Neutral Citation Number: [2008] EWCA Civ 1178

Case No: A3/2007/2497 & 2567

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE LEWISON
HC07C00763 & HC07C01505

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2008

Before :

SIR ANTHONY MAY
(THE PRESIDENT OF THE QUEEN'S BENCH DIVISION)
LADY JUSTICE HALLETT
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between :

Case No HC07C01505

ELEKTRIM S.A.	**Respondent /Claimant**
- and -	
VIVENDI HOLDINGS 1 CORP	**Appellant/ Defendant**

AND

Case No HC07C00763

LAW DEBENTURE TRUST CORPORATION PLC	**Respondent /Claimant**
- and -	
VIVENDI HOLDINGS 1 CORP	**Appellant/ Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Richard Millett QC and Mr Julian Kenny (instructed by **Barlow Lyde & Gilbert**) for **Elektrim S.A.**
Mr Robert Miles QC and Mr Andrew Clutterbuck (instructed by **Simmons & Simmons**) for Law Debenture Trust Corporation PLC
Mr Ali Malek QC and Mr David Quest (instructed by Orrick, Herrington & Sutcliffe) for Vivendi Holdings 1 Corp

Hearing date: July 29, 2008

- -

Judgment
As Approved by the Court

Lord Justice Lawrence Collins**: I Introduction**

No-action clauses

1. The principal question on this appeal relates to the construction of a "no-action" clause in a bond issue, whereby only the trustee of the issue is entitled to take enforcement action against the issuer, and bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation. Such clauses have been common in bond issues governed by English law since the nineteenth century, and in bond issues in other common law countries.

2. The use of a trustee is an effective way of centralising the administration and enforcement of bonds. Bondholders act through the trustee, and share *pari passu* in the fortunes of the investment, and do not compete with each other. The trustee represents and protects the bondholders, who are treated as forming a class, and who give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. Individual bondholders rely on the trustee as the exclusive channel of enforcement and can be confident that on enforcement principal and interest will be distributed *pari passu*.

3. No-action clauses are the subject of many decisions in the United States and Canada. They include the recent decision of the Ontario Court of Appeal in *Casurina Limited Partnership v. Rio Algom Ltd.* (2004) 40 BLR (3d) 112, in which it upheld the lower court's approval of the approach in the United States (citing *Feldbaum v. McCrory Corp.*, 1992 Del. Ch. LEXIS 113) that in consenting to no-action clauses by purchasing bonds, bondholders waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee, unless they first comply with the procedures in the instrument constituting the bonds. As I said in *Re Colt Telecom Group plc* [2002] EWHC 2503 (Ch.), [2003] 1 B.C.L.C. 290, at [12], no-action clauses have even been the subject of discussion in the International Court of Justice (although not the subject of decision) in relation to insolvency proceedings brought directly by bondholders: *Belgium v. Spain* (*Barcelona Traction* case), 1970 ICJ Rep 3, 104-5, *per* Judge Sir Gerald Fitzmaurice QC.

4. In the United States it has been said that a primary purpose of a no-action clause is to protect issuers from the expense involved in defending lawsuits which are either frivolous or otherwise not in the economic interest of the issuer and its creditors, causing expense to the issuer and diminishing the assets available to bondholders. In protecting the issuer such clauses protect bondholders. They can extend to non-contractual claims (other than fraudulent inducement of a purchase) because interpreting the no-action clause to exclude non-contractual claims would lead to inefficient claim-splitting. If the no-action clause required a noteholder to demand that the trustee should bring all contractual claims, but the noteholder had to bring the non-contractual claims, that would lead to a situation where contractual and non-contractual claims would have to be brought by different plaintiffs, possibly in different fora: see e.g. *Feldbaum v. McCrory Corp*, ante; *US Bank National Assn v US Timberlands*

Klamath Falls LLC, 864 A 2d 930 (Del Ch 2004); cf. *McMahan & Co v Wherehouse Entertainment Inc*, 859 F Supp 743 (SDNY 1994); *Re Dura Automotive Systems, Inc*, 379 B.R. 257 (SDNY 2007).

Parties

5. Elektrim S.A. ("Elektrim") is a Polish conglomerate (formerly state-owned) and now in bankruptcy, which has had substantial telecommunications interests. The Law Debenture Trust Corporation plc ("the Trustee") is the Trustee of €510,000,000 2% Bonds ("the bonds") originally issued in 1999 by Elektrim Finance BV (a special purpose vehicle), and guaranteed by Elektrim. The bonds were restructured in 2002: the maturity date was extended to December 15, 2005 and the interest rate was reduced, in return for which Elektrim agreed to make a contingent payment in 2006 (or earlier in certain circumstances), which represented 25% of the fair market value of Elektrim's assets in excess of €160m. This is referred to in this case as the "contingent payment" or the "equity kicker".

6. Elektrim had a 48% interest in Polska Telefonia Cyfrowa ("PTC") a leading mobile telephone service provider in Poland. Deutsche Telecom AG ("DT"), a major German media company, also had a substantial holding in PTC.

The dispute

7. A major French media company called Vivendi Universal SA ("Vivendi"), which had a joint venture with Elektrim, has been in dispute since 1999 with Elektrim and with DT about Elektrim's PTC stake. The Vivendi/Elektrim joint venture company is called Elektrim Telecommunikacja known as ET or Telco (and to which I shall refer as "Telco"), owned 51% by Vivendi and 49% by Elektrim. Vivendi says that Telco was formed to acquire Elektrim's 48% shareholding in PTC; that ultimately it acquired a controlling interest in Telco; that it has invested over €2 billion under various agreements and is entitled, through ET/Telco, to the PTC stake. Vivendi says that the shares in PTC had a market value of about US$3 billion.

8. DT challenged the transfer by Elektrim of the PTC shares to Telco, and claimed that it had an option over the PTC shares under a 1995 shareholder agreement, which it claimed to have exercised following Elektrim's entry into the joint venture with Vivendi. Elektrim says that it was originally entitled to the PTC stake and that, by virtue of various awards of an arbitral tribunal sitting in Vienna, Elektrim was obliged to transfer the stake to DT.

9. Vivendi claims that the transfer of the PTC shares to DT is invalid and at a substantial undervalue, and is part of a long-running fraudulent scheme by Elektrim and Mr Zygmunt Solorz-Zak (a Polish businessman who was the principal shareholder of Elektrim) to strip the assets out of Elektrim for his own benefit, and that DT has colluded in the fraud (and that the Vienna arbitration was a collusive device).

10. The battle for control of the PTC stake has been fought in numerous proceedings, including arbitrations in Vienna, Switzerland and London, and bankruptcy proceedings in Poland. There has also been related litigation (including claims brought by Vivendi against Mr Solorz-Zak) in France, Germany, and Switzerland, and in Seattle, Washington. Many millions of dollars in legal fees have been expended on this dispute.

Vivendi's acquisition of bonds

11. In 2007 Vivendi Holdings 1 Corp ("VH1"), a Delaware corporation with its principal place of business in New York and a subsidiary of Vivendi, acquired a substantial holding in the bonds, allegedly for commercial reasons. In fact it is apparent that VH1's acquisition of the bonds was for the purpose of pursuing Vivendi's battle with Elektrim by indirect means.

12. VH1 commenced proceedings in Florida against Elektrim and the Trustee alleging (inter alia) fraud against them, and also breach of fiduciary duty and negligence against the Trustee, although the fraud claims against the Trustee were later dropped. Lewison J granted anti-suit injunctions in favour of Elektrim and the Trustee, and this is an appeal by VH1 against the injunction in favour of Elektrim (permission to appeal having been given by Rix LJ) and a renewed application by VH1 for permission to appeal from the injunction in favour of the Trustee.

II The bonds and the 2002 Restructuring

13. As I have said, the restructuring of the bonds which took place in 2002 involved an extension of the maturity date to December 15, 2005 and a reduction of the interest rate, in return for which Elektrim agreed to make a contingent payment, which represented 25% of the fair market value of Elektrim's assets in excess of €160m. The Trust Deed was amended and restated on November 15, 2002 to reflect this restructuring. The Trust Deed, the bonds and the Bond Conditions were governed by and to be construed in accordance with English law (Trust Deed, clause 29.1).

14. The effect of clause 2.3 of the Trust Deed and Condition 6(k) of the Bond Conditions was that Elektrim was required to pay the contingent payment/equity kicker on the Contingent Payment Date (which was to be 180 days after the earlier of the date of publication of Elektrim Finance's accounts for the year ending December 31, 2005, or the year ending on the December 31 immediately following disposal of interests in certain defined assets, including its interest in Telco). As I have already indicated, in broad terms the amount of the contingent payment is a specified proportion of the difference between: (a) the fair market value of Elektrim's net assets (i.e. its assets after deduction of debt apart from contingent liabilities) as determined on the Contingent Payment Date and (b) €160 million.

Default and the bondholders' committee

15. In 2005, Elektrim and Elektrim Finance defaulted on the bonds.

16. Since early 2001 the bondholders had been represented by a bondholders' committee. The bondholders included Acciona (a substantial Spanish company) and Trafalgar (an asset management company) who together held almost 40% of the bonds.

17. Everest Capital Ltd ("Everest"), a Bermuda company, purchased Elektrim bonds, on its own behalf and on behalf of various clients, including General Motors, between February 2005 and June 2006. The investment was managed by Everest Capital Inc in Florida.

18. Everest held about 8% of the bonds. Everest became a member of the bondholders' committee. The evidence was that thereafter Everest was able to participate in all advice from Bingham McCutchen or Clifford Chance, the legal advisers to the bondholders' committee; and that all information and documents made available to the Trustee or its legal advisers in the course of the prosecution of the bankruptcy petition which would have been of relevance to decisions to be made by the committee, other than that relating to the Trustee's own legal position, were sent to Bingham McCutchen or Clifford Chance.

III Arbitration, court proceedings and bankruptcy

19. The history of the proceedings is complicated, and there was no agreed chronology available to the court. I will endeavour in this section to limit the account to the matters most relevant to the issues before the court.

A Vienna arbitrations between Elektrim and DT and the Polish bankruptcy proceedings

20. It is not possible to understand the course of the bankruptcy proceedings in Poland independently of the Vienna arbitrations and the judicial proceedings in Austria. That is because the petition debt was discharged from the proceeds of the transfer of the PTC shares by Elektrim to DT following an agreement in the course of the arbitration.

2004 arbitral award

21. DT commenced arbitration proceedings in Vienna against Elektrim and Telco challenging the transfer of Elektrim's shares in PTC to Telco. The arbitral tribunal, sitting under the auspices of the Vienna Court of Arbitration, rendered an award on November 26, 2004 declaring that the transfer of PTC shares to Telco was ineffective. But the tribunal also stated that it had no jurisdiction over Telco. On December 20,

2005 the Vienna Commercial Court set aside that part of the Vienna Award which had declared the transfer of PTC to be ineffective, because the arbitral tribunal did not have jurisdiction over Telco. A decision of the Court of Appeal in Vienna of October 10, 2006 set aside the annulment decision, but confirmed that the arbitral tribunal did not have jurisdiction over Telco.

Polish bankruptcy proceedings: March 2005

22. On March 3, 2005 the Trustee, on the instructions of more than 30% of the bondholders, issued a bankruptcy petition against Elektrim in Poland in the sum of €434,541,700. The contingent payment was not part of the petition debt. The petition was at first dismissed, but re-instated on appeal.

June 2006 arbitral award

23. After exercising its call option over the PTC shares then owned by Elektrim, DT commenced a further arbitration in Vienna against Elektrim claiming title to the PTC shares. Vivendi alleges that this arbitration was a sham in that Elektrim had separately agreed to transfer the PTC shares to DT at book value.

24. On June 6, 2006, the Vienna tribunal issued a First Partial Award ("the June 2006 Award"). For present purposes the significance of this Award is that the tribunal decided that DT had validly exercised an option over Elektrim's shareholding in PTC, and directed that the price of the shares would be established in a further award.

25. The tribunal said that it was not then in a position to determine the price. The tribunal considered that the right claimed by DT to acquire the shares at book price constituted a contractual penalty which, under Polish law, was liable to be reduced at the demand of the party liable for it. It said (para 68):

> "… the Arbitral Tribunal has to recognize that the penalty is glaringly exorbitant. The difference of price between the book value of the shares, which is said to be inferior to 400 million Euros, and a fair market value which would revolve around 2.4 billion Euros or even 3 billion Euros manifestly leads to the conclusion that the penalty included in [the call option] is glaringly exorbitant."

The tribunal directed that the price of the shares would be established in a further award after a reduction of the penalty, the payment terms and conditions to be determined after further submissions.

26. The operative part of the Award was as follows:

"1. DT validly exercised the call option provided by Article 16 of the Shareholders Agreement over the shares that Elektrim owned in PTC;

2. As a result of its exercise of the call option provided by Article 16 of the Shareholders Agreement and subject to payment within 30 days of the price (as determined pursuant to no. 3 below), DT will acquire the shares that Elektrim owned in PTC and will be their owner;

3. The price payable for Elektrim's shares is the price to be established by the Arbitral Tribunal taking into account that Article 16(3) of the Shareholders Agreement includes a penalty as compared to a fair market value and this price shall be determined after reduction of the penalty in a further award, the payment terms and conditions to be specified by the Arbitral Tribunal in the light of further developments and submissions;

4. Elektrim is in material default pursuant to Article 16(1) of the Shareholders Agreement;

5. The issue of the costs of arbitration in respect of the Interim Orders, the present Award as well as this entire proceeding is reserved for a subsequent Award."

September 2006 Warsaw court order

27. On September 21, 2006, on the Trustee's application in the course of the bankruptcy proceedings, the district court of Warsaw enjoined Elektrim from disposing of its assets.

October 2006 arbitral award

28. On October 2, 2006 the Vienna arbitral tribunal in the arbitration between Elektrim and DT issued a Second Partial Award ("the October 2006 Award"). The order made by the tribunal was that DT would acquire full legal title to the shares on payment of an amount in cash not less than the current book value of the shares and the provision of an undertaking to pay any subsequent adjustment of the price. Consequently, by contrast with the June 2006 Award, the October 2006 Award authorised the transfer of the

shares to DT.

29. The Award recited the operative parts of the June 2006 Award, in which the tribunal had held that DT had validly exercised an option over Elektrim's shareholding in PTC. It further declared that on payment of the price to be determined, DT would acquire that shareholding. The tribunal said (in a somewhat imperfect translation):

> "32. In the present case, [DT] itself admits that a great uncertainty shrouds both the thing to be sold and the price for which it should be deemed to have been sold on 15 February 2005.
>
> 33. First, as regards the Option Shares, [DT] has appropriately declared that the present title to the Shares is uncertain, and was uncertain at the time of the exercise of the call option. It points out that "it remains unclear whether DT has acquired 226,080 PTC shares (i.e., over 48 per cent of the PTC shares), on the one hand, or only a single PTC share, on the other" [referring to DT's submissions]. It is known that at least one parallel arbitration between different parties bears on the title on those shares. The Arbitral Tribunal is not informed about those proceedings nor concerning any finding of the other Arbitral Tribunal, so that the above mentioned uncertainty [endures] to the fullest extent conceivable. Therefore the validity of the so-called "share purchase agreement" that would have been concluded on 15 February 2005 is put to doubt by reason of the indetermination of its very subject matter, an indetermination which the present proceeding at the present stage cannot lift in any meaningful way…
>
> 34. Second, as concerns the price of the shares whichever they are, this price is neither determined nor determinable at the present time."

30. The tribunal concluded that the exercise by DT of its option fulfilled the requirement to bring about the transfer of the shares once the determination of the precise number and price had been determined. The order made by the tribunal was that DT would acquire full legal title to the shares on payment of an amount in cash not less than the current book value of the shares and the provision of an undertaking to pay any subsequent adjustment of the price. It also ordered Elektrim to transfer "full factual control over the Option Shares" to DT.

31. The operative part of the October 2006 Award was as follows:-

> "1. Claimant will acquire legal title to the Option Shares owned by Respondent with effect as of 15 February 2005 upon payment by Claimant of

(a) an amount in cash not less that the current book value price for the Option Shares, based on the most recent financial statements of PTC available at the date of payment, and

(b) provision to Respondent of DT AG's irrevocable undertaking to pay the subsequent adjustment of the current book value price for the PTC shares owned by Elektrim within 30 days from the Arbitral Tribunal's award in this regard.

2. Respondent is ordered to transfer full factual control over the Option Shares to Claimant by enabling Claimant, to the extent Respondent may exert a controlling influence on these points, fully to exercise all ownership rights and power attaching to these shares, including by insuring that

(a) Claimant will be listed as the owner of the shares in the National Court Register.

(b) Claimant's nominees to PTC's Supervisory and Management Boards will be listed in the National Court Register."

32. On October 5, 2006 the Trustee sent a notice to the bondholders' committee notifying them of the award.

Adjournment of Polish bankruptcy petition from October 4, 2006 to October 27, 2006

33. On October 4, 2006 (when the Polish bankruptcy petition against Elektrim was due for hearing), Bingham McCutchen sent an e-mail to the Trustee's lawyers to say that certain named bondholders, who included not only Concord, Acciona and Trafalgar, but also Everest, confirmed that they approved of:

"(1) the Trustee making an application to the Polish court to request an adjournment of the Polish bankruptcy hearing for up to four weeks on the basis that the Bondholders require further time to consider Elektrim's composition application and the implications of the Vienna award; and/or

(2) accepting a court endorsed payment of no less than Euro 525,000,000 out of the funds paid by DT on terms that the bankruptcy petition is withdrawn; and/or

(3) applying for ET's application for bankruptcy petition to be dismissed."

34. The petition was adjourned to October 27, 2006.

Polish bankruptcy court rejects Telco application: October 12, 2006

35. On October 12, 2006 an application by Telco for an attachment over Elektrim's receivables from DT was rejected by the Polish bankruptcy court. The court said that the Trustee represented essentially all Elektrim's creditors and to prevent Elektrim from paying what it owed to the Trustee would in effect decide the bankruptcy proceedings against Elektrim.

Compromise with DT and payment of petition debt: October 20 to October 27, 2006

36. On about October 20, 2006 it was agreed between Elektrim and DT that DT would pay the book value of the PTC shares (€643 million) to Elektrim, and that Elektrim would pay €525 million to the Trustee for distribution to the bondholders.

37. On October 23, 2006, Bingham McCutchen were asked for the Trustee's bank account details, so that Elektrim could pay the petition debt. Elektrim paid €525m to the Trustee on October 26, 2006.

38. On October 27, 2006 Bingham McCutchen sent an e-mail to the Trustee's lawyers. It confirmed instructions from Acciona and Trafalgar (bondholders who, as I have said, held almost 40 per cent in value of the bonds and who together with Everest were members of the bondholders' committee). The e-mail said that the bondholders approved of the Trustee applying to the bankruptcy court for a direction that the payment by Elektrim was lawful; and if that direction was obtained, to permit the petition to be dismissed or to withdraw it.

39. In circumstances where the petition was dismissed the Trustee was to reserve its rights in relation to the quantum of the payment and any additional amounts which might be outstanding under the Trust Deed. Mr Torres, a senior analyst at Everest Capital Inc, confirmed in a declaration attached to the Everest Assignment to VH1 that Everest had supported the decision to withdraw the petition, although he described it as the Trustee's decision.

40. At the hearing on that day the Polish bankruptcy court ruled that the payment was lawful, and that the order of the District Court of Warsaw dated September 21, 2006 (to which I have referred, and which enjoined Elektrim from disposing of its assets) did not prevent the repayment. Among the points made by the bankruptcy court in its written ruling were the following: (a) although Telco opposed withdrawal of the petition it advanced no substantial grounds for its opposition; (b) transfer of the shares was not a voluntary act of Elektrim because DT was exercising a pre-existing right, and hence was not in breach of any court order; (c) the Trustee represented all the creditors of Elektrim, and Telco was not a creditor because it had not filed for Elektrim's

bankruptcy; (d) a petitioner which decided that it no longer had an interest in pursuing the bankruptcy was entitled to withdraw the petition.

41. In the light of the court's ruling, the petition was withdrawn by the Trustee on instructions of more than 30% of the bondholders, and the Trustee retained the money. The Trustee did not immediately distribute the money to the bondholders because of its concern that Telco might appeal against the dismissal of bankruptcy proceedings, resulting in Elektrim's liquidation and a possible claim by a liquidator for the return of the €525 million under "claw-back" provisions in Polish bankruptcy legislation. Telco did attempt to appeal, but its attempts failed.

Elektrim bankruptcy: August 2007

42. On August 9, 2007, Elektrim petitioned the Polish court for its own bankruptcy and was adjudicated bankrupt on August 21, 2007.

B LCIA arbitration

43. In 2005 Vivendi commenced arbitration proceedings in the London Court of International Arbitration ("LCIA") against Elektrim under their joint venture agreement claiming that Telco, the joint venture company, still owned or was entitled to the PTC shares.

44. On August 2, 2006 the arbitral tribunal (Mr Wolfgang Peter, Chairman; Mr Alan Redfern and Mr Jerzy Raski), made an order ("LCIA Order No 6") for interim measures, which enjoined Elektrim from voluntarily selling or agreeing to sell the PTC Shares. On August 25, 2006 Vivendi wrote to Bingham McCutchen and the Trustee giving notice of the order.

45. On October 23, 2006 the LCIA tribunal made a seventh interim measures order in the arbitration between Vivendi and Elektrim ("LCIA Order No 7"). By that order the tribunal declared that LCIA Order No 6 did not prevent Elektrim from applying the sum of €600 million (the book value of the PTC shares) paid or payable by DT in discharge of Elektrim's liability to the bondholders which had presented the bankruptcy petition.

46. On March 19, 2008 the tribunal by a majority ruled in favour of Vivendi. It decided (inter alia) that Elektrim was in breach of the joint venture agreement by taking actions which purported to dispose of the PTC shares, and by failing to hold them in trust for Vivendi or take such measures as would protect Vivendi's interests in the shares to the extent Elektrim had or might recover the shares. But the tribunal emphasised (at para 122) that it was not making a decision on the question of who had title to the PTC shares, which was a question for the Polish courts. This court was told that Elektrim is challenging the award in the Commercial Court.

C Trustee's first English proceedings (the contingent payment proceedings): December 2005

47. The bonds were due for redemption on December 15, 2005. On the following day, the Trustee commenced a claim in England against Elektrim seeking damages for the loss of the contingent payment/equity kicker. The basis of the action was alleged asset-stripping by Elektrim in breach of the Trust Deed resulting in the loss of the full value of the contingent payment obligation under the Bond Conditions. In February 2006 the Trustee obtained judgment in default. Subsequently the judgment was set aside and a stay of the proceedings was agreed. This court was told that these proceedings are now continuing.

D The DT press releases

48. In September and October 2006 DT issued two press releases about its interest in PTC. According to VH1, these press releases were issued by DT in conjunction with Elektrim and were materially misleading, because they gave Everest the impression that the PTC shares owned by Elektrim had been legally transferred and that DT had good title to the shares pursuant to and consistently with the June 2006 Award and the October 2006 Award. VH1's case is that Everest relied on these press statements as a basis for agreeing to the Trustee's withdrawal of the bankruptcy petition: Mr Davis' witness statement, July 20, 2007, para 44.

September 2006

49. On September 5, 2006 DT issued a press release stating that a DT group employee had been appointed chief executive of PTC and went on:

> "The new management appointment at PTC is a direct consequence of Deutsche Telekom's acquisition of the 48 per cent stake of PTC formerly held by the Polish company Elektrim. The acquisition is based on a call option awarded to Deutsche Telekom by a Court of Arbitration."

October 2006

50. On October 4, 2006, DT issued a press release stating:

> "In yet another award of October 2, 2006, the Arbitral Tribunal in Vienna conferred the ownership title to the disputable 48% of the shares in PTC to [DT] (with effect as of February 15, 2005), which remains in concord with the joint stand of [Elektrim] and [DT] presented to date. For this reason [DT] has paid an amount of more than Euro 600m, which surely covers the current book value of the shares in PTC."

E Vivendi's claims and Part 8 proceedings by the Trustee

51. On October 23, 2006 Vivendi wrote to the Trustee, and to Mr Roome, of Bingham McCutchen, as counsel to the bondholders' committee, and to Citibank NA as the agent, to notify them that the intended acquisition by DT of the PTC shares was unlawful; even if Elektrim and DT did successfully manage to place the money in the Polish court, it constituted the proceeds of an unlawful acquisition of PTC shares; and that any acceptance by the bondholders would constitute an unlawful attempt by Elektrim to defraud its creditors, and would constitute a preferential payment by Elektrim to one of its creditors and would be subject to challenge. The letter put the addressees on notice of the existing orders, injunctions and court decisions and of the serious implications of the acceptance of any payments, and warned that pursuant to Article 302 of the Polish Criminal Code acceptance of such monies would constitute a criminal offence. On February 1, 2007 Vivendi alleged that the €525 million were the "proceeds of [an] illegal agreement."

52. In the light of these claims, on March 26, 2007 the Trustee began Part 8 proceedings in England seeking directions, to determine whether any of the claims that had been intimated against the Trustee arising from the circumstances in which it had received the funds were a bar to distribution to bondholders.

53. On April 2, 2007, Lewison J made a representation order appointing two of the bondholders, Concord and Acciona, to represent all the bondholders pursuant to CPR, r. 19.7(2).

54. On May 1, 2007 Lewison J gave judgment in the Part 8 proceedings, holding that the claims intimated by Vivendi to the effect that the monies received by the Trustee were tainted lacked any merit; and made an order that the claims threatened by Vivendi and/or Telco had no reasonable foundation. The basis of the decision was that the effect of the LCIA Order No 7 in the arbitration between Vivendi and Elektrim was that Elektrim was authorised to make a payment in discharge of its liabilities to the bondholders and the discharge of those liabilities could not be achieved if the money belonged to someone else. Accordingly the plain intention of the LCIA tribunal was that Vivendi would have no proprietary rights over the money. The tribunal had considered that Vivendi did not even have a prima facie proprietary right. Elektrim and Vivendi were bound not only by issue estoppel in the arbitration but also by contract since the arbitration arose out of a contractual arbitration clause. If Vivendi were to bring a claim against the Trustee in an attempt to outflank the order that would be a fraud on Elektrim and an abuse of process. In addition the Trustee had no notice of a proprietary claim at the date when it received the money and since the money was used in discharge of the Elektrim debt it followed that the Trustee was a purchaser for value.

55. Lewison J also ordered that notice of his judgment and order of May 1, 2007 be served on Vivendi and Telco pursuant to CPR, r. 19.8A, which gave Vivendi the right to apply within 28 days of service to set aside the order of May 1, 2007, failing which the order would be binding on it: CPR, r. 19.8A(8). The notice was served on Vivendi and it was

informed that a further hearing of the Part 8 claim was fixed for the week of June 5, 2007.

56. What happened next is described in the following sections, but to put the events in context I mention them here. First, on May 29, 2007 VH1 acquired a substantial holding of bonds from Everest. Second, on June 1, 2007 VH1 as assignee of the bonds commenced an action in a federal court in Florida against Elektrim and the Trustee, and on Sunday June 3, before the Complaint in those proceedings was served, Vivendi issued a press release to announce the proceedings. The Trustee says, with some justification, that the intention was to seek maximum publicity for the claim, and to frustrate the Part 8 hearing before Lewison J.

57. On June 4, 2007, Vivendi's solicitors wrote to the Trustee stating that Vivendi did not intend to acknowledge service in the Part 8 proceedings. They said that notwithstanding the right under CPR, r. 19.8A to apply to set aside Lewison J's judgment of May 1, 2007, to the extent that the judgment purported to bind them, what had occurred was contrary to Article 6 of the European Convention on Human Rights.

58. A further hearing of the Part 8 claim took place on June 5-8, 2007. Vivendi did not appear. On June 8, 2007 VH1 was joined as a necessary and proper party.

59. Lewison J delivered a further judgment in the Part 8 proceedings on June 15, 2007, and declared that the bonds had not been redeemed by the payment of the €525 million and that the security granted pursuant to the Trust Deed was still in place. Subsequently the Trustee made distributions to the bondholders, and after further payments by Elektrim the bonds were redeemed in April 2008.

60. The Trustee submitted an amended proof in the Polish bankruptcy relating to the contingent payment.

F May 2007 Assignment agreement

61. On May 29, 2007 Everest entered into an Assignment Agreement (in which it was described as a "sophisticated investor") which assigned its bonds (having a face value of €38.3 million) to VH1, together with "all current and potential causes of action and claims in law and equity, known or unknown, including … past, pending and future claims" against (among others) Elektrim and the Trustee.

62. Normally, as was submitted on behalf of Elektrim, such bonds are traded by electronic entries and an Assignment Agreement is unnecessary. It is plain on the face of the document that the purpose of the assignment was to enable Vivendi to pursue, through VH1, its claim against Elektrim in yet another forum. Although Vivendi suggested that it claimed to have a purely commercial purpose in causing VH1 to purchase the bonds, its own evidence shows that the motive was to pursue the Elektrim claim.

63. Mr Davis, Vivendi's lawyer, stated in his witness statement in these proceedings dated July 20, 2007 that VH1 and Vivendi had sound business reasons for acquiring the bonds and saw the potential to realise a significant return on their investment from the related claims concerning the contingent payment. The acquisition was a significant investment and was a reaction to Lewison J's judgment of May 1, 2007. Vivendi had considered acquiring Elektrim bonds at various stages in the past and there had been negotiations with other bondholders. Discussions with Everest began in October 2006, when Everest contacted Vivendi. The acquisition of the bonds and their claims also formed a legitimate part of Vivendi's strategy in the major dispute with DT and Elektrim concerning control of PTC. Subsequently (witness statement of September 7, 2007) Mr Davis said that VH1 had never asserted that the acquisition of the bonds and their related claims had nothing to do with the Elektrim dispute, and that his previous statement never suggested that VH1's motivation in acquiring the bonds was purely commercial.

G Florida proceedings: June 1, 2007

64. On June 1, 2007 VH1 (suing as the assignee of claims held by General Motors Corp) filed a Complaint in the United States District Court, Southern District of Florida (Miami), against the Trustee and Elektrim. The original Complaint recited Lewison J's Order of May 1, 2007, and said that it had been procured by non-disclosure, and sought a freeze on the assets in the Trustee's hands.

65. VH1 filed an Amended Complaint in the Florida proceedings on June 7, 2007. The Amended Complaint against the Trustee was (1) for breach of fiduciary duty to General Motors; (2) for breach of the Trust Deed (clause 18) by failing to exercise due care when withdrawing the bankruptcy petition in Poland; and (3) for fraudulent conspiracy to reduce the total recovery under the bonds in a manner designed to defraud other creditors of Elektrim. The claim against Elektrim was for fraud, consisting of (a) fraudulently inducing Everest, on behalf of General Motors, to purchase bonds based on false statements regarding Elektrim's assets; (b) fraudulently inducing Everest on behalf of General Motors to purchase the bonds by representing that it would make the contingent payment when in fact it was allowing assets to be stripped which were material to the calculation of the contingent payment; (c) making false statements regarding the legality of its transfer of PTC shares to DT; and (d) failing to disclose its complicity in the illegal stripping of its assets by Mr Solorz-Zak and DT.

Claim against the Trustee

66. VH1 now accepts that all the allegations of fraud against the Trustee are to be withdrawn. Following the conclusion of the hearing, the judge was provided (at his request) with a further version of the Amended Complaint with the allegations of fraud against the Trustee deleted.

67. In a lengthy section headed "Facts" (paras 7 to 47) the allegations against the Trustee which were maintained included the following:

i) The Trustee was aware of an injunction issued on November 23, 2005 by the Warsaw court in the bankruptcy proceedings to secure all PTC shares held by Elektrim and was aware that it precluded any sale of the PTC shares to DT (para 18), and was aware of Polish court orders in June and July 2006 attaching Elektrim's rights in the PTC shares, but ignored them (para 20 and 21).

ii) The Trustee was aware of the joint venture agreement between Elektrim and Vivendi prior to the withdrawal of the bankruptcy petition (para 22).

iii) The Trustee collaborated with Elektrim and DT on a plan whereby the Trustee would withdraw the bankruptcy petition in exchange for receiving the consideration owed by DT to Elektrim for the PTC shares which had been unlawfully transferred from Elektrim to DT and the Trustee did not disclose to Everest or General Motors material facts relating to this plan, including the fact that the transfer of PTC shares from Elektrim to DT had been in violation not only of outstanding injunctions, but also of the June 2006 Award (paras 33 and 34).

iv) Although the Trustee had access to the October 2006 Award, it failed to disclose it to Everest or General Motors at any time prior to the withdrawal of the bankruptcy petition on October 26, 2006 (para 37).

v) The Trustee supported the adjournment of the October 4, 2006 bankruptcy hearing even though the adjournment was against the interest of the bondholders (para 38).

vi) When DT made a payment of €525 million to the Trustee on October 26, 2006, the Trustee did not inform either Everest or General Motors that it was acting in a manner inconsistent with the orders of the Vienna arbitral tribunal (para 40).

vii) On October 26, 2006 the Trustee, without disclosing to Everest or General Motors that DT and Elektrim had engaged in a transaction which was contrary to the direction of the Vienna tribunal, withdrew the bankruptcy petition, irreparably damaging VH1 (para 41).

viii) The Trustee did not distribute the funds but, seeking to insulate itself from liability, filed an action in the High Court in England seeking permission to distribute the funds, without disclosing that at the time it received the funds the underlying transfer of PTC shares had violated the June 2006 Award (para 42).

ix) The Trustee blocked VH1 from attending and voting at a meeting of the bondholders on June 4, 2007 (para 47).

68. The claim against the Trustee is for breach of fiduciary duty in the following respects (para 50):

i) Failing to disclose to Everest and General Motors the full contents of the October 2006 Award prior to the withdrawal of the bankruptcy petition and the effect of such withdrawal on the value of the bonds.

ii) Failing to obtain from Elektrim and disclose to VH1 the full content of the June 2006 Award before agreeing to withdraw the bankruptcy petition.

iii) Failing to disclose to Everest and General Motors that DT and Elektrim had engaged in a transaction which was contrary to the direction of the Vienna tribunal.

iv) Accepting tainted funds from Elektrim without consulting Everest or General Motors and without obtaining prior approval of the bondholders.

v) Failing to disclose to Everest and General Motors the risks of accepting tainted money.

vi) Failing to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction.

vii) Acquiescing in delays of the bankruptcy proceedings.

viii) Withdrawing the bankruptcy petition and thereby giving up the right to recapture fraudulently transferred assets and thus to maximise the value of the contingent payment/equity kicker.

69. It is alleged (para 51) that if Everest had known the contents of the June 2006 Award and the October 2006 Award, namely that the first award did not permit Elektrim to transfer the PTC shares in August 2006 and that the second award did not sanction that transfer, Everest would have opposed the withdrawal of the bankruptcy petition. While Everest and General Motors wanted to be paid they did not want to receive tainted money and the possible liability which would come with it.

70. It is claimed (para 53) that the Trustee had an obligation not only to warn Everest that the conduct was unlawful but also to avoid entering into unlawful transactions. Had Everest opposed a withdrawal, it would not have occurred, because the bondholders typically required unanimity before making important decisions and the other bondholders would not have wanted to participate in an unlawful transaction and incur the risks that the funds would have to be disgorged: para 54. If Everest had disclosed to

the bankruptcy court that the underlying transaction had taken place in violation of both the LCIA Order No. 6 and the June 2006 Award, the bankruptcy court would not have permitted the withdrawal of the petition: para 55. General Motors would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets which would have given significant value to the equity kicker; and it would have been able to recover the principal and interest owed on the bonds without having to accept tainted money: para 56.

71. In addition (paras 60 and 62), as a result of those matters, "including actual and constructive knowledge of material information that it did not disclose to Everest or [General Motors]" the Trustee failed to exercise the degree of care and diligence required by the Trust Deed (clause 18), and its conduct constituted a material breach of its obligations.

Claim against Elektrim

72. In the section dealing with the facts, the allegations against Elektrim are as follows:

i) Elektrim represented to Everest that it owned substantial assets including the shares of PTC (claimed by VH1 to be worth more than $3 billion) (para 8).

ii) The Vienna arbitration was "in part a set-up" since DT and Elektrim had secretly agreed to transfer the PTC shares to DT in return for at least the book value of the shares, which was only a fraction of their true value, and Elektrim was willing to transfer the PTC shares at less than fair value because it had previously been paid the full market value by Vivendi for the same shares (para 15). DT and Elektrim ignored the injunctions of the LCIA and the Warsaw court and proceeded with their scheme to illegally transfer the PTC shares to DT and conspired to defraud other creditors of Elektrim and to withdraw the bankruptcy petition without informing either Everest, General Motors or the bankruptcy court of the full circumstances and consequences of the transfer (para 19).

iii) Elektrim transferred the PTC shares to DT in violation of outstanding injunctions in the order of the LCIA (para 23).

iv) On September 5, 2006 and October 4, 2006 DT, acting in collusion with Elektrim, issued materially misleading press releases upon which Everest relied (paras 26 – 27 and 35 – 36).

v) Prior to the October 2006 Award Elektrim had collaborated on a plan with the Trustee and DT whereby the Trustee would withdraw the bankruptcy petition in exchange for receiving the consideration for the PTC shares (para 33).

vi) Elektrim asked for an adjournment of the October 4, 2006 bankruptcy hearing so that it could continue to implement the illegal plan, and its lawyers failed to disclose to the court that the PTC shares had already been transferred.

73. The claim against Elektrim (para 65) is that it engaged in a pattern of fraud which included fraudulently inducing Everest on behalf of General Motors to purchase the bonds based on a false statement regarding its assets, and fraudulently inducing Everest on behalf of General Motors to purchase the bonds by representing that it would pay an equity kicker when in fact it was allowing assets to be stripped from Elektrim which were material to the calculation of the equity kicker, making false statements regarding the legality of its transfer of PTC shares to DT, and failing to disclose its complicity in the illegal stripping of its assets.

74. In particular the following allegations were made:-

i) The agreement with DT was a fraud, and, supporting the agreement to withdraw the bankruptcy petition, Everest reasonably relied upon statements of DT made in conspiracy with Elektrim that the sale of the shares of PTC to DT was lawful and had been authorised and permitted by the Vienna Tribunal, and Everest relied upon DT's press releases which falsely stated that the transfer was made pursuant to orders of the Vienna tribunal: paras 68 and 69.

ii) All the false statements were made pursuant to a conspiracy to facilitate the unlawful transfer of PTC shares from Elektrim to DT. It is said (para 70) that "as long as the bankruptcy proceedings remained pending, the PTC shares that Elektrim had illegally transferred to DT could have been recaptured as fraudulent conveyances to the benefit" of VH1.

75. The Amended Complaint went on to assert that Elektrim did not disclose to Everest that the transfer which had occurred in August was not authorised by the Vienna tribunal: para 71. Everest would have opposed the withdrawal of the bankruptcy petition, and if it had opposed the withdrawal, it would not have occurred because the bondholders followed a course of conduct in which important decisions were made by consensus: paras 72 and 73.

76. If the bondholders had not withdrawn their petition for bankruptcy, VH1 would have been in a substantially better position because it would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets, including the PTC shares which had been transferred to DT, the value of which was much greater than the amount which had been paid by DT to the trustee: para 74.

77. Elektrim defrauded General Motors and the other bondholders by aiding and abetting the illegal stripping and fraudulent transfers of Elektrim assets, and as a result the bondholders, including General Motors, were deprived of assets which could have been used to pay the full value which Elektrim owed to the bondholders, including the full

value of the contingent payment/equity kicker: paras 75 to 77.

IV Anti-suit injunctions and applicable principles

78. On June 7, 2008 Elektrim issued Part 8 proceedings against VH1 for a declaration that VH1 was in breach of the no-action clause by commencing the Florida proceedings and for an injunction enjoining VH1 from continuing the Florida proceedings, and on June 8, 2007 Lewison J made a without notice interim order.

79. As I have said, on June 8, 2007, on the Trustee's without notice application, VH1 was joined as an additional defendant to the Trustee's Part 8 proceedings, and service on VH1 was authorised on the basis that it was a necessary and proper party. By the same order an interim anti-suit injunction against VH1 was granted in favour of the Trustee to restrain the Florida proceedings.

80. On October 12, 2007, Lewison J granted final anti-suit injunctions restraining VH1 from continuing the Florida proceedings. Notice of voluntary dismissal of those proceedings was filed on October 23, 2007.

81. The injunction granted in favour of Elektrim was to enforce the no-action clause. The judge referred to cases involving jurisdiction clauses (*Donohue v Armco Inc* [2002] 1 Lloyd's Rep. 425) and arbitration clauses (*The Angelic Grace* [1995] 1 Lloyd's Rep 87) in this context, but in fact on this aspect the case involves not a question of the appropriate or chosen forum, but the question whether a party may sue at all. VH1 accepted that if the no-action clause was applicable an injunction was the appropriate remedy, because the court would ordinarily enforce a negative covenant by injunction.

82. Nor was there any substantial dispute on the principles to be applied on the alternative ground for an injunction in favour of Elektrim, or on the ground for an injunction in favour of the Trustee. An injunction could be granted if the applicant could show that the pursuit of foreign proceedings was vexatious or oppressive. This presupposed that, as a general rule, the English court must conclude that it provided the natural forum for the trial of the action; and since the court was concerned with the ends of justice, account must be taken not only of injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him: *Soc Nat Ind Aerospatiale v Lee Kui Jak* [1987] AC 871, 896 (PC).

83. The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could and should have formed part of an English action brought earlier: see Dicey, Morris and Collins, *Conflict of Laws*, 14th ed 2006, para 12-073.

84. But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86; *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor.

85. In particular, an injunction may be granted to protect the process of the English court, and in particular to prevent the re-litigation abroad of issues which have been (or should have been) the subject of decision in England: *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 625, at [83]-[88].

V No-action clause

Clause 10 of the Trust Deed and condition 13 of the Bond Conditions

86. By clause 10 of the Trust Deed:

> "10.1 The Trustee shall not be bound to take any proceedings mentioned in Clause 9 or any other action in relation to these presents unless respectively directed or requested to do so (i) by an Extraordinary Resolution of the holders of the Bonds or (ii) in writing by the holders of at least thirty percent in principal amount outstanding of the Bonds and in either (i) or (ii) then only if it shall be indemnified to its satisfaction against all Liabilities to which it may thereby render itself liable or which it may incur by so doing.
>
> 10.2 Only the Trustee may enforce (i) [against the security provided by Elektrim] or (ii) the provisions of these presents. No Bondholder shall be entitled to proceed directly against [Elektrim Finance] or [Elektrim] to enforce the performance of any of the provisions of these presents unless the Trustee having become bound as aforesaid to take proceedings fails to do so within a reasonable time and such failure is continuing."

87. By condition 13 of the Bond Conditions:

> "13. Enforcement of Rights
>
> At any time after the Bonds become due and repayable, the Bond Trustee may, at its discretion and without further notice, institute such proceedings against [Elektrim Finance] or [Elektrim] as it may think fit to enforce the Bonds and the provisions of the [Trust Deed], but it need not take any such proceedings unless (i) it shall have been so directed by an

> Extraordinary Resolution of the Bondholders or so requested in writing by holders of at least thirty percent in principal amount outstanding of the Bonds and (ii) it shall have been indemnified to its satisfaction. No Bondholder may proceed directly against [Elektrim Finance] or [Elektrim] unless the Bond Trustee, having become bound to proceed, fails to do so within a reasonable time and such failure is continuing."

88. The Bond Conditions and the Trust Deed were to be construed as one document (Trust Deed, clause 5.1). The Bond Conditions were subject to the detailed provisions of the Trust Deed and the bondholders were entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Trust Deed (Bond Conditions, recitals). Nothing turns on the different formulations in clause 10 of the Trust Deed and condition 13, and therefore the question of the effect of a difference does not arise for decision in this case.

The judge's decision

89. The judge's approach was to consider the application of the no-action clause against the commercial context within which the words were used, and the purpose which it could be inferred that the provisions were designed to achieve.

90. The overall structure of the Trust Deed and the Bond Conditions considered in the light of the evidence led the judge to the conclusion that the bondholders could not be free to pursue their own claims to enforce performance of the bonds individually against Elektrim because otherwise the Trustee scheme did not work. Instead they must trust the Trustee to do it. Only if the Trustee failed to act could bondholders pursue their own course.

91. The purpose of the regime was to ensure that the class of bondholders all acted through the Trustee. That ensured that they all shared equally in the fortunes of the investment and that there was no competition between the bondholders. If an individual bondholder were free to pursue a claim based on a loss caused to the bondholders as a class, then either there was the potential for multiplicity of actions or for duplication of actions brought by the Trustee on the one hand and individual bondholders on the other.

92. The phrase "enforce performance of" the Bond Conditions in clause 10.2 of the Trust Deed was not confined to claims for specific performance. It must extend at least to a claim for damages for compensation for non-performance of the Bond Conditions. The phrase was apt to include any claim designed to vindicate the rights of a bondholder in his capacity as such.

93. The test of what claims were caught by the phrase should be purposive and substantive, and not procedural or dependent on the ingenuity of the draftsman. A claim designed to compensate a bondholder for the loss of something that would have belonged to him in

his capacity as a bondholder was caught by the prohibition, whether the cause of action was pleaded in contract or tort.

94. A claim such as that advanced in the Florida proceedings, which was designed to secure to the plaintiff the lost value of the contingent payment/equity kicker which would have become payable under the Bond Conditions was within the prohibition because (a) the claimed loss was one which was suffered by Everest in its capacity as bondholder, and the claim was therefore one which was designed to vindicate its rights as bondholder; and (b) the allegedly fraudulent statements were not made to Everest individually but, to the extent that they were directed at the bondholders (rather than to the world generally) they were directed to the bondholders as a class. The claimed loss was one which (if established) was suffered by all the bondholders as a class, rather than by Everest individually; and (c) the claimed loss was predicated on Elektrim having been declared bankrupt. If that had happened, the only way of recovering the value attributable to the equity kicker would have been by proving in Elektrim's bankruptcy. Proving in bankruptcy was one of the species of proceedings whose conduct in accordance with the Trust Deed and the Bond Conditions was exclusively within the control of the Trustee.

95. Consequently, the Florida proceedings were proceedings which, in substance, were proceedings to enforce the provisions of the Trust Deed and the Bond Conditions; and were therefore within the contractual prohibition.

VH1's appeal

96. The main points made by VH1 are these. VH1's claim against Elektrim was a claim purely in fraud, a Florida law tort. No claim in contract was made against Elektrim, either to enforce the Trust Deed or to claim damages for its breach. There would be nothing to prevent a bondholder from suing for misrepresentation which induced him to buy bonds.

97. That would be a personal claim, unrelated to the contract. Consequently, VH1 was not seeking to enforce the Trust Deed or Bond Conditions. The Florida claim was not a class claim which could be made on behalf of all bondholders. The claim was made to recover its own (or Everest's) losses, and not the losses of other parties. That was not a claim which the Trustee could bring. The claim was not open to all bondholders, since not all bondholders would be able to prove reliance, to prove that they saw the press releases and acted on them.

98. Where the ordinary natural meaning gave a commercially sensible result, there was no need to look any further. There was no reason to give the no-action clause a wide or purposive meaning when it could sensibly be given its literal meaning. On a literal reading, it was confined to contractual claims under or for breach of the Trust Deed. To the extent that the no-action clause is said to provide a defence to Elektrim against claims by bondholders in tort, including claims for fraud, it ought to be construed *contra proferentem* against Elektrim.

99. The judge put excessive weight on what he described as the overall structure of the Trust Deed which required the bondholders to give up their individual rights of suit against the issuer. That begged the question of what the Trust Deed provided. The bondholders did not give up any rights against the issuer but, rather, the contractual obligations of the issuer (in particular the obligation to pay) were assumed only to the Trustee and therefore could only be enforced by the Trustee. The parties did not make any provision in the Trust Deed for the possibility that bondholders might wish to bring claims in tort against the issuer or guarantor for fraud.

Conclusion on the no-action clause

100. I am satisfied that the judge approached the question of construction in the right way and came to the correct conclusion. In particular the commercial purpose of the no-action clause leads me to conclude that the no-action clause applies to claims which are in substance claims to enforce the Trust Deed or the bonds, as well as to claims which are in terms claims to enforce them.

101. In particular, as I said in the introductory section, the purpose of the normal bond issue Trust Deed is that bondholders should act through the Trustee, and share equally in the fortunes of the investment, and not compete with each other. The bondholders are treated as forming a class, and give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. The no-action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what are in substance class claims. That can apply to tortious claims as well as to contractual claims.

102. VH1 made its claim in the Florida proceedings as assignee of the bonds. The only loss VH1 claimed in the Florida proceedings was the loss of the contingent payment/equity kicker. The loss was said to arise from the fact that if Elektrim had been made bankrupt, the bondholders would have used the bankruptcy to recover assets of which Elektrim had stripped itself: Complaint, para 74.

103. The claims are all class claims: if Elektrim defrauded or deceived anybody by the DT press release, then it was the entire class of bondholders. The statements in the press release were not made to Everest or VH1 alone in some private capacity.

104. I accept Elektrim's argument that although framed as a claim in the tort of "fraud", the loss that VH1 claims is the loss of a contractual benefit, the contingent payment/equity kicker. Although the Complaint includes a claim that Elektrim fraudulently induced Everest to purchase the bonds, there is no suggestion in Mr Torres' declaration or in the Complaint that any representation was made to Everest before its purchase of the bonds.

105. Although the cause of action is not for breach of contract but in tort, the object of the claim is to compensate it for the loss of a contractual right or entitlement under the

Bond Conditions which it had by virtue of being a Bondholder. The claim is, in effect, enforcing Everest's right as a bondholder to a share of the contingent payment. The loss of the contingent payment would be a loss which was suffered by all bondholders alike. It was a class loss, and not a loss which would be in any way peculiar to Everest. It is the same loss which the Trustee is currently seeking to recover from Elektrim in proceedings in the Chancery Division.

106. I also accept that the allegations made in the Florida proceedings would be clear breaches by Elektrim of the Trust Deed: (1) under clause 15.1(A) of the Trust Deed, Elektrim undertakes that it will "at all times carry on and conduct its affairs and procure that its Subsidiaries carry on and conduct their respective affairs in a proper and efficient manner"; (2) stripping itself of assets would clearly be a breach of that obligation; (3) engaging in a fraudulent conspiracy with third parties for the purposes of deceiving the bondholders and facilitating asset stripping must also be a breach of the same obligation. The misconduct relied upon is a breach of a duty owed to all the bondholders.

107. I accept, therefore, that VH1's claims are the mirror image of contractual claims for breach of the Trust Deed: both the alleged wrongful acts and the alleged losses are identical. In summary, the claim is one which is designed to vindicate Everest's rights as a bondholder. I am satisfied, therefore, that the judge's approach to the construction of the no-action clause was correct and I agree with his conclusion.

VI Vexation/oppression

108. The judge indicated that he would have also granted an anti-suit injunction on the general discretionary ground of vexation/oppression in favour of Elektrim had he not been persuaded that the no-action clause applied. He granted an injunction in favour of the Trustee on that ground.

109. In view of the fact that I would dismiss the appeal in relation to the no-action clause, it is not necessary for me to say much about the injunction on that ground in favour of Elektrim. Permission to appeal has not been granted to VH1 in relation to the injunction in favour of the Trustee and what is before the court on this appeal is its renewed application for permission to appeal on notice, with the appeal to follow if permission is granted. VH1 accepts that it has a heavy burden to discharge in seeking to upset the judge's exercise of discretion.

110. The points of principle in relation to which VH1 says that the judge erred are these. It says, first, that it is important not to take too narrow or restrictive an approach to the drafting of the Complaint since, in Florida as in England, pleadings can be amended. Moreover, the anti-suit injunction granted by the judge restrains not only the proceedings as pleaded in the Complaint but any proceedings based on the allegations contained in the Complaint, an order which could only be justified if the Florida proceedings not only were unconscionable as pleaded but also could not be rectified by amendment.

111. Secondly, it says that it is not ordinarily the role of the English court to assess the merits of proceedings before a foreign court, particularly in respect of claims made under foreign law. A claim may be so unmeritorious as to be vexatious or oppressive but the test is a high one: the claim must be so bad as to be "utterly absurd" (*SIPC v Coral Oil Co Ltd* [1999] 2 Lloyd's Rep 606, in which such cases were described as "an extremely rare category"). The court should not act as if it were hearing an application for summary judgment by the defendant to the foreign proceedings (*Midland Bank plc v Laker Airways Ltd* [1986] QB 689, at 700), since that is a matter for the foreign court, especially where the assessment of the merits involves a consideration of the evidence which is likely to be before the foreign court and the likely findings of fact in the light of discovery procedures which have not yet taken place: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86.

A Injunction in favour of Elektrim

The judge's conclusion

112. The judge's decision was that the essence of VH1's Amended Complaint in Florida was that Elektrim made fraudulent misrepresentations and non-disclosures, in particular about the circumstances and legality of the transfer of the PTC shares to DT, in the two press releases issued in the name of DT which VH1 alleged (a) were part of a conspiracy between DT and Elektrim to defraud Elektrim's creditors; and (b) were intended to, and did, induce Everest and the other bondholders to believe that DT had lawfully acquired title to 48 per cent of the PTC shares pursuant to the determination of an arbitration tribunal. It was alleged that in reliance on these press releases Everest supported the decision to withdraw the bankruptcy petition, and but for the misrepresentations by Elektrim, Everest would have taken steps to prevent a withdrawal of the petition.

113. The judge considered that the claim was unsustainable because it was now conceded (contrary to Mr Torres' declaration) that Everest in fact saw the full contents of the October 2006 Award at exactly the same time, and that it was in the hands of Bingham McCutchen. It could not therefore be plausibly argued that it relied on and was deceived by the press release. In addition, for the same reasons as he gave in relation to the injunction in favour of the Trustee, the causal link between the allegedly fraudulent statements and the claimed loss was fanciful, and the claim as framed against Elektrim was also bound to fail. Nor was there any juridical advantage in suing Elektrim in Florida of which VH1 would be unjustly deprived if the anti-suit injunction is continued.

VH1's appeal

114. VH1 takes two jurisdictional points which it did not take before the judge. Neither of these points were in its notice of appeal, although the first point was taken in its skeleton argument in support of its application for permission to appeal. The first point is as follows. VH1 accepts the judge had jurisdiction to determine whether the Florida

proceedings were in breach of the no-action clause because the Trust Deed and the Bond Conditions were governed by English law contract. But it says that the judge did not have jurisdiction to grant an anti-suit injunction because the English court did not have a sufficient interest in, or connection with, the matter in question to justify such interference: *Airbus Industrie v Patel* [1999] 1 AC 119, 138.

115. The dispute between VH1 and Elektrim is a dispute between companies neither of which is domiciled in England and which is based on events taking place in the United States and Poland. VH1 could pursue its claim against Elektrim either in the United States or in Poland. England is not only not the natural forum, but it is a not a possible forum at all in that (in the absence of agreement or submission) it has no jurisdiction over VH1's claim or over any claim by Elektrim based on the matters in the Florida Complaint.

116. The second jurisdictional point (taken for the first time on the hearing of this appeal) is that Elektrim obtained permission to serve VH1 out of the jurisdiction on the basis that its claim for an injunction to enforce the no-action clause was a claim within CPR, r. 6.20(5)(c) to enforce a contract governed by English law, and it was not permissible to join a claim for an injunction on the vexation/oppression ground, since it is elementary that it is not possible to join a claim which is not within CPR, r. 6.20 to proceedings in respect of which permission has been granted under CPR, r. 6.20.

117. There is nothing in either of these points. On the first point, it cannot be said that there is no connection with England, or that it could be a breach of international comity for the English court to exercise jurisdiction. Elektrim is being sued by the Trustee for the loss of the equity kicker, which is the same loss which VH1 claims in Florida, under the terms of a bond issue governed by English law, relying on substantially the same facts as the Florida claims, namely asset-stripping by Elektrim. The connection with Florida is only that Everest is said to have received the misrepresentations there.

118. As regards the second point, it is true that the application was made on the basis of CPR, r. 6.20(5)(c) (contract governed by English law), and no separate basis of jurisdiction was identified for the alternative basis of vexation/oppression and collateral attack on the judgment of May 1, 2007. But it is now far too late for VH1 to take the point. It never objected to the English court's exercise of jurisdiction over the claim on the alternative basis, and there has therefore been a clear submission to the jurisdiction by VH1 in respect of this claim.

119. Nor do I see any error of principle in what the judge said would have been his exercise of discretion to grant an injunction on the alternative basis.

120. I accept that, in considering whether a cause of action in a foreign country is vexatious or oppressive on the ground that it is bound to fail, the English judge should not conduct a summary determination under English law principles without regard to the fact that the foreign system of pleadings may be more liberal, or that the foreign system of discovery may yield sufficient material to support allegations which in England

should not be made without existing evidence. I also accept that an error or omission in a foreign pleading should not be considered fatal, if it can be cured by amendment.

121. But the inherent weakness of a claim, taken together with other matters, may be an important factor in the consideration of whether foreign proceedings are vexatious or oppressive. The English court is not exercising a summary jurisdiction. It is entitled to take a view in the round, and it is entitled to be sceptical about attempts to cure by potential amendment claims which on their face are hopeless (and, in this case, in some respects bogus). In my judgment, the judge was entitled to take the view that reliance on the press releases was plainly a cynical device to establish an independent cause of action in Florida, and that it was inherently incredible that Everest could have relied on a press release rather than on the Awards themselves or on the advice of the bondholders' lawyers, Bingham McCutchen. The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion.

122. I accept Elektrim's submission that VH1 has not identified any basis for a conclusion that the judge erred in principle in finding that the claims in the Florida proceedings against Elektrim were hopeless. Consequently, I agree with the judge that an injunction would have been appropriate on this ground even if the no-action clause had not applied.

B Injunction in favour of the Trustee

Judge's decision

123. The judge noted that the recitation of the facts in the Amended Complaint was peppered with allegations of fraud against the Trustee. But all those allegations had been withdrawn, and it had not been explained why, and on what material, they had been made.

124. The claims were against an English trustee, concerning the Trustee's duties under an English law Trust Deed, expressly governed by English law and containing a non-exclusive English jurisdiction clause, with the Trustee being in England and the relevant acts having occurred in England. VH1 accepted that England was the natural forum for this claim, and did not suggest that there was any advantage in proceeding in Florida of which VH1 would be deprived if an injunction were granted. The sole substantive question was whether the claim against the Trustee was vexatious or oppressive.

125. The judge considered that the claims were hopeless. The main points he made were as follows.

126. The allegations based on failure to disclose the full contents of the June 2006 Award

and the October 2006 Award before withdrawal of the bankruptcy petition were based on factual allegations which were simply wrong.

127. As for the allegations that the Trustee failed to disclose to Everest its knowledge that DT and Elektrim had engaged in a transaction that was contrary to the direction of the Vienna arbitral tribunal, and that the Trustee had failed to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction, the fact was that the Trustee expressly applied to the Polish bankruptcy court for a determination whether it was entitled to accept the money offered by Elektrim, and the Polish bankruptcy court ruled that it was. The Trustee was both entitled and obliged to act on the instructions of bondholders holding more than 30 per cent in value of the bonds.

128. The allegations based on receipt of "tainted money" from Elektrim were hopeless because they were predicated on Elektrim not being made bankrupt, and in any event the judge had held in a judgment binding on VH1 that they were not tainted.

129. In addition, the allegations of causation of loss flowing from the alleged breaches were themselves fanciful. The Amended Complaint said that had Everest "opposed withdrawal and explained its reasons for doing so, the withdrawal would not have occurred" or that the bankruptcy court "would not have permitted the withdrawal". The Trustee's evidence was that its instructions to withdraw the petition came from holders of more than 30 per cent in value of the bonds and that there was no realistic prospect of showing that bondholders other than Everest would have acted differently had they known about the June 2006 Award. It adduced evidence from the bondholders supporting that position.

130. The possibility that Everest's protests could have dissuaded the Trustee from accepting the money and withdrawing the petition was fanciful. It ignored the Trustee's obligation to act on the instructions of bondholders holding more than 30 per cent in value of the bonds. The suggestion that Everest could have whipped up support from 30 per cent of the bondholders was equally fanciful. The fact was that the bondholders were being offered repayment of the bonds after many years of waiting. If Elektrim were declared bankrupt, it would have been because its liabilities exceeded its assets, which would in itself have prejudiced its ability to repay the bonds.

131. The possibility that Everest might have prevented the withdrawal of the bankruptcy was also fanciful. It had no *locus standi* before the Polish bankruptcy court, because it was not a creditor of Elektrim and had not filed a petition for Elektrim's bankruptcy; the Polish court had made it clear in its ruling of October 27, 2006 that a petitioner was entitled to withdraw his petition if he wanted to. It also ruled that a bankruptcy petition could not be founded on an allegation that a contingent claim, if established, would not be met. So the possibility of the equity kicker becoming payable would not have figured in any decision of the Polish court. The idea that the Polish court would have compelled the Trustee to proceed with its petition when it did not want to was fanciful.

132. Consequently, the Amended Complaint disclosed no arguable cause of action against the Trustee, and no arguable claim for recoverable loss arising out of the alleged breaches. It was a claim that is bound to fail and was vexatious.

133. In addition the claim in Florida against the Trustee should not be allowed to proceed because it was an attempt to mount a collateral attack on the judge's judgment in the Part 8 proceedings. One of the principal purposes of the Part 8 proceedings was to determine whether there were any meritorious claims against the Trustee concerning the receipt from Elektrim of the €525m and the events of October 2006. In the course of the proceedings the judge made a representation order under which the bondholders (including Everest) were represented by two bondholders. The representative bondholders, through leading counsel instructed on their behalf, argued that the receipt of the monies by the Trustee was lawful and that there was no impediment to distribution. The judge accepted that argument and gave judgment to that effect. VH1 as assignee of the bonds from Everest was bound by that judgment. Its claim against the Trustee in Florida argued precisely the opposite. Its claim in Florida was therefore a collateral attack on that judgment. In addition the claim that VH1 sought to advance in Florida was a claim that could and should have been raised in the course of the Part 8 proceedings in this court. If necessary, Everest could have applied to have been separately represented in those proceedings on the ground that there was a conflict of interest between it and the remaining bondholders. It did not do so, and should not be allowed to do so now.

VH1's application for permission to appeal

134. Mr Malek QC accepted before this court that England was the natural forum, but that was not a sufficient basis for an anti-suit injunction. The motive for the assignment and the withdrawal of the fraud claims did not affect the question whether the remaining claims against the Trustee were viable. Mr Malek QC frankly accepted that if the question was which side had the better case, the answer would be against his clients. But the judge was not entitled, in effect, to decide summarily that the claims were hopeless.

135. The principal points made by VH1 on this application are these. First, VH1 (as distinct from Vivendi) was not bound by Lewison J's judgment in the Part 8 proceedings, and was therefore not making a collateral attack on a judgment by which it was bound. The judge attributed too wide a scope to the Part 8 proceedings. In those proceedings, the judge gave directions for distribution of the money and for that purpose determined the issues which were raised by the Trustee and the other parties. VH1 was bound by the result of the Part 8 proceedings because of the representation order, but it was not a party to them and there was no reason why it should be compelled to bring its claims against Elektrim and the Trustee within those proceedings.

136. The Part 8 judgment was only concerned with whether the Trustee could distribute, and did not relate to the question whether there were any personal claims against the Trustee. VH1's case related not to the possibility that Vivendi or any other third party

might assert a proprietary interest but to the possibility that, the original petition having been withdrawn against payment, the money could be clawed back (either from the Trustee or the bondholders) in *subsequent* bankruptcy proceedings.

137. The extent of the duty of the Trustee to ensure that bondholders were sufficiently informed was fact-sensitive, and the Trustee should have informed bondholders that the transfer to DT of the PTC shares at book value was considerably less than their real value. If Everest had appreciated this, it would have persuaded bondholders to press for bankruptcy, or instruct the Trustee not to withdraw the petition. If the sale had been set aside in the bankruptcy, $3 billion would have been recovered for the bondholders.

138. The judge was wrong to hold that the allegation that the Trustee was in breach of duty by failing to disclose the risks of accepting tainted money was hopeless. Even if a duty to give legal or commercial advice to the bondholders was not expressly pleaded, it was clear that VH1's case was that the Trustee owed a fiduciary duty of care to disclose the risks to Everest. The other points relied on by the judge (viz. it was Bingham McCutchen, and not the Trustee, who had a duty to give advice; Everest was a sophisticated investor, which did not ask the Trustee for advice; and the Trustee had no means of knowing the identities of all of the bondholders, and so could not have assumed a duty to them) were all important factors which would need to be weighed by a court seised of the substantive dispute in deciding the existence and extent of the duty owed. But none of them was in itself decisive. VH1 did not allege that the Trustee undertook to provide general legal or commercial advice about the transaction, but only alleged that it undertook a narrow obligation to disclose what it knew (or should have known) about the transfer of the PTC shares to DT. That was simply an aspect of the Trustee's general fiduciary duty of reasonable care and skill, which was expressly preserved by clause 18 of the Trust Deed.

Conclusion

139. It is plain, and virtually admitted, that the purpose of the assignment was to enable Vivendi to pursue its claim in yet another forum.

140. A fundamental part of the claim against the Trustee was that it was in breach of fiduciary duty in failing to disclose to Everest and General Motors the full contents of the October 2006 Award prior to the withdrawal of the bankruptcy petition and the effect of such withdrawal on the value of the bonds, and in failing to obtain from Elektrim and disclose to VH1 the full content of the June 2006 Award before agreeing to withdraw the bankruptcy petition (Florida Complaint, para 50). The Complaint also specifically pleaded that although the Trustee had access to the October 2006 Award, it failed to disclose it to Everest or General Motors at any time prior to the withdrawal of the bankruptcy petition on October 26, 2006 (para 37);

141. Clause 8(c) of the Assignment Agreement between Everest and VH1 contained a representation by Everest that it was unaware of any evidence which contradicted the statements in the attached declaration of Mr Richard Torres, who described himself (as

I have said) as a senior analyst with Everest Capital Inc.

142. In that declaration (made under penalty of perjury) he said: "At no time prior to the decision to withdraw the bankruptcy petition did Everest have access to either the First or Second Partial Awards of the Vienna Arbitration Panel which I understand were not publicly available and which neither DT, Elektrim Finance BV, or Elektrim SA disclosed to Everest." (para 12). Clause 8(c) also contained a representation that: "In particular [Everest] further represents that it has not seen a copy of either the June 6, 2006 Partial Award or the October 2, 2006 Partial Award. .."

143. The Amended Complaint in Florida alleged (para 51) that if Everest had known the contents of the June 2006 Award and the October 2006 Award, namely that the first award did not permit Elektrim to transfer the PTC shares in August 2006 and that the October 2006 Award did not sanction that transfer, Everest would have opposed the withdrawal of the bankruptcy petition.

144. In his witness statement of July 20, 2007 Mr Davis, of Orrick Herrington & Sutcliffe, in Washington DC, repeated (para 43) the allegation that the Trustee had failed to disclose to Everest and GM the full contents of the October 2006 Award, and failed to obtain and disclose the full content of the June 2006 Award.

145. The claim was bogus.

146. The evidence which emerged was that the Trustee's Polish lawyers obtained a copy of the October 2006 Award at the October 4, 2006 bankruptcy hearing. They arranged for an English translation to be produced and supplied the Award in the original and in translation to Clifford Chance (the lawyers for the bondholders' committee) in Poland. As I have said, on October 4, 2006 Bingham McCutchen sent an e-mail on behalf of (among others) Everest itself authorising the Trustee to seek an adjournment of the bankruptcy hearing because the bondholders "require further time to consider … the implications of the Vienna award."

147. On October 5, 2006 the Trustee sent a notice to all bondholders notifying them of the October 2006 Award and its contents and of the adjournment of the bankruptcy proceedings on October 4, and stating that further information would be available to bondholders on a confidential basis on request. No bondholder made such a request.

148. In his witness statement of September 6, 2007 Mr Torres said merely: "While I accept that the October award was made available to the bondholders, no one drew my attention to the fact that neither of these awards were consistent with the claims made in the press release." (para 7). There was no explanation for the false statement in his earlier declaration. In reply for VH1 Mr Davis also had no explanation for the misleading way in which the case had been put.

149. Consequently it is now common ground that the bondholders had a copy and that Mr Torres himself had a copy shortly after it was made, and the October 2006 Award recited in full the operative part of the June 2006 Award.

150. I have not been persuaded that there is any prospect of a successful appeal from the exercise of the discretion. There is no suggestion that the judge applied the wrong principles. The main point made by VH1 on this application is that, whatever the weaknesses in VH1's claims in the Florida proceedings, it was wrong in principle for the judge in effect to decide summarily that they were hopeless. I have already dealt with the approach to this aspect in my consideration of the alternative basis for an injunction in favour of Elektrim.

151. It is accepted that England is the appropriate forum for the claims made in the Florida proceedings. The claims are against an English trustee, concerning the Trustee's duties under an English law trust deed, expressly governed by English law, with a non-exclusive English jurisdiction clause, and the relevant acts occurred in England. The alleged victim was the assignor of the bonds, Everest, a Bermuda company. The only Florida connection relied on is that Mr Torres, who managed the investment of the bonds for General Motors, and his employer Everest Capital Inc, are based there. Neither Everest nor Everest Capital Inc was the owner of the bonds. General Motors is a Delaware corporation with its principal place of business in Detroit, Michigan. I accept the submission for the Trustee that there is no real connection with Florida.

152. Once the bogus claims about non-disclosure of the Awards are stripped out, the remaining claims are for breach of fiduciary duty in accepting "tainted funds" from Elektrim without consulting Everest or General Motors, and failing to disclose to Everest and General Motors the risks of accepting tainted money; failing to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction; acquiescing in delays of the bankruptcy proceedings; and withdrawing the bankruptcy petition and thereby giving up the right to recapture fraudulently transferred assets and thus to maximise the value of the contingent payment/equity kicker. In addition (paras 60 and 62), as a result of those matters, "including actual and constructive knowledge of material information that it did not disclose to Everest or [General Motors]" the Trustee failed to exercise the degree of care and diligence required by the Trust Deed (clause 18), and its conduct constituted a material breach of its obligations.

153. It is surprising to find an allegation that the Trustee of a bond issue (whose main function is administrative and ministerial) has the duties which are pleaded in the Amended Complaint, and I am satisfied that for the reasons given by the judge, there are no such duties in the circumstances of this case under English law, the only possible applicable law.

154. The Trustee issued the bankruptcy petition under direction from the bondholders. On October 4, 2006 the bondholders directed the Trustee to adjourn the petition to allow time to consider the consequences of the October 2006 Award. Everest was party to that

instruction. On October 27, 2006 the Trustee was directed by more than 30% of the bondholders regarding the conditional withdrawal of the petition and Everest later approved that instruction. Consequently, acceptance of the funds and the withdrawal were actions which were undertaken on the instructions of the bondholders' committee. By clause 10.1 of the Trust Deed the Trustee is not required to take any actions unless it is directed or requested to do so either by an extraordinary resolution of bondholders or in writing by 30% in value of the bondholders, and in each case only if indemnified to its satisfaction. If it receives such instructions it has to act (subject to getting satisfactory indemnities). I accept the Trustee's argument that bondholders are expert investors who look after their own interests, and that market practice is that when things go wrong bondholders may organise bondholders' committees.

155. Everest was a member at the material times of the bondholders' committee which pursued the commercial interests of the bondholders assiduously. The bondholders' committee had experienced lawyers, Clifford Chance in Poland, and Bingham McCutchen in London. All of the correspondence with Vivendi, in which Vivendi set out why it considered any receipt of repayment of the bonds from Elektrim would be "tainted", was addressed to the bondholders' committee as well as to the Trustee. Bingham McCutchen took the lead in responding to Vivendi's letters.

156. I also accept the argument for the Trustee that the case was hopeless because, even if it could be argued there was a duty to disclose information to bondholders, it is impossible to argue that the Trustee failed to discharge the duty. The Trustee provided the October 2006 Award to the bondholders' lawyers. Bondholders representing more than 30%, including Everest, then instructed the Trustee to seek an adjournment on the basis that the bondholders required further time to consider the implications of the Vienna award. Consequently the Trustee was being told that the bondholders were being advised on this very point. It is fanciful to suggest that the Trustee should have gone further and second-guessed the advice of the bondholders' own lawyers.

157. It is alleged that (a) if Everest had known the contents of the June 2006 Award and the October 2006 Award, or (b) if the Trustee had warned Everest that the conduct was unlawful, then Everest would have opposed the withdrawal of the bankruptcy petition. While Everest and General Motors wanted to be paid they did not want to receive tainted money and the possible liability which would come with it. Had Everest opposed a withdrawal, it would not have occurred, because the bondholders typically required unanimity before making important decisions and the other bondholders would not have wanted to participate in an unlawful transaction and incur the risk that the funds would have to be disgorged. If Everest had disclosed to the bankruptcy court that the underlying transaction had taken place in violation of both the LCIA and the June 2006 Award, the bankruptcy court would not have permitted the withdrawal of the petition. General Motors would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets which would have given significant value to the equity kicker; and it would have been able to recover the principal and interest owed on the bonds without having to accept tainted money.

158. I consider the judge's conclusions on causation are unassailable. As at October 27,

2006, Elektrim, the debtor, had tendered in available funds the full petition debt and the Polish Court had approved the payment. There is no realistic prospect of showing that the Trustee could have gone on with the petition even had it wished to. The bondholders who gave instructions to withdraw the petition have given evidence that they would have given those instructions in any event.

159. I also consider that there is no arguable basis for an appeal from the judge's conclusion that the injunction was justified on the ground of protection of the jurisdiction of the English court. Vivendi chose not to apply to the English court to challenge the Order of May 1, 2007 or seek to restrain distribution of the €525m. Vivendi was served with notice of the May 1, 2007 order and was given the opportunity to apply to set it aside. The Part 8 proceedings were between the Trustee, Elektrim, and all of the bondholders and concerned the circumstances of receipt of the €525m and whether the monies should be distributed, and in particular whether the Trustee might be liable in respect of the events of October 2006. England was plainly the natural forum for any disputes concerning the bonds. Instead Vivendi attacked the decision collaterally by having VH1 acquire bonds and issue the Florida proceedings, a jurisdiction having no substantial connection with the dispute, with the object of preventing the distribution.

160. The allegation that the funds were vulnerable to legal challenge is a necessary element of the Florida claim about the "tainted funds." Vivendi's claims could and should have been brought in the Part 8 proceedings. The court ruled, on May 1, 2007, on the question whether Vivendi's arguments had merit, and decided that there was no proprietary claim and, also, that the Trustee was a bona fide purchaser for value without notice of any claim.

161. VH1 now says that the term "tainted" means something other than being subject to adverse claims, and means sums which may be clawed back in the Polish bankruptcy. I am also wholly unconvinced by the suggestion now made on behalf of VH1 that the reference in the Amended Complaint to "tainted" money is a reference to the possibility of a later clawback in the bankruptcy. It is absolutely plain that when the Complaint speaks of "tainted" monies it is referring to the claims of third parties in respect of the monies.

VII Disposition

162. I would dismiss VH1's appeal against the injunction in favour of Elektrim, and dismiss VH1's application for permission to appeal against the order in favour of the Trustee. Vivendi may have some genuine grievance about the loss of its investment in PTC (about which I say no more), but the Florida action was a misconceived method of pursuing that grievance.

Lady Justice Hallett:

163. I am indebted to Lawrence Collins LJ for the thoroughness and clarity of his analysis. I

respectfully agree with his reasoning and in the result.

Sir Anthony May, P:

164. I also agree.