Remo Rochelle Ltd v Picot and Fay

Jurisdiction:	Jersey
Judge:	H.W.B. Page, Jurats Georgelin, King
Judgment Date:	22 October 2004
Neutral Citation:	[2004] JRC 182
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Text

[2004] JRC 182

ROYAL COURT

(Samedi Division)

Before:

H.W.B. Page, **Esq., Q.C. Commissioner, and** Jurats Georgelin **and** King.

Between
Remo Rochelle Limited
Plaintiff
and
Terence Alan Picot
Defendant

and

Eric Maurice Wilson Fay

Advocate L. Springate **for the Plaintiff and the Third Party**; Mr. Picot **in person**.

Authorities.

Macon v. Quéreé [2001] JLR 80.

Pirouet v. Pirouet [1985–86] JLR 48.

Selby v. Romeril [1996] JLR 210.

Claim by the Plaintiff, a Guernsey registered company, for £175,000 with interest and costs from the Defendant, a resident of Jersey, based on a guarantee by the Defendant of a promissory note, dated 18 th June 1990, given by Vekaplast Windows (C.I.) Limited ("Vekaplast"), another Guernsey company, in favour of the Plaintiff. The defendant denied liability and, in the event of judgment going against him sought an indemnity from the Third Party, a resident of Guernsey and a director of the Plaintiff.

Introduction

1 In this action Remo Rochelle Limited ("Remo Rochelle"), a Guernsey-registered company claims an amount of £175,000 together with interest and costs from Mr. Terence Picot, a resident of Jersey. The basis of the claim is a guarantee by Mr. Picot of a promissory note dated 18 th June 1990 given by Vekaplast Windows (C.I.) Limited ("Vekaplast"), another Guernsey company, in favour of Remo Rochelle. The defendant, Mr. Picot, denies liability and, in the event of judgment going against him seeks an indemnity from Mr. Eric Fay, the Third Party, a resident of Guernsey and a director of Remo Rochelle. Mr. Picot also claims damages from Mr. Fay for, among other things, the blighting effect that the action and Mr. Fay's conduct has had on his business and family life.

2 The terms of the promissory note (or 'bond' as it was sometimes described) so far as material to the present proceedings are as follows:

> *"On demand the Limited Liability Company Vekaplast Windows (C.I.) Limited* …..hereby promises to pay the Limited Liability Company Remo Rochelle Limited ….the sum of ONE HUNDRED AND SEVENTY FIVE THOUSAND POUNDS STERLING together with interest as agreed for value received ……AND I the undersigned Terence Allan Picot hereby guarantee for myself and my heirs the repayment of the said capital sum and interest in the event of the default of the said Limited Liability Company Vekaplast Windows (C.I.) Limited and agree to the registration of this charge against all my real property situate in Jersey……."

3 The note was signed by both Mr. Picot and his wife Mrs. Margaret Picot as directors of Vekaplast and again by Mr. Picot on his own behalf. Shortly afterwards, on 22 nd June 1990, it was formally registered in the Public Registry of Jersey, the Act of Court recording not only Mr. Picot's acknowledgment of his personal guarantee of the promissory note but also Mrs. Picot's formal declaration that she would not avail herself of her right of dower to the prejudice of the guarantee. Mrs. Picot's concurrence in the giving of a guarantee in terms that placed the matrimonial home at risk as security for Vekaplast's borrowings is a matter to which we return later.

4 Interest is claimed by Remo Rochelle at a rate based on the terms of a letter dated 28 th July 1990 from that company addressed to, and countersigned by, Mr. Picot on behalf of Vekaplast reading: “It is agreed that the Company will pay interest at the existing national Bank Rate, in quarterly, payments, if it is convenient, to this company”.

5 Remo Rochelle has been represented in these proceedings by Advocate Lisa Springate. Its claim is simply expressed. On 21 st May 2001 Vekaplast was declared *en désastre* by the Royal Court of Guernsey; on 12 th July 2001 formal demand was made by Remo Rochelle of Vekaplast for payment of the sum of £175,000 plus interest; Vekaplast failed to respond to this demand; on 26 th July 2001 Remo Rochelle accordingly called on Mr. Picot for payment under his guarantee but Mr. Picot has declined to make any such payment. The action is accordingly a straightforward claim on the guarantee contained in the promissory note.

6 Mr. Picot does not dispute the promissory note as such. His pleaded defences, in essence, are as follows: (i) that the £175,000 in question was in fact a gift to Vekaplast and that there never was, accordingly, any debt on which his guarantee could bite; (ii) alternatively, that the promissory note was subject to certain conditions and/or collateral agreements arising from his dealings with Mr. Fay, as a result of which, by the time that it was sought to enforce the note (at least), Vekaplast was not indebted in any way to the Plaintiff and not therefore in default of any payment obligation that could have given rise to liability on the part of Mr. Picot on his guarantee; and (iii) that, in any event, the note did not, on a true construction, create an obligation on Vekaplast to pay interest.

7 Mr. Picot has, throughout, conducted his own defence. Although he is far from being a stranger to litigation and in many respects he conducted his case with some skill, the formulation and expression of that case inevitably suffered at various times from a degree of confusion and absence of legal precision. It was evident from an early stage that if, there was a defence of any kind, it could only lie somewhere in the region of the second of these submissions, although a defence of this kind to a claim on a promissory note is, in principle, not one that a court should be ready to accept at all lightly.

8 As the case progressed it also became apparent that, within the overall umbrella of head

(ii), the defence that Mr. Picot was putting forward included, in effect, one of estoppel. Although not expressly pleaded as such, it was plainly a case that Mrs. Springate also recognised that she might have to meet, addressing it — as she did — in her written closing submissions dated 30 th July 2004. Additional supplementary submissions on estoppel were also requested by the Court from both parties at the close of the hearing.

March 1987 to July 2001: an over-view

9 The principal events with which we are concerned involve the dealings between Mr. Picot and Mr. Fay over a period of some 13 years between March 1987 and February 2000. On any view they are in many ways fairly unusual. In order to see the current issues in context, we first give a brief account of the principal mile-stones in that relationship. Many are common ground.

10 Mr. Fay, now aged eighty-nine, has in the past evidently had a highly successful career in the building industry in and around the Fareham area of Hampshire. In 1974 or thereabouts he took up residence in Guernsey and at some point settled much of his wealth in one or more trusts, for the benefit of his family, administered by Abacus Financial Group Limited (formerly by Coopers & Lybrand). Mr. Neil Crocker, a director of Abacus, appears to have been the person whom Mr. Fay regarded at the material time as his principal point of contact and his ‘trustee’. Remo Rochelle, we were informed by Mr. Crocker, was the principal investment holding company for the trust(s); and Mr. Fay has at all material times been its sole director. By Mr. Fay's own account, as well as that of Mr. Crocker, Mr. Fay had a fairly free hand in deciding on Remo Rochelle's investments. Mr. Fay spoke of it, on more than one occasion, as his company.

11 In or about 1978 a company was formed by Mr. Picot in Jersey by the name of T.A. Picot (C.I.) Limited (“TAPCI”). Its business was, originally, that of trading in heavy building materials, but by late 1979 it had moved into the marketing and sale of UPVC windows in the Channel Islands. The operation was successful, but difficulties with suppliers in Germany led to the establishment, in September 1980, of a wholly-owned Guernsey subsidiary of TAPCI with a manufacturing operation at a site on the La Hure Mare Trading Estate at Valein, Guernsey: this was Vekaplast. In 1981 a separate company, Window Fixers (Jersey) Limited was formed to deal with the fixing, as opposed to the supply of the windows. Supplies of the component ‘profiles’ continued to come from Germany. Success, however, was comparatively short-lived. By mid-1984 or so fortunes appear to have been in decline; and by early 1987 a combination of increasing competition, trade-mark and other disputes with its former German suppliers, Veka AG and one Heinrich Lauman, a break in relations between Mr. Picot and his one-time business partner, Mr. Barry Jehan, and a variety of other problems had resulted in a serious cash-flow situation and increasing pressure from the group's bankers, National Westminster Bank.

12 The detail of the dispute between Mr. Picot and the Jehans (Barry and his wife Lesley) is of no consequence to the present proceedings. The position, so far as relevant, can be stated

shortly. Mr. Jehan had, it seems, originally been employed by Mr. Picot for his skills on the production side, but had later become a 50% shareholder and a director of TAPCI. Mrs. Jehan had been the company secretary. In March 1984, certain events occurred which caused Mr. Picot to suspect Mr. Jehan of mis-applying company money. This resulted, in due course, in a formal agreement under which Mr. Jehan agreed to resign as a director and general manager of Vekaplast and a director of TAPCI, agreed to sell his shareholding in TAPCI to Mr. Picot, and accepted a five-year restrictive covenant as regards competition in Guernsey. But a subsequent action by Mr. Picot in the Royal Court of Jersey to enforce this agreement was successfully defended by Mr. Jehan on the ground that it had been entered into under duress and, in February 1986, was dismissed. An appeal by Mr. Picot from that decision to the Court of Appeal failed, and two further actions also started by Vekaplast and/or Mr. Picot against the Jehans ended up being finally dismissed by the Privy Council in December 1999.

13 The details of the disputes with Veka AG and Herr Lauman are also of no consequence. All that matters for present purposes is (i) that there were again, a series of actions, all or most of which ended unsuccessfully for Mr. Picot and his companies, and — importantly — (ii) that TAPCI and Vekaplast launched a claim for damages against Crills who had represented them alleging negligence in the conduct of one or more of those proceedings: we refer to this as “the Crills action”.

14 It was against this background that, on or about 27 th March, 1987, Mr. Picot and Mr. Fay met for the first time when Mr. Fay walked into the Vekaplast factory in Guernsey. The TAPCI group was by then at a low point. Mr. Picot was hoping either to raise fresh equity capital or to find a purchaser of the business, and for this purpose had prepared and distributed to a number of potential investors a document entitled “T.A. Picot (C.I.) Ltd.— Group History”. Discussion between the two men ensued. On 27 th March 1987 Mr. Picot wrote to Mr. Fay confirming arrangements for a further meeting on 31 st March and enclosed a copy of his “Group History”.

15 In the course of the second meeting on 31 st March 1987 Mr. Fay produced and handed to Mr. Picot a cheque for £60,000 drawn on Mr. Fay's personal account and payable to Mr. Picot. A manuscript letter on TAPCI-headed writing paper addressed to Mr. and Mrs. E.M.W. Fay and dated 31 st March 1987 reads: “We hereby acknowledge the receipt of the sum of £60,000 (sixty thousand pounds) which will be repaid to the said Mr.& Mrs. Fay on demand or converted into equity within the company.” This was signed by both Mr. Picot and Mrs. Picot. The following day the cheque was paid into TAPCI's account with the National Westminster Bank in St. Helier thereby substantially reducing its then overdraft.

16 Before long, Mr. Fay had become joint managing director of Vekaplast with Mr. Picot. This was the start of a remarkable friendship and business ‘partnership’ that was to last until January 2000.

17 In the course of 1988 and early 1989, a series of share transactions took place which are material to what follows. In short:— (i) In or about March 1988, Mr. Picot acquired the entirety of the share capital of Vekaplast from TAPCI, thereby severing, *prima facie*, any corporate connection between the former parent and subsidiary. (ii) In or about June 1988 Mr. Picot transferred 50% of his shareholding in Vekaplast to Mr. Fay for a nominal consideration in recognition generally of Mr. Fay's support for the company. (iii) In January 1989, Mr. Picot transferred his shareholding in TAPCI to Vekaplast, thereby leaving TAPCI and Mr Jehan (following his successful challenge to his 1984 agreement to sell his shares to Mr. Picot) as the principal shareholders in TAPCI. One purpose, quite plainly, was to consolidate the group's business in the Guernsey company, and to re-structure things so that Mr. Fay and Mr. Picot could be equal shareholders in that company, free of any possible equity interest on the part of Mr. Jehan.

18 Following the initial cheque for £60,000, further funds in varying amounts were made available to Vekaplast from time to time by Mr. Fay or by Remo Rochelle. For present purposes, we assume that one way or another the provider of these funds was in fact Remo Rochelle, though whether this was technically the case or not is unclear. By June 1990 the total so provided was approaching £225,000.

19 At about this time it was decided to change the group's bankers from National Westminster to Lloyds, who were Remo Rochelle's own bankers. Mr. Fay agreed to make further funds of £175,000 available, principally for the purpose of paying off the National Westminster Bank overdraft which then stood at some £152,000. Minutes of a meeting of the board of directors of Vekaplast on 8 th June 1990 record Mr. Fay's offer of “a facility up to £175,000” on condition that Mr. Picot “underwrite the debt with his property in Jersey” and note that with this extra facility Mr. Fay's total cash injection to save the business was nearing £400,000.

20 As earlier noted, the promissory note for £175,000 was executed on 18 th June 1990 and four days later was registered in the Jersey Public Registry with the consent of Mrs. Picot. A letter addressed by Mr. Fay on behalf of Remo Rochelle to Mr. Picot on behalf of Vekaplast dated 20 th July 1990 and headed “The money needed to remove the National Westminster Bank Account. And the Bond in favour of this company. Registered in JERSEY” listed various individual payments totalling £170,312 at or around this time: the largest of these was £152,465 to the National Westminster Bank on 25 th June 1990.

21 For a period of some 13 years following the first meeting of Mr. Picot and Mr. Fay, with the exception of one major incident in March 1997, relations between the two men appear to have remained largely harmonious. But that, in itself, is a wholly inadequate description of what, quite plainly, was in many ways an extraordinary relationship of mutual dependency within a context of frequent appeals to Christian prayer and divine guidance: a relationship that both men appear to have regarded as approaching that of father and son. Mr. Fay was and plainly still is a man of forceful personality and outspoken, frequently uncompromising, opinion: the trial bundles are full of letters and memoranda from him replete with religious

reference and exhortation, some of which we have occasion to refer to verbatim later on. Mr. Picot, a considerably younger man, appears to have been swept along by all this and by the seemingly unlimited funds that Mr. Fay appeared ready to invest in Vekaplast.

22 The purpose behind Mr. Fay's funding of Vekaplast was itself also unusual. In part it was designed to meet the ordinary needs of a manufacturing enterprise. But of equal if not greater importance to both Mr. Fay and Mr. Picot was the funding and pursuit of litigation of one kind or another against persons who were regarded as having wronged Mr. Picot, Vekaplast or TAPCI. Throughout their thirteen-year relationship, the pursuit of this litigation rather than the every-day business of Vekaplast appears to have been their dominant obsession, Mr. Fay playing the role of the strategist and Mr. Picot conducting the litigation itself and acting as advocate. Vekaplast seems to have survived, without ever having flourished, while a huge amount of time and resources was devoted to fighting legal actions that the two men had persuaded themselves were, one day, going to bring rich rewards in the order of several millions of pounds.

23 In late January 2000, however, there came an abrupt, somewhat dramatic parting of the ways. On the morning of 26 th January 2000 Mr. Fay came into the Vekaplast office. Ensuing discussions between Mr. Picot and Mr. Fay developed into an acrimonious altercation which ended later in the day with Mr. Fay announcing that he would make no further funds available to TAPCI or Vekaplast and wanted nothing more to do with Mr. Picot. The ostensible bone of contention involved Mr. Picot's proposal to purchase a replacement computer for one that he had transferred from his home in Jersey to the Guernsey. A detailed account of the incident and rival arguments is unnecessary. All that matters for present purposes is

(i) that Mr. Picot insisted that he was perfectly entitled to do this as he and/or his wife would be purchasing the new computer with their own money;

(ii) that Mr. Fay said something to the effect that Mr. Picot had no money of his own and that everything he had was the result of Mr. Fay's benevolence;

(iii) that Mr. Picot's response to this was to say that, if this was Mr. Fay's view, it was an ‘evil’ use of his money (a comment which he immediately regretted using and for which he sought to apologise); and

(iv) that Mr. Fay seized on these words as reason to discontinue all relations with Vekaplast and Mr. Picot, his reaction being recorded, in what appears to be a substantially contemporaneous note in Mr. Fay's hand-writing reading:

> *“Terry — God has blessed me!* God used Terry to bless me! He put the words into Terry's mouth and I was set free from Terry's evil use of me! The words:– “you are using your money to do evil work” said to me in Terry's rage on January 26, 2000. I (Fay) heard these words and then knew that this was God talking to me !!!! and I was set FREE!”

24 Similar sentiments are found in a letter dated 30 th January 2000 from Mr. Fay to Mrs. Vivien Edmonds, the Vekaplast company secretary from 1990 onwards, and in yet another letter of wishes addressed by Mr. Fay to Mr. Crocker on 31 st January 2000 asking his trustees to have no further dealings with Mr. Picot or his affairs.

25 There was then a somewhat unedifying competition between the two men to distance themselves from the company as fast as possible. The ship was going down and neither was keen to be associated with the wreck. Mr. Fay handed in a letter of resignation as joint managing director. Mr. Picot tore this up, resigned himself and purported to relinquish all his shares in favour of Mr. Fay. Mr. Fay protested that this was unlawful.

26 On 28 th February 2000 Mr. Fay issued and served a statutory demand under section 95 of the Companies (Guernsey) Law 1994 on Vekaplast in an amount of £777,799 — a curious document in which, as Mr. Picot pointed out, the named creditor in respect of the stated debt was shown as Mr. Fay himself rather than Remo Rochelle. One of Mr. Picot's subsidiary arguments was, accordingly, that by issuing this formal claim Mr. Fay had adopted the claim as his own and that thereafter Remo Rochelle ceased to have any right to assert any indebtedness to it on the part of Vekaplast. At best this seems to indicate a degree of confusion between Mr. Fay's personal finances and those of his trust, but for reasons that will become apparent it is not a point on which we need to dwell.

27 The actions against Crills and against Veka AG and Herr Lauman were subsequently settled or otherwise disposed of without any recovery of damages by Vekaplast.

28 Eventually, on 21 st May 2001, Vekaplast was declared ‘ *en désastre’*. This was followed on 12 th July 2001 by a formal demand by Bedell Cristin on behalf of Remo Rochelle addressed to Vekaplast requiring payment of £175,000 together with interest of £180,480 on the promissory note, and on 26 th July 2001 by a further corresponding demand on Mr. Picot. In his reply dated 13 th August 2001 Mr. Picot wrote “Your client company principal Mr Fay has clearly chosen to mislead you on the historic facts which if examined in Court will render his claims unsustainable and expose both his company and himself personally Mr. Picot a substantial counter claim. I would advise you to seek clarification from Mr. Fay on his waver [sic] of interest and his promises to write off his loans and walk away.”

Mr Fay's allegations of misrepresentation

29 A prominent if somewhat disparate theme of Mr. Fay's case in response to Mr. Picot's defence of Remo Rochelle's claim was that he had, from the outset, been seriously misled by the latter as regards the situation with the Jehans and it was the revelation of the true state of affairs that led to his decision to part from Vekaplast and Mr. Picot on 26 th January 2000. This allegation took various, sometimes inconsistent, forms:

(i) It first appeared in the case in paragraph 4 of Remo Rochelle's Re-Amended Reply in passage reading: “Mr. Fay subsequently learnt however that Mr. Jehan had never offered to transfer his shares and that [Mr. Picot's] action to obtain these shares had failed. Mr. Fay was not aware of this at the time.” The passage then went on to allege, in effect (though in a somewhat convoluted way), that the share transactions in 1988 and 1989 to which reference has been made in paragraph 17 above were invalid, that Mr. Jehan retained an indirect shareholding (via TAPCI) in Vekaplast and that Mr. Picot was never in a position to transfer 50% of his shareholding in Vekaplast to Mr. Fay. The passage concluded with an assertion that the reason that Mr. Fay tendered his resignation because he had “realised that [Mr. Picot] had misrepresented the position”.

(ii) In paragraph 42 of his witness statement dated 29 th June 2004, the explanation for his action on 26 th January 2000 was somewhat different: “It was only then that I realised that some of the monies which had been injected into the companies had been used to fund the litigation against Mr. & Mrs. Jehan whereby he had attempted to obtain Mr. Jehan's shares.”

(iii) In the course of his cross-examination by Mr. Picot, Mr. Fay vehemently and repeatedly accused Mr. Picot of trickery — of concealing the circumstances of his relationship with Mr. Jehan.

30 There appears, in truth, to have been no foundation whatever to these allegations: there was certainly nothing in evidence to substantiate them and, in the end, they were, to all intent and purposes, completely abandoned. In the closing stages of her cross-examination of Mr. Picot, Mrs. Springate put it to Mr. Picot that Mr. Fay resigned on 26 th January 2000 when and because the “true position” had become known. But she was taxed by the Court as to what precisely this meant in view of the fact that a number of documents in evidence appeared to suggest that Mr. Fay was not only well aware of the position as regards the Jehans back in 1987 but was also actively involved in helping Mr. Picot in his litigation with them (as Mr. Picot had alleged with supporting documentary references in his pleaded Reply to Third Party Answer of August 2003 and his Rejoinder of January 2004).

31 This led to Mrs. Springate taking further instructions over-night from Mr. Fay — who had by then completed his evidence and had returned to Guernsey — and resulted, the following morning, 23 rd July 2004, in her making a formal statement on his behalf conceding, inter alia, that he had known about Mr. Jehan's involvement from the start; had known about his successful challenge to the 1984 agreement on the ground that it had been entered into under duress; and had known that part of the money that he was putting into Vekaplast was being used to fund the litigation with Mr. Jehan (thus revealing the claim made in paragraph 42 of his witness statement that he had resigned in January 2000 because he had discovered that his money was being used for this purpose as incorrect). In answer to the Court, Mrs. Springate confirmed in terms that it was no longer suggested that Mr. Fay's resignation was caused by the discovery of any new facts not previously known to him, but simply by a message from God telling him to stop pouring money into Vekaplast: this, it was

said, was how he understood Mr. Picot's reference to “evil use” of his money.

32 One particular matter that she did not specifically deal with was her client's pleaded allegation that the corporate re-structuring of TAPCI and Vekaplast in 1988/89 (which enabled Mr. Picot to transfer 50% of his resulting shareholding in Vekaplast to Mr. Fay) was invalid. Now it may very well be that the transaction by which Mr. Picot purportedly acquired for himself the entirety of TAPCI's shareholding in its subsidiary Vekaplast would have been open to challenge at the time by Mr. Jehan or a creditor of TAPCI. But, in practice, no-one seems to have made any move to launch any such challenge and the matter was not explored in any detail before us. Be that as it may, it is perfectly clear that Mr. Fay was well aware of what was planned and of the potential vulnerability of the transaction. In a letter to Advocate Mary Ferbrache in Guernsey dated 25 th February 1988 which was copied to Mr. Fay, Mr. Crocker wrote:

> *“Mr. EMW Fay has asked that a contract for his purchase of the shares in [Vekaplast] should be drawn up ……*.I will leave you to Advise Mr. Picot as to the position of the holding company in selling its subsidiary for a nominal value. I feel that there is a possible argument that in selling [Vekaplast], assets of the holding company would be alienated from its creditors.”

33 Mrs. Springate's statement on behalf of Mr. Fay on 23rd July effectively marked the end of any case of deceit or misrepresentation against Mr. Picot. The whole episode was to a large extent a diversion from the main issues in the case. But, it remains of relevance for two reasons: firstly because it has a bearing on the matter of Mr. Fay's credibility as a witness; and secondly because it served to throw light on the circumstances in which Mr. Fay and Mr. Picot came to part company so abruptly in January 2000 — a matter of some relevance to what follows.

34 As to the first of these two, Mrs. Springate sought to take entire responsibility for the fact that what had proved to be wholly unfounded assertions of misrepresentation had found their way into her client's case and submitted that no adverse conclusions should be drawn about Mr. Fay's crediblity. But in this she was too generous. Closer attention to documents specifically pleaded by Mr. Picot and supplied to her should, most certainly, have sounded alarm-bells that her client's story might not be everything that he claimed (though Mr. Fay must have been a far from easy client to deal with). But Mr. Fay's vehement reiteration of the material allegations in the course of his cross-examination by Mr. Picot and also the fact that similar themes are to be found in correspondence addressed by him to the Bailiff and other public officials in Guernsey in the latter part of 2000 accusing Mr. Picot of fraud, perjury and other misconduct make it plain that he and he alone was the source and chief promulgator of these wild assertions. That he should have persisted so long in false charges of this kind inevitably makes it impossible to view him as a generally reliable and truthful witness.

35 As to the second reason (paragraph 33 above), we have little doubt that his altercation with Mr. Picot on 26/27 January 2000 was contrived by Mr. Fay because he was looking for an

excuse to discontinue his funding of Vekaplast. We return to this later.

Gifts or loans?

36 Reverting to the main issues, the rhetoric in which so much of what Mr. Fay said and wrote was couched was such that it is not difficult to see how Mr. Picot may have come to contend that some of the funds advanced by Mr. Fay — the first £60,000, at least — was a gift (as indeed Mrs. Picot was adamant that the initial cheque was); but it is not in our view a realistic one. It was based largely on the terms of certain paragraphs in an affidavit sworn by Mr. Fay in the Crills action in February 1997 in opposition to an application for security for costs which Mr. Picot submitted was clear confirmation of an out-and-out gift. In this affidavit Mr. Fay spoke of God having conferred on him as a child "the great *gift of giving"*; of his later success in business, which had allowed him "to further enjoy the *gift of giving"*; of how God had brought him into Mr. Picot's life in April 1987 and how he had soon realised that he was "needed to save his home for his young family and also his business who others had all but destroyed"; of how "God has given me the precious *gift of giving* and in Terry's case, for him and his family, I have the honour to be their Benefactor"; of how he had put up various funds from time to time and how "Over this past year alone Terry has required of me and *I have given him* just under £75,000.00 in order that his firms continue to trade" (our emphasis in these passages). The description of Mr. Fay as his "Benefactor" was one to which Mr. Picot returned again and again, as if the term itself — coupled with the use of the words "giving" and "given" in this affidavit — were conclusive of his contention.

37 Mr. Fay's conviction that he had been sent by God to help Mr. Picot fight his enemies and to restore the fortunes of his company is also a theme that appears repeatedly in his considerable out-put of letters and memoranda over the years of their association. And there seems little doubt that from time to time Mr. Fay has shown very considerable generosity to a variety of people viewed by him as having suffered some injustice or otherwise deserving of financial support. But on this occasion at least, while much was made of the philanthropic element of his involvement with Mr. Picot and Vekaplast, it is clear that it was also viewed by Mr. Fay as a business investment, and Mr. Picot must at heart have known that this was so. Mr. Fay may claim, as he did, to have stumbled on Mr. Picot and his then problems by chance when he called at the Vekaplast factory in March 1987 "to buy three windows", but we strongly suspect that in reality he knew in advance that the company was in trouble and might present an attractive investment opportunity.

38 Either way, Mrs. Springate was undoubtedly right in submitting that the great preponderance of documentary evidence leaves little room for doubt that the funds advanced by Remo Rochelle throughout were intended by Mr. Fay as loans and that they were acknowledged as such by Mr. Picot. The list of references to 'loans' is too long to bear citing.

The terms of repayment of the loans

39 Mr. Picot's alternative contention was that there was an understanding between him and Mr. Fay that, in practice, re-payment of all these moneys would only be required to be made out of the damages that were expected to be recovered sooner or later in the various legal actions that were being pursued against Veka AG and Herr Lauman, the Jehans, and Crills. Evidence of this understanding, he submitted, was to be found in a number of documents. The documents in question, together with one or two others that appear to us to have a significant bearing on this issue, are as follows.

40 The first such document was a letter of wishes from Mr. Fay dated 10 th March 1988, written on Remo Rochelle-headed writing paper and addressed to the Trustees of Trust No. N/150 which opened as follows:

> *"I need to place on record my latest wishes, in order that I may die in peace, should the Lord call upon me before my work is completed.* I wish that the Trustees pay for the following if I am deceased……"

There followed a list of legal cases either currently on foot or proposed including cases against Mr. and Mrs. Jehan. It concluded as follows:

> *"I wish the Trustees, if I am not living, to recover all this money from the Damages, but only if it does not ruin Mr. T.A. Picot and he wants to pay this money back.* We are only to take this money if it causes no harm to [Vekaplast], because I wish this Company to proceed to be Successful for all time."

Mr. Picot accepted that this only professed to deal with what Mr. Fay would wish to happen in the event of his death, but contended that it also reflected the understanding that he had with Mr. Fay as to the position more generally irrespective of whether Mr. Fay was alive or dead.

41 A further letter of wishes, addressed to Mr. Crocker, dated 18 th June 1990, read as follows:

> *"You being my trustee, once again I add to your task on my behalf. Dealing with Terry Picot and Vekaplast Windows (C.I.) Limited. Should our Lord Jesus decide I shall not complete my work for Terry and his family, and I pass away, I ask that you complete my wish, as follows:– (1) Provide any funds which Terry needs to keep the company going, so that he can complete the law actions he has now underway.* (2) Collect all the money that I have loaned to Terry and his company providing he has won enough so to do this, and it does not ruin him. (3) Return all the shares that I possess in my name relating to Terry's Company(s) as my gift to him. (4) Offer him a meeting with any of my children and yourself should he so wish."

Here again, Mr. Picot submitted, this did no more than confirm what had been agreed previously with Mr. Fay irrespective of whether Mr. Fay was or was not alive.

42 A third letter of wishes from Mr. Fay, dated 6 th June 1994, addressed this time to Mr. Crocker, Mr. John Hallam and Mr. Ron Hollingsworth as trustees of his discretionary trust no. 150 and copied to Mr. Picot, made reference to Mr. Fay' partnership with Mr. Picot and the various sets of litigation and continued:

> *"My job is to fund Terry to keep him going on with these law cases, I hope to make a substantial profit resulting from completion of these cases.* BUT, God may have other plans for me, and I may not survive the completion of these great battles, hence my wishes must be out before you. Once these cases have been completed and I have reclaimed all the money I had to invest, and also I have then received 50% (half of the profits) I intend to give my 50% of the *Vekaplast Windows (C.I.) Ltd. company back to Terry."*

And then by way of post-script:

> *"My further wishes:—I wish my trustees to fund Terry to complete his Law cases and also to keep the factory in business until he has won his cases, and my money has been paid into me or my trust funds, should I die!"*

43 In a memorandum dated 22 nd September 1994, copied to Mr. Picot, Mr. Fay recorded his considered reaction to a letter from Bailhache Labesse cautioning (it seems) about the possible costs implications of continuing to pursue the Crills action (the letter itself was not available) he wrote:

> *"I am being 'Pedantic', I am allowed to be unreasonable because it is my money that I have placed at risk… I am prepared to go ahead and finance both cases, win or lose.* AND TEST OUR CLAIM TO IT'S PROPER CONCLUSION. In fact, it shows that I am conducting an educated gamble by risking £459,998 plus £36,000 as my total loss (at 5 to 1) with a fair and reasonable chance to obtain: —— £2,500,000 our estimated damage, £5,000:—— the appeal case costs; £5,000 this final action's costs. I say that we are ready to complete this action in the Royal Court."

44 It seems that by November 1995 Bailhache Labesse were getting worried about how their fees for conducting the Crills litigation would be met in the event of Mr. Fay dying before it reached finality. This in turn seems to have led to certain discussions between Mr. Fay and Mr. Picot as to their relationship generally. On 7 th November 1995, Mr. Picot, in the course of a long letter to Mr. Fay, proposed that they should "formulate a new Agreement". The letter continued:

> *"I also, for some time, have been concerned over the security of my family should something unforeseen cause a failure in our Law actions.* As you know, over the recent weeks what you have told me has fluctuated from guaranteeing the return of my deeds unconditionally should you die to a demand for a payment of half a million pounds before they are released. It is right therefore that I seek from you certain guarantees in order that I may give you certain

guarantees……. What I ask of you is that I too receive from Neil Crocker a written undertaking that should our Law [action] fail I will receive my deeds and shares back and that your Trust will write off the capital injections you have made onto the Company. I in turn will give you the undertaking that you have requested and that both your undertaking from Neil and my undertaking can then be minuted in a Board Minute with the relevant undertakings annexed to the Minutes. This way, John, both you and I will know exactly where we stand. We will have commercial arrangement on which I will undertake with you to go out to maximise the return from our Legal work to our mutual benefit and should something happen to you to the mutual benefit of those you wish to benefit should you die."

No formal agreement appears to have come about. But Mr. Picot's work on the various legal actions continued unabated.

45 In March 1997, there was an argument over whether Mr. Picot should take his family on a holiday to Disneyland in America — the first family holiday for a long time. Mr. Fay objected but Mr. Picot was not to be dissuaded. On 12 th March 1997, following a rapprochement of sorts Mr. Fay wrote to Mr. Picot saying, among other things,

> *"And I have now decided that I need to stop being a partner with you once the [Crills case] is finalised.* ……..As I see it, I hope to get my Loan Money returned to me and then we split 50% the sum of damages. If you disagree with this, then please state what is your opinion? I shall work with you until we have completed Bailhache Case. To our satisfaction. If you wish me to loan you the £10,000 so that you can conduct the Privy Council case against the Jehans, this I will do, but I shall expect it to be returned along with the other money I deposited in the Court over the Jehans. I feel that it is now wise for me to state these words at this time, for your attention. Do you accept my conditions for the Partnership continuing?"

46 In his reply to this dated 13 th March 1997 Mr. Picot wrote:

> *"On the Jehan issue, I confirm that this loan along with all of the other loans injected into the Companies for all the legal actions will be re-paid from the monies recovered in the separate Actions or from the Crills case.* God willing, this year will see the end of the Crills case and maybe the both the Jehan and Laumann matters too. We both believe that we will recover substantial damages from Crills and I confirm what has long been agreed between us with regard to the application of the Crills damages. Our first objective with this money is to repay your loans with the appropriate interest. We will then divide the remaining damages between us." (Emphasis added).

If there was ever any written response to this letter it was not among the voluminous correspondence in the trial bundles. There was certainly nothing in the documentary evidence suggesting that Mr. Fay took issue with Mr. Picot's summary of what he

considered had “long been agreed between us”.

47 We make the following observations on these documents:–

(i) Each of the first two letters of wishes coincides, in point of time, with one of the major milestones in the history of this matter. In the former case, Mr. Picot's evidence before us was as follows (paragraph 13 of his witness statement): “The ownership changes [in Vekaplast and TAPCI] were induced by Mr. Fay upon his commitment to provide whatever monies were needed to not only return Vekaplast to profit but fund all the law actions he had I mind. His money was to be gifted as before and he went further to guarantee that his funding would continue should he die if I would agree to his recovering it, if and only if, enough damages were recovered from the litigation. This I agreed to and later he gave me a copy of his letter to his Trustee dated the 10 th March 1988 and told me to put it in a safe place.” This, Mr. Picot submitted, amounted to a “variation” of the original arrangement by which Mr. Fay became his “benefactor”. For reasons already given we are sceptical of Mr. Picot's use of the expression “gift” here. And, on any view, the terms of any such agreement go beyond anything in the letter of wishes itself. But, taken together with what followed, the letter remains of significance as indicating that the position as regards re-payment of Mr. Fay's loans had, from a relatively early stage, become less straightforward than simply being repayable on demand.

(ii) The second letter of wishes coincides precisely with the date of execution of the promissory note. On this, Mr. Picot's evidence was as follows:

> *“In order to fulfil his promise that the defendant's home would be safe Mr. Fay gave the defendant his undertaking that the monies loaned would only be recoverable along with his other monies from those damages sought by the companies and upon Mr. Fay confirming that agreed by letter of the 18th of June 1990 to his trustee [sic], the defendant felt able to authorise the Bond”.*

(iii) Mrs Margaret Picot, in her evidence, was adamant that, whatever the terms of the letter of 31 st March 1987 might say about repayment on demand, she had been assured by Mr. Fay that the initial £60,000 was, in fact a gift. But be that as it may, she readily accepted that the funds subsequently provided by Mr. Fay were loans. As regards the events of June 1990, however, she spoke with conviction of her concern about the prospect of a charge being registered over the family home and of how she was only persuaded to agree to it because she understood from her husband that Mr. Fay had repeatedly assured him that the moneys would only be recoverable out of the proceeds of the various legal actions and — crucially — because of the terms of Mr. Fay's letter of wishes, a copy of which she was shown before she consented to the registration of the promissory note against the house. Asked in cross-examination by Mrs. Springate why she had not taken legal advice on the document she answered because, as far as she was concerned, she had a written assurance that was “very precise and to the point”.

(iv) Technically, of course, the 18 th June 1990 letter of wishes by itself was a poor substitute for the sort of formal protection that Mrs. Picot would have been advised to insist on had she in fact had independent legal advice: it was not addressed to her and technically it had no greater status than any other letter of wishes given to a trustee by a settlor as to what he would like to happen in the event of his death. But the immediate coincidence of timing with the promissory note cannot be ignored. The overwhelming inference is that the letter was produced by Mr. Fay for the purpose of providing comfort to the Picots in relation to the execution of the note and registration of that note against their home. Its unspoken premise was that the wishes of which Mr. Crocker was being informed reflected and confirmed assurances already given and operative as regards the position during Mr. Fay's lifetime; and the Picots — Mrs. Picot in particular — were entitled to read the letter, written as it was by someone whom they respected and trusted as a devout Christian, in this way without further query. Any other reading of the letter (one that gave comfort as to what would happen following Mr. Fay's death but none whatsoever during his lifetime) would be absurd.

(v) Despite this June 1990 letter of wishes it is apparent from Mr. Picot's letter of 7 th November 1995 that from time to time the question of the security of the family home preyed on his mind, particularly what would happen should the Crills litigation prove unsuccessful.

(vi) Eventually, in March 1997 an exchange of letters occurred that finally put the matter beyond doubt. Mr. Fay wrote in terms that clearly contemplated that his loans would be re-paid from damages recovered in the litigation and that any surplus would then be divided 50:50 between them; and Mr. Picot, confirming this, spoke of what had long since been agreed between them.

(vii) That this should have been agreed is entirely logical given that Mr. Fay had, quite plainly, long since become the driving force behind the litigation and had repeatedly asserted that, win or lose, it was his money that was at risk (paragraph 43 above).

(viii) Whatever the position may or may not have been at the time when the promissory note was actually issued in June 1990 — and, for reasons already given there is a strong case for thinking that the true bargain even at that time was that the obligation of repayment was conditional on sufficient funds being available from the proceeds of litigation — these documents leave little doubt that by March 1997 at latest, the original re-payment obligations had gone by the board and become conditional on the recovery of damages.

48 One document relied on by Mrs. Springate as pointing to a different conclusion was what appeared to be a typed letter from Mr. Fay to Mr. Picot countersigned by Mr. Picot, bearing the date “30 th June 1987” in manuscript at the foot. Mr. Picot's countersignature is shown as having been witnessed by Mrs. Edmonds, the Vekaplast company secretary. The letter opens with the words “I write further to our recent meetings and my providing your Companies with an initial loan of £60,000 to confirm the basis on which we agreed this money and any further amount would be provided” and, having covered various other

matters, including that of interest, concluded “My final condition is that all capital loaned shall be at all times fall due [sic] for repayment upon demand”. Now, according to Mr. Picot this letter was not what it appeared to be in that it had been drawn up for the purposes of the Crills litigation in June 1996 — long after the date that it bore — in order to provide Bailhache Labesse and Vekaplast's expert accountants Deloitte & Touche with material to support the recovery of Mr. Fay's investment in Vekaplast by way of damages. “I was asked for evidence of our agreement with Mr. Fay and this caused him to draft an agreement to cover the position. Once drafted, Mrs. Edmonds witnessed it and I backdated it to June 1987 though the document was actually created in June of 1996. Our lawyers were not privy to the agreements I had with Mr. Fay under which he was gifting this money to Vekaplast” (Mr. Picot's affidavit of evidence paragraph 33).

49 That account of things was largely supported by Mrs. Edmonds when she came to give evidence: a witness of whose credibility we have no doubt. Mr. Fay, by contrast, said he had no recollection of the matter. Given that the fabrication of evidence for the purposes of litigation — if that is indeed what happened — is a serious matter in any circumstances it seems unlikely that Mr. Picot would have confessed to this if it were untrue. And it is not difficult to see that, if Mr. Picot and Mr. Fay were hoping that Vekaplast would be able to recover Mr. Fay's funding by way of damages, they may have been reluctant for it to be known that — by 1996, at least — Vekaplast's liability to Remo Rochelle was itself conditional on the recovery of damages from Crills. But it is unnecessary for present purposes to spend more time on this letter. Either it is what it purports to be, in which case it does no more than record what the position was back in June 1987 — which was overtaken by later events. Or it is not a true document, in which case it is of little probative value. Either way, it is of little consequence for the present action in the light of the exchange of letters between Mr. Fay and Mr. Picot in March 1997.

50 Leaving aside the documentation, when it came to giving evidence before us, Mr. Fay was unable to bring himself to deny, unequivocally, that he had at some point arrived at an agreement with Mr. Picot that his funding of Vekaplast would only be recoverable out of the damages that were expected to be recovered in the litigation in which Vekaplast was engaged (although he continued, to the end, to rail against Mr. Picot for refusing to ‘honour his bond’). His evidence in cross-examination by Mr. Picot (which, incidentally, was conducted throughout with restraint and courtesy in the face of considerable provocation) was by no means always easy to follow. This was partly because it was interspersed with frequent irrelevancies and contradictions, accusations of trickery by Mr. Picot, and invitations to the Court to listen to readings from religious writings (and on one occasion, to join Mr. Fay in prayer), and partly because of a not infrequent lack of relationship between question and answer. Making, as we do, all reasonable allowance for the natural infirmities and eccentricities that can attend people of his age, we nonetheless cannot avoid the conclusion that the difficulty that he had in translating his professed willingness to help the Court into action in the witness box was not entirely accidental.

51 That said, the following passages from his cross-examination by Mr. Picot and certain questions addressed to him by the Court, effectively confirm Mr. Picot's case:

> *Q. [Mr. Picot]: "Now Mr. Fay, would you agree that what was agreed between us is that your monies would be recovered out of the damages from Crills?* A. Yes".

Then, following a diversion:

> *Q. "But can we please return to this for one moment?* Surely, you have to concede that we did have that arrangement that your monies were to be recovered from the damages to be recovered from Crills." A. "Not in the beginning." Q. "No. In 1990, Mr. Fay."

And after further diversions:

> *Q. "…..I ask you for the third and a final time, was it not agreed between us that money would be recovered form the damages from Crills?" A. "Not in the beginning". Q. "No, but in 1990, Sir". A. "I'm saying that you had promised me, if I loaned all this money, that you would repay it, or guarantee your home to repay it, and you are now trying to break that promise."*

52 At this point, the specific suggestion that Mr. Picot was seeking to put was summarised by the President of the Court and Mr. Fay was invited to respond. His answer was:

> *"I will say this: that my letter of wishes was ridiculous because I believed I owned half of it, and I did not own half of it.* Mr. Picot had concealed from me that he sold 40% of the company to Barry Jehan."

And, a little later:

> *Q. [The Court] "…….*Did you actually agree with Mr. Picot in 1990 — June 1990 — at the time when he executed the promissory note that although he was executing that promissory note, although he was guaranteeing the Vekaplast note, you would never seek to enforce it other than in circumstances where you had *recovered sufficient money from the Crills litigation in order to pay it off?"* A. "No, Sir. No, Sir." Q. "You did not?" A. "I would expect, and I believed, I owned a half, and all the money I paid out I truly believed half of that money would come back to me out of the damages."

53 Mr. Picot then returned to the fray:

> *Q. "……there was — I put it to you — there was an agreement between you and I, both in 1988 and in 1990, that you would provide all the funds for the litigation and the companies, and that those monies could only be recovered from damages that were being sought" A. "That's correct".* Q. "That is correct. Now, in that situation, you would agree that Vekaplast had an undertaking through me to ensure that that would happen." A. "Yes." A. "Right. So, Vekaplast then could only be in default of that agreement that we had if they received damages and had not paid them to you." A. "That's not true." Q. "Well, how else could they be in default, Mr. Fay?" A. "Because they were insolvent."

Then, a few minutes later:

> *Q. "…So, you invested in a company, and you agreed the terms under which money would be repaid through damages on behalf of your trust.* Is that not so, Mr. Fay?" A. "That's right."……Q. "So, if Vekaplast were unable to recover damages, then your monies couldn't be recovered, could they?" A. "Correct.". Q. "Well, Vekaplast weren't in default, Mr. Fay, were they?" A. "Yes they were." Q. "How?" A. "Because you had resigned with your wife, and put all the shares in my name unlawfully ….[and] Because [Vekaplast] had no directors……..you, when you resigned, you ruined the company. You created the company and you withdrew."

54 There were, it seems to us, three main strands to this part of Mr. Fay's evidence. First, although he occasionally appeared to back-track, taking his evidence as a whole, he clearly accepted that at some point he had agreed that his funding of Vekaplast would only be recoverable out of the damages that were expected to be recovered.

55 Secondly, notwithstanding this, and the fact that no such damages were ever forthcoming, he continued to insist that Mr. Picot was liable on 'his bond'. In doing so he appeared to be labouring under the illusion that Mr. Picot's potential liability to Remo Rochelle was that of a primary obligor, entirely independent of Vekaplast, rather than that of a guarantor to whom liability could attach only if and when Vekaplast itself was in default.

56 Thirdly, he appeared to be arguing, in effect, that although there may have been an agreement that his funding would only be recoverable from the damages that were expected to be recovered, Mr. Picot's conduct after the parting of the ways in January 2000 and Vekaplast's subsequent insolvency destroyed any possibility of recovering any damages, thereby disentitling Mr. Picot from relying on any such agreement. But this is not a submission that accords with the evidence. The true position, we have no doubt, is quite different.

57 By the end of 1999 Mr. Fay must have known perfectly well that the prospect of recovering significant damages from any of the three sets of litigation were looking increasingly bleak, while continuing to involve considerable expense. The actions involving Veka AG and Herr Lauman had so far achieved little or nothing and were not seriously regarded as a likely source of substantial damages. In the Crills action, Vekaplast had failed in the Royal Court and in the Court of Appeal and was facing an appeal to the Privy Council. Most recently, on 13 th December 1999, the Privy Council had upheld the judgments of the Court of Appeal and the Royal Court in favour of the Jehans. Rightly or wrongly, Mr. Fay had by then also formed the view that much of Mr. Picot's misfortunes stemmed from his foolishness in sacking the Jehans rather than forgiving them, and his 'greed' in seeking to acquire the Jehan shares in TAPCI.

58 In a memorandum dated 17 th December 1999, Mr. Fay referred to his involvement with Mr.

Picot and Vekaplast and his expenditure to date of £777,690.92 "to keep this business alive" and wrote:

> *"To-day there is a crisis.* Terry has lost his fight against his one time Partner Barry Jehan. The Law Lords have supported Barry against Terry……To-day, I am confronted with the need to employ an English Barrister and pay all the legal costs to provide the legal team to fight Herr Heinrich Laumann to keep our trade names and be able to continue the firms selling our Goods in Guernsey and Jersey. We have to appeal before the Privy Council against VEKA A.G. and seek Damages from Herr Laumann and his company VEKA A.G. And we have to conduct the Royal Court Case against Crills for Damages."

And, in a further note the following day, he wrote:

> *"I have already spent 13 years of my life and spent £777,690.92p and I shall be 85 on 25th April 2000.* So I feel like stopping, and stepping aside, and forgetting Terry and the business……..BUT, Lauman will win his evil wish to destroy *Vekaplast Windows (C.I.) Ltd. So I must continue to do the work of Jesus Christ to stop the Evil Greed of Herr Heinrich Lauman"*.

59 Although Mr. Crocker in his evidence was not prepared to acknowledge that any such thing had occurred, it seems to us inconceivable that by this stage at least someone among the trustees of Mr. Fay's trusts and the beneficiaries was not beginning to get concerned about how much longer Mr. Fay was going to continue pouring funds into Vekaplast in the pursuit of the supposed pot of gold at the end of the litigation rainbow. (We know little of the detail of the Crills action, but such material as we have seen in the present case suggests that both Mr. Fay and Mr. Picot should have known that their expectations of ever securing a substantial award of damages were wholly unrealistic.)

60 As already indicated, the squabble over the computer in late January 2000 and Mr. Fay's resulting resignation and vehement declarations terminating his relations with Mr. Picot have all the hall-marks of a contrived dispute. Mrs. Edmonds, in her evidence, spoke of Mr. Fay coming in on 26 th January, 2000, in an aggressive mood and quickly causing an argument. We are in little doubt that by that stage Mr. Fay was looking for a way out and needed a suitable grievance to justify his final departure.

61 It is fanciful to suppose that once Mr. Fay had withdrawn his finance and moral support Mr. Picot could have continued the surviving litigation on his own. Mr. Fay had repeatedly undertaken to fund all these cases to the end. He was, quite clearly, the driving force behind these actions: the trial bundles are full of memoranda from him exhorting Mr. Picot to continue the fight against the evil-doers who were responsible for his misfortunes.

Conclusions

62 On the evidence that we have heard, we accordingly make the following findings of fact:–

(i) Over a period of twelve or thirteen years from March 1987, Mr. Fay and/or Remo Rochelle provided funding to Vekaplast to the extent of some £777,800 by way of loan.

(ii) Included in that total are funds made available in or about June 1990 for a variety of purposes, including in particular paying-off Vekaplast's then overdraft with National Westminster Bank. The promissory note executed by Vekaplast on 18 th June 1990 in an amount of £175,000 was given by way of acknowledgment of and security for that loan.

(iii) Whatever the position as regards repayment of the £175,000 may originally have been, by March 1997 at the latest, that obligation had been varied, by agreement between Mr. Fay and Mr. Picot (on behalf, respectively, of Remo Rochelle and Vekaplast) so as to provide that all such loans by Remo Rochelle to Vekaplast would only be repayable if and when sufficient damages had been recovered from the various litigation in which Vekaplast and TAPCI were then engaged (the principal recovery being expected to be from the Crills action); and, by way of necessary corollary, that if no such recovery were ever achieved no re-payment obligation would exist (in other words, the debt would be written off).

(iv) Moreover, the very strong probability is that an agreement in these terms had in fact been established long since, and had been the basis on which Mr. Picot had undertaken to guarantee the promissory note and Mrs. Picot had consented to the registration of the note and Mr. Picot's guarantee in the Royal Court of Jersey in June 1990, thereby giving rise to a collateral contract qualifying the terms of the note itself. The true bargain was, accordingly, one under which the note was repayable on demand, but only if and when sufficient damages had been recovered.

(v) In the event, no such damages were ever recovered. And the fact that this was so is not something for which any blame attaches to Vekaplast or Mr. Picot.

63 It follows from this that no obligation on the part of Vekaplast to repay any part of its borrowing from Remo Rochelle (or Mr. Fay), including that represented by the promissory note, ever arose; that Vekaplast was never in default of any payment obligation to Remo Rochelle; and that there was, therefore, no basis on which Remo Rochelle was ever entitled to call on Mr. Picot under his guarantee.

64 It was argued on behalf of Remo Rochelle that there was no consideration — or more properly no *cause* (per *Selby v. Romeril* [1996] JLR 210) — by Vekaplast or Mr. Picot that would support an enforceable agreement of the kind that we have described in paragraph 62 (iii) above. This is far too narrow a view of things. The *cause* (or consideration), was the continued — and from time to time renewed — commitment by Mr. Picot (on behalf of Vekaplast as well as himself) of his very considerable time and energy to the pursuit of the litigation and to the fulfilling of Mr. Fay's wishes. Mr. Picot's letter of 7 th November 1995 to

which we have referred earlier is eloquent on the point. For twelve years or so he continued to live and sleep during the week at the Guernsey factory, returning home only at the weekend. And it was common ground that throughout that time he had drawn only the most modest of wages. Mr. Fay himself spoke of these circumstances in his affidavit dated 21 st February 1997 (paragraph 8); "I am aware that Terry's wife and children have suffered because Terry has not earned a fair living wage and he has had to sleep in his Guernsey office for much of the past 10 years since I came into his life to save his home and Business." We are also satisfied, that the terms of the agreement were sufficiently certain to support a binding contract. There may have been some untidiness of language on the point whether the loans were to be recovered from any damages recovered from *any* of the various actions, or just from the Crills action; but this is almost certainly accounted for by the fact that it is clear that it was the Crills action that was thought likely to produce the real reward of all their efforts. So far as contractual intention goes, we have little doubt that the loans were to be repayable from any damages from *any* source.

65 Were we wrong in this conclusion, we are more than satisfied that Mr. Picot would in any event be entitled to succeed on the grounds of equity or *'équité'* – fairness — akin to the English law principles of equitable estoppel which the Royal Court has for some years now recognised as an important and legitimate part of its inherent jurisdiction to prevent injustice: see, for example the discussions in *Pirouet v. Pirouet* [1985–86] JLR 48 and *Macon v. Quéreé* [2001] JLR 80. Although these were cases of what would ordinarily be described as 'proprietary' estoppel, whereas the present case would conventionally be classified as one of 'promissory' estoppel or 'estoppel by representation', the underlying principle and jurisdiction is substantially the same in both: the discretionary power of the Court to intervene in order to prevent one party insisting on his or her strict legal rights where it would be unconscionable to do so.

66 The promissory note was, we find, quite plainly given against an assurance by Mr. Fay that repayment of the debt represented by it, together with all other borrowings by Vekaplast and related interest, would only ever be enforced as and when sufficient damages had been recovered to make this possible. That assurance, we find, was given orally by Mr. Fay to Mr. Picot either at the time when the promissory note was proposed or at some earlier time (it is immaterial which), and is reflected indirectly in the terms of Mr. Fay's letter of wishes written on the very same day that the note was signed. Mr. Picot — and for that matter Mrs. Picot — relied on that assurance when they signed the note and Mr. Picot's guarantee of it and when they agreed to its registration. Belief by Mr. Picot in this assurance was, moreover, fuelled and encouraged subsequently by Mr. Fay's failure to take issue at the time with Mr. Picot's letters of 7 th November 1995 and 13 th March 1997 (paragraphs 44 and 46 above). Meanwhile, for a period of over nine years, Mr. Picot continued to conduct his life on the basis of this assurance at some considerable personal cost in terms of time, energy and demands on his family as outlined in paragraph 64 above. To permit Remo Rochelle now to resile from that assurance would be wholly unjust. All the necessary ingredients of promissory estoppel or estoppel by representation are present.

67 For these reasons Remo Rochelle's claim fails and there will be judgment in the main

action for Mr. Picot.

Mr. Picot's Third Party claim against Mr. Fay.

68 This subject only received the most cursory attention in the course of the hearing. For this reason and because Mr. Picot is a litigant in person we shall permit him a further short opportunity to address us before delivering final judgment on this part of the case. But it is right that we say straight away that on the basis of what we have seen at the moment we have difficulty in seeing how any sustainable claim for damages against Mr. Fay could arise, with the possible exception of any loss that might be shown to have flowed from the Caveat or Opposition obtained by Remo Rochelle against Mr. Picot's property in or about June 2001.