[2011] UKPC 1
Privy Council Appeal No 0025 of 2009

JUDGMENT

Charles Villeneuve
Kyoto Securities Limited
v
Joel Gaillard
G Holdings Limited

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Phillips
Lord Walker
Lord Brown
Lord Collins
Lord Clarke

JUDGMENT DELIVERED BY
Lord Walker
ON

9th February 2011

Heard on 20 and 21 October 2010

Appellant	*Respondent*
Brian Moree QC (Bahamas Bar) Ms Margaret Gonsalves-Sabola (Instructed by Charles Russell LLP)	James Dingemans QC Monique Gomez (Bahamas Bar) (Instructed by Anthony Gold Solicitors)

1. On 26 April 2006 Lyons J handed down a judgment, which had been reserved for about seven months, dismissing a large monetary claim by the plaintiffs (Mr Joel Gaillard and a company controlled by him) and giving judgment for the defendants (Mr Charles Villeneuve and a company controlled by him) on their counterclaim. The plaintiffs appealed and on 8 February 2008 the Court of Appeal handed down a judgment, which had been reserved for about 16 months, allowing the appeal, setting aside the whole of the judge's order, and awarding damages totalling about $8.4m, plus interest, to the plaintiffs. (All references to $ are to US$ unless otherwise specified.)

2. The first general issue for the Board is whether the Court of Appeal was right to conclude that the trial judge erred so badly in failing to address his mind to indisputable facts as they appeared on the documentary evidence, and in failing to take advantage of seeing and hearing the witnesses, that his order had to be set aside. The second general issue is whether the Court of Appeal was right to go further and (instead of ordering a new trial) to reach its own conclusions on the documentary evidence and the transcript of the oral evidence.

3. The resolution of these two general issues (and especially the second) requires a close examination of the whole trial process, including the pleadings, the contemporaneous documents, and the transcript. This is a burdensome task (especially as the documents are scattered through the record in about 85 separate exhibits, instead of being presented in chronological order) but it is unavoidable. Because the documents are in such disarray a number of page references to the record are included in this advice.

The background

4. Mr Gaillard is a Frenchman, born in 1950, who at the age of 14 started work as a pastry confectioner at Locmine, a small town in Brittany [330]. Apart from a year's military service he worked in the business until 1990, first as his parents' employee and then from 1971 as proprietor. Under his ownership and control the business expanded enormously. It went from having one part-time employee to about 150 full-time employees, and from an annual turnover of about 120,000 francs to about 200m francs, supplying supermarkets and other big retail outlets. Mr Gaillard acknowledged in cross-examination [331] that he had expert accountants and a talented commercial agent who brought in about half the turnover of the business. He was modest about his own talent: "I made very good cakes" [330].

5. In 1990, still aged only 40, Mr Gaillard sold the business for a price which amounted, after payment of French tax, to about $40m [332]. He remained in France for some years with his money earning interest in the bank. His first major expenditure (about $8m) was on ordering a boat, the Lady Jenn, which was built in the United States and delivered in Nassau early in 1994 [262]. Before then Mr Gaillard had visited the Bahamas and in 1994 he decided to settle there. Since then he has been resident in the Bahamas, using the boat as his main home, though he has also travelled, particularly to Cuba and Canada. His evidence [262] was that he settled in the Bahamas both for fiscal reasons, and because he liked the sea.

6. Two individuals came with him to the Bahamas. One was Jean-Louis Autret, an old friend and (later) a business partner. He played a small part in the story. The other was Muriel Kerjouan (later Scoglio) who had been Mr Gaillard's personal assistant in the patisserie business. In the Bahamas she ran Mr Gaillard's office at Star Plaza, Nassau. She spoke French but was also fluent in English. By contrast Mr Gaillard did not become proficient in the English language, and he gave his evidence at the trial in French through an interpreter.

7. Mr Gaillard first met Mr Villeneuve at the offices of Scotia Bank in Nassau. Mr Gaillard needed a credit card and Scotia Bank were unhelpful. Mr Villeneuve's evidence [455] was that he arranged for Mr Gaillard to go to Royal Bank of Canada which provided one immediately. Later they met from time to time, sometimes on Mr Gaillard's boat. The first documented occasion was in April 1995 when Mr Villeneuve gave Mr Gaillard some advice, which was undoubtedly good advice, not to become involved in a dubious transaction for the purchase of Cuban sugar [766-767]. In August 1995 Mr Villneuve sent Mr Gaillard copies [778-790] of press cuttings and testimonials establishing his credentials as an expert investment manager. Mr Villeneuve's evidence [541] was that these were intended to be passed on to the authorities in Cuba to pave the way for a joint venture there. In any case it seems that Mr Gaillard was impressed by Mr Villeneuve as an investment expert.

8. Mr Villeneuve was French-Canadian, and fluent in French and English. He had a personal assistant, Susan Russel (or Russell), who was also French-Canadian and fluent in both languages. The two personal assistants frequently communicated by letter, fax or e-mail, usually in English but occasionally in French.

Relevant companies

9. Mr Gaillard controlled three Bahamian companies which call for mention. They were formed for him by Mr Gilbert Ward of Graham Thompson, a firm of Nassau lawyers. Mr Ward at one time acted for both Mr Villeneuve and Mr Gaillard. Mr Gaillard had 100% holdings in G Holding Ltd, an international business company (IBC) formed to hold his investments, and in Solenn Marine Ltd, which owned the Lady Jenn. G Holding Ltd often appears in the documents as G Holdings Ltd but the former appears to have been the correct name. There was another company called Dynamic Holding Ltd, of which Mr Gaillard owned 80% and Mr Autret owned 20% [271].

10. Mr Villeneuve had connections with several companies which appear frequently in the documentary and oral evidence, although the nature of his interest is not always apparent. The most important were (1) the second appellant, Kyoto Securities Ltd ("Kyoto"); (2) First American Company ("FAC"); (3) Globex Management Ltd ("Globex"); (4) Merlin Investment Management Ltd ("Merlin"); (5) St Andrew Private Placement Fund Ltd ("St Andrew PPF"); and (6) St Andrew Mutual Fund SA ("St Andrew SA").

11. Kyoto was incorporated as an IBC on 31 May 1996. It appears that it was twice struck off the register, but twice restored to the register, so that it was in existence to be joined as a party in these proceedings. It traded as an investment manager and broker [eg 963, referring to Mr Gaillard (or G Holding Ltd) as its client]. Mr Villeneuve was at one time President of Kyoto [eg 891] but later Ms Russel held this office [eg 874].

12. FAC was incorporated in 1988 under the law of the State of Nevada. Mr Villeneuve was one of its promoters and later its President [800]. It had previously been named America Maxifact System Inc and Edenville Creations Inc [800] and later it was renamed Nucleus Group. In 1995 Mr Villeneuve held 9,420,500 shares of $0.001 par value [805, 812]. The company was a US public company and in 1988 it had its prospectus approved by the Securities and Exchange Commission, but in 1995 its shares had not been traded for many years, and it had no income, no assets, no employees and no products [800]. The letter containing this information was written by Mr Charles ("Chuck") Campbell, who was a long-term associate of Mr Villeneuve and was also connected with QRS Music Inc [877].

13. Globex was not registered in the Bahamas [811]. Mr Villeneuve was its President [771].

14. Merlin was incorporated as an IBC on 22 December 1994 and was struck off the register on 1 January 1996 [810]. It was formed for Mr Villeneuve by Graham Thompson.

15. St Andrew PPF was incorporated as an IBC on 30 May 1996. It prepared an offering memorandum [817-840] indicating that it would be seeking a licence to operate as a mutual fund under the Mutual Funds Act 1995 of the Commonwealth of the Bahamas, but there was never any such registration or licensing [841]. The memorandum indicated that it had as its investment manager St Andrew SA, which was stated to have an address in Brighton, East Sussex, England. The administrator was stated to be Cardinal International Corporation (UK) Ltd with an address in Priors Marston, Warwickshire, England. The auditors were a firm of accountants in Eastbourne, England.

16. St Andrew SA was incorporated as an IBC on 20 October 1995 and was struck off on 31 October 1997. The offering memorandum stated [821]:

> "The Directors of St Andrew Mutual SA, the Investment Manager, combine many years of experience in the international financial markets with strong technical skills in financial engineering. Through a global network of financial contacts they have constant access to investment opportunities."

17. Four other companies call for mention as companies in which Mr Gaillard's funds were directly or indirectly invested: (1) Foratek International Inc ("FKI"); (2) Vasco Data Security International Inc ("Vasco"); (3) QRS Music Inc ("QRSM"); and (4) Hypersecur Corporation ("Hypersecur").

18. FKI was a Canadian company incorporated in Quebec on 30 January 1967 [1431]. Its shares were not listed on any stock exchange but were traded on the Canadian Over The Counter (OTC) market. It invested in some small capitalisation Quebec companies including CQI Biomed and GMP Plastix Inc, both of which were insolvent by the end of 1996 [1403].

19. Vasco was a technology company, incorporated in Delaware, engaged in the design and supply of security systems. Its shares were listed on the SmallCap NASDAQ market [1397]. Between 1999 and 2001 the prices and volume at which Vasco shares traded were very volatile [1352].

20. QRSM was a company incorporated in Delaware in January 1990 [1427]. It was previously named the Geneva American Group Inc [877]. It specialised in the manufacture and distribution of automated pianos. Its shares were traded on the NASDAQ OTC bulletin board [1400].

21. Hypersecur was a technology company incorporated in Utah but associated with a Canadian company, Corporation Hypersecur Inc [1311]. Its shares were traded on the OTC Pink Sheets market (explained by the expert witness at [1396]). It claimed to own a patent for automatic translation (the specification appears at [1235-1245]).

A brief chronology

22. Between 1995 and 2000 Mr Gaillard was engaged in investment transactions concerning (in one way or another) most of the companies mentioned in paras 11-21 above. In these proceedings he complains that Mr Villeneuve and Kyoto are responsible for heavy losses that he suffered on his investments. His case, in the briefest possible outline, is that he was induced by Mr Villeneuve's misrepresentations to spend $2m in buying from Mr Villeneuve half the shares of a worthless company, FAC, and that Mr Villeneuve was in breach of contractual obligations to repurchase the shares from him; that he relied on Mr Villeneuve's advice in taking up shares in FKI, a high-risk company that proved worthless; that he relied on Mr Villeneuve's advice to invest in Vasco and QRSM, also high-risk investments, and that Mr Villeneuve, through Kyoto, made secret profits, took undisclosed commissions, and failed to account properly for the investments in Vasco and QRSM; and that these breaches of duty were facilitated by the interposition of the St Andrew companies, which the expert witness, Mr Sylvain Perreault, described [1402] as "in fact depriving the plaintiffs of a direct control over their investments and adding a useless layer."

23. Parts of the evidence on these transactions will have to be considered in some detail, but it may be helpful to give a brief chronological summary of the main landmarks. In this summary (based on one helpfully supplied by Mr Dingemans QC) G refers to Mr Gaillard and V to Mr Villeneuve; M to Muriel (Kerjouan or Scoglio) and S to Susan Russel (or Russell).

1994:	about June – first meeting of G and V	
1995:	April – V advises G about Cuban sugar deal	[766-768]
	21 July – partnership agreement Dynamic/Globex	[775]

	31 Aug – V fax to G about FAC	[804]
	G transfers $2m in three tranches to Graham Thompson - for account of Merlin.	
	5 Sept. – Campbell letter to Ward about FAC	[800]
	8 Sept. – sale agreement (V to G) of 4m FAC shares for $2m	[802]
1996:	early in year G and V discuss investment in Vasco and QRSM	[813]
	28 May – Vasco issues to Kyoto $5m note	[865]
	1 June - St Andrew PPF offering memorandum	[817]
	5-25 June - G transfers $12.918m in tranches to St Andrews SA, receipt acknowledged	[842]
	June - Vasco issues 666,666 shares to Kyoto at $4.50 and 137,777 warrants, raising $3m	[876, 978]
	August - QRSM issues 1,142,857 shares to Kyoto for $2m	[877]
	20 August - V to G (first letter) $12.918m received V to G (second letter) 9,565 units of $1,000 in St Andrew PPF	[853] [855]
	31 Dec - balance sheet of St Andrew PPF showing book value of Vasco $4.118m, QRSM $2.857m	[883]
1997:	10 Feb - V/G “first FAC agreement”	[806]
	13 Jun - S to M urging G to complain about St Andrew administration	[888]
	24 Jun - G complains and asks to withdraw funds	[889-890]
	12 Aug - V/G “second FAC agreement”	[808]
	16 Sept - V to G: G holds 72.9% of St Andrew	[875]
	22 Oct - V to M: Vasco issuing further shares in lieu of interest payment	[898]

1998:	May - Kyoto sells 80,000 Vasco shares for $518,750	[917]
1999:	15 Feb - Kyoto portfolio summary: 486,000 Vasco shares at $6 book value	[917-918]
	22 Oct - first compromise agreement	[946]
	3 Dec - Hypersecur certificate (dated 3 Nov) sent to G Holding	[949]
2000:	25 Feb - V complains to Vasco on behalf of Kyoto client (G)	[963]
	7 Mar - Kyoto sends certificate for 300,000 Vasco shares	[966]
	9 Mar - Kyoto asks Vasco to convert bond	[1007]
	1 May - M/S exchange about Hypersecur patent	[961-962]
	15 Jun-5 July - M/S exchanges about lack of information and original documents	[969-977]
	19 June - V and Kyoto acknowledge liabilities	[980]
	16 Nov - V affidavit of loss of warrants	[981]
	16 Nov - Second compromise agreement	[1011]
2001:	16 Jan - Canadian proceedings for freezing orders	[763]
	12 Nov - Canadian orders set aside on ground that V domiciled in Bahamas	[763-764]
2002:	6 June - proceedings commenced in Bahamas	[1]

The parties' pleaded cases

24. Paras 40 and 41 of the judgment of Lyons J are as follows:

> "The plaintiff pleads that the relationship was one of an investment advisor and client. My finding is that it was not. The plaintiff must fail on his case as pleaded. It was on that basis that

> his entire case was based. He did not plead that it was a joint venture arrangement or anything else. He did not plead that it was some sort of joint venture partnership to which he committed the capital but somehow or other the defendant failed to hold up his end of the venture by making a mess of the investment strategy.
>
> I must decide the plaintiff's case as pleaded. I find against the plaintiff in respect of the basis on which he has pleaded his case. It must therefore be dismissed."

In the Court of Appeal Mr Dingemans QC (for the plaintiffs) successfully attacked this extremely summary manner of disposing of his clients' case, and he has made similar submissions to the Board. He argued that for the most part his clients' case did not rest on, and had not been pleaded as resting on, a particular relationship of investment adviser and client. Mr Dingemans also submitted that no case of partnership or joint venture had been put forward as a positive case by the defendants. It was, he said, an opportunistic afterthought developed in the course of the trial. It is therefore necessary to make some reference to the pleadings.

The pleadings

25. After some introductory averments the statement of claim [7-19] is divided by cross-headings into parts: FAC (paras 3 to 18); FKI (paras 19 to 26); Vasco (though the intended heading was omitted – paras 27-38); QRSM (paras 39 to 48); and Mutual Fund (paras 49 to 56). The causes of action pleaded in respect of FAC are deceit, breach of duty of care in advising and breaches of two repurchase agreements referred to in the chronology as the first FAC agreement (10 February 1997) and the second FAC agreement (12 August 1997). The principal causes of action pleaded in respect of FKI are deceit and breach of duty of care in advising (there was also a claim for breach of an oral contract but that was not pressed). The principal causes of action relied on in respect of Vasco and QRSM were breach of an oral agreement that Mr Villeneuve would himself invest in these companies, deceit, breach of duty of care in advising, conversion, and breaches of fiduciary duty in receiving undisclosed commissions and making secret profits. The pleaded causes of action in respect of the mutual fund (St Andrew PPF) were deceit and breach of a duty of care in advising. The Court of Appeal treated this last part of the claim as a duplication of the claims in respect of Vasco and QRSM, and Mr Dingemans has not presented it to the Board as a separate head of claim.

26. The defence and counterclaim [21-59] (running to over 150 paragraphs) contained a general denial (para 5) that the defendants had "acted a[s] financial managers or brokers to the plaintiffs" (which had not in terms been pleaded, although later particulars averred that they were acting as financial managers and brokers). In relation to FAC it was denied (para 7) that the plaintiff invested in FAC but Mr Villeneuve admitted (para 8) "that he stated that FAC would undertake investments in natural gas." He averred that the claim concerning FAC should have been brought against Merlin, and that Mr Villeneuve was at all material times acting as Merlin's agent. It was pleaded (para 15) that it was "inherently improbabl[e] that sophisticated investors such as the plaintiffs could reasonably have placed any reliance on the representations made by [Mr Villeneuve] or Merlin which they had not verified or sought support for" and (para 17) that "it was not reasonably foreseeable that the plaintiffs as prospective sophisticated investors would make any investment decision in reliance on any representations made allegedly by [Mr Villeneuve] personally or Merlin." Similar paragraphs recur in relation to FKI (paras 47 and 49), Vasco (paras 70 and 72), QRSM (paras 95 and 97) and the St Andrew companies (paras 118 and 120). All the duties of care pleaded in the statement of claim were denied, although there was an admission (para 82(vi)) that Mr Villeneuve lost Vasco share warrants. The allegations of conversion of Vasco and QRSM shares and of secret commissions and profits were simply denied (paras 83 and 106).

27. The counterclaim relied on the alleged compromise of claims under two agreements dated 22 October 1999 and 16 November 2000 (referred to in the chronology as the first compromise agreement and the second compromise agreement). These agreements were also introduced into the defence by a late amendment made at trial. The counterclaim claimed damages for breach of the agreements (but it is now common ground that the second compromise agreement need not be considered). The reply and defence to counterclaim [61-72] challenged the assertion that various terms were to be implied into the first compromise agreement, and averred that the defendants had not performed their obligations under it.

The trial

28. The trial began on Monday, 19 September 2005 and continued with sittings on 20, 21, 22, 23, 26, 27 and 28 September, when judgment was reserved. It seems that during the trial the atmosphere was oppressive both literally and metaphorically. The weather was very hot [137, 214] and the first day's hearing ended prematurely with a tropical storm [213]. The mood seems to have been contentious from the start. The first morning was wasted on an unsuccessful last-minute strike-out application by the defendants' counsel, who

also questioned whether Mr Dingemans had a work permit [138] and whether his witnesses should be permitted to remain in court [179]. On the first page of the transcript the judge [134] made the first of his lengthy interventions, some when witnesses were in the middle of giving evidence, which marked his conduct of the case [134-135, 141-146, 175, 292-294, 309-311, 317, 319, 371-373, 383. 562, 585]

29. The plaintiffs' complaint is about the judge's judgment, not about his conduct of the trial, but some passages in the judge's interventions seem to foreshadow his eventual summary dismissal of the plaintiffs' case. The following exchanges occurred while Mr Gaillard was in the middle of giving his evidence in chief, through an interpreter, about a complicated issue on the Vasco convertible loan note [309-311]:

> "THE COURT: Well, at the moment, you are all over the place like a mad dog's breakfast. There's another statement that's much cruder than that. But I will stick with the mad dog's breakfast. I am not getting – this game is simple. It is really so simple being counsel. Tell a story. That's what you have to do. You have to tell a story. Now, the opposition's job is to put holes in that story. Now, at the moment, and I get this quite regularly, instead of a story that starts at page 1 and reads through to the end, I get it starting at page 1 and then page 20 and then somewhere else. Now, at the moment, I'm not getting a story in any cohesive manner that I am able to understand.
>
> MR DINGEMANS: I'm sorry, my Lord.
>
> THE COURT: It is no fault to you if I tell you that at this stage. Because if I get to that stage of confusion – you know, it's not a prerequisite to being a judge that you have to have had a full frontal lobotomy. I realize that most counsel think that's the case, but most judges are fairly simple people who like to know the facts. At the moment, it's all over the show.
>
> MR DINGEMANS: My Lord.
>
> THE COURT: And I trust when Mr Moss comes to present his evidence it isn't all over the show. Because if you confuse the judge, counsel, the only thing the judge has then to do, the only course the judge has to do is go straight to the pleadings and

meticulously go through the evidence and see if you have proven everything as you have pleaded it. And that's the last pleading.

MR DINGEMANS: I did overnight as well to ensure that –

THE COURT: Well, Mr Dingemans, there's another rule: Know your judge. And I think all of these counsel can say, 'Look, tell him a story. He's a simple minded sort of a fellow. Don't try and confusion him, or whatever you do, don't present your case that confuses him.' Because if that's the case, he becomes very dangerous and particularly with the judgment that he hands down, so get the thread.

MR DINGEMANS: I will certainly try and improve that, my Lord."

30. After the wasted first morning, Mr Dingemans opened his case, taking the judge to many documents, for the rest of the day and next morning. Mr Gaillard gave his evidence in chief on the afternoon of 20 September and the next morning. He was cross-examined on the afternoon of 21 September and the next morning. Much of the questioning in cross-examination seems to have been directed to establishing that Mr Gaillard was an experienced investor with access to specialised advice, but it seems to have made little progress. After a lengthy series of questions the judge commented [342-343] "He is talking in general terms because you are just asking him general questions, which really are way beyond having assisted me, Mr Moss."

31. Mr Gaillard was also questioned about whether Mr Villeneuve was remunerated for his services. Mr Gaillard's response [344] was that Mr Villeneuve was "also a shareholder or a holder in the investment that he was advising me to take, and in others he would be remunerated according to what was earned, according to the profit." That reply seems to have been directed principally to FAC, Vasco and QRMS. As to FAC he added [345] that Mr Villeneuve "advised me to put money by selling me 50% of shares which he controlled, and if the work was done, Mr Villeneuve would have earned money." He was asked directly whether he and Mr Villeneuve ever agreed to become partners [353] and his reply was "Yes. He was supposed to have a part of the management company, but he never brought the money." Mr Gaillard was also asked about the partnership agreement with Globex [354] but said in re-examination [387] that it never occurred, (meaning, as the Board understands it, that no business was done under it). The judge's comments

[342-343, 346-347 and 353] suggest that at the time he got little out of this cross-examination.

32. Mr Gaillard had three other witnesses apart from his expert witness, Mr Perrault (who was not available until the following week). Mr Meledo had been Mr Gaillard's adviser when he lived in France. His evidence was that he tried to make some enquiries about FAC for Mr Gaillard, but gave no advice as he did not feel competent to do so [394]. He was not cross-examined. Muriel Scoglio was next. She produced a number of documents showing transfers of funds for investments: $2m in three tranches for FAC (the exhibits show that the $100,000 figure on the transcript at [406] should be $500,000), then Ff1.322m to buy Can$700,000 for FKI, and then other tranches totalling about $12.918m [416] (the sum acknowledged by Mr Villeneuve in the first letter of 20 August 1996 [853]). Mrs Scoglio also gave some detailed evidence about holdings of Vasco shares, and verified her correspondence with Ms Russel [969-977] trying to obtain further information and documents. She was not cross-examined. Mr Rene Lopez gave evidence that he had been engaged by Mr Gaillard, first in 1999 part-time and then in 2000 on a regular basis [429], as a financial adviser. This was after most of the events complained of but he did produce [431] two documents [876 and 877] which were important leads to Mr Gaillard's advisers in discovering the facts about the St Andrew companies and deals in Vasco and QRSM shares and warrants. Mr Lopez was asked very few questions in cross-examination. Mr Dingemans read some short Civil Evidence Act statements and then closed his case, except for the evidence of his expert witness.

33. Mr Villeneuve began his evidence on 23 September 2005, the fourth day of the trial. His evidence in chief occupied about a day and his cross-examination occupied another day. It is not easy to summarise his evidence. Both in chief and during his cross-examination his answers were lengthy and discursive. From the transcript they often seem to have wandered off the point without squarely answering the question (although the judge who saw and heard Mr Villeneuve took a different view). Neither the judge nor Mr Villeneuve's counsel seems to have made much effort to keep him to the point.

34. As to the general nature of his relationship with Mr Gaillard, Mr Villeneuve frequently referred to him as a partner [462-464, 486-487, 545, 554] and as a friend [545]. He referred to the written partnership agreement dated 21 July 1995 between Dynamic and Globex [462] but agreed in cross-examination [542-543] that the proposal for a joint venture in Cuba was not pursued, although he did not agree that that was because he did not want to put his own money into it. But he agreed that he had also referred to Mr Gaillard as a client [457-458, 539]. He agreed that he was an investment manager [536-

537] and said that he had many rich and sophisticated investors as clients [454]. He did not agree that Mr Gaillard was unsophisticated and very reliant on professional advice [543, 557]. He did agree that he had, part-time, assisted Mr Gaillard in connection with FAC, Vasco, QRSM and the St Andrew companies. He also agreed that without him Mr Gaillard would never have had anything to do with Merlin or Kyoto [545-546]. When pressed on the "investment manager" letterhead on his letters to Mr Gaillard (the letterhead later changed to "investment specialist" [eg. 875] and "investment advisor" [eg. 919]) his answer (though garbled) seemed to recognise that there were different strands to his relationship with Mr Gaillard [588]:

> "If I would be a dentist, if I'm writing a letter, that's only a letter at hand. I'm not trying to be investment manager. Something I can be partner [? span] I can be whatever he wants in every transaction doesn't mean we have the same role. You can interact with someone on different occasions. I'm not going to change my letterhead every time I change my letter."

35. Mr Villeneuve's evidence included several lengthy passages about "shell" companies, both in chief (some directed at FKI [473-480] and some at FAC [488-499]) and during his cross-examination (mostly directed at FAC [546-553]). He described (in chief) the transaction by which he sold FAC shares to Mr Gaillard [490]:

> "It is a private transaction between two gentlemen. I have the shell. I pay for the incorporation of shares of the company. I have 8 million shares. I will give you 50% in exchange for $2m, out of which I will use 75% to lend to the company or reinvest in some form to make the company benefit from this mass of money, of this $1.5m.
>
> So we never said that this company is going to be limited to natural gas. The company was in 1987 set up as a natural gas company. It is true to say that the first project I looked at was a natural gas project. Because it was something that I knew and I like."

Mr Villeneuve was asked (still in chief [493]) "Did you invest money in FAC?" His reply occupies almost three pages of transcript [to 496] but did not answer the question. He did not answer it when it was put to him again [497]. Eventually he agreed, in answer to a leading question from his own counsel, that he had ultimately bought Hypersecur [499]. There are then several pages

of transcript extolling the technology behind Hypersecur's patent. The judge joined in this discussion with apparent enthusiasm [500-508].

36. In cross-examining Mr Villeneuve Mr Dingemans seems to have tried to take each part of the claim in chronological sequence. He started with first contacts in Nassau and the Cuban sugar deal. Then he came to FAC [546] and pressed Mr Villeneuve about his stated intention, admitted in the defence, of FAC undertaking investment in natural gas projects [551]:

> "Q But with that defence, does it help us remember that you told Monsieur Gaillard that FAC would undertake investment in natural gas?
>
> A It would analyze it and we did. I cannot promise we're going to make. That's something before we study it.
>
> Q You also accept that you hadn't identified any other investments at the time that he invested, is that right.
>
> A. I repeat what I said earlier we do not comment on investment in a company before we study them. At that time when we agreed that you would buy the shares of the Shell, that's the only thing you agree on. From there, you will identify a source or what we call target companies, private companies that would merge from this company. We cannot know in advance what we're going to do with the company. And you know that would be illegal."

Later Mr Villeneuve seems to have become indignant [555]:

> "Hold on a minute. A check is given to me as the seller of the shares. And I don't have to report what I do with the money. It's my money. I've been paid. I sold something. I sold 4 million shares to someone. He's buying them. He's paying me and then I say, I will make available to this company that we own together 75% of the amount received in order for this company to carry out this project on which we will mutually agree which never happened, this is why October '99 because these never happened, listen, let's close all these deals and take 2 million shares and tell [? FAC] we signed it."

Then there were these exchanges [557]:

> "Q Monsieur Gaillard never even seen FAC, had he?
>
> A No.
>
> Q He'd never seen any board minutes or documents relating to FAC?
>
> A He don't need to.
>
> Q And he was relying solely on what you are telling him about FAC and his proposal. Do you agree with that in Canada?
>
> A I totally disagree. An investor is responsible for that he did when he invest more than $150,000. He bear the responsibilities to look at it. He took $2 million like you say way above $150,000 by law in Canada."

37. Mr Dingemans tried again at [559] and for the last time at [560]:

> "Q You gave [?got] $2 million for [? from] Gaillard by promising to use it in natural gas through FAC?
>
> A No. Stop asking that because I never said that.
>
> Q You never had any investment. You always intended to treat this money as your own?
>
> A No.
>
> Q You never told Gaillard of Geneva [later QRSM], did you, at this stage?
>
> A I didn't need to.

Q Yes. This is where the money is going. You didn't need to tell him that the first mutually acceptable project?

A I never told him before there was no project made in the company. [QRSM] is going to Geneva American.

Q Did you purchase Geneva stock?

A If this was a purchase of stock, 2000 shares something like that, it is not an investment. It is maybe at 25 cents. We are not talking about that. Hear me well, we're not taking over Geneva company. If we take purchasing stock of Geneva, buying 2000 shares at 10 cents, it is not buying back the company.

Q Did you purchase?

A It is not a project. It is an investment.

Q Just yes or no. Did you purchase Geneva stock?

A Probably.

Q And you accept you never discussed that with Monsieur Gaillard?

A Again, it is an investment. It is not a project. It is a cash employee investment. If I am in a stock to sell it at 2 cents, if I am buying an e-bill, we don't need to discuss that. It is an investment a tiny transaction, and we will discuss literally acceptable projects where we will bring the projections in the company and bring it public. I'm not going to call him everyday for $5000.

Q You accept you did not discuss it with Monsieur Gaillard?

A No.

Q You used some of the moneys that came into FAC from Mr Gaillard?

A From me. The money is coming from me."

38. Just before the short adjournment on the fifth day, Monday 26 September 2005, the judge intervened [562] complaining that counsel treated judges like idiots. He may have underestimated the difficulty of cross-examining this witness. After the short adjournment Mr Dingemans moved on to the first FAC agreement of 10 February 1997 and the second FAC agreement of 12 August 1997. Mr Villeneuve's evidence was that the effect of the agreements was that Mr Gaillard was contractually bound to sell, but that he (Mr Villeneuve) was not contractually bound to buy – that the agreements were in effect options [567]. This contention was not even hinted at in the defence, para 31 of which contained a wholly unparticularised denial of the relevant paragraphs of the statement of claim.

39. Then Mr Dingemans moved on to Vasco. Mr Villeneuve agreed [576] that it was he who raised this investment with Mr Gaillard, and that he (Mr Villeneuve) was known to the directors of Vasco. But he denied that he was advising Mr Gaillard; he was, he said, Mr Gaillard's partner [577].

40. During this part of his cross-examination Mr Dingemans was able to refer to two contemporaneous documents. One was a manuscript note [813] which appeared to show investments with a book value ("au coût achat") of about $11.856m apportioned to G (Mr Gaillard) $10m, M (Merlin) $1m and K (Kyoto) $0.856m. The other document [876] was a copy of a document, possibly a press release, relating to Vasco. It stated,

"During the second quarter of 1996, Vasco placed additional units consisting of 666,666 shares of Vasco common stock and 137,777 warrants, each of which entitles the holder to purchase one share of Vasco common stock at $4.50. The private placement of shares and warrants generated gross proceeds of $3m. In addition, in the same transaction, Vasco borrowed $5m and issued a $5m convertible note due on May 28, 2001.

. . .

> In addition, 55,555 shares of Vasco common stock and 8,889 Vasco warrants, each of which entitles the holder to purchase one share of Vasco common stock at $4.50, were issued as commissions related to the placement."

41. Mr Villeneuve accepted that Kyoto had bought Vasco shares at $4.50 [579] and sold them on to Mr Gaillard, through St Andrew PPF, at a higher price. The manuscript note [813] shows the book value of the Vasco shares as $6 each. Mr Villeneuve's evidence was that he had told Mr Gaillard (whom he referred to as both a client and a partner) that the shares had been purchased at a discount. Mr Villeneuve's answers to questions about this [580-582] are very hard to follow, though it is impossible to say how much is due to errors of transcription. But the following passage [582] is reasonably clear:

> "Q And if we look at [?876]. This is what you were also getting privately ... 5% or 7% cash or shares or 5% warrants?
>
> A Yes. It is paid by the issuer.
>
> Q So you accept that you received 7% of the value of $8m from Vasco?
>
> A Paid by the issuer.
>
> Q You got that?
>
> A Part that. And the other part was paid to us [?personally].
>
> Q And did you tell Gaillard about that commission that you received?
>
> A I don't recall if I said that but that has nothing to do with the transaction that we're doing. Vasco is issuing shares. Vasco look for someone that will make the commitment in buying the shares and they are going to pay a commission and I did.
>
> Q And do you accept that you received the warrant, the 7% warrants?

A Yes.

Q And what happened to those warrants?

A We signed the affidavits."

42. The last answer was an admission that Mr Villeneuve had lost Vasco warrants belonging to Mr Gaillard and had sworn an affidavit of loss [981]. Mr Villeneuve was challenged as to the validity of Vasco prices quoted in a bulletin when there were in fact no current trading transactions, and Mr Villeneuve had produced no expert evidence [584]. Mr Villeneuve said [586] that they had produced an expert report (if there was such a report it was not put in evidence, despite an order [1415] for the exchange of experts' reports).

43. Mr Villeneuve agreed [587] that in connection with Vasco he had used paperwork describing himself as an investment manager. He also agreed [589] that he had received warrants and commission in connection with Mr Gaillard's acquisition of QRSM shares. He agreed [591] that he had bought QRSM shares at $1.75 and sold them at $2.50 to St Andrew PPF (through which Mr Gaillard had indirectly invested in both Vasco and QRSM). There was this exchange [593]:

> "Q So you are not notwithstanding you purchased them on one day for a market rate from QRSM, you are selling them at an inflated price on the same day to St Andrew?
>
> A The value on that date is already different. The price had been fixed. We negotiated the price before."

He accepted [594-595] that he had signed a document stating that he was acting as a finder for St Andrew PPF. The QRSM warrants, he said [596], were kept as finder's fees.

44. Mr Villeneuve was questioned about whether he was controlling the way in which St Andrew PPF reported to Mr Gaillard, including an extraordinary error about a decimal point [600-601; the documents are 862 and 864], and about the size of Mr Gaillard's holding of Vasco shares [601-610]. Mr Villeneuve denied [605] that Mr Gaillard had been deprived of 160,000 shares. He accepted [607] that a further 80,000 Vasco shares had been sold in

May 1995. He did not accept that the proceeds (about $518,000) had not been paid to Mr Gaillard. His answers [607-609] are very hard to follow but seem to have been directed to the first compromise agreement of 22 October 1999.

45. In re-examination Mr Villeneuve reasserted that he had kept the warrants and commission in respect of Vasco and QRSM because he had earned them, and they were his [617, 622].

46. Mr Gaillard's expert witness, Mr Sylvain Perrault was called [627], produced his written reports [1389-1434] and was cross-examined [630-642]. His qualifications and experience in financial services were impressive [1389-1391]. In his opinion Canada, the USA and the Bahamas all applied the same basic principles to the regulation of investment advisers, including the "cardinal rule" of "know your client". He had interviewed Mr Gaillard in January 2003. He considered that his investment knowledge and expertise was limited. He was clearly not a sophisticated investor [1394]. He had committed more than half of his available capital (about $13.6m out of about $25m) to what Mr Perrault called the "disputed investments".

47. As to FAC the reports stated that it never had employees, products produced or services provided. Its records show no income and no net worth. It was "without any doubt, a venture situation and a high-risk investment" [1395]. Advice to purchase its shares would not have been reasonable, prudent and competent [1419]. By recommending such an investment Mr Villeneuve placed himself in a flagrant position of conflict of interest [1395]. Mr Perrault also stated in relation to FAC [1419]:

> "Irrespective of the nature of the investment, investing in an empty shell company is a very high-risk operation and does not make any sense. Especially so when there is no business plan, no pro forma budget, no objectives, no strategies, no comparable with similar ventures, no description of the management team. To me, it is the equivalent of signing someone a blank cheque."

48. The acquisition of Hypersecur shares did not produce any profit for Mr Gaillard. The company was worthless [1420].

49. Vasco had a trading history "typical of a 'tech bubble' stock." Its price peaked at $24.25 in March 2000 and had since been declining steadily. Investment in it was not prudent, competent and reasonable advice [1421]:

> "Vasco investment was of a speculative and high-risk nature and the size of the investment ($8,000,000) was not in the client's best interest and was not in compliance with the plaintiffs' financial situation. An investment of $8,000,000 through convertible debenture and stocks is, simply put, unthinkable given the financial situation of the company which was not profitable at that time."

50. As to the numbers of Vasco shares, Mr Perrault, who had studied the documents in detail, stated [1422-1423]:

> "According to Vasco's own statement, (exhibit JG-25) part of Vasco's placement in 1996 consisted of 666,666 shares at $4.50 for a sum of $3,000,000. Attached to the shares were 137,777 warrants entitling the holder to buy one share per warrant at a price of $4.50. Whether or not 180,666 shares and 137,777 warrants were diverted by Defendants is a matter for the Court to decide. Vasco also disclosed in that document that 55,555 shares and 8,889 warrants were granted as commissions related to the placement."

As to the lost warrants he stated [1423]:

> "This 'explanation' is a matter for the Court to decide, but I must add that securities regulations provide for very stringent rules and guidelines pertaining to the safekeeping of securities. I have never encountered a situation where a client would receive as an explanation that his/her certificates were lost. This is unthinkable from a securities professional."

The reports also gave detailed evidence [1424-1425] about the market values and restrictions on disposals of Vasco shares (the restrictions applied to most but not all of Mr Gaillard's shares).

51. As to QRSM the reports stated [1428]:

> "It is my opinion that the investment was of a high-risk and speculative nature and that the size of the investment ($2m) relative to the size of the company was not in the client's best

> interest and was not in compliance with the plaintiffs' financial situation"

The value of QRSM shares at the time of the supplemental report [July 2005] was $0.80.

52. As to FKI Mr Perrault stated [1432]:

> "FKI was a venture situation or long-term growth stock. This type of securities is always classified as speculative and high-risk in brokers/dealers classification. It is my opinion that the investment was of a high-risk and speculative nature and that the size of the investment (CAN$2,400,000) was not in the client's best interest and was not in compliance with the plaintiffs' financial situation."

It was not a "clean company" because it was engaged in litigation with its own subsidiary. Its shares were worthless at the time of the supplementary report.

53. As to St Andrew PPF Mr Perrault stated [1431]:

> "I fail to understand what would have been the advantages for the plaintiffs to use a private holding or a fund for their investments. In my opinion, the use of St Andrew was in fact depriving the plaintiffs of a direct control over their investments and adding a useless layer."

54. Mr Perrault was cross-examined on three main points. He agreed [631-632] that new regulatory laws introduced in the Bahamas in 1999 and 2000 were not in force in 1995. But he added [632] that the professional duties of a broker are "pretty universal" and do not depend on statutes or regulations. The second point on which Mr Perrault was cross-examined was as to Mr Villeneuve's status as an investment adviser. He said [634] that this was a question for the court, but that if there was a "commercial relationship" parts of his evidence might still assist the court [634]. He was not an expert on commercial relations [641]. The third point was whether Mr Gaillard was an unsophisticated investor. Mr Perrault stuck to his opinion that he was, calling on his own long experience of different types of investor on the Montreal Stock Exchange [637].

The judge's judgment

55. In his reserved judgment [702-724] handed down on 26 April 2006 Lyons J peremptorily dismissed the plaintiffs' claims in two paragraphs already quoted (para 24 above). He also gave judgment for the defendants on their counterclaim. At the outset of his judgment he had, without any introduction to the issues in the case, expressed decided views about the reliability of the principal witnesses, Mr Gaillard and Mr Villeneuve. He stated (para 3):

> "During the course of the trial I took care to critically observe the demeanour of the plaintiff and the defendant and the other witnesses as it was apparent to me from the commencement that the outcome of this case depended largely on the issue of credit – if not entirely so."

56. He formed a very unfavourable impression of Mr Gaillard (paras 4 and 5):

> "The plaintiff (Mr Gaillard) did not leave me with a favourable impression as to his truthfulness. I thought his evidence in chief was full of those half truths and evasions that are nowadays excused for political correctness but, if one is forthright about it, are better described as self-serving deceptions (see Onara O'Niell 2002 Reith Lecture). Only under some skilful cross-examination by counsel for the defendant did the plaintiff finally give some semblance of telling the court the whole truth.
>
> I found that during evidence in chief in particular, he was heavily guarded lest the whole truth (which in my opinion, he well knew) were to spill out. Instead of being forthright in his version of the relationship with the defendant, he offered snippets of the story only in the hope that the court would accept his spin of the evidence and come to a decision favourable to him. This was no more evident than in his approach in the extensive documents put before the court. He, in my view, carefully avoided attempting to sensibly and fully explain the documents in the context of their truthful place in the scheme of things. Rather he chose, in my view, to put these documents (with the context only half explained or not explained at all) before the court in the hope that the court would, again, be minded to accept the spin he hoped to put on them. By so doing, in my view, he was hopeful that the

court would accept his version of the events notwithstanding that it may well have been far removed from the truth."

57. His impression of Mr Villeneuve was much more favourable (paras 6 and 7):

> "By direct contrast, I found the defendant (Mr Villeneuve), to be a truthful witness. His evidence was to the point and both clear and precise. In fact I noticed several occasions, when it appeared to him (and to the court) that his evidence may have given the appearance of being unclear, he immediately corrected himself and clarified that evidence even if that clarification was unfavourable to the aspect of his case then under examination. He was completely unshaken in cross-examination despite the persistence and great skill brought to that cross-examination by counsel for the plaintiff.
>
> The upshot of this was that, where the evidence conflicted, I preferred the defendant's evidence to that of the plaintiff. This formed the foundation of my findings in this case and ultimately my judgment."

58. The judge then summarised in some detail Mr Gaillard's career down to his meeting with Mr Villeneuve (paras 9-23). The summary contains several references to Mr Gaillard's supposed evasiveness over matters which are of no real relevance to the issues, and which were not put to Mr Gaillard in cross-examination as matters of criticism (see para 13 as to his investments while he was resident in France, para 14 as to his awareness of the tax advantages of residence in the Bahamas, para 16 as to his yacht being owned by a company, and para 18 as to his purchase of some land on Paradise Island, which in fact he sold at a small profit, disclosed in his affidavit evidence).

59. The theme that Mr Gaillard was crafty and evasive recurred throughout the judgment: see for instance paras 35, 36, 45, 51, 57 and 59. Para 35 is a particularly notable example. The judge insinuated that Mr Gaillard understood the English language and had made use of an interpreter to give himself more time to think about his evidence. This suggestion was never put to Mr Gaillard during his evidence, either by counsel or by the judge himself, and there was oral and documentary evidence to show that Mr Gaillard, despite his years of residence in the Bahamas, was still not proficient in English [268-269, 285, 346, 538]. His associates in the Bahamas were mostly Francophones (or Hispanics; Mr Gaillard was fluent in Spanish).

60. The judge referred to the Cuban sugar deal, commenting, rightly, that on that Mr Villeneuve gave good advice (para 24). He referred to the plans for a joint venture in Cuba that came to nothing (para 26), but the parties did, he stated, subsequently enter into an investment plan. In para 30 the judge stated, putting down a marker for his ultimate conclusions:

> "The plaintiff's claim rests entirely on there being a relationship of investment advisor/broker and client. In direct contrast the defendant's defence rests entirely on his assertion that the relationship was of the nature of a joint venture partnership along similar lines as the proposed Cuban venture – that the defendant would provide the investment expertise and contacts and the plaintiff would provide the capital."

Analysis of the pleadings, on which the judge purported to decide the case, shows (see paras 25-27 above) that this was simply not how the issues had been defined in the pleadings. The notion of partnership as the defendants' all-encompassing defence seems to have developed during the course of the trial itself. If it had been pleaded it would no doubt have produced a robust response in reply, since (as Mr Dingemans put to Mr Villeneuve [583]) partners do owe each other duties to act in good faith.

61. It was only after he had dismissed the plaintiffs' claim, and turned to consider the counterclaim (para 43), that the judge mentioned any of the numerous companies referred to in the pleadings and the oral and documentary evidence. He described Mr Gaillard's case on both FAC and FKI as "clutching at straws" (paras 45 and 51) without so much as a passing reference to the first FAC agreement of 10 February 1997 and the second FAC agreement of 12 August 1997 under which Mr Villeneuve was to repurchase the FAC shares. He observed that Vasco was still "well and truly in business" (para 52) and that QRSM "still actively trades" (para 56) without so much as a passing reference to the case that the defendants had failed to account for secret profits and misappropriated shares and warrants. He accepted Mr Villeneuve's evidence that St Andrew PPF was not intended to be registered as a mutual fund under the Mutual Funds Act, ignoring the statements to that effect [817,819] in the elaborate printed offering memorandum that had been prepared and was in evidence. If there was never any such intention, that memorandum was an utterly false document.

62. After this rapid and selective tour round the companies the judge added (para 58):

> "As I have said I do not find it necessary, in view of my findings, to get into all the minute details of the dispute surrounding these investments."

He decided that the first compromise agreement of 22 October 1999 was decisive of the counterclaim. His view of this agreement (para 63) was that it

> "came from the plaintiff who by virtue of his greater financial strength and thus, superior bargaining power, and in full knowledge of all the defendants' alleged misdeeds, set out the terms of concluding the relationship. The defendant agreed to these terms."

He held that Mr Gaillard, and not Mr Villeneuve, was in breach of his obligations under this agreement. An important step to this conclusion was his finding that when the time limit of 15 December 1995 in clause 3 of the agreement was extended by a few days, time was not of the essence of this extension. He also held, wrongly (para 88) that clauses 6 and 7 of the agreement did not form any part of the case (Mr Dingemans had made clear that they did [382]).

The judgment of the Court of Appeal

63. The plaintiffs gave notice of appeal specifying the grounds of appeal in 32 separate paragraphs. The Court of Appeal (the Rt Hon Dame Joan Sawyer P and Ganpatsingh and Osadebay JJA) heard the appeal on 28 and 29 September 2006. They handed down a judgment of the Court, delivered by Ganpatsingh JA, on 18 February 2008. The judgment (para 94) acknowledged the regrettable delay and referred to the difficulties that the Court of Appeal was encountering, having been without a full complement of judges since December 2005.

64. After a brief but clear summary of the issues the Court of Appeal turned to the judgment below, concluding that it could not be upheld (para 7):

> "He [the judge] thought that the documents in the case, which we, with respect, think were highly relevant, were riddled with ambiguity so as to be unreliable and not accurate enough to point to the precise terms of the relationship. In the absence, in our view, of any reasoned analysis of the undisputed evidence, he

> came to the following conclusions, (i) that the parties' relationship based on the credibility of Mr Villeneuve was a partnership in which Mr Gaillard fully accepted the risks on the investments; (ii) that the respondents' role was restricted to devising an investment strategy and providing contacts for investment; and (iii) that the appellants were in breach of obligations in the agreement entered into. The appellants' claims were therefore dismissed in their entirety."

65. The Court of Appeal accepted the submission of the appellants (the plaintiffs at first instance) that the judge had failed to address the issues in the context of the whole body of evidence before him. They cited the well-known observations of Lord Bridge of Harwich in *Attorney General of Hong Kong v Wong Muk Ping* [1987] AC 501, 510:

> "It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability."

66. The Court of Appeal concluded (para 10):

> "There was, in our view, an abundance of indisputable and governing facts which the judge inexplicably failed to consider on the critical issues. These facts were eminently capable of enhancing the reliability of the evidence of Mr Gaillard rather than that of Mr Villeneuve who in the context of the evidence as a whole and more particularly the documentary evidence, was wholly discredited. In this situation, we are of the opinion that the issues are at large and we are entitled to make findings and come to our own conclusions on the evidence."

67. The Board concurs, with regret but with no hesitation, in the Court of Appeal's view that the judge failed to perform his duty of checking his impressions of the witnesses by reference to contemporaneous documentary evidence, and the probabilities of the situation. That duty was described by

Robert Goff LJ in a well-known passage in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1988] 1 Lloyd's Rep 1, 57:

> "Furthermore it is implicit in the statement of Lord Macmillan in *Powell v Streatham Manor Nursing Home* [1935] AC 243 at p.256 that the probabilities and possibilities of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

68. The judge wholly ignored some of the most important documents in the case, including the first FAC agreement, the second FAC agreement, the St Andrew PPF offering memorandum, the lengthy correspondence when Mr Gaillard (through Mrs Scoglio) was trying to get information and documents about his investments, various financial statements produced by Kyoto and the reports of Mr Perrault, the expert witness. The Court of Appeal rightly regarded Mr Perrault's expert testimony as "of cardinal importance and highly persuasive." Moreover the judge, while stating that he was deciding the case strictly according to the pleadings, seems to have misread the statement of claim and ignored inconsistencies between the defence and counterclaim and the unpleaded case which the defendants' counsel deployed at trial.

69. It is unnecessary to elaborate these points. The Board regret to have to say that the first-instance judgment was simply deplorable, and the Court of Appeal were right to recognise that the issues were at large. What is a much more difficult question is whether the Court of Appeal were right to proceed to give judgment for the appellants (the plaintiffs below) on every head of their claims, rather than taking the more usual course of ordering a new trial before another judge. It is entirely understandable that the Court were reluctant to order a new trial, with all the delay and expense that it would entail. At any new trial the judge would have been enquiring into events most of which lay ten years or more in the past, and moreover there would have been doubt as to

Mr Gaillard's ability to enforce any judgment that he might eventually obtain for damages and costs. Nevertheless the Court of Appeal's reasons for giving judgment in favour of the plaintiffs calls for close scrutiny. The Board examines the Court of Appeal's findings under four familiar heads: FAC; FKI; Vasco; and QRSM. But it is appropriate to start with the 1999 compromise, since the judge treated it as an agreement which was intended to resolve all the parties' differences, and of which Mr Gaillard, rather than Mr Villeneuve, was in breach.

The 1999 compromise

70. This agreement, dated 22 October 1999, was written in French and was signed, according to Mr Gaillard's recollection, in Montreal [302]. It was one of the few documents in the case that undoubtedly emanated from Mr Gaillard himself. There is an English translation in the record [946-948]. It has been agreed that the reference in clause 2 to "September 15, 1999" should be to "November 15, 1999".

71. The commercial context of the agreement was that Mr Gaillard had finally become disillusioned with Mr Villeneuve and wished to disengage his financial affairs. He was then aware of some but not all of what the judge called Mr Villeneuve's "alleged misdeeds", as Mr Dingemans established [304-305]. Mr Villeneuve had presented him with a draft agreement [944] to which Mr Gaillard strongly objected, as under that draft he was to give up most of his holdings in Vasco and QRSM, and to assume a liability for $350,000 in return for 2m restricted shares in Hypersecur (which were, on Mr Perrault's evidence, worthless) and an unsecured promise by Kyoto to pay within a year the sum of $525,000 already due as the proceeds of sale of 80,000 Vasco shares.

72. The operative provisions of the agreement prepared by Mr Gaillard (clauses 4 to 9) were all expressly made conditional on fulfilment of the conditions in clauses 2 and 3, which were in these terms:

> "2. Hypersecur issues, on [November] 15, 1999 at the latest, 2m shares, class A shares, in favour of G Holding.
>
> 3. Kyoto pays back to G Holding, on December 15, 1999 at the latest, the total amount of the principal of the convertible note dated May 28, 1996 between Kyoto and Vasco Corp, a Delaware company, an amount of US$5m as well as the accrued interest on this capital at the date of reimbursement."

It is common ground that Mr Gaillard extended the 15 December time limit in clause 3 to 28 December "in order to make things easier for him because he said he was having difficulties" [303]. (Mr Dingemans was understood to say in his oral submissions to the Board that the extension was to 23 December, but on any view there was only one short extension.)

73. The judge held (para 83), without giving any further reasons, that "Time was never made of the essence beyond the 15 December 1999." The Court of Appeal did not refer to the extension, but treated Kyoto's admitted failure to pay $5m together with accrued interest as a repudiatory breach of contract on the part of Kyoto. The Board consider that that was the correct conclusion. Clause 3 contained both a contractual obligation of which time was of the essence (as shown by "at the latest") and a condition precedent to the obligations contained in the later clauses. The very short extension which Mr Gaillard granted as an act of indulgence did not postpone the time for performance of the obligation, and fulfilment of the condition, beyond the expiration of that short extension. Mr Gaillard and his companies were not therefore in breach of the 1999 compromise, nor did it operate to terminate all obligations on the part of Mr Villeneuve and Kyoto.

FAC

74. The Court of Appeal considered this part of the case at paras 16 to 21 (the heading before para 13 seems to be in error). The Court concluded, rightly, that the second FAC agreement dated 12 August 1997 provided a short answer to this issue, subject only to the effect of the 1999 compromise (para 21). By the second FAC agreement [original French version at 808, translation at 809] Mr Gaillard and Mr Villeneuve agreed that the former would sell to the latter all his shares in FAC, for what he had invested ($2m) "majoré d'un rendement de 16% annualisé." Mr Villeneuve said at trial that the agreement merely gave him an option to buy, an argument not hinted at in the defence. Such a suggestion is completely inconsistent with the commercial context. It is also negatived by the second clause of the agreement which states,

> "L'acheteur pourra racheter les actions par tranche de 50% sous reserve de son engagement formel a acquerir la totalité."

the last ten words being added in ink and initialled.

75. It is not therefore necessary for the Board to endorse the Court of Appeal's strongly expressed findings about Mr Villeneuve's conduct over FAC (para 18):

> "This claim to the funds invested in FAC clearly shows that the promises and representations made by Mr Villeneuve, as to the prospects of the investment were false. There was absolutely no reason for Mr Gaillard to invest US$2m in a company with no worth, unless, based on the trust he placed in Mr Villeneuve, he believed what he was told. There was apparently never any intention to invest in any project whatsoever. The whole arrangement was a fraudulent sham to obtain funds from Mr Gaillard based on his belief that the investment was a good one. This conclusion seems unavoidable in light of the various inconsistent positions being taken by Mr Villeneuve. First he says the money is his. This is in the face of agreements to give it back. Then he says conveniently in his pleadings, that it was intended for investments in natural gas. But in his evidence under cross-examination he resiles from this position. Such a party is simply not worthy of belief, and his conduct is open to the interpretation that it was fraudulent."

In the last sentence of this passage the Court of Appeal seems to have started to draw back a little from a positive finding of fraud. The Board think it was right to do so. The circumstances surrounding Mr Villeneuve's sale of 4m FAC shares for $2m must arouse deep suspicion, but it is a very strong thing for an appellate court to find fraud proved when the lower court has rejected the claim, and in this case it is not necessary to do so.

76. The FAC episode is however highly revealing as to the characters and attitudes of the two principal parties. Reading the record of Mr Villeneuve's cross-examination about it, even with many garbled passages in the transcript, it is hard to credit the judge's conclusion that Mr Villeneuve was "completely unshaken in cross-examination." It is even harder, reflecting on the undisputed facts concerning the transaction in FAC shares, to credit the judge's conclusion that Mr Gaillard was a sophisticated investor pretending to be unsophisticated. He paid $2m for 4m shares, which sounds a lot of shares until it is pointed out that each share had a nominal value of one-tenth of one cent [812]. The money was going, not into FAC, but into Mr Villeneuve's pocket, subject only to his promise (which he admitted in his defence but denied in his evidence, and never performed) to provide $1.5m to FAC for investment in natural gas projects. Mr Gaillard seems to have trusted and relied on Mr Villeneuve

completely, and Mr Villeneuve seems to have ignored the huge conflict of interest involved in the transaction.

FKI

77. The Court of Appeal dealt with Mr Gaillard's investment in FKI at paras 22 to 28. In his evidence in chief Mr Villeneuve described FKI as a shell company which he had suggested to Mr Gaillard, who was looking for a shell company [474-475]. There is clear documentary evidence (a letter in French dated 20 August 1996 and signed by Mr Villeneuve, described in the letterhead as investment manager [853]) that Mr Villeneuve had received $1,750,165 and converted them into Can$2.4m for a placement of FKI shares at Can$0.40; and that he had already received approximately Can$700,000, used to buy FKI shares on the market (the English translation at [854] omits part of the text, but the defence [31] admits that 1.4m shares were purchased at Can$0.50; Mr Perrault [1403] reports this as Can$0.40). It seems clear that Mr Villeneuve was here acting as Mr Gaillard's broker and investment manager. Mrs Scoglio's evidence confirmed this transfer [408].

78. The evidence of Mr Perrault as to FKI has already been summarised (para 52 above). It was not challenged in cross-examination. Moreover, Mr Villeneuve never disclosed to Mr Gaillard his conflict of interest as an officer of FKI, something that Mr Gaillard's advisers discovered later (see clause 5.3 of the 2000 compromise [1014], quoted in para 25 of the Court of Appeal's judgment). Mr Perrault's investigations [1403] showed that although the private placement was to be of 6m shares at Can$0.40 per share, at a total cost of Can$2.4m, FKI only ever received Can$2.072m. There is room for suspicion that the difference was represented by FKI shares taken up by the defendants themselves. The Court of Appeal (para 24) made a finding to that effect but Mr Perrault's evidence [1403] did not justify it (he used the word "apparently"). But there was no defence to the straightforward claim for breach of a duty of care in investment advice, which is sufficient to justify the Court of Appeal's finding of liability. Under the 2000 compromise the defendants were obliged to transfer 3m FKI shares to G Holding Ltd, but the undisputed evidence of Mr Lopez [432] was that they were unable or unwilling to make that transfer, and it was never made.

Vasco

79. Vasco differed from FAC and FKI in that it did carry on business activities and there was a market (though an extremely volatile one) in its shares. But Mr Perrault's view was that for Mr Gaillard to invest $8m ($3m in

shares and $5m in a convertible debenture) was [1398] "simply put, unthinkable when one realises that Vasco's assets were at that time $1.364m" (see also para 49 above). In the event, however, Mr Gaillard did not actually suffer a loss on the Vasco shares that he did eventually own and control. His substantial claims in connection with Vasco were for breaches of other duties.

80. Mr Gaillard's first claims in relation to Vasco were for breaches of duties of care in advising, both on the original investment, on the acquisition of more shares in lieu of bond interest, and on the conversion of the bond into shares. Mr Villeneuve accepted that he was known to the directors of Vasco and that he had brought Vasco to the attention of Mr Gaillard [576-577] but denied advising him. As to the conversion of the bond the statement of claim relied specifically on a self-serving letter dated 25 February 2000 [963] from Mr Villeneuve to the directors of Vasco. It refers to Kyoto having invested $8m "for one of its clients" and to "sudden changes in Vasco policy towards Kyoto". The letter was self-serving because Mr Villeneuve had, through Ms Russel, encouraged Mr Gaillard to make a complaint [888-889]. The Board agrees with the Court of Appeal's comments, set out below, on this letter.

81. These breaches of duties of care did not by themselves result in loss. But they were supplemented by other claims (for conversion, breaches of fiduciary duty and failure to account) arising out of the way that Mr Gaillard's investment in Vasco was effected and managed by Kyoto and the St Andrew companies. Mr Villeneuve's name never appeared in the St Andrew PPF offering memorandum, but he readily accepted that he was closely involved in the arrangements under which it was held out as a mutual fund with St Andrew SA as its investment manager. Mr Villeneuve's case [578] was that it was a sort of private joint investment vehicle for three participants – Mr Gaillard, Merlin and Kyoto, as shown in the manuscript memorandum already referred to [813] (see also the financial statement at [884]; Eterna is Merlin under a new name or incorporation). Mr Gaillard's case was that he himself provided the whole of the funds ostensibly invested on behalf of these three participants, and that the holdings attributable to Merlin and Kyoto represented secret profits made in breach of fiduciary duty. Mr Villeneuve accepted (as he had to in face of the documentary evidence [876-877]) that he and Kyoto had made a turn on the placement of Vasco and QRSM shares and had received commissions, but asserted that they were entitled to do so. In the absence of informed consent by Mr Gaillard, which was not established, they had no right to make these secret profits.

82. The precise numbers of shares involved are difficult to ascertain, because the St Andrew PPF accounting was suspect, and Mr Gaillard was encouraged to take up further Vasco shares in lieu of interest payments on the

convertible bond, and did so (Mr Perrault [1399] regarded that as a further example of bad advice and conflict of interest). Mr Villeneuve's evidence did little to clarify the numbers. He seems to have had an interest in obfuscation. A letter dated 16 September 1997 [875] signed by Mr Villeneuve shows 666,666 Vasco shares originally held by St Andrew PPF, of which 486,000 are allocated to G Holding (leaving 180,666 ostensibly owned by Merlin and Kyoto). It then lists a further 103,556 shares (wrongly added up as 104,042 shares) issued down to June 1997 in respect of bond interest, and approximately 35,000 in respect of bond interest at September 1997. Mr Perrault's researches established that Mr Villeneuve or Kyoto received a further 55,555 Vasco shares and 8,889 Vasco warrants as commission. Mr Gaillard should have been entitled to 137,777 warrants, but they were lost.

83. In May 1998 Kyoto, acting with Mr Gaillard's consent, sold 80,000 Vasco shares for $518,750 (i.e. at about $6.48 a share) but failed to account for the proceeds. This sale is shown in a portfolio summary prepared by Kyoto dated 15 September 1999 [917] and Kyoto's failure to account for the proceeds was acknowledged in clause 6 of the 1999 compromise [947]. Eventually G Holding became registered holder of only 300,000 Vasco shares (share certificate dated 2 March 2000 at [967]). Apart from Mr Perrault's researches, there was evidence from Mrs Scoglio [418-422] about the number of missing Vasco shares. She put the number at 210,922: 186,000 as the difference between 486,000 and 300,000 and 24,922 as shares in respect of bond interest which were unaccounted for.

84. The Court of Appeal dealt with St Andrew PPF at paras 29-30 and with Vasco at paras 35-42. They covered all the points mentioned above except for the missing warrants and the additional 24,922 shares identified by Mrs Scoglio. They said of Mr Villeneuve's letter of 25 February 2000 [963] that in it he

> "acknowledged that, (i) this investment was made for one of the respondent clients, [as opposed to one for a partnership] (ii) the purpose of the investment was to acquire Digipass and Lintel, (iii) that shortly after the investment Vasco shares suffered a significant drop in trade value and, that Vasco's business was underperforming to the extent that it was barely able to meet its interest payments due on the note and (iv) Kyoto on behalf of its client had accepted interest payments in shares to accommodate Vasco. These would be astonishing admissions if the respondents did not stand in the position of investment adviser to, and manager of the funds for the appellants."

The Court of Appeal found that the breaches of duty complained of had been established.

QRSM

85. Mr Gaillard's investment in QRSM was also made in the name of Kyoto through St Andrew PPF and it mirrors the investment in Vasco, although with smaller sums involved, and rather simpler facts. It can therefore be recounted quite briefly. Again, the investment was introduced to Mr Gaillard by Mr Villeneuve, who did not tell him that it was (as Mr Perrault thought [1400, 1428]) "speculative" and "high-risk". He invested $2m for which Kyoto acquired 1,142,856 QRSM shares of $0.01 par value at $1.75, and an equal number of warrants (exercisable at prices between $3 and $6) under a purchase agreement dated 27 August 1996 [983]. However only 833,142 shares were allocated to Mr Gaillard at $2.50 (see the letter of 16 September 1997 [875]). The entire holding of 1,142,856 shares was shown in a St Andrew PPF financial statement for 1996 at a book cost of $2,857,140, whereas the true figure was £2m [884]. 309,714 additional shares were retained by Kyoto. It also retained all the warrants, although (as Mr Perrault noted [1434]) they were worthless because the subscription price was well above the market value. These matters are covered in paras 43-47 of the Court of Appeal's judgment. The Court found breaches of duty established.

Conclusions as to liability

86. The Board considers that the Court of Appeal was not in error in considering the case on its merits, rather than causing Mr Gaillard to incur the delay and expense of a new trial. There was sufficient material in the documentary evidence (particularly in the form of letters, financial statements and Mr Perrault's reports), supplemented by the transcript of evidence, to enable the Court to reach safe conclusions. But in order to do substantial justice to Mr Gaillard it was not necessary for the Court of Appeal to make a positive finding that Mr Villeneuve was guilty of fraud. His conduct was on any view dishonourable but the Board considers that it would have been better if the Court of Appeal had refrained from finding fraud in relation to the FAC transaction (if indeed para 18 of the judgment amounts to such a finding).

87. The Board also considers that it would be unsafe to rely on the Court of Appeal's finding about misappropriation of FKI shares. The Board upholds all the other conclusions as to liability arrived at by the Court of Appeal.

Quantum

88. There are some difficulties about the Court of Appeal's reasoning and conclusions as to the quantum of its money judgment, which was for $8,402,267 against the defendants jointly and severally, with interest at the rate of 10 per cent per annum from the date of the writ (6 June 2002). Mr Dingemans acknowledged these difficulties in a written memorandum supplied to the Board after the hearing. It had been shown in draft to the appellants' advisers but did not produce any response from them.

89. The Court of Appeal's total figure was arrived at as follows:

	$
FAC	2,000,000
FKI	1,750,165
Vasco (loss)	1,228,792
Vasco (diverted shares)	1,333,328
Vasco (shares sold)	518,750
QRSM (loss)	1,323,461
QRSM (diverted shares)	247,771
	8,402,267

90. There are three main difficulties about these figures. They are (in ascending order of complexity) first that the figure for FAC is $0.5m less than the figure of $2.5m mentioned in para 78 of the Court of Appeal's judgment (this may possibly be the result of second thoughts on the part of the Court). Second, the figures for Vasco and QRSM might be thought (as Mr Dingemans puts it in his memorandum) to involve an element of double counting. Third, the Court of Appeal seems to have taken its figures from Mr Perrault's penultimate written report dated 21 February 2005 [1411] rather than his final report dated 18 July 2005 [1418]. Some of the figures in these reports vary, either because of changes in values or because of new facts which had come to light.

91. Before addressing the detail of these difficulties the Board make some general observations. The respondents have not cross-appealed on the ground that the sum awarded by the Court of Appeal was too low. Mr Dingemans accepts that the Court of Appeal's award provides a cap on what the respondents can recover. But he submits, and the Board accept, that up to the limit of the cap he can deploy other grounds for upholding the award.

92. Mr Villeneuve and Kyoto never fully complied with their obligations to make discovery (that was a regular complaint made by Mr Dingemans at trial) and Mr Villeneuve's oral evidence left obscure many matters that he might have been able to elucidate. There is therefore some room for making presumptions "contra spoliatorem." (see *Armory v Delamirie* (1722) 1Str 504). But Mr Dingemans was moderate in his submissions. He did not suggest that Mr Gaillard should be compensated for gains that he might have made had he received competent and disinterested advice, or that Mr Villeneuve and Kyoto should be presumed to have sold any misappropriated Vasco shares when they reached a peak of well over $20 a share in 2000.

93. There is no general principle that in assessing either common law damages or equitable compensation for breach of fiduciary duty, losses should be reduced by adventitious gains in separate transactions between the same parties: *Brown v KMR Services Ltd* [1995] 4 All ER 598, 640-641 (Hobhouse LJ); *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515, 538 (Brightman J). Mr Perrault seems to have made such a set-off in the summary at the end of his last report [1434]. He was of course assisting the court as an expert on investment, not on the computation of damages.

94. The Board now addresses in turn the items making up the Court of Appeal's total of about $8.4m. In the Board's view the figure of $2.5m can be justified as the damages in respect of FAC. Mr Gaillard paid $2m for the FAC shares, but Mr Villeneuve contracted to pay $2.5m to buy them back (all but 500,000) by the first FAC agreement, and $2m "with an annualized markup of 16 per cent" (which very quickly exceeds $2.5m) by the second FAC agreement.

95. As to FKI, in his last report [1433] Mr Perrault stated that the claimants could liquidate its investment portfolio (then worth about US$350,000) but "the company itself is worthless." This apparently contradictory statement might be explained by liabilities of FKI, or the cost of liquidation. Mr Perrault treated Mr Gaillard's investment in FKI as a total loss. The appellants have not objected to Mr Dingemans' memorandum as to quantum and the Board think it right to leave the award as US$1,750,165 (the equivalent of Can$2.4m).

96. At the time of Mr Perrault's last report Vasco shares were recovering and stood at $9.84 [1426]. In July 2005 Mr Gaillard retained 841,401 Vasco shares (worth about $8.279m) [1426] and had received $741,228 from sales at an average price of about $3.70 [1426]. Speculative and high-risk though his investment of $8m was, he had not made a loss. But he had an outstanding claim for $518,750 for shares sold by Kyoto with his consent.

97. Mr Gaillard also had another, larger claim for Vasco shares and warrants which Kyoto acquired in its own name with Mr Gaillard's money, either by buying at $4.50 and selling the same day at $6, or in secret, unauthorised and unlawful commissions paid by Vasco, or as warrants (exercisable at $4.50) which Mr Villeneuve and Kyoto may have misappropriated (but claimed to have lost). The total number of shares unaccounted for was 210,922 (see para 83 above). In addition, the defendants received 55,555 shares from Vasco as commission [876]. The corresponding figures for warrants were 137,777 (para 82 above) and 8,889 [876], with a value in July 2005 (had they been exercised in due time) of $5.34 each. The total by which the defendants were unjustly enriched was therefore $3,405,330, if they are assumed to have continued to hold Vasco shares at the time of the trial. If (as may be more likely, or might be assumed "contra spoliatorem") they sold Vasco shares at the top of the market in 2000, the total would have been far greater.

98. At this point it becomes apparent that the cap provided by the Court of Appeal's award is going to come into operation, even if there was a degree of double counting in their award in respect of QRSM. Mr Gaillard invested $2m in QRSM, received $181,188 from sales [1430] and was left with shares worth $619,640 at Mr Perrault's estimate of $0.80 per share for disposal of a large holding in a thin market. This produces a loss of $1,199,172. There were also 309,714 shares representing the difference between Kyoto buying at $1.75 and selling at $2.50, and shares received as secret unauthorised commission. The warrants (exercisable at prices ranging from $3 to $6) were always worthless. The Board would if necessary be inclined to hold that Kyoto could not be heard to deny that the QRSM shares, by which it was unjustly enriched, were worth $2.50 each, the price that Kyoto put on them in August 1996. But the loss of $1,199,172 by itself makes the total award exceed the cap provided by the Court of Appeal's judgment.

99. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.