

IN THE HIGH COURT OF JUSTICE

HC 9900100  
CHANCERY DIVISION

B E T W E E N

- (1) **Sir Elton Hercules John**
  - (2) **Happenstance Limited**
  - (3) **William A Bong Limited**
  - (4) **J Bondi Limited**
- Claimants

-and-

- (1) **Price Waterhouse**  
(a firm now carrying on business under  
the name PricewaterhouseCoopers)
- (2) **Andrew Mansel Haydon**

Defendants

A N D B E T W E E N

**Price Waterhouse**  
(a firm carrying on business under  
the name PricewaterhouseCoopers)

Part 20 Claimants

-and-

- (1) **Frere Cholmeley (a firm)**
- (2) **Frere Cholmely Bischoff (a firm)**

Part 20 Defendants

JUDGMENT  
OF  
The Honourable Mr Justice Ferris

**Mr G Pollock QC and Mr N Calver** instructed by Eversheds appeared on behalf of the Claimants.

**Mr M Hapgood QC and Mr C Kinsky** instructed by Barlow Lyde & Gilbert appeared on behalf of the First Defendant and Part 20 Claimants.

**Mr A Fletcher** instructed by LeBoeuf Lamb Greene & MacRae appeared on behalf of the Second Defendant.

**Mr M Kallipetis QC and Mr S Monty** instructed by Ince & Co. appeared on behalf of the Part 20 Defendants.

**Hearing Dates:** 30/31 October, 1/3/7-9/13-17/20-23/29-30 November, 1/4-8/11-15/18-19/December 2000 and 12/16-17/22-26/29-31 January, 1February 2001.

**Judgment Handed Down:** 11th April 2001.

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS).

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**Mr Justice Ferris :**

## **Outline of the proceedings**

1. In this action the claimants, who are Sir Elton John and certain companies closely connected with him, claim damages for negligence against the first defendants, Price Waterhouse. Price Waterhouse are the well-known firm of accountants now practising under the name PricewaterhouseCoopers. I will refer to them as "PW". The corporate claimants (that is to say the second third and fourth claimants), but not Sir Elton, make a somewhat similar claim in negligence against the second defendant, Andrew Haydon. I will explain who Mr Haydon is after I have set out some further matters of background.
2. PW and Mr Haydon, in addition to denying liability to the claimants, have brought contribution proceedings against Sir Elton. In addition PW have brought proceedings under Part 20 of the CPRs against Frere Cholmeley, a firm of solicitors, and its successor firm Frere Cholmeley Bischoff. I will refer to both firms as "FC". FC were at all material times the solicitors to Sir Elton and the claimant companies. The firm ceased to exist as a practising entity in 1998. Some of its former partners are now partners in the firm of Eversheds, who represent the claimants in these proceedings. Others of the former partners have joined different firms.

## **General Background**

3. Sir Elton John is an internationally famous writer composer and performer of popular music. He was born in Pinner, Middlesex, in 1947 and his career began in this country in the late 1960s. His international fame dates from about 1970 and has been continuous since then. He was awarded the CBE in 1996 and a knighthood was conferred upon him in 1998. Many of the events with which this action is concerned occurred before 1998 but I will refer to him throughout as "Sir Elton".
4. Like other artists engaged in the fields of entertainment and popular music, Sir Elton has needed the services of a manager to organise his career. In his early years he was managed by an organisation named Dick James Music. However by 1973, and perhaps as early as 1971, he placed his career in the hands of an individual named John Reid and a company formed by John Reid to provide management services which was named John Reid Enterprises Limited ("JREL"). John Reid, through JREL, continued as Sir Elton's manager until the relationship was terminated in May 1998.
5. While John Reid himself was at all times the individual principally concerned in JREL, the work involved in the administration of Sir Elton's affairs was considerably more than could be handled by a single individual. A number of other persons were, therefore, from time to time concerned with those affairs on behalf of JREL. There was little evidence before me about the position during the 1970s, although the general picture seems to be one in which inadequate financial controls were applied in the management of the businesses of Sir Elton and his companies and of JREL itself.
6. In 1981, under the guidance of Arthur Andersen ("AA"), who had been retained in the preceding year as accountants and financial advisers to Sir Elton, his companies and JREL itself, efforts were made to tighten up the financial aspects of the management. A chartered accountant named Pelham Allen was engaged by JREL as financial manager in March 1981. Mr Andrew Haydon, the second defendant, was also engaged by JREL. Mr Haydon was born in 1955. He qualified as a chartered accountant with PW in 1980 and became employed by JREL on 8th July 1981. He worked under Pelham Allen, but for the first year or more of his employment he was not much concerned with the day to day management of Sir Elton's affairs.
7. In May 1983 Mr Pelham Allen left the employment of JREL and Mr Haydon was appointed as financial controller in his place. He was also designated joint general manager of JREL, the other general manager being Miss Catherine MacRae, a lawyer. When Miss MacRae left JREL in 1987, Mr Haydon became sole general manager. He was made a director of JREL in 1995 and was, in fact if not in name, its managing director.
8. Reference has already been made to Sir Elton's companies. Like many entertainers and other individuals with high earning capacity, Sir Elton provides his services through a number of companies. Three of these companies are claimants with Sir Elton in these proceedings. They are respectively Happenstance Limited, William A. Bong Limited and J. Bondi Limited. I will refer to them collectively as "the EJ companies" and individually as "Happenstance" "Bong" and "Bondi" respectively.

9. The shares in Happenstance, or the majority of them, are owned by a charity named Watside Charities. Happenstance is the company through which Sir Elton provided his services on overseas tours between about 1982 and 1986. On 2nd September 1982 it entered into a service agreement with Sir Elton. Under that agreement Sir Elton agreed to provide his services as a composer, writer, performer, recording artist and entertainer outside the United Kingdom and Eire exclusively to Happenstance. In return Happenstance agreed to pay Sir Elton a salary which (simplifying a more complex formula) was equivalent to 99 per cent of the net income realised by Happenstance in each year from the exploitation of Sir Elton's services. Thus Sir Elton, although not a director or shareholder in Happenstance, was entitled to almost the entirety of what would otherwise have been the profits of Happenstance.
10. Bondi is a wholly owned subsidiary of Happenstance. By agreements dated 1st December 1986 the 1982 agreement between Sir Elton and Happenstance was brought to an end and Sir Elton agreed with Bondi to provide his services outside the United Kingdom and Eire exclusively to Bondi as from 20th October 1986. Bondi agreed to pay Sir Elton a salary in accordance with a formula equivalent to that previously applicable as between Sir Elton and Happenstance. The practical effect, therefore, was that as from 20th October 1986 Bondi took over the position previously occupied by Happenstance, on substantially the same terms.
11. Bong is the company through which Sir Elton provides his services in the United Kingdom and Eire. A service agreement to this effect was entered into between Sir Elton and Bong on 28th May 1976. That agreement provided for the payment by Bong to Sir Elton of a yearly salary of £6000 "or such further salary as the parties hereto may agree". It seems that the initial salary was substantially increased over the years, for in 1993 Sir Elton's gross remuneration from Bong was £375,000 and in each of the next two years it was over £2.5 million. Clearly Sir Elton himself had a substantial interest in the net income of Bong, although it does not appear that he was legally entitled to receive, by way of remuneration, virtually the whole of this net income, as he was in the case of Happenstance and Bondi.
12. Particulars of the directors and secretaries of the EJ companies were helpfully set out in Appendix C to the opening submissions of Mr Fletcher, counsel for Mr Haydon, the accuracy of which was not challenged. So far as these particulars are material to the issues in the action they can be summarised as follows:-
  - (i) Happenstance: Sir Elton's mother and step-father, Sheila and Frederick Farebrother, were directors from 1980 or 1981, except for a period between 1982 and 1983 when Pelham Allen replaced Frederick Farebrother. Mr Haydon became a director of Happenstance on 1st September 1987. From then until 28th April 1998 the directors were Mr Haydon and the Farebrothers. Mr Haydon was secretary during two periods, one lasting about 2 months in 1986 and one lasting about 22 months in 1988 and 1989. The Farebrothers are persons of no business experience and played no active part in the management of the affairs of Happenstance. For many years they have lived abroad.
  - (ii) Bondi: Mr Haydon became sole director on 28th August 1986, which was about the time that Bondi became active, and he remained sole director until 28th April 1998.
  - (iii) Bong: Between 1970 and 1st April 1980 Sir Elton himself was the sole director. On 1st April 1980 his mother Sheila Farebrother became sole director in his place. Mr Haydon was secretary during the same two periods as he was secretary of Happenstance.

### **The management agreements in summary**

13. In this action a great deal depends upon the terms of the management agreements which were from time to time in effect between Sir Elton and the EJ companies on the one hand and John Reid and JREL on the other hand. In due course I shall have to consider in some detail the meaning of the provisions of one of these agreements, namely that dated 14th March 1986 ("the 1986 Agreement"). At this stage, however, I propose only to set out a brief description of the main terms of the various agreements in order to establish the contractual framework.

#### **(1) The 1973 Agreements**

14. The first formal agreements are dated 16th July 1973. The essence of them was that, by two separate agreements in similar terms, Bong and a company named Sackville Productions Limited (which then performed the role subsequently performed by Happenstance) appointed JREL to manage the career of Sir Elton. JREL was to receive 20% of the gross receipts of Bong and Sackville respectively in respect of Sir Elton's services as a performer; 10% of their gross receipts in respect of Sir Elton's recordings; and no commission in respect of Sir Elton's activities as a composer, writer or arranger of musical works. These agreements were to have effect for a fixed period of three years from 11th May 1973.

#### **(2) The 1977 Agreements**

15. New agreements were entered into by Bong, Sackville and JREL on 16th August 1977. The general scheme of these agreements was similar to that of the 1973 Agreements, save that JREL's commission on recording income was increased from 10% of the gross receipts to 15% of gross receipts and JREL was also to have commission at the rate of 10% of receipts from the creation or writing of articles or literary works, but nothing in respect of Sir Elton's activities as a composer writer or arranger of musical works. The 1977 Agreements were to have effect for a fixed term of five years

from 11th May 1976.

16. Although the five year term of the 1977 Agreements expired on 11th May 1981, the parties treated the 1977 Agreements as continuing to govern their relationship, subject to the variation mentioned in the next paragraph, until they were superseded by the 1986 Agreement as hereafter mentioned. However in 1982 Happenstance replaced Sackville as the company through which Sir Elton provided his services outside the United Kingdom and Eire. By an agreement dated 1st September 1982 Happenstance was formally substituted for Sackville for the purposes of the 1977 Agreements as from that date.
17. By an undated memorandum signed by John Reid and Sir Elton in November 1984 JREL's rate of commission for the period from 11th May 1981 to 31st December 1983 was expressed to be varied as therein mentioned. The details of the variations do not matter for present purposes.

### **(3) The 1986 Agreement**

18. Negotiations for a new agreement began during 1982. They turned out to be extremely protracted. I heard a great deal of evidence about them in the course of the trial and I shall have to consider them in detail in relation to some of the issues which have been raised. For a variety of reasons, not all of them connected with the protracted nature of the negotiations, the new agreement was not executed until 14th March 1986. The term of the agreement was to be the period from 1st January 1984 to 31st December 1989 and continuing thereafter until terminated by notice given by any of the parties. I will refer to it as "the 1986 Agreement", although this description may cause some confusion in the light of the fact that it had retrospective effect for more than two years.
19. The 1986 Agreement was a much more elaborate document than its predecessors. The parties to it were (1) Bong; (2) Happenstance; (3) a company named the Rocket Record Company Limited, which has no part in the events which led up to these proceedings and whose rights and obligations I shall ignore; (4) Sir Elton; (5) JREL; and (6) John Reid. The previous arrangements between the parties to the 1973 and 1977 Agreements were summarised in the recitals and it was then recited that

"It is the wish of the parties hereto that new arrangements be entered into relating to the continuing management by JREL and concerning certain administrative functions which have been and will continue to be undertaken by JREL in respect of Bong Rocket Happenstance and Mr John and certain other parties associated with Mr John."

20. It is convenient to note at this stage the following features of the 1986 Agreement, although many of the details will be left until later in this judgment:
  - (1) Bong, Happenstance and Sir Elton each appointed JREL as its or his exclusive manager during the term of the agreement (clause 4).
  - (2) By clause 5 Bong and Happenstance each appointed JREL to act as administrator for it and to perform functions described as "Administrative Functions" and "Tour and Recording Administration". These terms were defined by reference to Schedules 3 and 5 respectively and I shall have to come back to the second of them. JREL agreed to perform these functions.
  - (3) Sir Elton also appointed JREL as his personal administrator to perform the administrative duties specified in Schedule 4.
  - (4) Clause 7 set out certain general provisions regarding the performance of JREL's duties. These are central to one of the main issues in this action but I will not go into them at this stage.
  - (5) Clauses 8 to 11 set out elaborate provisions in respect of JREL's commission. For present purposes the most important of these provisions is Clause 9.1, under which JREL was to be paid 20% of the gross amount of the income derived from "the Managed Activities" or the products thereof. The Managed Activities were defined in Clause 1.1.3 and Schedule 1. In substance they included all of Sir Elton's activities as writer, composer, performer or recording artist, including his income from publishing articles, musical, literary and dramatic works. JREL had not been entitled to commission on this publishing income under the 1973 or 1977 Agreements.
  - (6) Clause 13 contained a provision requiring JREL to pay its own expenses incurred in the performance of its duties.
  - (7) By Clause 18 provision was made for the termination of the Agreement in certain events.
  - (8) By Clause 20 John Reid agreed to indemnify Happenstance, Bong and Sir Elton in respect of any breach of its obligations on the part of JREL. Sir Elton entered into a corresponding obligation in respect of breaches by Happenstance and Bong. Thus John Reid and Sir Elton became, in substance, guarantors for their respective companies.
21. By a supplemental agreement dated 1st December 1986 and made between the same parties as the 1986 Agreement and

also Bondi, which had become entitled to the services of Sir Elton outside the United Kingdom and Eire in place of Happenstance, Bondi was brought into the arrangements established by the 1986 Agreement as if it had been a party thereto alongside Happenstance and Bong.

#### **(4) The 1992 Agreement**

22. Another agreement supplemental to the 1986 Agreement was entered into on 26th March 1992 between all those who were parties to the 1986 Agreement and also Bondi. By this agreement it was provided that the terms of the 1986 Agreement should continue until the 31st March 1997 and thereafter until terminated by at least six months' notice. The detailed provisions of the 1986 Agreement were, however, modified in certain respects. The only modification which is relevant to these proceedings is one under which it was agreed that JREL would bear the salaries and expenses of certain employees of Bong who were engaged to provide services for Sir Elton. It will be necessary at a later stage to consider the details of this modification.

#### **(5) The 1997 Agreement**

23. By a further supplemental agreement made between the same parties as the 1992 Agreement and dated 24th June 1997 the term of the 1986 Agreement was continued for a minimum of five years from 1st July 1997. That Agreement could not, therefore, be terminated by notice expiring earlier than 1st July 2002. Some further modifications were, however, made to the detailed provisions of the 1986 Agreement. The main changes were as follows:-
- (1) JREL's general rate of commission was reduced from 20% to 15% of the relevant gross income;
  - (2) On publishing income a sliding scale of between 5% and 15% of the net receipts was to apply;
  - (3) Commission was to be paid at a reduced rate on income received after the end of the term under contracts entered into during the term;
  - (4) JREL was no longer to bear the salary and expenses of Bob Halley (one of the employees of Bong referred to in the 1992 Agreement) after 1st July 1997.

### **Sir Elton's relationship with John Reid and JREL and his attitude to business matters**

24. All the parties to these proceedings were in agreement that the successive Management Agreements were all generous to John Reid and JREL. The 20% commission rate is at the very top end of the range of commission rates which artists commonly agree to pay to their managers. Before Sir Elton entered into the 1986 Agreement FC, as his solicitor, wrote to him warning him that the agreement was extremely generous to John Reid. I find that Sir Elton must have received this letter, although he disputed this. I think it probable that he also read it. Whether he fully absorbed its contents is a more doubtful matter, having regard to Sir Elton's attitude to business matters on which I comment later. During the negotiation of the 1986 Agreement and again at the time of the negotiation of the 1992 Agreement, FC tried to persuade Sir Elton to insist that the commission should be payable on net, not gross, receipts. On each occasion, after discussions directly with John Reid, Sir Elton decided to accept a gross receipts basis. The most that was achieved in favour of Sir Elton was the agreement in respect of staff salaries and expenses embodied in the 1992 Agreement, the reductions in the rate of commission implemented by the 1997 Agreement and, it seems, some fairly minor concessions offered on an ad hoc basis by John Reid from time to time.
25. This generosity on the part of Sir Elton was attributable to two things. First Sir Elton is clearly a man of an uncommonly generous disposition. He likes spending money on himself and on gifts or other benefits to friends. Secondly there was a very close relationship between Sir Elton and John Reid.
26. The nature of this relationship is best described in Sir Elton's own words. In paragraph 8 of his witness statement he said
- "Until late 1997 and in particular the discovery of the matters which led to the termination of his services in May 1998, I trusted John Reid absolutely. We had a personal relationship for five years from 1970 until 1975 and, even after that relationship came to an end, we were extremely close throughout the time of his management of my affairs until, really, the last year. I relied upon him and the advisers he employed, in particular [PW] and Andrew Haydon to look after my business affairs properly and to do all that was necessary to act in my best interests. I left business matters entirely to [JREL] and the professionals they retained to act and advise on my behalf and on behalf of my companies."
27. Sir Elton is, if I may say so, clearly a man of great intelligence. He has the ability to understand almost anything which is explained to him. But he has little or no interest in business matters and does not bother to understand matters which do not interest him. He substantially recognised this in the following passage in his cross-examination by Mr Hapgood (Day 10, pages 18-20)

" Q. Could you please go to paragraph 6 of your witness statement, bundle B? Sir Elton, you say there that you are:



"... a professional musician and performer, but I have no ability or aptitude for business matters."

Do you see that at paragraph 6?

A. Yes.

Q. That is something of a recurring theme, is it not, throughout your statement?

A. Yes.

Q. Sir Elton, do you accept that ability and aptitude are two very different things?

A. I am sorry?

Q. You understand that ability is one thing, and aptitude is something else?

A. In which respect?

Q. I am so sorry?

A. In what respect?

Q. They have different meanings and refer to different concepts?

A. Yes, I see. They are two different words, so they are bound to have two different meanings.

Q. So there is no misunderstanding between us, what I am going to put to you is that you were perfectly well able to understand financial information, but you simply were not bothered to do so; that would be a fair characterisation of your attitude over the years, would it not?

A. No.

Q. Why that is wrong?

A. I have never been interested in business. I never had a flair for business. I have a flair for writing songs, I have a flair for composing, and I have a flair for performing and making records. I do not have an aptitude for business.

Q. Exactly. You do not have an aptitude, but you are certainly able to understand basic financial information, are you not?

A. Basic financial --

Q. Yes

A. Yes."

28. Sir Elton's lack of interest in detailed matters of business is further illustrated by the fact that on more than one occasion he failed to keep appointments with partners in PW who, as I shall explain, became his own financial advisers as well as

performing other roles. On at least one occasion a partner went by arrangement to see Sir Elton at his home in Windsor but was not received by Sir Elton. On another occasion a different partner went to see Sir Elton in Los Angeles but Sir Elton declined to see him. In the period in which PW were his advisers they prepared numerous reports on his financial position, which were unfavourable because of his spending habits. Sir Elton took little or no notice of these and on one occasion sent a report back to Mr Haydon torn into small pieces.

29. Sir Elton's indifference to the details of financial and business matters was for a long time compounded by the fact that he had serious problems with alcohol and drug abuse. Sir Elton himself is now quite frank about these problems. He says that he was cured of them in 1990 and there is no reason to doubt this.
30. It is right to add that John Reid had similar problems at the same time. He too is quite frank about them and in his evidence he acknowledged Sir Elton's help in helping him to overcome them in 1991.

### **PW's involvement with Sir Elton, the EJ companies and JREL**

31. As I have already mentioned, the affairs of Sir Elton and JREL had fallen into some disarray by 1980 and AA were engaged in order to sort them out and introduce proper financial disciplines. JREL's engagement of Mr Pelham Allen and, under him, Mr Haydon was, as I have indicated, done on the recommendation of AA. The firm itself took on the role of financial and taxation adviser to Sir Elton and the EJ companies and auditor of the EJ companies and of JREL.
32. Sir Elton got on well with Pat Desmond, the AA partner who was principally responsible for his affairs. Although Sir Elton had begun to instruct FC as his solicitors from about 1981 onwards, their instructions came from AA rather than directly from Sir Elton himself. This was clearly what Sir Elton wanted at the time.
33. PW replaced AA in 1987. Discussions leading up to the engagement of PW seem to have begun in about February of that year and were completed by the end of June. In the course of these discussions AA co-operated fully with PW and there was a proper hand-over between the two firms. PW's formal letter of engagement is dated 1st July 1987 and was addressed to Sir Elton care of JREL's office. It was signed by Sir Elton by way of acceptance. There was no separate acceptance of the engagement on behalf of any of the EJ companies. At about the same time PW became auditor to JREL.
34. In the course of these proceedings it has been suggested that the replacement of AA by PW was something engineered by Mr Haydon, who was by then the general manager of JREL, and that Sir Elton thereby lost the services of a firm in which he had complete confidence and which was replaced by PW with whom he never developed the same rapport. I do not think this would be particularly material even if it was correct, but I think it right to say that I do not accept it. I find that the change occurred because Pat Desmond was sent to one of AA's offices abroad and was no longer able to attend to Sir Elton's affairs. Sir Elton did not get on as well with his successor as he had with Pat Desmond and it was decided that a change of accountancy advisers should be made. Mr Haydon was undoubtedly responsible for introducing Sir Elton and the EJ companies to PW, the firm with which he had qualified. This was because, once the decision to change had been made, it was obvious that the services of another major firm of accountants would be required and Mr Haydon understandably used his own contacts. I see nothing sinister or self-serving in this. I do not think that it was, in the end, seriously suggested on behalf of Sir Elton that anything of this kind was involved.
35. At the time of the change from AA to PW the accounting years of Happenstance and Bong ended on 31st March. (For Bong this remains the relevant date. In the case of Happenstance it was changed to 31st July in 1990 and to 31st December in 1998, but nothing turns on these changes). AA completed the audits of the accounts of Happenstance and Bong for the year ended 31st March 1985. The first accounts of these companies which PW audited were for the year ended 31st March 1986. The first accounts of Bondi to be prepared were for the period which ended on 31st March 1987. These were audited by PW.

### **Breakdown of relations with John Reid and JREL and termination of the 1997 Management Agreement**

36. The business and personal relationship of Sir Elton and John Reid had seldom proceeded entirely smoothly but it deteriorated sharply in the early months of 1998. I am not required to make findings as to the causes of the deterioration, but it seems fair to say that various factors played their part. Sir Elton became increasingly annoyed that his financial advisers were always telling him that he must cut his spending. He found this difficult because of his extravagant propensities and because he did not see why he could not spend what he wanted when he knew that his earnings were very large indeed. It seems that he began to doubt the efficacy of John Reid's management and to feel that too large a proportion of his own earnings were being paid to JREL. Relationships were exacerbated in January 1998 when the Daily Mirror published a copy of a letter from PW to Sir Elton advising him on his latest financial crisis. This letter and other documents were apparently taken from the waste bins at JREL's offices by a third party who sold them to the newspaper. Sir Elton was undoubtedly furious at this and blamed JREL for a lapse of security.
37. Mr Frank Presland, a partner in FC, had acted for Sir Elton in litigation during the 1980s and had played a part in the negotiation of the 1992 Management Agreement, but his involvement with Sir Elton in the early 1990s was, as he put it, "very episodic and infrequent". He became more closely involved from about 1996 and by the summer of 1997 Sir Elton

had begun to repose a considerable degree of trust and confidence in him. In October 1997, at Sir Elton's request, Mr Presland visited him in Atlanta. Sir Elton made Mr Presland aware of his concerns about his financial position and his increasing disenchantment with JREL. One consequence of this was that Mr Presland advised Sir Elton that he should have his own financial manager who would be independent of JREL and report direct to Sir Elton. Miss Lindsay Moffatt, a solicitor with some financial experience, was appointed to this position in February 1998.

38. At the end of February 1998 Sir Elton decided, on the advice of Mr Presland, to commission an independent audit of his financial position. On 9th March KPMG were instructed to carry out this task. As a result of KPMG's investigations complaints against John Reid and JREL were formulated under two heads. The first head of complaint was that the salaries and expenses of the members of staff mentioned in the 1992 Management Agreement had not been borne, or had not been fully borne, by JREL in accordance with that Agreement. The second head of complaint, which does not appear to have been fully worked out when matters were brought to a head as hereafter mentioned, was that certain payments to third parties concerned in the organisation of Sir Elton's overseas tours which, on Mr Presland's interpretation of the 1986 Agreement, ought to have been borne by JREL, had been borne, not by JREL, but by Happenstance or, in later years, Bondi. I will refer to this second head as "the tour agents' costs" claim, but the use of this description is not to be regarded as pre-empting a number of issues which, as will appear later, arise in respect of it. At a later stage of this judgment it will be necessary for me to evaluate these two heads of complaint in considerably greater detail, but this short statement of them will suffice for present purposes.
39. John Reid seems to have got wind of the complaint about salaries and expenses early in April 1998. This is hardly surprising, because KPMG's investigations involved the examination of the records kept by JREL and discussion with Mr Haydon and other employees of JREL, so that it must have been apparent what was concerning KPMG. Mr Presland taxed John Reid with the complaints at meetings on 15th and 17th April 1998. There followed a period during which further discussions and correspondence took place and the possibility of a compromise was explored. For part of the time John Reid was represented by Messrs Herbert Smith. By a letter dated 12th May 1998 Mr Presland, on behalf of Sir Elton and the EJ companies, formally accepted what was said to be JREL's repudiatory breach of the 1997 Management Agreement and claimed to terminate that Agreement forthwith.
40. Early in the week beginning 11th May there were two meetings between Mr Presland and Mr Reid, who was not accompanied by Herbert Smith, at which agreement was reached. This agreement was embodied in written Heads of Agreement which were signed by Sir Elton and Mr Reid on 15th May 1998.
41. At a later stage it will be necessary for me to examine in greater detail the terms of the Heads of Agreement and the negotiations leading up to them. For present purposes it will suffice to say that, during the course of the negotiations, JREL paid £688,000 to Sir Elton or the EJ companies. Under the Heads of Agreement Mr Reid and JREL agreed to pay a total sum of \$5 million. This was additional to the £688,000 already paid, although this was not stated in the Heads of Agreement. A maximum of £1 million was to be credited against the \$5 million in respect of commission due down to 30th June 1998. The balance was to be paid in four equal half yearly instalments on 1st January and 1st July in each of the next two years. Although the credit of £1 million was expressed to be a maximum amount the full amount appears to have been allowed without investigation as to whether it was the true amount. The balance has, I understand, been satisfied in the agreed instalments. The Management Agreement was expressed to be terminated on Friday 15th May 1998. JREL expressly agreed that it would not be entitled to any commission after 30th June 1998, including the post-termination commission of 2.5% provided for by the 1997 Agreement.

### **The claims in the present proceedings**

42. Sir Elton and the EJ companies contend that the amounts recovered from John Reid and JREL under the compromise I have referred to did not cover their entire loss resulting from JREL's breach of contract in respect of the tour agents' costs and the salaries and expenses. The sum of \$5 million referred to in the Heads of Agreement represented, it is said, not the full amount of the loss but the maximum amount which it was possible to recover from John Reid and JREL, having regard to their respective financial positions. It is claimed that there remains a substantial difference between that sum and the full amount of the loss. The claimants seek to recover the amount of this difference from the defendants. In describing the basis of their claim it is necessary to consider separately (i) the tour agents' costs claim against PW; (ii) the salaries and expenses claim against PW; (iii) the tour agents' costs claim against Mr Haydon; and (iv) the salaries and expenses claim against Mr Haydon. At this stage of my judgment I will deal with them only in very summary form.

#### **(1) The tour agents' costs claim against PW**

43. Although the proceedings allege that PW were concerned with Sir Elton and the EJ companies in a variety of capacities (financial advisers, tax advisers, accountants and auditors), as the case has been refined during the course of argument the only capacity which is really relied upon by the EJ companies is that of auditor. The claim of Sir Elton himself is, as I understand it, based upon PW's duties as financial advisers. The steps by which the claimants seek to make good their claim can be summarised as follows:-

(i) On the true construction of the 1986 Agreement, the relevant provisions of which were carried through into the 1992 and 1997 Agreements, the tour agents' costs (the nature of which will call for detailed consideration later) should have

been borne by JREL.

(ii) In fact JREL so managed matters that, in breach of its contract with Sir Elton and the EJ companies, the tour agents' costs were borne by one or other of the EJ companies.

(iii) PW noticed this practice in the summer of 1989 when they were carrying out the audit of the accounts of Happenstance for the year ended 31st March 1987 and, internally within the audit team, questioned whether it was correct.

(iv) PW neither satisfied themselves that this treatment of tour agents' costs was (contrary to the audit partner's initial view) correct nor reported the matter to Sir Elton or his solicitors (FC) or anyone else independent of JREL who could have taken the matter up.

(v) PW made a similar error in each subsequent year when auditing the accounts of the EJ companies.

(vi) PW's failures summarised at (iii), (iv) and (v) amounted to breaches of duties of care owed to the EJ companies and Sir Elton himself.

(vii) As a result of these breaches Sir Elton and the EJ companies have suffered loss. In the pleadings the loss is said to be the amounts wrongly paid away by the EJ companies, credit being given for the amounts recovered from John Reid and JREL under the compromise I have referred to. As the case has developed, however, the claim has changed, although no amendment to the pleadings was made. What is now said is that (a) the initial payment of the tour agents' costs by the EJ companies was correct; (b) the effect of the Management Agreements is that JREL should have recouped the tour agents' costs to the EJ companies by way of inter-company re-charge; (c) JREL was in breach of contract in failing to effect such recoupment; and (d) PW's failure to draw attention to this breach of contract went on for so long and the amounts became so large that, when JREL's breach of contract was eventually discovered in 1998, it was impossible to recover the full amount from JREL or John Reid because neither of them had sufficient assets.

## **(2) The salaries and expenses claim against PW**

44. The elements of this claim are somewhat more straightforward. I summarise them as follows:-

(i) The salaries and expenses in question were, in the first instance, properly paid to the relevant employees by their employer, which was Bong.

(ii) Under the terms of the 1992 Agreement, continued in modified form by the 1997 Agreement, these salaries and expenses ought to have been repaid by JREL to Bong on a monthly basis.

(iii) In fact JREL did not make monthly repayments to Bong. It purported to make partial recoupment by means of inter-company re-charges, but these were not made at the proper time, they did not effect full recoupment even as a matter of book entries and such book entries as were made were not followed by payment in full.

(iv) As auditors PW should have made themselves aware that the provisions of the 1992 Agreement were not being implemented by JREL and reported this fact to Sir Elton or the EJ companies. They failed to do any such thing and this is said to be a breach of a duty of care owed by them.

(v) As in the case of the tour expenses claim, the statement of claim asserts that the loss resulting from the alleged negligence is the full amount of the salaries and expenses not recouped by JREL. As the case has been developed it has, I think, been recognised by the claimants that the recoverable loss (if any) is the amount which the claimants were unable to recover from John Reid or JREL by reason of the delay in discovering the true position.

## **(3) The tour agents' costs claim against Mr Haydon**

45. This claim, which is made only by the EJ companies and not by Sir Elton, differs from the equivalent claim mainly in respect of the nature of the duty of care relied upon. In the pleadings two duties of care were alleged, a fiduciary duty and a duty of care owed in tort. Both duties were said to arise from Mr Haydon's position as a director of Happenstance and Bondi and as what was said to be a "shadow director" of Bong. In the case of the tortious duty of care, Mr Haydon's position as the secretary of Bong during certain periods was relied upon, but ultimately it was accepted that this was not really relevant. More importantly, the claim for breach of fiduciary duty was dropped at an early stage of the trial. Accordingly the case against Mr Haydon has proceeded solely on the basis that he owed a duty of care to each of the EJ companies as a director or shadow director.

46. As it was agreed at trial that questions of the amount of damages should be referred to an inquiry in the event of liability being established, the nature of the loss flowing from Mr Haydon's breaches of a duty of care was not fully explored at trial. But the substance of the breaches of duty alleged against Mr Haydon is that, as a director or shadow director, he ought to have ensured that the EJ companies did not bear the tour agents' costs. It seems to me that, if such breaches

were established, the loss resulting from them would be somewhat different from the loss resulting from breaches of PW's duty of care, because Mr Haydon's duty was, if the claimants are right, a duty to secure a result (i.e. that third party tour expenses were recouped by JREL) not just a duty to report the existence of a breach of contract so that the EJ companies secured whatever remedy was available. I have thought it right to draw attention to this point, although I am not to be taken as expressing a concluded view on it.

#### **(4) The salaries and expenses claim against Mr Haydon**

47. I do not find it necessary to say much about this claim. The relevant considerations are similar to those in respect of the tour agents' costs claim.
48. The claims and the defences raised in respect of them, which I shall not attempt to summarise at this stage, raise a multiplicity of issues, by no means all of which will be apparent from my summary. I do not find it easy to devise a scheme of dealing with these issues in a logical sequence. I shall endeavour to deal with the points raised in the order which seems likely to be most intelligible.

### **Touring and tour expenses**

#### **(1) General**

49. Touring, particularly in North America and Canada, has always been a major source of income for Sir Elton and the EJ companies. I propose to begin by describing the structure which was brought into existence for the arrangement and administration of Sir Elton's North American tours. This remained largely unchanged throughout the period with which I am concerned.
50. An important feature in the establishment of this structure was the attitude of the United States Internal Revenue Service ("IRS"). Not surprisingly, United States tax is payable on the profits of performing in the United States. I was told that the IRS adopts a particularly stringent attitude towards the taxation of the receipts of overseas artists who perform in the United States. Unless special arrangements are made the IRS will attend the venue where a performance takes place and exact immediate payment of the tax which it considers to be due in respect of the proceeds of the performance. This process is liable to make insufficient allowance for the costs which would ordinarily be allowable in the ascertainment of the taxable profits. As I understand it, the artist may subsequently claim additional allowances for other proper costs, but this process, even assuming that it ultimately takes account of all proper deductions, leaves the artist out of pocket during the period, which may be substantial, in which claims are processed and re-payments of tax obtained.
51. The IRS will, however, adopt a modified approach which is more favourable to the artist where appropriate arrangements are made. The fundamental requirement appears to be that there shall be an approved entity which is established in the United States and which, in effect, takes control over all aspects of the tour. Such an entity is, at least for the purposes of these proceedings, described as a "tour producer". The tour producer submits a tour budget to the IRS before the tour begins and, together with the artist (or, in the case of Sir Elton, the company entitled to his services), enters into a Withholding Agreement with the IRS under which the tour producer makes itself responsible to account to the IRS and to pay the tax due. The benefit of this arrangement to the artist is that tax is payable in arrears instead of immediately the receipts come in and it is paid in accordance with accounts which can make due allowance for all properly deductible expenses.
52. In order to perform its obligations under the Withholding Agreement the tour producer, as principal, enters into a contract with each of the other parties whose services are necessary to enable the tour to proceed. So far as performances are concerned two such parties are engaged. The first is known as a "booking agent". His task is to know the territory in which the tour is taking place and, in conjunction with the tour producer and the artist or his manager, to arrange an itinerary for the artist to visit and perform in particular places. The second is a "local promoter" who owns or controls particular venues at which the artist may perform. In determining the itinerary one of the principal functions of a booking agent is to identify appropriate local promoters who will arrange for the artist to perform at the venues which they have available. Once selected the local promoter will contract with the tour producer for the performance to take place. The local promoter will be responsible for ticket sales and for all the direct expenses connected with the use of the relevant venue. His contract with the tour producer will usually provide for the payment by him to the tour producer of a guaranteed sum which is payable regardless of the level of receipts. He will also agree to pay a high proportion of the amount by which the receipts in respect of the performance exceed the expenses of staging the performance, credit being given for the guaranteed sum. The local promoter is thus remunerated by means of a share of the profits of the performance. The booking agent is remunerated by means of receiving a percentage of the sum paid over by the local promoter to the tour producer.
53. The tour producer is also responsible for most of the administrative arrangements for the tour. Thus the tour producer enters into contracts for such things as transport of the touring party and their musical instruments from place to place and for accommodation of the touring party (although in Sir Elton's case his personal accommodation and that of his immediate entourage was arranged by JREL itself, the tour producer dealing only with the accommodation of the less important members of the party).

54. In this process accountancy assistance will be required at two levels. First an accountancy firm with appropriate expertise will be needed to negotiate a Withholding Agreement with the IRS and to prepare and submit to the IRS the appropriate tour accounts. Secondly it will be necessary for the proper accounting records to be kept during the tour. For this purpose the tour producer may engage the services of an individual with appropriate expertise whose job it will be to go round with the tour and check on such matters as the local promoter's accounting processes, the remission of the proper accounts to the tour producer and the payment of day to day expenses.
55. Having described the structure in general terms I now turn to the particular arrangements which were made from time to time in respect of Sir Elton's North American tours. I deal with each of the representatives I have mentioned in turn.

**(2) Tour producer (JRE Inc. and Constant Communications)**

56. In 1974 John Reid procured the incorporation in California of a company named John Reid Enterprises Inc. ("JRE Inc."). It became a subsidiary of JREL and acted as tour producer for Sir Elton. There was produced at trial a copy of an agreement dated 4th September 1979 and made between JRE Inc. and Sackville, which then employed Sir Elton for engagements outside the United Kingdom and Eire. By this agreement Sackville agreed to make the services of Sir Elton available to JRE Inc. for a series of concerts to be presented by JRE Inc. in the United States and Canada between September and November 1979. The agreement contained detailed provisions in respect of the arrangements which were to be made by JRE Inc. It is clear, in my judgment, that JRE Inc. was to act as principal on its own account and not as agent for Sackville or, for that matter, JREL. In return for providing the services of Sir Elton, Sackville was to receive whichever should be the greater of (i) "fixed compensation" of \$25,000 for each concert appearance and (ii) "contingent compensation" equal to 80% of the amount of the gross income received by JRE Inc. for presenting the concert appearances which remained after the payment of certain specified costs and expenses. These costs and expenses included "theatrical booking agency and other commissions".
57. I think that it is plain from this agreement that the gross income received by JRE Inc. from presenting the intended concerts was to be its own money. Correspondingly it was to contract for and be personally liable for the cost of the various services (accommodation, travel, musical accompaniment etc.) which were to be provided for Sir Elton under the agreement. If, as seems likely to have been the case, a booking agent was engaged, his commission would have been payable by JRE Inc., although it would have been deductible in ascertaining the amount of the contingent compensation.
58. Thus if the tour was not sufficiently successful to produce as much as \$25,000 per concert appearance after payment of all the expenses for which JRE Inc. was liable, JRE Inc. was to bear the expenses and was also to pay \$25,000 per appearance to Sackville. If that left JRE Inc. with a loss, the loss would have to be borne by JRE Inc. If, however, the tour produced more than \$25,000 per appearance after payment of expenses, Sackville would receive the contingent compensation of 80% of the net amount. In that event Sackville would, in economic terms, "bear" 80% of the expenses. But this does not alter the legal analysis that JRE Inc. was solely liable to the third parties who had provided the services in respect of which the expenses were incurred.
59. Between 1974 and 1977 one of the people who worked for JRE Inc. was Constance Hillman (then Constance Pappas). For about four years before that she had worked for other entities concerned with the exploitation of Sir Elton's talents. In 1977 she had a dispute with John Reid who terminated her employment by JRE Inc. Thereafter she worked for a time for other companies not connected with Sir Elton.
60. By 1981 there was a fear among Sir Elton's advisers that if an entity closely connected with Sir Elton or his manager, as JRE Inc. was, acted as tour producer in the United States this would have adverse tax consequences. It was decided to seek a tour producer who would be unconnected with Sir Elton, John Reid or JREL. Pelham Allen approached Constance Hillman and asked her to establish a company independent of JREL which would act as the representative of JREL in the United States and assist in the arrangements for Sir Elton's tours in the United States. She agreed to do this and in the spring of 1982 a company in which she owned, and still owns, all the shares was incorporated under the name Constant Communications Corporation ("CC"). Thereafter JRE Inc. (which had become known as Poptropolis) ceased to perform any function in relation to Sir Elton. It is not clear whether it was dissolved, but in a memorandum dated 26th November 1982 Pelham Allen spoke of the incorporation of CC as making possible the "elimination" of JRE Inc.
61. From the outset it appears to have been envisaged that CC would be remunerated for its services partly by an annual fee of a specified amount, which was intended to cover its services as United States representative of JREL, and partly by additional remuneration for each tour for which it acted as tour producer.
62. There is no doubt that the arrangements under which CC was established in this way were made by John Reid and JREL, almost certainly on the advice of AA and Pelham Allen. Constance Hillman said that she was "actually appointed by John Reid" and was "appointed and brought back into work by John Reid Enterprises Limited to work with Elton and with John Reid" (Day 17, page 22). A proposed press release on behalf of CC, a copy of which was sent to Pelham Allen on 22nd March 1982, states:

"Connie Pappas Hillman forms Constant Communications Corp., John Reid retains firm to produce Elton John tours for

United States and Canada.

Connie Pappas Hillman has today announced the formation of Constant Communications Corp. a Los Angeles-based production company which she will head up as president.

John Reid, founder of John Reid Enterprises Ltd., co-founder of the Rocket Record Company Ltd. with Elton John, and manager of Elton John, simultaneously announced that Constant Communications Corp. has been retained to administer the co-ordination and promotion of all Elton John concert tours exclusively in the United States and Canada.

"I am absolutely delighted to be working again with Connie," states Reid. "We have had a wonderful relationship in the past and I look forward to a successful future."

63. The first tour of North America to be undertaken by Sir Elton after the incorporation of CC was planned for the summer of 1982. In anticipation of that tour an agreement was entered into on 13th May 1982 between CC and Happenstance (bundle H1, tab 2). This agreement somewhat confusingly refers to CC as "the Promoter", but it was common ground that CC was to fill the role of tour producer. The provisions of this agreement which are relevant for present purposes can be summarised as follows:-
- (i) Happenstance agreed to make available the services of Sir Elton for the performances which were to take place in the course of the tour.
  - (ii) CC agreed to be responsible at its own expense for a wide variety of things including the booking hiring and renting of venues and the staging of the concerts (Clause 4.1.1.); booking hiring and renting of rehearsal facilities (Clause 4.2.2.); the transportation of Sir Elton and others to and from the concert venues and their accommodation (Clause 4.1.5.); and the provision of first class living accommodation for Sir Elton and others (Clause 4.1.6).
  - (iii) In consideration of the provision by Happenstance of the services of Sir Elton CC was to pay to Happenstance a fee equal to "the Net Proceeds" less the sum of \$100,000 (Clause 5). "The Net Proceeds" was defined as "the Gross Receipts less the Tour Costs". These expressions are reasonably self-explanatory, although their meaning was spelt out. Gross Receipts meant all monies received or receivable by CC and arising out of the tour. Tour Costs meant all costs incurred by CC in fulfilling its obligations under Clause 4, i.e. those I have summarised at (ii) above.
  - (iv) Clause 11 contained a provision expressly denying the creation of any relationship of partnership, joint venture or agency between Happenstance and CC.
64. The agreement was signed by Constance Hillman on behalf of CC and by Pelham Allen, who was at the time a director of Happenstance, on behalf of Happenstance.
65. The effect of this agreement was that CC, like JRE Inc. before it, was to act as principal and not as agent for Happenstance or JREL. It was to receive the proceeds of the performances which took place during the tour and was to make itself liable as principal for the provision of all the services which it agreed to provide at its own expense. This legal analysis is not, in my judgment, displaced by the fact that the provision for payment for Sir Elton's services was formulated in such a way that CC was in substance to receive a fixed fee of \$100,000 regardless of whether the tour made a profit or a loss and, if it made a profit, regardless of the size of that profit.
66. CC entered into a similar agreement with Happenstance in respect of Sir Elton's North American tours in 1984 and 1986 and with Bondi in respect of his tours in 1988, 1992, 1995 and 1997. CC's fixed remuneration differed from tour to tour, but this makes no difference in principle. The tours in the years I have mentioned were the only North American tours undertaken by Sir Elton between 1982 and 1997.

### **(3) Booking agent (Howard Rose Agency)**

67. In 1970 John Reid engaged an agency named Chartwell Artist Limited to assist in the arrangements for Sir Elton's first tour of the United States, which took place that year. The individual principally concerned with Sir Elton's tour on behalf of that agency and its successor, International Famous Agency Ltd, was Mr Howard Rose. In 1973 Howard Rose left International Famous Agency and set up his own agency, Howard Rose Agency Ltd ("HRA"). On 22nd May 1974 John Reid wrote on behalf of JREL to Howard Rose

"confirming that the Howard Rose Agency is sole agent for Elton John for the territories of the United States and Canada, for the duration of the company's Management Agreement with the group."

"The group" must mean Sir Elton and any performers who worked with him. John Reid said that if the management agreement was extended he would inform Howard Rose "and we will enter into a more formal agreement in due course". By a letter dated 7th June 1974, which was countersigned by John Reid on behalf of JREL, Howard Rose accepted the appointment as Sir Elton's agent and agreed to act in return for a commission of 10%.

68. It is common ground between the parties that HRA is a booking agent and that, although the letters refer to HRA being simply Sir Elton's "agent", the main services which were to be performed, and which have been performed ever since by HRA in respect of successive North American tours, were those of a booking agent. However HRA has also been used to seek out and negotiate sponsorship deals for Sir Elton through Happenstance or Bondi.
69. No other contractual documents between John Reid or JREL and HRA prior to the introduction of CC as tour producer were produced at the trial. It seems likely that HRA was engaged as booking agent for the 1984 tour, as the tour accounts show agent's commission of \$642,587 being paid and Howard Rose said in evidence that HRA had acted as booking agent for Sir Elton's tours ever since 1974.
70. In relation to the 1984 tour an agreement was entered into in the form of a letter dated 15th January 1984 from HRA to CC which was countersigned by Constance Hillman by way of agreement on behalf of CC. The letter reads:-

"Dear Connie

This letter shall serve as our Agreement with regard to the forthcoming ELTON JOHN concert tour starting August 17, 1984 thru November 18, 1984.

A. This will reconfirm our agreement whereby the Howard Rose Agency, Ltd. is the sole and exclusive booking agency in the United States and Canada for Constant Communications Corp. for the period of January 1, 1984 thru December 31, 1984 in connection with any and all concerts performed by ELTON JOHN.

B. Constant Communications Corp. warrants that it is entitled to the sole and exclusive services of ELTON JOHN in the United States and Canada in connection with any and all concert performances for the period August 17, 1984 thru November 18, 1984.

C. In full consideration of all services performed by the Howard Rose Agency, Ltd., Constant Communications Corp. agrees to pay, or cause to be paid, to the Howard Rose Agency, Ltd., a sum equal to ten percent (10%) of the gross monies or other considerations paid by local concert promoters for the concert performances income of ELTON JOHN in the territory during the term."

71. Similar agreements were entered into between CC and HRA in respect of each of Sir Elton's later tours to North America. The rate of commission receivable by HRA varied from time to time. It was usually 10% but sometimes it was lower. For 1992 and subsequent years a somewhat shorter form of letter was used, but the substance of the agreement remained the same.
72. As the agreements make clear, HRA agreed to act as booking agent for CC, not as agent for Sir Elton, Happenstance or Bondi. I do not doubt that Howard Rose looked upon himself as a representative of Sir Elton in North America. I accept his evidence given during Mr Pollock's short examination in chief when the following exchange took place

" Q. How did you present yourself to the outside world when you were acting as a booking agent or negotiating sponsorship?

A. I presented myself to the outside world – the perception was that I was Elton's agent and I worked for JREL.

Q. Whom did you regard as engaging your services? Who hired you?

A. JREL.

Q. Whom did you regard as likely to fire you if such an unfortunate eventuality came to pass?

A. JREL."

73. Equally I do not doubt that the original choice of HRA as booking agent was that of John Reid on behalf of JREL and that when CC came into the picture it entered into its agreement with HRA at the request of John Reid and JREL. Probably little needed to be said after the first occasion. Sir Elton knew Howard Rose and liked and trusted him and it almost went without saying that HRA would be engaged as booking agent for each tour. Further I accept that for each tour HRA formed its plans in direct consultation with JREL. I accept Howard Rose's evidence that John Reid would give him a period during which Sir Elton proposed to tour in North America. Howard Rose would then come up with recommendations as to the places which would be included in the tour and would discuss these with John Reid and Sir Elton himself. When the itinerary was settled Howard Rose would negotiate with individual local promoters and would consult with John Reid on such matters as pricing policy.
74. The fact remains however that, at least from the time when CC began to be used as tour producer, HRA's contract in respect of each tour was with CC and no one else. HRA was a representative engaged to negotiate rather than an agent in the full sense, but so far as he was an agent his principal was CC and not Sir Elton, Happenstance, Bondi or JREL.



#### **(4) Local promoters**

75. Once HRA had identified and negotiated terms with a particular local promoter, CC would enter into a contract with that promoter. CC appears to have used a standard form of contract for this purpose, an example of which was at File H1, page 226. Under this agreement the local promoter engaged CC, and CC agreed, to provide the services of Sir Elton to perform at a particular venue on a specified date or dates. The local promoter agreed to pay CC a specified guaranteed sum and a further sum equal to a specified percentage of the net profits, which in the example referred to was 90%. The meaning of "net profits" was in accordance with what one would expect, that is to say gross receipts from the sale of tickets after payment of local taxes, less "direct hall expenses" (which were defined in detail) and a fund set aside for promotional purposes.
76. Thus the local promoter would promote the concert or performance as principal, having obtained the promise of CC that the services of Sir Elton would be made available. The local promoter was to receive the gross receipts on his own behalf, not as agent or trustee for any other party. He would have to pay out of his own resources (including the gross receipts) the amounts due to CC, and the direct hall expenses and he would have to set aside the promotion fund. His profit would be the amount of the gross receipts remaining after satisfying these outgoings.

#### **(5) Accountants - Neal Levin & Co**

77. I referred earlier to the tour producer's need for accountancy assistance at two levels. Neal Levin & Co, a firm of certified public accountants based in Beverly Hills, California, has considerable experience of accounting matters in relation to persons engaged in the entertainment business. Its services have been used at the first level that I mentioned, that is to say the negotiation of Withholding Agreements and the preparation of tour budgets and tour accounts, for all Sir Elton's American tours since 1978 at the latest. Ms Lisa Ferguson, who is now a partner in Neal Levin & Co and gave evidence at the trial, said that she had worked on all the Elton John US tour accounts since 1978 and had primary control of the accountancy for each tour from 1984 onwards.
78. There was no evidence before me about who first retained the services of Neal Levin & Co. The likelihood seems to be that it was John Reid, acting either for JREL or for JRE Inc. However since CC was brought into the picture, Neal Levin & Co has in fact been retained by CC. There is no agreement in writing showing this to be the case, but it seems to me that it inevitably follows from what I was told, particularly by Constance Hillman (at Day 17, pages 49-54) about the flow of money produced by each tour.
79. The starting point of this flow is the local promoter who collects the box office takings. Under the standard form of contract with CC, the payment for the services of Sir Elton, which is legally due from the local promoter to CC, is to be made by the promoter not to CC but to a specified bank account of HRA, partly in the form of a deposit which is payable before the concert takes place. HRA then deducts its own commission and any expenses it is entitled to recover and pays the balance into a bank account of CC which is operated on behalf of CC by Neal Levin & Co. Neal Levin pays out of that account the expenses for which CC is liable (including its own charges), the remuneration due to CC for acting as tour producer and the tax which is payable in accordance with the Withholding Agreement. The balance is remitted to London. Until the early 1980s the entirety was remitted to JREL which in turn was entitled to retain its commission and obliged to account for the balance to Sackville or later Happenstance. It appears that JREL was somewhat lax about actually paying over this balance, with the result that a considerable book debt became owed by JREL to the EJ companies. From a time when the 1986 Management Agreement was being negotiated this system was changed and Neal Levin & Co, on behalf of CC, paid only JREL's commission to JREL, the balance being paid to Happenstance or later Bondi.
80. It is clear that, as with the selection of HRA and indeed CC itself, the decision to retain Neal Levin & Co was that of John Reid on behalf of JREL. But, I am satisfied that the actual retainer of Neal Levin & Co and the obligation to pay its charges lay with CC.
81. In 1992 two incidents occurred in relation to Neal Levin & Co. on which the claimants place some reliance. The first was when, John Reid decided that JREL would bear the remuneration of CC under its agreement with Bondi. The implementation of this decision was achieved by John Reid telling Lisa Ferguson that this remuneration should be removed from the tour accounts and that it would be an expense of JREL. This was done for a time, but the IRS started to question whether CC was truly an entity independent of JREL when its remuneration as tour producer was not charged in the tour accounts. Lisa Ferguson discussed this with Mr Haydon on behalf of JREL and they decided to restore the CC remuneration as an expense in the tour accounts and then re-charge it to JREL in some way by means of appropriate book entries.
82. The other incident occurred earlier in 1992 when Mr Haydon came to Los Angeles and had a meeting with Neal Levin, the principal partner in Neal Levin & Co. In this meeting Mr Haydon informed Mr Levin that the retainer of his firm was being terminated and that another accountancy firm would be engaged in its place. This was a considerable blow to Neal Levin & Co. and Mr Levin wrote a vigorous letter of protest to John Reid on 29th April 1992. After that Neal Levin & Co. were reinstated in their previous role.

83. These incidents illustrate that, notwithstanding the structure under which CC was an independent principal and the parties I have mentioned were in a contractual relationship only with CC so far as the activities of Sir Elton and the EJ companies were concerned, JREL dealt directly with Neal Levin & Co. which considered itself obliged to obey the directions of JREL. I accept that this was the case not only in relation to Neal Levin & Co. but also in relation to HRA.
84. The claimants also contended that the termination of the engagement of Neal Levin & Co. was carried out by Mr Haydon without reference to John Reid and that this emphasises the extent to which Mr Haydon personally controlled the affairs of the EJ companies. The documentation shows that Mr Haydon had been planning to change from Neal Levin & Co. to another firm at the end of March 1982, some weeks before he went to Los Angeles to see Mr Levin. Some criticism was made of the fact that Mr Haydon had only one alternative firm in mind as a replacement for Neal Levin & Co. and that no other firm was invited to bid for the assignment. It was suggested that Mr Haydon wanted to make the change for his own reasons in connection with the establishment of a new management agency named Management World in which he, as well as John Reid and other individuals, were interested.
85. The most important complaint was that Mr Haydon dismissed Neal Levin & Co. without the knowledge or consent of John Reid and that this explains why John Reid reversed his decision within 24 hours of receiving Neal Levin's letter of 29th April. Lisa Ferguson referred in her oral evidence to a telephone conversation with John Reid shortly after he received that letter in which John Reid expressed surprise at what had been done and, in a later telephone call, said that after consulting Sir Elton he was instructing Mr Haydon to reinstate Neal Levin & Co. (Day 14, pages 114-115). John Reid said

" I think we had agreed that Owen Sloane was not the kind of lawyer that we needed at that time in Los Angeles, and I did authorise his being let go. But I did not authorise him [i.e. Mr Haydon] to fire Neal Levin. I think he did that off his own back. He did tell me he was going to make some other changes, but he did not tell me that he was going to do that, because if he had, I would not have allowed it."

Mr Haydon was vigorously cross-examined on this matter (Day 26, pages 145 to 169) but was adamant that he had got John Reid's approval to the dismissal of Neal Levin & Co. He said he went to Los Angeles to perform an unpleasant task and he was not looking forward to it. When he returned he was surprised to receive a message from John Reid saying that everything was back to normal. He described as nonsense a suggestion that he had not told John Reid what he was going to do and that John Reid was cross about it when he found out.

86. My impression of Mr Haydon was that he was an honest and straightforward witness who was not trying to hold anything back on this or other matters on which he gave evidence. I had a less favourable impression of John Reid's evidence. Lisa Ferguson was clearly a witness of truth and I do not doubt that her account of what John Reid said on the telephone after receiving the letter of 29th April is substantially correct. I think that John Reid may have said this in order to explain a change of policy which he felt obliged to make, possibly after he had told Sir Elton of Neal Levin's protest. I accept Mr Haydon's evidence that John Reid was aware that he was going to Los Angeles to terminate the engagement of Neal Levin & Co. I find also that this was something done by Mr Haydon in his capacity as an executive of JREL, rather than in his capacity as director of Bondi.

#### **(6) Booking Agents for tours outside North America**

87. Evidence was given at the trial about two agents who performed in a similar role to HRA, but outside the United States and Canada. These were Mel Bush and Harvey Goldsmith, both of whom gave evidence.
88. Mel Bush became involved in promoting Sir Elton's concerts through his acquaintance with John Reid. His first involvement was with concerts given by Sir Elton in the United Kingdom. Later he was booking agent for a number of tours in Europe between 1984 and 1989. No copy of any contract engaging him was produced, but he said that there was an agreement for each tour and that each contract was made between the Mel Bush Organisation Limited, which is the company through which he provides his services, and Bondi. The arrangements which he described between his company and local promoters seem to have been very similar to those between HRA and local promoters in America. He said that the local promoters' contracts were always with an Elton John company. Presumably this was Bong for the UK and Eire and Bondi for other countries. Mel Bush himself reported on a regular basis to John Reid and Andrew Haydon.
89. Harvey Goldsmith, or one of the companies through which he operated, was engaged as booking agent for a number of tours in Europe and Japan between 1992 and 1995. He said in his written statement (para. 3):

"I was appointed by John Reid (on behalf of [JREL]) to act as booking agent. The contracts appointing me as agent were agreed and signed by J Bondi Limited."

He said that he negotiated the contracts with Nicola Turnbull, an in-house lawyer at JREL.

#### **The Incidence of the Tour Agents' costs**

## **(1) Introductory**

90. There is no doubt that at all times up to the termination of Sir Elton's agreement with JREL in 1998, the commissions and expenses payable to the parties I have referred to (CC, HRA, Mel Bush and Harvey Goldsmith) and the charges of Neal Levin & Co. were paid in the way I have described, with the result that these commissions and charges were borne by Happenstance or later Bondi. This treatment was consistent throughout, both before and after the commencement of the 1986 Management Agreement. For convenience I will hereafter refer to CC, HRA, Mel Bush, Harvey Goldsmith and Neal Levin & Co. collectively as "the tour agents", but this usage is subject to the caveat that there is an issue whether any of them is rightly to be called an "agent" at all.
91. In this action the claimants' case in respect of the tour agents' costs is based upon the proposition that, although this treatment was correct under the 1973 and 1977 Management Agreements, it ceased to be correct on 1st January 1984, the date on which the 1986 Management Agreement was deemed to commence.
92. It is, I think, appropriate to note that, if the claimants are right, a similar claim in respect of payments to other third parties would or might be well-founded. Thus there was evidence of the engagement of an individual named Marc Robbins as tour accountant and later as tour manager on many, if not all, of Sir Elton's North American tours from 1982 onwards. He was engaged and remunerated under a contract with CC. On his evidence as to his functions, which I accept, it is far from clear to me how in principle his engagement as tour accountant is to be distinguished in character from that of Neal Levin & Co., although of course their detailed functions were different. Further his services as tour manager appear to me to have involved similar features to those which the claimants identify as relevant in respect of the services of CC and HRA. Nevertheless the claimants make no claim in respect of the payments to Marc Robbins. It appears also that tour accountants were used on tours to Australia, but no claim is made in respect of the costs of engaging them.

## **(2) Clause 7 of the 1986 Agreement**

93. The claimants' case in respect of the tour agents' costs is founded upon Clause 7 of the 1986 Management Agreement and, in particular, upon Clause 7.2.2. It is necessary, in my view, to set out the whole of Clause 7 down to the particular sub-clause relied upon. It reads as follows:-

"7. General Provisions as regards JREL's Obligations Hereunder

7.1. In performing its duties (both as manager and administrator) hereunder JREL shall:-

7.1.1. have authority to negotiate agreements and arrangements on behalf of Happenstance Bong and Mr John but shall not have authority without the prior consent of the party concerned to enter into agreements or arrangements on behalf of any of them.

7.1.2. at all times consult with the principal concerned with regard to any agreements or arrangements which JREL is negotiating or proposes to negotiate on behalf of it and shall act in accordance with the instructions given by the principal in respect thereof.

7.1.3. procure that throughout the Term its obligations hereunder are performed or discharged personally by Mr Reid or under his direct personal supervision or control provided always that notwithstanding anything to the contrary herein contained or implied Mr Reid shall himself attend upon and consult with Mr John as necessary or desirable in connection with JREL's obligations hereunder.

7.2. JREL shall not be entitled to appoint an agent or agents to act on its behalf in the performance and discharge of any of its obligations hereunder without the prior written consent of the person ("the Principal") in respect of whose activities such agent is appointed save for an agent in respect of bookings for a live performance concert tour. Any such appointment shall be subject to the following provisions of this clause:-

7.2.1. Mr Reid shall at all times exercise supervision and control of the activities of such agent;

7.2.2. the fees and expenses of such agent shall be paid by JREL out of the Commission and administration fees paid to it hereunder unless otherwise agreed in writing by the Principal."

94. Clauses 7.2.3 to 7.2.7 contain further provisions in respect of the appointment of agents which are not material for the purposes of this case.
95. Put shortly, the claimants' argument is as follows:-
- (1) Each of the tour agents is an agent of the kind referred to in the opening words of Clause 7.2.
  - (2) Each of the tour agents is an agent for whose appointment written consent was either unnecessary (i.e. a booking agent) or must be regarded as having been given.

(3) Accordingly the fees and expenses of each of the tour agents were payable by JREL under Clause 7.2.2, no agreement to the contrary having been made.

(4) Although the structure under which one or other of the EJ companies initially bore all the tour agent's fees and expenses was one which was concurred in by all the claimants, and was indeed essential if the claimants were not to suffer United States tax to an unacceptable extent, the effect of Clause 7.2.2 is to require JREL to adjust the position by a system of re-charging under which JREL recouped to the relevant EJ company the tour agent's fees and expenses which it had borne.

96. On the face of it this part of the claimants' case depends upon a concise point of construction of a written agreement. It is one which, at an early stage of the trial, appeared to me to be capable of being determined as a preliminary issue, a course which would have had a number of attractions. In the event I was persuaded it was not practicable to deal with it in this way. In arriving at this conclusion I was influenced by the fact that it seemed that there would be prolonged argument about what material constituted the relevant factual matrix.

### **(3) The law as to construction of the 1986 Agreement**

97. On the law governing what evidence is admissible for the purpose of construing the 1986 Agreement there was little dispute between the parties. The argument concerned the admissibility or otherwise of particular material, having regard to the established principles.

98. I was referred to a large number of modern authorities as to admissibility, beginning with the speech of Lord Wilberforce in *Prenn -v- Simmonds* [1971] 1 WLR 1381. It would not be appropriate to review these authorities here. It will suffice to quote what has become a well-known passage from the speech of Lord Hoffmann in *ICS Ltd -v- West Bromwich BS* [1998] 1 WLR 896 at 912-3 when he said

"I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn -v- Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd -v- Yngvar Hansen-Tangen* [1976] 1 WLR 989 is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

Lord Hoffmann also stated two further principles as (4) and (5), but these do not appear to me to have relevance to the present case, so I omit them.

99. Lord Hoffmann's reference, in his principle (2), to "absolutely anything" has, I think, sometimes been relied upon in support of somewhat extravagant arguments as to the admissibility of particular material, but nothing of this kind was urged upon me here. All the parties approached the issue of construction on the footing that Lord Hoffmann was merely re-stating the principles to be found in earlier cases, albeit that in his view these principles amounted to a fundamental change in the approach to be adopted to questions of construction.

100. In this case there is a complicating factor. PW and Mr Haydon contend that, if the claimants are right about the meaning of Clause 7, that is not in accordance with the underlying accord between Sir Elton and John Reid which was intended to be implemented by the 1986 Agreement. They contend that John Reid and JREL would have been entitled to have the 1986 Agreement rectified so as to give effect to this accord and that, if PW and Mr Haydon would otherwise be liable to the claimants, they are entitled to rely upon this entitlement by way of defence. It is convenient to refer to this defence as the "quasi-rectification point". I shall have to deal with it in due course. The fact that it proved impracticable to determine

as a separate issue the question of the true meaning of Clause 7 means that I have heard evidence not only of matters which go to make up the factual matrix surrounding the making of the 1986 Agreement but also in respect of the quasi-rectification point. This evidence, so far as it goes beyond what is needed to establish the factual matrix, is not admissible for the purpose of construing the 1986 Agreement. While I cannot escape the fact that I have heard it, I am very conscious of the fact that I must endeavour to put such inadmissible evidence out of my mind when I am deciding the meaning of the 1986 Agreement.

101. However I clearly can and should take into account the factual matters which I have described at some length in the preceding sections of this judgment, so far as those facts existed at the date of the 1986 Agreement. All this material was known to, or at least was reasonably available to, the parties to that Agreement. Where I think it relevant, helpful and permissible to take into account other material I shall indicate what it is. I must endeavour to put out of my mind other material.

#### **(4) The scheme of Clause 7**

102. I begin by considering the scheme of Clause 7. It appears to me that Clause 7.1 and 7.2 deal with two separate aspects of JREL's duties as manager and administrator and that, notwithstanding the way in which the sub-clauses are numbered, the real dividing point comes between Clauses 7.1.1 and 7.1.2 on the one hand and Clauses 7.1.3 and 7.2 on the other. Clauses 7.1.1 and 7.1.2 deal with JREL's powers to commit Sir Elton and the EJ companies to agreements or arrangements. Clauses 7.1.3 and 7.2 deal with the way in which JREL is to perform its own obligations, particularly in respect of the personal involvement of John Reid and the extent to which JREL is entitled to delegate the performance of its obligations to other parties. For convenience I will describe these other parties as "sub-agents", but in doing so I do not intend to pre-judge the legal status of the parties referred to.
103. Another respect in which the structure is somewhat strange is that Clause 7.2 begins with a qualified prohibition upon the appointment of sub-agents, but the greater part of the Clause is taken up with provisions which can operate only if and when sub-agents are appointed. The language is thus somewhat deceptive, but I do not think that there can be any doubt that the effect of the second sentence of Clause 7.2 is to impose upon JREL positive requirements in respect of certain sub-agents. These positive requirements include, by virtue of Clause 7.2.2, a requirement that JREL shall pay out of its own resources the fees and expenses of the sub-agents in question.
104. The sub-agents whose engagement is subject to this requirement are those who are engaged pursuant to "any such appointment". The scope of these words must be determined by the language of the first sentence of Clause 7.2. In order to give them meaning, that first sentence has to be treated, despite its prohibitory form, as permitting some appointments. This is not too difficult. Appointments of agents of the kind referred to are permitted in two types of case, namely where the prior written consent of the principal is obtained and where such prior written consent is not required. Any appointment in either of these cases is, in my judgment, within the words "any such appointment".
105. I consider it important, however, to note that it is not every type of agent who might be appointed by JREL who is within the language of the first sentence. An agent appointed for a purpose unconnected with the performance of JREL's obligations is altogether outside the scope of Clause 7.2. Subject to a special argument in respect of booking agents, the appointees who are within the second sentence of Clause 7.2 are those who are (i) appointed by JREL (ii) as agents to act on JREL's behalf in (iii) the discharge of any of JREL's obligations under the Agreement.
106. I propose to consider these elements in the reverse order from that in which I have stated them and then to consider the special argument in respect of booking agents.

#### **(5) "The discharge of any of JREL's obligations under the Agreement"**

107. The obligations of JREL under the Agreement fall under a number of heads as follows:-

(1) To act as manager of Sir Elton and the EJ companies in respect of "the Managed Activities" and to perform "the Manager's Duties" in respect of "the Managed Activities" (Clauses 4.1 and 4.2). The expressions "the Managed Activities" and "the Manager's Duties" are defined in Clause 1.1. I do not find it necessary to consider these definitions for present purposes.

(2) To act as administrator of the EJ companies and

"to perform throughout the Term such of the Administrative Functions and Tour and Recording Administration as are applicable to them or their undertakings" (Clause 5).

"Administrative Functions" are those described in Schedule 3 to the Agreement and are not material for present purposes. "Tour and Recording Administration" is described in Schedule 5, to which I shall return.

(3) To act as personal administrator to Sir Elton and accordingly to perform "Personal Administration" throughout the term of the Agreement (Clause 6.1). The scope of what is included in "Personal Administration" is set out in Schedule 4

but I do not propose to examine it.

(4) To perform certain other services for companies other than those I have defined as the EJ companies (Clause 6.2). These are not material for present purposes.

108. It is the claimants' case in these proceedings that the tour agents were appointed to act in the performance of some of JREL's obligations in respect of Tour and Recording Administration. I must therefore examine Schedule 5, which reads as follows:-

"(a) planning and scheduling of concert tours or recording sessions as the case may be

(b) booking of concert venues or recording studios as appropriate

(c) advertising and publicising of concert tours

(d) engaging musicians, technicians, producers or road managers as appropriate

(e) preparing and administering budgets in respect of tours or recording sessions and ensuring that copies of such budgets and all amendments thereto are copied to and approved by the person for whom Tour and Recording Administration is being performed and their financial advisers.

(f) arranging travel, accommodation and subsistence as appropriate

(g) keeping of full accounting records in respect of tours and recording sessions and the preparation of accounts in respect thereof

(h) where used, the appointment of experienced and trustworthy local promoters and the supervision thereof

(i) arranging appropriate insurance cover

(j) generally supervising and arranging tours and recording sessions

(k) such other duties as may reasonably be required of JREL as regards tour and recording administration

(l) the proper supply of information in connection with the tour or recording session as may be required necessary or desirable to the person for whom such services are carried out or its legal tax and accounting advisers"

109. It is, I think, clear that much, if not all, of what the tour agents were engaged to do and in fact did was within the descriptions of the tasks set out in Schedule 5. Thus:-

(1) CC carried out tasks which fall within each of the paragraphs of Schedule 5, as set out in paragraph 20 of Constance Hillman's witness statement.

(2) HRA carried out tasks which may fairly be said to fall within paragraphs (a), (c), (h), (j) and (l) of Schedule 5.

(3) Mel Bush and Harvey Goldsmith appear to have carried out tasks similar to those carried out by HRA.

(4) Neal Levin & Co. carried out tasks within paragraphs (g) and (l) of Schedule 5.

110. The fact that the tour agents each carried out tasks which fall within the descriptions in Schedule 5 does not, however, provide a conclusive answer to the question whether they were engaged to discharge obligations of JREL under the Agreement. It is necessary to consider also whether, on its true construction, Clause 5 and Schedule 5 required JREL itself to perform the Schedule 5 tasks completely and exhaustively, without delegating any of them to another party save to the extent (and on the terms) that the Agreement permits delegation.

111. There are a number of internal indications in Schedule 5 which lead me to doubt whether that was what the Agreement intended. The clearest is paragraph (c), relating to the advertising and publicising of concert tours. It seems extremely unlikely that JREL was to be responsible for the preparation and placing of advertisements, still less for placing them at its own expense. It must have been envisaged that JREL would use advertising agents for this purpose and that the cost would be met by one of the EJ companies. A similar observation may be made in respect of paragraphs (e) and (g) relating to budgeting and accounts. It seems doubtful whether JREL itself was to carry out every aspect of these activities. Likewise one would expect insurance cover (paragraph (i)) to be placed through a broker. The arrangement of travel accommodation and subsistence would also be likely to involve, at least in part, using the services of intermediaries. It is true, of course, that paragraph (f) expresses the duty as that of "arranging" travel etc., but I doubt whether the use of the word "arranging" makes this a fundamentally different duty from that imposed by the other paragraphs.

112. The view that JREL was not intended itself to perform all the functions specified in Schedule 5 also accords with the facts which existed at the time when the 1986 Agreement was being negotiated. At that time the contractual framework under which Happenstance engaged CC which in turn engaged HRA, Neal Levin & Co. and local promoters was well-established. The framework was brought into existence in order to obtain a tax treatment which would not have been available if JREL itself was substituted for CC, but the continued availability of which was essential to Sir Elton and the EJ companies. In my judgment it would be inconsistent with this framework for the 1986 Agreement to provide that JREL was itself obliged to do personally all the things described in Schedule 5, even though these things were in fact to be done by CC, HRA and Neal Levin & Co.
113. An additional factor which points in the same direction is the special function of booking agents, who need to have skills and contacts which a managing agent such as JREL could not be expected to have. Moreover Howard Rose gave evidence, which I accept, that in New York and California the functions of a booking agent can only be performed by a party which has the requisite licence (Day 15, pages 4-5). HRA had such a licence, but JREL did not. Even where the use of a licensed booking agent is not required, the use of a separate booking agent such as HRA is highly desirable, even essential.
114. This last point emerged clearly from the following passage in the cross-examination of Sir Elton by Mr Fletcher, on behalf of Mr Haydon (Day 11, pages 31-32):

" Q. I suspect some of this will be common ground, Sir Elton, but, I mean, it is very important in North American tours to have someone like Howard Rose in the team?

A. Yes, of course. It is essential.

Q. I mean, it is a complicated touring market, and you need to understand it well in order to arrange a good --

A. Absolutely, yes.

Q. -- a good itinerary, and on good terms, at the right venue?

A. Absolutely.

Q. I do not know if you were aware of this, but in relation to North American tours, it was Howard Rose, using their expertise, who would devise a route for a particular tour?

A. Yes.

Q. It having been decided between you and John Reid that you wanted to tour in a time window in the States?

A. Correct.

Q. Howard Rose Associates was run by Howard Rose himself and he had an assistant called Steve Smith?

A. Yes, that is correct.

Q. And the relationship between you and Howard Rose was very longstanding?

A. Yes.

Q. And you placed great trust and confidence in him --

A. Yes.

Q. -- as someone who had knowledge of North America and the concert scene there. Then, Mr Rose having devised a preliminary route, that would be discussed, I suggest, between him and John Reid and then John Reid would come to you with some proposals?

A. Yes.

Q. And you would discuss them with John Reid, you might refine them a little bit, and then you would go back to Howard Rose and say, "Fine. Make it --

A. Yes, that is the way that it usually works.

Q. I mean, negotiations with local promoters in the US was something that Howard Rose was well placed to undertake?

A. Yes.

Q. And which JREL could not have undertaken?

A. Absolutely.

Q. And you never expected them to do that; you never expected JREL?

A. No, the whole point of hiring a US promoter or, sorry, a US agent, is to take care of all of that.

Q. Because they were able to provide something that JREL could not?

A. Yes, exactly."

**(6) "As agents to act on JREL's behalf"**

115. It is clear, in my view, that Clause 7.2 governs only the employment of third parties to act as agents of JREL. But, as I have pointed out in the course of analysing the structure under which the tour agents were engaged, none of them was, as a matter of law, the agent of JREL. Indeed CC was not an agent at all, but a principal. If it had been an agent of JREL the whole purpose of having an independent entity to act as tour producer in North America would have been defeated. No one suggests that the independent status of CC was in any way a sham.
116. Neal Levin & Co. was also not an agent of any other party. It provided accountancy services to CC, and indirectly to Happenstance and Bondi, in the capacity of an independent contractor.
117. HRA probably was an agent, at least in the broader or colloquial sense of this term, but as a matter of legal analysis its principal was CC, not JREL, or perhaps Happenstance and Bondi or Sir Elton himself. Sir Elton himself regarded HRA as his agent (Day 10, page 48; Day 11, page 30); and Howard Rose regarded Sir Elton as his client (Day 15, page 15). The considerations which I have referred to in paragraphs 113 and 114 above also support the view that HRA was in no sense an agent of JREL.
118. The position of Mel Bush and Harvey Goldsmith was not explored in the same amount of detail as that of the North American tour agents, but the legal analysis of their position must be the same as their contracts were with Bondi.

**(7) "Appointed by JREL"**

119. None of the tour agents was appointed by JREL in the legal sense. By "the legal sense" I mean, as suggested by Mr Hapgood on behalf of PW, by means of an agreement which brings the appointee into privity of contact with the appointor. CC, HRA, Mel Bush and Harvey Goldsmith were, in this sense, appointed by Happenstance or Bondi. Neal Levin & Co. was, so far as one can tell, appointed by CC. I accept, however, that all of them were identified by JREL and selected by it. Moreover I am satisfied that if JREL had decided (after such consultation with Sir Elton as John Reid or Mr Haydon considered to be appropriate) that the engagement of any of them should be terminated, or not renewed, that is what would have happened. The termination of the engagement of Neal Levin & Co. and its rapid reinstatement illustrate this.
120. It is possible to say, therefore, that the tour agents were appointed by JREL, although this would not, in my judgment, represent the ordinary meaning of the word "appoint". If the requirement for appointment by JREL were the only requirement which needed to be satisfied to bring a case within Clause 7.2 the position would, in my view, be ambiguous. But when this requirement is taken in conjunction with the other two which I have mentioned then, subject to the special arguments in respect of booking agents to which I come next, my conclusion is that the tour agents in respect of which this part of the claim is brought are not within Clause 7.2.

**(8) Special arguments as to booking agents**

121. I was presented with a number of arguments based upon the inclusion of the words "save for an agent in respect of bookings for a live performance concert tour". One of these arguments, based upon the origin of these words and what it is convenient to refer to as "the Lee/Eadie conversation", is not in my judgment admissible for the purpose of construing the words used, although I shall have to consider it in relation to the quasi rectification claim. Two other arguments are, however, relevant to the construction of Clause 7.2.
122. The first of them was of the utmost simplicity. It would not have been necessary, it was said, to insert a saving in respect



of booking agents unless, in the absence of such a saving, booking agents would be within Clause 7.2. Further, if booking agents would, in the absence of a saving provision, be within Clause 7.2, why are not the other tour representatives, for whom there is no saving clause, within that Clause?

123. The second argument was more far-reaching. It was contended that the effect of the saving words is to take booking agents outside the scope of Clause 7.2 altogether, so that Clause 7.2.2 does not apply to them.
124. I propose to deal with this second argument first. To a large extent it was based upon the subjective intentions of Mr Lee, the solicitor acting for John Reid and JREL, who proposed the relevant words and was party to the Lee/Eadie conversation. I leave these intentions altogether out of account because they are not admissible for the purpose of construing the Clause. I do not accept that they, or the Lee/Eadie conversation, are admissible as showing the object and purpose of the saving provision. The expression "object and purpose" harks back to the words of Lord Wilberforce in *Prenn -v- Simmonds* [1971] 1 WLR at 1384-5 and in the *Reardon Smith* case [1976] 1 WLR 995-997. But what Lord Wilberforce was referring to was the "genesis" "aim" or "purpose" of the transaction. I do not think his language enables one to look at the circumstances surrounding the negotiation of a particular clause which is part of an agreement intended to effect a larger transaction.
125. Once the intentions of Mr Lee and the Lee/Eadie conversation are left on one side I find nothing in the language of Clause 7.2 as a whole and the saving provision in particular to justify the view that the booking agents are wholly excluded from the regime imposed by Clause 7.2. Clearly their appointment is excluded from the requirement that there must be prior written consent. That represents the ordinary and natural meaning of the words used. I am unable to attribute to it any other meaning. Hence if booking agents were otherwise within Clause 7.2, the saving provision would not take them out of the requirement of Clause 7.2.2 that JREL bears the cost of employing them.
126. That leads back to the first argument, namely that the very existence of the saving provision, albeit that its effect is only to dispense with the requirement for consent, means that booking agents, are to be regarded as being agents of the kind referred to in the main part of Clause 7.2. I can see the logical force of this argument, but to my mind it places too much weight on the saving provision. That provision certainly shows that the parties who included it thought that booking agents would or might be within Clause 7.2 if there were no saving. But in my view, having regard to the other factors I have mentioned, this understanding was wrong. I cannot regard words of this kind as justifying an incorrect understanding as to the scope of the Clause which they qualify, either in the case of booking agents or in the case of other representatives.
127. One further argument based upon the saving provision needs to be mentioned here. It was submitted that the effect of the Lee/Eadie conversation was that the parties agreed that the word "agent" in Clause 7.2 did not include booking agents. I was referred to *The Karen Oltmann* [1976] 2 Lloyds Rep 708 at 712 and *Inland Revenue Commissioners -v- Botnar* [1999] STC 711 at 738 in support of the proposition that, in construing a contract, the court will give effect to a pre-contractual agreement as to the meaning of particular words or expressions. I have no difficulty in accepting this as a general proposition. However I do not accept that the Lee/Eadie conversation produced such an agreement. My reasons for this conclusion will appear when I deal with the Lee/Eadie conversation.

#### **(9) Other factors**

128. There are a number of other factors which support the view that tour agents were not intended to be covered by Clause 7.2, although these are not so cogent as those which I have discussed in paragraphs 102 to 120 above.
129. The first of these is that it was common ground between the parties that the normal industry practice, in the absence of special arrangements, is for the artist, not his manager, to bear the cost of a tour booking agent, tour producer and tour accountant. The parties' agreement on this leaves open the possibility that there may be special arrangements in any particular case and it was accepted that the possibility that a special arrangement will be made is greater where the manager's commission is calculated by reference to the artist's gross commission and also where the artist is well-known and successful and the manager is correspondingly well remunerated. Arrangements under which the manager bears costs of the kind mentioned would, nevertheless, be unusual by the ordinary standards of the music industry. Clause 7.2 does not, to me, have the air of a provision designed to give effect to a special arrangement. Rather it is in the nature of a provision working out a normal requirement that the manager must act personally and must not delegate his duties except within strict limits.
130. Secondly it was common ground that at the time when the 1986 Agreement was negotiated JREL was substantially indebted to the EJ companies. This was the result of the practice under the earlier management agreements under which income due to the EJ companies was remitted not direct to the EJ company entitled to it but to JREL, which was dilatory about passing it on. The only way in which JREL could hope to repay what it owed to the EJ companies was out of future commission income earned by it. A memorandum brought into existence in the course of negotiations in November 1984 and signed by Sir Elton and John Reid (the "old basis/new basis " referred to in more detail below) indicates that, at least at that stage of the negotiations, it was envisaged that JREL would have a substantially enhanced income under the new management agreement, and that this enhanced income would be used in part to pay off JREL's indebtedness to the EJ companies at a much earlier date than would otherwise be possible. It does not appear that the intention to increase,

rather than reduce, the income of JREL was ever changed. If, however, Clause 7.2 were to have the effect contended for by the claimants JREL's income would have been reduced rather than increased.

131. I have considered carefully whether I am entitled to take the old basis/new basis memorandum into account in construing the 1986 Agreement. It was, in one sense, merely a stage in the negotiations and negotiations are not generally to be looked at because they are unhelpful in ascertaining the final intentions of the parties. But the old basis/new basis memorandum constitutes not merely a statement of the position of one party to negotiations but a formal statement, signed by both parties, which recognises at least the broad result which they expected their negotiations to achieve if and when they led to a concluded agreement. I consider that I am entitled to take account of the memorandum, not as showing precise figures for JREL's commission but as showing that such commission was expected to increase substantially.
132. Thirdly I consider that there is force in the submission that, as Clause 7.2 starts with a prohibition on the appointment of agents, the part of the Clause beginning "Any such appointment ..." represents an exception intended to deal with special cases. The employment of tour agents was, however, something which by 1986 (and indeed much earlier) had become a necessary and routine procedure. It would be odd to find this to be authorised only by an exceptional procedure.

### **(10) Conclusion as to the meaning of Clause 7.2**

133. In the result I find that the circumstances which I have discussed in paragraphs 102 to 120 above, supported by the other factors mentioned in paragraphs 128 to 132, outweigh the factors which point in the opposite direction. I conclude that the tour agents are not within Clause 7.2 and that JREL was under no obligation to bear their fees and expenses under Clause 7.2.2.
134. This conclusion means that the claimants' case in respect of tour agents costs must fail. However a large number of other issues were argued before me and it is my duty to deal with them, particularly where findings of fact are required, in case a different view of the construction of Clause 7.2 were taken by a higher court.

## **Quasi Rectification**

### **(1) Introductory**

135. As I indicated earlier, PW and Mr Haydon contended that if, contrary to what I have concluded, tour agents were within Clause 7.2, this was not in accordance with the common intention of Sir Elton and the EJ companies on the one hand and John Reid and JREL on the other. On this basis they argued that John Reid and JREL were entitled to have the 1986 Agreement rectified and that PW and Mr Haydon ought not to be held liable for the consequences which would follow if that Agreement were to be treated as having effect in accordance with its terms.
136. This argument involves a number of technical difficulties. First neither PW nor Mr Haydon was a party to the 1986 Agreement. They accept that they have no standing to seek actual rectification. For this reason this part of their argument was labelled "quasi-rectification". What it comes to, I think, is that their conduct in relation to the matters complained of should be evaluated not in accordance with the 1986 Agreement as it stands but in accordance with the 1986 Agreement as it would be if it were rectified.
137. Secondly, John Reid and JREL never did seek rectification of the 1986 Agreement or even suggest that there ought to be rectification. The fact that a written agreement does not give effect to the true agreement between the parties, so giving rise to a right for the party adversely affected to have the agreement rectified, does not make the agreement void or even voidable. Unless it is rectified the erroneous agreement represents the agreement between the parties. If it is rectified the rectification will have retrospective effect. But until that happens either party is entitled to enforce it as it stands. Moreover a party entitled to such rectification is not obliged to seek it. He may choose to live with the agreement as it stands, if he thinks fit to do so. The fact that John Reid and JREL did not seek rectification and clearly will not now attempt to do so thus represents an extraordinary difficulty so far as PW and Mr Haydon are concerned.
138. Thirdly, PW and Mr Haydon have to face the fact that particularly strong evidence is required if a claim for rectification is to succeed. This burden is not, in my judgment, diminished by the fact that they cannot actually obtain rectification as such. The evidence must be sufficient to contradict the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by them (see Snell's Equity, 30th edition, page 699).
139. Although the first and second problems are considerable, I propose to leave them on one side and to concentrate my attention on the third, which is one which cannot be resolved without findings of fact.
140. I was referred to the summary of the relevant principles contained in the judgment of Mustill J in *The "Olympic Pride"* [1980] 2 Lloyds Rep. 67 at pages 72-3. There was no dispute that this summary accurately states the law. It reads as follows:-

"1. The remedy of rectification is available only for the putting right of a mistake in the terms of a document which purports to record a previous transaction. It is not an appropriate remedy where the mistake relates to the transaction itself

rather than to the document which purports to record it.

2. Rectification may be granted in two situations: (a) where there is a mistake common to both parties, the mistake being the belief that the document accurately records the transaction. (The fact that the mistake must be shared does not necessarily mean that it must arise in the same way on each side. Very often the mistake of one party occurs in the writing and of the other in the signing of the document, but the mistaken belief is common to both.); (b) where one party is mistaken as to the compliance of the document with the transaction and the other party knows of this mistaken belief but does nothing to correct it. The person seeking rectification in this situation must, in effect establish that his opponent was guilty of sharp practice.

3. The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.

4. The court must be satisfied not only that the document fails to reflect the prior agreement or intention but also that there was a prior or common agreement (or intention) in terms which the Court can ascertain.

5. The Court requires the mistake to be proved with a high degree of conviction before granting relief. There are sound policy reasons for this. The Court is reluctant to allow a party of full capacity who has signed a document with opportunity of inspection, to say afterwards that it is not what he meant. Otherwise, certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to pre-contractual negotiations. These considerations apply with considerable force in the field of commerce, where certainty is so important. Various expressions have been employed in the reported cases to describe the standard of proof required of the person who seeks rectification. Counsel in the present case were agreed that the standard can adequately be stated by saying that the Court must be "sure" of the mistake, and of the existence of a prior agreement or common intention before granting the remedy."

141. As PW put forward a somewhat broader claim than Mr Haydon I shall consider it first. The essence of it was that the "previous transaction" about which the parties were agreed took the form of a draft of what became the 1986 Management Agreement as it stood in July 1984, as varied by an oral agreement made between Sir Elton and John Reid at St. Tropez at the end of July 1984. It was this transaction which, it is said, was incorrectly recorded in the 1986 Agreement if the true construction of that Agreement is as contended for by the claimants. The rectification proposed on behalf of PW involves two types of alteration to be made to the 1986 Agreement as executed. These are

(i) the alteration of the saving words in Clause 7.2 so that they read "save ~~for an~~ that this clause and its sub-clauses shall not apply to an agent in respect of bookings for a live performance concert tour, a tour producer or a tour accountant".

Thus the words "for an" are to be struck out and the words underlined are to be inserted.

(ii) Each of the paragraphs of Schedule 5 is to be preceded by the words "supervising the ...", the following participle being changed to a noun as necessary. Thus the opening word of paragraph (e) would become "supervising the preparation of ..."

I observe that if the first of these changes is made the second is not really necessary.

## **(2) The evidence relied upon**

142. The evaluation of this claim cannot be carried out without exploring in considerable detail the history of the negotiations between Sir Elton and John Reid and their respective companies. A number of events or documents are relied upon, and I will have to deal with each of them. In heading form they are as follows:-

- (i) The position under the 1977 Agreement
- (ii) The early negotiations for the 1986 Agreement
- (iii) The Lee/Eadie conversation
- (iv) The subsequent negotiations down to July 1984
- (v) The St. Tropez meeting
- (vi) The September 1984 Heads of Agreement
- (vii) The old basis/new basis memorandum
- (viii) The revised draft agreement

(ix) The execution of the 1986 Agreement

(x) The memorandum of understanding.

**(i) The position under the 1977 Agreements**

143. The starting point is that it was common ground between the parties that under the 1977 Management Agreements, the costs of engaging tour agents were to be borne by the relevant EJ company. This was the result of Clause 6 of each of the agreements between Bong and Sackville and JREL, which was in the following terms:-

"6. THE Manager shall subject to the prior consent of the Company in each case and in the best interests of the Artist, be entitled to appoint any agent or agents for the purpose of obtaining engagements or employment for the Artist or for furthering the Artist's career in any way (in the case of recording or publishing activities only with the prior written approval of the Company). Any commission due to such agents appointed by the Manager (which shall not exceed ten per centum (10%) of the gross fees payable in respect of such engagements or employment unless by agreement between the Company and the Manager) shall be in addition to the commission payable to the Manager pursuant to Clause 10 hereof and may be deducted and paid by the Manager as provided in Clause 11 hereof."

This position was not changed by the undated memorandum concerning commission which I have previously referred to (see paragraph 17 above) which provided that JREL's commission in respect of all income except recording income, including in particular touring income, should be 20% of the net instead of 15%.

**(ii) The early negotiations for the 1986 Agreement**

144. Heads of Agreement prepared by AA at the end of December 1982 proposed no change in these respects. Subsequently during 1983 a draft of a full Management Agreement was prepared by FC and submitted to the solicitors for John Reid and JREL. For a short while Messrs Titmuss Sainer & Webb acted for John Reid and JREL. They were replaced by Harbottle & Lewis in the first half of 1983, where Mr Robert Lee, who had been a partner in that firm since 1974, handled the matter. In the middle of 1983 Mr Lee left Harbottle & Lewis to form his own firm in partnership with another solicitor under the name Lee & Thompson. He continued to act for John Reid and JREL after founding his new firm. By that time he had gained considerable experience as a solicitor practising in the area of entertainment law.
145. The partner within FC who, in 1983 and 1984, had day to day responsibility for the drafting and negotiation of the new management agreement on behalf of Sir Elton and the EJ companies was Mr Steven Sugar, who also had considerable experience in this field. Mr Albert Dugate, an assistant solicitor with FC, was Mr Sugar's assistant in relation to the negotiation of the new management agreement in the summer of 1983.
146. On 20th June 1983 Mr Sugar sent to Mr Lee, who was then still with Harbottle & Lewis, a draft of the proposed management agreement. The features of this draft which are relevant for present purposes can be summarised as follows:-

(1) Its general framework, including most of the relevant definitions, was similar to that of the 1986 Agreement as executed.

(2) JREL was to be paid commission at varying rates on different classes of income. So far as performing income was concerned the rate was to be 20% of the gross amount of such income less the costs and expenses attributable to the earning of such income. Those expenses were to include those of the kinds referred to in Schedule 7. Among the heads of expenditure listed in Schedule 7 were "Promoters' fees and/or commission" "Agents' fees and/or commission" and "Accountancy and Legal Fees". The effect of these provisions taken together would have been that JREL's commission was to be 20% of net income.

(3) It was expressly provided that JREL was not to be paid commission on income from publishing.

(4) A version of what was subsequently to become Clause 7 of the 1986 Agreement appeared as Clause 16 in the draft. Clause 16.1 was in the same terms, or virtually the same terms, as Clause 7.1 of the executed Agreement. Likewise the sub-clauses of Clause 16.2 were for present purposes the same as the sub-clauses of Clause 7.2. The only material difference between Clause 16 of the draft and Clause 7 of the executed Agreement lies in the opening words of Clause 16.2 which read:

"16.2 JREL shall not be entitled to appoint an agent or agents to act on its behalf in the performance and discharge of any of its obligations hereunder without the prior written consent of the person ("the Principal") in respect of whose activities such agent is appointed and any such appointment shall be subject to the following provisions of this clause."

(5) Sir Elton and the EJ companies were to pay to JREL, in addition to its commission, administration fees in respect of administration duties which were to be performed for them. The administration fees for the year from 31st March 1983 to 31st March 1984 were agreed at £192,000. For future years they were to be fixed by agreement on the basis of estimates and discussions as to the actual cost to JREL of providing the administration services.

147. Mr Lee submitted amendments to the draft under cover of a letter dated 11th August 1993. The amendments which he proposed included the following:-

(1) He amended Clause 16.2 by inserting the saving provision in respect of booking agents and making the part beginning "Any such appointment" a separate sentence. In other words he amended the opening part of Clause 16.2 so that it accords exactly with what became Clause 7.2 in the agreement as executed.

(2) He deleted Clauses 16.2.2 and 16.2.3 (which became Clauses 7.2.2 and 7.2.3) and added the marginal note

"These provisions are not necessary in view of need of Principal's consent to the arrangement generally"

(3) He proposed a number of additional clauses of which the following is relevant:

"In addition to all other sums due to JREL and/or Mr Reid hereunder Happenstance shall reimburse the full cost to JREL of maintaining the business operations of Connie Hillman and Constant Communication Corp. PROVIDED THAT if at any time such business operations shall be provided for persons other than Happenstance Mr John or Happenstance shall be required to bear only an equitable proportion of such cost."

148. In his evidence Mr Lee said that there were two aspects of Clause 16.2 which particularly concerned him. One was that it appeared to require the prior written consent of Sir Elton or his companies to the appointment of any agent. The other was that Clause 16.2.2 required JREL to bear the cost of such agents if appointed. His concern extended to agents generally, but he had in mind in particular booking agents and CC. He said that his purpose in inserting the saving provision into Clause 16.2 was to take booking agents altogether out of that Clause, including the payment obligation contained in Clause 16.2.2.

**(iii) The Lee/Eadie conversation**

149. At about the time that he submitted these amendments Mr Lee had a conversation with someone at FC. He himself could not remember who the conversation had been with but, having seen a witness statement of Mr Craig Eadie in which Mr Eadie referred to what was evidently the same conversation, he said he must have spoken to Mr Eadie. Mr Lee himself did not claim any clear recollection of what was said. Indeed he said he had omitted any mention of the conversation from his first witness statement because his recollection of it was so dim.

150. When Mr Lee was cross-examined by Mr Pollock he was cautious about everything except his own understanding of Clause 16.2 in the draft. The following exchange occurred on Day 24, pages 21-22:

" Q. What had happened, as I understand it, is that 16.2 had been drafted by Mr Sugar in your view to place the burden of tour agents on John Reid's shoulders?

A. It had been drafted in such a way that it achieved that effect. Whether that was the intention or not, I do not know.

Q. Do you have any recollection of Mr Eadie telling you what the intention was?

A. If the conversation of which I have this recollection is correct, my recollection is that when I pointed out the reasons that tour agents could not, in commercial terms at least, be borne by JREL, the point was accepted.

Q. It was accepted it was a commercial matter?

A. Yes, and that it must be this way, and --

Q. Was it accepted, having taken instructions from their client, so far as you knew?

A. The conversation that I am referring to, I think, was not after instructions; it was the preliminary discussion."

Later on, at pages 33-34 the following exchange took place:

"Q. As I understand it, you understood that it was the desire of Frere Cholmeley to make it plain that John Reid paid for anyone that he used or appointed, employed, put into position, whatever, where that person was carrying out what the agreement defined as his responsibilities?

A. Did you say the intention, or the effect?

Q. That, I take it, must have been plain as the intention when you read the original draft?

A. I -- and this is purely my own view at the time -- I always thought that -- I accept that was the effect of the clause. I always thought that they, Frere Cholmeley, had drafted that clause with words that had a wider effect than they intended.

I may well have been wrong. One is always in danger when trying to attribute motives to the other side, but it was such -- it was so unlikely that, from a net deal, agents' commission would be deducted or paid by JREL, that I thought it was an evident mistake and my recollection of the conversation I had with Frere Cholmeley was that they thought that as well, that, when I initially raised it with them.

Q. With whom?

A. With, I believe, Craig Eadie."

151. Mr Eadie's evidence was somewhat more definite. In his supplemental witness statement he said:-

"I recall [Mr Lee] saying words to the effect that we (FC or Elton) could not mean tour agents by the reference to agents in clause 16 and that we all knew that the clause was not intended to apply to such agents. He accordingly wanted to insert his amendment, the "save for", to ensure that there was no doubt about it."

The following questions and answers came during his cross-examination by Mr. Pollock:

"Q. [You say in your witness statement] 'I think the discussion was either in the context of amendments he had made or that he was about to make. I recall him saying words to the effect that we ... could not mean tour agents by the reference to agents in clause 16 and that we all knew the clause was not intended to apply to such agents.' This is right, a recollection of words to that effect?

A. Yes, he said: "It has just occurred to me", he put it that it was a point that had just occurred to him, he said: "When we talk about agents" -- I forget whether he said tour or booking agents -- "but we do not mean that kind of agent, do we"? (Day 31, page 9)

Later on the following exchanges took place:

"Q. You are saying that you had knowledge from discussions with Mr Sugar of what he had intended in drafting 16.2?

A. I think I had some understanding of the background to the clause and what it was intended to deal with, primarily, yes, because I remember thinking I have not thought of that point, that seems quite an obvious point that I should, you know, know an answer to, we should know the answer to. I do not think it is intended; I had better go and ask Steven Sugar, because I am not actually quite sure, but I do not think it is intended. That is my recollection." (Day 31, page 10)

"Q. Let us look at what you say: "He accordingly wanted to insert his amendment, the 'save for', to ensure that there was no doubt about it." Then you say:

"It was and has remained my understanding that the amendment was intended by him to confirm that the 'agents' referred to in the clause were not intended to include tour agents."

A. Yes.

Q. When you say "has remained", I mean, as I understand your evidence, you are now saying it was your understanding then?

A. Yes.

Q. It ceased to be your understanding until you went through the file in order to prepare for evidence in this case?

A. No, it has always been my understanding that the amendment was intended to exclude tour agents entirely, and I have said in my evidence that in 1991 or 1992, on the congruence review, it was my understanding that that was the intended effect of the amendment. Whether I remembered the conversation I say is less clear. I do not think that the only times I have remembered that conversation are 1986 and then again in 2000, but I have said that in 1992 and 1998 in those specific instances, where I may not have looked at the point for some years, it was not then, the conversation was not, I think, then in my mind." (Day 31, page 11)

"Q. You see, as I understand it, what you are recollecting is that Mr Lee rang up and said something which indicated that a booking agent should come out of the scope of the clause entirely; is that right?

A. Yes.

Q. That included both the question of appointment and the question of payment?

A. That was my understanding of what he said." (Day 31, page 15)"

152. Mr Sugar had no direct conversation with Mr Lee about this matter at the time, but he had a dim recollection of discussing the matter with Mr Eadie. The relevant part of his cross-examination by Mr Pollock was as follows:-
- "Q: Would you just take your witness statement? You told me that you in fact have no recollection of Robert Lee raising the question of tour agents with you; is that right?
- A. That is what I said.
- ...
- Q. ... Now, you do say there that you have some dim recollection of considering the point and taking the view that it was harmless to Elton John's interests?
- A. Yes.
- Q. Which is right; that you now say that you do not remember it at all, or that you have a dim recollection?
- A. No, they are both right.
- Q. They are both?
- A. Yes.
- Q. They do seem to be inconsistent, with great respect?
- A. They are not, they are not.
- Q. No doubt you will explain to me why not.
- A. By all means. I do not have any recollection of a discussion with Robert Lee about the matter; I have a dim recollection of a discussion with Craig Eadie about the matter.
- Q. With Mr?
- A. Mr Eadie.
- Q. Mr Eadie. An internal discussion, when you considered this point?
- A. Yes.
- Q. Because you mean this insertion had been made by Robert Lee?
- A. Yes.
- Q. And you discussed it with Mr Eadie?
- A. Yes.
- Q. And you both took the view that it was harmless to Elton John's interests?
- A. Yes, well, I took that view." (Day 28, page 70)
153. Both Mr Lee and Mr Eadie were severely cross-examined by Mr Pollock, who suggested that their recollections of this conversation were both recent and false. Moreover Mr Eadie had remembered nothing of this conversation when he and Mr Presland were considering the meaning of the 1986 Agreement in March 1998 and had arrived at a conclusion which is at variance with the conversation. Clearly after this lapse of time memories of a conversation in respect of which no written note was made are likely to be fallible. Nevertheless it appeared to me that both Mr Lee and Mr Eadie were essentially truthful witnesses who were doing their best to recollect accurately what had occurred.
154. My main difficulty with Mr Lee's evidence is to understand how he can have thought that the amendment which he proposed to make to Clause 16.2, and which was accepted, was apt to take booking agents out of Clause 16.2 altogether, not just to remove them from the requirement for consent (which it undoubtedly did). In the end, however, I have come to the conclusion that he did actually believe this to be the case.
155. I have much more doubt about whether Mr Lee effectively communicated this view to Mr Eadie. I accept that Mr Lee must have said something to the effect of "We don't mean to include booking agents do we?", but this by itself was

equivocal, because it might have been directed only to including booking agents in the requirement for consent. I recognise that Mr Eadie's evidence was to the effect that his understanding was the same as that of Mr Lee, but I feel no confidence in this part of what he said. In particular, while I accept, albeit with some hesitation, that Mr Lee, as the author of the proposed amendment, misapprehended its scope, I am not satisfied that Mr Eadie can have done so.

156. Moreover Mr Eadie was at that time in a fairly junior position in FC and was not concerned on a day to day basis with the negotiations concerning the draft agreement. In my judgment he did not have any authority or standing to reach any kind of agreement with Mr Lee. Indeed he did not really claim to have done so. If Mr Lee's amendment was as far-reaching as is now claimed, its impact as explained in the conversation would have needed to be carefully explained to Mr Sugar. I accept that Mr Eadie did speak to Mr Sugar about the conversation, but what he said does not appear to have had much impact on Mr Sugar's mind. Mr Sugar did, of course, accept Mr Lee's amendment but he cannot, in my view, be regarded as having understood it in anything other than its ordinary linguistic sense of removing the requirement for consent to the appointment of booking agents. This, I think, is consistent with Mr Sugar's evidence when he said he did not think the amendment adversely affected Sir Elton. If he had understood the intention underlying the amendment to be as far-reaching as is suggested, this would have revealed either a fairly serious mistake in the original draft, in which case I think Mr Sugar would have remembered it, or a substantial change in the bargain which would have a serious impact on the financial consequences from Sir Elton's point of view.
157. In the result I conclude that the Lee/Eadie conversation does not, at any rate standing by itself, prove the existence of a "prior transaction" with the high degree of conviction which is required in proceedings for rectification.

**(iv) The subsequent negotiations down to July 1984**

158. On 22nd August 1983, which must I think have been after the Lee/Eadie conversation, Mr Sugar wrote to Mr Lee saying
- "As you will appreciate, there are a number of important matters arising from your amendments which will require further discussions between John Reid and Elton John. However, I think it would be useful to try and settle as many of the amendments between ourselves as we can, and when you return from holiday, would you please telephone to fix a time when we could meet to discuss the Agreement. I suggest that it might be useful if Catherine MacRae and a representative of [AA] joined our meeting."
159. Subsequently, on 20th September 1983, Mr Sugar sent Mr Lee a redraft of the amendment. The meeting proposed in his letter of 22nd August had not yet taken place, so that this seems to have been part of the attempt to settle as many as possible of the amendments between themselves. In the redraft Mr Sugar indicated "the parts of it which I know are not agreed" by enclosing them in square brackets. The fate of the amendments proposed by Mr Lee as noted in paragraph 147 above was as follows:-
- (1) The saving provision for booking agents and the division of the opening section of Clause 16.2 into two sentences were, on the face of it agreed.
  - (2) Clauses 16.2.2 and 16.2.3 were enclosed in square brackets.
  - (3) Mr Lee's proposed new clause in respect of reimbursement of the cost of CC did not appear at all. This indicates rejection of this proposal, which is consistent with Mr Lee's letter of 26th September to John Reid in which he said
- "There seems to be very little agreement as to the basis on which Connie's activities should be charged, and I feel that this is a matter that can only be settled between you and Elton."
160. A meeting at the offices of AA took place on 29th September at which Sir Elton and John Reid were both present. A note of this meeting prepared by someone within AA and countersigned as agreed by John Reid on 5th October 1983 contains the following paragraph:

**"1. Overseas Representation Costs**

It was agreed that the costs of retaining overseas representatives are to be borne by John Reid Enterprises Limited. Further costs caused by Elton John visiting overseas would be budgeted beforehand and subject to agreeing the budget would be met by Elton or his employers as appropriate."

A later paragraph records agreement in respect of Clause 16 to the effect that JREL should obtain consent for the appointment but there would be no requirement for this to be in writing or to be given prior to the appointment.

**(v) The St. Tropez Meeting**

161. After October 1983 there was a period in which little happened by way of finalising the draft agreement. This had largely been agreed between the solicitors, but Sir Elton and John Reid themselves were not completely happy. Sir Elton, and probably John Reid too, thought the draft agreement was unnecessarily long and complex. John Reid was not happy with an agreement which provided for commission to be payable on net touring income, because he felt that this opened up the



possibility that extravagant expenses could be incurred by Sir Elton on tour and that, under a net commission arrangement, part of the cost would fall upon JREL. It is common ground that Sir Elton and John Reid met together, without their advisers, to discuss these matters while they were on holiday together at St. Tropez at the end of July 1984.

162. Sir Elton's evidence about his understanding of the position prior to the meeting at St. Tropez was quite clear. He said that he understood that he was bearing the cost of engaging HRA, CC and Neal Levin & Co. and that this position was changed at the meeting (see his answer to Mr Fletcher at Day 11, pages 98-99). As to what was agreed at St. Tropez, it is necessary to refer first to his cross-examination by Mr Hapgood. Mr Hapgood began by putting to him a passage in Mr Reid's witness statement in which Mr Reid said that the approach of charging commission on net income was too complicated. Sir Elton agreed this. The exchange then continued as follows:-

"Q. ... Why was it too complicated?

A. At this stage, I mean at this point in time, I wanted to get all the previous years' hassling and the negotiations finished, and it was a meeting between both of us, and I just thought that it would be better if JREL got 20 per cent of the gross, therefore taking care of all costs involved in my career, i.e. agents, overseas, Constant Communications, et cetera, to make life much simpler. I again reiterate, I was only interested in writing, recording and touring. I had no interest in the administration of my career, and I thought this would make it a much easier situation if he would receive 20 per cent of gross, including publishing, which I have to say had been a sticking point throughout this whole negotiation.

Q. Yes. My question was: why was an approach based on net income -- why was that more complicated than an approach based on gross income?

A. I just thought it would be easier to administrate for him, and for me that way.

Q. The net income approach carried with it an administration fee payable to JREL, did it not?

A. I do not know.

Q. You do not recall that?

A. No. I just told you, I am not interested in the business side of it. I have no idea what a net income would do or who pays what. I just wanted to get this resolved.

Q. Is it your recollection that Mr Reid put it to you that the process of agreeing an administration fee every year was unnecessarily complicated?

A. Probably, yes.

Q. And that JREL would receive commission at 20 per cent on gross income from all sources, including touring, but there would be no administration fee; so, so far you and Mr Reid seem to be in agreement that the basic deal was 20 per cent on gross income from all sources?

A. Yes.

Q. He says it was as simple as that.

A. It was.

Q. Are you saying that something more was agreed?

A. I beg your pardon?

Q. Are you saying that something over and above that was agreed?

A. No, I am not. I am just saying that when we sat down, he would receive 20 per cent of the gross, including publishing, which was an extraordinarily generous thing for me to do, and unheard of in the business. And that would include all income from all sources and he would take care of all expenses.

Q. He would have to take care of his own business expenses, would he not?

A. Yes, but I am talking about business expenses incurred on my behalf, like booking agents and Constant Communications. I wanted an uncomplicated life. I was not going to complicate matters by saying, "Except for this, except for that." 20 per cent of the gross: "You take care of everything, including my publishing. That is the deal." It cannot be any simpler than that.

Q. Those are the kind of words you think you would have used?

A. Yes.

Q. You did not refer in that conversation to Howard Rose, did you?

A. I beg your pardon?

Q. In the conversation you had with Mr Reid, there was no mention of Howard Rose, was there?

A. Not by name, no.

Q. Nor Constant Communications?

A. Not by name, no.

Q. Because you had already agreed the position with them in September 1983, had you not?

A. No, that is not true. Absolutely not true at all, no.

Q. No mention of Neal Levin by name?

A. No.

Q. The gist of the agreement was, "You can have 20 per cent and that is it", 20 per cent gross on everything?

A. That is it? That is an extremely generous deal.

Q. "But we will keep it simple. 20 per cent gross on everything, and then you provide services under the Management Agreement"?

A. Exactly.

Q. Of course, since you did not know -- you had indeed apparently no idea at all how much Howard Rose was charging for his services?

A. That is correct.

Q. It would have made no sense for you to seek some kind of quid pro quo on the basis, "Well, I will go up to 20 per cent, if you bear the Howard Rose costs"?

A. My deal, and I said it just then, "20 per cent you get on gross, including publishing", which is extra-generous. "Take care of everything", it cannot be simpler than that, and by "everything", that includes Howard Rose, and Constant Communications, is that clear?

Q. If you are saying is it clear to me, the answer is no, but the relevant matter is that you did not say it to Mr Reid, did you?

A. I did, but I did not mention Constant Communications, Howard Rose and Neal Levin by name. I told him, "You would take care of everything in the business side of my life. You are getting 20 per cent of the gross, including publishing, unheard of at this stage in an artist's career. Your commission should be going down and not up and you are getting the benefit of our friendship and relationship. You are getting more than a generous deal, unheard of. You take care of all the costs". No, I did not mention Howard Rose by name, nor Constant Communications, I did not have to. We knew each other that well." (Day 10, pages 77-81)

Mr. Hapgood's reference to Sir Elton having agreed the position in September 1983 was a reference to the meeting at Arthur Andersen's offices on 29th September 1983, which I have referred to above. Mr. Pollock had appeared to open the case on the basis that it was at that time that it was agreed that JREL would bear the costs of tour agents. However that suggestion was refuted by Sir Elton, as this passage makes clear, and it was not subsequently pursued on his behalf.

163. Sir Elton's answer to Mr. Fletcher's suggestion that his recollection was hazy because the conversation was on a subject of limited interest to him was:

"A. It was not of limited interest to me, I beg your pardon. It was very interesting to me. I was giving him -- and I have to reiterate this again -- he wanted a piece of my publishing. I am a song writer. When I write a song, that is like a child to me. No manager usually gets a piece of any artist's songwriting. I was, in the end, prepared to give him the

songwriting to shut him up from his continual whining over the last two years that he was an underpaid, poor, curmudgeonly-type manager, and I agreed it because we had had a personal relationship, it was of great importance to me. I wanted to get this settled, I wanted to get on with my life. This had been going on for so long, and I can remember it precisely: "You get the publishing and I have a fine, safe life. You take care of everything. I trust you. Now let us get on with it. Let us shake hands, and you take care of all those administrative costs. I do not want to do that. You take care of it. You can also have a piece of my songs", which to me is probably the most precious thing an artist can give to anybody. So to say that I do not remember it is, I find, quite insulting.

Q. It is certainly not intended as an insult, Sir Elton. It is simply intended to suggest to you that it is natural for people for their recollections to fade over a period of time like that.

A. Not when you are giving away a piece of yourself or your soul, i.e. your songs." (Day 11, pages 105-6)

164. John Reid's evidence about St. Tropez appears most clearly in his answers to Mr. Pollock in the course of his cross-examination when he said:

"Q. And I put it to you that at that stage" (Mr. Pollock was referring to the position after the meeting on 29th September 1983) "you remained unhappy at the amount of money which you were receiving and that you expected to receive, under the deal which you had done?"

A. It was not completely satisfactory.

Q. It was leaving you still on a net basis?

A. Yes.

Q. Plus administration fees?

A. Yes.

Q. And you complained steadily to Sir Elton that you thought you were worth more?

A. I think it is an exaggeration to say that I complained steadily to Elton, Mr Pollock. It is not a good practice between anyone and Sir Elton to complain steadily.

Q. Sir Elton has told us in evidence that you moaned on about how you felt you were not getting enough under the deal which had been agreed.

A. I do not believe that "moaned on" was appropriate, but had that been the case I would have expected to have been fired in that year.

Q. When you met that summer in St Tropez, you continued to argue that you were not getting enough?

A. I continued to press my case, yes.

Q. That you wanted more?

A. That I wanted a fairer compensation.

Q. By a fairer compensation, you meant switching from net to gross?

A. Correct.

Q. 20 per cent gross instead of 20 per cent net?

A. Correct.

Q. And Sir Elton gave way in St Tropez; is that not right?

A. Yes.

Q. He said to you something along the lines, "Very well, you can have 20 per cent, but you are responsible for everything"?

A. My recollection is that he said, "Yes, you can have 20 per cent. You take care of the office costs", because we were referring at that time to the structure that was in place for the previous 18 months, or two years, whatever it was, that we

talked about yesterday.

Q. How much were the office costs going to cost him at that stage?

A. I think his contribution which had been previously set was at somewhere between £180,000 or £200,000." (Day 21, pages 24-25)

Mr. Reid went on to resist Mr. Pollock's suggestion that it was a poor exchange for Sir Elton to substitute gross for net in return for being relieved of office costs of £180,000 or £200,000 a year.

**(vi) The September 1984 Heads of Agreement**

165. Sir Elton himself made no report to anyone of the outcome of the meeting at St. Tropez, but John Reid made a report to Catherine MacRae in JREL's office. On 3rd September 1984 Miss MacRae wrote letters in identical terms to Mr Lee and Mr Sugar. The letters read:-

"While Elton and John Reid were on holiday in St. Tropez in July, they had an opportunity to sit down together and discuss the basis of the management agreement in detail. Both felt that the latest draft agreement was unduly complicated and legalistic and were of the opinion that a fresh start was called for. They settled the arrangements for the period between 11th May 1981 and 31st December 1983 and agreed new terms to take effect from 1st January 1984.

In respect of the period prior to 1st January 1984, the parties have confirmed the existing arrangements as follows:-

1. JRE to receive 10 percent of gross income in respect of recording.
2. JRE to receive 20 percent of net income after deduction of directly associated expenses from tours.
3. JRE to receive 20 percent of net income after deduction of directly associated expenses in respect of all other income.
- 4 The parties confirm the payment of agreed fees for administrative services amounting to £143,205 for the period from 11th May 1982 to 31st March 1982 and £144,000 for the period from 1st April 1982 to 31st December 1983.

It has been agreed that JRE will receive 20 percent of gross income from all sources from 1st January 1984 onwards. For the avoidance of doubt, this includes touring, recording, publishing, sponsorship and film income. There will be no administration fee payable although certain Elton John companies will receive an occupancy charge where they are using office accommodation. All other office costs in the United States and the United Kingdom and all staff salaries will be the responsibility of JRE.

John and Elton have suggested that I prepare a statement of agreement for the arrangements prior to 31st December 1983 and Heads of Agreement setting out the near arrangements. When this has been done they would like you to sit down with Steven Sugar and draft a brief management agreement based on the Heads of Agreement."

166. I think that Miss MacRae must have meant "pay", not "receive", in relation to the occupancy charge referred to in the penultimate paragraph. Subsequently, on or about 24th September 1984, Miss MacRae drafted Heads of Agreement. These were signed by Sir Elton and John Reid, although the precise date on which they did so is not apparent. The Heads of Agreement generally contained provisions of the kind that one would expect to find in heads of terms proposed at that stage of the negotiations. In particular they provided:

**"5. COMMISSION**

The Manager is entitled to commission all earnings of Bong, Happenstance and the Artist derived from the managed activities at the rate of 20% of gross earnings.

**6. ADMINISTRATION OF COMPANIES**

The Manager is responsible for the administration of all companies connected with the Artist at the Manager's own expense. The Manager shall be entitled to levy occupancy charges to be agreed between the parties where any such company is provided with accommodation and/or other facilities.

**7. OVERSEAS REPRESENTATION**

The appointment of overseas agents and responsibility therefor shall lie with the Manager at its own cost."

**(vii) The old basis/new basis memorandum**

167. Under cover of a letter dated 8th November 1984 Miss MacRae sent to Mr Boreham, the senior partner of FC, a number of documents signed by Sir Elton and John Reid, including what has been labelled in these proceedings "the old

basis/new basis memorandum". Mr Boreham was at about that time taking over Sir Elton's affairs from Mr Sugar, apparently because Sir Elton wanted to deal with someone more senior than Mr Sugar. At about the same time Mr Craig Eadie, whose involvement with Sir Elton's affairs had previously been somewhat peripheral, began to take a much more active part as assistant to Mr Boreham.

168. The origin of the old basis/new basis memorandum almost certainly lies in a telephone conversation between Mr Sugar and Pat Desmond of AA. As reported by Mr Sugar to Mr Boreham in a memorandum dated 6th September 1984

"I [Mr Sugar] ... have suggested to Pat Desmond on the telephone that Elton will need quantification of the effect of a 20% on gross income arrangement from 1st January 1984. I have not heard. I must say that I do not like any kind of gross income arrangements but there we are."

169. By the old basis/new basis memorandum Sir Elton and John Reid stated

"We confirm that we have reviewed the attached schedule which illustrates projected management commission for the period from 1st January 1984 to 31st March 1985 calculated pursuant to the arrangements pertaining prior to 1st January 1984 as compared with those pertaining after 1st January 1984."

The attached schedule consists of a single page in which figures are set out in summary form which show that, on the projected figures for the 15 month period from 1st January 1984 to 31st March 1985, JREL's commission would have been about £1.6 million on the old basis and would be about £2.9 million on the new basis. The figures for touring and sponsorship were approximately £1 million on the old basis and approximately £2.1 million on the new.

170. The schedule does not contain anything which directly shows how the costs of tour agents were assumed to be borne, but I think Mr Hapgood was correct in saying that it cannot have been supposed that JREL was paying for the tour agents on the new basis. The main reason for drawing this conclusion is that HRA alone would have to be paid 7.5% or 10% of the tour income and it is impossible to suppose that there would be such a large increase in JREL's commission on touring and sponsorship if JREL was having to bear these payments.

**(viii) The revised draft agreement**

171. Although Miss MacRae had reported that both Sir Elton and John Reid thought that the draft agreement as it stood before their meeting at St. Tropez was unduly complicated and legalistic, their lawyers, in the shape of Mr Boreham on the one hand and Mr Lee on the other, saw little wrong with it. They seem to have decided to proceed by making the minimum amount of changes needed to accommodate what they understood to have been agreed at St. Tropez.
172. The initial work seems to have been done by Mr Lee. On 22nd February 1985 he sent to Mr Boreham a revised version of the draft received from Mr Sugar in September 1983. There were a number of further exchanges, but by some time in July 1985 the solicitors on both sides were agreed upon the draft. The changes from the pre-St. Tropez draft which are material to be noted for the purposes of these proceedings were as follows:-

(1) What had previously been Clause 16 had been brought forward in the agreement and now appeared as Clause 7. Its wording was, however, unchanged from that agreed in the autumn of 1983 and was the same as that of Clause 7 in the agreement as executed in March 1986.

(2) The provision for JREL's commission was revised so as to provide for payment at 20% of the gross amount of income derived from the Managed Activities. Schedule 7 of the earlier draft, setting out examples of expenses deductible in ascertaining commissionable income, was omitted. It was, of course, no longer needed once commission was agreed to be paid on gross income.

(3) The provision which had previously excluded any entitlement of JREL to commission on publishing income was omitted.

(4) The provisions for JREL to recover administrative fees in addition to commission were omitted. Instead provision was made for JREL to be paid occupancy charges reflecting the extent to which Sir Elton or the EJ companies occupied premises in the possession of JREL.

**(ix) The execution of the 1986 Agreement**

173. By October 1985 Mr Boreham was ready to have the agreement executed by Sir Elton. He arranged for this to be done through JREL. His letter to Miss MacRae dated 21st October 1985 reads as follows:-

"This is the envelope containing the Management Agreement which I would be grateful if you could forward to Elton on the basis that Bob Halley will explain to Elton that it is important that he reads the letter - it is not very long."

On the next day he substituted a revised package for the original one, but the arrangements remained the same. It is not known whether the package reached Sir Elton. Certainly the agreement was not returned executed by him.

174. The package included a letter of advice from Mr Boreham to Sir Elton. The following extracts from the letter are of significance

"I am sure you are aware that the new arrangements are infinitely more favourable to John Reid than those which were, I understand, agreed between you and John in your discussions with Pat Desmond and which were in operation prior to 31st December 1983.

You have seen the schedule prepared by Andrew Haydon showing the difference between the new and the old arrangements on the basis of the projected commission for the period to 31st March 1985. I have no way of checking these figures but they show that you will be paying nearly £3 million as commission to John in that period as against approximately £1,600,000 which would have been payable on the old basis. You will appreciate that as the commission is payable on gross income before deduction of any expenses, John's income is likely to be far more than a quarter of your income and could be nearer a third or a half depending on the amount of expenses that you will be bearing.

In the case of touring income John could receive far more income than you if the expenses are very large and so far as I am aware you have never before paid John commission on gross touring income.

I fully appreciate that it is your money and it is for you to make the decision as to how much commission you are prepared to pay John. However, I think it is only right for me to say that I regard the financial terms of the new arrangement as being exceptionally favourable to John. It could be said to be an act of generosity which goes beyond a normal business arrangement."

175. By early December 1985 the new arrangement had still not been signed and John Reid communicated with FC asking for a new copy to be supplied to Sir Elton for execution. At the time Mr Boreham was abroad and the matter was handled by Mr Frank Presland. Mr Presland took a considerable amount of trouble to ensure that a new package, containing the agreement for signing and a copy of Mr Boreham's letter of 21st October, was sent to Sir Elton in Nottingham, further copies being provided to John Reid. The arrangements which he made are set out in a note he made for Mr Boreham on 5th December 1985. I have no doubt that the note correctly records what was done.
176. It is not known precisely what happened to the new agreement after that, but it must have reached Sir Elton because a completed version of it exists and has been dated 14th March 1986. Sir Elton's signature was witnessed by Mr Halley.
177. In his evidence Sir Elton insisted that he had never seen Mr Boreham's letter of 21st October 1985. But his evidence about this was not, in my judgment, satisfactory. Having categorically denied seeing it he said it was the kind of document he would have read if he had received it because he always read anything marked "personal, private and confidential". He said that what convinced him that he had not seen the letter before was the fact that it was warning him that he was giving John Reid too generous a deal. But later he said that he was not surprised to see the degree of the increase in JREL's commission. Having regard to the fact that the letter was included in the same package as the agreement, that it was sent to him twice and that the agreement itself clearly reached him, I regard it as probable that the letter reached him too, that he regarded it as an important letter and that he read it.

**(x) The memorandum of understanding**

178. During the late spring and the summer of 1986 AA, who were then engaged in the auditing of the accounts of Happenstance for the year ended 31st March 1985, which included the proceeds of a world tour in 1984, raised a number of questions concerning the calculation of JREL's commission. The outcome was a document headed "memorandum of understanding", which was signed by Sir Elton on behalf of himself and Bong, by Mrs Farebrother on behalf of Happenstance and by John Reid on behalf of JREL. The memorandum is undated but a copy of it was supplied by Mr Haydon to Mr Eadie under cover of a letter dated 1st December 1986, so it appears to have been finalised shortly before that date.
179. The memorandum begins by paraphrasing JREL's entitlement to commission under the 1986 Agreement. It continues

"The attached memorandum sets out the commission arrangements in respect of the 1984 Elton John World Tour and explains the basis on which commission has been calculated in each of the major territories. For the avoidance of doubt we confirm we have read this memorandum and we confirm that management commission has been calculated in a manner consistent with the intentions of the management agreement. We approve these calculations.

We approve the principles upon which these calculations have been made, subject to any adjustment which may be required to the figures resulting from the application of those principles.

We also confirm that the attached memorandum applies only to the arrangements made in relation to the 1984 Elton John World Tour that it specifically refers to, and shall not be taken into account in construing the management agreement as it applies in any other case."

The attached memorandum is expressed to indicate the amount of the commission payable to JREL in respect of each part

of the 1984 world tour, together with a statement of the basis on which such commission fell to be calculated. It does not state specifically who was responsible for the tour agents' costs although CC and HRA are mentioned by name. I think it is fair to say that a careful reading of it indicates that these costs must be treated as the responsibility of the relevant EJ company. But I doubt whether an ordinary reader of it would reach this conclusion on the basis of the memorandum alone unless he was expressly directing his mind to the point.

### (3) PW's quasi-rectification argument

180. PW's argument on the quasi-rectification issue was founded upon all the evidence which I have reviewed in the preceding section, particularly the Lee/Eadie conversation and the St. Tropez meeting. I have already indicated my conclusions in respect of the Lee/Eadie conversation. I must now consider the St. Tropez meeting.
181. It is important to keep in mind the fact that the claimants' case is not directly based upon any agreement which was made at St. Tropez in July 1984. Their case is that the 1986 Agreement correctly recorded the bargain between the parties and that on its true construction it has the effect that JREL was obliged to bear the fees and expenses of the tour agents. As recorded above I have reached the conclusion that the claimants are wrong on this issue and, if that is right, that disposes of the claimants' case in respect of tour agents fees and expenses. No claim for rectification or quasi-rectification is made by the claimants.
182. This leads to a somewhat paradoxical result. The claimants accept that prior to the St. Tropez meeting it was the common intention of both sides that the fees and expenses of tour agents should be borne by the relevant EJ company, as they had been under the 1977 Agreement. Presumably Clause 16 of the draft of the new agreement which was proposed by FC was intended to have this effect. The claimants say that this common intention was changed at St. Tropez, when Mr Reid agreed that JREL would bear the tour agents' fees and expenses in return for Sir Elton's agreement that its commission should be 20% of gross income, including income from publishing. One would expect that, if there had been such a significant change in the parties' intentions, a correspondingly significant change would be required in the draft agreement intended to give effect to it. But no change at all was made in Clause 16 of the draft agreement. The words of Clause 16.2 which, before St. Tropez, must have been intended to produce, or at least be consistent with, the bearing of the tour agents' fees and expenses by the EJ companies, are now said by the claimants to produce exactly the opposite result.
183. I have held that this is not the case as a matter of construction and in reaching this conclusion I have tried to exclude from my mind the paradox which I have mentioned which, because it only emerges from a consideration of the negotiations, is in my view inadmissible for the purpose of construction of the 1986 Agreement. The fact remains, however, that if I am right about the construction of the 1986 Agreement then that Agreement fails to give effect to what Sir Elton claims to have agreed at St. Tropez. In these circumstances the logic of the claimants' position is that they should be seeking rectification. However, no such claim is made. This is not surprising, because there would be obvious difficulty in the way of an attempt by the claimants to maintain this action against PW and Mr Haydon on the footing that although the 1986 Agreement means one thing it ought to be treated as meaning something else by reason of an arrangement to which neither PW nor Mr Haydon was a party and of which neither of them had any knowledge.
184. It is in the light of this paradox that I have to address the case for rectification which is made by PW on the basis of the St. Tropez meeting. The essence of this case is that at St. Tropez Sir Elton and Mr Reid agreed nothing about the incidence of the tour agents fees and expenses. What they did was to agree that JREL's commission should be 20% of gross income, including publishing, instead of 20% of net income, excluding publishing. In return JREL agreed to give up any right to an administration charge, although it was to have the right to make a (presumably much smaller) occupation charge.
185. I have no difficulty in accepting that Sir Elton and Mr Reid agreed nothing about the incidence of tour agents' fees and expenses at St. Tropez. The claim that they did so depends entirely on the evidence of Sir Elton. Although that evidence was given forcefully I think that anyone would, after some fifteen or sixteen years, have difficulty in remembering the details of a conversation of which there is no written record. Moreover Sir Elton was not, in my judgment, a very reliable witness. Mr Hapgood provided me with an analysis of his evidence (see Appendix D. to section 1 of his written closing submissions). I do not propose to summarise it here. It will suffice to say that I endorse the criticisms of Sir Elton's evidence which are made in it. In particular I find it wholly unconvincing for Sir Elton to say that there was agreement about the incidence of tour agents' fees and expenses when, on his own evidence, none of them was mentioned by name or even it seems, by category, the agreement being said to be the result of an acceptance by John Reid that he would bear "all expenses". I think it much more likely that the expenses discussed were those which, before St. Tropez, were intended to be covered by the administration charge.
186. Further, although it seemed at first sight attractive to regard the provision as to "Overseas Representation" in the Heads of Agreement signed in or before November 1984 as relating to tour agents in the sense of that expression as I have defined it, I have reached the conclusion, in the light of the evidence which I heard, that this provision relates to the cost of CC in her capacity as United States representative of JREL and the cost of any other representative who might be used by JREL in a similar capacity in the United States or elsewhere. On this basis the Heads of Agreement provide no support for the claimants' case.

187. Having thus rejected the claimants' case on the St. Tropez meeting I am left with the fact that what was agreed was that JREL should have 20% of gross income including publishing income. I am satisfied that this remained what was agreed right up to the time that the 1986 Agreement was executed. If there had been a failure to reflect this agreement in the 1986 Agreement as executed, there might well have been some question of rectification, at any rate if that remedy had been claimed by JREL. But there was, of course, no such failure. No one has suggested that JREL is not entitled, by way of commission, to 20% of gross income including publishing income.
188. The quasi-rectification case raised by PW depends therefore, as it seems to me, not upon a claim that it was expressly agreed at St. Tropez that the EJ companies should continue to bear the tour agents' fees and expenses but upon the contention that it had hitherto been agreed or assumed that the EJ companies would bear these outgoings and this agreement or assumption remained unchanged after St. Tropez. Having analysed in some detail the relevant sequence of events I think that this claim is well-founded.
189. If, therefore, contrary to the conclusions I have reached on the construction issue, the 1986 Agreement had in terms provided that the tour agents' fees and expenses should be borne by JREL I consider that JREL would have had quite a strong claim to have it rectified so as to exclude this provision. Whether this can assist PW in the present action depends upon (i) how the issues which I left on one side at an earlier stage of this section of my judgment are to be resolved and (ii) whether or not it should be assumed that JREL would have sought rectification if it had been necessary for it to do so.
190. As to (i), I do not propose to try to resolve these issues in this already over-long judgment. On the view which I take as to the construction of Clause 7.2, PW do not need to rely on quasi-rectification and it is not necessary to resolve these issues. It would only become necessary to do so if an appellate court were to take a different view on construction. If that were to happen then the appellate court would, I think, be in as good a position as I am to carry out the task. I think I have sufficiently performed my duty by stating the facts as I find them.
191. As to (ii), I doubt whether JREL would have commenced proceedings for rectification. But I do not think it would have accepted with equanimity advice that, on the true construction of Clause 7.2, it was obliged to bear the tour agents' costs. The likely course, in my view, is that it would have resisted this conclusion vigorously and that, taking into account Sir Elton's reluctance to enter into disputes with John Reid, a compromise solution would have been arrived at.

#### **(4) Mr Haydon's quasi-rectification argument**

192. As I indicated earlier, Mr Haydon's quasi-rectification argument was narrower than that of PW. It rests entirely on the Lee/Eadie conversation and upon the proposition that, it having then been agreed that booking agents were outside the scope of Clause 7.2, nothing happened thereafter to alter that as the common intention of the parties. In the light of the conclusion as to the Lee/Eadie conversation which I have already expressed, this argument must fail. I hasten to add, however, that in dealing with the matter with such brevity, I intended no disrespect to the very thorough arguments of Mr Fletcher. Indeed I have drawn substantially upon these arguments in dealing with the relevant facts.

#### **Estoppel by Convention**

193. PW, supported by Mr Haydon, raised an attractive argument founded upon estoppel by convention. The relevant principle was stated by Lord Steyn in *Republic of India -v- India Steamboat Co* [1998] AC 878 at page 913:

"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. ... It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

I was also referred to the *Amalgamated Properties* case [1982] 2 QB 84 and *The Vistafjord* [1988] 2 Lloyds' Rep 343.

194. What is said is that Sir Elton and John Reid acted at all material times on a shared assumption that the tour agents' fees and expenses were to be borne by the EJ companies. Alternatively John Reid acted on this assumption and Sir Elton acquiesced in it. For the purpose of this submission John Reid is treated as representing the mind and will of JREL and Sir Elton is treated as representing the mind and will of the EJ companies.
195. The facts relied upon in support of this contention are those which I have referred to in considering the quasi-rectification claims and certain additional material. It is right to say that Mr Hapgood sought to deploy this additional material in support of the quasi-rectification claim as well, but I have not discussed it in that connection because it seemed to me to cast no light on the common intentions of the parties at the time when the 1986 Agreement was signed.
196. The first item of additional material relied upon is that Sir Elton was regularly supplied with copies of the tour accounts which show the tour agents' fees and expenses being paid as a tour expense by the relevant EJ company. I accept that this



is so, but a fairly careful reading of the accounts would have to take place for it to be realised that this was how the tour agents' fees and expenses were treated. I am not satisfied that Sir Elton carried out such a reading or otherwise became subjectively aware that this is what the tour accounts showed. Moreover it would not, in my view, have been enough if Sir Elton had become so aware. It has to be assumed for this purpose that the claimants are right in their contentions as to the meaning of Clause 7.2. But if their contentions are correct it would not be wrong for the tour accounts to show what they do show. The claimants do not now say that it was wrong for the tour agents' fees and expenses to be borne in the first instance by the relevant EJ company. Their claim is that they ought subsequently to have been re-charged to JREL. The tour accounts would not be expected to show whether or not such a re-charge had been made.

197. Secondly Mr Marc Robbins, who was the tour manager for Sir Elton's 1988 tour of North America, gave evidence of a conversation which he had with Bob Halley in Sir Elton's hotel suite at some time during that tour. He said that he made some observations to Mr Halley to the effect that HRA was being paid too much. Sir Elton asked Mr Robbins and Mr Halley what they were talking about and Mr Robbins somewhat reluctantly told him. Mr Robbins said that Sir Elton then said something to the effect of "I am not cheap. I will always pay for Howard". It is said that this amounted to recognition by Sir Elton that the burden of paying HRA was falling upon Happenstance.
198. I accept that a conversation of this kind took place, but I have no confidence that Mr Robbins accurately remembered it after twelve years. He is not to be criticised if he did not. The following exchange took place in his cross-examination by Mr Pollock:

"Q. Sir Elton did not like the thought that anyone would think him mean?"

A. I would agree with that.

Q. So these words that you heard, were they anything more than Sir Elton saying, effectively, "I am not mean. If Howard does a good job he should be paid properly"?

A. It could have been interpreted as that, yes.

Q. It could have been no more than that?

A. It could be.

Q. Again, Mr Robbins, I must put it to you that it is a bit unlikely that you have this clear recollection of this passing incident from 12 years ago, and that much of what you have told us is simply invented.

A. I have to disagree with you." (Day 23, page 16)

Mr Robbins' last answer is perhaps an unsurprising one. But his previous answer casts considerable doubt on the accuracy of his evidence in chief on this point. In all the circumstances I am not satisfied that whatever it was that Sir Elton said can be regarded as recognition that his company, as distinct from JREL, was bearing the cost of using HRA.

199. Thirdly reliance is placed on a presentation which was made by PW to Sir Elton at a meeting which took place in November 1991. The context in which the meeting took place was that Sir Elton's financial difficulties, resulting from his over-spending, were becoming ever greater and what became the 1992 Management Agreement was in course of negotiation. PW and Mr Presland, who by that time was concerned on a day to day basis with Sir Elton's affairs at FC, wanted to impress upon Sir Elton that his financial difficulties were attributable in part to his generous treatment of JREL in paying commission at 20% of gross income. In order to try to bring home the point to Sir Elton, PW prepared a pie chart. This showed that the gross income of the EJ companies for the five years to 31st March 1990 was applied in the following proportions:

%

Expenses of Sir Elton and his companies 60.3

Sir Elton's net income 22.4

JREL's expenses 9.2

JREL's net income 8.1

100.0

200. I accept the evidence about this presentation which was given by Mr Keith Tilson, the partner in PW who was then

dealing with Sir Elton's general financial affairs, and Mr Presland's note of the meeting. The part of this evidence which is material to the submission now under consideration is that Sir Elton at that stage recognised that JREL was being paid too much and appeared to be determined that commission at 20% of gross income would not be agreed in the renewed management agreement then in course of negotiation. He subsequently gave way on this. What is relied upon, however, is that in circumstances in which Sir Elton quite clearly appreciated that the 1986 Agreement had worked out greatly to the advantage of JREL, Sir Elton did not inquire how the expenses were made up or question why, in the light of what he claims to have been agreed at St. Tropez about JREL bearing "all expenses", the expenses of himself and the EJ companies represented such a high proportion of the total.

201. While the argument on this point has considerable force from a lawyer's point of view, I do not think it fairly reflects Sir Elton's approach to business matters. In my view he was looking forward to how the arrangement might be changed to his advantage for the future, not to what had happened in the past. The fact that John Reid was able to persuade him to adhere to the 20% of gross income arrangement illustrates, in my view, how irresolute Sir Elton was about such matters and I do not think he would want to have questioned what had happened in the past, however much he might at that time have regretted it. I do not consider that this episode demonstrates a degree of understanding on the part of Sir Elton of the way in which tour agents' fees and expenses had been dealt with which is sufficient to support Mr Hapgood's argument.
202. Mr Hapgood relied also upon a discussion between Sir Elton and Mr Reid in connection with Sir Elton's 1995 European tour. Sir Elton questioned Mr Reid as to why it was necessary to use the services of Harvey Goldsmith and told Mr Reid that he would not pay for him. Mr Reid regarded the use of Harvey Goldsmith as important and said that JREL would pay Harvey Goldsmith for that tour. Sir Elton then agreed that Harvey Goldsmith could be retained. While Mr Reid's evidence was challenged in this respect and it was suggested that no such conversation took place, that evidence is supported by the fact that JREL did bear Harvey Goldsmith's commission of 4% for that tour. I accept what Mr Reid said about this incident and I think it does illustrate a recognition by Sir Elton at that time that he, or rather Bondi, would, in the absence of the special arrangement which was made, bear the commission payable to Harvey Goldsmith.
203. Mr Hapgood relied finally upon a meeting between Mr Tilson and others and Sir Elton which took place in Paris in June 1995. I quote the summary of the point which is contained in Mr Hapgood's written closing submissions:

"Mr Tilson gave evidence that the purpose of the June 1995 meeting in Paris was to respond to a request from Sir Elton via JREL to look at the profitability of tours and to answer his question: "where does all the money go"? His explained that Sir Elton was given a presentation involving an analysis by PW of the report in front of him. Included in the presentation was a 1985 US tour budget section to which Mr Tilson took Sir Elton. Mr Tilson remarked on the numerous costs which had to be deducted to arrive at the net tour profit. It is submitted that it was obvious on the face of this document that the costs of Howard Rose, CC, and Neal Levin were being treated as tour expenses for the EJ Companies."
204. While I accept the accuracy of this summary of the primary facts and accept also the objective validity of the submission in the last sentence, I am not satisfied that this incident shows Sir Elton's subjective understanding of the matter.
205. The argument that there is estoppel by convention in the present case rests upon the contention that the parties have acted on an assumption as to a matter of law, namely the assumption that, contrary to what for the purpose of this argument is to be regarded as the true meaning of the 1986 Agreement, that Agreement requires the tour agents' fees and expenses to be borne by the EJ companies. As appears from Lord Steyn's statement of the principles which I have set out above (see paragraph 193), the estoppel may arise if either both parties have acted on a shared assumption or if one of them has acted on an assumption which has been communicated to the other and that other has acquiesced in his conduct.
206. On the facts as I have found them (that is to say the facts relied upon in relation to quasi-rectification and the additional facts I have discussed in the preceding paragraphs), I do not find it possible to say that John Reid and Sir Elton have acted on a shared assumption. Therefore the case does not, in my judgment, fall within the first limb of the principle. As to the second limb, manifestly John Reid and JREL have acted on the assumption I have mentioned. I think it is also the case that they have communicated this assumption and the fact that they were acting on it to Sir Elton and the EJ companies, because they have over the years provided information which would communicate these things to a reasonable man. Where I find difficulty is in deciding whether or not Sir Elton can be said to have acquiesced in this state of affairs. Acquiescence seems to me to require a degree of subjective knowledge and appreciation which, Sir Elton did not have. The one possible exception to this is in respect of the Harvey Goldsmith matter (see paragraph 202), but in my judgment this is not enough by itself to amount to acquiescence. There would only be such acquiescence if it were unjust (or in equitable terms unconscionable) to allow Sir Elton and the EJ companies to go back on what was implicit in this incident. In my view this is not the case.
207. I would not, therefore, be prepared to uphold the estoppel by convention claim. I appreciate that I have expressed the reasons for this conclusion somewhat briefly, but I think that this is excusable when, on the view that I take, PW and Mr Haydon do not need to rely on this claim.

### **Private dictionary meaning of 'agent'**

208. The case under this head, in which PW and Mr Haydon joined forces, is strictly part of the case on the construction of Clause 7.2. It was, however, convenient to postpone the consideration of it until after I had made my findings in respect of the Lee/Eadie conversation. What was said was that in the course of that conversation the parties had adopted their own meaning for the term "agent" as used in Clause 7.2, this meaning being one which excluded booking agents.
209. For the principle that the parties to an agreement may create or adopt their own private dictionary for the purpose of construing the agreement I was referred to *The Karen Oltmann* [1976] 2 Lloyds Rep 708 at page 712 and *IRC -v- Botnar* [1999] STC 711 at 738. I have no difficulty with this principle. However, having regard to my findings in respect of the Lee/Eadie conversation, I cannot accept that the parties adopted the special meaning which was in the mind of Mr Lee.

### **Did PW owe a general duty of care to Sir Elton?**

210. There is no doubt that PW owed a duty of care to the EJ companies, to which they were auditors. I did not understand it to be disputed that this duty was owed both in contract and in tort. As between the EJ companies and PW the main issue (leaving aside those which I have already considered) is whether PW was in breach of that duty of care and, if so, whether this resulted in loss to the EJ companies.
211. In respect of Sir Elton there is however an earlier question to be answered, namely whether PW owed him any, and if so what, duty of care. It is to that matter to which I now turn. As the argument on it developed three questions emerged for decision. First did PW owe a duty of care to Sir Elton by reason of their capacity as auditors to the EJ companies? Secondly did PW owe general duty of care to Sir Elton by reason of their retainer as his financial advisers? Thirdly can Sir Elton sue in respect of any loss of the kind which the claimants allege? The third point is not strictly one which goes to the existence or otherwise of a duty of care, but it is convenient to deal with it here.

#### **(1) Duty of care by reason of PW's capacity as auditors**

212. Mr Calver, who made the closing submissions on behalf of the claimants, understandably relied upon the fact that PW's letter of engagement gave rise to a retainer of PW by Sir Elton as well as by the EJ companies. He emphasised the proximity between Sir Elton and PW and the fact that, to the knowledge of PW, Sir Elton was entitled by way of salary to an overwhelmingly large proportion of the net income of Happenstance and later of Bondi. He argued that these factors were enough, when taken into the general circumstances of the case, to establish the existence of a duty of care owed to Sir Elton personally. He referred me to the now well-known threefold test propounded in *Caparo -v- Dickman* [1990] 2 AC 605, particularly in the speech of Lord Bridge at pages 617-618. This test requires there to be established (i) foreseeability of damage; (ii) a relationship of 'proximity' or 'neighbourhood'; and (iii) a situation in which the court considers it fair just and reasonable to impose the duty which is asserted to exist. It was submitted that all elements of this test are satisfied here.
213. There is, however, an additional dimension, or perhaps more accurately a special facet of tests (ii) and (iii), which needs to be taken into account in relation to the duty of auditors. In *Caparo* itself the question was whether auditors were liable to shareholders who, on the facts which were assumed, had bought shares in a company in reliance upon inaccurate accounts. It was held that whatever duty was owed by auditors was not owed to individual shareholders. Mr Hapgood particularly referred me to a passage in the speech of Lord Oliver at page 652 where he said:

"In seeking to ascertain whether there should be imposed on the adviser a duty to avoid the occurrence of the kind of damage which the advisee claims to have suffered it is not, I think, sufficient to ask simply whether there existed a "closeness" between them in the sense that the advisee had a legal entitlement to receive the information upon the basis of which he has acted or in the sense that the information was intended to serve his interest or to protect him. One must, I think, go further and ask, in what capacity was his interest to be served and from what was he intended to be protected? A company's annual accounts are capable of being utilised for a number of purposes and if one thinks about it it is entirely foreseeable that they may be so employed. But many of such purposes have absolutely no connection with the recipient's status or capacity, whether as a shareholder, voting or non-voting, or as a debenture-holder. Before it can be concluded that the duty is imposed to protect the recipient against harm which he suffers by reason of the particular use that he chooses to make of the information which he receives, one must, I think, first ascertain the purpose for which the information is required to be given."

Later, after quoting and approving a passage in the dissenting judgment of O'Connor LJ in the Court of Appeal, Lord Oliver said:

"In my judgment, accordingly, the purpose for which the auditors' certificate is made and published is that of providing those entitled to receive the report with information to enable them to exercise in conjunction those powers which their respective proprietary interests confer upon them and not for the purposes of individual speculation with a view to profit. The same considerations as limit the existence of a duty of care also, in my judgment, limit the scope of the duty and I agree with O'Connor LJ that the duty of care is one owed to the shareholders as a body and not to individual shareholders.

To widen the scope of the duty to include loss caused to an individual by reliance upon the accounts for a purpose for

which they were not supplied and were not intended would be to extend it beyond the limits which are so far deducible from the from the decisions of this house. It is not, as I think, an extension which either logic requires or policy dictates."

214. Caparo was, of course, a case in which the function of the auditors was to carry out the tasks which they were required to do by statute and the question was whether the duty of care which was asserted by the shareholders arose from that function. Here, as will appear later, the principal complaint is not that PW failed to discover an error in the accounts which a careful auditor should have discovered but that they failed to report an irregularity which they did in fact discover in the course of carrying out the 1989 audit. But I do not think this materially changes the position. The difference in the facts relates, in my view, to the nature of the alleged breach rather than to the scope of the supposed duty.
215. In my judgment, on the authority of Caparo as illustrated by the passages which I have quoted from the speech of Lord Oliver, no general duty of care would have been owed to Sir Elton by PW in their capacity as auditors even if he had been a shareholder. Of course Sir Elton was not a shareholder in either Happenstance or Bondi, which are the only companies which need to be considered in relation to the tour agents' costs claim. He was merely an employee, albeit an extremely important one on whose talents the prosperity of the companies depended and who was to be rewarded by the receipt of most of the companies' net income. In my judgment this fact adds force to the conclusion that PW's duties as auditor did not give rise to a duty of care to Sir Elton.

### **(2) Duty of care by reason of PW's capacity as Sir Elton's financial advisers**

216. The reasoning set out above does not, however, dispose of the argument that PW owed a duty of care to Sir Elton as his financial advisers. That they were retained in this capacity, amongst others, is clear from the terms of PW's letter of engagement. This retainer must, in my judgment, have given rise to contractual and tortious duties of care. The real question is what types of matter were within the scope of these duties or, to put it another way, against what types of harm was it the duty of PW to guard Sir Elton? I do not find it necessary to try to answer this question exhaustively. It will suffice in my view to consider whether the harm complained of in this case was of such a nature that PW, as Sir Elton's financial advisers, ought to have taken reasonable steps to guard him against it.
217. The complaint which is made against PW is that they discovered in the course of an audit carried out in 1989 that Happenstance had been paying the tour agents' fees and expenses when, as they understood the 1986 Agreement, JREL should have borne them. Having made the discovery they neither satisfied themselves that this treatment was in fact correct nor insisted that it be reversed nor reported the irregularity to Sir Elton or someone such as FC who could have advised him what to do about it. It was submitted that, in view of the fact that, to the knowledge of PW, the irregularity (as PW thought it to be and the claimants contend that it was) left Sir Elton significantly out of pocket because of the diminution in his salary, it was squarely within the scope of the duty of PW as financial advisers to report to Sir Elton, or to FC on his behalf, what they had discovered. I agree with this submission and I find that PW did owe Sir Elton a duty of care in this respect.

### **(3) Can Sir Elton sue in respect of loss of the kind alleged?**

218. Mr Hapgood argued that this question must be answered in the negative. He relied upon Johnson -v- Gore-Wood [2001] 2 WLR 72 in which the decision of the House of Lords, affirming in substance the material part of the decision of the Court of Appeal [1999] Lloyds Rep PN 91, was given during the course of the present trial on 14th December 2000. The House of Lords upheld the principle stated in Prudential Assurance -v- Newman (No.2) [1982] Ch 204. That principle appears from the first of three propositions which Lord Bingham stated in Johnson -v- Gore-Wood at page 94 in the following terms:-

"(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss."

I was referred also to passages in the speeches of Lord Goff at page 100, Lord Hutton at page 114 and Lord Millett at pages 120-126. I do not think it necessary for me to burden this judgment with quotations from these speeches which describe the principle in greater detail.

219. As I remarked earlier, Sir Elton was not a shareholder but an employee of Happenstance and later of Bondi. The loss which he claims to have suffered is the diminution in his salary which results from the fact that, as he claims, the net income of Happenstance and Bondi was reduced by the payment of expenses which they ought not to have borne and the companies' inability to obtain complete redress from JREL. If it be assumed that this claim is correct, Mr Hapgood argued that Sir Elton's loss is reflective of the loss of Happenstance or Bondi. Sir Elton was entitled to a salary equal to 99% of the net income of each company and he has received a salary equal to 99% of the net income of each company. His complaint is that the company's net income was less than it should have been. But that is essentially the company's loss, just as a reduction in a company's net asset value is the company's loss notwithstanding that it is reflected in a

diminution in the value of a shareholder's shares.

220. I have to say that I found Mr Hapgood's argument on this point compelling. Indeed I do not think that Mr Calver, on behalf of Sir Elton, really disputed it so far as it goes. Mr Calver's argument was that it does not go far enough for Mr Hapgood's purposes in two situations, namely (a) if I were to find that Bong has no cause of action against PW although it had suffered a diminution in its net income resulting in loss to Sir Elton; and (b) if I were to find that the cause of action of Happenstance is time barred, so that it too had no enforceable claim against PW. In each of these situations he argued that the case would fall within the second principle stated by Lord Bingham in *Johnson -v- Gore-Wood* [2001] 2 WLR at page 94G, which he expressed as follows:-

"(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so) even though the loss is a diminution in the value of his shareholding."

221. The first of Mr. Calver's special situations would exist if I were to find (i) that PW were negligent in carrying out the 1989 audit of the accounts of Happenstance; (ii) PW were not negligent in carrying out any other audit (including in particular the audits of Bondi's accounts which were not undertaken until after 1989); and (iii) that PW's negligence in respect of the 1989 audit of the accounts of Happenstance resulted in the continued failure of JREL to re-charge the tour agents' costs to JREL in subsequent years, when they were being borne by Bondi. In those circumstances Bondi would have no cause of action because it had suffered no negligence. But Sir Elton would have suffered loss in the form of the diminution of his income from Bondi. I have to say that I find Mr. Calver's argument that the Prudential Assurance principle would not apply in these circumstances an unconvincing one, but I do not think I would be justified in taking up time to consider it in detail unless, when I come to deal with later issues, I find that all the elements of the special situation exist here.
222. In my view Mr Calver's argument in respect of the second special situation is fallacious. If it is the case that Happenstance's cause of action is time barred (a matter which I shall have to deal with later) this does not produce a situation in which "the company ... has no cause of action". On the assumed facts Happenstance had a cause of action and strictly it still has it, although it is subject to a procedural bar which prevents it maintaining an action upon it. Moreover the shareholder's (or in this case the employee's) loss is attributable not to the action of the assumed wrongdoer but to the fact that the company has allowed its claim to become time-barred. (See the closing words of Lord Bingham's statement of the first principle and the speech of Lord Millett at page 125 D-F, where he endorsed the view of *Hobhouse LJ* in another case as to the position if the company chooses not to exercise its remedy).
223. In the result I conclude that, even though I would accept that PW owed a duty of care to Sir Elton in the respect mentioned above, Sir Elton cannot himself sue in respect of the alleged breach of this duty unless Mr Calver's point in relation to Bondi having no cause of action is a good one.

## **Were PW in breach of their duties of care in respect of the tour agents' fees and expenses?**

### **(1) Introductory**

224. I regret that although this is one of the central issues of the case it is only at this stage of my judgment that I find it possible to address it. I use the expression duties (in the plural) of care to indicate that I am now dealing both with PW's duty of care as auditors to Happenstance and Bondi and as financial advisers to Sir Elton. Although the duties arise on slightly different bases the issues in respect of breach are the same in each case. In relation to the duty of care owed to Sir Elton I ignore what I have just said in respect of the Prudential Assurance principle.
225. At the outset I feel that I must emphasise that the exercise upon which I am embarking is, on the view I take, an academic one. In the light of my conclusion about the meaning of Clause 7.2, tour agents' fees and expenses were correctly dealt with. The claimants are wrong in their claim that this was not the case. It cannot have been a breach of duty for PW to refrain from reporting that correct treatment was incorrect merely because they wrongly thought it was incorrect at the time. While it may well be the duty of a guardian to sound an alarm, the guardian is not in my view in breach of duty if he fails to sound what would, if given, prove to have been a false alarm.
226. It must be appreciated, therefore, that I am approaching the issues discussed in this part of my judgment on the footing that, contrary to my earlier conclusion, the bearing of tour agents' fees and expenses by Happenstance and Bondi was contrary to the 1986 Agreement.
227. In the Statement of Claim in its original form the relevant part of the complaint against PW was pleaded fairly widely as a breach of PW's duty as auditors by reason of their failure to discover and report what was alleged to be (and what for the purpose of this part of my judgment I assume to have been) the incorrect treatment of tour agents' fees and expenses. However after discovery had taken place the claimants were able to plead a much more specific case in respect of the audit carried out in 1989. This more specific case has been the heart of this part of the claimants' case as argued before me.
228. As I mentioned earlier, the audit of the accounts of Happenstance for the year ended 31st March 1985 was undertaken by

AA. The first accounts to be audited by PW were those for the year ended 31st March 1986. There was no North American tour during that year, but there was a European tour in which Mel Bush acted as "central promoter". The more specific case which I have just mentioned is based upon what happened in the course of auditing the financial statements of Happenstance for the year ended 31st March 1987. Work on that audit began within PW in April 1989. As will appear hereafter, the work was completed and the accounts signed off by PW early in August 1989. I propose to concentrate my attention on that audit, which I shall refer to as "the 1989 audit". Then, as it is the claimants' case that PW were also in breach of their duty in respect of later and, so it seems, earlier audits, I shall consider these.

## **(2) The 1989 audit : general**

229. The substance of the claimants' case in respect of this audit is that PW actually discovered the incorrect treatment of tour agents' fees and expenses and noted that it was incorrect. This, it is said, gave rise for a need for PW either to satisfy themselves that this treatment was in fact correct or to report the irregularity to Sir Elton or to FC as his solicitors. It is said that PW did neither of these things but signed off the financial statements without the irregularity being corrected.
230. The case, at least in respect of the 1989 audit, thus falls somewhat outside the ambit of what may be described as the "ordinary" case where negligence is alleged against an auditor and where the issue is whether the auditor acted with due care in expressing the opinion that the financial statements give a true and fair view of the state of affairs of the company at the relevant date. When that is the issue one of the matters to be considered is whether any errors which are complained of relate to an item which is "material", meaning thereby material in relation to the expressed opinion. I accept that a different issue arises and a different test is applicable to the special case which is made here. I would accept that when an auditor discovers an irregularity in the form of a payment by the company of expenses which it ought not to have borne then the auditor cannot, consistently with his duty to exercise a proper degree of care, simply overlook the matter. His duty requires him, in my view, either to satisfy himself that what he has observed is not in truth an irregularity or to report the matter to the management of the company for appropriate action to be taken. In my view this duty would exist even where the amount involved is not material (in the sense referred to above), although there might no doubt be an exceptional case where the amount involved is so trivial and the circumstances surrounding the error so benign that no further inquiry or report is warranted. The present case is clearly not one which falls within any such exception. I must therefore examine whether or not PW performed the duty which I have referred to.
231. Within PW the practice is for an audit to be carried out by an audit team. For the purposes of the 1989 audit the team consisted of a partner, Mr Glyn Barker, a senior manager, Mr Frank Johnson, and below him Mr John Bailey, who qualified as a chartered accountant in September 1987 and who is variously referred to as an assistant manager or senior.
232. The 1989 audit took place under a certain amount of time pressure. The Registrar of Companies had previously had occasion to serve default notices in respect of a number of companies connected with Sir Elton, including Happenstance. The statutory time limit for the filing of the financial statements of Happenstance for the period ended 31st March 1987 had already passed by some considerable time when the 1989 audit began in April that year and the final date agreed with the Companies' Registrar for the filing of the accounts was 9th June 1989. There is no suggestion that the exceeding of the time limits was attributable to PW. It seems to have been the fault of JREL, whose systems were weak.

## **(3) The 1989 audit : chronology of events**

233. Mr Pollock, Mr Calver and Mr Hapgood took me in detail through the various things which were done in the course of the 1989 audit and Mr Calver included in his written closing submissions a helpful chronology of events which appears to me to be accurate. However, I do not find it necessary in this judgment to refer to all of the events mentioned by Mr Calver.
234. The field work for the audit was done by Mr Bailey and, to some extent, by PW's associated firm in Los Angeles which checked Neal Levin's tour accounts for the 1986 North American tour. Based on this field work Mr Bailey prepared some 14 typed pages of "Final Notes". These, with the underlying papers, were submitted to Mr Johnson for review. Mr Johnson in turn prepared three pages of notes recording points which he observed. With Mr Johnson's assistance he was satisfied about all these points and he marked his notes as "All cleared". This seems to have been done by about the middle of June.
235. The next stage was for the audit file to be taken to Mr Barker for review at partner level. It is probable that Mr Johnson remained in Mr Barker's room for at least some part of the review. When he had carried out his review Mr Barker produced a manuscript list of some 14 points on which he wanted further information. Two of them were recorded as follows:

"IIa - Howard Rose Agency - why did they need yet another agent? - see II(g)(i) (and what did producer do?)"

The numbers are cross-references to Mr Johnson's Final Notes from which it appears that what had attracted Mr Barker's attention were payments of £371,006 to HRA and £105,079 to CC. Subsequently it was agreed that Mr Bailey would check these matters with Andrew Grocott, who was then responsible for accounting and book-keeping within JREL.

236. Mr Bailey then made inquiries within JREL and reported back to Mr Johnson. This was in the early part of July. He prepared supplemental Final Notes in which he made the following comments in respect of HRA and CC.

"HOWARD ROSE AGENCY-

Howard Rose Agency are an agent employed by JREL to perform the necessary work in respect of booking for live performances.

Under the JREL management agreement clause 7.2 JREL is entitled to appoint an agent to act on its behalf in the performance and discharge of its obligations with respect to the bookings for a live performance concert tour. The costs of this do not come out of John Reid's 20%.

#### CONSTANT COMMUNICATIONS

Constant Communications is again employed by JREL and indeed incurred \$85,000 on its own accounts. Constant Communications is the US administration agents who act in a similar fashion to the employees of Galena Road. However, during a tour the level of their administrative functions increase and hence an additional one-off fee of \$150,000 was negotiated re the US tour.

We have satisfied ourselves that these are bone fide costs of Happenstance."

237. "Galena Road" is the address of JREL's offices, so Mr Bailey appears to be equating the work of CC to that of JREL. Mr Bailey must have made these supplemental Final Notes before Thursday 13th July, when he went to the United States on holiday. He returned on Sunday 23rd July. While he was away, on 18th July or thereabouts, Mr Johnson took the Supplemental Final Notes to Mr Barker to see if he was satisfied with what was said. Mr Barker was not satisfied. He wrote against the statement that the costs of HRA do not come out of John Reid's 20% the words

"Not so per clause 7.2.2 Unless agreed in writing. To be followed up."

Against the words "We have satisfied ourselves that these are bona fide costs to Happenstance" he wrote

"No - See GAB review."

This must be a reference back to his first note.

238. At the same time as Mr Barker made the notes referred to above he also made a point concerning a part of Mr Bailey's Supplemental Final Notes which dealt with the deductibility or otherwise of direct venue costs in calculating JREL's commission. This is not directly material to what I have to consider and I mention it in passing only because it helps to explain the next matter.
239. It is the practice within PW, or at any rate it was the practice of Mr Barker, to note any outstanding points on the front of the audit file when the partner review had taken place. Mr Barker endorsed the front of the audit file as follows:-

"Approved subject to resolution of:

- JRE commission deduction of direct venue costs
- treatment of sub agents costs on JRE commission."

240. On 18th July Mr Johnson, who was himself about to go on holiday the next day, wrote a note for Mr Bailey the material parts of which are as follows:-

"Since you are returning to the office ahead of me, I set out below the current status on various Elton John matters.

(1) Fees ...

(2) Happenstance - although I got to see Glyn, he did not sign the accounts pending resolution of two matters which are identified on the front of the file. In essence, he is not happy with the interpretation on gross income relating to the direct venue expenses. He is also not convinced that clause 7.2.2 permits the Howard Rose and Constant Communication expenses to be charged to Elton without the prior written consent. ...

In the case of the expenses, although John Reid is entitled by Clause 7.2 to appoint an agent since this is a US tour, the subsequent clauses indicate that these expenses should be deducted from his commission unless he gets the prior written consent of the other party. This would seem to apply regardless of whether the agent is appointed in connection with a tour (for which approval is not required) or for any other agent (when prior approval is required).

When I talked to Andrew Grocott about the Happenstance outstanding points his view was very much one of "we aren't going to change the numbers so let us know what documentary evidence you need to support the numbers as they stand". The good news arising from this is that there would not be a knock-on impact into the JRE accounts were Happenstance to change. However, the amounts involved are too significant to rely merely on Andrew Haydon's interpretation."

Although the note did not specifically tell Mr Bailey what he was to do the clear implication was that he was to consider these points further.

241. There, unfortunately, PW's written records of what was done come to an end. Not surprisingly after eleven years, neither Mr Barker nor Mr Johnson nor Mr Bailey could remember precisely what happened thereafter.
242. Mr Bailey returned to the office on Monday 24th July. Mr Johnson returned on Thursday 3rd August. Mr Barker, who had gone on holiday on or soon after 18th July, returned at about the same time as Mr Johnson. He said he did not remember whether it was before then.
243. An audit clearance meeting with Mr Haydon had been fixed for Monday 7th August. Mr Johnson produced an agenda for the meeting at the end of the preceding week (that is to say on 3rd or 4th August) and cleared it with Mr Barker. The first item on the agenda under the heading "Audit status" noted "All 1987 audits completed and accounts filed". There was no mention in the agenda of any of the matters noted by Mr Barker on 18th July. Mr Johnson agreed that the correct deduction to be made from this is that matters had ceased to be live issues by the time the agenda was prepared (Day 19, pages 68 and 70).
244. So far as the financial statements themselves are concerned, these were signed by Mr and Mrs Farebrother, the directors of Happenstance, and are dated 7th July 1989. This date may well be correct, but it is not particularly material. The report of PW is also expressed to be dated 7th July 1989. This is a typed date which was clearly inserted when the report itself was typed. I feel sure it was not the date when the report was actually signed by Mr Barker on behalf of PW. I am confident that Mr Barker did not sign off the report until the 3rd or 4th, or perhaps the 7th, August.
245. The financial statements, including PW's signed report, were sent or delivered to Companies House either on the 4th August or, as I think rather more likely, on 7th August. I think that the statement in the clearance meeting agenda to the effect that the accounts had been filed might be consistent with the possibility that filing was taking place concurrently with the meeting. The financial statements are stamped by Companies House as having been received on 8th August. If they were sent by post they must have been posted on 7th, or perhaps 4th August. On this basis I consider the 7th August to have been not only the most likely but also the latest date on which they were signed off by PW.

#### **(4) The 1989 audit : conclusions**

246. It seems to be clear that PW did not report their concern about tour agents' fees and expenses to Sir Elton himself or to FC, who were for all practical purposes the only independent party to whom it would have been sensible to make such a report on behalf of Sir Elton. Mr Barker very properly recognised that a mere consent from Mr Haydon on behalf of Sir Elton or Happenstance would not be sufficient to provide him with the necessary comfort. I therefore exclude the possibility that PW dealt with their concern by reporting it to a proper person or by obtaining any kind of waiver on the part of Sir Elton or Happenstance. This leaves the stark alternatives that PW either (i) signed off the accounts without satisfying themselves in respect of the irregularity which they thought they had uncovered or (ii) obtained satisfaction from a source and in a manner of which no one concerned now has any recollection and in respect of which no note was made.
247. In support of the first alternative the claimants rely upon all the circumstances which I have reviewed in dealing with the chronology. They submitted, and I accept (indeed it was not really disputed), that PW had not satisfied themselves in respect of the two matters noted by Mr Barker at the time when Mr Barker and Mr Johnson returned to the office after their holidays on 3rd August. If they were subsequently satisfied about these matters then this must have happened on 3rd or 4th August, otherwise the two points would have been included in the agenda for the clearance meeting. No one could give evidence as to how or when they were satisfied. Moreover the points noted by Mr Barker on the front of the audit file remain uncancelled, although it was Mr Barker's evidence that it was normal practice to cross such points through if they had been resolved. The same is the case with the corresponding points in the list of 14 points prepared by Mr Barker on his initial review, although all the other points have been crossed out.
248. The claimants' case is undoubtedly a formidable one. If it is correct then I think it must follow that PW are only saved from being in breach of their duties of care by reason of the fact that they were, in my view, mistaken as to the meaning of Clause 7.2. That protection would, of course, be removed if I were held to be wrong in my own conclusion as to that meaning.
249. On the other hand I have to bear in mind that PW have been required to explain how particular matters were resolved in the course of an audit which was completed almost ten years before this action was commenced. The individuals concerned are busy professional men who have been concerned with many audits since 1989 and, at least in the case of Mr Barker and Mr Johnson, many before then. They all appeared to me to be competent professionals, well aware of the



potential conflict between JREL and Sir Elton and his companies and not disposed to resolve matters for the convenience of their immediate client and against their professional judgment.

250. I must examine closely the position of Mr Barker. I found him to be a straightforward, frank, careful and thoroughly honest witness. I found particularly impressive the way in which he took pains to make clear which matters were within his recollection and where he was dealing with matters of reconstruction, conjecture or hypothesis. It would have been easy for a less open witness to suggest that a particular exonerating hypothesis represented what must in fact have occurred, but Mr Barker refrained from doing anything of this kind.
251. So far as his professional standards are concerned, Mr Barker appeared to me to be well qualified technically and to bring to his work a proper degree of objectivity or even scepticism. It was, after all, he who raised and persevered with the point on Clause 7.2, notwithstanding the apparent inclination of Mr Bailey and Mr Johnson to be content with the explanations they had received. If indeed Mr Barker signed off the Happenstance accounts without satisfying himself in respect of the two matters on which he had persevered this would, in my judgment, have been an aberration on his part, entirely out of character.
252. At a number of points in his evidence Mr Barker was asked about what kind of explanation would have satisfied him that his point on Clause 7.2 did not need to be pursued. In paragraph 33 of his witness statement he said

"As I explain below I cannot remember how my concerns on the point were resolved, but I think that if they had been resolved by anything other than a convincing explanation from Andrew Haydon, I would have remembered."

While giving evidence in chief he was asked by Mr Hapgood to explain this and he said:

"Well, it is slightly clumsy wording, but I think I meant two things by that: firstly, having got to a stage in my audit where I had identified what I regarded as two material issues, but not received an adequate explanation from my team, I think my natural first port of call would have been to go to Andrew Haydon and ask him for an explanation, because he ran JREL and was overall in day-to-day charge of these things and he was the person most likely to be able to explain this to me. So the first point I am making, I think, is that Andrew Haydon would be the most likely first port of call, and the second point that I am trying to make here is to say, if he had given me an unconvincing explanation, such that I was concerned that there was a material error in the accounts or malpractice, or anything like that, then that would have elevated this issue in my mind to something beyond the normal in resolving an audit issue and then it going away, and if it had been so elevated, I think it is more likely then that I would have remembered. That is what I was trying to say here."

When Mr Hapgood asked him what he meant by 'a convincing explanation' he replied

"Well, I think, in getting satisfaction on a point, on this point, as is often the case -- as is usually the case, I would be taking into account a number of factors, a number of pieces of information in getting comfortable with the situation, and I think in this case there would be two types of information that I would take into account. One would be what was said to me by Andrew Haydon, and conceivably Frere Cholmeley, and secondly, the context in which it was said to me, the kind of background and environmental factors. So, as an example of what I think I would be satisfied by -- if Andrew had explained to me what Howard Rose and Constant Communications did for Sir Elton on the North American tours, if he pointed out to me that our audit files were factually incorrect, for example the appointments were made directly by Happenstance and not by JREL, as is said on (II)g(i), and if he had pointed out to me that there was the precedent of the 1984 World Tour, which was audited by Arthur Andersen, but where in North America these costs had been treated in an identical way, and that had been looked at by Arthur Andersen, I think, taking all those things together against what I would call the environmental factors, such as I had formed the view, which I still have, that Andrew Haydon was a very open and honest and straightforward person, and also it would have been clear to me that the treatment was not being done in any covert or subversive way, it was fully disclosed and open and clear to see on tour accounts, and things like that; taking all of those factors into account, I would probably have regarded that as a convincing explanation." (Day 17, pages 135-137)

253. This was a recurring theme which ran through Mr Barker's evidence. Thus when he was cross-examined by Mr Pollock the following exchange took place:-

"Q. Now let us move on, then, to the second issue;" (this is the issue concerning tour agents' fees and expenses) "that is something on which you might have changed your mind?"

A. I think that is something on which the facts changed that were available to me, in the sense that at this stage, in terms of writing the notes here, I believed what John Bailey had written, which was that these were agents or promoters employed by JREL and doing the things that he set out that they were doing. I -- and this is reconstruction -- I can imagine that, as I said yesterday, if I had had the conversation with Andrew, he would have pointed out to me that that was factually incorrect and then perhaps said other things that cumulatively made me happy with the situation.

Q. Your supposition is that you might on your return have had a telephone conversation with Mr Haydon?

A. Or a meeting, yes.

Q. And Mr Haydon had said, "No, you have misunderstood the position. 7.2 does not apply, because these are in fact agents employed by Constant Communications, in the case of Howard Rose, and in the case of the producer, employed by Happenstance and the clause does not apply to those kind of people"; is that what you are suggesting?

A. And the clause does not apply because it is not an appointment by JREL.

Q. Do you think this is what happened?

A. I do not know what happened, but what I am -- all I can tell you is that it is inconceivable to me that I did not resolve these points, because the evidence is of the way that the clearance meeting was conducted, and I am trying to give you a feeling for how I think I can have got satisfied on these points in the absence of any documentation.

Q. You see, the notes that we have got suggest that an interpretation of 7.2 which had that result had already been put to Mr Bailey, and passed on to you, and rejected by you. They said, "Look at 7.2. We are entitled to appoint these agents and we do not have to pay". Mr Bailey and Mr Johnson said, "We are satisfied that these are Happenstance costs"; do you see that?

A. Yes, I do.

Q. At which point you disagreed. If you look at page 840 -- I think you have agreed that this note of Mr Johnson's expressed your thinking at the time?

A. Yes.

Q. You say: "Although John Reid is entitled to appoint an agent." You had already been told, you already knew that these were agents who had contracts either with Happenstance directly or indirectly, because that is how they appeared from the first page that we looked at. So although he is entitled to appointed these agents; so you had in mind that these were agents being appointed to act in relation to the relevant company, yet you go on to say: "... the subsequent clauses indicate that they should be deducted from his commission and that he gets prior written consent." If that was your state of mind, I would suggest that it is unlikely that Mr Haydon simply asserting the contrary would suddenly have changed it?

A. I agree with that, but that is not what I am suggesting to you. Firstly, it is not uncommon, as I said before, that a junior member of the Price Waterhouse team talking to a relatively junior member of the client team gets the wrong end of the stick. So it would not have been amazing to me if I then got a different version from Andrew. Certainly if Andrew had said to me, "Look, this is wrong, and this treatment is incorrect", i.e. pure representation from Andrew Haydon, that would not have been sufficient, I agree with that entirely. But if he had not only said, "Look, it is a Happenstance appointment. This is the thing that these people do, this is how it was treated in the 1984 tour, and look, Arthur Andersen have been through all of this", then I would take all that sort of thing into account, plus the fact that, as auditors do, they take a view on the person actually giving the information too, and I took the view that Andrew is a very straightforward and honest person and there was evidence available of cases where John Reid Enterprises had been doing things in Elton John's favour, taking reduced commissions, actually picking up costs of other agents where they were undertaking John Reid-type activities, and so there would have been -- this is reconstruction, but there would have been lots of information round which cumulatively could have given me comfort." (Day 18, pages 63-67)

There were other passages to the same effect (see Day 17, pages 156-158; Day 18, pages 69-71; Day 18, pages 106-7). However Mr Barker was, throughout, careful to make it clear that all these things involved reconstruction on his part and that he was not in a position to say that they represented what actually happened.

254. Mr Barker was putting forward as a matter of hypothesis that he might have been told, or had emphasised to him, facts which, on the view of the construction Clause 7.2 which I take, would have shown him that there was a complete explanation for the treatment which he was questioning. However I think I have to consider the matter on the assumption that I am wrong about Clause 7.2 and that Mr Barker's initial view about the Clause was correct. This is not an easy thing to do, but I must do the best I can. My view is that Mr Barker, as an auditor, would have acted properly if he had made inquiries of the kind he suggested and that, if he had been given answers on the basis of the hypothetical answers which he mentioned, he would have been justified in concluding that he need take the point no further. In other words if Mr Barker was made to "feel comfortable" by answers of this kind I would not regard him as being in breach of his duty of care even if it were subsequently to be held by a court that his original view about Clause 7.2 was the correct one. I consider therefore, on the facts of this case that it would have been possible for an adequate explanation to be given to Mr Barker.
255. It appears to me that each side's case depends at the crucial point on the drawing of an inference. The claimants have satisfied me that Mr Barker did not receive an adequate explanation before the 3rd August. They ask me, in effect, to infer

from the absence of evidence that he received such an explanation on or after that date that he in fact received no such explanation before the time, which was not later than 7th August, that the accounts were signed off. Correspondingly PW has to invite me to infer that, although Mr Barker cannot say that he did receive any explanation, the probability is that he did.

256. In making my decision I am influenced by a number of factors. In the claimants' favour is the fact that, although they have the difficult task of proving a negative, it is at least probable that if there had been an explanation a note recording it would have been placed on the audit file and the outstanding queries would have been struck through as having been cleared. Against these factors, the burden of proof lies upon the claimants and, as the competence of a professional man is at issue, it is right to require the claimants' case to be established with a fairly high degree of conviction. Further there is a risk of unfairness to PW in requiring them to explain the details of an audit which they completed so long ago. Finally I give considerable weight to my favourable impression of the character and general competence of Mr Barker as an auditor.
257. Weighing all these factors I have come to the conclusion that it is rather more likely that Mr Barker received an explanation which justified him in taking no further action than that he signed off the accounts without resolving the query which he had raised. I am not satisfied that PW were in breach of their duties of care.

#### **(5) PW's liability in respect of audits before and after the 1989 audit**

258. Although attention at the trial was concentrated upon the 1989 audit, the claimants have contended that PW are liable in respect of the incorrect treatment (as for present purposes I assume it was) of the tour agents' fees and expenses in accounts for all the periods falling after 1st January 1984, the date from which the 1986 Agreement had effect, whether the relevant audits were carried out before or after the 1989 audit.
259. In relation to this claim it is necessary, in my judgment, to distinguish between breach of duty and causation. One way in which, as I understand it, the claimants put their case is to say that, as a result of the failure of PW to report what they had discovered in the course of the 1989 audit, the incorrect treatment of tour agents' fees and expenses continued until it was revealed by the investigations carried out in 1998, by which time the amounts involved had become so large that it was impossible to recover them in full from JREL or John Reid. If this argument were correct, the loss flowing from negligence in 1989 might include money misapplied in earlier and later years to the extent that it was not recovered from JREL. But this, as I see it, involves questions of causation, not of breach of duty in respect of audits earlier or later than the 1989 audit. In this section of my judgment I confine myself to issues concerning such breach of duty.
260. The first accounts of Happenstance which included tour receipts after 1st January 1984 were those for the year ended 31st March 1985. These accounts, as I mentioned earlier, were audited by AA and PW were not concerned. It is not clear to me whether or not the claimants are alleging that PW were negligent in respect of these accounts but if they do allege this the claim is, in my judgment, absurd.
261. The first accounts to be audited by PW were those for the year ended 31st March 1986, in which there was only a European tour in respect of which Mel Bush was engaged. PW were, of course, aware of this. A copy of the relevant tour accounts is in PW's file showing payment of a fee of £106,928 to Mel Bush. Someone within PW has written the word "Promoter" against this item. Clearly PW did not raise any suggestion that the payment of this fee by Happenstance was not in accordance with the 1986 Agreement. No witness from PW was cross-examined in any way which suggested that this omission involved negligence in the course of the relevant audit. To the extent that the claimants assert that it was negligent I reject this.
262. The next audit was the 1989 audit which I have considered at length. That audit was in respect of the accounts of Happenstance for the year ended 31st March 1987. That was the last year in which Sir Elton provided his services in respect of tours through Happenstance. For the next year the relevant company was Bondi and this continued to be the case in subsequent years. PW audited the accounts of Bondi in these years as follows:-

Year ended Date of auditors' report

31st March 1988 25th May 1989

31st March 1989 8th June 1990

31st March 1990 22nd March 1991

31st July 1990 (4 months) 11th October 1991

31st July 1991 14th May 1992

31st July 1992 29th May 1993

31st July 1993 31st August 1994

31st July 1994 29th August 1995

31st July 1995 17th May 1996

31st July 1996 30th May 1997

31st July 1997 15th July 1998

The accounts for the next period, which was a sixteen month period ending on 31st December 1998, were audited not by PW but by KPMG, whose report is dated 26th January 2000.

263. In many, if not all, of these periods there was tour income and the fees and expenses of tour agents were treated in the same way as in previous years. That is to say they were paid by Bondi without there being any re-charge to JREL except that, as already mentioned, JREL bore the cost of Mel Bush for the 1995 European tour and from 1992 onwards CC was paid for by JREL. There was no evidence that any of this treatment was questioned by PW.
264. I had some difficulty in understanding precisely how the claimants put their case that PW were negligent in respect of audits after the 1989 audit, save that it was based squarely on the contention that an irregularity had been discovered in the course of the 1989 audit and not cleared up at that time. The claimants seemed to contend that this gave rise to a duty on the part of PW to re-visit the point in some way. It was said that PW ought, in respect of at least the first audit after 1989, to have looked at the cover of their audit file and noticed that Mr Barker's two points had not been struck out as being cleared off.
265. In his closing submissions Mr Calver quoted from a passage in paragraph 5.22 of the report of Mr Nigel MacDonald, a partner in Ernst & Young. Mr MacDonald made his report as an expert instructed on behalf of PW on the question whether the amounts involved in the claim in respect of tour agents' fees and expenses and staff salaries and expenses were "material" from the point of view of an auditor. Paragraph 5.22 is one of three paragraphs in which Mr MacDonald expressed his opinion on the materiality of the tour agents' fees and expenses. I think it appropriate to set out Mr MacDonald's opinion in full. It reads

"5.21. In my opinion it is reasonable to conclude from the above information that the audit team considered the combined effect of both the Howard Rose and the Constant Communications expense to be material to the audit of HST for the 1987 financial year in the eyes of the PW audit team. However my conclusions are limited to commenting on the materiality of the alleged misallocated expenses identified in the PwC materiality schedules.

5.22. I note that there appears to have been some degree of continuity in the audit team of the EJ companies, and I would expect that the resolution (or otherwise) of this point in the 1987 audit would have been known by the audit team carrying out the audits of the EJ companies in the immediate succeeding years.

5.23. In my opinion, the review point raised by Mr Barker should have been resolved prior to an unqualified audit opinion being given by PW on the HST 1987 accounts. I do not speculate on how the matter was ultimately resolved or indeed whether it was so resolved."

266. Mr Calver sought to build upon paragraph 5.22 by submitting as follows:

"Either it was known or it ought to have been known. It is the claimant's submission that it is not open to Price Waterhouse to say: well, we negligently failed to pursue the point in 1989, but for one reason or another, it did not occur to us, or we had forgotten about it, assuming that is the position in 1990, but we are not in breach of duty precisely because we had forgotten about it.

We do not say it is the duty of Mr Barker as auditor every year, as it were, to analyse all the terms and so on of the management contracts. The breach in years two, three, four, five and six, was Price Waterhouse reliance upon their negligent act in year one, in failing properly to sort the point out.

The point was then not drawn to the attention of Sir Elton or his companies in years two to six, but Price Waterhouse cannot contend that they were not negligent in years two to six because the reason that it was not drawn to the attention of Sir Elton and his companies was because it was not sorted out in year one as a result of their own negligence. (Day 34, page 34)"

267. This is not a submission which I can accept. Even if it be assumed in favour of the claimants that their contention as to the meaning of Clause 7.2 is correct and that Mr Barker's review point was not cleared up in the course of the 1989 audit in a manner consistent with the exercise of due care by PW, the submissions appear to me to amount to a claim that PW was under a duty constantly to remind themselves that they had been negligent in the past. This would, in my view, be inconsistent with the holding of *Oliver J in Midland Bank -v- Hett Stubbs & Kemp* [1979] Ch 384 at 403 that

"It is not seriously arguable that a solicitor who or whose firm has acted negligently comes under a continuing duty to take care to remind himself of the negligence of which, ex hypothesis, he is aware. "

I was also referred to Bell -v- Peter Browne & Co [1990] 2 QB 495, a decision of the Court of Appeal, in which the material part of the judgment of Nicholls LJ at pages 500-501 appears to me to be to substantially the same effect.

268. The duty of a company's auditors under Section 235 of the Companies' Act 1985 is to

"make a report to the company's members on all annual accounts of the company of which copies are to be laid before the company in general meeting during their tenure of office."

Auditors are to be appointed at each general meeting at which accounts are laid and they hold office from the conclusion of that meeting until the conclusion of the next meeting at which accounts are laid (see Section 385). Although it is common, indeed normal, for auditors to be re-appointed this does not alter the character of their duties, which are essentially to examine and report upon the accounts which are to be laid before the meeting in each period of office. The fact (if it be the fact), that auditors have negligently performed their duties by failing to report a particular matter in one year does not by itself establish that the absence of a report about the same matter in the next year is negligent. To do so it would be necessary to examine the conduct of the audit for that year. Where what is complained of is an omission to note a particular point the circumstances giving rise to that omission in the year in question need to be examined. No attempt to do this was made in respect of the audits after the 1989 audit.

269. Accordingly even if I had been satisfied that PW were in breach of their duty in respect of the 1989 audit I would not regard this as establishing that they were in breach of their duty in respect of the preceding and subsequent audits. Further, I heard nothing else which would lead me to this conclusion.

## **The case of the EJ companies against Mr Haydon in respect of tour agents' fees and expenses**

### **(1) Capacities in which Mr Haydon acted**

270. It is only the EJ companies, not Sir Elton himself, who make claims against Mr Haydon. He acted in a variety of capacities in relation to the EJ companies. I have referred to them earlier but I summarise them again here.
271. He was a director of Happenstance from 1st September 1987 until 29th April 1998. Throughout this period Mr and Mrs Farebrother were co-directors with his and they had been the only directors of Happenstance between March 1983 and 1st September 1987. Mr Haydon was also company secretary of Happenstance for a period of about 2 months in 1986 and a further period of about 22 months in 1988-89.
272. He was the sole director of Bondi between 28th August 1986 and 29th April 1998.
273. He was company secretary of Bong for two months in 1986 and again for 22 months in 1988-89, these being the periods in which he was also company secretary of Happenstance. These were the only offices which he formally held in Bong. The only formally appointed director of Bong between April 1980 and 28th April 1998 was Mr Farebrother. It is alleged, however, that Mr Haydon was a shadow director of Bong "at all material times". I take this to mean from some time in 1986 until 28th April 1998.
274. Reliance is also placed on Mr Haydon's position within JREL. I do not think this can be said to have been a significant one until May 1983, when he succeeded Pelham Allen as financial controller of JREL. But from 1985 onwards he was JREL's general manager, acting jointly with Catherine MacRae until 1987. In 1995 he attained the added status of being a director of JREL.
275. Although in the pleadings and in Mr Calver's written closing submissions some emphasis was placed upon Mr Haydon's position as company secretary of Happenstance and Bong it was not in the end suggested that the holding of this office placed Mr Haydon under relevant duties additional to those he would have been under as a director of Happenstance or Bondi or as a shadow director of Bong. (I shall consider whether he was in fact such a shadow director when I deal with the staff salaries and expenses claim.) Accordingly I ignore, as being irrelevant, Mr Haydon's position as company secretary of Happenstance and Bondi during the two periods I have mentioned.

### **(2) The case against Mr Haydon : general**

276. Mr Calver spent some time in his written closing submissions emphasising the conflict between the position which Mr Haydon occupied within the EJ companies and the position which he held within JREL. It was suggested that Mr Haydon failed to give sufficient recognition to this conflict and tended to favour JREL, on which he was dependent for his own remuneration, which in later years was very considerable, over the EJ companies.
277. I discount this general line of attack to a very considerable extent. First the position of conflict was one which resulted

from the decision of Sir Elton himself to use JREL not only as the manager of his career but as the manager of the EJ companies. It was not something brought about by the machinations of John Reid acting contrary to the wishes of Sir Elton, still less by any conduct of Mr Haydon. Secondly, and probably more important, the claimants' case against Mr Haydon is a case in negligence. It is therefore necessary to consider (i) what duties Mr Haydon owed to the EJ companies and (ii) what he is said to have done which constitutes a breach of these duties. While it is usually convenient to consider these points in that order, I think that in this instance it will be best to consider (ii) first, because in the event the case of the EJ companies against Mr Haydon has been narrowed considerably by comparison with what it appeared to be on the pleadings.

278. The EJ companies now seek to make a two-fold case against Mr Haydon. The first is, in effect, an alternative to the case against PW. Putting it in a somewhat general way, the contention is that if PW obtained from Mr Haydon the "comfort" for which Mr Barker was looking in the 1989 audit, then it was negligent of Mr Haydon to give it. I will refer to this as "the giving comfort case". The second case is that, by 1992 at the latest, Mr Haydon knew that Sir Elton might not be aware that he, through Happenstance or Bondi, was bearing the tour producers' fee paid to CC, but he failed to take this up with Sir Elton. I will refer to this as "the CC fee case".

### (3) The "giving comfort" case

279. As part of their answer to the claimants' case, PW pleaded (in paragraph 45 of their defence) what they said had happened in the course of the 1989 audit. In paragraph 45(4) they pleaded the inquiries which Mr Bailey or Mr Johnson had made of JREL. The pleading continued as follows:-

"(5) The second defendant and Mr Grocott told Mr Bailey and/or Mr Johnson that (a) the treatment they had adopted was correct, (b) that it had always been done that way in the past and (c) the treatment properly reflected the understanding between the Plaintiffs and Mr Reid as to who was responsible for paying the Howard Rose Agency commission and the Constant Communications fee.

(6) Later, in the course of the same audit, the audit partner Glyn Barker, raised the same issues with Mr Bailey and/or Mr Johnson and insisted that further confirmation be obtained that the treatment adopted by the Second Defendant and Mr Grocott was correct. He also indicated to Mr Johnson that he would not "sign off" on the audit until and unless such further confirmation had been obtained.

(7) Ten years later, the First Defendants cannot identify the form or the terms in which, or the precise date upon which, the confirmation required by Mr Barker was given. However, it is to be inferred from, (a) the seriousness of Mr Barker's concerns and the uncompromising way in which he expressed them and (b) the fact that he did "sign off" the 1987 audit of the Second Plaintiff's financial statements that adequate confirmation was received by the First Defendants in or about July 1989."

280. I am content to proceed on the basis that paragraph 45(5) of the defence was substantially made good, although the only real evidence of the answer which was given is in the notes which are to be found on PW's audit file, the material parts of which, have been set out above. Paragraph 45(6) is also correct. However, for present purposes the important allegation is the statement in paragraph 45(7) that "it is to be inferred ... that adequate confirmation was received by PW in or about July 1989". Although paragraph 45(7) does not expressly say so, the implication seems to be that the confirmation was received from Mr Haydon.

281. There was, as I have been at pains to demonstrate, no direct evidence of what, if any, confirmation was given and who gave it if it was given. The conclusion which I have reached in respect of the claim against PW is that PW would only be in breach of duty if Mr Barker received no explanation which he was entitled to regard as satisfying him on the point he had raised and, there being an available explanation which, if given, would have sufficed for that purpose, I am not prepared to hold that, on the balance of probabilities, it was not given. But that is a long way from what would be needed to draw the inference referred to in paragraph 45(7). I am not prepared to draw that inference.

282. Even if that inference were drawn it would not resolve the matter in favour of the EJ companies. Mr Haydon would only have been negligent in giving the suggested confirmation if he knew or ought to have known that it was not well-founded. Paragraph 23(4) of the EJ companies' Re-Amended Statement of Claim recognised the need to establish this additional element when it claimed that Mr Haydon

"ought to have informed [PW] that these sums were, under the terms of the Management Agreement, to be paid to JREL and/or through [PW] should ask [Sir Elton] whether or not the treatment was correct and properly reflected the understanding between the Plaintiffs and Mr Reid as to who was responsible for paying these sums."

283. I heard Mr Haydon give evidence for about two and a half days. I think there may be some substance in the suggestion that he is a man of only average ability and that he was over remunerated by JREL in his later years. But I see no basis for an attack on his integrity. He seemed to me to be a truthful and reliable witness. I am sure that in July 1986 he not only knew that the tour agents' fees and expenses had always been borne by Happenstance but that he believed that this treatment was correct and in accordance with the 1986 Agreement. He is not a lawyer and I do not think it was for him to

question the interpretation of that Agreement which all those around him, including the lawyers, accepted.

284. Accordingly even if it were the case that Mr Haydon was acting throughout as a director of Happenstance; that, in that capacity, he owed to Happenstance a duty of care of the kind alleged by Happenstance; and that it was he who gave the comfort referred to by PW, I would find that the "giving comfort" claim against him fails.

#### **(4) The "CC fee" case**

285. This is based upon some evidence which I have not hitherto referred to. On 24th July 1992 Mr Haydon wrote a memorandum to John Reid concerning the fees and commission which were to be paid to HRA and CC for Sir Elton's North American tour which was intended to take place that autumn. These had not at that time been agreed and, as appears from a letter dated 22nd July 1992 from Neal Levin & Co, the IRS was insisting on having a signed agreement in respect of CC by 2nd August 1992. In his memorandum Mr Haydon made some suggestions in respect of the rate of commission which would be offered to HRA and the fee which would be offered to CC. He then included a paragraph in the following terms

"One final point regarding Connie is really an internal one insofar as I am not sure whether Elton understands that Connie's Producer Fee is a Tour Expense and is his responsibility."

286. Mr Calver sought to build upon this paragraph as follows (I quote from his written closing submissions):

"Despite this, Mr. Haydon then failed to pursue this point with Sir Elton as he ought to have done qua director in the light of this knowledge. It was not sufficient for him simply to raise this point with John Reid because he did not "feel that [he] could approach Elton directly" (see his w/s, para. 109 at C2/1/p. 39). There were very substantial sums of money at stake here. John Reid's interests in the resolution of this point were obviously directly in conflict with Sir Elton's and he knew how dismissive John Reid had been of the term in the 1992 Management Agreement - just 6 months after it had been agreed - that he should bear the costs of the valet, Mr. Hewitson."

287. Mr Calver tried to support his case by reference to the explanation which Mr Haydon had given of his memorandum when cross-examined about it. In my judgment, however, the memorandum will not bear the weight which Mr Calver sought to place upon it. I cannot see how the memorandum can be the basis of a case in negligence against Mr Haydon unless it can be shown that Mr Haydon knew that the cost of CC was being borne by Happenstance in breach of the management agreement. Unless he knew this there could have been no reason for Mr Haydon to pursue this point with Sir Elton. And if he did know it, then to pursue it with Sir Elton would hardly have been the appropriate course. What mattered was not what Sir Elton knew or understood but what the management agreement provided. If, contrary to my view, the management agreement required JREL to bear the fee then JREL had been acting in breach of contract for many years and what was required was for Mr Haydon to point this out and see that it was remedied. Strangely this is not how Mr Calver has advanced this part of his case.
288. However I decide this point not on a criticism of how the case was put but because I see nothing in Mr Haydon's memorandum which supports a claim in negligence against him. Mr Haydon was well aware that Sir Elton was bearing CC's producer fee and thought that this treatment was correct. Any doubt on his part about whether Sir Elton understood that this was how the management agreement was being interpreted and applied by JREL is, in my view, of no importance unless it can be elevated into a belief that Sir Elton might be able to challenge this treatment on substantial grounds. I find that Mr Haydon had no such belief. Moreover I cannot see how it was any breach of duty on the part of Mr Haydon to raise the matter of Sir Elton's understanding internally with John Reid rather than himself going directly to Sir Elton.

#### **(5) Scope of Mr Haydon's duties and the capacity in which he was acting**

289. In dealing with the case against Mr Haydon mainly on a factual basis I have by-passed two other issues which were argued before me. These are the scope of Mr Haydon's duties as a director of Happenstance and Bondi and the capacity in which Mr Haydon was acting when the acts or omissions on his part which are complained of were done or occurred. I now come back to these issues.
290. There was a good deal of argument about what if any duty of care was owed by Mr Haydon to Happenstance and Bondi respectively in his capacity as a director of these companies. To some extent the argument was engendered by uncertainty on my part as to the consequences of the fact that the EJ companies had initially alleged, but abandoned in the early days of the trial, breaches of fiduciary duty on the part of Mr Haydon. I was satisfied, however, that there was no abandonment of the allegation that Mr Haydon owed a duty of care, as distinct from a fiduciary duty, to Happenstance and Bondi.
291. I am not sure that it is helpful to attempt to divide the duties of a director into separate categories of fiduciary duties and duties of care. That is not the basis on which such duties were discussed in the speech of Lord Browne-Wilkinson in *Henderson -v- Merrett Syndicates Ltd* [1995] 2 AC 145 at page 205 or the judgment of Millett LJ in *Bristol and West Building Society -v- Mothew* [1998] Ch 1 at pages 16-17. I entirely accept, however, that a director owes a duty of care

to the company of which he is a director. In both Norman -v- Theodore Goddard [1992] BCLC 14 and Re D'Jan [1993] BCC 646 it was held that a director's duty of care could be defined by reference to Section 214(4) of the Insolvency Act 1986 as the conduct of

"a reasonably diligent person having both

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and

(b) the general knowledge, skill and experience that that director has."

292. The duties of a director have recently been considered by Jonathan Parker J in Re Barings (No.5) [1999] 1 BCLC 433 at pages 486-489 and by the Court of Appeal in Re Simmons Box Diamonds, unreported, 24th November 2000. I think the effect of these decisions was fairly analysed by Mr Fletcher in paragraphs 206-210 of his written closing submissions. I do not think it necessary to explore this analysis in detail or to examine Re City Equitable Fire Insurance [1925] Ch 407 which is always regarded as the leading case in respect of a director's duties.

293. There are, however, two respects in which it is material to go a little further. First I accept and adopt Mr Fletcher's summary of the points made by Jonathan Parker J in Re Barings (No.5), which was as follows:-

"A director may delegate (Dovey v Cory [1901] AC 477, which itself had been cited in Re City Equitable).

What is delegable is the discharge of particular functions.

After delegation, there is a residual duty of supervision and control, the precise extent of which will depend on the facts of each case.

Where there is an issue as to the extent of a director's duties and responsibilities in a particular case, the level of reward may be a relevant factor in resolving that issue.

The extent of the duty and the question whether it has been discharged must depend on the facts of each particular case, including the director's role in the management of the company."

294. Secondly in Re Simmons Box Diamonds emphasis was placed on the need, especially where what is complained of is an omission, for the case to be pleaded with some particularity. In that case diamonds belonging to a company were stolen. They were uninsured because the decision whether to insure had been delegated by the sole director of the company, Mr Andrew Selby, to his father Mr Gerald Selby, who was found to be a shadow director. Mr Gerald Selby had failed to effect insurance. In his judgment, with which the other members of the Court of Appeal agreed, Chadwick LJ said:

"30. If, as I think, the pleading goes no further than to allege that Mr Andrew Selby was negligent and in breach of duty in delegating to his father the power to decide (a) whether to effect insurance against loss or theft in respect of stock while that stock was outside the United Kingdom and (b) to decide whether stock which was not so insured should be taken out of the United Kingdom, then it is plain that the pleaded case was not made out at the trial; and that the judge did not reach his conclusion that Mr Andrew Selby was in breach of duty on the basis of the pleaded case. The judge held Mr Andrew Selby to be in breach of duty because, as he put it at page 21H, "his surrender of his duties [as a director] was so abject that he really cannot escape liability". But that was not the case alleged against Mr Andrew Selby in the pleadings. If it had been, it would have been necessary, as it seems to me, to set out with some particularity what it was that Mr Andrew Selby ought to have done that he did not do; and what it was that he failed to do that caused the loss which the company suffered as a result of the theft on 11th December 1993. As Hoffmann LJ pointed out in Bishopsgate Investment Management Ltd v Maxwell (No 2) [1993] BCLC 1282, at page 1285C, in cases in which the alleged breach of duty is an omission, the plaintiff must prove that to act would have prevented the damage. For a further discussion of the point, reference may be made to the judgment below in that case, at [1993] BCLC 814, 817E G and 829G 831G. As I have said, the pleaded allegation that Mr Andrew Selby ought, himself, to have effected insurance in respect of the jewellery was not pursued at the trial.

31. It follows that I am persuaded that the appellant is right to say that the judge failed to recognise that the breach of duty which he found was outside the pleaded case. In the result, the defendant was held liable for breach of a duty which had not been alleged against him. He was held liable for a breach of duty which, he is entitled to say, he had not come to trial to refute. I would allow this appeal on that ground alone."

295. The case of the EJ companies against Mr Haydon in the present action is pleaded in a fairly general manner on the footing that Mr Haydon, as one of the directors of Happenstance and sole director of Bondi (I leave aside Bong for the moment) was responsible for everything that happened, whether by way of commission or omission, to Happenstance and Bondi. The involvement of JREL, otherwise than as a party which is said to have profited itself at the expense of Happenstance and Bondi, is largely ignored. In particular no account is taken of the fact that by Clause 5 of the 1986 Agreement JREL had been appointed administrator of (inter alia) Happenstance, an appointment which was later extended to Bondi by the



agreement dated 1st December 1986 which I mentioned previously.

296. Clause 5 reads as follows:-

"5. Appointment of JREL as Administrator of Bong, Happenstance and Rocket

Bong Happenstance and Rocket each hereby appoint JREL with effect from the commencement of the Term to act as administrator for them and to perform throughout the Term such of the Administrative Functions and Tour and Recording Administration as are applicable to them or their undertakings and JREL accepts such appointment and agrees to perform such services accordingly."

The administrative functions referred to are those set out in Schedule 3 to the 1986 Agreement. A number of specific functions are there specified. I will not set them out, save to mention that they culminate in the following paragraph:

"(m) Generally, the administration of the business and personnel of the enterprise for whom JREL has been appointed administrator hereunder and such other administrative duties as may from time to time be reasonably required of JREL."

297. This delegation of management to JREL was something decided upon and put into effect by Happenstance before Mr Haydon became a director. The accession of Bondi to the arrangement was effected afterwards, as were the renewals of the delegation by the 1992 and 1997 Agreements. However no criticism is directed at Mr Haydon for his part in these later events, nor is there any claim that Mr Haydon was negligent as a director of Happenstance and Bondi for failing to terminate the appointment of JREL as administrator, or anything of that kind. It appears to me, therefore, that the continued engagement of JREL as manager and administrator of the business of (inter alia) Happenstance and Bondi is not criticised.

298. However this engagement left the directors of Happenstance and Bondi with nothing to do except such formal acts as only the directors personally could carry out. Moreover it opens up a completely different perspective on the activities of Mr Haydon in relation to the EJ companies generally. Subject to the directions of John Reid, he was the executive within JREL who was primarily responsible for the performance of JREL's obligations under the management agreements, including its obligations to manage and administer the business of the EJ companies. It is not surprising that he said in evidence that he and his team were "running the EJ companies" (Day 26, page 22). But this begs the question of the capacity in which he was doing this. In my judgment it was in his capacity as an executive of JREL. Not only did the EJ companies delegate the management of their businesses to JREL, but Mr Haydon was remunerated by JREL and received no remuneration from any of the EJ companies. This recognised the reality of the arrangements which had been put in place.

299. I did not understand the EJ companies to argue that Mr Haydon personally owed them a duty of care by virtue of his position as an executive of JREL, as distinct from his position as a director of the EJ companies. Had such a claim been advanced it would, in my judgment, have been ill founded (see Williams -v- Natural Life Health Foods [1998] 1 WLR 830).

### **(6) Conclusions in respect of the tour agents' costs claim against Mr Haydon**

300. In the result I reject this claim against Mr Haydon for various reasons which I summarise as follows:-

(1) The treatment of tour agents' fees and expenses which is complained of was in accordance with the 1986 Agreement and not in breach of it.

(2) Even if that treatment was incorrect, the two specific complaints made against Mr Haydon under this head fail on the facts I have found.

(3) Having regard to the way in which the management and administration of Happenstance and Bondi had been delegated to JREL, Mr Haydon would not, as a director of Happenstance and Bondi, have been in breach of any duty of care owed by him to these companies by reason of the treatment of tour agents' fees and expenses even if that treatment was incorrect.

(4) To the extent that Mr Haydon was the individual who was responsible for any erroneous acts or omissions, he was acting as an executive of JREL, not as a director of Happenstance or Bondi. Any error on his part would give rise to a claim against JREL but not a claim against him personally.

### **The staff salaries and expenses claim**

#### **(1) The obligations assumed by JREL**

301. The extent of JREL's contractual obligations is not in dispute. It arises under Clause 3 of the 1992 Agreement which, so far as material, provided:-

"3.1. By way of reduction in the amount of Commission otherwise payable to JREL under the Management Agreement by the employer concerned, JREL shall with effect from the Effective Date bear the costs of the salary, PAYE, National Insurance and other benefits to which the individuals referred to below (the "staff") are entitled under the terms of their employment with Bong (or in the case of the valet, such other employer as may be concerned), together with their reasonable expenses incurred in the course of that employment:-

(i) Bob Halley

(ii) Robert Key

(iii) (If so decided by Mr John) a valet to Mr John. "

...

"3.2. The amounts payable under Clause 3.1 above shall be as payable under the current terms of the employment of the individuals concerned, subject to reasonable periodic review after consultation with JREL, and in the case of the valet shall be such amounts as are reasonable in the circumstances, as determined by his employer after consultation with JREL."

...

"3.4. The relevant employer of the Staff shall be entitled to appoint replacements for the individuals named in Clause 3.1 above at any time and this Clause 3 shall apply to those replacements.

3.5. Sums payable under this Clause 3 shall be invoiced to JREL by the employer concerned at the end of the month in which they are paid and shall be paid by JREL to the employer concerned within 14 days of invoice date. JREL shall issue a VAT credit note where applicable in respect of the reduction in commission represented by the payment."

302. In paragraph 17(1) to (4) of the Statement of Claim JREL's breaches of this contract, on which the consequential claim against PW and Mr Haydon are based are pleaded in a manner which I paraphrase as follows:-

(1) Contrary to Clause 3.1 Bob Halley was employed by and paid a salary by Bong, rather than JREL, for a period between 1st April 1992 and 30th June 1997;

(2) Contrary to Clause 3.1, Robert Key was paid a "top-up" salary by Bong, rather than JREL between June 1996 and January 1998, after which he was paid his full salary by Bong rather than JREL.

(3) Contrary to Clause 3.1, Mike Hewitson, who worked as a valet to Sir Elton, was remunerated by "the Plaintiffs" rather than JREL down to 1st June 1996. After that date he had a contract of employment with and was paid by Bong rather than JREL.

(4) Contrary to Clause 3.1 "the Plaintiffs" rather than JREL paid the reasonable expenses of Messrs Halley, Key and Hewitson.

303. The pleading of the case in this way reveals a remarkable failure to understand the plain effect of Clause 3 of the 1992 Agreement. That Clause shows unequivocally that the employees in question were to be employed and paid by Bong or, in the case of the valet, by another company connected with Sir Elton and were to be paid in the normal way by their employer. That employer was then to invoice JREL for the amounts it had paid out and JREL was to reimburse the employer within 14 days of the invoice date.

304. Although no amendment was made to the pleading, this part of the case, which is in substance a claim by Bong alone, was argued on the basis that what had been done wrong was not the employment and payment of the employees in question by Bong, but a failure to operate the machinery for reimbursement provided by Clause 3.5. This departure from the pleaded case was not seriously objected to, although it gave rise to the comment, which I considered to be justified, that it was indicative of a failure to think through the staff salaries and expenses claim with a proper degree of clarity.

## **(2) Implementation of JREL's obligations**

305. It is not altogether clear to what extent JREL bore the burden of the staff salaries and expenses it was required to bear by Clause 3 of the 1992 Agreement. The salaries and expenses were, it seems, duly paid by Bong in its capacity as employer. The system of monthly invoices envisaged by Clause 3.5 was never operated. Nevertheless the salaries and expenses were to a significant extent the subject of re-charges. Figures set out in Appendix 4 to the report of Mr Haberman, a partner in KPMG called as an expert witness on behalf of the claimants, state the total amounts paid out by Bong in respect of the salaries in question and the total amounts re-charged. These re-charges were apparently made on an annual basis at the 31st March in each year. The figures as set out by Mr Haberman are not altogether easy to interpret

because a claim for interest has been brought into the calculation and re-charges, which amounted to £712,677 in the years 1993 to 1997 inclusive, have been credited as a single sum as at 31st March 1996. Mr Haberman suggests that the total amount not re-charged as at 31st March 1997 was £275,592. If the claim for interest is disregarded this is reduced to a little more than £206,000. Thus the amount re-charged in the six years was more than three times the amount not re-charged.

306. This calculation does not, however, take account of expenses. These may well have been considerable. In Appendix 5.3 of his report Mr Haberman estimated these at £335,000 for the period April 1992 to March 1998. (It is doubtful whether one ought to go beyond the figures down to March 1997, at least as regards the claim against PW, because the last year for which PW audited the accounts of Bong was that which ended on 31st March 1997. That is why I have taken the period to 31st March 1997 as the period which is relevant in respect of salaries and re-charges. For expenses, however, it is not practicable for present purposes to go behind Mr Haberman's calculations in such a way as to arrive at an estimate of expenses to 31st March 1997).
307. The factual position is complicated by the fact that there are issues between the parties about the extent to which the salary actually paid to Mr Key is within Clause 3.1 and whether certain very substantial increases in Mr Halley's salary which Sir Elton required to be paid were within Clause 3.2. There are also questions about whether certain expenses included in Mr Haberman's calculations are truly to be regarded as expenses of the kind referred to in Clause 3.1. I heard a certain amount of evidence and argument about these matters, but I am unable to decide them at this stage.
308. Generally I approach the staff salaries and expenses claim on the basis that, although the requirements of Clause 3 were not performed in accordance with the terms of the agreement they were certainly not completely ignored by JREL.

### **(3) The case against PW**

309. The pleaded case against PW which, as I have observed, starts from the erroneous premise that the salaries and expenses should never have been paid by Bong, is unclear about exactly what conduct on the part of PW is complained of. Allegations that PW failed to have proper regard to material such as the payable documents and nominal ledger accounts of the claimants or to satisfy themselves that the proper accounting records had been kept by the EJ companies are both extremely unspecific and wide of the mark. In the end the argument against PW was that they ought to have ensured that proper systems were in place for re-charging the relevant salaries and expenses to JREL. This was, in my view, barely within the scope of the pleaded case, but no great issue was made of the pleading point by Mr Hapgood.
310. Mr Calver tried to gain support from the fact that PW's witnesses were not very specific about what checks PW made in respect of salaries and expenses in auditing the accounts from 1983 onwards. But their answers must, in my view, be considered in the light of the absence of pleaded allegations setting out details of the acts or omissions relied upon. Moreover this want of particularity was not made good in the course of cross-examination. Thus the claimants sought to attach significance to a passage in Mr Pollock's cross-examination of Mr Bowman (who succeeded Mr Johnson as senior manager in Mr Barker's audit team in 1991 and himself became audit partner from July 1995 onwards):

"Q. What would you regard as being necessary to put in place so that you had a proper internal control environment to deal with [the obligation upon JREL to reimburse the employees' salaries and expenses under the 1992 Agreement]?"

A. Strictly speaking, I would just expect for the recharges to be made in accordance with the agreement. I would not suggest there is anything specific within an internal control framework that is required.

Q. Do you have to have a system which records the salaries?

A. Yes.

Q. Do you have to have a system which records the expenses?

A. Yes.

Q. Do you then have to have a system which records either that those sums have been paid or that they are owed?

A. Yes.

Q. Would all of those be involved in having satisfactory controls?

A. Yes.

Q. Did you ever discover whether those satisfactory internal controls existed in JREL in relation to the salaries and expenses?

A. I am not certain whether we looked at it specifically in that context, no. I cannot recall." (Day 22, pages 156-7)"

311. While Mr Bowman was clearly accepting that there needed to be some system for operating Clause 3, he cannot be taken as accepting that no system was in place or that PW had formed the view that what was in place was not satisfactory. He simply said that he could not recall how PW had looked at the matter. He had, however, already pointed out that

"in the audit files there are a number of schedules that demonstrate that there were recharges or adjustments made to the accounts that clearly show that salaries and indeed, related expenses were recharged."

He then elaborated to some extent upon what documents or schedules he was referring to (Day 22, pages 125-7).

312. It is not the function of an auditor to investigate and verify every single item in the accounts he is auditing, as Mr Haberman agreed (Day 31, page 75). In his preceding answer to Mr Hapgood Mr Haberman had described the auditor's responsibility in this way:

" Q. Could we please begin with materiality as a concept. What is the function of the concept of materiality to an auditor?"

A. Functionally an auditor's responsibility is to report on whether some financial statements give a true and fair view of the affairs of the company. There is a normal understanding of materiality as being almost a reverse definition that something which affects the view given of the financial statements is by definition material. So if something were to change in the financial statements, to a small extent that would not affect the view, given that item would not be material. If a more substantial change were to take place, then that item would be material. (Day 31, pages 74-5)"

313. Mr Barker had said much the same in answer to Mr Pollock

" Q. Having become aware of that [i.e. the change made by Clause 3 of the 1992 Agreement], would you have regarded it as part of the audit team's job to check that those salaries and expenses were being borne by the JREL company rather than the EJ Companies?"

A. No, not precisely that, no. I think it would have been -- our overriding job is to look at the truth and fairness of the financial statements and therefore look at things that are material. I think, with a change of Management Contract, we would have wanted to test that recharges were taking place and just to satisfy ourselves that nothing looked untoward, but we would not have felt it as part of our job to check the detailed application of that, because we would not have regarded it as particularly significant to the financial statements.

Q. When you say you would have wanted to test the recharges, can you help with what you mean by that?"

A. When we do an audit -- there are basically two extremes of how one does an audit, as I have alluded to in my witness statement. If you have a big company, with good systems and controls, you test the systems and controls and then rely on the controls to produce the financial statements, a so-called compliance audit. When you have a situation such as we had with these clients, where you do not have good systems and controls, you test balances and transactions, but having -- in addition to testing the material balances and transactions in the financial statements one also does a little bit of test-checking of other items just to be alert to the fact that, or just to make sure, or try and make sure that there is nothing untoward going on in other areas which one has not specifically focused on in the compliance testing. So if there is a change in a Management Agreement, I think we would have briefly tested the application, or sought to test the application of that, just to see if there was anything obvious that was not being done, but it would not have been a primary focus. (Day 17, pages 161-2)"

314. I find that this was the approach that was adopted by PW. In my view it was a proper approach. The question is whether it was properly carried through. In particular was there anything which went unremarked upon by PW which was "material" in the sense described by Mr Haberman.

315. Both Mr Haberman and Mr MacDonald dealt with materiality in their reports. There was very little between them. Indeed after Mr Haberman had been briefly cross-examined by Mr Hapgood it was decided that there was no point in calling Mr MacDonald, the schedule to whose report had been agreed by Mr Haberman.

316. Mr Haberman and Mr MacDonald both agreed that it was appropriate to judge materiality by looking at each company's accounts separately. Further Mr Haberman accepted Mr MacDonald's approach of judging the materiality of the challenged items by comparing them with the amount of Sir Elton's gross remuneration from the particular company. Any item which was less than 5% of that gross remuneration would not be viewed as material. An item which was in excess of 10% of such remuneration would almost certainly be material. For items between 5% and 10% materiality would depend upon the particular item and the particular circumstances (see Day 31, pages 77-80).

317. Mr Haberman said that he had looked at the figures in Mr MacDonald's tables 2.2 and 2.3 and was satisfied that they were correct. Table 2.3 deals with staff salaries and expenses borne by Bong. The highest ratio of such salaries and expenses in relation to Sir Elton's gross remuneration was 4.3% in the year to 31st March 1993. In other years it was between 0.9% and 2.1%. Table 2.2 deals in a composite manner with the cost of CC, Neal Levin & Co. and certain staff

salaries and expenses which, it seems, were borne by Bondi when they should have been re-charged to JREL. The highest ratio of the aggregate of these items to Sir Elton's gross remuneration was 2.7% in the year 31st July 1994. In other years after the 1992 Agreement came into effect and while the accounts were audited by PW the ratio was between 1.1% and 2.0%.

318. I therefore conclude that PW adopted a proper approach in carrying out their audits so far as the implementation of Clause 3 of the 1992 Agreement is concerned and they did not overlook any item which was material in the auditing sense. Accordingly they were, in my judgment, not in breach of their duty so far as the staff salary and expenses claim is concerned.

#### **(4) The case against Mr Haydon**

319. The case against Mr Haydon was that he was in breach of a duty of care owed by him to Bong as a shadow director and, to the extent that the salaries and expenses were debited to Bondi, in breach of a duty of care owed by him to Bondi. For reasons which I have already stated, I am satisfied that Mr Haydon did owe such a duty of care to Bondi. If it is correct that he was a shadow director of Bong I would accept that he owed a similar duty of care to Bong.
320. By Section 741(2) of the Companies' Act 1985 a shadow director means "a person in accordance with whose directions or instructions the directors of a company are accustomed to act". The only duly appointed director of Bong between 1st April 1980 and 28th April 1998 was Mrs Farebrother. She was not called to give evidence and there was no evidence from anybody else about anything done by her in her capacity as director, still less about what caused her to do it. Correspondingly no instance was put to Mr Haydon in which it was said that he had given directions to Mrs Farebrother about how she was to act in the performance of her duties as director.
321. The reality is that, once Bong had appointed JREL to administer its business there was nothing very much left for Mrs Farebrother to do in her capacity as director. Mr Haydon had no need to direct her to do anything in that capacity. As an executive of JREL he had the ability himself to cause Bong to do whatever he thought it ought to do. That did not, in my judgment, make him a shadow director of Bong. It left him as the individual who, on behalf of JREL, was able to manage Bong's business. Accordingly I hold that he was not a shadow director and owed no personal duty of care to Bong.
322. Mr Haydon was quite frank about the way that JREL had dealt with the re-charging of staff salaries and expenses. He said that such re-charging was

"terribly straightforward to implement, to have been implemented by competent, qualified, people."

Within JREL he left it to Andrew Grocott, who was JREL's financial controller and thus responsible for accounting matters in connection with the EJ companies, to deal with the matter. Unfortunately Mr Grocott did not implement the 1992 Agreement correctly, but Mr Haydon did not appreciate that he was falling down on this task. When Mr Pollock put to him that JREL had, by making re-charges only once a year, prejudiced the EJ companies by taking a year's interest free credit he replied:

"[That] is right, but can I just say, I do not think that was the motive. I think we made a substantial mess of recharges of salaries and expenses." (Day 26, page 34).

323. Mr Grocott was, of course, an employee of JREL, not of Bong or any other EJ company. Within JREL he was working under the supervision of Mr Haydon. It may be that Mr Haydon ought to have supervised him more closely, although there seems to be some substance in Mr Haydon's explanation that he was so busy on other more important matters concerning Sir Elton within JREL that it was not wrong for him to leave an apparently simple accountancy task to Mr Grocott. The important feature, however, is that whatever Mr Haydon did or omitted to do in these respects was done by him in his capacity as an executive of JREL. I have no real doubt that the lamentable performance of JREL in relation to the implementation of Clause 3 of the 1992 Agreement put JREL in breach of its contract with Sir Elton and the EJ companies. But it does not demonstrate a breach of any duty of care owed by Mr Haydon personally.
324. I therefore reject the staff salaries and expenses claim against Mr Haydon.

#### **Causation**

325. Some important issues of causation would arise if PW were in breach of a duty of care. Although for the reasons I have stated, I find that PW were not in breach, I think I ought to say something about these issues.
326. The claimants' case against PW was that they failed to report the incorrect treatment of tour expenses to Sir Elton or to some independent party such as FC who could have advised him what action to take. If this claim had been made good it would inevitably have raised the question what action Sir Elton would have taken if he, or an adviser such as FC, had received the report whose absence is complained of. Although the Statement of Claim does not recognise it, this is essentially a "loss of a chance" case. What is said is that, because what is said to have been the incorrect treatment of tour

expenses was not reported to Sir Elton when it should have been reported, Sir Elton was unable to take remedial steps against JREL until the true position was discovered as the result of the investigations of KPMG and FC in the early months of 1998. By that time, it is said, it was too late to obtain full redress from JREL.

327. What is now regarded as the leading case on this subject is *Allied Maples Group Ltd -v- Simmons & Simmons* [1995] 1 WLR 1602. That case was, I think, somewhat more complex than the present, because the claim there depended not only on what the plaintiff would have done if properly advised but whether the concurrence of an independent third party could have been obtained. Here there is no need for a third party to have become involved. The question is what would the claimants have done if they had been warned that (as I assume for present purposes to be the case, although I have decided otherwise) JREL was leaving Happenstance and Bondi to bear the tour expenses in breach of the 1986 Agreement.
328. In *Allied Maples* the leading judgment in the Court of Appeal was given by Stuart Smith LJ who said (at page 1610):
- "If the defendant's negligence consists of an omission, for example to provide proper equipment, given proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given? This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not.
- Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour."
329. What has to be considered, therefore, is whether on the balance of probabilities Sir Elton and his companies would have brought a claim against JREL if they had been told of the assumed irregularity. If that question is answered in the affirmative there will be a further question as to the consequences of them not having made such a claim at the time when they would, if properly advised, have made it. This is not, I think, the same as the third party concurrence point which existed in *Allied Maples*, but it is something I shall have to consider.
330. To some extent the answer will depend upon when it is to be assumed that the report was made. As the strongest part of the case in negligence against PW is that which is based upon the 1989 audit, I think that the matter should be tested by considering what would have happened if PW had, in about August 1989, reported to Sir Elton their belief that the tour agents' expenses had been wrongly dealt with as between Sir Elton and JREL.
331. A large number of factors are potentially material. They were expounded by Mr Hapgood in his closing submissions at Day 37, pages 2-26. I do not propose to go through all these factors. I think that all those which Mr Hapgood relied upon were well-founded in fact and that they all tend to support Mr Hapgood's submission that Sir Elton would not have pressed a claim against JREL, although obviously some of them are more persuasive than others. The ones which seemed to me to be particularly cogent were the long-standing and very close relationship between Sir Elton and Mr Reid; Sir Elton's generous disposition; John Reid's belief that tour expenses should always be paid by the artist; John Reid's power of persuasion, as demonstrated at St. Tropez when he persuaded Sir Elton to pay commission at 20% of gross receipts including publishing and again in 1992 when he persuaded Sir Elton to continue the gross arrangement and to accept only the relatively small concession that was made in respect of staff salaries; the fact that what JREL actually received appears to have been in line with what the old basis/new basis memorandum had intended; and the fact that, even on Sir Elton's recollection of the conversation at St. Tropez, it would not have been possible to identify any point in the negotiations at which a fundamental change in the arrangements concerning tour agents' expenses was expressly discussed.
332. As against these factors the claimants were able to rely upon the indignation of Sir Elton, clearly expressed in the witness box, at what he claimed to be the revelation for the first time in 1998 of the way in which tour agents' expenses had been left to be borne by Happenstance and Bondi and to the fact that, after this revelation, he terminated the management agreement with JREL and forced John Reid and JREL to make financial redress.
333. I appreciate the force of these factors, but I think that the situation was materially different in 1998 from what it had been in 1989. In particular the relationship between Sir Elton and John Reid had deteriorated. They, or at any rate John Reid, had contemplated a break-up at the time of the negotiation of the 1997 Agreement (see Mr Presland's file note of a conversation on 11th June 1997 with Mr Barker, who was acting for John Reid). Sir Elton was becoming disenchanted with, as he saw it, a restricted availability of funds to satisfy his extravagant spending habits. There was finally the incident of the publication of the PW letter. Even these factors were not enough to drive Sir Elton to insist upon a hard bargain. As I shall explain, the settlement reached with John Reid and JREL was, like Sir Elton's other dealings, comparatively generous to John Reid and JREL despite the largely unchallenged belief of Sir Elton and his advisers that the treatment of the tour agents' expenses during the preceding 14 years was not in accordance with Clause 7.2.
334. The "loss of a chance" claim which is advanced by the claimants is only maintainable if I am satisfied, on the balance of

probabilities, that the claimants would have taken the chance if they had known it was available to them. Taking the chance, in this case, would mean pressing a claim for redress against JREL, if necessary by litigation, notwithstanding that this would have been likely to lead to Sir Elton needing to find a new manager. It is for the claimants to satisfy me about this. The conclusion which I have reached is that they have failed to do so.

335. It would be unrealistic for me to go on to consider what the position would be if I had reached the opposite conclusion. I very much doubt if the claimants would have recovered the full amount said by them to be due to JREL. It is likely, in my view, that the claim would have been compromised on some terms, but what those terms would have been is, I think, entirely a matter of speculation.
336. There is one other matter which I must mention in relation to causation. This is the extent to which it can be said that, on the footing that PW were in breach of a duty to report the irregularity which they thought they had uncovered in the course of the 1989 audit, this breach can be said to have caused loss not only by reason of the non-recovery of the amounts wrongly borne by Happenstance in the year ending 31st March 1987 (the accounts for which were the subject of the 1989 audit), but also loss resulting from the non-recovery of the amounts wrongly borne in earlier and later years.
337. There is an undeniable logic in the contention that, if the irregularity had been reported in 1989, it would not have been repeated in subsequent years. Further, if redress had been sought in 1989 the amounts involved would have been much less than they had become in 1998 and the prospect of making full recovery against JREL and John Reid would have been greater. In my judgment, if all the things which would have had to be established in favour of the claimants for a successful claim to be made against JREL and John Reid are assumed to have existed in 1989, the liability of JREL would have included all the amounts improperly dealt with down to the date of the claim. But it does not follow, in my view, that loss recoverable from PW for an assumed failure to report the irregularity would be quantified in the same way. That loss would, I think, fall to be calculated by reference to the difference between the amount which could have been recovered (or not lost) if a timely report had been made and the amount which would have been recoverable from John Reid and JREL if a claim against them had been made and pursued with all due vigour when the true position was discovered. The quantification of this latter amount, which would not necessarily be the amount actually recovered under the settlement made in 1998, would involve many of the considerations which I have mentioned earlier when discussing other causation issues. I think that no useful purpose would be served by an attempt to take it further in this judgment. Further, in the light of what I have said concerning breach of duty and causation I do not think it necessary to come back to the point referred to in paragraph 221 above.

### **Limitation**

338. It is impossible to address this topic except on the assumption that the defendants were negligent. I think it right, therefore, to emphasise that, for the reasons I have already given, I have found that they were not negligent. Language indicating that they are liable represents only an assumption which I make for the purpose of considering whether, on this footing, the defendants can successfully contend that the claimants' case is time-barred.
339. The writ in this action was issued on 12th January 1999. Accordingly if it be assumed that PW were negligent in carrying out the audits of the accounts of the EJ companies, any negligence on the part of PW occurring during the course of audits completed before 12th January 1993, including in particular the negligence alleged to have occurred in the course of the 1989 audit, took place more than six years before the commencement of the action. In relation to Mr Haydon the position is similar, save that if Mr Haydon was negligent this must, I think, have been on a day to day basis, not audit by audit.
340. In these circumstances it is not surprising that both defendants have raised limitation defences. In practical terms these are only material in relation to the alleged negligence in respect of tour agents' costs. The agreement in respect of re-charging staff salaries and expenses only came into effect on 1st April 1992, so that the first audit in which any question could have arisen about the implementation of this agreement was the audit of the accounts for the year ended 31st March 1993, which was carried out less than six years before the writ. In the case of Mr Haydon it might be said that, if he was negligent, part of that negligence consisted of a failure to cause Bong to render invoices under Clause 3.5 of the 1992 Agreement at the end of April 1992 and monthly thereafter. A small part of the alleged negligence of Mr Haydon may have occurred, therefore, more than six years before the writ. But I ignore this for present purposes and confine myself to the claim in respect of tour agents' costs.
341. Two points were argued in respect of the limitation defences. The first concerns the date when the claimants' cause of action occurred. The claimants said that, at any rate so far as their claims in tort are concerned, this was later than the breaches of duty complained of. The second point is whether Section 14A of the Limitation Act 1980 assists the claimants.

#### **(1) When did the claimants' cause of action arise?**

342. It is, of course, well established that loss is an essential ingredient of a claim in tort, so that a cause of action for tortious negligence does not arise until loss is suffered. There is no dispute in this case that, subject to Section 14A, the period of limitation is six years from the date when the cause of action accrued.

343. The claimants' first argument was that, as PW were negligent in respect of every audit after the 1989 audit, a new cause of action accrued not earlier than the date when the relevant accounts were signed off. Thus any claim in respect of negligence in the course of the audits of the 1992 accounts of Happenstance and Bondi accrued only when those accounts were signed off on 24th May 1993 and is not time barred; and the same applies to negligence in the course of later audits. Moreover it is said that if the incorrect treatment of tour agents' costs had been reported in the course of those audits this would inevitably have drawn attention to the incorrect treatment in previous years. The result would be that all loss suffered by reason of the failure to report the incorrect treatment in the 1992 accounts would be recoverable in an action for negligence in respect of the 1992 accounts.
344. Whether the contention as to the extent of the loss recoverable in respect of negligence in any one year's audit is correct is one which I leave open (see paragraphs 336-337 above). However the argument that the claimants can escape the effect of limitation by relying on negligence in the course of the audit of the 1992 accounts fails by reason of my earlier conclusion that there was no such negligence.
345. The claimants' alternative argument was that they did not suffer loss until any claim against JREL became statute barred. Assuming in their favour that JREL's treatment of tour agents' costs was incorrect, the claimants argued that a cause of action against JREL in debt arose a reasonable time after the relevant tour accounts had been finalised by Neal Levin & Co. I will assume that this is correct, although I do not decide it. On this basis it is said that the claimants had until about June 1993 to bring a claim against JREL which would not have been time-barred; and that in consequence of this no cause of action in tort arose against either PW or Mr Haydon until that time.
346. In support of this argument Mr Calver referred me to *UBAF Ltd -v- European American Banking Corporation* [1984] 2 All ER 226. In that case UBAF participated, at the invitation of the defendant, in two syndicated loans to two companies, which subsequently defaulted. UBAF then sued the defendant, alleging that it had made the loans on the strength of representations made by the defendant which, it was claimed, were negligently false. It was contended that the case was bound to fail because the representations and the loans had been made more than six years before the date of the writ. The Court of Appeal declined to accept this contention on an application to set aside leave to serve the writ outside the jurisdiction. It held that the point must depend on evidence as to the value of the company's covenant at the time when the loans were made. Giving the judgment of the court Ackner LJ said (at page 234):
- "It is possible, although it may be improbable, that, at the date when the plaintiff advanced its money, the value of the chose in action which it then acquired was, in fact, not less than the sum which the plaintiff lent, or even exceeded it."
347. Mr Calver referred me also to *Midland Bank Ltd -v- Hett Stubbs & Kemp* [1979] Ch 385, where a solicitor negligently failed to register an option as a land charge. There it was held (in the words of the material part of the headnote at pages 385-6)
- "That since the negligence relied upon was not the giving of wrong and negligent advice, in which case the breach of contract would necessarily have arisen at a fixed point of time, but was a simple nonfeasance, the duty of the defendant firm of solicitors to register the option continued to bind them until it ceased to be effectively capable of performance on August 17, 1967, and therefore, since the action against the defendants in contract was not statute-barred, they were also liable to the plaintiffs in contract."
348. The recent decision of Neuberger J in *Gold -v- Mincoff*, unreported, 21st December 2000, was also cited, but it does not appear to me to take the matter further.
349. The opposing argument was that, assuming that the claimants' contentions on the substantive issues are correct, the claimants suffered loss as soon as PW failed to report what they ought to have reported or, in the case of the claim against Mr Haydon, as soon as he failed to take such action as he ought to have taken in respect of the tour agents' costs. In support of this argument I was referred to *Forster -v- Outred* [1982] 1 WLR 86 and *Bell -v- Peter Browne & Co* [1990] 2 QB 495.
350. In *Forster -v- Outred* the plaintiff claimed damages for negligence against her former solicitors on the ground that they had failed to advise her properly when she charged her own property to secure a loan made by a third party to her son. The action was commenced more than six years after the date of the charge but less than six years after the plaintiff was forced to repay the loan. Stephenson LJ, with whom the other members of the Court of Appeal agreed, upheld an argument of counsel for the defendants in that case to the effect that actual damage is suffered when there is any detriment, liability or loss capable of assessment in money terms, including a liability which may arise on a contingency such as loss of earning capacity or loss of a chance or bargain (see pages 94C-D and 98D-E). Accordingly in that case the plaintiff suffered loss when she subjected her property to the charge.
351. In the UBAF case the Court of Appeal distinguished *Forster -v- Outred* and another authority to similar effect on the grounds that the factual situations which they dealt with were different from those in UBAF (see [1984] 2 All ER at 235).
352. In *Bell -v- Peter Browne* a husband who was separated from his wife agreed to transfer the matrimonial home to his wife



on the basis that if and when it was sold he would receive a share of the proceeds of sale. On the advice of his solicitor the husband transferred the house to his wife, but the solicitor failed to protect the husband's claim to a share of the proceeds of sale by means of obtaining a trust deed or registering a caution. The wife sold the house and spent the proceeds of sale, but the husband did not find out about this until the sale had been implemented and the money had gone. It was held by the Court of Appeal that the husband suffered loss when the transfer was executed without there being a declaration of trust or similar protection. Although the solicitors could have provided the husband with alternative protection by registering a caution at any time before the sale took place, the existence of this opportunity to cure the original omission did not prevent time running from the date of the original failure.

353. These authorities show, in my judgment, that ascertainment of the time when loss is suffered in such a way as to give rise to a cause of action depends upon an analysis of the particular facts. The fact that a negligent party can make good his error by taking steps after the original mistake may sometimes prevent time running, as it did on the facts in the *Midland Bank* case, where the obligation of the solicitor was regarded as a continuing obligation to register the option. But it will not always, or even usually, have this effect as appears from *Forster -v- Outred and Bell -v- Peter Browne*.
354. It seems to me that much will depend upon whether, after the occurrence of the act or omission which is said to be negligent, the claimant is in the position in which he would have been if there had been no negligence. In *Forster -v- Outred* the claimant was not in such a position because she ought not to have executed the charge without first receiving proper advice. In *Bell -v- Peter Browne* the claimant was not in that position because, if properly advised, he would not have transferred the house without an appropriate declaration of trust being executed. In the *UBAF* case the claimant entered into a transaction of the kind it always intended to enter into because it made the loans in return for an agreed form of security. Its complaint was that this security had proved to be less valuable than it had been represented to be. If it was always of such diminished value, then the loss was suffered when the loan was made. If, however, it had only become of diminished value at a later date then no loss was suffered, and no cause of action in tort arose, until that date.
355. In my judgment, on the facts of this case if the claimants had been right in their allegations of negligence, they would have suffered loss immediately PW failed to report or Mr Haydon failed to take appropriate action. The claimants never intended to allow JREL to leave the burden of tour agents' costs with Happenstance or Bondi without re-charging them to JREL. If Mr Haydon brought this position about by his negligence then, in my judgment, loss was suffered as soon as this situation was allowed to exist uncorrected. If PW were negligent in failing to report what they had found in the course of the 1989 audit, loss was suffered at the time of the failure to report, which was not later than 7th August 1989.
356. While it is true that an opportunity to remedy the position would have existed until such time as a claim against JREL became time barred or JREL and John Reid had insufficient assets to satisfy the claim, this does not, in my view, prevent there being an immediate detriment to the claimants. This detriment can, I think, best be characterised as the acceptance or continuance of an unlooked for credit risk. The fact that the risk might never have materialised, or might have been avoided, by taking appropriate action does not remove the fact that, if the claimants are right in their allegations against Mr Haydon, they would not have incurred the risk at all and, if they are right in their allegations against PW, they would have received a report which would have enabled them to take steps to bring it to an end at a relatively early date.

## **(2) Are the claimants assisted by Section 14A?**

357. Section 14A of the Limitation Act 1980, so far as material, provides as follows:-

"(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

...

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either-

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant

damage" means knowledge both-

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are-

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant;

...

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire-

(a) from facts observable or ascertainable by him;

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

358. Whether or not the claimants can benefit from Section 14A depends upon whether the "starting date" referred to in subsection (5) was on or after 12th January 1996. If it was before that date, Section 14A provides no assistance for them. As the claimants have, on the assumptions in their favour which have to be made before Section 14A becomes relevant, had a right to bring the present action since some time before 12th January 1996, the crucial question is whether the claimants first had the knowledge referred to in subsection (5) before or after 12th January 1993.

359. I think it will be convenient to consider this question separately in relation to (i) Sir Elton's personal claim against PW; (ii) the EJ companies' claim against PW; and (iii) the EJ companies' claim against Mr Haydon.

**(i) Sir Elton's personal claim against PW**

360. The first matter to be addressed is what are the facts knowledge of which is requisite for the purposes of subsection (5) as expanded by the later subsections. There was, I think, no dispute that knowledge of two elements was required namely that (a) the companies' money had been expended in payment of tour agents' costs and not re-charged to JREL; and (b) that this was contrary to the terms of the 1986 Agreement. Both parties agreed that knowledge of a third element (element (c)) was also required, but they differed about its precise nature. On behalf of PW Mr Hapgood addressed me on the footing that it was sufficient that there should be knowledge that PW had audited the accounts of Happenstance and later of Bondi and had reported nothing untoward. On behalf of the claimants Mr Calver contended that, now that the case originally pleaded against PW has been narrowed down to a complaint based upon failure to report the point which had been spotted in the course of the 1989 audit, it was necessary that there should be knowledge both of the fact that PW had spotted the point and of the fact that they had failed to report it.

361. On this matter I prefer the approach of Mr Hapgood. A person having knowledge of elements (a) and (b) would, in my view, have the knowledge required for bringing an action against PW if he knew also element (c) in the form favoured by Mr Hapgood. Indeed that was the basis on which the present action was commenced against PW. Once Sir Elton was told what had happened in respect of tour agents' costs he concluded (with the assistance of his advisers, although subsection (9) makes that irrelevant) that he had a good claim in negligence against PW. Moreover his subsequent narrowing of the claim in such a way as to rely on the failure to report what had been spotted in the course of the 1989 audit does not represent a new or fundamentally different claim against PW. It represents, in my view, a refinement of the initial reaction that the loss resulting from the incorrect treatment of tour agents' costs must be attributable to some omission on the part of PW.

362. Did Sir Elton have the requisite knowledge in respect of the three items before 12th January 1996? He clearly had knowledge of element (b), in that he knew that if tour agents' costs had been borne by Happenstance and Bondi and not by JREL this would have been wrong. He made no bones about this. When asked by Mr Fletcher what would have been

his reaction if, in about March 1985, he had been shown the tour accounts relating to his 1984 North American tour in reference to HRA and CC he replied:

"I would have been extremely surprised and angry that I was paying commission to Howard Rose and to Constant Communications, when I thought that it had been agreed that that should come out of my management expenses." (Day11, page 11).

363. I think that there is equally no doubt that Sir Elton knew that PW had audited the accounts of Happenstance and Bondi from 1986 onwards and had reported nothing untoward. In my judgment he almost certainly had actual subjective knowledge of this. If I were wrong about that I would hold that he had constructive knowledge through the agents I shall mention in respect of element (a).
364. The only aspect which gives rise to difficulty is Sir Elton's knowledge of element (a). He himself denied knowledge of the incorrect treatment of tour agents' costs until about April 1998. I think that this was probably the case so far as Sir Elton's personal subjective knowledge is concerned. But that is not the end of the matter. Subsection (10) shows that a degree of constructive knowledge will suffice. I find that Sir Elton had supplied to him from time to time the tour accounts prepared by Neal Levin & Co. These showed quite clearly that the tour agents' costs were being borne by Happenstance and later by Bondi.
365. I do not doubt that Sir Elton did not himself study the tour accounts and extract this information from them, but that was because of his own choice. In answer to Mr Fletcher at Day 11, page 9, he said that he would not have wished to see the tour accounts

"because that again is part of my trust with Mr Reid. As I explained at quite good length yesterday, that I never expected to see tour accounts, because the whole point of - I was the left arm he was the right arm, he took care of the business. I am a far too busy a person to have to be bothered by this. If you trust somebody as implicitly as I did Mr Reid and his organisation, including Mr Haydon, I would have expected this to be taken care of owing to the generous deal that he was already getting."

366. Sir Elton was perfectly entitled to take this attitude if he wished to. But what he cannot do, in my judgment, is to claim not to have had the knowledge which a person with a more business-like approach would have had. He had appointed JREL to handle this aspect of his affairs. JREL undoubtedly knew, through John Reid and Mr Haydon, that the tour agents' costs were being borne by Happenstance and Bondi. I accept that JREL did not know that this was in breach of the 1986 Agreement (as I assume it was for present purposes) but that does not matter. Its knowledge that the tour agents' costs had been borne in this way must, in my judgment, be attributed to Sir Elton.
367. I therefore conclude that Sir Elton had, before 12th January 1996, actual or constructive knowledge, or knowledge through his duly appointed agents, of all three elements I identified earlier. He cannot, therefore, rely upon Section 14A.

**(ii) The EJ companies' claim against PW**

368. The relevant facts in relation to the EJ companies' reliance upon Section 14A are the same as those in relation to Sir Elton's reliance. The circumstances relating to the companies' knowledge or ignorance of those facts are, however, slightly different.
369. It was argued that in relation to the companies Sir Elton's knowledge was sufficient. I see the force of this argument, but I have some hesitation about it. While it is true that the companies existed for Sir Elton's benefit and that, generally speaking, JREL ensured that Sir Elton's wishes were carried out in relation to the companies, Sir Elton was not himself a director of or shareholder in the companies. In respect of the companies' knowledge I prefer to look elsewhere.
370. However I do not find it necessary to look very far. In my view Mr Haydon and JREL represented the companies' minds for this purpose, Mr Haydon because he was a director of Happenstance and Bondi and JREL because it was engaged to manage the affairs of each company. Clearly Mr Haydon and JREL had knowledge of elements (a) and (c). The only doubt is in respect of element (b). I accept that Mr Haydon and John Reid did not think that the treatment of agents' tour costs was contrary to the 1986 Agreement. But they knew the terms of the 1986 Agreement and if, on its true construction, it required JREL to bear the tour agents' costs that is something which they, on behalf of the companies, might be expected to know from the facts ascertainable by them with the help of appropriate expert advice which it was reasonable for them to seek (see subsection (10)).
371. I therefore find that Happenstance and Bondi had the requisite knowledge before 12th January 1996 and cannot rely on Section 14A.

**(iii) The EJ companies' claim against Mr Haydon**

372. As the nature of Mr Haydon's negligence, which has to be assumed for present purposes, was different from the nature of PW's assumed negligence the elements involved in the subsection (5) knowledge require separate consideration. In my judgment elements (a) and (b) (the treatment of agents' tour costs and the fact that this treatment was contrary to the 1986

Agreement) remain unchanged, but element (c) is different. It appears to me that, in the case of the claim against Mr Haydon, what is required is that the companies knew that the state of affairs involved in elements (a) and (b) had been brought about, or allowed to continue, by reason of the negligent acts or omissions of Mr Haydon.

373. In my judgment the companies had knowledge of element (c) in this form. The companies knew who their director was, namely Mr Haydon, and if, as has to be assumed for present purposes, the loss suffered by the companies was attributable to the negligent acts or omissions of Mr Haydon as director, the companies must, it seems to me, be fixed with knowledge of this fact. The only alternative view would lead to the absurd result that, when a company suffers loss as the result of the negligent act of its sole director, Section 14A may operate to give the company an extension of time until three years after the negligent director has been replaced. I cannot accept that this should be so.
374. As to element (b), the companies were parties to the 1986 Agreement and must be taken to have knowledge of its terms. The true meaning of these terms is something that was ascertainable by the companies with the help of appropriate legal advice which it would have been reasonable to expect the companies to seek.
375. As to element (a), Mr Haydon knew how the tour agents' costs had been dealt with. However Mr Fletcher disclaimed reliance upon Mr Haydon's knowledge in this respect. Instead he sought to attribute Sir Elton's knowledge to the companies. I am doubtful about this for two reasons. The first is the absence of any formal status of Sir Elton in relation to the companies. His position as an employee engaged to generate income for the companies by the provision of entertainment services is not, in my view, enough. The second is the fact that Sir Elton's only knowledge of the facts involved in element (a) is constructive knowledge or knowledge which he had through his own agents. I do not think that this is a sufficient basis for attributing the same knowledge to the companies.
376. Nevertheless I consider that the companies did have knowledge of element (a) before 12th January 1996, because I take the view that the knowledge of JREL is to be attributed to the companies. JREL was the contractual administrator of the affairs of the companies. In my judgment it was not open to the companies to contract out the administration of their affairs to a third party and then to contend that they have no knowledge of an aspect of such administration which was well-known to the administrator.
377. Accordingly I find that the companies cannot rely on Section 14A against Mr Haydon.

## **The Settlement with JREL and John Reid**

### **(1) Preliminary**

378. At a much earlier stage of this judgment I referred to the fact that the claimants had reached a settlement with JREL and John Reid in May 1998. Both PW and Mr Haydon contended that this settlement not only discharged all claims against JREL and John Reid but also discharged any claims which the claimants might otherwise have had against PW and Mr Haydon. It is to this contention that I now turn.
379. The issue raised by this contention would have been determinative of both the claimants' claims if decided in favour of PW and Mr Haydon. As it depends to a large extent on arguments of law it appeared to be suitable for determination as a preliminary issue and I agreed to deal with it in this way. I heard argument upon it on days 5 and 6. However in the course of that argument information was obtained that the Court of Appeal had recently heard argument in a case which raised a similar point (Cape & Dalglish -v- Fitzgerald). It was agreed, therefore that I would not give my decision until after the Court of Appeal had given judgment, which it did on 15th November. I heard submissions on Cape & Dalglish from the parties in the present case on 22nd November 2000, which was Day 15 of the trial.
380. In the meantime I had heard the evidence of a number of witnesses and I continued to do so after 22nd November, while attempting outside court-sitting hours to write my judgment on the issue. Eventually it became apparent to me that it would not be possible for me to complete my judgment within a reasonable time without adjourning the trial for one or two days. This disruption would not have been welcomed by the parties. Further, by that time it no longer seemed sensible to persevere with an attempt to decide the issue as a preliminary issue. I had heard so much evidence on the other issues that the efficient course appeared to be to proceed to decide these issues in the ordinary way at a single trial. I therefore announced that I would deal with the settlement point in the course of my judgment at the end of the trial, as I now do.
381. I can, however, be much briefer than I would have had to be if I had adhered to the original course. This is partly because I have, in the preceding part of this judgment, rejected the claimants' case on other grounds and partly because the point at issue is a difficult one on which a further detailed decision of a first instance court is likely to be of little value. There is however one ancillary aspect of the point on which I ought to make findings of fact.

### **(2) The Settlement Agreement**

382. The settlement between the claimants and JREL and John Reid was embodied in a document headed "Heads of Agreement" signed by Sir Elton and John Reid and dated 15th May 1998. It consists of ten fairly short clauses. Clauses 7

and 8 do not matter for present purposes. The other Clauses provide as follows:

"1. JRE agree to termination (without compensation) of the Management Agreement as from Friday 15 May, but will continue to co-operate with the orderly handover until 30 June 1998 and will be entitled to be credited with commission (less agents' fees) until 30 June, the maximum of such credit to be £1,000,000 (one million pounds). Such amounts of management commission shall be credited against the sum of \$5 million referred to below. No further sums unless expressly stated in this agreement shall be due from either party to the other.

2. JRE agree that compensation for all Elton John financial claims (except in the case of fraud) be quantified in the sum of \$5 million (five million U.S. dollars), which shall be due from 1 July 1998.

3. JRE has provided a written summary of the financial position of the company (including the personal financial position of John Reid) and upon which Elton John relies in entering into this agreement and which is attached hereto.

4.

(a) In view of the stated financial position of JRE and John Reid, Elton John agrees that the balance of Elton John's financial claims be paid in 4 equal instalments on 1 January 1999, 1 July 1999, 1 January 2000 and 1 July 2000 provided that if any of the instalments are not paid on the due date Elton John shall have the right to issue proceedings to recover the whole amount outstanding.

(b) If there is any significant improvement at any time in the financial position or prospects of JRE, (as to which Elton John shall have the right to require further written statements as to financial position of JRE or John Reid) JRE shall accelerate payment of financial claims.

5. For the avoidance of doubt, JRE gives up entitlement to any commission after 30 June 1998, including post termination commission of 2.5%.

6. John Reid to give up shareholdings, directorships in Elton John companies including Rocket Records, Rocket Pictures and Bona (including any interest in the Rocket Records label) and will rename Rocket Theatre. Elton John to give up shareholdings in John Reid companies. All future dealings are to be "at arms length". Elton John has no objection to John Reid continuing as Executive Producer of the Disney musical Aida.

...

9. This agreement though binding, will be put into more formal terms to be prepared before 29 May.

10. For the avoidance of doubt references to JRE shall include references to John Reid and any other company he controls and references to Elton John includes references to the managed companies."

383. No more formal agreement of the kind envisaged by Clause 9 was ever executed. As I have already mentioned credit was allowed in the maximum sum of £1 million referred to in Clause 1. The balance of the \$5 million (equivalent to about £2.3 million after the £1 million allowance) was duly paid by the instalments referred to in Clause 4(a).

### **(3) The recent authorities**

384. The contention that the agreement discharged not only all the claimants' claims against JREL and John Reid but also any claims they might have against PW or Mr Haydon was based upon the decision of the House of Lords in Jameson -v- CEGB given in December 1998 and reported at [2000] AC 455. In that case Jameson had been injured by separate torts committed by Babcock and the CEGB respectively. He brought a claim against Babcock which was settled on payment of an agreed sum. After Jameson's death his executors brought an action against the CEGB. They offered to give credit for the sum received from Babcock but contended that this sum did not provide full compensation for the loss which Jameson had suffered and that the excess was recoverable from the CEGB. The CEGB argued that settlement with Babcock had extinguished any claim against the CEGB. The House of Lords approached the matter on the basis that Babcock and the CEGB were concurrent tortfeasors, that is to say persons who by their separate acts had caused the same harm. It upheld the CEGB's argument.

385. In the two years which have elapsed since the decision in Jameson a similar point has come before the Court of Appeal on several occasions. I was referred to Heaton -v- Axa Equity & Law [2000] 3 WLR 1341; Kenburgh Investments -v- David Yablon Minton [2000] Lloyds Law Reports (PN) 736; and Cape & Dalgleish -v- Fitzgerald, unreported, 15th November 2000. In these cases the parties against whom claims were made were not concurrent tortfeasors as in Jameson. In Heaton -v- Axa they were described as "successive contract breakers" (see [2000] 3 WLR at page 1367) although that case also involved a claim in tort. Nevertheless the Court of Appeal has declined to hold that the principle which underlies the decision in Jameson has no application in a contract case, or in a case where one claim is against a party in breach of contract and the other against a tortfeasor. Permission to appeal to the House of Lords has, however, been granted in Heaton -v- Axa (see [2000] 1 WLR 111).

386. In addition to the authorities in what may be called the Jameson line of cases I was referred to certain authorities in kindred areas of the law. These included *Deanplan Ltd -v- Mahmoud* [1993] Ch 151 and *Royal Brompton Hospital NHS Trust -v- Watkins Gray International*, Court of Appeal, unreported, 10th April 2000.
387. A proper discussion of the point raised in the present case would, I think, require a detailed review of most, if not all, of these decisions. I do not consider that this would be justified in a judgment in which I have reached the conclusion that the point is not necessary to success on the part of the defendants. I content myself by stating briefly the conclusion which I would be disposed to reach, without explaining my reasons in full.
388. A crucial feature of the Jameson case was the fact that the two concurrent tortfeasors were liable in respect of the same damage. This enabled an important part of the reasoning in the decision in that case to proceed by reference to the Civil Liability (Contribution) Act 1978, Section 1 of which gives a right to a person liable to another in respect of any damage to obtain contribution from any other person who is liable for the same damage.
389. In the present case, assuming that the 1986 Agreement had the meaning which the claimants seek to ascribe to it, the claim against JREL and John Reid was a claim for a debt due under that Agreement, namely the amount that ought to have been, but was not, re-charged to JREL. The debt would have been liquidated in amount. In contrast the claim against PW is for unliquidated damages for professional negligence. The claim against Mr Haydon is also for unliquidated damages for negligence. These constitute important differences which, in my view, in the light of my reading of the authorities I have mentioned, make the Jameson principle inapplicable.
390. Further I do not find in the terms of the Heads of Agreement anything which indicates that the claimants were to accept the payment which was made by JREL and John Reid in satisfaction of their claims against any other party. Nor, in my view, is there any implied agreement on the part of the claimants not to sue any other party who might be liable in respect of the same loss. In the context of the Heads of Agreement as a whole I read the reference in Clause 2 to "compensation for all Elton John financial claims" as meaning compensation only for financial claims against JREL and John Reid. "JRE" (as defined in Clause 10) would hardly take upon itself the agreement of compensation for claims against other parties. This view of the matter is consistent with the last sentence of Clause 1 ("No further sums ... shall be due from either party to the other").
391. I therefore conclude that the settlement agreement with JREL and John Reid would not prevent the claimants maintaining the claims brought in the action against PW and Mr Haydon if, contrary to what I have earlier decided, those claims would otherwise be well-founded.

#### **(4) Was the settlement full satisfaction of all the claimants' claims?**

392. Under this head I deal with some factual matters which were pleaded by PW and the claimants in connection with the settlement with John Reid and JREL. On the view which I have expressed under the preceding head these matters are not relevant, but I think I must consider them in case a different conclusion on earlier matters is reached by a superior court.
393. In paragraph 29 of their defence (as amended) PW pleaded that the effect of the settlement agreement was that "all the plaintiffs' claims (whether in contract or in tort) arising out of or connected with the breaches of the Management Agreement pleaded in paragraph 17 [of the Statement of Claim] were fully satisfied."
394. In response to this the claimants, in paragraph 10C of their Reply (as amended) not only denied the contention but continued
- "... Without prejudice to the generality of such denial:
- (1) The settlement was a settlement of all financial claims against JREL alone and did not purport to settle (nor was it the parties intention to settle) any claim which the Plaintiffs had against the First Defendant for breach of its retainer and/or negligence or against the Second Defendant for breach of his fiduciary duty and/or negligence;
- (2) The settlement sum was fixed at only \$5 million (less credit of a maximum of £1 million) by reason of JREL and John Reid's financial position. The agreement expressly stated at clause 3 thereof that in entering into the settlement agreement, the Plaintiffs relied upon JREL's and John Reid's stated financial position contained in its written summary appended to the agreement (which summary was prepared in consultation with the Defendants). The settlement did not, accordingly, give the Plaintiffs satisfaction for the full amount of their claim in damages, nor was it intended to do so."
395. I think that I have sufficiently dealt with the denial and sub-paragraph (1) under the preceding head. On this I would only add that I find it was not the subjective intention of the parties to settle any claim which the claimants had against PW or Mr Haydon.
396. On paragraph 10C(2) the issue which I need to address is that raised by the contention of the claimants that they accepted

the \$5 million (less the £1 million deduction) paid under the settlement agreement because Mr Reid and JREL could not pay the larger sum which would have represented the claimants' full loss. This is denied by PW, whose arguments were supported by Mr Haydon.

397. In order to determine this issue it is necessary to examine the negotiations for settlement. For this purpose I think that I can pick them up as at 14th April 1998 when JREL made the payment of £688,000 to Bong. Down to this time the discussions had been focused almost entirely on the staff salaries and expenses matter and the inter-company indebtedness. The £688,000 was, as I see it, a payment on account of this indebtedness. The claim in respect of tour agents' costs was not effectively advanced until Mr Presland wrote to John Reid on 17th April 1998. Even then no very clear figure was put upon it.
398. After receiving Mr Presland's second letter of 17th April (there were two letters of that date) Mr Reid instructed Herbert Smith, who wrote a vigorous response on 22nd April. Amongst other things, Herbert Smith warned that any attempt on the part of the claimants to terminate the Management Agreement might amount to a repudiatory breach. Meetings between Mr Presland and two partners in Herbert Smith, at which John Reid was present, took place on 22nd and 24th April. It seems probable that in the course of these meetings reference was made to draft Heads of Agreement which Mr Presland had prepared on 21st April in which he proposed that JREL should be required to make an interim payment of £5 million. Mr Presland said that he was told that John Reid was not a very rich man and could not come up with anything like £5 million. Herbert Smith also appear to have threatened that if the Management Agreement was terminated Sir Elton and his companies would be liable for something like £20 million damages for breach of contract.
399. John Reid had become very distressed. He said he did not like the posturing of the lawyers. On Monday 27th and again on Tuesday 28th April he and Mr Presland met together. Mr Presland said that the principal matter discussed was that John Reid just did not have £5 million. It was agreed that Mr Presland would prepare a document which would form the basis of an agreement. He duly did so. His draft was approved by Sir Elton, who was in the United States on tour at the time, on 29th April and sent by fax to Mr Haydon and JREL on the same day. In this draft it was proposed that compensation "for all Elton John financial claims" be quantified at £5 million, which was to be paid by instalments.
400. The draft was passed to Herbert Smith who wrote on 30th April denying that it represented terms which John Reid had indicated that he would agree to and making a counter proposal for, in effect, termination of the Management Agreement without compensation to either party. This counter offer was later withdrawn. That represented the end of any involvement of Herbert Smith in negotiations for settlement. There was some further correspondence between FC and Herbert Smith, but this was mainly about other aspects of the dispute. By a letter dated 12th May 1998 FC, as I have already mentioned, claimed to terminate the Management Agreement on the ground of JREL's breaches.
401. Negotiations directly between Mr Presland and John Reid, with Mr Haydon present for at least some of the time, began again on about 13th May 1998. In the course of these negotiations Mr Presland indicated that, if the claimants were to take into account John Reid's lack of assets, they would require a statement of the assets which he did have. The result was that on 14th May 1998 Mr Haydon sent to Mr Presland the "written summary" referred to in Clause 3 of the Heads of Agreement.
402. This written summary was in two parts. One of them related to the assets and liabilities of JREL. This disclosed an excess of liabilities over assets amounting to £677,000. This has not been questioned in these proceedings. While JREL had in the past received very substantial amounts in respect of commission its net receipts had very largely been distributed by way of salary to John Reid.
403. The other part of the written summary set out the assets and liabilities of John Reid. These were material because of John Reid's personal liability, under the Management Agreement, to satisfy the obligations of JREL. The material part of it was as follows:

"ASSETS £'000 £'000

Hamilton Terrace/Abercorn - net of mortgage 2.350

L'Ecoissaise - net of mortgage/selling costs 1.000

Millennium Tower-net of mortgage/selling costs/tax 937

House Contents 2.616

Jewellery 253

Cars 96

Rocket Theatre \_

—

7.252

## LIABILITIES

Loan from JRE (1.648)

Funding balance sheet deficit JRE to

achieve going concern (677)

Personal creditors (352)

Net Barclays (150)

Personal funding to create future JRE May - August (800)

Provision for funding Flatley to 'Liability Trial' (583)

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(4.210)

Net assets prior to settlement with EJ 3.042"

404. What is referred to as "Hamilton Terrace/Abercorn" was John Reid's London house; "L'Ecosaise" was his house in France; and "Millennium Tower" was his apartment in New York. The other assets are, I think, self-explanatory. Nothing was done to check the values of these properties or the amounts secured by mortgages. All of them have, it seems, subsequently been sold for substantially greater net sums than were included in the statement. Likewise nothing was done to verify the value of the house contents. Mr Presland guessed that the value stated was based upon some insurance valuation but did not check. Generally Mr Presland thought that he had no alternative but to accept the values which he was given. He thought that Mr Reid was trying to be honest about them.
405. Nothing was brought into account among the assets of JREL or John Reid in respect of commission already earned under the Management Agreement but not yet received. Nevertheless, as appears from the Heads of Agreement, this was allowed as a credit against the agreed payment of \$5 million. In a sense, therefore, JREL was allowed the benefit of this item twice over - once in its omission from JREL's assets and again in its allowance as a credit.
406. Turning to the list of liabilities, the 'loan from JRE' and 'personal creditors' call for no comment. The figure for 'net Barclays' represents, it seems, a net amount due to Barclays Bank after taking into account security over a substantial portfolio of investments. Neither the value of the portfolio nor the amount of the indebtedness appears to have been the subject of investigation by Mr Presland on behalf of Sir Elton.
407. The sum of £677,000 for "funding balance sheet deficit JRE" corresponds with the net asset deficiency in the statement of JREL's financial position. The £800,000 for 'Personal funding to create future JRE' is a sum which John Reid wanted to inject into JREL to ensure its continued viability. The £583,000 'Provision for funding Flatley to liability trial' is a sum estimated to cover John Reid's costs in respect of litigation in which he was then engaged with an artist named Michael Flatley.
408. None of the items mentioned in the preceding paragraph represents a liability which would ordinarily be allowed for in ascertaining what a person faced with a claim could be reasonably be expected to pay without being made bankrupt. The primary respondent to the claim was JREL, which was accepted, probably quite rightly, as being unable to pay anything. But there was no reason why John Reid, as the party secondarily liable, should have been left in a position which would enable him to restore JREL to solvency, still less to finance its continued activities, when Sir Elton and his companies were not to benefit in any way from this. Likewise Sir Elton and his companies were not going to profit in any way from any success in the Flatley action. Indeed if John Reid had failed at the trial of that action the likely order for costs against him might well have prejudiced his ability to keep up the instalments he was to pay under the Heads of Agreement.
409. What appears to have happened after the receipt of these financial statements on 14th May was that the parties moved rapidly to the finalisation of the Heads of Agreement. The date which they bear is 15th May, which was a Friday. There seems to be no reason to doubt that they were in fact signed on that day. A press release recording the termination of the management agreement was issued on 18th May.

**(5) Conclusion on the argument concerning the settlement agreement**

410. In my judgment it cannot be said that the sum paid to the claimants under the Heads of Agreement represented the most



that could have been recovered from John Reid and JREL. Their financial position was plainly taken into account in negotiating the settlement, but a number of generous and unusual allowances were made in their favour. It is not suggested on behalf of the claimants that they made allowance for the fact that, if it came to litigation, they might not succeed. At the time they had absolute confidence in their claim, which they considered to be worth between £5 and £10 million before interest was calculated. The fact that they accepted much less than this under the settlement can only be explained, in my judgment, on the basis that they decided to "go easy" on John Reid and JREL and to seek a parting of the ways on a basis which gave rise to as little animosity as possible.

411. I should add that on this part of the case both sides placed some reliance upon Clauses 3 and 4 of the Heads of Agreement. The claimants emphasised that Clause 3 records Sir Elton's reliance upon the financial statements. PW pointed out that this was not the basis of any warranty and that the only consequence of a change for the better in the financial position of John Reid or JREL would be to open up the possibility of acceleration of the instalment payments. Both these contentions are correct, for what they are worth, but they do not affect my assessment of the 'soft' nature of the settlement.

## **PW's contribution claim against FC**

### **(1) Preliminary**

412. On the view which I have taken of the claimants' case against PW this claim does not arise because PW is not under any liability to which FC could be required to contribute. However as I heard a good deal of evidence and argument about the matter I think I ought to deal with it. I do so on the hypothesis that (i) Clause 7.2 of the 1986 Agreement required JREL to bear the tour agents' costs; (ii) that PW correctly appreciated this at the time of the 1989 audit and recognised that it had not been implemented; and (iii) that PW negligently failed to report what they had discovered.
413. The need to work on this hypothesis provokes two observations on my part. First it seems fair to emphasise once again that each of the assumptions I have set out is contrary to what I have decided earlier in this judgment.
414. Secondly, and more seriously, assumption (i) appears to me to give rise to a fundamental difficulty in the way of PW's Part 20 claim. I shall have to consider PW's detailed allegations in due course, but each of them involves the proposition that FC were negligent in the performance of their duties to Sir Elton and the EJ companies. I can see how this might be the case if it could be shown that the underlying agreement between Sir Elton and John Reid was that JREL should bear the tour agents' costs and that FC were instructed that this was the case but failed to ensure that the 1986 Agreement and its successor were drafted in such a way as to give effect to this intention. But on that footing there would be no liability on PW to which FC could be required to contribute. The hypothesis on which I have to work is that the 1986 Agreement had the meaning that I have held that it did have, in which case PW's only fault (which cannot have given rise to any liability on their part) was to toy with a false belief as to the meaning of Clause 7.2 during part of the 1989 audit. If, however, one assumes that PW are liable to the claimants that could only be because the 1986 Agreement required that JREL should bear the tour agents' costs and PW negligently failed to warn that this was not being implemented. On that basis the 1986 Agreement would have achieved precisely what the claimants say that it was intended to achieve and I find it impossible to see how that can have involved any material negligence on the part of FC.
415. In my judgment the Part 20 claim must fail by reason of what I have said in the preceding paragraph. Although this was one of the bases on which the case was addressed by Mr Kallipetis, it does not represent the basis on which that claim was dealt with by Mr Hapgood. Accordingly I think I ought to go on to consider the claim in more detail, in case my conclusion on the basis of an overview is held to be wrong.
416. PW alleges that FC were negligent in five respects as follows:

"(1) FC failed to obtain instructions direct from Sir Elton in relation to the meaning of paragraph 7 of the Heads of Agreement dated 24th September 1984.

(2) FC failed to consider and advise Sir Elton on the memorandum of understanding signed in November 1986.

(3) FC failed to advise the claimants before they entered into the 1992 and 1997 Agreements that the EJ companies had borne the tour agents' costs which should have been borne by JREL.

(4) FC failed to advise the claimants that the 1992 and 1997 Agreements should clarify the liability of JREL to pay the tour agents' costs.

(5) If JREL was not liable to pay the tour agent's costs then, in the alternative to (3) and (4) above, FC failed to advise the claimants that JREL was breaching the management agreements by procuring the EJ companies to appoint the tour agents."

I shall consider these in turn.

**(2) Failure to obtain instructions direct from Sir Elton in relation to the meaning of paragraph 7 of the Heads of Agreement dated 24th September 1984**

417. It will be recalled that the 1984 Heads of Agreement were drafted by Catherine MacRae in order to reflect what she understood to have been agreed between Sir Elton and John Reid at St. Tropez at the end of July 1984. Clause 7 provided:

"OVERSEAS REPRESENTATION: The appointment of overseas agents and responsibility therefor shall lie with the manager [i.e. JREL] at its own cost."

PW say that it was the duty of FC to find out from Sir Elton exactly what was intended to be comprised in the expression "overseas agents".

418. This head of negligence was not alleged when the Part 20 particulars of Claim were originally served or when they were amended in July 2000. It is proposed to be alleged in a further amended version of those Particulars of Claim for which I am asked to give leave. The intention to seek leave to amend was announced by Mr Hapgood on 19th December 2000, after all the oral evidence of the parties had been heard and immediately before the court adjourned for the Christmas break. The formulated amendment was put forward when the hearing resumed on 12th January, or soon afterwards. Mr Kallipetis at once indicated that the application for leave to amend was vigorously opposed. However by agreement between him and Mr Hapgood it was arranged that Mr Hapgood should make his application and present his argument on the substantive case when he came to make his other submissions on the Part 20 claim. Correspondingly Mr Kallipetis opposed the amendment and argued on the merits of the point in a single set of submissions.
419. The grounds on which Mr Kallipetis opposed the giving of leave were that the amendment was put forward very late and that to allow it to be made would give rise to substantial prejudice to FC.
420. The proposed amendment certainly was put forward at a very late stage. All the evidence had been concluded and it would have been out of the question, looking at the course of the trial as a whole, to recall any of the witnesses. Mr Hapgood argued that it was only when Mr Craig Eadie, one of the last witnesses to be heard, gave his evidence that PW appreciated that FC had not obtained Sir Elton's personal instructions on the 1984 Heads of Agreement. Mr Kallipetis said that it had been made clear from the outset of the trial that, at least in those early years, FC obtained Sir Elton's instructions from AA and JREL, who were Sir Elton's chosen channels of communication, rather than from Sir Elton himself. On this matter I find in favour of FC. While I accept entirely that PW had not been keeping the proposed amendment up their sleeves, I think that they had all the essential information which underlies it for some time before the commencement of this trial.
421. As to prejudice, it was argued on behalf of FC that had they been aware that it was to be suggested that they were negligent in not obtaining Sir Elton's direct personal instructions on the Heads of Agreement in 1984 they would have conducted their case differently in a number of respects. They would have cross-examined Sir Elton more extensively on this point and would or might have called additional evidence of their own. They would also have sought to join AA and Sir Elton in contribution proceedings. The probability that FC might need to join Sir Elton was expressly raised at an early stage of the trial, when Mr Pollock suggested that the claimants might seek leave to amend so as to make a direct claim against FC. This suggestion was later abandoned, partly as the result of Mr Kallipetis having pointed out the dire consequences in respect of the continuance of the trial which would follow if it was carried out. To allow PW to amend in order to raise an additional head of negligence against FC would, it was suggested, produce unfairness without there being the opportunity, which would have been sought if Sir Elton's threat had been carried out, to seek an adjournment for the purpose of enabling FC to prepare its case on the new issue.
422. In my judgment, if the amendment were allowed, FC would suffer prejudice of the kind referred to by Mr Kallipetis and that prejudice could not be compensated for by means of an order for costs. I therefore refuse leave to amend.

**(3) Failure to consider and advise Sir Elton on the memorandum of understanding signed in November 1986**

423. I have dealt with the circumstances in which the memorandum of understanding was brought into existence in paragraphs 178-179 above. A number of facts stand out in respect of this document. First it was brought into existence in order to deal with a query raised by AA as to the effect of the 1986 Agreement. It took some time for the nature of that query to be identified, but eventually it was expressed as a problem concerning the ascertainment of the gross income for the purposes of calculating JREL's commission under Clause 9 of the Agreement. To be specific the question was whether that gross income was to be ascertained before or after the deduction of certain other commissions and expenses. These were not the items which I have identified as tour agents' costs which are in issue in these proceedings but, as I understand it, commission and expenses deducted by the local promoters.
424. Secondly the memorandum of understanding started life as a document produced by Mr Haydon which was intended to describe what the arrangements were in respect of tour income. It was discussed and revised over a considerable period. Mr Eadie took the view that although what was described probably reflected Sir Elton's current intentions, it represented

a concession to JREL by comparison with the terms of the 1986 Agreement.

425. Thirdly Mr Eadie clearly took the view that Sir Elton ought to be advised by FC before he signed the memorandum. He did not himself give that advice. He seemed to have contemplated that this would be done by Mr Boreham, who was at the time the partner principally responsible for Sir Elton's affairs within FC. It does not appear that Mr Boreham himself gave any written or oral advice to Sir Elton. It appears, however, from a note which Mr Boreham wrote to Mr Eadie on 11th August that he intended

"to have a word with Pat Desmond to make certain that he is going to let Elton have figures which show, in respect of each tour, the amount he is paying John Reid and the amount Elton is receiving out of the tour."

426. I think that Mr Boreham probably did this and that Mr Desmond may well have gone through the figures with Sir Elton. This way of proceeding would have been consistent with FC's continuing concern that what was important was to be sure that Sir Elton knew that the arrangements which he had made were extremely generous to JREL. In the absence of a complaint from Sir Elton, FC's client, in respect of this matter I am not prepared to say that FC's conduct in relation to the memorandum of understanding was outside the scope of what a reasonably careful solicitor might do in the circumstances.
427. Even if this view of the matter is too generous to FC I am not satisfied that the conduct of FC in relation to the memorandum of understanding has caused any loss to Sir Elton or the other claimants. The memorandum was intended to deal with a different matter from that which has given rise to the claim against PW. It only dealt with tour agents' costs obliquely and somewhat obscurely. Moreover by the time that the memorandum was signed the 1986 Agreement had been executed. If, as I have held, its effect was to leave the EJ companies to bear the tour agents' costs, the memorandum did not qualify or contradict it. If, as I have to assume for the purposes of assessing the present claim, the 1986 Agreement provided that JREL was to bear the tour agents' costs, the memorandum was wrong in appearing to endorse arrangements which gave effect to the contrary view. But, as I have held in dealing with the quasi-rectification claims, it was not sufficient, either by itself or in conjunction with other factors, to affect the respective rights of the claimants and JREL.

#### **(4) and (5) Conduct of FC in relation to the 1992 and 1997 Agreements**

428. Under this composite head I deal with grounds (3) and (4) of PW's claim against FC. I have to say, however, that I find it difficult to understand precisely what the complaint expressed in these grounds amounts to. A large part of that difficulty is, I think, attributable to the fact that the grounds, as formulated, do not take account of the fact that, as I hold to be the case, nobody within FC thought that the successive management agreements were intended to provide, or did in fact provide, for JREL to bear the tour agents' costs.
429. I base the conclusion that this was the state of mind of those involved within FC on a number of factors. First the 1977 agreements proceeded on the basis that on the basis that the EJ companies were to bear the tour agents' costs and, on any view of this matter, the negotiations which led up to the 1986 Agreement proceeded on the same basis until July 1984. Secondly, if (contrary to what I have found) Sir Elton and John Reid agreed something different in July 1984 at St. Tropez, nobody told FC of this. As I have indicated when dealing with the complaint under head (1), FC were entitled to act on the footing that Sir Elton's wishes were communicated to them through AA and JREL. In relation to the St. Tropez negotiations the relevant channel of communication was JREL. Nothing which was said by JREL supported such a fundamental change in the arrangements as Sir Elton now asserts.
430. The only indication that might have been regarded as pointing in the opposite direction was paragraph 7 of the Heads of Agreement. But this appears to have been interpreted by FC as relating to such matters as the engagement of CC as United States representative of JREL, not its engagement as tour promoter. I think that this was the true meaning of paragraph 7, but even if it was not I do not think that FC were to blame for thinking that it was. (I do not lose sight of the fact that, when he was asked by Mr Presland in April or May 1998 to consider the meaning of Clause 7.2 of the 1986 Agreement, Mr Eadie looked fairly quickly at the file and came to the conclusion that paragraph 7 of the Heads of Agreement established that the meaning of Clause 7.2 which Mr Presland favoured was correct. I think this was the first time that Mr Eadie had taken this view of paragraph 7 and that his approach was affected by a degree of haste and the context in which the matter was being raised.)
431. PW rely in particular on two matters which arose in 1991 in support of their claim under heads (3) and (4). These are the so called "congruence check" and Mr Eadie's conduct in refraining from clearing up an ambiguity which he considered to exist in the wording of Clause 7.2 of the 1986 Agreement. I will deal with each of these and then consider the position in respect of the 1977 Agreement and state my conclusions on this head.

##### **(i) The congruence check**

432. Negotiations for the renewal of the 1986 Agreement opened with Debra Breslaw, who had succeeded Catherine MacRae as the in-house lawyer employed by JREL, writing to Mr Eadie at FC and to PW in similar terms on 8th February 1990. Ms Breslaw said that it was the current intention of John Reid and Elton John to renew the 1986 Management Agreement for a further five years "upon identical terms and conditions". She submitted for consideration the draft of a short

agreement which would have achieved this.

433. After the receipt of these letters discussions took place between FC and PW about how to proceed in negotiating a new agreement. It appears to have been agreed between them that a simple renewal without full consideration of the terms would not be appropriate and that the important thing would be to make Sir Elton aware of how the 1986 Agreement had worked out in financial terms, in respect of both his own income and that of JREL. PW prepared some schedules setting out this information. These were discussed at a number of meetings between Mr Eadie of FC and Mr Tilson of PW. One such meeting took place on 6th September 1991. Mr Tilson's note of that meeting includes the following:

"Freres (as agreed) to give view on congruence of costs split and agreement."

434. Mr Tilson was not really able to offer an explanation of that note, although he rejected a suggestion made by Mr Pollock that it was concerned with the split of the costs of the office overheads. He said he did not really know what kind of check Mr Eadie was going to carry out and he did not regard it as a necessary part of the exercise. He thought "congruence" was probably his word (Day 16, page 156).
435. Mr Eadie's explanation was that he wanted to satisfy himself that the figures set out in PW's schedules did not simply reproduce information obtained by PW from JREL which might have been incorrect. Mr Tilson indicated that PW could not or would not undertake such a check, with the result that Mr Eadie said that he would do so. He had in mind something very general, as a check against gross error, and this is all he did. He said it took him no more than fifteen or twenty minutes.
436. The substance of Mr Eadie's evidence on this matter appears from the following passages in his cross-examination by Mr Hapgood.

"I said to Keith [Tilson], effectively, could he confirm that these were figures prepared by reference to the Management Agreement? I assumed it would be a very simple question for him to answer, but the substance of his answer was that he could not confirm it. My concern at this point was simply that we were about to present a review to Sir Elton as to slices of cake and there was a notional risk -- not a lot more -- that we were basing it on the wrong numbers.

By "the wrong numbers", I simply mean that there was a better set of numbers somewhere in the John Reid Enterprises or Price Waterhouse files which had been prepared as being the parties' then understanding of how the figures were to be allocated, be it audit files or anything else. I merely wanted to avoid the very slight risk of us looking stupid and the process being set back when John Reid said, "Look, you have this all wrong, these are the wrong numbers, where did you get them from?", and of course blaming John Reid Enterprises would be no use; it would be Price Waterhouse's fault.

I then asked Price Waterhouse again, were they going to check, again meaning were they going to spend the five or ten minutes necessary to check where the numbers had come from, but again they said, "No".

Q. How did you envisage that Price Waterhouse would check that, if they were going to check it?

A. They would check from their files. They would presumably have numbers for audit or other purposes; they were the financial adviser, this is their job. They would check that these were the consistent figures.

Q. So it was a task you yourself could not undertake,

I take it?

A. It was a task naturally to be undertaken by them.

Q. No, that was not the question.

A. I know.

Q. What is the answer to the question?

A. It was a task that I could not conclude -- completely undertake, but that I could at least have a look at since they were not prepared to. It seemed to me that since they had not given the confirmation, I simply said, "I will look for myself", meaning, "I will look in the Management Agreement" -- this is what I ended up doing -- to see if it identified clear costs that should be borne by John Reid Enterprises, and that on these figures were shown as being borne by Sir Elton, which would indicate to me that somebody had got the wrong numbers, which is what I did.

Q. The summary of the exercise you did is very much as I think I put it to you before you started that rather lengthy answer: that you were going to go away -- this was your suggestion, was it not?

A. It was my question and then my suggestion, that is right.

Q. Yes. We will go into the great detail of the exercise you did, but the gist of it was that you wanted to satisfy yourself, by reference to the Management Agreement, that Elton John was not bearing costs which ought to have been borne by John Reid?

A. No, I wanted to satisfy myself that the figures that were being put forward, which were not my figures, were not on the face of it and obviously the wrong figures by comparison with what the parties thought the allocation should be. Whether the parties had actually got that right in every respect is another matter. That comes down to whether Sir Elton has ultimately been correctly paid or not, but that is a much more lengthy process. I wanted to check, as best I could, to see if there was any manifest error indicating they were the wrong numbers; and there is a difference, I am sorry." (Day 29, pages 129-132)"

437. I do not fully understand why Mr Eadie should have been so doubtful about the reliability of the figures put forward by PW, but that does not matter greatly for present purposes. I am satisfied that his concern was as he described it to Mr Hapgood and that he neither represented that he was going to carry out a more extensive exercise nor carried out such an exercise.

**(ii) The ambiguity**

438. In what I find to be a remarkable piece of evidence given by Mr Eadie in answer to questions put by Mr Hapgood, Mr Eadie said that at the time of the negotiations for the 1992 agreement he recognised that Clause 7.2 of the 1986 agreement contained an ambiguity, but he decided to do nothing about it. The passage occurs on Day 29 at pages 153-176. The ambiguity which he perceived arose from the words introduced into Clause 7.2 at the instance of Mr Lee at about the time of the Lee/Eadie conversation. These words seem to have raised a number of problems in Mr Eadie's mind when he looked back at them in 1991. First he understood that the intention of the additional words had been to exclude all tour agents from Clause 7.2, but the words themselves referred only to booking agents. Secondly he had understood Mr Lee's intention to be to exclude tour agents from Clause 7.2 altogether, whereas the words might be construed (indeed, in my judgment, can only be construed) as removing the need for consent to their appointment. Thirdly, the making of an exception for one type of tour agent, might be said to emphasise that other types of tour agents were within Clause 7.2. Mr Eadie himself did not analyse the ambiguity in precisely these ways, but I think that I have fairly summarised what he perceived.

439. Mr Eadie said that the basis on which he decided not to draw attention to this ambiguity was that he was confident that the way in which the 1986 agreement had been operated, with tour agents' costs being borne by the EJ companies, was in accordance with the true intentions of the parties, even if it was not in accordance with the language of the agreement. He agreed that in some circumstances the renewal of the agreement might represent a suitable occasion for rectifying the ambiguity, but he did not think that the circumstances which existed in 1991 made this appropriate.

440. I find Mr Eadie's conduct in this respect, as described in his own evidence, to have been quite extraordinary. If it had been the subject of a specific complaint in a properly formulated claim in negligence brought by his clients it might well have been the subject matter of considerable criticism. However I have to consider it not in that context but in the context of PW's Part 20 claim. That is a matter which I shall come back to in a moment.

**(iii) The 1997 renewal**

441. While PW do not rely upon any specific incidents in relation to the 1997 renewal, I understand their case in respect of that renewal to be substantially the same as their case in relation to the 1992 renewal. In other words the complaint is that FC ought to have checked that the previous agreement was being correctly operated in accordance with its terms before allowing their clients to renew it, but they failed to do this or to require that any ambiguity in the terms should be resolved. I find that FC did not do what it is said that they ought to have done. The question is whether they were under a duty to do it.

**(iv) Conclusion**

442. PW's case in respect of these grounds appears to be that FC was under a continuing retainer, or at any rate a retainer which operated at the stage of each renewal, which required FC to consider whether the previous agreement had been applied in accordance with its terms and advise their clients accordingly. No such retainer is alleged by the claimants and PW are not in a position to prove any such retainer, except by inference. I am not prepared to infer that there was such a retainer. What FC were retained to do was to advise about the terms of the renewals and to see that their instructions in respect of those terms were implemented. Their approach was to satisfy themselves that Sir Elton was content with the result which the earlier agreement had produced. They made a significant effort at the time of the 1992 renewal to persuade Sir Elton that he ought to require JREL to accept commission calculated on the basis of net, not gross, income.

This was initially accepted by Sir Elton but then rejected and FC were instructed to proceed on the basis of a continuation of the previous gross income basis. Having regard to FC's knowledge of Sir Elton's limited attention span in relation to matters of business I do not think it was unreasonable of them to proceed on the basis that they did. An examination of the operation of the previous agreement of the kind which PW seem to suggest that they should have undertaken would, in my view, have required FC to exceed their instructions.

**(6) Failure of FC to advise the claimants that JREL was breaking the management agreements by procuring the EJ companies to appoint tour agents**

443. I think that the formulation of this ground must be attributable to the way in which the claimants pleaded their own case. It was certainly part of the pleaded case of the claimants that tour agents should have been engaged and paid for by JREL, not the EJ companies. It is understandable, therefore, that the Part 20 claim should have been formulated on the basis that, despite PW's argument to the contrary, the appointment of tour agents by the EJ companies would be held to be a breach of the management agreements. In the event, however, the claimants have not put their case in the manner pleaded. The breach complained of was not the appointment of the tour agents by the EJ companies but the failure of JREL to bear the costs of such appointment by way of re-charge.
444. It appears to me that the whole basis of ground (5) of the Part 20 claim has been destroyed by the fact that the claimants never sought to make good the particular breach of the management agreements which this ground assumes. Accordingly even if I had found in favour of the claimants on their claim against PW in respect of the tour agents' costs, I would see no scope for upholding this aspect of the Part 20 claim.

**(7) Conclusion on the Part 20 claim**

445. My conclusion on the Part 20 claim as a whole is that it does not arise in view of my rejection of the claimants' case but that even if I had accepted that case I would have rejected the Part 20 claim.

**Residual Points**

446. I am conscious that, despite the length of this judgment, there are some issues which I have left unresolved. Thus PW and Mr Haydon each have a counterclaim against Sir Elton for contribution or an indemnity. PW also presented an estoppel claim based upon Mr Eadie's congruence check in 1991 and Sir Elton's instructions in March 1992 that the 1986 Agreement was to be renewed on the same terms. Some of what I have already said is relevant to these matters, but I recognise that I have not specifically dealt with these arguments. I believe that no useful purpose would be served by my doing so. Having regard to my decision on the other points no order in favour of PW or Mr Haydon is required on their respective counterclaims; and PW has no need to rely upon its estoppel argument.
447. There is, however, one matter on which I should comment briefly. Mr Haydon has claimed that, if he were otherwise liable to the claimants, he ought to be relieved under Section 727 of the Companies Act 1985. That Section enables the court to grant total or partial relief in any proceedings for negligence against an officer of a company if it is satisfied that he has acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused. As I have found in favour of Mr Haydon on the issue of liability there is no occasion for me to grant him relief and I do not think it would be possible to say how I would have exercised my discretion under Section 727 if I had found otherwise. Apart from anything else the exercise would require me to make assumptions as to factual matters which I have determined in the opposite sense, which would in my view be highly artificial in the context of Section 727. I think it right to say, however that I am fully satisfied that Mr Haydon acted honestly even if, contrary to what I have held, he was wrong in his belief about the meaning of the management agreement.

**Result of the proceedings**

448. In accordance with this judgment I shall dismiss the claimants' action. I shall make no substantive order on the counterclaims of PW and Mr Haydon. I seek the assistance of counsel as to the appropriate order to be made on PW's Part 20 claim and, of course, in respect of costs.