BCO Curacao in similar fashion to that which a shadow director or puppet master might exercise. The judge's response was that the shadow director was a creature of United Kingdom and certain other Commonwealth jurisdictions, but as yet unborn in The Bahamas.

38. In relation to the claim in deceit, the judge amplified his previous conclusions that Mr Taylor had acted as a mere functionary, relying entirely on Ansbacher and appearing to lack "the information or resources necessary to carry out any serious analysis of the transactions", involving companies of which he was in charge but about the detailed operations of which he "knew very little", and so that he was in the judge's view someone who "could not know of the elements of the transactions which make it dishonest according to ordinary standards following the test in *Barlow Clowes*" (para 298). Since the focus of the present appeal is on dishonest assistance, the Board need not comment on, but should not be taken as affirming, the judge's apparent importation of the test stated in *Barlow Clowes* into the tort of deceit. The judge went on to find that, in the absence of any evidence from Ansbacher, "there is not sufficient evidence of what was Ansbacher's state of knowledge about the transactions" and it was "therefore impossible to say that in making the implied representation to Mr Taylor Ansbacher did not believe in the truth of it" (para 298).

39. Addressing the claim for dishonest assistance, the judge again rejected a submission by the respondents that the standard to be expected of a director such as Mr Taylor, who is "paid a paltry sum … and performs rudimentary services to 50 or more IBCs in offshore jurisdictions" should be limited to not allowing "one knowingly to do something illegal or

fraudulent", noting that "a varying standard for offshore jurisdictions in today's current environment could be a double edged sword" (para 300). He repeated his conclusion that Mr Taylor was in breach of a duty of care to IAMF. But he found that "the material assistance was by Ansbacher and it is impossible to determine if that assistance was dishonest" (para 302).

40. Importantly, he continued (para 303):

> "I further find that the assistance, if any, rendered by the defendants was not dishonest; it was a *bona fide* attempt to carry out the debt/equity plan. In any event I do not think that the requests given under the authority of the Instruction Letter "*… put [Taylor] upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron ...."* within the meaning of the nominee director referred to by Lord Denning in *Boulting v Association of Cinematograph et al* [1963] 2 QB 606, at p 626."

41. Before the Court of Appeal the claim under the Fraudulent Dispositions Act 1991 fell away, leaving only the claims for dishonest assistance, deceit and conspiracy. The Court of Appeal dismissed the appeal in respect of all these claims on various grounds. Its primary ground was that "the finding of the learned judge that Mr Taylor was in breach of his fiduciary duty as director was plainly wrong" (para 53). It gave two reasons:

i) With regard to the judge's finding that Mr Taylor was in breach because he did not independently apply his mind to IAMF's interests, the Court of Appeal asked rhetorically "what in the circumstances was in the interest of IAMF, and how would Mr Taylor have discovered what that was?" (para 46). The Court went on to say that:

> "if, as found by the learned judge, Mr Taylor acted in accordance with the respondents' instructions via Ansbacher [sic] without using any independent judgment and must therefore be fixed with their knowledge of the nature of the transactions in accordance with the principle in *Selangor Rubber* …. and, if as the learned judge found, the

> respondents were not dishonest and procured the transactions to save the bank during a "serious economic and financial crisis" …" (para 320), and, if, as he found, it was impossible to say that Ansbacher was dishonest, the question is whether he could reasonably have concluded that Mr Taylor was in breach of his duty to act in good faith in the interests of the company? We think not." (para 49).

ii) There was "no evidence of the full valuation of the loans" which IAMF bought or subsequently transferred to Conticorp, and

> "It is impossible therefore to say what, if anything, IAMF lost as a result of the GDR transactions. Further, there are no creditors, depositors or investors of IAMF who claim or can claim a loss as a result of the GDR transactions" (para 52).

42. The Court of Appeal nonetheless went on, in case it was incorrect on its primary ground, to consider other issues raised before it. First, as to the claim that the respondents could not honestly have been looking after the interests of IAMF and the depositors in Banco Continental and BCO Curacao, the Court said that:

i) in so far as it was asserted that the respondents could not honestly have believed in their predictions of Banco Continental's value and profitability "which inflated the value of the GDRs", that these predictions were done "substantially before" the onset of the financial crisis" (para 59);

ii) in so far as it was asserted that the respondents were dishonest because the transactions stripped a group tottering on insolvency of nearly USD 192m in assets and handed them to a company they owned and controlled, "there was absolutely no evidence before the learned judge that USD 192m or any other amount for that matter was stripped from IAMF" (para 60);

iii) in so far as it was argued that the respondents could not have been honest unless they genuinely believed that the GDRs were worth as much as IAMF paid for them, the plaintiffs had not pleaded or argued this case before the judge, before whom their case was that

the respondents "knew the GDRs were 'worthless', 'valueless' or 'of little or no value'" (paras 61 and 64 to 67);

iv) all that the judge was required to determine was "whether the respondents honestly believed the GDRs had value" (para 62), which he found (in his paras 281 and 308) that they had (para 69);

v) it would take the Court no further to value the GDRs, "in as much as there is no evidence of the value of the portfolio of loans transferred to IAMF and subsequently to Conticorp" (para 63);

vi) a finding that the respondents did not honestly believe the GDRs were worth as much as IAMF paid for them "would, in any event, be wholly inconsistent with dishonesty on the part of the respondents. Surely, dishonesty cannot be reasonably inferred simply because a purchaser is astute enough to negotiate a discount and succeed in obtaining a bargain" (para 68);

vii) in the light of the judge's findings regarding the existence of "a plan to convert debts into equity by using GDRs, … agreed by Dr Intriago, albeit after the plan was already in progress" (para 75), and after reviewing the evidence, the Court rejected the submission that the GDR programme, although originally legitimate, was used ultimately "for a different purpose than originally planned, namely to enrich [the respondents] to the detriment of IAMF" (para 77) and concluded:

(1) "… we support his finding that the loans were transferred to IAMF and subsequently removed from IAMF in a debt/equity swap in a bona fide attempt to carry out the plan devised by them and to take the related loans off the books, reduce the exposure of BCO Curacao, to obtain outside capital, and to ultimately save the bank" (para 78).

(2) there was "no evidence of what is an essential element of dishonesty, namely, an intention to bring about a loss to IAMF, and gain for themselves" (para 79), in which connection the Court also referred to para 320 of the judge's judgment.

43. The Court of Appeal gave as a further reason for dismissing the appeal that:

> "… it seems to us that following the appellants' abandonment, in the Court below, of their claim to pierce the corporate veil of BCO Curacao, BCO Bahamas, IAMF, and Conticorp, the learned judge could not reasonably find the respondents personally liable in as much as the GDR transactions were executed as authorised by the shareholders of legal entities capable of entering into such transactions (see *Saloman v Saloman* [1897] AC 22)." (para 95).

The respondents submit (case para 205) that the Court of Appeal was not here limiting itself to the two heads of claim identified by the judge, and that it was correct not to do so.

44. The Court of Appeal concluded by describing the appellants' case as from the beginning "all smoke and mirrors".

***Analysis of the judgments below***

*(i) The difference between the judge and Court of Appeal as to whether Mr Taylor was in breach of fiduciary duty:*

45. The Board has the following observations on the judgments below. In relation to Mr Taylor, the judge and Court of Appeal took different views. The judge was, the Board considers, clearly correct in his view of the duty of a nominee director in The Bahamas, as summarised by the Board in para 25 above, and in his conclusion that Mr Taylor was in breach of fiduciary duty (paras 25, 31 and 38 above). A nominee director is not entitled to forego, or surrender to another, any exercise of his discretion, however paltry the amount he may be paid. Under the International Business Companies Act, section 55, a director must "act honestly and in good faith with a view to the best interests of the company", and must also "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". So far as appears, Mr Taylor did nothing presently material except comply with instructions (see paras 31 and 38 above), and the judge found that he lacked any information or resources to be able to do anything more (para 38 above).

46. The Court of Appeal's contrary conclusion, that Mr Taylor was not in breach of any fiduciary duty, was based on reasoning which the Board has summarised in para 41 above, but which is, in the Board's view, plainly unsupportable. First, Mr Taylor was in breach of duty in giving effect, blindly and ignorantly, to others' instructions, and this was so whether or not he was, in the event, fortunate enough to receive only instructions which were in IAMF's best interests. It was his duty to understand IAMF's affairs and to apply his own mind to IAMF's interests. Second, it is equally irrelevant to a conclusion that Mr Taylor was in breach of duty as director whether loss was caused thereby to IAMF. The existence of loss goes not to the question whether there was a breach of duty, but to whether it can lead to any relevant relief.

*(ii) Ansbacher's role:*

47. The Board's second observation goes to the judge's associated finding that Mr Taylor relied on the representations of Ansbacher and not of the respondents (para 31 above) and that any material assistance was by Ansbacher (para 39 above). On this the Court of Appeal appears to have taken a different view from, although one which it also attributed to, the judge, namely that "Mr Taylor acted in accordance with the respondents' instructions via Ansbacher" (see para 41(i) above). The Board has no doubt that, despite its misattribution to the judge, the Court of Appeal's description as to events is realistic and accurate. It accords with the letter dated 5 July 1995 to which the Board has referred in para 13 above, as well as with all the evidence as to the origin and execution of all transactions entered into by IAMF about which there is documentary and oral evidence in this case. It is correct that the plaintiffs originally also claimed against Ansbacher in fraud. But the abandonment of that case before trial does not involve acceptance of the proposition that Ansbacher reviewed and approved the transactions and their implications in any meaningful sense, even if that had been material, or that Ansbacher did anything presently material other than pass on the instructions to Mr Taylor for him to implement. The absence of any evidence from Ansbacher also means in this connection that there is nothing to rebut the natural inference from all the other available material that the instructions which it gave Mr Taylor were in fact the direct product of decisions taken in Ecuador.

48. The Board notes at this point that the respondents now advance two further arguments, which related to Ansbacher, but were not addressed or accepted by either court below. The first is, in effect, that it was open to Ansbacher as sole nominee shareholder to authorise any action by Mr Taylor so long as it was not *ultra vires* IAMF or an unlawful distribution

to shareholders. The argument is untenable. As indicated in para 13 above, IAMF was a mutual investment fund set up to hold assets for its shareholder investors - whether they are viewed at the material times as BCO Curacao itself or the members of the Ecuadorian public placing money with BCO Curacao. Any suggestion that those holding management shares in IAMF could do what they wanted with its assets, to the deprivation or obvious detriment of those holding equity participations, is obviously unsustainable.

49. The second argument is that the authorisation to Mr Taylor to act on Ansbacher's and/or the respondents' instructions constituted a unanimous shareholders' agreement, restricting his power to manage IAMF's affairs within the meaning of section 41 of the International Business Companies Law of The Bahamas. But, as Dr Luis Ortega himself accepted in evidence, the letter dated 5 July 1995 which he wrote to Mr Taylor cannot and should not be read as having the effect in law of binding Mr Taylor to give effect to any instructions that he did not consider to be in IAMF's interests. Further, if it had done, the consequence would simply have been, under section 41(2), to impose directly on the respondents imposing such a restriction "all the rights, powers and duties", and "all the liabilities" of a director of IAMF to the extent that the agreement did restrict Mr Taylor's discretion or powers. So those respondents would have been under the more onerous duties of directors, rather than potentially liable for assisting Mr Taylor's breaches.

*(iii) Piercing the corporate veil and shadow directors:*

50. Third, both the judge and the Court of Appeal attached, in relation to the claim for dishonest assistance against the personal respondents, some significance to the fact that the plaintiffs had abandoned any case based on piercing the corporate veil (paras 35 and 41 above). The judge confined the direct effect of this conclusion to two specific claims, but appears to have thought that it affected the plaintiffs' case based on non-disclosure by the respondents of their controlling interest in IAMF. The Court of Appeal seems to have regarded it, correctly the respondents submit, as fatal to any claims against the respondents. The individual respondents' case is that they were each at all times acting, and acting only, as officers of Conticorp (written case para 196). But whether an individual has dishonestly assisted a breach of duty by a director of another company or has de facto control of that company has nothing to do with circumstances in which the corporate veil may in law be pierced. Nor does it depend, as it seems that the judge may have thought, upon whether or not the concept of a shadow director has yet been recognised as relevant in company law in The Bahamas (see para 37 above) or upon whether the person allegedly

assisting had bound the person whose breach was being assisted to act as he did (para 40 above). Acting as an officer of one company, a person may dishonestly procure or assist a breach of duty by the director of another company, in which case such person may make liable for dishonest assistance both himself personally and the company of which he is an officer. Otherwise, individuals acting as officers of a company could never commit any wrong, tortious or equitable. What matters in the present context are, in short, the factual questions whether the respondents procured or assisted Mr Taylor's breaches of duty, what knowledge they had when giving such assistance, and whether any honest person(s) in their position giving such assistance with that knowledge could have believed that the relevant transaction was in IAMF's interests.

*(iv) The issue about the value of the GDRs:*

51. Fourth, the judge considered that any claim failed because IAMF had not established that the GDRs were known by the respondents to be valueless or worthless - words used by the judge in expressing his conclusions (paras 34-35 above), although at the outset of his judgment in para 6 he had referred to the plaintiffs' case as being that the GDRs had "little or no value". The judge simply asserted that this is what the plaintiffs must establish (para 34 above). The Court of Appeal also expressed the issue in an alternative form as being whether the shares were of "little or no value" (para 42(iii)-(iv) above). But it took a narrow view of this formulation, treated the plaintiffs' case as limited by the way in which it had been pleaded and argued, and refused on that basis to consider a submission that the test of honesty was whether the respondents "genuinely believed that the GDRs were worth as much IAMF paid for them" (para 42(iii)-(iv) above).

52. The Board considers that the judge erred in his understanding of a crucial issue and that the Court of Appeal was wrong to consider that IAMF had confined itself to a narrow case based on establishing that the GDRs had either little or no value. IAMF had certainly aimed to establish that the GDRs were worthless, but it did not confine itself to such a case. It would have been strange, indeed, if so hard-contested a case had been fought out on so obviously limited and artificial a basis. No doubt for good tactical reasons, the respondents in their written closing submissions chose to characterise the case against them as being that "the loans were valuable but the GDRS were valueless" and as a case which they could therefore rebut by a simple submission that:

> "The loans were valuable (but not to be priced simply by adding up the loan amounts) and the GDRs were (a) actually valuable and (b) in any event reasonably and rationally believed to be valuable by all those involved (not just the defendants)."

The judge accepted this characterisation of the issue relating to the GDRs, and went no further in his conclusions. However, in his recital at para 269 of some elements of the plaintiffs' case that the GDRs were fraudulent, he came close to stating the true nature of the issue before him, when he listed among the factors relied upon that:

> "(4) There was no negotiation on the price and the price was too high having regard to the state of Banco Continental GFC's, its primary asset [sic]. …
>
> (9) The January 1996 transactions were fraudulent because of all the above and also that the price per GDR increased from US$480 to US$769 per share for no good reason
>
> (11) The March 1996 transactions (US82.4m) were fraudulent because …
>
> (ii) GDRs were sold at a price of US$602 per share in GFC with no apparent justification and no negotiations except by Pan American Services an allegedly Ortega controlled company"

But, having listed those and other factors on which the plaintiffs relied, the judge failed to analyse or address them specifically or in any detail at any point. In confining himself in effect to consideration of the respondents' characterisation of the plaintiffs' case, the Board has no doubt that he was in error.

53. As the respondents themselves accept, the logical test of honesty is whether there was (or could honestly have been) an actual belief that the transactions were in IAMF's interests (respondents' written case, paras 43 and 54). That test is in context necessarily associated with the question whether the respondents believed or could honestly have believed that the GDRs or GFC shares were worth at least what they arranged for IAMF to pay for them. Mere over-optimism or imprudence in assessing their worth

would not of course be significant in this context. IAMF's case depends on showing that there was or could not honestly have been any belief that the GDRs or shares which Conticorp delivered were of commensurate value with what IAMF transferred or surrendered to Conticorp. The Board is satisfied that this is how the plaintiffs also presented their case throughout. The plaintiffs pleaded that the transactions were "made for no consideration or at an undervalue". The Case Summary served in December 2008 stated that their case was that the shares were "worthless or at least worth substantially less than the value of the loans assigned". Their written opening submissions at trial said that "Even if one were to attempt to attribute a market value to the shares in GFC, it is clear that they were worthless, or worth substantially less than the value of the loans released".

54. The expert evidence at trial from Mr Croft (called by IAMF) and Mr Abboud (called by the respondents, though he proved to lack the independence to qualify him as an expert) dealt extensively with questions as to what, if any, value could be put on the GDRs. Mr Croft's primary view was that the GDRs were valueless, but he presented in his first report an alternative based on the net asset value of the GFC group. Mr Abboud sought to justify a valuation put on the GDRs in January 1996 based on a multiple of projected profits, and Mr Croft in his third report produced further alternative valuations based on Mr Abboud's methodology (with which the judge dealt in paras 274-279 of his judgment, and to which the Board will return in para 153 below). Similarly, the factual evidence, in particular the cross-examination of the personal respondents, was not limited to whether the GDRs had any value. Dr Leonidas Ortega was cross-examined about the differences between the values put on each tranche of shares for the purposes of each of the three transactions.

55. In written closing submissions, the plaintiffs submitted that the GDRs "were or would rapidly become worthless", but addressed in detail the above evidence on value. They submitted that there was no honest explanation of the differences between the values assigned to the GDRs on the different transactions and on the 1995 capitalisation and submitted that such values were unsupportable in terms of net asset value or on any other basis. In oral closing submissions, Mr Salter QC for IAMF made clear that the respondents' characterisation of the plaintiffs' case was not accepted or correct. He emphasised that

> "the question is not, did the defendants believe that the GDRs were valuable; the question is, did they honestly

> believe that they were worth at least the amount for which they sold them to IAMF?"

56. Neither the judge nor the Court of Appeal ever addressed or answered this question directly. In these circumstances, the Board regards their judgments as fundamentally flawed by a failure to address a central issue before them. However, the Court of Appeal did also address the effect of a hypothesis that the respondents did not honestly believe that the GDRs were worth as much as IAMF paid for them, in a passage set it out in para 42(vi) above. It suggested that what happened could then be analysed as transactions in relation to which Conticorp had been "astute enough to negotiate a discount and succeed in obtaining a bargain". The suggestion does not, in the Board's view, begin to reflect the reality of the present case. It is one thing for parties at arm's length to negotiate (or indeed to fail to negotiate) a discount or bargain – and the plaintiffs made clear at trial that there would be no claim in such circumstances. But the plaintiffs' case was that IAMF was under the respondents' control and that the transactions were neither negotiated nor at arm's length. For reasons which will appear, this, in the Board's view, represents the reality. In these circumstances the Board concludes that both the judge and the Court of Appeal again failed to appreciate or address a central aspect of IAMF's case on dishonesty.

*(v) The Court of Appeal's doubt about the value of the loans:*

57. Fifth, the Court of Appeal, but not the judge, cast doubt on the value of the loan portfolio transferred to Conticorp by the three transactions. The judge himself at the outset of his judgment summarised the transactions as follows (para 5):

> "The assets of IAMF, primarily hundreds of loans which were acknowledged to be good, were cancelled in favour of or transferred to Conticorp in exchange for [GDRs] which represented shares in [GFC] a subsidiary whose major single asset was Banco Continental."

The Court of Appeal in contrast appears to have been ready to decide the appeal on the basis that IAMF gave up nothing by giving up the loans: see paras 42(ii) and (v) above. Its reasoning is puzzling. In para 21 it summarised the effect of the first and second transactions as being that, because IAMF had insufficient funds to meet the cheques given for the GDRs "In reality, IAMF gained 1,669,920 GDRs and paid nothing". This

appears entirely to overlook the assignments of loans which represented the real quid pro quo under each such transaction as well as the balancing payment of USD 4,446,873.14 made by IAMF: see para 16 above. Only in relation to the third transaction did the Court of Appeal refer to a "portfolio of loans transferred by IAMF to Conticorp", which it noted (in its para 23, based on the judge's judgment, para 263) "included those made to subscribers for shares in Banco Continental". It was in relation to this portfolio that it said that there was "no evidence of the value": see para 42(v) above. The Court of Appeal also expressed difficulty in understanding how IAMF's overall portfolio had grown between April 1995, when loans were transferred from BCO Bahamas to IAMF in return for share participations issued to BCO Curacao valued at some USD 109m, and the end of 1995 at which date the accounts prepared for BCO Curacao showed the value of BCO Curacao's participations in IAMF (and so by inference of IAMF's lending and other assets) as nearly USD 163m. The Court in this connection referred dismissively to counsel for IAMF's oral explanation in submissions before it that there must have been additional lending by IAMF, which was then itself agreed to be cancelled by the three transactions. The Board did not understand the respondents to rely on this aspect of the Court of Appeal's reasoning. But, in any event, it seems clear that by the end of 1995 IAMF had already advanced or acquired some additional loans, for example (a) in connection with the ostensible open market capitalisation involving sale of 25% of Banco Continental's shares to some 222 shareholders, as mentioned in the analysis No INB-96-0366 dated 18 April 1996 prepared by the Superintendence of Banks' auditors and (b) by way of purchase from BCO Curacao as recorded in note 13 to the latter's 1995 accounts.

58. IAMF's case in relation to the loan portfolio agreed to be transferred by the three transactions is that its value speaks for itself. The loans were, as the judge said (para 5), "acknowledged to be good". Originally, it is true, the plaintiffs had challenged the loans transferred to IAMF by BCO Bahamas as fictitious, but that case was abandoned, and the respondents' own pleaded case involved a plea that "the GDRs transferred to IAMF in discharge of the loans to the Conticorp group represented a true and fair valuation of the loans" and a denial that "any of the loans was either fictitious or made other than bona fide or for value". The evidence of Dr Leonidas Ortega was that the loans held by IAMF as a result of the transfer from BCO Bahamas were "genuine and recoverable at their face value" and were "paying interest to IAMF" and Dr Luis Ortega added that

> "… all were in competitive terms. In the terms of the markets, everything was in the same way that you deal with any other customers. Of course, in those cases, we knew

more than anybody the quality and qualification of the customers, but none were on favourable terms."

59. Before the Board Mr Julian Malins QC for the respondents sought to build on the submission in the respondents' closing submissions before the judge that "The loans were valuable (but not to be priced simply be adding up the loan amounts)" (para 52 above). He relied upon the evidence of Mr Croft, IAMF's own expert, that the portfolio of loans was a mix, some of the loans having favourable terms in that interest was rolled up, and that in an arm's length transaction, one would normally expect some negotiation and valuation of the loans. But Mr Croft added that "on the basis of the overall portfolio it can very well be that the loan portfolio could be sold for a premium as opposed to a discount, although with a lot of Ecuadorean companies this was less likely".

60. The loans were assigned their face value by all three transactions, they were good, performing loans and they were made to Conticorp or Conticorp-related companies, so that their transfer to Conticorp probably had the practical effect of a substantial discharge of at least many of them. Further, the judge viewed them as loans which were "acknowledged to be good". In these circumstances, the Court of Appeal was clearly wrong to say that there was no evidence of the value of the loan portfolio and no evidence that the transactions deprived IAMF of any amount corresponding with the face value of the loan portfolio transferred to Conticorp. It might have been open to the judge, on the basis of Mr Croft's evidence, to apply a slight discount to the face value of the loan portfolio when considering what IAMF gave up. But he did not do so, and the fact that Conticorp itself treated the loan portfolio as having its full face value when arranging the transactions by which it and its related companies were effectively discharged from further performance of the loans militates, in the Board's view, against the application of any such discount. In any event, any discount would be slight. It could not affect the Board's conclusions on the issue whether the GDRs could honestly have been regarded as having a value equating with that of the loans transferred in exchange for them. The Board adds only that, as regards the shares in property companies which were agreed to be sold by IAMF to Conticorp under the second part of the third transaction (para 17 above), there has been and is no suggestion that their actual value was less than the face value for which they were to be sold.

*(vi) The conclusion that the three transactions were part of a long-standing "debt to equity" plan:*

61. Sixth, both courts below attached very great significance to their conclusion that the transactions were the culmination of a plan (which the judge appears to have thought dated back to 1994) involving the issue of GDRs to enable the marketing of GFC shares and the exchange of debt for equity. But this description cannot be applied to these transactions in the conventional sense of an exchange of debt owed by a company for shares in that company. They involved the exchange of loans owed by Conticorp or Conticorp-related companies for shares held not in but by Conticorp. The shares were furthermore in the GFC group, a subsidiary of which had funded the loans out of the receipt of public deposits. At the time of the first transaction, the respondents were proposing an accounting approach which made this irrelevant to the GFC group (though highly relevant to the public depositors), in so far as the respondents were proposing that BCO Curacao could and should treat the deposits as made with IAMF on behalf and at the risk of such depositors. But by the time of the second and third transactions, it was known that the Ecuadorian supervisory authorities would not tolerate that approach, and that BCO Curacao (and through it, under article 64 of the General Law on Financial Institutions, Banco Continental) would have to accept personal responsibility for repaying the deposits (paras 14 above and 66 below). Far from involving any conventional debt for equity swap, at least the second and third transactions amounted therefore in economic terms to a reduction in the assets and capital available to the GFC group to meet their public obligations. If the shares received by IAMF had themselves been both marketable and marketed, then at that point the diminution of capital would have been redressed. A group or company which has reduced its capital can, if it can attract outside subscriptions, always raise further capital. But the critical pre-condition is that its equity should be marketable.

62. The distinction between a conventional exchange of debt for equity and the present transactions was highlighted at trial, in, *inter alia*, the final paragraph of Mr Croft's first report. But nowhere did either court below identify it. And, as the Board has stated, nowhere did either court deal even with the factors listed by the judge himself in para 269 of his judgment, on which the plaintiffs relied to discredit any suggestion that the three transactions conceived in the period December 1995 to March 1996 could honestly have been regarded as necessary or appropriate for IAMF or in the interests of anyone save Conticorp and its other associates. Inter alia, they failed to give any or any credible reason why the transactions were in anyone save Conticorp's interests in the "atmosphere of extreme urgency" which the judge identified. Instead, both courts

below placed great reliance on the finding that the transactions were part of a plan which was known to and approved by the Banking Supervisor, Dr Intriago - even though, as the judge found, he did not devise all aspects of it and even though, as the Court of Appeal recognised, the first transaction had already taken place before he can have known of any aspect of the plan.

63. The Board will examine below the evidence bearing on what precisely Dr Intriago knew or can sensibly be taken to have known and understood. At this stage, it confines itself to observing that, even if it were to be assumed that Dr Intriago knew all relevant aspects of the transactions, it does not follow that the transactions were such as could honestly be believed to be appropriate by those arranging them. Dr Intriago's attitude cannot, in short, be the primary test: those controlling the relevant companies had the primary duty to act properly and look after such companies' individual interests. Even more importantly, Dr Intriago was entitled to assume that they were doing so and he may not have focused on corporate considerations of this nature at all. Rather than finding that Dr Intriago knew and agreed all relevant details of a plan which included the transactions, and therefore that the transactions were and could honestly be believed by the respondents to be in IAMF's interests, the Board considers that the courts below should have addressed the detailed reasons, a number of which were listed by the judge himself in para 269, why the transactions could not honestly have been believed to be in IAMF's interests. They should, in that light, have considered whether Dr Intriago could really have known and understood all aspects of the transactions. As the Board will demonstrate, there is reason to believe that Dr Intriago had no such detailed understanding, and that his and the Ecuadorian authorities' focus was on different, unobjectionable aspects of the plan put forward to him by the respondents.

*(vii) The Board's conclusion that a full review of the conclusions reached below is necessary:*

64. The Board regards it as necessary, in the above circumstances, to review for itself whether there was a sound basis for the general finding of honesty which was made by the courts below, when this finding was made without analysis of the factors relied upon as discrediting such a conclusion and as indicating that the transactions, when agreed, served no purpose of IAMF's and no useful purpose of anyone other than the respondents and their associates. To do this, it is necessary to trace the history of IAMF, of the GDRs and of the three transactions.

***The history of IAMF, the GDRs and the three transactions***

65. The formation of IAMF came about as indicated in para 13 above. The BNA required BCO Curacao to bring its related-party lending to Conticorp and Conticorp-related companies below 20% of its assets: para 14 above. A transfer of BCO Curacao's loan portfolio to BCO Bahamas and the formation at a future date of a Bahamian fund to invest in Conticorp and Conticorp-related company lending had been discussed quite extensively in August/September 1994. But, at that date, all that was effected, under the BNA's pressure, was the transfer of the loan portfolio to BCO Bahamas, in return for "obligation certificates" representing a liability to pay BCO Curacao the corresponding amounts plus interest. On 15 August 1994, Henrik Schutte of BCO Curacao and Ider Valverde of the law firm Ortega Moreira and Ortega Trujillo were also in communication about the possibility of presenting the loans granted as investments made by BCO Curacao on behalf its depositor clients. This was a treatment which Mr Schutte was already doubting whether the Central Bank would accept.

66. A two-point plan to achieve both a transfer to a Bahamian fund or trust and to eliminate any exposure on the part of BCO Curacao and BCO Bahamas appears to have been developed at an executive meeting of Conticorp on 7 April 1995 (the subject of a memorandum of 10 April 1995 referred to by the judge in para 249). It appears the Bahamian supervisory authorities had become concerned about BCO Bahamas's holding of the related-party lending portfolio. The plan was to transfer it to a Bahamian trust, with the trust giving in return certificates of participation with which BCO Bahamas would then satisfy its obligations to BCO Curacao. Second, BCO Curacao would treat its depositors as having interests not in it, but in the trust, thereby eliminating the deposits from BCO Curacao's balance sheet: para 14 above. Immediately after IAMF's formation, BCO Curacao sought to give effect to the latter part of the plan by a letter dated 30 April 1995 to IAMF declaring that all the participations in IAMF that it had acquired "have been acquired by us, as agent for our various clients and on their behalf as per the power and authorisation given by such investors" and would be allocated to each of such clients and investors "proportionally to their investments as per the attached list". There is no suggestion that the Ecuadorian authorities were involved in or informed at this stage of the transfer of the debt portfolio to IAMF. Indeed, much later in the year, on 27 November 1995, the Superintendence of Banks wrote to BCO Curacao about the credit risk in respect of lending to related companies to which its accounts for the year ended 31 December 1994 indicated that it remained exposed following its initial transfer of the loan portfolio to BCO Bahamas.

67. On 30 June 1995 Mr Valverde of the law firm Ortega Moreira wrote to Alan Cole of Ansbacher (with a copy to Xavier Santillan) confirming instructions as to the issue of IAMF's participating shares to BCO Bahamas, as well as the appointments of Michael Taylor as sole director and investment adviser, of Ansbacher as administrator and of BCO Curacao as custodian of the fund. They added that "the officer who will give further material instructions" would be confirmed. This was done by Dr Luis Ortega by letter dated 5 July 1995 (para 13 above), which also ratified instructions which Mr Valverde had evidently given that IAMF should buy 8000 shares in GFC offered by Conticorp through the Stock Exchange. On 7 August 1995 Dr Luis Ortega writing on the law firm's letter paper reconfirmed the joint effect of the letters of 30 June and 5 July 1995.

68. There was at this stage no suggestion of any disposal by IAMF of the loan portfolio. On the contrary, the memorandum dated 23 June 1995, referred to in para 14 above, makes clear that the plan was that IAMF should hold the loan portfolio originating from BCO Curacao's lending to, and should be responsible for any future lending to, Conticorp and its associated companies, using funding raised where necessary from sale of shares or obtained through a line of credit from BCO Curacao, and that BCO Curacao should "sell its shares in IAMF to its clients", and hold them, and be registered in The Bahamas by Ansbacher as holding them, "on behalf of clients", with the value of such shares being credited to such clients' memorandum accounts. A letter dated 20 April 1995 from Ansbacher to its Guernsey legal department also confirms that it was intended that shares in the fund would "be sold/transferred to mainly Ecuadorian investors through brokers in Ecuador". A later letter dated 5 July 1995 from Ansbacher to Mr Taylor is in the like sense, explaining IAMF's "proposed operations" by stating that "We understand that the Fund will enable the client to raise additional funds from private investors for further diversification of the client's business within and outside of Ecuador". At a meeting on 9 August 1995, after the Central Bank of The Bahamas had queried the rationale of the loan portfolio transfers to BCO Bahamas and then IAMF, Dr Luis Ortega further confirmed that IAMF was "established as the company through which loans would be received in exchange for shares in the Fund".

69. The judge evidently thought that IAMF was conceived and formed with an idea of converting "these debts [the loan portfolio originating from BCO Curacao] into equity by use of the facility of the GDR" (para 28 above). The contemporary material does not support such a conclusion. The most that might be said is that the respondents devised a plan to present what had until then been accepted as deposits in BCO Curacao so that they would henceforth appear as equity participations in IAMF made

through BCO Curacao as agents. The effect of that would be to transmute the rights of members of the Ecuadorian public who had placed deposits with BCO Curacao into equity rights against the Bahamian fund, meaning that BCO Curacao was no longer at risk. But this plan, ultimately rejected by the authorities, had nothing to do with GDRs or with Conticorp shares in GFC.

70. That Banco Continental was investigating the possibility of raising additional capital on the market in mid-1995 is however clear. A letter from Oppenheimer & Co Inc dated 24 June 1995 shows that they had been (unsuccessfully) approached. At a Conticorp board meeting on 4 August 1995 Dr Leonidas Ortega is recorded as presenting

> "the need to approve/ratify the financial strategy of Conticorp SA towards the year 2000, approved in the previous meeting of the Board of Directors of Conticorp SA held on June 23, 1995 and in the meeting of July 20, 1995 by the Board of Conticorp, in order to sign a share lending/or sale/contract for 49% of the shares owned by Conticorp SA in the capital of Grupo Financial Conticorp SA with Fondo Internacional IAMF."

So at this point the beginnings of an idea of some form of undefined borrowing or buying by IAMF of 49% of Conticorp's holding of GFC shares did emerge. But the idea was clearly very rudimentary, and there is no sign of its pursuit in any form until near the end of the year.

71. The concept of a GDR (or "ADR") programme was explained to Mr Baquerizo by Bankers Trust Company at a meeting on 11 August 1995, confirmed by the former's letter dated 14 August 1995. The letter confirms that the programme was envisaged as a means by which investors might through American brokers acquire and sell shares in GFC without any need for any transaction on the Ecuadorian market. On 21 August 1995 Mr Baquerizo wrote to ask for American legal advice from Dewey Ballantine on "the scheme which we have developed". This, he explained, consisted of the public offering by GFC of 25.48% of its holding in Banco Continental (as mentioned in para 11 above), accompanied by a GDR programme which would enable sale by (a) the purchasers of 15% of the shares in Banco Continental and (b) by GFC of 23.6% of such shares (leaving it with a 51% controlling stake in Banco Continental). The concern was that a GDR programme would not allow (b), when the sale of 23.6% would be by someone with a controlling interest in Banco Continental.

72. Memoranda in August and September 1995 indicate attempts to interest overseas investors in purchasing shares in GFC. One particular potential Swiss investor emerged, a Mr Gilliéron, and Dewey Ballantine were informed by memorandum dated 21 August 1995, without disclosure of his name. By 28 September 1995 GFC was in a position, after taking Dewey Ballantine's advice, to appoint Bankers Trust Company as GDR depositary. On 2 October 1995 Dewey Ballantine sent Snra Maria Carmen de Velez and Mr Barquerizo revised drafts of terms, a timetable and a working group list for sale of depositary receipts to an unspecific investor purchasing approximately 42% of GFC shares for an unspecific price. Whoever the investor might be, he was to

> "agree in the Purchase Agreement to hold the depositary receipts for a specified period of, say, 18 months to ensure a valid exemption from registration under the Securities Act."

In or about October the potential sale to a Swiss investor was discussed at some length by telephone with Dewey Ballantine, and it was agreed that he would be asked if he was prepared to disclose his name. As will appear, Mr Gilliéron agreed to this and his interest continued until at least the end of November 1995.

73. On 9 November 1995 Dr Leonidas Ortega, as executive president of Conticorp, wrote to the Central Bank of Ecuador, attaching issue no 20 of our "Positive Balance Sheet" and stating that the broad acceptance of the public offering of 25.48% of Banco Continental's shares confirmed the extraordinary confidence, based on solid reputation and past performance, which the Conticorp group enjoyed in the market.

74. On 15 November 1995 Snra Maria Carmen de Velez wrote to Dr Intriago requesting authorisation for the issue through Bankers Trust Company of GDRs representing 45% of the GFC shares held by Conticorp, which "will be traded in the international market". A draft of this letter referred to them being traded in the US financial market. Such authorisation was given by letter to Dr Leonidas Ortega dated 3 December 1995.

75. However two days later, on 17 November 1995, Snra Maria Carmen de Velez wrote to Dr Leonidas Ortega that she felt it necessary that they talk about the possible advisability of not executing the transaction of GDRs of GFC, preferably not under time pressure, but at ease over the weekend. On 30 November she wrote again, referring to a decision taken the

previous day to sell GDRs at a price of two to one (ie 2,000m sucres for each GFC share with a nominal value of 1,000m sucres), making market and other comparisons which suggested that this could overvalue Banco Continental by around double, and pointing out that

> "… in the previous case of GFC, one of the most important factors in dealing with the authorities was to present to them the technical and actual support of the evaluations on which we had based the transaction, which in this case would be impossible to do."

She concluded:

> "After analysing it, my position is not to do it. Please reconsider. I will be in the office if you need anything."

76. By faxed letter dated 29 November 1995 Mr Gilliéron through Swiss lawyers, Borel & Barbey, took up direct contact with Dewey Ballantine. Borel & Barbey stated that they would be recommending to Mr Gilliéron that he invest through a Gibraltar company and that they were studying a draft purchase agreement which had evidently already been sent to him. Internal notes and workings headed "Preguntas Claves GDR" (Key Questions GDR), which appear to come from this period, leave open the buyer's name, but, in answer to a question where the funds would be obtained, say "ask Gilliéron". The workings contemplate the sale of GDRs representing 167,000 GFC shares at 1,500m sucres (equivalent to c. USD 523.56) per share.

77. By now, however, Banco Continental was suffering from a lack of liquidity and had begun borrowing heavily on the interbank market. On 16 November 1995 it began to take short-term liquidity loans from the Central Bank. It was in the event the only bank to do so, a fact which became public to its detriment. Two days earlier, on 14 November 1995, Angel Torres, Banco Continental's general manager, also wrote to the Central Bank of Ecuador requesting a formal loan of up to 50% of the bank's technical capital "to reduce current demand for interbank resources". On 27 November 1995 the Monetary Board, the governing body of the Central Bank, authorised such a loan, but subject to conditions, which included that Banco Continental was to be "overseen by the Banking Superintendence", that it take steps to "overcome its problem of liquidity", that it promise to restructure its investments and that it "accelerate its process of opening up capital that could allow it to

attain new resources in line with the restructuring of its liabilities …". At the meeting of the Monetary Board, which Dr Intriago attended, he is recorded as having

> "also commented on the mechanism for selling the portfolio, with the objective of restructuring its clients' liabilities, an operation which would be assessed by the Superintendent's auditors."

The respondents put to Dr Intriago and he denied, but they continue to suggest, that "this was "a clear reference to proposed sale by IAMF of the portfolio of loans". The Board regards this suggestion as implausible. The meeting was about Banco Continental and its problems. It was not about and did not mention IAMF, about which it appears likely, from the letter dated 27 November 1995 referred to in para 66 above, that Dr Intriago had not even heard at that date. In any event, Banco Continental was in the middle of a liquidity crisis. The proposition that Banco Continental should sell off part of *its* loan portfolio for cash was, as Dr Intriago indicated in his evidence, obvious and realistic. A suggestion that IAMF should sell off its assets in return for an interest in GFC would, in contrast, have been very surprising. All the indications are that even the respondents had not made any decision to involve IAMF at that date, and that such a decision was only taken after any hope of an outside buyer to rescue the bank had fallen away.

78. On 3 December 1995 Angel Torres replied to the Monetary Board complaining that it had been misinformed by the Central Bank as to Banco Continental's position, declining the loan as offered, but repeating its willingness to accept a treasury credit with no special conditions detrimental to Banco Continental's identity as a solvent, efficient and correctly managed bank, and asking the Board to take steps to correct any misunderstanding. On 5 December 1995 a number of smaller financial institutions went bankrupt, leading to rumours that Banco Continental was in financial difficulties and to a run on Banco Continental throughout December 1995 involving withdrawals totalling some 130,000m sucres (c USD 44m). On 6 December 1995 Banco Continental wrote formally to the Central Bank asking for a loan of 62m sucres (c USD 20m). On 11 December 1995 the Central Bank reviewed the situation and referred to the negative liquidity position that Banco Continental had registered in January, February, August, October and November, reaching the highest levels in February and November. It found comfort however in the placement of 25.48% of Banco Continental's shares, which "noticeably affects the equity situation of the entity" and recommended the extension of credit operations for 50 days, with an annual interest rate of 60%

subject to the minimum conditions, which included that no dividends be distributed and that Banco Continental provide all information that might be requested. Banco Continental accepted this loan under protest concerning the conditions by letter dated 15 December 1995.

79. On 20 December 1995 Mr Taylor was informed by Mr Baquerizo through Ansbacher that "we need that the [IAMF] sign the following letter" authorising Casa de Valores Continental to purchase 1855 GFC shares at 2000 sucres per share on IAMF's behalf on 20 December value 22 December 1995. By reply sent on 27 December 1995 he gave such authorisation, presumably indicating that the transaction was effected before his reply.

80. On 21 December 1995 the minutes of a Conticorp Board meeting record as follows:

> "SECOND: SALE TRANSACTIONS OF GDR'S: With regard to the value of the GFC shares from Conticorp for when these pass from the custody of Bankers Trust to change to GDR's to be acquired by an International Fund, after hearing the disclosure made by Mr Leonidas Ortega Trujillo and from Mrs Snra Carmen de Velez, the auditorium, after a long discussion on the calculations and values of the companies that make up the Grupo Financial Conticorp, resolved to support the position of Dr Leonidas Ortega Trujillo by a majority."

The Board has in para 29 above set out the judge's treatment of this meeting. The meeting involves the first documented reference to a decision that IAMF should acquire GDRs. The great majority of the attendees were members of the Ortega Trujillo family. None of the calculations or valuations discussed has been produced.

81. On or about 27 December 1995 Conticorp issued an Information Memorandum relating to the proposed offering of 100 GDRs representing 167,000 (out of the soon-to-be reduced total of 371,000) shares in GFC, the first 115,712 of which were priced at USD 480.30 per share, making a price of USD 55,595,685. The memorandum included as section III Financial Statements for GFC and its subsidiaries, and as section IV Financial Statement Projections which were introduced by the statement that

> " … prepared by GFC at the date hereof, [they] are based on assumptions which GFC believes are reasonable in the light of currently known information. …"

Notwithstanding this, Dr Leonidas Ortega stated in evidence that the projections were made "obviously, before this date, substantially before", while going on to maintain that "the projection assumes a projection in 1996 that we thought was viable". The Court of Appeal seems to have regarded the fact that the projections were out of date as a virtue and to have paid little attention to it (para 42(i) above). But how far such projections could, on any objective assessment of the situation, have been regarded as plausible by the end of December 1995 is, in the Board's view, a matter of some importance.

82. In the Information Memorandum the Financial Statements for "Multibanco" (that is Banco Continental and GFC's other less important subsidiaries) showed net profits of about USD 1m in 1990, USD 2.5m in 1991, USD 4.4m in 1992, USD 10.6m in 1993 and USD 26.6m in 1994. The projected profit statement for Multibanco showed a net profit of less than USD 7m in 1995, but over USD 29m in 1996 and over USD 45 million in 1996, increasing steadily each year thereafter. The spreadsheet used to develop these cash flow projections was not produced. The respondents' expert, Mr Abboud, said that Mr Baquerizo had been the relevant lead person in the management of the GDR issue and had confirmed to him that such a spread sheet existed, but that he had not received it despite requesting it. Both experts were agreed that the validity of such projections depends on the model used and its workings and assumptions, and, although Mr Abboud exhibited to his report, *inter alia*, what was said to be a supporting printout, the projections have never been explained. Mr Abboud confirmed his understanding that the profit projected for 1996 was based on the profit shown for 1994. However, the accounts of Banco Continental for 1995, prepared in January 1996, note that the profits for 1994 included two very large items of profit arising from transactions with related parties, one entered as an extraordinary item of profit of 17,090m sucres (nearly USD 6 million) on a sale to Contileasing SA, the other entered as an ordinary item of profit of 34m sucres (USD 10.1m) on a purchase of a credit portfolio from Contileasing SA and Financonti SA, companies merged with Banco Continental during or at the end of 1994.

83. The Information Memorandum contains no hint of the acute liquidity problems which Banco Continental and BCO Curacao were experiencing in November and December 1995. Equally, it does not appear to have served any practical commercial purpose, since it is clear that a firm

decision had already been taken that IAMF would buy all the shares. A sale agreement to that effect was sent on 27 December 1995 by Mr Baquerizo of Conticorp to Ansbacher "to be signed by Mr Taylor", and a further communication direct by Mr Baquerizo to Mr Taylor, marked "Top Urgent" requested him to return each copy duly signed "today". Mr Taylor evidently did as he was told, since Ansbacher were able to transmit a signed copy to Mr Baquerizo at 1.05 pm that day. On the same day Mr Baquerizo sent to Dewey Ballantine copies of the face of the cheque drawn by IAMF in ostensible payment for the GDRs (though not of the reverse on which its endorsement back to IAMF would have appeared), as well as of the debit transfer for the balancing sum of USD 4,466,873.14 (para 16 above). In the course of a half-hour meeting of PanAmerican Services on 30 December 1995, the instructions given by Mr Baquerizo to Mr Taylor to agree IAMF's purchase of the GDRs from Conticorp were formally ratified.

84. The figures in the Information Memorandum contrast with Banco Continental's actual financial position. This is shown by its accounts for 1995, which were swiftly prepared and on 30 January 1996 signed off by the auditors. The accounts show a loss for the year 1995 of 86,456m sucres, some USD 29.56m. The bank itself may have broken even (or even made a very small profit of not more than USD 1m) over the year, but Financonti and Contileasing made very large losses indeed, due apparently to over-exposure on fixed-rate contracts for purchase and leasing of cars and other durables, losses which, although stated in evidence to be temporary, were showing no signs of diminishing by the end of the year. The first note to the 1995 accounts recorded that the economy in Ecuador had been affected by a variety of factors and went on to record that the bank had been affected by:

> "Generation of uncertainty and nervousness in the public.
>
> Massive withdrawals of deposits from checking and savings accounts and other deposits, primarily during the months of January, February, November and December 1995.
>
> Increase in the credit risk, shown by clients who were unable to comply with their obligations because their productivity, profitability and liquidity were also affected.

> Increase in the liquidity risk, reflected by insufficient availability of liquid resources at specific times to cover the withdrawal of deposits.
>
> This risk also increased significantly in the Bank when its subsidiary [BCO Curacao] received agency funds on the short-term, which were placed in a foreign investment fund in the [IAMF] in mid-term and long-term risk investments (stock in related companies), as indicated in the corresponding investment documents.
>
> Increase in the interest rate risk that occurred when, in order to settle the liquidity problem, there was a need to resort to deposits in very short-term funds and with high interest rates …. This drastically affected the financial margins."

The accounts further noted that Banco Continental had during February and November 1995 had to rely on a liquidity credit line which it had with the Central Bank to borrow respectively 13,000m and 156,000m sucres, that is c USD 4m and USD 52m, respectively, the latter repayable on 4 February 1996 with an interest rate of 50.49%. Over the months up to the end of December 1995 Banco Continental's share of US dollar deposits halved, dropping from 16% to 8%, corresponding to its need for credit. All these are matters of which the respondents must have been generally well aware from management accounts by 27/28 December 1995, when the Information Memorandum was issued and the first transaction agreed.

85. The accounts further recorded that during January 1996 the bank's management had prepared a "structural reordering programme", to deal with the adverse effects described, which had been accepted by the Superintendent of Banks and included by the Central Bank in an agreement reached on 26 January 1996 for a new liquidity facility for 242,000m sucres, with 90 day terms for each disbursement renewable once, carrying interest at approximately 55%. The summary of the structural reordering programme included as one item "Continuation of the process to open up the Bank's capital until it represents 49%".

86. The genesis of this restructuring programme was as follows. By the end of December 1995 or early January 1996 Banco Continental, the Superintendent of Banks and the Central Bank of Ecuador were in frequent contact. Dr Leonidas Ortega had already become concerned that Banco Continental might be forced into liquidation, and warned the

authorities accordingly in early January. On 8 January 1996 the directors of Banco Continental made a presentation to the authorities of the bank's history, of its balance sheet and profit and loss account at the end of December 1995 (as reflected no doubt shortly afterwards in its published accounts as at that date) and of the current liquidity problems which the bank was experiencing. Banco Continental's aim, confirmed by its general manager Angel Torres's letters dated 15 January 1996 to the Central Bank and Monetary Board, was to achieve the rolling over of its outstanding borrowing totalling 156,000m sucres due for repayment in early February 1996 into a new loan with repayment by instalments over the period April to August 1996. Not surprisingly, Mr Torres focused in writing on providing what he described as the "highlights of our successful institutional trajectory", a trajectory which he said, with understatement, was "somewhat affected in 1995 by a series of events many of which were exogenous" which had given rise to "the imperative need to fund/implement alternatives that effectively contribute to the stability and reinforcement of our institution". In a provisional report on Banco Continental's results for 1995, Mr Torres also expressed optimism about the bank's position, but acknowledged continuing unresolved problems, national and international, particularly since November/December 1995, and major economic uncertainty with devastating effects on liquidity and profitability of financial institutions. The provisional figures appended showed that the bank's Financonti and Contileasing divisions had made losses of respectively 63,494m and 8396m sucres, while its financial division had made a profit of only 4,384m sucres. (The actual figures available shortly afterwards were even worse, leading to the overall loss of 86,456m sucres mentioned in para 84 above.) While Mr Torres presented 1995 as "an atypical year, completely distinct from the previous years, particularly the period of 1991 to 1994", the idea that it could be ignored as if the bank's previous trajectory would shortly resume as if nothing had happened could only have been, and been seen as, highly wishful thinking. Mr Torres was not called by the respondents as a witness, and so was not available for cross-examination.

87. It was in this context that Dr Leonidas Ortega called a meeting at his home in the afternoon of Saturday 20 January of other officers of Banco Continental and Conticorp. According to a memorandum prepared by Banco Continental, although Dr Intriago did not accept its accuracy in various respects, this was "a special and urgent meeting" to which Dr Intriago was invited and which he attended shortly after its commencement, in order that he might be presented with the Bank's position and the meeting's vision of its future. While it was an informal meeting, it appears to have continued over some five further hours, during which it is clear that there must have been extensive discussion of company's affairs. The memorandum ends by recording, in what may be

somewhat rose-tinted terms, that Dr Intriago expressed his satisfaction with and congratulations for the presentation and his optimism for the future. But there is no reason to doubt that he said that he would liaise with the Central Bank and Monetary Board "to list, in accordance with [Banco Continental] the different steps to be taken and details to be considered in restructuring some operating procedures observed by him". Following another meeting in Dr Leonidas Ortega's offices on Monday 22 January 1996, Dr Intriago's letter dated 26 January 1996 to the Monetary Board did just that.

88. At some point around this time, Banco Continental produced the "Structural Reorganisation Program for Conticorp's Financial Activity in Ecuador and Abroad" dated 24 January 1996. This was not however sent by Banco Continental to Dr Intriago until 1 February 1996 when it was sent under cover of a letter saying that

> "Up to this date, we have made in accordance with your instructions the proposal's most important procedures, that will allow that Banco Continental count, by January 31, with levels of technical equity and patrimony needed for the consolidation programs already defined and functioning, as well as to you and the monetary authorities to have total control and information over the operations that Conticorp's companies make in Ecuador and abroad, in the financial and insurance activities."

89. On 23 February 1996 the Superintendence of Banks replied formally to the receipt of this Program to say that "Once this file has been reviewed and analysed by this office, I will be happy to inform you about the pertinent conclusions and decisions". Meanwhile, it was on the basis of Dr Intriago's letter dated 26 January 1996 that the Monetary Board was acting: see para 92 below. It was however on a comparison of the Structural Reorganisation Programme of 24 January and Dr Intriago's letter of 26 January 1996 that the judge found "the similarities in the thirteen recommendations ... too numerous to be coincidences", and concluded that either Dr Leonidas Ortega had received an advance copy of Dr Intriago's letter or they had agreed "the major points", even though they might not have agreed "on the minute details of how the plan would be effected". He went on to conclude, in effect, that the agreed plan included or was believed by the respondents to include significant elements not mentioned in Dr Intriago's letter dated 26 January 1996. However, the starting point to any understanding, at least of what Dr Intriago understood and agreed, must be the terms of his own letter dated 26 January 1006.

90. Dr Intriago's letter listed 19 recommendations. Those presently material read:

> "1. The following mergers will be made: Banco Continental with Financiero Continental and with the real estate companies owned by the bank.
>
> 2. Maintain all companies of the financial sphere associated with Conticorp, under its administration and responsibility. These companies include Contivalores; Contifondo; Almaconti; Continental Overseas Bahamas.
>
> 3. [BCO Curacao] would record memorandum accounts assets and liabilities, in addition to its obligation to restructure operating procedures and accounts between Banco Continental SA, [BCO Curacao and the Administrative Fund of the company constituted in The Bahamas.
>
> 4, Form a trust with the shares and assets of all the mercantile companies belonging to Holding Conticorp, in favour of the legal representative of Banco Continental, in order to use it exclusively to honour liabilities of this institution.
>
> …
>
> 7. Do not allow any new investments in business activities authorized by Law, without prior agreement of the Superintendence of Banks; nor increase asset operations with companies that are associated and related with Holding Conticorp SA and [GFC].
>
> …
>
> 13. Continue with the process of opening capital of Banco Continental to democratise the share package up to a maximum of 49%.

> 14. Remit to the Superintendence of Banks the consolidated balance sheet of [GFC] and Holding Conticorp, with the respective work sheets from the consolidation and list of eliminations.
>
> …"

91. None of these items relates in terms to any GDR transaction with IAMF. Item 3 was Dr Intriago's recommendation that BCO Curacao be required to reverse the decision (reflected in BCO Curacao's accounts for the year ended 31 December 1995) to treat depositors as having made deposits in IAMF through BCO Curacao, rather than as having made investments with BCO Curacao. Mr Malins does not suggest otherwise. The Monetary Board acted swiftly on this recommendation by a corresponding order on 30 January 1996. Items 4 and 5 evidence concern that assets should be made available to Banco Continental, and that new asset operations should not take place with Conticorp or its related companies. Item 13 is on its face describing an intention to sell shares in Banco Continental on the open market, continuing with the process ostensibly established by the 25.48% capitalisation (para 11 above). The respondents submit that it relates to or anticipates the three transactions. The Board does not accept this submission. The three transactions as agreed and executed with IAMF could not be described as "democratising" Banco Continental's or GFC's shares, and item 13 cannot indicate that Dr Intriago understood the nature of or agreed to any such transactions. If anything, it indicates the contrary, in that item 13 clearly stipulates for arm's length sales on the open market.

92. The Monetary Board discussed the position on 29 January, and followed up Dr Intriago's letter on 30 January 1996 by an offer of a loan of up to 100% of its technical equity to Banco Continental on terms adopting all but four of his recommendations (those omitted being items 4, 9, 10 and 19). It held a further meeting on 12 February 1996 (by when pre-payment of the second part of the capitalisation had increased Banco Continental's apparent credit capacity). Banco Continental accepted the loan and the conditions, wrote on 16 February 1996 reporting on its compliance with them and made no suggestion that the conditions were incomplete or failed to reflect what had been understood. It also made no reference to any transactions which had taken place in the meanwhile.

93. In fact, on 31 January 1996 not only had Banco Continental, BCO Curacao and IAMF all been involved in steps to pay up the second instalment of the capitalisation (see paras 96-97 below), but IAMF had also been instructed and complied with instructions from Mr Baquerizo

(a) to purchase 4935 GFC shares at 2m sucres (USD 676) a share from Conticorp (bringing its total holdings as a result of small purchases at that price to 14,790 shares) and (b) to execute the second transaction referred to in paras 16 above, whereby it received GDRs representing 51,248 GFC shares at a price of USD 2,273,400 sucres (USD 768) a share paid for in substance by the assignment to Conticorp of loans valued at some USD 39m and cash transferred in the sum of nearly USD 4.467m.

94. It is on the Structural Reorganisation Program that attention focused during the trial and in the judge's judgment. The Program was said at the outset to be "as agreed upon with the Superintendent of Banks as necessary for a better control of our financial activity". The judge identified the similarities between this document and Dr Intriago's letter. But the Board considers that it is important to look at the differences, in order to understand on what it was that Dr Intriago was concentrating and what was really said and understood about the complicated arrangements which had been and were proposed to be put in place by the respondents. The Program is a lengthy, but in many places inexplicit, document. Under Specific Projects, item 1 is "Reorganization of [GFC]/Banco Continental SA and other operative procedures and accounts between Banco Continental SA, [BCO Curacao], Bahamas Fund". This matches broadly item 3 in Dr Intriago's letter, but was explained as including a number of sub-items. The first two, sub-items 1.1 and 1.2, were similar to items 1 and 2 in Dr Intriago's letter. But there were further sub-items.

95. Sub-item 1.3 was the sale of foreign currency assets for USD 50m by Banco Continental to BCO Curacao coupled with a loan by Banco Continental to BCO Curacao to enable it to make this purchase. The sub-item continued with the note:

> "This loan originates in the purchase Banco Continental SA made in order that [BCO Curacao] attend its cash flow from November, 1995."

The (re)sale to BCO Curacao was therefore of assets that Banco Continental had not long before (according to BCO Curacao's 1995 accounts on 29 December 1995) purchased from BCO Curacao in order to assist BCO Curacao's cash flow needs resulting from the run upon in November 1995. Sub-item 1.4 referred to "Pre-payment of the second part of Banco Continental's capital increase … (approximately USD 22m"). This refers to the ostensible capital increase to which the Board has already referred. But it says nothing about how such pre-payment was to

be achieved. Under sub-item 1.6 BCO Curacao is shown as having assets in the form of a credit, explained as

> "Assets for US$ 50,000,000 bought in January 96 (para 1.3) to be recovered on the foreseen terms and payment of the liability to Banco Continental."

96. No connection appears on their face between two sub-items 1.3 and 1.4. But in fact pre-payment was made on 31 January 1996 in the following unusual way: First, Banco Continental resold to BCO Continental the foreign currency portfolio which it had bought from BCO Curacao on or about 29 December 1995, but ensured that no money passed hands by extending BCO Curacao a sucres loan to equivalent value, at a 50% p a rate of interest. Adderley J gave the dates of this resale and loan to BCO Curacao as "on or about 14 December 1995" (para 216(1)). But it is now clear that the correct date is on, or no more than 2 days before, 31 January 1996, pursuant to a contract dated 29 January 1996. 14 December 1995 was the date of a resolution No SB-JB-95-0015 issued by the Superintendence of Banks requiring all financial institutions to ensure that their net foreign currency positions (active or passive) did not exceed 20% of their technical capital. The resale to BCO Curacao was ostensibly effected in view of this resolution. Second, on or about the same date, 31 January 1996 Banco Continental repurchased most of the assets which it had just resold to BCO Curacao, but, instead of using the outstanding loan to BCO Curacao to pay the price, it credited only two different smaller amounts, leaving a debt of USD 21.75m outstanding to BCO Curacao. BCO Curacao then transferred this debt to IAMF in return for additional participating shares. Also on 31 January 1996, Mr Baquerizo instructed Mr Taylor who duly authorised Banco Continental to convert the debt into sucres and to use it to pay up the second instalment of its own increase in capital resolved upon in autumn 1995, nominally at least on behalf of the 222 investors who had acquired such capital.

97. As mentioned in para 11 above, the sale ostensibly on the market of 25.48% of Banco Continental's capital was later investigated, when it was alleged that it breached article 128(b) of the General Law on Financial Institutions. It is clear from paras 243-245 of his judgment that the judge regarded a passage in Dr Intriago's cross-examination in the context of the capitalisation as a particular key to the question whether he understood the transactions. Dr Intriago was cross-examined on this point by reference to a lengthy letter dated 8 May 1996 in which Dr Leonidas Ortega defended his position on the capitalisation. The cross-examination was conducted through an interpreter, and the transcript shows that the interpretation was not always fluent. The judge thought that Dr Intriago

was not telling the truth when he denied that Dr Leonidas and he had "discussed and agreed upon" the Structural Reorganisation Program. The Board considers this finding further in paras 136-142 below.

98. Sub-item 1.5 of the Structural Reorganisation Program read "USD 10m capitalisation to [BCO Curacao]". Sub-item 1.6, under the sub-heading "Reorganization of assets, liabilities, operating procedures and accounts of Banco Continental SA, [BCO Curacao] and The Bahamas Fund", recorded the decision to restate BCO Curacao's accounts to show the deposits as its liabilities to the public, and to show "resources … completely invested in assets clearly known by the regulatory authority in Ecuador and Curacao". Under this was a plan showing on the left hand (asset) side US dollar assets and participations in IAMF and on the right-hand (debit) side "funds received from the public" and, as mentioned in para 95 above, a credit, explained as "Assets for US$ 50,000,000 bought in January 96 (para 1.3) to be recovered on the foreseen terms and payment of the liability to Banco Continental", which can now be seen to have been assets used to subscribe for participations in IAMF which IAMF in turn used to meet the second instalment of the capitalisation.

99. Sub-item 1.8 stated that "The Bahamas Fund will have participations issued for US$188,000,000 and the following assets", totalling USD 201.4m. Six heads of asset were listed and explained briefly under this sub-item and slightly more fully on another page of the Program. The principal asset was "49% of [GFC] 110.7MM", explained on the separate page as being based on

> "49% GFC Holding owner of 74.5% of Banco Continental SA
>
> Estimated value Banco Continental 15 times profits projected for 1996 US$20MM = US$300MM
>
> US$300MMx74.5% = 223' + US$3' (other companies – Almaconti, Contivalores and Contifondos) x 49% and based on prior results US$110.7MM."

The Program gave no information about any transactions by which or any terms on which IAMF was to acquire 49% of GFC, or about any transfer or surrender to Conticorp or anyone by IAMF of any loan portfolio.

100. Three other listed assets were shares in companies, valued at USD 36.7m (these being the shares the subject later of the third transaction). The fifth to a value of USD 44m was described as "first class assets of third parties' increase in Banco Continental's capital at face value" (being in fact the loans made by IAMF to support the 25.48% capitalisation of Banco Continental), while the sixth was "Assets to be recovered from Conticorp for US$10m".

101. The "Bahamas Fund IAMF" was shown on two corporate charts as connected, though only by a dotted line, to BCO Curacao, in contrast to companies in the Banco Continental group which were connected by firm lines. The dotted line was no doubt intended to reflect the equity participations which BCO Curacao held in IAMF and to which the Program refers. But, if IAMF was an arm's length fund which investors could use for investment purposes and which could in turn make its own investment decisions, there would be no necessary further significance in the dotted line. The Program included a page on which an explanation was given for not splitting Conticorp from GFC. It was that this would mean that Conticorp would not lose control of GFC. The fact that IAMF only held 49% of GFC was readily understandable in the same context. There was nothing to suggest that IAMF was not independent and would not be making its own decisions about sales.

102. The respondents draw attention to the accounts for 1995 produced in respect of BCO Curacao, and not signed off until 9 February 1996. The accounts refer to a structural reorganisation program accepted by the Office of the Superintendent of Banks of Ecuador as having been agreed in January 1996. They directly address IAMF and its ownership of GDRs in GFC in a way which is of some significance. First, they are at pains to emphasise IAMF's independence – which they express as being from the (unidentified) persons establishing and managing it, from depositors (presented as acquiring a mere "expectative contingency of profiting and losing according to the results of the management" as a result of investments placed with it by BCO Curacao "on behalf and for the benefit of its clients and investors") and above all from GFC, in which IAMF is said to have acquired GDRs as a third party. Second, note 16 lists investments by IAMF as at 31 December 1995 in "shares of companies affiliated with [BCO Curacao] including shares to a value of USD 6,761,578 and GDRs to a value of USD 55,595, 868". It thus records the effect, though not the nature, of the first transaction. Note 15 addresses the second transaction. Under the head "Purchase of [GDRs]" it records that IAMF bought from Conticorp GDRs for USD 39,387,000, adding that the "The price of this purchase was paid in cash". Separately (and lower down the page after setting out various share purchases, including an unexplained figure of 3290 said to have been bought on 31 January

1996), it refers under the head "Purchase of Documents" to the sale on 31 January 1996 by IAMF to Conticorp of (loan) documents to a value of USD 45,527,175. Again, it says that "The price of this sale was collected in cash".

103. Banco Continental's position continued to deteriorate. On 14 February 1996 a radio broadcast to the effect that it was insolvent caused it further public damage. The borrowings from the Central Bank of 156,000m sucres (c USD 52m) at 31 December 1995 increased by 28 February to 369,900m sucres and by 6 March 1996 to 396,100m sucres (c USD 135.5m). Between November 1995 and 18 March 1996 it lost half its US dollar deposits. By letter dated 7 March 1996 Angel Torres wrote as Banco Continental's general manager to Dr Intriago, saying that the Law of the Monetary System would permit Banco Continental to drawdown up to an additional USD 30m, which would "permit us to reach the first half of April 1996 without the need for new strategies", and suggesting "as a new strategy for expanding our liquidity resources" thereafter "an affiliation agreement with [BCO Curacao] allowing us to increase our Regulatory Capital by 60 billion sucres and, thereby, also increase our ability to access Banco Central Ecuador resources …". An internal analysis dated 7 March 1996 by the Superintendence of Banks of Banco Continental's balance sheet at the end of February 1996 revealed unexpected increases of 100,225m sucres in "Other Equity Contributions", of 100,535m sucres (89.19%) in "Other Investments" and 65,210m sucres (822.78%) in "Other accounts receivable".

104. Between 7 and 11 March 1996 several conversations took place about the situation between representatives of Conticorp, GFC and Banco Continental, including Dr Leonidas Ortega, and the Ecuadorian authorities, during which the former made an alternative proposal, that, with the authorisation of the Monetary Board, the Central Bank should, subject to conditions, grant Banco Continental a one-year subordinated loan, to pay off the borrowings granted up to 15 March 1996, thus freeing up the securities given to the Central Bank and enabling them to be used for depositors' protection.

105. The Central Bank prepared a detailed memorandum dated 11 March 1996 recording and analysing this proposal and the conditions as it understood them. As regards the conditions, the relevant part reads as follows:

> "The grant of the subordinate loan would be *subject to the requirement that the Central Bank take full control of*

*Banco Continental*, and this would require that at least the following conditions are met:

1. The creation of a trust of Banco Continental's shares in favor of the Central Bank, whereby the Central Bank would be entitled to appoint a director with a majority vote, sell the shares and adopt the measures established next.

2. The replacement of the upper management, for which the Central Bank would hire a professional manager, preferably foreign, with an excellent reputation. Meanwhile, a Management Committee may be created; this committee would be made up of executives appointed by the Superintendence of Banks and the Central Bank.

3. The immediate hiring of a first-class specialized firm to assess Banco Continental. The current shareholders would have the priority option to inject the required capital and retake control, within a specified period of time, by repaying the subordinate loan to the Central Bank. *If the net worth is found to be zero or negative, the shareholders would be deprived of the legal ownership of the bank. This should be specified in the trust provisions*.

4. Subsequently, the Central Bank, on the basis of its credibility and/or moral pressure, would try to syndicate the subordinate loan among several Ecuadorian banks. Once control has been taken and the bank has been stabilized, the Central Bank would try to sell its shares in Banco Continental, using open and competitive sales methods in stock exchanges.

5. From the beginning of this operation, a permanent communication strategy on the situation of the aided bank aimed at the national and international market must be implemented.

6. If an insolvency problem is detected, and the current shareholders of Banco Continental refuse to accept the above mentioned proposal, the Superintendence of Banks should proceed to the liquidation of the bank, in spite of the potential systemic risks."

106. On 12 March 1996 Dr Leonidas Ortega wrote to the Superintendent of Banks, the chair of the Monetary Board, the general manager of the Central Bank and the Minister of Finance "in furtherance of our several conversations" putting the proposal in these terms:

> "The grant of the aforementioned subordinate loan would be conditioned on the Central Bank of Ecuador taking control of Banco Continental SA, for which we would be in accordance with proceeding according to the following five steps:
>
> (1) RESTRUCTURING OF THE "IAMF"' TRUST OF THE BAHAMAS
>
> So that IAMF would have 67.45% of the shares of Banco Continental SA among its principal assets, Conticorp would exchange the corresponding assets.
>
> One hundred per cent of the shares of the trust would continue to be solely owned by Banco Continental Overseas, who would as a consequence have the right to share with the administrators the relevant instructions for their best handling. Banco Continental Overseas, being wholly owned by Banco Continental SA would obey only instructions for its management; consequently the trust managers will obey exclusively orders from the management bodies of Banco Continental SA
>
> (2) RESTRUCTURING OF DIRECTORATES, OFFICERS AND SPECIAL FUNCTIONS OF BANCO CONTINENTAL SA AND BANCO CONTINENTAL OVERSEAS NV

2.1 The respective Directorates of said entities would be structured in such a way that they would be made up in the same way, with the same members and officers; that is, 12 members and 12 alternates, of whom five would be from Guayaquil, five from Quito and 2 from Cuenca. …

2.2 The Chairman, First Vice Chairman and Second Vice Chairman of the Board of Directors of Banco Continental S.A. and Banco Continental Overseas will be the same people and will be named from among the members of the Board on request of the Banco Central of Ecuador. …

2.3 Simultaneously with the restructuring of the Board of Directors, Dr Leonidas Ortega Trujillo will be ratified as Executive Chairman of Banco Continental SA …

2.4 Mr Angel Torres Noboa will be ratified as General Manager …

2.5 New External Auditors will be appointed from among those authorized by the Superintendence of Banks.

2.6 An Investment Bank will be retained so that it can determine the price of the stock and search internationally for a strategic partner that might be interested in purchasing all or part of the Central Bank of Ecuador's interest and their own, in the opinion of the shareholders, example; Swiss Bank.

2.7 An International Consulting Firm will be retained in order to have advice on making the major decisions of the Board of Directors, the Executive Chairman, the General Manager, example: Andersen Consultance.

2.8 A risk assessor will be retained, whose report will serve as support for the proper evaluation of the assets and/or value of the stock, which can be a valid support for the placement of an issue of bonds in the international market, example: Thompson Bank Watch.

> 3. The current shareholders will have the first option to acquire the stock representing the Central Bank of Ecuador's interest and to take over control of the Institution again, providing they pay the subordinate loan to the Central Bank of Ecuador or the price of the shares stipulated by the Investment Bank.
>
> 4. From the outset of the operation the Bank and the authorities must implement a strategy of positive, continuous communication, oriented to the domestic and international markets on behalf of the Bank and the authorities, our collaborators and shareholders concerning the Bank's financial situation.
>
> 5. [A repetition of the proposal to affiliate Banco Continental and BCO Curacao, to increase borrowing capacity.]"

107. Again, the absence from the Central Bank's internal analysis dated 11 March 1996 of any such reference to the restructuring of IAMF as appeared in Dr Leonidas Ortega's version of the proposal developed "in furtherance of our several conversations" is in the Board's view significant. It cannot have been mentioned, or at least explained, in any way which made it important for the Central Bank to understand. Equally notable is the fact that the restructuring was presented as something for the future. In fact, it was, as an agreement, a fait accompli. Already on 4 March 1996 Dr Leonidas Ortega had signed on behalf of Conticorp the loan portfolio purchase agreement, to which Mr Taylor added his signature on 6 March for IAMF. Also on 4 March 1996 both Dr Leonidas Ortega and Mr Taylor had signed the agreement for set-off and sale of shares representing the second half of the third transaction. These agreements gave Conticorp the option of paying either by currency or "by means of the cession of" GDRs representing, in total, 155,755 GFC shares. They therefore valued each GFC share at 1,795,226m sucres or USD 602. By letter dated 6 March 1996 Mr Baquerizo had also written to Dewey Ballantine confirming an "interest" in increasing the GDR programme by latest 18 March 1996 by 98,210 GFC shares, to be issued to IAMF. This increase never in fact took place.

108. The Monetary Board meeting to decide whether to grant a subordinated loan was fixed for 19 March 1996. Prior to that meeting, Dr Intriago wrote two reports of that date. He noted that BCO Curacao had been required in January 1996 to reverse its treatment of its investments in IAMF as

deposits made as agent on behalf its depositors. He mentioned – as a weakness – that BCO Curacao had (as a result) obligations assumed to its depositors in respect of funds, which it had invested in illiquid assets of long maturity in IAMF, "such as investments in shares and portfolio of companies in the Conticorp group". Contrary to the respondents' submission, the Board does not regard this as a reference to any of the three transactions. (Indeed, Dr Leonidas Ortega's letter dated 12 March 1996 had only just made the vaguest reference to the third, and it was not on the respondents' own case completed by delivery of shares until after the execution of the subordinated loan and trust agreement: see paras 19 above and 109 below.) Dr Intriago was at this stage still focusing on the share holdings and loan portfolios which were held by IAMF before the three transactions. The reference harks back to the note in the accounts of GFC and BCO Curacao for 1995 (paras 84 and 102 above).

109. A subordinated loan was advanced by the Central Bank under subordinated loan and trust agreements dated 20 March and 23 March 1996. The trust agreement satisfied the condition that the Central Bank should control GFC and Banco Continental, and was signed by Dr Leonidas Ortega for both Conticorp and IAMF. Mr Taylor by letter dated 19 March 1996 had given Dr Leonidas Ortega authority to sign on behalf of IAMF an agreement in which IAMF Conticorp transferred its shares to the Central Bank, while IAMF for its part transferred "14,790 shares and [GDRs] representing 167,000 shares … held by [IAMF] in [GFC]", ie a total holding by IAMF of 49% of GFC's shares, on the basis that GFC had 371,000 shares in issue. However, clause 2.1 of the trust agreement also stated that Conticorp was delivering 155,755 of its GFC shares "on behalf of the IAMF, pursuant to an agreement that exists between the IAMF and Conticorp". Because the loan portfolio and set-off and share sale agreements did not cover delivery of GFC shares, as opposed to GDRs, Dr Luis Ortega by fax on 3 April 1996 arranged for Ansbacher to get Mr Taylor to sign a letter backdated to 7 March 1996 purporting to accept on behalf of IAMF that the price due under the second part of the third transaction could be met by direct delivery of shares. There is likely to have been a similar letter in respect of the first part of the third transaction. On this basis, and despite the obvious doubt about Conticorp's and Mr Taylor's power to act in any relevant respect after the execution of the subordinated loan and trust agreement, it has been and is the respondents' case that Conticorp met its payment obligations under the third transaction. The litigation has been conducted on both sides on the basis that IAMF parted with the loan portfolio and shares which it agreed to supply to Conticorp and that Conticorp has no outstanding liabilities under the express terms of either part of the transaction itself. The Board is as stated in para 19 above content to proceed on that basis.

110. Shortly before 19 March 1996, there was also a meeting at which Dr Leonidas Ortega, Snra Maria Carmen de Velez and Mr Baquerizo were all present, as was Snra Patino for the Central Bank. At that meeting Dr Leonidas Ortega was asked to explain the corporate structure, and explained that IAMF owned shares in GFC and was "an instrument in order to help them to sell the bank", but did not explain that the Ortega family had formed or controlled IAMF. Dr Leonidas Ortega wrote on 26 April 1996 replying to the letter dated 19 April 1996 in which Dr Intriago raised the fact the investments of the fund which IAMF administered consisted 100% of GFC shares and belonged to BCO Curacao. The reply dated 26 April 1996 justified IAMF's transfer under the first two transactions of loan portfolios in exchange for GDRs representing a 49% interest in GFC by saying that Conticorp had had to borrow in order to meet its need for additional resources, and had

> "returned these assets to IAMF as soon as possible after the sale of GDRs issued by Bankers Trust, constituting 49% of [GFC's] capital, with a price ratio of 1.8 to 1 of the value of its capital."

It continued:

> "The GDRs then had to be sold later by IAMF in the international market, with the expectation of generating important benefits for its investors.
>
> It wasn't possible to finalise this financial strategy due to the country's situation and the liquidity crisis surrounding Banco Continental and its companies. ..."

At this point, therefore, Dr Leonidas Ortega was not suggesting that the first two transactions were part of a plan agreed with the Ecuadorian authorities, but rather that they were normal investment operations which were frustrated by the financial crisis affecting Banco Continental and its companies. The third transaction was however explained as being "to fulfil the monetary authorities' conditions to extend the above-mentioned subordinated debt". It was said that to do this

> "Conticorp had to negotiate with IAMF regarding the buy-back of stocks of various companies that had become part of IAMF's assets and that should be exchanged for GDRs for 41.98% of the GFC shares or directly for stocks."

The suggestion in the letter dated 26 April 1996 that there was any negotiation, and the implication that IAMF possessed any independence that would enable it to negotiate, lacked, in the Board's view, any basis in reality. Later, the letter repeated that

> "As per the conversations that we had with the country's economic authorities to enable the contracting of a subordinated loan, and to fulfill the requirements of the associated trustee, we communicated that it was necessary to exchange other various financed assets with IAMF, for rights to the remaining GFC stocks that belonged to Conticorp SA, so that Conticorp could pay the loans [probably better translated as "commitments"] that it assumed with the Central Bank of Ecuador's trustee contract, including the delivery of shares of Banco Continental SA belonging to third party shareholders, and the delivery of 51 % of the ownership of Conticorp free of liens that some of the GFC loans have to the Bank of Guayaquil, the Previsora International Bank, Defactor (BMU), Solinversiones, Filanbanco Trust 8c Banking Corp and Financorp."

The letter added that this was "the only alternative to avoid voluntary or forced liquidation of Banco Continental which would have generated a national disaster", and maintained that it could not constitute a violation of the law,

> "because it was part of the fulfilment of an instruction granted by a competent legal authority."

111. The Board will in due course have to analyse in some detail letters exchanged between Dr Intriago and Dr Leonidas Ortega on 7 and 8 May 1996. But there is one feature of Dr Ortega's letter dated 8 May 1996 which the judge failed to note and which the Board mentions at this point. The Structural Reorganisation Program, read carefully, did disclose that IAMF had USD 44m in assets consisting of "first class assets of third parties increase in Banco Continental's capital at face value", and the letter of 8 May 1996 also referred to IAMF's lending for the purposes of the capitalisation. But Dr Ortega was concerned to stress, firstly, that IAMF was "an Independent Investment Fund" in which BCO Curacao invested under "AGENCY OR MANAGEMENT agreements signed by its investor clients", that IAMF was "under no circumstances … related to" Banco Continental, GFC or Conticorp, "since neither its stakeholders

nor its management is related or depends on" any of these companies pursuant to the relevant legal provisions and that IAMF was not therefore subject to article 128. His letter went on:

> "The fact that such fund manager has invested the resources of its investors in some of the activities of the Group based on its own decision and the advice of a company related to [GFC] such as PanAmerican Services PAF SA does not make it part of the Group as a subsidiary or affiliate, pursuant to the definition of article 67 of the General Law of Financial Institutions, because of the very fact that IAMF is not an Ecuadorian financial entity as already mentioned several times."

The Board cannot regard a description of IAMF as a fund manager investing the resources of its investors in activities of the "Group" [presumably, Conticorp, GFC and Banco Continental] "based on its own decision" and advice as reflective of the actual position. The Board is satisfied from all the evidence that IAMF at all times acted and acted only on and in accordance with the instructions of the respondents.

112. On 10 May 1996 Dr Intriago also wrote to Dr Paredes, who had now succeeded Dr Leonidas Ortega as executive president of Banco Continental, reporting that the Superintendence of Bank's audit committee had established that

i) IAMF's holdings of 14,790 GFC shares (the result of its three small purchases) plus GDRs representing 167,000 GFC shares (the result of the first two transactions) were over-valued in its balance sheet as at 31 March 1996 by 1,301m sucres against a book value of 1,820 million sucres,

ii) IAMF's balance sheet included an account receivable from Conticorp of 94,000m sucres (by virtue of the transfer of the loan portfolio and shares and the small credit due under the third transaction), which Banco Continental, BCO Curacao and IAMF must take actions to recoup, and in respect of which an immediate reserve must be made to cover the 38,000m sucres due for the shares, because of Conticorp's financial weakness, which had led it "to propose shares in [GFC] as payment".

iii) Because of Banco Continental's and GFC's financial deficiencies, the residual value of IAMF's holdings in GFC should be written off in Banco Continental's accounts.

Evidently, at this stage, Dr Intriago did not appreciate that Conticorp was maintaining that it had actually settled the third transaction with GFC shares. The whole document shows the Superintendent seeking carefully and properly to address the accounting consequences of the transactions, in a manner which is difficult to reconcile with any view that he was or would have been prepared to bless such transactions in January 1996 orally, without obtaining any clear documentation evidencing them and without examining and reporting on their nature and effect.

113. The Central Bank of Ecuador was from around the time of the subordinated loan also investigating the corporate position and the transactions, independently of the Superintendence of Banks. Examination of the documents made available to Snra Patino then and during later visits by her and the Central Bank's legal advisers to The Bahamas on 17 April, to Curacao on 20 April and again to The Bahamas in May 1996 led them to conclude that the Ortega family controlled IAMF which had simply effected the three transactions on instructions and that the three transactions were improper. The present proceedings by the Central Bank and others, challenging the propriety of the three transactions were begun in early June 1996.

114. On 20 June 1996 there was a board meeting of BCO Curacao at which Dr Leonidas Ortega and Dr Augusto de la Torre of the Central Bank made presentations, separately and in that order as well as it appears in each other's absence. It was submitted on behalf of the respondents that significance attached to a failure to accuse Dr Leonidas Ortega of wrong-doing at that meeting. But by early June 1996 the present proceedings had already been issued albeit at that stage only against Ansbacher. Further, it is clear from Dr de la Torre's presentation at the meeting of 20 June itself that he was reporting on a whole course of events which had only recently been uncovered, and which had led to a conclusion that the transactions were suspect. "With these crossed transactions", he is reported as saying, "a value increase of the Conticorp SA companies is triggered, through the disappearance of its debts". The record also indicates that Dr Leonidas Ortega replied to what he described as an accusation that he had been hiding from the authorities the existence of the fund in Bahamas by asserting that "that fund does not belong to us, or to Conticorp SA or Banco Continental SA, and there was no such pyramid of which I am accused".

115. Following the grant of the subordinated loan, Banco Continental continued to experience a lack of liquidity. On 5 November 1996, the Central Bank granted Banco Continental a further special loan of about USD 159m. On 20 September 1996, SBC Warburg, appointed by the Central Bank to value GFC and Banco Continental under clause 5.3 of the Trust Agreement, gave a presentation analysing the reasons why Banco Continental failed. It identified as a principal reason transactions which "drained cash" from the company, referring to IAMF's transfer to Conticorp of loans and shares in GFC. It also concluded that Banco Continental had had a deficit of capital of USD 114m as at 31 July 1996 (ie its liabilities had exceeded its assets by that amount).

116. Banco Continental did not repay either the subordinated loan or the special loan. In March and July 1997, these loans were converted into shares in Banco Continental in accordance with clause 5.2 of the Subordinated Loan Agreement and a Special Law was approved by the Ecuadorian Congress on 1 July 1997, declaring that the Central Bank of Ecuador would recover its funds from the sale of shares in Banco Continental and that the Respondents were precluded from buying them.

117. The Central Bank thus injected a total of about USD 325m new capital into Banco Continental. On 14 March 1997, all existing shares in Banco Continental were cancelled under the terms of the Subordinated Loan Agreement and the Trust Agreement. On 21 March 1997 Banco Continental's 1996 accounts were signed off by Arthur Andersen, indicating that, even after the capitalisation of the subordinated loan, Banco Continental had a deficit of over 153,000m sucres (c USD 42m).

118. By resolution dated 5 October 2000, the Superintendent of Banks approved the merger of Banco Continental with another Ecuadorian bank, Banco del Pacifico SA. That merger was effected, with Banco del Pacifico SA being the surviving entity and succeeding to the rights and obligations of Banco Continental, in March 2001, at which date Booz Allen Hamilton valued Banco Continental (as distinct from Banco del Pacifico SA) at only USD 82m. For convenience, the surviving entity has continued to be described in this litigation as Banco Continental.

***Analysis regarding liability***

*(1) Mr Taylor's breach of fiduciary duty in relation to the transactions and (2) whether the respondents could have assisted such breach, if Mr Taylor was relying on Ansbacher to vet the transactions?:*

119. In the light of this course of events, the Board turns to a more detailed analysis of the rival cases and the relevant evidence. The starting point is that it is clear that the judge was correct to find that Mr Taylor was in breach of duty as a director. He simply did as he was told, no more and no less, even it appears if it consisted in signing back-dated documentation. He took the risk, at the very least, that the instructions he received and followed might not be proper. Second, the judge was wrong to find that Mr Taylor's evidence that he was relying on Ansbacher to scrutinise the transactions and, in effect, to refuse any which were not appropriate meant that the respondents could not dishonestly have assisted Mr Taylor. The Board regards is as extremely improbable that Ansbacher engaged in any such scrutiny, or had a full picture which would enable them to do so. The Board also adds that Mr Taylor was clearly well aware that the instructions emanated in Ecuador. Many of them came on letter paper showing their precise origin. The speed with which they were relayed to him through Ansbacher and required to be implemented adds to the difficulty about accepting his evidence and the judge's view that Mr Taylor really thought that Ansbacher were undertaking any significant vetting. But in any event, whatever attention Ansbacher gave or may have been thought to give to them, the transactions in fact originated from, and were implemented in accordance with, instructions given from Ecuador (para 47 above). Ansbacher dealt with them in a manner which was precisely as intended by the respondents, who would no doubt have been surprised if Ansbacher had done anything else, and doubtless even more surprised if Ansbacher had started to investigate or tender advice about them. The respondents' instructions were in short causative of Mr Taylor's conduct, whoever he thought may have scrutinised them *en route*. They procured or assisted him to enter into transactions which involved breaches of fiduciary duty towards IAMF.

*(3) Were all four respondents responsible for assisting Mr Taylor's breach?:*

120. Third, the Board regards it as correct to attribute the instructions for all three transactions to all four respondents. Despite the attempts at various points to treat PanAmerican Services as an independent adviser, it is clear

that Drs Leonidas, Luis and Jaime Ortega were the moving spirits behind the transactions. The Board also considers that the instructions given to implement the transactions were given by them both in the interests of Conticorp, the company which was their principal beneficiary, and in the individual respondents' own interests in so far as their fortunes were tied up with those of Conticorp. The respondents positively assert in their case that the individual respondents acted on behalf of Conticorp, and contend that as a result the latter cannot be personally responsible. For reasons already indicated, however, an individual who dishonestly assists a breach of duty cannot, in the Board's view, contend that he was not assisting because he was at the same time acting in his capacity as an officer or agent of a company (para 50 above).

*(4) Were the transactions part of a plan to convert "debt to equity"?:*

121. Fourth, the judge evidently thought that the transactions were the culmination of a long-standing plan to convert "debts into equity". But the judge at no point identified the distinction between a conventional debt to equity plan, under which a creditor obtains equity in the debtor and continues to enjoy the potential benefit of recourse to that debtor's assets, and the three transactions in the months December 1995, January 1996 and March 1996, which had the effect of depriving the creditor of assets to which to look to satisfy its depositors, whether these were members of the Ecuadorian public depositing with BCO Curacao or BCO Curacao itself. The same blurring of an important distinction – and of the identity of "the group" - appears in explanations given by Dr Leonidas and Dr Luis Ortega of the genesis of IAMF, Dr Leonidas Ortega said in his witness statement, para 104:

> "By late 1995, in accordance to the Debt Equity Plan, the group had set up IAMF as a long term mechanism through which investments could lie made in the group. Further, rather than holding loans, investors would obtain a more direct participation in the group as these loans were replaced with equity."

Dr Luis Ortega said in his witness statement, para 73:

> "We also felt it made more sense and would be more convenient if, rather than IAMF having holdings in separate companies in the group, and different loans to the group, it would own the shares in all of the group. Also, the risk was

> spread - if we had a loan to just one company in the group, if that company failed IAMF would lose totally."

*(5) When were the transactions decided upon?:*

122. Fifth, the judge thought that a plan to convert debt to equity could be traced back to as early a date as August 1994, and associated, even at that date, with the GDR Program. But it is clear that no settled plan of this nature existed in August 1994 or in April 1995, dates when the focus was on achieving, by one means or another, the actual or apparent removal of the related party lending from BCO Curacao's balance sheet as required by Netherlands Antilles law, and then from BCO Bahamas's balance sheet, because of the Bahamian authorities' concern and/or because of the potential association of BCO Bahamas with BCO Curacao.

123. Further, the GDR Program did not materialise as a possibility until August 1995, and was then seen and pursued not as a means of selling to IAMF, but as a means of selling to one or more outside investors, particularly Mr Gilliéron. His interest evidently fell through in around early December 1995. Only then, when that had fallen through was any decision made to replace IAMF's portfolio of lending to Conticorp and Conticorp-related companies by a holding of shares by IAMF in GFC.

*(6) In what circumstances were the transactions decided upon?:*

124. Sixth, it was at precisely that point that the run on Banco Continental and BCO Curacao had become apparent and attracted public attention to the possibility that the bank was in real difficulties. And throughout December 1995 the run on Banco Continental and BCO Curacao continued and led them into ever increasing straits, so much so that by the end of December 1995 or early January 1996 Dr Leonidas Ortega was openly contemplating the possibility that the Banco Continental might have to be liquidated.

125. The Board cannot in the above circumstances accept as consistent with the contemporary material or accurate Dr Luis Ortega's account in his witness statement that

> "72. At some stage whilst we were developing the GDR concept, it became clear that the two strategic objectives of placing the shares in the group into GDRs, and of replacing

> the loans held by the mutual fund with equity in the underlying assets, could be achieved by replacing the loans held by IAMF with the GDRs of GFC. Thus, once the GDRs were issued, the plan was to put the GDRs into the IAMF fund in order that IAMF could have assets that were completely independent and marketable in the local and international market."

The Board is satisfied that the GDR programme was developed with a view to sale by Conticorp of part of its interest in the GFC on the international market, and that it was only when attempts over months to sell the GDRs on the market had failed, and when the bank was caught in a financial crisis, that a decision was taken some time in December 1995 to put GDRs into IAMF's name, and to take its assets in return.

*(7) What attention was given to IAMF's interests in entering into the transactions?:*

126. Seventh, there is no evidence or likelihood that any independent advice was taken on behalf of IAMF regarding the purpose or prudence of its entering into any of the three transactions. Had IAMF's interests been given any attention, the most obvious course would have been to arrange for it to receive independent advice. Moreover, there is no record of any of the discussions even within Conticorp or among the respondents which led to the decision, taken by the time of the Conticorp board meeting on 21 December 1995, that IAMF should acquire GDRs from Conticorp. The board meeting evidences discussion of the price to be assigned to the GDRs, but the only evidence of the likely nature of that discussion consists in Snra Maria Carmen de Velez's memorandum of 30 November 1995. That relates to a potential sale at 2m sucres a share, the same price as that of which IAMF made on instructions its three small direct purchases of GFC shares in June and December 1995 and January 1996, rather than to the value of 1,403,917 sucres a share assigned to the 115,752 GFC shares covered by GDRs which were bought by IAMF on 28 December 1995. To whatever operation Snra Maria Carmen de Velez was directly referring in her memorandum of 30 November 1995 (and she was not called as a witness to explain), it appears from the values she gave that she would not have agreed with any of these prices. Her values would not appear capable of justifying any value much greater than par, and any suggestion that the valuation should be higher by reference to profit projections based on Banco Continental's past profit profile must by that date have become suspect in the light of the bank's deteriorating position, and have called for close examination and the exercise of due diligence in IAMF's interests. Yet there is no sign that any up-to-date figures were

requested or examined. The absence of any contemporary documentary justification of the values assigned is even more remarkable in the light of concern expressed in Snra Maria Carmen de Velez's memorandum of 30 November 1995 regarding the need to be in a position to present to the authorities "the technical and actual support of the evaluations on which we had based the transactions."

*(8) What was Banco Continental and BCO Curacao's financial position when the transactions were entered into?:*

127. Eighth, the Information Memorandum, which must have been seen as a formal explanation and/or justification for the transaction, simply ignores the evident and increasing financial difficulties and threats facing Banco Continental and BCO Curacao by 27 December 1995. Dr Leonidas Ortega himself accepted that the projections it contained had been prepared "substantially before". By 27 December 1995 it must or should have been obvious that the projected profit of just under USD 7m for 1995 contained in the Information Memorandum was completely unrealistic. Within a very short time, the actual figure was confirmed as a loss approaching USD 30m. Banco Continental clearly kept accurate and up to date management accounts, which enabled it to produce annual figures to the authorities on 8 January 1996 and to finalise its annual accounts for 1995 with notable speed later in January 1996. The respondents must have been aware that the bank's actual financial position at the date of the Information Memorandum was quite different from that appended to the Memorandum.

*(9) Was there any reason for IAMF to enter into the first transaction in late December 1995?:*

128. Ninth, there was and is no apparent reason in December 1995 for IAMF to buy the GDRs. Attempts to sell the GDRs on the open market had been going on for months, without success. IAMF's intervention was not going to assist their success. What it was going to do was pass from Conticorp to IAMF the risk that the GDRs would prove unsaleable. In return IAMF was going in effect to relieve Conticorp and its associates of their liability to repay the valuable portfolio of loans which IAMF held. Dr Leonidas Ortega's letter dated 26 April 1996 appears to suggest that the plan to sell to IAMF dated from before, and was frustrated by, the financial crisis, with the intention having been that IAMF should market the GDRs to its own benefit. But that was clearly not the intention at any point up to the end of November 1995, during a period when efforts were being made by

Conticorp to sell the GDRs to outside (and evidently long-term) investors for Conticorp's own benefit.

129. In December 1995 no-one thinking of IAMF's interests can seriously have thought that introducing IAMF as owners of the GDRs would improve the prospects of a sale or lead to IAMF benefiting on any resale in the foreseeable future. Realistically, Dr Leonidas Ortega himself accepted that no-one other than IAMF would have been prepared to buy the GDRs in the first half of 1996. The position cannot sensibly have been seen any differently in late December 1995. All attempts to find an open-market buyer during 1995 had failed and Mr Gilliéron had evidently lost interest in the circumstances of early December 1995. By the end of December or early January 1996, Dr Leonidas Ortega was already concerned about the possibility that Banco Continental would be forced into liquidation. As mentioned in para 84 above, Banco Continental's own accounts for 1995 noted that the risks to which it and its subsidiary BCO Curacao were exposed, increased significantly due to the latter's receipt (from depositors) of short-term funds, which were then placed in IAMF as mid- and long-term risk investments in related companies. (A similar note appeared in BCO Curacao's own later issued accounts for 1995.) The risk of bringing about the collapse of IAMF if it was deprived of the assets on which it relied to service its depositors, whoever they might be regarded as being, and given instead a long-term prospect of marketing GDRs must have been similarly apparent. In contrast, if there was a real risk of Banco Continental collapsing, there was every incentive for Conticorp and the respondents to save whatever assets they could from the wreckage. Dr Luis Ortega accepted that over 90% of Conticorp's income came from Banco Continental.

*(10) Was there any reason for IAMF to enter into the second transaction in late January 1996?:*

130. Tenth, there was even less reason for IAMF to part with a valuable loan portfolio in order to acquire further GDRs on 31 January 1996. By then, the authorities had decided and then ordered the reversal of the accounting approach whereby deposits with IAMF were treated as being made by the Ecuadorian public with IAMF through BCO Curacao. The risk of depriving IAMF of readily available assets would on that basis impact directly on BCO Curacao and Banco Continental. Further, the position of Banco Continental and BCO Curacao had continued to deteriorate, and the respondents had been engaged for some time in contacts with the authorities, with a view to the introduction of a structural reorganisation program.

*(11) The relationship between the transactions and any plan or program:*

131. Eleventh, there are in the Board's view fundamental difficulties about the judge's conclusion that "the defendants were in the process of carrying out that plan by the transactions complained of" or at least "honestly and reasonably believed that such a plan had been agreed" (para 246). In particular: (a) that cannot apply to the first transaction, since it was decided and implemented before any such plan had been mooted by either side with the other; (b) as to the second transaction, the suggestion that it was part of such a plan is also inconsistent with Dr Leonidas Ortega's letter dated 26 April 1996; and (c) the third transaction was not anticipated in - or even conceived until about six weeks after - the Structural Reorganisation Program.

*(a) Evaluation of the oral evidence against the background of the documentation and probabilities:*

132. The judge's conclusion was influenced by a poor view which he took of Dr Intriago's evidence, but he did so for reasons which the Board considers do not stand scrutiny. Most importantly, the judge did not in his judgment note the differences between Dr Intriago's letter dated 26 January 1996 and the respondents' Structural Reorganisation Program which was only sent to Dr Intriago on 1 February and to which the Superintendence of Banks did not respond, and then only formally, until much later on 23 February 1996. Dr Intriago in his evidence pointed out the importance of these differences. The particular difference which stands out is that his letter contains no reference to IAMF acquiring any holding in GDRs or GFC. If this had been an aspect which Dr Intriago knew and understood or which had been explained in any understandable way, it would have been expected to appear in Dr Intriago's letter. If it had had any intelligible relationship to any structural reorganisation which would improve the position of Banco Continental and BCO Curacao, then no doubt this would have been made clear. But it did not and does not. So it is not surprising that, if and to the extent that it was mentioned at all, it did not impact on Dr Intriago's thinking as having any relevance. The judge found that either Dr Intriago approved a plan including the transactions or the respondents honestly and reasonably believed he had. In so far as the judge concluded that Dr Intriago may have approved such a plan, the Board regards his finding as against all the probabilities and unsustainable. In so far as he concluded that the respondents could as honest businessmen have believed that Dr Intriago had approved such a plan, the Board also regards the finding as against all the probabilities and unsustainable.

133. In this area, the Board considers that the judge failed clearly to take proper advantage of having heard and seen the witnesses, and failed in particular to test their accounts against the background of all available material as well as the inherent probabilities. The individual respondents are highly experienced and evidently acute businessmen as well as qualified lawyers. Dr Intriago was an experienced senior banker who had held posts in both the private and the public sector, including as President of the Association of Private Bankers (1985-1987), alternate member of the Monetary Board (1988-1989) and a member of the Banking Board (1994-1995). He had only recently, on 23 October 1995, become Superintendent of Banks. He was then in excellent health (though unwell by the time of trial in 2010 – he in fact died the next year). He was responsible for some 37 banks (Banco Continental being only the biggest problem), over 70 finance companies and about 15 insurance companies. It was a very busy time.

134. The case against Dr Intriago in relation to the first two transactions was that he had positively wanted IAMF to own 49% of GFC's shares, that he had typed up the Structural Reorganisation Program himself on his computer and that it contained "his valuation of IAMF" at USD 110.7m. Even the judge accepted that the respondents were not telling the truth in so far as they claimed that the whole plan originated with Dr Intriago in this way (para 247). Yet the judge concluded from similarities between the letter dated 26 January 1996 and the Program, sent only on 1 February 1996, that either there was an agreed plan which embraced the transactions, or at least that the respondents reasonably believed that whatever was agreed embraced the transactions (though he did not explain how it could embrace the first, already completed transaction, let alone the third transaction which was in no-one's mind until nearly two months later).

135. The judge did not address the differences between the documents. The raising of outside capital by sale on the open market of shares in Banco Continental was recommended by item 13 of Dr Intriago's letter dated 26 January 1996. But what happened was very different. The judge did not address the extreme improbability of Dr Intriago "wanting" IAMF to enter into transactions whereby it acquired 49% of GFC in return for GDRs in GFC, or the improbability of his putting a value on any holding in GFC for this purpose. He did not address the nature of the transactions. No motive has been suggested why Dr Intriago should have approved any, let alone all, of the three on any view extraordinary transactions in issue in this case, which led, as he put it, to the "pyramidisation" of capital in Banco Continental. Ultimately, the respondents' case relating to the plan also comes down to this. Dr Intriago diligently observed, and through his letter dated 26 January 1996 to which the Monetary Board gave effect by

its order of 30 January 1996 *required* the correction of, BCO Curacao's inventive treatment of deposits made with it. Yet he was at precisely the same time aware of, and without asking any questions whatever was prepared orally to approve, a transaction or transactions eliminating or seriously reducing the assets held by IAMF on which the servicing of BCO Curacao's depositors depended, leaving IAMF with in return no more than GDRs in BCO Curacao's parent company which was in the middle of a financial crisis. The judge did not test his view of the evidence or the plan as agreed or as reasonably understood to be agreed against any of these considerations. The Board regards it as wholly implausible that Dr Intriago should by his words or conduct have given the respondents to believe that he was approving the unusual transactions, the first of which they had already executed, the second of which they executed on their case on the basis of Dr Intriago's oral say-so before they sent him the Structural Reorganisation Program and the third of which they again executed before even suggesting that it was in the offing.

*(b) Obscurity of Structural Reorganisation Program:*

136. The obscurity of this Program as presented by the respondents on 1 February 1996 is notable. Although it says that IAMF will hold 49% of GFC, it gives no account or explanation of the transaction(s) leading to this position, or in particular of the loan portfolio which IAMF had surrendered by the first and second transactions to give rise to it. If a full picture had been presented, the respondents might have had some basis for saying that the Superintendent of Banks must have understood and approved it. But there is no sign in the full documentation which the Ecuadorian authorities have produced of any such understanding. Dr Intriago in his witness statement commented on the respondents' approach to disclosure of the three transactions that "They revealed selective parts of their scheme before the Central Bank took control". The transactions were bound at some stage to come under (at least) accounting and auditory scrutiny, whether or not Banco Continental and BCO Curacao survived. The Board's view of the case overall is that Dr Intriago's comment is likely to reflect the precise position. The respondents were, for whatever reason, concerned to allude or refer to the transactions, including by references to their being part of an already agreed plan, but not in any way which made their substance obvious or would attract close scrutiny. The Board sees no reason to conclude that Dr Intriago or anyone in the Superintendence of Banks understood IAMF's position or the nature and effect of any of the three transactions until well after they had all been agreed, and detailed investigations into them took place. The reply dated 23 February 1996 sent by Senor Moreno, the Superintendence of Banks's Inspector of Banks to Dr Leonidas' letter dated 1 February 1996 enclosing the Program was that the Program would

be reviewed and analysed. The Board sees no reason not to take this at face value. Dr Intriago and Senor Moreno gave evidence that, when the Program was received, it was simply sent by the former to the latter for analysis, which he arranged by sending it on to the Superintendence's auditors. If the Program had been either drafted or agreed by Dr Intriago in the manner which the respondents suggest, the time for analysis would in fact long have passed.

*(c) Dr Intriago's cross-examination:*

137. The judge concluded that Dr Intriago was not telling the truth when he denied in cross-examination that Dr Leonidas Ortega and he had "discussed and agreed upon" the Structural Reorganisation Program. The key passages centred on Dr Leonidas Ortega's letter dated 8 May 1996 defending his position in relation to the 25.48% capitalisation: para 97 above. The background to the letter dated 8 May 1996 is that, as early as 19 March 1996 (ie before finalisation of the subordinated loan and trust agreement and before Dr Intriago can have had any reason to cover his back from anyone), Dr Intriago reported in one of two reports addressed to the President of the Monetary Board that the Superintendency's auditors were concerned about the capitalisation. This was on the generalised basis that "the resources of IAMF that were booked as memorandum accounts of BCO and that represent the active portion of [BCO Curacao], were used to cover the capitalisation of Banco Continental and of other companies comprising the [GFC] as well as the firms related to Holding Conticorp", with the implication that there was an equity deficiency within Banco Continental. He said that the matter would be further investigated by a special auditor.

138. Then, after the Ecuadorian authorities had received an internal report dated 18 April 1996, letters were written by Dr Intriago on 19 April and 7 May 1996 requiring Banco Continental to explain two matters: first, the investments of the fund which IAMF administered consisted 100% of GFC shares and belonged to BCO Curacao; second, the resources used for the capitalisation of Banco Continental in November 1995 and January 1996 appeared to be fed by or come from BCO Curacao and Banco Continental. The two letters were the subject of vigorous replies by Dr Leonidas Ortega dated respectively 26 April and 8 May 1996. As regards the second part of the capitalisation, the specific allegation, contained in para 3 of the letter dated 19 April 1996, was that the relevant resources "appear to come from the same Banco Continental SA through sale transactions and subsequent repurchases of portfolio investments in foreign currencies with [BCO Curacao]" transferred to IAMF. The letter dated 7 May said that Dr Leonidas Ortega's answer of 26 April 1996 had

"failed to provide new elements", but it gave him an opportunity to "extend the rebutting evidence pursuant to article 125 of the above-mentioned Law". In response to an oral request by the Ortega Trujillo family, it also provided a copy of the auditors' analysis No INB-96-0366 dated 18 April 1996 (mentioned in para 57 above), which, it said, established that, "in conducting such capital increase, Banco Continental SA violated the provisions of article 128(b)" of the General Law on Financial Institutions. The analysis outlined the transactions whereby Banco Continental first sold a foreign currency portfolio to BCO Curacao, loaning it a sum equivalent to the sale price so that no money actually passed hands, and then repurchased the portfolio from BCO Curacao in return for a separate credit. The analysis concluded that Banco Continental through the latter repurchase on 31 January 1996 had in effect funded the second part of the capitalisation (as summarised by Adderley J in para 216(2) of his judgment). It is Dr Intriago's evidence in cross-examination with regard to Dr Leonidas Ortega's reply dated 8 May 1996 that led to the judge forming the adverse view which he did about Dr Intriago.

139. The cross-examination started at the close of 9 February 2010 with a suggestion, which Dr Intriago denied, that his challenge to the capitalisation was motivated by a desire to strengthen the justification for the subordinated loan, which, it was suggested, had by 7 May 1996 become controversial publicly. This suggestion lacks force, when the capitalisation had been under investigation for a number of months. First thing next morning, however, the focus moved to what was in fact a fall-back response in Dr Leonidas Ortega's reply dated 8 May 1996 to the effect that "Moreover [*Más aún quanto*], this transaction is included in the Structural Reorganisation Program …". By "this transaction", it is in fact clear from the text of the letter that Dr Leonidas Ortega was referring to the Banco Continental's repurchase of the foreign currency portfolio from BCO Curacao on 31 January 1996, which was the subject of challenge in the letter of 7 May 1996. What was put to Dr Intriago was that "the transaction" had been discussed and agreed with him in January 1996. Dr Intriago denied this immediately. He was then asked whether he could point to any memorandum or communication recording that Dr Ortega's statement in the letter of 8 May 1996 was wrong. His answer was that the Monetary Board had only two days later on 10 May 1996 determined that Banco Continental had contravened article 128(b), and thereby in effect rejected the letter dated 8 May 1996. Asked again whether he had anywhere recorded that Dr Ortega was wrong to suggest that he had agreed "the transaction", he was, not surprisingly, puzzled as to what "transaction" the question related. The answer given by counsel at this point was the wrongdoing or violation under article 128(b) of which Dr Ortega was being accused. A further question was then put

asking Dr Intriago specifically to comment on Dr Ortega's statement in his letter that "the transaction was discussed and agreed with you in January 1996". To this, Dr Intriago responded by addressing the question whether the Superintendency of Banks had accepted the Structural Reorganisation Program. He did so in terms which were muddled in their interpretation into English. But, even in English, they can when studied be seen to have been intended to make clear that he did not agree with any suggestion by Dr Ortega that the Superintendency had accepted Banco Continental's letter of 1 February 1996, and that Snr Moreno's reply had indicated this.

140. Counsel's response was that Dr Intriago was referring to the wrong letter, and that he was asking about the letter dated 8 May 1996. There followed these questions as put in English and answers as translated from the Spanish:

> "A. You are relating this letter with the supposed acceptance of the Superintendency of Banks in which a programme was approved.
>
> Q. I'm asking you whether Dr Ortega's statement that there was agreement, a discussion and agreement with you in connection with a structural reorganisation programme in January 1996 as stated in Spanish by him at 102K. Is that true or false?
>
> A. In the terms that I'm interpreting – in the terms that I'm interpreting your question, there should have been an answer to this instrument. We should have replied to this instrument. Your request seems to mean that the reply to this — to this instrument, to this communication should have been provided an answer to each and every one of the paragraphs contemplated in this communication.
>
> Q. Mr Intriago …
>
> A. That's my response.
>
> Mr Intriago, it is nice to play with swords, but it is a simple question: Is this statement true or false?

A. There is no reply to that paragraph as well as just there is no reply to some other paragraphs to which you are making reference.

Q. And the reason for that, I suggest, is because this paragraph was true.

A. No.

Q. It is an important suggestion, however.

A. Do you mean your suggestion?

Q. The suggestion in the letter that you agreed is an important suggestion that –

A. I consider that that is your personal opinion; not my personal opinion.

Q. Ah, what is your personal opinion?

A. That there was no previous authorisation.

Q. But it is, I asked, an important suggestion? Mr Intriago ...

A. Important suggestion? You're asking -- you're asking me some questions -- you're asking me some questions that give me an environment of providing an unsure answer to you.

Q. You are the regulator; are you.

A. Yes.

Q. You are suggesting that Dr Ortega's broke a regulation, an Article?

A. Yes.

Q. If, in response, the bank says, but you agreed it in advance, that would be an important suggestion?

A. The problem — it is that there had not been any approval or acceptance from the Superintendency of Banks in relation to – in relation to the letters submitted on February 1st by Dr Ortega.

….

Q. Was Dr Ortega's letter of …. The 8th of May, was that copied for the members [at the Monetary Board meeting on 10 May 1996]?

A. It should have been included in the report presented, the General Intendant of Banks.

Q. Did anybody ask if what Dr Ortega wrote about an agreement with you was true?

A. No.

Q. Does that surprise you now?

A. Yes.

Q. Did you feel the need to explain to the other members of the Board that what Dr Ortega had written about an agreement was wrong?

A. In the totality and the general information contained many things were not -- that were not adjusted to the reality."

141. (a) The exchange ending with counsel's words that "it is nice to play with swords" and (b) the judge's observation of Dr Intriago's demeanour during its course were evidently central to the judge's conclusion that he "was not persuaded that Dr Intriago was telling the truth when he finally said 'no'". The Board does not consider that either counsel's comment, or suggestion if it was so intended, that "it is nice to play with swords" or the judge's use of the word "finally" represent a fair account of the course of this evidence. First, the questioning of Dr Intriago was far from clear or consistent in its focus. It started and continued for some time by questions about the repurchase transaction of 31 January 1996 which the Superintendency was suggesting had involved Banco Continental in breach of article 128(b). It was in fact Dr Intriago who turned the subject explicitly to the question whether he had accepted the Structural Reorganisation Program. And he was then told to focus on the letter of 8 May 1996. Second, Dr Intriago had already made clear that he regarded that letter as having been rejected generally by the Monetary Board's determination on 10 May 1996 that there had been a breach of article 128(b). The repeated suggestion that he should have done more by way of some specific denial of its assertions seems to the Board unrealistic. In circumstances where he and the authorities were simply rejecting the whole letter as unfounded, the Board sees no point or likelihood in someone in his position doing any more to pick out particular parts for specific denial. Self-evidently, he was rejecting any suggestion that he had approved the method of capitalisation. Otherwise, how could he now be condemning that as a breach of article 128(b)? Third, what the judge regarded as "a degree of equivocation" was in reality a repetition by Dr Intriago of this very point: was he expected to reply to every paragraph in a letter which had been rejected generally? In the Board's view, that was a fair riposte. He had already made his position clear, and his riposte did so again. Fourth, the Board is conscious of the advantages possessed by a trial judge seeing and hearing a witness. But the judge does not analyse the whole course of the relevant passages of evidence, or address the fluctuating focus of the questioning.

142. Still less did the judge consider the plausibility of a conclusion that Dr Intriago's answers showed that, far from being in any position to condemn the method of capitalisation as a breach of article 128(b), he had in fact specifically discussed and agreed that very method with Dr Leonidas Ortega in January 1996. Such a conclusion is self-evidently implausible. In particular, the judge did not address the question what motive the Superintendent of Banks might have had for agreeing to such a method of funding of the capitalisation by Banco Continental or BCO Curacao in January, and then reversing his attitude in April 1996 and permitting an investigation to take place into the funding of the capitalisation and, on the investigation revealing Banco Continental's and BCO Curacao's

involvement, deciding on reversal of the capitalisation (as was ordered on 10 May 1996). The respondents attribute Dr Intriago's attitude after the Central Bank took over to a desire to protect his back from an attack by the Ecuadorian courts relating to the granting of the subordinated loan and trust agreement. However, this attack, initially against Dr Leonidas Ortega but then extended very widely, did not emerge as a possibility until around or a few days before 10 May 1996, and investigation of the capitalisation had in fact begun even before the subordinated loan and trust agreement were finalised. Further, the question is unanswered what interest Dr Intriago might have had in the first instance in overlooking an improper transaction, if he understood it, in January 1996. The judge's finding also means that the Superintendent must after the event have been prepared to go the lengths of involving himself in a disingenuous charade.

*(d) The capitalisation:*

143. In this connection the Board also notes that none of the transactions referred to in sub-items 1.3, 1.4 or 1.6 of the Structural Reorganisation Program had on its face anything to do with any raising of capital by Banco Continental, and sub-item 1.4 did not disclose any such connection either. Further, Dr Leonidas Ortega in his reply dated 8 May 1996 had expressly disclaimed any such connection. He had stated categorically that the transaction which he dated as occurring on 14 December 1995 was for Banco Continental

> "to adjust its position in foreign currency imposed through resolution SB-JB-95-015".

Further, he went on that it was "extremely important" to note that

> "it was entirely unrelated to the portfolio repurchase transaction of January 31 1996, which was due to liquidity needs of [BCO Curacao] as a result of the rumours which initiated the financial crisis of Banco Continental."

So, on Dr Leonidas Ortega's account, neither of the transactions which he dated as occurring on 14 December 1995 and 31 January 1996 between Banco Continental and BCO Curacao took place to fund the capitalisation. He was asserting that each was entirely separate from the other, and that the capitalisation was for this reason in no way in breach of article 128. The judge himself declined to accept "the plaintiffs' theory on the three transactions *[ie those occurring on or about 31 January 1996*

*and involving the sale and repurchase of the foreign current portfolio and IAMF's funding of the second part of the capitalisation]* as being part of one plan to purchase the shares" (para 230). Yet it is the respondents' case that Dr Intriago had in January 1996 a full understanding of the implications of the Structural Reorganisation Program, indeed (although the judge himself did not go this far) that he actually originated it. Yet it is now clear that even the judge himself did not appreciate that all three stages by which IAMF was enabled to meet the second instalment due on the capitalisation were effectively contemporaneous. The judge did not appreciate this because he wrongly followed Dr Leonidas Ortega in dating Banco Continental's resale of the foreign currency portfolio as occurring on 14 December 1995, rather than 31 January 1996. The Superintendency's auditors' view was that the Superintendency of Banks' resolution dated 14 December 1995 was used as a pretext for the initial resale and loan to BCO Curacao on or about 31 January 1996. It is clear that it was only the resale and loan by Banco Continental on or about 31 January which gave BCO Curacao the wherewithal to sell or appear to resell the same portfolio back to Banco Continental on the same date on terms not cancelling the loan, but creating an immediate indebtedness, which BCO Curacao could then use to fund IAMF. A conclusion that the three stages occurring on or about 31 January 1996 were intimately linked is unavoidable in the light not merely of their dating, but also of their nature and description, as outlined in the second and third charts annexed to a letter dated 5 March 1996 which Banco Continental later wrote to Dr Intriago. This is so, even though the letter maintained that the first stage "has its origin" in the resolution dated 14 December 1995. It is on any view also obvious that Banco Continental's repurchase of the same portfolio on 31 January 1996 was an essential element of the second half of the capitalisation on the same date. The third chart (PASO 3) enclosed by Banco Continental in its letter dated 5 March to the Superintendency of Banks actually makes clear that it was part of a "scheme of financing of the new shareholders who had not paid up their capital contributions". For all these reasons, it seems clear now that it was Dr Leonidas Ortega's account of the capitalisation in his letter dated 8 May 1996 that was inaccurate, but that there is no plausible basis however for thinking that Dr Intriago understood or agreed in January/February 1996 the implications of the sub-items of the Structural Reorganisation Program which can now be seen to be intimately linked with the ostensible payment of the second capitalisation instalment. The judge said that he appreciated "the accounting argument" that this ostensible payment did not involve any cash flow from outside into the bank, but said that "to peg the transaction as dishonest may be placing it too high". Equally, the Board does not propose to go further than it has done above into the implications of the arrangements by which the second capitalisation payment was made. What is relevant - though no more than confirmatory of an ultimate conclusion which the Board would anyway reach

independently of the matters stated made in the present paragraph - is the light these matters throw on Dr Intriago's cross-examination and the judge's appraisal of his credibility. Other aspects did not feature in the appellants' case, were only investigated after the oral hearing before the Board and are not on any view central to the issues which do arise.

*(e) The judge's conclusions based on Dr Intriago's cross-examination:*

144. The judge appears to have been prepared to derive from the passage in cross-examination which the Board has set out in para 139 above support for a proposition that Dr Intriago had not only agreed the method of capitalisation used in January 1996, but had also discussed and agreed with Dr Leonidas Ortega in January 1996 all aspects and implications of the Structural Reorganisation Program, that is including the three GDR/share transactions which were no part of the subject matter of the letter dated 8 May 1996. This is in the Board's view even less plausible than a suggestion the Dr Intriago understood the capitalisation in January/February 1996, even if one focuses simply on the relationship between Dr Intriago and Dr Leonidas Ortega. Viewed in the context of all the material in the case, the Board has no doubt that the judge was wrong to draw any such conclusion.

*(12) The third transaction:*

145. Twelfth there was no sensible reason for IAMF to enter into the third transaction. The third transaction was suggested by Dr Leonidas Ortega in his letter dated 26 April 1996 to have been dictated by the Ecuadorian authorities. But the letter justifies it in terms not of any benefit that it might bring to IAMF, but in terms of the need to meet the Central Bank's terms for a subordinated loan. Further, it is clear that, although the respondents had ample opportunity to disclose what was intended by way of the third transaction, they in fact executed it without informing the authorities, and only mentioned it after the event, as item 1 in Dr Leonidas Ortega's letter dated 12 March 1996, reading:

> "RESTRUCTURING OF THE "IAMF"' TRUST OF THE BAHAMAS" said "So that IAMF would have 67.45% of the shares of Banco Continental SA among its principal assets, Conticorp would exchange the corresponding assets."

This obscure announcement hardly reflects a reality under which Conticorp and Conticorp-related companies were to be relieved of various debts and to acquire valuable shares.

146. From the viewpoint of the interests of IAMF and the depositors with BCO Curacao who depended on IAMF's assets, there can in March 1996 have been no sensible reason for the third transaction. The Board cannot accept the explanation given in Dr Leonidas Ortega's letter dated 26 April 1996 and repeated at trial that it was necessary to exchange IAMF's assets for GDRs

> "so as to allow the Central Bank of Ecuador, in its role as trustee, to take control of the shares of GFC, Banco Continental SA and its subsidiaries."

No sensible reason can be discerned why Conticorp could not have delivered shares it held to the Central Bank, or why it was necessary - let along necessary in IAMF's interests - to involve IAMF. Neither the proposal for, nor satisfaction of the conditions of, a subordinated loan can sensibly, or legitimately, have been contingent upon IAMF surrendering valuable loan and share portfolios to Conticorp's and Conticorp-related companies' evident benefit. The explanation given in Dr Leonidas Ortega's letter dated 26 April 1996 included a statement that the shares transferred under the third transaction were required to enable payment of credits of USD 20 million owed to companies and persons who had part-funded Banco Continental's capitalisation on the security of GFC shares, which shares were now required to be surrendered by Conticorp under the trust agreement. But, even if that were so, it ignores IAMF's interests in its assets, and is no justification for requiring it to release valuable assets in return for GDRs of no commensurate value.

*(13) Dr Luis and Leonidas Ortega's explanations for the transactions:*

147. Thirteenth, the Board addresses Dr Luis and Leonidas Ortega's explanations for the transactions. The following passages in Dr Luis Ortega's evidence as to the reasoning for IAMF owning GDRs rather than its portfolio of loans are, the Board considers, revealing:

> "It made sense for the fund to own the GDRs instead of the loans. Unlike the loans, these assets would increase in value, and the fund could buy and sell the GDRs on the open market (unlike being stuck with the loans) and thus would

> be more flexible. Further, if the fund decided to purchase other assets outside the group, it could finance such investments through selling GDRs. We also felt it made more sense and would be more convenient if, rather than IAMF having holdings in separate companies in the group, and different loans to the group, it would own the shares in all of the group. Also, the risk was spread - if we had a loan to just one company in the group, if that company failed IAMF would lose totally. However, by having GDRs the risk was spread across the whole group."

The first two sentences might make sense, in circumstances where the GDRs were marketable and there was any prospect of reselling them at a profit. The last two sentences are incoherent. IAMF had loans to the Conticorp group, but was not acquiring any shares in that group. The risk to which IAMF was exposed before the transactions was of non-payment by the Conticorp group, but, by taking and having the GDRs, IAMF excused Conticorp from that risk, took shares in the GFC group and reduced the assets available to meet its depositors.

148. The Board also finds revealing the following passages from Dr Luis Ortega's cross-examination in relation to the third transaction:

> "Q. Why was it in IAMF's and BCO Curacao's best interest to sell these three companies that are referred to here at that moment?
>
> A. IAMF's interest was always looking to benefit what was more convenient for the investors or the depositors. In this case, changing and swapping the shares by GDRs gave IAMF an asset much more secure and much more commerciable [sic] to secure the interest of their investors. … Besides the fact that this was already part of an agreement that we were interested in supporting as well. …
>
> Q. These were, were they not, good companies with a prosperous future?
>
> A. Correct.

Q. There was no immediate chance that any of the companies being sold would go into liquidation at that moment and become worthless.

A. No.

Q. They were being exchanged for shares in GFC, weren't they?

A. Correct.

Q. Now, this was March 1996, if you remember? …

Q. At this point there was a real risk that Banco Continental would have gone into liquidation, wasn't there?

A. Yes.

Q. If Banco Continental would have gone into the liquidation, the GDRs in GFC and shares in GFC would have become worthless; would they not?

A. It would not have had the value of the assets which it was representing, but it would had the value of the assets that, during the process of liquidation, would have been realised.

Q. It would have had a very limited value?

A. It would have had a different value. I couldn't assure whether higher or lower, but definitely different.

Q. Why swap shares in healthy companies for shares in a company which might well not survive?

A. Surviving in the way in which it survived, the bank survived, which is an asset much more valuable, especially for us, the asset of — the assets of the other companies had

a value which was very limited in comparison to the assets it was representing."

149. The cross-examination continued:

"Q. Let us look at the second part of this. Why was it helpful to IAMF to release those loans at that moment?

A. To ensure the interest of the depositors, the investors, by facilitating the fact that - the part of carrying out the plan that would ensure - that will secure the major part of the assets of the Fund.

Q. I'm not understanding this, Dr Ortega. Why was it useful for IAMF to release these loans at that point? What benefit did it get from it?

A. The benefit that 1AMF was obtaining was to achieve to consolidate the future projection of the assets which would make feasible the recovering and development of the Fund as such as for the benefit of the investors.

Q. I'm sorry, Dr Ortega, I still don't understand. Why, at that moment, was it helpful to release these loans, at that moment in March?

A. Again, it facilitated to secure the most important asset of the Fund.

Q. Why wasn't it more sensible to wait until it was clear whether Banco Continental was going to survive or not?

A. That alternative was always there. We believed that it was not the most convenient one.

Q. Why not convenient, Dr Ortega?

A. Because it wasn't going to grant on behalf of Banco Continental — Central Bank, it was not going to allow us to comply with the conditions which the Central Bank had imposed in order to disburse the subordinated loan which was very important for the development of the bank in the future.

Q. Which condition?

A. The condition was to have full control.

Q. But that could be achieved by Conticorp delivering its shares into the Trust. Why did this transaction help that?

A. It was the only way in which the shares would have been able to enter into the Fund, actually to become an asset of the Fund.

Q. I still don't understand, Dr Ortega. Under the Trust Agreement — you remember the Trust Agreement? That was eventually signed?

A. Yes.

Q. IAMF agreed to deliver its 167,000 GDRs, which had nothing to do with this, and Conticorp agreed to deliver the balance. Why did IAMF need to buy any shares in order to make that possible?

A. Because that was the only way to swap the assets in the Fund to protect the investors.

Q. I still don't understand, Dr Ortega. Why was that a good idea? Why did that fulfil the conditions, as you said, of the Central Bank?

A. Because that would have made feasible -- it would make a fact -- the fact that Banco Continental would have received the values, the assets, by means of the

subordinated loan in order to develop its operations and to continue for the benefit of the investors.

Q. We'll leave it there, Dr Ortega."

150. Dr Leonidas Ortega was also questioned about the rationale of the transactions. He accepted that before they took place IAMF had assets in the form of shares as to USD 37m and "loans which were genuine and recoverable at their face value", while after the transactions it had instead GDRs and shares in GFC. Asked how IAMF was to generate profits after 6 March 1996, his evidence continued:

"A. With the recovering and sale of the bank.

Q. So this was gambling on the recovery of the bank?

A. No, we were just obeying the authorities.

Q. You mean you exercised no independent judgment, Dr Ortega?

A. At that time, yes, accepting the decision of the authorities, because I consider it convenient to - for the investors - for the investors, I insist in investors for the Banco Continental as the least owner of Banco Continental Overseas and for the country.

Q. If Banco Continental had gone into liquidation at that point, these GDRs would have been worthless, wouldn't they?

A. We would have never liquidated it.

Q. That's nonsense, Dr Ortega. You were threatening to liquidate the bank at the time. … You were threatening at, the time, in so many words, that the bank would go into liquidation.

A. There were persons interested in purchasing. What was your other question?

Q. If Banco Continental had gone into liquidation, these GFCs [sic] would have been valueless, wouldn't they?

A. Liquidation was not an option at that time.

Q. That's true, isn't it? The shares would have been valueless.

A. I cannot say that, because I would have sold many things that the bank had that had a very high value, but it would have been nonsense to do something like that. It was a theoretical [sic] option.

Q. These transactions produced no cash or other benefits for IAMF or any other group, did they?

A. No.

Q. The people that they benefitted were Conticorp and the people associated with Conticorp?

A. What was the question again?

Q. The benefit from these transactions came to Conticorp and to your family.

A. No, no, it's the opposite.

Q. The effect of these transactions was that your loans and your shares were got out of the bank so that even if Banco Continental failed, your family's businesses would survive?

A. No. They have nothing to do in that sense. They were very small size-wise, and they were not the debtors.

…

Q. What happened was there was a risk, that Banco Continental would be forced into liquidation. And if that had happened, these loans would have been called in, and these shares would have been sold, wouldn't they?

A. Everything that we did was in obedience of two plans. One was the conversion of debt into capital conceived about the beginning of 1994. And the second one was Dr Intriago's plan in commitment with the authorities unmodified and last minute in March. We could have never planned to lose 90% or 90-plus percent of the assets in Conticorp by handing to the Central Bank the most productive asset. These are not my own phrases; those are phrases of the consultants hired by Central Bank …

Q. That's why it was so important for you to get these loans and these shares out of the bank so that at least the rest of your businesses could survive?

A. No, sir.

Q. The effect of these transactions was to prefer your interest and the interest of your family as [sic] the depositors?

A. No, sir.

Q. Your conduct in procuring that these transactions was carried out was both selfish and dishonest, Dr Ortega.

A. No, sir.

Q. And you did your best to conceal the true nature of these transactions and the extent of your dishonesty from the public and the Ecuadorian authorities?

A. No, sir, it's the opposite. …"

151. In these passages both Dr Leonidas Ortega and Dr Luis Ortega sought to underline that the transactions were entered into in the interests of IAMF's depositors. But they fail to contain any coherent or plausible explanation as to why they were or can have been thought to be appropriate in IAMF's or its depositors' interests, under the conditions pertaining during the period late December 1995 to March 1996. Why at that time was it conceivably sensible, that IAMF should give up valuable and performing assets, receiving only in return shares in the GFC group which was under acute financial stress to enable it to service its depositors?

*(14) The exposure of IAMF to the risk that the GDRs and shares might prove worthless:*

152. Fourteenth, the transactions would have been open to question, even if it could have been said that they were effected for fair consideration, which IAMF might then hope to realise on the market. Even then, the question would arise what possible reason there could be for exposing IAMF and its depositors to the risk that there might prove to be no market in shares in a bank on which there was a run. But in fact there had before the first transaction already proved to be no real prospect of any substantial sale on the open market - despite such encouragement as the small purchase made in June 1995 by IAMF at the price of 2m sucres may perhaps have been designed to give. Even Dr Leonidas Ortega accepted that it might be that the GDRs were not "particularly marketable" in the first half of 1996 and that "no-one other than IAMF would, at that time, have been prepared to buy them". Further feelers were apparently put out on 2 February 1996 to explore whether a Bavarian investor might be interested, and on 29 February 1996 to see whether the Banco de Bogota might agree to a merger. But nothing came of them. In such circumstances, and the position cannot have been any different at the end of December 1995, there can have been no justification for exposing IAMF to the risk, already perceived by around the end of 1995 of Banco Continental's collapse. Nor can there have been any basis for placing the GDRs or shares in IAMF with a view to it making a profit, if and when Banco Continental, with such further support as might be necessary from the Central Bank, survived and pulled out of all its difficulties. If it had been the intention to gift such a profit to IAMF and its investor depositors, the time to do so was when and if such a profit ever became a realistic prospect. The judge referred to the transactions as "occurring in an atmosphere of extreme urgency". But there was no urgency for IAMF to undertake, let alone any sensible purpose for it to undertake, any of the transactions at any time in the period December 1995 to March 1996. Rather, there was from IAMF's point of view every reason not to risk doing so. Not surprisingly, neither the Structural Reorganisation Program nor any other document associated with the transactions refers to any intention that IAMF was

acquiring or held the GDRs or shares in GFC with a view to resale, and the Board does not accept that resale can realistically have been in mind or explain any of the transactions.

*(15) The values assigned to the GDRs and the GFC shares:*

153. Fifteenth, the values assigned by the transactions to GFC shares are not, in the Board's view, reconcilable with a conclusion that the transactions can have been entered into with IAMF's interests in mind.

*(a) Comparisons with other pricing information:*

154. The 25.48% capitalisation itself would even on its face only imply a price of USD 356 per GFC share, and it was the result of a public offer in October 1995 (before the financial crisis of late 1995 affected the Bank's market reputation), was facilitated by behind the scenes assistance by, at least, IAMF to the 222 nominal purchasers and did not in economic terms generate any new inflow of cash into the bank. IAMF's own purchases range from 2m sucres a share for the three small purchases made in June 1995, December 1996 and January 1996 to 1.404m sucres per share for the first transaction, 2.272m sucres per share for the second transaction and then 1.795m for the third transaction. 2m sucres was regarded by Snra Carmen de Velez at any rate by 30 November 1995 as unsustainable, on a valuation of the whole bank. Her figures would, as the Board has said, appear to support a valuation of little more than par at the end of November. Even the workings relating to the hoped for sale to Mr Gilliéron were based on 1.5m sucres (c USD 523.56) a share. No plausible explanation was given why Mr Taylor was instructed to make the two small purchases at 2m sucres a share on the same dates as the first and second transaction "following the process by international consultants". But what advice they can have given that could have appeared plausible to Dr Leonidas Ortega is unexplained. Whatever the position in that respect, the bank's position by the end of December 1995 had deteriorated compared with that in November 1995, and a valuation based on the profit figures and projections in the Information Memorandum dated 27 December 1995 could not have been regarded as realistic.

*(b) Expert evidence:*

155. The judge recounted the evidence given by Mr Croft and Mr Abboud in paras 274-279 of his judgment. He recorded that Mr Abboud was "not a disinterested witness because he served on the boards of various Ortega

related companies and had a long working relationship with them but this was not previously disclosed to the court". The Board also notes that Mr Abboud had had no prior experience of acting as an expert, and his answers indicated that he understood his role as being to prove the accuracy of the Banco Continental profit projections which had been produced. Be that as it may be, Mr Croft as the only properly qualified expert regarded Mr Abboud's data and method as inappropriate. He sought nonetheless to determine what results his method might have yielded had it been applied to data available at the end of 1995. The judge recorded the evidence given in these terms:

> "275 … Using the published accounts of Banco Continental as of December 1995 he [Mr Croft] calculated a value of US$129 per Global Depository Share in GFC instead of the US$480.30 agreed by the Conticorp board *[ie for the purposes of the first transaction]*. This value was negative (zero) after the consolidation of GFC, Banco Continental and BCO Curacao and the restatement of the accounts on a consolidated basis following the May 10 1996 reversal of capital as ordered by regulation of the Superintendency of Banks. …
>
> 276. The weighted average price at which the GDR's were sold per share was US $582 *[The Board interposes that this must refer to all three transactions, in respect of which the Board calculates a weighted average price of USD 585 per share]*. Mr Abboud had cross checked the figures with another common measure called price to book ratio that is the ratio of the market value to the book value of a company (its net asset value). It is calculated by taking the price to book value of comparable companies and applying it to the company under consideration. Mr Abboud took the weighted average price to book value of six other Ecuadorian banks considered comparable by him and he obtained a figure of 2.92. The price to book value implied by the price at which the original GDR transactions took place ($480.28) was 2.73. *[The Board notes that USD 480.28 was in fact the price of the first transaction only - the second transaction was at USD 768.56 a share, giving a weighted average for the first two transactions of USD 568.75 a share.]* On that basis Mr Abboud concluded that the GDRs were, if anything, exchanged for less than they were worth.

> 277. Mr Abboud's calculations were based on financial data for June 1995. Mr Croft performed that equivalent calculation using December 1995 figures and arrived at a price to book value of 1.43. Applying the ratio he arrived at a value for Banco Continental of S/372,632 [US$127.4 million] and a value for GFC of US $97.97m. This resulted in a GFC price per share of US$264.00.
>
> 278. Different methods and data yielded different estimates for the value of the GFC shares. Where Mr Croft used Mr Abboud's calculations using December 1995 instead of June 1995 figures: $355 per share based on the capitalization of Banco Continental, US$264 based on the equity of Banco Continental applying the 1.43 market to book value ratio before reversing the capitalization, and US$181.5 after the reversal of the capitalization.
>
> 279. Under Mr Croft's method after consolidating GFC, Banco Continental, BCO Curacao and IAMF he arrived at a consolidated net asset value for Banco Continental of US$89.1m, and after the reversal of the capitalization a value of $45.0m. To obtain the value of GFC in order to calculate the value of the GDR's he used a consolidated balance sheet for the whole GFC group which had a net asset value of $46.6m and reduced this by the value of the GDR's on the basis that they represented shares in the group itself. This resulted in a negative figure for the net asset value for the GFC group which meant that the GDR's had no value."

156. The reference in para 275 to the reversal of the capitalisation can be put aside, because, as the judge noted (para 281), it only occurred subsequently. The Board can, for present purposes, also put on one side Mr Croft's reduction (recorded in para 279) of the net asset value by the value of the GDRs on the basis that they represented shares in the group itself. Even apart from both these matters, Mr Croft's evidence exposed a basic incompatibility between any sensibly conceivable valuations based on the financial position at the times of the three transactions and the prices assigned to GFC shares by such transactions.

157. The judge addressed this evidence as follows:

> "281. The voluminous expert reports of Mr Croft and Mr Abboud each of which generated extensive examination and cross examination show the difficulty of deciding on the value of the GDRs at the time the transactions were taking place. These transactions were occurring in an atmosphere of extreme urgency. While in hindsight the capitalization was reversed by the Superintendency of Banks this would clearly not have been a fact known at the time of the GDR transactions. Were it not for that reversal and the reversal of the value of the GDRs held by GFC as treasury shares the GDRs had a real value and it cannot be said on the evidence that the defendants knew they were worthless especially since they had reason to believe that the Central Bank would continue to provide funding until they passed what they considered a temporary crisis. It seems to me that in applying *Royal Brunei Airlines v Tan* the objective standard of honesty cannot be judged on facts known to the defendant as amplified by detailed expert evidence made available *ex post facto*."

For reasons which the Board has already given (paras 51-56 above), the judge erred in proceeding on the basis that the critical question was whether the GDRs or GFC shares were worthless. Further, although it may have been difficult to assign a precise value to the GDRs or GFC shares at the times of three transactions, what mattered and could be said is that it bore no relationship to, and could not honestly have been thought to justify, the values assigned to the GDRs or GFC shares by such transactions. Further, there was no urgency and no sensible rationale for IAMF to enter into any of the three transactions.

*(c) The respondents' explanations for the pricing:*

158. In the course of his evidence, Dr Leonidas Ortega failed to give any satisfactory explanation of the uplift in price from the capitalisation to the first transaction mentioned in para 152 above, suggesting at one point that the uplift was a premium for control related to an objective "gradually to sell the control of the company" by parting with 51% of GFC's shares. But it is clear on any view (and the Structural Reorganisation Program itself says so expressly) that the respondents' intention in December 1995 and January 1996 was to limit any transfer to IAMF to 49% in order to retain a 51% majority holding in Conticorp's name. The uplift of the price under the second transaction to 2.272m sucres was explained by the respondents as attributable to the advantage conferred on a purchaser by

owning over 45% of a company's shares. Mr Baquerizo said in a letter dated 29 January 1996 to Dewey Ballantine that:

> "This price is higher than the previous transaction because with this purchase the fund will reach a participation of 49% in GFC through the GDS's and also through ordinary shares that have bought through the stock exchange."

GFC had at the time 400,000 shares in issue, which a reduction in capital was about to reduce to 371,000, which would give the 49% figure to which Mr Baquerizo referred. Under articles 17 and 18 of GFC's constitution, a 45% shareholding gave a time-limited blocking power, since it required two (for some matters such as an increase in capital, three) general meetings to force through any resolution not commanding a 55% majority. In addition, the GFC Board consisted of 20 directors and every five percent holding entitled the holder to appoint one director, with appointment of the final director having to be by agreement or, in default of agreement, having to be forced through by a general meeting. The respondents submit that, in such circumstances, a 49% shareholding could give rise to substantial practical inconvenience for the majority shareholder. However, the Board regards it as implausible that such considerations either led to or could justify the imposition on IAMF of any increase in price remotely approaching the 62% increase in price involved in the change from 1.404m sucres (USD 480.30) to 2.272m sucres (USD 768.56) per share. They can have had no significance for the respondents or IAMF while the GDRs remained with IAMF, since the respondents controlled IAMF, whatever the picture presented to the outside world. Even if it is conceivable that an outside purchaser from IAMF might be prepared to pay some premium for such rights, that would only apply if (a) Conticorp permitted IAMF to sell over 45% of its holding in GFC despite the suggested disadvantages for Conticorp as its majority shareholder and (b) a single outside purchaser emerged for the whole of IAMF's interest. Even if it had been intended that IAMF should resell, the prospects of obtaining any purchaser at any reasonably foreseeable date were throughout the period December 1995 to March 1996 negligible, and a requirement to find a single purchaser, if IAMF was to have any hope of recouping its outlay, would have shrunk any appreciable market, if there had been one, even further. Further, if the respondents had been entering into the transactions with IAMF's interests in mind, then IAMF might itself have expected to be allowed all or a large part of the benefit that might be extracted for an interest of over 45% on resale to a single outside purchaser, bearing in mind the obvious risk that no such purchaser or benefit would emerge. Instead on the respondents' account, it was a benefit which they determined to extract from IAMF, regardless of the risk or probability that it would not materialise.

*(d) The pricing of the third transaction:*

159. The price of 2.273m sucres (c USD 602) assigned to each GFC share under the third transaction appears equally arbitrary, and no less sustainable in its size, in the light of the conditions in March 1996 under which that transaction was effected. Dr Leonidas and Dr Luis Ortega were as the Board has stated in para 151 above, unable to advance any coherent or comprehensible justification for this transaction.

*(e) The Board's conclusions on pricing:*

160. The conclusion that the Board reaches is that the prices assigned to each share under the three transactions were related not to any objective valuation of GFC or its shares in the interests of arriving at a price fair to IAMF, but were simply arrived at with a view to matching in approximate value the assets which it had been determined that IAMF should transfer to Conticorp under those transactions. Further, the prices were far in excess of any which it could sensibly have been believed should be paid by IAMF for parting with such assets at the times when they were transferred. The transactions effectively emptied IAMF and left it exposed to the risks of Banco Continental's liquidation. There were at the time, reiterated in the evidence adduced by the respondents, expressions of confidence that Banco Continental could and would pull through with Central Bank support. But the contrary risk was, putting the matter at its lowest, glaringly apparent, and there was no reason or excuse for transferring IAMF's assets to Conticorp and exposing IAMF to it.

*(16) The probity of the transactions:*

161. Finally, and as the sixteenth point, in so far as the courts below gained comfort for a conclusion that the transactions were such as the respondents could and did honestly enter into, because their actions appeared to be directed at trying to save the bank, the Board cannot view the three transactions in this light. The Board has already noted that none of the transactions fits into any sensible or discernible plan to save the bank. Dr Leonidas and Luis Ortega were also concerned to justify them as being for the benefit of IAMF's depositors. For reasons which the Board has again already noted, the conditions under which the transactions were agreed make this justification implausible. On the accounting approach which the respondents were maintaining in December 1995, the depositors would simply have been members of the Ecuadorian public. On the accounting approach on which the Ecuadorian

authorities had insisted by the time of the second and third transactions, BCO Curacao and Banco Continental would also have to answer for such benefits as were guaranteed under the relevant deposits, so that all three transactions must have appeared to anyone thinking about it to impose substantial risks, rather than any real prospect of benefit, on the GFC group of which IAMF was an economic part, as well on the Ecuadorian depositing public. The Board sees nothing in the respondents' actions in the period leading up this litigation to lead it to conclude that anyone directing their minds to the interests of IAMF and its depositors could seriously or honestly have thought any of the three transactions to be appropriate in such interests.

***Conclusions on liability***

162. The Board regards this as an exceptional case, falling outside the scope of the general principles, stated in paras 4-7 above, that it will not interfere with concurrent findings on issues of fact, will be very cautious about over-turning any finding of fact by the trial judge and especially so when the finding exonerates a person from a finding of dishonesty. The circumstances of the present case are, in the Board's view, not dissimilar to those which the Court of Appeal addressed in the case of *The Ocean Frost* which the Board has addressed in para 8 above. Further, the Board repeats that what it is concerned with on this appeal has, ultimately, an important objective element, stated in para 9 above: the ultimate question is whether a lawyer-businessman, who was party to the same actions as these respondents instructed and had the same state of knowledge as they had when they instructed such actions, could honestly have believed that such actions were in the interests of IAMF.

163. The courts below gave reasons for concluding that the claim must fail which are unsustainable – notably:

i) that belief by the respondents that the GDRs or GFC shares were not "worthless" was fatal to a conclusion that they acted dishonestly,

ii) that the respondents cannot have rendered any assistance to Mr Taylor because he was relying on Ansbacher, and

iii) that the plaintiffs' abandonment of any attempt to pierce the corporate veil precluded any argument that the respondents controlled the various companies in question, including IAMF.

So far as the courts below gave any answer to the critical question whether the respondents could honestly have believed that the transactions were in IAMF's interests:

iv) the judge stated such an answer only in the most general terms without analysis of the contrary factors relied upon by the plaintiffs (although he had listed a number of them in para 269), and without testing the answer in the light of the documented history and probabilities,

v) he failed to identify or address (a) the distinction between a conventional exchange of debt for equity and what actually occurred, which (at least in respect of the second and third transactions) amounted in economic substance to a reduction in capital of the GFC group, (b) the different stages at which transfers of debt portfolio took place first to BCO Bahamas and then to IAMF, (c) the purpose of and pursued by the GDR programme prior to the financial crisis affecting Banco Continental, namely to raise outside capital, (d) the significance of the fact that IAMF was only introduced as an (inside) buyer in the teeth of the financial crisis when all else had failed, (e) the extraordinary features of all three transactions - including the use of an Information Memorandum based on figures which must have been known to be out of date, and the absence of any documentation evidencing any internal consideration of the commercial and financial rationale of the transactions from IAMF's (or even Conticorp's) viewpoint or explaining the (wildly varying) values attributed by to the GDRs and shares, and (f) the absence in the circumstances prevailing in December 1995, January 1996 and March 1996 of any plausible reason why it was in IAMF's interests to buy GDRs or shares in GFC from Conticorp or to transfer its assets to Conticorp;

vi) in relying heavily on the Superintendent of Bank's supposed approval of a plan contained in the Structural Reorganisation Program embracing the transactions, they failed to identify or address (a) the fact that the first transaction had already occurred before any such plan was even conceived, (b) the fact that the third transaction was not covered by any such plan, was effected by the respondents without advising the Ecuadorian authorities and was only mentioned to them after the event in terms suggesting it had not yet been effected, (c) the absence from the Superintendent's documentation of any reference to the transactions, (d) the lack of any reason why, and the extreme improbability that, the Superintendent would have approved the transactions had he

understood them. All this is quite apart from a factor on which it is unnecessary for the Board to rely, which is (e) the ultimate irrelevance of any approval which the Superintendent may have given, in the circumstances where the respondents had and can have had no honest reason to believe that the transactions could be in IAMF's, as opposed to Conticorp's, interests;

vii) the Court of Appeal went so far as to say that, if the critical question was whether the transactions were honestly believed to be in IAMF's interests, a finding that the respondents did not believe that the GDRs were worth as much as IAMF paid for them was indicative of nothing more than a negotiated discount or bargain.

164. Both courts below therefore erred in law by relying on points which they wrongly viewed as significant, and erred as a matter of process in failing properly to address the factors and issues which were really significant. Further, the judge failed to adopt the salutary approach advised by Robert Goff LJ in *The Ocean Frost* of testing the witnesses' account against objective facts proved independently of their testimony, particularly by reference to the documented history. It would be wrong in the circumstances to treat the judge's very general exoneration of the respondents' conduct as conclusive of the probity of the transactions. The Board has found itself compelled to undertake its own review of all the material before it in order that, for the first time, the central issues in the case should be directly addressed and analysed. It has been conscious in doing this of the need to give full weight to the advantage which the trial judge enjoyed of observing the witnesses give oral evidence, and, further, that it is only on the clearest grounds that it could and should disturb findings of fact or a conclusion that any or all three of the transactions in issue could be and was undertaken honestly in IAMF's interests.

165. Having undertaken the exercise identified in the previous paragraph, the Board is however fully satisfied that this is one of the very rare cases where it must interfere with the decisions reached below. It has come to the conclusion that all three transactions were, as and when entered into, not transactions which persons in the respondents' position could in the light of what they knew honestly have considered to be in IAMF's interests. The likely explanation of what happened is, in the Board's view, that no separate consideration was ever given to the interests of IAMF, when the transactions were devised and instructed. IAMF, despite the protestations that it was an independent fund taking its own decisions, was simply regarded as a tool which could be used at Conticorp's behest and for its purposes. However, it also follows that no consideration was given to the depositors whose investments depended on IAMF's assets.

But it is on the interests of IAMF as the entity with its responsibilities towards such depositors that attention should have been, but the Board concludes cannot honestly have been, focused. It follows that the respondents are jointly and severally responsible for dishonestly procuring and assisting Mr Taylor's breaches of fiduciary duty in entering into each of the three transactions.

***Loss***

*(a) Preliminary:*

166. At various points in this litigation, it has been suggested either that, if there was any claim, it must belong to the Central Bank of Ecuador or depend upon that Bank showing that it or depositors had suffered a loss. In so far as depositors have not suffered any loss, this is only as a result of the Central Bank's financial subventions to the GFC group. Were it material, the Board would need some persuasion that the Central Bank itself had not suffered a substantial loss overall. The amounts ultimately injected by the Central Bank of Ecuador totalled some USD 325m, and even after that the independent value put on the Banco Continental group in 2001 was only USD 81m. However, as Mr Malins pointed out, the true loss might not be easy to quantify against the background of very turbulent conditions affecting the Ecuadorian economy and its currency in that period.

167. On behalf of the respondents, reliance was placed on an obscure exchange between counsel for IAMF and Luis Ortega, during the course of his cross-examination, where, on a literal reading, counsel might be taken to have accepted that the Central Bank had recovered all it had injected. The Board thinks it much more likely that what counsel was intending to accept was that no depositor had ultimately lost out. But, even if counsel was - momentarily and inconsistently with both the general thrust of his clients' case and his later clarification - accepting that the Central Bank had not lost any money, that would be inconsistent with what the Board sees as strong contrary indications.

168. In any event, the true position is that the Board is concerned with a claim by IAMF, a separate legal entity with separate rights and interests, in respect of loss of assets which it claims as the result of the breaches of duty which the Board has held to occur. We have not been shown any pleading which defines the claim to damages or compensation with any precision. There was no need for this issue to be examined it in any detail

in the courts below, in view of their rejection of the claim on the merits. However, the Court of Appeal expressed the view that, in the absence of "evidence of the full valuation of the loans", it was impossible to say what if anything IAMF had lost as a result of the transactions (para 52). Mr Salter's opening submissions to the Board on this issue were directed largely to challenging the reasoning of the Court of Appeal.

169. In his own case, Mr Malins described it as a striking feature of the case that the appellants had never explained "precisely who had lost what and why and what the evidence was to establish that proposition". In his closing reply (under the heading "IAMF suffered a loss") Mr Salter responded that, while the loans were recoverable at their face value, no credit was to be given for the GDRs: first because, on the basis of Mr Croft's "uncontradicted" evidence, they were worthless "at the time of the GDR transactions"; and secondly because -

> "The GDRs that IAMF received in return did not in the event have any value, because they transferred to the Central Bank under the Trust Agreement and ultimately cancelled. In a fraud claim IAMF is entitled to recover for the actual consequences of the fraudulent transaction in full."

*(b) Analysis:*

170. There is as we understand it no real issue as to the principles applicable to the assessment of loss. Snell's Equity 33rd ed para 30-80 indicates that once liability for dishonest assistance is established, the defendant may be required to compensate the trust for losses following from his assistance. It seems clear that the assessment is not limited to the position at the date of breach, but may in principle take account of events up to the date of the trial (see *AIB v Redler* [2014] UKSC 58, [2014] 3 WLR 1367, para 135, per Lord Reed).

171. The Board does not with respect share the view of the Court of Appeal on the need for further evidence as to the value of the loans. It sees no reason to doubt the evidence, set out in paras 57-60 above, that the loans were, to use Dr Leonidas Ortega's words, "genuine and recoverable at their face value". On the other side of the balance-sheet, the Board is unable to place any great weight in this context of the evidence of Mr Croft. It was not, as Mr Salter asserts, uncontradicted, but more importantly it was directed at the value of the GDRs in December 1995 and January 1996, at a time when IAMF was still controlled by the respondents. The Board sees no

justification for treating that as the correct date for assessment of loss to IAMF which was not crystallised until later.

172. The Board sees more substance in Mr Salter's alternative submission, that following the take-over by the Central Bank, the GDRs were either not re-saleable or rapidly ceased to be re-saleable, and were subsequently cancelled. The Board agrees that these events are properly regarded as the consequence of the dishonest assistance, since they were precisely the risks to which IAMF was wrongly exposed by the respondents' actions.

173. They were risks that might have been to a degree limited, had the GDRs been resaleable and resold before Banco Continental collapsed. As Mr Malins points out, as late as May 1996 there were hopes of recouping the Central Bank's investment by sale of shares in due course. It is true that this would have depended to a large extent on the injection of capital by, and the continuing support of, the Central Bank. But it is not clear to the Board that this fact should detract from the then value of the GDRs in the hands of IAMF, viewed separately as it must be. Indeed, given the weight attached by Mr Salter to the need for separate consideration of IAMF's interests, Mr Malins was entitled to draw attention to the lack of direct evidence from anyone now associated with the Bank, as to what exactly happened to IAMF itself, or what decisions were made on its behalf, after take-over by the Central Bank.

174. However, such arguments could have had no relevance following the cancellation in March 1997 of all existing shares in Banco Continental, pursuant to the terms of the Subordinated Loan Agreement (see para 117 above). The Board agrees with Mr Salter's submission that this cancellation was the direct consequence of the risk to which IAMF was exposed by the wrongful transactions and is therefore properly taken into account in assessing the loss. Mr Malins submitted that any award of damages would only be possible if IAMF could restore the GDRs and GFC shares which it obtained under the transactions. The Board cannot accept that submission, in a context where the GDRs and shares are no longer available for restoration as a result of the very risk which made it improper to transfer them to IAMF.

*(c) Conclusion on loss:*

175. On this basis, IAMF is entitled to recover the face value of the cash, loans and shares it transferred or surrendered to Conticorp by the three

transactions, which the Board, subject to correction by the parties, computes as totalling USD 191,953,517.50.

***Overall summary and Advice to Her Majesty***

176. It follows from the Board's conclusions in paras 162-165 and 170-175 above that the Board will humbly advise Her Majesty

i) that the respondents are jointly and severally liable to IAMF for dishonestly procuring and assisting Mr Taylor in breaches of fiduciary duty towards IAMF in entering into the three transactions;

ii) that IAMF is entitled to recover from the respondents the face value of the cash, loans (with accrued interest) and shares it transferred or surrendered to Conticorp by those transactions, which the Board, subject to correction by the parties, computes as totalling USD 191,953,517.50;

iii) that submissions on the accuracy of this computation, together with any submissions on interest and costs, be made within 21 days of the handing down of this judgment.


**Trinity Term**
[2015] UKPC 11
**Privy Council Appeal No 0072 of 2013**

# JUDGMENT ON INTEREST AND COSTS

# Central Bank of Ecuador and others (Appellants) *v* Conticorp SA and others (Respondents) (The Bahamas)

## From the Court of Appeal of the Commonwealth of The Bahamas

**before**

**Lord Mance**
**Lord Clarke**
**Lord Sumption**
**Lord Carnwath**
**Lord Toulson**

## JUDGMENT GIVEN ON

## 14 July 2015

**Heard on 10, 11, 12 and 13 November 2014**

| *Appellants* | *Respondents* |
| --- | --- |
| Richard Salter QC | Julian Malins QC |
| Matthew Parker | Ruth Jordan |
| (Instructed by K&L Gates LLP) | (Instructed by Sheridans) |

**LORD MANCE:**

***INTEREST***

1. By its judgment dated 23 March 2015 the Board held that:

   i) the four respondents procured or assisted the entry into by International Asset Management Fund Ltd ("IAMF") through Mr Taylor of three transactions which persons in their position and with their knowledge could not honestly have considered to be in IAMF's interests,

   ii) these transactions deprived IAMF of essentially all its assets and transferred them to the respondents or companies associated with the respondents; the assets were performing assets, for the most part consisting of dollar denominated loans, many carrying interest rates well in excess of what is shown to have been the US prime rate,

   iii) the GDRs or shares received in return by IAMF were either never re-saleable or rapidly ceased to be re-saleable, and the transactions exposed IAMF to the risk, which materialised, that such GDRs or shares would prove to be valueless.

   iv) IAMF's resulting loss dates back to the dates when the assets were transferred by the three transactions: 28 December 1995, 31 January 1996 and 4 March 1996.

2. The principal sums due under the Board's judgment total US$191,953,517.50. IAMF now seeks an order for compound interest, by way of equitable compensation, alternatively for simple interest under section 3(1) of the Civil Procedure (Award of Interest) Act of The Bahamas. Based on US dollar prime rates from time to time, the compound interest claimed up the end of March 2015 amounts with quarterly compounding to US$381,886,435 or on a simple interest basis to US$211,927,042, in each case as set out in a calculation appended to IAMF's written submissions dated 13 April 2015.

3. The respondents submit that, under Order 18 rule 15(1) of the Rules of the Supreme Court, "A statement of claim must state specifically the relief or remedy which the plaintiff claims" though "costs need not be specifically claimed", and

that there was here no pleaded claim to interest either under the Act or as damages, so that no interest can now be claimed.

4. Both the writ and the statement of claim sought "interest on such sums as the court deems just", and there was an express plea against the respondents for "Such … equitable remedies against [the respondents] as Constructive Trustee as shall to the Court seem just and equitable". In their closing submissions at trial, the plaintiffs further expressly submitted that "To the extent that the plaintiffs' claims are based in equity, … it would be just to award compound, and not just simple interest" and suggested "such interest should, in accordance with the usual practice of bankers be compounded with three-monthly rests".

5. In these circumstances, the Board considers that the claim to interest, including in equity to compound interest, was adequately pleaded and is now open to IAMF.

6. In their initial post-hearing submissions dated 13 April 2015, the respondents suggested that the only power in The Bahamas to award interest is under section 3(1) of the Civil Procedure (Award of Interest) Act 1992, where applicable. They cited *Tynes v Barr and Attorney General* No 9 of 1989, where Sawyer J, as she then was, rejected a claim for interest because, at the time when the cause of action accrued and up to the filing of the action, the 1992 Act was not in force. Sawyer J was however concerned with tort claims, not with the equitable jurisdiction to award interest. The courts of The Bahamas have the same inherent equitable jurisdiction as those of England and Wales: Declaratory Act 1799, section 2, and Supreme Court Act 1996, section 16.

7. IAMF relies on the equitable jurisdiction to award interest, summarised by Lord Brandon in *President of India v La Pintada Compania Navigacion SA* [1985] AC 104, 116A-B in these terms:

> "Chancery courts have further regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money has been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position."

8. The Board notes, without comment, that it has been suggested that, even in cases where money has been obtained and retained by fraud, the equitable jurisdiction does not exist unless there also exists a fiduciary duty to account for any profit: see eg *Clef Aquitaine Sarl and another v Laporte Materials (Barrow) Ltd (sued*

*as Sovereign Chemical Industries Ltd)* [2000] EWCA Civ 161, [2001] QB 488, 503H-506C and *Black and others v Davies* [2005] EWCA Civ 531, paras 87-89.

9. In a recent penetrating judgment in *Novoship (UK) Ltd and others v Nikitin and others* [2014] EWCA Civ 908, [2015] 2 WLR 526, at paras 66-93, the Court of Appeal (Longmore, Moore-Bick and Lewison LJJ) has held that both knowing recipients of trust property and dishonest assistants of breaches of duty by a fiduciary are liable in equity to account for unauthorised profits. In this context, the Court refused to distinguish between the liability in equity of the fiduciary and that of a knowing recipient or a dishonest assister. The Board considers that this is in principle correct, and that the same approach must govern the discretion to award compound interest. There is in this connection no satisfactory reason why those who dishonestly receive and retain, or procure or assist the fiduciary to misapply, the fiduciary assets should be in any different position from the fiduciary who actually misapplies the assets. This is perhaps particularly obvious in the case of those who have dishonestly procured or assisted the fiduciary to misapply the assets.

10. In the present case IAMF's assets, consisting of shares, cash and loans, were misapplied by Mr Taylor, in breach of his fiduciary duties to IAMF. Conticorp not only procured or assisted Mr Taylor to commit such breaches, but thereby also dishonestly obtained and retained IAMF's assets. In these circumstances, Conticorp has, in the Board's opinion, no answer to the submission that power exists to award compound interest, as claimed by IAMF.

11. The other three respondents, the Ortega brothers, all resist the claim that they are potentially liable to have to pay compound interest. They too have however been held jointly and severally liable, with Conticorp, for dishonestly procuring or assisting Mr Taylor's breach of fiduciary duties towards IAMF, whereby Conticorp received IAMF's assets. That is in the Board's view sufficient to make them jointly and severally liable to IAMF. The Board adds that they were all also closely interested in Conticorp as its shareholders and/or controlling officers, even though others may also have been involved. In these circumstances, there also appears to the Board to be a strong argument that they must be taken as having arranged the improper transfer of IAMF's assets to Conticorp in their own joint interests, and, as the Court of Appeal concluded was the case with Dr Wallersteiner in *Wallersteiner v Moir (No 2)* [1975] QB 373, that they should thereby be presumed together to have received IAMF's assets for their own purposes. But the Board need not rest its conclusion on this latter point.

12. In these circumstances, the Board considers that compound interest is in principle available as an appropriate remedy, in the exercise of the Board's discretion, as against all four respondents. Having regard to the nature of the

claim and the Board's findings and conclusions upon it, the Board also considers that it should make an award of compound interest against all four respondents.

13. The respondents have in submissions dated 17 June 2015 accepted that, if compound interest is to be applied to the judgment sum, the appropriate rate is the prevailing US Prime (dollar) Rate with quarterly rests, as claimed by IAMF in the calculation appended to its submissions dated 13 April 2015.

14. The Board will humbly advise Her Majesty that (a) compound interest should be awarded on the principal amounts making up the judgment sum of US$191,953,517.50; (b) such interest should be awarded as set out in the calculation appended to IAMF's submissions dated 13 April 2015, totalling US381,886,435 to 31 March 2015 and continuing thereafter on the like basis until this judgment takes effect. Thereafter, the total of the principal judgment sum and of the interest on it will no doubt carry interest at the appropriate judgment rate.

***COSTS***

15. IAMF has before the Board succeeded in its appeal and in its claim against the First to Fourth respondents.

16. The following orders made in the courts below should be set aside to the following extent:

    i) Paragraph 1 of the order made by Adderley J dated 4 June 2010, so far as it relates to IAMF's claim.

    ii) Paragraph 3 of Adderley J's said order in its entirety.

    iii) The order made by the Court of Appeal dated 22 November 2012 in so far as it dismissed IAMF's appeal and affirmed paragraph 3 of Adderley J's order.

    iv) The remainder of the Court of Appeal's said order, in so far as it ordered that the First to Fourth Respondents have the costs of the appeal to the Court of Appeal.

17. Following its success before the Board, IAMF is entitled to an order for costs in its favour in respect of all three instances.

18. Having regard to the substantially more wide-ranging basis on which the case was pursued in the courts below and the focus of the appeal before the Board on dishonest procurement or assistance alone (see *inter alia* paras 20-21 and 41 of the Board's judgment dated 23 March 2015), the Board will humbly advise Her Majesty that such order should be for costs on the standard basis.